



Title: De Minimis Rule within the EU Internal Market Freedoms: Towards a More Mature and Legitimate Market?

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Abstract:

Deriving from the former internal market Commissioner McCreevy's statement that the internal market needs to become more decentralised, the article explores to what degree the de minimis rule applies or should apply to the internal market, discussing in the process the advantages and disadvantages of the transfer of this rule from the field of competition to the internal market law. Although there are some conceptual as well as practical problems related to the application of the de minimis rule to fundamental freedoms, the author concludes that in the field of the internal market law the de minimis rule increases the autonomy of national authorities thereby strengthening democratic decision-making in the EU which is conceived as a multi-level governance system. Through this rule the Member States preserve their competence in the domain of market law with respect to rules which do not formally discriminate between domestic and foreign goods, people and services, the aim of which is not to regulate trade between Member States and whose restrictive effects on the internal market are too uncertain and too indirect for the measure to present a breach of the TFEU.

***De Minimis* Rule within the EU Internal Market Freedoms: Towards a More Mature and Legitimate Market?**

Janja Hojnik*

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1. INTRODUCTION

Over fifty years after the goal of a common market was determined in the Rome Treaty and twenty years after the deadline for its completion, as established in the Single European Act, the European Union (hereinafter EU) is discussing the future of its internal market, which is seen as the main economic leverage of the EU. With respect to the future development of the internal market the former internal market Commissioner McCreevy made an interesting statement in his speech in Sophia in 2007 by saying that ‘we need to accept that the nature of the game has changed. [...] The Single Market must become more decentralised [...]. We need to improve the ownership in the Member States. And we must strengthen cooperation between the national and EU level’.¹ On the other hand, the Commission found in the Single Market Act, adopted in 2011, that the growth potential of the internal market has not been fully exploited yet.² On the basis of the latter, as well as on the basis of other recent internal market documents, it may be concluded that the aim of the Commission is no longer to adopt a great deal of new market legislation, but to assure a more legitimate and effective internal market, where the Member States will play a (an important) part in the creation of market regulation and will furthermore enforce it in cases of restrictions.³

The main objective of the article is to examine how the *de minimis* rule might contribute to both abovementioned goals of the future regulation of the EU internal market – ie legitimacy and effectiveness. According to the *de minimis* rule, should it be recognised in the field of the internal market, only measures (of the Member States and private entities) which significantly hinder the functioning of the internal market would be prohibited, while measure that do not would stay within the bounds of national autonomy. Despite such advantages of the *de minimis* rule, its application in the field of the internal market is all but simple.

The article compares the internal market provisions, where the *de minimis* rule is quasi absent, with some other EU legal fields, where the *de minimis* rule is applied. In this respect the article explores the general characteristics and functions of the *de minimis* rule, its current application in the field of EU competition law and public procurement and also discusses the application of this rule to the field of internal market freedoms. It points out internal market judgments in which the application of the *de minimis* rule was rejected, as well as a growing number of the EU Court's decisions ruling quite the opposite. On the basis of theoretical commentaries on this rule the article discusses the advantages and disadvantages of the potential application of this rule to the field of the internal market.

2. PROCEDURAL AND SUBSTANTIVE *DE MINIMIS* RULE ACROSS LEGAL DISCIPLINES

The *de minimis* rule derives from Roman law and has two meanings: a procedural and a substantive one. The procedural aspect is derived from the ‘*de minimis non curat praetor*’ principle, in accordance with which the praetor does not concern himself with trifles.

¹ Charlie McCreevy, ‘The Future of the Single Market’, (Sofia University, 14 May 2007) <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/308&format=HTML&aged=1&language=EN&guiLanguage=en>> accessed 16 June 2013.

² ‘Twelve Projects for the 2012 Single Market: Together for New Growth’ Press Release, IP/10/1390.

³ See eg Commission staff working document; accompanying document to the Proposal for a Regulation of the European Parliament and of the Council laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State, impact assessment, SEC(2007)112.

Consequently, court proceedings do not deliberate about unimportant or petty matters. In such cases the court dismisses the claim or decides in a simplified proceeding intended for the so-called ‘bagatelle’ disputes.⁴ In this sense the *de minimis* rule is recognised world-wide. The European Court for Human Rights (ECtHR), for example, held in 2010 in *Korolev v Russia*⁵, where the applicant complained about the failure of Russian authorities to pay him the 22.50 roubles (0.56 EUR), that applications are inadmissible where ‘the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits’. Similarly, in *Bock v Germany*⁶, the applicant, a civil servant with a monthly salary of 4,500 EUR, asked to be reimbursed for a part of the costs, namely 7.99 EUR, which he paid for magnesium tablets prescribed by his physician. Due to the length of the proceedings, the case reached the ECtHR, which evoked the *de minimis* rule by claiming: ‘The Court shall declare inadmissible any individual application (...) which it considers (...) an abuse of the right of application.’ The *de minimis* rule enables the Court to dispose more rapidly of unmeritorious cases and to focus on its key role of providing legal protection of human rights at the European level.⁷ In a similar sense this rule is also recognised in the courts of common law, where it is known through the maxim ‘the law does not concern itself with trifles’.⁸ In this respect the rule was used by the English Judge Lord Stowell already in 1818 in the *Reward* case⁹, where he held:

The law permits the qualification implied in the ancient maxim *De minimis non curat lex*. Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked.

Similar interpretations of the rule can be found in the case law of the US courts.¹⁰

On the other hand, the substantive meaning of the rule appears from the maxim ‘*de minimis non curat lex*’, ie the law does not concern itself with trifles.¹¹ Consequently, only matters of wider community relevance are of concern of the law, while issues which are irrelevant from the aspect of a community as a whole, are usually not considered by the legislator. This assures the consistency of the legal system, as intervention into irrelevant details could disturb the balance within the legal system and diminish legal certainty.¹² In this sense the *de minimis* rule is particularly widespread in criminal law, where certain *de minimis* conducts satisfying the definition of an offense are nonetheless declared noncriminal, because they “really” do not violate the legal virtue protected by the law (eg tipping the mailman is not

⁴ Janez Kranjc, *Latinski Pravni Reki* (GV Založba, Ljubljana 2006) 66. Kranjc also refers to a less known version of the rule: *Minima non curat praetor*.

⁵ *Korolev v Russia*, App no 5447/03 (ECHR, 01 April 2010).

⁶ *Bock v Germany*, App no 22051/07 (ECHR, 16 February 2010).

⁷ Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the Control System of the Convention, CETS No. 194, <<http://conventions.coe.int/Treaty/en/Reports/Html/194.htm>> accessed 16 June 2013. See also *Adrian Mihai Ionescu v Romania*, App no 36659/04 (ECHR, 01 June 2010).

⁸ Translation from French: ‘*Les Magistrats ne doivent pas s'attacher à des vétilles*’.

⁹ *The "Reward"* (1818) 2 Dods 265, 165 ER 1482.

¹⁰ See eg *The People of the State of Illinois v Daniel Durham*, No. 4-08-0448, 25.6.2009 (Steigmann J).

¹¹ Max L Veech and Charles R Moon, ‘*De Minimis Non Curat Lex*’, (1947) 45 Michigan L Rev 537.

¹² Kranjc (n 5) 66.

considered bribery, playing penny poker is not considered gambling, etc).¹³ The *de minimis* rule is further relevant in the field of risk regulation where it is assumed that risks that are highly unlikely to be realised (eg where the probability is one in a million) do not need to be regulated.¹⁴ The *de minimis* rule can also be found in copyright law, where it applies to a violation so trivial that the law will impose no consequence to it because its effect on the copyright owner is so insignificant as to be deemed meaningless. In the copyright context, *de minimis* can also be applied to the use of a work which does not involve a high enough level of copying to constitute substantial similarity – a required element of actionable copying.¹⁵

In the following chapters the article focuses on the *de minimis* rule in the substantive sense – ie not as an admissibility requirement for judicial review, but as guidance to determine the most optimal content of the EU substantive law.

3. THE *DE MINIMIS* RULE UNDER EU SUBSTANTIVE LAW

3.1 *De Minimis* Agreements between Undertakings

In the field of EU competition law the *de minimis* rule requires that agreements between undertakings must have a *considerably* restrictive effect upon free competition in order to be caught by Article 101 TFEU (*ex 81 EC*), *which prohibits agreements between undertakings*; an agreement that has a negligible effect on competition is not caught by the prohibition of restricting competition and is as such acceptable. When considering the illegality of agreements between undertakings, prohibited under Article 101 TFEU, the intensity of competition restrictive effect is thus of vital importance. As long as agreements, decisions of associations and concerted practices do not affect trade between EU Member States, they are not prohibited by Article 101(1) TFEU as the effect upon interstate trade is one of the conditions for its application. Such agreements fall under national law. Furthermore, Article 101(1) TFEU does not foresee legal consequences for agreements that affect interstate trade and competition but have only a marginal effect.¹⁶ The *de minimis* rule applies to all agreements that restrict competition on the internal market; however, it is assumed that they do not breach competition law as they only have a minimal effect on competition and interstate trade.¹⁷

The effects of a particular agreement on competition and interstate trade are determined using economic analysis. The Court, however, refuses to apply purely a quantitative approach. Hence, for this rule to apply, a very detailed analysis of the market is needed, determining the potential market fragmentation, the competitors' market shares as well as

¹³ Indian Penal Code 1860, sec 95 for example provides: 'Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.'

¹⁴ Matthew D Adler, 'Why De Minimis?' University of Pennsylvania Law School, Public Law Research Paper No. 07-26, 2007 <<http://ssrn.com/abstract=992878>> accessed 16 June 2013.

¹⁵ James B Astrachan, 'De Minimus Copyright Infringement' *The Daily Record* (Baltimore MD, 2008) <<http://ssrn.com/abstract=1625037>> accessed 16 June 2013

¹⁶ Richard Wish, *Competition Law* (OUP 2009) 137-142.

¹⁷ Marjana Coronna, 'Konkurenčno pravo EU in Mala in Srednja Podjetja' (2002) 5 Podjetje in Delo 767. When considering minimal effect one must take into consideration the Commission's Notice on agreements of minor importance – The Commission has issued several such notices, the most recent of which appeared in 2001 – Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), OJ 2001/C 368/07.

the general annual income of the company concerned.¹⁸ Despite meeting the general criteria for the application of the *de minimis* rule, Article 101(1) TFEU nevertheless applies to agreements between competitors, which have as their object price fixing, limiting output or sales or the allocation of markets or customers, as well as to agreements between non-competitors, which determine sale prices or restrict the territory where the buyer may sell the contracted goods or services. With regard to agreements, where the competitors operate, for the purposes of the agreement, at a different level of the production or distribution chain, any of the abovementioned hard-core restrictions are prohibited.¹⁹ According to Monti, this almost completely diminishes the importance of the *de minimis* rule.²⁰ On the other hand, Jones and Sufrin find that the exclusion of agreements containing hard-core restraints from the ambit of the notice does not mean that these agreements may never fall outside the scope of Article 101(1) TFEU on grounds that they do not appreciably restrict competition. Rather, this could reflect the view that where an agreement contains particularly serious restrictions of competition from an EU perspective, it will not be considered to be of minor importance unless the parties' market shares are considerably lower than set in the notice. Jones and Sufrin thus conclude that 'the more serious the restrain the less likely it is to be insignificant' and that it seems unlikely that the Commission would allocate resources to cases in which market shares were small.²¹ Accordingly, the *de minimis* doctrine is particularly relevant for small and medium sized enterprises (SMEs). Agreements between them will rarely have a negative effect on interstate trade in the EU and will thus fall under the *de minimis* rule.²² This enables the SMEs to avoid provisions of competition law and the dangers of having an unenforceable agreement, thereby saving money with regard to administrative costs and having a better starting position when competing with giant agglomerations, holdings and trusts.²³

3.2 *De Minimis* State Aids

The second area of EU competition law, which recognises the *de minimis* rule, concerns state aids. In 2001 the Commission adopted a Regulation on *de minimis* state aids whose purpose was to explain the application of the rule to state aids.²⁴ Prior to the adoption of this Regulation it was, however, unclear whether the rule applied to state aids or not, taking into consideration that Article 107(1) TFEU (*ex 87 EC*) does not contain direct grounds for the *de minimis* rule and that the European Court of Justice was not very fond of it. Although the Court in 1970 in *Commission v France*²⁵ implied that the amount of the aid is relevant and as a matter of principle agreed that insignificant aids do not fall within the scope of Article 107(1) TFEU, in 1987 in *France v Commission*²⁶, the Court decided that circumstances in

¹⁸ See Martina Repas, *Ekonomski Pristop Določanja Upoštevne Trga v Konkurenčnem Pravu EU* (2010) II(1) LeXonomica 35–65. See Case 30/78 *Distillers Co. Ltd v Commission* [1980] ECR 2229, para 28 and Case 100/80 *Musique Diffusion Française v Commission* [1983] ECR 1825.

¹⁹ Notice (n 17) point 11(3).

²⁰ Giorgio Monti, 'New Directions in EC **Competition** Policy' in T Tridimas and others (eds), *European Union Law for the Twenty-first Century: Internal Market and Free Movement Community Policies, Vol II - Rethinking the New Legal Order. Essays in European Law* (Hart 2004) 187.

²¹ Alison Jones and Brenda Sufrin, *EU Competition Law* (OUP 2011) 171–172; also referring to Jonathan Faull and Ali Nikpay (eds) *The EC Law of Competition* (OUP 2007) para 3.164.

²² Notice, (n 17) point 3.

²³ *Coronna* (n 17) 769.

²⁴ Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid [2001] **OJ L10/30–32**.

²⁵ Case 47/69, [1970] ECR 487.

²⁶ Case 259/85, [1987] ECR 4393.

which the aid was awarded are of greater significance than its scale.²⁷ Ferčič emphasises that in this context particular importance is given to performance surpluses and to a high level of market competition, which demand high cost effectiveness and produce low profits.²⁸

On the other hand, the Commission has recognised the *de minimis* rule in the field of state aids already in 1992, providing that certain criteria have been met. This recognition was legally disputable causing constant dilemmas, which eventually led to the adoption of a *de minimis* state aid Regulation in 2001,²⁹ which was later repealed by the Regulation 1998/2006 (*De Minimis Regulation*).³⁰ The Regulation provides the criteria for a *de minimis* aid, its legal consequences and control mechanisms. The *de minimis* rule determines the amount of the state aid, below which Article 107(1) TFEU does not apply, as well as the respective public measures which need not to be notified to the Commission. The rule is based on the assumption that small amounts of aid generally do not affect market competition and trade between two or more Member States.³¹

3.3 *De Minimis* Public Purchasing

The third field of EU law applying the *de minimis* rule concerns public purchasing. In order to apply EU rules to public purchasing, the 'European dimension' condition must be met, which depends upon the value of public purchasing.³² Purchasing that does not meet the values (thresholds) is called '*sub-dimensional public purchasing*'. In this respect the *de minimis* principle, as defined in Regulation 1177/2009,³³ allows authorities to avoid an expensive and lengthy tendering and award procedure for low-value contracts where the costs of the procedure would exceed the public welfare benefits of increased transparency and competition associated with the procedure. On the other hand, it is understandable that the *de minimis* principle also provides an incentive for authorities to divide contracts into separate lots for the purpose of avoiding bothersome procedures. Although this is prohibited by the Directive 2004/18/EC,³⁴ such avoidance of procurement law is difficult to detect and enforce and it is thought to be the main reason behind the low percentage of public contracts published in the EU Official Journal.³⁵

4. *DE MINIMIS* RULE IN THE FIELD OF THE INTERNAL MARKET FREEDOMS

²⁷ Conor Quigley, *European State Aid Law and Policy* (Hart Publishing 2009) 60-61.

²⁸ Aleš Ferčič, *Državne Pomoči Podjetje, Teorija, Praksa in Predpisi* (Uradni list RS 2011) 67.

²⁹ Regulation on the application of Articles 87 and 88 of the EC Treaty.

³⁰ Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid [2006] OJ L379 p 5-10.

³¹ Ferčič (n 28) 68-69. See also Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest [2012] OJ L114/ 8-13.

³² The thresholds are dependent upon the subject-matter of public purchasing and range between 125.000 (for public sector supply and service contracts) and 4,845.000 EUR (for public works concession contracts).

³³ Commission Regulation (EC) No 1177/2009 of 30 November 2009 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts [2009] OJ L314/64-65.

³⁴ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114-240.

³⁵ Christopher Bovis, *EU Public Procurement Law* (Edward Elgar Publishing 2012) 71-72.

In contrast to the competition law and public purchasing, the European Court of Justice has, ever since *Van de Haar*,³⁶ refused to apply the *de minimis* rule in the field of the EU internal market.³⁷ In *Corsica Ferries* the Court even made a general statement claiming that ‘the articles of the (...) Treaty concerning the free movement of goods, persons, services and capital are fundamental Community provisions and any restriction, even minor, of that freedom is prohibited.’³⁸ However, the Court’s case law of the past twenty years regarding the topic of minor restrictions to trade has not been consistent. The following chapters analyse the case-law of the Court in which it has not expressly accepted the *de minimis* rule in the field of the four freedoms, but how it has nevertheless given signs suggesting that the *de minimis* rule is gaining ground in the field of the internal market

4.1 Free Movement of Goods

Free movement of goods is founded on the removal of charges having equivalent effect to customs as well as on prohibition of measures having equivalent effect to quantitative restrictions. Both concepts have been interpreted by the Court as incompatible with the *de minimis* rule. Charges, prohibited by Article 30 TFEU (*ex 25 EC*), have been defined as ‘any pecuniary charge, however small and whatever designation and mode of application, which is imposed unilaterally on domestic or foreign goods when they cross a frontier’.³⁹ The Court consequently prohibited an Italian statistical levy on goods exported to the other Member States and explained that ‘the very low rate of the charge cannot change its character with regard to (...) the legality of those charges’. Similarly broad is the Court’s definition of measures having equivalent effect to quantitative restrictions prohibited by Article 34 TFEU (*ex 28 EC*). In *Dassonville* the Court explained 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’.⁴⁰ Considering the broad scope of the *Dassonville* formula there was no room for the recognition of the *de minimis* rule in the context of Article 34 TFEU.⁴¹ This was expressly held in *Van de Haar*,⁴² where the Court clarified this refusal with the following terms:

Article (34 TFEU), which seeks to eliminate national measures capable of hindering trade between Member States, pursues an aim different from that of Article (101), which seeks to maintain effective competition between undertakings. A Court called upon to consider whether national legislation is compatible with article (34) of the Treaty must decide whether the measure in question is capable of hindering, directly or indirectly, actually or

³⁶ Joined Cases 177 and 178/82 *Criminal proceedings against Jan van de Haar and Kaveka de Meern BV* [1984] ECR 1797.

³⁷ See eg Case 269/83 *Commission v France* [1985] ECR 837.

³⁸ Case C-49/89 *Corsica Ferries France v Direction Générale des Douanes*, [1989] ECR I-4441, para 8.

³⁹ Case 24/68 *Commission v Italy* [1969] ECR 193, para 7.

⁴⁰ Case 8/74 *Procureur du Roi v Dassonville*, [1974] ECR 837, para 5. Reference to direct and indirect, actual or potential hindrance to the trade between the Member States the Court ‘borrowed’ from its first ruling in the competition law field – Joined Cases 56 and 58/64 *Établissements Consten S.à.R.L. and Gründig-Verkaufs-GmbH v Commission* [1966] ECR 429, para 6. In this respect Steiner points out that the ‘effect upon intra-Community trade’ criteria could serve as a limitation of the scope of Article 34 TFEU – J Steiner ‘Drawing the Line: Uses and Abuses of Article 30 EEC’ (1992) 26 CMLR 749.

⁴¹ For most recent case law, in which the Court still refers to the *Dassonville* formula, see eg Case C-420/01, *Commission v Italy* [2003] ECR I-6445, para 25; Case C-192/01, *Commission v Denmark* [2003] ECR I-9693, para 39; Case C-41/02, *Commission v Netherlands* [2004] ECR I-11375, para 39, and Case C-147/04 *De Groot en Slot Allium et Bejo Zaden* [2006] ECR I-245, para 71.

⁴² *Jan van de Haar* (n 36). See also *Commission v France* (n 37).

potentially, intra-Community trade. That may be the case even though the hindrance is slight and even though it is possible for imported products to be marketed in other ways.⁴³

The question of applicability of the *de minimis* rule has further been raised in *Bluhme*.⁴⁴ The defendant breached the Danish rules prohibiting the import of bees to a small island of Læsø and some of its neighbouring islands, the aim of which was to protect the Læsø brown bee on the islands. One of the arguments of the Danish government was that the measure was not caught by Article 34 TFEU as it was of a *de minimis* nature, considering that it only concerned 0,3 per cent of the Danish territory. The Court rejected the argument.⁴⁵ Similarly, in *Yves Rocher* the Court again affirmed that with the exception of rules having a purely hypothetical effect on intra-Community trade, Article 34 TFEU does not draw any distinction, with regard to the degree of effect on trade, between measures which can be classified as measures having equivalent effect to a quantitative restriction.⁴⁶

This position has, however, been refused by Advocate General Jacobs in his well-known opinion in the case *Leclerc-Siplec*,⁴⁷ where he presented his critical standpoint towards the *Keck and Mithouard*⁴⁸ judgment, where the Court re-affirmed the discrimination principle. In this respect Jacobs claimed that ‘all undertakings should have unfettered access to the whole of the Community market’, and concluded that in order to prove a breach of Article 34 TFEU a ‘substantial restriction on that access’ should be the relevant factor, even though this amounts to the introduction of the *de minimis* rule into Article 34 TFEU.⁴⁹ Albeit Jacobs was aware that the Court refused to apply the *de minimis* rule in its previous free movement of goods case law, he insisted that ‘restrictions on trade should not be tested against local conditions which happen to prevail in each Member State, but against the aim of access to the entire Community market. A discrimination test is therefore inconsistent as a matter of principle with the aims of the Treaty’.⁵⁰ In this respect Jacobs was surprised by the fact that ‘in view of the avowed aim of preventing excessive recourse to Article (34), the Court did not opt for such a solution in *Keck*.’ While applying the *de minimis* rule to restrictions on advertising, which were at stake in *Leclerc-Siplec*, Jacobs suggested that ‘a total ban on the advertising of a product which may lawfully be sold in the Member State

⁴³ *Jan van de Haar* (n 36), para 14.

⁴⁴ Case C-67/97 *Criminal Proceeding against Ditlev Bluhme* [1998] ECR I-8033.

⁴⁵ See also Joined Cases C-277, 318 and 319/91 *Ligur Carni Srl and Genova Carni Srl v Unita Sanitaria Locale* [1993] ECR I-6621, concerning a prohibition of the municipality of Genova in accordance with which traders importing fresh meat into the municipality were banned from using their own means of transport to deliver their goods within the territory of the municipality, unless they paid a local undertaking the amount corresponding to the services which that undertaking provided under an exclusive concession for handling in the municipal slaughterhouse, transporting and delivering the goods in question. Although the rule was limited to one municipality, it was found to breach Article 34 TFEU. Similarly, the Court refused to apply the *de minimis* rule also in Case 16/83 *Prantl* [1984] ECR 1299; *Commission v France* (n 37); and in Case 103/84 *Commission v Italy* [1986] ECR 1759.

⁴⁶ Case 126/91 *Schutzverband gegen Unwesen in der Wirtschaft e. V v Yves Rocher* [1993] ECR I-2361, para 21. See also Case C-292/92 *Ruth Hünernmund and others v Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6787, Opinion of AG Tesaro.

⁴⁷ Case C-412/93 *Edouard Leclerc-Siplec v TF1 Publicité* [1995] ECR I-179, Opinion of AG Jacobs paras 195 and 196. See also his opinion in case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659, para 65, where he stated: ‘It would seem for example out of the question that a brief delay to traffic on a road occasionally used for intra-Community transport could in any way fall within the scope of Article (34). A longer interruption on a major transit route may none the less call for a different assessment.’

⁴⁸ Joined Cases C-267 and 268/91 *Keck and Mithouard* [1993] ECR I-6097.

⁴⁹ See para 42 of the opinion in Case C-412/93 (n 47). See also Rosa Greaves, ‘A Commentary on Selected Opinions of Advocate General Jacobs’ (2006) 29 *Fordham Intl L J* 690-715.

⁵⁰ Opinion of AG Jacobs (n 47), para. 40.

where the ban is imposed and in other Member States cannot lie outside the scope of Article (34).⁵¹ Even though Jacobs applied the *de minimis* test the French measure was nevertheless found to breach free movement of goods.⁵² The Court, however, rejected his proposal altogether. On the basis of this case law it may be concluded that a state measure can constitute a prohibited measure having an equivalent effect even if: a) it is of relatively minor economic significance; b) it is only applicable to a very limited geographical part of a national territory; and c) it only affects a limited number of imports/exports or a limited number of economic operators.⁵³

Nevertheless, certain national rules have been found to fall outside the scope of Article 34 TFEU if their restrictive effect on trade between Member States is too uncertain and too indirect. In this respect the Court held in *Burmanjer*⁵⁴ that the national rules at issue, which made the itinerant sale of subscriptions to periodicals subject to prior authorisation, had an effect on the marketing of products from other Member States that was too insignificant and too uncertain to be regarded as being such as to hinder or otherwise interfere with trade between Member States. That the restrictive effects on the free movement of goods are 'too uncertain and too indirect to be considered to be an obstacle to trade between the Member States' was further held by the Court in *BASF*,⁵⁵ where the President of the German Patent Office ruled that a European patent belonging to BASF was void in Germany on grounds that its proprietor had not filed a German translation of the patent specification. A similar decision was also adopted in *Krantz*,⁵⁶ where a German debt collector seized all the movable property found on the premises of the company in order to recover a tax debt. The Court ruled that the possibility of nationals of other Member States hesitating to sell goods on instalment terms to purchasers because such goods could be liable to seizure by the collector of taxes if the purchasers failed to discharge its tax debts was 'too uncertain and indirect to warrant the conclusion that a national provision authorizing such seizure is liable to hinder trade between Member States'.⁵⁷ From this series of cases a conclusion can be made that Article 34 TFEU is not breached by national legislation which makes no distinction between the origin of the substance transported, whose purpose is not to regulate trade in goods with other Member States and whose potential restrictive effects on the free movement of goods are too uncertain and too indirect to be regarded as a hindrance to trade between Member States.⁵⁸

⁵¹ *ibid* para 50.

⁵² For a comment see Laurence Idot 'Annotation, Case C-412/93, Société d'Importation Édouard Leclerc-Siplec v TF1' (1996) 33 CMLR 120.

⁵³ See *Van de Haar* (n 36); *Commission v France* (n 37); *Commission v Italy* (n. 41). See also European Commission, Free Movement of Goods, Guide to the Application of Treaty Provisions Governing the Free Movement of Goods, 2010 <http://ec.europa.eu/enterprise/policies/single-market-goods/files/goods/docs/art34-36/new_guide_en.pdf> accessed 16 June 2013).

⁵⁴ Case C-20/03 *Burmanjer and Others* [2005] ECR I-4133.

⁵⁵ Case C-44/98 *BASF v Präsident des Deutschen Patentamts* [1999] ECR I-6269.

⁵⁶ Case C-69/88 *Krantz* [1990] ECR I-583, para 11.

⁵⁷ *ibid* para 11.

⁵⁸ See eg Catherine Barnard, 'Fitting the Remaining Pieces into the Goods and Persons Jigsaw' (2001) 26 European L Rev 52.

See Case C-379/92 *Peralta* [1994] ECR I-3453, para. 24. The case concerned the rules applicable to the discharge of hydrocarbons and other harmful substances into the sea. See also Case C-93/92 *CMC Motorradcenter v Pelin Baskiciogullari* [1993] ECR I-5009, para. 12 – in this Case a German importer was required to inform the purchaser of a Yamaha motorcycle that German dealers, authorized by the Yamaha corporation, often refused to carry out repairs under the warranty for vehicles which were subject to parallel imports. The test has also been applied in Cases C-266/96 *Corsica Ferries France* [1998] ECR I-3949, para. 31 and C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883, para 41.

Furthermore, the applicability of Article 35 TFEU (*ex 29 EC*), which prohibits trade barriers to export, was narrowed in *Italo Fenocchio*.⁵⁹ From the latter it is evident that with regard to measures with an effect equal to quantitative restrictions in exports, the *de minimis* test must be used, according to which the remoteness of the effect on exports is assessed. The case referred to a national provision prohibiting the issuance of a summary payment order in cases where the defendant lived in another Member State. The plaintiff believed that such a provision restricted exports but the Court did not agree, explaining that ‘the possibility that nationals would therefore hesitate to sell goods to purchasers established in other Member States is too uncertain and indirect for that national provision to be regarded as liable to hinder trade between Member States.’⁶⁰

4.2 Free Movement of Workers

Just like in the field of free movement of goods, the Court has also not expressly recognised the application of the *de minimis* rule in the field of free movement of workers. In *Bosman*⁶¹ it was held that free movement of workers is based on the market access principle. Even though citizenship played no role in the application of the disputed rules, this did not prevent the Court from applying Article 45 TFEU (*ex 39 EC*). Based on this ruling the Court further held in *Graf* that ‘(p)rovisions which, even if they are applicable without distinction, preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement [...] constitute an obstacle to that freedom (of movement of workers, N/A). However, in order to be capable of constituting such an obstacle, they must affect access of workers to the labour market.’⁶² The *Graf* case concerned German regulation which prevented workers from receiving compensation on termination of employment in cases when it was the worker, as opposed to the employer, who terminated the employment contract. The Court's ruling is important from the point of view of application of the *de minimis* rule to the field of the internal market, for the Court introduced the test of an ‘uncertain and indirect’⁶³ restriction to free movement from *Krantz* and other rulings to the field of free movement of workers and furthermore decided that such barriers do not breach Article 45 TFEU. Due to the fact that the respective national regulation did not deny workers the right to compensation on termination of employment because they terminated the employment contract for reasons of finding employment in another Member State, the Court found that ‘such an event is too uncertain and indirect a possibility for legislation to be capable of being regarded as liable to hinder freedom of movement for workers’.⁶⁴ With this the *de minimis* rule was introduced into the scope of this freedom.⁶⁵

4.3 Free Movement of Services and Freedom of Establishment

⁵⁹ Case C-412/97 *ED Srl v Italo Fenocchio* [1999] ECR I-3845.

⁶⁰ *ibid* para 11.

⁶¹ Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL and others v Jean Marc Bosman* [1995] ECR I-4921. For comments see Amicam Omer Kranz, ‘The Bosman Case: The Relationship between European Union Law and the Transfer System in European Football’ (1999) 5 Columbia J Eur L 431; Stephen Weatherill, ‘Comment on Case C-415/95, Bosman’ (1995) 32 CMLR 991; Jukka Snell, *Goods and Services in EC Law: A Study of the Relationship between the Freedoms* (OUP 2002), fn 99.

⁶² Case C-190/98 *Volker Graf* [2000] ECR I-493, para 23.

⁶³ French: *aléatoire et indirecte*; German: *ungewiß und indirekt*.

⁶⁴ *Volker Graf* (n 62) para 25.

⁶⁵ See also Anthony Arnall, *The European Union and its Court of Justice* (OUP 2006) 491.

As was the case with free movement of goods and workers, the Court has likewise not expressly accepted the *de minimis* rule in the field of free movement of services. In *Säger v Dennemeyer*⁶⁶ the Court explained that Article 56 TFEU (*ex 49 EC*)

requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.⁶⁷

This ruling follows the all-encompassing interpretation of the internal market freedoms in line with the *Dassonville* formula. Notwithstanding this, however, signs suggesting that the *de minimis* rule is gaining ground can also be found in the field of free movement of services. In this regard, *Viacom II*⁶⁸ is authoritative. In this case it was disputed whether a special municipal tax on poster advertising constituted a (part of the) service which must be paid for by the recipient of the service. The recipient of the service claimed that such a tax (which amounted to more than two hundred EUR) was prohibited by Article 56 TFEU (*ex 49 EC*). Despite the fact that the tax itself was non-discriminatory, the recipient claimed that it represented an obstacle to the free movement of services which, taking into account the rule referred to in *Säger*,⁶⁹ should not exist. The Court held that such a tax

is fixed at a level which may be considered modest in relation to the value of the services provided which are subject to it' and that 'the levying of such a tax is not on any view liable to prohibit, impede or otherwise make less attractive the provision of advertising services to be carried out in the territory of the municipalities concerned.'⁷⁰

Accordingly, the tax was found not to be in contravention of Article 56 TFEU, as it was neither discriminatory nor too high. By applying the latter condition, the Court has actually introduced the *de minimis* rule into Article 56 TFEU.⁷¹ Similarly in *Mobistar*,⁷² where municipal legislation imposing a tax on pylons, mast and transmission antennae for mobile communication systems was challenged, the Court observed that 'measures, the only effect of which is to create additional costs in respect of the service in question and which affect in the same way the provision of services between Member States and that within one Member State, do not fall within the scope of Article (56) of the Treaty'.⁷³ Meulman and Waele thus conclude that with regard to the service provision, permissible measures under Article 56 TFEU could in the future be those which would apply without distinction - either consisting of minor obstacles to market access or failing that, affecting in the same manner, in law and in fact both, bilateral and unilateral service transactions.⁷⁴ Arnall similarly

⁶⁶ Case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd.* [1991] ECR I-4221.

⁶⁷ *ibid* para 12.

⁶⁸ Case C-134/03 *Viacom Outdoor Srl v Giotto Immobilier SARL* [2005] ECR I-1167.

⁶⁹ *Säger v Dennemeyer* (n 66).

⁷⁰ *Viacom* (n 68) para. 38.

⁷¹ John Meulman and Henri de Waele, 'A Retreat from *Säger*? Servicing or Fine-Tuning the Application of Article 49 EC' (2006) 33 L Issues of Economic Integration 226.

⁷² Joined Cases C-544 and 545/03 *Mobistar SA v Commune de Fléron* [2005] ECR I-7723.

⁷³ *ibid*, para 31.

⁷⁴ *ibid*. See also Rajko Knez, Prosto Opravljanje Storitve in Razvoj Sodne Prakse do Leta 2006 – Ali je Zadeva *Säger* še Pomembna? (2007) 2 Revizor 115.

concludes that Article 56 TFEU ‘bites only where there is more than a remote or uncertain effect on freedom of movement’.⁷⁵

Additionally, the *de minimis* rule can also be found in the field of freedom of establishment. In *Semeraro Casa*,⁷⁶ which concerned Italian legislation on closing retail outlets on Sundays and public holidays, the Court decided, in line with Article 49 TFEU (*ex 43 EC*), that the legislation in question was applicable to all traders exercising their activity on national territory; that its purpose was not to regulate the conditions concerning the establishment of the undertakings concerned; and that any restrictive effects which it might have on the freedom of establishment were ‘too uncertain and indirect for the obligation laid down to be regarded as being capable of hindering that freedom’.⁷⁷ Consequently, the Court found that the freedom of establishment did not preclude national rules from regulating the closing times of shops.

4.4 Free Movement of Capital

A focus on impediments to market access, which tries to be accommodated with the *de minimis* test can also be traced in the field of free movement of capital. A *de minimis* exception within the ambit of this freedom has been suggested by the United Kingdom in the golden shares case,⁷⁸ where the UK government argued that the national measures at issue were not of such a nature as to restrict access to the market, for they were too uncertain and too indirect to amount to a restriction on the freedoms and would thus not be subject to Article 63 TFEU (*ex 56 EC*). The Court entered into a substantive examination of the effects of the national measures, which it would not have done, had it proceeded from the assumption that such a consideration would be inadmissible with respect to the free movement of capital.⁷⁹ Hindelang states that in principle any national measure ultimately affects the access of capital to a market, whereas many do it only insignificantly. By paraphrasing the Court’s judgment in the UK golden shares case he concludes that a measure substantially impedes market access when it affects ‘the position of a person acquiring a shareholding as such’,⁸⁰ which must be left to the Court to clarify – in a casuistic way.⁸¹

4.5 Rocky Road to Define *De Minimis* in the Internal Market Field

From the above analysis it may be deduced that the Court has never explicitly applied the *de minimis* rule to the field of the internal market; even so, some measures in the field of all four freedoms are considered as insubstantially restricting market access and are thus not caught by the articles of the Treaty regulating the freedoms. Since there are different opinions among commentators whether ‘substantial restriction’ (also called the ‘remoteness’) test is in fact a form of the *de minimis* rule or not, it is submitted that from the author’s point of view there are two aspects of the ‘*de minimis*’ rule in the field of the internal market:

⁷⁵ Arnulf (n 65) 492, also referring to Case C-159/90 *Grogan* [1991] ECR I-4685 and Joined Cases C-51 and 191/97 *Deliège* [2000] ECR I-2549.

⁷⁶ Case C-418/93 *Semeraro di casa* [1996] ECR I-2975.

⁷⁷ *ibid* para 32.

⁷⁸ Case C-98/01 *Commission v United Kingdom* [2003] ECR I-4641, para 36.

⁷⁹ Steffen Hindelang, *The Free Movement of Capital and Foreign Direct Investment*, (OUP 2009) 126.

⁸⁰ *Commission v United Kingdom* (n 78) para 61.

⁸¹ *ibid* 127.

- a) *De minimis* in terms of quantity: this is *de minimis* in the sense the European Court of Justice understands it. When the Court has ruled in *Van de Haar*⁸² that the *de minimis* rule is not acceptable in the area of free movement, it has taken more of a quantity approach – i.e. the number of concerned products. According to the Court's view, for a certain measure to be challenged under free movement rules it does not have to affect a great amount of products (workers, services or capital flows); it suffices for a natural person to be restricted when importing a *single* product and reliance on Article 34 TFEU is already allowable.
- b) *De minimis* in terms of quality: here *de minimis* is not about the number of the concerned products, workers, services, capital flows, but about the *intensity* of a measure's effect.⁸³ If the factors of production are heavily affected, if the measure has a significant (certain and direct) effect on the market access, then the measure will be caught by the principles on fundamental freedoms. If, however, the effect of the measure is 'too uncertain and indirect', 'too remote', if it lacks significant effect on the market access, then it is not caught by the Treaties. The Court recognised this in a series of cases, eg in *Kranz*, although in a non-consistent manner and without detailed explanation what the terms, such as significant, certain, direct and remote mean.

As the word *significant* is considerably ambiguous and cannot be expressed in quantitative terms it is a convenient concept of interpretation for both advocates of a centralist and decentralist internal market. The remoteness test is closely related to the question of causality or to the jurisdictional criteria, according to which measures having no effect on cross-border trade stay in the national autonomy, whereas those having (any) effect on trade are within the scope of the fundamental freedoms. Nevertheless, the *de minimis* rule in this sense is not just about causality, but it requires a *significant* effect upon the cross-border trade for a measure to legitimately fall within the Treaty.

In this respect Jacobs explains that where a measure prohibits the sale of goods lawfully placed on the market in another Member State (as in *Cassis de Dijon*), it may be presumed to have a substantial impact on access to the market, since the goods are either denied access altogether or can gain access only after being modified in some way; the need to modify the goods is in itself a substantial barrier to market access.⁸⁴ On the other hand, however, one cannot claim the same for measures applicable without distinction, which simply restrict certain selling arrangements, by stipulating when, where, how, by whom or at what price the goods may be sold. Whether such measures significantly hinder free movement would, according to Jacobs, depend on a number of factors, such as whether it applies to certain goods,⁸⁵ to most goods⁸⁶ or to all goods⁸⁷ on the extent to which other selling arrangements remain available, and on whether the effect of the measure is direct or indirect, immediate or

⁸² *Jan van de Haar* (n 36).

⁸³ In this sense *de minimis* is understood, eg, by Arnulf (n 65) 491; Hindelang (n 79) 125; and Christoph Krenn, 'A Missing Piece in the Horizontal Effect 'jigsaw': Horizontal Direct Effect and the Free Movement of Goods', (2012) 49 CMLR 210-212.

⁸⁴ Opinion of AG Jacobs (n 47) para 44.

⁸⁵ As in Case 75/81 *Belgium v Blesgen* [1982] ECR 1211, in the Case 382/87 *Buet* [1989] ECR 1235 or in Case C-23/89 *Quitlynn* [1990] ECR I-3059.

⁸⁶ As in Case 145/88 *Torfaen BC v B&Q* [1989] ECR 3851.

⁸⁷ *Keck and Mithouard* (n 48).

remote, or purely speculative⁸⁸ and uncertain.⁸⁹ Accordingly, Jacobs emphasises that the magnitude of the barrier to market access may vary enormously: it may range from the insignificant to a quasi-prohibition. In this respect the *de minimis* test could perform a useful function.⁹⁰ His explicit proposal in *Leclerc-Siplec* to introduce the *de minimis* test to the field of the internal market freedoms thus understandably led to mixed responses.

5. ARGUMENTS AGAINST ADOPTING THE *DE MINIMIS* RULE IN THE INTERNAL MARKET FIELD

Scholars offer various explanations why EU law recognises the *de minimis* rule in the field of competition law but not in the field of the internal market.

5.1 The Difference between the Internal Market and Competition Law

Gormley recognises the differences between the two fields, emphasising that the internal market and competition law have different roles and subject-matter, which makes the *de minimis* rule more appropriate to one field than the other.⁹¹ He particularly highlights that competition law concentrates on the effects a measure has on patterns of trade between Member States and not on effects on trade itself, which is a much simpler concept.⁹² At the same time competition law, as opposed to the internal market, does not assist in the removal of national hindrances to trade between Member States through negative integration. Davies, on the other hand, with regard to the differences between the two fields, highlights that competition law is able to build itself around non-legal ideas, as no competition case is complete without a market survey, while free movement law lacks enthusiasm for empiricism, particularly because free movement cases do not tend to pass through the Commission on their way to the Court, but rather arise from preliminary references by national courts. Since the Court decides principles rather than facts, which are then applied by the national courts to the individual facts, claims Davies, the Court held in *O'Flynn*⁹³ that in order to establish discrimination it is not necessary to show an 'actual' disparate impact on the internal market, but merely that a measure is liable to have one.⁹⁴ Furthermore, since market surveys cost money, competition law is concerned merely with big commerce, significant restrictions and important economic players, who have such money, whereas free movement often concerns small players, like Bosman. Requiring market investigations in order to determine whether such small player's rights to free movement have been breached would almost certainly mean denying them of their rights. On these bases, Davies concludes that market language cannot automatically be transferred from one field to another.⁹⁵

5.2 Public and Private Interventions in the Market

An additional reason for refusing the *de minimis* rule to enter the field of the internal market is that the freedoms predominantly concern the measures of Member States and not those of

⁸⁸ As an example Opinion of AG Jacobs (n 47) refers to para. 15 of the Court's judgment in Case C-169/91 *Stoke-on-Trent* [1992] ECR I-6635.

⁸⁹ For example Case C-69/88 *Krantz* [1990] ECR I-583, para 11 of the judgment.

⁹⁰ Opinion of AG Jacobs (n 47) para. 45.

⁹¹ Laurence W Gormley, 'Competition and Free Movement: Is the Internal Market the Same as a Common Market?' (2002) 13 *Eur Business L Rev* 517, 520.

⁹² Thereby referring to Case 15/79 *P.B. Groenveld BV* [1979] ECR 3409.

⁹³ Case C-237/94 *O'Flynn v Adjudication Officer* [1996] ECR I-2617.

⁹⁴ *ibid* para 21.

⁹⁵ Gareth Davies, *Nationality Discrimination in the European Internal Market* (Kluwer 2003) 96-98.

private entities, as is the case with competition law. It is the public bodies who should have a greater responsibility for the functioning of the internal market than private entities. In this respect Barents observed years ago that ‘state interventions on the market may be said to have an appreciable effect by their very nature’,⁹⁶ whereas Krenn recently proposed a more convergent approach towards public and private intervention on the market and argued in favour of introducing the horizontal direct effect of Article 34 TFEU accompanied by a recognition of the *de minimis* rule⁹⁷ in order to prohibit only those barriers of private entities that significantly hinder access to the market. According to his opinion, most private measures would not be caught by Article 34 TFEU as there are alternative channels to market goods; the recognition of the horizontal direct effect of Article 34 TFEU as a matter of principle would, however, bring free movement of goods in line with the case law in the field of personal freedoms.

5.3 National Courts’ Concern

An additional explanation for the refusal of the *de minimis* rule in the field of the internal market was given by Advocate General Jacobs,⁹⁸ who pointed out the danger of applying the *de minimis* test to all measures affecting trade in goods, as this might induce national courts, who are primarily responsible for the application of the fundamental freedoms, to exclude too great a number of measures from the scope of the prohibition laid down by this provision. Similarly, Mortelmans pointed out that the *de minimis* test would not assure clear guidelines for the explanation of judgements by national courts, as it would demand a complete review of the legal and economic framework,⁹⁹ while Oliver warned that reliance on statistical data would lead to depraved results as the legality of a measure could change on a monthly basis.¹⁰⁰ Oliver thus claimed that the application of the *de minimis* rule to the internal market freedoms would cause practical problems, introduce a new element of legal uncertainty and consequently make it much more difficult for national courts to apply the internal market provisions of the Treaty.¹⁰¹ Finally, Advocate General Tesauro was of the opinion that ‘to apply a *de minimis* rule in the field of trade in goods (...) is, it seems to me, very difficult, if not downright impossible’.¹⁰² Jacobs, who generally defended the application of the *de minimis* rule to the field of the freedoms, warned that caution must be exercised and if the *de minimis* test is to be introduced, the circumstances, under which it should be applied, must be carefully defined.¹⁰³ He particularly pointed out that it would not be appropriate to apply the *de minimis* test to measures which overtly discriminated against goods from other Member States; such measures should remain, in line with the *per se* prohibition of overtly discriminatory measures, prohibited by Article 34 TFEU even if their effect on inter-State trade is only slight.¹⁰⁴ According to Jacobs, the introduction of a substantial restriction on market access requirement would therefore only be necessary in

⁹⁶ Rene Barents, ‘Measures of Equivalent Effect: Some Recent Developments’ (1981) 18 CMLR 287.

⁹⁷ Krenn (n 83) 177-215.

⁹⁸ Opinion of AG Jacobs (n 47) para 42.

⁹⁹ Kamiel Mortelmans, ‘Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition’ (1991) 28 CMLR 127 and Kamiel Mortelmans, ‘Towards Convergence in the Application of Rules on Free Movement and on Competition?’ (2001) 38 CMLR 626.

¹⁰⁰ Peter Oliver, ‘Some Further Reflections on the Scope of Articles 28-30’ (1999) 36 CMLR 796.

¹⁰¹ Peter Oliver (ed) *Oliver on Free Movement of Goods in the European Union* (Hart Publishing 2010) 92-93, para 6.18.

¹⁰² *Ruth Hünermund* (n 48) Opinion of AG Tesauro, para 21.

¹⁰³ Opinion of AG Jacobs (n 47) para 42.

¹⁰⁴ *ibid* para 43.

relation to measures which are applicable without distinction to domestic goods and goods from other Member States.¹⁰⁵

5.4 Fundamental Principles Argument

The final reason why the Court refused to apply the *de minimis* rule to the field of economic freedoms, as is evident from *Corsica Ferries*, might lie in the fact that it considers the freedoms as fundamental principles of EU law where all barriers should be prohibited, including minor ones¹⁰⁶ – much the same as the *de minimis* rule cannot be applied to the field of human rights. On the other hand, the Court also regards Article 101 TFEU to be ‘a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market’,¹⁰⁷ but even so this provision is subject to the *de minimis* rule. This speaks in favour of a systematic recognition of the *de minimis* rule in the internal market field.

6. ARGUMENTS SUPPORTING THE *DE MINIMIS* RULE IN THE INTERNAL MARKET FIELD

6.1 Sensible and Mature Market Regulation

According to Greaves, the proposal of Advocate General Jacobs in *Leclerc-Siplec* is highly persuasive and has much in its favour as it reflects the competition law approach to the field of the internal market freedoms. This makes sense, says Greaves, as the two share a common objective, which is to integrate national markets into a single market, undivided by national territorial boundaries, national laws and regulations or private contractual arrangements.¹⁰⁸ In this respect O’Keeffe and Bavasso note that the aim of creating an internal market constitutes ‘a unifying thread’ between EU internal trade law and competition law and that the ‘common ancestry’ of competition and free movement can be traced to the fact that both sets of rules are subject to an assessment of the effect on trade between Member States.¹⁰⁹ Krenn too is of the opinion that excluding certain insignificant threats from the scope of the freedoms would be a sign of maturity in the application of the internal market provisions, allowing efficient control of those measures that do present a significant peril to the internal market. This is accepted as common sense in competition law and should, according to Krenn, be accepted also with regard to Article 34 TFEU.¹¹⁰ Krenn furthermore stresses that the thresholds for the application of the *de minimis* rule to the field of the internal market will necessarily differ from the ones in the field of competition law, thereby advocating the *effet utile* approach in the field of the internal market in order to effectively monitor significant threats to the internal market.¹¹¹

¹⁰⁵ *ibid* para 44.

¹⁰⁶ *Corsica Ferries* (n 38), para 8; Case C-212/06 *Government of Communauté française and Gouvernement wallon v Gouvernement flamand* [2008] ECR 1683, para 52. See Oliver (n 101) 91, para 6.18.

¹⁰⁷ Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV*, [1999] ECR 3055, para. 36.

¹⁰⁸ Greaves (n 49) 696. See also Ulrich Immenga and Ernst-Joachim Mestmäcker, ‘Die Bedeutung der Wettbewerbsregeln in der Wirtschaftsverfassung der EG’ in Ulrich Immenga and Ernst-Joachim Mestmäcker (eds) *Wettbewerbsrecht, Volume. 1 Part 1* (Beck, 2007) 26.

¹⁰⁹ David O’Keeffe and Antonio Bavasso, ‘Four Freedoms, One Market and National Competence: In Search of a Dividing Line’ in David O’Keeffe and Antonio Bavasso (eds) *Judicial Review in European Union Law* (Kluwer Law International 2000) 543–544.

¹¹⁰ Krenn (n 83) 211 – referring to Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (2nd edn, CUP 2010) 754.

¹¹¹ Krenn (n 83) 211.

In this respect Perišin points out that nothing distinguishes the *de minimis* rule from other formulas, such as the one for selling arrangements in the *Keck* ruling, emphasising that all substantive assessments of a measure leave a degree of discretion to the adjudicator which can cause legal uncertainty.¹¹² The latter has been defined by Advocate General Kokott as the main downside of the *de minimis* rule in the field of the internal market,¹¹³ however, Perišin states that the *de minimis* rule is a substantive criteria and as such much more appropriate than formal criteria, such as the one in the *Keck* formula, which, according to Kokott's opinion, should also be applied to measures concerning the use of goods.

6.2 Subsidiarity Aspect – More Legitimate Market Regulation

Perhaps the most important advantage of the *de minimis* rule is that it presents a convenient concept for reducing centralisation in the field of the internal market and it balances free trade and national autonomy. The rule addresses questions about the desirable degree of market integration as well as the recommendable scope of prohibition within the EU law. These issues touch upon the main problem that is the line between legitimate and illegitimate national legislation: how many restrictions can the internal market handle and when do national measures need to be removed. The establishment of the internal market has brought many advantages to the EU Member States and can in this respect be considered as indisputable success. Nevertheless, economic liberalisation has inevitably also brought costs to the Member States. These are related not only to the loss of national legislative autonomy far beyond strict market law, but also to the resulting erosion of national social and cultural values. This often occurred without discussing various institutional alternatives that are available when setting legal rules, even though economic analyses pose various issues of democracy.¹¹⁴

The application of the *de minimis* rule to various fields of EU law reflects the principle of subsidiarity, which was introduced to the Treaties in order to increase the flexibility of European governance and to limit centralism.¹¹⁵ It protects the rights of the national legislators to choose between various political alternatives within the scope of their competences and discretions.¹¹⁶ Each institution entrusted with the regulation of the internal market needs to protect, according to the principle of subsidiarity, the appropriate balance between different goals of EU legal acts. Namely, the main goal of the EU is to achieve optimal benefits for society by balancing free trade interests with other EU and Member States' interest. In this respect, the recognition of the *de minimis* rule in the field of the internal market is in line with the abovementioned statement of the former internal market Commissioner McCreevy on the need of the internal market to become more decentralised. In this regard the principle of subsidiarity must be taken into consideration

¹¹² Tamara Perišin, *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and WTO* (T.M.C. Asser Press 2008) 39.

¹¹³ Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR I-4273, Opinion of AG Kokott, para. 46.

¹¹⁴ Miguel Poiars Maduro, *We the Court, The European Court of Justice and the European Economic Constitution, A Critical Reading of Article 30 of the EC Treaty* (Hart Publishing 1998); Neil K Komesar, *Imperfect Alternatives – Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press 1994).

¹¹⁵ See art 5(3) TEU.

¹¹⁶ George A Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States', (1994) 94 Columbia L Rev 332-455; Grainne de Burca, 'Reappraising Subsidiarity's Significance After Amsterdam', Harvard Jean Monnet Working Paper, No. 7/1999; Thomas Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?', (2012) 50 Journal of Common Market Studies 267-282.

when adopting EU secondary legislation as well as when interpreting the provisions of the EU Treaties. Substantive market rules (eg the *Dassonville* formula) are in fact hidden institutional criteria for the division of powers between EU institutions and Member States. In line with this the principle of subsidiarity requires genuine institutional criteria which will enable the identification of situations where complete unification of market law is legitimate and where it is not, or in other words, where the effectiveness of the internal market requires diversity (ie preservation of various national rules) and where unification is needed (ie common rules).

In this context the *de minimis* rule presents an important concept for the enforcement of the principle of subsidiarity in the field of the internal market. As Perišin points out, it is appropriate, in view of EU's ambitious aims - primarily the creation of a single market, to go beyond non-protectionism, which is still the main requirement of the WTO, and even beyond non-discrimination. She emphasises, however, that times have changed since *Dassonville* and *Cassis de Dijon*,¹¹⁷ as it is no longer necessary for the freedoms to be as broad as to cover all obstacles to trade and that the Court's review of measures only remotely connected to the internal market would present an unnecessary burden for national regulatory autonomy. This would furthermore also endanger the legitimacy of the EU. In this regard Perišin notices that an approach based on substantial hindrance of market access seems to be developing and advocates that only this kind of measures should be caught by the EU Treaties.¹¹⁸

Broadening the concept of *uncertain and indirect* hindrances to free movement, which are not prohibited by EU law, is also in line with the Court's interpretation of Article 114 TFEU (*ex 95 EC*), considering its emphasis in the tobacco advertising case¹¹⁹ that recourse to Article 114 TFEU as a legal basis is only possible if the 'aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws', adding that 'the emergence of such obstacles must be likely'¹²⁰ and that reliance on Article 114 TFEU is not legitimate 'when the measure to be adopted only incidentally harmonises market conditions within the Community'.¹²¹ For this reason the Court held that Article 114 TFEU cannot be applied to the so-called static advertising media as the effect on free movement of goods was too 'remote and indirect'.¹²²

As an instrument for establishing balance between state and federal authorities in the field of interstate regulation, the *de minimis* rule is also applied in the USA. In the famous *Pike v Church*¹²³ case, the US Supreme Court decided: 'where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only

¹¹⁷ Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.

¹¹⁸ Perišin (n 112) 39.

¹¹⁹ Case C-376/98 *Germany v European Parliament and Council* [2000] ECR I-8419, para 86.

¹²⁰ *ibid* para 86.

¹²¹ *ibid* para 33.

¹²² *ibid* para. 109. It is also worth noting that since the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1-25 entered into force, argumentation that enforcement of competition law is centralised, whereas enforcement of the *de minimis* rule in the field of market freedoms by national authorities would keep too many (significant) hindrances to the internal market, is no longer convincing. Regulation 1/2003 provides for a decentralised application of arts 101 and 102 TFEU by the Commission, national competition authorities and national courts – arts 4, 5 and 6 of the Regulation 1/2003. See for example Jones and Sufrin (n 21) 1021 and Michael J Frese, 'Decentralised Enforcement of EU Competition Law and the Institutional Autonomy of the Member States: A Case Commentary', Amsterdam Centre for Law & Economics, Working Paper No. 2011-04.

¹²³ *Pike v Bruce Church, Inc* 397 U.S. 137 (1970).

incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.' Furthermore, the Supreme Court held in *Hughes v Oklahoma*¹²⁴ that 'the range of regulations that a State may adopt [...] is extremely broad, particularly where, as here, the burden on interstate commerce is, at most, minimal', and judge Frankfurter noted in *H P Hood & Sons*¹²⁵ that '[b]ehind the distinction between 'substantial' and 'incidental' burdens upon interstate commerce is a recognition that, in the absence of federal regulation, it is sometimes (...) of greater importance that local interests be protected than that interstate commerce be not touched.' Finally, the case of *Jones & Laughlin Steel* should be pointed out, where the Supreme Court warned that competences to regulate interstate trade must be assessed 'in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'¹²⁶ This proves the Supreme Court's practical orientation towards assuring a workable market, whereas the refusal to apply the *de minimis* test systematically in the EU internal market shows the EU Court's determination to establish an ideal internal market, despite the fact that the former judge of the Court Jann realistically noted that: 'Discussions must concentrate on the common market that truly exists and not on the ideal market that has no failures. The latter simply does not exist'.¹²⁷

7. CONCLUSIONS

The *de minimis* rule is recognised in various legal fields, within procedural as well as substantive law. Even though this rule is derived from various laws, executive acts and case law and has broad support by scholars, Adler emphasises that relying on the *de minimis* rule is not morally justifiable. According to him, *de minimis* tests have no basis in the *ideal moral theory*. The ideal moral theory provides norms for idealized decision makers, who are fully rational and motivated to comply with the norms. Although there are no ideal decision makers, ideal moral theories can be seen as a useful analytical tool to review legal rules in general, including the *de minimis* rule.¹²⁸ The ideal moral theory ignores the problems of bounded rationality and imperfect compliance,¹²⁹ however, Adler finds that none of the moral theories would direct an *idealized* government decision maker, who is fully rational and conscientious in complying with the demands of the theory, to employ a *de minimis* test.¹³⁰

In contrast to these general conclusions about the *de minimis* rule, one may nevertheless conclude that this rule has a rather different meaning under EU internal market law, as it increases the autonomy of national authorities, thereby strengthening democratic decision-making in the EU as a multi-level governance system. On the basis of this rule, Member

¹²⁴ *Hughes v Oklahoma* 441 U.S. 322 (1979).

¹²⁵ *H P Hood & Sons, Inc v Du Mond* 336 U. S. 525, at 567 (1949).

¹²⁶ 301 U.S. 1 (1937) at 37. See also *United States v Darby*, 312 U.S. 100 (1941) where it has been decided that: 'Congress may regulate intrastate activity that has a "substantial effect" on interstate commerce'; and *Wickard v Filburn* 317 U.S. 111 (1942), where the Supreme Court held that the Congress may regulate activity that 'exerts a substantial economic effect on interstate commerce'.

¹²⁷ Interview with the Judge Peter Jann, Trybunał Sprawiedliwości i Integracja, Radca Prawny (12 February. 2002) 100.

¹²⁸ In this respect the latter can be compared to the plea of statute of limitations (or lapse of time) which, as stated already in Roman law, is predominantly used by dishonest people.

¹²⁹ More about these theories in Shelly Kagan, *Normative Ethics* (Westview Press 1998).

¹³⁰ Adler (n 14) 2007, p. 9.

States keep their competences in the field of market law with regard to rules which do not formally discriminate between domestic and foreign goods, people, services and capital, the purpose of which is not to regulate trade with other Member States and whose potential restrictive effects on the functioning of the internal market are too uncertain and too indirect for the obligation which they lay down to be regarded as being in breach of the EU Treaties. In this respect one may argue that it is immoral (or at least democratically illegitimate) for EU law to prohibit all Member States' trading rules, as the European Court of Justice has proclaimed in its 40-year old judgment of *Dassonville*.

As the Court already discovered twenty years ago that the *Dassonville* formula was too wide, that Member States did not approve of it and that, despite its breadth it still did not enable effective enforcement of the internal market law, the Court narrowed it down by forming a formal (*Keck*) test, according to which rules on selling arrangements were left to national autonomy. By contrast, the *de minimis* test is a substantive test, which does not differentiate between rules on certain selling arrangements and the characteristics of goods, but regardless of the content of a rule it is judged by its effect on the internal market – in so far as this effect is not significant, the rule does not breach EU law. Additionally, systematic recognition of the rule would facilitate the understanding of the horizontal direct effect of the freedoms and enable the EU Court of Justice to accept the horizontal direct effect in the field of free movement of goods and capital.¹³¹ In accordance with the *de minimis* rule, insignificant barriers to free movement imposed by private entities would not present a breach of the internal market rules, whereas national measures would be subdued to a 'remoteness' test, which would measure how direct the impact of the rules concerned is on free movement of goods, workers, services and capital between Member States. In this respect all four freedoms could prohibit formally (directly) as well as actually (indirectly) discriminatory measures that significantly hinder access to the market – such as a complete prohibition of selling certain goods or providing certain services,¹³² whereas national and private measures with an insignificant effect on the internal market, could remain.

Despite all the advantages of the transfer of the *de minimis* rule from the EU competition law to the field of the internal market, the actual transfer is all but easy. It must foremost be accepted that the rule is not identical in both fields, as its purpose is not the same. In this respect one cannot count on having concrete mathematical criteria for defining a significant and an insignificant (remote, uncertain, indirect) restriction to the single internal market. One must also recognise that although the *de minimis* rule would increase the autonomy of the Member States in the market field and thus increase the legitimacy of EU law in light of the subsidiarity principle, most national courts would not necessarily accept such broader competences with delight.¹³³ An additional difficulty related to the application of the *de minimis* rule by national courts lies in the fact that even within a single Member State national judges might come to different conclusions. This is the main concern of advocates of centralism in the market field as differential application of the rule can lead to

¹³¹ For the latter see eg Case C-112/05 *Commission v Germany (Volkswagen)* [2007] ECR I-8995; on the issue of horizontal direct effect of art 63 TFEU see Siniša Rodin, *Ford, Dodge i Lehtinen – šutnja je Zlato*, Banka 24.5.2012.

¹³² Eg Case C-36/02 *Omega Spielhallen v Bundesstadt Bonn* [2004] ECR I-9609. For a comment see Perišin (n 112), 41.

¹³³ In this respect some parallels could be drawn between the review of the *de minimis* rule and the principle of proportionality. With regard to the latter, the English Judge Mustill in *W. H. Smith Do-It-All and Payless DIY Ltd v Peterborough City Council*, 1990 (2) CMLR 577 asked rhetorically: 'How could [say] a desire to keep the Sabbath holy be measured against the free-trade economic premises of the common market?' See more in Richard Rawlings, 'The Eurolaw Game: Some Deductions from a Saga' (1993) 20 J L & Society 309.

compartmentalisation of the single market. In this respect, the *de minimis* rule would firstly have to be interpreted by the EU Court of Justice and only when sufficient criteria would be developed through its case law, as was also the case with the principle of proportionality, would it be reasonable to transfer this competence to national courts.

Considering all the arguments in favour and against the application of the *de minimis* rule to the field of the internal market it may be concluded that this rule probably presents the least worrisome contribution of the EU Court of Justice (and the Commission) towards the decentralisation of the internal market regulation and the increase of its legitimacy. Any other demands made by the Member States for the enhancement of their autonomy as market regulators would probably have much greater consequences for the effectiveness of the internal market.