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The Cultural Implications of Market Regulation: Does EU Law Destroy the Texture of National Life?

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Abstract: A persistent set of arguments, both in the academic and general debate, rejects EU integration not much because of its adverse economic, social, or political consequences, but rather because of its cultural ones. As markets grow less regulated and more homogenous, the argument goes, everyday life looses its national character and citizens are left with a weakened sense of community and identity. In legal scholarship this approach takes the shape of a denunciation of the free movement decisions of the Court of Justice of the EU and the competition interventions of the European Commission because they allegedly destroy market-limiting forms of regulation that have been part of the national fabric for decades and have taken on a certain cultural significance. My claim is that this narrative, which I call *the culturalist narrative* is unsatisfactory both conceptually and empirically. In my dissertation I try to propose an alternative narrative by better defining the relationship between market regulation and culture and by offering fine-grained descriptions of the impact of EU interventions on certain forms of national market regulation.

In the first chapter, I describe the arguments that I see forming the *culturalist narrative* or the cultural critique of European integration. I then isolate various notions of culture that appear implicated in this critique and three mechanisms through which market regulation can be said to relate to culture. In the second chapter, I focus on an area of market regulation which provides at least one promising avenue to challenge culturalist claims. This is retail regulation, or the law of everyday shopping (e.g. entry regulation, regulation of business practices and opening hours). My focus on these rules is motivated by: (1) the fact that they are implicated in reproducing certain local ways of economic life that may be valued in cultural terms; and (2) the fact that while they often come into conflict with EU law, the outcome of these conflicts is ambiguous enough to call for interpretation. In this chapter I have drawn mostly from economic sociology and the history of ideas to develop a taxonomy of the various socio-cultural interests that retail regulation might protect.

In the further two chapters, the case studies, I offer contextual descriptions of two instances of retail regulation: entry regulation in retail markets (commercial authorization and licensing schemes) and resale price maintenance in the book trade (in the form of fixed book price rules). These case studies seek to illustrate both how the cultural value of these rules is contested at the national level and that EU interventions are not purely deregulatory but may be interpreted as able to safeguarding or even enhancing culturally valued features of markets. Overall, I argue, EU law appears hospitable to normative (and even cultural) frameworks different from the internal market (market-expanding) rationality. Hence, as I have tried to sketch in my conclusions, EU law operates as a coping mechanism to allow Member States to adapt to economic globalization and other social transformation while retaining some of their cultural specificities. This allows for forms of cultural rootedness within an integrated European market and the emergence of "political" forms of cosmopolitanism.

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All mistakes, of course, are my own.

Outline

Introduction

The idea that culture needs protection from globalization – and more generally from the instrumental rationality of economic relations – is certainly not new, but it emerges today with renewed vigor in the Europe post-crisis.[1] A persistent set of arguments, both in the academic and the general debate, rejects EU integration not much because of its adverse economic, social, or political consequences, but rather because of its cultural ones. As markets grow less regulated and more homogenous, the argument goes, everyday life looses its national character and citizens are left with a weakened sense of community and identity. As a consequence, the Union is said to become not only more homogeneous, but also more illegitimate. In legal scholarship this approach takes the shape of a denunciation of the free movement decisions of the Court of Justice of the EU ("the Court") and the competition interventions of the European Commission ("the Commission") because they allegedly destroy forms of market ordering that have been part of the national fabric for decades or have taken on a certain cultural significance.[2] The critique often sounds like a Polanyian defense of the last bits of morality in the market against the final attack launched on them by the EU.[3]

My claim is that this narrative, which I call *the culturalist narrative* (or the cultural critique of European Integration) is unsatisfactory both from a conceptual and empirical point of view. In my dissertation I try to revise this narrative by better defining the relationship between market regulation and culture and by offering a thinly grained description of the impact of EU interventions on certain forms of national market regulation. However, while I set to challenge this narrative, I far from dismiss its preoccupations. Rather, I see my investigation

[1] This concern, one might say, is as old as modern sociology. Durkheim, for example, was concerned about the moral vacuum and the erosion of social life brought about by the economization of society: E. Durkheim, *Professional Ethics and Civic Morals,* (New York, The Free Press, 1958). For some reflections on the general relationship between globalization and culture see R. Cotterell, *Law in Culture,* in *Law, Culture and Society*, (London, Routledge, 2006). In particular he defines the conflict as one between "*the transnational proliferation of instrumental relations of community and the more local promotion of other types of community*" (what he elsewhere calls traditional communities, communities of belief, affective communities).

[2] See in particular: G. Davies, *Internal Market Adjudication and the Quality of Life in Europe,* Columbia Journal of European Law, 21:1, pp. 289-328 (2014-2015); A. Somek, *Europe: Political, Not Cosmopolitan,* European Law Journal, 20:2, pp. 142-163 (2014). See also: J. H. H. Weiler, *Van Gend en Loos: The individual as Subject and Object and the Dilemma of European Legitimacy,* International Journal of Constitutional Law, 12:1, pp. 94-103 (2014); C. Joerges, *Law and Politics in Europe's Crisis: On the History of the Impact of an Unfortunate Configuration,* Constellations, 21:2, pp. 249-261 (2014).

[3] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (1944) (Boston, Beacon Press, 2001).

motivated by similar concerns for the growing cultural insecurities that citizens in the Member States seem to be experiencing. These insecurities appear rooted in a sense that something important is being lost with the advancement of transnational markets. Through my analysis I would like to understand what that something is. More rigorously formulated the questions I am brought to ask are: how does market regulation build or protect culture? And what is the culture that Member States protect through certain rules that the EU allegedly destroys? Answering these questions requires developing a theoretical account of the general mechanisms through which law (and market regulation in particular) interact with culture and an exploration of the substantive values and interests through which certain specific forms of market regulation can be said to take on cultural significance. So in the first two chapters, the theoretical/analytical part of this dissertation, I draw from various legal and non-legal disciplines and I develop an exploratory theoretical framework or a preliminary taxonomy which is useful to understand the cultural significance of a specific set of rules.

More precisely, in chapter 1, I try to understand the claims of an influential critical stream of EU legal scholarship (1.1). Since I argue that the concerns of this scholarship are best understood as cultural, I then discuss different notions of culture that might be relevant to understand these concerns (1.2.1) and finally isolate three mechanisms through which law, and market regulation in particular, relate to these notions of culture (1.2.2). In the second chapter, I further develop these reflections by focusing on a specific set of rules, what I call retail regulation or the law of everyday shopping, that have particularly visible connections with the notions of culture I identify and also often come into conflict with EU Law (2.1). I there isolate a list of socio-cultural interests that retail regulation might protect and also discuss how these interests can survive in the absence of that regulation (2.2).

My focus on retail markets as a lens to discuss claims about culture is in line with a renewed interest in the social sciences for everyday life experiences[4] and in particular, in the context of scholarship focusing on the EU, for how these experiences determine perceptions of either belonging or foreignness in a certain environment and contribute to the emergence

[4] While mainstream classic sociology from Durkheim to Weber, focused on social systems, in the last thirty years or so a burgeoning number of studies have focused on everyday lived experiences. This went with a revival of methodologies such as ethnography and phenomenology in observing the social experiences of everyday life. Of course consumption and shopping have been favored areas of investigation. As further discussed later, the study of everyday life is a key feature of cultural studies. (See 1.2.1)

of a European identity.[5] While there is a tendency to focus on transnational exchanges and interactions, I here focus on the more mundane experiences of everyday consumption, which are experienced not only by the transnational few, but also by the local many.[6] My approach focuses on the market experience (and retail regulation is visibly implicated in shaping this experience) as expressive, positional and relational, rather than purely functional. In so doing, it draws generally from economic sociology, and in particular from what Viviana Zelizer has called "*economic lives*" to indicate that our forms of life in the market are intrinsically linked to (and inextricable from) other spheres of life which we tend to treat as strictly separate (work, leisure, the family and friendships, etc.).[7]

In fact, as I develop what I see a theoretical framework to assess the cultural value of certain forms of market regulation I will also try to de-stabilize entrenched notions that conceive the relationship between culture and the market in purely oppositional terms – whatever is "market-limiting" or "market-correcting" being also "culture-building" while that which is "market-expanding" also "culture-eroding." Markets, in this narrative, are de-socializing and corrupting; they are solvents of social bonds, and ultimately have a degrading "anthropological" impact as they alter how people think and interact. As convincingly argued by Zelizer, this approach is the result of a deeply engrained tendency in social sciences that "*assum[es] the existence of two hostile worlds: a world of rationality, efficiency and*

[5] This notion owes to the seminal work of Karl Deutsch who prescribed that international security communities, such as the EU, integrate not only their elites but also their publics, through increased transnational interactions that would ultimately foster public support for the integration project and shared identities. See K. W. Deutsch et al., *Political Community and the North Atlantic Area,* (New York: Greenwood Press, 1957). In this guise, measures of European Identity have preponderantly focused on the cross-border experiences of various groups of Europeans. For a recent such effort to test Deutsch's theories see T. Kuhn, *Experiencing European Integration*, *Transnational Lives and European Identity* (Oxford, Oxford University Press, 2015). For a literature review of various approaches to the study of European identity see the EUCROSS project and in particular A. Favell, *et al.*, *The Europeanization of Everyday Life: Transnational Identifications Among EU and Third Country Citizens,* State of the Art Report, https://pure.au.dk/ws/files/53643017/EUCROSS_D2.1_State_of_the_Art.pdf. While most of these studies identify the main source of sociological "experienced" integration in transnational interactions between citizens which lets emerge a sense of transnational community, in others, the transnational dimension is not preponderant. For example (as cited in *A. Favell et al*) M. Savage, G. Bagnall, B. J. Longhurst, *Globalization and belonging* (SAGE Publishing, 2005) is a study of how globalization changes routine behaviors and attitudes by exploring "*how global changes are articulated locally in cultural practices, lifestyle and identities of the middle class*" (p. 27). Their study is not one on already "*highly Europeanized populations*", but rather, "*an investigation into the internationalization and cosmopolitanism of national populations – who may or may not find the European dimension salient*" (p. 35).

[6] A rich body of scholarship inside and outside legal studies emphasizes that the integration project is experienced only by transnationally mobile elites. See for example N. Fligstein, *Euroclash: the EU, European Identity and the Future of Europe,* (Oxford, Oxford University Press, 2008). For this approach in legal scholarship see also A. Somek, *Europe: Political, cit.*

[7] V. A. Zelizer, *Economic Lives: How Culture Shapes the Economy*, (Princeton, Princeton University Press, 2010).

impersonality on one side [and a] world of self-expression, cultural richness, and intimacy on the other – with contact between the two worlds inevitably corrupting both of them."[8] By pointing at the pervasive role of both cultural and relational considerations in the organization of markets, I will try to put these two worlds in closer contact and dispel some of the excesses of the dichotomous view.

An effort to better describe the underlying social reality will also lay the groundwork for a reconsideration of the role of EU law – and in particular the relationship between (EU) rule and (national) exceptions as one between market and non-market concerns. This reconsideration implies, for example, that when I find EU law to be sufficiently responsive to local cultural interests, it is not simply by way of exception to an otherwise dominant market-rationality. In Chapters III and IV – the empirical/descriptive part of the dissertation – I will in fact loosely apply the framework developed in the first part to two case studies – entry regulation in retail distribution (Chapter 3) and book-pricing rules (chapter 4) – by describing "*thickly*" how these rules are linked to market experiences and cultural practices and how they evolve under the impact of EU Law. In particular, I will discuss: 1) how these forms of retail regulation function and are understood at the national level; and 2) the impact of EU economic law in the transformation of these rules as well as the consequences of these transformations for national cultures. Through these case studies, I seek to illustrate my claims about the role of EU law by showing that its impact is not univocally homogenizing, but allows for both diversity and upgrading of local arrangements and can be seen as safeguarding or even enhancing certain culturally valued features of markets. As I have said, this allows me to revisit the role assigned to EU law by the *culturalist narrative.*

First, while the contributions I see forming the *culturalist narrative* implicitly postulate the cultural value of national market regulation and treasure regulatory diversity as such, my research subjects these assumptions to close scrutiny. In so doing I draws from a different vision of EU law as providing deliberative platforms needed to unveil the authentic motivations of national market regulation, expose concentrated interests and limit their

[8] V. Zelizer, *Culture and Consumption*, in V. Zelizer, *Economic Lives: How Culture Shapes the Economy, cit.*, p. 429.

protectionist and exclusionary effects.[9] Secondly, while the arguments I set to challenge, by focusing predominantly on the outcome of judicial decisions, tend to describe the impact of EU law as primarily deregulatory, I try to provide a more nuanced description of EU interventions.

Without denying that there might be instances where EU economic law is a cause or catalyst for processes of change that result in less regulation, I argue that headings such as "deregulation" and "homogenization" fail to describe the complexity of these phenomena and their socio-cultural ramifications. A theoretically grounded and sociologically informed analysis (that starts from the conflicts emerging in the case law and expands the inquiry into developments in the underlying markets) reveals the nature of these processes as complex and multidirectional transformations of both markets and identities: it allows to isolate factors and actors of change and describe the meanings various social groups associate to these changes.[10] By challenging a view of EU institutions (and the Court in particular) as animated by a purely integrationist agenda, my work draws from a rich series of contributions that point at the advancements produced by the Court beyond market integration[11] and that account for its ability to give serious consideration to contextual local values and non-market concerns.[12]As the literature has also shown, the kind of justificatory

[9] For this approach, see C. Joerges & J. Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology*, *cit.* describing comitology as providing "a forum for the development of novel and mediating forms of interest formation and decision making"; O. Gerstenberg & C. Sabel, *Directly-Deliberative Polyarchy: An Institutional Ideal for Europe* in C. Joerges & R. Dehousse (eds.), *Good Governance in Europe's Integrated Market* (2002); Y. Svetiev, *The EU's Private Law in the Regulated Sectors: Competitive Market Handmaiden or Institutional Platform?*, European Law Journal, 22:5, pp. 659-680 (2016). These contributions describe the production of law and the solution of conflicts in the EU as deliberative processes that take member states' interests very seriously. For these scholars, supranational institutions are there to "*tame the failures of the nation state*" insofar as it does not take into account "*foreign identities and their interests*", but also the identities of local outsiders (C. Joerges & J. Neyer, *op. cit.*, p. 294).

[10]Even in the harder cases where member states lose *vis a vis* the Commission or the Court of Justice, a socio-legal approach might reveal intervening factors that limit or offset the deregulatory impact at the local level: e.g. business or technological innovations in the underlying markets or other (positive) legal interventions at the local, national or EU level.

[11] See for example L. Azoulai, *The Court of Justice and the Social Market Economy: the Emergence of an Ideal and the Conditions for its Realization*, Common Market Law Review, vol. 45, p. 1335, (2008); H. W. Micklitz and N. Reich, *The Court and Sleeping Beauty: The revival of the Unfair Contract Terms Directive* (UCTD), Common Market Law Review, vol. 51:3, pp. 771–808 (2014); G. Comandé, *The Fifth European Union Freedom. Aggregating Citizenship...around Private Law*, in H. W. Micklitz (ed.), Constitutionalization of European Private Law, Oxford (2014).

[12] See generally L. Azoulai, *The ECJ and the duty to respect sensitive national interests*, in M. Dawson, B. de Witte, E. Muir, *Judicial Activism at the European Court of Justice,* (Edward Elgar, 2013) providing a doctrinal analysis of the various strategies employed by the Court in order to excuse certain areas from the jurisprudence stemming from Cassis de Dijon. See also: F. de Witte, *Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law*, Common Market Law Review 50:6, pp. 1545-1578 (2013) detecting the emergence of a procedural form of proportionality, whose objective is "*not to challenge or re-orient the content of a national*

work that Member States engage with before the Court or in communications with the Commission can become the occasion for reflection, re-evaluation and possibly reform, also in the absence of legally enforced deregulation.[13]

Overall, in the counter-narrative I try to establish through my analysis and case studies, the EU actually helps to protect local and national cultures from homogenization, while encouraging transnational forms of socialization that contribute to the definition of a new European form of life.[14] On one level, EU economic law emerges as a coping mechanism rather than a market homogenizer: it provides Member States with opportunities to adapt to trans-nationalization and other social transformations while retaining some of the specificity characterizing their market arrangements.[15] On another level, the transformations of market experiences and cultural practices brought about by the creation of an internal market can be interpreted not much as "cultural loss" for the citizens of the member nations, but rather as a "re-mix" of practices and experiences that can expand and even enhance some culturally valued features of markets. In my narrative, national diversities are remixed, tamed and corrected but not eliminated.[16] Resulting is not much a new European (federal and post-national) identity, but a reformulation of what it means to be a citizen of the member nations that retains cultural specificity and difference. Such an identity is compatible with a Union that keeps evolving in its current hybrid form – a Union

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policy … but rather to rationalize its implementation, and ensure the absence of discrimination or protectionism" (p. 1573); D. Damjanovic, *The EU Market Rules as Social Market Rules: Why the EU Can Be A Social Market Economy,* Common Market Law Review, 50:6, pp. 1685-1718 (2013).

[13] See L. Azoulai, *The European Court of Justice and the Duty to Respect Sensitive National Interests,* cit. describing EU Law as a "*densitization process*". See for example, the UK experience with the Net Book Agreement in Chapter 4 of this dissertation.

[14] This argument is in the spirit of L. van Middelaar, *The Passage to Europe*, (Yale University Press, 2013). See also R. Friedmand and M. Thiel, *Narrative of Transnational Belonging* (Routledge, 2012).

[15] By "coping mechanism" I refer to the idea that without the constraints imposed by the EU, national arrangements would be more rather than less exposed to the deregulatory pressure of globalization or other autonomous catalysts for change. As noted by C. Joerges, J. Neyer, *op. cit.* in relation to the foodstuff sector: "*the scientification of foodstuffs regulation, taken together with its politicization, has exerted such pressure on traditional foodstuffs' law that innovations would have occurred at the national level even without any European market building and harmonization efforts*" (p. 276). For Gerstenberg and Sabel, "*in [our] world, openness to difference is pre-condition for preservation of identity*". Furthermore, the coping mechanism argument is in the spirit of those claiming that deep economic integration increases state capacity in the face of globalization. See for example L. Brustz, N. F. Campos, *Does Deep Economic Integration Increase State Capacity? Evidence from the 2004 European Union Enlargement and Beyond*, Preliminary Draft (June 8, 2016; available online at the authors website). Claiming that sovereignty is ultimately enhanced rather than diluted by EU integration see also A.S. Milward, *The European Rescue of the Nation State* (London, Routledge, 2000); D. Calleo, *Rethinking Europe's Future* (Princeton, Princeton University Press, 2001).

[16] For this approach see J. Weiler, *To be a European Citizen – Eros and Civilization,* Journal of European Public Policy, 4:4, pp. 495-519 (1997), at p. 509.

that strives for more democracy and legitimacy, without having necessarily to turn into a fully formed federal state.

Before proceeding, a few methodological caveats. I like to think about my research as an effort in something that could be called economic sociology of law. This is not to be intended as a subfield of a subfield, but rather, by quoting Sabine Frerichs, as an "*integrative effort in reconnecting law, economy, and society, both as spheres of reality and as fields of scholarly interest*."[17] Furthermore, as already mentioned, my approach draws from one of the key intuitions of the *Cultural Study of Law* as well as more broadly of *Law and Society*[18] increasingly also embraced by mainstream legal scholarship: that the law (and also EU law) shapes and creates forms of life. So as it has been written EU law "*is not just a functional instrument of integration, [but it is] also about constituting... social reality – new forms of real or imagined life*."[19] Of course one should be careful not to over-attribute to EU law all locally experienced transformations in the patterns of everyday life, but the law certainly plays a role in these transformations and trying to understand it is important to gaining insight into the resistance European integration faces today as well imagining new narratives.

[17] S. Frerichs, *Studying Law, Economy, and Society: A Short History of Socio-Legal Thinking*, March 15, 2012), Helsinki Legal Studies Research Paper No. 19. Available at SSRN: https://ssrn.com/abstract=2022891

[18] This approach draws from A. Sarat, T. R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, in A. Sarat, T. R. Kearns (eds.) *Law in Everyday Life* (Ann Arbor, The University of Michigan Press, 1993)

[19] Editorial Comments, *EU as a Way of Life,* Common Market Law Review, 54:2, pp. 357-368, 2017, p. 359.

Chapter 1:

The Cultural Implications of Market Regulation: A Conceptual Framework

This Chapter Is divided into two parts. In the first part, I try to understand a set of arguments about the impact of EU legal integration in the Member States which I have labeled *the culturalist narrative*. In the second part, I first discuss the main tangents of contemporary debates on culture. And I then explore theoretical possibilities on how the law in general and market regulation in particular interact with the various notions of culture I have isolated. This, in turn, allows me to further specify the nature of *culturalist* claims in EU legal scholarship.

1.1. Introducing the "Culturalist Narrative"

The project of unification of the states of Western Europe that started with the Treaty of Rome is premised on the construction of a common market where goods, people, services and capital can circulate freely across national borders. In order to create such common market, the Treaties prohibit not only tariffs and quotas but also national regulatory measures having equivalent effects. To perfect the system is competition law: while free movement law catches obstacles to free trade as created by state action, which is laws and regulations, competition law catches the same obstacles as created by private action, which is inter-firm agreements.[20] The judge-made notions of *supremacy*[21] and *direct effects*[22] make free movement provisions hierarchically superior to national law and directly applicable at the national level without need of implementation, which in turn makes Member States' laws directly reviewable by national judges when in contrast with EU law. To ensure the coherence of a de-centralized system of enforcement is the preliminary reference procedure that enables the Court – when asked by national judges – to authoritatively resolve conflicts

[20] As well as abuses of dominant position. Competition law was indeed conceived as a key instrument in the creation of a European single market by making sure that undertakings do not partition the internal market along national lines. See P. Craig, G. de Burca, *EU Law, Text, Cases and Materials,* 5th edition (Oxford University Press, 2011), pp. 959 ss.
[21] Case 6/64, *Flaminio Costa v. ENEL* [1964] ECR I-00585 establishing the principle of supremacy.
[22] Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR I-00001 establishing the principle of direct effects of Treaty provisions.

between EU and national law.

These are the key tenets of what has come to be known as *"negative integration through law"*. Integration is "negative" (or market building) because it integrates by eliminating national laws and private arrangements constituting obstacles to free trade, rather than by adding new (market-correcting) homogeneous rules – s.c. "positive integration". It is "*integration through law*" because law is both the object and the instrument of integration – an otherwise political project, which is produced here through the enforcement of legal provisions by an executive (the Commission) and a judiciary (the Court), rather than through the Member States' voluntary adoption of politically negotiated outcomes.[23] Furthermore, in such a system, free movement provisions are said to be "constitutionalized" as integration is mostly activated by individuals and firms enforcing their free movement (constitutional) rights against national rules that infringe upon those rights.[24]

While integration through law has been praised by many as the main enabler of the European project[25], some historical developments in the case law of the Court have generated sharp discontents. Through the preliminary reference procedure, in fact, the Court has given a broad interpretation of free movement law. The idea of discrimination was construed broadly to outlaw Member States laws and regulations that directly or indirectly discriminate against foreign products.[26] Furthermore, the Court held in *Cassis de Dijon*[27], also non-discriminatory measures (national rules applying to domestic goods and

[23] The phrase comes from the title of a series of publications edited by Mauro Cappelletti, Joseph Weiler and Monica Seccombe. For the original formulation see the introduction to this: M. Cappelletti, M. Seccombe, & J. H. H. Weiler, *Integration Through Law: Europe and the American Federal Experience,* Volume 1, Book 1, *A Political, Legal and Economic Overview* (Berlin, De Gruyter, 1986). The introduction makes clear that integration is a political project and law only the prevalent instrument to its realization within the European context. Law is more precisely both an object of integration and its instrument and it is a law that operates instrumentally. The emphasis on the role of law had before been emphasized by Hallstein who had famously defined the European Community "*a remarkable legal phenomenon. It is a creation of law; it is a source of Law; and it is a legal system*." See W. Hallstein, *Europe in the Making* (London, George Allen and Unwin, 1972), p. 30. For a contemporary critical re-evaluation see L. Azoulai, *Integration through Law and Us*, International Journal of Constitutional Law,1 4:2, pp. 229-263 (2016). See also A. Vauchez, *Integration Through Law: Contribution to a Socio-History of EU Political Common Sense*, EUI Working Paper No. RSCAS 2008/10.

[24] See among others J. H. H. Weiler, *The Transformation of Europe*, Yale Law Jounal, 100:8, pp. 2403-2483 (1991).

[25] *Ibid.*

[26] Dassonville – *Case 8/74 Procureur du Roi v Dassonville* [1974] ECR I-00837 – establishing 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.

[27] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein* [1979] ECR 649. In *Cassis de Dijon*, German authorities refused to allow the importation of a French liqueur, *Cassis de Dijon,* into Germany, because the drink was not of sufficient alcoholic strength to be marketed in Germany. Germany, in fact, had a

imports alike) can constitute obstacles to free trade. The implication of this jurisprudence is the so-called principle of "*mutual recognition*" pursuant to which goods that have been lawfully marketed in one Member State should be admitted into any other Member State without restriction. Unless justified by one of the public interest objectives identified by the Court, national measures creating obstacles to intra-community trade cannot be enforced against foreign products. [28]

While a general disquietude about the compression of member states' sovereignty and regulatory autonomy is almost connatural to a federalizing project like the European one, the developments described above have generated severe anxieties around the scope and de-regulatory impact of EU market integration. Such anxieties go back several decades. They have been directed, in particular, at the principle of "*mutual recognition*". As it promised to achieve an integrated market without harmonization, which usually entails a degree of re-regulation, "*mutual recognition*" was feared to make negative integration self-sufficient.[29] Furthermore, some feared, *mutual recognition* would trigger a regulatory "race to the bottom" as Member States were predicted to drastically lower regulatory standards in order both to avoid burdening their own products with regulations that imports were able to escape and to provide a friendly business environment for the first marketing of new

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rule that allowed the marketing of liqueurs with an alcoholic content above 25 % while Cassis has an alcoholic content comprised between 15 and 20 %. The German importer claimed that the German rule was a measure having equivalent effect under the definition of art 34 TFEU. The court dismissed the justifications adduced by the German government (effectiveness of fiscal supervision, protection of public health, fairness of commercial transactions, consumer protection) and concluded that "*the principal effect of requirements of this nature is to promote the alcoholic beverages having a high alcohol content by excluding from the national market products of other member states which do not answer that description*" (para 14). The rules thus constituted an obstacle to free trade incompatible with art. 34 TFEU. See P. Craig, G. de Búrca, *EU Law, Text, Cases and Materials,* (Oxford University Press, 2011) pp. 647 ss.

[28] With *Cassis de Dijon*, the Court also gave a broad interpretation of the public interests objectives that can justify non-discriminatory measures, by expanding the list of art 36 TFEU through the notion of "*mandatory requirements*." Hence, there are alternative and much more benign interpretations of this case law which focus on the expansion of the justifications rather than the expansion of the obstacles. Gerstenberg and Sabel, for example, see the evolution from *Dassonville* to *Cassis de Dijon* not much as the expansion of the kinds of measures caught by art 34 TFEU – to include indistinctly applicable measures – but rather as the expansion of the possible justifications. As they write: "*the point of Cassis, accordingly, was to unfreeze the EC's constitutional development by expanding the class of legitimate social reasons to include general-clause-like 'way-of-life-reasons' – and thus to broaden the scope of, to dynamize and to adapt to changing realities and public sensibilities, the process of constitutional balancing.*" (O. Gerstenberg, C. Sabel, *op. cit.*, p. 329.) Therefore the social justifications become not much exceptions to a rule but rather "*extensions of an evolving core of substantive constitutional commitments; they are subsumed into the core and become part of a constitutional continuum, which expands as the practice of principled justification proceeds*."

[29] This concern was mostly attributed to social democrats: see for example. F. Scharpf, *Democratic Policy in Europe,* European Law Journal, 2:2, pp. 136-155(1996). For analogous concerns see H. Collins, *European Private Law and the Cultural Identity of Member States,* European Review of Private Law, 3:2, 353-365 (1995). For an account of this kind of critique see. O. Gerstenbetg C. Sabel, *Directly Deliberative Poliarchy, cit.*, p. 294.

products.[30]

Other scholars, to be sure, contributed to sedate these anxieties. They started documenting advancements of positive integration in growingly significant areas of regulation, praised *comitology* as a flexible tool to adapt EU legislation to local circumstances[31] and also detected the signals of a business-driven spiraling up of regulation more similar to a race-to-the-top than to a race-to-the-bottom.[32] More generally, orthodox accounts of European integration in political sciences tended to dismiss concerns about the overextension of markets by recurring to neo-functionalist[33] and transactionalist predictions[34]: market integration was expected not only to create functional pressure for further integration beyond markets but also new transnational experiences that would ultimately shift citizens' allegiances and identities from the national to the European level, thus both guaranteeing support for the EU and entrenching its social legitimacy.

But in more recent years, integration through law has come under a more systematic attack. The same project that was once lauded as the main enabler of European integration is at the center of a major critical reconsideration – a *Critical Turn*, as someone has put it.[35] Academics in law as well as other disciplines have become highly critical of "*its development and purpose*" which they see producing "*division, inequality and exclusion.*"[36] The more or less explicit premise of a great deal of this scholarship is that the European Union is not in good health – its *malaise* being variously identified in different disciplines. Legal scholars tend to diagnose a crisis of legitimacy (social rather than formal) of the Union and tend to

[30] On the race to the bottom see: C. Barnard, S. Deakin, *Market Access and Regulatory Competition*, Jean Monnet Program Papers 2002, www.jeanmonnetprogram.org/archive/papers/01/012701.html.
[31] See C. Joerges, J. Neyer, From Intergovernmental Bargainging to Deliberative Political Processes, cit.; C. Joerges, "Good Governance" through Comitology, in C. Joerges, E. Vos (eds.) *EU Committees: Social Regulation, Law and Politics* (Oxford, Hart, 1999)
[32] O. Gerstenberg, C. Sabel, *op. cit.*, p. 323. For similar ideas in a different debate see A. Bradford, *The Bruxelles Effect,* Northwestern University Law Review, 107/1, pp. 1-64 (2012).
[33] Neo-functionalism is a theory of regional integration that builds on the seminal work of Ernst B. Haas and best embodied by Jean Monnet's vision of Europe. At the core of Monnet's approach there is the idea of spillovers: integration in some initial sector would spill over into others and so sustain the integration process. For an original formulation see Ernst B. Haas, *Beyond the Nation State: Functionalism and International Organization,* (Stanford, Stanford University Press, 1964).
[34] Transactionalism is an approach in anthropology and philosophy which understands human behavior as fundamentally transactional. Applied to post-war Europe, this intuition is elaborated by political scientist Karl Deutsch. See K. W. Deutsch et al., *op. cit.* For a literature review and an empirical test of Deutsch's theories see T. Kuhn, *op. cit.*.
[35] *The Critical Turn in EU Legal Studies*, Editorial Comments, Common Market Law Review, 52:4, pp. 881-888, (2015).
[36] *Id.,* p. 881.

blame the law for such crisis. The doctrine of *Direct Effects*, the free movement jurisprudence stemming from *Cassis de Dijon* as well as EU competition law all come under attack as accomplices, if not main culprits.

To make this picture even darker are a series of contributions targeting, with similar charges, specific sectorial areas of EU (positive) law and policy-making – from private law[37] to work and the family.[38] These accounts often blame a combination of structural (legal) elements and neo-liberal (political) biases.[39]What is more, this critical turn is not confined to those communities of national lawyers that have traditionally been particularly alert to EU law altering the integrity and coherence of their fields of law. It extends, possibly for the first time, to that community of transnational lawyers whose self-conceived role, until a few years ago, had been not only that of describing and advancing the understanding of the EU and its law but also of providing intellectual support to the integration project[40] – "*brokering Europe*", as someone has put it.[41] If the development of a robustly critical body of scholarship is to be welcomed as a sign of maturity of a field, certain strands of the critique appear highly problematic in both claims and methodology.

But before focusing on the specific set of arguments I am interested in, I should provide some more context that allows to understand how the critique emerged with such strength and how this sense of crisis came about. Legal scholarship, in the last few years, has shown a renewed interest for the Union's foundation and legitimation.[42] With the expansion of its competences, in number and intensity, scholars have grown increasingly concerned about the legitimacy of the Union.[43] They started to look for some original form of legitimation beyond the derivative one coming from the delegation of powers by the Member States. Plausible candidates have been democracy, justice, with the rule of law, and cultural

[37] M. Bartl, *Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political*, European Law Journal 21:5, pp. 572-598 (2015).
[38] P. Tsoukala, *Household Regulation and European Integration: The Family Portrait of a Crisis,* The American Journal of Comparative Law, 63:3, 2015, pp. 747-800.
[39] See for example, M. Bartl, *Internal Market Rationality, cit*. Bartl sees the Union's "*internal market rationality*" as the product of the interaction of three elements: two so-called structural elements – the EU's functionalist design (entailing fixity of goals and objectives) and the process of post-national juridification – and an ideological one – the substantive content of EU law as shaped by the power of neo-liberal ideas
[40] *The Critical Turn in EU Legal Studies, cit.* p. 881.
[41] A. Vauchez, *Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity* (Cambridge, Cambridge University Press, 2015).
[42] See, for example, G. de Búrca, *Europe's Raison d'Etre,* NYU School of Law, Public Law Research Paper No. 13-09.
[43] For an early discussion of these questions see J. Weiler, *The Transformation of Europe, cit.*

identity.[44] This search was made more urgent on the one side by the financial crisis and the great recession that ensued and, on the other side, by a series of decisions of the Court of Justice that appeared to sacrifice social rights in favor of economic freedoms.[45] Coupled with the new budgetary rules the EU has adopted[46] and the austerity measures its economic institutions have imposed in the Southern Member States,[47] these decisions were seen as accelerating processes of retreat of the State from social welfare provision and control over the economy in general.

In parallel, politics has generally come to question the ability of integrated markets to deliver those goods that ultimately motivated the integration process: peace and prosperity in Europe. With economic growth shrinking and national welfare systems coming under increased stress as a result of declining revenues, budget cuts and aging populations, expectations for the EU to step in and provide extra bold action grew. As expectations rose, integration beyond markets staggered (most visibly in areas like social welfare, defense and fiscal policy) and Europe came to be confronted with new challenges, for which its experience in market-building appeared particularly blunt: an extraordinary influx of refugees from the middle-east and the increased threat posed by Islamic terrorism. In this context, many political forces gain support by both attacking the original European project and pointing at its most recent inadequacies.[48] Pundits and politicians, on both left and right, construct narratives that vilify the EU and magnify the efforts of the Member States. Overall, as the EU comes to be seen as non-delivering on its promises and inadequately responding to new challenges, its original focus on market integration is perceived to be at

[44] For an account of this debate see D. Kochenov, G. de Búrca, A. Williams (eds.) *Europe's Justice Deficit*, Oxford, (Hart, 2015). See in particular N. Walker, *Justice in and of the European Union*.

[45] These are the (in)famous cases Viking and Laval: Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OU Viking Line Eesti* [2007] ECR I–10779; Case C- 341/05 *Laval un Partneri Svenska Byggnadsarbetareforbundet* [2007] ECR I-11767. Emblematic of the harsh criticism generated by this case law see F. Scharpf, *The Asymmetry of European Integration, or why the EU Cannot be a "social market economy?*, Socio-Economic Review, 8:2, pp. 211-250 (2010). More nuanced but still critical is See also C. Joerges, F. Rödl, *Informal Politics, Formalized Law an the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval*, European Law Journal, 15:1, pp.1-19 (2009). For a more favorable reading of these decisions, see instead: L. Azoulai, *Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for Its Realization*, The Common Market Law Review, 45:5, p.1335-1355 (2008); D. Kukovec, *Law and the Periphery*, European Law Journal, 21:3, pp. 406-428 (2015).

[46] For an overview see M. Adams, F. Fabbrini and P. Larouche (eds.), *The Constitutionalization of European Budgetary Constraints* (Oxford, Hart Publishing, 2014).

[47] P. Tsoukala, *Eurozone Crisis Management and the New Social Europe,* Columbia Journal of European Legal Studies, 20:1, pp. 31-76 (2013).

[48] The list of parties campaigning on anti-EU platforms (from very different perspectives and with very different histories) is long and expanding. Just to name a few: in France, the Front National, in Italy the Northern League and the Five Star Movement, in the UK, UKIP, in Germany, Alternative for Germany.

the root of many of its problems. Hence, the law and the market – the once glorified technologies of European integration – cease today to be reservoirs of possibilities and progress and become villains.[49]

This is the political and academic intellectual environment within which the critical turn in EU legal scholarship has emerged. To be sure, this *critical turn* has many voices and branches off in multiple directions. Different authors identify different etiologies for the Union's *malaise*. While some blame certain developments of EU market integration – the hermeneutics of the Court[50], others blame its purpose and essence – the structure and process (or constitution) of the EU.[51]

On the one hand, integration through law is seen as having over-extended beyond its original (and desirable) reach thus engendering a runaway expansion of economic freedoms and competitive markets.[52] Those original anxieties about deregulation and homogenization resurface as EU institutions are seen as uniformly enforcing free movement and competition law against highly visible national norms of social and cultural protection. Once enthusiasts have turned critics. Christian Joerges, for example, who has in the past described European law as a constellation of diagonal conflicts that rejects hierarchy and invites dialogue and deliberation[53] does not detect these virtues anymore. The Court of Justice (post *Viking* and *Laval*) has excessively restricted the legitimate concerns that can justify restrictions to free trade and hence Member States have lost the ability to freely organize their national economic systems.[54]

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[49] On the general revision of the role of law in narratives of European integration see L. Azoulai, *"Integration through Law and Us", cit.* He defines our context as one of "*widespread mistrust in the positive force of law*" and he furthermore notes that "*the narrative of an intimate and positive relation between law and integration is over*" (p. 450).

[50] G. Davies, *Internal Market Adjudication, cit.*

[51] J. Weiler, *Van Gend en Loos*, cit.

[52] See for example, G. Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?* (Cambridge, Cambridge University Press, 2014).

[53] See C. Joerges, *A New Type of Conflicts Law as the Legal Paradigm of the Post-national Constellation*, in in C. Joerges, J. Falke (eds.), *Karl Polanyi, Globalization and the Potential of Law in Transnational Markets* (Oxford, Hart Publishing, 2011): In this "*constellation... the resolution of a problem cannot be achieved with the power conferred [to the EU] but needs to engage competences which have been reserved to the member states... [therefore] European Law cannot plausibly claim 'supremacy' or resort to the doctrine of pre-emption."*

[54] C. Joerges, *Law and Politics in Europe's Crisis: On the History of the Impact of an Unfortunate Configuration*, *cit.* More specifically Joerges compares recent developments in the ECJ case law with the American jurisprudence of Lochner: C. Joerges, *Market Integration and Europeanization of Private Law*, provisional draft presented at the Jean Monnet Project Conference on European Economy and People's Mobility, Jena 7-9 May 2015. See also C. Joerges, F. Rödl, *Informal Politics, Formalised Law an the 'Social Deficit' of European Integration,*

On the other hand, a more fundamental critique has emerged which extends to the very pillars of integration through law. The preliminary reference procedure and *direct effects* come to be seen as insurmountable obstacles to the achievement of a legitimate and democratic Union.[55] Rather than its overextension, this more radical stream of the critique has as its target "*the very nature of the claims supported by EU law... [as] ontologically bound to produce deregulatory and de-socializing effects*."[56] As rightly noted, the problem here is not the EU's failure to achieve its emancipatory potential, but that emancipatory potential itself.[57]

Different branches of the critique not only identify different etiologies for the Union's ailment but also, to keep at an outdated but effective medical metaphor, different organs affected in the body politics. One branch is specifically concerned with the "social" – with the inability of Member States to retain national welfare systems in a liberalized common market.[58] Social democrats, in both politics and academia, have long interpreted the judicial interventions of the Court as preventing Member States to retain their favored social policies. Here the concern is with the prevalence of market-making negative integration over market-correcting positive integration. While this prevalence destroys national welfare states, the Union is too heterogeneous and fragmented to develop an equally protective pan-European welfare system. The most explicit version of the social critique is probably incarnated by the scholarship of Fritz Scharpf[59], whose analysis gains high resonance in today's context of aggravating and also growingly visible economic inequalities.[60] But this is not the stream of the critique I will primarily focus on. Nor my focus is directed at those critics who lament a lack of democracy (in terms of political oversight and accountability) in the EU, not only because of its famed structural democratic deficit but also because the technocratic and a-political nature of decision-making detracts from the viability of such oversight.[61]

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cit. Joerges, as a student of the Varieties of Capitalism is particularly concerned with the homogenization of nationally specific versions of capitalism.

[55] See J. Weiler, *Van Gend en Loos*, *cit.*

[56] *The Critical Turn*, cit., p. 886.

[57] *Ibid.*

[58] F. Scharpf, *The Asymmetry of European Integration*, *cit.*

[59] My reconstruction to the various branches of the critique owes to O. Gerstenberg, C. Sabel, *op. cit.,* p. 290.

[60] To intensify discussions on inequality was mostly F. Piketty, *Capital in the 21st Century* (Cambridge, Harvard University Press, 2013).

[61] See G. Majone, *Europe's Democratic Deficit: the Question of Standards,* European Law Journal, 4:1, pp. 5-28 (1998) introducing the idea of *depoliticization* of European policy, that makes the very idea of a democratic

The branch of the critique I am interested in sees the most detrimental effects of EU negative integration occurring in what we might call the culture of national societies. As I hope I will show, in fact, within the more general *critical turn*, it is possible to isolate a more distinctive *cultural turn* whose preoccupations rest in what are essentially cultural phenomena. [62] The arguments I set to understand seem not much concerned with the social security of citizens, nor with their participation in (or oversight of) EU decisional processes; rather they worry about the citizens' cultural belonging – a sense of belonging that is directly linked to the experiences of everyday life.[63] A recurrent phrase is that the EU destroys, or undoes, or unthreads the texture (or fabric) of national life.

Even if they rarely explicitly talk about "culture", I contend these claims may be best understood together as cultural claims. As I have said, in fact, their preoccupations lie not much in the deterioration of some functionally valued good – prosperity, the welfare state, political representation, but in the loss of something more immaterial – tradition, identity, a way of life, even virtue. They are about who we are and what is important in our lives. In some of these arguments, the disruption of the social fabric is the result of a deep anthropological transformation: the EU changes who we are, but not in a civilizing way, rather in a degrading one.[64] Often times, claims about the erosion of culture at the national level present themselves as links in more complex chains of arguments about the impossibility for the Union to develop its own culture as a basis for valuable (democratic) political processes – a critique which is familiarly phrased in terms of lack of a European demos.[65]

Taken together, these arguments form something of a narrative about the detrimental effect of the EU, and in particular its economic law on national cultures: the *culturalist*

Europe unrealistic when judged according to national standards. This preoccupation is also alive in J. H. H. Weiler, *Van Gend en Loos, cit.* See also for a more nuanced approach V. Schmidt, *Democracy and Legitimacy in the European Union Revisited: Input, Output and Throughput,* Political Studies, 61:1, pp. 2-22 (2013).

[62] See in particular: G. Davies, *Internal Market Adjudication and the Quality of Life in Europe,* Columbia Journal of European Law, 21:1, pp. 289-328 (2014-2015); A. Somek, *Europe: Political, Not Cosmopolitan,* European Law Journal, 20:2, pp. 142-163 (2014). See also: J. H. H. Weiler, *Van Gend en Loos: The individual as Subject and Object and the Dilemma of European Legitimacy,* International Journal of Constitutional Law, 12:1, pp. 94-103 (2014).

[63] For this link on the everyday experiences see in particular, D. Chalmers, *The Unconfined Power of European Union Law*, European Papers, 1(2), pp. 405-437, (2016) (see infra).

[64] See in particular J. Weiler, *Van Gend en Loos, cit.*

[65] For an older seminal version of this approach see J. H. H. Weiler, *To Be a European Citizen – Eros and Civilization*, *cit.*

narrative or the cultural critique of European Integration as I have called it.[66] These arguments seem to belong, as their subset, to a broader and older set of arguments about the homogenizing impact of globalization on national cultures and identities.[67] What sets them apart, from this perspective, is the centrality assigned to law, within the European context, in these processes of standardization. In the next few pages, I will try to give a flavor of the kind of arguments that I see forming such narrative.

As mentioned before, in some arguments, the erosion of culture is consequence of the EU structure and process. Joseph Weiler, for example, has come to see the problem as lying in the combination of a scarcely democratic decision-making process with the inescapable system of enforcement of the preliminary reference procedure.[68] This combination "*places the individual in the center, but turns him into a self-centered individual*"[69] – private enforcer of Community law over which he has virtually no control against the democratically legitimated (or culturally enshrined) rules of his own polity. This is, for Weiler, an individual who has not only lost culture but even virtue. As he elsewhere articulates, the Union has a fundamental humanistic approach – it relies on individuals to effectuate its project.[70] But citizens in Europe, while declaring an uncommitted attachment to certain values (democracy, rule of law, human rights, and a certain environmentalism) have in fact lost the virtues necessary to achieve those values (caring enough to go and vote, patriotism, etc.). [71]

In Weiler's Aristotelian vision, the goodness of individuals depends on them being governed by good laws: hence the EU and its law are at the root of the loss of virtue he diagnoses. In previous writing, Weiler saw European supra-nationalism as compatible with worthy forms of nationalism, and even useful to correcting some of the excesses of the

[66] I use the term in a non-technical sense, without referring to any specific theory in the social sciences that goes under the name of *culturalism.* To be sure, the cultural concern and the attention for the experiences of everyday life is not always associated with a negative view of the impact of EU law. In this sense see for example see: L. Azoulai, S. Barbou des Places, E. Pataut, (eds.) *Constructing the Person in EU Law, Rights, Roles, identities,* (Oxford, Hart, 2016).
[67] For an idea of the plurality of fields in which globalization is said to stamp out local cultures see G. Yudice, *The Expediency of Culture: Uses of Culture in the Global Era,* (Duke University Press, 2004).
[68] J. H. H. Weiler, *Van Gend en Loos*, *cit.*
[69] *Id.*, p. 103.
[70] J. Weiler, *On Europe's Values, Virtues and Vices,* unpublished Manuscript on file with the Author (2015).
[71] *Ibid.*

nation state.[72] The Union he sees today has lost this potential. The self-centered individuals it produces might be good enough to support a project of technocratic transnational governance, but seem to have lost those qualities – "*belongingness and originality*" – necessary to support good national societies, all the more a supranational federal polity. [73]

Damian Chalmers's critique of the EU's functionalist orientation takes on a similar cultural, or anthropological, bend. For Chalmers, EU law provides an alienating depiction of life because individuals matter for it only insofar as they are functionally useful to the achievement of some bigger project – primarily the creation of a common market. Hence EU law "*sets out a vision of human association based exclusively around shared or common activities*" and never around mere "*coexistence*"[74]. To put it differently, the EU only fosters instrumental relations of community, but it disregards affective or traditional communities.[75] This feature of EU legal power (together with other two features Chalmers identifies: *"over-responsibilization"*[76] and "*disorientiation"*[77]) explain EU law's "*propensity to generate conflict where it destabilizes identities which link daily activities, roles and status to wider notions of social or national boundary setting*."[78] EU interventions are particularly disruptive of identities rooted in everyday experiences and market practices – identities that, by being shared across different ethnic, religious and political communities, contribute to create a climate of personal tolerance. The domestic response to such disruptions cannot be but to associate the idea of Europe with "*an unpleasant cultural politics in which a collective freedom, in which the smallest activities are tied to wider notions of society and the nation, is to be defended from a EU which is the enemy of that freedom*."[79]

[72] J. Weiler, *To be a European Citizen – Eros and Civilization, cit.*
[73] *Id*., p. 504.
[74] D. Chalmers, *op. cit.,* p. 415.
[75] These notions of instrumental and affective community are borrowed from R. Cotterell, *Law, Culture and Society*, *cit.*
[76] This refers to the fact that EU secondary legislation responsibilizes citizens and consumers by imposing new costs and responsibilities on private households. For example, Chalmers mentions the Vnuk Case (Case C-162/13, *Damijan Vnuk v Zavarovalnica Triglav d.d.* [2014], ECLI:EU:C:2014:2146) concerning the duty introduced through an EU directive to insure lawnmowers as one triggering harsh debate in the United Kingdom.
[77] Its destabilizing effect has to do with its obscurity and the fact that EU law is normally activated and implemented through national law, but national lawmakers and publics have limited understanding of (and often little sympathy of) EU Law's motivations.
[78] D. Chalmers, *op. cit.*, p. 407.
[79] *Ibid*.

Chalmers acknowledges that opportunist politicians often exploit and accentuate these sentiments. He also notes that the "EU's *otherness*" makes the scrutiny to which its interventions are subjected to – mostly by national media, but also by academics – more stringent than the one reserved to national law. To use his example, a EU intervention on halogen lamps, unlike a national law on halogen lamps, is never only about its narrow object, but always also about "*its wider relations, symbols and associations.*"[80] With these observations, Chalmers suggests that the perceptions of the disruptions triggered by EU law might outsize the real impact of these disruptions. Still, he attributes primary responsibility to the nature of the Union's legal power and its failure to provide adequate arenas for contestation.[81] Even if the Union's unduly meddling with *"the minutiae of everyday life"* is more illusory than real, tells us Chalmers, the triggers for these illusions are to be found in some structural elements of the integration process and features of EU law-making in general.

In other scholars the cultural turn is more explicit still. Gareth Davies, for example, has put forward a particularly sensitive and detailed cultural critique of European economic law. In a recent piece, he argues that *Cassis de Dijon* and its offspring are threatening an already endangered species of norms regulating "*what could be bought and sold, who could buy and sell it, and how they could buy and sell it*" which have important consequences for social cohesion, culture and identity.[82] The European Court of Justice is seen as incapable to assess the "*importance of a rule or institution for a sense of community, the value of its history, the degree to which it reinforces identity and public norms, the sense of loss... which may be experienced if it is snatched away for reasons of trade*".[83] Furthermore, Davies explains, while these national rules are historically rooted and meaningful, "*there is no equivalent expressivity in the relatively sterile and rootless body of EU law. Hence law as such in Europe, is reduced to shallow instrumentality and ceases to become something that can bind, inspire, unite,*

[80] *Id.,* p. 410. Chalmers refers to European Directives provisions (1194/2012 and 244/2009) imposing to phase out across Europe certain high voltage halogen bulbs. The rules triggered a heated debate in the UK with euro-skeptics and mostly the Daily Mail utilizing the controversy as part of their Leave Campaign. See for example, J. Delingpole, *Why the EU's Ban on Halogen Lamps should Make you Blow a Fuse,* The Daily Mail Online, 3 march 2015 (http://www.dailymail.co.uk/debate/article-2976692/Why-EU-s-plan-ban-halogen-light-bulbs-make-blow-fuse-JAMES-DELINGPOLE.html) defining the directive as the typical *bullying* EU intervention.
[81] D. Chalmers, *op. cit*., p. 407.
[82] G. Davies, *Internal Market Adjudication, cit*., p. 296.
[83] G. Davies, *Democracy and Legitimacy in the Shadow of Purposive Competence*, European Law Journal, 21:1, p. 2-22 (2015), at p. 19.

reflect and create loyalty."[84] These quotes suggest a concern with the expressive force of market regulation – with the fact that national law reflects, or symbolizes something deep and important that unites people.[85]

Elsewhere, nonetheless, his critique seems to take distance from expressive explanations and points at specific substantive social ends that certain national rules would protect and EU interventions allegedly destroy: rules about buying and selling are important because they build a limited marketplace, encourage restraint in the uses of wealth and provide appearance of equality.[86] Also, by limiting choice, these rules are said to reduce anxiety and make consumers feel more secure.[87] From this perspective, it is the orientation of national law and policy to the achievement of a more limited marketplace that is worth protecting, an orientation that unites most European member states against the ever-expanding market rationality of the EU. *Cassis de Dijon* is guilty of releasing "*material desires from the straightjacket of standardization*", hence it is not implausible, suggests Davies, "*to consider [Cassis de Dijon] a question not just of trade, not even just of social relations, but of Europe's soul.*"[88]

Similarly, for Alexander Somek, there is a common European "*soul*" to be found in the less competitive markets of the Member States,[89] whose fundamental character is being altered by a Union that encourages extreme individualism.[90] In the Europe Somek describes, citizens are confined to be accidental cosmopolitans who support transnational governance only insofar as it sustains their perfectly private lives, but cannot become political cosmopolitans with a shared sense of culture and identity.[91] For this

[84] G. Davies, *Internal Market Adjudication, cit*., p. 325.
[85] Id., p. 325, specifying that "even regulation can be expressive, performing a social function of communicating and reinforcing values and identity". On expressive law see Section 2 of this chapter (1.2.2.1).
[86] Davies complains that the Court systematically ignores such range of interests. This is not simply due to short-sighted judges or an underdeveloped conception of the functions of market regulation, but it is rather attributable to the structure of the European legal system: the interests at stake are those of a more limited marketplace and as such irreconcilable with a system constitutionally oriented to the expansion of free trade. It is plausible that rules restricting the size of dental clinics or what pharmacies can sell restrict establishment, admits Davies, but they perform a function, different from their stated superficial objective that the Court is not mandated to consider (for this discussion see Chapter III of this dissertation-3.3.1.1).
[87] On this notion see further in the next chapter, section 2.3.10. Davies dubs this "*the psychological merits of limiting choice*": *Internal Marked Adjudication, cit.*, p. 290.
[88] *Id.*, p. 310.
[89] A. Somek, *Europe: Political, Not Cosmopolitan, cit.*
[90] For an earlier contribution in this sense see A. Somek, *Individualism: An Essay on the Authority of the European Union*, (Oxford, Oxford University Press, 2008)
[91] A. Somek, *Europe: Political, not Cosmopolitan, cit.* This is salso linked to Somek's arguments on democracy in Europe: see A. Somek, *The Darling Dogma of Bourgeois Europeanists,* European Law Journal, 20:4, pp. 142-163

anthropological revolution to take place, Somek advocates a reversal of *Cassis de Dijon* and a relaxation of competition law through the realization that "*states are necessary, not only in order to provide public services, but to offer employment for those who do not want to live competitive lives.*"[92]

A general recalibration of the internal market in favor of national states is called for in order to sustain *"the clusters of life form... that add up, jointly and severally to the European form of life."*[93] Only a EU that is true to these national (limitedly competitive and non commercial) ways of life – that lets its member nations express their true selves – the argument goes, can then develop its own *form of life* and fosters feelings of attachment and identity. In Somek, culture seems to take on a specific substantive content and conflate with limits to trade and competition. Market and culture are seen mainly in oppositional terms, so that any expansion of one results in a shrinking of the other.

In yet other arguments, what is important about national regulation seems to be not much its substance but the fact of being nationally specific and differentiated. And if national autonomy and the diversity of European regulatory cultures are the real virtues, re-regulation at the European level (known as harmonization) has not much to offer. Autonomy, to be sure, is to be maximally expressed by idiosyncratic rules that have no immediately understandable function: the freedom to pursue "*obviously acceptable*" goals, such as health or environmental protection, explains Davies, is hardly freedom.[94]

In sum, the arguments I have described as forming a *culturalist narrative,* although seductively assembled, are fundamentally ambiguous. It is often not clear what their exact concern is – if the arguments are about the expressivity of the law, the bonds of solidarity it creates, the diversity of European ways of life as sustained by certain regulatory arrangements, other substantive, more or less cultural, interests (equality, authenticity, a limited marketplace) or finally, and probably including all of the previous ones, a certain shape (role and extent) of markets valued in terms of national identity.

(2014). The prototype of the *bourgeois Europeanist is* Jurgen Neyer whose *The Justification of Europe* (Oxford, Oxford University Press, 2012) Somek is here reviewing.

[92] A. Somek, *Europe: Political, Not Cosmopolitan, cit*., p. 162.

[93] *Ibid.*

[94] G. Davies, *Internal Market Adjudication, cit.,* p. 305. As he writes "*The freedom of a lower community in a federal context to protect health, fairness, or cleanliness is hardly freedom-it is merely the allocation of a necessary executive power. It is the freedom to draw a line for the sake of drawing a line, just because we want to, or just because we like the kind of public sphere it gives us, that demonstrates the autonomy of the community and thereby fuels a sense of freedom and control of collective destiny."*

Given the diversity, ambiguity and often implicit nature of these arguments, perhaps what I have called a narrative is better described as a sensitivity: while they are set apart by a common tone and array of preoccupations, the authors I dealt with ultimately formulate autonomous arguments and would probably not think of themselves as belonging to one camp. Furthermore, while I have bundled them together here, cultural arguments appear, in their original context, often intertwined with other arguments – not necessarily cultural but about social welfare, growing inequalities or democracy. In other writings still, the same authors offer partially different – and certainly more benign – narratives about the EU.

All this to say that I am aware I have not identified a camp with fixed membership and precise perimeters, but rather a sensitivity, as such necessarily porous and fuzzy. This sensitivity emerges in the writings of some of the most influential contemporary students of EU law and more generally in many debates about the EU.[95] It appears to be the contemporary scholarly reflection of something that is taking place more broadly in politics – a rejection of further European integration (and more generally of trade liberalization and immigration) in defense of culture and tradition.[96] As various studies suggest, these ideas have deployed the might of their political traction in the recent Brexit referendum and contribute to explain the rise of Europe's various populisms.[97]

For these reasons, how to understand these arguments and how much weight to give to them appear relevant and timely questions. Despite their ultimate diversity, the common sensitivity they reveal urges us to look for the common concern behind them. What does

[95] And also in the popular media, see for example the debates on lawnmowers and halogen lamps mentioned by Chalmers.

[96] A speech given by John Major in 1993 (as recently quoted in a paper by J. Waldron, *What Respect is Owed to Illusions about Immigration and Culture?* October, 11, 2016. Draft presented at the NYU Legal Philosophy Colloquium, www.law.nyu.edu/sites/default/files/upload_documents/Immigration%20and%20Imagined%20Community.pdf.) well exemplifies the tone of this debate: "*Fifty years from now Britain will still be the country of long shadows on county [cricket] grounds, warm beer, invincible green suburbs, dog lovers and pools fillers [football lottery] and – as George Orwell said – 'old maids bicycling to Holy Communion through the morning mist'...".* Mayor in 1993 expressed confidence that the EU would not alter this British culture; in the Brexit debate the damage to British culture was a key argument of the Leave campaign.

[97] R. F. Inglehart, P. Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash,* Faculty Research Working Paper Series, Harvard Kennedy School, April 2016 comparing economic and cultural explanations for the rise of populism.

the *culturalist narrative* tries to voice? What is that "*culture*" which certain national rules would sustain and the EU allegedly destroy? The rest of this chapter tries to find out.

The way in which I have phrased these questions hopefully makes clear that I am ready to take cultural concerns seriously. In fact, before proceeding I would like to introduce a couple of reflections on how I do not intend to refute the *culturalist* narrative. On the one side I do not wish to dismiss its arguments as expression of simple-minded conservatism. One could easily go on explaining that culture is inherently dynamic and that protecting existing national market arrangements in the name of it is necessarily dishonest. A free-market liberal would probably argue that much of market regulation defends the *status quo* and awards unwarranted economic advantage to certain groups. Somebody more conservatively minded might talk instead about balance, or indeed culture, to indicate there is value in maintaining things the way they are and slowing down the pace of change. In this imaginary dialogue, I would not dismiss the "conservative" arguments at once. Slowing down the pace of change might be a legitimate political project – and one particularly worth pursuing in times of growing cultural insecurities like ours.[98] However, I argue, it is ultimately necessary to inquire which specific features of markets are protected by existing arrangements and how change would disrupt them. Leaving aside, for now, questions about the effectiveness of market regulation in protecting from such unwanted change, I don't dismiss the possibility that Member States might want to retain these forms of regulation with legitimate reasons.

Similarly, an honest reading of these arguments should not take them to mean that all idiosyncratic forms of national regulation should be excused from the rules of the internal market. It goes without saying that if all claims of cultural significance could allow deviating from such rules, very little would be left of an integrated Europe. I believe that despite their emphasis, this is not what these critics are calling for – there must be a specific set of instances or issues that concern them.

Hence, as I have already stressed, any effort to engage seriously with *culturalist* claims requires an analytical articulation of how law and market regulation can be said to have

[98] In other words, if the *culturalist narrative* points at the inability of Member States to retain certain *conservative* (in a literal sense) policies, it might be pointing at a real problem. If EU law seriously eliminates this possibility, there might be some serious impoverishment of Member States autonomy.

cultural significance (see section 2 of this chapter) and of the specific interests that might justify claims of cultural significance (these, to be sure, depend on the specific rules at stake – see chapter 2). The next sections of this chapter and the following one are devoted to such efforts. Ultimately, to be sure, judgments are only possible with reference to the single rules at stake, which will be the function of the Case Studies.

There is, I can anticipate, a certain common core of the intuition behind the *culturalist narrative* to which I tend to subscribe and that, as it will become clear, contributes to explain my case selection. As Chalmers has articulated, certain shared experiences in our economic lives build feelings of identity and solidarity, also by encouraging dialogue across different components of otherwise fractured societies. And there is a sense in which altering these everyday experiences threatens to weaken feelings of solidarity and cultural belonging. I agree this is key in order to understand the resistance (and the discontents) associated to certain EU interventions. Again, however, while the *culturalist narrative* assumes the alteration to be unidirectional – always degrading, a *dumbing down* of national cultures, a deterioration of the relational and cultural quality of certain experiences – my further analysis will try to show otherwise.

1.2. Problematizing Culture in Market Regulation

The ambiguities outlined above in the *culturalist narrative*, to be sure, are also rooted in the complexity of the issues at stake. They point at unanswered questions about the relationship between markets and culture, law and culture, and, at their intersection, between market regulation and culture. This section hopes to bring some clarity to these items. It first introduces the main tangents of contemporary debates on culture, discusses which ones of these notions may be implicated in the claims of the *culturalist narrative*, and then isolates three mechanisms through which the law is said to have cultural implications. Despite the perilousness of definitions, a discussion of what it is today meant by culture seems necessary to understand how citizens and States can lose it in the process of EU integration.

Numerous have been the points of connection between legal scholarship and cultural analysis. Therefore, in approaching this complex subject, I would preliminarily like to

clarify that my contribution is not related to the debate on legal cultures, which is to say the distinct ways in which the law is thought of, created, applied, or practiced by legal professionals in different legal disciplines.[99] Also, my research does not want to analyze "*law as culture*", as one (of many) sources creating meanings and ideas – to be subjected to literary analysis rather than the one proper of social sciences – an approach favored by many in cultural studies as well as anthropology.[100] My research is instead in the field of socio-legal studies (or law and social theory) and it is quite broadly about the cultural consequences of economic law. It is about how the law relates to certain features of life that can be said cultural. In the next section, I will therefore try to discuss what are these features and how and where they manifest themselves.

1.2.1. Some Reflections on the Concept of Culture

With the *Cultural Turn*[101] of the social sciences in the last thirty years or so, the concept of culture has been used so pervasively and in so many directions that some have claimed it has lost most of its analytical purchase.[102] While it is today impossible to provide an agreed upon definition, it is useful to point at some recurrent clusters of meaning. By re-elaborating a distinction proposed by social historian William Sewell, general discussions about culture, both academic and not, can be seen as oscillating between two main uses of the term – or groups of meanings – often, to be sure, conflating.[103] The first use intends culture as a field of social reality, the second as a character, a spirit, describing – or more often essentializing – key features of a group.

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[99]The most influential instantiation of this approach in sociology is P. Bourdieau, *The Force of Law: Towards a Sociology of the Juridical Field*, Hastings Law Journal, 38:5, pp. 814-853 (1987). On analogous lines, legal scholars are particularly interested in the possibility to insert legal concepts developed in within a particular legal culture into a different legal culture and in concepts of legal adaptation. For a sense of the debate see: D. Nelken, J. Feest, *Adapting Legal Cultures* (Oxford, Hart Publishing, 2001).

[100] See for example, L. Rosen, *Law as Culture, an Invitation*, (Princeton, Princeton University Press, 2006). See also N. Mezey, *Law as Culture,* Yale Journal of Law and the Humanities, 13:1, pp.35-67 (2001).

[101] For a definition of this movement in the social sciences and humanities contemporary debates, see S. Best, "Cultural Turn" in G. Ritzer (ed.), *Blackwell Encyclopedia of Sociology*, (Blackwell Publishing, 2007) www.sociologyencyclopedia.com/subscriber/tocnode.html?id=g9781405124331_yr2013_chunk_g97814051243319_ss1-202. See more broadly, E. V. Bonnell, L. Hunt (eds.) *Beyond the Cultural Turn* (University of California Press, 1999).

[102] See K. A. Appiah, *The Ethics of Identity* (Princeton University Press, 2005), p. 114.

[103] This categorization extrapolates from W. H. Sewell, *The Concepts of Culture*, in E. V. Bonnell, L. Hunt (eds.), *Beyond the Cultural Turn* (University of California Press, 1999).

Culture as a field is a category of social life distinct and autonomous from other categories like the economy, science, religion, politics, etc. Within this first use, multiple notions are in circulation. First, and most commonly, culture comes to identify "*an institutional sphere devoted to the making of meaning*".[104] Hence culture becomes primarily a synonym for the arts and letters. This notion is linked to the "*idea of culture as a sphere of high or uplifting artistic and intellectual activity.*"[105] It goes back to Matthew Arnold's famous adage: "*the best which has been thought and said."* Even if, under the growing impact of the so-called *Cultural Studies,* the notion expanded to include more popular forms of expression (pop music, fashion, entertainment, design, even commercial merchandise), what keeps this notion distinct is that it is the product of consciously culture-producing activities (by artists, designers, film-makers, poets, architects, writers and journalists, etc. – intellectuals and creative talents in general). These people consciously and deliberately make culture – they produce meanings.[106] To support these activities are a series of institutions that favor cultural production (publishers, literary agents, governments, film producers, newspapers) and organize, study and preserve it (museums, libraries, universities). From this perspective culture roughly coincides with the Bourdieuian field of cultural production.[107] Overall, this is today the dominant notion of culture in much of sociology and cultural studies, as well as law. It is this notion people typically have in mind when they talk about cultural policy or state interventions for the protection of culture – culture is something valuable that public policy picks as an object to be built, financed, promoted or protected. And culture in this sense has also an important commercial dimension, because it is produced and traded by a series of lively cultural industries (music, film, and books above all).[108] It is in this sense that, in legal scholarship, we talk about a cultural exception to free trade.[109]

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[104] *Id.*, p. 41.
[105] *Ibid.* See M. Arnold, *Culture and Anarchy* (1869), http://www.gutenberg.org/ebooks/4212.
[106] W. H. Sewell, *op. cit.*, p. 37 and 42.
[107] P. Bourdieu, *The Field of Cultural Production* (Columbia University Press, 1993).
[108] For a seminal piece on these industries see. P. M. Hirsch, *Processsing Fads and Fashions: An Organization-Set Anlysis of Cultural Industry Systems,* American Journal of Sociology, 77:4, pp.639-659 (1972).
[109] Debate on the cultural exception especially within the WTO have mostly concerned audiovisual products. The fixed book price rules that I study in a further chapter are also often conceptualized as a form of cultural exception. C. U. Schmid, *Diagonal Competence Conflicts Between European Competition Law and National Regulation – A Conflict of Laws Reconstruction of the Dispute on Book Price Fixing*, European Review of Private Law, 8:1, pp.153-170 (2000).

Another notion owes much to early anthropology and conceives of culture as learned behavior. Edward Burnett Tylor best exemplifies this approach. As he defined it, culture is "*that complex whole which includes knowledge, belief, arts, morals, law, customs, and any other capabilities and habits acquired by man as a member of society*."[110] From this perspective culture is opposed to nature and draws from the realization that natural, biological differences (e.g. race) could not explain the variation of human experiences.

This traditional anthropological definition, while incredibly persistent in non-specialist debates, was soon challenged in academic circles. It left space to another deeply influential notion, dominant in contemporary Marxism, that conceived of culture as agency. Culture as agency is opposed to structure. "*Cultural*", from this perspective, is everything that "*escapes from the otherwise pervasive determination of social action by economic or social structures"*: a free space of creativity that escapes functional economic determination.[111]

From the 1960s, in line with a more general *linguistic turn* in the social sciences, culture comes to be defined through various semiotic notions. The dominant conception in anthropology becomes one of culture as a *system of symbols and meanings*. Within this tradition, the most influential approach is perhaps the one of Clifford Geertz. For Geertz, culture is a coherent system of meanings to be extracted from social reality through interpretation.[112] From this perspective, to a social system of norms and institutions corresponds a cultural system of symbols and meanings which is lying at a higher level of abstraction.[113] Geertzian cultural analysis aims at isolating the semiotic or cultural determinants of human action from other determinants – biological, technological, economic, etc.[114] The favored technique of cultural analysis is what is known as a *thick description*, a methodology widely employed across the social sciences and also in legal studies.

[110] As quoted in K. A. Appiah, *The Ethics of Identity, cit.,* p. 120.
[111] W. H. Sewell, *op. cit.*, p. 42 linking this notion in particular to the work of E. P. Thompson. *Making of the English Working Class* (London, Vintage Books, 1963). Cultural Studies have tried to subvert this assumption by rejecting the dichotomy between agency and structure – history and consciousness being mutually dependent and constituted (cfr. A. Sarat and T. R. Kearns, *Editorial Introduction,* in *Law in Everyday Life, cit.*)
[112] See C. Geertz, Thick Description: Towards an Interpretive Theory of Culture, cit.
[113] W. H. Sewell, *op. cit.,* p. 43. This tradition draws from the thinking of Talcott Parsons. In addition to a cultural system of meanings, and a social system of institutions, there is also a personal system of motivations.
[114] *Ibid.*

More recently, the Geertzian construction has come under attack to be replaced with notions of culture as practice, or culture as a tool-kit. Culture, from this perspective, is that pre-set repertoire of options from which people pick in the performance of action.[115] This development has to do with the emergence of a new sensitivity: a disparate set of insights and approaches that challenged the systematic and coherent nature of cultural systems. In these accounts culture is not systematic but rather fragmented, constantly changing, object of contestation and field of power struggles.

In all of the notions discussed above, culture is still a separate field of social life. When we hear of culture in the plural, instead, like in the cultures of Europe, or preceded by an adjective, like in national culture, culture is used to indicate the character of a group – a historically bounded and organic set of shared practices, beliefs, attitudes, and ideas. [116] In this sense we hear that every national society has a culture, but also that organizations have their own specific cultures, as well as classes (middle-class and upper-class cultures). Furthermore, there is a mainstream culture and various subcultures – gay, immigrant, youth etc. These cultures take shape and find expression not only in the field of high culture, but more broadly, in the ordinary – our every day life in the family, the market, work and leisure.[117]

There is a tendency, in this second use of the term, to stress the coherence of a certain culture, so that each part of a complex universe, the material and the immaterial, the high and the low, join up to fit a common construction. And this is particularly true in the context of nation states. In a long-lasting association, in fact, this idea of culture becomes the basis and the glue of national societies to support viable democratic processes.[118] Art, food, architecture, ways of speaking, dress-codes, attitudes to the family and religiosity and work, forms of behavior in the market, political ideas and constitutions, celebrities, salutations all join up as constitutive parts of the culture of a national community – "*shared understandings and their representations*" as someone has put it.[119] In these discussions one

[115] See W. H. Sewell, *op. cit.,* p. 45 quoting Ann Swidler (A. Swilder, *Culture in Action: Symbols and Strategies,* American Sociological Review, 51:2, pp. 273-286 (1986)). For this approach see also K. A. Appiah, *op. cit.,* p. 107.
[116] W. H. Sewell, *op. cit.*, p. 39.
[117] For a broad discussion of these issues as they relate to the law see A. Sarat and T. R. Kearns, *Editorial Introduction, cit.*
[118] For reflections on this association see sparsely G. Steinmetz (ed.), *State/Culture: State Formation after the Cultural Turn* (Ithaca and London, Cornell University Press, 1999)
[119] See V. Zelizer*, Culture and Consumption, cit*., p. 428.

can detect a tendency to merge the early anthropological Tylorian notion of culture as learned behavior and the Arnoldian civilizational idea of the best of a country's cultural production. Furthermore, in line with the semiotic approach, there is a propensity to stress the systematic, organic (or better *organicist*) and stable character of national cultures.

It is culture in this *organicist* sense, for example, that a cosmopolitan like Kwame Anthony Appiah mocks when he describes a tendency to define Western Culture as made of "*Athenian democracy, the Magna Carta, Copernican Revolution, and so on. Plato to Nato.*"[120] The use of the term "culture" to indicate the character of a group, in fact, even if still common, has fallen into academic disrepute especially as it aspires to identify an organic and bounded set of behaviors, beliefs and value-commitments to which all member of the group, and in particular the nation, should adhere. Many have expressed skepticism about the pre-existence of such shared cultures and the assumption that they should constitute the basis of our identities.[121] Liberal cosmopolitans contribute to show not only how certain cultural traits are shared across nations, but also how varied they are within the nation.

For Appiah, for example, a Tylorian notion of national culture becomes problematic when it assumes that a people sharing a culture, should share, not only institutions, practices and symbols – which is social objects – but also knowledge, beliefs, capabilities and habits – which is personal properties, matters of taste, opinion, natural predisposition or education and as such unavoidably varied in our modern plural societies (but also arguably in more traditional and homogeneous ones). Appiah, indeed, believes a common culture can only be a matter of "*shared institutions and practices, where sharing entails regarding them as a common possession, sustained by common commitments*."[122] From this perspective, for a certain practice to be part of one's culture, it needs to be shared by a group and valued in terms of

[120] Appiah refers to this as a fusion of the Arnoldian picture and the Tylorian picture – the realm of everyday life and the realm of the ideal. As he puts it in a recent Reith lecture for BBC with regard to the notion of western culture: "*Remember the famous [Tylorian] definition I quoted: it began with culture as a "complex whole." What you're hearing there is something we can call organicism. A vision of culture not as a loose assemblage of disparate fragments but as an organic unity, each component, like the organs in a body, carefully adapted to occupy a particular place, each part essential to the functioning of the whole. The Eurovision Song Contest, the cutouts of Matisse, the dialogues of Plato are all part of a larger whole. As such, each is a holding in your cultural library, so to speak, even if you've never personally checked it out. Even if it isn't your cup of tea, it's still your heritage and possession. Organicism explained how our everyday selves could be dusted with gold."* Transcript available at: http://downloads.bbc.co.uk/radio4/transcripts/2016_reith4_Appiah_Mistaken_Identities_Culture.pdf.

[121] This view is often associated with adherents to liberal cosmopolitanism. See J. Waldron, *What is Cosmopolitan?* The Journal of Political Philosophy, 8:2, 2000, pp. 227-243. For a partial revision of this argument see more recently J. Waldron, *What Respect is Owed to Illusions about Immigration and Culture, cit.*

[122] As articulated in comments to a previous version of this paper presented at NYU JSD Forum (10 February 2016): K.A. Appiah, *The Cultural Defense in European Law* – in file with the author.

identity as a common possession – even if the actual meanings each individual associates to that practice are differentiated and plural.

To be sure, as nations came to be studied as social constructs rather than natural entities, their cultures started to be seen as products of, rather than bases for, the emergence of the state. Benedict Anderson explained that national communities were largely "*imagined*" through myths, symbols, and also newspapers.[123] Hobsbawm similarly showed that tradition was "*invented*" in processes of official nationalism.[124] The narrative element is widely recognized as central to the construction of national cultures: it is the stories we tell about our history and its importance in our lives that make up much of it.[125] Unlike in the family, the neighborhood or the small village, in fact, being members of a nation state – which is, citizens – meant to be bound together "*by language, law and literature*" rather than "*direct mutual knowledge and recognition*."[126]

It became clear that identity building implied a process of abstraction and simplification as distancing from concrete differences was needed to allow people to coalesce into a national community.[127] Despite their artificiality, various identity-building projects are recognized to have provided the "*glue*" that solders bonds of solidarity and even loyalty as preconditions for functioning democratic processes. Hence, the construction of *essentialized* national cultures of the kind described above is seen as playing important historical functions. These "imagined" cultures are instrumental to democracy and also sources of value and meanings for citizens who see them as part of their own identity. This last element emphasizes the individual component – it is about what individuals value in the definition of their identity and the personal meanings they associate to it.

What to keep of this brief excursus for our further discussion? What does it mean that European economic law has negative cultural consequences? In line with the different notions identified above, if culture is a field of social reality, it could mean a few things. It

[123] B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London, Verso, 1982). Anderson assigns a key role to the media: the development of a printed press in national vernacular languages.
[124] E. Hobsbawm & T. Ranger, *Introduction,* in E. Hobsbawm & T. Ranger (eds.), *The Invention of Tradition*, (Cambridge, Cambridge University Press, 1983).
[125] This idea is linked to the notion of narrative identity as developed by Paul Ricoeur. See Stanford Encyclopedia of Philosophy, *Paul Ricoeur*, https://plato.stanford.edu/entries/ricoeur/#NarrIdenTurnSelf
[126] K. A. Appiah, *The Ethics of Identity, cit*., p. 217.
[127] *Ibid.*

could mean that the cultural products are worse within Europe because of the impact of EU law. Some have suggested that, but I don't think this is a primary concern of the *culturalist* arguments nor it will be the focus of my dissertation.[128] It could mean that EU Law changes the culture in a detrimental way in the sense that it alters shared understanding and meanings in a way these critics don't like. To identify the content of the shared understandings and meanings threatened by EU law is what Chapter 2 tries to do, but for now I will simply say that this is certainly one of the *culturalist* narrative's concerns. Furthermore, as shared understandings and their representations are bundled together in notions of national culture, by altering single components of it, EU Law is said to break down the cultural consistency of organic national systems. Finally, and particularly interestingly for how my argument will unfold is the idea that certain experiences and behaviors come to be seen as part of a local way of life, so much so that if EU Law makes these experiences unavailable to people is said to be harming their culture. These three dimensions of culture – concern for how understandings and meanings change, for the coherence of cultural systems, and for daily experiences valued in terms of identity and belonging – all coexist in the *culturalist narrative*. With these notions in mind I set to further explore the role of law and market regulation in this discussion – the mechanisms through which national law might be protecting culture and the EU destroying it.

1.2.2. Cultural Implications of the Law: a Preliminary Taxonomy

I will here try to isolate a few ways in which the law (and market regulation in particular) can be said to have cultural implications – the general mechanisms (rather than the concrete cultural interests) through which law relates to culture. It seems to me there are at least three often interrelated but still distinguishable such mechanisms: law can shape or create culture by altering the meanings and values dominant in society (through the mechanisms of expressive law); law can reflect culture in the sense of formalizing preexisting attitudes, beliefs and orientations of society; law can functionally protect culture by altering incentives and thus offering protection to practices, places, feelings and experiences that are valued in cultural (or identity) terms. Of course it might be possible to list more (Law and Cultural Heritage, Law in Popular Culture, etc.), and add more nuances and differentiations, but for the kinds of arguments I engage with these three mechanisms

[128] I will however engage with it in the case studies on book pricing rules, Chapter IV.

seem to me the relevant ones.

1.2.2.1. Expressive Law

The first way in which law is said to have cultural implications is through the mechanisms described by expressive theories of law. This means that the law not only has material consequences – e.g. it alters behavior through the power of sanctions, but also sends messages and makes statements – thus producing cultural consequences.[129] These theories, with different degrees of normativity, believe that law can be "*symbolic, expressive or meaningful*"[130] – that it can send a message – and also that law should be evaluated according to the messages it sends. Differently put, and to link this discussion back to our previous exploration of the various meanings of culture, the law is here said to have cultural consequences because its consequences do not (or do not only) materialize concretely in the real world – in society, so to say – but also in the abstract universe of symbols and meanings – that separate category of social life that we have called culture. Expressive law is also described as transformative because it transforms attitudes and values and through them culture.[131] Anti-discrimination law, for example, is often said to be transformative in this sense: through its statements it alters dominant attitudes in society.[132] And more generally statutory provisions mandating certain good behaviors – without much in terms of enforcement – are the kind of norms typically identified with this function.[133] All this does not exclude that the same law, through its statements and by altering meanings and values,

[129] See for example, C. R. Sunstein, *On the Expressive Function of Law*, University of Pennsylvania Law Review, 144:5, pp. 2021-2053, (1996). For a critical account of various expressive theories see: M. D. Adler, *Expressive Theories of Law: A Skeptical Overview*, University of Pennsylvania Law Review, 148:4, pp. 1363-1501 (2000). Adler is largely skeptical of these theories, which he associates with three legal scholars: Richad Pildes in constitutional law, Dan Kahan in criminal law, and Cass Sunstein in regulation. N.B. the association between expressive mechanisms and cultural consequences is explicit in at least part of the scholarship. See for example R. H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium,* Michigan Law Review, 89: 4, pp. 936-978 (1991).
[130] M. D. Adler, *op. cit.*, p. 1363.
[131] On the transformative role of law see for example, R. H. Pildes, *The Unintended Cultural Consequences of Public Policy*, *cit.*: the realization of the cultural consequences of public policy and regulation more generally was a key element of the New Public Law Scholarship as it developed in the US throughout the 1980s and 1990s.
[132] As C. Sunstein explains: "*a society might identify the norms to which it is committed and insist on those norms via law, even if the consequences of the insistence are obscure or unknown. A society might, for example, insist on an antidiscrimination law for expressive reasons even if it does not know whether the law actually helps members of minority groups*" (op. cit., 2027).
[133] *Id.,* p. 2032.

can ultimately also affect behavior and have indirect material consequences.[134] Most times, to be sure, material and symbolic consequences coexist in the functioning of law.

The complaints described above against the instrumental rationality of EU law and the incapability of EU institutions to value the meaningfulness of national law resemble the objections that American proponents of expressive theories make against cost-benefit analysis and other purely consequentialist and utilitarian approaches to law.[135] Richard Pildes and Cass Sunstein, for example, have put forward an expressive theory of regulation. As they explain: "*by expressive dimension – what might be understood as cultural consequences of choice – we mean the values that a particular policy choice, in the specific context in which is taken, will be generally understood to endorse. Policy choices do not just bring about certain immediate material consequences; they also will be understood at times, to be important for what they reflect about various value commitments.... Both the material consequences and the expressive consequences of policy choices are appropriate concerns for policymakers."*[136] The Court of Justice of the EU, lament the *culturalists*, does not adequately take into account the expressive consequences of European economic law nor it adequately values the expressivity of national law. [137]

I argue that the emergence of expressive theories of law is to be understood in the context of an increased scholarly awareness of the growing role of the *cultural* in modern law and policymaking, with a contextual retreat of the social.[138] As it has been noted, modern (or better post-modern) law is engaged not only in "*traditional goals like reducing crime and poverty*" but in newer cultural goals like "*reducing fear of crime and eliminating the culture of dependency."*[139] Let's pause a second to understand what this means. We often encounter phrases such as a "*culture of...*". We say, for example that a certain group has a toxic "*culture*

[134] This link between expression and function has become explicit in the work of R. Cooter, *Expressive Law and Economics*, Journal of Legal Studies, 27: S2, pp. 585-608 (1998) (elaborating on the functional import of the expression of social values by legislators and courts).
[135] Sunstein's interest for expressive theories is linked to his work on incommensurability. Government policies are incommensurable not only because they pursue different rationalities but also because any utilitarian grading would ignore the expressive considerations that come with those policies.
[136] R. Pildes, C. Sunstein, *Reinventing the Regulatory State,* University of Chicago Law Review, 61:1, pp. 1-129 (1995), at p. 66. See also R. H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, Michigan Law Review. 89:2, pp. 936-1000, (1991).
[137] See in particular G. Davies, *Quality of Life in Europe*, cit.
[138] For these reflections see: A. Sarat, J. Simon, Cultural Analysis, *Cultural Studies and the Situation of Legal Scholarsh*ip, in A. Sarat, J. Simon (eds) C*ultural Analysis, Cultural Studies and the Law* (Durham, Duke University Press, 2003)
[139] *Ibid.*

of masculinity" when it values certain stereotypically masculine behaviors and we want to substitute that with a "*culture of respect*" for women; a "*culture of dependency*" characterizes citizens that rely on the State to provide for them and it is often singled out as the bad unintended consequence *par excellence* of generous welfare systems.

What follows "*a culture of*" indicates the substantive content of a culture – bundled sets of meanings, values, attitudes and pre-fabricated behaviors. We tend to use these phrases in explanatory terms to indicate that certain phenomena are caused not much by given economic, technological, or material processes but by cultural ones – by how people think about or understand social and economic relations. In this sense, in order to tackle certain problems, public policy needs to change not much the incentives, or the sanctions, but the mindset, the culture of people. This is important to understand because expressive theories point at the symbolic nature of law not in order to expose its ineffectiveness or dishonesty.[140] Rather, expressive law is theorized as an instrument to fix certain specific problems that are rooted in culture and not in other material processes.[141] Processes of cultural change are here activated through law as changed reputational incentives shift behavior in new directions.[142]

It is not this the space to delve deeper into this discussion, but the shift from governing the social to governing the cultural is often associated to transitions from the traditional welfare (administrative) State to its various neo-liberal successors.[143] A retreating State would rather intervene to change perceptions and ideas than material life circumstances. I mention this because it is interesting how the cultural critique of European integration censures at once the EU's neo-liberal, market-expanding, orientation and its disregard for expressive law, when the two things (neo-liberalism and cultural engineering through law) are often understood to have a deep association.

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[140] For scholars that describe symbolic law in this way (as dishonest or anyways distorting the normal business of regulation) see, for example: J. P. Dwyer, *The Pathology of Symbolic Legislation.* Ecology Law Quarterly, 17/2, pp. 233-316 (describing certain environmental programs as more symbolic than functional thus creating distortions in the regulatory process). For a more recent application see: A. Wang, *The Symbolic Aspects of Environmental Reform in China*, Draft presented at the NYU Law and Development Colloquium, NYU School of Law, March 23, 2017 (describing Chinese environmental efforts as mainly generating symbolic capital for Chinese leadership in terms of legitimacy and identity)

[141] This intuitions seem to be at the root of Sunstein's more recent work on nudging. See for example C. Sunstein, *Nudge* (New Heaven, Yale University Press, 2008).

[142] C. Sunstein, *On the Expressive Function of Law, cit.*, p. 2033.

[143] A. Sarat, J. Simon, *op. cit.*, p. 2. As it has been phrased (in Foucaldian terms) this passage coincides with a turn in the logics of governance in the late modern era, away from society and towards culture.

There is, however, another dimension of expressivity – another sense in which the law is said to be expressive, meaningful or symbolic, perhaps through a subset of the mechanisms described above. And I suspect that the *culturalist* critics are more concerned with this second dimension. The law is sometimes said to be expressive because of the attachments it generates. This is what we say when we say that people identify in the law, that the law is a statement about their identity, or, from a group perspective, that the law is part of the identity of a country. The intuition of expressivity is at play here – the law does not matter for its function or material consequences. However, what matters in these cases is not much the law's statements or what we have called its cultural consequences, but the attachments it generates. This is a purely sociological understanding of expressivity; it is about the meaning the law takes on in people's life rather than its consequences.

This is, to be sure, a tricky terrain: the intensity to which people identify in – or attach to – a piece of legislation is hard to measure and can only be described impressionistically here. Nonetheless, one can say, if a law matters for the attachments it generates, there might be reasons to keep that law in place simply to avoid the psychological or identity costs linked to losing those attachments. And this might be true even if its effectiveness in functional or even expressive terms is hard to assess. [144]

It is possible that a law takes on this function because of the public prominence of its objective, its history, how it came about, its visibility and the public debates that it triggered. This is unrelated to the effects and implementation of the law and has more to do with the context that accompanied its adoption and the mythology built around it – e.g. revolutions, rejection of authoritarian regimes, state formation, more generally the participatory processes involved. In certain phases of history, private law codifications[145] have taken on such role. The symbolic dimension is inevitably present in constitutions and bills of rights[146]. But it can also apply to more specific forms of regulation. Protection of the environment and wilderness, for example, is said to have played this nation-building role in

[144] A recent field experiment points however at the social costs of maintaining unenforced laws, in terms of the psychological costs linked to rights violation, that are often unacknowledged by expressive theories. B. Depoorter, S. Tontrup, *The Cost of Unenforced Laws: a Field Experiment,* New York University Public Law and Legal Theory Working Papers, 3-2016 (the article contains a literature review on power of unenforced law)
[145] G. Comparato, *Nationalism and Private Law in Europe*, (Oxford, Hart, 2014).
[146] See among others, P. Khan, *The Cultural Study of Law: Reconstructing Legal Scholarship*, (Chicago, Chicago University Press, 1999)

the progressive America of Theodore Roosevelt,[147] while in certain continental European countries it was the protection of objects and places.[148]

To be sure, such processes of identification need not to involve the whole community, but might be at play for specific sections of society – professions, minority groups, etc. – for which that piece of law is meaningful. If the rules at stake play such role, their erasure might seriously impoverish the social fabric or at least the identity of the specific group. This seems to be what Gareth Davies refers to when he writes that national law being "*historically rooted and meaningful*" can "*bind, inspire, unite, reflect and create loyalty*" whereas EU treaties and EU secondary law cannot dispel such expressivity – they are sterile and meaningless.[149]

By applying these ideas to the forms of regulation which will be object of my case studies, one may say that a rule regulating the price of books is important, no matter what its functional import, because of what it says about the importance of certain things in society – books in this case. A piece of law imposing obstacles to the opening of certain larger stores, might be there because of what it says about the public commercial spaces we want, rather than because it functionally produces them. In other words, these regulations might simply signal a commitment to certain themes or objectives – without the pretense of functionally achieving them. Again, as we have said, it is the messages the law sends that matter. As for the second dimension of expressivity, it is harder to imagine how sectorial regulation of specific markets might matter for the public at large who arguably has limited knowledge of the functioning of such regulations. But these regulations are plausibly well known to industry participants and valued by them not only in functional terms, but also for the increased status and social recognition they accrue. As I will further elaborate in the next chapter, being perceived as offering protection to a profession and often the outcome of its mobilization, these rules might become important for the identity of the group.

As for the charge of the *culturalist narrative* that EU law is incapable of dispelling an expressivity analogous to national law, for now I will simply say that it is hard to imagine

[147] D. Brinkley, The Wilderness Warrior. Theodore Roosevelt and the Crusade for America, (New York, Harper Collins, 2009).
[148] S. Settis, *Italia S.P.A*, (Torino, Einaudi, 2007).
[149] G. Davies, *Internal Market Adjudication, cit.,* p. 325 (this is because they are phrased in instrumental terms and are not accompanied by meaningful public debates).

why European law could not operate through the mechanisms described by expressive theories of law, by affecting meanings and not only behaviors, or behaviors only indirectly by altering meanings. Even if the charge is ultimately aimed at the second dimension of expressivity – the law creating attachments, one needs to consider, on the one side, that not all national law generates these attachments and, on the other side, that EU law has a rich mythology of its own, most notably linked to the ending of war in Europe through market integration and inter-dependency. It is possible that this mythology has been exhausted, and that EU lawmaking is in need of new symbols and narratives, but I see no obstacle to such rejuvenation.

As for the charge that EU institutions – the Court and the Commission – are particularly inimical to national laws and regulations that operate through expressive mechanisms, the judgment is more complex. Given he kind of justificatory work needed to retain rules that create obstacles to the freedoms of movement, it is hard for Member States to maintain such rules in place simply based on the statements these rules make or attachments they generate.

1.2.2.2. Constitutive Approaches to Culture and Law: the Law Reflecting Pre-existing National Cultures

The second mechanism through which law is said to have cultural implications is linked to the notion of law reflecting culture, meaning that the law reflects a series of non-randomly distributed pre-existing preferences and attitudes. Culture is here said to be constitutive of law and therefore culture is also the principal variable in explaining why law looks a certain way.[150] The identification of this mechanism is well established in legal scholarship and dates back several centuries. Montesquieu[151] and, later on, Herder[152] can be seen as the fathers of a tradition that tries to explain variations in national laws and institutions by reference to broadly understood notions of culture. Cultural differences were said to shape the national spirit and spill over into the organization of the state and society. To simplify

[150] The phrase "*national culture as constitutive of law*" is borrowed from M. Mautner, *Three Approaches to Law and Culture*, Cornell Law Review, 96:4, pp. 839-868 (2011).
[151] M. de Montesquieu, *The Spirit of the Laws,* The Internet Archive, https://archive.org/details/spiritlaws01montgoog
[152] On Herder's cultural nationalism see A. Patten, *The Most Natural State: Culture and Nationalism,* History of Political Thought, 31:4, 657-689. See also: See entry *Johann Gottfried von Herder* in Stanford Encyclopedia of Philsophy, https://plato.stanford.edu/entries/herder/

and draw associations this approach can be understood as Romanticism's reaction to the Enlightenment's mandate that laws be the product of universal reason rather than local customs.[153] While this mandate produced the great wave of codifications of the early 19th century and certainly great achievements in terms of legal rationalization and modernization, it was also robustly resisted in the name of various *localist* sensitivities.

Savigny with his historical school of jurisprudence was, in Germany, the most prominent voice of such resistance.[154] For his school the law is peculiar to a people. Like language and manners it is shaped by history, and hence naturally varied and idiosyncratic. Law in fact emerges not out of the legislator's will but of everyday interactions, so that "*the locus of law is not state legislation but the daily customs and practices of a people and the notions and understandings prevalent among them*."[155] As the distribution of such different practices, notions and understandings was assumed to coincide with ethno-linguistic differences, the law produced by nation states in modern Europe was (and to a great extent still is) presumed to meet the test of cultural consistency. Furthermore, the coherence and antecedent nature of the culture in which state law is rooted become sources both of authority and identity for the State.[156]

As I have mentioned, the emphasis on the cultural, daily, local and contextual elements of life certainly responds to a romantic sensitivity that values authenticity more than rationality. In this sense, it can probably be linked to what Charles Taylor has called the *expressivist turn*.[157] As Taylor explains, one element of the modern self is an expressive view of human life: the romantic (anti-enlightenment) notion that pursuing one's nature means making manifest an inner voice or impulse, which takes full shape through its expression in life. This idea presupposes a certain originality of each individual. And transferred to the collective realm, it presupposes a certain originality of each people. This approach most limpidly takes form in Herder, for whom each *volk* had an inner self – a spirit to be made express through national law, among other things. To link this discussion back to the

[153] For this discussion see M. Mautner, *op. cit.,* p. 844 ss.
[154] F. C. von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* (London, Littlewood & Co., 1831).
[155] M. Mautner, *op. cit.*, p. 845.
[156] R. C. Post, *Law and Cultural Conflict*, Chicago Kent Law Review, 78:2, pp. 485-508, (2003). Post attributes the core of this intuition in the American context to Patrick Devlin, *The Enforcement of Morals,* 1965.
[157] C. Taylor, *Sources of the Self* (Cambridge, Harvard University Press, 1989). See in particular *The Expressivist Turn,* pp. 368-390.

various meanings of culture described in the previous section, it is clear that here the pre-existing culture in which law is rooted is the *essentialized* and *organicist* one that Appiah describes. It is culture as a coherent system and also culture as the spirit of a group that merges material and immaterial, the everyday and the sublime, and also that commands adherence not only to common institutions and practices but to preferences, beliefs and habits as well. It is, overall, an ethnic vision of culture to which all members of a group are supposed to be adhering.

While in the title of this section I write that the law "*reflects*" pre-existing cultures (or that culture is constitutive of it), as the previous paragraph suggests the mechanism described here can also be phrased in terms of "*expression*". To go back to Taylor, something is expressive when it is the medium through which deeper beliefs, attitudes or principles are made manifest. And as he clarifies, expression makes manifest something that is most likely not fully formed beforehand, so that it is hard to distinguish between medium and message.[158] In other words, if it was not for the expression, we would not know what it is the deeper thing being expressed. And similarly, for what interests me here, it is not simply (or not only) that law reflects some separately observable culture, but rather it is through its law that a certain culture is revealed. Differently put, by observing the law one can distill the traits of the underlying culture. Here, however, unlike for the mechanisms described by expressive theories of law, the accent is on stability rather than transformation. What is expressed through law is not a new idea that can transform meanings and values, but rather a pre-existing and coherent national or local culture. The law reveals, at most solidifies or protects, but certainly does not create or change culture.

In the Anglo-Saxon world, it is the very notion of Common Law to enshrine this idea of cultural consistency. As it has been noted, the Common Law is particularly well positioned to ensure that the law fits the culture and this is thanks to its reference to notions like "experience", "custom" or "the reasonable person".[159] Furthermore, by being open-ended and non-formalized, Common Law can easily respond and adapt to changing practices and customs in the underlying culture. If the cultural approach to law as promulgated by Savigny, in assuming a static and coherent culture, can be seen as perpetrating outdated

[158] C. Taylor, *Sources of the Self*, cit., p. 374.
[159] R. C. Post, *op. cit.*, p. 486.

ethnic visions, its contemporary proponents are instead attracted exactly to these ideas of fluidity and proximity typically associated to the Common Law. In today's context, in fact, preoccupations for cultural consistency are more commonly encountered in the writings of comparative lawyers or proponents of legal pluralism than in those of "nationalist" private lawyers. Proof of the persistence of this vision, albeit in its modern version, is found, in the European context, in the debate around the adoption of a European Civil Code. Within that debate it is worth recalling the contribution of Pierre Legrand who, in the name of local-knowledge, condemned the codification proposal, by proxy of its German champion Professor von Bar, as one "*connecting law and geometry*"[160], that failed to apprehend the plurality of the law, and also a "*violent*" and "*exclusionary*" instrument to confine Common Law to "*a historical footnote*."[161]. While Von Bar is a proxy for the imperialism of reason, Common Law is here a proxy for cultural consistency.[162]

As it has been noted, the constitutive model oversimplifies both culture and the law, because culture is arguably not only pre-existing the law (but often shaped by it, as the last sub-section has shown) and also because reflecting pre-existing cultures is only one of the many things law does.[163] In addition to its outdated vision of culture, in fact, the intuition of the historical school is problematic because it is difficulty reconciled with one of the key functions of law in the modern administrative state, which is its instrumental function – law as an (often progressive) instrument of social engineering or also politics through other means (see infra). Certainly, from the perspective of the historical school and its modern scions, law cannot be an instrument of social change – its objective is not to shape reality but to reflect and at most solidify existing social practices.

Hence, it seems to me, the critics of EU law that I have named *culturalist* subscribe to at least two of the intuitions of constitutive approaches to culture and law. First, they assume that while national law guarantees a match between the pre-existing culture and the law, EU law is a carrier of mismatches. And secondly, they identify the roots of these mismatches in the instrumental rationality they attribute to EU law.

[160] P. Legrand, *Antivonbar*, Journal of Comparative Law, 1:1, pp. 13-40 (2006), at p. 21.
[161] *Id.*, p. 30.
[162] Similar views can be found in H. Collins, European Private Law and Cultural Identity of the Member States, cit.
[163] R. C. Post, *op. cit.*, pp. 487-488.

But instrumental law, in the European context, is certainly not an innovation introduced by the Treaties or by EU secondary legislation; rather, it is a legal rationality amply utilized by Member States in the construction of their national welfare systems.[164] Hence, not surprisingly, also the critique directed towards EU law's instrumentalism is not novel: it finds its illustrious predecessors in arguments aimed more generally against modern law (or the law of the welfare state) that emerged decades ago. It was in fact often said of modern law, before it was said of EU law, that because of its functional or instrumental orientation it eroded or altered culture. These arguments find illustration in the Habermasian critique of the law of the welfare state that Teubner summarizes under the heading of *Colonization of Law*.[165] As he puts it: *"Instrumental legal programs obey a functional logic and follow criteria of rationality and patterns of organization which are contradictory to those of the regulated spheres of life. In consequence, law as a medium of the welfare state either turns out to be ineffective or it works effectively but at the price of destroying traditional patterns of social life."*[166]

Before moving on, I will formulate a few reflections on the possibility that market regulation can respond to this culturally reflective rationality. If it is true that cultural consistency is maximally expected of private law – and within it family law – as the law of our everyday interactions, it is however possible to formulate a version of these theories that extends to market regulation – as a form of law more typical of the modern welfare state (hence normally assumed to be working instrumentally) but which, at closer look, is also susceptible of cultural explanations.[167] From this perspective, a certain shape of markets as sustained by market regulation, would not be the messy product of power struggles or politics, nor designed as an instrument of social engineering, but simply emerge as the formalization of culturally enshrined practices already prevalent in those markets and more broadly reflective of orientations in society.[168] For example, to anticipate

[164] For an account of the shift from formalist to functionalist law (and beyond) see P. Zumbansen, *Law After the Welfare State: Formalism, Functionalism, and the Ironic Turn of Reflexive Law*, American Journal of Comparative Law, 56:3, pp. 769-808.
[165] G. Teubner, *The Transformation of Law in the Welfare State*, in G. Teubner (ed.) *Dilemmas of Law in the Welfare State*, (New York and Berlin, De Gruyter, 1988), pp. 3-10.
[166] *Id.*, p. 6.
[167] For a series of contributions in this sense see L. Lancher, M. Moran (eds.), *Capitalism, Culture and Market Regulation* (Oxford, Clarendon Press, 1989)
[168] The objection here would be that the fact that market regulation needs to intervene to protect some arrangements reveals that these arrangements are challenged in society, and that society is not as culturally homogeneous as it would like to claim when it comes to these arrangements. But as I will try to articulate

some of my later discussion, a country might be said to have producerist arrangements as reflection of an underlying producerist orientation of society – of less competitive lifestyles and preferences which the law formalizes rather than shape.[169]

To better understand how specific economic institutions might be said to reflect culture, one can also look at some approaches to the study of political economy, and most prominently the Varieties of Capitalism literature. Scholars in the Varieties of Capitalism frame their arguments mostly in functional (or rather functionalist) terms – institutions matter for their function, which is understandable in relation to the reproduction of a mostly stable economic system. They study how different national assemblages of economic institutions produce diversely productive and efficient market economies, with a particular emphasis on the notion of complementarity – institutions complement each other as parts of a system. [170]

But it is also possible to see a marked cultural sensitivity in this stream of literature, in that it sees institutions as historical products that precede markets, and national types as mostly coherent and path-dependent. For certain contributions, the cultural reference is even more explicit as the idiosyncratic nature of economic institutions is linked to pre-existing characters of the group that has produced them: variations in shape and consequences of functionally equivalent arrangements are seen rooted in pre-existing features of the group[171]. Again by factoring these intuitions into my own field of research each form of market regulation can be seen as an economic institution that functionally fits a broader system and whose features generally reflect the cultural orientation of society. It is for these reasons that the paradigm of *Varieties of Capitalism* is said by its critics to be "*static and structuralist*"[172]. Furthermore, it seems to me, the Varieties of Capitalism's notion that sectorial reforms are bound to failure if reform is not contextually introduced in other

later, it is possible to counter this objection with reference to Durkheimian notions that see market arrangements as products of bottom up, sectorial and profession-specific moralities.

[169] This seems to me is the underlying approach of J. Q. Whitman, *Consumerism versus Producerism: a Study in Comparative Law*, Yale Law Journal, 117:3, pp. 340-406, (2007) (see infra).

[170] Following a Polanyian insight, this is the key intuition of the *Varieties of Capitalism* literature. See P. A. Hall, D. Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford, Oxford University Press, 2001). Cf. G. Herrigel, and J. Zeitlin, *Alternatives to Varieties of Capitalism,* The Business History Review, 84:4, pp. 667-774 (2010).

[171] See for example: B. Jessop & N. L. Sum, *Towards a Cultural Political Economy* (Cheltenham, Edward Elgar, 2013)

[172] G. Herrigel, J. Zeitlin, *op. cit.,* p. 668.

complimentary institutions echoes the suspicions of the historical school for instrumental interventions and those of my *culturalists* generally for EU interventions.

2.2.3. Culture as the Object of Protection

The third way in which law can have cultural implications is because legal regulation materially alters elements of social reality that are valued in cultural terms. So here the cultural implications rest on the material consequences of the law rather than its symbolic ones. These are also cultural consequences of law, but – unlike for what described by expressive theories – they are not activated by the messages the law sends but by how the law alters reality. Sometimes culture is the deliberate object of regulation, other times it is only through its "*unintended consequences*" that law affects forms of life that are valued in cultural terms. What is important here is that the law operates instrumentally rather than as a culture reflective device. Instrumental law shapes reality through various means: it prohibits, organizes, constitutes, alters incentives, promotes and directs resources. Both the material consequences of the law and the means employed to achieve them, will come with a set of cultural implications.

As it appears clear, the borders of these cultural implications are potentially infinite. Overall if one accepts the intuition that markets are social constructs rather than natural entities, it becomes easy to detect cultural implications in each collective decision a polity makes about the size, scope, shape and limits of its markets. From this perspective, each legal project organizing or regulating markets will carry with it a certain set of cultural consequences[173]– the broader idea being that the organization of social life also influences the "*evolution of values, tastes and personalities*."[174]

Given the pervasiveness of this kind of cultural consequence, I will focus on a subset of relationships. The relationships I am interested in are those in which the law protects (sustains or perpetrate) culture. By this I do not only refer to laws protecting cultural heritage or incentivizing creative production, but also laws that instrumentally act upon

[173] There is a rich body of scholarship exploring the cultural implications of various modes of economic organization. See for example, R. Sennet, *The Culture of New Capitalism,* (New Heaven, Yale University Press, 2007).
[174] S. Bowles, *Endogenous Preferences: the Cultural Consequences of Preferences and Other Economic Institutions*, Journal of Economic Literature, 1998, 36:1, pp. 75-111 (1998).

markets to protect certain features of them that people value in cultural terms – certain practices, experiences or small-scale interpersonal relations. In other words, it is not only that the law deals with culture as a field devoted to the production of meaning, but generally that the law shapes, creates, protects or alters a set of experiences to which people attach importance in non functional terms. These features or experiences might be linked to notions of shared national identity, but this is not necessary for them to be said cultural.

As I mentioned before and as I will further investigate in the next section, sometimes the law is deliberately motivated by the protection of culturally valued experiences or practices, so that it operates instrumentally as an element of social engineering. Other times, however, the law, while originally motivated by other goals, ends up producing experiences or practices that become part of one's culture and are defended from this perspective.

Talk of "*protection*" – the law protects culture – implies that legal regulation steps in to aid, sustain or allow the survival of something that free markets would not produce (anymore) in sufficient quantity or quality. Hence, with a degree of simplification, one can say that a great deal of regulation is animated by this "*preservationist ethic*" – it addresses concerns about the perishability of certain forms of shared life and instrumentally comes to their aid.[175] Again, for a law to be said to have cultural implications in this sense, it must be protecting the practice not because of its functional import – because it makes the underlying market work better, or it is good for health or for the environment – but because the practice protected is valuable in itself, either as expression of uniqueness or diversity or because people attach meaning to it, and consider it important for their self-conception. More simply put, here the law protects a certain form of shared life, because of the importance people attach to it in terms of meanings, identities, self-expression, relationships. This is not incompatible with the practice also performing a specific economic function. Often time, as my case studies demonstrate, it is hard to distinguish which part of a practice is protected because of its cultural value, and which one because of other (economic) functions it performs, but for my analytical purposes it is important to at least try and make the distinction.

[175] K.A. Appiah, *The Ethics of* Identity, *cit.* p. 130, 131 making a rather explicit parallel with the preservation of biological forms of life.

For example, as I will further elaborate, a law that protects a certain type of shop – like independent bookstores or butchers – or a specific practice within it – no discounts, Sunday closing, etc. – might plausibly be seen as protecting culture if that shop or practice have taken on significance for how people think about themselves – if the attendance of these places is important for their identity. It will not, if the rules are necessary only to boost the income of a certain class or to let economic transactions run smoothly. As I will articulate at length in the next section, such rules, the State might say in their defense, aim to maintain some distinctive dimension of the retail experience for their citizens and that distinctive experience is articulated as an element of local culture that is offered protection.

These examples, to be sure, seem to give credit to that deeply rooted association for which culture is always protected by arrangements that restrict competition or markets – so culture as opposed to the market. This is because what we normally protect in the name of culture against market-driven unification are practices and arrangements that are already prevalent in the community or at least rooted in historical narratives about a more or less imagined common past. Hence culture is the existent and the habitual (the past or what is thought to be) and the market as a dynamic and disruptive force threatens to replace the existent with constantly new forms.[176]

While this seems to be the most common scenario, it is possible to point at instances where market-expanding practices are offered protection for cultural reasons. In the United States, for example, we can think of the right to freely buy and sell guns as having this type of cultural implication.[177] But also one can imagine a sort of cultural defense to legal interventions defending a certain entrepreneurial culture[178]and also for highly disruptive and dynamics market or productive clusters, like the Silicon Valley for example.[179] Things like research and innovation policy, industry clusters and start-up incubators are also often motivated with cultural undertones. Here of course it will be a culture of dynamism and competitiveness rather than one that values tradition and small-scale interactions. Furthermore, as the next chapter will articulate, it is possible to point at dynamics of

[176] See J. Schumpeter, *Capitalism, Socialism and Democracy* (1942) popularizing the phrase "creative *destruction.*"
[177] I would like to thank Daniel Francis for this intuition.
[178] Quote D. McCloskey, *Bourgeois Equality. How Ideas, Not Capital or Institutions Enriched the World* (Chicago, Chicago University Press, 2016).
[179] A. Saxonian, *Regional Advantage: Culture and Competition in Silicon Valley and Route 128* (Cambridge, Harvard University Press, 1994).

market expansion which do not compromise the culturally valued experience, and therefore emphasize elements of continuity rather than disruption.

Clearly, when States deploy law in this way they are dealing with rather fundamental questions about the shape of markets and their organization. These questions are about the collective choices a community makes on the degree of inequality, competition, choice that is deemed desirable and about where markets stand in relation to other important things in people's life – the places they live in, their families and friendships. These choices are about the shape and limits of the market and how to deal with innovation. By linking this to notions of shared culture, one certainly suggests that where to strike the balance might be more a matter of socially constructed imaginaries than of objective economic criteria.[180]

On the other side, these choices point at the normative question of how much culture we want to share as a community. Is it enough to share a general commitment to the respect of the law, or do we want the world around us to conform to, or reflect, more of our "cultural" preferences – our passion for opera, for example, or small bookshops, or espresso coffee? If we do, then the State has an important role to play. In the past, conformity of the outside world to dominant (or official) preferences was ensured through indoctrination or also expulsion of those who do not share those preferences. Today, in our western democratic societies, these options cease to be available; hence forms of regulation that slow down the pace of change and maintain things the way they are appear the principal way in which to reinforce certain shared preferences that we deem important for our national identity. This is normally accepted, for example, in relation to the protection of historic buildings or subsidies to the arts; it is way more contentious when the protection is offered to a particular business model, to certain ways of buying and selling things, and the experiences which go with them.

[180] This argument is in the spirit of B. Christophers, *The Great Leveler, Capitalism and Competition in the Court of Law*, (Cambridge, Harvard University Press, 2016). See also the book review by B. Jessop, *A cultural political economy of legal regulation of monopoly and competition,* Environment and Planning A, 48:12, pp. 2541-2546, (2016).

Chapter 2:

The Law of Everyday Shopping: Social and Cultural Interests

In this chapter, I define a set of rules through which I intend to further discuss the claims of the *culturalist narrative*, I justify why I choose them and try to offer a preliminary conceptualization by isolating the plausible socio-cultural concerns that might underpin these rules. I will try my best to connect the discussion to the one of the previous chapter, where I have generally outlined mechanisms through which market ordering can relate to culture. The categories I develop in this chapter will then guide the analysis in the two Case Studies.

2.1. Defining the Scope of the Research: Why Retail Markets?

In many European countries end-of-season sales start on the same day in each store; booksellers don't give but small discounts; pharmacies sell only drugs and cosmetics, they are mostly family owned and have a distinct boutique vibe; large supermarkets are rare in city centers and many shops are still closed on Sunday. These features of European retail markets are often sanctioned or protected by various forms of legal regulation – rules about how, where, when and who can sell things.[181] As they determine the modes, times and places of distribution of goods and services, these rules are about the most visible and tangible elements of the market, that we all directly experience in our everyday lives. One could say that these rules are about the materiality of the marketplace. In their sum they

[181] The rules I study broadly fit one of two categories: they are either forms of a) entry regulation (authorizations, square footage limitations, rules that make exercise of certain services conditional to a professional qualification); or b) regulation of business practices (price regulation, opening hours, rules limiting the range of merchandise a shop can sell). These rules reduce or eliminate some form of competition. Entry regulation represents an obstacle to the establishment of certain businesses and as such naturally helps incumbents. The regulation of business practices eliminates competition on prices (resale price maintenance) or on services (opening hours regulation) or on the variety of products available (merchandise regulation). For this distinction see A. Pozzi, F. Schivardi, *Entry Regulation in Retail Markets*, Discussion Paper No. 10836, Center for Economic Policy Research, September 2015.

contribute to give national markets a distinctive shape[182] and are said to reflect certain national or local "cultures of consumption."[183]

Commercial activity has always been subjected to forms of local regulation. Administered by the police, these (originally mostly municipal) rules originated in the need of solving the typical problems of urbanization: sanitary, hygiene and public order concerns emerging where great numbers of people aggregate to buy and sell – to avoid overcrowding, to start with.[184] Together with measures intended to avoid fraud and regulations in pursuance of public morality, decorum or religion – to avoid that commerce interferes with, distracts from or offends religious practice for example – such rules shaped the physical marketplace. These forms of police regulation not only had a common object, but also a common form and style: that of the list, and of the great degree of technical specification.[185] Typical examples are lists of businesses requiring a municipal license to operate, or lists of measurements that define properties for zoning purposes, or again lists of goods certain shops could or could not sell. As someone has put it, *"to police and to urbanize are the same thing"* and these rules well demonstrate the early link between police regulation and spatial organization of commercial activity in the city.[186]

From the 1890s on, when free market liberalism became the governing principle of most countries in Western Europe, the ability of the police to interfere with free enterprise was greatly limited.[187] But while the liberal state was expected to completely displace such forms

[182] See G. Davies, *Internal Market Adjudication, cit.*
[183] See F. Trentmann, *Empire of Things: How We Became a World of Consumers from the Fifteenth Century to the Twenty*-First (New York, Harper Collins, 2016) (emphasizing the role of the State in shaping different cultures of consumption).
[184] See M. Valverde, *Governamentality, Security, Police*, in M. Valverde (ed.) *Michael Foucalt* (London, Routledge, 2017), pp. 79-102.
[185] Examples offered by M. Valverde, (*op. cit.,* p. 95) are the lists of businesses requiring a municipal license, or the list of measurements that define property for zoning purposes. Foucault wrote that the police governed through lists of dos and don'ts specified to a great degree of technical detail.
[186] As explained by M. Valverde (*op. cit.* p. 94), regulation of urban space is the typical subject of police regulation. Her thinking draws from Foucault, who stated: "*to police and to urbanize are the same things*" (p. 94). She defines the "*police power of the state*" as "*the power to arrange economic activities spatially and temporarily.*" (p. 94) From this perspective, "*the liberal revolution that transformed both law and economics is presented as the negation of police, rather than as a revision or modification of police powers and techniques, that left police powers at the local level largely untouched while putting limits on what central state could do by way of micromanaging and monitoring citizen*"(p. 98).
[187] As noted by Valverde (*id*.), Adam Smith had the view that much of "*French police regulations were greatly hindering economic development while not actually securing urban order*." But Adam Smith relied "on *a caricatured view of continental police regulations in order to promote his own ideas about letting the capitalist economy flourish according to its own laws*."

of regulation, many such rules survived and live today intact at the local level. On top of that, the Welfare State, with its enhanced role in the economy and its habit to deploy law as an instrument to engineer desired social outcomes, has added a new layer of commercial regulation by transforming the purpose and nature of the old rules. Retail markets were enlisted as objects of policymaking in order to achieve the economic goals of price stabilization, full employment and higher productivity. At the same time, protective interventions were designed to help the traditional sector survive the impact of modernizing economies. And a more general attention was soon devoted to the spatial dimension, to ensure the harmonious development of buildings and cities. Turned into macro-instruments, and in the form of more rational, abstract and general forms of law, the old police and other municipal rules, today take the form of retail regulation. The techniques are often similar to the old ones – licensing schemes, prohibitions, detailed spatial and product regulations, etc., but they are today turned to serve not much micro-goals such as hygiene, public order or avoiding overcrowding, but macro-goals – economic, social and cultural. From police regulation to instrumental law, one might say, not without running risks of oversimplification.

While these regulations pursue a plurality of aims (environmental, work-protection, health, religion), their common side effect is that they play a role in shaping the market experience,[188] or more specifically the retail experience. As such, these distinctive experiences can be articulated as elements of a local culture, which is offered protection as a democratic response to the demands of citizens. To be sure, as I have already mentioned, not each form of legal regulation that shapes the retail experience will do that intentionally; more often regulation will shape the experience as the side effect of protecting some other interest. In some cases the effect on the experience is no more than an unintended consequence. For example, a regulation requiring the closure of retail shops within a certain radius of a church or temple might be motivated by respect for the religious observances of citizens, without any interest in its effect on shopping.[189] So too regulations limiting opening hours aim arguably at protecting the rights to leisure of workers or the sleep of the store's neighbors, rather than the experiences of customers. In other cases still, the regulations will yes aim at the retail experience, though not for cultural reasons. There

[188] See R. Lane, *The Market Experience* (Cambridge, Cambridge University Press, 1991).
[189] I thank prof. Kwame Anthony Appiah for suggesting this example.

might be regulations about temperature and space that aim to protect the welfare of shoppers, but which again will not be defended in the name of a distinctive culture. So there is a distinctive domain here – that of the retail experience – and a distinctive defense of regulation – in the name of a local culture. As I will further articulate, my two case studies both belong to this domain and can be offered this distinctive defense. As such, they allow me to engage with the claims of the *culturalist narrative.*

For EU lawyers, these forms of retail regulation matter insofar as they clash with freedom of movement and competition law. Since Keck these rules have been known as "*selling arrangements*" and have been at the center of vigorous doctrinal debates about the limits of the internal market and how to best identify obstacles to its realization. [190] And competition lawyers are very aware of the impact of EU law on the retail industry and mostly distribution agreements.[191] However, beyond these conflicts and beyond doctrine and the more practical concerns of lawyers, the rules I set to study have not attracted much attention and have remained at the margins of legal scholarship.[192] Students of regulation have predominantly specialized in energy, telecommunications, financial markets, insurance – in line with the notion of regulatory silos for which each industry is regulated by an autonomous agency knowledgeable about the functioning of that industry; others have been concerned with risk regulation[193] – mostly regulation of products and foodstuffs for safety reasons; and a more recent fashion still is the study of lifestyle regulation – in

[190] Case C-267 and 268/91 *Criminal Proceedings against Keck and Mithouard [*1993] ECR I-6097. In Keck the court distinguished between *product requirements* (Cassis-type rules relating to the product) which fall under the prohibition of art. 34 and *selling arrangements* whose aim is not to regulate trade (para. 12) and hence cannot be considered as having equivalent effects to a quantitative restriction. With Keck, the Court was clearly willing to limit the application of art. 34. However, the category of "*selling arrangements*" has proved unstable (see. P. Craig, G. de Bùrca*, op. cit*. p. 655) and it has been partially revised by further case law. Among many contributions, see E. Spaventa, *Leaving Keck behind? The Free Movement of Goods after the Rulings in Commission v. Italy and Mickelsson and Roos,* European Law Review 34:6, pp. 914-932 (2009); P. Koutrakos, *On Groceries, Alcohol and Olive Oil: More on Free Movement of Goods after Keck,* European Law Review, 26:3, p. 391 -407 (2001).

[191] See for example, J. Goyder, *EU Distribution Law,* (Oxford, Hart Publishing, 2001).

[192] Part of this lack of attention might be explained by the fact that, unlike in the so-called networked industries, regulation of retail is generally not thought of as instrumental to the functioning of the industry, but rather pursuing purely external goals. See the discussion in the next chapter (3.2.2)

[193] See A. Somek, *Individualism*, *cit.*, defining a cultural theory of risk regulation according to which "*public perceptions of risks*" are akin to "*aesthetic judgment*" – a matter of common sensibility. As he explains: "[*citizens'] self understanding are manifest in the day by day regulatory business of governments... .I surmise, therefore, that if we want to uncover something truly 'deep' about ourselves we need to consult the ordinary, namely, the bulk of regulations that situates our lives with regard to certain risks"* (p. 34).

order to discourage unhealthy habits, such as alcohol and smoking, and encourage healthy ones, such as physical activity.[194]

There is, to be sure, a greatly significant set of insights, coming from industrial organization theory of regulation[195] and also studies on the regulation of professions (medical, legal, pharmacies) – in particular on issues like the kind of interests that are being served by these regulations – that have been useful for my study.[196] Scholars however, and legal scholars in particular, have rarely turned their sight specifically to the rules governing our everyday shopping – the "*hows*", rather than the "*whats*" of everyday economic transactions.[197] And particularly unexplored are the social consequences of these rules: their consequences on business practices and consumer behaviors, and ultimately also on people's experiences in the market and their identities.[198]

Given the pervasiveness of legal regulation in shaping retail markets and considering the great deal of interest that the evolution of retailing generates – in the media as well as other academic disciplines, the relative omission of legal scholarship appears surprising. The innovations brought about by online shops, fears about the disappearance of physical ones and the impact of these processes on the texture of the city, inspire an incredible amount of writing, from academic papers to the lifestyle sections of glossy magazines.[199]

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[194] The typical example of lifestyle risks regulation are tobacco and alcohol control. On these forms of regulation see more broadly A. Alemanno, A. Garde (eds) *Regulating Lifestyle Risk: the EU, Alcohol, Tobacco and Unealthy Diets* (Cambridge, Cambridge University Press, 2015).

[195] J. Tyrole, *The Theory of Industrial Organization,* (Boston, The MIT Press, 1988); see also L. Pepall, D. Richards, G. Norman, *Industrial Organization: Contemporary Theory and Empyrical Applications*, 5th edition (Hoboken, Wiley, 2013)

[196] For a literature review of such studies, L. Haller, *Regulating the Professions*, in P. Cane, H. M. Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford, Oxford University Press, 2012). While regulation of profession is often justified towards the protection of some interests of consumers (mostly to quality and against harm) that are more acute than those encountered in retail regulation – which are normally more diffused, the legal phenomenon is similar.

[197] There are however a growing number of empirical studies on the effects of entry regulation, opening hours regulation and also resale price maintenance. Most contributions on retail regulation seem to come from Economics and also Geography. See for example, R. Sadun, *Does Planning Regulation Protect Independent Retailers,* The Review of Economics and Statistics, 97:5, pp. 983-1001 (2015); A. Pozzi, F. Schivardi, *op. cit.*; F. Schivardi, E. Viviano, *Entry Barriers in Retail Trade*, The Economic Journal, 121:551, pp. 145-170, (2011); N. Wrigley, *Antitrust Regulation and the Restructuring of Grocery Retailing in Britain and the USA*, Environment and Planning A, 24:4, pp. 727-749. (1992). For a broader discussion of this literature see Chapter III and IV.

[198] The most thorough attempt in this regard comes from J. Q. Whitman, *Consumerism versus Producerism: a Study in Comparative Law*, Yale Law Journal, 117:3, pp. 340-406, (2007).

[199] The quality of retailing (indicators such as number of independent bookshops and number of international retail chains like Zara or Starbucks) is one of the criteria in many rankings of the most attractive cities. See for example, Monocle's top 25 most livable cities: https://monocle.com/film/affairs/top-25-cities-2016/. On the book pricing rules, see for example, M. Nauman, *How Germany Keeps Amazon at Bay and Literary*

Politics also mobilizes these themes to attract voters.[200] Traditionally, while free-marketers have tended to see regulations of this kind as anachronistic residues of inefficient and corporatist economies, conservatives and communitarians alike defended them as expression of restraint or also national identity. Economic nationalists from left and right, to be sure, advertise their support for these rules to defend local business.[201]

Moreover, the mobilizing force of these themes appears strengthened in today's context, as the great recession exposes the disruptiveness of certain long-term economic transformations on the texture of European societies and in particular its cities. Recent studies in political sciences suggest that the urban-rural (and also digital-non-digital) cleavage is a decisive explanatory force behind the rise of populism and the resurgence of *nativist* forms of conservatism.[202] We often hear that what distinguishes Europe's metropolises from its smaller cities and towns is not only economic dynamism and access to good jobs, but also cultural dynamism. The perception is that life used to be commercially, culturally, and relationally rich in peripheral Europe, and that it is not anymore or it is much less.[203] So access to quality markets and more specifically to familiar and recognizable markets benefits the winners of globalization – concentrated in a handful of big cities in what are rapidly centralizing European countries.[204] The rest of the population in smaller cities and towns grows disenfranchised not only because there are

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Culture Alive, the Nation, 2012 (http://www.thenation.com/article/how-germany-keeps-amazon-bay-and-literary-culture-alive/)

[200] Even before the rise of e-commerce, the processes of service liberalization undertaken by many European countries had been spurring heated public debates around these rules See, for example, E. Grossman, C. Woll, *The French Debate Over the Bolkenstein Directive,* Comparative European Poltics, 9:3, pp. 344-366, (2011). See infra (3.3.4)

[201] In Hungary, the Orban government introduced rules to ban Sunday trading and also to force closure of retailers that operate at a loss for more than two years. See European Supermarket Magazine, *Hungary Bans Loss-Making Supermarkets,* 9 December 2014 https://www.esmmagazine.com/hungary-bans-lossmaking-supermarkets/7745

[202] S.L. de Lange, M. Roodujin, *Contemporary Populism, the Agrarian and the Rural in Central Eastern and Western Europe*, in D. Strijker et al. (eds) *Rural Protest Groups and Populist Political Parties*, (Wageningen, Wageningen Academic Publishers, 2015). For a journalistic account of the debate see J. Emont, *The Growing Urban-Rural Divide Around the World: How Politics Pits Demographic Groups Against Each Other*, The Atlantic, January 4, 2017.

[203] This phenomenon is in line with the tendency for certain cities to move ahead of the rest of the countries. The Economist, *The Great Divergence, America's most successful cities, states and firms are leaving the rest behind*, March 12 2016. www.economist.com/news/united-states/21694356-inequality-between-states-has-risen-most-past-15-years-americas-most-successful-cities. On the debate between the growing polarization of a few cities and the rest in America see also T. Cowen, *Average is Over,* (New York, Penguin, 2009). The debate seems to be particularly lively in France: see C. Caldwell, *The French, Coming Apart. A Social Thinker Illuminates His Country's Populist Divide*, City Journal, Spring 2017, https://www.city-journal.org/html/french-coming-apart-15125.html; Alternatives Economiques, *Les Villes Moyennes Sont-Elle Condamnées?,* n. 376, February 2018

[204] See for example, L. Sartori, *Windscreen washers, gutter punks and Roma, spritz, robbery and graffiti: what is insecurity in Italy today?,* in M. Donovan, P. Onofri (eds.), *Italian Politics: Frustrated Aspirations for Change* (New York-Oxford, Berghahn Books, 2008), pp. 234-251.

less and less-paying jobs but also because their everyday experiences become unrecognizable (and less enjoyable) as a consequence of immigration and changing markets.[205] "*Commercial desertification*", *"Cultural crisis",* the "*feeling of being left behind*" become common phrases in describing and explaining such phenomena.[206] So there is a clear link in the narrative that is being put forward between the cultural crisis experienced in certain Member States (or certain areas within them) and the commercial impoverishment of these areas.[207] The political force of these narratives is one more reason to suggest the relevance of my focus on retail.[208]

To be sure, and this is a theme that I will just introduce here to then further discuss later in this chapter, the association between the erosion of traditional commerce (and more generally traditional forms of economic life) and feelings of cultural dispossession that potentially lead to reaction is not a new theme in Western European politics, rather it is recurrent. As one reads in a study on the socio-politics of the middle-classes (now 30 years old): "*'... what seems an old order, a traditional society, keeps appearing, reappearing at bewildering various dates... as an idea to some extant based on experience, against which contemporary change can be measured.' The petite bourgeoisie in the West have from time to time helped create 'retrospects' not of pastoral societies but of 'traditional' capitalist societies in which free and independent men and women competed in the market place, where monopolies were held at bay, where the State acted as an umpire ensuring that the game was played by the rules."*[209] While in the 1980s these retrospects served to oppose left-wing policies – big government and the power of trade unions within the big firm as threats to the independence of the middle

[205] Consumer data surveys show that typically people living in town of less than 10.000 inhabitants are less satisfied with the choice of shops to which they have access. See European Commission, Retail Market Monitoring Report, *Towards more efficient and fairer retail services in the internal market for 2020,* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0355&from=EN, quoting *Ipsos Consumer Satisfaction Survey on behalf of the Commission, 2008.*

[206] Journalistic accounts commonly employ these formulations as a google search on *desertification commercial* or *desertificazione commercial*e reveal.

[207] This debate echoes discussions around de-urbanization and *mallization* previously had in America. See for example, R. Putman, *Bowling Alone: The Collapse and Revival of American Community,* (New York, Simon and Schuster, 2000)

[208] As amply documented in political sciences, people growingly vote also as consumers, which means that they vote according to their experiences and perceptions in the market. Whitman reports the evolution of this discovery in his essay. J. Whitman, *Consumerism v. Producerism, cit.,* p. 361.

[209] F. Bechhofer, B. Elliott, *Petty Property: the Survival of a Moral Economy,* in F. Bechhofer, B. Elliott, (ed.) *The Petite Bourgeoisie: Comparative Study of the Uneasy Stratum* (London and Basingstoke, McMillan Press, 1981) p. 192, quoting R. Williams, *The Country and the City* (London, Chatto & Windus, 1973), p. 35. The authors note that Marxists disliked these *retrsopects* as "*highly idealized version[s]*" of an early eighteen or nineteenth century moral market economy which never really existed.

classes, today they are deployed to oppose further EU integration as a facilitator of both unruly globalization and neo-liberalism. Smallness and economic independence, as it will be further discussed, are integral ingredients in the construction of these narratives.

All this is to say that retail markets are a fruitful entry point to try and investigate how the sense of cultural crisis that I tried to account for above (when describing how the *culturalist narrative* came about) is linked to the impact of EU interventions. I am aware that my focus on the retail experience might be perceived as quite narrow given the generality and breadth of the claims advanced by the *culturalist* narrative. But as I have articulated, what I perceive as the common core of *culturalist* arguments is that EU economic law brings forward an alteration of everyday experiences that makes life unrecognizable in the Member States and weakens feelings of belonging. If this is true then a focus on our experiences in the market seems at least one appropriate avenue to discuss the validity of the *culturalist* claims and ultimately attempt a re-evaluation of the agency of the EU in transforming these experiences. As I have mentioned before, this approach owes much to the writings of sociologist Viviana Zelizer, whose notion of *Economic Lives* aims to show the intersections between "*economic activities, small-scale interpersonal relations, and shared culture*"[210] – the intuition being that, for people, economic activity is not a separate sphere of life, but is rather integrated in the "*wider range of their social relations.*"[211]

While I believe my approach suitable to other areas of market regulation as well as social policy, the case studies object of this dissertation concern a limited set of issues about the quality of the retail experience and our everyday lives in the market. To link elements of our everyday-life experiences to wider processes of identity formation aspires to infuse with specific content otherwise empty invocations of national cultures. Even if I set to challenge what I call a *culturalist narrative*, in fact, my views are not simply, so to say, *abolitionist*, meaning that I don't deny the possibility that certain forms of market regulation might have a true cultural value or play deeply rooted social functions that are worth preserving. I also don't deny that in these rules there might be something of a national identity, nor that Europe cannot try to find its common culture in some of these things and actively cultivate it. As it will also be clear by now, the rules I set to study

[210] V. Zelizer, *The Lives behind Economic Lives*, in V. Zelizer, *Economic Lives, cit.* p. 2.
[211] V. Zelizer, *Appraising Economic Lives*, in V. Zelizer, *Economic Lives, cit*., p. 359,

concern only a particular set of issues that have implications for culture and identity – not the thick ones of religion, race, language, personal belief, gender, and the family (at least not directly), but the thin ones of the market, consumption and indirectly also work and leisure.

In these thinner relationships the stakes are typically lower: they are not about human rights but about prices and preferred ways to shop or spend one's free time. But for this same reason, the judgment about an affirmation of identity based on these rules is, I believe, not an easy one. If banning to build mosques or even only minarets like in a recent Swiss case is easily dismissible as exclusionary and also probably in violation of numerous human rights conventions, banning certain kinds of shops or forcibly protecting others presents us with more nuanced judgments. The ultimate question is: are people entitled to a (market) environment that reflects their own identity? One should seriously engage with this question, as it touches some exposed nerves of our times: a general sense of loss people experience and a resurgence of tradition as a source of identity also in the market which has powerful political consequences. Ultimately, however, judgments are only possible in relation to the single rules involved and the specific concerns at stake that the rest of this chapter tries to disentangle.

2.2. What Do These Rules Protect That the EU Allegedly Destroys? A List of Plausible Concerns Served by Retail Regulation.

When litigated before the Court of Justice or defended before the Commission, Member States justify these trading rules by reference to specific public interest objectives: for the fixed book price rules it is the cultural/educational interest of consumers/readers; for limitations imposed on the establishment and operation of supermarkets it is the integrity of urban centers; for other such rules like rules reserving the ownership of pharmacies to qualified pharmacists, it is the expert advice that consumers are able to get and ultimately their health. However, despite variation in their specific declared objectives and legal technologies (bans, systems of authorization, incentives, etc.) these rules present important similarities and deserve a common conceptualization. Very generally, these regulations are comparable to light forms of market closure: they restrict who can sell certain things and how they can sell them. They typically present themselves in the form of entry regulation

(see chapter III) or regulation of business practices (see chapter IV). As such they are normally understood either as forms of protection of certain business providers – of a certain class or profession – to sustain their *economic viability* and increase their status or as instruments to serve the consumers interest to quality by controlling who can provide a certain service. These features of these rules will receive consideration both in this section and the case studies, but this section will more specifically focus on the articulation of the broader and more diffused public interests that these rules might (individually and cumulatively) serve.

This section draws from the general reflections made above on how market regulation can be said to relate to culture (Section II of chapter I) as well as material collected for the case studies and theoretical insights coming from various disciplines to try and isolate the specific kinds of concerns that might be protected by the rules under consideration. So if the previous chapter was devoted to isolating the general mechanisms, here I try to unearth the substantive interests that might justify claims of cultural significance for a specific set of rules. It is an effort in analytic exploration to offer a preliminary typology of the concerns underlying these rules. It aims at distinguishing and problematizing in order to provide somewhat testable categories rather than providing definitive answers. What follows are indeed only plausible explanations, whose empirical validity will be discussed in the case studies.

2.2.1. Producerist Law

A useful take-off point comes from James Q. Whitman who characterizes arrangements of the kind I am studying as instances of what he calls *producerist law.*[212] In an influential essay, he describes Europe and America as divided along a *producerist-consumerist* line. The divide is about the economic identities that the law employs – the role through which human beings become relevant as objects of law and policy. So while Western Europe's *producerist* legal systems protect people in their productive capacities – as workers, shop-owners and competitors in general – America's consumerist law revolves around the interests of consumers – and mostly their economic interest to lower prices. If a general movement towards the American model is undeniable, admits Whitman, the divide is still particularly

[212] J. Q. Whitman, *Consumerism versus Producerism, cit*.

apparent (and, he predicts, there to stay) in the different approaches of American and EU antitrust[213] and in the uneven resilience of forms of retail regulation across the Atlantic.[214]

At a very general level I agree with Whitman that what characterizes Europe's law of shopping is its *producerist* orientation: it is conceived to aid producers – primarily here shop-owners and their employees. This means first of all protecting the physical persons working in the shops, their welfare and right to leisure. And the case of store-hours regulations is quite emblematic in this sense.[215] In litigation before the CJEU, for example, German rules banning night-work in bakeries were defended with explicit reference to the protection of the wellbeing of workers.[216] Secondly, it means protecting the status and social position of people in their professional capacity – their dignity as workers as well as the artisanal quality of their work (see infra 2.2.4).

Since every person is both a consumer and a producer at the same time, understanding why different legal systems are organized around different economic identities is certainly an interesting puzzle. Whitman's analysis is particularly nuanced. He does not give easy answers and he certainly contextualizes the divide by featuring a great deal of the history of ideas as well as legal and economic history. As he explains, for example, legal systems used to be predominantly *producerist* in both Europe and America until the end of the 19th century. And America's consumerism came about only as the product of a quintessentially

[213] With great simplification, it is often said that the dominant orientation of American antitrust is towards the protection of the economic interest of consumers, while European competition law is still more responsive to the interest of competitors. On this divide see, for example, E. Fox, *We Protect Competition, You Protect Competitors*, World Competition, 26:2, 149-165, (2003).

[214] As Whitman notes, rules limiting the range of merchandise a shop can sell, its opening hours and square footage, or entry regulation allowing for a limited number of businesses in a given territory are in sharp decline in the United States; these rules, albeit also declining, are instead still strong in most continental Europe. Whitman makes clear that the divide was not always there. Both systems were originally *producerist,* but while the US has had a fast transitions toward consumerist law, countries in Europe have clang to their *producerist* arrangements. See Whitman, *op. cit.,* p. 384. For a description of this transition in the US with regard to food markets see A. J. Cohen, *The Law and Political Economy of Contemporary Food: Some Reflections on the Local and the Small*, Law and Contemporary Problems, 78:1, pp. 101-145 (2015).

[215] Today, these rules are greatly relaxed across Europe, but still quite rigorously enforced in a series of countries, including Germany, that always had one of the most stringent opening hours regime. See O. Boylaud, G. Nicoletti, *Regulatory Reform in Retail Distribution*. OECD Economic Studies, 2001:1, 2003.

[216] See Case C-155/80, *Oebel* [1981] ECR I-01993 where the ECJ found rules governing the hours of delivery and sale in the bread and confectionary industry legitimate expressions of economic policy. "*The German government retraces the history of the legislation at issue and states that the purpose of the legislation is primarily to protect workers in the bread and pastry industry against permanent work at night likely to harm their health*." (p. 1998).

American political project that aspired to surpass the contraposition between labour and capital, by appealing to consumers as members of a universal class.[217]

Nonetheless, after discounting history and politics, for Whitman it is cultural factors to explain the persistence of these different legal orientations. He sees *producerist* features of regulation as products of a (deep) cultural orientation of society[218] – a *producerist* orientation that, to be sure, finds expression also in other fields of regulation and in other social fields outside of law. In the continental mindset it is the worker that deserves protection and this has consequences on the lifestyle before than the law: workers need to be able to go home after work, not in order to shop, but to enjoy the family and the house.[219] From this perspective, Whitman's approach has something of the constitutive approach to law and culture that I described above: it assumes that there are certain underlying attitudes prevalent in a community that the law reflects (and solidifies) and also that by observing the law one can distil these original cultural traits.[220] It also has something of the *Varieties of Capitalism* in that it emphasizes the coherence and internal complementarities of national systems, rather than their contradictions.

By stressing that a choice between consumer and producer identities does not imply any direct transfer of resources[221] – it is in other words a costless choice because both *producerist* and *consumerist* legal technologies protect people from uncorrected markets – Whitman suggests that this choice is a matter of culture and that it should be left to the autonomy of States. But in so doing, it seems to me, he invites to stop at a rather superficial assessment of the cultural significance of these rules, without truly looking into their effects or into who wins and who loses from them. From this perspective, *producerist* rules are seen as having a mark of cultural consistency and the assumption is that they should not be altered in order to avoid mismatches. This suggests, for example, by extrapolating, that German customers would not enjoy or would not take advantage of longer opening hours even if

[217] Whitman reports historical research placing this consumerist turn in American society as early as the end of the 19th century, *Id.,* p. 361.
[218] J. Q. Whitman, *op. cit.*, p. 348. As he writes: "*this reflects a fundamental fact about continental cultures: countries like France and Germany remain both far more paternalistic and far more producerist in their deep cultural orientation than America*."
[219] As the same Whitman acknowledges however, and as I will articulate later on, it is possible to see these rules as aiding consumers as well.
[220] He talks, for example of "*distinctive artisanal legal traditions*" that "*will continue to have an impact on the workings of distinctive economies*", *Id.,* p. 405.
[221] *Id.,* p. 398.

they could, because they don't like it and because it is part of their culture not to like it. It also suggests that French customers value quality more than choice whereas American customers do not and this is because of their culture – of who they are. With reference to my case studies, it would suggest that continental Europeans do not like to buy discounted books or to have supermarkets close to home – and the rules are there to protect these preferences from the pursuit of cheapness that consumerism encourages. Essentialist views of this kind are, to be sure, very widely held, and they are exactly what my case studies hope to problematize.

In conclusion, while I utilize Whitman's categorization as a descriptive tool, I tend to be skeptical of its underlying assumption. Evoking ethnic visions of pre-existing national cultures does not seem sufficient to establish the cultural value of certain rules. And this has practical consequences because if the diffused (but arguably small) detraction of *producerist* arrangements from consumers' welfare might appear loosely justifiable in the name of culture, other categories of people might be harmed in more serious ways by these arrangements, and hence an unspecified recourse to culture might become insufficient defense. By lifting the veil of cultural consistency one soon discovers that preferences are not homogeneous within the nation and that arrangements are contradictory.[222] It is the same Whitman to acknowledge that limited shop hours, for example, assume that women do not work and that they will have time to shop during the working hours of their husbands.[223] Furthermore, as also noted by Whitman, it appears suspicious that in various European countries the liberalization of opening hours followed the entry of migrants in the grocery retail market.[224] This might suggests that the *producerist* identity worth protecting is in need of further specification as the worker whose leisure is valuable also needs to be male and ethnically German or French or Italian.

It is possible to detect this approach also in some of the *cultural critics* of EU integration. Somek, quite explicitly, and also more implicitly Davies see the *producerism* of Europe's Member States as part of an underlying culture and reject American-style consumerist

[222] A classical premise of c*ommunitarian* and *cosmopolitan* theories is that preferences are varied within the nation and often common across nations. This is documented in a number of studies in sociology and other disciplines and also, as I will discuss, I found evidence of it in my case studies (see infra). For a discussion of these themes see G. Comparato, *op. cit.,* p. 156.
[223] J. Whitman, *op. cit.*, pp. 385-386.
[224] *Ibid.*

arrangements (that the EU is blamed of importing) because they not only leave people socially less protected but also alter (and degrade) their national cultures. In an effort to revise these notions, the rest of this chapter will try to show that what we have here preliminary called *producerist* arrangements work in complex ways and might protect a plurality of interests – also of consumers. Similarly, consumerist arrangements are revealed not only as carriers of homogenized impersonal transactions, lower prices and shabbier products, but also as compatible with traditionally valued cultural items. Furthermore, there may be evidence that even the most corporatist Member States are not the strongholds of limited marketplaces *culturalists* like, and that in any event EU-style consumerism is of a different kind than the American one. What Whitman acknowledges – and the rest of this chapter takes him up on this suggestion – is that *consumerism* and *producerism* are in fact only macro orientations, big boxes within which laws and policies can actually protect different things and go in different directions.

2.2.2. Smallness

Under closer examination, what Whitman calls *producerist la*w appears to be protecting not much productive identities as such, but rather the smallness of the productive or distributive unit – both in terms of physical and economic size. Much of Europe's law of shopping is not concerned with the wellbeing of all workers, nor equally aimed at all sorts of "producers", but seems to favor a particular form of distribution over another: decentralized, urban, retail networks of small independent shops to the detriment of larger, sub-urban, supermarket-like chain distributors – in other words, the traditional sector versus modern distribution.[225] Of course there are many overlaps, but the association between the traditional sector and legal *producerist* arrangements on the one side and modern distribution and legal consumerist arrangements on the other remains useful.

Going back to the mechanisms through which the law operates, here we are in the realm of instrumental legal programs: law is designed (or a posteriori understood) in a way as to

[225] For the distinction between the traditional and the modern sector see S. Berger, J. Piore, *Dualism and Discontinuity in Industrial Societies* (Cambridge, Cambridge University Press, 1980). See in particular, S. Berger, *The Traditional Sector in France and Italy,* in S. Berger, J. Piore, *op. cit*.. As Berger notes "*throughout the postwar period, the grand schemes for industrialization and modernization of economy and society never entirely supplanted a second set of policies that were pursued to protect the small firms that the first set of policies were designed to eliminate* (p. 109). – see discussion later in this chapter.

materially aid the small shop.[226] The rules I focus on mostly impose neutral obligations (applying equally to all businesses), but these obligations are in fact often more burdensome for larger retailers. Typically these rules either regulate entry in a way that advantages small businesses, or prohibit business practices in which bigger businesses would enjoy an advantage (because of size of the establishment, number of employees, legal form, etc.) if these practices were allowed. For example, regulating opening hours can be seen as preventing bigger businesses to employ their larger staff to stay open longer, and thus help family-owned traditional businesses that are less able to do so.[227] Similarly, resale price maintenance rules such as those adopted in the book trade are said to award an advantage to small retailers: by constraining price competition, these rules prevent bookstore chains and supermarkets to exploit their ability to undercut prices thanks to their economies of scale. Subordinating the operation of certain shops, such as pharmacies, to having obtained a pharmacy degree also helps the small, because it confines the property of these businesses to physical persons.[228] Finally, regulation limiting the square footage of commercial establishments in certain areas explicitly seeks to avoid the American system of large-scale distribution to take root in Europe.

The tension between protection of producers/workers in general and the specific protection accorded to small businesses emerges vividly from a careful reading of the Case Law of the Court of Justice on opening hours. Consider the original British *Sunday trading* cases first. In those cases, the Court exempted rules prohibiting shops to be opened on Sunday from internal market law, because those rules were aimed at ensuring that the balance between working and non-working hours was "*so arranged as to accord with national or regional socio-cultural characteristics."*[229] In so doing, the Court assimilated the situation to

[226] These forms of retail regulation are the subset of a commonly employed set of policies imposing restrictions on the size of large firms or promoting small ones. For an assessment of the economic consequences of these rules see: N. Guner, G. Ventura, Y. Xu, *Macroeconomic Implications of Size Dependent Policies,* Review of Economic Dynamics, 11:4, pp. 721-744 (2008).

[227] With the important exception of shops run by immigrant families, whose business models often revolve around extended opening hours.

[228] These rules were under consideration in C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others*, [2009]*;* C-531/06, *Commission* v *Italy*, [2009]. German and Italian regulation providing that only certified pharmacists can own and operate a pharmacy reached the Court of Justice that decided that even if constituting an obstacle to free establishment and free movement of capital, the norm can be justified on grounds of public health as non-pharmacists do not share the expertise, experience and responsibility of pharmacists

[229] Case C-145/88, *Trofaen BC v B & Q plc* [1989], ECR I-765, (para 14). That decision had left the judgment on the proportionality of the measure to the national courts, which had caused great confusion among British and Welsh judges and numerous discordant rulings (S. Weatherhill, *Cases and Marerials on EU Law,* (Oxford,

the one in the German bakery case (*Oebel*) where it had already accepted that rules banning night work were there to protect workers. In both cases the rules were not considered violations of art. 34 TFEU, so the Court did not discuss their possible justification nor the differential impact
they might have on various types of businesses.

In more recent cases, concerning similar Italian rules restricting opening hours (which reached the Court after *Keck* had generally validated non-discriminatory selling arrangements) the referring Italian judges asked the Court to think again, in light of specific features of the Italian legislation. [230] The Italian rules in fact required shops to close on Sundays, but did not prohibit working inside the closed shops on Sunday. This suggests that the rules were not there only to protect the Sunday leisure of retail workers, but rather they were an instrument of retail planning (see next chapter 3.2.1). In fact, the Italian referring judge invited the Court to consider that given the geographical location of larger retail outlets in Italy, outside of city centers, a Sunday opening ban affected these shops disproportionately as it is harder for consumers to reach these shops during normal working days.[231] In an unexpected alignment of positions – national judges with the large distribution on one side and the Court of Justice with the national Government and small retailers on the other – the Court simply reaffirmed Keck and thus did not discuss the interests the Italian rules might serve.

Of course, there is considerable empirical uncertainty on whether these forms of retail regulation, including restrictions on opening hours, are effective in aiding small shops, but theoretically it makes sense that they would, and so it is plausible that they were designed

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Oxford University Press, 2014), p. 328. In further cases, *C-312/89, UDS v. Conforama*, [1991] ECR I-997; and *C-169/91, Stoke on Trent and Norwich City Council v B & Q*, [1992], ECR I-6457 the Court ruled respectively that a rule banning Sunday work, and one prohibiting national shops from opening on Sunday had to be considered justified and proportionate. See also R. Rawlings, *The Eurolaw Game: Some Deductions from a Saga,* Journal of Law and Society, 20:3, pp. 309-340 (1993).

[230] Case C-69/93, 298/93, *Punto Casa and PPV*, [1994] ECR I-02355: Cases C-418/93, C-419/93, C-420/93, C-421/93, C-460/93, C-461/93, C-462/93, C-464/93, C-9/94, C-10/94, C-11/94, C-14/94, C-15/94, C-23/94, C-24/94 e C-332/94, *Semeraro Casa Uno and Others v. Sindaco del Comune di Erbusco and Others*, [1996], ECR I-02975.

[231] These features of the regulation, the referring judges suggested, had clear consequences for the Internal market, because "*sales which large-scale distributors and organized distribution centres cannot make on public holidays are not compensated for by those which they make during the working week, and therefore unsatisfied customer demand is directed towards other trade outlets (made up of small and medium-sized businesses closer to consumers and easy to reach even on public holidays) which, however, in general obtain their supplies only from domestic producers*" (*Semeraro Casa Uno*, para 7).

to that aim.[232] And in fact, most historical investigations, albeit with important distinctions, demonstrate this was the original purpose of retail regulation (see next chapter, 3.2.1).[233] But why does the law come to the aid of small businesses and small shops in particular? Is it pure protectionism propelled by the lobbying efforts of small business-owners or is there something more? And if there is something more, why is that smallness is accorded protection? What reasons (cultural or otherwise) motivate these State interventions?

As I have just suggested, to try and answer these questions requires going past the objection most commonly made against these rules: that they are simply the product of successful lobbying efforts of greedy and self-interested business-owners or residues of deeply rooted cartels.[234] The fact that most public policy towards retailing was shaped by the demands of small shop-owners asking protection *vis a vis* the modern distribution does not exclude that these rules might serve the public interest, including culture, in various ways. As demonstrated by empirical studies in the area of professional regulation, the dichotomy between professional and public interest is often a false one.[235]

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[232] In fact their effects are ultimately ambiguous. Empirical evidence, some of which will be discussed in the Case Studies, is discordant about the ability of these rules to truly help the small over the big and on balance tends to prove their ineffectiveness. In fact, as it will be discussed in the next chapter, many recent studies come to question the efficacy of these rules. See for example, on planning rules, R. Sadun, *Does Planning Regulation Protect Independent Retailers, cit.* This might be either because these rules are insufficient to contrast some economic transformations that are beyond the control of national policymaking, or also because they undeniably coexist with many other laws and policies, (with which I do not deal here) that instead go in the direction of favoring big retailers.

[233] Historical inquiry in this field is mostly produced in national languages. See, however: J. J. Boddewyn, *Belgian Public Policy towards Retailing since 1789*, MSU International Business and Economic Study, 1971. For a comparative approach: J.J. Boddewyn, S. C. Hollander (eds.), *Public Policy Toward Retailing: An International Symposium,* (Lexington Books, 1972). See also N. Alexander, G. Akehurst, *Introduction: The Emergence of Modern Retailing 1750-1950,* Business History, 40:4, pp. 1-15 (1998). On the United Kingdom see: J. B. Jefferys, *Retail Trading in Britain 1850-1950,* Cambridge University Press, 1954; J. Blackman, *The Development of the Retail Grocery Trade in the Nineteenth Century,* Business History, 9:2, pp. 110-117 (1967); D Hodson, *'The Muncipal Store': Adaptation and Development in the Retail Markets of Nineteenth-Century Urban Lancashire,* Business History, 40:4, pp. 94-114 (1998). For Italy: J. Morris, *The Fascist "Disciplining" of the Italian Retail Sector, 1922-1940,* Business History, pp. 138-164 (1998); V. Negri Zamagni, *La Distribuzione Commerciale in Italia fra le Due Guerre* (Milano, Franco Angeli, 1981).

[234] If this is the case, these rules can at most be temporary and are necessarily bound to disappear, together with the very categories they aim to protect. Berger calls this the *withering away paradigm* and she describes it as the dominant paradigm in both economics and political economy (N.B. this was probably true before the diffusion of the *Varieties of Capitalism*). For that paradigm rules such as those I study are explained by the retrograde battles of politically organized sectors. See S. Berger, *The Traditional Sector in France and Italy, cit.*, p 88.

[235] L. Haller, *Regulating the Professions*, *cit.,* p. 218. The complexity and interconnectedness of the interests involved (consumer interest, diffused public interests, professional interest) often makes judgments arduous, but there is not necessarily a contradiction between the interest of the profession, or the lobby, and the public interest.

In other words it is possible that shop-owners asked for these regulations, legislators accorded them, but society at large ends up benefitting. From this perspective, two possibilities deserve consideration. First, there may be good socio-economic reasons that command granting favorable treatment to small shop-owners – in other words, small shop-owners deserve this protection because they play an important and valuable role in society. This possibility points in the direction of *functional explanations* which would explain the persistence of these forms of retail regulation with reference to the utility of small businesses towards the reproduction of certain economic or social structures. Secondly, a rule that was originally motivated by the self-interest of a certain class might have taken on, through implementation, a broader significance for society at large – not least because consumers like it, get used or even attached to it.[236] This possibility suggests explanation for these rules that are more easily interpreted as cultural.

2.2.3. Decentralist Thought – The Virtues of Economic Independence.

With regard to the first possibility – small businesses receive protection because of the positive function they play in society– it is possible to isolate various streams of thought.

From an economic/antitrust perspective, the early suspicion of law and policy for bigness is linked to the price-cutting ability of big businesses that Whitman, through Sandel, identifies as a key feature of early American antitrust.[237] It is often read today, that modern antitrust, certainly in the US and growingly also in the EU, serves more the interest to lower prices of consumers than the interests of competitors.[238] This trend, welcomed by many during previous decades, is today object of a major reconsideration. Given that the big has gotten huge, new problems emerge – and the old virtues of smallness are newly appreciated. As retail giants (like Amazon and Walmart) expand to virtually all areas of merchandise and integrate online and physical stores in a way that, some fear, will – in a near future – wipe out smaller shops altogether, antitrust is under increasing pressure to divert its attention away from prices to other interests of consumers[239] – their privacy to

[236] The general intuition that public policy produces consequences different from their purpose finds theorization in R. K. Merton, *The Unanticipated Consequences of Purposive Social Action*, American Sociological Review, 1:6, pp. 894-904, (1936).
[237] See Whitman, *op. cit.,* p. 362. See more generally, M. J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Harvard University Press, 1996).
[238] E. Fox, *op. cit.*
[239] See L. M. Khan, *Amazon's Antitrust Paradox,* Yale Law Journal, 126:3, pp. 710-805.

start with, but also, as we will see, their interest to have access to a plurality of retail channels – which are served by smallness.

More broadly and beyond the economics rationale, smallness is seen as a guarantee against absolute power. There is an important intellectual tradition that sees the big, the monopolist, the concentration of economic power as dangerous for society in general and democracy in particular. "*Decentralist*" thought had a particularly rich tradition in progressive America where intellectuals attacked "*large-scale industrialization and big business as responsible for dispossessing small farmers, shopkeepers and manufacturers.*"[240] And an appreciation of the virtues of the middle classes is deeply rooted also in Europe.[241] Small business acts as a social buffer against economic concentration and its undesirable socio-political consequences.[242] Hence, from this perspective, it is economic independence (*petty business ownership*) rather than smallness itself that deserves protection. If our rules protect small shops in this sense, they can be seen as part of an orientation of economic policy toward dispersion of property, de-concentrated (democratic) economic structures and protection of the contractually weaker economic units.

Petty property in fact propagates some distinctively political virtues, as it acts as a stem both against concentration and abuse of power by the State and the radicalization of the working classes. Independent shop-owners, in fact, generally dislike State interference. And also, given the proximity of the small bourgeoisie to dependent workers, the suasive power of economic (and political) independence is recognized to have played an important role in diverting workers away of radical political propositions.[243] A life as "*an independent*" (small shop-owner, for example) was in sight for many from the working classes and seemed a more appealing and realistic project than revolution.

In her study of the *traditional sector* in France and Italy, Suzanne Berger explains the persistence of small business (and small commerce within it), with reference to the

[240] A. J. Cohen, *op. cit.* (isolating a stream of American legal thought, best exemplified by Louis Brandeis and John Dewey).
[241] F. Bechofer, B. Elliott, *Petty Property: the Survival of a Moral Economy, cit*.

[242] See S. Berger, *The Traditional Sector in France and Italy*, *cit*. Her study sets to understand "*the economic and political functions in advanced industrial societies of a class of small, independent, property owners – shopkeepers, farmers, small and medium businessmen – whose very survival appears problematic in the conventional theories of modern society*" (p. 87).
[243] *Ibid.* (Berger finds indication this has happened in Italy and France).

economic and political function it performed in these national economies.[244] As she explains, the survival of the traditional sector is not to be attributed to the protection this sector unduly gains from government through forms of regulation such as those I am studying. Rather, this sector persists (and also gains protection) *"because of the ways in which its political and economic interests overlap with those of the modern Sector"*[245] or the economic system as a whole. In particular, in Berger's narrative, small commerce served as a buffer able to absorb the newly unemployed in times of recessions[246] and also as a toll against unionization and to discourage labor militancy.[247]

But beyond the details of her explanation which concern specific countries in a specific historical context, what is generally relevant is, I believe, Berger's description of what constitutes the traditional sector. To belong to the traditional sector a firm needs not to be old nor adopt old technologies or an outdated business model. As she explains, in fact, many of what she calls *traditional* firms were of recent creation and innovative, and many of the *modern* firms old and inefficient. What is traditional –which is from the past – are the social, cultural and political categories through which these firms participate in public life. As she writes: "*the past has been crystalized in the structures of the economy, in patterns of social and political alliance, in law that identify these groups as a universe subject to particular kinds of regulation, in ideologies that attribute to them special virtues or dangers."*[248] So, she suggests, ideas about the virtues of smallness and independence are enshrined in laws and regulations and these laws are constitutive of some of the virtues of independence and not only consequence of them. In her narrative, an independently owned small firm will be traditional even if innovative and of recent creation, because it finds available rooted forms of protection, practices and economic relationships and at the same time it is constrained by them.

[244] *Ibid.*
[245] *Ibid*.
[246] It is known that commerce in particular and self employed work in general is where people go when they lose their job and have some saving. There is indication this has happened also in the recent crises. The metaphor Berger uses is the one of a sponge. *Id.*, p. 108.
[247] Specifically small business was useful in Italy and France, because it discouraged labor militancy –a and so the bigger, more modern industries preferred to externalize part of their work to smaller firms. This, as she explains, is a functionally equivalent to employing blacks and immigrants in the United States (*Ibid*).
[248] *Id.*, p. 87.

Hence in her explanation, the forms of retail regulation I study are part of what constitutes these notions of smallness and independence – the law leading, shaping a certain culture that is functional to a certain economic structure. Explaining the function of a rule by reference to its role within the reproduction of a given market system is akin to producing a functional explanation.[249] But functional and cultural elements are here deeply intertwined.

In any event, for my purposes it is particularly important to stress that the value of smallness may lie in its association with economic independence through petty property. If this is the case, for example, the recent strategy of many big distributors to directly open small shops in downtown areas – shops that were once in many countries realm of the *traditional sector* – could not contribute to appease anxieties about the disappearance of small commerce and would call for a defense of retail regulation.

2.2.4. *The Ethics of the Merchant*

Furthermore, as already anticipated, the small, traditional, and often artisanal, shop is home to a certain pride in the quality and craft of one's profession. From this perspective, retail regulation has more than something to do with the status and social recognition of pharmacists, opticians, bakers, butchers, cloth and other merchants. This function was historically performed by now surpassed guilds or corporations – associations of traders that were granted quasi-monopoly over certain markets.[250] Evidently there is some of this heritage in Europe's law of shopping and referring to it suggests that these rules are instances of professionalization, to protect the status and the identity of a group. It also suggests that the rules are product of an internal morality of the group rather than designed from outside.

[249] For this notion see for example, G. A. Cohen, *Functional Explanation in Marxism*, in G.A. Cohen, *Karl Marx's Theory of History: A Defense* (Princeton, Princeton University Press, 1978).

[250] These organizations also administered justice within the industry, enforced compliance through strong reputational mechanisms, and provided various forms of entertainment (celebrations, funerals, etc.). Similar organizations survive today in certain industries, for example the diamond industry. See in this regard the studies of: L. Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, Journal of Legal Studies, 21:1, pp. 115:117 (1992); B. D. Richman, *Contracts and Cartels: Reconciling Competition and Development Policy*, in D. D. Sokol, T. K. Cheng, I. Lianos (eds.) *Competition Law and Development* (Redwood, Stanford University Press, 2013), 155-166.

Emile Durkheim blamed the disappearance of guilds and corporations for the lack of morality he observed in the market.[251] For Durkheim, in fact, while the excesses of certain guilds contributed to explain the disrepute in which they had fallen, their abolition after the French revolution was unfortunate, as these "*secondary associations*" were the natural *loci* for the development of the professional ethics which he thought precondition for the emergence of organic solidarity.[252] While the Welfare State has taken on many of Durkheim's concerns by articulating professional ethics in a series of generally applicable norms, some residues of the older sectorial tradition appear to be surviving in our forms of retail regulation.

Also guilds and corporations can be seen as performing an important political function. One can in fact point at an important intellectual tradition that, starting from Hegel, conceived of these organizations as devices to keep in check otherwise restless classes – instruments of social engineering to reassure the small bourgeoisie.[253] As explained by Axel Honneth these bodies served "*the institutional task of providing the members of different economic strata with an ethical sense of their constitutive contribution to market-based reproduction.*"[254] Corporations performed the important social function of making the work of traders socially recognized and prestigious – they constrained and directed towards the common good an activity that would otherwise tend towards greed and a certain love for luxury and extravagance.[255]

If these ideas might today sound outdated, the declining socio-economic importance of small merchants makes them in fact very current. The notion that if unchecked or unsatisfied certain classes turn politically restless and disruptive is surprisingly back in fashion under the current wave of populism.[256] If certain professions have a hard time in

[251] E. Durkheim, Professional Ethics and Civic Morals, cit.
[252] *Ibid.* Durkheim reports that the first forms of protection of both workers and consumers were developed within guilds and corporations.
[253] Axel Honneth links this tradition to Hegel's *Philosophy of Right*. See A. Honneth, *Freedom's Rights: The Social Foundations of Democratic Life*, (New York, Columbia University Press, 2014), p. 9.
[254] *Ibid.*
[255] Hegel, as quoted by Honneth, writes: "*If the individual is not the member of a legally recognized corporation... he is without the honor of belonging to an estate, his isolation reduces him to the selfish aspect of his trade, and his livelihood and satisfaction lack stability. He will accordingly try to gain recognition through the external manifestations of success in his trade, and these are without limit, because it is impossible for him to live in a way appropriate to his estate if his estate does not exist*." *Id*., p. 10.
[256] There is a rich historical and sociological tradition that links the petit bourgeoisie to various strands of populism. The most vivid prefiguration of this kind of ideological degeneration of the middle classes is

maintaining their dignity and status, the State might wish to intervene and offer them reassurance – by slowing down the pace of change or simply by signalling a commitment in this sense through expressive interventions – in the name of social peace and stability. Furthermore, as mentioned above, the formalization of these rules through national law might deploy an expressive capacity able to generate attachments to the law within the profession.

2.2.5. *The Beauty and the Comforts of the Market.*

This category directly speaks to the second set of reasons outlined above. The protection accorded to smallness (3.3.2) may be explained by the fact that rules born out of the self-interest of a few might have take on, through implementation, significance for society at large. From this perspective, it is often said that retail regulation contributes to create a certain pattern, a certain familiar structure of commercial life. Hence, the protection of traditional shops can be thought of as preserving habitual ways of buying and selling and the forms of socialization that go with them. Business owners might have self-interestedly lobbied for something to which the public at large has grown attached. The feature of smallness protected here has not much to do with size itself, but with the fact that in most European countries, the traditional sector is made of very small firms, owned stably for generations, which people know and like.

The intuition here is that certain shops and certain experiences within them become familiar for people, and produce a sort of habituation that makes market transactions smoother, repetitive, recognizable. This can be seen functionally as a way of making trade easier: familiarity greases economic interactions so to create something that economists

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identified in the movement created by Pierre Poujade, a French owner of a bookshop and stationery that started organizing a tax protest movement of small shopkeepers. His *Union de défense des commerçants et artisans* galvanized quite some support in the late 50s by opposing modernization, industrialization and Americanism as threats to the identity of rural France. The almost forgotten Poujade came back in fashion in recent years and parallels were made between his movement and both Donald Trump and the Brexit Referendum. (see for example, T. Garthon Ash, *As an English European, This is the Biggest Defeat of My Political Life,* The Guardian, https://www.theguardian.com/politics/commentisfree/2016/jun/24/lifelong-english-european-the-biggest-defeat-of-my-political-life-timothy-garton-ash-brexit; See also R. Douthat, *Make Family Policy Great Again,* The New York Times, May 28, 2016). For reflection on the political role of the small bourgoise see F. Bechhofer, B. Elliott, *Petty Property: the Survival of a Moral Economy,* in F. Bechhofer, B. Elliott, (eds.), *op. cit*.

would call *trust*.[257] But it can also be seen as resonating with what Anthony Appiah has called *the comforts of home.*[258] If people have a certain sense of place shared with a community, it is pretty realistic that this sense of place also be connected to the quality and texture of public commercial life. It might sound heresy to Germans, but their idea of Heimat – a place to which we associate feelings of belonging – normally linked to language, natural landscape and intimacy might in fact have an important commercial component to it. I am not sure one needs to recur to notions of culture to illustrate this dynamic, but certainly the idea is that these experiences reflect a local, context-specific sensibility.

As I have noted with regard to the reassurance that might be owed to professions that are losing their social function and status, reassurance might also be owed to consumers who feel the market environment around them is changing at a pace they find uncomfortable. As I will further elaborate, the accommodation of this longing for familiarity and *comfort* is not necessarily to be ruled out if it is not exclusionary and its claims are limited to the marketplace. But what is that actually builds this familiarity? It seems to me there is both an aesthetic (material) dimension and a relational (immaterial) dimension to it, on which I would now like to separately focus on.

2.2.6 *The Texture of the City*

From the aesthetic perspective, retail regulation is linked to the development of a certain taste for the city or the town – a preoccupation for how our cities look like, grow and develop. Since the places where people's everyday lives take place – cities, streets, neighborhoods – are filled with economic activity – shops, restaurants, super-markets, bookstores – then retail regulation has a great impact on the quality of these places in

[257] Economics theorizes that in conditions of insufficient rules or customs people rely on familiarity and trust as mechanisms to reduce social uncertainty. Marketing Studies have elaborated this notion in many directions: see F. R. Dwyer, P. H. Schurr, S. Oh, *Developing Buyer-Seller Relationships*, Journal of Marketing, 51:2, pp. 11-27, 1987. More generally Trust is seen as a precondition for functioning markets and competitive national economies. See F. Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (New York, Free Press, 1996).

[258] A. Appiah, *Immigrants and Refugees: Individualism and the Moral Status of Strangers*, in R. E. Auxier, L. E. Hahn (eds.), *The Philosophy of Michael Dummett*, *The Library of Living Philosophers, Vol XXXVI* (Chicago and La Salle, Open Court, 2007), pp. 825-840. Appiah, elaborating the thinking of philosopher Michael Dummett writes: "*people are harmed – or, at any rate, deprived of something worth having – when they are deprived of the comforts of home; and it would be best, therefore, if it is possible, to create a regime that allows them to maintain them.*" As noted by Appiah such a view is essentially individualist. The group, the home, is there to provide comforts to the individual who enjoys them, but it does not perform other functions in and of itself.

particular and the quality of the public space more generally.[259] Not only certain rules deliberately regulate the spatial organization of economic activity, but also generally all rules that aid "smallness" can be seen as maintaining a certain material structure of commercial life in the city. So the stroll might be the real issue here. Again, this preoccupation has deep roots: fear that free trade, with its endless pursuit of cheapness, might destroy the material texture of our cities largely predates today's anxieties with online markets. Even an otherwise "free-trader" like John Maynard Keynes could be heard advocating for national self sufficiency in defense of agriculture, traditional ways of living and "*shops which are really shops and not merely a branch of the multiplication table.*"[260] In Cambridge, where he grew up, Keynes went on adding, you could spend a whole afternoon strolling and looking at these real shops.

Most European countries have, to be sure, robust systems of urban planning and heritage protection. There are sharp variations in the strictness of these legislations and the intensity with which these powers are exercised but what is generally true is that the urban texture of downtown areas is not easily alterable. So I am not suggesting here that Europe's law of shopping is used as a substitute to protect something else, which is architecture, but rather that it might be used to ensure that buildings, streets and shops that are protected in their artistic and architectural qualities through other instruments are still occupied by viable retail activity, and also by retail activity which fits a certain aesthetic geography – that sells quality products or at least traditional local products. Here culture is protected by law through its material consequences, so we are within the third of the three mechanisms I described in the previous chapter (1.2.2.3).

Furthermore, one might argue, the association of retail regulation with municipal government is even deeper. Also when the rules are enshrined in national law, it is city government that implements them. And as mentioned above (2.1), various social theorists,

[259] The city as a space of consumption is to be sure a major interest of modern sociology as "*the geographical lens to observe the consumption habits of the new elites*". E. Currid-Halkett, *The Sum of Small Things. A Theory of the Aspirational Class,* (Princeton, Princeton University Press, 2017) p. 148. See in particular Chapter 6. *Landscapes of Consumption.*

[260] As quoted by R. Skidelsky, *John Maynard Keynes: The Economist as Saviour, Volume 2: 1920-1937*, (Allen Lane, 1994), p. 476. Skidelsky locates these considerations in the context of Keynes' revision of his original positions on free trade. As he explains "*Keynes had in fact been pursuing both lines of thought – internationalism and nationalism – for some time past without bringing them together*." Nonetheless his advocacy of national self-sufficiency took on increasingly colored tones to peak in the "*Ruskinian denunciation of capitalist civilization*" of this 1933 lecture in Dublin (*Id.. pp. 478-480).*

particularly of Foucaldian instincts, have explored the links of commercial regulation (as a form of police regulation) and urbanization. *"To police and to urbanize are the same things"* writes Mariana Valverde.[261] The link stays strong to this day, as mayors growingly recur to commercial rules (bans from selfie-sticks to kebabs to street vendors) in order to protect urban centers from the indecorous behavior of both tourists and locals.[262]

It is of course possible to point at alternative sensitivities with regard to these themes. When the concern is for the architectural quality of the city or the un-decency of certain shops in certain places, one should ask for whom are we to protect things intact or unaltered? Aside for concerns for the protection of cultural heritage and historic building, which are not threatened by EU interventions, why should we care if a well-preserved historic building is occupied by McDonald? One should interrogate the deeper reasons of what has been called the preservationist ethics. And in so doing one should consider that the kind of cities my discussion has in mind are not only populated by locals but by tourists as well, who often spend way more money than locals and hence have a say on how these cities evolve. Whose enjoyment does preservation of traditional commercial life serve? Is it the tourists or the locals or both? We arguably all like quaint towns with restaurants on the square and small shops whose owners remember our names. And in some countries of continental Europe this is not only an idealized idyll, but a reality which we might want to preserve. Denizens, however, are easily seduced by the efficiency and cheapness of supermarkets off the highway. And tourists, if in small quantities contribute to the economic viability of small business, in masses might push for more standardized, cheaper and fast-selling kinds of stores. Hence locals and visitors might be pushing the economics of retail in different (incompatible) directions, and in directions which are not always easy to predict.

Certainly, as suggested by the most sensitive studies on the subject, preservation cannot serve purely a taste for the traditional and the pristine, entertaining a certain *nostalgie de la boue*[263] of those visitors who regularly enjoy more efficient shopping and cities.[264] If the

[261] M. Valverde, Governmentality, Security, Police, cit., p. 94.
[262] See for example, F. O'Sullivan, *Why Italy is Banning Everything,* The Atlantic CityLab, July 31, 2017; https://www.citylab.com/life/2017/07/why-italy-is-banning-everything/535404/?utm_source=atlfb
[263] This phrase was popularized in another context by T. Wolfe, *Radical Chic* (New york, Farrar, Strauss and Giroux, 1970).
[264] This argument is in the spirit of Appiah's notion of *spectatorial diversity*, *The Ethics of Identity*, cit. p.149.

older orthodoxy prescribed *museification* and sterilization, heritage studies are today predominantly prescribing a functional utilization of heritage to be integrated within everyday city-life.[265] In line with this tendency it appears that banning city centers to certain retail outlets contributes more to *museification* than to the economic viability of traditional businesses. Without denying that there are serious interests at stake, the risk of fetishizing tradition appears a real one. Hence intervening in the commercial life of a city should be guided by a cautious and conscious effort of the community to preserve what is meaningful, rather than an instinct to sterilize and keep intact in the name of tradition.[266] Evidence that will be further discussed in the case studies suggests that growingly common (and advertised) interventions by mayors like bans on indecorous shops in certain parts of the city are not particularly effective, while rent-control or other forms of aid to "virtuous" historical or local (non-chain) stores appear promising avenues.

2.2.7. *Relational Richness*

The other side of the coin of what Appiah has called the *comforts of home* is the relational dimension. This has to do with the forms of socialization that take place in certain shops – our experiences in the market and the small-scale interactions that take place within it. The assumption here is that in small shops we establish relationships that are not purely instrumental to the purchase. These relationships, the argument goes, are not only linked to the shallow and impersonal kindness brought about by consumerist arrangements, but are said to be deeper and more authentic interactions. Under Europe's "producerist" arrangements, the fact that the consumer is not always right might encourage some kind of equality between those serving and those who are being served. So we might be able to have a chat, a laugh, a gossip – we might even talk politics – with shop-assistants, owners,

[265] See for example ICCROM, *People-Centered Approaches to the conservation of Cultural Heritage: Living Heritage,*Guidance Note, http://www.iccrom.org/wp-content/uploads/PCA_Annexe-2.pdf. For a specific application see M. Lusiani, F. Panozzo, *Culture on Top: Beyond Museification and Culture-Led Regeneration of Industrial Heritage,* Ca Foscari Department of Menagement, Working Paper 2/2016.

[266] A recent decision of the Mayor of Florence to ban the opening of McDonald from its main Piazza del Duomo has spurred a heated debate. McDonald was willing to provide hamburgers produced with local products to meet a zoning regulation that provided this requirement for new businesses opening in that area. The idea coming across here is that there are certain commercial activities which are objectively unworthy, no matter what their effort to adapt to local standards, and that a "nativist" interpretation of the protection of tradition prevails. (The Guardian, *McDonald's claims $20m from Florence over piazza restaurant rebuff*, www.theguardian.com/business/2016/nov/07/mcdonalds-claims-20m-from-florence-over-piazza-restaurant-rebuff).

or fellow clients.[267] One could say that these arrangements are there to protect the friendships we make in the marketplace.[268]

While this image of the friendly shopkeeper appears today a familiar one, it is actually the product of a relatively recent cultural revisionism in popular representations of shopping.[269] The shopkeeper " *is no longer the obsequious figure of 19th century caricatures..., nor yet the vulgar commercial of Matthew Arnold's Culture and Anarchy, but rather, like the old-fashioned draper, an emblem of 'knowledgeable and friendly service.'"*[270] The reasons of the original anti-commercial sentiment are beyond the scope of my discussion, but certainly the re-evaluation is in line with new narratives about the past that emphasize more feminine, domestic and private aspects of life.[271] The re-evaluation, however, only extends so far: to the small town store, perhaps to the luxury department store in its early manifestations,[272] but it does not seem to encompass commercial activity in general or modern versions of standardized buying and selling – chain-stores, malls and supermarkets.[273]

As pointed out by Viviana Zelizer, treating consumption as relational work is one of the dominant approaches in economic sociology (together with the Vebleian view of consumption as *positional effort* – see infra).[274] This approach emphasizes how markets and personal relationships are often intermixed in complex ways. It points out, for example, how a significant slice of economic activity happens with and through people that we

[267] R. Oldenburg, *The Great Good Place*, (New York, Marlowe & Company, 1997) emphasizing the role that shops and restaurants of various kind play in the formation of a sense of community.
[268] For contributions that tend to blur the distinction between personal life and the relationships we establish in the market see V. Zelizer, *Economic Lives: How Culture Shapes the Economy*, *cit.* In particular she reports the work of anthropologist David Miller who puts forward a *"relational approach to consumption"*. Miller found people "*making love in supermarkets*" to indicate that shopping serves more as "an expression of kinship and other social relationship" than even the construction of individual identities. Zelizer, *Culture and Consumption, cit.* p 404, referencing D. Miller, *A Theory of Shopping* (Cornell University Press, 1998) p. 41)
[269] See D. Miller et al., *Shopping, Place and Identity* (London, Routledge, 1998), p. 15.
[270] R. Samuel, *Theatres of Memory* (London, Verso, 1994), p. 161.
[271] *Ibid.*
[272] See for example the BBC shows, *The Paradise,* or ITV's *Mr. Selfridge* in the UK, and various national adaptations. See in Italy RAI's *Il Paradiso dell Signore*.
[273] Deirdre McCloskley dedicates the third volume of her trilogy, *Bourgeois Equality. How Ideas, Not Capital or Institutions Enriched the World* (Chicago, Chicago University Press, 2016) to understanding how dominant narratives that vilified commercial society and the Bourgeoisie came to be transformed thanks to culture, ideas and popular representation of commercial society. She sees the process happening first in England and Holland – not surprisingly the first countries to industrialize. As she notes however, the process is not complete and it is one to which she wishes to contribute: "*the cultural task was to bring the Bourgoisie out in the daylight of honor. Even now the task (which is mine as well) is not entirely finished*" (p. 264).
[274] V. Zelizer, *Culture and Consumption, cit*., p. 408.

might know already.[275] As shown by numerous studies, purchases recurrently serve to affirm relations with family, friends, acquaintances or customers.[276] Furthermore, as already mentioned, new friendships are established through the purchase and shopping is a key activity that reinforces our most intimate pre-existing social ties – we go shopping with friends and for friends and family. This relational approach to consumption, in fact, also contributes to displace the home or generally private spaces as the places of all meaningful social interaction. As demonstrated by empirical studies, for example, eating outside is normally more convivial than eating at home.[277]

While this awareness is present within a stream of economic sociology, many contributions within the discipline – and certainly outside of it – still hold on to the view that the expansion of retail trade (and the spaces where it happens) is de-socializing and "*destroys earlier forms of meaningful social connection.*" [278] Once again commodification is seen substituting "*impersonal [economic] rationality for the rich sentimental connections of earlier stages.*"[279] But is really this relational richness annulled by the expansion of markets and the rise of more standardized retail outlet, like malls or supermarkets? Is, in other words, this relational dimension of shopping only possible in small traditional stores? In answering this question one should consider that these concerns are not uniquely new to the advent of malls (and today the Internet), but are the same concerns that accompanied earlier innovations in retail – the introduction of the one-price system for example, and later on of

[275] In another context and with different preoccupations these same dynamics are detailed in legal scholarship by the work of Lisa Bernstein on trust based relational contracting in certain industries. Her focus however is on business-to-business transactions, and not on consumption. See her seminal work on the diamond industry: *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, cit.*; see also her more recent work on Original Equipment Manufacturers: *Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts,* Coase-Sandor Working Paper Series in Law and Economics No. 742*, 2016*

[276] P. DiMaggio, H. Louch, *Socially Embedded Economic Transactions; For What Kind of Purchases do Consumers Use Networks Most,* American Sociological Review, 63:5, pp. 619-637 (1998) (documenting how in the purchase of cars, houses, legal and repair services, a remarkable high incidence of transactions takes place not between strangers but among kin, friends or acquaintances) (cited by V. Zelizer, *Culture and Consumption, cit.,* p. 412).

[277]A. Warde, L. Martens, *Eating Out: Social Differentiation, Consumption and Pleasure,* (Cambridge, Cambridge University Press, 2000) (cited by V. Zelizer, *Culture and Consumption., cit.,* p. 429).

[278] In the American debate the link between *mallization* and erosion of social life was promulgated most notably by Robert Putnam: R. Putman, *Bowling Alone: The Collapse and Revival of American Community,* (New York, Simon and Schuster, 2000). Zelizer interestingly points out how this grim vision of suburban life around the mall did not originally accompanied the emergence of malls. In the 1960s in fact progressive planners envisioned the mall as a solution to "*suburban sprawl and urban anomie*". See V. Zelizer, *Culture and Consumption*, *cit.,* p. 398.

[279] V. Zelizer, *Culture and* Consumption, *cit.*, p. 421

credit cards. [280] Well before the mall or the net, these novelties were said to replace relationally rich connections with impersonal routine.

However, Viviana Zelizer points out how not all standardization destroys human contact and furthermore how not all human contact is necessarily satisfying. [281] On the one hand, Zelizer argues, commercial life is almost ontologically pervaded by interpersonal relations and hence shops need not to be small or traditional or family-owned to be spaces of authentic social interaction. A number of empirical studies document this in different contexts. As it was observed for consumers' experiences at McDonald, for example, despite the homogeneity of the encounter, "*service interactions were not all alike and were not necessarily devoid of personal involvement*."[282] Furthermore, even hostile and rude reactions by service people remain possible – so also non-canonical interactions do not seem to be a prerogative of small shops but also happen in tightly monitored big scale chains. All this is to say that there is, in sociological jargon, "*negotiated, meaningful social interaction going on*" also in the new, supposedly impersonal, spaces.[283]

Additionally, I would argue, standardized chains like McDonald (but also Zara or H&M) are perceived differently in different contexts. In countries where the restaurant and retail industries are still more traditional, the presence of global chains is often perceived as an element of diversification providing valued avenues for distraction and entertainment. And these kinds of intuitions have been detailed by studies that go under the heading of "*glocalism*": investigations of the kind of adaptation that global economic actors do to local context and the different meanings that different geographies attribute to them. [284]

If we buy Zelizer's account, "*fast food does not stamp out local culture.*" What about online selling? The question is a more insidious one, because the process is under way and its

[280] *Ibid.*
[281] *Ibid.*
[282] M. Leidner, *Fast Food, Fast Walk, Service Talk and the Routinization of Everyday life* (University of California Press, 1993), p. 136, suggesting that homogenization is not absolute and there is always space for a joke and additional services.
[283] Zelizer, *Culture and Consumption, cit*., p. 423.
[284] This idea is in line with the literature on "glocalization" (e.g. the global expansion of retail outlets is often localized and adapted to the local context). See for example, J. Watson, *Golden Aches East: McDonald's in East Asia* (Stanford, Stanford University Press, 1997) (describing the penetration of McDonald in Asian cities). As Zelizer writes about that study (*Culture and Consumption, cit.,* p. 426): "*East Asian consumers have quietly, and in some cases stubbornly, transformed their neighborhood McDonald's into local Institutions.*"

future developments harder to predict. But here again there is a rich body of literature documenting the social enhancing features of online shopping.[285] Early studies, in predicting a significant continued role of customer service in advising the online purchaser, probably underestimated the level of automation that online selling would have reached. But the game-changer here, which was hard to predict in the early 2000s, is the impact of social media as external complements to the purchase experience. As early as 2001, Sartori, through her large study of Italian online shoppers was showing how customers utilized their existing networks to reduce risks in the transactions and also to form new digital ties in collecting information towards the purchase.[286] Studies on the interconnections between social media and online shopping platform suggest similar processes.[287]Furthermore, a more recent development in the direction of socializing online retail are the growing synergies between online and physical stores (see for example, the opening by Amazon of physical bookstores) on which more to follow.

The other suggestion by Zelizer is that not all "authentic" human touch is satisfying. By looking deeper into the differentiated experiences of different classes of people one discovers that some customers might actually welcome the protection and anonymity offered by routinized interactions. The well-known shopkeeper who knows everybody in the city might be a source of entertainment and comfort for many, but she is obviously also an instrument of social control. The divorced woman might not want to buy where the other good wives shop. The gay teenager might not enjoy buying from the pharmacist who knows his parents. With reference to my case studies, our literary choices are exposed to "judgment" when we buy in the corner bookstore, while they enjoy greater anonymity in a bigger store, or at the library for that matter. If buying online eliminates all of these concerns, buying in standardized impersonal environments alleviates them.

[285] For an early study on these subjects see: P. DiMaggio et al., *Social Implications of the Internet,* Annual Review of Sociology, 27, pp. 307-336, (2001). For a more recent contribution see D. Gefen, D. W. Straub, *Consumer Trust in B2C E-Commerce and the Importance of Social Presence: Experiments in E-Products and E-Services*, Omega, 32:6, 2004, pp. 407-424.
[286] L. Sartori, *Le Conseguenze Sociali di Internet: Relazioni Sociali e Vita Quotidiana*, in M. Santoro (ed.), *Nuovi Media, Vecchi Media* (Bologna, Il Mulino, 2007), pp. 125-147.
[287] S. Guo, M. Wang, J. Leskovec, *The Role of Social Networks in Online Shopping: Information Passing, Price of Trust and Consumer Choice,* in Proceeding of the 12th ACM Conference on Electronic Commerce, pp. 157-166.

2.2.8. We do it for the Consumer

What other reasons might suggest according protection to smallness? In the previous sections I have isolated concerns that connect retail regulation to the protection of producers – e.g. protection of their economic independence or instances of professionalization – and the public interest in general – social stability, familiarity, the texture of the city, or social relationships. But it is also possible to see these rules as serving individual interests of the consumer. In particular, these rules are said to protect quality both of the services and the goods provided. For example, as I will explain in Chapter IV, one of the key arguments in defense of resale price maintenance in the book sector is that they constitute instances of cross-subsidization: the rules are devised to finance the publication of quality books with the profits from commercial best-sellers. And the provision of quality services is the defense for most forms of market closure in the regulated professions (pharmacies, medical, legal). More generally, restrictions to price competition are often justified by reference to the fact that this enhances competition on the services. And thus improves the quality of the service (see discussion in chapter IV).

From a closely related perspective, these rules are defended as they serve another specific interest of consumers. More precisely, they are said to protect the consumers' ability to have access, in marketing jargon, to their favored distribution channel. Hence, even if they were to keep prices higher, the rules could still be good for consumers. As we have already explored, many Europeans take pride in their little store shopping: they know and trust their butchers and fruit seller and don't want to give that up. In these places one often encounters a certain stigma against the pursuit of cheapness, but higher prices might be compensated because consumers take pride in attending these shops. This intuition directly enters the litigation over these arrangements: the French Court of Competition, in judging the law regulating prices within a "*zone de Chalandise*"[288] left it alive so that "*the consumer will have the ability of choosing the mode of distribution that he prefers*"[289] and this approach is comparable to the American tolerance for retail price maintenance as emerged

[288] *Zone de chalandise* (Catchment Area) indicates a marketing radius from which customers are normally attracted. Within this radius no competitor may charge predatory prices.
[289] Conseil de la concurrence, *Avis n. 96-A-06 du 2 mai 1996, at 5 (May 2, 1996)* as cited by J. Q. Whitman, *op. cit.,* p. 389.

in Leegin.[290] In the next two chapters, I will discuss at length the ambiguities of the court of Justice towards the acceptability of this kind of interest (see in particular 3.3.1.1.).

Here it is possible to see the protection granted to retailers as just an instrument to guarantee the choice of consumers. Research in marketing suggests that this intuition is not unfounded. Since the 1950s, in fact, marketing scholars have devoted attention to consumer behavior that is unexplainable on the basis of "*classical price considerations or functional factors*."[291] The personality of the retail store could matter more than price, location, parking, and even quality in explaining consumer preferences.[292] Some studies suggest that the hedonic dimension of shopping is so prevalent with respect to the utilitarian one that (for many categories of merchandise) it might be useful to classify shops as part of "*the social-recreational industry*" rather than of "*retail distribution*".[293]

2.2.9. We Are What We Buy... and Where We Buy It

This brings us to a second important tradition in economic sociology, which studies consumption (and more specifically shopping) as an activity defining our individual identities. It is not only consumer welfare to be influenced by immaterial elements in the shopping experience, but also one's sense of self. Identity is what is at stake in our everyday shopping. Hence you change the shops and you challenge our identities. This awareness is growing in a context where professional identities are said to be fading, in line with the decreasing societal importance of work, and leisurely activities – including shopping – become key in defining our sense of self. The awareness that shopping and consumption

[290] J. Q Whitman, *op. cit.,* footnote 163. This argument, albeit implicitly, also entered litigation before the ECJ on book pricing rules: see for example, the Dutch/Flemish Book Case (Joined Cases 43/82 and 63/82, *VbVb and VBBB v. Commission*, [1984] ECR I 00019, p. 39)

[291] P. Martineau, *The Personality of the Retail Store,* Harvard Business Review, 36:1, pp. 47-55, (1958). See also E. M. Tauber, *Why do People Shop?,* Journal of Marketing, 36:4, pp. 46-49, (1972) (tipifying a series of personal motives – *Role Playing, Diversion, Self-Gratification, Sensory Stimulation* – and social motives – *Social Experiences outside the Home, Communication with Others Having Similar Interests, Peer Group Attraction, Status and Authority, Pleasure of Bargaining* – for which we shop). According to that classification, bookshops as well as record stores, are clear places of *Peer Group Attraction*: "*in many cases the shopper may have limited interest in the product category and little intention to make a purchase*" but might attend a shop as a function to one's identification in a category.

[292] P. Martineu, *op. cit.,* suggests that intangible elements, such as the fact that the store is a place where you see your friends, or the kindness and helpfulness of the shop-assistants score higher than prices in consumer preferences. Empirical studies, already in the 1950s, showed that women shoppers when doing grocery "*instead of comparing prices, evaluated supermarkets from a different set of criteria: variety of goods, orderliness of the store, services and non-services, personnel, other shoppers, and goals of the owner or manager*" (p. 47).

[293] *Id.,* p. 49.

are linked to processes of identity formation is certainly not a new discovery in the social sciences but it is one that affirmed itself relatively late and not without resistance.[294]

Economics has never showed a keen interest in consumption and has overwhelmingly treated it as utility maximizing behavior. The most notable early exception, was Veblen's *Theory of the Leisure Class* introducing the notion of conspicuous consumption: for the first time consumption was thought of as a process of emulation and social distinction rather than means to the satisfaction of material needs.[295] After WWII, what Veblen saw limited to a leisure class was expanded to the masses with the shift from "a *production-based-working-class"* society to a "*consumption-based-middle-class"* society.[296] The instinct to *keep up with the Joneses* encompasses different goods and behaviors in different social contexts, but it is recognized as an ever-present social feature of consumption.[297] From this perspective, consumption is positional – it is used to signal our status and belonging to a certain group or class.

Veblen's long-lasting intuition was articulated, in the post war, by generations of sociologists and anthropologist. Bourdieu through his notion of cultural capital[298] and de Certeau through his focus on the creative uses of goods after the purchase[299] are identified

[294] V. Zelizer, *Culture and Consumption, cit.,* documenting the delay with which economists (including economic sociologists) turned to studies on consumption. For a long time the dynamics of production have monopolized scholarship, which many attribute to the strong *producerist* influence of Marxism.

[295] T. Veblen, *The Theory of the Leisure Class*, 1899, available online: http://moglen.law.columbia.edu/LCS/theoryleisureclass.pdf. See also C. Cambell, *The Romantic Ethic and the Spirit of Modern Consumerism* (Hoboken, Blackwell, 1987).

[296] See D. Miller et al.,*op.cit*., p. 15.

[297] See E. Currid Halkett, *op. cit.*

[298] P. Bourdieau, *Distinction: a Social Critique of the Judgment of Taste* (Cambridge, Harvard University Press, 1984) developing a theory about how tastes and consumption choices of people are the result of habituation – a set of practices that are learned as part of belonging to certain classes. Taste from this perspective is not a matter of choice, but it is determined by those who posses cultural capital (education, non-financial social assets, connections). Distinction between high and low culture is instrumental to the reproduction of inequalities in social capital. Bourdieau later applied his theories to the housing markets among others: P. Bourdieau, *The Social Structures of the Economy* (Cambridge, Polity Press, 2005).

[299] M. de Certeau, *The Practice of Everyday Life* (Oakland, University of California Press, 1984). An Interest for the *"how",* for the *"ways of operating or doing things"* is what animates de Certeau's effort to illuminate the practices of everyday life (*the quotidian* to use the more evocative French term) that for long had stayed in the background of social activity. In his semiotic theory of consumption, Certeau explains that identity does not emerge in the acquisition of a product, but rather in its uses or better re-uses. It is through these re-uses that consumers can break free of the imposition of consumption. Hence, consumption carries an emancipatory capacity against the established order, not much in itself but in its "*procedures*" and "*tactics*". For de Certeau, consumers are a marginal category, because they are substantially oppressed and forced to buy products, but still they are themselves producers – re-users of the products they are consuming. "*Marginality is today no longer limited to minority groups, but is rather massive and pervasive; this cultural activity of the non-producers of*

as central authors in the autonomization of the studies on consumption. In line with the cultural turn, the orthodoxy in the social sciences became to consider consumption as site of expressive rather than functional behavior.[300] Through these intuitions as then elaborated and specified by students of marketing, geographers and historians' the link of consumption with individual and groups identities was soon established beyond any reasonable doubt: the kind of goods bought, the places where these are bought, links with gender and sexual identities have been favored areas of investigation.[301]

What also became clear was that consumption does not only signal who we are, it does not only reveals identities that are formed somewhere else, but it is an autonomous source of identity formation. As one can read in one of the authoritative studies on the subject: "*shopping does not merely reproduce identities that are forged elsewhere but provides an active and independent component of identity construction*."[302] And these identities, in our post-modern world are better defined as lifestyles: they are elective, unstable and made of *"cultural signs, representations and media"*.[303]

Finally, the more recent step in this awareness, particularly interesting for my study, is the attention devoted to spaces and places: "*in line with a general increase in interest in space and spatial metaphors, more and more attention was paid to particular consumption spaces which were no longer seen as just passive backdrops but as spaces with their own properties which could intervene in the construction of difference*."[304] Hence not only the goods we buy, but also how and where we buy them become relevant in the definition of our selves.

Here, once more, it was the super or hypermarket – as a proxy for consumption on steroids – to excite the most fervent passions. And the literature still oscillates between conceiving

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culture, an activity that is unsigned, unreadable, and un-symbolized, for the showy products through which a productivist economy articulates itself" (p. xvii).

[300] And to be sure, in more recent years many have denounced the cultural turn for having gone too far in the reading of consumption as expressive behavior to the expenses of political economy and generally of the inequalities built within the system. See V. Zelizer, *Culture and Consumption*, cit., p. 403.

[301] For a literature review of these contributions see D. Miller et al, *op. cit.*

[302] *Id.,* p. 3.

[303] Post-traditional notions of identity have focused around the notion of lifestyle (*Id.*, p. 10). Miller quotes Giddens who writes: "*Lifestyles are routinized practices, the routines incorporated into habits of dress, entry, modes of acting, and favored milieus of encountering others; but the routine are reflexively open to change in the light of the mobile nature of self-identity. Each of the small decisions a person makes every day... contributes to such routines*" (A. Giddens, *Modernity and Self Identity: Self and Society in the Late Modern Age* (Cambridge, Polity Press, 1991)).

[304] D. Miller et al., *op. cit.*, pp. 3-4. See also, P. Glennie, N. J. Thrift, *Consumers, Identities and Consumption Spaces in Early Modern England,* Environment and Planning A, 28:1, pp. 25-46 (1996).

the supermarket as an apocalyptic distortion of modernity or a playground for semiotic democracy and the liberation of the oppressed. Enthusiasts, mostly from America, saw in it the seeds of an emancipatory process, especially for minorities such as blacks and women – who could finally find a place to freely choose and being served rather than serving and accepting choices made by others.[305] Critics, mostly in Europe, saw in it an instrument to neutralize class awareness through the alienating qualities of goods. In Jean Baudrillard, perhaps the most perceptive – and hysterical – critic of consumerism, "*the hypermarket [becomes], beyond the factory and traditional institutions of capital, the model to all future forms of controlled socialization*"[306] – the embodiment of a culture of *Simulacra* rather than real meanings.

What does all this have to do with my forms of retail regulation? Well, if the places where we shop are fundamental to our identities or lifestyles, and if some of these places are in danger of disappearing due to changes in the market, rules that aid small stores or that disadvantage feared hypermarkets and online retailers might be important to preserve an environment that reflects the identity of small-shop buyers. But once more, one needs to be careful and ask whose identities are being served by the aid accorded to certain economic activities. Is it a national identity that is embodied in the lifestyles we associate with these shops? Is it an identity that cuts across difference and brings together people from different strata of society, as the *culturalist narrative* seems to suggest? Or are these shops and places signaling the social positioning of a more or less new elite? I will try to answer these questions through the case studies with reference to the specific markets under consideration, but for now I would like to go back for a second to Veblen and some of his modern scions.

[305] See for example G. Reekie, *Temptations. Sex, Selling and the Department Store* (Crows Nest, Allen & Unwin, 1993). For an historical account of these phenomena see L. Cohen, *A Consumers Republic: the Politics of Mass Consumption in Postwar America* (New York, Knopf, 2003).

[306] J. Baudrillard, *Simulacra and Simulation* (Ann Arbor, the University of Michigan Press, 1991), p. 76. The hypermarket, which stands as a proxy for mass-consumption society, blends those that used to be separate functions of society (commerce, work, knowledge and leisure). His account contrasts the older and higher culture of meaning with a newer and lower culture of simulacra. As he elaborates in another essay in the book (*The Beaubourg Effect: Implosion and Deterrence*) the temple of this culture was the then new Beaubourg's *Centre Pompidou*: "*the hypermarket of culture*". As he "explains", "*The hypermarket as well as the hyper-museum make masses, in the sense that they create them: "the masses are the increasingly dense sphere in which the whole social comes to be imploded and to be devoured in an uninterrupted process of simulation*" (p. 68).

Veblen was not only a particularly perceptive economist and cultural critic of his times but also a moralist. He believed in the progressive potential of economics and exposed the passions of the leisure class for useless frivolities as hampering this potential. Consumption, in his narrative, is not liberating – not only because at that time it was prerogative of the very rich – but also because the elites will always find ways to exclude outsiders even when these acquire the money needed to keep up in material consumption. Conspicuous consumption was in fact complemented by conspicuous leisure (education, intellectualism, sporting activities) as well as etiquettes and manners and conspicuous waste (such as unnecessary house help).[307] This appears even truer in recent times: as the *nouvau riches* have become particularly guilty of material over-consumption, the old rich started to retreat in more understated and implicit status signifiers. [308]

The creative class[309], Bobos[310], and more recently *the aspirational class*[311] are all Vebleian attempts to define these changing patterns of conspicuousness in a context where it is not anymore linked to consuming material goods. For example, as Elizabeth Currid Halkett suggests with the title of her book, the new elite signals its status through a *Sum of Small Things:* coffee, clothing, attendance of certain bars and shops, even more so the kind of readings and cultural products being consumed. The addends vary with geography but the common feature of these new patterns of consumption is that they include much fewer expensive things – houses and cars – and way more immaterial experiences and ideas. The result is that the new elite locks in its privilege in ways that are growingly impenetrable to outsiders. Access to this elite, to be sure, depends more on cultural and social capital than crude money. Furthermore, for the first time, the aspirational class is conscious that we are what we buy, which explains its attention to the *hows* of production and distribution – what Currid Halkett calls *conspicuous production*.[312] So much so that these new elites ask for transparency of the production and distribution system, they want to buy ethically and from shops that fit their worldview (her example, in the American context, is that they

[307] E. Currid-Halkett, *op. cit.*, p. 221.
[308] *Ibid.* As she writes: "*the democratization of conspicuous consumption has provided many more material goods to the middle class, but this change is to their detriment. As they spend more on material status symbols, they are spending less on those thing that would pave the way on more intergenerational upward mobility*" (p. 21)
[309] R. L. Florida, *The Rise of the Creative Class: And How It is Transforming Work. Leisure, Community and Everyday Life* (New York, Basic Books, 2002).
[310] D. Brooks, Bobos *in Paradise: The New Upper Class and how they Got There* (New York, Simon and Schuster 2000)
[311] E. Currid-Halkett, *op. cit.*
[312] *Id.,* p. 117.

drink *Intelligentsia* coffee over Starbucks). And in this worldview one finds a certain opposition to bigness, globalization and a certain passion for the small scale of both business and relationships.

Like Veblen's, Currid Halkett's account is a moralist one – these choices are not liberating but conforming and signaling privilege.[313] My impression is that there is still more fluidity than Currid Halkett would suggest and that the impenetrability of her sum of things is not as hard to unlock nor that new. Certainly she draws attention to the inequalities hidden behind what appear harmless evolutions of taste and lifestyle which should be taken into account – and I hope I will be able to incorporate this attitude in my case studies.

2.2.10. The Moral Limits of the Market

In more recent years, the symptoms of runway consumerism stopped being associated with the super or hyper-market, an outlet in itself quite in decline – and focused on the expansion of markets to new, once un-imaginable products – kidneys, good grades, line-standers, pollution and procreation permits.[314] There has been a proliferation of scholarship concerned with "the *moral limits of the market*", as the subtitles of two recent books by Michael Sandel and Debra Satz suggest.[315]

As Sandel points out, the moral critique of markets has two strands. The corruption thesis (or elsewhere called essentialist approach) predicates that the commercialization of certain goods changes the nature of those goods and deprives them of their intrinsic value.[316] The equality thesis (or consequentialist approach) is concerned with the inequalities unleashed

[313] In a very different field, the sociologically grounded theory of justice of Axel Honneth reaches similar conclusions. (A. Honneth, *op. cit.*) As he sees it, the *moralization* of the market was a theoretically possible bottom-up project, a project that showed promise in the 1960s and 1970s, but that seems to be fading today. As various bottom-up initiatives to encourage responsible or restrained consumption have grown weaker – e.g. consumer cooperatives, ethical consumption, consumer protection organizations – there has been a resurgence of Veblenian status-related consumption that brings rich and poor to live increasingly differentiated and isolated lives with little avenues of communication and shared experiences.
[314] These examples come from M. J. Sandel, *What Money Can't Buy, The Moral Limits of the Market* (New York, Farrar, Strauss and Giroux, 2012).
[315] D. Satz, *Why Some Things Should Not be for Sale. The Moral Limits of the Market* (Oxford, Oxford University Press, 2010); M. J. Sandel, *op. cit.*. On a similar tone see R. Skidelsky, E. Skidelsky, *How Much is Enough? Money and the Good Life* (New York, Other Press, 2012)
[316] This is the argument most notably made for prostitution. See E. Anderson, *The Moral Limitations of Markets,* Economics and Philosophy, 6:2, 179-205 (1990).

by the provision of certain goods on uncorrected market terms.[317] For this second strand, the core intuition is that certain things should not be sold not much because of preconceptions about the inviolability of such things but because of the detrimental effects of the expansion of markets on the social fabric: weakening of social bonds and altruistic behaviour through the unleashing of inequality. Certain goods should not be distributed through the market because the rich should not be given advantage in achieving those goods. This is, for example, one rationale behind public provision of things like education, healthcare, or parks.

While the corruption thesis concerns issues quite far from the ones I am studying, the equality concern seems particularly relevant for my discussion. Buying the same things at the same prices in the same places can be seen as one of the collective shared experiences that brings rich and poor together. So that rules that constrain innovation and diversification can be seen as protecting this form of equality. Some of the authors I see forming the *culturalist narrative* explicitly share this preoccupation. Gareth Davies, for example, sees forms of market regulation like the ones described here as virtuous manifestations of what he calls *"the policy of a limited marketplace."*[318] He suggests these forms of regulation are about equality and restraint in the uses one makes of his or her wealth.

From his perspective, retail regulation and even more so product regulation make products alike wherever you buy them – variations in quality are relatively small, and rich and poor get access to similar products that they buy in the same places. This, in turn, is supposed to contribute to shared experiences and social bonds. Furthermore, he argues, by creating sameness in the marketplace, these rules are about the psychological merits of limiting choice – reducing anxiety as consumers are confronted with few products all of relatively high quality.[319] Davies, to be sure, as his title suggests, makes of these issues a matter of "*quality of life in Europe*".

[317] This seems to be the primary concern of D. Satz, *op. cit.*
[318] G. Davies, *Internal Market Adjudication, cit.* p. 290.
[319] While Economic theory typically assumes that more variety is good for consumer welfare, some researchers in psychology and marketing have established that too much choice might make costumers unhappy. See for example, S. S. Iyengar and M. R. Lepper, *When Choice is Demotivating: Can One Desire Too Much of a Good thing?*, Journal of Personality and Social Psychology, 79:6, pp. 995-1006, (2000).

2.3. A Liaison *in Lieu* of a Conclusion: Introducing the Case Studies and Some Notes on Methodology and Case Selection.

This chapter has mapped the various socio-cultural interests that might explain the presence and persistence, one might say the function, of the forms of regulation I am studying. By drawing connections across various disciplines and fields of scholarship, it has tried to provide theoretical complexity to ideas and intuitions which are often sketched in relation to these rules, but rarely thoroughly elaborated. In fact, while statements about the cultural significance of market regulation, in particular rules that have been in force for decades and are today "threatened" with reform, are easily put forward, these statements often remain unspecified and vague.

The categories isolated in this chapter will guide the analysis in the next two chapters, the case studies or the descriptive part of my dissertation. There, I will try to assess if the interests isolated in this chapter are relevant, and if so to what degree, in explaining two specific forms of regulation: entry regulation in retail markets and resale price maintenance in books markets. More broadly, and autonomously from this dissertation, the conceptual framework developed in this chapter (and also partly in the previous one) may offer a new methodology to think about certain rules by taking their cultural ramifications seriously. Hopefully, this framework can be adapted to be employed also in the analysis of other areas of regulation or public policy.

Two more caveats are necessary. First, it is worth stressing that the categories I have identified in this chapter are only possibilities, not findings – plausible explanations which are mostly not yet empirically tested. It conceptually makes sense that the law of shopping be explained by reference to the protection of a profession, type of business, independence and values of a class, ability of consumers to choose their favoured distribution channel, consumers' identities or lifestyles, the texture of the city, social relationships, and also more generally equality in the marketplace. But clearly not all retail regulation is aimed at serving all of these interests – and there might be further interests that I have missed in my analysis. The role played by these different explanations necessarily vary for each specific form of regulation and it is only with reference to the specific nature of each rule that one may say which interests are relevant and which ones are not.

Secondly, even after finding that a rule is functionally oriented at protecting a given interest, we do not know much about the effects of that rule. Legal rules interact with each other and intervene in complex social realities, such as markets, that are governed and transformed by many other legal and non-legal forces. The case studies will discuss the effects of these rules with reference to the available empirical studies, but definite answers on the effects of a rule can only be given through the use of statistical tools which are beyond the scope of this dissertation. It might disappoint some, but my case studies are not natural experiments. Furthermore, while contextually rich, they are not even *thick descriptions* in a Geertzian sense, because I start analyzing the rules with pre-formed categories about their functioning and relationships to various previously identified interests.[320] More modestly, my case studies are in depth contextual descriptions of how two forms of market regulation (belonging to what I have called Europe's law of shopping) function, how they are understood and evolve in certain national contexts, and how EU law changes them. Overall the case studies should also be understood as avenues to test and specify my theory, in a recursive process, where the theoretical part of this dissertation has been modified in light of some of the findings in the case studies.

All along, in line with a key intuition of the cultural study of the law, in the case studies I will attempt to "*connect the symbolic and the material*" while at the same time *"resisting their dichotomization."*[321] This approach tries to describe pre-existing practices and patterns of behavior, to inquire the meanings that different social groups attribute to them, and to inquire how the law and legal change impact upon these practices and meanings. In so doing it also draws from what Mezey has called "*thick explanation*": "*an analysis of the particularized ways cultural practices coincide or collide with law so as to alter the meaning of either or both.*"[322] Such analysis is unavoidably complex: it adds layers rather than isolate

[320] In my case studies I will employ interviews to market participants and regulators to figure out how the role of these rules is understood at the national level and evaluate the impact of the rules in the underlying markets as well as other causal processes, which may be involved in their modification. These descriptions however will not be "thick" in a Geertzian sense. When interviewing market participants and regulators to assess the effects of the rules, I do not simply adopt their internal perspective but I employ the analytical categories developed in the present chapter. For the concept of thick description, see Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, from Clifford Geertz, *The Interpretation of Culture* (Basic Books, 1983). When describing thickly the observer adopts the categories of the participants in the practice she studies –description begins without previous theorization and all theory is an inductive development.
[321] See A. Sarat and J. Simon, *Cultural Analysis, Cultural Studies, and The Situation of Legal Scholarship*, cit., p. 14.
[322] *Id.*, p. 17 (citing N. Mezey, *op. cit*.).

discrete variables. In so doing it clearly lacks the succinct quality of the economic analysis of the law or of a natural experiment. Its complexity, however, is arguably an asset, as it provides a valuable complement to describe effects of regulation that simply quantitative or statistical approaches would arguably miss.

More precisely, in each case study, I try to do three things. First, I describe how the rules I study operate: what effects they seek to achieve and what economic and other arguments are used to justify them. Secondly, through doctrinal and contextual analysis of the CJEU case law and Commission interventions, I describe the impact of EU law on these rules. Thirdly, I look at the evolution of the rules in specific national contexts, under the impact of EU Law and other legal and non-legal forces. With reference to available historical accounts I describe how the rules came about in a series of exemplary Western European countries. Through available surveys, reports, and a limited number of interviews to market participants (for the book pricing rules),[323] I discuss how the rules are presently understood, also in relation to challenges and transformations faced by the underlying industries. In so doing, my case studies will seek to illustrate both that EU interventions are not purely deregulatory but might be able to safeguard or even enhance culturally valued features of markets and that the cultural value of these rules is contested at the national level.

The first case study (Chapter III of this dissertation) concerns a heterogeneous set of zoning rules and forms of entry regulation affecting retail distribution that discriminate in favor of small establishments and seek to slow down the penetration of large-scale distribution in the European member states. For EU law these rules become a problem because they constitute an obstacle to the freedom of establishment. My research will seek to show that despite a CJEU decision[324] which has been broadly interpreted as precluding Member States to retain such schemes, Member States are able to retain a strong regulatory stance on retail distribution. This chapter illustrates these evolutions with reference to the particular experiences of Italy and France, as countries that provide variation in how entry regulation in retail markets has been understood and contextualized.

[323] I utilized a series of taped loosely structured interviews. The selection of interviewees took place through snowball sampling techniques. I began with a group of research participants known to me who have then provided details of other respondents identified as good research subjects. For these methodologies see L. Webley, *Qualitative Approaches to Empirical Legal Research,* in P. Cane, H. M. Kritzer, *The Oxford Hanbook of Empirical Legal Research,* (Oxford, Oxford University Press, 2010).
[324] Case C-400/08, *Commission v. Spain* [2011] ECR I-01195.

The second case study (Chapter IV of this dissertation) concerns book-pricing rules, in particular resale price maintenance (RPM) in the form of fixed book price agreements or analogous laws. This means that publishers set the retail price of books, while the ability of bookshops to give discounts is eliminated or strongly limited. These agreements or regulations come into conflict with the EU rules on competition. In my study I follow the emergence of these markets arrangements in three countries – the United Kingdom, Germany and Italy – to study how national and EU law have influenced their evolution. In the German case, which has provided the intuition behind the case study, the European Commission validated an amended version of the *Sammelreverse* (Fixed Book Price Agreement) re-tailored so as to limit its protectionist effects.

I choose to study these specific rules for two main reasons. First, as it will be clear by now, they are some of the rules that allow me to engage with the "*culturalist narrative*": their connection with everyday experiences in the market and the fact that they are (more or less explicitly) justified by reference to cultural arguments make them particularly useful to try and understand the relationship between culture and market regulation and ultimately assess claims about the degrading impact of EU law on national cultures. Secondly, while the Court's case law reveals interesting conflicts around these rules, the impact of EU law on them is ambiguous enough to justify an in-depth study of their functioning and modification at the national level, which allows to engage in the discussion on the deregulatory nature of EU interventions.

Ultimately, in order to validate my narrative, the case studies should be able to show that locally differentiated and culturally rooted ways of economic life (for which smallness is often a proxy) are better protected, rather than degraded, through EU law interventions. This may be because EU law forces Member States into reflection on whether the goals pursued through these forms of regulation are still desirable in changing markets and, if they are, on whether the instruments employed to achieve these goals are still effective. Furthermore, the kind of context-rich analysis of my case studies may reveal that some of the culturally valued features associated to smallness survive in other settings different from the small traditional shop – thanks, for example, to new synergies between online markets and physical distribution or other innovations in retailing.

Chapter 3:

Entry Regulation in Retail Markets: Between Economic and Urban Planning

3.1. Introduction

Retail markets are an important, and yet tricky terrain of economic activity. For a long time dismissed, if not maligned, by economists as a dependent (producing very little value added) sector of the economy, extracting income from consumers and producers to the benefit of shop-owners – an intermediation one would ideally do without,[325] retail is today recognized as a productive sector in its own right, a major source of employment, and a reservoir of developmental possibilities for local economies.[326] Hence local governments have an interest in productive and fast-growing retail markets in order to boost their regions' or cities' GDPs. Furthermore, the sector attracts the attention of policymakers as an area of intervention to achieve other macroeconomic goals. The control of inflation, for example, has been a favored goal pursued through retail policy and more specifically entry regulation.[327] Particularly during recessions, more competition is prescribed in retail markets to alleviate the negative consequences of shrinking incomes through the disciplining of prices and new bigger entrants (often price discounters) are at those times especially welcomed. [328]

From an opposite perspective, in retail perhaps more than other markets, governments are sensitive to the demands of small and medium independent retailers who receive protection in the name of corollary public interests that they are said to serve. Clearly government has an interest in realizing an efficient distributive network that reaches all

[325] C. C. Williams, *Rethinking the Role of the Retail Sector in Economic Development,* The Service Industries Journal, Vol. 17, No. 2, pp. 205-220 (1997). See infra Marshall's views on the extractive capacity of booksellers (4.5.1).
[326] In particular, by pursuing the right composition of retail firms, cities seek to minimize retail leakage, which occurs when people spend more on goods than local businesses sell. C. C. Williams, *Rethinking the Role of the Retail Sector in Economic Development, cit.*
[327] In the US, the impact of Walmart "*everyday low prices*" was conventionally used to explain low inflation during the expansionary monetary policy of Greenspan during the Clinton Administration. See D. Calleo, *Follies of Power,* (Cambridge, Cambridge University Press, 2009).
[328] The role of retail markets both in keeping inflation low and alleviating the consequences of the economic crisis is recognized by the European Commission: see the *European Retail Action Plan*, Brussels 31/1/2013. COM(2013).

consumers (also in less profitable areas). This is a public interest that typically calls for government intervention (akin to transport, for example). It is certainly part of the explanation, but it is not enough to justify the scope of government intervention in retail markets. [329]

As we have seen, a long series of cultural implications might contribute to explain rules such as the ones under analysis. Small independent retailers – as part of what is known as the middle classes or the *small bourgeoisie* – embody certain culturally valued items – professional respect, pride in craft, defense against excessive concentration of power and, as a sum of all this, moral, political and economic independence. So interventions in retail are also to be understood as policies for the middle classes, to which some European countries devote ad hoc ministries.[330] Some scholars, as we will discuss, see this as pure capture: as the government giving up to the interests of a class which is particularly capable of mobilizing and threatening unrest.[331] But retail markets are also an important part of what makes cities attractive to both locals and tourists and hence governments might want to intervene to protect traditional (or quality) trade – and more generally urbanity versus suburbanization. Finally, as the underlying theme of this work, retail markets are linked to everyday-life experiences that might become part of one's identity and be offered protection for this very reason.

Some degree of retail planning – intended as a set of policies devised to control the geographical distribution of retail establishments – is present in most if not all Member States in the EU. Entry regulation constitutes the most explicit form of retail planning, either in the form of general land-use and planning schemes, or of retail specific authorization schemes. In a context where most countries have undergone serious liberalization processes (and greatly reduced the number of authorizations they require, also in order to comply with the EU Services Directive), most remaining forms of entry regulation appear deliberately aimed at slowing down the penetration of large-scale distribution in order to protect the cohesion of downtown centers through according a certain preference to small, independent, urban shops.

[329] A. Pozzi, F. Schivardi, *Entry Regulation in Retail Markets*, *cit.*
[330] Belgium for example has since the 1960s a Ministry for the Middle Classes and so does Luxembourg.
[331] See later in this chapter (3.3.2)

Hence, the focus on licensing and authorization schemes in retail allows to reflect on the relationship between small retailers, with the values they embody and experiences they make available to consumers, and big retailers, which come with another set of values and experiences. Today, at the EU level, much policy attention is devoted to grocery retailing, in order to limit the power that big distributors acquire in the supply chain *vis a vis* the small farmers and producers that supply them.[332] These conflicts, albeit relevant to understand productive relationships on the business side, will remain on the backdrop of my analysis. In this chapter I intend to focus on the older and I would argue deeper conflict between small and large distribution, how governments have dealt with this conflict, and what this has meant for consumers.

Public policy towards retailing has in fact generally been understood as oscillating between two objectives. On the one side, the goal is to improve economic performance and productivity – modernizing a sector that was *tradidional* by definition,[333] while controlling inflation. On the other side the goal is to maintain small and medium independent retailers, for the economic, social, political and cultural contributions they make – the interests I have detailed in Chapter II of this dissertation. At least at first sight, regulators and policymakers pursue contradictory or at least difficultly reconcilable goals through retail markets. And there is, to be sure, a strong association between each of these sets of goals and certain commonly utilized instruments.[334] On the one side, Concern for rapid growth and increased productivity (and also fight against inflation) is served by deregulation (of both entry and business practices), as well as strong anti-cartel enforcement. In unprotected and vigorously competitive markets (at least in theory) less efficient firms rapidly exit and new innovative firms enter the market – so productivity increases and there is real growth in the economy. On the other side, concern for maintaining the commercial function of inner cities, as well as proximity and variety of choice for consumers, and the economic viability of small traders is served by a strong

[332] After a public consultation (European Commission – Press Release, *Towards a fairer food supply chain: European Commission asks for input,* Brussels, 16 August 2017, http://europa.eu/rapid/press-release_IP-17-2521_en.htm), EU Commissioner for Agriculture Phil Hogan has recently proposed legislation that would protect weaker suppliers in their contractual relationships with large retailers. See S. Marks, *Brussels Declares Wars on Supermarkets: The EU looks to roll out new laws to protect farmers from big retailers. Supermarkets insist they are not the profiteers,* Politico, 10 October 2017, *http://www.politico.eu/article/carrefour-tesco-asda-sainsbury-leclerc-intermarche-brussels-declares-war-on-supermarkets/.* See discussion later in this chapter (3.3.5)

[333] See S. Berger, *The Traditional Sector in France and Italy, cit.*

[334] On the tendency of government to employ pre-packaged bundles of objectives and instruments see: C. E. Lindblom, *The Science of Muddling Through,* Public Administration Review, 19:2, pp. 79-88 (1959).

regulatory stance against monopoly (combined with a less vigorous anti-cartel enforcement) and a strong control over the location of establishments through entry regulation.[335]

On top of this, from the EU perspective, retail is a sector through which many of the freedoms of the internal market materialize, and there is a *prima facie* affinity between the instruments of market integration and those employed to achieve the first set of goals described above: efficiency and growth. The internal market literally comes true when, through retailers, foreign goods get to local consumers. In fact many forms of retail regulation, including (in at least one case) entry regulation, have been challenged as obstacles to article 34 TFEU – normally with little success, especially after Keck. Furthermore, retail chains might want to open their shops in other Member States, thus exercising their freedom of establishment. And from this perspective, entry regulation easily becomes an obstacle to the exercise of such freedom. Hence in this context, there is not only a strong association between certain goals and certain instruments, but also a *prima facie* rigid distribution of competences to pursue different goals at different levels of governments. The EU pursues efficiency through the freedoms of movement while Member States protect various non-market concerns through regulation of entry and business practices.

This division of competences (or rationalities[336]) is so deeply engrained in the scholarship, that it is hard to think in different terms. As discussed in previous chapters, this approach is also shared by the authors I see forming the *culturalist narrative.* An oft-unstated assumption of that scholarship is that all of the culture is in national market regulation, while all of the economics is in the market freedoms, which are alien to local cultures and colonizing them. Various factors encourage this kind of thinking: the nature of the debate in the media, the way these conflicts are structured in EU Law – violation and justification through reference to strictly non-economic overriding reasons – as well as many influential

[335] Geographers agree on this general subdivision see P. Guimaraes, *Revisiting Retail Planning Policies in Countries of Restraint of Western Europe*, International Journal of Urban Sciences, 20:3, 361-380, 2016.
[336] For this notion of rationality as habitual association of goals and interests see. Y. Svetiev, *European Regulatory Private Law: From Conflicts to Platforms*, in K. Purnhagen and P. Rott (eds.), *Varieties of European Economic Law and Regulation* (Springer, 2014)

legal doctrines that praise the virtues of this construction.[337] This chapter will try to destabilize this rigid division, by showing for example that there might be purely economic rationalities behind the national entry regulation schemes, and culture-enhancing features in the deregulatory programs attributed to the EU. In so doing it would like to add a *tessera* to a growingly rich mosaic of scholarly contributions exposing the insufficiency of a vision of EU economic law as purely deregulatory.[338] My contribution in this chapter will be both to challenge sweeping statements about the cultural rootedness of national regulation and better describe the impact of *prima facie* deregulatory EU intervention.

The structure of the chapter is as follows. In the next section, I survey how the rules I study manifest across Europe and the main economic justifications for introducing them (section 2). I then explain how these rules come into conflict with EU law, in particular freedom of establishment, and try to discuss which kind of entry regulation remains available to Member States after EU law interventions (section 3). I use this section also to discuss some ambiguities in the justificatory paradigm employed by the CJEU that are powerfully revealed by the rules I study. Section 4 starts by summarizing key moments in the evolution of modern retailing and then describes the emergence and evolution of retail planning rules in two European countries, France and Italy. There, with reference to available historical accounts, I try to understand the rules in specific national socio-cultural contexts and also to emphasize the kind of retailing patterns and consumer experiences the rules may sustain. Ultimately it is only this fine grained analysis that allows me to intervene on the nature of the conflict with EU law – cultural or not, real or apparent. I finally draw some conclusions and underline those findings that are more relevant to the broader argument of my dissertation (5).

3.2. The Rules under Consideration: Entry Regulation in Retail Markets.

This section is dedicated to better describing the object of this study. In the first part of this section (3.2.1), I will survey the forms of entry regulation in retail markets which are encountered across Europe and highlight certain common features that are relevant for my

[337] See for example, the notion of diagonal conflicts as elaborated by Joerges: C. Joerges, *A New Type of Conflicts Law as the Legal Paradigm of the post-national Constellations*, *cit.* – see next chapter for a more in depth discussion (4.3).
[338] See above, footnote 12.

further discussion. In the second part (3.2.2) I survey the main economic justifications for these kinds of regulatory interventions, and try to fit them in the broader discussion of socio-cultural interests protected by these rules (see supra chapter 2).

3.2.1. Key Substantive and Procedural Features: How do Countries Regulate Entry?

By drawing on the classification proposed by Pozzi and Schivardi, it is possible to identify three levels of State intervention when regulating entry.[339] The State can directly control retail activity or assign it to a monopolist. This is the highest level of regulation, which is today very rare and limited to areas of merchandise that raise particular public health concerns – certain drugs, alcohol (only Sweden) or cigarettes (nowhere now in Europe). In this case the State has full control on the number of establishments and their locations. The second stage is retail specific authorizations. In the most stringent forms of this kind of regulation the State caps the number of stores in given areas through quotas or territorial restrictions – this happens in certain countries for specific kinds of shops, such as opticians or pharmacies (Italy and Belgium).[340] But milder versions of authorization schemes also regulate entry to generalist retailing across merchandise sectors. These authorizations are retail specific in the sense that they are required only of retailers and they are necessary to exercise the commercial activity. They pursue various urban and economic planning objectives and they constitute the primary focus of my study. The lowest level of scrutiny is exercised through zoning, or planning regulation. Zoning rules pre-determine which areas of a town and which building can be devoted to retail and which ones cannot. This last form of regulation is not retail specific, but it clearly affects retail distribution pervasively.

Furthermore, entry regulation is only the most explicit way in which governments regulate retail in its physical/spatial dimension. There are other, more implicit, rules that are recognized to be motivated by the same goal. Studies in economic geography identify the category of *retail planning policy* as including entry regulation, but also opening hours and positive regulations aimed at supporting "*the commercial environmen*t" in general.[341] Typical opening hours regulation that affects retail planning includes prohibitions on night work and Sunday trading. As first argued by geographer Ross Davies, the time and duration of

[339] A. Pozzi, F. Schivardi, *op. cit.*
[340] *Id.*, p. 6.
[341] P. Guimaraes, *op. cit.,* p. 364.

trading hours is one of the elements that planners consider when trying to control the locations of new establishments.[342] For example, compulsory closure of supermarkets at 6:30 pm in Germany is found to have functionally discouraged opening of supermarkets outside of city centers.[343] I mention this affinity between entry regulation and opening hours, and their possible common purpose, because under EU Law they are treated very differently (see infra, 3.3).

The last kinds of measures that can be seen as part of retail planning are forms of positive discrimination helping certain retailers – normally small, traditional, independent shops or shops operating in isolated places/small villages – different from entry regulation. These measures include subsidized rent for certain establishments, and other additional services governments offer to retailers in downtown areas. One should probably include in this category various regeneration plans like Town Center Management schemes and Business Improvement Districts.[344] First developed in the United Kingdom, these entities were subsequently copied by many other Member States. I will not deal directly with these instruments in this chapter, but they constitute increasingly popular *soft-law* alternatives to entry regulation.

This chapter primarily deals with entry regulation as the most explicit form of retail planning and touches only tangentially upon the other more implicit forms of retail planning sketched above. All countries in Europe adopt some form of entry regulation in retail markets either in the form of retail specific authorization schemes or of planning regulation (zoning), or both.[345] This means that somebody who wants to open a shop

[342] R. Davies, *Retail Planning Policies in Western Europe*, (London, Routledge, 1995). See in particular the *Preface*.
[343] Example quoted in P. Guimaraes, *op. cit.*, p. 365, who attributes it to C. Guy, *Controlling New Retail Spaces: the Impress of Planning Policies in Western Europe*, Urban Studies, 35, pp. 953-979 (1998), at p. 967
[344] The original idea behind these bodies was to treat city centers (downtown areas where the aggregation of economic activity happened spontaneously) as malls, so to manage them according to their overall economic viability, with attention to differentiated merchandising sectors, price range, etc. Management, together with promotion and collateral services to be offered by the municipality or the private organization in charge of the management are key features of these schemes. Their diffusion seems to be part of a shift away from prohibition into management. P. Guimaraes, *op. cit.*,p. 362. For the UK see M. Portas, *The Portas Review, An Independent Review into the Future of Our High Streets,* Study commissioned by the UK Government, (2011) www.gov.uk/government/uploads/system/uploads/attachment_data/file/6292/2081646.pdf. On the diffusion of the model abroad see: L. Zanderighi, *Town Management Centers, uno strumento innovativo per la valorizzazione del centro storico e del commercio urbano*, Departmental Working Papers 2001-14, Department of Economics, Management and Quantitative Methods at Università degli Studi di Milano. *Working paper 14 2001, http://w.marcointroini.com/files/wp70-Zanderighi.pdf*
[345] HVG Law LLP, for the European Commission, Directorate General for the Internal Market and Services, *Legal Study on Retail Establishment*, Project Number 2014.127, 2016, p. 39, para 105.

cannot just open it, but needs to interact with public authorities. In the majority of cases, entry regulation takes the form of an authorization or licensing scheme. Public authorities decide, based on an application, and being given certain decisional criteria, if the shop is to be granted the license or not. Ten Member States employ retail specific authorization schemes – Spain, Italy, and Belgium, among others. But of course, not all authorization schemes are retail specific. There are in fact many other permits and licenses – environmental, building, use, urban planning – that may be required of retailers as well as other economic operators, or more generally any time a building is to be built or occupied.[346] A recent study sponsored by the European Commission shows, for example, that all countries employing retail specific authorization schemes do so on top of the normal planning (zoning) rules – so that each applicant will have to satisfy both requirements.[347] That study emphasizes how entry (or establishment) in retail markets is still heavily regulated at the Member States level: all Member States in the EU require at least one permit, some Member States require up to five different permits, and at least half of them require at least three.[348] And these numbers only consider generalist retailing like grocery stores, not more regulated sectors, such as pharmacies or restaurants.

Given the complexity of the regulatory environment – overlapping functions, multiple bodies participating in the decision-making, different levels of government involved (in regulating and administering the schemes), it is important to highlight a few common substantive and procedural features. A first general feature to keep in mind is that entry regulation in retail is mostly multi-level regulation. This means that typically there is (at least in regional and federal State) a national framework law, which is specified by regional (or other sub-national) regulation and also administered locally by municipalities.[349] In certain countries, even municipalities have some lawmaking power in this field (such as in Italy), which is said to create truly labyrinthic regulatory frameworks.[350]

[346] Intuitively, establishments that need the construction of a new building (or major renovations) will need to obtain more authorizations than those simply starting operation in an already existing one. And numerous other factual circumstances (the kind of activity, location, size, number of workers employed, type of building occupied, etc.) will affect the number of authorizations required. (*Ibid*., p. 44, para 105)
[347] *Id.*, p. 85, figure 15.
[348] *Id.*, p. 39, para 105.
[349] *Id.*, p. 85, para 200. Italy and Spain, for example, work this way and, the study acknowledges, are the countries with the most regional variations (see infra in this dissertation).
[350] *Id.* This is true for Italy, for example – see the graphics at at p. 53.

From a substantive point of view, three recurring features emerge. The first one is that virtually all countries differentiate between large and small establishments.[351] Sometimes the classification is more complex, with also medium establishments, but the core idea is that the size of the establishment determines the kind of authorization required. While in the past some countries like Italy required a license to be obtained by all retailers, today most retail specific authorization schemes are limited to shops of a certain size.[352] Typically, the definition of large establishment, meaning the size threshold, changes according to the population of the area.[353] And the size of the shop also determines the kind of procedure required – e.g. for the larger shops normally the competent authority is the sub-national unit (the region) and for smaller shops it is the municipality.[354]

The second recurring feature is the use of bans – general prohibitions preventing the opening of certain shops in certain areas. Normally authorization schemes leave discretion to the competent authorities to decide according to certain criteria.[355] But in various countries, further bans or restrictions are introduced – through the same scheme or through other regulatory interventions – which eliminate the discretion for certain kinds of shops in certain areas: these shops are simply banned so the license must be denied. In some extreme cases it is a total ban on certain kinds of shop – like recently in Hungary.[356] More commonly, bans work by identifying a specific store format, (e.g. hypermarkets, or loss-making stores) which cannot open outside of certain areas (e.g. consolidated urban areas in Catalonia – see infra).[357]

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[351] *Id.,* p. 81, para 188. This is true both in Countries requiring retail authorization schemes, and in those simply adopting planning instruments.

[352] *Id.*, p. 85, para 198. With the exception of Romania, Croatia and Slovakia, which require all new shops to obtain an authorization.

[353] *Id.,* p. 81, para 189.

[354] *Id.*, p. 80. See Table 11.

[355] The retail specific authorizations are granted on the basis of sets of criteria established by law and assessed by (normally local) administrators. As reported by the *Legal Study on Retail Establishment,* these criteria typically include: "*compliance with spatial planning and planning regulations; protection of the environment; protection of the urban environment; consumer protection; compliance with social legislation; the outlet's location; accessibility, impact on traffic, availability of public transport, parking facilities; impact on job creation; protection of historical, cultural and artistic heritage*." *Id.*, p. 86.

[356] I*d.,* p. 87, para 210. Hungary, for example, appeared to have banned new supermarkets for some period of time. The ban actually referred to loss-making shops, as a proxy for foreign shops. See European Supermarket Magazine, *Hungary Bans Loss-Making Supermarkets,* 9 December 2014 https://www.esmmagazine.com/hungary-bans-lossmaking-supermarkets/7745

[357] De facto bans are also imposed in countries making use of planning rules only, without retail specific authorization schemes. The *Legal Study on Retail Establishment, cit.* reports the case of Germany where the planning system is very rigorous and introduces a hierarchy between goods that can be sold in certain core supply areas (city centers) and other goods that can be sold outside. With a few exceptions, in order to sell

Thirdly, many Member States utilize location-specific requirements. This means that they impose stricter requirements in certain areas or apply the retail licensing schemes only to shops that aim to open in certain areas. In most cases, location specific requirements aim at protecting city centers and they are often parts of comprehensive packages aimed at strengthening urbanity by restricting certain forms of retailing and encouraging others. Requirements aimed at protecting city centers work in two opposite ways. Some countries wish to prioritize establishment within city centers, also of large retail outlets – this is the case of the UK with the *Town Center First* program (see infra), as well as Germany with the notion of core supply areas (see infra). Other countries instead encourage the establishment of larger outlets outside of city centers through bans or other disincentives to open large stores downtown (this is true for Italy, for example, and generally for countries which have strong heritage preservation rules).[358]

For what concerns the common procedural features, two key elements tend to recur. First, most regulations establish variously defined commissions or committees to be consulted towards the granting of the license. These typically include representatives of sectorial interests or experts of distribution, and most controversially also competitors. Another commonly encountered feature is that authorization schemes ask the applicant retailer to submit some form of impact assessment.[359] These are of disparate kind – environmental, traffic, employment – but the most problematic, and also common, is a form of economic assessment of the effects that the new entrant would generate on existing retailers – also known as market study.[360] In some countries market studies employ the notion of a catchment area, an area within which the effects of the new entrant should be evaluated (see chapter II).

In my analysis I will focus on authorizations that are specific to retail establishments – rules specific to the opening of shops, rather than general planning rules, unavoidably with overlaps given that many countries subject retailers to specific requirements within general

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core-supply-area-goods large stores must be established within city centers *(*p. 87, para 214). This can be seen as a way to force the large distribution to establish in urban areas or alternatively as a way to penalize the large-distribution as such.

[358] *Id.,* p. 47, para 126. The study finds that the impact on retail establishment of rules on the preservation of city centers is very high.

[359] *Id*., p. 64, para 149.

[360] *Id.*, p. 67. See the chart.

planning procedures.[361] Restricting my focus to retail specific authorizations is important because these schemes are explicitly adopted in order to regulate retail markets, which makes them instances of retail regulation or the law of everyday shopping as I have described it in the previous chapter. Furthermore, as mentioned before, retail-specific authorization schemes employ today, in virtually all countries where they are adopted, a size threshold, in the sense that they are only required of large retail outlets. In this context, the smaller outlets, like the typical neighbor grocer or the typical clothing shop do not need to obtain retail-specific authorization, and even when they do they are subject to less demanding requirements.[362] This feature is also particularly useful for my discussion, because it *prima facie* locates these rules among those which are aimed at protecting smallness.

Despite some relevant national variation that I have sketched here and that I will deepen through the analysis of the historical evolution of these rules in certain countries, the current situation appears one of considerable homogeneity. Most European countries show commitment towards maintaining control over the location of retail establishment, and the typical form of this control is entry regulation that tends to advantage small retailers over the big. According to a recent study on the subject: "*the adoption of a position of positive discrimination towards small independent retail appears to be one of the most consensual features in Western Europe….* [and] *this is usually associated with a process of protection of traditional shopping areas*."[363] And this is even more significant, it seems to me, because it happens in a general context where the trend is undoubtedly towards liberalization and simplification of the rules.[364]

One more thing to consider, before proceeding, is the role of discretion. Since law can only go so far in pre-identifying requirements and criteria, it is ultimately how public

[361] *Id.,* p. 41. See the chart. Planning rules are mostly municipal or regional regulations (also known as zoning) *Id.,* pp. 44-46. All Member States in the EU make use of planning rules, with different degree of rigidity. Particularly burdensome appear situations in which no new establishment can be set up in areas for which a plan has not been adopted, as well as those countries that make recurrent use of amendments to the plans upon completion of a formal procedure as the standard procedure to "authorize" new large establishments. In Italy, for example, it is not unusual for retailers to have to wait several years before being able to obtain the necessary amendments to the plans. (*id*., p. 45).
[362] *Id.* p 85, para 195.
[363] P. Guimaraes, *op. cit.,* p. 363.
[364] *Legal Study on Retail Establishment, cit*., p. 86 para 202. Mostly this has happened through the insertion of retail-specific authorizations within the planning permits so as to move towards a single-application permit system – like in the case of the 2014 French reform (see infra, 3.4.1)

administrations exercise their discretion that determines the impact of these restrictions on retailers. In this field more than others, it is then important to pay attention to administrative practice as well as formal law. Studies into the implementation of these forms of regulation suggest that discretion may actually increase in more regulated environments.[365] For example, the high numbers of entities to be contacted to obtain the necessary authorizations makes very hard to predict the results of the application process thus increasing the discretion of individual decision-makers and overall uncertainty.[366] And increased uncertainty appears to disproportionally disadvantage small retailers.[367] This may depend on the fact that the complexity of the administrative framework weights more heavily on the small retailers, who do not have dedicated offices and are thus much less able to navigate the system, than on large retail groups.[368] It may more generally depend on the fact that local authorities are permeable to the interests of the large distribution, which often brings big investment to struggling local economies (as I will show there is some indication that this has happened in countries like Italy and France). Hence, a possibility to keep in mind as the analysis moves forward is that the weight of regulatory uncertainty may be able to offset the formal advantage that most regulatory schemes award to small businesses by imposing more stringent requirements on larger new entrants.

3.2.2. The Economics of Entry Regulation – Why do Countries Regulate Entry?

Two macro-approaches to regulation coexist in economic theory.[369] Public interest theories hold that unregulated markets produce frequent failures – mostly in terms of externalities and excesses of market power. For what concerns entry regulation, the defendants of these theories advocate government intervention in order to screen new entrants in the interest of consumers for quality, to limit fraud, or reduce negative externalities (typically

[365] *Id.,* p. 8.
[366] *Ibid.*
[367] *Ibid.*
[368] *Ibid.* "*large and small store formats are not affected by the regulatory aspects of retail establishment in the same way. While the dynamics of large store formats (mainly supermarkets) are most affected by the restrictiveness of the specific requirements, small store formats are most affected by the number of entities to be contacted for the authorization process. The latter findings could be explained by economies of scales for store chains in the treatment of administrative tasks*" (para 25).
[369] This reconstruction owes to S. Djankov, R. La Porta, F. Lopez-de-Silanes, A. Schleifer, *The Regulation of Entry,* The Quarterly Journal of Economics, 97:1, 2002.

environmental).[370] Public interest theories are often normative, in the sense that they investigate which kind of regulation is more useful in achieving the better social outcome.[371] Other theories – known as public choice theories – look at these kinds of intervention much less benignly. This is either because they assume that regulation is the product of a lobby of incumbents able to persuade government to entrench their privilege – and so regulation is designed and administered in their favor,[372] or because they fundamentally distrust government to govern in the public interest – government for these theories is rent-seeking and corrupt.[373] Public choice theories generally come to doubt the ability of regulation, and entry-regulation in particular, to be designed and managed in the public interest.[374] Therefore, for these theories, more regulation is always associated with inferior social outcomes.

No matter what the ability of regulation to serve the public interest, it is certainly true that from an industrial organization perspective, entry regulation reduces competition and thus overall welfare: it increases the market power of incumbents and produces an economic situation in which "*prices are higher and quantity lower than in competitive equilibrium*."[375] This is predicted to harm consumers as well as to reduce employment.[376] Furthermore, firms have little incentives to innovate and reduce costs which makes them more vulnerable to external shocks.[377] However, despite the general acknowledgment of these detrimental effects, entry is, at last in retail markets, still heavily regulated.[378] Why is that the case?

Public interest theories, so theories that think regulation can be useful, offer various economic justifications to entry regulation.[379] Three justifications in particular fit the arguments typically employed (in the Case Law and the literature) to justify entry regulation in retail markets. The first one, *excessive competition*, seeks to justify regulation

[370] This approach has its roots in Pigou's work. A. C. Pigou, *The Economics of Welfare,* 4th ed. (London: Macmillan, 1938)
[371] J. den Hertog, *General Theories of Regulation,* Encyclopedia of Law and Economics, 1999, pp. 223-270
[372] This is known as regulatory capture. Its first formulation is attributed to G. J. Stigler, T*he Theory of Economic Regulation*, Bell Journal of Economics and Management Science*,* 2:1, pp. 3–21, (1971).
[373] See H. De Soto, *The Other Path* (New York, Harper and Row, 1990).
[374] S. Djankov, *et al.*, *op. cit.*, p. 3. On the role of entry regulation in Peru's informal retail sector see H. De Soto, *op. cit.*
[375] A. Pozzi, E. Schivardi, *op. cit.*, p. 4.
[376] *Ibid.*
[377] *Ibid*. (see the literature cited therein).
[378] This seems to be less the case in manufacturing. See *Legal Study on Retail Establishment, cit.*
[379] For a list of available justifications see: S. Breyer, *Typical Justifications for Regulation,* in R. Baldwin, C. Scott. C. Hood, (eds.) *A Reader on Regulation* (Oxford, Oxford University Press, 1998), pp. 59-92

with reference to structural features of the industry so that entry regulation is ultimately needed to ensure the *economic viability* of the industry. The second justification conceives of entry regulation as necessary to rationalize/modernize the industry. The third one recurs to the notion of externalities or spillover benefits.

The first justification employs the *excessive competition* rationale as identified by Stephen Breyer, which holds that in certain markets, in the absence of regulation, competition is so intense that prices drop at unprofitably low levels. This, in turn, forces most firms out of business and allows the surviving ones to raise prices too much.[380] This situation not only is to the detriment of consumer welfare, but also endangers the economic viability of industries which, given their public interest dimension, need to be kept well functioning. Historically, this rationale served to justify certain forms of regulation in the transport industry.[381] Today, it is used to justify limited licenses for taxis, for example,[382] and it keeps appearing, more or less implicitly, also to justify entry regulation in retail markets.

The public interest in retail distribution requires shops to be proximate to populated areas.[383] It is quite intuitive how this may require regulation in isolated areas where demand is low. There, restrictions on entry can be seen as protecting the economic viability of retailers in the interest of continued provision of service. But according to numerous accounts, the viability of retail is threatened also in cities where demand is high.[384] The argument goes more or less as follows. Given that entry costs are generally low in retail markets, everybody can open a shop with little investment.[385] Furthermore, given the limited possibilities to differentiate retail services, it is very hard to generate market power in this industry. In such a context, price competition would normally be too severe, drive

[380] *Id.*, p. 75.
[381] Breyer (*Typical Justifications for Regulation, cit.*) identifies this rationale as first emerging in the regulation of the American airline and truck industries and recognizes that it actually encompassed various different justifications, most of which are today unacceptable. The common notion was that "*prices, set at unprofitably low levels, will force firms out of business and results in products that are too costly.*" p. 75. As such, this justification is today an *empty box* not accepted anymore by economic theory. Breyer also observes that this line of argument tended to affirm itself during recessions (and the great depression in particular). During recessions, in fact, there might be a stronger argument for intervention in order to keep (temporarily) unprofitable firms in business (p. 76).
[382] R. D. Cairns, C. L. Heyes, *Competition and Regulation in the Taxi Industry,* Journal of Public Economics, 59:1, pp. 1-15 (1996) (showing that the rationale may have some plausibility for taxis)
[383] A. Pozzi and F. Schivardi, *op. cit.*
[384] This is the economic theory implicit in the cases on entry regulation for pharmacies and accepted in those cases by the Court – see infra (3.3.1.1).
[385] This is true least for general merchandise retailing (such as food and groceries) and assuming an abundance of retail space is available.

prices below marginal costs, and most firms out of business.[386] Without some form of regulation that keeps the number of firms low, and/or that makes entry costs higher, there would be no retail distribution.

Industrial organization theory has however powerfully discredited this justification, at least for what concerns retail markets. Economic theory acknowledges that under certain conditions, competition can be excessive, but these conditions are not found in retail markets. One such condition is that of a natural monopoly, where many firms seeking entry result in a wasteful fight between firms, and unavoidably only one survivor.[387] Competition may also be excessive when it leads to predatory pricing [388] – the practice of a firm which is capable of drastically reducing prices in order to drive all competitors out of the market to then subsequently raise prices by using its market power. But economic theory identifies a threat of predatory pricing only in industries with high fixed (entry) costs, in which the price predator can easily raise prices with a limited risk of re-entry of competitors. [389] In any case, as it has been noted, entry regulation would not be the most appropriate instrument to prevent predation: by raising entry costs it is said to make predatory pricing easier rather than more difficult.[390]

Retail markets are not a natural monopoly nor have entry costs high enough to create a risk of predatory pricing. Hence, despite more or less explicit attempts, *excessive competition* cannot be considered a valid justification for entry regulation in retail. W Overall, economics rejects the possibility that *excessive competition* may be a threat in retail. In so doing, it also rejects the possibility that regulation may be required to ensure the viability of the industry. Retail markets, at least theoretically, can function well without entry regulation. As it will be further articulated, this does not mean that regulation cannot serve to safeguard the *economic viability* of specific types of retailers, which receive protection in

[386] While marginal costs matter in pricing decisions, fixed costs matter for entry decisions. See J. Tirole, *The Theory of Industrial Organization,* (Boston, The MIT Press, 1998).
[387] See S. Breyer, *op. cit.,* p. 77. However, some economists argue that even in cases of natural monopoly, an initial competitive stage may be desirable. Albeit wasteful, competition can be justified as a tool for selecting the best firm and also proving empirically that the industry is truly a natural monopoly.
[388] *Ibid.*
[389] *Id.*, p. 78.
[390] *Id.*, p. 79. A better response to the risk of price predation would be fixed minimum prices (see next chapter).

the function of other interests, nor that regulation cannot serve to alleviate the negative consequences of the unruly development of retail markets.

The second set of justifications for entry regulation in retail falls under the umbrella of what Breyer calls the *rationalization* rationale.[391] From this perspective, public intervention is needed to organize and discipline the industry. Regulation is deployed to increase the size of existing firms and force unproductive firms out of business. Without licensing, the argument goes, firms would remain too small and too many, and the productivity of the industry would also suffer. This is because while in competitive markets firms have a natural tendency to grow and cooperate or leave the market if too unprofitable or small,[392] there might be social or political factors that counteract this tendency in certain specific markets.[393] As we will see, the ability of family businesses to internalize losses might be one such factor in retail markets.

Rationalization arguments are often employed to justify forms of economic planning for example to respond to the coordination needs of an industry that would otherwise stay too fragmented.[394] And entry regulation has in certain contexts also been justified this way (see infra the first Italian licensing scheme–3.4.2). The perception of being *overshopped* seems to have provided impetus for the first introduction of retail licensing schemes in various European countries.[395] This suggests that some of these schemes were originally conceptualized as general instruments of economic planning rather than forms of control over the location of establishments or as forms of protection for "*endangered*" or weaker businesses.

The third group of arguments justifies entry regulation with reference to the notion of externalities or spillover benefits. This seems today the most common justification and also the one most widely accepted by economists.[396] Entry regulation is deployed to correct the negative consequences and encourage the desirable consequences of retail markets. As it will be articulated at length, governments do not only want retail to be economically

[391] *Ibid.*
[392] *Ibid.*
[393] *Ibid.*
[394] *Ibid.* (using the example of electricity markets in the US in the 1960s).
[395] For the debate in the UK, see for example, P. Ford, *Excessive Competition in the Retail Trades. Changes in the Numbers of Shops, 1901-1931*, The Economic Journal, 45:179, pp. 501-508 (1935).
[396] A. Pozzi and F. Schivardi, *op. cit.*

sustainable as an industry, but also want retail markets to pursue other public interests. On the one side, it might be that the market, when left to itself, overproduces certain forms of retailing that have negative social consequences (negative externalities). On the other side, the government might want to intervene to encourage forms of retailing that (even if more costly or less productive) deliver other socially valued goods (spillover benefits). Through entry regulation in fact governments pursue a series of external goals about quality of life, urban/rural relations, preservation of urban centers, the environment, health and consumer protection, etc.[397] A common scenario sees entry regulation deployed to protect small retailers, typically assumed to be producing positive externalities in terms of quality of life (among other things) and discourage large (big-box) retailers that generate negative externalities in terms of traffic, de-urbanization, etc.

The notion of externality is a useful descriptive device that I will at times employ. Arguably also the more immaterial cultural interests that I have identified in the previous chapter (e.g. lifestyle, consumer identity, professional identity) can be featured in this scheme. But thinking about retail regulation only in terms of externalities reinforces the paradigm for which there is a "*natural*" market rationality pursued by EU law while national regulation intervenes to correct market outcomes and accommodate various non-market interests. As discussed earlier on, this is one of the associations I would like to destabilize, and therefore my analysis will try to go beyond the paradigm of externalities. In fact, I would argue, governments do not only regulate retail instrumentally to pursue clearly separable and external policy goals. Rather, economic and non-economic (including cultural) goals are often bundled together in pre-assembled policy and regulatory choices in ways that are extremely hard to disentangle.[398] Retail regulation may be aimed at shaping the public commercial space in a certain way in order to fit a sense of place, or it may be aimed at safeguarding the relational dimension of markets and the meanings people associate to them. But these objectives, as I have tried to articulate in the previous chapter, are not only external to the economic function of markets, but rather depend on it and contribute to it. These are the kind of considerations that both economists and lawyers tend to dismiss and which I will try to incorporate in my analysis. This is why I argue that it is not enough to think of these interests in terms of externalities. The shape and feel of retail markets are

[397] *Id.,* p. 5.
[398] See C. E. Lindblom, *op. cit.,*

deeply intertwined with the very economic function retail markets serve – once more, the functional and the cultural are hard to disentangle.

Before proceeding, one more caveat. My discussion has so far stayed limited to theory. I have discussed various justifications for entry regulation, but not its effects. In so doing, I have greatly simplified the association between certain rules and certain consequences. Growingly, instead, empirical studies have come to question the effectiveness of entry regulation in achieving the objectives that justify its introduction. Exemplary in this regard is Raffaella Sadun's natural experiment on the *Town Center First* program, introduced in Britain in 1996 in order to slow down the penetration of the large distribution and come to the aid of independent shops.[399] That program subordinated the obtaining of out-of-town retail licenses to proof that no adequate space was available in downtown areas.[400] Sadun's study shows that the program did not help independent retailers. Big retail groups in fact adapted to the new rules by starting to establish smaller in-town chain stores, which resulted into direct competition for traditional independent shops. [401] Sadun's analysis may suggest that British authorities were unable to predict the unintended consequences of the program or that they were in fact not much interested in the benefits of independent ownership but in those of urbanity (see discussion above – 2.2.3 and 2.2.6). Similarly, also the positive impact on competition, innovation and job creation of deregulatory interventions comes to be questioned by empirical studies.[402] Overall, there is widespread uncertainty about the ability of both regulatory and deregulatory legal programs to achieve the goals that motivate them. This uncertainty probably contributes to explain a movement away from prohibition (or fixed rules) into management.

No matter what their conclusions, these empirical studies are key to my analysis because they point at the importance of establishing clear parameters when assessing the

[399] R. Sadun, *op. cit.*
[400] According to the British rules, new developments that wished to open out of town had to comply with a sequential test: 1) show that the there was no suitable central location for the new shop; 2) furthermore there was a *Test of Need* where shops were required to show that the new developments needed to meet local demands. These tests applied to all new development above 1000 square meters. Clearly they tried to disadvantage big stores that normally located out of town. The new development had to be judged based on their effect on a catchment area. See. R. Sadun, *op. cit.*
[401] *Id.* p.3. As she concludes, restricting the entry of large stores does not necessarily lead to a world with fewer stores, but one with different stores, with uncertain competitive effects on independent retailers.
[402] R. Inderst, A. Irmen, *Shopping Hours and Price Competition,* European Economic Review, 49:5, pp. 1105-1124 (2001) (suggesting that opening hours liberalization results in higher rather than lower prices as a result of many firms leaving the market).

effectiveness of regulatory interventions and also of investigating the unintended consequences of regulation. For my own purposes, these studies suggest that it is only fine grained, contextual analysis that might produce the kind of knowledge I am looking for. Before going back to that analysis, by zooming into the history of retail planning in Italy and France (see section IV of this chapter), the next section looks at entry regulation from the perspective of EU Law, describes the conflict of the national rules with EU free movement law, and discusses which kind of retail planning policy remains available to Member States after EU law interventions.

3.3. EU Law and Entry Regulation in Retail Markets

After having described, in the previous section, the functioning of the national and local rules and the main justifications in circulation, this section of the chapter illustrates how these rules come into conflict with EU law. Unlike for opening-hours regulations, which the Court of Justice exempted from the rules of the internal market – first as an expression of socio-cultural diversity and subsequently in line with the broader exemption owed to selling arrangements – EU law takes a harder stance on the authorization schemes which form object of this study. Under the Treaties, in fact, rules restricting entry might infringe upon the freedom of establishment and can be retained only when justified by the protection of a series of mandatory requirements identified by the Court and provided that they are appropriate and proportionate. While the central tenets of freedom of establishment have been developed through case law, secondary legislation also plays an important role in determining which kind of national rules are permitted and which ones are instead prohibited. Particularly relevant in this regard is the Services Directive of 2006, whose chapter on establishment contains detailed rules on the admissible uses Member States can make of authorization schemes. In particular, the Services Directive explicitly prohibits some of these schemes' favored regulatory techniques, such as economic tests (see infra).

Overall the present section discusses which kind of retail planning policy is left available to Member Sates within the rules of the internal market. Towards that effort, particularly useful is the analysis of the Case Law of the Court dealing explicitly with national retail planning schemes. In particular, one recent decision concerning a Catalan retail

authorization scheme (Case 400-08 EC) effectively exemplifies the structure of the conflicts under consideration and the alignment of the relevant interests. To that decision I will dedicate an in depth contextual analysis, by also comparing features of the Spanish law to other similar national experiences and trying to track the evolution of the Spanish legislation after the Court decision.

Before proceeding, I should mention that in at least one case, retail-planning schemes were considered by the Court not as obstacles to freedom of establishment but the free movement of goods (art 34 TFEU) and the rules on competition (art 101 and 102 TFEU) read in conjunction with the duty to cooperate (art. 4(3) TEU). It was 1994, and three Italian preliminary references by the Regional Administrative Tribunal of Veneto reached the Court inquiring about Italian Law 11 June 1971, n. 426. Under that law, the opening of new shops was subject to the issuing of a license by the Mayor who decided on the basis of an opinion by a municipal committee.[403] Representatives of local traders organizations sat on that committee. And it is based on this feature of the regulation that the Italian Tribunal suspected a violation of the rules on competition: letting incumbents decide on the entry of newcomers was akin to the government requiring or favoring an anticompetitive agreement.[404]

The Court disagreed, being satisfied by the fact that members of the traders' organizations constituted only a minority in the committees (they sat there together with workers representatives and various public servants) (para. 17) and also that they served "*as experts on distribution problems*" rather than industry representatives (para. 18). For the Court, these elements impeded to qualify the opinions of the municipal committees as agreements between traders required or favored by the public authority (para 19). Furthermore, by reference to a sort of *de minimis* rule, the Court dismissed the possibility that the rules amounted to measures equivalent to a quantitative restriction (art. 34 TFEU): the effects of

[403] Joined Cases C-140/94, C-141/94 and c-142/94, *Dip and Others v. Comune di Bassano del Grappa and Comune di Chioggia* [1995] ECR I-3257.

[404] While the rules on competition (current art 101 and 102 TFEU) clearly only apply to the actions of private undertakings, the Court has consistently held that read in conjunction with the provision on the duty to cooperate (current art 4(3) TEU) the rules on competition can serve to sanction state rules that permit or encourage a breach of the rules on competition (see for art 101, Case C-267/86, *Van Eycke v. Aspa* [1988] ECR 4769 and for art 102 Case C-13/77 *NV GB-INNO-BM v. ATAB* [1977] ECR 2115). As discussed in the next chapter, this reasoning was also applied to challenge laws imposing resale price maintenance in the book trade (4.4.2).

the licensing scheme on free movement of goods were *too uncertain and indirec*t to be regarded as capable of hindering trade (para 29).

It is not clear why the Italian tribunal did not raise an issue about freedom of establishment. Given that in one of the controversies *a quo* the applicant was the German discounter *Lidl,* this would have arguably been the most straightforward way to challenge the Italian law. It is likely that in a direct infringement procedure the Commission would have acted on establishment rather than the more uncertain grounds chosen by the Italian administrative tribunal. As we are about to see, however, it is only in the early 2000s that it becomes common knowledge in EU Law that indistinctly applicable measures might constitute obstacles to establishment. To be sure, the approach of the Court in the 1995 case suggests quite some deference accorded to national schemes. Is this deference lost in subsequent cases decided on freedom of establishment and more generally with the Services Directive? The next sections try to find out.

3.3.1. Freedom of Establishment and Authorization Schemes

Freedom of Establishment as enshrined in article 49 TFEU is aimed at eliminating obstacles to the right of individuals and firms to set up a permanent place of business in another Member State.[405] The permanent nature of the economic activity is what is said to distinguish establishment from freedom to provide services, which instead only applies to economic activity provided abroad on a temporary basis.[406] The Court came to give a very ample definition of establishment: "*the concept of establishment ... is a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a*

[405] The first paragraph prescribes the abolition of restrictions to primary and secondary establishment "*... restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting up of agencies, branches, or subsidiaries by nationals of any Member State established in the territory of any Member State*." The second paragraph specifies that establishment includes a right to pursue self-employed activities at the same conditions of the nationals of the Member State of establishment: "*freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of art. 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected*."

[406] As noted by Weatherill, the distinction is rather artificial and "*at the margin it may be difficult to choose the correct classification.*" While the distinction is often, in practice, quite blurry, problems rarely arise in an acute form, because the Court recognizes the common purpose of the two provisions and construes them similarly. Furthermore, the two freedoms are functionally correlated. In fact the temporary provision of services is considered very important to test longer-term investment possibilities. S. Weatherill, *Cases and Materials on EU Law*, (Oxford University Press, 2014, p. 380).

Member State other than his State of origin and to profit therefrom, so contributing to economic and social inter-penetration within the Community in the sphere of activities as self-employed persons."[407]

But what are the national measures that freedom of establishment intended to catch? This was not easy to figure out, especially in the early phases of integration. Accordingly, the original Treaties envisioned implementing legislation. Article 54 EEC (current article 50 TFEU) provided that the Council adopted a General program for the abolition of restrictions to establishment within the transitional period, which it did in 1961.[408] Furthermore, the Council needed to adopt sectorial directives to implement the General Program (art. 54.2 EEC). These directives identified specific national measures to be progressively eliminated in each sector (e.g. insurance, banking, transport, retail, etc.).

One of these Directives was specifically devoted to attain freedom of establishment in the retail trade, by identifying exemplary national measures that undoubtedly constituted obstacles to the establishment of foreign retailers.[409] The Directive drew attention, for example, on the *carte professionelle*, a sort of retail permit that only foreigners needed to obtain to exercise commerce in Belgium (art. 5.2(a)). Similarly, France had to abandon its own *carte d'identité d'étranger commerçant*. Further measures to be eliminated included: reciprocity (France) or nationality (Italy) requirements for trade in carrier pigeons; nationality and residency requirements (France and Germany), but also tests of economic need that only applied to foreigners (Germany) for trade in weapons and ammunitions; and rules providing that retail licenses granted to foreigners expired earlier than those

[407] Case C. 33/94, Gebhard *v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para 25.
[408] *General Programme for the Abolition of Restrictions on Freedom of Establishment,* 18/12/1961 (http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31961X1202&from=EN). The program set up a timeline for liberalization which assigned different levels of priority to different economic sectors – obstacles to industrial production and wholesale were granted priority over both retail trade and professional services, for example, and within retail different areas of merchandise were differently prioritized. An analogous program was adopted for the abolition of restrictions to free provision of services: *General Programme for the Abolition of Retrictions on Freedom to Provide Services,* 15/1/1962 (http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31961X1201&from=EN).
[409] Council Directive of 15 October 1968 (68/363/EEC), concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in retail trade (ISIC ex Group 612). http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31968L0363&from=EN. For an assesment of these directives from the time see. W. Van Gerven, *The Right of Establishment and Free Supply of Services within the Common Market*, Common Market Law Review, 3/3, pp. 344 362 (1966).

granted to nationals (Luxemburg).[410] While many of these measures have the flavor of another era, they effectively show how the original scope of the liberalization entailed by free establishment was limited to discriminatory measures.

A textual reading of article 49 does in fact suggest that only discriminatory measures are to be prohibited.[411] And in earlier stages of integration it was accordingly argued that while freedom to provide services (akin to free movement of goods) – as primarily aimed at the construction of an internal market through liberalization – caught all obstacles to free movement, establishment (akin to free movement of workers) was primarily concerned with equal treatment and hence only caught discriminatory measures.[412] In its early Case Law, the Court seemed to espouse this approach by suggesting that measures that restricted establishment without direct or indirect discrimination would not violate article 49.[413] Furthermore the Court was initially clear in requiring a transnational dimension of the conflict, which meant it ruled out the possibility for citizens to challenge their own national laws as obstacles to establishment.

This approach is clear in two early – almost identical – cases dealing with the French *Loi Royer*, the first French law subjecting large retail establishments to a special authorization scheme, which will be discussed at length in the next section of this chapter.[414] The Law required shops above 1000 m^2 (or 1500 m^2 depending on the size of the municipality) to obtain special retail authorizations from Departmental Commissions for Commercial Planning (see infra).[415] Two French tribunals deciding on criminal proceedings against the managers of respectively a supermarket and a car concessionary, which had expanded their shops in violation of the law, referred a question to the Court. The French tribunals suggested that the requirement imposed by the *Loi Royer* "*clearly constitute[d] a restriction on*

[410] These examples are mentioned in art. 5, Directive 68/363/EEC. The Directive also generally mandated that Member States which required proof of good repute or proof that retailers had not previously been declared bankrupt should simply accept an extract from the judicial record – or analogous certification – by the foreign authorities (without having its own authorities assessing such requirements again).
[411] P.Craig, G. de Burca, *op. cit.,* p. 802 (this is because of its accent on equal treatment).
[412] *Id.,* p. 797 (attributing this association to AG Warner in Case 52/79, *Procureur du Roi v. Debauve* [1980] ECR I-00833).
[413] See C. 221/85, *Commission v. Belgium*, [1987], ECR I-00719.
[414] *Loi no. 73-1193 du 27 décembre 1973 d'orientation du commerce et de l'artisanat* (for an in depth discussion of the law see 3.4.1).
[415] Case C-20/87, *Ministere Public v. Gauchard*, [1987], ECR I-04879; Case 204/87, *Criminal Proceedings Against Guy Bekaert*, [1988], ECR I-02029

freedom of establishment, even if such a restriction is prompted by the wish to protect a class of traders that is threatened with extinction."[416]

The national judges explicitly configured the rules as aimed at protecting a certain class of traders – small traders – and seemed to suggest that this interest is not sufficient to deviate from freedom of establishment. In so doing they appeared to stand with the applicants, such as Mr. Gauchard who in his observations to the Court stated: "*it may be observed that 13 years after its adoption the Loi Royer has long since attained its objective of giving other forms of business the time needed to adapt to the presence of supermarkets. Today, large and small shops share the market more or less equally, and small businesses have succeeded in assuring their own survival by specializing in certain fields*."[417] Furthermore, with regard to the implementation of the rules, Mr. Gauchard claimed that they protected French retailers in general – traditional and modern distribution alike. While the rules had been introduced to protect small retailers, in fact, supermarket owners had soon installed their representatives in the Departmental Commissions for Commercial Planning and "*they impose[d] on foreign traders the same restrictions they [had] suffered in 1974 as a result of the law Royer.*"[418]

Unfortunately for my own purposes, the Court had nothing to say about these arguments. In both cases, in fact, the Court found that freedom of establishment could only be triggered in cases with a transnational dimension, which was there clearly absent. The Commission in its submission also claimed that in any case indistinctly applicable measures could not constitute obstacles to establishment.[419] The Court was more reticent on this point, but by mentioning the authority of *Commission v. Belgium [1987]*[420] it seemed

[416] Case 20/87, para 8; Case 204/87, para 8.
[417] This meant that *"The first 'legitimate ground' for the law's adverse affect on the freedom to set up a business has thus disappeared"*. The first legitimate ground is the protection of small shops. In fact Mr. Gauchard argued that the Law Royer pursued two interests: "*Protection of small business against the unchecked development of super- markets and Protection of the public interest in town-planning matters"* (*Report for the hearing*, p. 4882). The first had been achieved, and the second, Gauchard also adds that the law Royer is unnecessary for planning purposes because France has other and more effective planning rules to that end (p. 4882). The French government in its observations does not try to justify the law but simply stresses that freedom of establishment does not apply to purely internal situations and that the Law Royer "*in fact creates the conditions needed for open and fair competition by regulating the growth of retail businesses.*" (p. 4883)
[418] *Id.*, p. 4880-4884),
[419] *Id.*, p. 4884. The court decided both cases with reference to the purely internal nature of the issues at stake and hence declaring the inapplicability of art 49 TFEU, nor of the 1968 implementing directive on retail trade mentioned above.
[420] C-221/85, *Commission v. Belgium* [1987].

to validate the then dominant interpretation of establishment as limited to equal treatment and protection from discrimination.

This orientation, however, was soon to be overcome as the Court expanded, in the early 1990s, the scope of application of establishment also to include indistinctly applicable measures, thus aligning its Case Law in this field to the rest of the free movement jurisprudence.[421] And this line of reasoning has consistently been confirmed by the Court since.[422] Furthermore, a similar expansive evolution has concerned the application of establishment provision to purely domestic situations. While the Court initially rejected every claim under art 49 TFEU when the situation was wholly internal (see above the preliminary references on the *Loi Royer)*[423], it has more recently provided rulings to national courts also in cases of challenges to national regulation coming from citizens. [424]

[421]Originally affirmed in Case C-19/92, *Kraus v Land Baden Wurttemberg,* [1993] ECR I-01663, para. 32, this approach was further made explicit in Gebhard were the Court stated that: "*it follows from the Court's Case Law that National Measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaties must fulfill four conditions:*" they must be applied non-discriminatorily (1); must be justified by imperative requirements (2); must be suitable to achieve the objectives they set to pursue (3) and necessary to achieve them (4). (para 37).

[422] The standard formula now employed is: "*any national measure... which is liable to hinder or render less attractive the exercise by EU nationals of the Freedom of Establishment guaranteed by the Treaty constitutes a restriction within the meaning of art 49 TFEU*." See Case C-299/02, *Commission v. Netherlands*, [2004], I-09761, para 15; Case C-140/03, *Commission v. Greece*, I-03177 [2005], para. 27; Case C 570/07, *Blanco Perez and Chao Gomez*, [2010], I-04629, para 53; C-384/08, *Attanasio Group* [2010] ECR I-02055, para 43.

[423] A textual reading of art. 49 TFEU suggests that self-employed individuals establishing their business in their own member states cannot complain about national regulation by relying on art. 49 TFEU. The Court however affirmed the possibility to raise freedom of establishment for citizens who had been previously residing abroad and there obtained qualifications – thus exercising their freedom of movement. See Case C-115/78, *Knoors v. Secretary of State for Economic Affairs* [1979], ECR I-00399, para 24 where the Court first affirmed that: "*the reference in art 39 TFEU to 'nationals of a Member State' who wish to establish themselves 'in the territory of another member state cannot be interpreted in such a way as to exclude from the benefit of Community Law a given Member State's own Nationals when the latter are ... in a situation which may be assimilated to that of any other persons enjoying the rights and liberties guaranteed by the Treaty.*" In that case, however, the nationals involved had been residing and received education abroad before establishing their business in their own Member State, so there was a clear transnational dimension. The Court, instead, has generally declined to decide in cases with a wholly internal dimension. This, in turn, has been said to create reverse discrimination, in which foreigners get a more favorable treatment than nationals – see P. Craig and G. de Burca, *op. cit.* p. 807 (see in particular, Case C-212/06, *Government of the French Community and Walloon Government v. Flemish Government,* [2008] ECR I-1683.)

[424] The Court has provided indication to national Courts also in wholly internal situations for two sets of reasons. The Court has acknowledged that "*a reply might none the less be useful to the national court in particular if its national law were to require, in proceedings such as those in this case, that a ... national must be allowed to enjoy the same rights as those which a national of another Member State would derive from Community law in the same situation*." See Case C-451/03, *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, para. 29; Case C□202/04 *Cipolla and Others* [2006] ECR I□11421, para. 30; *Blanco Pérez* [2010], para 36 and Case C-393/08, *Sbarigia*, [2010] ECR I-6337, para 24. The Court might also decide because it cannot be excluded that foreign operators might find themselves in a similar situation than the local applicants. See Case C-384/08 *Attanasio Group* [2010], para 23 & 24; *Blanco Perez* [2010] para. 40; *Sbarigia* [2010] para 24. See also the Susisalo case where private operators in Finland were allowed to challenge a national law that granted a Public University preferential treatment in managing pharmacies. That measure was ultimately found to be justified, but art. 49 was considered a valid

These two "new" features of establishment have been recently confirmed in a series of decisions involving authorization schemes for entry in health-related retail markets – pharmacies, opticians, and dental clinics. In Blanco Perez, dealing with a scheme that provided for competitive allocation of new pharmacy licenses in the Autonomous Community of Asturias, the Court stated that: "*a national rule which makes the establishment of an undertaking from another Member State conditional upon the issue of prior authorization... is capable of hindering the exercise by that undertaking of freedom of establishment by preventing it from freely pursuing its activities through a fixed place of business.*"[425] And this is exactly the same way in which, one year before, in *Hartlauer*, the Court had dealt with an authorization scheme based on a test of economic need applied to for-profit dental clinics in Austria[426] – approach confirmed more recently for Sicilian rules limiting the number of opticians in *Ottica New Line di Accardi Vincenzo.*[427]

While these cases concerned particularly severe obstacles to establishment –territorial restrictions (quotas) and minimum distance requirements – and furthermore dealt with specific markets whose regulation is explicitly motivated by public health concerns (see infra the discussion on justifications), in other cases the Court has also found authorization schemes for generalist retail to be obstacles to establishment. In an infringement case against a Catalan authorization scheme for large supermarkets – the most directly relevant case to my discussion to which I will go back for an in depth analysis – the court re-affirmed that *"the concept of restriction for the purposes of Article 49 TFEU covers measures taken by a Member State which, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder intra-Community trade."*[428]

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basis to challenge the measure: Case C-84/11, *Susisalo and Others* [2012], ECLI:EU:C:2012:374. According to Craig and de Burca (*op. cit*, p. 808, ft. 97) the Court in these cases has established a sort of "*Guimont exception, indicating that it may nonetheless provide a ruling for a national court where, eg. national law was being extended to provide the same benefits to nationals as non-national EU persons would enjoy under EU law*).

[425] First, the undertaking may have to bear the additional administrative and financial costs which any such grant of authorization entails. Secondly, the system of prior authorization acts as a bar to self-employed activity for economic operators who do not satisfy predetermined requirement. *Blanco Perez* [2010], para 54.

[426] Case *C-169/07*, *Hartlauer* [2009], ECR I-01721, (para 34). The case refers also to previous cases in which the Court had found that subordinating certain activities to tests of economic or social need is always an obstacle to establishment – even for immigration rules: see Case C-63/99, *Gloszczuk* [2001], ECR I-04221

[427] Case C-539/11, *Ottica New Line di Accardi Vincenzo v. Comune di Campobello di Mazara* [2013], ECLI:EU:C:2013:591, para 26.

[428] Case C-400/08, *Commission v. Spain* [2011] ECR I-01195. For a case note see: L. Sancho, *Freedom of establishment and Catalonian legislation concerning the establishment of shopping centres*, Zeitschrift für Gemeinschaftsprivatrecht, 8(6), pp. 281-283, (2011).

In conclusion, establishment, like the other freedoms of movement, is today construed by the Court so as to catch both direct and indirect discrimination against foreign firms and also indistinctly applicable measures insofar as they are able to considerably restrict market access. This means, for my own purposes, that for a national retail planning scheme to violate freedom of establishment it does not necessarily have to disadvantage foreign firms *vis a vis* local retailers, but it is enough that this measure makes *de facto* less advantageous the establishment of new entrants. Furthermore, as I said before, establishment is today construed so as to allow business-owners to challenge their own nations' regulatory schemes.

3.3.1.1. Justifying Restrictions: Non-Market and Purely Economic Concerns.

In this context, the only remaining difference between distinctly and indistinctly applicable measures concerns the justifications available. For distinctly applicable measures (which is discriminatory measures), justifications are limited to the three grounds explicitly mentioned in article 52 TFEU: public policy, public security and health. For indistinctly applicable measures, in line with the jurisprudence stemming from *Cassis de Dijon,* possible justifications include all the objectives identified by the Court as *mandatory requirements* or *overriding reasons in the public interest.* Furthermore, in line with a jurisprudence that is constant across the market freedoms, the Court adopts proportionality analysis. This means that the measures seeking justification also need to be suitable, necessary, and proportionate to achieve the desired *overriding reason.*[429]

The list of overriding reasons recognized by the Court is long and expanding. Yet, not all reasons are able to justify obstacles to free movement. The Court, in fact, draws a rigorous distinction between non-market concerns and purely economic ones. While the former are able to justify obstacles to free trade, the latter are not. The Court has accepted all sort of public policy objectives as *non-market concerns* capable, at least in principle, of justifying obstacles to free movement, but it still rigorously sticks to the notion that *purely economic*

[429] *Gebhard* [1995], para. 37.

interests cannot serve as justifications.[430] The typical phrase employed by the Court is that *"grounds of a purely economic nature cannot constitute overriding reasons in the public interest justifying a restriction of a fundamental freedom."*[431] In this sub-section, I will briefly digress into the distinction between non-market interests and purely economic interests, which is particularly relevant to my broader discussion. As I argue – and as the forms of market regulation which form object of this chapter illustrate – this distinction is fundamentally unstable. While it theoretically makes sense, from the perspective of building a common market, that purely economic, including protectionist, reasons should not be able to justify deviations from the market freedoms, the practice of the Court is unavoidably rich of ambiguities, which ultimately points at the broader and more fundamental problem of distinguishing what is economic from what is not.

It is not easy to understand what the Court means with *purely economic reasons*. Even a cursory reading of the cases which employ the formula reveals that the Court has drawn under its heading very different situations[432] – "*from micro-reasons, such as the protection of a particular undertaking, to macro-reasons, such as avoiding the loss of tax revenue or the erosion of the tax base."*[433] While many of these reasons are irrelevant to my discussion, one is key. The reasos I am particularly interested in is protection of the *economic viability* of a certain

[430] See J. Snell, *Economic Justifications and the Role of the State*, in P. Koutrakos, N. N. Shuihbne, P. Syrpis, *Exceptions to EU Free Movement Law: Derogation, Justification, Proportionality* (Oxford, Hart, 2016), pp. 12-31, noting how this is one of the few rules that are clear-cut in the otherwise mostly casuistic law of exceptions to free movement.

[431] See C-400/08, *Commission v. Spain* [2011], para. 74, among many others (see next footnote).

[432] In many cases, the economic interest to be protected is that of State revenues or the financial viability of a certain public body. For example, in C-352/85, Bond *van Adverteerders v Netherlands* [1988], ECR I-02085, the court stated that "*economic aims, such as that of securing for a national public foundation all the revenue from advertising intended especially for the public of the member state in question, cannot constitute grounds of public policy within the meaning of article 56 of the treaty*" (34). The Netherlands tried again to justify a similar rule in case *C-288/89, Collectieve Antennevoorziening Gouda* [1991], ECR I-04007, with reference to cultural policy, but the court said that in fact the rule simply served to guarantee revenue to the public foundation (and in this sense was purely economic; para. 23,24). In other cases, the objectives seem different still. See for example case C-120/95, *Decker v. Caisse de Maladie des Employés Privés*, [1998] ECR I-01831; and Case C-158/96, *Kholl v. Union des Caisses de Maladies*, ECR I-09131 – dealing with Luxemburgish rules that prevented reimbursement for optical and dental prescriptions filled abroad. Here the Court is saying if the aim is the protection of Luxemburgish opticians and dentists it is not justifiable, if the rule is there to safeguard the financial integrity of the social security system is fine (here it could not be, because the reimbursement was flat). The tax cases have a similar structure, Case C-96/08, *CIBA* [2010], ECR I-00911, for example, dealt with a Hungarian Tax (VTL), calculated on wage costs by including wage costs incurred by the firm in its plants abroad (even if these jobs were autonomously taxed in the other Member State as well). The detriment that giving up that rule would bring to the revenues dedicated to vocational training is considered a purely economic justification and as such not admissible (para. 48). See also case C-436/00, *X and Y*, [2002] ECR I□10829 where again the cohesiveness of a tax system is an acceptable concern while concern for a mere decrease in tax revenue is a purely economic one and therefore not admissible (para 51).

[433] J. Snell, *Economic Justification*, cit., p .15.

industry, or specific type of business within that industry. One useful case to illustrate this reason is the *Greek tour guides* case.[434] In that case, a mandatory form of work contract for tourist guides was considered contrary to the freedom to provide services. Greek government had explicitly tried to justify the rule as useful for "*maintaining industrial peace in the sensitive area of the supply of tourist services, in respect of which the Greek State, as a country for which tourism is important, has a reasonable and justifiable interest in intervening by regulation*" (para. 5). Greece further specified that the rules were needed "*to ensure the proper functioning of the national economy*" (para 22). The Court rejected these justifications as purely economic grounds which cannot constitute overriding reasons in the public interest.

In this case, it is quite clear what the Court wanted to prohibit: rules that aim at offering protection to an industry because of its strategic importance for the national economy. In other words the rules were aimed at protecting the *economic viability* of a certain industry through the particular businesses partaking in the national market. Hence in the Greek case the Court seemed to rule out that *economic viability* could serve as a justification, at least insofar as it ultimately aims to protect interests as vague as the national interest or social (industrial) peace.

To go back to the rules object of my study, on the basis of this Case Law one should conclude that a market-restricting form of regulation which aims to ensure the *economic viability* of small retailers could not be justified, at least insofar as small retailers gain protection in their own right, as a socially relevant or economically important sector. A hint of this is also present in the language used to argue cases dealing with rules that sought to protect small traders. While in the cases that reached the Court in the 1980s, deviations to the freedom of establishment were seeking justification as needed to protect "*a class threatened with extinction*," such language disappears from the more recent cases (see infra). This may depend on the fact that in more recent cases, the parties have internalized the distinction between purely economic and other justifications and hence

[434] Case c-398/95, *Settg v. Ypourgos Ergasias* [1997], ECR I-03091. Snell compares this case to Case C-384/93, *Alpine Investments,* [1995] ECR I-01141, where instead the court accepted the interest of protecting the reputation of the Dutch financial services sector as a legitimate concern, and emphasizes the lack of coherence of the case law.

Member States do not try anymore to justify their rules as needed to protect a valued or strategic class or profession.

However, as illustrated by other cases, *economic viability* keeps reappearing, albeit implicitly, as a justification, in various areas of the Case Law. And the Court, even if it sticks to the formula that *purely economic reasons* cannot serve as justifications, does not seem to rule out *economic viability*. This emerges clearly in the cases mentioned above dealing with territorial restrictions in health-related services (*Hartlauer*, *Blanco Perez* and *Ottica Accardi*).[435] Let's consider *Blanco Perez* first. In that case, the Court started by acknowledging that territorial planning is generally accepted under EU Law for hospitals and clinics (public health establishments) in order to avoid gaps in the access to public service and duplications (para 70). And the Court found that planning, through minimum distance requirements among other instruments, was also acceptable in relation to the location of pharmacies. Once more, planning served not only to ensure service in isolated areas, but also to avoid duplications in more densely inhabited (and thus profitable) ones (para. 80). The Court does not say it, but minimum distance requirements, akin to the notion of a catchment area, aim to ensure sufficient business to each retailer, and hence its *economic viability*. Therefore, even if the Court does not say it explicitly, public health is here achieved through ensuring the *economic viability* of incumbent pharmacies, which national regulation seeks to maintain.[436]

Ottica Accardi replicates this reasoning almost identically, in a case concerning minimum distance requirements for opticians – an activity for which, arguably even more than pharmacies, the commercial dimension prevails over the public health concerns.[437] In Hartlauer, concerning dental clinics, the partial overlap between *economic viability* and

[435] In those cases, by reference to the overriding interest of public health, "*the Court has found territorial restrictions to be compatible with EU free movement rules, typically demanding only some minor adjustments so as to reorganize the national regimes in a 'consistent and systematic' manner*." D. Damjanovic, *Territorial Restrictions in the Chimney Sweep Business Under the Services Directive: Hiebler*, Common Market Law Review, 54:5, pp. 1535-1554 (2017) at 1535. This, according to Damjanovic is owed to a particularly deferential application of the proportionality test, akin to the special proportionality test applied to Services of General Economic Interests (p. 1547).

[436] This seems confirmed by the fact that the Court admits that the damage to new qualified potential entrants that territorial restrictions cause is justified by the nature of the interest, public health, which weighs more than establishment and can thus justify restrictions with adverse circumstances for certain retailers (*Blanco Perez* [2010] para.90).

[437] The referring court emphasizes the commercial dimension of the activity: see *Ottica New Line* [2013], para. 12.

non-economic goals is more explicit still. In that case, the Court specified that the overriding reason of public health protection, which is capable in principle of justifying a law subordinating authorizations for dental clinics to tests of economic need,[438] comprises the public interest to ensure the *financial balance of the social security system*.[439] This is an overriding reasons in the public interest previously accepted by the Court and specifically recognized as not-purely economic.[440] But again, as noted by Damjanovic, financial balance is here "*only another formulation for the goal to ensure the economic viability of services providers.*"[441] All in all, I would argue, in these cases the Court allows concerns for the *economic viability* of service providers to justify obstacles to establishment.

To make sense of this more or less explicit acceptance of *economic viability* as justification, while safeguarding the distinction between available non-market interests and unavailable purely economic ones, one may follow Damjanovic in noting that in these cases "*economic viability is not the ultimate public interest reason, but the instrument to achieve the ultimate aim of public health protection.*"[442] One may also suggest that the Court treats these "*health retailers*" like Services of General Economic Interests – for which Member States are allowed to accord a certain protection to services providers in order to compensate them for the public interest function they serve.[443] But even if one is to understand this specific set of decisions as explained by the special nature of the health-related concerns (in pharmacies, opticians and dental clinics), the instability of the distinction between purely economic and acceptable reasons remains.

[438] The Court considered a test of economic need for new establishments "*corollary of a system of planning of medical service*s" (*Harlauer* [2009], para 48).
[439] So in these cases the economic viability argument is explicitly accepted as a justification This Is about planning of medical service, which is acceptable and it includes outpatients clinics (para 50), which is private clinics. In *Hartlauer* the measure lacked consistency and systematicity as part of the appropriateness test (pare 55) insofar as group practices were excluded. If the concern is genuine, says the Court, Austria will have to extend the test of economic need to group practices, while before it was limited to outpatient activities.
[440] See for example Case C-371/04, *Watts* [2006], ECR I-04325, para 103-104.
[441] D. Damjanovic, *Territorial Restrictions, cit*. p. 1549.
[442] *Ibid.*, p. 1550.
[443] And in fact in Hartlauer the Court suggests that, given the public health concerns at stake, Member States need to be accorded special discretion in determining the desired level of protection. As the recent Chimney Sweeper case confirms, the economic viability argument is able to justify restrictions for Services of General Economic Interest – Case C-293/14, *Gerhart Hiebler v. Walter Schlagbauer* [2015], EU:C:2015:843, para 65-70. But as the Court clarifies in that case, for this to be possible one needs to be able to distinguish between the unprofitable public service provided and the profitable one. Hence for Services of General Economic Interest, the *economic viability* argument becomes explicitly acceptable for the Court, even if the measure still needs to be proportionate.

That instability, in fact, also shows through in other areas of the Case Law. It manifests, for example, in the Catalan case on an authorization scheme for larger stores, which I will analyze in depth in the next section. There, Spain sought to justify its rules by reference to environmental protection, *consumer protection*, and *town and country planning*.[444] Rather unsurprisingly the Court accepted all three as valid overriding reasons. But for at least two of them – *consumer protection* and *town and country planning* – the distinction with the purely economic reason of "*helping small local traders*"[445] seems very thin. Saying that *consumer protection* is a valid concern and *protecting small retailers* is not is, in that case, particularly problematic. This is because the protection of consumers passes through the help accorded to small retailers. In fact, the only way in which an entry-restricting authorization scheme that discriminates against large retailers can protect consumers is through aiding the *economic viability* of endangered small retailers, with the implicit assumption that the survival of these "threatened" businesses is either valuable in order to provide consumers *real choice* between different distribution channels (retail pluralism, as Spain suggests – see infra) or that the retailers protected offer better services, which is in itself good for consumers.

The Court, as we will see in more detail, did not rule out that this notion of consumer protection could serve as a justification. It ultimately did not justify the scheme because it failed the proportionality test insofar as it contained a test of economic need (see infra). But this suggests that what determines the acceptability of the regulation is in fact not the interest itself, but the kind of instrument chosen to pursue it whose acceptability is sector-specific (tests of economic need were acceptable for dental clinics, they are not for retailers in general). In other words, the Court decides that certain instruments necessarily suggests that the goal is purely economic, so that it is hard to understand if to be unacceptable is the instrument or the goal. In any case, by accepting consumer protection as a valid overriding reason here, the court is accepting that the economic viability of small retailers could deserve protection. Still, the Court does not say it. And this reticence, as I will further argue, may be problematic because it may drive false justification efforts and prevent to devise truly "*proportionate*" instruments to achieve that "acceptable" goal.

[444] Case C-400/08, para. 74.
[445] That is how the Commission, in that case, seeks to qualify the objective of the Catalan regulation (Case C-400/08, para. 89).

The instability also emerges in the *town and country planning* justification. The recognition of *town and country planning* as a legitimate concern has been affirmed mostly through preliminary references on the compatibility with free movement of capital of national measures limiting real estate alienation in defense of objectives "*such as maintaining, in the general interest, a permanent population and an economic activity independent of the tourist sector in certain regions.*"[446] In Konle, the Court justified a Tyrolese authorization scheme aimed at avoiding that houses be sold as vacation or second houses.[447] Since then, the Court has repeatedly affirmed the validity of this interest, even if often these cases failed on proportionality.[448] Having real people living in a city and having real shops selling things within those cities are complementary parts of most urban strategies to keep city centers alive and compact. EU law, at least in principle, is sympathetic to such projects. But once more planning urban development can easily become a way of planning the economy, and retail planning policy, as it must be clear by now, has much of this ambiguity.

All this to say that, in more than one area of the case law and especially with regard to retail planning, the distinction between non-market and purely economic concerns is extremely thin. Non-market concerns are sometimes achieved through the protection offered to certain category of businesses, if not a whole industry, which for the court is a purely economic concern. At the same time, the Court has in various instances accepted justifications which only make sense if one accepts to protect the economic viability of certain businesses. These cases also seem to show that the determination of a goal as an acceptable *overriding reason* often depends on the choice of instruments, and that the acceptable goals depend on the specific market involved. All in all, the abstract discussion

[446] Case C-302/97, *Konle*, [1999] ECR I-03099, (para 40).
[447] Interestingly the Court found that a prior authorization procedure is always disproportionate for immovable property, such as currency exports, it is not with regard to housing (*Ibid.,* para. 44 and 45).
[448] In the analogous C-515/99, *Reisch and Others* [2002], ECR I-02157, the Court added that "this finding can only be strengthened by the other concerns which may underlie those same measures, such as protection of the environment" (para. 34). In *Festersen*, Case C-370/05, *Uwe Kai Festersen* [2007] ECR I-01129, a Danish rule that required to take permanent residency in acquired agricultural land, was justified by Denmark as needed, "*to preserve the farming of agricultural land by means of owner-occupancy, which constitutes one of the traditional forms of farming in Denmark, and to ensure that agricultural property be occupied and farmed predominantly by the owners, second, as a town and country planning measure, to preserve a permanent agricultural community and, third, to encourage a reasonable use of the available land by resisting pressure on land*" (para. 27). The Danish rule however, in that cased was deemed to be a disproportionate obstacle to freedom of establishment. See also Case C-452/01, *Ospelt v Schlosse Weissenberg* [2003], ECR I-09743, concerning Austrian legislation that subordinated the sales of agricultural (and forestry) land to a special authorization: "*preserving agricultural communities, maintaining a distribution of land ownership which allows the development of viable farms and sympathetic management of green spaces and the countryside as well as encouraging a reasonable use of the available land by resisting pressure on land, and preventing natural disasters are social objectives*" (para. 39).

of goals, and the distinction between purely economic and non-market goals do not seem to lead to a fruitful discussion of what market regulation wants to achieve and it may thus drive false justification efforts. This is problematic because it may prevent EU Law to perform what many see as the virtue of its justificatory paradigm, which is to unveil the authentic goals of national regulation and test the efficacy of the instruments chosen to achieve them, while at the same time disclosing the hidden costs of those instruments. [449]

3.3.2 Case 400-08 Commission v. Spain – Catalan Hypermarkets, Mediterranean Lifestyles and Free Establishment.

In the previous sections I have anticipated some relevant features of Case C-400-08, *Commission v. Spain,* [450] the Court's decision which most directly engages with the compatibility of retail entry regulation with freedom of establishment.[451] Here I offer an in depth contextual analysis of that case as a way to better illuminate the conflicts I study and better isolate the interests involved.

The case is an infringement procedure started by the Commission following a complaint from several large undertakings about the rules governing the opening of large retail establishments in Catalonia.[452] The first letter of formal notice was sent on 9 July 2004.[453] The Catalan law was modified in December 2005, but for the Commission the amendments failed to eliminate the problems and rather introduced further restrictions to freedom of establishment. In fact, over those years, restrictions to entry in retail markets had become more stringent across Spain, and in Particular in Catalonia – all along one of the Spanish regions with the strongest regulatory stance. A new letter of formal notice was sent on 4 July 2006, to which Spain responded with further explanations. [454] The

[449] O. Gerstenberg & C. Sabel, *Directly-Deliberative Polyarchy: An Institutional Ideal for Europe*, cit.; Y. Svetiev, The EU's Private Law in the Regulated Sectors: Competitive Market Handmaiden or Institutional Platform?, *cit.*

[450] Case C-400-08, *Commission v. Spain* [2011], ECR I-01195.

[451] See however later in this chapter various other infringement procedures initiated by the Commission, (3.3.4).

[452] The Spanish Retail landscape is dominated by a high presence of French supermarkets – e.g. Carrefour.

[453] The original concerns of the Commission revolved around Ley 17/2000, de 29 de diciembre, de equipamientos comerciales.

[454] The then commissioner for the Internal Market Charlie McCreevy is reported having rhetorically asked: "*which kind of areas are left available for commercial establishment... the sum of the various provisions factually prohibits the implantation of large establishments outside of city centers and in city centers where there are already*

Commission, not satisfied with Spain's explanations, issued a reasoned opinion on December 23, 2007. Spain, in its response of 3 January 2008, confirmed its intention to amend its legislation but stated that the changes would not be made within the 2 months deadline given by the Commission but in the process of implementing the Services Directive. Unconvinced, the Commission brought action on 16 September 2008. Catalonia and Spain had indeed amended their legislation respectively in 2009 and 2010,[455] but the Commission asked the court to decide on the previous laws, which the Court did.[456] So the decision of the Court intervened on laws that had been already amended and were to a large degree not in place anymore. This, however, does not detract from the relevance of the decision for my discussion.

The decision has been interpreted as one where the Court pushes the liberalizing potential of freedom of establishment quite far. According to Craig and de Burca: "*the strict scrutiny applied by the ECJ to what was agreed to be non-discriminatory Spanish legislation... clearly illustrates the powerfully liberalizing approach adopted by the Court to the economic freedoms of the Treaty*."[457] A closer look, however, reveals that the Court actually only accepted some, and arguably not the most relevant, Commission complaints. Overall, my analysis of the case in this section would like to show that the liberalizing potential of freedom of establishment towards national retail planning schemes is not as radical as a more superficial assessment of the Case Law might suggest. In order to show this, it is necessary to reconstruct in quite some detail the functioning of the Spanish framework law and the various Catalan regulations complementing it.[458]

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large establishments" See A. Missè, *Bruselas Considera Que la Ley de Grandes Superficies Limita la Liberad de Apertura*, Cataluna, 14 July 2006.

[455] Decreto *Ley 1/2009, de 22 de diciembre, de ordenación de los equipamientos comerciales*, for Catalonia. And Ley 1/2010, de 1 de marzo, de reforma de la Ley 7/1996, de 15 de Jenero, de Ordenación del Comercio Minorista for Spain. These two pieces of legislation implemented the Bolkestein directive for Spain and Catalonia with specific regard to retail distribution. This was a special implementation for the commercial sector, made necessary by the intensity of the restrictions in this field. See M. Matea, *La Transposicion de la Directiva de Servicios a La Normativa Espanola de Comercio Minorista*, Boletìn Economico (Banco de Espana), 10 /2010, pp. 104-112, (2010), p. 105

[456] The Commission argued this was necessary also to help inform its views on the new law. A.G. Sharpsoton, *Opinion of Advocate General Sharpston*, delivered on 7 October 2010; Case C-400-08, para 23.

[457] P. Craig, G. de Burca, *op. cit.*, p. 806.

[458] This is not always easy given the complexity of the regulatory framework and the multiple levels of government involved. Furthermore, the complexities of the underlying legal framework seem aggravated by what Advocate General Sharpston complained about as the lack of clarity and detail of the Commission action and the comparable *lack of focus* of the Spanish Government's response (para 34): "*I should like to remind the Commission of its duty to state its case in a manner sufficiently clear and precise to enable the defendant to prepare its defense and the Court to rule... It may be added that the Court's task might also have been facilitated by a more focused approach on the part of the Spanish Government*."

3.3.2.1. The Conditions for Obtaining a Specific Retail License

The Spanish National Law 5 January, 1996 n. 7 (Law 7/1996 or the Spanish Law) on retail establishments (*Ley de ordenaciòn del comercio minorista*) set up a general framework for commercial establishment that Autonomous Communities (AACC) specified and supplemented through their own laws.[459] The key principle of the Spanish law was that larger retail outlets needed to obtain a retail-specific license (hereinafter indistinctly the license or the authorization) granted by the AACC (article 6.1).[460] Smaller establishments did not, but AACC could still require them to obtain other analogous licenses (Catalonia, in fact, did for medium establishments – see infra). As discussed above, by "*retail specific*" I mean that these authorizations are required on top of other (urban planning, use, environmental, etc.) permits that new shops may need to obtain – and in fact in most cases retailers still needed to obtain a separate planning permit from the municipality.[461]

Article 6 of the Spanish law (7/1996) prescribed that when deciding to grant or refuse a license, subnational entities needed to consider the "*adequacy of the existing retail facilities in the local area concerned and the impact which the new establishment might have on the commercial structure of that area*" (art. 6.2).[462] *Adequacy* was to be assessed by taking into account the needs of the population in terms of "*quality, variety, service, price and opening hours*" of the retail supply (art. 6.3). *Impact* was to be evaluated in terms of the improvement that new large establishments would bring to free competition and also their negative effects on small traders (art. 6.4).[463]

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[459] Hence, similarly to Italy (Bersani decree 1998 – see infra 3.4.1), Spain embraces a broadly regionalist framework – of shared law-making authority between central and regional government – on issues concerning commercial establishment

[460] While it was up to the Autonomous Communities to identify size thresholds above which an establishment was to be considered large, the national law prescribed that establishments larger than 2500 squared meters be always considered large (art. 2.3).

[461] Large retailers needed two authorizations: As it has been noted this is part of a tendency consolidated in the first 2000s of strengthening in retail regulation in most Spanish autonomous communities. In all of the autonomous communities there was system in place for which larger establishments need to obtain a retail specific regional license on top of a retail specific municipal one. Furthermore the trend had been one of an extension of the kinds of establishments falling under the authorization schemes, by lowering the size threshold to include also the hard discounters (such as Lidl). See M. Matea, *op. cit.* p. 105

[462] To that end, a non-binding report by the Competition Court is required: art. 6.2.2 of the Spanish Law.

[463] These general definitions of adequacy and impact, however, only found application in case of lack of more specific criteria (AG Sharpston, para 10). And since Catalonia had its own rules on this matter (see infra), the Court declared the action inadmissible for what concerns paragraph 3 and 4 of Article 6 of the Spanish Law (para 47).

Catalonia completed the national framework law through its own law 18/2005, *Ley de equipamientos comerciales* (law 18/2005 or the Catalan Law).[464] The Catalan law defined large establishments by reference to the population of the municipality in which they were to be located – e.g. large establishments were those of above 800 squared meters in towns of up to 10.000 inhabitants and those of above 2500 squared meters in cities with more than 240.000 inhabitants (art. 3.1).[465] It also introduced the category of medium-size retail outlets – those with surfaces from above 500 squared meters in smaller towns, to above 1000 squared meters in larger cities (art. 3.2).[466] As it has been noted, the relatively low threshold identifying large establishments, together with the category of medium size establishments, ensured control also on small supermarkets such as those typically opened by hard discounters. [467]

Medium-size establishments received the license by the municipality (art. 6), while for large establishments the competent (granting) authority was the Generalitat (the regional government of Catalonia) which decided on the basis of a report by the municipality (art. 7). So it was a system in which large establishments needed to receive a positive approval by both the municipality and the Generalitat (see infra – rules on procedure: 3.3.2.3). Furthermore, article 8 of the Catalan Law required both medium and large-size applicants to submit to the competent authority a market share report. This was issued by the Department of Trade which assessed the share of the relevant market possessed by the

[464] Ley 18/2005, de 27 de diciembre, de equipamientos comerciales, now superseded and replaced by Decreto Ley 1/2009, de 22 de diciembre, de ordenación de los equipamientos comerciales, which amends the discipline by also implementing, in this field, the services directive (see infra).

[465] As clearly shown by the table reproduced in the judgment these are the thresholds: in cities with population up to 10.000, establishments above 800 m^2; in cities with population from 10001 to 25.000, establishments above 1300 m^2; in cities with population from 25001 to 24.000, establishments above 2000 m^2; in cities with population above 240000, establishments above 2500 m^2.

[466] Medium establishments are: those above 500 m^2 in cities with population up to 10.000; those above 600 m^2 in cities with population between 10.001 and 25.000; those above 800 m^2 in cities with population between 25.001 and 240.000; those above 1000 m^2 in cities with population above 240.000.

[467] Just to give a sense of what these numbers mean: an average supermarket in a downtown area is normally below 2000 squared meters. Above 2500 are shops normally known as superstore or hypermarkets that integrate the sale of groceries and other goods. For example, Coop, one of the key actors in the Italian grocery markets classifies its stores in such way: *InCoop*, inside city centers, up to 1000 squared meters; *Coop* is their average size supermarket with a surface from 1000 to up to 2000-2500 squared meters – this is normally a large supermarkets; *Coop&Coop* identifies larger supermarkets which normally sell articles beyond groceries (from 2500 to 3500 squared meters); and finally *hypercoop*, as the name suggests, a hypermarket, which integrates groceries with many other merchandise sectors (above 3500 squared m.). Other grocery retailers apply similar distinctions across Europe, like Carrefour. Overall, the cut off of 2500 meters seems a generous squared footage to include all normal size supermarkets and exclude only hypermarkets.

undertaking planning to set up a new establishment.[468] Interestingly SMEs were exempted from this requirement, which may suggest that the Catalan Law was not only concerned with the (physical) size of new establishments, but also the size of the businesses operating them. If unfavorable, the market share report bound the granting authority (art. 8.4), which had to deny the license. And the market share report had to be unfavorable if the market share of the undertaking was above a threshold which was set up annually for each retail sector (art 33.2 and 31.4 Catalan Decree 378/2006).[469]

Article 10 of the Catalan Law restricted the discretion of granting authorities by listing the elements their decisions had to be based upon. These included: "*conformity with the territorial retail plan (PTSEC)* (see infra)*; compliance with town planning rules; safety of the project and the integration in the urban environment; mobility generated in terms of road network and use of public transport; parking; location within the consolidated urban area and compliance with additional municipal plans for retail; the right of consumers in terms of product quality, quantity, price and characteristics; the applicant undertaking's market share."*

Finally, article 11 of the Catalan Law set up an advisory committee called the Retail Facilities Commission, to advise the Generalitat on the granting of licenses. The committee was involved in various tasks in an advisory role. As specified by decree 378/2006 (art 26) the Commission's composition was as follows: 7 representatives from the Generalitat; 6 representatives from the municipalities; 7 business representatives (2 from chambers of commerce and 5 from the most representative traders organizations); 2 representative appointed from the Generalitat's department of trade as experts; and a secretary appointed by the chairmen of the committee. [470]

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[468] "In order to measure the market share, the department responsible for trade, in agreement with the department and bodies of the Generalitat responsible for competition, shall define the concepts of relevant market, market share and catchment area, which must be set out in the rules for the implementation of the present Law. In defining those concepts, account shall be taken, inter alia, of the products and services competing on the same market, the turnover of the sectors and the surface area of the existing establishments." Art. 8 , law 18/2005, as translated in para 16, case c-400/08.

[469] *Decreto 378/2006, de 10 de octubre, por el que se desarrolla la Ley 18/2005, de 27 de diciembre, de equipamientos comerciales*. That decree is still in vigor after few amendments. Art 28(2) determines that for large retail outlets the market share is calculated on outlets trading under the same name, whether under direct or indirect control (which of course includes franchising). At the time of the decision, since these had not been established yet, the Court referred to the previous ones in vigor: 25% of the sales area in Catalonia, or 35% within the catchment area of the proposed establishment. (C 400/08, para 25). For the report, however, holds the rule of silence-means-consent, so that it is considered to be positive if not received within 6 months from the request (art. 33.5).

[470] The composition has now been amended to include 2 representatives from consumers' organizations.

3.3.2.2. Restrictions on the Location and Size of Large Establishment

The clarity of the distinction between medium and large establishments was destabilized by additional requirements that introduced further categories and thresholds. These, as we are about to see, were among the most problematic elements of the Catalan regime. Article 4 of the Catalan Law introduced mandatory restrictions on the location of large establishments (on top of those deriving from municipal urban plans): it provided that large establishments could only open in *consolidated urban areas* (roughly coinciding with urban downtowns)[471] of provincial capital cities (*capitales de comarca*) or of cities with more than 25.000 inhabitants. And the same restriction applied to certain specialized stores with a sale area of above 1000 squared meters (e.g. those selling home electrical and electronic goods, sports items, personal equipment, and leisure and cultural items)[472] (art. 4.2). Overall, article 4 *de facto* banned new large stores in suburban areas.[473]

Finally, in order to understand the working of the Catalan system, one needs to consider the role played by the *Plan Territorial Sectorial de Equipamentos Comerciales* (PTSEC) (art 13. Law 18/2005). This was a retail specific regional planning instrument adopted every 4 years by the Autonomous Community. It provided sales areas limitations for each district and municipality in Catalonia, towards "*the achievement of a balance among the various format of commercial distribution and satisfaction of consumers needs.*"[474] According to article 3.3 of the Catalan Law, its limitations applied to all medium and large food establishments and to the specialized stores of above 1000 squared meters described above.

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[471] Consolidated urban areas were defined by the PTSEC (see infra) on the basis of local development plans as those areas of continuous apartment housing where retail outlets are integrated into residential areas (art. 4.3).

[472] This measure appears to target specialized megastores such as Decathlon (selling sportswear and sports equipment) or Brico Depot/Castorama (selling DIY, gardening tools and home improvement tools) or also bookstore and record store FNAC. Spain was very permeable to the penetration of French retailers, and in particular Specialized Large Stores. Decathlon, for example, has 144 shops in Spain. More research would be useful on the kind of local stores these new foreign entrants came to threaten.

[473] There are however exceptions for shops such as factory outlets, among others (art. 4.8), which would deserve closer consideration.

[474] See preamble, which also calls attention on the need of coordination between the policies of different municipalities. Lack of coordination had in fact caused many problems: "*En la elaboración del nuevo Plan territorial sectorial de equipamientos comerciales deberá tenerse en cuenta la relación funcional entre la oferta situada en determinados municipios y la incidencia de esta oferta en los municipios del entorno, en función de las condiciones de movilidad y de las interacciones que estas generen.*"

The specific PTSEC under consideration had been adopted as an annex of Catalan decree 379/2006. And the contested provisions were those which introduced specific restrictions on hypermarkets. Its art 10.2 in fact established that hypermarkets could not account for more than 9% of estimated staples supplies and 7% of estimated non-staples supplies in 2009.[475] Furthermore, no new hypermarket could be built in those districts for which excess supply was forecasted for 2009 (art. 10.2 PTSEC). Interestingly, the PTSEC was not only concerned with size threshold, but considered the shop format as an autonomous criterion to introduce restrictions. For example, one of its annexes defined the maximum surface that could be allocated to the various outlets (supermarkets, hypermarkets, specialist, establishments, shopping centers and department stores) for the period 2006-2009.

3.3.2.3. Certain Procedural Aspects

A few features of the application procedure were also problematic. Applicants for a large establishment had to present to the Generalitat a reasoned report approved by the Council of the Municipality. In case that report was unfavorable or if it was not granted within 3 months the license could not be issued (negative silence rule, aka tacit denial). Hence large establishment needed a favorable assessment by both the municipality and the Generalitat in order to obtain the retail license. The negative-silence-rule also applied to decisions from the Generalitat, if not granted within 6 months.

3.3.2.4. The Decision

As mentioned above, the Commission preliminary argued that the Catalan scheme was a form of indirect discrimination. [476] As confirmed by previous Case Law, the burden of proof of indirect discrimination is upon the Commission, which cannot rely on any presumption.[477] This means that the Commission needed to prove that there was a

[475] Decree 378/2006 defines hypermarkets as "self service outlets with a sales area of at least 2500 m2 selling a wide range of staple and non-staple goods, and with a large parking area." (art. 3)
[476] "*It is the Commission's responsibility to place before the Court all the factual information needed to enable the Court to establish that the obligation has not been fulfilled and, in so doing, the Commission may not rely on any presumption."* The case is identified as part of a trend towards a growing role of evidence-based assessments of indirect discrimination in the case law of the Court. See N. Nic Shuibhne, M. Maci, *Proving Public Interest: the Growing Impact of Evidence in Free Movement Case Law,* Common Market Law Review 50:4, pp. 965-1006, (2013).
[477] Citing on this point Case 290/87, *Commission v. Netherlands* [1989] ECR I-03083

difference in treatment between large retail establishments and other establishments and that that difference helped local Spanish businesses to the disadvantage of foreign businesses. As noted by the Court, there was undoubtedly a difference in treatment – large establishments needed a retail specific license (and certain outlets like hypermarkets were banned altogether in many areas of Catalonia), while smaller establishment did not. Nonetheless, for this difference in treatment to be considered indirect discrimination it needed to disadvantage foreign undertakings. And the only way in which such a system could be shown to be causing this disadvantage, argued AG Sharpston, was by showing that Catalan (local) operators prefer smaller retail spaces while foreign operators favor bigger ones.[478]AG Sharpston considered the data brought by the Commission insufficient and the Court agreed with her.[479]

After finding that the Commission had not brought sufficient evidence to prove indirect discrimination, the Court proceeded to consider the Catalan scheme as an indistinctly applicable measure which "*even though … applicable without distinctions on grounds of nationality… is liable to hinder or render less attractive*" the exercise of freedom of establishment. As discussed above, it was already clear in the Case Law that authorization schemes normally constitute obstacles to free establishment,[480] so the Court could expeditiously establish that the Catalan system, considered as a whole, had the effect to hinder or make less attractive the establishment of foreign operators (para 70). Even Spain was ready to agree that some of the Catalan provisions could constitute obstacles to free

[478] Interestingly Sharpston does not consider sufficient to find a discrimination the fact that introducing a licensing scheme of this kind might naturally benefit existing incumbents – she requires proof that local providers are favored for what concerns new entries.
[479] The Commission and the Spanish government brought data referring to different years and coming from different sources and both showed that foreign operators controlled a majority of the retail establishments above 2500 (between 53% and 68%) and local ones controlled a majority of the smaller establishments (between 72% and 92%). Also they both show, albeit with different scales, that the area cumulatively occupied by smaller establishments greatly exceeds the area of larger ones (from 4 to 10 times). But as noted by the Advocate General, there is in Spain great variation in the size of establishment below 2500 and no statistical data for these kinds of shops. Overall, for the AG, Even if the data suggested a positive statistical correlation between size and foreignness, it certainly did not prove any causation. The Commission argued that causation could be inferred from the fact that foreign operators naturally prefer larger retail outlets, because they need economies of scale in order to compensate the costs and general risk of setting up business abroad. Sharpston was skeptical of this line of thinking: even if it had to be true, this would apply to operators from other (far away) regions of Spain as much as to foreign operators.
[480] See in particular *Blanco Pérez and Chao Gòmez* [2001], para 54. See also Hartlauer [2009], para 34.

establishment (para. 71). The court thus proceeded to consider if each specific measure targeted by the Commission could be justified.[481]

In line with a well-documented trend, the core of the decision is shifted from the identification of the obstacle to its justification. As mentioned above, Spain defended the rules with reference to three overriding reasons in the public interest: Consumer Protection, Environmental Protection and Town and Country Planning. The Court did not spend much time on the grounds for justification which had all been recognized before as theoretically valid grounds. After reiterating the unavailability of purely economic reasons as justifications (see discussion in previous subsection 3.3.1.1.), it went on to consider whether each specific measure challenged by the Commission was effectively justified by these interests and proportionate.

The Court first considered ***restrictions on the location and size of establishment***[482]*,* such as the prohibition to open *large* stores outside of consolidated areas (para. 77). Spain defended these provisions with reference to environmental protection and town and country planning: "*the contested legislation seeks to avoid polluting car journeys, to counter urban decay, to preserve an environmentally integrated urban model, to avoid new road building and to ensure access by public transport*"(para 78).[483] The Commission argued that these instruments are not appropriate for such objectives. The Court disagreed: *"contrary to the assertions made by the Commission, restrictions in relation to the location and size of large retail establishments appear to be methods suitable for achieving the objectives relating to town and country planning and environmental protection, relied on by the Kingdom of Spain."* (80).

The Court however took issue with the severity of the rules on hypermarkets whose opening was de facto banned in most of Catalonia. As we have seen, new hypermarkets were prohibited in all districts in which there was excessive supply for 2009, and this was

[481] Interestingly while the Court finds the measure an obstacle as a whole, the justification is assessed for each specific measure.
[482] Art 4.1, Catalan Law 18/2005 and art 7 PTSEC with its restrictions on hypermarkets;
[483] It is interesting to notice here that the Court puts the accent on environmental matters rather than cultural ones – such as preserving a certain culture or way of life in the city; the only one which implies such themes is the reference to urban decay. Those motivations, however, feature more prominently in the amended Catalan Law (see infra 3.3.4).

the case in 37 out of 41 districts.[484] Furthermore, hypermarkets could open only if their cumulative business share did not exceed 9 and 7 per cent respectively of staple and non-staple supplies. It was for Spain to show, through specific evidence, that the measures were suitable and necessary to serve the stated objectives (para. 83). The Court, by noting that Spain had not brought such evidence, concluded that these restrictions on size and location of establishment were not justified (para. 85) and thus upheld the first complaint of the Commission.

If one is allowed to speculate, it is not to be ruled out that if Spain had brought more and better evidence – such as, for example, studies from marketing or other disciplines documenting how hypermarket can disrupt certain forms of sociability of small town centers, and bring detriment to social cohesion – the Court might have been more open. It is true that from the judgment it is hard to understand which city planning objectives Catalonia actually pursued through its ban on hypermarkets. If one is willing to believe the preamble of the Catalan law, art. 4 served to "*strengthen the vitality, cohesion, and commercial function of cities and at the same time encourage the large distribution to come closer to the citizens, who can thus avoid commuting to the periphery in order to satisfy their purchasing needs...*"[485] As mentioned above with reference to the British experience, it is by no means proven that banning shops to open outside of town would protect small traders – on the contrary these might be more directly hit by large distributors that are able to adapt to the small format imposed by downtown geography.[486] The intention of the Spanish law to bring large distribution downtown might be simply the inconsequential statement of a preamble not to be overemphasized, but it might also suggest that the law is genuinely concerned with the integrity of urban life, a goal for which EU law seems to have more sympathy than the protection of independent retailers.

The Court then went on considering the second set of complaints, ***conditions for obtaining a retail license:***[487] the authorization scheme itself and the modalities of its application. Here

[484] Furthermore, for the four remaining districts, the PTSEC provided a maximum surface area of 23.000 m^2 to divide between 6 municipalities (not very much if considered that the average hypermarket size is above 2.500).
[485] Preamble of Catalan Law 18/2015 – translation my own.
[486] R. Sadun, *op. cit.*
[487] The provision of a specific retail license for large establishment (art 6.1 of the Spanish Law) and the fact that account should be taken of adequacy of the existing retail structure and impact of the new establishment (art. 6.2 of the Spanish Law), the market share report requirement which is binding if unfavorable and which

the more general challenge is to the core feature of the Spanish law (art. 2) which is the discrimination against larger establishment, by only requiring a retail license from them. Spain defended this rule with reference to the three concerns mentioned above, while the Commission argued the rule in fact served purely economic objectives such as the protection of small local traders through a system of previous authorization (89). The Court seemed persuaded by the Spanish argument that a system of prior authorization is the only appropriate instrument to achieve the objectives, while a system of ex post notification would not do. The Court followed AG Sharpston in the finding that "*the introduction of preventative and therefore prior measures must be regarded as appropriate means of achieving the objective of environmental protection. Adoption of measures a posteriori ... appears a less effective and more costly alternative to the system of prior authorization*" (para 92). And the same reasoning applies to the objective of town and county planning (para 92). By rejecting this complaint, the Court safeguarded the key feature of the law – an authorization scheme only applying to large retail outlets.

What the Court deemed problematic was instead article 2 of the Spanish Law 7/1996, which required local authorities, when deciding on the granting of authorizations, to consider the impact of the new large establishments on existing retailers. This is not really a test of economic need, but it is close to it. Such a requirement, said the Court, could not be interpreted as serving consumer protection: it was about market structure and the negative impact of new entrants on existing retailers (para 95). As such it served purely economic interests, said the Court, and was thus unjustifiable. The same was true for the Catalan instantiation of this general rule which required a *market share report* to be submitted from all applicants (art. 8 of the Catalan Law and art. 31.4 and 33.2 Decree 378/2006). Hence here the Commission won: considering the impact of new entrants on incumbents and requiring market share reports are not adequate instruments to achieve non-economic goals – they necessarily suggest the goal is purely economic.

This is arguably the deepest, or at least more visible, wound inflicted by the Court on the Catalan legislation. The Press release on the Case titled: "*a Member State may not make the opening of a large retail establishment conditional upon economic considerations such as its impact*

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must be unfavorable if above a certain threshold (art. 8, Catalan law 18/2005 and articles 31(4) and 33(2) of Catalan decree 378/2006), the role and composition of the Retail Facilities Commission (art. 11 law 18/2005 and art. 26 Decree 378/2006); the lack of clarity of the criteria of art 10 law 18/2005.

on the existing retail trade, or the market share of the undertaking concerned."[488] However, this is hardly a new finding: the Court rules out requirements which, as we are about to see, had already been declared inadmissible and by the time of the decision were also explicitly prohibited by the Services Directive (art. 14). As discussed above (3.1.2), the Court does not rule out that consumer protection, which is here taken to mean safeguarding the "*real freedom of choice"* of consumers[489] by ensuring the economic viability of certain businesses – in the interest of maintaining a retail network where consumers have access to more than one retail channel – may be a valid concern. Pluralism of the retail network, one might say, is not an unavailable objective. But the fact that it was achieved through certain instruments (tests of economic needs) suggests that it is not a genuine concern. It suggests, in other words that the real concern is not pluralism, but the protection of incumbents which de facto impedes the large new entrants.

The Court went on considering the composition of the Retail Facilities Committee, an organ that needed to be consulted when granting licenses. The Commission did not complain about the function of the committee, but about its composition. As it used to happen, in fact, competitor business owners sat on these committees. The Court decided that it was not the presence of traders representatives as such to be problematic, but the fact that the *"only sectorial interest represented in that committee is that of the existing local trade."* This factor impeded to consider the composition of the committee as suitable to achieve the desired goals of environmental protection, consumer protection and town and country planning – particularly because of the complete lack of representation of consumers' interests. Here there is an interesting parallel with the *DIP v. Commune di Bassano* case mentioned above (see supra): in 1995 the Court said it was fine to have a minority of competitors sitting in the boards deciding on new licenses; in 2011 it became impossible to have an advisory board representing competitors' but not consumers' interests. Has the liberalizing impact of the Court expanded? Maybe. But one should consider that in revising its rules after the judgment Catalonia simply added two consumer representatives to the Commission, which seems to have been enough to avoid further action.

[488] Court of Justice of the European Union, *Press Release no 23/11*, Luxembourg, 24 march 2011.
[489] Preamble of Catalan Law 18/2005, speaking of "*Verdadera libertad de elección de los consumidores*" (comment to art. 8).

Finally, with reference to the decisional criteria identified by the Catalan Law (Article 10), the Commission did not challenge their substance, but rather their lack of precision (117). This may be explained by the fact that article 10 of the Catalan Law avoided mentioning all criteria that might have been problematic under EU Law: protection of small local traders, or the impact of new establishments on them, as well as references to a local culture, which might strongly suggest protection of incumbents. This is not surprising given that, as attested in the preamble, the drafters of the law were well aware of the need to eliminate all tests of economic need or other purely economic requirements in order to avoid problems of compatibility with art 49 TFEU.[490] The problem, for the Commission, was that these criteria were so broad that it was impossible for an applicant to predict its chances of obtaining a license in advance (para 115). The Court followed Sharpston in her conclusion that "*it is difficult to specify precise thresholds in advance without introducing a degree of rigidity likely to be even more restrictive of freedom of establishment*" (AG Sharpston 116) and thus rejected the complaints on this measure. Overall, this statement suggests a preference of the Court for flexible rules rather than legally fixed criteria and thresholds.

For what concerns the third set of complaints, ***certain aspects of the procedure***, the Court focused in particular on the use of tacit denial. Spain argued that tacit denial served to allow the applicants to challenge administratiove inaction (para 120). The Commission claimed that this rule was disproportionate and that the same objective could be achieved through a positive silence system (para 121). The Court agreed in principle, but reaffirmed that placing the burden of proof on the justifying party (Spain) did not extend to requiring a Member State to prove positively that no other measure could achieve the same results. (123). Positive silence would have been better, said the Court, but negative silence was good enough (and also more easily managed by the national authorities). It thus disagreed with AG Shaprston and also plainly contradicted the obligation to adopt *silence means consent* introduced by the Services Directive – an element which might give credit to those for which, under the Directive, Member States are subjected to a stricter scrutiny than under the Treaty provisions (see infra).

[490] Preamble of Catalan Law 18/2005, explains the criteria of art. 10 are identified in order to avoid problems of compatibility with art 49 TFEU and the Case Law of the Court of Justice. In fact the analogous article of the previous law 10/2000 contained much more references to the economic consequences of new entrants.

3.3.2.5. Some Conclusions on the Case. Did Spain Lose?

Unlike what a superficial assessment could suggest, this judgment is not one in which Spain loses its autonomy to regulate entry in retail markets in any significant way. This can be affirmed simply through a careful reading of the decision, informed by some notions of how entry regulation works. A more accurate way to characterize the decision would be to say this: the Court has found a system of retail specific authorizations for large establishments compatible with EU free movement law, and it has demanded adjustments with reference to some of its requirements which previous Case Law had found incompatible with the internal market, and which are today explicitly prohibited by the Services Directive (see infra).

A decision that one could call "*deregulatory*" or "*liberalizing*" would have been one where the Court found a system discriminating against large retailers incompatible with the rules of the internal market, which the Court did not. Growing evidence showing that authorization schemes such as the Catalan one do not really help small local retailers while substantially disadvantaging supermarket-like (often multinational) distributors creates space for an argument that the Court should have sided with the Commission and affirm the discriminatory nature of the rules. I am not interested in making this argument here, but I would like to stress that the Court was given an option which one could call *deregulatory* but chose to go another way – it even preserved some features of the law (like the tacit denial) in sharp contrast with the Services Directive.

Still, one might remark that the outcome of the decision does not matter that much: Spain and Catalonia were forced to abandon their favored rules in the process of implementation of the Services Directive and the combined deregulatory impact of the Directive's implementation and the infringement procedure is much sharper than the one of the legal decision itself. In fact, as we have seen, the rules had been changed before the Court issued its decision. But as I will show in the next section, also an analysis of how Spain and Catalonia actually amended their framework is such as to exclude a qualification of the impact of EU interventions as simply deregulatory *(*see infra the discussion on the Services Directive).

While my analysis has tried to dispel some of the alarmism about the deregulatory impact of decisions such as this one, I have also tried to draw attention to what seem to me some problematic features of the decision. In particular, I have pointed at the insufficiency of the discussion on overriding reasons – with its rigid distinction between purely economic objectives and non-market concerns – to let emerge the more authentic motivations of national regulation. For example, despite the reference to urban and country planning it is hard to figure out what exactly the Catalan Law wanted to protect – which kind of city, which features of urbanity are valued, etc. The preamble of the Catalan Law suggests that it is a model of urbanization that Catalonia wants to protect: *una ciudad compacta, compleda y socialmente cohesionada*[491] – a city in which commerce has a critical function, goes on explaining that preamble: compact because it reduces the need to travel outside of it, complex because it harmoniously integrates its residential function with commerce and services; and socially cohesive, because it ensures provision of goods and services to all citizens – no matter if they have access to a car, or a computer.

This is not just an imagined city but the typical city of Catalonia. As the Preamble goes on: "*commercial activity has been the most relevant factor in the birth and development of European cities*" and "*in the Mediterranean context, this shapes cities which are more vital, better to live together, and safer.*" It is a model "*characteristic of most European countries, which is part of our lifestyle and identity.*" Interestingly, despite the *Mediterranean* reference, it is not a specifically Catalan way of life that Catalonia wants to protect, but a European one, against "*models of suburban commerce, characteristic of paradigms which are alien to us, from both a cultural and urban/spatial perspective*." If one believes the Preamble, the cultural matrix is essential to understand the law, but it is a cultural matrix which is not articulated in a *localist* or *nativist* dimension but rather in a transnational European one – the compact city as part of a European heritage. There is none of this discussion in the decision of the Court, and this is only one of the elements which remain underexplored. I will go back to this discussion in Section 4 of this Chapter where I try to contextualize some exemplary forms of entry regulation in a few European countries.

[491] Preamble to *Ley 18/2005, de 27 de diciembre, de equipamentos comerciales*. http://noticias.juridicas.com/base_datos/CCAA/ca-l18-2005.html#i

3.3.3. Other Infringement Procedures

While the Catalan scheme is the only one which reached the Court, various other national retail-planning schemes have come under the attention of the Commission.[492] The Commission has initiated procedures against a number of Member States with regards to their entry regulation rules in retail markets, which have been either settled informally or explicitly dropped by the Commission after amendments introduced by the Member States. In 2006 the Commission sent a reasoned opinion to France concerning its retail planning rules.[493] The Commission pointed at the lack of objectivity and precision in the decision criteria for granting the authorization, *"most of them aimed at assessing the potential economic impact of the opening of a new shop."*[494] Furthermore, the Commission was concerned by the fact the French law assigned part of the decision-making power to competitors, which is clearly incompatible with freedom of establishment.[495] Under the impulse of these proceedings, France modernized its law by replacing "*traditional competition criteria... with spatial planning and sustainable development principles*" (see infra 3.4.2.).[496]

Similar infringements procedures were initiated against Poland[497] and Portugal.[498] In Poland the intervention was dropped after its own Constitutional Court declared the rules unconstitutional[499] and in Portugal after the government amended the law in compliance

[492] These interventions have been reconstructed also by W. K. Korthals Altes, *Freedom of Establishment versus Retail Planning: The European Case,* European Planning Studies, 24: 1, pp. 163-180 (2016).
[493] European Commission, *Freedom of establishment: infringement procedures against France,* Press Release 13 December 2006, IP/06/1794. A reasoned opinion is the second step in an infringement procedure: it precedes the formal referral to the Court and is preceded by a more informal request of information. In fact the Commission had sent a letter of formal notice to France asking to amend its retail planning law in July 2005.
[494] *Ibid.*
[495] *Ibid.*
[496] W. K. Korthals, *op. cit.,* p. 171.
[497] European Commission, *Freedom of establishment: Commission inquires into restrictions on the establishment of retail facilities in Poland,* Bruxelles 31 January 2007, IP/08/121, about a Polish Law requiring an authorization out of all retail facilities above 400 m^2. The Commission took issue in particular with the fact that among the various criteria for deciding on the granting of an authorization there is the "*the maintenance of a balance between various forms of retailing*". And the new law was even more problematic because it intervened during the timeframe for Poland to implement the Services Directive.
[498] European Commission, Freedom *of establishment: Commission requests Portugal to amend its legislation on retail services*, Press Release of 27 June 2007, IP/07/904. The Commission defined the Portuguese Law "discriminatory, unnecessarily burdensome and unfair in granting incumbent operators a decisive role" and sent a reasoned opinion asking for amendment.
[499] European Commission, *Freedom of establishment and freedom to supply services: closure of a number of infringement proceedings*, Brussels, 27 Novembr 2008, IP/08/1793. See also W. K. Korthals, op. cit., p. 171.

with the indications of the Commission, which consequently dropped the case.[500] Furthermore, in 2008, the Commission had sent a letter of formal notice to Spain regarding another one of its Autonomous Communities, Andalusia, whose rules implementing the same national law object of Case C-400/08 also seemed to violate freedom of establishment.[501]

The rules of certain German regions (Nordrhein-Westfalen and the region of Stuttgart), also came under the radar of the commission. These regions adopted rules of the kind described above (3.2.1) which institute a sort of merchandise spatial hierarchy, according to which, shops selling certain products can only establish themselves outside of city centers and those selling others can establish only in downtown areas (known as Core-Supply-Areas).[502] Also relevant, albeit dealing with wholesale trade, is a reasoned opinion which reached Greece in 2011 concerning rules that impose fresh agricultural products and meat sellers to establish either inside the central markets of Athens and Thessaloniki or at least 2 km outside of them; the Commission took issue with the fact that being the markets fully occupied, the measure constituted a severe restriction on new entrants.[503] These last three procedures seem to have been settled informally as no official notice of their closure is publicly available.

Even if they did not reach the Court, these interactions are relevant. First of all they reveal a certain activism of the Commission in policing entry regulation in retail in the years around the introduction of the Services Directive – years, as we are about to see of a new awareness about the obstacle that certain forms of national regulation posed to the internal

[500] European Commission, *Internal Market: Commission Action Leads to Removal of Unjustified Restrictions in Austria (Casino Advertising), France (Bovine Insemination) and Portugal (Retail Stores*), Brussels, 8 October 2009, IP-09-1479. The Commission motivates its closure of the infringement procedure by reference to the fact that Portugal's "*new procedure... is based on non-economic criteria (such as those related to environmental and territorial planning), which have been made transparent in the implementing decree. Moreover, the new procedure does not provide for the consultation of competitors*." Before the Commission intervention, instead, the authorizations were subjected to purely economic criteria – such as "*competitive conditions in the retail sector*" and "*regional sectorial integration*".

[501] European Commission, *Freedom of Establishment: Commission asks Spain to Comment on Andulasian Rules Regarding Commercial Premises*, Brussels, 8 June 2008, IP/08/861. The Andalusian scheme was very similar to the Catalan law but also contained a special further authorization to be obtained discount stores above 400 m^2

[502] European Commission, *Free movement of services and freedom of establishment: Commission takes action against Greece and Germany, closes case against Austria*, 25 June 2009, IP/09/1002,.

[503] European Commission, *Internal market: Commission requests Greece to end restrictions on wholesalers' right of establishment*, 16 February 2011, IP/11/180.

market.[504] As it appears, most of the complaints concerned rules analogous to the Catalan ones, and in particular tests of economic needs, involvement of competitors in decision making, the imprecision of certain decisional criteria and rigidity of certain restrictions – all issues which have been addressed in decision C-400/08 and are also regulated by the Services Directive.

Furthermore, these interactions show that, in most cases, Member States – or at least certain actors within them – are ready to engage with the Commission and amend national regulation in a way that is satisfactory for both the EU and the Member States. Unlike for the book pricing rules, which will be considered in the next chapter, Member States did not, in most cases, *put up a fight.* As we have seen, even in the Catalan case above, the decision of the Commission to refer to the Court came while Spain was seriously engaged in modifying its national law to respond to the Commission, while implementing the Services Directive.

3.3.4. The Services Directive

As illustrated in the previous section, the internal market rules do not deprive Member States' from the possibility of keeping in place authorization schemes that discriminate against large establishments in favor of small ones. Is the Services Directive capable of further compressing Member States' regulatory autonomy depriving them of this possibility? In other words are entry regulation schemes such as the Catalan one bound to disappear under the new Directive. Answering this question requires some background on the Directive itself.

The Services Directive[505] – Directive 123/2006, also known as the Bolkestein Directive, from the then Dutch Commissioner on the Internal Market Frits Bolkestein – has arguably been one of the most contentious pieces of secondary legislation in the history of the Union.[506]

[504] And the scrutiny in fact concentrated on some of those prohibited or suspect requirement identified by the Services Directive: the economic criteria employed when deciding on the authorizations and also the presence of competitors in the bodies who took these decisions. (see infra).
[505] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.
[506] Opposition was particularly virulent (and to an extent continues to be) in France, Belgium, Sweden and Italy. See E. Grossman, C. Woll, *The French Debate Over the Bolkestein Directive,* Comparative European Poltics, 9(3), pp. 344-366, (2011) (explaining the opposition as caused by a mix of 4 elements: political economy –

Welcomed by some as an instrument to fight the red tape and administrative opacity that crippled the economies of too many Member States, the Directive was perceived by others as taking too strong a deregulatory stance, which could have endangered social cohesion at the national level and harmed certain non-market objectives that Member States pursued through public and private forms of market regulation affecting service provision.[507]

As it has been noted, the Directive was motivated by a new awareness that, despite the broad interpretation of the market freedoms given by the Court, many sectors of the economy remained severely obstructed.[508] This new awareness seemed confirmed by the approach of the Commission in preparation for the Directive: a bottom-up one which started by surveying the obstructions to free establishment and movement of services still existing in the various Member States.[509] The product of this effort was, in 2002, a Report named *The State of the Internal Market for Services*, which identified over 90 such obstructions.[510] Looking into the Report is quite revealing, especially if one compares the measures listed therein to the analogous ones listed in the 1960s Directives (see above 3.3.1).

In the 2002 Report, one finds, for example, quotas – such as a rule providing that only one chimney sweeper can operate per district or commune –, rules on maximum surface areas – quite common in retail – and rules on geographical distance – such as a rule prescribing

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France had a still strong traditional sector, which would have lost protection – ; cultural opposition to neo-liberalism and globalization ; bad timing – the directive was introduced just after enlargement and during the run-up to the French referendum on the European Constitution; and political exploitation – opposition to the directive is to be understood within a deeper cleavage in the Socialist Party). B. de Witte, *Setting the Scene: How did Services get to Bolkestein and Why?,* EUI Working Papers 20/2007 suggesting that the strong opposition to the directive might be explained by the markedly de-regulatory outlook of the original draft.

[507] The opposition to the Directive was in some countries so pronounced that it often also produced a broader backlash against economic integration and the Union in general E. Grossman, C. Woll, *op. cit.*, p. 345.

[508] As de Witte describes it (*Setting the Scene, cit*.), the system that emerged out of the 1992 strategy was one of specific provisions for the most obstructed, and arguably economic relevant, sectors (through a series of directives on the networked industries, insurance, etc.) and a *catch-all* approach of the Court that was supposed to take care of the remaining obstacles, through its broad construction of the market freedoms (p. 5). Given this context, de Witte suggests, the realization of the need of a comprehensive new Directive must have arisen out of a newly gained awareness of "*the inherent weakness of the judicial limb of* [this] *double-track approach*" (p.5). The fact that many obstacles survived at the national level seemed to be confirmed by the high number of cases concerning services and establishment that reached the Court in the early 2000s (from deciding 40 cases on art 49 from 1995 to 1999, to deciding 140 such cases from 2000 to 2005, p. 6).

[509] C. Barnard, *Unraveling the Services Directive,* Common Market Law Review, 45:2, pp. 323-394, (2008), at p. 327.

[510] *Report from the Commission to the Council and the European Parliament on The State of the Internal Market for Services,* Brussels, 30.07.2002 COM(2002) 441 final. On the number of obstacles identified see C. Barnard, *op. cit.* p. 327. The report specifies that the barriers identified are not necessarily incompatible with Community law, but certainly create a prima facie obstacle. And particular attention was drawn upon the excessive number of authorizations required to open a business, and the long times needed to get them (p. 18).

at least 350 meters between opticians or one mandating that new shopping centers be only opened in downtown locations.[511] All of these are indistinctly applicable measures – entry barriers affecting nationals and foreigners alike that in the early 2000s, after the evolution of the case law described above, were clearly recognized as potential obstructions and started coming under the attention of the Commission and the Court. It was mostly with these kinds of obstacles that the Directive had to deal with – general, non-technical administrative schemes. And the instrument chosen to tackle these newly identified barriers was a horizontal directive – addressing obstacles to free movement and establishment that cut across different types of services.

The Directive contains three main blocks: one on establishment (Chapter III), one on temporary provision of services (Chapter IV) and one on administrative simplification and mutual assistance between Member States (Chapters II and VI).[512] Provisions on establishment and administrative simplification were less contentious than the ones on services, but with the benefit of hindsight, they appear also to have had the bigger impact on Member States' conduct.[513]

The key target of the establishment chapter of the Directive is authorization schemes, one *evil* pervasively *"used by the Member States and frequently declared unlawful by the ECJ."*[514]

[511] I*d.* p. 16.
[512] As noted by de Witte (*Setting the Scene, cit.*) while up until then, the specific sector interventions had been devoted at achieving a certain regulatory mix between deregulation and harmonization, which heavily depended on the specificities of the industry, in the draft proposed by Bolkestein the balance was clearly shifted in favor of deregulation. Its cardinal legal technology in the original proposal was the application to service providers established in another countries of the rules of the home country, rather than those of the host country, which is akin to the idea of mutual recognition translated to services. In de Witte's interpretation the Directive proposal however went further than mutual recognition as normally construed by the Court, which "*simply meant that the host state must take into account the laws and regulations to which the service provider is subject in its home state, so as not to create unjustified double burdens. "This is not the same thing as imposing, as a matter of principle, the application of the laws of the country of origin..."* which is what the Directive proposal did (p.8). Art. 19 contains a list of the grounds for derogation but it is a narrow one, which certainly does not include all of the grounds emerging from the case law. As de Witte writes "*non-market values were thus exclusively seen as grounds of derogation, to be rolled back as far as possible, and not as positive objects for Community regulation, as they used to be in the earlier sector-specific approach"* (p. 9)
[513] While the provisions on establishment and those on administrative simplification largely reflect the original proposal of the Commission (the Bolkestein Draft), the provisions on free movement of services have been object of a major revision. The original Bolkestein draft presented in fact a strong deregulatory stance on services revolving around a rigid application of the country of origin principle. Since application of home rules to service providers abroad was feared to trigger a deregulatory race to the bottom, Member States, as well as the European Parliament, strongly resisted the principle. The draft ultimately adopted, known as *McCreevy draft,* was a watered-down measure shorn of the country of origin principle. See C. Barnard, *op. cit.*, p. 330.
[514] *Ibid.*

Under the directive, the general rule is that authorization schemes are prohibited unless they have certain characteristics. In line with consolidated Case Law on justifications, they need to be non-discriminatory, justified by an "*overriding reason relating to the public interest*"[515] and non-attainable with a less restrictive measure, such as, for example, an *a-posteriori* inspection (art. 9). In other words, every scheme subordinating the provision of economic activity to an authorization represents a *prima facie* obstacle to free establishment, which is susceptible of being justified.

Similar conditions apply to the criteria employed by Member States towards the granting of authorizations. Article 10 clarifies that these criteria shall be such as to preclude arbitrary decisions. This means they, as well, need to be j*ustified*, *proportionate* and *non discriminatory*, on top of *objective*, *clear and unambiguous*, *made public in advance* and *transparent and accessible* (art. 10.2). Article 10.6 significantly also requires that each refusal or withdrawal of an authorization be fully reasoned and reviewable in Court and article 13 establishes the principle of silence means consent: "f*ailing a response within the time period set … authorization shall be deemed to have been granted*" (art. 13.4).[516]

Furthermore, the chapter on establishment prohibits certain requirements commonly employed by Member States either as part of an authorization scheme or autonomously from it (art. 14.15). Article 14 identifies *prohibited requirements*.[517] These requirements are prohibited *tout court* and cannot be justified. Among them, we find nationality and residence requirements – even if these had been mostly eliminated in previous phases of integration – but also tests of economic needs[518] and the involvement of competitors in the

[515] As defined in art 4.8 of the directive: "*overriding reasons relating to the public interest' means reasons recognized as such in the case law of the Court of Jus- tice, including the following grounds: public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives*"

[516] This rule bans the silence means denial principle by forcing Member States to espouse the opposite *silence means consent*. And while already adopted in various Member States as a result of homegrown administrative reform efforts, tacit acquiescence was set to profoundly alter the way public administrations work in at least some Member States.

[517] C. Barnad, *op. cit*., p. 356 where she notes that in identifying these requirements the directive extensively draws on he Court's Case law.

[518] "*the case-by-case application of an economic test making the granting of authorization subject to proof of the existence of an economic need or market demand, an assessment of the potential or current economic effects of the activity or an assessment of the appropriateness of the activity in relation to the economic planning objectives set by the competent authority*" (Art. 14, Services Directive).

decision-making process[519] – requirements that the Court had already found to be disproportionate and to which the Commission was directing quite some enforcement attention (see supra p.). With regard to the economic tests, however, the Directive clarifies that "*this prohibition shall not concern planning requirements which do not pursue economic aims but serve overriding reasons relating to the public interest*" (art. 14.5). In so doing the directive employs the distinction discussed above between purely economic concerns and overriding (non-economic) reasons. It therefore prohibits economic planning, leaving available other forms of planning like urban, regional and environmental planning based on spatial or other non-economic criteria.

Article 15 instead identifies suspect requirements, which are generally prohibited but susceptible of being justified.[520] Member States need to identify them and evaluate them to make sure that they meet the usual justification criteria (non-discrimination, necessity, and proportionality).[521] Among them, the Directive lists quantitative and territorial restrictions – such as the minimum distance requirements adopted for pharmacies, opticians and other health professionals or the Austrian one-chimney-sweeper-for-commune rule.

The Directive also contains norms on administrative simplification. It generally prescribes simplification of procedures, the set up of points of single contact – through which service providers can obtain all necessary authorizations (and other formalities) required to start a business – and procedures by electronic means. As it has been noted, many of the provisions of the directive, might go under the heading of *Better Regulation.*[522] A further relevant provision for my purposes is contained in the harmonization chapter known as *Quality of Service*. Article 25, *Multidisciplinary Activities* provides that "*Member States shall ensure that providers are not made subject to requirements which oblige them to exercise a given*

[519] Strictly related is the prohibition on the involvement of competing operators in consultative bodies or in the granting of authorizations (art 14.6). With the exception of cases when the professional association coincides with the competent authority – to exclude forms of professionally administered licensing schemes – such as those in place for lawyers, pharmacists, etc.

[520] Suspect requirement is the phrase used by C. Barnard, *op. cit.*, p 357.

[521] So the regime for these requirements is akin to the one generally provided for authorization schemes (art. 9).

[522] S. Weatherill, *Better Regulation*, (Oxford, Hart, 2007). See also V. Hatzopolous, *Authorizations under EU Internal Market Rules*, Research Papers in Law, College of Europe, 5/2013, p. 17, noting how the directive makes explicit something which had already appeared in the case law, which is that "t*he internal market rules impact on the quality of national regulation, since it is required to be clear precise and unequivocal so as to secure legal certainty*." This approach was recently confirmed also in case C-72/10, *Criminal Proceedings Against Marcello Costa and Ugo Cifone* [2012], ECLI:EU:C:2012:80

specific activity exclusively or which restrict the exercise jointly or in partnership of different activities" – this norm wants to encourage innovative formats by desegregating economic activity and appears to render problematic certain forms of hierarchical planning such as the ones used in Germany. This provision is particularly important because in retail a great deal of innovation goes through de-specialization and desegregation of the goods sold (see infra 3.4).

Before proceeding we should at least mention that the monitoring of potential obstacles identified by the Directive and their amendment by the Member States was subjected to a *mutual evaluation* procedure – one of the governance techniques often known as Comitology or Open Method of Coordination, which are today common features of EU secondary legislation. As part of this procedure, Member States were required to submit a list of their authorization schemes, and other suspect requirements, and an assessment of the compatibility of their own rules with the Directive, listing those that were deemed justified and those which had been abolished or made less stringent.[523]

Some have suggested that in light of these features, key provisions of the Directive are to be understood as "*instruments in facilitating a strategy to realize the internal market of services through administrative cooperation and mutual evaluation*"[524] – the Directive as policy, or a governance strategy, rather than hard law. To be sure, despite the original uncertainties about the relationship between article 49 TFEU and the Directive – what should prevail? What should the Court apply? – the Court took some very clear-cut decisions by applying the *Tedeschi rule* – for which primary law is non applicable where there is more specific secondary legislation – to art. 14 of the Directive.[525] This seems to disprove a reading of the Directive as a purely strategic instrument and suggests that in the future, Member States regulations will be scrutinized with reference to the Directive's more stringent features.

[523] C. Barnard, *op. cit.*, p. 381 These reports were due by 28 December 2009, which was also the date for implementing the directive. The Commission had then to distribute these reports to the other Member States which had six months to submit their observations (art. 39(2)). The Commission was then supposed to consult other interested parties and present conclusions to the Parliament and the Council with proposals for additional initiatives.

[524] M. Botman, *Book Review* to M. Wiberg, *The EU Services Directive – Law or Simply Policy?*, Vienna: Springer, 2014, Common Market Law Review, 54:1, pp. 311-312, (2017), at p. 312.

[525] See Case C-593/13, *Rina Services* [2015], ECLI:EU:C:2015:399 (paras. 37, 38) and Joined Case C-458/14, *Promoimpresa* [2016], ECLI:EU:C:2016:558. On this point see the remarks of M. Botman, *op. cit.*

There are, to be sure, discordant judgments about the ultimate usefulness of the directive, given that it mostly replicates and codifies the Court interpretation of the market freedoms and that the outcome of decisions based on it does not appear to be very different from the previous case law of the Court.[526] Barnard had predicted this but also suggested that the directive might have been worth the fight as an effort to improve legal certainty, as codification makes business-owners more aware of their rights *vis a vis* public administrations. Furthermore, the various reporting duties together with the measures of administrative simplification, forced Member States to review their legislation by a deadline, without waiting for the unavoidably selective enforcement of the Commission.[527] Others, like Weatherill, were less optimistic. The directive appeared to him as abstract as the Court's case law and, he argued, will bring little benefit to small business-owners.[528]

No matter what the ultimate judgment about the Directive, at least three features are relevant for my discussion here. At a very broad level, the Directive seems to further disconnect freedom of establishment from the need for a transnational dimension of the conflict.[529] This means that after the Directive, it is even clearer that EU law has an impact on how public administrations treat the economic activity of their own citizens. Secondly, the directive codifies the suspicion for authorization schemes. These always need to be justified. As discussed in section III, retail markets are normally not such as to require an authorization for their normal functioning. When this happens, it is in pursuance of external public policy objectives, such as the environment, urbanity or cultural heritage, among others. Arguably, in order to justify non-discriminatory planning schemes pursuing a non-economic rationality, under the Directive like under the previous Case Law, Member States will enjoy almost unrestricted freedom to pick the policy objectives they prefer. And of course, they will then need to prove that the measure is also proportionate. Thirdly, the directive seeks to permanently change the modes of regulation of Member States by banning certain instruments and generally prescribing simplification. Most importantly for my purposes, recourse to tests of economic needs is now completely and

[526] Barnard, *op. cit.*, p. 358 also suggests that the Court will be free to identify further obstacles according to the Gebhard jurisprudence.
[527] Barnard, op. cit. p. 393. As she also writes, the reporting duties might, if carried out thoroughly "impose a dramatic and onerous requirement, not only on Member States, but also on the professional bodies, organizations and associations" (p. 386).
[528] *Ibid.*, p. 394.
[529] In *Hiebler* [2016] the Court does not even consider the question and simply goes on deciding. See on this D. Damjanovic, *Territorial Restrictions, cit.,* p. 1542.

explicitly prohibited. It is likely that Member States will try to insert instruments with different shape but similar consequences – so that litigation might arise on what constitutes a test of economic need under art. 14 – but undoubtedly the new introduction of explicit tests of economic needs is now precluded.

Overall, the Directive is likely to encourage, and there is indication this has already happened, a further strengthening of the move away from administration through legal regulation towards management (see France, 3.4.1). This would probably mean more dynamic and responsive regulation. It would probably also entail more innovation-welcoming rather than restricting interventions. For my case study, this means a move away from rigid commercial planning regulation towards management of town centers and historic districts through soft law instruments. However, in this process of regulatory innovation the EU, I predict, would continue to intervene quite prominently. For example, some of these management schemes may attempt to re-introduce forms of economic planning (that the directive implicitly forbid) and it is thus not to be excluded that the Commission will extend its scrutiny to these forms of regulation thus going beyond the Directive. It seems in fact clear, that the Court will be able to keep identifying new obstacles to establishment as they emerge.

To address some of these issues more specifically it might be useful to go back and observe how Spain and Catalonia had actually changed their retail planning schemes in order to comply with the directive and satisfy the demands of the Commission and later the Court (Case C-400/08). Spain implemented the Services Directive with a general horizontal law and some specific sectorial interventions. In retail markets, it intervened with Law 1/2010 (*de reforma de la Ley 7/1996, de 15 de Jenero, de Ordenación del Comercio Minorista*). With that law Spain ceased to oblige the Autonomous Communities to require a retail specific authorization scheme from large establishments. Under the new regime in fact it is up to each AC to decide whether to adopt the retail specific authorization or not. By mirroring the Directive, the law establishes that when AACC introduce these authorization schemes, they need to be justified by a list of overriding reasons in the public interest as well as non-discriminatory and proportionate.

In implementing the new national law all AACC, with the exception of Madrid, have decided to maintain in place a system of authorization for large establishments.[530] Size thresholds, however, have typically become independent from the size of the local population and have generally also been raised. In most AACC a retail specific authorization is today only required of new establishments larger than 2500 squared meters.[531] This is the approach taken by Catalonia, with its Law Decree 1/2009 (*de 22 de Diciembre, de Ordenación de los Equipamientos Comerciales*).[532] However Catalonia maintains a few exceptions that make its legislation stringent: it provides that medium and large establishments may only open in towns of more than 5000 inhabitants (this used to be 25000 so it has been relaxed) or in towns which are capitals of *comarcas* (provincial districts).[533] Furthermore, when a new establishment has to be implanted outside of consolidated urban areas, the authorization is needed also for smaller shops - above 800 squared meters (so in this regard the regulation has been strengthened)[534].

Overall, the system of entry regulation in Catalonia may have been relaxed. But it has retained a strong regulatory stance, while also being rationalized and streamlined, so that it is hard to claim it has been object of unspecified deregulation. This seems confirmed by quantitative studies which assign numeric indicators to the level of retail regulation in each Spanish regions. The one developed by Matea and Mora shows that the score of Catalonia has gone from 5.4 in 2007 to 5 in 2011 – now and then one of the highest in Spain.[535] At the

[530] M. Matea, *La Transposicion de la Directiva de Servicios, cit*., p. 107.
[531] *Ibid.* Even if there are still numerous exceptions, the general trend has been towards a relaxation of the size thresholds. Furthermore, the new regional laws have abolished all special retail authorizations for hard discounters (that many AACC, but not Catalonia, had in place) as well as all moratoriums on new supermarkets and more generally restrictions depending on retail format – such as the Catalan rules on hypermarkets described above. As it has been noted, these developments should generally permit the entry of new medium size supermarkets of less than 2500 squared meters, while allowing the AACC to retain control on the establishment of macro-structures such as hypermarkets. As it has been noted, this might be a sort of (welcomed) liberalization on the entry of hard discounters, whose typical size is around 1000 squared meters, and whose degree of penetration was in Spain very low. Ibid. p. 109. In fact he mentions how Spain was very effecting in blocking the distribution of these new establishments. In 2009 their market share amounted to 6.5 % of Grocery sales, versus an average in the Eurozone of 14.1 % and a German 36.3 %.
[532] There are now four types of shops identified irrespective from the size of the city. Below 800 squared meters are establishments which never need an authorization. Between 800 and 1300 squared meters are medium establishment. Between 1300 and 2500 squared meters are large establishments. Above 2500 squared meters are territorial establishments. Of these only territorial establishments always need an authorization from the Generalitat.
[533] *Id*., p. 109 .
[534] *Ibid.*
[535] *Ibid.,* p. 110, referring to the scoring system developed in M. L. Matea, J. Mora, *Una aproximación a la regulación del comercio al por menor a partir de indicadores sintéticos*, Boletín Económico, Banco de España 10/2007, pp. 89-100.

same time, the system resulting out of the amended Catalan Law has proved compatible with the principles established by the Court in Case C-400/08, and only minor interventions proved necessary.[536]

Nonetheless, the vicissitudes of these rules continue to this day. For example, with transitory disposition 8 of law 2/2004, Catalonia suspended the provision of decree 1/2009 that allowed to implant establishments above 800 squared meters outside of consolidated urban areas after obtaining a special authorization. In so doing Catalonia de facto prohibited new establishments of above 800 squared meters outside of city centers. In 2016, the Spanish Constitutional Court struck down this restriction by deciding over a complaint brought by the Spanish government that claimed that the Catalan law violated the general Spanish framework law. In so doing, the Constitutional Court gives the status of basic laws (so constitutional) to certain provisions of the discipline on retail establishment as amended following the Services Directive. As we have seen, in implementing the Directive, the new national law provides that all limitations to retail establishment introduced by AACC be justified by certain overriding reasons, non-discriminatory and proportionate.[537] By violating these principles, the Catalan legislation violates the distribution of competence between central and national government and must be struck down. This interaction enriches my narrative from a double perspective. On the one side, it shows that despite the many EU interventions regional governments still consider the strengthening of their retail planning rules a viable policy option to protect local commerce. On the other side, the implementation of the Services Directive has altered the national regulatory landscape so that to police the local planning schemes – their reasonableness, proportionality and non-discrimination – is today not only the Court of Justice of the EU but also the national constitutional court for compliance with the Constitution. [538]

[536] Such as for example the addition of two consumer representatives in the advisory retail commissions (see supra).
[537] C. Fernandez, *El Tribunal Constituticonal Anula Las Restriciones Comerciales en Catalunia*, Expansion, 20 May 2016.
[538] M. Moratal, *Grandes Superficies Apoyan al Gobierno Contra la Desconexion Comercial Catalana,* Vozpopuli, 05/01/2017. The article prefigures a sort of war between central and regional government on the subject of retail establishment. It is interesting how the undertones of the debate have taken a sort of political coloring with the Popular Party seen favoring the big groups against Catalonian laws that for more than a decade have been the most stringent in Spain and amongst the most stringent in Europe. The fight with the central government continues to this day, with the adoption, in January 2017 a new bill of the *Ley de Comercio, Servicios Y Ferias*, which introduced new strict rules on opening hours and other features of commercial regulation: www.elnacional.cat/ca/politica/govern-desafia-estat-llum-verda-llei-comerc_129558_102.html

In conclusion, as a result of the Case Law and the Services Directive (which it seems have influenced each other in complex and still not fully explored directions) we can say that EU Law does not interfere with authorization schemes (even if they only apply to large establishments) when these avoid tests of economic needs, market share reports, and the inclusion of competitors as the only sectorial interest represented in public bodies involved in making the decisions. Special attention is given to complete bans in certain areas, which is also safe to say have normally become unavailable. As I have already affirmed, this does not equate to a deregulation but rather a rationalization of the national schemes, which is likely to make the regulation more, rather than less effective in achieving the desired goals.

3.3.5. The EU Retail Strategy

Beyond its more formal legal interventions, in the last decade post-crisis, the Union has intensified its policy initiatives in the field of retail. These initiatives mostly take the form of *soft law* instruments: action plans, high-level expert groups, best practices and peer review processes. While the temptation is strong to consider these efforts as negligible, they signal that considerable policy attention goes to the problems of retail markets, and are useful in trying to understand how EU institutions, and specifically the Commission, understand public policy towards retailing, including the authorization schemes I study. As I argue, the interest of the Commission in retail markets (and even online markets) goes beyond treating them as instruments to encourage seamless and cheap transactions across the Union, but appears sensitive to the concerns of smaller retailers and the fairness of relationships on the business side.

A first Retail Market Monitoring Report was adopted in 2010,[539] followed by a public consultation[540] and by a Retail Market Action Plan in 2013.[541] The parliament has responded with two resolutions, one in 2011[542] and one in 2013.[543] In pursuance to the plan, a

[539] European Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, Retail Market Monitoring Report*, "Towards More Efficient and Fairer Retail Services in the Internal Market for 2020,* SEC(2010)807

[540] Consultation on the Retail market monitoring report "*Towards more efficient and fairer retail services in the internal market for 2020*", available online at https://ec.europa.eu/growth/content/consultation-retail-market-monitoring-report-towards-more-efficient-and-fairer-retail_en

[541] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions setting up a *European Retail Action Plan*, Brussels, 31.1.2013 COM(2013) 36 final

[542] European Parliament resolution of 11 December 2013 on the European Retail Action Plan for the benefit of all actors (2013/2093(INI))

peer review process between national administrators and local retailers has been established in order to identify barriers to establishment, and a High Level Group on Retail Competitiveness has been instituted in December 2013 (whose results have been published in 2015).[544]

These documents all start by acknowledging the importance of retail in terms of its size in the EU economy as well as its instrumental function in delivering the internal market and empowering consumers.[545]Furthermore, reference is often made to its role in combating inflation, and keeping prices low – useful endeavors especially during crises.[546] At the same time, there is an awareness that more competitive retail markets, while they are useful in delivering lower prices, are specially problematic for small and medium enterprises and for certain categories of consumers.[547] Hence, the documents also recognize that while the modernization of the sector has contributed to some EU objectives, it has happened to the detriment of others, for example environmental protection as well as social and territorial cohesion.[548]

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[543] European Parliament Resolution of 11 December 2013 on the European Retail Action Plan for the Benefits of All Actors (2012/2093(INI).

[544] Report of the High Level Group on Retail Competitiveness, July 2015. Also, one reads in that report, the Group had the objective to assist the Commission in "*developing policies to improve long term competitiveness of EU retail sector*", on how to tackle its remaining barriers to a retail single market and to ensure the sector deliver its full potential. The group has 20 members representing the various stakeholders in retailing: Multinational corporations, SMEs, independent retailers, discounters, cooperatives, an online trading platform, suppliers, a consumer organization, a European trade union organization and one academic.

[545] On the Website of the European Commission one read this: "*Over 6 million companies in the retail sector act as intermediaries between thousands of product suppliers and millions of consumers. E-commerce has increased the potential market for retailers and the scope of products available to consumers. The European Commission aims to ensure that EU wholesalers, retailers and consumers enjoy an integrated retail market.*" As one reads in the 2010 report, the "*retail sector was chosen for this market monitoring exercise because of its economic significance for the European union*". The report acknowledges that given its prominent dimension in the downstream market, the operation of retail markets has a direct impact on the quality of life of citizens – it recognizes for example that it is thanks to the access people get to product from other member states at their local retailer, that people benefit "*in a very real way from the internal market*." In the 2013 action plan, the Commission recalls that retail amounts to 11% if the EU's GDP and account for almost 15 % of the EU's total employment.

[546] For example, in the *Retail market monitoring report* (p. 3), the Commission praises retail markets because, since the 1960s, they have significantly contributed to combating inflation. It explicitly stresses how the rise of supermarkets and discount stores in particular has been useful in times of crisis in that it allowed people to switch income away of basic needs into other consumption areas Ibid. This in the commission narrative is due mostly to economies of scale and vertical integration achieved by many retailers, which has allowed them to negotiate lower prices. Productivity growth, despite not as big as the American one, has been significant also across Europe.

[547] *Retail Market Monitoring Report, cit*., *p. 4* In the 2010 report for example, the Commission acknowledges that lower prices have had significant impact on "*small independent shops, local authorities, small agricultural producers, small and medium sized manufacturers, employees and socially disadvantaged consumers.*"

[548] *Id.* p. 4.

Through studying these documents, I have identified three key areas of intervention – three macro-objectives – of EU retail policy as articulated (mostly) by the Commission. The first one – which most directly interests me here – is the completion of the internal market in order to achieve better and better functioning markets, allow operators to grow in size, and prices to stay low. This however is not a one sided approach which only pursues lower prices in the interest of consumers. The Commission, in fact, often emphasizes that the completion of the internal market should not happen at the expenses of SMEs, and that their interests need to receive particular attention. Nonetheless, and here seems to lie the most apparent disagreement with the Member States, the Commission (as well as the Parliament in its responses) show conviction that integrated markets, and in particular enhanced access to online markets, help SMEs more than market-limiting national rules.[549]

The second area of intervention (very topical in the days I write) is fairness in the retail supply chain, especially in grocery, by encouraging fairer commercial practices that can fill the growing power imbalances between large multinational retailers and small agricultural producers. This is the area where the Commission action seems to have more bite, also given the recent announcement of the competent Commissioner of intending to proceed with a legislative initiative.[550]

The third area of intervention is sustainability and the environmental impact of both consumption and certain forms of distribution – suburban, land-consuming, traffic-congesting, hypermarket-retailing. As I will further explore, various elements in these documents signal that through its environmental action, EU policy is becoming unsympathetic to big-box, suburban, retail developments. So while under the first pillar, which is the internal market, the Union might be seen (albeit with distinctions) to be sympathetic to larger retailers, the other two areas of intervention position the Commission against the interests of big-box retailers.

[549] For example, the Commission refers to evidence showing how regulation and red tape is more burdensome for small rather than big businesses.

[550] The instruments announced by the Commission are considered particularly radical: E. Livingstone, *Europe Rips Up Free Market Rules to Help Farmers,* POLITICO, https://www.politico.eu/article/europe-rips-up-free-market-rules-to-help-farmers-supermarkets-supply-chain/. This action is strongly resisted by big grocery retailers. See Eurocommerce, *Retailers Surprised at Commission Pre-Empting Consultation on the Supply Chain,* Press Release, 25 Octobrer, 2017. *http://www.eurocommerce.eu/media/152682/2017.10.25%20-%20COM%20work%20programme.pdf*

Consider the 2013 Commission's *Action Plan on Retail*, to this date the most significant policy document in the field. The Action Plan is to be understood within the Europe 2020 strategy, the EU growth strategy for the decade. Retail plays a key role in that strategy, in order to achieve "*a more sustainable economy and consumption patters.*"[551] While the Services Directive defines "*a general strategy in the field of Services,*" the Action Plan is conceptualized as providing a roadmap for a single market in retail, through the elimination of the obstacles identified in the 2010 Retail Market Monitoring Report.[552] The Plan identifies eleven specific actions to be adopted in order to overcome obstacles to integrated and sustainable retail markets. The key obstacles identified are 1) restrictions on establishment and 2) lack of competitiveness in some member states mostly linked to operational restrictions. (p.4).

The Action plan, however, acknowledges that there is not a "*one size fits all solution*" (p. 4). It describes a diverse retail landscape across Europe in terms of size of the actors (SMEs or larger companies) and their internal organizations (corporations, cooperatives, independent retailers – often family owned) among other differences. Hence, it is possible to detect a distinctive awareness of both the benefits and the negative spillovers that the evolution of modern retailing has brought. "*Over the past two decades, modernization of the EU economy has resulted in many changes in retail. Networks of outlets have emerged selling multiple product lines. Vertical integration has enabled retailers to benefit from more efficient distribution and logistics*" (p. 5). In grocery, certainly "*the retailers' quest to respond better to consumer demand has led them to increase their control over the supply chain (e.g. through private labels)"*, aka own brands (p. 5). The net impact of these changes has been more outlets, formats and product lines, as well as lower prices. However, "*increased competition and squeezed margins have also driven many small independent shops and SME producers/suppliers out of business,"* and also the environmental impact of these developments has been problematic. It is a rhetoric of reconciliation which emerges out of this document. The objective is to produce a single market in retail "*for the benefit of all actors"*[553] to be achieved

[551] *Retail Market Action Plan, cit.,* p. 3 .
[552] *Ibid.*
[553] *Id.,* p. 5. For example, integrated market in retail would be beneficial for consumers also because they would allow them by enhanced "*choice within both bricks and mortar and e-commerce retail formats*." Furthermore, businesses and employees will benefit, and in particular SMEs. To achieve this integrated retail market, the commission envisions

through a *holistic European strategy* that seeks to "*strike the balance between economic freedoms and public-interest objectives"* (p. 6).

Given this diagnosis, many of the eleven actions put forward in the Action Plan deal with the supply chain, environmental action, and also online services.[554] The two more relevant actions for my purposes are those that aim to realize more sustainable and competitive retail services through "*clearer and more transparent establishment rules."*[555] Action 3 states that "*Member States must remove all remaining instances of non-compliance with unequivocal obligations under the Services Directive concerning access to, and exercise of, retail activities, including eliminating economic needs tests within the meaning of art 14(5) … [and] the Commission will apply its zero tolerance policy through infringement procedures were appropriate*" (p. 10). With action 4, the Commission committed to "*launch a performance check in the retail sector to explore how commercial and spatial planning rules and plans are applied on the ground by the competent authorities where a potential service provider wishes to set up a small, medium or large retail outlet"* and also *"through exchange of best practices provide for greater clarity regarding the proper balance between freedom of establishment, spatial/commercial planning, and environmental and social protection"* (p.10).

Once more, one detects confidence that eliminating barriers to establishment and more generally strengthening competition in the retail sector would improve the performance of Small and Medium Enterprises, and also confidence that retail is a sector through which to realize the full potential of the Services Directive.[556] The Commission stresses that the location of establishment is a fundamental choice in ensuring business success and should normally be left to retailers.[557] But, ensuring a balanced and sustainable territorial development, adds the Commission, is not only a valid interest, but also primary responsibility of Member States. It cites the authority of Case 400/08 and recalls that

[554] consumer empowerment (through more information in order to make cross-border comparisons of prices and quality of products), in order to enhance trans-boundary competition.
[555] Point 2 of the FIve Key drivers for more competitive and sustainable retail services (p. 6):
[556] to act a better implementation of the EU Service Directive could bring a further 2. 6% to the EU GDP if fully implemented (p. 8). Given that according to estimate brought by the Commission, retail corresponds to ¼ of the total service sector, it is clear that there is great potential in eliminating residual effects of establishment barriers
[557] Hence the key strategy is to facilitate market entry and to allow the new entrants to pick location and timing in a way which maximizes the prospects of business success: requirement for this is not only the availability of real estate but also "*the existence of commercial and spatial planning rules and procedures that do not inappropriately hamper competition.*" p. 9.

Member States can introduce restrictions to commercial establishment, "*when justified by overriding reasons in the public interest, such as environmental protection, town and country planning and consumer protection, provided that they are appropriate and proportionate*."[558] And furthermore *"planning for sustainable development, for territorial cohesion, and for high quality of both urban and rural life"* are also EU objectives, enshrined in many of its policies. [559]The exchange of best practices envisioned by the Commission should serve to "*ensure the successful marriage of a competitive retail sector with fair and sustainable development of cities, towns, and rural areas across the European Union*."[560]

Finally it appears useful to mention a very recent initiative the Commission has launched within its *Single Market Strategy.*[561] One of the features of the strategy is a project to identity best practices for facilitating retail establishment and reducing operational restriction in the Single Market. As establishment restrictions were identified as a key problem, the Commission has commissioned a study to identify the current state of entry regulation in the single market.[562] That report has been extremely useful for my study and it features amply in the first part of this chapter where I describe the European regulatory landscape for entry regulation in retail (3.2.1). The new awareness seems to be that "*not all restrictions which can hamper the performance of the retail sector can be efficiently addressed through infringement policy."*[563] The best practices initiative in fact aims at providing Member States with inspiration to copy the virtuous states. Only secondarily the best practices are conceived "*as providing guidance for priority setting for enforcement policy in the retail secto*r". The Commission has explicitly stated that it considers the work on best practices as the best option to advance its action on retail planning, certainly preferable to direct regulation.[564] If such initiative has the potential of becoming a source of policy and regulatory homogenization, it also is evidence of the bottom-up approach of the

[558] *Ibid.* It furthermore stresses that the Service Directive plays a role in this, as it prescribes the elimination of "economic tests which make the granting of an authorization to carry out a service activity subject to proof of the existence of an economic need or market demand, an assessment of the potential or current economic effects of the activity, or an assessment of the appropriateness of the activity in relation to the economic planning objectives set by the competent authority."
[559] *Ibid.*
[560] *Id.*, p. 10.
[561] European Commission, Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Upgrading the Single Market: More Opportunities for People and Business*" COM(2015) 550 final.
[562] *Legal Study on Retail Establishment, cit.* quoted extensively in section 3.1. of this chapter.
[563]European Commission, *Best Practices on Retail Regulation*, Roadmap, https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-2131884_en
[564] *Ibid.*

Commission, which is willing to tailor its enforcement policy towards the real needs of the retail sector.

3.4. Historical evolution of retail markets and retail planning in some exemplary European countries

National and local idiosyncrasies are still significant in retail markets. Many sectors are still dominated by domestic retailers, and this is particularly true for grocery retail markets.[565] Regulatory differences are only one of the elements that contribute to explain persisting variation across Europe. Different consumption habits, geographies, levels of economic development, business histories and resulting firm structures and strategies are all elements which, together with the law, contribute to give form to markets.[566] And of course some of the determinants which might explain divergence are also "cultural" – linked to deeply rooted local practices, forms of interaction, narratives, which are varied not only across nations, but even more so across regions and towns within nations.

One, however, should not make the mistake of overemphasizing difference and forget about common trends. The shape of retail markets is to a great extent the product of consumers' buying behavior, and this behavior, in post-war Europe, has been subjected to various unifying demographic and socio-economic trends: the rise in disposable income, amplified by the shrinking size of households; aging population; women's growing involvement in the workforce and men's in the household labor; new forms of urbanization linked to the use of cars; most recently, the rise of online markets. However, as noted by Colla, these trends have not manifested at the same time and to the same extent in all of the countries, which contributes to explain a great deal of the variation.[567]

[565] See in general, M. Corstjens, R. Lal, *Retail Doesn't Cross Borders. Here is Why and What to do About it,* Harvard Business Review, April 2012 (documenting how none of the world's biggest grocery retailers is present in all of the major economies. Walmart does not operate in continental Europe after having failed to be successful in Germany; Carrefour is not present in Germany nor the US despite trying to establish presence; Tesco does not have a presence in Western Europe since it pulled out of France; etc.) This is quite puzzling because the main food producers have instead been very successful in creating truly global brands. The study in fact shows that the level of internationalization in retail does not affect profit margin nor growth rate.

[566] For an account of the various factors that might be implicated in explaining persistent variation in retail markets see E. Colla, *The Outlook for European Grocery Retailing: Competition and Format Development*, International Review of Retail Distribution and Consumer Research, 14:1, pp. 47-69,(2004).

[567] *Id.*, p. 47.

Other factors that have an impact across countries might go under the heading of the globalization of retailing. This comprises at least three phenomena. First, more foreign products are sold in local shops, as a result of various processes of economic integration, including (but not limited to) the European internal market. Secondly, more foreign retailers operate, directly or indirectly, in domestic markets as part of their international expansion strategies, by establishing their own stores, through the steady growth of franchising (especially in clothing and fast food restaurants)[568] and of course also through e-commerce. Thirdly, it refers to the global diffusion of certain retail formats, business models and practices, which expand through the diffusion of technology or through mere imitation (e.g. electronic payments, increase in size of establishments, costumer service, fixed prices, etc.). The power of imitation is, in a sector like retail (where innovation is typically non technologically intensive[569]) more than others, very important. In fact, as marketing scholars contribute to show, one of the reasons that explains the absence of truly global retail firms, mostly in grocery, is that innovations are easily picked up and developed (copied) by local firms. Nothing is in retail innovative enough that it cannot be copied.[570]

Of course the impact of globalization, like the one of changing consumption patterns, is hardly uniform. As documented by various studies, globalization produces forms of local adaptation and sometimes further diversification of the national models rather than more homogeneity.[571] This is because it interacts with different local economic structures, business models, and cultures also. The shape of retail markets is today the outcome of the differential impact of global phenomena on pre-existing national models, which are

[568] Franchising has been showing positive growth trends also during the crisis. "It has proven to promote the creation of enterprises and small-business ownership and, as a consequence, of employment and of turnover" with annual average growth rate in the number of brands in EU17 of 8.1% in 2009 and the Share of Franchise Employment in SMES in EU 17 at 10.8% in 2009. Data from European Franchise Federation, Franchising: A Vector for Economic Growth in Europe, 2009 www.eff-franchise.com/Data/PUBLICATION%20Franchising%20-%20A%20vector%20for%20Economic%20Growth%20in%20Europe%20-%20finalp.pdf

[569] For this distinction, and the relationship between technological and non-technological innovation see: T. Schmidt, C. Rammer, *Non Technological and Technological Innovation: Strange Bedfellows?* Centre for European Economic Research, Discussion Paper No. 07-052.

[570] M. Corstjens, R. Lal, *op. cit.*

[571] This is the idea for which the same global events (such as an invention) impact different economies at different stages of economic developments thus producing different reactions and outcomes. The concept is known as *differential of contemporaneousness*, see S. Pollard, *Peaceful Conquest. The Industrialization of Europe.1760-1970* (Oxford, Oxford University Press, 1981)

naturally differentiated across Europe.[572] By zooming into the experiences of two European countries (Italy and France), I propose in this section to try and highlight some of the histories surrounding the rules at issue, to understand how they fit into the broader socio-economic and cultural context of their respective countries and to better asses what the modifications brought about by EU Law entail.

Most countries in Europe had a similar retail structure until the 1950s and 60s, a retail scene dominated by small shops and "*spatially configured in a rigid hierarchy of shopping centres: neighbourhood centres offering convenience goods; district centres offering a mix of convenience and low-level specialist goods; town and city centers providing a full range of convenience, specialist and service goods through both small and large stores including department store."*[573] As this description makes clear, in the 1950s and 1960s, in order to acquire certain specialist goods and services one needed to go downtown. As marketing geographer Ross Davies also explains this retail geography did not arise naturally but it was upheld by a series of planning policies, which encouraged firms to fit into this scheme. And the Country which more rigorously stuck to this approach seems to have been Germany.

While various innovations introduced important elements of differentiation into this scheme starting already in the 1920s, [574] the first real disruption of what was otherwise a rather stable outlook was, starting the 1970s, the rise of the hypermarket. First appeared in Belgium, the hypermarket was further popularized in France where it had the biggest expansion. It initially led to a major breakdown of traditional retailing in those two countries and also to a temporary loosening of rules and a *free-for-all* retail development.[575] This first "unruly" expansion was met with reaction and more stringent planning constraints, first introduced in the mid 1970s – in France most notably. Other countries that stuck to more rigid planning control saw a less invasive penetration of hypermarkets.

In various countries, as we will see, the intermingling of planning policy with other political concerns was often present. But the most evident breakthrough of politics in this sphere is witnessed in 1980s Britain where, under Margaret Thatcher, planning policies

[572] See S. Howe (ed.), *Retailing in the European Union* (London and New York, Routledge, 2003).
[573] R. Davies, *Planning policy for retailing*. In J. Reynolds & C. Cuthbertson (eds.), *Retail strategy, the view from the bridge* (Oxford, Elsevier, 2004), pp. 78-95, at p. 80.
[574] See the debate on variety stores for example (3.4.1).
[575] R. Davies, *Planning Policy for Retailing, cit.*

were largely abandoned in the name of free enterprise. This approach expanded to the southern European countries – with the notable exception of Italy – where Spain, Portugal and Greece considerably loosened their regulatory stance and thus became very porous to the penetration of foreign hypermarket chains like Carrefour. In this context, it was the central European and northern countries as well as Italy that retained the strongest regulatory stance. With the fall of the Berlin wall, also Eastern European countries, with newly opened economies devoid of any planning control, became extremely porous to the penetration of western (mostly German) retailers. Eastern Europe is overlooked by my research, but some of its countries are said to have developed forms of hyper-consumerist arrangements that will certainly deserve more in- depth studies in the future.[576]

Through the 1990s there was a shift away of the *laissez faire* policies of the previous decade, and a new strengthening of the old planning rules. In particular, the formerly liberalized countries of Britain and Southern Europe passed new bills focused on the regeneration of downtown areas and the protection of small independent businesses.[577] Overall, one can isolate two main groups of countries: countries that retained all along rather stringent planning policies (Germany, Austria, the Nordic Countries and Italy – until the liberalization of the late 1990s), countries that went through a phase of laissez-faire to then reintroduce more stringent controls (France, Belgium, the UK and the Mediterranean Countries).

The evolution and the history of retail planning is, to be sure, linked to major evolutions in the history of retailing more generally.[578]I will point at some features of this evolution, which are relevant for my narrative. One of the key features of the modernization of retailing has been de-specialization. Most new shop formats that developed during the last century were characterized by an expansion of the range of goods on sale – both at the cheap end of the spectrum (hypermarkets, variety stores) and at the luxury end (department stores, recently the concept store). While traditional shops typically sold only one category of merchandise, modern shops tended to become promiscuous. This has happened first in the non-food sector with the department store and its various popular

[576] For data on these trends L. Dries, T. Reardon, J. F. M. Swinnen*, The Rapid Rise of Supermarkets in Central and Eastern Europe: Implications for the Agri-food Sector and Rural Development*, Development Policy Review, 22:5, pp. 525-556 (2014).
[577] R. Davies, *Planning Policy for Retailing, cit.*
[578] For a recent global history of retailing and consumption more generally see F. Trentmann, *op. cit.*

versions up to the one price store. In the food sector, this process was mainly performed by the supermarket. And last came the hypermarket, which has perfected this trend towards de-specialization by making available in the same space all forms of food and non-food merchandise. The regulatory tool to resist these trends were merchandise specific retail licenses, as we have seen now explicitly prohibited by the Services Directive.

Some other specific shops formats can be understood as complementary to the mainstream modern formats – the super and hypermarkets.[579] One of these was the discount store, that started in Germany in the 1960s on imitation of previous American experiences and grew in many parts of Europe by offering a set of products in little variety, from brands on the lower end of the quality spectrum and thus at lower prices.[580] This shop format greatly expanded over the 1990s in many European countries as it fulfilled the demand for cheap products close to downtown areas (and normally on smaller surfaces) of growingly price-aware customers, who would still buy some better food products at the supermarket, but bought everyday essentials at the discount store.[581] The other complementary format was the convenience store, which sold many types of everyday use products on a small surface and whose distinguishing feature was its proximity either to densely populated areas in its urban version (open 24/7 and rare in Europe until recent times) or to service stations in its suburban version.[582]

As these various formats came and go, one type of shop stayed. Albeit its market share has kept shrinking – drastically in some Member States (like the UK) more slowly in others – the small independent shop survived and coexisted with the various instantiations of the modern distribution. These shops were often micro-enterprises but they were also politically organized and were awarded what some saw as an outsized social and political standing. The Object of the mobilization and resistance of small-shop-owners has been a moving target. First it was the itinerant trader, then the department store, then the one-price store and consumer cooperatives, more recently super and hypermarkets and the discount store, today it is online retailers such as amazon. Despite the specificities, one

[579] For this notion of complementarity see L. Pellegrini, *Il Commercio in Italia* (Bologna, Il Mulino, 2001), p, 48.
[580] The discount principle was very publicly discussed in Germany already starting from the 1960s. In 1962, the Aldi group, one of the oldest retail chain stores in Germany "*moved to the price-aggressive discount principle*." K. Barth, M. Hartmann, *Germany*, in S. Howe (ed.), *op. cit.*, pp. 56-80, at p. 59.
[581] L. Pellegrini, *Il Commercio in Italia,* cit. p. 48.
[582] *Ibid.*

could say that the independent shop has survived by learning to coexist with various other forms of retailing and also to exploit complementarities. Hard to tell if this is a story of decline, temporarily slowed down by political mobilization resulting in protective legal regulation, but which will unavoidably lead to disappearance – what Berger and Piore call the withering away paradigm[583] – or if persistence of pre-modern forms of distribution is itself a feature of modern capitalism, understandable in functional or structural terms.[584] Both of these narratives are useful albeit insufficient simplifications. Certainly, it would be a mistake to read the history of this survival only as one of governments giving up to the anxieties of the small independent shop-owner *vis a vis* modern retailing, or also to say that the small distribution is functional to modern capitalism and hence it receives protection.

The analysis of how public policy towards retailing evolved and is presently understood in two exemplary European countries – France and Italy –hopes to add nuances to both of these narratives and possibly let emerge other elements. In particular I will try to discuss what specifically retail planning aimed to achieve in these two countries. What I can anticipate is common to these experiences is the coexistence and often contemporaneous pursue of two policy objectives: 1) the modernization of the retail trade in order to boost growth and lower the costs of distribution and 2) "*to prevent the rate of modernization from exceeding a rhythm which is socially, economically, and politically tolerable*."[585]

3.4.1. France: The Contemporaneous Pursuit of and Resistance to the "Modern Distribution"

While we are used to associate innovation and scale in retailing to the United States and by proxy to Britain, France is actually the country where many innovations first developed in Europe. *Au Bon Marchè* was in 1852 the first department store – a retail establishment where different categories of merchandise are on show in different departments. Department stores were the first outlets to introduce on a major scale many of the features of modern retailing: *"fixed and clearly displayed prices, a low-sales margin policy, promotional sales, free*

[583] S. Berger, J. Piore, *Dualism and Discontinuity, cit.*
[584] S. Berger, *The Traditional Sector in France and Italy, cit.,* p. 88.
[585] P. Cortesse, *France*, in J.J. Boddewyn, J. C. Hollander, *Public Policy Towards Retailing: an International Symposium*, (Lanham, Lexington Books, 1972) pp. 117-143, at p. 123.

entry, merchandise exchange and catalogue selling."[586] The second wave of innovation concerned the emergence of variety, single-price-stores in the 1920s. Often operated as a separate company by the department stores owners, these shops flourished during the great recession.[587] And the third one, more recently, super and hypermarkets. The 1960s were in fact the decade of self-service and supermarkets taking root in France before most other European countries – with Leclerc, Carrefour, Auchan and others in the grocery sector and the very French invention of the Large Specialized Stores such as Conforama, Castorama and Darty. These shops rapidly grew in the late 60s and early 70s.[588]

All along, France was based on a system of free establishment where everybody could open a business with no need for authorization, with the exception of the payment of a license fee (*patente*) for certain kinds of shops.[589] In the 1960s, commercial city planning rules were introduced to make sure new urban developments considered the necessity of shops for the new population – so they aimed at encouraging rather than discouraging the establishment of shops in the peripheries.[590] The concern in this phase was that the new suburban districts did not have their own stores and lacked *"an element of irreplaceable liveliness."*[591] To this need the hypermarket could respond quite effectively, and in fact this format grew in France much faster than in other European countries. The first Carrefour hypermarket opened in 1963 and in 1973 one could count 207 such establishments in France.[592] The tendency was not only one of multiplication of the number of establishment but also one of enormous growth in size.[593] In line with the planning strategy of the 1960s, hypermarkets had to serve "*working class housing estate which until then had been virtually*

[586] E. Colla, *France*, in S. Howe (ed.), *op. cit.*, pp. 23-55, at p. 23. As noted by management scholar Enrico Colla, however, many of these innovations were actually first developed in the small *boutique* shops of manufacturers and craftsmen and were just combined and enhanced within the department store, which proved able to systematize and bring to profit these innovations.
[587] *Id.* p. 24.
[588] *Id.* p. 26 (Colla reports that supermarkets accounted for 21.8 per cent of the food retail market by 1980).
[589] P. Cortesse, *op. cit*., p. 129, referring this freedom back to the *Act Chepelier* of 1791.
[590] P. Cortesse, *op. cit.,* p. 129. See also J. Beaujeu-Garnier, M. Bouveret-Gauer, *Retail Planning in France,* in R. L. Davies, *Retail Planning in the European Community,* (Farnboroughs, Saxon House, 1979), pp. 99-111, at p. 101. The authors attribute this change in policy to the *Fontanet Circular* of August 24 1961. The post-war often disorderly growth of housing needed to be matched by infrastructure, and the circular wished to address the lack of shops in the newly urbanized areas.
[591] J. Beaujeu-Garnier, M. Bouveret-Gauer, *op. cit.*, p. 101.
[592] A. Metton, *Retail Planning Policy in France*, in R. L. Davies, Retail Planning Policies in Western Europe, (London, Routledge, 1995), pp. 62-78, p. 63.
[593] *Ibid.* (from the original 2500 square meters of the 1963 shop to the 23000 of certain developments of the 1970s).

bereft of any retailing facilitites."[594] As the various studies I utilized suggest France was not only a passive receiver of these innovations, but it encouraged big-box developments as they fitted the economic and urban growth strategy of the time. This retail policy, however, neglected the risks for downtown areas and their commercial viability. As the growth continued, it came to upset more established traders which pushed the government into intervention.[595]

It is in this context, that in 1973, France passed its law Royer introducing a separate system of permits for retail, different from the general laws governing town planning.[596] The law takes the name of Jean Royer, Mayor of Tours, who was then serving as ministry of trade. The law was prominently resisted by Mr. Fournier, owner of Carrefour, joined by both the left and the liberal right. The law was explicitly motivated by a genuine desire to do something about problems such as the "*declin du petit commerce, desertification rurale, étiolement commercial des centres-villes*...,"which were commonly attributed to the outsized and too fast development of hypermarkets.[597] The law was consistently applied for 20 years without changes. Its impact is still vigorously debated today: for some it worked (at least in part) to slow down the penetration of hypermarkets,[598] for other it was a purely symbolic intervention to reassure the small bourgeoisie, for others still it did work but its impact was detrimental to job-creation in the retail sector without awarding a real benefit to small shop-owners.[599]

The Law Royer picked up a model, already implemented in the 1930s in various countries, of discrimination against certain kind of stores (at that time department and one price

[594] *Id.* p. 63
[595] P. Cortesse, *op. cit.,* p. 122: government intervened "t*o curb the excesses of competition and slow down the pace of large surface stores."*
[596] Loi no73-1193 du 27 décembre 1973 d'orientation du commerce et de l'artisanat.
[597] J. L. Monino, S. Turolla, *Urbanisme commercial et grande distribution. Etude empirique et bilan de la loi Raffarin*, Revue Francaise d'Economie, 23:2, pp. 139-178 (2008), at. p. 142.
[598] A. Metton, *op. cit.*
[599] M. Bertrand, F. Kramarz, *Does Entry Regulation Hinder Job Creation: Evidence from the French Retail Industry,* The Quarterly Journal of Economics, 117:4, pp. 1396-1413 (2002) (finding that the entry regulation scheme of the French Loi Royer has significantly hindered job creation in the retail sector). The key causal mechanism they identify is that the Loi Royer has increased market concentration in the French market, meaning that a limited number of retailers control most of the industry. The result they find are more significant for women and youth which seem to be the most harmed by entry regulation, p. 30.

store) through licensing schemes.[600] It made it obligatory to obtain a permit in order to open shops exceeding 1000 square meters (or 1500 square meters in communes with more than 40.000 inhabitants). Similarly to the Catalan law described above, the authorization scheme only applied to larger stores. Hence while before the law shops only needed a building permit, from 1974 some shops also needed a retail specific authorization scheme. Competence to decide on the permit was assigned to the Departmental Commissions for Commercial Planning (CDUC) so retail planning policy was administered at the departmental level. These commissions were composed of 9 representatives chosen among local administrations, 9 representatives of commerce and trade appointed by the Chambers of Commerce and 2 representatives of consumers associations.[601] Their decisions could be appealed before the Minister of Trade who was advised by a National Commission.

According to data reported by Alain Metton, during the first 20 years of life of the law, 7000 applications were presented and one out of two applications was granted. Furthermore, data confirms a tendency to more easily grant applications for smaller establishment.[602] In the judgment of Metton, the law has worked to slow down penetration of large-scale establishment up until 1986; but the amount of authorized space since 1990s (an average of 1.500.000 square meters a year) suggests that the law could not really stop the rise of large distribution.[603] In fact, with time, the law came to be criticized also by the small shopkeepers and the chambers of commerce as too mild and not awarding them with enough protection.[604]

Other studies are much harsher in the judgment. The to date most influential empirical study on the effects of the law Royer was produced in 2000 by Bertrand and Kramarz.[605]

[600] France had adopted a ban on the one-price stores in 1936, but other countries had adopted licensing schemes which were more onerous towards the new formats than the normal shops –see next section on Italy. V. Zamagni, *La Distribuzione Commerciale in Italia tra le Due Guerre* (Milano, Franco Angeli, 1981), p. 130.
[601] Since consumer representatives are often expected to favor entry and commerce representatives are expected to oppose entry, normally the deciding vote will be the one of a local politician. Bertrand and Kramarz use this feature to devise their empirical assessment of the law, *op. cit.*, p. 8.
[602] A. Metton, *op. cit.*, p. 64. This can be inferred from the fact that while half applications were granted, the amount of new retail space authorized amounted to 1/3 of the total space applied for Metton also reports how distributors took on the habit of submitting multiple applications, re-submitting applications with minor changes and also of appealing all denials, which de facto transferred the burden to the ministerial level.
[603] *Ibid.*
[604] *Ibid*.
[605] M. Bertrand, F. Kramarz, *op. cit*.

The study appears to confirm what has been often anecdotally suggested, which is that "*under the guise of protecting small shopkeepers, [the law Royer] was de facto used to limit product market competition among large retail chains,*" and which is thus partly responsible for creating a very concentrated retail environment in France.[606] Qualitative analyses also point at the distortions the law has created. For example, it is reported that there has been in France, a big growth in supermarkets with an upper-size limit of 1000 (meaning shops close to 1000 m² but not above it).[607] And in particular in the 1990s the very fast diffusion of the hard discount supermarkets (coming mostly from Germany, like Lidl and Aldi) has been shown to take advantage of this lower threshold.[608] So much so that, Metton reports, even the large distribution has complained about the lack of statutory instruments to slow down the penetration of hard discount stores.[609] This line of thinking is implicit in the argumentation of the case law which reached the Court in 1996 on the Loy Royer (see supra 3.3.1) and which the Court had dismissed as purely internal. For Colla, its most significant effect has been to redirect the expansion strategy of big French retailers such as Carrefour abroad and most visibly to countries with (at the time) very little entry barriers such as Spain and Portugal.[610]

Another significant development has been the rise of retail parks: groupings of specialized (non grocery) retail establishments, each measuring up to a 1000 and thus not needing an authorization, whose conglomerate impact however well exceeds the size and impact of a hypermarket.[611] Also the decision-making process of the Departmental Commissions has been criticized for having been piecemeal, without a strategic view and without any possibility to intervene in other issues linked to urban development. In this regard it is often the municipality to provide the necessary information to the Commissions – and the political majority governing the municipal government is said to have had a big impact.[612] But mayors and municipalities are nothing but neutral in these processes as they have an interest in attracting the jobs generated by large selling units as well as the tax revenues they extract from these businesses – property tax for businesses (aka Business Rates) that in France, as in most European countries is retained by the local authority on whose territory

[606] *Id*., p. 26 .
[607] A. Metton, *op. cit.* p. 65.
[608] *Ibid.*
[609] *Ibid.*
[610] E. Colla, *France, cit.*, p. 28.
[611] *Ibid.*
[612] *Ibid.*

the shop is established. Often, municipal government actively seeks these kinds of investments in its own territory and it is involved since the early phases of development, which is to say well before the application is submitted. [613]

These developments coincided in France with a significant population growth and a trend towards further urbanization. Furthermore, shopping habits were changing. People got way more purchasing power and wanted more choice and variety. However the increased purchasing power did not benefit equally all kinds of retail outlets as the new large stores better catered the needs of changing consumption patterns: less fresh food and more food that could be conserved at home, for example. There were in 1973 200 hypermarket, there were 1000 in 1993. This resulted in France, as in other countries, into a rigid functional differentiation of retailing between urban and suburban areas.[614] As the downtown areas specialized in the sale of luxury goods, clothing and cultural goods, the outskirts gained an advantage in food grocery and household equipment.

In those years in France, like in many other European countries, local policies aimed at the valorization of city centers – introduction of pedestrian-only areas, renovation of downtown areas with the opening up of larger commercial spaces in the city centers – resulted in fact in a further de-functionalization of city centers, or rather in their extreme functional specialization as areas devoted exclusively to shopping (of a certain kind) and entertainment. [615] The impact of these policies is hard to assess, but anecdotal evidence suggests that these policies have been detrimental for downtown areas: as city centers grew cleaner and less populated, they also lost their "soul", which ended up making them less attractive. These broader developments, combined with purely commercial developments (like the formidable growth of franchising) are seen as having substantially deteriorated the commercial viability of small shops. Ant this was not only seen as detrimental to the life of city centers, but particularly for the life of rural France – that part of the country where weaker consumers are concentrated: elderly, less mobile, with no car. As one read

[613] Edouard Leclerc, founder of group Leclerc vocally denounced the corruption of municipal administrators as made available by the system of the Loi Royer. See the video document *Contre la Loi Royer*, in *E. Lecler, Histoire et Archives,* http://www.histoireetarchives.leclerc/thematiques/l-evolution-du-cadre-legislatif/de-la-loi-royer-a-la-loi-sapin-1969-1993.
[614] A. Metton, *op. cit.,* p. 69.
[615] *Id.*, p. 69, 70.

already in 1995: "*It is thus the whole rural environment constituting the major part of the national territory of France that is threatened with real loss of life.*[616]

By the early 1990s the Loi Royer started being subjected to reflection.[617] At that time, the majority of large retailers was formally still contrary to the *Loi Royer* and called for its simple abolition while small retailers and the Chambers of Commerce remained in favor to the law and advocated its further strengthening through a reduction of its size-threshold from 1000 to 400 squared meters. [618] And this was also a phase when a more general shift in opinion started emerging among local administrators. While in previous decades mayors generally welcomed the establishment of the new big box commercial outlets in their municipality, more and more came to perceive with preoccupation the threat that big box developments posed to the liveliness of their downtown areas.[619]

It is also this last shift that brought to the subsequent *Loi Raffarin*, passed in 1996. The new law modified the discipline of the *Loi Royer* by lowering the size threshold and thus overall strengthening entry restriction in France. [620] Under the new law a retail specific authorization came to be required for every new establishment or expansion above 300 square meters.[621] The law, as noted by Colla, was motivated by the will to slow down the penetration of hard discounters – like the German Lidl and Aldi – who were growing fast in France but were not caught by the previous Loi Royer because normally having a surface below 1000 squared meter.[622] So it is strong the suspicion that the well-established national large distribution ultimately welcomed the law despite publicly still opposing it.

The law restructured and simplified the composition of the local commissions in charge of granting the authorization. Under the *Loi Raffarin* they are composed of 6 members, three among the local mayors of the covered territory, 1 representative from consumer

[616] *Id.,* p. 72.
[617] *Id.*,p. 73. In 1992 a moment of observation was initiated through a freezing of new permits for one and a half year and the introduction of new Centers of Observation for Commercial Facilities in charge of providing more accurate information to the deciding commissions.
[618] *Id.*, p. 75
[619] *Ibid.*
[620] Loi n° 96-603 du 5 juillet 1996 relative au développement et à la promotion du commerce et de l'artisanat
[621] Under the new law all developments larger than 1000 square meters had to present an impact study, assessing the consequences of the project. This included for example an estimate of the jobs created and also of the jobs threatened by the project. Furthermore for projects above 6000 the law required to institute a public consultation assessing the economic and social impact of the project.
[622] E. Colla, *France, cit.*, p. 47.

associations, the president of the Chamber of Commerce and the president of the *Chambre de Métiers* (the equivalent of a chamber of commerce for artisans). While the system still accorded to politicians the decisive vote, the inclusion of mayors hoped to increase coordination in the granting policy. In a context of great complexity of the criteria resulting in a high number of appeals, the *Conseil de Etat* intervened to clarify that the dominant criteria had to be the number of establishments in the so called *zone de chalandise* (the catchment area).[623] This was an economic criterion, which suggests the law was also an instrument of economic planning. Certainly if this was the main criterion, it appears safe to say that the scheme presupposed each department could have its own big box development, and if they did not have one they should get one. It is in fact this feature of the law which brought the Commission to intervene in 2005, which ultimately resulted in an amendment of the law (see supra 3.3.3).

One should further consider that the French *Loi Raffarin* was passed together with the *Loi Galland* which prohibited selling at a loss so the combination of the two laws put France at the forefront of retail regulation within Europe. As it is often the case with strict thresholds, the 300 squared meters threshold has been criticized not only as too strict but also arbitrary, lacking any form of empirical basis on why establishments larger than 300 squared meters are detrimental. As it has been argued, that threshold seems to have been adopted more on the impulse of emotions than a thought-through analysis of the French retailing environment.[624] As the then Minister of Commerce is quoted saying: "*on est allé trop loin. L'équipment commercial est maintenant proche de la saturation. Il doit etre maitrisé et cette maitrise nous l'avons evaluee a 300 square meters.*"[625]

The judgment of Monino and Turolla on the strengthening of the *Law Raffarin* is not a positive one. The new stricter rules have not slowed down the growth of commercial surface. And there is evidence suggesting that more or less formal networks of incumbents

[623] Decision of the Council of State, *Conseil D'Etat*, Section, du 27 mau 2002, 229187, *publié au recueil Lebon, www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000008094435&dateTexte=*. As explained by L. Monino, S. Turolla, *op. cit.,* p. 163, this has meant that the Commissions granted the authorization if the ratio of large surface establishments over all establishments (*taux d'equipment*) was lower than the average departmental or national one. If this was the main criterion, explain Monino and Turolla, it is easily explained why the overall granted surface kept growing in the 1990s and early 2000s. Any department which did not have "enough" large establishments could have one.
[624] L. Monino, S. Turolla, *op. cit.,* p. 143.
[625] *Ibid.*

have played a major role in the administration of the scheme, so much so that it does not seem that the laws was a real obstacle for their expansion.[626] In line with the findings of Bertrand and Kramertz, also Monino and Turolla's study suggests that entry barriers have been linked to a strengthening of the oligopolistic structure of the market, with a high concentration of the large distribution among few big retailers.[627] Overall France, despite these two important legislative interventions has had the highest penetration of hypermarkets and also grew to be the most concentrated market in the EU. [628]

In the early 2000s France was encouraged to amend the laws, in order to comply with the Bolkestein Directive and to deal with a Commission intervention that encouraged to amend the law after a complaint deposited by Aldi. Furthermore, a growing awareness about the ineffectiveness of the law was mounting at the national level too. Renaud Dutreil, ex minister for Small and Medium Enterprises declared: "*ces lois n'ont pas attaint leur objectif qui consistait à favoriser un meilleur èquilibre entre grands et petits commerces, péripheérie et centre-ville.*"[629] The Raffarin law was finally abolished through la *Loi de Modernisation de l'Economie du 4 Aout 2008.* France has not adopted a horizontal law to implement the services directive, but rather specific sectorial intervention with the law on the modernization of the economy playing a key role. One of the areas of intervention of the law was retail planning rules. Now these rules are included not in an autonomous law but within the Commercial Code – to suggest things have gone back to normal.

Nonetheless, the new framework has maintained the key intuition of the previous laws intact, which is requiring a specific retail authorization only from large establishments – while raising the threshold above which authorization is required from 300 squared meters to 1000 squared meters.[630] Significantly competitors have been taken out of the granting

[626] *Id,* p. 165.
[627] *Id.,* p. 166.
[628] With the five largest retail groups controlling 83% of Grocery retailing in 2000. Furthermore, Hypermarkets hold 53 % of the grocery retail market itself: see E. Colla, *France,* cit. p. 36. Numbers are today comparable, with data reporting the 7 largest actors controlling 85% of the market in 2016. Kantar Retail, R. Gaul, T. Popa, *France: Grocery Retail Market Profile*, *Innovation and Sustainability,* August 2016, http://www.tcgfsrs.com/files/SRS_2016_Kantar_Retail_France_Retail_Report.pdf.
[629] *Id*., p. 140. See also S. Lauer, *Le gouvernement souhait reformer la loi Raffarin,* LeMonde, Economie, 25 October 2006 http://www.lemonde.fr/economie/article/2006/10/25/le-gouvernement-souhaite-reformer-la-loi-raffarin_827397_3234.html.
[630] Under the new regime of article l. 752-1 of the Commercial code, only new establishments of above 1000 m^2 need a retail specific authorization.

commissions[631] – with the new criteria shifting from economic considerations to consumer protection, urban and regional planning and environmental.
Most recently, with a new law in 2014, France has made a further important step towards simplification by providing that in cases where a building permit and a commercial development authorizations are both needed, the latter will be considered together with the building permit so as to produce a one application system.[632] The measure is part of a package aimed at helping small retailers through stricter rules on commercial rent, which suggests new patterns of policymaking: more problem-based and less dogmatic.

3.4.2. Italy: Entry Regulation between Forced Modernization and Protection.

The considerable delay in the penetration of large-scale distribution and the resilience of the so-called traditional sector has made Italy a partial outlier in the European landscape. Italy faces today challenges similar to most European countries, but these challenges came later and presented themselves in partially different forms. What is perceived as an often outsized role of small independent retailers has been dealt with as a puzzle by sociologists and business historians.[633] Suzanne Berger wrote that the weight of the traditional sector in Italy reveals rather than an unspecified resilience of this sector, *"a specific form of adaptation to industrialism, in which small independent property performs economic and political functions that are critical to the modern sector."*[634] While the analysis here is limited to retail planning policy as described above, Berger seems to refer to a broader set of policies that, since the post-war, were aimed at helping small and medium businesses (mostly industrial), primarily through the reduction of social insurance costs. Before going back to this hypothesis, I should briefly reconstruct the history of retail planning in Italy.

Throughout its modern history, Italy has adopted at least three different retail authorization schemes that are worth reconstructing in some detail. The different

[631] The power to decide now belongs to the Departmental Commissions of Commercial Menagment (*Commissions Départementales d'aménagement commercial* CDAC). According to art. L 751-2, the composition is in line with the new provisions of the Services Directive: 5 local administrators, 3 experts respectively of Consumption, Sustainable Development and Territorial Management. The commissions are chaired by the Prefect.
[632] Loi du 18 juin 2014 relative à l'artisanat, au commerce et aux très petites entreprises, art. 39. See on this *Legal Study on Retail Establishment*, cit., p. 41.
[633] S. Berger, *The Uses of the Traditional Sector in Italy: Why Declining Classes Survive*, in F. Bechofer, B. Elliott, *The Petite Bourgoisie*, cit.
[634] *Id.,* p. 77.

rationales behind the schemes in fact illuminate the different interests retail planning is able to serve. To summarize, the three moments that can be isolated are: the fascist legislation as a mix of forced modernization and protection; the 1970s law – introducing elements of professionalization and protection; and the Bersani law in the late 1990s, a prima facie liberalization which however left great autonomy to regions which have proven able to offset some of the liberalizing potential of the law.

From Italian unification until 1926, Italy, like most other European countries was governed by a system of free trade – the opening of a new shop simply needed to be communicated to the local authorities.[635] The first organic discipline of retailing dates back to 1926, with the Fascist *Regio Decreto Legge 16 Dicembre 1926, no. 2174*. After decades of relatively free trade and very limited entry barriers , the 1926 *Disciplina del Commercio* introduced a new comprehensive shop-licensing scheme. Under the scheme, all importers, wholesalers and retailers (including those already exercising the activity) had to obtain a license from a local municipal commission.[636]

As a minimum requirement, retailers needed to deposit a cautionary fee with the provincial treasury and possess a clean criminal record.[637] Furthermore, licenses could be denied whenever the Commission found "*the number of existing shops sufficient to the needs of the town, as judged by keeping into account urban development, population density and the location of neighborhood markets.*" Like in more modern versions of such laws, the main criterion to grant the authorization was the existence of market demand for a new shop – so an economic criterion. Overall, however, also due to its broad framing, the law left very wide discretion to municipal Commissions and even more so to the appeal bodies (the provincial governments) in denying licenses.[638]

[635] Of course also in this period rules that we might call police regulation existed. These rules served public security, hygiene or health.
[636] Municipalities exercised this power of authorization through newly instituted commissions, composed of the Podestà (the fascist equivalent of a Mayor), two representatives of the Confederation (the professional organization of retailers; see Infra) and two representatives of the syndical organization for retail workers (art. 3).
[637] Art. 2 R.D.L 2174/1926.
[638] What is more, these commissions were highly responsive to ministerial directives and other forms of more or less formal interference. Initially, for example, the regime explicitly encouraged to grant licenses with great parsimony. Through a series of ministerial directives, the Commissions were in fact advised to grant the licenses only in cases of *"urgent and apparent necessity"* See V. Zamagni, *op. cit.,* p. 97. and the tightening continued to peak in 1930 with a 5 year ban on all new opening of grocery shops by individual persons (*Decreto Legge 19 maggio 1930, n. 774*) Other Ministerial directives for example recommended the Commissions

It is particularly useful to digress into the role played by these rules within the broader context of fascism's socio-economic policies. As it emerges from at least two authoritative studies on the subject, in fact, unlike most modern instantiations of entry regulation, the fascist rules were not born out of the lobbying efforts of small shop-owners.[639] Rather, the rules were part of the regime's anti-inflationary effort known as *Battle for the Lira*.[640] Mussolini's war on inflation deployed entry regulation as an instrument to reduce the number of operators selling things. The idea of the regime, in fact, was that what caused prices to rise was the excessive number of retailers on the market. By reducing the number of shops, they thought, one could also lower prices.

From today's perspective, the economics behind this idea sounds, to say the least, shaky. Basic economics teaches that by increasing concentration, the market power of single firms increases and so does their ability to raise prices. This means that by reducing the number of shops, prices are supposed to rise and not to decrease. But the Fascist regime and its economists seemed to firmly believe that the growing differential between retail and wholesale prices was to be attributed to the excessive number of small firms on the market: *"too many people were opening shops and thereby driving down individual volumes while raising overheads."*[641] To try and understand the rationale behind this thinking, one should consider that the Italian market was dominated by family-owned businesses which also pursued non-profit-making goals. Combined with the low employment ratio of these shops and general scarcity of outside options (alternative jobs available if one had to close the shop) in 1920s Italy, this feature made these firms able (and willing) to internalize losses to a very high degree and remain in the market also if inefficient.

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to try and encourage the transfer of stores out of city centers and into the suburbs where costs were lower: J. Morris, *The Fascist Disciplining of the Italian Retail Sector, 1922-1940*, *cit.,* p. 154.

[639] J. Morris, *op. cit.*, p. 151.

[640] On top of serving anti-inflationary and modernization efforts, the measure also broadly fit Fascism's preference for the values of production over those of consumption and its promotion of more austere lifestyles. Mussolini's retail package, as we would call it today, also included a decree law on the *disciplinging of consumption*: measures like a ban on any new opening of bars, cafès, public houses, pastry shops and night clubs (*Decreto Legge 30 giugno 1926, n. 1096, per la disciplina di taluni consumi*). See J. Morris, *op. cit.,* p. 151.

[641] *Id.* p. 153. In the words of Belluzzo, national minister of the economy in 1926 when the law was passed, retailing had reached "*a point so chaotic and abnormal that competition ha[d] lost its leveling function."* As he went on: *"a plethora of new shops... by inevitably reducing the volume of business in each one, continuously adds to the high cost of living. ... It is therefore necessary to limit the number of shops*." As translated by J. Morris, *op. cit*., p. 153.

In fact it was not only fewer shops that the regime wanted, but also different – more modern – shops. The new licensing scheme, the regime hoped, would drive undercapitalized firms out of the market and encourage the entry of better capitalized new ones. In a market with higher entry barriers, more capital resources are needed to start a new operation and also to purchase a shop that has already been licensed. Stronger hygiene and fraud regulations were also introduced to this end.[642] Again, unlike what modern common sense would suggest, the scheme did not aim to protect incumbents from innovations in retailing, but actually hoped to produce those innovations.[643] The licensing rules were in fact part of a broader set of policies aimed at modernizing the retail sector by increasing scale and concentration of firms and the methods of retailing. For my purposes this is interesting as it shows how law was very early on engaged in cultural programs, in the sense that it wanted to push culture (in this case commercial culture) into a specific direction, rather than following culture. Once more, the fact that a law is deeply rooted and long-standing does not mean it replicates pre-existing cultural features.

The same 1926 law, for example, required retailers to expose the (maximum) price of goods on a label (art.4) and provided that licenses could be withdrawn if the shop sold the goods at prices above those indicated on the labels (art. 5).[644] These were the first steps, in Italy, towards the affirmation of the fixed price system, in a context where prices were still mostly individually negotiated between seller and purchaser.[645] These measures were not only intended to control inflation, but also to modernize retailing by eliminating certain outdated practices – bargaining to start with, but also store credit. One can detect here an early (more or less explicit) attention for the modes of the retail exchange and their cultural ramifications. Principally, the regime wanted to eliminate bargaining because the system left consumer unprotected and unable to compare prices,[646] but undeniably there were

[642] *Ibid.* (reporting how the regime had envisioned an even more radical plan where even already established businesses had to submit application for a license and could have been forced to close down and these plans were dropped only after protest from small shopkeepers).
[643] *Id.*, p. 151.
[644] The Confederation of retailers (see infra) also joined the effort, by directing its members to label goods and expose maximum prices
[645] Morris, *op. cit.,* p. 147
[646] *Ibid*.

also aesthetic-cultural reasons at play – as bargaining was associated with rudimentary, pre-modern, and also irrational forms of exchange.[647]

However, over the 1930s, Fascist policy towards retailing moved away from its original modernizing impetus towards the sensitivities of smaller commerce. For example, as small shop-owners complained about the advantages awarded to other categories of retailers – mostly chain stores[648] and street vendors.[649] the government turned against *prezzo unico* stores – the most successful new retail format in 20s and 30s Italy. This episode allows exploring the relationship of that government with innovations in retailing. Large-scale distribution was making inroads in Italy, albeit later and at a much lower pace than in most other European countries.[650] The rise of chains and department stores was just starting when the great depression hit in the early 1930s.[651] In this context, the type of modern retailing which best fitted the economic landscape of the crisis was the variety store, also known as one price (*prezzo unico*) store, modeled on the American Woolwort format.[652] These stores appealed to customers who had been hit hard by the great depression. By 1940, one price store UPIM, together with its competitors Standa and Per tutte le Borse, operated over 60 shops, being present in most major provincial capitals (capoluoghi) of Northern Italy.[653]

The Government originally welcomed the format as it promised to keep prices low and modernize retail markets – through the use of fixed prices, among other things, and by

[647] In the confederation views, the efforts to reduce the public suspicion towards shopkeepers. The war on bargaining was further strengthen in 1928 when a decree mandating that everything should be sold at the labeled price was issued.
[648] Many chain stores, for example, by being operated directly by industrial producers (e.g. Olivetti, Perugina, Richard-Ginori, Motta, Dolciumi Unica – The list comes from V. Zamagni, *op. cit.,* p. 126) came under industrial rather than commercial discipline and were not subject to the licensing scheme
[649] Street vendors, although licensed, were subjected to virtually no hygiene or price control. Generally thought to charge lower prices they were not considered responsible for inflation. (p. 155) Again, the government was responsive to such new climate so that in 1934 a law was passed that limited the free movement of street vendors by only allowing them to trade in 5 neighboring provinces to where they obtained the license. (Legge 5 Febbraio 1934, n. 327.)
[650] Vera Zamagni believes that the general economic backwardness of the country is not sufficient to explain the phenomena, as its industrial structure was in fact quite advanced. Zamagni explains this with reference to the limited diffusion of consumption in Italy a late industrializer, where industrialization concentrated in a few areas and was halted by the war.
[651] La Rinascente, for example, Italy's first and best-known department store was operating 17 shops in 1929 and went down to 5 by 1934; V. Zamagni, *op. cit.* p. 128.
[652] UPIM (Unico Prezzo Italiano Milano) was the most successful Italian variety store. Started by Rinascente in 1928, it grew to operate 25 stores by 1934. See J. Morris, *op. cit*., p. 150.
[653] *Ibid.* In fact while they started operating as variety stores and despite UPIM's name explicit reference to the one price system, these stores (unlike their American counterparts) had almost 50 different prices available.

eliminating store credit. But given this success, small shops started feeling threatened. They opposed the new format in the name of what we would call unfair competition: by escaping forms of regulation that had been tailored on the previous dominant formats the new shops were not playing by the rules.[654]In 1938, as complaints grew louder, Italy introduced its first measures discriminating against the new outlets. The *prezzo unico* stores had to receive a special license by the Prefect himself (the representative of the Central Government with the Municipality).[655] The rationale behind this measure is that given the potential disruptiveness of these stores on the local economy, they needed to be authorized by the central government rather than the municipal authorities. These stores were defined as those selling *general merchandise of common value in pre-prepared units or packages without the need for weighting or measuring and using a sequence of predetermined prices applied with uniform criteria across every type of merchandise which is paid for and handed over to the consumer at the sales counter."*[656] Morris notes how unlike similar laws passed in other European countries around the same time,[657] the Italian law identified variety shops not through their larger size or promiscuous nature (the fact that they sold all sorts of goods together) but by reference to those skills that they had done away with: "*preparation, wrapping, measuring, home delivery, customer credit."*[658] These skills were at the core of professional pride but also heavily contributed to the overheads of independent stores and here came a format that thrived without making use of any of these skills.

Jonathan Morris and Vera Zamagni give an explanation of the regime's turn of policy that is illuminating for my purposes. The regime was initially betting on the development of new retail formats to modernize the sector while also keeping prices low and thus combating inflation. They soon realized, however, the limitations of this project. While variety stores came to scare many, their impact was not disruptive. First of all they did not sell groceries (in that sector, arguably the most relevant for the control of inflation, the preponderance of small shops selling on store credit, mostly small quantities to customers

[654] Particularly vocal were clothing-shop owners who lamented that *prezzo unico* stores were favored under employment contracts that allowed them to hire less qualified staff. P.
[655] Decreto legge 21 luglio 1938, n. 1468 (convertito in legge 9 gennaio 1939, 142). Significantly the norm stayed in place in post-war Italy and served to limit the opening of supermarkets and hypermarkets on top of variety stores. (see infra)
[656] Regio Decreto Legge 21 luglio 1938, n. 1468, as translated by J. Morris, *op. cit.,* p. 158.
[657] Zamagni documents the various laws passed in Europe to discourage the entry of variety stores. Between 1932 and 1936, Germany, France, Belgium and Austria, all banned or strongly reduced the entry of variety stores. V. Zamagni*, op. cit.,* p. 131.
[658] J. Morris, *op. cit.,* p. 158.

who bought on a daily basis, remained intact). Secondly, their rise, albeit relevant, was confined to the bigger cities in a country that was still overwhelmingly rural by comparison to others in Europe. Overall, as concluded by Morris, it was family owned small businesses who could internalize the costs of Fascism's battle on higher prices, the regime understood it and granted them, among other things to keep in place an authorization scheme originally devised for other purposes and also highly symbolic legislation against the one price stores.[659]

Hence, overall, in Morris's judgment, the new licensing scheme did more in preserving existing forms of retailing than in promoting new ones. It is interesting to note how the law, even if it had this potential was never oriented at re-configuring retailing as a professional discipline. Italian retailers never became a profession but used the licensing scheme well into the 1970s as an instrument to protect incumbents against new entrants. As Morris summarizes it: "*The Fascist regime's priority for retailing was that it should distribute basic commodities at the lowest possible prices and it set out to achieve this by forcing down margins to a minimum. Ultimately, it was traditional retailers who proved best able to deliver this, because of their preparedness to accept declining incomes and to nurture their clientele through customer credit.*"[660]

This digression is to say that the original approach of the regime denounces not great sympathy for the small shopkeeper. This is partly explained by fascism's strong rhetorical praise of producers (both employers and workers) and suspicion for speculators, including at least some shop-owners[661] – an attitude that went together with a certain disdain for the excesses of consumption and encouragement of austere lifestyles.[662] Unlike in more modern instantiations of anti-commercial sentiment, the target was not modern retailing but the small traditional shop. While in the stereotype, the old-style shopkeeper was greedy and deceitful, large-scale distribution, albeit foreign-born, had the allure of modernity and promised to offer cheaper goods to workers/consumers. This element

[659] J. Morris, *op. cit.*, p. 151, showing the continuous reduction of small-shop owner income data on the average income of commercial proprietors, 1921-1938 extrapolated from V. Zamagni (*op. cit.,* p. 75). The regime interest was in lower prices – and ultimately it was small retailers that were able to accept this by their ability to accept credit and also to internalize decreasing income within the family
[660] J. Morris, *op. cit.,* p. 161.
[661] *Id.,* p. 138.
[662] Mussolini embarked in a series of public speeches calling for a sacrifice of "*sensual pleasures*" and *"harder work". Id.,* p. 151.

contributes to my narrative in its own right, by showing how entry regulation was understood as serving very different objectives in different contexts. Furthermore, the resistance of small retailers to the modern distribution and also of the government's attempt to encourage its installation, their gaming the system by turning to their advantage a legislation that aimed to disadvantage them, is more consistent with a functionalist than a culturalist explanation of their persistence.

In post-war Italy the licensing scheme and various other measures stayed intact so that the general structure of retail planning was, in post-war Italy, the Fascist one. Interestingly, the rules first introduced against the *prezzo unico* store that required the authorization of the prefect, were then used to slow down the penetration of supermarkets. As reported by Berger, the opposition of local shopkeepers to supermarkets "*often forced the prefect to shelve applications for indefinite periods of time, apparently with the hope that either the promoters of the Supermarket or the local opposition would give up the battle.*"[663] To applications rejected by the Prefect, one could appeal before the Ministry of Industry, Commerce and Artisanry – and it is estimated that by the 1970s around 800 denied supermarket projects were lying with the Ministry pending decision. [664]

During this time, various measures of the Fascist legislation were challenged before the Constitutional Court for violation of art 41 Italian Constitution – (free private enterprise). Interestingly, these cases resemble the structure of free movement cases. Some economic operator is fined or criminally prosecuted for violating a commercial rule; during the procedure an incidental question of Constitutionality is raised challenging the rules for violation art 41. First it was in 1959, the 1934 law that limited the selling territory of street vendors to the five neighboring provinces to the one in which they obtained the license.[665] Then it was in 1965, the 1939 discipline on special sales (or *liquidazioni*) – that required a special authorization of the local Camera di Commercio before any such sale.[666] Finally, in 1968 it was the decree on *prezzo unico* stores.[667] Overall the Court tended to validate the pre-

[663] S. Berger, *The Uses of the Traditional Sector*, *cit.* p. 80.
[664] *Ibid*. (some of these applications were decades old).
[665] Sentenza N. 32/1959.
[666] Sentenza N. 60/1965.
[667] Sentenza N. 97/1969. The decree was challenged before the Italian constitutional court in 1968. An ordinance from the Tribunale di Saronno inquired about the constitutionality of the *ad hoc* licensing scheme, after complaints by the owner of a prezzo unico store, Mr. Segalini, who was fined after having sold goods (not of small value) that were not included in the prezzo unico license he owned. To sell those goods Segalini

constitutional trading rules, by justifying them with reference to the notion of social utility contained in section 2 of Art. 41 of the Constitution.[668] Of course, this period, despite formally regulated by the fascist corporatist rules was in fact much more open. For example, governmental and municipal authorities had much less discretion because the Constitution, as interpreted by Courts, required them to motivate their denials. [669]

Over the 1960s, various proposals were introduced to amend the system by requiring a simple registration rather than an authorization.[670] All of these proposals failed and in 1971, the so called Helfer Law was passed – law 476/1971.[671] Rather than liberalizing, however, that law further restricted access to trade. It transferred all powers to Municipalities (Comune) (including those formerly of Prefects), without possibility of appeal. While politicians were busy discussing how to modernize a "*pathologically overcrowded*" and outdated retail landscape,[672] on the other side, the law wanted to appease fears of incumbents that in Italy, as documented by Pellegrini had always enjoyed "*outsized*" social and political standing.

For Berger, the Helfer law, represented an "*astonishing reversion to protectionism in the face of nationally proclaimed goals of commercial modernization.*"[673] And what she finds even more astonishing is that the rules were passed with the agreement of virtually all the political

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would have needed a normal retail license on top of the special prezzo unico license. For the State lawyers the discipline rightly attributed decisions on prezzo unico stores to the Government (through the prefect) rather than the municipality, because of the prominence of the interest involved: "the harmonious development of the distributive system and to avoid the formation of economic actors able to limit competition." The Court dismissed all claims, by noting that under the Italian Constitution competition is subordinated to social utility. Competition, adds the Court, "is not considered in and of itself sufficient to achieve.. the interests of society." The Court reminds the motivation for introducing the law and notes that "*for what concern prezzo unico stores, there is a greater risk that complete liberalization –especially in a phase in which small operators have not yet organized themselves to deal with the social transformations in action – will result in a situation of monopoly not corresponding to the interest of consumers and therefore of society in general.*"

[668] Art 41(2) Italian Constitution: It may not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity – and section 3 – The law shall provide for appropriate programs and controls so that public and private-sector economic activity may be oriented and coordinated for social purposes.

[669] See P. Talarico, M. Polacco, *L'Evoluzione della Normativa Sul Commercio in Italia e nelle Marche*, in G. L. Gregori, T. Pencarelli (eds.), *Economia, Management e Disciplina del Commercio in Italia e nelle Marche* (Milano, Franco Angeli, 2012), pp. 72-107, at p. 74. See also See R. O. Di Stilo*, Evoluzione Storica della Disciplina Commerciale al Dettaglio, Dal Sistema Distributivo Libero, al Sistema Distributivo Vincolato; dal Sistema Distributivo Programmato alla Quasi Abolizione della Programmazione,* Disciplina del Commercio e dei Servizi, 8:4, pp. 43-52 (2009).

[670] Berger quotes proposal included in the 1966-1970 plan, and later on one by CNEL, for the plan 1971-1975 which went in the same liberalizing direction (S. Berger, *The Uses of the Trasitional Sector, cit.,* p. 80).

[671] Legge 11 giugno 1971, n. 426.

[672] L. Pellegrini, *op. cit.*

[673] S. Berger, *The Uses of the Traditional Sector, cit*., p. 81.

forces.[674] This was part of a socio-political process rather than one about mere electoral return, a process where social stability was guaranteed through the help accorded to the traditional sector, as a sector able to internalize many problems which would have otherwise disrupted Italian society, mostly potential unemployment. But again Berger emphasizes that the firms of the modern sector (industrial and commercial alike) largely accepted these policies. Their willingness "*to accept protectionist policies for the traditional sector stems from a belief that they provide solutions on the employment front, ... that they are the price of a strategy of alliance with the small productive bourgeoisie in the task of controlling social tensions.*"[675]

So if we follow Berger, small commerce in particular, but small business in general, receives protection because of its role in absorbing the unemployed– it has a cushioning function especially in times of economic crisis, as the 1970s were in Italy. Differently put, "*the traditional sector serves to reduce the costs of economic fluctuations and change for the modern sector, by allowing these costs to be distributed in such a way that their burden is disproportionately carried by those who own and work in independent small property.*"[676] As it is documented by many studies, in times of crises and recession the newly unemployed out of big industry, often start or seek employment in the traditional sector.[677] It is a vicious circle the one Berger describes: while relying on state protection to survive, the petite bourgeoisie is kept alive because it serves the growth of the modern sector as it is able to absorb the costs of economic fluctuations and change. While this gives stability, recognition and status to the petite bourgeoisie, it also prevents, Berger suggests, any real economic and social improvement for its members. While this narrative is compelling, there is no space for idiosyncrasies in consumption, for the possibility that small-scale might have some autonomous cultural or social value beyond stability, or attention for other cultural dynamics – that the protection they are awarded might be in the interest of consumers.

[674] *Id.* p. 82.
[675] *Id.*, p. 82 citing Pizzorno who writes that the system creates a solidarity between the small business owner and the worker, as both dependent, to an extent on a certain policy and not the market: "*Out of this arose a de facto alliance between the small bourgeoisie and marginal social strata, and a complicity of all in a policy of protection of precarious work*" (A. Pizzorno, *I Ceti Medi nei meccanism del Consenso,* in F. Cavazza and S. Graubad (eds.) *Il Caso Italiano,* Milano, Garzanti, 1974).
[676] S. Berger, *The Uses of the Traditional Sector, cit.,* p. 84.
[677] *Id.*, p. 85.

Through a closer look to the law of 1971, I will try to highlight some of these other elements. The legge 476/1971 mandated local authorities to set explicit rules and to previously determine the location of the new establishments in accordance to a commercial plan. The law was the first attempt to have planning principles governing the development of commerce. Entry is still subordinated to an authorization, but now this authorization is motivated by the need to develop an harmonious match of demand and supply and avoid overcrowding.[678] The way Italian doctrine has conceptualized the new regime with respect to the previous one was that the Municipality had lost discretion – they simply had to assess requirements and enable the exercise of a right which was already there. Once more, retail is unique in this, as other non-commercial businesses and also the wholesale trade did not require an authorization.[679]

First of all retail planning competence was transferred in its entirety to the municipality (the Comune) with the elimination of all residual governmental competences (through its local representatives – prefects). The only exception was the new involvement of regions in the authorization of larger outlets. In fact the Helfer Law, like French and Spanish counterparts described earlier on, also discriminated against the large distribution by requiring shops larger than 400 m^2 in cities with more than 10000 inhabitants (or shops above 1500 m^2 in larger cities) to obtain an additional favorable opinion of the Region, in consultation with the regional commission. This was also needed for "*shopping mall and shops that would attract crowds from a large geographical area*." (art. 27). The rationale behind such provision is in fact that of avoiding that the municipality validates all sorts of large scale retailers in order to attract jobs and revenues. The size thresholds were high enough to exclude downtown supermarkets or *superettes*, but would catch all out of town developments – super or hypermarkets. These features of the law, however did not gain much visibility: as the law continued to require a municipal authorization for all shops, the Italian law was never perceived as a law against the large distribution.

Furthermore authorizations were granted for specific categories of merchandise, so that shops could only sell those goods for which they hold an authorization. As reported by Pellegrini, within groceries there were at least 8 different merchandise categories, shoes

[678] P. Talarico, M. Polacco, *op. cit.*, p. 75.
[679] These businesses simply needed to register in the local Chamber of Commerce

and clothing were two separate ones, etc.[680] And this is proved to stifle innovation. On top of this, all shops needed to be registered within the local register of retailers (*Registro degli Esercizi Commerciali*) – and in order to register they had to demonstrate some professional requirement and pass an habilitation exam. This element, together with the strict merchandise subdivisions with respect to the previous regime suggests that in comparison with the previous system there is an effort towards the professionalization of retailing. Arguably, innovation has been slowed down by the Italian merchandise specific authorizations, which in turn have favored specialization – often associated with quality. But as mentioned above, promiscuity is the defining features of most innovations in retailing. While the Italian law did not stop the penetration of promiscuous shops like hypermarkets, there is evidence that it stifled innovation and made more difficult to produce homegrown versions of these formats.

The commercial plan was the core of the system. It provided a de facto quota system for the most profitable sectors: clothing and food. If the municipality did not provide new spaces for those merchandise sectors, no new shops could be allowed to open. Various critical elements should be underlined. First the presence of municipal plans produced great variation on how the laws were administered at the municipal level.[681] Pellegrini suggests that the plans were more stringent in those territories where outside options were lower – the south of the country – and more relaxed in those territories with more industrial or service jobs related to industry – the north. Furthermore, the impact has been differential according to the sector. Food grocery was more tightly controlled, also because it was the small food stores to be threatened the most by the large distribution. Within-national differentiation also is an important level in challenging assumptions of cultural rootedness of national regulation.

Until the 1980, while growing purchasing power went disproportionately to consumption in the non-food sector – mostly clothing – the modern distribution mostly focused on groceries.[682] Finally, the implementation of the rules seemed to privilege those firms with good economic and social contacts at the local level. This meant a favor was accorded to the GDO – *Grande Distribuzione Organizzata* (*large organized distribution* made of

[680] L. Pellegrini, *op. cit.,* p. 26.
[681] *Id.* p. 27
[682] *Id.,* p 28.

independently owned groceries which put together buying and other activities through retailers cooperatives such as Conad and consumer cooperatives such as COOP) – rather than corporations directly opening large stores (such as Carrefour or Esselunga). Reasons of economic planning always prevailed over those of urban planning, which remained to the margin of the concerns of local authorities.[683]

The discipline on commercial authorizations of the Helfer Law (together with the one on opening hours) was subjected to a popular abrogative referendum in 1995. These referendum questions are relevant because they powerfully contribute to show the contested nature of these rules. They were proposed by the Radical party (the Italian equivalent of a libertarian party) as a referendum package known as Liberal Revolution (*rivoluzione liberale).* The two questions on shops were also supported by the Northern League. Interestingly, 62,5 % of electors voted against the liberalization of opening hours, while the question on the liberalization of commercial licenses was rejected with 64,4 % of voters. These numbers seem to show overwhelming support for the restrictive arrangements. They are in fact often quoted still today in efforts to introduce stricter rules, mostly on opening hours.[684]

The third moment in the evolution of Italian Retail Planning was, in the late 1990s, what we might call liberalization. Italy is currently governed by the Bersani Law, *Decreto legislativo 114/1998*, part of the major liberalization effort of the Prodi government managed by the then minister of industry and commerce Pierluigi Bersani. It was, to be sure, a highly visible and debated legislative intervention. The law was motivated by the will to reduce entry barrier and even more so the administrative formalities that went with it. The guiding ideas of the reform were two: on the one side turning retail markets into competitive markets, and on the other side implementing the new principle of *subsisdiarity* – to allow regions to legislate on retail planning as the governing bodies which are closer to the citizens and have better knowledge of local problems.[685] The law in fact gave regions autonomy in the field of retail planning in the hope to better adapt the regulation to local

[683] M. Talarico, M. Polacco, *op. cit.*, p. 74.
[684] See Confesercenti, Quattro Anni di Deregulation, 2015: www.senato.it/application/xmanager/projects/leg17/attachments/documento_evento_procedura_commissione/files/000/002/894/2015_07_09_-_Confesercenti.pdf.
[685] L. Pellegrini, *op. cit.,* p. 32.

knowledge and local circumstances and also to generally reduce the level of entry barriers.[686]

The liberalization first abolished the REC (registers of retailers) so that in order to open a shop one does not need to prove any professional knowledge anymore. With this it came the quasi-total abolition of the merchandise categories, in the sense that only two macro-categories remain – food grocery and non-food grocery. This limitation did not find equivalent in any other European country and it was finally abolished also in Italy. The previous merchandise specific authorizations are considered to have been one of the elements that has most slowed down innovation in Italian retailing.[687] The *Piani Commerciali*, Retail specific forms of planning established under the previous Helfer Law were are also abolished. And here the shift is quite clear: from economic planning into urban planning.

Most importantly the requirement to obtain an authorization is dropped for all small shops – which the law calls *neighborhood shops* – with surfaces up to 150 squared meters (or 250 squared meters in municipalities with more than 10.000 inhabitants). In order to open such shop, one simply needs to send a notice to the Municipality certifying that he/she has the right personal prerequisites and respect of municipal rules on urban police, hygiene, planning, etc. The main obstacle here remains that these shops still need to respect the use rules (destinazione d'uso) established in the municipal plan, meaning they need to occupy a building, which the planning rules identify – as retail space. Given the abundance of such small spaces destined to retail, as it has been noted, the rules equate to a full liberalization for small shops.[688]

A retail specific authorization remains instead needed for medium and large retail outlets. Medium-sized shops, between 150 and 1500 squared meters (or between 250 and 2500 squared meters in cities above 10.000 people) need to apply to the municipality like in the previous regime. Municipalities need to set up rules and procedures to this end, but the national law establishes certain general principles. Large establishments – over 1500 square

[686] *Ibid.*
[687] *Id.*, p. 33 (what remains in terms of personal/professional qualifications are general requirements such as a duty not to have been criminally convicted or undergone bankruptcy (art. 5.2)).
[688] *Id.* p. 34.

meters (or 2500 squared meters in cities with more than 10.000 inhabitants) – need still to obtain an authorization from the competent municipality, but the decision is here not taken by the municipality alone but in concert with regional and provincial authorities, through a body called *Conferenza dei Servizi* which is composed of at least three members (one representative of the Region, one of the Province and one of the Comune). In any case the authorization can only be granted with the favorable opinion of the Regional representative, which is why one often hears that authorizations for large establishments are of regional competence.

Within this scheme, regional legislation, as we are about to discover, can both change the procedures and specify the requirements towards the granting of the authorization. The law in fact establishes what has been called Retail Federalism (Federalismo Commerciale).[689] In line with the broader decentralizing legislation of those years[690] the law left ample autonomy to regions in determining the actual ceilings above which developers need a retail specific authorization. In the scheme of the new Bersani law, authorizations were only needed to alleviate the negative externalities associated to large establishments mostly with urban planning criteria. But in fact, as it has been noted, the autonomy awarded to regional regulation has altered such premises. A focal point of the new law is in fact its art. 6 – *Planning of the Distributive Network* – mandating regions to set up through law general orientations for the set-up of retail activities, and specific regional plans according to which municipalities develop their urban plans. The regions needed to set up these plans by April 1999 and no authorization for the larger establishment could be granted without a regional plan being in force. Research conducted by Schivardi and Saviano where they interviewed the regional administrators in charge of setting up the plans show that these policymakers lacked experience and data for regulating the sector. They established the ceilings simply by reference to *rule of thumb rules* and without "*a systematic analysis of the local sectorial characteristics*"[691]

[689] G. L. Gregori, *Il Federalismo Commerciale: un Opportunità Mancata*, in G. L. Gregori, T. Pancarelli (eds.), *op. cit.*

[690] The law intervenes in the same years of major efforts toward the devolution of administrative power to the Italian regions and went towards a general simplification of administrative powers. The Bassanini reform of 1997 through ordinary law preceded the 2001 reform of the Constitution that enhanced Italy's regionalism by turning it into a quasi-federal state.

[691] F. Schivardi, E. Viviano, *Entry Barriers in Retail Trade, cit.,* p. 149.

It is interesting to note how, despite the law was advertised as a moment of liberalization, regions had the ability to implement stringent plans, and so they did. Data once more reported by Schivardi and Viviano shows that all regions (with the exception of Emilia Romagna, Piedmont and Marche) implemented very restrictive plans.[692] The plans normally work this way: they subdivide the region in areas roughly coinciding with administrative provinces and for each area establish a maximum number of square meters of floor space and/or the maximum number of new large stores that can be authorized. Once that limit is reached no new stores can be opened until the next plan is drafted. The first review of the plans was in 2002, all regions proceeded to tighten their regulations during that first occasion, probably after realizing that the ceilings originally set up allowed too much entry. Most problematically, in the regional legislations, the old criterion of the law 426/71 often reappeared. So that regions subordinated the granting of authorizations to proof that the new business was needed to meet actual demand.[693] Many agree that the regional intervention has de facto constituted a "*counter-reformation.*"[694]

In the context of a highly heterogeneous retail landscape within Italy ,the Bersani law has produced further diversification. Locally powerful actors – such as cooperatives in Central Italy – were able to exercise great political influence to which many attribute the fact that hypermarkets have continued to open outside of town. The debate of the last two decades has in Italy mostly revolved around the opening of malls which often develop around a hypermarket owning the commercial gallery and renting out the various spaces to retailers. Within this debate, the new rules are said to have created a further mismatch between the distributive system, and the actual level of development in the territory – with detrimental consequences on accessibility by disadvantaged consumers. Heavily relying on out-of-town supermarkets might not be coherent with territories with rapidly aging populations and decreasing car mobility. Furthermore, on top of the neo-protectionism of many regions, many municipalities have engaged in regulatory competition to attract retailers on their territory.[695] Overall, the Bersani Law has not come into conflict with Internal Market Law, but there are reasons to believe that certain regional implementation have de facto reintroduced economic criteria in the authorization schemes.

[692] *Ibid.*
[693] L. Pellegrini, *op. cit.* p. 37,
[694] *Id.*, p. 39.
[695] *Ibid.*

3.5. Conclusions

The last section of this chapter has tried to show some variation in the meanings that retail planning policy can take on within particular geographical and historical contexts. First I have tried to show that the nature of entry regulation in retail distribution is deeply contested – the Italian referendum on the rules in the 1970s being only the most visible manifestation of this. The rules came about to deal with specific problems, but they have often adapted to the changing contexts and are deployed to target groups of retailers different from those against whom they had originally been devised. They are instrumental rules, whose meaning is context specific, but legal technologies very similar. While they certainly play also a symbolic/expressive function, and some elements suggest they might have served as instances of identity building/professionalization for retailers, it is difficult to argue that they are rooted in the national histories.

No matter what their specific impact, the rules do not appear to have worked in realizing the "harmony" they sought to achieve between large, suburban, chain distribution and small, independent, downtown distribution. In France, for example, urban downtowns have continued to suffer also in the face of a formal tightening of the rules. Market concentration has kept increasing and, some economists have argued, the large distribution was able to turn the implementation of the rules in its favor – for example by slowing down the penetration of hard discounters. In Italy, many distortions have emerged first under the law of the 1970s and also with the more recent liberalization which awards regions powers which they have often used to offset the liberalizing potential of the reform. In any case, in Italy the reform was a homegrown process which emerged in the 1990s without any explicit involvement of the EU.

In France, the new framework of the Services Directive has hastened reform which was being discussed already at the national level but it is hard to say if it would have come in the way it did. From one of the most regulated countries France is now one of the virtuous one providing for a single-application system. But this has certainly not entailed full deregulation. As we have seen, as a result of EU legal interventions certain features of regulation become unavailable. The use of economic criteria when granting a retail authorization (harmony or balance of the commercial offer, the idea that every locality

should get its own hypermarket) is not acceptable anymore. Similarly tests of economic needs should be abandoned and competitors should not be included in the commissions deciding on the granting of authorizations. Furthermore, the EU interventions push the national schemes towards coherence, systematicity and *better regulation*. Nonetheless the technology employed by retail planning regulation, which is requiring a special retail authorization only from larger retailers is still acceptable under EU law. Many Member States including France retain such systems, but now the schemes must be aimed "truly" at achieving territorial and urban cohesion, the protection of the environment, or of consumer interests (to accessibility and a varied supply and perhaps even their favored choice of retail channel).

While I have expressed some criticisms on the lack of a more open discussion of the cultural implications of the rules under consideration within the case law or also in the policy documents of the Commission, I consider the outcome of the specific EU Law interventions I studied a desirable one. For what concerns the role played by EU Law more generally there is space to suggest that the EU has functioned as a coping mechanism for these specific set of rules rather than a market homogenizer.

Let me just sketch here a set of dynamics that will be in need of further specification and research. The impact of EU Law comes at a time where the rules are often already contested at the national level, and there are serious doubts they can achieve their desired outcomes. It forces Member States into reflection, to look for justifications. It is a *soul searching* or *function searching* effort it encourages Member States into – an effort similar to the one I have tried to put in practice in these Case Studies. As a result, Member States are forced to eliminate certain elements of the legislation which undoubtedly make the rule incompatible with open and competitive markets, but the overall structure of these rules is left intact. The rules as amended promise to be less burdensome, not only on large retailers but on all retailers – thanks to their simplification. Where economic criteria have failed in realizing a more balanced and inclusive territorial development or preserving cherished lifestyles and experiences, perhaps the territorial and environmental criteria will. While it is impossible to guess what purely national processes of reform would look like, without EU Law interferences it is plausible that these processes would have been delayed thus putting the rules under further pressure and generating further resistance against them.

And where change was to come, perhaps, it would have come in the form of more abrupt radical de-regulation rather than the softer tinkering that EU-Law-induced legal reform seems to amount to.

Chapter 4:

The European Union and the Price of Books: a Case Study on Culture and Competition

4.1. Introduction

Books are written, published, printed, sold, read or otherwise used. Each of these moments in the *life* of a book has important economic and cultural (material and ideological) determinants and complex (intended and unintended) social consequences. Different actors are involved in each of these moments – writers and publishers, editors, designers, booksellers and finally consumers. In this chapter I will focus primarily on one of these moments – how books are sold: on booksellers (old and new) and their clients, on the government interventions and legal decisions that shape their interactions, and how buying and selling books is implicated in people's lives. As discussed at length in Chapter II, this approach conceives of consumption as relational and positional work, that matters for people's social relationships and identities – ultimately their culture, their *economic lives*. Clearly, the fact that books are also explicitly cultural goods is relevant as it allows me to engage with more than one of the notions of culture I outlined above, but it is not the only, nor the primary reason that has motivated the choice of this case study.

The reason why I chose books – which is also the legal entry point into these issues –is that the book trade is, in many European countries governed by Resale Price Maintenance (RPM) rules: private or public arrangements that prohibit (partly or completely) booksellers from giving discounts, thus eliminating (or reducing) a key element of competition in the retail book trade: price competition. For this reason, the rules studied here have been at the center of various conflicts between the European Commission and the Member States – conflicts of rationalities, someone has written, competition (or the Market) versus culture.[696] How did these rules come about? Which interests do they serve? How do they change markets and identities? What impact have EU interventions had on them? These questions will be discussed with reference to EU Commission decisions and Case Law of the Court and the experiences of various EU countries – in particular the

[696] C. U. Schmid, *Diagonal Competence Conflicts Between European Competition Law and National Regulation – A Conflict of Laws Reconstruction of the Dispute on Book Price Fixing*, *cit*. See discussion later in this chapter.

United Kingdom, Germany and Italy – reconstructed with reference to available historical accounts and a limited number of interviews. The countries have been chosen because they show variation both in terms of how (and when) the rules were introduced and how they were defended vis-à-vis the Commission.

Ultimately, this chapter would like to say something about the relationship between culture and competition. As discussed in Chapter I, culture and competition are not an easy pair to reconcile: across the social sciences, they are mostly conceived in oppositional terms – one eroding the other. Their relationship, as this chapter tries to show, is in fact more complex and multifaceted. The book market, and more specifically its pricing rules, offer an interesting case study to try and understand this relationship, by clarifying the role that EU law, with its rules on competition, plays in modifying certain forms of market ordering that are said to protect culture.

An influential stream of literature, what I have called the *culturalist narrative*, would have little doubts in describing this role: by challenging national forms of market-ordering that limit competition and are said to reflect deeply-rooted local preferences, European internal market and competition law alter – and even degrade – Member States' cultures that are made of less competitive forms of life.[697] More precisely, EU institutions are said to be incapable of valuing the expressivity of rules about "*what can be bought and sold*"[698] and at which conditions – rules, I would add, about what money can and cannot buy and about the right price for certain things.[699] As explored above, in fact, EU economic law is said to be detrimental for rules that build a *limited marketplace* which has social value both because it reflects local cultures and because it encourages equality in terms of shared experiences (2.2.10.).

The rules that I study in this chapter arguably show all of these features: they are deeply rooted, market limiting, and potentially expressive. Additionally these rules deal with goods, such as books, that are explicitly *cultural goods* (see infra). They are, in other words,

[697] See in particular A. Somek, *Europe: Political, Not Cosmopolitan, cit.*. See also G. Davies, *Internal Market Adjudication,* cit.
[698] G. Davies, *Internal Market Adjudication, cit*., p. 296.
[699] This definition borrows from C. R. Sunstein, *On the Expressive Function of Law, cit.*. Sunstein clarifies that a lot of these expressive rules have to do with what money can and cannot buy. On this idea see also M. J. Sandel, *What Money Can't Buy, cit.* G. Davies specifies that "*even regulation can be expressive, performing a social function of communicating and reinforcing values and identity.*" (*Internal Market Adjudication, cit.,* p. 325)

ideal candidates to test claims about the cultural significance of national market regulation. Their evolution however, as this chapter will show, hints at a different role for EU law – and ultimately also a different relationship between culture and competition. In fact, book-pricing rules have been explicitly defended by Member States as necessary for the protection of national culture, and the EU, while uncompromising on the issue of cross-border exchanges (see infra), has left the purely national systems intact. Therefore, where they wanted to, Member States have proven capable of retaining and even upgrading their national systems of fixed book pricing.

The structure of the chapter is as follows. A first part introduces the reader to the notion of Resale Price Maintenance, by looking at how economic theory conceives of it with particular reference to its pro and anti-competitive effects in the book sector. A second section discusses possible conceptualizations of fixed book price rules with reference to the various notions of culture described above. After this theoretical introduction, the paper tries to reconstruct the approach of the EU by surveying the interventions of the European Commission and decisions of the European Court of Justice. Particular attention will be devoted to two early cases that set the stage for future EU interventions: the Dutch/Flemish books controversy, dealing with a transnational fixed book price agreement[700], and the *Leclerc v. Au Blé Vert* decision, dealing with a national fixed book price law.[701] The fourth section follows the evolution of book pricing rules in the United Kingdom, Germany and Italy, from the emersion of the rules, to the recent conflicts that have emerged with new (online) retailers like Amazon and the advent of digital books. As I will show, the three countries analyzed show enough variation to challenge the most radical claims about the homogenizing role of the EU. While the challenges that new technologies bring about in this sector (through e-books and online retailers) are just sketched here, but they are certainly an area of inquiry which will deserve more study and thinking.

4.2. Resale Price Maintenance and Competition in the Book Retail Trade

Under Resale Price Maintenance (RPM) schemes as they apply to books, publishers set the retail price of books on top of their wholesale price, while the ability of resellers to give discounts is eliminated or strongly limited. Across the last century, most European

[700] Commission Decision 82/123/EEC of 25 November 1981.
[701] Case C- 229/83, *Edouard Leclerc and Others v. SARL "au blé vert" and others* [1985], ECR I-00001.

countries have adopted some variation of Resale Price Maintenance in the book trade, typically in the form of collective arrangements between associations of publishers and booksellers – so called Fixed Book Price Agreements (FBPA).[702] In the last thirty years or so, many countries have transitioned to what we might call Fixed Book Price Laws, by turning their trade agreements into State legislation that limits or excludes the ability of booksellers to discount books (France, Germany, Austria, Italy).[703]

A few general remarks on the economics of Resale Price Maintenance are in order. By adopting RPM schemes, suppliers and distributors agree to set a fixed, minimum or maximum retail price for certain goods. While arrangements that set a maximum price are rare and also do not cause particular concerns, those setting a fixed or minimum price are typically considered to have more severe anticompetitive effects. In these cases, in fact, RPM eliminates or reduces intra-brand price competition at the retail level and, by increasing price transparency, might facilitate horizontal collusion at the upstream level – by serving as a so called *facilitating device*.[704] It is worth clarifying that, in the book market, each book can be thought of as a single brand: intra-brand competition thus only manifests itself if booksellers are able to compete on the price of a single edition; inter-brand competition corresponds, instead, to the competition existing between different books or different editions of the same book. Hence, when retailers cannot discount, as prices of books are fixed, intra-brand price competition is eliminated.

Since the 1960, however, economists belonging to the Chicago School have started providing objective justifications for RPM clauses by pointing at their possible pro-

[702] Resale Price Maintenance is typically thought of as the product of an individual agreement. In the case of books, however, the agreements were more often collective horizontal agreement to facilitate the enforcement of individual vertical RPM clauses. The clearer example of this model is represented by the British Net Book Agreement. For a discussion of the competitive implications of vertical v. horizontal agreements, see: D. Geradin. A. L. Farrar, N. Petit, *EU Competition Law and* Economics (Oxford, Oxford University Press, 2012), p. 150.

[703] For a comparative overview of the transitions from trade agreements to national laws see D. Stockmann, *Free or Fixed Prices on Books – Patterns of Book Pricing in Europe*, Javnost – The Public (Journal of the European Institute for Communication and Culture), 11: 4, pp. 49-63 (2004).

[704] N. Verras, *Resale Price Maintenance in EU Competition Law: Thoughts in Relation to the Vertical Restraints Review Procedure*, The Columbia Journal of European Law Online (2009). On the risks of collusion see also M. Motta, *Competition Policy: Theory and Practice* (Cambridge University Press, 2004), p. 359. In the Net Book Agreement, the horizontal dimension to ensure collective enforcement seems to fit this definition of facilitating device. See M. Utton, B*ooks Are Not Different After All: Observations on the Formal Ending of the Net Book Agreement in the UK*, International Journal of the Economics of Business, 7:1, pp. 115-126 (2000), at p. 122.

competitive effects.[705] This more benign outlook on RPM (as well as on exclusive contracts, for example) relies on the assumption that each industry is able to make the contractual choices that maximize efficiency of the vertical chain and that the State should generally not intervene to alter these choices. With particular regard to RPM, the main intuition of the Chicago School is that by eliminating price competition, RPM leads to enhanced competition in other equally important areas, such as the services provided to customers.

The following list gives a taste of the beneficial effects typically attributed to RPM in economic literature – in other words they are their possible economic justifications[706]: RPM protects suppliers against the risk of retailers lowering prices at the expenses of quality of service; RPM protects the image and reputation of "branded or positional" goods (e.g. luxury goods); RPM protects from free riding, when some retailers offer pre-and-post sales services and others do not (it prevents, in other words, customers from browsing in one shop that has good service to then buy at the cheaper shop with bad service – this is the most widely accepted justification by economists[707]); RPM helps in dealing with the risk aversion of retailers in markets with uncertain consumer demand; RPM is an instrument for producers to retain so called "*brick and mortar*" retail networks, that face higher promotional, inventory and distribution costs than online retail networks, but are very important for the reputation of the brand. Furthermore, proponents of RPM generally believe that inter-brand competition should be the primary concern of anti-trust. These economic justifications, as we will see, feature quite prominently in Member States' defenses of their national RPM schemes.

Hence, both detractors and supporters of fixed book price find in economics possible justifications for their position. For their detractors, fixed book price schemes favor cartels that keep the prices of books artificially high and, by eliminating price competition at the retail level, further damage the economic (and cultural) interest of the consumer-reader.

[705] L. G. Telser, *Why Should Manufacturers Want Fair Trade?,* Journal of Law and Economics, 86:3, pp. 89-96 (1960). R. Mathewson, R. Winter, *The Law and Economics of Resale Price Maintenance,* Review of Industrial Organization, 13: 1/2, pp. 57-48, (1998).
[706] The list borrows from D. Geradin. A. L. Farrar, N. Petit, *op. cit.*, p. 469.
[707] This risk has manifested its disruptive potential with the emergence of multi-channel shopping, which is consumers buying online after trying on, physically experiencing and looking at things in physical stores. In these situations the online retailer is able to capture the benefits of an investment made by another firm, the physical retailer, without having to pay for it. G. T. Gundlach, J. P. Cannon, K. C. Manning, *Free Riding and Resale Price Maintenance: Insights from Marketing Research and Practice*, The AntiTrust Bullettin, 55:2, pp. 381-422 (2010).

For their supporters, FBPAs do not eliminate competition, but simply shift it from prices to services: they thus allow for the survival of rich networks of high-quality and well-stocked bookshops which would otherwise be wiped out by retailers with better price-cutting ability (large stores, supermarkets, more recently Amazon and other online retailers) and for the emergence of synergies between online and physical shops – rather than the cannibalization of the latter by the former.[708] Another argument that features prominently in the defenses of FBPAs and laws (but which appears limited to books – it is not in other words employed as a general justification for RPM) is the "*cross-subsidization*" argument: the extra profits derived by retailers from "over-priced" bestsellers are needed to subsidize investments in more culturally challenging and slow selling books. Only insofar as they are assured of making large profits from best-sellers, booksellers will keep buying large stocks of books, including more culturally challenging ones, and thus sustain the riskier investments of publishers in these kinds of books. From this perspective RPM, is essential for the quality and variety of books on the market.

On top of these two main arguments in favor of RPM in the book sector, which are the positive effects of RPM on both the distribution network and the quality (and variety of books), Member States used to put forward, at least in the earlier litigation a sort of excessive competition argument (see also the McMillan, Marshall correspondence later in the chapter). As discussed above for entry regulation, the argument runs more or less like this: without RPM, price cutting competition by predatory booksellers would drive most bookshops out of the market which would ultimately create a market with few firms able to impose much higher prices. So the abandonment of RPM would in the long run produce higher prices rather than lower ones. As we have seen, this justification might make sense only for industries with relatively higher entry costs, which does not allow to rule bookstores out given their high inventory costs. [709]

[708] For the notion of synergy and cannibalization in multi-channel shopping see T. Gundlach, J. P. Cannon, K. C. Manning, *op. cit.*, p. 400. However the same authors quote research showing that trying to discourage consumer *research shopping* through strategies like RPM might actually increase channel cannibalization. This is because by focusing on similar non-price strategies (meaning that also the potential discounter will focus on services) They quote J. Avery, T. Steenburgh, J. A. Deighton, M. Caravella, *Adding Bricks to Clicks: The Contingencies Driving Cannibalization and Complementarity in Multichannel Retailing*, Harvard Business School Working Paper, 07/043, Feb 2009 in that "*cannibalization is more likely to occur when channels closely duplicate each other and do not provide adequate product and(or service differentiation. ... [and] when channels target the same consumers*" (pp.3-4)

[709] S. Breyer, *op. cit*. See discussion above (3.2.2).

While the theory is rich, empirical evidence on the effects of Resale Price Maintenance is lacking. Interestingly, both sides stick to economic arguments, despite the fact that economics is everything but settled on the effects of fixed book price schemes on the distributive network, prices, variety, quality and ultimately consumer welfare.[710] This contributes to a rather dogmatic discussion of the subject. The two camps of this debate stick faithfully to their own sets of arguments, their own theories, despite the fact that these theories are not empirically demonstrated. Not unlike other analogous quarrels between free traders and defendants of national autonomy, the debate on book pricing appears at times like a dialogue of the deaf.[711].

But even if it could provide a conclusive answer and establish that one camp is right and the other one is wrong, Economics would still not offer sufficient guidance to understand the implications of this conflict. Economics, while providing useful theory and insights, thinks about these issues in terms of what is the best firm strategy – does it make sense for a producer to use a multichannel strategy and to support it through RPM? Does it increase the productivity of the industry? These are useful questions but do not acknowledge the possibility that RPM might have value for how it shapes the market along the way, rather than because of its ability to achieve certain stated of objectives. This intuition goes back to the idea that the means of government, not only its goals, have important consequences (see discussion in 1.2.2.3.). In order to discuss these consequences it is necessary to delve deeper into the meaning that industry participants and society at large attach to fixed book price rules. In other words, it is necessary to explore the cultural implications of these particular forms of organization of the market.

[710] With few exceptions, the empirical studies on the issue are quite underdeveloped. For the difficulties in evaluating the effects of Fixed Book Price Agreements, see F. Van Der Ploeg, *Beyond the Dogma of the Fixed Book Price Agreement,* Journal of Cultural Economics, 28:1, pp. 1-20 (2004). The author finds evidence to disprove the cross-subsidization argument. However, he notes that the inconclusive empirical evidence contributes to the issue being treated as a dogma in the book world and the political arena.

[711] Within the context of international trade liberalization and WTO in particular a parallel debate has involved audiovisuals. See for example, R. Martin, *Audiovisual Services in the Doha Round; 'Dialogue de Sourds, the sequel?*, Journal of World Investment & Trade, 6:6, pp. 923-952 (2005). See more broadly the current debate on the *cultural exception* in the Transatlantic Trade and Investment Partnership (TTIP). For a recent collection on this and other conflicts between free trade and culture see C. Vadi, B. de Witte, (eds.) *Culture and International Economic Law*, (Abingdon, Routledge, 2015)

4.3. Two or Three notions of Culture

One way to study book-pricing rules is to look at them as instances of cultural policy, calling for a so-called cultural exception: books should be exempted from competition law because of their inherent (higher) cultural value. This predicament relies on a conception of books – thoroughly elaborated by German scholarship – as both economic and cultural goods requiring a special treatment.[712] Germany, indeed, in its competition law, provided for an exception in relation to the publishing industries (see infra).[713] From this perspective, the interaction between EU and national law in this field was conceptualized by Christoph Schmid as a diagonal competence conflict.[714] Through the category of diagonal conflict, Schmid describes a clash between two rationalities, two sets of irreconcilable logical and teleological worldviews – in the specific case, indeed, competition and cultural policy.

Not only these rationalities are irreconcilable from a substantive point of view, but competence over them belongs to different levels of government – competition to the EU, cultural policy to the Member States. This is why these conflicts are not only horizontal (substantive conflicts solvable through balancing) nor only vertical (competence conflicts solvable through hierarchy), but diagonal. Diagonal conflicts require more nuanced legal solutions and a mutual engagement of the various actors involved with each other competences.[715]

In 2000, German publishers and booksellers, helped by the government, were vigorously defending their book pricing rules, which had come under the scrutiny of the European Commission. Schmid wrote to help their cause: he advocated a relaxation of the rules on competition in relation to book pricing arrangements and explored possible doctrinal

[712] German scholarship has gone at great length in theorizing the value of the book not only as a cultural good, but also as a Constitutional good, enjoying a special status because of its importance for freedom of expression, and education. See for example A. Lamping, and M Ludwigs, *Die kartellrechtliche Bedeutung des Buches als Wirtschafts- und Kulturgut nach europaischem Gemeinschatsrecht: Sind Bucher anders?*, Zeitschrift fur Rechtsvergleichung, pp. 51-58, 1999. See also U. Everling, *Book Price Fixing in the German Language Area and European Community Law* (Baden Baden, Nomos Verlagsgesellschaft, 1997)

[713] Para. 16 of the GWB (Gesetz Gegen Wettbewerbsbeschränkungen–Law against restrictions on competition). For the publishing industries, the German Law provided for an exception to the generally applicable prohibition of vertical price fixing.

[714] C. U. Schmid, *Diagonal Competence Conflicts, cit.*

[715] On this point see also C. Joerges, *A New Type of Conflicts Law as the Legal Paradigm of the Postnational Constellations*, *cit.*; Y. Svetiev, *European Regulatory Private Law: From Conflicts to Platforms, cit.*

avenues to achieve it.[716] In comparison to the dominant tones of the contemporary debate,[717] however, his writings reveal a much deeper confidence in the EU as a plural and nuanced market-builder. While warning the EU not to give in to "*unrealistic neo-liberal generalizations,*" Schmidt did not detect a tendency to give precedence to competition over other values, as this would indeed contradict "*the subtle balancing of market integration goals and national regulatory concerns undertaken by the ECJ in its jurisprudence on the market freedoms, and overstretching the EC Treaty.*"[718]

As further elaborated by Martin Lodge, the interaction between EU and national law in this field can be seen as a typical example of a "*direct conflict between a national exempt sector and the EC competition regime.*"[719] Such conflicts help competition policy to Europeanize as "*new opportunities for new actors to challenge existing national provisions*" are created[720] – in this case the national and foreign book discounters (see infra).

Conceptualizing the conflict as a clash between cultural policy and competition law – or as a conflict between a national exemption and the European "normal" regime – is a useful starting point, especially because member states defended their national arrangements also as necessary to sustain the production of sound, high quality books.[721] And from this

[716] C. U. Schmid envisaged three doctrinal avenues to affirm a cultural exception under EU competition Law that would shield German rules on fixed book pricing. The first is to interpretatively adopt a sort of *Rule of Reason* approach to excluding an agreement from the application of art 85(1) EEC (current art 101(1) TFEU) when it promotes competition – this approach borrows in turn from U. Everling's proposal to apply an *Immanenztheorie* to cartels (U. Everling, *Book Price Fixing in the German Language Area and European Community Law*, cit.). The second avenue is the introduction of a sort of *Cassis de Dijon* exception for competition law when "*private agreements take over intrinsic public functions or when national law has at least authorized certain anti-competitive measures*" (p. 167). Again, for Schmid this appears problematic as it only envisages "*all or nothing*" solutions, which exclude "*negotiation of compromise solutions, and expert advice to be integrated in the procedure*" which is instead guaranteed by commission interventions. The third option advocates a wide reading of art. 81(3) for the granting of exceptions and an assimilation of these kinds of judgments to "*decisions on the basic freedoms*" by removing the burden of argument and proof from the enterprises. Schmid considers this approach the most desirable and likely one, in the light of the jurisprudence of *Familiaepresse* where the Court found that "*maintenance of press diversity may constitute an overriding requirement justifying a restriction on the free movement*" (170). He rightly predicted that "*an escalation of the book price conflict into a more severe conflict on competences" seemed very unlikely,* but warned that if the Commission disregarded national cultural concerns *"without even attempting to give a plausible justification*", Germany could declare the implementation of the EC treaties contrary to its own Constitution.

[717] See G. Davies, *Internal Market Adjudication, cit.*; A. Somek, *Europe: political, not cosmopolitan, cit.*; J. H. H. Weiler, *Van Gend en Loos, cit.*; C. Joerges, *Law and Politics in Europe's Crisis, cit.*

[718] C. U. Schmid, *op. cit.*, p. 158.

[719] M. Lodge, *Competition Policy: From Centrality to Muddling Through*, in K. Dyson, K. H. Goetz (eds.), *Germany, Europe and the Politics of Constraint*, Proceeding of the British Academy 119, (Oxford, Oxford University Press, 2003) pp. 232-250, at p. 243.

[720] *Ibid.*

[721] See Joined Cases C-43/82 and 63/82, *VbVb and VBBB v. Commission* [1984] ECR I-00019, para. 39.

perspective, of course, they used the cross-subsidization argument described above. This conceptualization, however, is not the only available one. A further layer of analysis seems possible, as the rules at stake offer themselves to be interpreted as subtler manifestations of culture as a way of life – or rather culture as embodied in market experiences, the small-scale interpersonal relations that go with them, and the meanings people associate to these things.[722]

While it is fair to say, with a degree of simplification, that cultural policy – intended as the promotion of the arts and cultural products – is a competence of Member States,[723] the "*way of life*" considerations reflected in the organization of markets remain largely implicit but arguably pervade regulation at each level of government – the national and the EU. If accepting the intuition that markets are social constructs rather than natural entities, it becomes easy to detect cultural implications in each collective decision a polity takes about the size, scope and shape – so to say the limits – of its markets.[724] In the book trade, these "*way of life*" implications become unusually explicit. As Member States have typically argued, the value of book pricing rules lies in that they allow for the survival of rich networks of specialized bookshops, holding large stocks, and providing quality advice to their customers-readers. Once more, Member States phrase their justification in economic terms, by explaining that competition is shifted from prices to services, but this argument carries with it many of the ideas discussed above in Chapter II. Bookshops, and better small independent bookshops, are not like any other shop – people do not only go there to buy, but also to engage in more complex forms of social interaction, for a set of experiences that are context specific, and linked to a particular sense of place, or finally to signal to others and themselves who they are (their place in the world).[725] All these things are able to

[722] V. Zelizer, *The Lives behind Economic Lives, cit.*

[723] As Schmid acknowledged, the boundaries of the competence over Cultural Policy are today less clear, as the role of culture grew in prominence in the treaties. In particular, with Maastricht, culture has become an autonomous sphere of EU action, with a legal basis in the Treaties, although there is still an explicit prohibition to harmonize. See however R. Craufurd Smith, *The Evolution of Cultural Policy in the European Union* in P. Craig, G. de Búrca, *The Evolution of EU Law* (Oxford: Oxford University Press, 2011), pp. 869-894. See also B. de Witte, *Cultural Policy Justifications*, in P. Koutrakos, N. N. Shuibhne, P. Syrpis (eds.), *Exceptions from EU Free Movement Law*, *cit.*, pp. 131-142.

[724] For this intuition see for example C. Joerges, B. Strath, P. Wagner, *The Economy as a Polity: the Political Constitution of Contemporary Capitalism* (London, UCL Press, 2005). See in particular, J. P. Arnason, *The Varieties of Accumulation: Civilizational Perspectives on Capitalism,* pp. 17-36.

[725] See for example R. Oldenburg, *The Great Good Place, cit.* detailing how these processes happen in *third places* including bookshops in particular. Among all shops in fact, bookshops are often explicitly engaged in activities which go beyond the purchase: book launches, readings, etc. Investigating if chain bookstores possess the same qualities see: A. Laing, J. Royle, *Examining Chain Bookstores in the Context of Third Place,*

reinforce social bonds and build a sense of community and identity based on shared valued experiences.

As suggested by studies in marketing some people like to spend their free time browsing through shelves of "over-priced" books in the neighborhood bookshops and they attach value to this possibility. From this perspective, the rules at stake have less to do with the quality or variety of a nation's cultural production than with the choices people make about how to spend their time and money, and with the meanings they attribute to these choices. As economic research has long established, idiosyncratic behavior plays a major role in explaining consumer choice: personalized buying experiences are often valued more than lower prices.[726] So fixed book price rules might be seen as sustaining the conditions that allow this type of shopping experience. They might be seen as providing the legal skeleton for highly expressive forms of market interaction. This presupposes, of course that RPM does have a some impact – that the national arrangements are enforced and that they do in fact contribute to keep small bookstores alive.

Broadly speaking, these two conceptualizations of the conflict reflect two of the different notions of culture I outlined above (1.2.1.). The first notion intends culture as synonym for cultural production, the arts, the creative industries or cultural heritage – something, so to say, exceptional, that public policy picks as an object to be built, financed, promoted or protected. This notion is strictly linked to the "*idea of culture as a sphere of high or uplifting artistic and intellectual activity.*"[727] Even if under the growing impact of the so-called *Cultural Studies* this notion has expanded to include more popular forms of production (music, fashion, entertainment), what keeps this notion distinct is that it focuses on a range of meanings produced by self-consciously "cultural" institutions.[728] The second notion, in line with the so called *Cultural Turn* of the social sciences in the last thirty years or so, sees culture as reflected in the ordinary – our every day life – and consequently also in the

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International Journal of Retail and Distribution Management, 41:1, pp. 27-44 (2013). They conclude they do not but that the insertion of coffee corners within some book chain stores improves sociability within them.

[726] These concepts are considered common knowledge in modern economic theory. See, for example, E. H. Chamberlin, *The Theory of Monopolistic Competition: A Re-orientation of the Theory of Value*, 8th edition (Cambridge, Harvard University Press, 1965).

[727] W. H. Sewell, *op. cit.*, p. 41. This definition goes back to Matthew Arnold's equation of culture with a positive and restricted meaning of civilization. In *Culture and Anarchy* (1869), Arnold defined culture as "*the best which has been thought and said*".

[728] *Id.*, p. 42.

organization of the market.[729] From this perspective, to a social system of norms and institutions, corresponds a cultural system of meanings attributed to those norms and institutions.[730] With a degree of simplification one could think of culture in the first sense as encompassing forms of material or immaterial expression deliberately aimed at the production of meaning, while culture in the second sense as the bundles of attitudes and meanings reflected in the organization of social life. Book pricing rules seem to lie at the intersection of the two notions.

I am aware that the second notion of culture, which this paper embraces to conceptualize the conflict under consideration, is potentially very broad and as such exposed to powerful objections. Its manifestations are ready to be interpreted as reflection of consolidated power structures – products of economic interests and interrelated cartels, rather than of deeper preferences shared by a community. As it will emerge from the British case study, book-pricing rules are indeed the product of preferences coming from within the industry, under the push of publishers concerned with shrinking profits. While these objections should be given very serious consideration, one cannot rule out the possibility that what was born out of concentrated economic interests might take on, through implementation, a particular expressive value for society at large.

In fact a third possibility becomes available (overlapping with the previous two) is that these rules matter not much because of what they achieve but because of the statements they make. Especially when they are transformed from trade agreements to national laws, the rules might be meaningful because they signal a commitment to aid quality books and booksellers – or even to reflect local preferences about how to buy and sell it.[731] They might thus provide a source of identity to the profession and also consumers at large might get to value the rules for the statements they make. The fact that the causal link between RPM and the survival of decentralized retail structures is suggested but not definitely confirmed by empirical evidence does not matter here, as what matters is the statements these rules make and the importance people attach to them.[732] Rules of this kind might be seen as

[729] For a broad discussion of these issues see: See A. Sarat and T. R. Kearns, *Law and Everyday Life*, The University of Michigan Press (1995). See, in particular, the *Editorial Introduction.*
[730] W. H. Sewell, *op. cit*., p. 43
[731] See G. Davies, *Internal Market Adjudication, cit.*
[732] As noted by C. Sunstein, *On the Expressive Function of Law, cit*: "*a society might identify the norms to which it is committed and insist on those norms via law, even if the consequences of the insistence are obscure or unknown. A*

paternalistic. But they also might be interpreted as giving a more visible texture to deeper shared preferences about the role of the market, leisure and work in people's life and thus contributing to create feelings of community and identity.[733] The interconnections of these three conceptualizations are what make fixed book price rules particularly interesting to study.

4.4. The EU Perspective

Starting in the 1980s, the European Commission (hereinafter also the Commission) has had several occasions to consider the compatibility of national or transnational fixed book price schemes with European competition law.[734] The Commission had to decide following the notifications coming from various Member States in order to obtain exemptions for their national Fixed Book Price Agreements (FBPA) under art. 101 (3) TFEU. The Commission generally considers price fixing vertical agreements as having an anticompetitive object[735] and consequently found FBPAs to fall under the prohibition of article 101(1) TFEU every time they had appreciable effects on cross border exchanges. As it is often the case in relation to agreements which are found to violate art 101(1) by object, exemptions under art. 101(3) were not granted. It is important to stress, however, that the Commission never took issue with purely national schemes and only scrutinized the cross-border effects of the FBPAs. As with established case law, particular attention was devoted to the issue of re-

society might, for example, insist on an antidiscrimination law for expressive reasons even if it does not know whether the law actually helps members of minority groups."

[733] See again G. Davies, *Internal Market Adjudication, cit. passim.*

[734] Article 101 (1) TFEU – ex art. 81(1), TEC, and art. 85(1) TEEC – forbids all "*agreements between undertakings*" and "*decisions by associations of undertakings and concerted practices*" with an anticompetitive object or effect and which "*may affect trade between Member States*". Article 101(3) TFEU – ex 81(1) TEC and ex 85(3) TEEC – provides an exception for any agreement, as well as decision by association of undertakings or concerted practice, which cumulatively meets four requirements: (1) "*contributes to improving the production or distribution of goods or to promoting technical or economic progress*"; allows "*consumers a fair share of the resulting benefits*"; does not "*impose on the undertakings concerned, restrictions which are not indispensible to the attainments of these objectives*"; does not "*afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question*".

[735] The European Commission typically considered Resale Price Maintenance to violate art. 101(1) TFEU by object. After the 2007 US Supreme Court decision in *Leegin* that overruled the long lasting *per se* illegality of RPM and established a *rule of reason* approach, a debate on the re-evaluation of RPM also developed within the EU. This seemed to be reflected in the 2008 ECJ decision in Case C-279/06, *CEPSA* [2008], ECR I-06681. The EU's new 2010 Guidelines on Vertical Restraints, replacing the 1999 guidelines, make few concessions to this new doctrine by restating the RPM are hardcore restraint (with a presumption of illegality) but stressing, in particular with regard to RPM, that they might be justified under 101(3). See F. Amato, *RPM in the European Union: Any Development since Leegin*, CPI Antitrust Chronicle, November 2013. See also C. Ewald, *The Economics of Resale Price Maintenance –Why the EU is Right not to Follow the USA on the Slippery Slope of Leegin,* Journal of European Competition Law and Practice, 3:3, pp. 300-307 (2012).

imports. To be sure, being book markets naturally segmented along linguistic lines, cross-border elements only came to assume relevance in "*transnational linguistic areas*" where the market for books in one language extends across national borders.[736] So whenever there was an explicit cross-border issue such as for Belgium and the Netherlands or England and Ireland, the Commission found violations of the rules on competition. As national associations representing publishers and booksellers appealed the Commission's decisions, also the Court of Justice of the EU had numerous occasions to express its views on the compatibility of national trade agreements with European Competition law.

In the meantime, some countries had picked up the RPM technology of these trade agreement and inserted it in national laws. Hence through a number of preliminary references, the Court has been invested with judgments on the compatibility of these national laws with internal market law – specifically art. 34 to 36 TFEU.[737] In most of these cases, the Court was also asked to check the compatibility of national laws with the rules on competition (art. 101(1) and 102 TFEU) through the duty to cooperate of article 4.3 TEU (previous article 5 TEEC) which establishes a general obligation of Member States to cooperate with the European Union to facilitate the objectives of the Treaty. The Court, however, generally dismissed these claims and preferred to limit its judgment to internal market law.[738]

As it will become clear, both the Commission and the Court of Justice have been rather agnostic with regard to the cultural justifications employed by the Member States. The challenge for Member States has not so much been to demonstrate that their measures pursued legitimate cultural objectives, but rather convincing the Commission and the Court that it was necessary to apply the national rules also to foreign products or companies wanting to access their national markets. On this point they have mostly been

[736] In particular the Commission analyzed agreements that extended across the Netherlands and the Flanders, the UK and Ireland, and Germany and Austria (see *infra*).
[737] *Leclerc* (C 229/83) and subsequent French cases, as well as *LIBRO* (C–531/07).
[738] For an overview of the case law dealing with the review of state legislation with respect to EU Competition Law see D. Chalmers, G. Davies, G. Monti, *State Regulation and EU Competition Law* in, *European Union Law: Text and Materials,* Third Edition (Cambridge, Cambridge University Press, 2014): "*In an adventurous spate of decisions from the late 1970s to the mid-1980s the Court of Justice held that, on the basis of Article 4(3) TEU, Member States could not maintain in force legislation that allowed an undertaking to infringe EU competition law because such legislation deprived competition law of its effet-utile*" (p. 1015). As noted by the authors this case law has grown irrelevant because of the difficulty in its enforcement and because of the preference of the Court for the use of internal market rules (p. 1020).

unsuccessful, but, as already pointed out, the purely national fixed book price schemes have never been questioned. This feature of the EU's approach is in itself quite significant and might reveal a special deference with regard to book pricing systems. As noted by Monti, it would have been relatively easy for the EU to also attack the purely national systems: *"in both the free movement and competition case law the Court has regularly said that measures affect trade between Member States when the effect is 'direct or indirect, actual or potential' ... [and] this test has been applied so aggressively that it is unconvincing that national price fixing schemes have no inter-state effects."*[739]

Before zooming into the Case Law which explicitly dealt with fixed book price schemes, I should at least mention that EU institutions did not only oppose fixed book price laws, but also put effort into some form of re-regulation. Early on, the European Parliament and the Council (in parallel with initiatives undertaken by the Council of Europe) recognized the potential value of these rules in the promotion of cultural and educational values.[740] If it is true that most of these statements are to be understood as collective reactions of Member States to the meddling of the Commission and the Court in their national book pricing systems, their importance should not be underestimated. Various resolutions of the Parliament and the Council, throughout the 1980s and 1990s, envisaged the possibility to adopt common European rules on book prices.[741] The efforts to draw up harmonized rules

[739] G. Monti, *EC Competition Law*, (Cambridge, Cambridge University Press, 2007). For Monti these decisions are problematic because policy considerations about valuable state interests to preserve (including cultural diversity) seem to spill over into the determination of the effects on trade under art. 101(1) TFEU: "*the EC massages the meaning of 'effect on trade' to achieve certain policy justifications.*" (p. 104).

[740] On 13 February 1981, the Parliament adopted a resolution calling the Commission "*to put forward the necessary proposals on book prices... in order to guarantee a policy on books in the Community which is worthy of the unique role of this educational and cultural instrument*." (OJ, No C 50, 9.3.1981, p. 103). The Council of Europe drew on this resolution when adopting its recommendation 930 (1981), encouraging national parliaments to legislate in this direction as a way to guarantee literary diversity, freedom of expression and prevent the formation of monopolies in publishing and bookselling. Meetings of the Council of ministers responsible for cultural affairs discussed several time the possibility to adopt common pricing rules and on November 22 1984 formalized their "*interest in the possibility of introducing a pricing system based on ... a single price for books*." (As reported by the European Commission, *Communication to the Council on the Creation of a Community framework System for Book Prices* – COM(85)258, 1985). After the decision of the Court of Justice in Leclerc (C-229/83), the Commission acted upon these recommendations and declared its intention to include the preparation of a framework for common rules on book prices in its 1985 Program (*Communication to the Council on the Creation of a Community framework System for Book Prices, cit*.). In that document, the Commission explicitly embraced the view of books as both "industrial" and cultural products that might require a special regulation, and envisaged the possibility to harmonize national book pricing rules.

[741] Resolution of the Parliament of 10 July 1987 on the fixing of book prices (OJ C 99, 3.4.1987, p. 172); Resolution of the Council of 18 May 1989 on promoting books and readings (OJ C 183, 20.7.1989, p. 1); Resolution of the European Parliament of 21 January 1993 on the promotion of books and reading in Europe (OJ C 42, 15.2.1993, p. 182). In particular, in 1997, the Council adopted a decision on cross border fixed book prices in European linguistic areas where it suggested that given the inclusion of the new art. 128 (4) (Current article 167(4)

culminated in 2001 with the so called Rothley Report, adopted by the European Parliament and containing recommendations to the Commission to draw up a Directive on the fixing of book prices.[742] The proposed Directive was not going to mandate the adoption of fixed book price laws, but would simply provide Member States with this possibility, while giving more certainty and stability to the national laws or contractual arrangements already in place. The Parliament was concerned about the recent Commission intervention on the German Sammelrevers (see *infra*) and invited the Commission to act in order to avoid further erosion of the national systems. The Commission never acted upon this recommendation, but the situation seems to have stabilized with no further Commission interventions since the early 2000.

4.4.1. The Dutch/Flemish Book Case

The first European Commission intervention dealing with book pricing concerned a transnational RPM scheme between the Flanders and the Netherlands – so called Dutch/Flemish Books case.[743] In November 1981, with decision 82/123/EEC the Commission found an agreement between a Flemish and a Dutch association for the promotion of the book trade to be a form of anticompetitive coordination violating art 101(1) TFEU and denied an exemption under art. 101(3) TFEU. Each national association drew together publishers, booksellers, wholesalers and other participants in the book market. Each laid down binding rules regulating the book trade in its own country. Additionally, in 1949, the two associations entered an agreement (amended in 1958) to regulate cross-border trade in Dutch-language books between the Netherlands and Belgium. The agreement set up a resale price maintenance system whereby each publisher had a duty to fix a retail price for his publications and to enforce it *vis a vis* all other members of the two associations in both

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TFEU): "*The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures*" also cross border agreements necessary to keep integrated a linguistic area might be justified.

[742] The directive would have mandated free prices for re-imports but allowed the possibility of providing for common criteria to establish circumvention. The proposed directive would have also mandated that the price of imported books could not be lower than those practiced in the home country – a provision that the ECJ will strike down with regard to the Austrian Law in *LIBRO* (C 531-07) (see infra).

[743] The case has received attention mostly because, as noted by R. Wesseling, *The Modernization of EC Antitrust Law*, (Oxford, Hart Publishing, 2000) p. 95, for the first time in this case, the extra-competition concern of cultural policy played a role in the decision of the Commission.

countries.[744] The agreement also provided for an exclusive dealing system, as members were forbidden to engage in trade with publishers or booksellers who were not part of the national associations.[745] The Commission took issue with both the exclusive dealing system and the resale price maintenance system. Since this was the first Commission intervention where the various arguments pro and against fixed book pricing were articulated, it is worth considering the decision in quite some depth. In this case, more than in others, the clash of rationalities described by Schmid seems to materialize: both parties use the typical arguments described above.

The Commission easily found the agreement to violate art 85(1): it was an agreement between associations of undertakings, it restricted by object competition within the common market, and had appreciable effects on trade between the Member States. The cross border element of trade was indeed very significant as 80% of all books in Dutch sold in the Flanders were published in the Netherlands; the percentage of Belgian books sold in the Netherlands was much lower (around 7%), but very concentrated in some kind of books, such as comics.[746]

It then fell upon the trade associations to prove that the agreement was worthy of an exemption. To that aim, in order to prove that the system *improved the production and distribution of goods* (the first and principal requirement to obtain an exemption under art. 101(3) TFEU), the trade associations mainly relied on the argument of "*cross-subsidization*": "*the fixed book price for Dutch language books, even beyond national borders, allows subsidization of less popular books by fast selling books and thus enables publishers to place a wide range of titles on the market.*"[747] Only with a fixed book price, the argument goes, the publisher can be sure that booksellers would buy not only his fast selling books, but also less popular books – riskier investments typically appealing to a *niche* public. The trade associations further argued that the system allowed retailers to retain well-stocked inventories and offer

[744] The fixed book price was determined by converting the retail price fixed by the foreign publisher at a set rate determined by the association in the Netherlands and by the minister in Belgium.
[745] It is worth clarifying that after the Commission initiated proceeding, the two associations declared willing to relax considerably the resale price maintenance rules by limiting them to one year after the publication and to discontinue completely the exclusive dealing system. Furthermore, they were ready to make the imposition of resale price maintenance voluntary at the discretion of the publisher, similarly to the British Net Book Agreement (see infra). (Decision 82/123/EEC of 25 November 1981; para. 24-26)
[746] 82/123/EEC, para. 19.
[747] *Id.* para. 50.

additional services to consumers.[748] The Commission explicitly dismissed the cross-subsidization argument: to cross-subsidize is a choice for publishers and most publishers decide not to do it, despite the RPM system being in place.[749] As for the benefits of the system on the retail networks, the Commission again noted that, despite the RPM system being in place, the number of specialized stock-holding bookshops was decreasing.[750]

The Commission also rejected the claim that a fair share of the benefits produced by the agreement went to consumers (the second requirement of art. 101(3)). For the Commission, in fact "*this system denies the consumer the opportunity of deciding for himself whether to buy books at a price that includes a service charge or to take his custom to a bookseller who does not provide any services and from whom he can buy books more cheaply*."[751] For the Commission this meant that the majority of consumers, who favor more popular books, was asked to subsidize the "*more refined*" tastes of a small part of the population: "*it cannot be accepted that the advantages [the system] involves for a small minority of the population outweigh the disadvantage for the majority of consumers*."[752]

With regard to the indispensability of the system (the third requirement under 101(3)), the Commission made a few concessions to the cultural policy concerns of the member states: it recognized "*the important role which books play as a cultural medium…"* and agreed with the parties that *"a situation must not be allowed to develop in which works of value can no longer be published*."[753] However, the imposition of resale price maintenance on all cross border exchanges was considered not indispensable. On this point, the trade associations stressed that the cross border dimension of the agreement was essential because "*the Netherlands and Flanders form a single market for Dutch language books*" and the rules at stake were thus necessary to preserve the "*unity of the market and to make possible the development of Dutch-language culture.*"[754] In refusing this argument, the Commission stated: "*it is not for undertakings to conclude* agreements *on cultural questions, which are principally a matter for*

[748] Ibid. ("this profit enables him to offer ancillary services to the public and to place orders for individual customers.")
[749] In the Commission's view publishers either focus on general interest books or on less popular books but rarely publish both kinds (*Id.,* para. 51)
[750] *Id,* para. 51.
[751] *Id.,*para. 54.
[752] *Id.,* para. 56.
[753] *Id.,* para. 59.
[754] *Id.,* para. 60.

government". Anticipating what was going to happen in the years ahead, the Commission declared herself sure "*that the Member States concerned would not hesitate to take action to protect certain cultural interests should this be necessary.*"[755] This statement is particularly interesting because it reveals the preference of the Commission for state regulation over trade agreements also where the application of the schemes had to be purely national.

Fourthly and finally, the parties tried to demonstrate that competition was not eliminated by the system (the fourth requirement of 101(3)) by reference to the idea that RPM shifts competition from prices to services.[756] The Commission was quite *trenchant* on this point, in fact revealing an orientation that prioritizes the economic interest of consumers over other concerns: "*the other forms of competition – stocking, specialization, service offered and ordering facilities – must be regarded as secondary to price competition*"[757] and the limited inter-brand competition existing between publishers was to be considered negligible as books are not really substitutable goods. The Commission thus found that none of the four cumulative conditions to qualify for an exemption under art. 85(3) was met, it dismissed the application and asked the parties to terminate the agreement within one month. The parties did not accede to this request and appealed to the European Court of Justice.

Before the Court, the parties argued that the Commission was wrong in assuming that an RPM system would automatically restrict competition and fall under the prohibition of art 101(1).[758] They argued that the "*restriction on competition*" had to be judged with reference to a notion of effective competition that keeps into account the special characteristics of the market. In this regard, they explained, the book market was very unique. In the book market, the possibilities for inter-brand competition are very limited and the only analysis worth making concerned the effects on competition between products of the same brand – which is between the same book edition.[759] This kind of competition was not eliminated but shifted from prices to services. Furthermore, argued the associations, price competition

[755] *Id.,* para. 60.
[756] Id., para 61. They compete "*in the areas of stocking, specialization, service offered and ordering facilities*."
[757] *Id.,* para. 62.
[758] *VbVb and VBBB v. Commission*, (Joined Cases 43/82 and 63/82).
[759] The applicants noted that all member states adopted systems of resale price maintenance so as to guarantee "*an effective distribution structure and freedom of expression*." Furthermore, "*the agreement in question contributed to the integration of the Flemish and Dutch linguistic and cultural communities*" – an objective which is "in conformity with both the principles of the Member State concerned and "*the principle of integration in community Law*"; *VbVb and VBBB v. Commission*, (Joined Cases 43/82 and 63/82), pp. 33-34.

is not an effective tool in the book market, because a big group of consumers (and likely those most sensitive to price changes) are in fact not buyers, but borrowers from libraries and buyers are arguably those who care relatively less about prices.[760]

The Commission refuted this argument by stressing that the parties were ruling out the possibility that borrowers could turn into buyers if only prices were lower, as they might decide to shift their leisure spending to books from other products. In their defense the parties stated that the purpose of the agreement was *"to allow booksellers holding a considerable stock to enjoy a reasonable existence economically, to integrate books into socio-economic context by taking into account the difference between active purchasers, who look for a considerable spread, and non active purchasers... and to develop other methods of distribution to reach non-active purchasers."*[761] The Court dismissed these arguments and reminded that even if the special conditions of the book market required the imposition of these rules nationally, their transnational application did have an effect on competition in the internal market.[762] With regard to the effects on trade between member states, the parties attempted to justify the agreement by stressing that "*competition is not an object in itself but one of the means by which the integration of the market may be effected*."[763] In the case at issue, argued the Associations – quite persuasively I must say – while the transnational FBPA achieved the "*integration of the Flemish and Dutch communities*"[764] with regard to the book market, its abolition would segregate two formerly integrated markets. The Court, at this stage (it will in fact change its mind – see infra), is not sensitive to this reasoning and prefers a literal reading of art. 101(1): "*notwithstanding the linguistic link between them*" the agreement indisputably affected trade between Member States.[765]

Similarly, with regard to the granting of an exemption under 85 (3), the Court held that the beneficial effects of resale price maintenance in maintaining the cross subsidization system could only be conclusively appraised with regard to the national agreements. Since the

[760] The applicants quoted research showing that a 20% reduction in the price of books would hardly lead to any increase in sales. As such any abolition of RPM rules risks producing a rise rather than a drop in prices. *Id*, p. 34.
[761] The method of distribution to reach non-active purchasers is book clubs. Book Clubs here means Book Sales Club – subscription based methods of selling and purchasing books. *Ibid*, p. 50.
[762] *VbVb and VBBB v. Commission*, (Joined Cases 43/82 and 63/82), *Decision*, para 46.
[763] VbVb and VBBB v. Commission, (Joined Cases 43/82 and 63/82), Facts and Issues, p. 36.
[764] *Id.*, p. 34.
[765] Years later, in *Publishers Association v. Commission* (Case C-360/92 P: Judgment of 17 January 1995) the Court would achieve different results, by recognizing to assign a specific importance to linguistic areas. See *infra.*

Court's decision is limited to the transnational agreement, the exemption could not be granted as the parties failed to demonstrate that the transnational price maintenance system was a necessary feature to improve production and distribution of books.

In sum, the Court confirmed the decision of the Commission. The parties lamented that the real intention of the Commission was to bring down the national systems by indirect means. They claimed that the transnational agreement was a "*necessary condition for the continued existence of the national ones*." The Court however had no intention of investigating the merits of the national systems that were left intact by the Commission, and confined its judgment to the transnational part of the agreement. After this decision the Flanders proceeded to full liberalization and abandoned the national agreement, with effects that some authors claim to have been profoundly disruptive for that market.[766] The Netherlands instead kept the rules and the Commission re-opened a proceeding in 1998, to then drop it after fixed prices were removed from imported books. The Netherlands adopted a fixed book price law in 2005.[767]

Analogous litigation concerned the transnational agreement between the United Kingdom and Ireland – that litigation reached different conclusions and ultimately had very different consequences, it will be described later on in this chapter as I zoom into the experience of the United Kingdom.

4.4.2 Leclerc and Subsequent French Cases

A few months after the Dutch/Flemish Books case, the Court was confronted with a new issue concerning RPM in the book sector. This time, however, the rules under consideration were not product of an agreement between trade associations, but of a national law. Consequently, the Court was in a position to check their compatibility not only with European competition law, but also with Treaty provisions on the internal market. The case came before the Court through a preliminary reference concerning the

[766] For example, in 2000 it was estimated that the Netherlands had 1.29 bookstores every 10.000 inhabitants versus 0.44 of the Flanders. See F. van der Ploeg, *op. cit.*, p. 14. See also See also E. Fernhout, *Fixed Book Price in Difficulties,* The Low Countries. Jaargang 4. Stichting Ons Erfdeel, Rekkem 1996-1997, attesting projects in the 1990s to reintroduce some form of cross-border price control after the Commission had relaxed its stance.
[767] Brussels, 9 September 1999, Commission Closes File on Dutch Fixed Book Price System (IP/99/668)

French fixed book price Law[768] – the so called *Loi* Lang, named for then Minister of Culture Jack Lang.[769]

French book trade had historically been based on a system of "*recommended prices*" (*Prix Conseillé*); these prices were not mandatory, but informally complied with by most industry participants. In the 1970s the system grew weaker as new large-scale retailers like FNAC, and supermarkets like Leclerc, started adopting aggressive discount policies, reducing the recommended price of books from 20 to 40 per cent.[770] In 1979, the system was outlawed by the then minister of finance René Monory, who, in line with his government campaign for price liberalization, adopted an administrative decision that banned each and every form of price recommendation from the publisher to the bookseller. The so-called *arreté Monory* made both publishers and traditional booksellers unhappy, so much so that the practice of recommended prices continued in an implicit way.[771] The market was nonetheless suddenly opened up and the share of new entrants grew considerably.[772] Widespread discontent with the new system helped to coalesce support around a national law. After only three years of full price liberalization, on August 10 1981, the *Loi* Lang (law 81-766) was adopted. The law, which is still in place and has recently been strengthened[773], established a mandatory system whereby every publisher or first importer of books was required to fix a public selling price for each book published or imported in France. Retailers could, with few exceptions, grant a maximum discount of 5 %. For the purposes of the law, the importer was considered to be the person who first completed the legal deposit requirement.[774]

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[768] Case *Edouard Leclerc and others v SARL "Au blé vert" and others* (C- 229/83).
[769] Loi n° 81-766 du 10 août 1981 relative au prix du livre. For a history and an evaluation of the French law see H. Gaymard, Situation du Livre, Evaluation de la loi relative au prix du livre et Questions prospectives, Rapport à la Ministre de la Culture et de la Communication, 2009.
[770] *Id,* p. 40.
[771] *Id*., p. 41.
[772] I*bid.*
[773] In 2014, the French law was amended to fight the practice of online retailers to provide free shipping on top of the 5 % discount on the price of the book (*Loi n° 2014-779 du 8 juillet 2014 encadrant les conditions de la vente à distance des livres…* modifying art. 1 of the *Loi Lang*). The amendment presented by four conservative MPs was voted at unanimity. In the talk that accompanied the amendment, Amazon was accused of *dumping*, and the law was seen as necessary to prevent unfair competition. After the amendment, online retailers cannot offer free shipping and they can apply a discount up to 5% of the price of the book on the total price including shipping fees. The law has the effect of making a book purchased online always more expensive than one purchased at a shop. On this see also A. Schwartz, *Vive la Bookstore*, The New Yorker, Oct 9, 2013. Earlier on in May 2011 (*Loi n. 2011-590 du 26 mai 2011 relative au prix du livre numérique*), France had passed a law that extended the principles of the *Law Lang* to e-books, but without the possibility of the 5% discount.
[774] The Legal deposit is a system in place in most countries, whereby each publication must be submitted to a legal repository, usually a library, for conservation or, in some contexts, censorship purposes.

A couple of years after the entry into force of the Law, a number of booksellers, with the *Union Syndical des Libraires de France*, brought action against the low cost supermarket chain Leclerc that discounted books in violation of the new law. The booksellers obtained an injunction that ordered Leclerc to stop this practice.[775] Leclerc appealed, claiming that the French law violated a series of provisions in the Treaties: the rules on competition of article 101(1) TFEU through the duty to cooperate of art 4.3 TEU (and art. 3(f) EEC) and the prohibition against quantitative restrictions on importation of art. 34 TFEU. On 28 September 1983, the Court of Appeal of Poitiers referred the question to the European Court of Justice.

In the proceedings Leclerc claimed that the monopoly assigned to French importers severely restricted cross-border trade: under the system, in fact, a French bookseller was forced to buy for example Belgian books at the price fixed by the French importer – the importer had, in other words, a role equivalent to a publisher for national books. This, claimed the supermarket chain, was relevant for its business, as 20 % of books sold by Leclerc (mostly comics and handbooks) were printed in Belgium. The French government defended its law with reference to the particular history of book pricing in France. The three years of free pricing from 1979 to 1981 resulted in a "*disruption of the publishing sector as a whole, which was unsatisfactory for the publishers, the retailers and the public.*"[776] The government saw the law as necessary to restore order in the industry. The French Government also relied on the fact that Fixed Book Price Systems were adopted in most European countries and on the abovementioned statements of the Parliament, Commission and Council of Europe that seemed to validate the practice. The French defense, even more than the Dutch/Flemish one used the arguments that are today associated with the idea of a cultural exception.[777] By reference to the value of "*books as cultural works*" – preeminent medium of reflection and creativity, France argued that "*giving competitive forces free rein [was] certainly not the most appropriate and effective policy for*

[775] The *Association des Centres distributeurs Edouard Leclerc* pointed out that the *Loi Lang* prevented the shops part of its network, to comply with an essential part of its business model that imposed through contractual obligations to never set prices generating a profit margin above 18 %. Leclerc in fact operates as a retailer cooperative, where independently owned supermarkets aggregate and exercise together certain activities, mostly purchase and marketing. See Case *Edouard Leclerc and others v SARL "Au blé vert" and others* (C- 229/83), *Facts and Issues*, p. 19.
[776] *Id.,* p. 20.
[777] The concept was first used by France in the 1993 negotiations for the *General Agreement on Tariffs and Trade*.

the book sector." France hinted at the negative effects of price liberalization on its market and, in particular, at the threat posed by supermarkets for both small publishers and booksellers.[778]

Leclerc argued that the law should first be analyzed under the light of art. 101, by maintaining that also States and not only undertakings are bound to respect competition law, through the provision of then art 3(f) EEC – stating that the creation of an "*undistorted system of competition*" is one of the activities the Community could engage with to achieve its purposes – and art 4.3 TFEU – which imposes on member states an obligation to abstain from measures that might jeopardize the attainment of community objectives.[779] The Court partially agreed with Leclerc that a scrutiny under the rules on competition was in theory possible: had the law obliged firms to conclude agreements banned under 101(1), it would have been easy for the Court to find a violation of art. 4(3) TEU.[780] The French Law, however, was more subtle: it did not require agreements to be concluded between publishers and retailers, but simply imposed on publishers a statutory obligation to fix retail prices unilaterally. In other words the French law made the behavior prohibited by art 101(1) superfluous.[781] In any case, the Court concluded with what will become a recurrent statement in further decisions on fixed book price laws: "*the purely national systems and practices in the book trade have not yet been made subject to a Community competition policy with which the Member States would be required to comply by virtue of their*

[778] "*Publishers and intermediaries were directly threatened by the freedom of prices which had existed after 1979. That freedom gave supermarkets a position of superiority in the sale of books. Their policy of reduced profit margins requires a rapid turnover of stock and therefore excludes works of reflection and creativity. By selling huge quantities of a limited number of titles, supermarkets were in a position to impose their choice on publishers and to influence the latter's policy. There was a danger that works of reflection and creativity, which are not available in supermarkets, would disappear, to be replaced by books for light reading. For financial reasons small publishers of cultural works were not able to stand up against the negotiating power of the distributors. Specialized bookshops were incapable of competing with the prices charged by supermarkets and were deprived of sales of works involving no commercial risk. They too were therefore in danger of disappearing. The organization of the trade solely in the terms of the objective of selling books at the lowest prices cannot guarantee the public a real variety of choice such as exists in France, where a range of some 240 000 titles is available and the annual production exceeds 25000 of which 12000 are new publications*." Case 229-83, *Facts and Issues,* p. 20.

[779] Case 229-83, *Decision*, para. 10. France resisted this argument by pointing out that art 3 and 5 are general statements, which do not impose specific obligations on member states; the Commission agreed with the French government and that the law should only be assessed as an obstacle to art 34 TFEU. In any case, with the usual argument, the French government maintained that competition was not eliminated: it was limited with regard to retail prices, but left untouched with regard to services and it survived between publishers at the upstream level.

[780] *Id.,* para. 14.

[781] According to D. Chalmers, G. Davies and G. Monti, *State Regulation and EU Competition Law*, cit. Leclerc represents an innovation in this Case Law as the Court seems to suggest that art 4(3) TEU might apply also without anticompetitive behavior by private undertakings, p. 1015.

duty to abstain from any measures which might jeopardize the attainment of the objectives of the Treaty," hence articles 3(f) EEC, 101 and 4(3) TFEU do not prohibit member states from enacting legislation requiring publishers to fix the retail price of books.[782]

The Court, however, still needed to check the compatibility of the law with the Treaty provisions relating to the free movement of goods, in particular with art. 34 TFEU. The Commission argued that the law constituted a measure equivalent in effect to a quantitative restriction, because of two provisions that established a different treatment for imported books. The first one was Article 1 specifying that re-imported books should be marketed to a price that is no less than the original price fixed by the French publisher.[783] The second provision was the rule providing that only the first importer completing the legal deposit requirement could fix the price of imported books.[784] The court agreed with the Commission and found that both norms constituted measures having equivalent effect and thus violated art. 34 TFEU. The provision on re-imports discouraged the marketing of re-imported books, insofar as its application was not limited to preventing circumvention.[785] The assignment of price fixing power only to the first importer eliminated competition among importers: by assigning "*the responsibility for fixing price to a trader at a different stage in the commercial process than the* publishers" the law made impossible for any "*other importer of the same book to charge the retail price that he considers adequate*."[786] The Court did not accept that the protection of consumers (and their cultural interests) could constitute an imperative requirement under the *Cassis de Dijon* doctrine, as these justifications only help indistinctly applicable measure, whereas the Court found that the law established here a different regime for importers and was thus discriminatory.[787] The only available justifications were, for the Court, those listed under art. 36 TFEU, but nor *consumer protection* neither *cultural diversity* feature in this list of exceptions.[788] In sum,

[782] *Leclerc* (C-229/83), *Decision*, para. 15.
[783] For the Commission, this rule prevented French consumers from benefitting from potential lower prices prevailing in other member states (*Id.*, para. 21). The French Government stressed that the provision was essential to prevent the circumvention of the law and that the intra-community trade produced if re-imports were priced freely would be onlyory (*id.*, para. 22).
[784] The French Government explained that the commercial role of the principal distributor for imported books is analogous to that of the publisher for national books (*Id.*, para. 22). N. B. The legal deposit requirement is the mandatory deposit of all published books to the National Library.
[785] *Id.,* para. 26.
[786] *Id.,* para. 25.
[787] *Id.,* para. 29.
[788] *Id.,* para. 30. On this point and future evolution of the case law on cultural justifications see B. de Witte, *Cultural Policy Justifications, cit.*

the Court left the national system of fixed book pricing intact, but struck down two of its rules concerning the pricing of imported books and re-imports.

The impact of this decision was particularly significant from a double perspective. On the one side, as noted by Hervé Gaymard, it had a strong impact on the public debate and was perceived as an explicit validation of purely national book pricing laws.[789] On the other side, it forced the French government to slightly modify the implementation of the law so as to comply with the Court's judgment.[790] After the amendments to the law, however, the preliminary references did not stop. In at least three more cases, French national courts accepted to consult the ECJ on the compatibility of the *Loi Lang* with EU Law. The preliminary references came either from criminal proceedings against managers of retail outlets that were illegally discounting books[791] or from civil suits brought by traditional bookshops against Leclerc.[792] These cases show that Leclerc continued the practice of underselling arguably as a strategy to bring down the national law, and that traditional

[789] H. Gaymard, *op. cit.*, p. 46.

[790] Decree 85-272 of February 26, 1985, amended the implementing decree of the law so as to provide that any importer (not only the principal one) could set the retail price of imported books, with the specification that the price should not be lower than the one recommended by the Foreign publisher for France, or, if not provided, the one fixed or recommended by the publisher in the country of publication. Another amendment allowed free pricing for re-imports, unless objective facts such as the lack of effective commercialization in the country of first export, reveal that the intent of the re-import is only to evade the law. The Law was further modified in 1990. After Lengthy exchanges between France and the European Commission, the law was amended to allow importers that have obtained special advantages to reduce the price in derogation of the law. (H. Gaymard, *op. cit.,* p. 47)

[791] In case C-355/85, *Driancourt v. Cognet*, [1996], ECR 03231 the manager of a center Leclerc who was undergoing criminal proceedings because his supermarket sold books at a discount of 20 % raised a preliminary question about the Loi Land. The Court was asked to decide whether the new rules that allowed to freely price re-imports of French books were compatible with the principle of non-discrimination of art. 7. The Court decided that the new system as amended as a consequence of the Leclerc judgment was perfectly compatible with EU Law. Until there is no harmonization on the issue of book pricing, the principle of non-discrimination cannot be applied to protect the treatment of national products *vis a vis* more favorably treated foreign products. An analogous preliminary reference procedure emerged in a criminal proceeding brought against Jacques Verbrugge (Case C- 160/86, *Ministère public v Jacques Verbrugge*, [1987], ECR I-01873), manager of the shop the "Continent", who was prosecuted for having sold books at discounts bigger than 5 %. The Court of Justice again confirmed the compatibility of the new rules.

[792] In 1988, another case came from an action brought from the Syndicat des Libraires de Normandie against l'Aigle Distribution – a Leclerc affiliated center: Case C-254/87, *Syndicat des libraires de Normandie v L'Aigle distribution* [1988], ECR I-04457. Leclerc did not deny to be contravening the law, but it claimed that the Law violated the EC Treaties under the usual ground of the rules on competition (current 101, 102 TFEU) in conjunction with he duty to cooperate (current 4(3) TEU). The national rules according to the Leclerc center facilitated the establishment of "*captive distribution networks*" or the "*abuse of a dominant position*." The Court reaffirmed that the French Law as amended after Leclerc was compatible with EU Law: in the absence of a competition policy in the field of books, the provisions of art. 4.3 TEU and 101 TFEU were not sufficiently defined to prevent a fixed book price law. Furthermore, a law assigning to a category of actors (publishers or importers) the mandatory fixing of retail prices does not force them to collude nor per se creates the conditions for an abuse of dominant position. Furthermore, the Court noted that the amendment to the law allowing any importer to set the prices (and thus basically equating importers and publishers) has the effect of enhancing competition in the book trade. See later also *Enchirolles* (C-9/99; 3 October 2000)

bookshops kept complaining, either individually or through their representative associations, and that national referring courts are sympathetic to the claims of the modern *discounting* distribution. In 1999, for example, *Enchirolles Distribution SA* which operated a Centre Leclerc and sold books at a discount higher than 5% was condemned to pay damages to Local bookseller Mr. Corbet and the *Association du Dauphiné*. In appeal Enchirolles asked for a preliminary ruling on the compatibility of the French Law with the Treaty establishing the European Community as amended by the Amsterdam treaty.[793] The Court of Justice found that the authority of Lecler held true, and that the *Loi Lang*, as amended, was compatible with the internal market. In particular, the Court restated that, in the absence of a common community policy on the issue, the principles of art. 3 EEC and 4.3 TFEU are too general to constrain the ability of member states to retain purely national systems of fixed book pricing. After five preliminary references, all confirming the compatibility of the French law with both EU Internal Market and Competition Law, the freedom of a member state to put into place purely national legislative systems for the fixation of book prices seemed uncontested.

The Court however remained un-flexible on the cross-border impact of the rules, which were alleviated by allowing importers to price with more freedom and also to allow free-pricing on re-imports. This last feature was potentially problematic as it could have triggered systematic contravention of the law. But on this point one should remember that France was able to negotiate strict rules that allowed to limit re-imports as modes of pure circumvention of the *Loi Lang.* Overall, the fact that the law survives to this day suggests that the EU interventions have not compromised the operation of the law and its effectiveness.

[793] Case C-9/99, *Enchirolles Distribution SA v. Association du Dauphiné and others* [2000], ECR I-08207. The Court of appeal referred to the ECJ, suggesting that under the new rules of the Amsterdam Treaty, the Court might want to revise its finding in *Leclerc* (C-229/83). In particular, the Court of Appeal stated that "*the single internal market, governed by the principle of an open market economy with free competition, does not appear to be subject to any exception in favor of the book trade, as it is clear from paragraph 30 of Leclerc.*" (para. 13) The Court of appeal mentioned *Council Decision on Cross Border Fixed Book Prices in European Linguistic Areas* (Decision C 305/02 of September 22, 1997) recognizing the "*dual character of books*" as economic and cultural goods. It also noted that the Union cultural action had been expanded by then new art. 128 (4) TEC , but that article defined culture mainly in artistic and literary terms, which does not seem in compliance with the French law. The referring Court suggests that what is problematic in the French Law is the fact that all books, including technical or professional books, are subjected to the fixed price rules – and this damages disproportionally some categories – lawyers, doctors and architects. So the question as formulated by the French Court is whether the law, "*by asking publishers to fix prices for the resale of books, regardless of the content, to both consumers and purchasers for occupational purposes*" violates community law (para. 14).

4.4.3. The LIBRO Case

In 2007 however another preliminary reference reached the Court from Austria, in the so-called LIBRO case.[794] The case concerned the Austrian fixed book price law, adopted on July 1 2000 after the abandonment of a century old agreement that governed book trade in the German speaking area, the so-called Sammelrevers (see *Infra*). Austria is a particularly interesting market because around 80% of its book trade involves books printed in Germany. The preliminary reference stemmed from an action brought by the Austrian "*Trade Association for the Book and Media*" (*Fachverband der Buch*) against the bookshop chain LIBRO, asking that it stopped to advertise books at prices lower than those allowed by the national law.

The law, which replicates quite faithfully the French *Loi Lang*, imposes on publishers and importers to fix the price of books and prevents retailers from discounting above 5%. The Austrian law applies to all German language books and music, with exclusion of cross border electronic trade, and it specifies that imported books should be priced at a level not lower than the one determined by the publisher in the country of production – which happens to be mostly Germany. To ensure compliance with this provision, the *Fachverband* published a list of advertising prices for foreign books based on the price in the home countries: when prices deviated from such list it was safe to assume that the Law was being circumvented.

Starting in 2006, LIBRO advertised German books in Austria at prices lower than those determined by the association. As the Austrian Court granted interim measures against LIBRO,[795] the bookselling chain appealed on a point of law claiming that previous decisions of the European Court of Justice, *Leclerc* and *Enchirolles*, demonstrate that the Court had not yet answered definitively whether a national statutory fixed book price scheme is compatible with EU law or not. The national court asked the Court to determine whether he Austrian law was compatible with art article 34 TFEU; in case it found a violation, whether the law could be exempted under art. 36 TFEU by regarding the book as a cultural asset; if it did not violate art. 34 TFEU or it could be exempted, whether it

[794] Case C-531/07, *Fachverband der Buch und Medienwirtschaft v. LIBRO* Handelsgesseschaft mbH [2009], ECR I-03717.

[795] Based on the view that even if the Austrian system violated art 34 TFEU, it was justified for cultural reasons. *LIBRO*, para 11.

violated art. 101 TFEU through art 101 through article 4(3) TEU and and 3(1)(g) TEC (the equivalent of 3(1)(b) TFEU).[796]

For the first time the Court went on considering the Resale Price Maintenance rules as *selling arrangements* under the definition of Keck: *selling arrangements* are normally not to be considered measures having equivalent effects as far as they do not discriminate between national and foreign products. The Court, however, found that by preventing Austrian importers of German books to fix a retail price lower than that fixed or recommended in Germany, the law established a less favorable treatment for imported books because it prevented to take into consideration the specific needs of the local market.[797] In other words, the law was a selling arrangement, but it was not applicable without distinction. Therefore, analogous to Leclerc, the Court found the measure to have equivalent effects in that it created a less favorable regime for the imported books.[798]

With regard to a possible justification for the system, the Austrian government, in the best German tradition (see infra), described the system as one which "*has regard to the status of books as cultural assets, to the interests of consumers in reasonable prices for books, and to the commercial characteristics of the book trade*" arguing that these objectives could be justified under art. 36 TFEU and 167 TFEU.[799] Austria argued that without the law, prices for general interest books would drop considerably and as profits for publishers shrank high risk investments in culturally challenging books would be discouraged; furthermore, small booksellers who offer such wide choice would be driven out of business by large booksellers selling mostly commercial goods. The Court simply restated its finding of *Leclerc* that a special protection of books as cultural goods cannot constitute a justification under art. 36 TFEU, "*because the protection of cultural diversity in general cannot be considered to come within the 'protection of national treasures possessing artistic, historic or archaeological value' within the meaning of Article 36 TFEU*."[800] Furthermore, art.167 TFEU (then new art. 151 EC) whose purpose was to provide a framework for the activity of the community in the

[796] *Id.,* para. 13.
[797] *Id.*, para. 21.
[798] The intervening German government explained that the Austrian law did not damage its publishers: as German books cover the majority of the Austrian market, it is impossible to distinguish between a market for local and imported books (*Ibid.*, para. 23). The court, however pointed out that this did not exclude a disadvantage for Austrian importers
[799] *Id.*, para. 30.
[800] *Id.,* para. 32.

field of culture could not be used to escape free movement law – it does not, in other words, provide for any new exception.[801]

Nonetheless, what the Court recognized here for the very first time is that "*the protection of books as cultural objects can be considered as an overriding requirement in the public interest capable of justifying measures restricting the free movement of goods, on condition that those measures are appropriate for achieving the objective fixed and do not go beyond what is necessary to achieve it*."[802] While the Court agreed with the commission that the protection of books could be achieved with means less restrictive for the importer, by letting him decide the price freely (akin to the French Law), it is relevant that the Court admits cultural considerations also as justification of what is a discriminatory measure. The provision at stake could not be justified because it was disproportionate, but despite its outcome, this reasoning constituted an important innovation in that the Court considers *overriding reasons,* in the presence of what is clearly a discriminatory measure.

As noted by Craufurd Smith, for the first time, the "*Court appears willing to blur the line between directly and indirectly discriminatory measures, apparently countenancing the possibility that cultural justifications might be relevant even where there is direct discrimination*."[803] I think that Craufurd Smith means here to talk about the difference between distinctly and indistinctly applicable measures, rather than about direct and indirect discrimination. Nonetheless, she is right in pointing out an innovation in LIBRO with respect to Leclerc, for example, where the Court had established that if the measure amounts to discrimination there is no space to enquire if it can be justified by a mandatory requirement or overriding reason in the public interest.

4.5. Evolution of Book Pricing Rules in Three Countries: A Contextual Analysis

This part of the chapter presents the national experiences of three countries with fixed book price schemes. It describes, with reference to available historical accounts how the

[801] *Id.*, para. 33.
[802] *Id.*, para. 34.
[803] R. Craufurd Smith*, The Evolution of Cultural Policy in the European Union, cit.* p. 875.

rules have evolved in three countries under the impact of EU law, national law, as well as other forces outside of the law. Through this analysis I would like to isolate some of the processes that accompanied the emergence of the rules, their role in national socio-cultural contexts, and further specify the agency of EU Law in their modification. The countries selected – the United Kingdom, Germany and Italy – show interesting variation in terms of presence of national fixed book price scheme across time and in terms of the depth of interaction with the European Union. The United Kingdom had a deeply rooted fixed book price agreement, which was abandoned not much as a result of EU or national legal interventions, but due to evolutions in the underlying markets. Germany also had a deeply rooted trade agreement between publishers and booksellers to fix the price of books; unlike the UK, however, after the intervention of the Commission, Germany proved capable of retaining and even upgrading its national scheme by turning it into a national law, and thus arguably making its effects more visible and traceable. Italy has had a series of book pricing laws on the model of the French *Loi Lang*; these never came under the scrutiny of the EU Commission but continue, to this day, to generate a lively debate. The diversity of these interactions seems, in itself, able to disprove some of the most radical claims about the EU's homogenizing impact.[804] The three countries might be seen as all starting off with similar cultural assumptions abut the role of books and about the market arrangements that best fit this role. Their different histories however produce three rather different outcomes. In these three stories the EU does play a role, but its role is certainly not that of a compulsive deregulator, as some popular accounts and also part of the scholarship tend to describe it.

4.5.1. The United Kingdom and the Net Book Agreement

The book trade in the United Kingdom was governed for most of last century by a system of resale price maintenance embodied in the Net Book Agreement (NBA).[805] The NBA was a horizontal agreement among British (and Irish) publishers to control the price of books by maintaining a vertical restraint on resale prices. Under the agreement, any publisher

[804] See G. Davies, A. Somek, J. Weiler, *op. cit.* as well as F. Scharpf, *The Asymmetry of European Integration, or why the EU Cannot be a "social market economy?*, Socio-Economic Review, vol. 8:2, pp. 211-250 (2010).

[805] For an early assessment of the features of the Net Book Agreement, see B. S. Yamey, *The Net Book Agreement*, Modern Law Review, 26, 692-699 (1963). The features of the agreement were subject to very few modifications since the 1960s. For historical context see M. Daunton, *The Organization of Knowledge in Victorian Britain* (Oxford, Oxford University Press, 2005). See also J. Feather, *A History of British Publishing*, 2nd Edition (London, Routledge, 2006), pp. 100-2.

could declare a book a "*net book*" and publish it with a fixed minimum price printed on the cover. Exceptions were provided for books in stock and second hand books, as well as net books to be sold to libraries, book agents and quantity buyers. Publishers retained full discretion to keep a book out of the agreement, by publishing it as a so-called "*subject book*"[806] – these non-net books were usually nominally more expensive and could be freely discounted. This was indeed the normal practice before the entry into force of the agreement. It is to be noted that the agreement left full freedom to publishers as to the determination of the price. Publishers were also free to change the price of net books at any time as well as to convert a net book into a non-net-book.

The agreement was collectively enforced through the Publishers Association: its Council collected information about breaches of contract by booksellers, while individual publishers committed to enforce their contractual rights if asked upon to do so by the Council. The Publishers Association would then indemnify the costs incurred by the publisher.[807] Booksellers were free not to participate in the system, but in this case they would be provided with net books only at the full printed price. Bookshops that subscribed to the scheme were instead allowed a customary discount of 25 % on the printed price – 33% was customary for exporters.[808] Given its features, it is possible to conceptualize the NBA as a collective horizontal agreement to facilitate the enforcement of individual resale price maintenance clauses implicitly imposed by publishers when supplying booksellers with net books. It is important to keep in mind that despite the fact that system was not mandatory, the greatest majority of British books were indeed published as net books and booksellers typically abstained from practicing discounts also when they traded non-net books.

Reconstructing the debate that surrounded the birth of the *Net Book Agreement* might help to isolate some of the motivations behind its adoption. The agreement was born in 1900 as

[806] See F. McMillan, *The Net Book Agreement 1899 and the Book Wars 1906-1908*, (Glasgow, Glasgow University Press, 1924) – digitized by the Internet Archive in 2013, p. 5.
[807] The system did not provide for a system of sanctions or penalties: the only way to enforce the net price was to ask for an injunction, for which there was no need to prove a contractual relationship.
[808] For a description of the commercial practices followed by the industry up until the 1950s see R. Blackwell, *The Pricing of Books,* The Journal of Industrial Economics, Vol. 2: 3, pp. 174-183 (1954). As it emerges from the literature, the contractual negotiations in the vertical chain between publishers and retailers happened on discounts. There is not a wholesale price and a retail price – but simply a printed retail price, based on which discounts are negotiated. This was the case both before and after the Net Book Agreement. And it seems to be a feature of the book trade also in other countries, Italy included – see *infra*.

the result of a campaign by some prominent publishers, most notably Frederick McMillan, against the practice of underselling, which was seen as endangering the existence of well-stocked bookstores, especially outside of London, and thus the sustainability of the whole industry. The agreement wanted to achieve a general reduction of nominal prices of books and a ban on discounts.[809] Initially, most booksellers were strongly opposed to this project, as demonstrated by the result of a survey promoted by the industry magazine, *The Bookseller.*[810] Most of McMillan's fellow publishers were favorable in theory, but expressed perplexities about the practical viability of the plan. To overcome these resistances, came the first experiments with publishing books as net books, including in 1890, *The Principles of Economic*, a widely adopted textbook by the Cambridge economist Alfred Marshall. The correspondence between McMillan and Marshall gives a colorful taste of the debate of the time.[811] To the risk of extensive quotation, it is worth reporting a few passages from that correspondence, as the similarities with the arguments employed today by supporters and detractors of fixed prices is, to say the least, striking.

McMillan wrote to convince one of his best selling authors, the economist Alfred Marshall, to publish his new book as a net book. McMillan described the pre-net book system as one where the practice of allowing discounts to retail purchasers had *"fostered a spirit of competition among booksellers so keen that there ... [was] not enough profit in the business to enable booksellers to carry good stocks or to give their attention to bookselling proper." "They have to supplement their profits by selling 'fancy* goods'" went on McMillan, *"and are in many cases, in the country especially, driven out of business altogether."*[812] McMillan explained that the few books he had previously published as net books had met "*with approval of the better class of booksellers*". Publishing with a net price meant publishing with a considerably lower

[809] In his *the Net Book Agreement 1899 and the Book Wars 1906-1908*, *cit.*, the publisher Frederick McMillan describes previous attempts to introduce fixed book prices. His account makes clear how, already in the mid 19th century, the conflict was conceptualized as one between competition/free trade and culture: "*the regulation of the price of books had of course nothing to do with Free Trade, but that did not matter: it was only necessary to mention the blessed word 'competition' and to suggest that if the retailer was free to sell at any price he liked instead of at a price fixed by the publisher, the element of competition would be at once introduced into the article of books and the Principles of Free Trade would be vindicated*.", p. 2.
[810] *Id.*, p. 20.
[811] The correspondence is reproduced by C. W. Guillebaud, *The Marshall-MacMillan Correspondence over the Net Book System*, The Economic Journal, 75: 299, pp. 518-538 (1965).
[812] *Id*., p. 522.

nominal price and Marshall, who was keen to have his books available at lower prices in order to meet the needs of students, agreed to the offer.[813]

What McMillan wrote suggests two things about the emergence of fixed book price rules in Britain. Firstly, the rules appear as an instance of self-organization of the industry, under the push of publishers concerned with the sustainability of their business. Secondly, the idea that bookshops are not like any other shop – that booksellers have a special role and should only sell certain things – is already part of the rhetoric around the introduction of fixed book price rules. There is no trace here of a concern for books as special cultural "*goods*" in need of different rules. There is instead a concern for the quality of bookselling, for the services offered, the stocks and the other "fancy" goods sold, that predates any development of the modern distribution, and emerges clearly already in the late 19th century.

As publishers started to release more books as net books, the fortune of the formula grew rapidly. After its establishment, in 1895, the Associated Booksellers of Great Britain and Ireland came out strongly in support of a future agreement.[814] By 1896, when publishers organized themselves into the Publishers Association, the conditions to formalize the agreement were in place. In 1899, the publishers committed "*in the interest of the booksellers, as urged by the majority of them and their representatives*" to introduce resale price maintenance in relations to those books published as net books. The following year, in 1900, the Net Book Agreement came into force.[815]

Few years into the operation of the agreement, Marshall, who had initially supported the net book system as a way to lower nominal prices to the benefit of students, wrote to express his new concerns. As he saw it, the Net Book Agreement was assigning excessive profits to booksellers, a category that he considered growingly irrelevant – almost an anachronism – especially in the trade of specialized academic books like his own.[816] This is what he wrote in response to McMillan's assurance that the average profit of booksellers

[813] See Marshall's response: *Id.*, p. 523.
[814] *Id,* p. 526.
[815] See Yamey, *op. cit.*, p. 691.
[816] McMillan countered this by explaining that: "*The profit the bookseller gets under the net system is 25% but as the turnover of most retail booksellers is comparatively small, their business expenses are never less than 15 % and in most cases run up to 17% of the business they do. Their net profits therefore are not more than from 7% to 10% of the business they do*." C. W. Guillebaud*, op. cit*., p.530.

under the system did not exceed 7 to 10 per cent: "*You say that booksellers' expenses are high relatively to their receipts. Of course, they are, by economic law. They are not ill paid, because competition is severe. But competition is severe, because little of their work now needs very high pay. The growing specialization of knowledge, and the development of reviews have displaced the bookseller from his post of mentor, and made it impossible for him to keep a stock that is of any service except in literature, which is bought by the general public rather than specialists.*"[817] Marshall was ready to acknowledge that "*a moderate and wise movement for improving the position of the bookseller in handling art books, belles-lettres and that very important form of applied art – stationery, would have economic forces on its side; and would benefit him without injury to the public*,"[818] but he would have liked scientific publications like his own exempted from the net price system as "*the cruel exploitation of young men of science by the booksellers league [was] inflicting a deadly injury on the best work of the nation.*"[819] Marshall's grudges are extremely interesting as they add nuance to the debate, show the importance that intellectuals attached to these issues, and demonstrate how little quarrels about the industrial organization of knowledge have changed in the last 100 years or so. His concerns however are more the one of an economist, complaining (in line with the orthodoxy of the time) of the little added value that retailing brings to the vertical chain (see supra 3.1). They are not those typical of authors.

Authors, indeed, were to become big supporters of the Net Book system because the agreement allowed calculating royalties on the net price, which made their income more stable and predictable. The Net Book Agreement flourished, with full support of publishers, booksellers and authors. For almost a century, conflicts between these different categories were, so to say, silenced and harmony seemed to reign in the industry. As markets evolved, however, with the rise of new business models, forms of distribution, and technologies, some of Marshall's preoccupations about the "*artificial*" protection allowed to certain retailers came back with a vengeance.

[817] *Id*., p. 532
[818] *Id.*, N.B. This same argument based on the distinction between general books and specialist or academic books is made also today: see for example the preliminary reference in *Enchirolles* (*supra*).
[819] *Ibid.*, p. 531. For Marshall since in relation to scientific publications, the bookseller's role is limited if not superfluous, his remuneration should be correspondingly small. In a letter from 1907 he was restating this argument with more strength. He went as far as envisaging a centralized bookseller: "*I do not think that English booksellers –no, not even German –do stock largely books which contain new constructive work. I believe that I told you some time ago that in my opinion a score of booksellers shops in say Leeds would be of less service than one central store to which all Publishers would send books on view (perhaps not selling any) and an organized carrying trade like that of newsvendors*." (p. 536)

In the 1950s and 1960s, as British competition law strengthened,[820] the NBA came under the scrutiny of British antitrust authorities. In 1962, a Restrictive Practices Court granted the Net Book Agreement an exemption: "*books are different,*"[821] stated justice Buckley to then find that the NBA was not contrary to the public interest. While its abolition would have resulted in higher nominal prices for most books, reduction of stock-holding bookshops and decline in the number and variety of published titles, its maintenance did not produce any substantial disadvantage.[822] In 1968, the agreement was reconsidered in light of the new 1964 resale prices act and once again passed the scrutiny of the Court.[823] And after these endorsing decisions, the agreement went on undisturbed for another 30 years.

By the 1980s, however, the enforcement of the NBA was growing more problematic due to entry into the market of many new retailers with increased bargaining power, such as large bookstore chains and also supermarkets. Furthermore, the NBA came under the radar of the European Commission that in 1988 judged the agreement incompatible with current article 101(1) TFEU, because of its cross borders effects between the UK and Ireland.[824] When the United Kingdom joined the Community in 1975, the NBA was notified to obtain an exemption under art. 101(3) TFEU. It was, however, only in 1988 that the Commission issued a decision on the Net Book Agreement – 89/44/EEC. The Commission found that the agreement violated art. 101(1) TFEU, because, to the extent that it also applied to sales in Ireland and to re-imported books, it restricted trade between Member States. The Commission also denied an exemption under art. 101(3) TFEU, as it found that some of the restrictions imposed by the agreement were not indispensable to the attainment of its positive objectives, namely to avoid stockholding booksellers to decrease, sales to fall, as well as smaller print runs and hence a rise in book prices.[825]

[820] In 1956, the Restrictive Practices Act was passed, followed in 1964 by the resale prices act, which prohibited any "*collectively enforced*" resale price maintenance. The RPM agreement would formally violate both rules.
[821] R. E. Barker, G. R. Davies, *Books are different: An account of the defense of the Net Book Agreement before the Restrictive Practices Court in 1962*, (London: Macmillan, 1966). The book contains the 1962 judgment together with pleadings and other documents. It was supplied as evidence to the European Commission when deciding on the granting of an exemption under 101(3) TFEU to the Net Book Agreement (see infra).
[822] Ibid.
[823] As quoted in Commission Decision of 12 November 1988, relating to a proceeding under Art. 85 EEC Treaty (89/44/EEC) para. 43.
[824] Commission Decision (89/44/EEC)
[825] *Id.*, para 73.

In its complaint to the Court of First Instance, the Publishers Association noted that publishers had simply a possibility and not a duty to market imported books as net books and that final consumers could still buy freely from foreign bookshops at variable prices.[826] This is what distinguished the British system from the French *Loi Lang*, for example, which compulsorily requires the setting of fixed prices on imported books at the moment of importation. The Court of First Instance did not accept this justification, as the Commission's findings on the cross-border effects of the scheme were much broader. In particular they concerned the export of British books to Ireland and re-imports into the UK. Since these findings were not challenged, the Court of First Instance agreed with the Commission that the Net Book Agreement had an impact on cross-border trade and constituted a violation of art. 101(1) TFEU.

The Court of First Instance also confirmed the Commission decision to deny an exemption under art. 101(3) TFEU: "*in view of the nature of the restrictions under the NBA system and their impact on intra-community trade, the Decision considers that the PA (Publishers Association) is required to demonstrate the achievement of the aims of the agreements calls for a collective scheme rather than an individual vertical resale price maintenance system.*"[827] In sum, the Court of First Instance dismissed all the complaints and confirmed the decision of the Commission. This decision resulted in the NBA's collapse in the Republic of Ireland in 1992; but the *Publishers Association* was still ready to defend the agreement in the UK and appealed to the Court of Justice. The appeal only challenged the denial of the exemption under art 101(3), and dropped all claims with regard to 101(1) as it was then clear that the Court considered RPM schemes as anticompetitive by object.

The Court of Justice's decision constituted a significant innovation in comparison to the Dutch/Flemish books case, as its reasoning recognized the importance of the unity of the linguistic area including the UK and Ireland.[828] Advocate General Lenz highlighted the weaknesses of the Commission decision: the Commission ignored the 1962 decision of the British Court of Restrictive Practices and relied instead heavily on its previous decision in the Dutch/Flemish case, without considering that the Net Book Agreement was much less

[826] Case T-66/89, *Publishers Association v. Commission*, [1992], ECR I-01995, Judgment of the First Chamber, para. 50.
[827] *Id.,* para. 72.
[828] Case C-360/92, *The Publishers Association v. Commission* [1995], ECR 00023.

restrictive than the Dutch/Flemish system. The Advocate General further noted that "*the Commission's decision has the consequence that the book market of the United Kingdom and Ireland, hitherto a single unit, will now be divided along the national frontiers. The appellant and both the booksellers association are not wrong in drawing attention to this consequence, which at least at first sight appears paradoxical.*"[829] The decision of the Court followed the AG's opinion in affirming that "*the Court of First instance did not take into consideration the consequences of the existence of a single language area forming a single market for books in Ireland and the United Kingdom. That omission is said to have prevented the Court from carrying out a sufficiently detailed review of the Commission's assessment that the restrictions of competition resulting from the NBA were not indispensible.*"[830] For failure to consider the effects on the single language area, the Court of Justice annulled the decision of the Court of First Instance and proceeded to give final judgment in the matter by annulling the decision of the Commission.

Normally, the result of such decisions is to restore the matter to the Commission for further consideration. Given the indications of the Court, had the Commission had a chance to re-decide the case, it would have most likely granted the exception. The Commission however never had this chance. Not only had the Publisher Association *de facto* abandoned the application of the NBA in September 1995 just two months after the Court of Justice's decision[831], but an intervening national decision of the Court of Restrictive practice in 1997 found the NBA to operate against the public interest and consequently struck it down.[832] Once more, the British decision was not the real cause for the termination of the agreement, whose application had already been discontinued in practice, but it certainly did create a legal obstacle for its future reintroduction. Furthermore, it made a re-evaluation of the NBA by the Commission unnecessary and thus terminated the controversy with the EU.

As the European Community was clearing the way for a survival of the NBA, its role had been *de facto* superseded by evolutions in the market. In 1991, Reed Consumer Books was

[829] Opinion of Advocate General Lenz, delivered on 16 June 1994, para. 17.
[830] *The Publishers Association v. Commission* (C 360/92), para. 21
[831] The association had however declared itself ready to keep defending the scheme with the Commission
[832] Decision J 154/648, Court of Restrictive Practices. For a reconstruction of the various characters who took part in the judgment and their role in British politics and society, see S. Jordison, *Time to Bring Back the Net Book Agreement*, The Guardian, 17 June 2010, http://www.theguardian.com/books/booksblog/2010/jun/17/net-book-agreement-publishing

the first big publisher to withdraw from the agreement, followed in 1994 by Hodder Headline.[833] In September 1995, Random house and HarperCollins announced that they would not be bound by the agreement any longer and shortly after the retailer WH Smith, previously one of the most convinced defenders of the agreement, announced a major "de-netted" promotion with the two publishers.[834] After this move by two of the bigger British publishers, the "*NBA was effectively dead.*"[835]

An analysis of the 1997 British decision helps to understand why and how the market had changed so much and what had precipitated these changes. For the first time in its history, in fact, the British Court of Restrictive Practices agreed to re-open a case because of a "*material change of circumstances.*"[836] As already mentioned, by the time the second hearing came before the Restrictive Practices Court, the NBA had been abandoned and its main champion, the Publishers Association, was no longer willing to defend it. When calling for a third hearing, the Court had to call for "*volunteers*" to defend the agreement. The evidence deposited by the Director General of Fair Trading in order to prove the change in material circumstances that had intervened since 1962 proves very useful in reconstructing the evolution of the market and deserves attentive consideration.[837]

First of all, since the 1960s, printing a book had become cheaper. Due to the impact of computerized technology, unit production costs had shrank and so had the viable size of print-runs.[838] Additionally, new technologies greatly reduced storage costs as well as the cost and speediness of reprints. All of these changes contributed to reduce the uncertainty that characterized the upstream market and which, in the 1962 decision, had been one of the main justifications for the exemption. Further changes had impacted the structure of the retail industry. In 1962, the Court described a retail network of 400 to 700 stock-holding booksellers – the "*backbone of the trade*" was made mostly of "*single unit and independent*" bookstores.[839] As already mentioned, however, by the 1990s the retail structure was much

[833] *Id.,* 769.
[834] For a description of these events see B. Thompson, *Merchants of Culture*, *The Publishing Business in the Twenty-First Century*, Second Edition (Penguin Books, 2012), p. 53.
[835] Ibid.
[836] The reconstruction of this decision is based on: M. A. Utton, *Books are not Different After All: Observations on the Formal Ending of the Net Book Agreement in the UK*, International Journal of the Economics of Business, 7: 1, pp. 115-126 (2000).
[837] *Id.*, p. 117.
[838] As reported by Utton, the typical print run had fallen from 4000 to 3000 and unit costs by about 28%.
[839] *Id.,* p. 118.

less decentralized as a result, on the one side, of mergers and growth within traditional booksellers (such as Blackwells and W. H. Smith) and, on the other side, of major new chains entering the market (Waterstones and Dillons). Hence, the retail structure of 1997 was much less vulnerable to price competition than the retail structure of the 1960s.

A further relevant development considered by the Court concerned the discounts granted by publishers to certain classes of retailers. One of the main reasons for exempting the NBA in 1962 was that the agreement protected small booksellers with less contractual power from the possibility of bigger retailers buying large quantities to obtain large discounts for quantity purchases.[840] But since the NBA did not regulate wholesale prices from publishers to booksellers, bigger discounts to bigger retailers had become customary already under the NBA. This evolution alone put the NBA under great strain.[841] Last but not least, what was arguably the most significant transformation in the market – certainly the most visible – was the rise of non-traditional retail outlets – book clubs[842], but even more so supermarkets like Tesco that started commissioning non-net books while also financing their own publications. All of these changes picture a situation where, despite the Net Book Agreement being in place, stock-holding booksellers – the very category the British Court of 1962 was willing to protect – kept loosing market shares in favor of other types of retailers that grew better and better at escaping fixed book prices.

After having accepted that the material circumstances had changed, for the Court of Restrictive Practices it was easy to find that the NBA did not any longer qualify for an exemption under one of the so-called gateways of the *Restrictive Trade Practices Act 1956*. Unlike in 1962, in 1997 the abolition of the NBA would not deprive people of substantial benefits.[843] After almost 100 years the NBA was ruled illegal; the market had profoundly changed since 1962, and the willingness to sustain the NBA had faded.

[840] *Ibid.*
[841] As noted by Utton, (p. 119) this develoment had partially been offset by the rise of wholesalers, who usually offer very big discounts also to small bookshops and thus "*neutralize the advantage gained by the large retail chains*" as well as by the growing practice of allowing to return unsold stocks.
[842] As reported by Utton, the main book club in the UK went from having 3000 members in the 1960 to 2 millions in the mid-1990s (p. 119).
[843] Utton notes how the arguments used in denying the exemption were a re-statement or a reformulation of those used to prove the change in material circumstances.

Since then, various studies have tried to estimate the impact of the abolition of the NBA on the book trade.[844] The most thorough effort was produced in 2008 by the British Office of Fair Trading.[845]From a theoretical point of view, the first consequence that one would expect to observe is an immediate advantage gained by supermarkets like Tesco and Sainsbury, or low cost retailers like Amazon, that thanks to the abolition of fixed prices become able to obtain the benefits of their business models, by passing their lower costs to consumers through lower prices. From the perspective of the overall productivity of the industry this creates an immediately positive "*entry effect*" as high productivity entrants replace low productivity incumbents.[846] With the growth of these new high productivity firms, competitive pressure increases also on the traditional brick and mortars businesses – it generates *spillover effects*. Some of the low productivity incumbents are thus expected to raise their own productivity by updating their business model and reducing costs.[847]

In theory the abolition of RPM could have triggered a virtuous cycle of increasing productivity in the retail sector. Things, however, did not go quite as expected. The study does produce evidence of a positive "*between-firm effect*" (the substitution of high productivity new entrants with low productivity incumbents), but "*within-firm productivity*" (improvement in productivity of the old incumbents) does not seem to have improved. On the contrary, brick and mortar book retailers seem to have suffered deep negative changes, for an aggregate depression of productivity growth of between 10 and 16 %.[848] In sum, it is likely that the two effects have offset each other so that the overall productivity of the industry has not changed. On the contrary, it does not find evidence of a reduction in the number of published titles after the abolition of the NBA. [849] To untangle all of the causal links of this story is clearly beyond the scope of this study, but evidence seems to suggest that the supporters of the Net Book Agreement were right about one thing: the abolition of Resale Price Maintenance on books does decrease the chances of survival of smaller independent retailers. Once again, however, the picture is more complex than it seems, as

[844] See for example, F. Fishwick an S. Fitzsimmons, *Effects of the Abandonment of the Net Book Agreement*, Cranfield School of Management (1998)
[845] Office of Fair Trading, *An Evaluation of the Impact upon Productivity of Ending Resale Price Maintenance on Books,* Report prepared for the OFT by the Centre or Competition Policy at the University of East Anglia (2008)
[846] *Id.,* p. 6; this first positive effect is called "*between-firm effect*": low productivity firms are replaced by high productivity firms.
[847] This would be a positive "*within firm effect*": low productivity firms improve their productivity.
[848] *Id.*, p. 7.
[849] *Id.*, p. 12.

also some of the more "*industrial*" large-scale book retailers have scored very badly in the years after the NBA abolition.

What the fixed book price abolition likely contributes to explain, however, is the depth of the market penetration of bookstore chains and discounters in Britain compared to other markets. The American low cost chain Borders did not open in Germany, for example, but in the UK as its business model relied heavily on the ability to make discounts. Borders' own collapse, a few years later (together with Dillons, one of the main campaigners for fixed price abolition)[850] further complicates the story as it seems to suggest that competition of online retailers truly damaged big low cost book chains rather than traditional and specialized bookstores.[851] Given the years in which fixed book price abolition took place, big retailers and supermarkets – more than online shops – were the real motor behind the abolition. The possibility to discount, however, seems to favor the penetration of online shops way more than physical large-scale retailers. As the next case study will show, the penetration of Amazon in a country like Germany that has retained its RPM system is not comparable to the one of the UK. [852]

4.5.2. Germany: from the Sammelrevers to a National Law

"*Germany has always considered itself a late nation, by which we mean that we came together late in history as a nation, and what has always brought us together is the concept of education…Books*

[850] As described by J. B. Thompson, *Merchants of Culture, cit.*, p. 52: "*Terry Maher, head of the Pentos retail group which had acquired Dillons – an academic bookseller – in 1977 and began to roll a national chain of bookstores in the late 1980s, had always opposed the NBA. 'I just thought the Net Book Agreement was stupid'*". In 1989 Dillons started experimenting with price promotions and it was stopped numerous times by injunctions secured by the Publishers Association. See also Maher's own memoirs: T. Maher, *Against my Better Judgement: Adventures in the City and in the Book Trade* (London, Sinclair Stevenson, 1994).

[851] Borders was (together with Barnes and Nobles) one of the two main bookstore chains in the US. In 2006, it had total sales around $ 4.1 billion and 1063 bookstores across the country. Borders had expanded internationally, mainly in the UK, acquiring the British chain Books etc. in 1997. In the early 2000s Borders overseas operation began to run into difficulties. In 2007, the business which by then comprised 42 superstores in the UK and Ireland and 28 branches of Books Etc. was bought for only 10 millions by a private equity group to then be bought out by the management in July 2009. In November 2009 the business went into administration and on 22 September 2009 all Borders shops in the UK and Ireland closed down. By September 2011, also the American operation had bankrupted and all remaining American shops had closed down. This reconstruction is based on J. B. Thompson, *Merchants of Culture*, p. 30.

[852] On this comparison see: M. Nauman, *How Germany Keeps Amazon at Bay and Literary Culture Alive*, the Nation, 2012 (http://www.thenation.com/article/how-germany-keeps-amazon-bay-and-literary-culture-alive/)

are inseparable from our self identity."[853] This quote from a German publisher exemplifies the special role that books are said to occupy in German culture and society. This role was firstly an educational role, as especially after World War II books were needed to re-build the nation and heal the wounds of an authoritarian past. Books were like medicines: people needed them badly. [854] This idea has certainly a discreet amount of rhetoric in it, but seems to run deep in the German consciousness and it certainly plays a role in the story I am going to tell. In fact, unlike in the UK were the Net Book Agreement was explicitly conceptualized as necessary to the good functioning of the industry, here it is linked to the special role attributed to books.

This special role is also reflected by some elaborations of German legal scholarship on the special cultural and even "*Constitutional*" nature of the book, which is seen as much more than an economic good. A corollary of this idea is that books should also occupy a special role in the market. The publishing industries in Germany have always been subject to special treatment, first thanks to an exception inserted in the German GWB to justify the existence of a trade agreement like the Sammelrevers,[855] later through a national law imposing RPM in the book sector. Therefore, unlike in the UK, German booksellers never had to defend their agreement *vis a vis* the government. Industry initiative in the UK, national strategy in Germany, one could say, with some degree of simplification.

Hence, in Germany, the subjecting of books to a special price regime is justified with reference to the special role of books in the definition of the nation's culture, but also by a more general idea of equity and economic democracy. Fixed book price rules are also about an "*idea of equal protection, [as] in this system everybody has the same chances, whether*

[853] Thomas Sparr, Frankfurt publisher of Suhrkamp Verlag, as quoted by M. Kimmelman, *German Border Threat: Cheap Books*, Oct 24, 2007, The New York Times; www.nytimes.com/2007/10/24/arts/24book.html?pagewanted=all&_r=0.

[854] M. Kimmelman, *op. cit*., reports another publisher saying: "I *grew up in a remote town and it was the same system that distributed drugs to pharmacies overnight. The books came with the drugs on the same trucks*."

[855] Sec. 15 of the GWB (Gesetz Gegen Wettbewerbsbeschränkungen–Law against restrictions on competition) provided for an exception, limited to the publishing industries, to the generally applicable prohibition of vertical price fixing (sec. 14). The following provision, sec. 16, was aimed at preventing abuse of the exemption. The exemption is allowed merely for vertical fixed prices; horizontal restraints, such as price cartels, remain forbidden as they represent agreements between competitors. See M. MacLaren, *Is the Price Right? The European Competition Law Dispute over National Systems of Fixed Book Prices,* German Law Journal, vol 2, 2001.

you're a small or big publisher or bookseller, or a consumer in Berlin or some small town."[856] This resonates with Gareth Davies' notion of equality in a more limited and standardized marketplace, where everyone gets access to similar goods in similar circumstances.[857] It becomes rapidly clear when reading about it, that RPM schemes in the book trade are in Germany supported by a high degree of consensus, in the industry, government, and the broader public.[858]

Today Germany has a fixed book price law which was adopted in 2002 at the end of complex proceedings that started in 1993, when the German fixed book price agreement, the Sammelrevers, came under the attention of the European Commission because of its cross border effects. Once more, reconstructing the functioning of the Sammelrevers and the Commission interventions is particularly instructive.

Adopted in 1887, the *Sammelrevers* applied to the whole German speaking area – Germany, Austria and Switzerland. It was a membership contract between publishers and booksellers that provided a collective management of individual resale price maintenance agreements. The system worked through a central management of individual RPM agreements by a trustee. The trustee was authorized by the publishers to send commitment forms to all booksellers. Through these commitment forms the booksellers bound themselves to sell books at the prices set by the publishers. Resale price maintenance agreements thus existed between each participating publisher and each bookseller through the trustee. Enforcement was guaranteed through a system of conventional penalties for booksellers that practiced unauthorized discounts, and through the possibility for publishers to stop supplying any bookseller who breached the FBPA.[859] From 1994 on, a parallel scheme – the Einzelrevers –was established by the 7 largest German publishing houses that had in the meantime left the Sammelrevers.

The Sammelrevers was first notified to the Commission in 1993 in preparation to Austria's accession to the EU. Lengthy negotiations between the German Book Association and the

[856] M. Kimmelman, *op. cit*., statement attributed to Heike Fischer, a Cologne based publisher. More generally, on the idea that a stream of German Ordoliberalism was concerned with protecting the small against the big, in comparison with the American experience see: J. Q. Whitman, *Consumerism Versus Producerism, cit.*
[857] G. Davies*, Internal Market Adjudication, cit.*
[858] In other words almost everybody seems to agree with them as put by M. Kimmelman, *op. cit.*
[859] For a description of the agreement see C. Schmid, *op. cit.* p. 158. See also U. Everling, *op. cit.*

Commission ensued. Compared to the British and also the French experience, the dialogue that is instantiated between the national and the European authorities appears to go much deeper into the technicalities of the scheme. It can be interpreted as a mutual effort of revision of the scheme to make it compatible with the EU rules on competition. On April 29 1994, the Commission issued a comfort letter to grant a temporary exemption to the transnational fixed book price scheme, valid until June 1996.[860] The then German Director General for competition Claus Dieter Ehlermann explicitly recognized the value of fixed book price rules in promoting the diversity of titles and a decentralized retail structure.[861]

In the comfort letter, the Commission simply asked to harmonize the prices in Germany and Austria, which the two countries did. The Commission gained more time before taking a final decision and granted an extension of the temporary exemption. In 1996, however, the Austrian discount retailer Librodisk (later on LIBRO) lodged a complaint with the Commission against the scheme. This marked the beginning of growingly adversarial relationships between Germany – its government, publishers, booksellers and authors, on the one side and the Commission (and LIBRO) on the other.[862] As the Commission, under its new Competition Commissioner Karel Van Miert, initiated informal proceedings against Germany, member states reacted. The Council expressed its concern with decision 22 September 1997, on *Cross Border Fixed Book Prices in European Linguistic Areas*[863] where it suggested that, given new art. 128 (4) (Current article 167(4) TFEU) on the inclusion of cultural aspects in Community action, the Community might justify cross border agreements necessary to keep a linguistic area integrated.

Relationships grew adversarial also within the Commission as its president, Jaques Santer, sided with the German government against Van Miert. The book association launched a campaign where it explicitly accused the Commission of being attacking the core of German culture.[864]Nonetheless, the hard stance prevailed within the Commission and in 1998 DG Competition issued a formal complaint to Austria and Germany, demanding the abolition of the existing book price agreement. Replying to a question in the European Parliament, Van Miert explained that Germany had simply not adduced sufficient

[860] Communication of Director General Ehlerman of 29/7/1994.
[861] *Ibid.*
[862] M. Lodge, *op. cit.*, p. 244.
[863] Decision C 305/02 of September 22, 1997
[864] M. Lodge, *op. cit.*, p. 244.

evidence to show that the system deserved an exemption under 101(3) and that a comparison between Member States with and without RPM schemes in place was simply inconclusive – Sweden in particular was proof of a country that was doing very well in terms of numbers of books published under a system of free prices; Austria, on the contrary, despite the Sammelrevers had seen a big discount chain come to dominate the retail market.[865]

As a way of compromise the German book association offered to lift the fixed price regime from particular products with a lower cultural value, but the Commission did not consider this sufficient. In July 1999 the Commission was ready to vote a decision that would have outlawed the Austro-German scheme, but van Miert's attempt failed by one vote.[866] After the resignation of the Commission, an unwillingness to tackle politically sensitive issues prevented van Miert to gather support around his preferred decision. Nonetheless, in early January 2000, as LIBRO threatened to take the Commission to court for failure to act, the German book association consented to the Commission proposals and agreed to drop the transnational elements of the system.[867]

Two separate national systems of resale price maintenance were going to emerge, thus removing competition issues from the scope of EU competition law. The only form of cross-border control that the Commission was going to allow was limited at avoiding circumvention of the system through artificial exportations and re-importations. Austria complied by adopting a national law, while Germany through an amendment of the Sammelrevers retailored so that the price maintenance between German booksellers and foreign publishers was annulled. Also, the new agreement did not apply to direct cross border sales of products via the Internet. In June 2000, the Commission published a communication pursuant to art. 19(3) of Regulation Nr. 17 that preliminary validated the amended system as it did not violate art 101(1) TFEU, while inviting third parties to send their observations. In its new formulation, in fact, the agreement had only negligible effects on trade between Member States. [868]

[865] As reported in C. Schmid, *op. cit.*, OJ C 402/22.12.98, 26.
[866] C. Schmid, *op. cit.*, p. 159.
[867] M. Lodge, *op. cit*., p. 245.
[868] Notice pursuant to Article 19(3) of Council Regulation No 17 (1) concerning an application for negative clearance or exemption under Article 81(3) of the EC Treaty (C 162/08; 10 June 2000)

After this decision, the way seemed cleared for the new Sammelrevers. Only a year later, however, in July 2001, the Commission re-opened the proceedings as the implementation of the amended Sammelrevers was not complying with the understanding reached by the Commission and the German Book association. This new intervention of the Commission was the result of new complaints by LIBRO (later joined by the online Belgian retailer Proxis). LIBRO had started offering online discounts of 20 % for books purchased from Austria and had installed in its German shops computer terminals that allowed costumers to order German books at cheaper prices from abroad. As a consequence of this behavior, German publishers refused to supply LIBRO with any further stock, and a Berlin judge deemed LIBRO's behavior a purposive circumvention of the agreement.[869] The Commission found that Germany was in breach, because, contrary to the understanding previously reached with the Commission, it systematically considered direct cross-border sales to German customers as circumventions of the system. Furthermore, the Commission found that the collective refusal of German Publishers and wholesalers to supply foreign internet re-sellers to prevent direct cross border sales amounted to illegal collusion. The Commission took the view that "*direct cross-border sales of books to final consumers in Germany via the Internet can in general not be regarded as a circumvention of the "Sammelrevers" that could justify the application of the fixed prices and refusals to supply*."[870]

After this decision, Germany submitted a new agreement that exempted from RPM direct cross border sales via the internet and also a limited list of circumstances under which circumvention was to be presumed. In March 2002, the Commission accepted the undertaking and dropped once and for all the proceedings against the *Sammelrevers*. As affirmed, by then competition commissioner Mario Monti: "*On the basis of EU competition law the Commission has no problem with national book price fixing systems which do not appreciably affect trade between Member States. By clearing the German price fixing system the Commission, in a perspective of subsidiarity, also takes account of the national interest in maintaining these systems which are aimed at preserving cultural and linguistic diversity in*

[869] M. Lodge, *op. cit.*, p. 245.
[870] Press Release, *Commission re-opens proceedings concerning the German system of fixed book prices because of its effects on cross-border Internet bookselling* (IP/01/1035): http://europa.eu/rapid/press-release_IP-01-1035_en.htm?locale=EN

Europe."[871] The new undertaking was going to be applied until Germany substituted the agreement with a Law.

The Law, passed in 2002, functions similarly to the French Law, but it is, in a way, stricter. The publisher or the importer must set a fixed retail price, and discounts are generally prohibited. While in France two years after publication (or import) and six months after supply the retailers may lower prices, in Germany only the publisher may decide to cancel the fixed price after 18 months. The Law has been enforced very rigorously by German judges as suggested by some prominent cases, which have made the headlines of the general press. In July 2015, the German Federal High Court ruled that Amazon had violated Germany's Fixed Book Price Law when it gave a 5 euros credit to customers who traded in books. In 2013, Apple was found to violate the Law, when it sold discounted I-tunes Gift Cards that could be used to buy e-books on the iBooks Store. Similarly the German Law had served to prevent Amazon to offer free shipping, as the practice was considered equivalent to discounting. [872]

Germany's commitment to retain and upgrade its law is demonstrated by the recent initiative to extend its application to e-books. On February 3 2016, the German Government has submitted draft legislation to this end.[873] The law in its original formulation in fact did not specify if it applied or not to digital books and even if it has generally been interpreted extensively, legal uncertainty prevailed. The extension would also apply to cross border purchases of e-books when the final consumer is located in Germany, which might re-open some of the issues already discussed with regard to the Sammelrevers.[874]

[871] Press Release, *Commission accepts undertaking in competition proceedings regarding German book price fixing*, IP/02/461. See also: H. P. Nehl and J. Nuijten, Directorate-General Competition, unit C-2, *Commission ends competition proceedings regarding German book price fixing agreements following acceptance of an undertaking on cross-border sales*, Competition Policy Newsletter, 2/2002.
[872] See N. Hoffelder, *Amazon Has Run Afoul of Germany's Fixed Price Book Laws – Again*, The Digital Reader (30 July 2015).
[873] Reuters, German Cabinet agrees to extend fixed prices to e-books, http://www.reuters.com/article/us-germany-publishing-idUSKCN0VC1QU
[874] For an economic assessment of the extension of fixed book price laws to e-books see J. Poort, N. V. Eijk, *Digital Fixation: the Law and Economic of a Fixed E-Book Price,* International Journal of Cultural Policy, 23:4, pp.464-481 (2017). The authors conclude that while evidence for a defense of fixed prices for printed books is slim, the case for e-books is even weaker and the compatibility with EU Law also doubtful.

5.4.3. Italy's Legge Levi – an Anti-Amazon Law?

Italy's book trade has been governed, throughout most of the 20th century, by systems of fixed prices imposed by trade agreements between publishers and booksellers. These agreements, however, were never as visible as their British or German counterparts. Nor they became object of controversies with the EU.

The first of these agreements to come to prominence was the Collective Agreement 5 June 1935, which forbad discounts higher than 10% on the cover price of books set by the publishers. This agreement came before the Italian Constitutional Court, as a bookseller lamented that the publisher Paravia sold books directly to schools with discounts above 10 %. The Italian Constitutional Court accepted all the usual justifications in favor of FBPAs and deemed the agreement compatible with the principle of Freedom of Enterprise as established by art. 41 of the Italian Constitution.[875] In particular, the Court found that as far as any individual publisher was able to freely fix the price in a regime of free competition, the fixed book price system would constitute "*the best way to achieve a broad fast and economic distribution of books, in the interest of culture*." The Court stated that the "*1935 agreement simply codified this need, restraining the unruliness of discounts, which is damaging for the book trade, bookshops, as well as the public at large*."

Despite the validation of the Constitutional Court, Italy, unlike Germany, lacked a special provision that exempted the publishing sector from the rules on competition. Therefore, the Italian Fixed Book Price Agreements were particularly vulnerable to the decisions of Italy's own Competition Authority. Starting in 1991, the AGCOM (*Autorità Garante della Concorrenza e del Mercato)* outlawed a series of agreements that potentially distorted competition by producing an artificial increase of prices.[876] In 1992 the Authority struck down a system of special exchange rates administered by the ALI, the Italian Booksellers Association (*Associazione Librai Italiani*) to ensure homogeneous (and inflated) prices in the sale of foreign books.[877] In 1996, the AGCOM found an agreement between all of the major

[875] Corte Costituzionale, Sentenza 12 Febbraio 1963, n. 1.
[876] The first of such decisions is decision 18 December 1991, n. 273.
[877] AGCOM, Decision 27 April 1992, n. 471.

Italian publishers and booksellers to violate the Italian rules on competition.[878] Publishers and booksellers asked for an exemption under art. 4 of Italian law 287/90[879] claiming that fixed prices were needed to guarantee equal treatment to all classes of consumers in relation to a special kind of good like books, the survival of smaller bookshops and a decentralized retail structure, and the cross-subsidization of slow selling books. The Authority did not accept these justifications and denied the exemption. It deemed the effects on competition too severe, and the consequences for the violation of the agreement too onerous. The agreement indeed not only established a system of fines but also provided that publishers could refuse to supply the transgressing bookseller and could terminate all special conditions (discounts, returns, etc) that had been contractually granted to that bookseller.[880]

After these decisions, the Italian market was formally liberalized for a few years, even if the practice of recommending cover prices stayed intact. The first statutory provision to limit discounts on books was introduced in 2001 with art. 11 of law 62/2001, which allowed booksellers to offer a maximum discount of 15 %.[881] The provision however had a temporary nature and even if it was extended several times, it was theoretically subjected to periodic redefinition by the Government. Small and big publishers alike kept lobbying for a new, more visible and more permanent law, which they finally got in 2011. The adoption of the so called *Legge Levi*, from the MP who introduced it, is better understood as a response to the growing preoccupation with the rise of online retailers aggravated by the negative performances of the industry starting in 2009. The Law was in fact unashamedly referred to as anti-Amazon Law by its own proponents.

The *Legge Levi*[882]re-states the maximum 15% discount on the price of books as set by the publisher. Unlike in the previous regime, however, the threshold is permanent and not

[878] AGCOM, Decision 19 June 1996, n. 4001. The decision concerned a series of individual vertical agreements that forced booksellers to fix the price within a small range determined by the Publisher. These agreements assigned responsibility for monitoring the discounts that bookshops could give to customers to the ALI (Associazione Librai Italiani)

[879] Legge 10 ottobre 1990, n. 287, *Norme per la tutela della concorrenza e del mercato*, faithfully replicating the discipline of the EU Treaties.

[880] For a detailed description of the case see G. Smorto, *Il Contratto Librario*, Contratto e Impresa / Europa, 1, pp. 461-480 (2010).

[881] Legge 7 marzo 2001, n. 62; See on this point, M. Gerlach, *Proteggere il Libro*, *Risvolti Culturali, Economici e Politici del Prezzo Fisso*, Fidare, Federazione Italiana Editori Indipendenti, (2010), p. 20.

[882] Legge 27 luglio 2011, n. 128.

subjected to re-definition. The stated objective of the law is to "*allow the development of the book sector, sustaining literary creativity, promoting readership, diffusion of culture, and protecting media freedom and pluralism.*" Under the Law the publisher or the importer freely sets the retail price of books and prints it on the cover of the book. Retailers of any kind, including online retailers (previously excluded) can apply a maximum discount of 15%. The law provides for an important exception – the most prominent innovation with respect to the 2001 regime: publishers might promote special sales for up to a month per year (with exclusion of the month of December) discounting books up to 25 %. Retailers must be informed and are free not to participate. Furthermore, discounts up to 20% are normally allowed for certain categories of books (including any book after 20 months since publication and 6 months since supply) or categories of purchasers (libraries, museums, educational institutions etc.). Libraries were excluded by the previous regime, in the sense that retailers could discount freely when selling to them. Since they were used to get much larger discounts, many library directors strongly opposed the new law. Finally,, for what concerns enforcement, the law provides for a system of penalties for transgressing booksellers administered by municipalities.

Despite its innovations being limited with respect to the 2001 regime, the law has stimulated a lively debate, taking on a remarkably expressive character. Small publishers and booksellers lament that the law is not strict enough and that it should be strengthened. By allowing publishers to promote special sales, in fact, it arguably disproportionally favors the big publishing houses, which also control the main retail chains (e.g. Feltrinelli, Mondadori, Rizzoli). The Italian market is characterized by a high level of vertical integration between publishers and retailers. As it has been defined by small publisher Pietro del Vecchio the law is a "*wrong law going into the right direction. It recognizes a necessary principle, but sets the bar too high – 15 % is much higher than the discounts allowed in Germany or France*."[883] In 2015, the Government intended to abolish the Law as part of a new liberalization package recommended by the AGCOM. A powerful lobbying effort of publishers and booksellers however brought the Government to scratch the provision and the Legge Levi is today intact.

[883] As interviewd on www.senzaudio.it

To assess the economic impact of the law is behind the scope of this study, but looking at recent data on the Italian book market might help to isolate some relevant trends.[884] From 2011 to 2014, the market lost 17,9 % of its value from 3,166 billion euros in 2011 to 2558 billions in 2014. The penetration of online retailers is still quite limited. E-commerce of physical books has grown from 5.1% of the total trade in 2010 to 13,8 % in 2014 while the e-book market rose from 0.1 in 2010 to 3.5% in 2014. Over the same period of time traditional bookshops have seen their share decrease from 78,6% to 71,3%. Despite this downward trend, physical bookshops still represent the backbone of the retail market. By looking better into this percentage, however, one discovers that bookstore chains and franchising gained market shares from both traditional "independent" bookshops (whose market share decreased from 42.5 % in 2007 to 30.7 % in 2014) and supermarkets, that after having boomed in the 1990s, are today in a serious crisis with regard to their books sales (from 18 % in 2009, to 14.9% in 2014).

A series of interviews have allowed me to isolate a few more relevant consequences of the law which would have otherwise gone unnoticed. Interviews with employees of Italy's largest bookselling chain, Feltrinelli, at various level (both local stores and the central management)[885] have revealed that the law has not relevantly altered the practices of chain bookstores. In particular, the law does not seem to have had an impact on the discounting practices of a chain like Feltrinelli.[886] This is because these retailers never really discounted or organized promotional campaigns out of their own will, but simply adhered to the campaigns that publishers promoted. This suggests that the provision of the law allowing publishers to organize promotional campaign with discounts up to 25 % for a month a year (in derogation of the normal 15% threshold) is simply an exceptional case of the normal

[884] This data comes from G. Peresson, *Rapporto sullo Stato dell'Editoria in Italia 2015*, Giornale della Libreria 38 (2015).
[885] I have interviewed the managers of one Feltrinelli bookstore in Ravenna, Italy and of two shops in Milan. Through these interviews I have been referred to two more persons working in the buying office of that company.
[886] The only difference the shop managers reported dealt with the application of loyalty membership programs. Feltrinelli, in fact, gives members a gift certificate after they accumulate a certain number of points awarded each time they purchase. The managers reported that they do not credit points for purchase of discounted books. While the law is not explicit, this measure has been adopted precautionary by the shops. From this perspective one could predict a possible negative effect on bookstore chains loyalty marketing initiatives.

circumstances: publishers promote the discounting campaign, bookshops adhere to it.[887] Very different is the situation for small bookstores.[888] These bookstores have variable practices but they tend to adhere to much less promotional campaigns (and they certainly do not adhere to all of them like Feltrinelli). Therefore unlike what the rhetoric suggests, the law does not seem to have halted the discounting practices of chain bookstores.

Another feature which has emerged, and which would have been difficult to understand from published sources, is that bookstore chains receive two kinds of advantages from publishers due to their larger size. The first one is that they can negotiate larger discounts – and this point will deserve one more reflection in an instant. The second is that they are able to negotiate a free returns policy, which reduces drastically their stock (inventory) costs. The people I interviewed identified free returns as the single most significant advantage they are able to get because of their size. It is this feature, more than protection from price competition, that seems able to encourage riskier choices from booksellers who can more easily buy difficult books (and then return them). Small independent bookstores normally do not get this kind of advantage from the large publishers[889] and as already mentioned they are able to negotiate much lower discounts. This feature of the market suggests the scarce plausibility of the *cross-subsidization* argument.

This brings me to the third *discovery* I made through the interviews. Negotiations, in the book trade, happen mostly on discounts. In other words, there is not in the book trade a wholesale price and a retail price, but there is a book cover retail price set by the publishers and there is discounts on that price that retailers negotiate. That is how the people working for major bookselling chain think: not in terms of mark ups, but in terms of discounts they are able to get from publishers on the cover price. This suggests that the system of the cover price, which goes with limited discounting ability at the retail level, is deeply rooted in the industry and industry participants do not see it as deriving from the law.

Overall, I recorded a general skepticism about the value of the law. Small independent bookstores do not see it as protective enough and as mentioned above denounce the 15%

[887] E.G. Feltrinelli adheres to the promotional campaigns organized by all publishers. Individual bookshops do not organize campaigns, but have ability to give discounts (up to 15%) to friends, neighbor shop-owners, etc.
[888] I have interviewed three independent bookstores in the city of Ravenna, and 1 in Milan.
[889] They might however be able to negotiate better deals with small independent publishers.

threshold as too high. Larger retailers, such as bookstore chains, consider it largely irrelevant in its present form but they have also expressed worries about the detrimental effects that a strengthening of the law might have. None of the people I interviewed however demonstrated confidence that price competition is a key threat to their viability. Rather, both categories of booksellers have pointed at other elements as the key challenges they face, mostly rising rents in urban downtowns and declining readership.

4.6. Conclusions:

This chapter has explored the impact of EU Law on national market arrangements establishing fixed book price schemes. As EU Law appears to allow for both diversity and upgrading of these local market arrangements, the interactions described contribute to sketch a more nuanced narrative about the impact of the European Union on the diversity of national ways of life. This narrative would like to challenge some of the most radical claims about the homogenizing role of the EU, whose institutions are considered incapable of valuing the expressivity of national laws and are thus said to erode national cultures and identities.

As the survey of the main European interventions has demonstrated, the EU seems to have gradually relaxed its approach on fixed book price schemes. In the Dutch/Flemish books case, the unity of the linguistic area could not help to justify a transnational system. But as I showed when describing the British experience, the Court of Justice, in *Publishers Association*[890] struck down the Commission decision on the British Net Book Agreement for not taking into consideration the unity of the linguistic area. The same evolution can be seen from Leclerc to LIBRO, where the Court, despite the outcome, was ready to recognize that also the imposition of a different system to importers – which is a discriminatory selling arrangement – could be justified in the light of the imperative requirement of the protection of books as cultural objects. In sum not only the EU shows deference with regard to purely national systems, but also its assessment of the cross border effects of fixed book price schemes seems to have gone through a relaxation. The blending of the two rationalities described by Christoph Schmid seems to have taken place in a way that makes

[890] *Publishers Association* (C-360/92).

it difficult to describe the relationship of EU law and national law in this field as purely oppositional.

If the European Union and its law come to play a specific role in the stories I have told, it is certainly not that of pure market homogenizers. To the contrary, EU Law, and competition law in particular, might be seen as providing the discursive platforms needed to problematize the conventional justifications offered in defense of national market arrangements, unveil their authentic motivations and limit their exclusionary or protectionist effects.[891]These discursive disruptions are not always deregulatory. As the German experience illustrates, where Member States are able to prove a real commitment to retain their preferred regulation, while showing willingness to adapt it and retailor it to limit its effects on trade, the European Union does not prove insensitive to the Member States' justifications. The fact that Germany was more or less directly forced by the Commission to turn its trade agreement into law does not disprove this narrative. To the contrary one could see the transition from trade agreement to law, typical of many countries, as mutually beneficial from both a EU and a Member State perspective: the effects of the system become more transparent and traceable, and its enforcement becomes stricter.

Writing with reference to the German experience, competition law scholar Giorgio Monti described the Community policy as an "*unhelpful attempt to carve out a compromise without confronting the difficult question about how to balance competition and culture in the book sector.*"[892] But a more benign view is possible if we think about the rules at stake not much as instances of cultural policy, but as expressions of a way of life – rules about how we live together, the virtues of certain commercial spaces, and ultimately about the limits of markets. As I tried to explain, these way-of-life considerations pervade regulation at each level of government and it is unrealistic to think of them as a unique preoccupation of Member States. As far as books go, the EU and its law do not deprive people of their traditional or habitual patterns to get books in favor of a natural and unlimited conception of the market. The EU is not unwilling to accept that national fixed book price schemes

[891] On this approach see for example C. Joerges & J. Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes, cit.*;O. Gerstenberg & C. Sabel, *Directly-Deliberative Polyarchy cit.*; Y. Svetiev, *European Regulatory Private Law: From Conflicts to Platforms*, *cit.*
[892] G. Monti, *EC Competition Law*, p. 105.

might be needed to allow people who like to spend their free time browsing through shelves of "over-priced" books in the local bookshop to keep doing that.

Rather, EU Law simply seems to suggest that there are other, equally valuable, market arrangements, presiding over other kinds of buying experiences. As many people enjoy the uniqueness of independent bookstores, others might be more at ease amongst the relative homogeneity of supermarkets, which confront them with a simpler and more limited choice of books and might thus be less "intimidating."[893] Still another group of people might enjoy shopping from home, comparing prices on the Internet, or even prefer digital books over paper books. The EU may, more or less consciously, attach a particular importance to the transactions that happen through the Internet, as they are often transnational in character, but it does not prevent member states from proactively sustaining more traditional forms of life in the market through familiar, decentralized and specialized retail structures.

Certainly the industry keeps evolving and many developments were beyond the scope of this study. Various factors however contribute to dispel fears that small bookshops and physical books with them will be wiped out. The rise of e-books, for example, is reported to be stagnant – to suggest that the physical book will stay around for quite some time. Furthermore, as consequences are often unexpected, one of the spillover effects of the rise of e-books is that the physical (material) quality of recently published books is reported to be as high as it ever was.[894] Furthermore, as my analysis seems to confirm, the rise of online retailers seems to have hit hard not much on the small, more or less traditional, shops, but on malls and supermarkets. As Amazon plans to open physical bookstores (and groceries) across the United States, many praise the renaissance of brick and mortar shops.[895] On these evolutions, and how legal regulation will be able to encourage and direct them, will

[893] While Economic theory typically assumes that more variety is good for consumer welfare, some researchers in psychology and marketing have established that too much choice might make costumers unhappy. See for example, S. S. Iyengar and M. R. Lepper, *When Choice is Demotivating: Can One Desire Too Much of a Good thing?*, Journal of Personality and Social Psychology, 79:6, pp. 995-1006 (2000).

[894] There have never been so many beautiful books around, announced the Guardian a few months ago; www.theguardian.com/books/2017/may/14/how-real-books-trumped-ebooks-publishing-revival?utm_source=dlvr.it&utm_medium=facebook

[895] See for example T. McKeough, *Clicks to Bricks: Online Retailers find the Lure of a Store,* www.nytimes.com/2016/11/11/style/clicks-to-bricks-online-retailers-find-the-lure-of-a-store.html?_r=0, The New York Times, November 10, 2016; T. de Monchaux, *How Amazon Bookstore Soothes Our Anxieties about Technology*, http://www.newyorker.com/culture/culture-desk/how-amazons-bookstore-soothes-our-anxieties-about-technology, The New Yorker, December 22, 2015.

depend the future of many of the questions addressed in this chapter, which of course calls for further monitoring and analysis in the next years.

General Conclusions

This dissertation has tried to revise a powerful and seductive critique of the European Union, and its economic law in particular, as agents of globalization and neo-liberalism with detrimental cultural consequences on the life of citizens in the Member States. Through the erasure of forms of market regulation that contribute to build more limited marketplaces and preserve small-scale interactions, relational richness, as well as political stability, EU economic law interventions is described as endangering both national cohesion and support for the EU. This critique rests on two assumptions. The first one is that national market-limiting forms of regulation are best understood as expressions of culture – both because of their rootedness in national history and because they organize markets in ways to which people get attached or like. The second one is that the impact of EU Law on national cultures, by intervening on these forms of regulation, is degrading and homogenizing. These assumptions however are rarely tested. Through two case studies where I have described rules which show some of these cultural features, I have found evidence that contributes to displace the *culturalist narrative* and build a different one. I should stress that this has been a recursive project where the theory (the analysis of my first two chapters) has guided my case studies, but where I also have come back and specified the theory based on findings from the case studies. What have I discovered?

My analysis allows me to say that if regulatory diversity as a proxy for cultural diversity is what the concern of the *culturalist narrative* is about, its fears may truly be unfounded. My case studies show considerable homogeneity in starting points, in the sense that for both forms of regulation I have found that most countries in the EU have adopted them at some point in their recent history. This might suggest processes of imitation or rather a specific functional orientation of rules that are often described as nationally specific and idiosyncratic. But in any case, the impact of EU law appears to produce more rather than less diversification.

Some countries retain these rules and defend them as important parts of the social fabric (see Germany for the book pricing rule), while other countries, the UK for example, have happily abandoned a great number of them – largely through processes unrelated to legally enforced deregulation. As the case studies on book pricing rules suggests, for

example, the UK is a rather recent outlier, and only a partial one. As countries need to put effort and come up with justifications in order to keep the rules, they may also decide, in the process, that these rules are not as salient anymore and can be given up without drastic consequences. From this perspective the questioning of these rules triggered by EU interventions seems to produce more diversification across Europe, rather than more homogeneity. And this finding is in line with literature on globalization and its differential impact on local contexts.

I consider this a first valuable insight that I was able to extract from my analysis. This, however, has convinced me that, despite the ambiguity of their claims, the real preoccupation of the cultural critics I have studied is not much with the diversity of national cultures, but rather with a certain set of experiences which are often common across the Member States and build a type of life different from the impersonal, market-centred, efficiency-enhancing one the EU is said to encourage – a model of life, as I said before, which is less focused, made of small-scale non functional interactions, in the market as well as other spheres of life. Have I found evidence that this model of life is threatened by EU Law?

I would not say so. In the book pricing rules, which is my "*easy case*", Member States explicitly win and are able to retain rules protecting independent bookshops and certain treasured social interactions within them. The ability to keep intact purely national systems of fixed book pricing is in fact unchallenged, even if the beneficial impact of these rules for the industry in general and small bookstores in particular is contested in the literature. But also in the retail entry regulation case, which I thought to be the *"hard case,"* I have in fact learned that Member States are able to retain rules justified by the protection of small shop-life and certain personal interactions within them, and the city in general. Member States, while having to give up some features of their regulations (such as tests of economic need) are in fact able to keep in place authorization schemes that discriminate big retailers in favor of the small ones. And once more this is despite the fact that the effectiveness of these authorization schemes in protecting small independent businesses is contested. The uncertainty around the effects of these forms of market regulation and at the same time the perseverance of Member States in relying on them to achieve certain objectives suggests that these rules have some expressive dimension – they are there to

signal a commitment rather than achieve results. Still, EU law does not take them away. Rather, at least for the book pricing rules, as a result of EU interventions, Member States turned what were collective trade agreements into national laws, which enhanced their visibility and traceability.

With this of course I do not mean to say that the livelihood of downtown areas is not threatened, especially in certain Member States, nor that the expansion of the large distribution has not often been unruly and damaging. I have tried not to conceal the challenges and pressures to which European cultures are subjected to. But as both case studies suggest, the causal relationship between the law and changes in society appears much more multifaceted than it would emerge from most accounts. This points at a tendency in part of EU legal scholarship to over-ascribe to the law in general and to EU law in particular, market and social transformations occurring in the Member States, which have a plurality of complex causes. As I have shown, for both book pricing rules (UK) and entry regulation in retail (France), EU law often intervenes when the national schemes are already contested, because of homegrown political processes or "global" technological and business innovations.

Here the counterargument is often that even if EU law is not the original cause, it is still culpable: by taking away the ability of Member States to retain protective market regulation, it enhances the dislocating impact of business and technological innovations which are lethal to certain local ways of economic life, as part of people's culture. Even if one ignores the fact that there is evidence showing that certain features of the protected lifestyle can survive in transformed markets, and are compatible with the new forms of distribution (see discussion in Chapter II) (and also evidence which questions the links between technological innovation and the decline of small independent retailers[896]), my case studies have shown that EU law may actually leave Member States more, rather than less, protected. By forcing Member States to justify their national regulations and demonstrate the efficacy of the regulatory instruments adopted, EU Law forces the Member States into reflection on whether the objectives pursued through regulation are

[896] See for journalistic accoutns, T. McKeough, *Clicks to Bricks: Online Retailers find the Lure of a Store,* www.nytimes.com/2016/11/11/style/clicks-to-bricks-online-retailers-find-the-lure-of-a-store.html?_r=0, The New York Times, November 10, 2016; T. de Monchaux, *How Amazon Bookstore Soothes Our Anxieties about Technology*, http://www.newyorker.com/culture/culture-desk/how-amazons-bookstore-soothes-our-anxieties-about-technology, The New Yorker, December 22, 2015.

still desirable in transformed market environments, and if they are on whether the instruments adopted are still effective to pursue them. This, to be sure, requires a mutual willingness of the EU and the Member States (and firms also) to engage with each other's sets of goals and instruments, with each other's rationalities, and also to revise and adapt their preferred instruments. Albeit certain rigidities in the justificatory paradigm outlined in Chapter 3 (3.3.1.1), I have found evidence of this mutual willingness. All in all, I would argue, EU law can be seen as a coping mechanism for Member States to deal with the growingly contested nature of certain forms of market regulation, while retaining at least some degree of protection.

Furthermore, by creating "*new opportunities for new actors to challenge existing national provisions,*"[897] EU competition and internal market law unveil the diversity of national preferences about how to buy things – a diversity, which is often hidden behind the strong presupposition of uniformity of most "*nativist*" or *"culturalist"* narratives and most often only revealed through innovative actors. EU law might be seen as liberating this diversity, without necessarily overthrowing the dominant or "*official*" pattern that has taken on an expressive value for a large part of society. The collisions I have described might thus be seen as producing a Europeanization of national cultures, which does not proceed by suppressing local particularism, but rather hybridizes and re-mixes national and local forms of life.

More broadly, my dissertation would like to encourage research on the everyday-life consequences of EU law, and not only for the transnationally mobile citizens. EU Law, in fact, I have tried to show, does not only offer a richer and longer menu of life options to the "transnational few", it also re-shapes forms of life at the national level in ways that can be seen as culture-enhancing for the "local many". More similar studies will undoubtedly be necessary to respond conclusively to the question in the sub-title of this work ("Does EU Law Destroy the Texture of National Life?"), but I hope my case studies have contributed to illuminate certain ways in which EU Law has an impact on national cultural patterns. It is in the interstices of the case law that one has to look for, through contextual analysis which is legally rigorous, but theoretically grounded and sociologically informed. If I am allowed to extract political implications from this, more of these kinds of inquiries could provide

[897] M. Lodge, *Competition Policy: from Centrality to Muddling Through, cit*. p. 246.

material to imagine new narratives about how EU law changes the everyday experiences of the non-transnationally mobile citizens, a much needed project to help reinvigorate the integration process.

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