Free Movement of Goods, Persons, Services and Capital within the European Union

Jurisprudential Adjudications by the Court of Justice

Timothy Charles CONNOR

Doctor of Philosophy

School of Management

School of Law

University of Bradford

2013

Abstract

Timothy Charles Connor

Free Movement of Goods, Persons, Services and Capital within the European Union

Jurisprudential Adjudications by the Court of Justice

Subject Key Words

Free Movement

Worker

Services

Capital

Citizenship

Restriction

Non Discrimination

Selling Arrangement

Market Access

Justification

The published work which forms the basis of this submission by the applicant for the Degree of Doctor of Philosophy represents an extensive research which has extended the boundaries of knowledge and understanding in relation to the jurisprudential adjudications by the Court of Justice concerning the application of the TFEU freedoms of *goods*, *persons*, *services* and *capital* to national measures. The publications maintain thematic analytical focus on the jurisprudential employment of the EU principles of non discrimination, *market access* and the rule relating to the 'selling arrangement' that are used as the modus operandi in the acquisition of Treaty free movement rights. The thread is law making; the published work evidences inconsistencies, complexities and confusions in the application by the Court of Justice of the modus operandi used to ensure acquisition of Treaty free movement rights. The research depicts a *goods*, *persons*, *services* and *capital* jurisprudence which displays a want of thematically consistent underpinning and some doctrinal diversity. It is the purpose of this Submission to exhibit the cohesiveness of the published work under review in the context of the contribution made to the knowledge and understanding of the jurisprudence of *goods*, *persons*, *services* and *capital* in European Union law.

Acknowledgment and dedication

I would like to record a debt of gratitude to Jennie and our children Katie and Annabelle without whose unfailing support and encouragement; this work would not have been completed.

Statement of Authorship

I confirm that I am responsible solely for the authorship of the published articles which support this submission for Degree of Doctor of Philosophy by Published Work to the University of Bradford.

Date ……

Signature ……

Table of Contents

Statement	Description	Pages
	Statement supporting Submission for Degree of Doctor of Philosophy by Published Work	1-44
	Appendices	
Appendix 1	List of Publications submitted to support Submission	Numbered i. – viii.
Appendix 2		Citations of published work under consideration
Appendix 3	Published articles & case notes supporting applicant's statement	Numbered i. – viii.
Appendix 4		General List of publications connected with free movement jurisprudence which have been consulted throughout the research process

Contents of Statement supporting submission for Degree of Doctor of Philosophy by Published Work

A. Introduction 4

i. General 4

ii. Focus 8

B. Free Movement Literature 8

C. Thematics of the Published Work 11

1. Non discrimination 13

2. Market Access 18

i. Re-engagement 19

ii. 'Market access' or combination of principles? 22

iii. Absence of definition 23

3. Selling Arrangement 26

i. Recent jurisprudence 28

ii. Future direction 29

iii. Particular considerations 31

a. Advertising 31

b. Traditional social practices . . . local habits and customs 32

c. Product characteristics 34

d. Justification and remoteness 35

4. *Restriction* to free movement right 37

i. Effect on justification 39

ii. Proportionality 41

5. Conclusions 42

Statement supporting Submission for Degree of Doctor of Philosophy by Published Work

The articles referred to in this Submission which underpin the application for the Degree of Doctor of Philosophy by Published Work are inextricably linked by the thread of scrutiny of the law making process of the Court of Justice. The articles focus on the adjudication by that Court on the application of the Treaty free movement rights of *Goods, Persons, Services* and *Capital* to national measures restrictive of such rights. There is focus on the principles of non discrimination and *market access* wherein those principles have operated as modus operandi of Treaty free movement rights. The exposition includes consideration of the 'selling arrangement' within the free movement of *goods*. There is an identification of common themes and depiction of a want of thematically consistent underpinning to free movement jurisprudence. The articles evidence doctrinal diversity and exhibit the existence of a degree of complexity, even confusion within the jurisprudence of free movement.

It is acknowledged that within free movement jurisprudence, in the cause of the application of Treaty free movement rights to national measures there is recourse to principles of *mutual recognition* and of *proportionality*. Both principles are crucial in the equation of the application of Treaty free movement rights at the national level. The principles of *mutual recognition*

and of *proportionality* merit separate study in their own right; they do not retain a prime focus in the context of this research.

A. Introduction

i. General

My academic and professional interest in the jurisprudence relating to the free movement of *goods*, *persons*, *services* and *capital* was first engendered as a research assistant to Dr C.L. Vincenzi (Huddersfield Polytechnic, 1985-1986). A Study was published in result: Dr. C.L. Vincenzi & Connor T., (1986) 'EEC Nationals and Rights of Free Movement of Labour within the UK'. It compared UK immigration law and practice in the United Kingdom with the requirements of EC law in the context of the treatment of EC nationals who were either working or seeking work in the UK. The empirical investigation embraced interviews with the national regulatory authorities and EC nationals who were ‘end users’ within the United Kingdom. In the preparation of the Study, interviews were undertaken with the Home Office, The Immigration Service, DHSS (European Section), EC Commission (London), Ambassadors, MPs, The Immigration Advisory Service, law centre and citizens advice bureau advisors and trade unions. The published report was reported by the Daily Telegraph and the Financial Times newspapers. A copy is filed in the Library of the House of Commons. The expertise

acquired during the writing and conduct of the study formed the basis of the M. Phil entitled 'EEC Nationals & Their Right to (Seek) Work within the United Kingdom' (awarded 1990).

The published study and the M.Phil acted as a platform of knowledge to support further publications concerned with free movement jurisprudence (listed within this Submission at pg 43). These papers evidence strong lineage, a demonstrable longstanding interest in the jurisprudence of free movement within the European Union. The earlier case notes are offered because thematically they relate to particular aspects of free movement jurisprudence. They present a demonstrable trajectory of continuing academic development; from response to particular issues arising from the practical application of EU law at the national level to the more particularly conceptual work on free movement that is evidenced within the more recent published articles.

The early publications supporting this Submission focused on a response to particular underlying tensions and practical problems that had been associated with inadequate reflection of EU free movement law at the national level. In this context for example *'Article 39 (ex 48) E.C. Offers no Protection where Restriction on Free Movement rights arises from act of Migrant Worker: Citibank International PLC v. Kessler'* concerned commentary on particular difficulties arising at the interface between

European Community[1] and national law. *Kessler* evidenced failure by the national court to reflect EU law. The Court of Appeal obfuscated the scope and the application of Article 39 EC (now Art 45 TFEU)[2] in ruling lawful in that instance a mortgagee's insistence that a mortgagor EU national comply with the terms of a mortgage. The judgment by the national Court was effective to prevent the latter's return to work in the home state.

Other case notes concerned particular instances of underlying tensions and problems which had resulted from incorrect applications of EU law at the national level. In both *'Non-Community Spouses: Interpretation of Community Residence Rights'. Boukssid v. Secretary of State for the Home Department'*, together with *ex parte Zeghraba and Sahota*', the source residence rights respecting spouses of UK nationals who returned to the UK after working in Netherlands, Ireland and Germany was attributed incorrectly by the Court of Appeal to national and not EC (now EU) law. The commentary contained in '*Migrant Community Nationals: Remedies for Refusal of Entry by Member States Joined Cases C-65/95 & 111/95 The Queen v. Secretary of State for the Home Department ex parte Shingara and Radiom* [1997] E.C.R. I-3343' critiqued the UK's appeal system. The Court of Justice interpreted the requirement imposed on Member States to provide 'the same legal remedies'[3] as a requirement to accord the 'general' but not the specific remedies provided at the

[1] Now European Union.
[2] In failing to account for the judgments of *Even* or the concept of 'social advantages'.
[3] Article 8, OJ 056, 04/04/1964 P. 0850 – 0857.

national level to challenge the acts of the administration. The Court additionally ruled that prior to the execution of administrative decisions[4] an opinion of a 'competent authority' must be obtained; also that a decision refusing first residence permit or expulsion before issue will require an 'opinion' where there is either no right of appeal to a court of law or where the appeal cannot have suspensory effect.

The final commentary concerned the free movement of *goods* in the context of trade mark protection and market partitioning. In *Pharmacia* & *Upjohn* v. *Paranova*, the approach to the assessment of market partitioning with respect to trade mark replacement was clarified, the Court of Justice, choosing to stir into the pot an element of objectivity. The element of objectivity has made it more difficult for the trade mark holder to reply on trade mark rights. The judgment maintains the thematic of the Court; it exposed yet another example of further support for the free movement of *goods*.

These commentaries maintain the same trajectory as that adopted previously in the research study (undertaken for The Polytechnic Huddersfield) and the M.Phil. The commentaries exposed particular issues arising from specific examples of failures to reflect adequately EU law at the national level. The commentaries adopted the perspective that failure to reflect EU free movement rights in national legal systems was both

[4] Article 9 *Id*.

unlawful and practically effective to deny or the hinder the enjoyment of EU free movement rights.

ii. Focus

The focus of the work published by the applicant relates to the acquisition and knowledge relating to the jurisprudence of EU law which has applied the rights given by the free movement provisions of the TFEU.[5] The jurisprudence relating to free movement of *goods*, *persons*, *services* and *capital* within the European Union supplies a discrete area for study.

There are many other aspects of EU law that equally would have supplied a fruitful research platform; EU Competition law, Agriculture and State Aids are to name but a few. Enquiry was not extended thus far; the research process would have been disparate and unmanageable. For the same reason enquiry into free movement case law was limited to the jurisprudence which applied Treaty rights to national measures. That which was concerned for example with social security and deportation issues was omitted from investigation.

B. Free Movement Literature

[5] And of the Treaty of Rome 1957.

The applicant is aware that the jurisprudence of EU free movement has been the subject of abundance of research by academics, practitioners, EU institutions and professional bodies. Within the framework relating to freedom of movement law, the sources of information are multifaceted. Operating at the EU Institutions level for example, White Papers have been produced by the European Commission in relation to the Internal Market: Completing the Internal Market Com (85) 310 Final and The Internal Market for Goods (COM (2007) 35 Final). Various communications have been produced, for example in relation to *goods* on the practical application of mutual recognition (OJ C 265, 4.11.2003). In addition the Commission operates a *Market Access* Database containing information in relation to import duties and related studies on *market access* related topics. Other EU sources exist, for example the report by the High-Level Panel on the Free Movement of Persons (April 1997). Free movement research has been conducted by other bodies; academic and empirical studies have been conducted at the national, European and International levels; for example the Robert Schuman Centre and Academy of European Law, The European Univ. Institute, Florence and the Max Planck Institute for the Study of Societies (MPIfG), Cologne and UACES in the United Kingdom. In addition, The European Network on Free Movement of Workers within the European Union is coordinated by the University of Nijmegen's Centre for Migration Law (under the European Commission's supervision); the Thematic Report Application of

Regulation 1612/68 for example was produced in January 2011 in co-operation with the AIRE Centre, London.

An extensive library of materials has been published in relation to EU free movement. Research presented in the form of scholarly articles, monographs (for example Barnard[6]) and reports into free movement within the European Union has been conducted by academics at Universities within the United Kingdom, Europe and beyond, including America. The German Law Journal for example, the publisher of two of the articles supporting this Submission is published by Universities based in USA and Canada. Articles and monographs exist in languages other than English; they were not considered. The language of research in this area of law is almost overwhelmingly English, to an extent reflecting the growing lingua franca of that language within the European Institutions.

From the outset, the research undertaken adopted an interpretative approach which would find favour with that adopted by English lawyers. A list of sources that have been consulted during the course of the completion of the research is included a 'General List' of Publications; included in this Submission at **Appendix 2**.

[6] Barnard, C. *The Substantive Law of the EU The Four Freedoms* (OUP, 3rd edn, 2010).

Throughout this Statement there exists reference to the articles identified within the 'General list', so as to position the applicant's published work within the context of the general body of academic literature that has been produced on EU free movement jurisprudence.

C. Thematics of the published work

The triumvirate of articles that form the core for this Statement exhibit common themes. In the cause achieving a better understanding of the Court's adjudication in relation to the application of Treaty free movement rights to national measures, the published articles and case notes maintain focus on jurisprudence which has developed the principles of non discrimination and *market access* into the modus operandi used by the Court of Justice in the acquisition of Treaty free movement rights. The role of the 'selling arrangement' together with the *justification* of measures held restrictive of Treaty free movement rights are considered in that same context.

The articles supporting this Submission (i) *Goods, Persons, Services and Capital in the European Union: Jurisprudential Routes to Free Movement*, (*Goods, Persons, Services and Capital in the European Union*), (2010); (ii) *Market Access" or Bust? Positioning the Principle Within the Jurisprudence of Goods, Persons, Services, and Capital* (*Market Access" or Bust?*); (2012) and (iii) *Accentuating the Positive: the*

"selling arrangement", the first decade and beyond (Accentuating the Positive), (2005) are thematic in nature.

The achievement of the articles, the presentation of a greater knowledge and understanding with respect to free movement jurisprudence is represented in this Statement. A vast and complex jurisprudence has been established by the Court of Justice through which Treaty[7] free movement rights have been applied to national measures. The jurisprudence of the Court that has been concerned with the application of the Treaty provisions relating to *Goods*[8], *Persons*,[9] *Services*,[10] *and Capital*[11] is characterised by complexities and even confusion. The aim of the research which supports this Submission has been to identify and to evaluate such complexities and confusions within jurisprudence through which national measures alleged to have been restrictive of free movement rights have been scrutinised for legality. It is research which depicts a want of thematically consistent underpinnings to the free movement case law.

The Statement commences with an exposition of the contribution of the principle of non discrimination in *Goods, Persons, Services and Capital in the European Union*. This exposition is maintained in the subsequent

[7] Treaty on the Functioning of the European Union.
[8] Article 34 TFEU (ex Article 28 EC).
[9] Article 45 TFEU (ex Article 39 EC), Article 49 TFEU (ex Article 43 EC).
[10] Article 56 TFEU (ex Article 49 EC).
[11] Article 63 TFEU (ex Article 56 EC).

article *Market Access" or Bust?*. The later publication presents focus on the principle of *market access* as modus operandi of Treaty free movement rights. The same thematic analysis is maintained within *Accentuating the Positive* with respect to the more discrete jurisprudence relating to the free movement of *goods*. That paper is concerned with the 'selling arrangement'; the effect of that rule on *goods* jurisprudence together with a contextualisation of the rule and an analysis which extends to encompass the recent re-engagement of the Court with the principle of *market access*.

1. Non discrimination

This section of the Submission is concerned with the furtherance of knowledge and understanding of free movement jurisprudence with respect to the principle of *non discrimination* operated by the Court as modus operandi of free movement rights. The proposition explored by *Goods, Persons, Services and Capital in the European Union* is that recourse to the principle of non discrimination within the jurisprudence of free movement will be realigned as a result of a recent refocus by the Court of Justice on the *restriction* to the free movement right.

It is recognised by the Court, the academic community and within the published work under consideration that early free movement jurisprudence was founded on the application of principle non

discrimination on the grounds of nationality.[12] The article *Goods, Persons, Services and Capital in the European Union* makes a major contribution to the knowledge and understanding of free movement jurisprudence in the promotion of what is considered to be a new perspective. In relation to the operation of the principle non discrimination as modus operandi of Treaty free movement rights in early jurisprudence, the Article provides focus on a pertinent question. 'Why was the concept of discrimination allowed to remain for so long in the vanguard of the attack on the national measure that hindered the exercise of the free movement right'? The question evidences new perspectives which respect an ability to understand accurately the overall mapping of free movement jurisprudence by the Court of Justice. It represents a new critique on the 'structure' of early free movement jurisprudence. *Goods, Persons, Services and Capital in the European Union* in this context expresses the view that the early focus on the principle of non discrimination was effective to place a straight jacket on the future development of free movement jurisprudence. The published article maintains that 'It is arguable that the terminology of *restriction* and *obstacle* in the context of asserting free movement rights bears a more honest reflection of the intent of Treaty free movement provisions.'

It is in the present context that *Goods, Persons, Services and Capital in the European Union* offers a novel contribution in the claim that had such

[12] Founded on Article 18 TFEU (ex Article 12 EC). 'Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited'.

honest reflections of Treaty intent been followed by the Court in the early stages of adjudications on national measures, it would have removed a pressure at that particular time to impose the subdivisions of direct or indirect with respect to the application of non discrimination. The article does not suggest that the distinction between direct and indirect discrimination ought never to have been made, but maintains the view that the Court's concentration on the distinction in initial jurisprudence was effective to skew the compositional development of free movement jurisprudence. The article argues that the initial concentration on the non discrimination principle was effective to impose a developmental straightjacket on free movement jurisprudence. For example, in the field of *goods*, this was effective to open the Court to the influence of Directive 70/50[13] and the resultant nomenclature of the distinctly and indistinctly measure.[14] A further perspective is maintained; an additional ramification of such exposure was the failure to engage initially with the non-discriminatory restriction as a conduit for achieving Treaty free movement rights (for example *Debauve*: *services*). This resulted in the operation of an incomplete weaponry against restrictive national measures in early free

[13] L 013 , 19/01/1970 P. 0029 – 0031.

[14] This is terminology has been referred by the Commission as recently as 2010. *Free movement of goods: Guide to the application of Treaty provisions governing the free movement of goods* (2010), p.28. Other academic writers have used the same terminology. Woods, L *Consistency in the chambers of the ECJ: a case study on the free movement of goods* C.J.Q. 2012, 31(3), 339-367, 353; P. Wenneras, *Towards an Ever Greener Union? Competence In the Field of the Environment and Beyond (*2008) 45 CML.Rev. 1645, 1654-1655; Enchelmaier, S *The ECJ's Recent Case Law on the Free Movement of Goods: Movement in All Sorts of Directions* (2007) 26 YEL 115-156, 127.

movement jurisprudence. The article adopts a novel critique of the judgments of this period, observing 'that it would not have been an insurmountable hurdle for the Court in the first instance to envisage an equation encompassing *obstacles* rather than one routed in discrimination' and that engagement with the nomenclature of the Treaty would have been effective to produce jurisprudence which contained a clarity of constructive purpose, reflective of the aims of the Treaty. It is implicit from the arguments exposed in the article that the initial focus on non discrimination in the jurisprudence of free movement was effective to introduce unnecessary complexity.

Published academic research to date appears not to have fully addressed the issues which surround the application of the principle of non discrimination as the early driver of free movement jurisprudence. Wilsher for example considers the terminology of 'indistinctly applicable' but in the context of a view that the Court of Justice 'perhaps deliberately eschewed the language of discrimination' in *Cassis*.[15] Aside this aspect, the perspective given to the effect of the nomenclature appears to have remained unconsidered. On the other hand, in this context, the analysis within *Goods, Persons, Services and Capital in the European Union* provides an understanding of the importance of the early influences on free movement jurisprudence that are now alleged to have shaped the

[15] Encapsulating a test of regulatory, not market equivalence. D. Wilsher "Does Keck discrimination make any sense? An assessment of the non-discrimination principle within the European Single Market" (2008), 33 ELRev 3-22, 11.

format of the case law of the Court of Justice. That a detrimental effect on the emergent structure of free movement jurisprudence might have occurred is a claim which exposes doctrinal diversity; between the Court's overarching focus on the principle of non discrimination and the Treaty exhortations with respect to the identification of the *restriction* to the free movement right. The existence of such diversity is for example exemplified within the article by the observation relating to the subsequent establishment of an ability to examine the 'non-discriminatory requirement' which 'arguably explodes any residual notion that the concept of discrimination alone was ever the sole battle-ground with respect to the achievement of the right of free movement'.The contribution of the article to furthering understanding of the jurisprudence of free movement is clear. It adds a perspective of an evolution within free movement jurisprudence; a trajectory which has moved from a jurisprudence which promotes primacy focus on the modus operandi principles of Treaty free movement rights to one which more recently has presented focus on the *restriction* to the free movement right.

In the context of the exposition of complexities and confusions within free movement jurisprudence, *Goods, Persons, Services and Capital in the European Union* adopts a novel perspective, that the recent focus upon the *restriction* to the free movement right has resulted in the principle of

non discrimination being *subsumed* within the enquiry[16] as to the legality of the national measure. Set against the context of academic reference to 'internal-market case law on what constitutes discrimination, whether direct or indirect…is highly confused',[17] the paper acknowledges the contra-distinction of the Court's continued use of the principle of non discrimination on a 'standalone-basis'. In the furtherance of understanding the direction of free movement jurisprudence, the paper suggests a novel perspective in advocating that the recent approach adopted in *Contse* (C-234/03 *Services*) may provide a solution to the confusions and complexities that have resulted from the use of the principle of non discrimination. With the 'conceptual honesty' of an enquiry focussed on the *restriction* to the free movement right, the admission conditions in *Contse* for respiratory treatment were held to be 'applicable without distinction'.[18] *Goods, Persons, Services and Capital in the European Union* observes that the novel mix in the pot relating to 'applicability without distinction' together with reference which 'imports connotations of indirect discrimination' 'gently reinforces a perceived convergence of the tests for the application of all Treaty free movement provision'.

2. Market Access

[16] See also AG Jacobs (C 136/00) *R v. Danner*. Examples given inter alia refer to (C-136/00) *Danner*, (C-224/97) *Ciola*, and (C-204/90) *Bachmann*.
[17] Craig, P & De Búrca G *EU Text, Cases, and Materials* OUP 4th ed., 2007, pg 803.
[18] The national court was instructed to assess whether those conditions had been met.

The rationale of the body of published work which has sought to further knowledge and understanding of the intricacies of the operandi principles of free move movement rights continues with respect to the principle of *market access*. The examination is timely. Current and ongoing issues have arisen as a result of the recent re-engagement with the *market access* principle within the jurisprudence of *goods*. The principle has been adopted in the recent judgments of *Commission v. Italy* and *Mickelsson and Roos*; in circumstances in which 'the Court could have arguably engaged more readily with the principle of the 'selling arrangement.'[19]

i. Re-engagement

Research conducted within *"Market Access" or Bust?* contributes to furthering the understanding of free movement jurisprudence; it contextualizes the recent re-engagement of the principle of *market access* not only from the perspective of *goods*, but in addition from the jurisprudence of free movement in general and the concept of the 'selling arrangement' in particular. Such consequences exemplify a jurisprudential doctrinal diversity; it is a re-engagement which bears overtones of shifting

[19] The rule of the 'selling arrangement' was introduced by the Court of Justice into the case law of the free movement of goods by *Keck*. See Joined Cases C-268/91 & C-276/91, *Criminal proceedings against Bernard Keck and David Mithouard*, 1993 ECR I-6097, para 16. *Roos* in judgment did not mention *Keck*, a point made by Spaventa *Leaving Keck behind? The free movement of goods after the rulings in Commission v Italy and Mickelsson and Roos* (2009) 34 ELRev 914-932, 918.

the sands of emphasis with respect to jurisprudential scrutiny of the *restrictive* national measure.

"Market Access" or Bust? contextualises the analysis of the resurrection of the principle of *market access* within the jurisprudence of *goods* as representing a 'phoenix from the ashes'.[20] In itself, this evidences thematically inconsistent underpinning. The published work juxtaposes the prospect of a re-engagement with the principle *market access*[21] across all free movement jurisprudence in general with analysis that would support the maintenance of access to an eclectic mix of modus operandi from which to source free movement rights.

The value of the published work in terms of furthering knowledge and understanding of free movement jurisprudence lies in the attempts to locate a more precise identification of the nature of the principle of *market access*. "*Market Access" or Bust?* offers the perspective that the principle

[20] 'The effect of the decision in *Trailers* is that the market access test - first introduced by Case 8/74 *Dassonville* [1974] ECR 837 and then significantly curtailed by *Keck* - has risen, phoenix-like, from the ashes.' Barnard, C, *Trailing a new approach to free movement of goods* (2009), 68 CLJ 288-290, 290.

[21] Tryfonidou for example argues that 'However, in *Commission v Italy (mopeds)* and *Mickelsson and Roos* the Court seems to have followed the tide and decided to transpose into the context of the free movement of goods, the approach that has been followed in the context of the other market freedoms. Accordingly, when determining whether a measure amounts to an MEQR on imports or a violation of one of the other market freedoms, the question that should now be asked is the same: is there a hindrance to access to the market?' Tryfonidou, A *Further steps on the road to convergence among the market freedoms* (2010) 35 EL.Rev 36-56, 49.

has not operated in isolation from the principles of *non discrimination* and *mutual recognition*. The view is expressed for example that the principle of non discrimination 'has been allowed to coalesce alongside the principle of *market access*', that the former has been 'a principle inextricably mixed' with the latter; initially with respect to *goods* but then also with respect to that of *persons*, *services* and *capital*. "*Market Access" or Bust?* in the first instance delivers new perspectives with respect to the jurisprudential composition of *goods*. It affords a greater understanding of the mix of principles operated by the Court as the modus operandi purveyors of Treaty free movement rights. It adopts a new critique with respect to the principles of *market access* and non discrimination. It sets out original argument which supports a proposition of a 'simmering symbiosis' between the principles of non discrimination and of *market access*.[22] "*Market Access" or Bust?* provides the critique for example that the principle of *mutual recognition* is arguably 'imbued with notions of market access'.[23] Exposure by the published work of a symbioticsm between *non discrimination*, *mutual recognition* and *market access* arguably represents a new critique on the relationship between those principles in the Court's evolving approach to free movement jurisprudence. This too provides evidence within the published work of the existence of unnecessary complications and confusions within free movement jurisprudence.

[22] Case noted here for example include (231/83) *Cullet* and (C-108/09) *Ker-Optika*.
[23] For example 4-75 *Rewe-Zentral*, para 14.

ii. 'Market access' or combination of principles?

In an attempt to further knowledge of the nature of the issues arising in relation to the establishment of consistency with respect to judicial underpinning, "*Market Access" or Bust?* considers which principle or combinations of principles are to be adopted by the Court as modus operandi of Treaty free movement rights. The argument is contextualised in the context of current academic debate. Of the increasing influence of the *market access* test, the article observes that academics such as Tryfonidou have noted that in *Commission v. Italy* and *Mickelsson and Roos* the jurisprudence of *goods* for 'the first time … expressly adopted a *market access* test;'[24] and that the jurisprudence of *goods* 'has moved closer to reflect that of persons'.[25] Such critique would accord with the observation of Prechal and De Vries that 'The market access test has been increasing used beyond the context of the free movement of goods'.[26]

The published work contributes to the understanding of free movement jurisprudence in arguing that though the observations above may well prove to be correct, 'at present there remains a strong argument for a continued use of the principle of non-discrimination in the jurisprudence'. This evidences the existence of an underlying tension within free

[24] Tryfonidou, A (note 21), 49.
[25] Reflecting the observations of Spaventa (note 19), 918.
[26] Prechal, S and De Vries, S., *Seamless web of judicial protection in the internal market?* (2009) 34 ELRev. (2009), 5-24, ft nt 24.

movement jurisprudence respecting the nature of the operandi of free movement rights. "*Market Access" or Bust?* furthers an understanding with this aspect of free movement. It observes that although it 'may indeed prove correct' that *market access* may be used as *the* basis of free movement jurisprudence, nevertheless it presents the perspective that there 'remains a strong argument for a continued use of the principle of non-discrimination in the jurisprudence relating to the free movement of goods'. Such would reflect the view of Enchelmaier; that 'to declare each one of them a 'test' [discrimination and *market access*] and to contrast them with one another yields no clear cut results: they are not opposed to each other but correlated [emphasis added].[27] "*Market Access" or Bust?* in a context wider than *goods* argues for a 'back to the future' approach to be adopted by the Court of Justice in which the part of all the 'old chestnut principles' is clearly enunciated within the application of Treaty free movement rights to national measures.

iii. Absence of definition

Other evidence is presented by *"Market Access" or Bust* respecting the complexity and tensions which relate specifically to the Court's failure to define the principle of *market access*. These issues are addressed by *"Market Access" or Bust?* by reference to the academic opinion which has

[27] *The ECJ's Recent Case Law on the Free Movement of Goods: Movement in All Sorts of Directions* (2007) 26 115-15, 127.

conspired to fill that gap.[28] The article presents understanding of a *market access* principle which as a concept is 'inherently nebulous',[29] one which is surrounded by an established uncertainty, together with 'academic arguments to the effect that the *market access* test is one that does not readily open itself to particular definition'.

In the exploration of the jurisprudential complexities associated with the principle of *market access*, *"Market Access" or Bust* evidences the uncertainty that the principle is one which remains devoid of definition. Academic opinion would support this proposition. Tryfonidou for example is of the view that 'the Court has been particularly laconic and has not given any guidance as to what, exactly, it means by an impediment/hindrance to market access' in the context of Article 34 TFEU.[30] Spaventa has argued that 'the concept of *market access* has adopted an *intuitive* rather than an economic approach'.[31] *"Market Access" or Bust* picks up the logicality of this argument; 'the adoption of a default intuitive approach and the failure of the Court of Justice to use economic analysis 'carries with it the risk of an overbroad interpretation of the notion

[28] For example, Jukka Snell, *The Notion of Market Access: A Concept or a Slogan?,* (2010) 47 CMLRev 437 – 472; Spaventa, E., *From Gebhard to Carpenter: Towards a (non-)economic European Constitution*, 41 CMLRev 743-773, 756-759.
[29] Peter Oliver and Stefan Enchelmaier, *Free movement of Goods: Recent Developments in the Case Law*, 44 CMLRev. 649-704, 674 (2007).
[30] Tryfonidou, A (note 21), 50.
[31] Spaventa E., *From Gebhard to Carpenter: towards a (non) economic European Constitution* (2004) 41 CML.Rev 743-773, 758-759. The concept is discussed by Snell. Snell, J., (note 28), 468-469.

of a barrier caught by the Treaty'.[32] The article alludes to the Court's failure to provide underpinning to the concept of *market access* and argues that since the principle was relied on in *Commission v. Italy* and *Mickelsson and Roos* 'without qualification', that 'it becomes a more compelling reason for the Court of Justice to provide a workable definition of the concept'. This addresses a fundamental issue with respect to the principle of *market access*. At present without the 'workable definition' the article has called for, the 'seeming inability to establish accurately which national rules are to be covered by the concept and which are not' represents a lacuna in the ability to understand fully both the nature of the *market access* principle and the extent or otherwise of its application. *"Market Access" or Bust* records the confusing situation that at present, the *market access* principle could extend to cover 'national measures that impose a barrier to entry to the host market as well as those measures that impose restrictions on the product or migrant after entry'.

In the cause of attempting to further understanding of the nature of the principle of *market access*, other associated complexities are addressed by "*Market Access" or Bust?*. From the same stable of complexities, the article critiques the perspective that compares the proponents of the test qualifying the principle with respect to *justification* through the route of '*de minimis* or notions such as a substantial *hindrance* to market access'[33] with the significant judgments of *Commission v. Italy* and *Mickelsson and*

[32] Spaventa (note 19), 923.
[33] Spaventa (note 19), 923.

Roos 'because both employ the market access test without such qualification'. Such a view would seem to bring a clarity to this aspect of the nature and understanding that can be attributed to the principle. However, even in this context, academic opinion is divided. Snell for example expresses the opposite view that in the context of *goods*[34] 'the Court seems to have finally embraced the idea of a substantial hindrance'.[35] In the absence of the provision of the 'workable definition' which has been called for by *Market Access" or Bust?*, some confusion as to proper identification of the nature of principle of *market access* must remain. The importance of *Market Access" or Bust?* in the context of a contribution to the knowledge and understanding of free movement jurisprudence relates not only to the identification of the seemingly inherent complexities which arise from the absence of definition of the principle of *market access* but also the attempt by the article to provide a rationale response to overcoming the deficiencies associated with the principle.

3. Selling Arrangement

There is a definable linkage between the papers *'Market Access" or Bust?* and *Accentuating the Positive: the "Selling arrangement", the First Decade and Beyond*. The previous section of this Submission considered the effect of the re-engagement with the principle of *market access* on free

[34] Also establishment and *services*.
[35] Jukka Snell, (note 28), 455.

movement jurisprudence in general. This section considers the effect of that re-engagement in the context of the rule relating to the 'selling arrangement' in the context of the free movement of *goods*.

The consideration of the 'selling arrangement' within the applicant's published research which considers an adjudication of the Court of Justice's law making with respect to free movement jurisprudence is apposite. In the context of furthering knowledge and understanding of the law making process with respect to the free movement of *goods* in general and of the 'selling arrangement' in particular, there is demonstrable thematic linkage between the principles of *market access* and the rule of the 'selling arrangement'. The latter rule 'suppressed' the principle of *market access* on its creation by *Keck and Mithouard*.[36] The rule of the 'selling arrangement' was the focus of the research undertaken for *Accentuating the Positive* (2005). The resurrection within *goods* of recourse to the principle of *market access* signalled within the recent judgments of *Commission v. Italy* and *Mickelsson and Roos* formed the impetus for the completion of further research with respect to the 'selling arrangement' within the article, *"Market Access" or Bust?* (2012).

The furtherance of knowledge and understanding of the rule of the 'selling arrangement' is conducted within *Accentuating the Positive* through an examination of the complexities and confusions which had arisen as a

[36] The case concerned the criminal prosecution of Keck for reselling products "at a loss" contrary to French Law.

result of the creation by the rule; a number of specific perspectives assist a more complete understanding of the effect of the rule of the 'selling arrangement' within the free movement of *goods*. The perspective offered by *Accentuating the Positive* is that the 'selling arrangement' representing a jurisprudential response by the Court of Justice to the width of *Dassonville* was borne from jurisprudential inability to deal with the equal burden rule in a consistent manner.

i. Recent jurisprudence

"Market Access" or Bust? capitalises on the contribution of *Accentuating the Positive* to the enhancement of knowledge and understanding with respect to the rule relating to the 'selling arrangement'. Such is contextualized within the recent judgments of *Commission v. Italy* and *Mickelsson and Roos*. The former article is clear to express the view that the recent judgments serve to inject a further twist of uncertainty with respect to the future operation of the rule of the 'selling arrangement' within the jurisprudence of *goods*. It provides an exposition which represents a contribution to knowledge and understanding of *goods* jurisprudence which is both current and forward looking in critique. The analysis contained within *"Market Access" or Bust?* maintains thematic coherence within the body of work published to date. The section below concludes with an examination of the relationship between two 'protagonist' principles of free movement jurisprudence; *market access*

and the ‘selling arrangement’. The re-engagement by the Court with the principle of *market access* cuts at the heart of free movement jurisprudence, the research respecting the nature of the *market access* principle respects the attributes, tensions and shortcomings of a principle explored at the core of the article *“Market Access” or Bust?.*

ii. Future direction

It is clear from *“Market Access” or Bust?* that the future direction of the ‘selling arrangement’ is in issue as a result of the judgments of *Commission v. Italy* and *Mickelsson and Roos*. It is expressed within the articles that the judgments ‘arguably appear to have arrested an unbridled march of the use of the concept of the “selling arrangement” [and] in some ways [have] trampled through the jurisprudence relating to goods’. The contribution to a knowledge and understanding which is to be associated with such development is explained from the perspective that were the principle of *market access* to be accorded an automatic prominence to the detriment of both the principles of non discrimination and mutual recognition, such would represent an ‘obfuscation of the causal reality’ for any ruling of illegality. The observation adds to academic debate; other writers would not agree. Wenneras & Moen for example have expressed the view that the two judgments signal that *“*that the notion of *market access* may ultimately be the criterion defining the scope of art. 34 TFEU

(thus also in effect replacing *Dassonville*)',[37] that these are judgments which may be seen as "a departure from orthodox jurisprudence and the beginning of a universal and strict 'market access' era."[38] In the context of maintaining academic perspective and a furtherance of understanding of the 'renewed' circumstances under which the rule of the 'selling arrangement' is to be applied in future, the value of *"Market Access" or Bust?* is in the provision of arguments which advocate a tempering view that *Commission v. Italy* reinforced the 'abiding respect for the principles of non discrimination and mutual recognition' within free movement jurisprudence. The contribution of the article is the perspective of the use of not just one principle, *market access*, but of the 'stirring into the pot of enquiry a range of ingredient principles [which] arguably strengthens the potency of the application of Article 34 TFEU' as maintained in *"Market Access" or Bust?*

Such perspective, the adoption of a *mixture* of principles of market access, non discrimination and mutual recognition adopted in *"Market Access" or Bust?* as an integral part of an inclusive equation in this context adds academic value to current debate in relation to the future direction of the rule of 'selling arrangement'. The perspective provides some cohesiveness, it would accord also with adoptive nomenclature by the

[37] Wenneras, P & Moen, K., *Selling Arrangements, Keeping* Keck, (2010) 35 ELRev 387-400, 287. This was noted also by Szydlo E*xport restrictions within the structure of free movement of goods. Reconsideration of an old paradigm* 2010 47 CMLRev., 753-789, 771.
[38] *Ibid* 387. Support for this proposition may be had from Advocate General Jacobs in C-412/93 *Leclerc-Siplec,* para 41.

jurisprudence[39] which has allowed 'the maintenance of a continuing respect for the principles of nondiscrimination and of mutual recognition as integral parts of the equation in the application of Article 34 TFEU.

iii. Particular considerations

a. Advertising

The lack of clarity together with the inconsistencies that have been allowed to exist and to persist within the jurisprudence respecting the rule of the 'selling arrangement' are visited within the applicant's research papers. There is allusion for example within *Accentuating the Positive* to an initial confusion which concerned whether or not the 'selling arrangement' covered the advertising rule;[40] a confusion which had to be addressed subsequently in *Hünermund*.[41] From another angle, *Accentuating the Positive* promotes additional understanding with respect to the difficulties associated with advertising.[42] Uncertainties arise from assessing the effect

[39] The eclectic descriptive terminology with respect to the national measure of *restriction*, *hindrance*, or *barrier* to the exercise of the free movement right.
[40] Echoing Advocate General Jacobs. (C-412/93) *Leclerc-Siplec* para 37.
[41] Case C 292/92 [1993] ECR 1 6787. In *Hünermund,* a professional conduct rule imposed by a professional association in Baden-Wuerttemberg, Germany which regulated advertising by pharmacists was held to be a 'selling arrangement' on the grounds that it did not affect the marketing of goods from other Member States in any different way from that of domestic products.
[42] A total ban may have effects that are different in law and in fact. In this instance, market analysis may be more difficult for the importer to acquire in comparison to the domestic producer. Contrast for example the

of particular advertisements. For example, the advertising prohibitions of both *Hünermund* and *Leclerc-Siplec*[43] had been 'relatively insignificant'; by contrast, other circumstances may signify a prohibition which 'may result in a loss of turnover to the business'. A total ban may have effects that are different in law and in fact. *Accentuating the Positive* identifies in addition that there are inconsistencies and difficulties in the Court's application of the 'selling arrangement to particular instances'. In this context for example, the regulation of shop opening hours classified as a 'selling arrangement' in *Tankstation't* may have actually been more intrusive of business activity than the advertising restriction. This observation relating to inconsistencies and difficulties with respect to the classification of the advert is reinforced by the comments of Gormley. These are selling arrangements which have 'a considerable effect on the behaviour of consumers.'[44]

b. Traditional social practices . . . local habits and customs

An associated problem which evidences further complexity and lack of consistency with respect to the 'selling arrangement' is exemplified in *Accentuating the Positive* with the reference to the ability of the Court to

---

observation made by the same article that classification as a 'traditional social practice' introduces an objectivity which relives the importer from the requirement to produce statistical analysis.

[43] Case C-412/93 1995 E.C.R. 1-179. In *Leclerc-Siplec* a national law which prohibited TV advertising in the distribution sector was held to be a 'selling arrangement'. It was not designed to regulate trade in goods between Member States and did not prevent distributors from using other forms of advertising.

[44] L. Gormley *Free movement of goods within the EU: some issues and an Irish perspective*. Irish Jurist (2011), 46, 74-95, 91.

'stir into the pot factors such as traditional social practices . . . local habits and customs'. In introducing the facility to factor in such objective factors, the Court has relieved the importer from undertaking market analysis. The rationale for such introduction is to inject an ability to compare particular products on a more subtle basis rather than merely a 'like for like' basis in the context of establishing a product market. *Accentuating the Positive* welcomes the attempt to inject meaningful and objective comparison between the imported and domestic goods within the process of assessment of a product market but observes that the creation of the concept of 'similar' product is another example of an introduced inconsistency and uncertainty within the jurisprudence of free movement. Wilsher adopts an argument which is sympathetic to this view. He writes 'The Court has remained very unclear about this issue which is at the heart of its search for the appropriate balance between Member State and EC regulation of trade … the Court almost never seeks to examine the product markets to identify suitable comparators amongst domestic producers'.[45] On a practical basis, the assessment of the *similarity* of products may be inherently more difficult for the importer than it is for the producer of the domestic product. The process is made more difficult for the importer; this arising from the Court's failure to deliver clarity respecting the identification of the content of the concept of the *similar* product in this context.

[45] D. Wilsher (note 15), 12-13.

The assessment above of the research which concerns the difficulties of locating the boundaries of Article 34 TFEU vis-à-vis the 'selling arrangement' with respect to particular adverts, identification of 'product characteristics', social practices and customs together with issues of remoteness introduced by the Court evidences an inability to supply consistency of underpinning. The research of *Accentuating the Positive* and *"Market Access" or Bust?* in these contexts expose the tensions and problems associated with the rule of the 'selling arrangement'. Such exposure by the published work under consideration provides a definable contribution to knowledge which has furthered the understanding of the rule of the 'selling arrangement' in free movement jurisprudence in relation to *goods*.

c. Product characteristics

In the spirit of the identification of the inconsistencies and confusions that have surrounded the 'selling arrangement', *Accentuating the Positive* has presented focus on the contradictions of the variant terminology that have been prescribed by the Court in relation to the descriptions accorded to the 'product characteristic'. The 'product characteristic' strikes at the 'boundary between the application of Article 28 (ex 30) EC[46] and of the selling arrangement.' A fresh perspective is pursued; *Accentuating the Positive* argues that the differing descriptions of product characteristics as

[46] Now Article 34 TFEU.

‘intrinsic characteristics’ and ‘actual contents’ represent a lack of clarity as to preciseness of meaning. The article maintains that in the context of a concept operating at the boundary of the application of Article 34 and of the ‘selling arrangement’ rule, it is imperative that the ‘semantic differences’ in the terminologies prescribed by the Court are clarified. The existence of such difficulties and the ramifications which arise from them appear not to have been addressed elsewhere in the literature on free movement. That such differences are and have been allowed to exist within the context of the ‘selling arrangement’ is further evidence of another complexity that the Court seems to have allowed both to exist and then to have been perpetuated.

d. Justification and remoteness

A novel perspective is expressed by *Accentuating the Positive* which concerns the proposition that ‘the introduction of the mandatory requirement … shifted the emphasis from *application* of Article 30 (now 28) EC to *justification*’. It is an original critique with respect to the ‘mandatory requirement’ to locate it as a control mechanism of Article 34 TFEU scrutiny; the concept considered to be the ‘new kid on the block’ which the article has described as having ‘almost unconsciously and seamlessly become the control mechanism which could be used to reign

in the unlimited consequences of *Dassonville*'.[47] In effect, *Accentuating the Positive* critiques a jurisprudence in which the ability to *justify* the restrictive national measure is enhanced vis-à-vis an ability to designate particular measures as 'selling arrangements'. The critique is important; the designation of a measure as a 'selling arrangement' removes the scrutiny of Article 34 but perhaps more significantly in this context also removes the measure from 'the uncertainty pertaining to the process of justification'.

The argument displayed in *Accentuating the Positive,* whilst in this context representing a novel perspective is also pragmatic. The argument displays a logicality which furthers understanding of the consequences for the jurisprudence of *goods* of the introduction of the rule relating to the 'selling arrangement'. So too, contortions and confusions arise in this context within the jurisprudence resulting from the description of a measure as one which has had 'too uncertain and indirect' effect on trade. *Accentuating the Positive* describes the introduction of the concept of remoteness as one which 'can be likened to that of the introduction of a '"wild card" in a game of poker'.[48] Not only is the observation significant in terms of the complications and confusions arising from the same, but also as the article

[47] '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.' Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837, para 5.
[48] Noted by Barnard *The Substantive Law of the EU: The Four Freedoms* (OUP, 2nd edition 2007), pg 166.

observes, it has a practical consequence. The recognition of remoteness in particular circumstances will be effective to 'stultify any further enquiry either into the applicability of Article 30 [now 34 TFEU] … or the availability of the concept of the selling arrangement'. The stirring into the pot of the concept of remoteness with respect to the operation of the 'selling arrangement' is expressed by *Accentuating the Positive* as 'not a welcome addition to the mix'. It is yet further evidence of the introduction of a complexity within the jurisprudence relating to the free movement of *goods* and one which the article makes clear adds to the uncertainties surrounding the operation of the rule of the 'selling arrangement' in particular circumstances.

4*. Restriction* to free movement right

In the context of the free movement of *persons*, *services* and *capital, "Market Access" or Bust?* raises a novel perspective with respect to the 'recent innovation' relating to the embellishment of the terminology of *restriction* within free movement jurisprudence. The portrayal of *restrictions* in relation to *persons* and *services* for example as *liable to hamper or to render less attractive* or as *liable to prohibit or otherwise impede* are described as 'adjectival descriptions [which] bear overtones of *access* to the market'. Although at one level this presents a new critique of the nature of the *restriction*, it also signifies complexities within the jurisprudence. *"Market Access" or Bust?* has observed that 'It is arguable

that maintaining the focus within the composition of jurisprudence on the *restriction* or *obstacle* to the free movement right allows for a platform of principles to be employed as options for attack on the national measure suspected of hindering free movement rights. The perspective of *"Market Access" or Bust?* is clear, the availability of different principles as modus operandi to free movement rights may be welcomed; it strengthens the Court's hand in scrutinising alleged *restrictions* to free movement rights. In furtherance of a continuation of the critique on the adoption of the adjectival terminology with respect to the *restriction*, *"Market Access" or Bust* adopts the perspective that such allusions ought to be removed from the Court's jurisprudence. Such removal it is argued would address the inconsistencies in the jurisprudence that stem from any preference for *market access* vis-à-vis the renewed respect for the identification of the terminology of *obstacle*/*restriction* to the free movement right. Such is a novel argument, it employs the rationale that such 'refocus' of free movement jurisprudence would implant clarity of purpose to the scrutiny of the national measure that would be in line with Treaty exhortations. The argument would allow a consistency of underpinning that appears to be currently lacking within the jurisprudence in this context and allow the Court to use the plethora of modus operandi principles that are available to secure the Treaty free movement right in issue. As such it is a proposition that goes some way to exposing the minutiae of the scrutiny process; the proposed solution which would expose a transparency of

purpose would assist in the fostering of a greater understanding of free movement jurisprudence.

i. Effect on justification

Not only does reclassification of the enquiry led by the focus on the *restriction* to the free movement right allow the incorporation of the modus operandi principles at the appropriate level, the published work maintains that the observation is crucially important in cause of introducing clarity into the process of *justification*. The article *Goods, Persons, Services and Capital in the European Union* provides a novel perspective; the refocus of the enquiry onto *restrictions*/*obstacles* with respect to the jurisprudence of *persons* and *services* has been effective 'partially, at least to displace that natural order' relating to *justification* of discriminatory and non discriminatory measures. The novel critique goes further; the reclassification within the jurisprudence has been effective 'to render redundant considerations of the Treaty grounds for *justification* in instances wherein previously the classification of directly discriminatory measures would have been used'. The proposition made is that this has handed to Member States a wider range of *justification* grounds for measures formerly designated as directly discriminatory and now held *restrictive* of free movement rights. *Goods, Persons, Services and Capital in the European Union* maintains the thematic of this analysis, highlighting an 'inappropriateness of having different grounds for the *justification* of

national measures relating to *persons* and *services* dependent upon whether the measure is classified as discriminatory or as a non-discriminatory restriction. Such 'amalgam' was advocated by Advocate General Jacobs in *Danner*[49] in the context of *services*; the occurrence of such within the jurisprudence would contribute positively towards the adoption of transparency.

Nevertheless, *Goods, Persons, Services and Capital in the European Union* observes that with respect to *goods* for example, contortions and lack of consistency with respect to underpinning the process of *justification* remain with the language of *restriction* having failed to 'ferment(ed) a fusion with respect to the traditional basis of justification'. The article calls for clarity and a consistency from the Court of Justice; the development of a 'symbiosis' between the *justification* processes of *persons* and *services* and that of *goods*. Such arguments are reflected within those of Oliver and Enchelmaier who in the context of the recognition of 'mandatory requirements' in addition to Article 36 grounds in a number of cases, have maintained the view that it would be 'more honest' for the Court to admit an enlargement of the rules on *justification*.[50] The development of a 'symbiosis' would represent the instigation of a clarity within g*oods* jurisprudence; the Court would not have to persist with inconsistencies in

[49] Case C-136/00 *Danner*, para. 40.
[50] Oliver, P & Enchelmaier, S (note 29), 689-690.

underpinning the *justification* process.[51] *Goods, Persons, Services and Capital in the European Union* evidences further inconsistency with respect to the justification of national measures. Oliver and Enchelmaier for example highlight that the Court 'has on occasion been driven to extraordinary contortions to find "distinctly applicable" restrictions justified under the mandatory requirements'.[52] The article observes that a development of the 'symbiosis' in the context of *goods* would both remove the pressure relating to an inconsistency of identification of the national measure and permit for example the desirability of extending the grounds for the *justification* of the directly discriminatory measure.[53]

ii. Proportionality

Finally, with respect to the issues surrounding the process of *justification*, *Goods, Persons, Services and Capital in the European Union* makes a novel contribution to furthering the understanding of free movement jurisprudence in linking the advent of the wider *justifications* of reclassified 'directly discriminatory' measures with the observation that the Court has 'it seems, effectively placed the operation of *proportionality* into the forefront of preservation of free movement rights.' The article maintains

[51] Weatherill observes that if discrimination is present that only Article 36 is relevant. 'The Court established this at an early stage in its shaping of this area of the law and it has never recanted.' *Free movement of goods* ICLQ. 2012, 61(2), 541-550, 544.
[52] *Id*. pg. 690.
[53] For example in C-2/90 *Commission v Belgium* the grounds imperative requirements were not available in relation to an absolute prohibition on the dumping of imported hazardous waste.

that it is now incumbent on the Court to assist this change in emphasis by the provision of defined guidelines as to the application of the principle of proportionality, noting that the lack of guidance 'represents an abdication of responsibility on the part of the Court.'

Such shift in emphasis would represent additional evidence of inconsistency in the underpinning of free movement jurisprudence in this context. The view taken on the increased importance of the principle of proportionality adopts new perspectives in its contribution to furthering an understanding of the jurisprudence of free movement. Though not directly expressed within the literature associated within free movement, it is a view which would seem to find support from Spaventa's comments in the context of *Commission v. Italy* and *Mickelsson and Roos* that 'the details of the *way* such policies are implemented become increasingly important in assessing the compatibility of national rules with Community law. In this respect, the proportionality scrutiny becomes [both less] and more intensive' [emphasis added].[54]

5. Conclusions

The body of published work which has supported this Statement has maintained focus upon the jurisprudence of the Court of Justice in relation to *goods*, *persons*, *services* and *capital*. The case notes and

[54] Spaventa, (note 19), 925.

commentaries submitted as representative of earlier work were concerned with more general notions of free movement, applied in instances of particular difficulties. Such concerned the practical application of ensuring that migrant EU nationals exercising free movement rights at the national level enjoyed the rights to which they were entitled. The published articles in concept expose trajectory; from commentary on specified and problematical explanations of EU law to academic thematic exposition designed to map the judicial development with respect to free movement jurisprudence. Such exposition has exposed want of thematically consistent underpinnings, complexities, and confusions together with some doctrinal diversity within the jurisprudence of free movement. Through such modus operandi, the research has added an increased knowledge and understanding of free movement jurisprudence; specific details of which have been detailed throughout this Submission.

The body of research which finds expression within this output of published work represents a substantial and thematic enquiry into the jurisprudence of *goods*, *persons*, *services* and *capital*. The conducted research is temporally finite. The jurisprudence however is not static; there is an inherent organic evolution. The identified lacuna and issues exposed thus far must be addressed by the Court of Justice. Is free movement jurisprudence for example to be operated solely by the principle of *market access* or in future to be driven by a combined triumvirate of principles of non discrimination, *market access* and reliance on the principle of mutual

recognition? How will the tensions between these principles as the driver(s) of free movement be resolved? Is *market access* to be assessed on an economic or intuitive basis? What are the future prospects for the rule of '*selling arrangement'* given the context of the judgments of *Commission v. Italy* and *Mickelsson and Roos*?. Will the identified idiosyncrasies of the rule of the 'selling arrangement', for example with respect to advertisement or product characteristic be addressed?

On a more general basis, other issues need to be addressed. Will there be for example convergence within the jurisprudence relating to the Treaty freedoms; how will the jurisprudence of citizenship impact upon the jurisprudence of *goods*, *persons*, *services* and *capital*? Such identified lacuna and issues exposed by the published articles remain fertile areas for research and enquiry. It is research that will both develop and enhance further the level of knowledge and understanding acquired thus far with respect to free movement jurisprudence.

Appendices

Appendix 1	List of Publications submitted to support Submission	Numbered i. – viii.
Appendix 2		Citations of published work under consideration
Appendix 3	Published articles & case notes supporting applicant's statement	Numbered i. – viii.
Appendix 4		General List of publications connected with free movement jurisprudence which have been consulted throughout the research process

Appendix 1

Publications Relied Upon for the Degree of Doctor of Philosophy

i. *"Market Access" or Bust? Positioning the Principle Within the Jurisprudence of Goods, Persons, Services, and Capital* 13 German Law Journal 679-756 (2012)

ii. *Goods, Persons, Services and Capital in the European Union: Jurisprudential Routes to Free Movement* 11 German Law Journal 159-209 (2010)

iii. *Accentuating the Positive: the "Selling arrangement", the First Decade and Beyond* (2005) 54 ICLQ 127-160

iv. '*Trade Mark Protection: Market Partitioning. Objective Test Imported where Trade Mark Replaced'*, L.M.C.L.Q. 301 – 308

v. *'Article 39 (ex 48) E.C. Offers no Protection where Restriction on Free Movement rights arises from act of Migrant Worker: Citibank International PLC v. Kessler: Court of Appeal'*, (1999) 24 E.L.Rev, 525 - 530

vi. *'Non-Community Spouses: Interpretation of Community Residence Rights'. Boukssid v. Secretary of State for the Home Department'*, (1999) 24 E.L.Rev, 99 - 105

vii. '*United Kingdom, Non-Community Spouses: Interpretation of Community Residence Rights: R v. Secretary of State for the Home Department, ex parte Zeghraba and Sahota*', (1998) 23 E.L.Rev, 184 - 190

viii. '*Migrant Community Nationals: Remedies for Refusal of Entry by Member States Joined Cases C-65/95 & 111/95 The Queen v. Secretary of State for the Home Department ex parte Shingara and Radiom* [1997] E.C.R. I-3343', (1998) 23 E.L.Rev, 157 - 164

Note that the articles relied upon were published by Tim Connor between 2005 and 2012.

Appendix 2.

Citations of published work under consideration

Article	Textbook/Journal	Reference
Accentuating the Positive: the "selling arrangement", the first decade and beyond	i. *Consistency in the chambers of the ECJ: a case study on the free movement of goods* Woods, L C.J.Q. 2012, 31(3), 339-367	References within main text - footnotes 83, 94, 101 & 102
	ii. Barnard C., *The Substantive Law of the EU: The Four Freedoms* (OUP, 2nd edition 2007),	Noted pg 166 – referenced within main text
	iii. Craig, P & De Búrca G EU *Text, Cases, and Materials* OUP 5th ed., 2011, pg 691	'Further reading' – Chapter 13
	iv. Foster *EU Law Directions* Oxford 3rd Ed (2012) pg 305	'Further reading' – Chapter 13
	viii. *Moped Trailers, Mickelsson & Roos, Gysbrechts: The ECJ's Case Law on Goods Keeps on Moving* Enchelmaier YEL (2010) 29(1): 190-223, 196	Footnote 196: pg 22
	v. *Switch in Time for the European Community - Lochner Discourse and the Recalibration of Economic and Social Rights in Europe,* Ian H Eliasoph, 14 Colum. J. Eur. L. 467 -508 (2007-2008), 498	Footnote 213: pg 489
	ix. *Commercial Law of the European Union (Ius Gentium: Comparative*	Footnote pg 61

	Perspectives on Law and Justice) Gabriël Moens, John Trone Springer 2011 Western Australia	
	x. *The Foundations of European Union Competition Law: The objectives & Principles of Article 102* OUP 2011, Renato Nazzini	Bibliography Page 407
	Cases & Materials on EU Law Weatherill 8th ed OUP, pg 400 Cases & Materials on EU Law Weatherill 9th ed OUP, pg 381	Noted within text - Chapter "Beyond Discrimination: Article 34 TFEU"
Goods, Persons, Services and Capital in the European Union: Jurisprudential Routes to Free Movement	i. *Cases & Materials on EU Law* Weatherill 10th ed OUP, pg 390	Noted within text – Chapter - "Freedom of Establishment and the Free Movement of Services: Articles 49 & 56 TFEU"
	ii. *The Path-dependency of Case Law and the Free Movement of Persons* Susanne K. Schmidt University of Bremen skschmidt@uni-bremen.de Paper presented at the EUSA Twelfth Biennial International Conference Boston, Massachusetts March 3-5, 2011 pg 15	Quoted within the text and referenced
	iii. *Liberalising Trade in the EU and the WTO: A Legal Comparison* Edited by: Sanford E. Gaines, Aarhus Universitet,	Chapter 7 - Non-discriminatory restrictions on trade pp. 176-202 Removing non-discriminatory barriers to trade in the EU and the

	Denmark • Edited by: Birgitte Egelund Olsen, Aarhus Universitet, Denmark Edited by: Karsten Engsig Sørensen, Aarhus Universitet, Denmark CUP 2012 January 2012	WTO: can one system benefit from the experiences of the other? –Sørensen Footnote 13
	iv. *Who cares about nationality? The path-dependent case law of the ECJ from goods to citizens* Susanne K. Schmidt Journal of European Public Policy 19:1 8-24, 17.	Quoted within the text and referenced (section - The development of the case law on workers' free movement)
	v. T.C. Anhora University SOSYAL BĠLĠMLER ENSTĠTÜSÜ AVRUPA BĠRLĠĞĞ ULUSLARARASI EKONOMĠK ĠLĠĢKĠLER ANABĠLĠM DALI (HUKUK BĠLĠM DALI) ĠÇ PAZAR DOLAĢIM SERBESTÎLERĠ ĠLE BĠRLĠK VATAND	Doctoral thesis Footnotes: 24, 25, 57, 70, 103, 208, 359, 400, 581, 599, 623, 624 & 628.
Migrant Community Nationals: Remedies for Refusal of Entry by Member States Joined Cases C-65/95 & 111/95 *The Queen v.*	Steiner & Woods *EU Law* 11th Ed Oxford Annuaire Europeen 1998 *Annuaire European/European Yearbook Volume 46 of European Yearbook / Annuaire Européen Series* Hans Kroger, C. Brooks Bril Academic Publishes 2000	Further reading: pg 551.

Secretary of State for the Home Department ex parte Shingara and Radiom [1997] E.C.R. I-3343		
United Kingdom, Non-Community Spouses: Interpretation of Community Residence Rights: R v. Secretary of State for the Home Department, ex parte Zeghraba and Sahota', (1998) 23 E.L.Rev, 184 - 190	Annuaire Europeen 1998 *Annuaire European/European Yearbook* *Volume 46 of European Yearbook / Annuaire Européen Series* Hans Kroger, C. Brooks Bril Academic Publishes 2000	
	Dazed and confused: family members' residence rights and the Court of Justice *Kaba v Secretary of State for the Home Department* (C356/98) Times, April 19, 2000 (ECJ) Steve Peers E.L. Rev. 2001, 26(1), 76-83	Footnote 7 & Comment
Request to republish - from The Ukraine	*Proposal* to reproduce Market Access" or Bust? Positioning the principle within the jurisprudence of goods, persons, services and capital" in journal: "European Law". This journal is the additional version of the well-known Ukrainian journal "The Law of Ukraine" Request made June 2012	Kseniya Smyrnova PhD, Associate Professor, Institute of International Relations Kyiv National Taras Shevchenko University www.iir.kiev.ua Cell: +38(050)3125722

Appendix 3

Copies of Publications supporting submission

i. *"Market Access" or Bust? Positioning the Principle Within the Jurisprudence of Goods, Persons, Services, and Capital* 13 German Law Journal 679-756 (2012)

ii. *Goods, Persons, Services and Capital in the European Union: Jurisprudential Routes to Free Movement* 11 German Law Journal 159-209 (2010)

iii. *Accentuating the Positive: the "Selling arrangement", the First Decade and Beyond* (2005) 54 ICLQ 127-160

iv. '*Trade Mark Protection: Market Partitioning. Objective Test Imported where Trade Mark Replaced'*, L.M.C.L.Q. 301 – 308

v. *'Article 39 (ex 48) E.C. Offers no Protection where Restriction on Free Movement rights arises from act of Migrant Worker: Citibank International PLC v. Kessler: Court of Appeal'*, (1999) 24 E.L.Rev, 525 - 530

vi. *'Non-Community Spouses: Interpretation of Community Residence Rights'. Boukssid v. Secretary of State for the Home Department'*, (1999) 24 E.L.Rev, 99 - 105

vii. '*United Kingdom, Non-Community Spouses: Interpretation of Community Residence Rights: R v. Secretary of State for the Home Department, ex parte Zeghraba and Sahota*', (1998) 23 E.L.Rev, 184 - 190

viii. '*Migrant Community Nationals: Remedies for Refusal of Entry by Member States Joined Cases C-65/95 & 111/95 The Queen v. Secretary of State for the Home Department ex parte Shingara and Radiom* [1997] E.C.R. I-3343', (1998) 23 E.L.Rev, 157 - 164

Appendix 3

i. *"Market Access" or Bust? Positioning the Principle Within the Jurisprudence of Goods, Persons, Services, and Capital* 13 German Law Journal 679-756 (2012)

Articles

"Market Access" or Bust? Positioning the Principle Within the Jurisprudence of Goods, Persons, Services, and Capital

By Tim Connor[*]

A. Introduction

The Treaty on the Functioning of the European Union (TFEU) provides with respect to the free movement of goods that "[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited."[1] In contrast, the TFEU provides that, with respect to the free movement of persons, services, and capital, restrictions at the national level on such rights are similarly unlawful.[2]

The jurisprudence of the Court of Justice has applied the Treaty's free movement provisions to national measures. Such measures may be rendered unlawful unless *justified*.[3] Within the process of the assessment of the lawfulness of the national measure, the Court has had recourse to the principles of nondiscrimination,[4] mutual recognition[5] and market access.[6] Free movement jurisprudence respects the operation of the three principles in the assessment of the application of the free movement provisions to national

* Lecturer in Law at Bradford University Law School. Email: T.Connor@Bradford.ac.uk

[1] *See* Treaty on the Functioning of the European Union, art. 34, 13 Dec. 2007, 2010 O.J. (C083) 1 [hereinafter TFEU].

[2] This is not strictly true. With respect to the *worker,* it has been determined that Treaty free movement provisions operate in the same manner as the other Treaty free movement provisions. *See* Case 96/85, Comm'n v. France, 1986 E.C.R. 1475; *see also* TFEU art. 49 (respecting establishment); TFEU art. 56 (respecting services); TFEU art. 63 (with respect to capital).

[3] TFEU, *supra* note 1, at art. 36. With respect to goods, *justification* is either by recourse to TFEU art. 36 or to the "mandatory requirement"; *see also* TFEU art. 45(3) (worker); TFEU art. 52(1) (establishment); TFEU art. 56 (services).

[4] TFEU, *supra* note 1, at art. 18 ("Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.").

[5] Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649 [hereinafter *Rewe-Zentral*].

[6] Case 8/74, Procureur du Roi v. Benoît and Gustave Dassonville, 1974 E.C.R. 837 [hereinafter *Dassonville*] (originally introducing with respect to goods).

measures.[7] The market access principle notably has been used recently within the jurisprudence relating to the free movement of goods. The judgment of *Commission v. Italy*[8] held unlawful an Italian law which prohibited mopeds from towing trailers,[9] and *Mickelsson and Roos*[10] held unlawful Swedish laws which prohibited the use of personal watercraft on waters other than generally navigable waterways.[11] Both respective measures were held to have prevented the *access* of the import to the respective national markets in those Member States. The use of the market access principle in relation to the assessment of the legality of the Italian and Swedish national measures is important not only for the jurisprudence relating to the free movement of goods, but also in the wider context of the jurisprudence for free movement in general. In particular, the use of the principle in *Commission v. Italy*[12] and *Mickelsson and Roos*[13] bears on the status of the *selling arrangement* in the context of the free movement of goods.

This article addresses issues raised by the use of the principle of market access in the free movement jurisprudence of goods,[14] persons,[15] services,[16] and capital.[17] It concentrates initially on the jurisprudence relating to the free movement of goods.[18] The use of the principle of market access in the wider context of all free movement jurisprudence is then considered. The article arose from the composition of the judgments of *Commission v.*

---

[7] Case C-110/05, Comm'n v. Italian Republic, 2009 E.C.R. I-519, para. 35 [hereinafter *Commission v. Italy*]: "It is also apparent from settled caselaw that Article 28 EC [now Art. 34 TFEU] reflects the obligation to respect the principles of *non-discrimination* and of *mutual recognition* of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of Community products to national markets." (emphasis added).

[8] *Id.*

[9] *Id.* at para. 56 ("A prohibition on the use of a product in the territory of a Member State has a considerable influence on the behaviour of consumers, which, in its turn, affects the *access* of that product to the market of that Member State." (emphasis added)).

[10] Case C-142/05, Åklagaren v. Mickelsson, 2009 E.C.R. I-4273 [hereinafter *Mickelsson*].

[11] *Id.* at para. 28 ("Such regulations have the effect of *hindering* the *access* to the domestic market." (emphasis added)).

[12] See *Commission v. Italy*, 2009 E.C.R. I-519.

[13] See *Mickelsson*, 2009 E.C.R. I-4273.

[14] TFEU, *supra* note 1, at art. 34.

[15] See TFEU art. 45 (worker); *see also* TFEU art. 49 (establishment); Case T-266/97, Vlaamse Televisie Maatschapij NV v. Comm'n, 1999 E.C.R. I-2329 [hereinafter *Maatschapij*].

[16] TFEU, *supra* note 1, at art. 56.

[17] TFEU, *supra* note 1, at art. 63.

[18] TFEU, *supra* note 1, at art. 34.

Italy[19] and *Mickelsson and Roos*[20] in the context of the use therein of the principle of *market access*. In the particular context of the free movement of *goods*, this article will examine the re-engagement with the market access principle which is evidenced in the judgments of the Court of Justice in *Commission v. Italy* and *Mickelsson*. In this particular context, is the principle of market access now to take precedence over the concept of the *selling arrangement*? This article will also examine a context wider than the free movement of goods.[21] Does the rejuvenation and re-engagement with the principle of market access within the jurisprudence of goods have ramifications for the jurisprudence beyond goods, including that of persons, services, and capital?[22] These are issues that are addressed within this article.

B. Positioning Market Access: Goods

I. Contextualisation

To contextualise the use of the principle of market access as a benchmark assessment point in the measurement of the legality of national measures, the market access principle was initially introduced with respect to the free movement of goods in 1974 in *Procureur du Roi v. Benoît and Gustave Dassonville*.[23] As a test in the field of the free movement of goods, its use became significantly curtailed some twenty years later by the judgment of *Criminal proceedings against Bernard Keck and Daniel Mithouard*,[24] which was delivered in 1993.[25] Eclipsed by *Keck and Mithouard*,[26] and recently described in the instant context as a "phoenix"[27] rising from the ashes, the recent recourse to the principle of market access in

---

[19] See *Commission v. Italy*, 2009 E.C.R. I-519.

[20] See *Mickelsson*, 2009 E.C.R. I-4273.

[21] TFEU, *supra* note 1, at art. 34.

[22] *See* TFEU, *supra* note 1, at art. 45 (for workers); *see also* TFEU, *supra* note 1, at art. 49 (for establishment); TFEU, *supra* note 1, at art. 56 (for services); TFEU, *supra* note 1, at art. 63 (for capital).

[23] *Dassonville*, 1974 E.C.R. 837, para. 6 (holding unlawful Belgian requirements relating to proof of origin because they prevented access to the Belgian market of Scotch whisky which had imported through third party states). Such laws, it was held, "should not act as a hindrance to trade between Member States and should, in consequence, be *accessible* to all Community nationals" (emphasis added).

[24] See Joined Cases C-268/91 & C-276/91, Criminal proceedings against Bernard Keck and David Mithouard, 1993 E.C.R. I-6097, Case C-276/91, Comm'n v. French Republic, 1993 E.C.R. I-4413 [hereinafter collectively *Keck and Mithouard*].

[25] *Id*.

[26] *Id.*

[27] Catherine Barnard, *Trailing a New Approach to Free Movement of Goods?*, 68 CAMBRIDGE L.J. 288, 290 (2009).

Commission v. Italy[28] and *Mickelsson*[29] may prove to have significant repercussions with respect to usage, not only in the theatre of goods, but also in the wider community of persons,[30] services,[31] and capital.[32]

In the jurisprudence relating to the application of the principle of the free movement of goods[33] between Member States, "free access of Community products to national markets" has been but one of the principles available to the Court as a benchmark of the legality of the national measure in relation to the requirements of European Union law.[34] Contextualising the use of that principle in relation to the free movement of goods[35] in *Commission v. Italy*, the Court of Justice held that:

> It is also apparent from settled case-law that Article 28 EC [Treaty Establishing the European Community; now Article 34 TFEU] reflects the obligation to respect the principles of *nondiscrimination*[36] and of *mutual recognition*[37] of products lawfully manufactured and marketed in other Member States as well as the principle of ensuring free access of community products to national markets.[38]

---

[28] *Commission v. Italy,* 2009 E.C.R. I-519.

[29] *Mickelsson*, 2009 E.C.R. I-4273.

[30] TFEU, *supra* note 1, at art. 45 (for worker); *see also* TFEU, *supra* note 1, at art. 49 (establishment); *see generally Maatschapij*, para. 107.

[31] TFEU, *supra* note 1, at art. 56.

[32] TFEU, *supra* note 1, at art. 63.

[33] TFEU, *supra* note 1, at art. 34 (stating a fundamental Treaty principle); *see also* Case C-333/08, Comm'n v. France, judgment of 28 January 2010.

[34] *Commission v. Italy*, 2009 E.C.R. I-519, para. 1 (imposing this principle in the context of goods by Articles 34); *see also* TFEU, *supra* note 1, at art. 34 (providing that "[q]uantitative restrictions on imports, and all measures having equivalent effect, shall be prohibited between Member States").

[35] TFEU, *supra* note 1, at art. 34.

[36] *Commission v. Italy*, 2009 E.C.R. I-519, para. 34. There are many examples of the application of the principle of nondiscrimination in jurisprudence relating to the free movement of goods. *See, e.g.*, Tim Connor, *Goods, Persons, Services and Capital in the European Union: Jurisprudential Routes to Free Movement*, 11 GERMAN L.J. 159 (2010).

[37] *Rewe-Zentral*, 1979 E.C.R. 649 (introducing the principle of mutual recognition into jurisprudence relating to goods).

[38] *Commission v. Italy*, 2009 E.C.R. I-519, para. 38.

Even though interest in the market access principle has been renewed, this passage is evidence from the Court that other principles are available to smooth the application of Article 34 TFEU to national measures. *Commission v. Italy* confirmed the availability of such alternatives by referring to *Criminal proceedings against Sandoz BV*,[39] *Rewe Zentral*[40] and *Criminal proceedings against Bernard Keck and Daniel Mithouard*.[41] The *Sandoz BV*[42] judgment had proceeded on the basis of the application[43] of the principle of nondiscrimination.[44] The Court in that case held that "[t]he *objective pursued* by the principle of free movement of goods is precisely to ensure for products from the various Member States *access* to markets."[45] *Rewe Zentral*,[46] which held that national measures found to be effective in excluding the imported product were "an *obstacle* to trade,"[47] had been decided on the basis of the operation of the principle of mutual recognition.[48] In the judgment of *Keck*,[49] even in the context of the introduction of the concept of the selling arrangement, the Court acknowledged clear respect for the principle of market access.[50]

---

[39] Case C-174/82, Criminal proceedings against Sandoz BV, 1983 E.C.R. 2445 [hereinafter *Sandoz BV*].

[40] *Rewe-Zentral*, 1979 E.C.R. 649.

[41] *Keck and Mithouard*, 1993 E.C.R. I-6097.

[42] *Sandoz BV*, 1983 E.C.R. 2445, para. 7.

[43] *Id.* (proceeding to the issue of justification and not considering the detail of this aspect).

[44] *Id*. (concerning, in essence, indirectly discriminatory Dutch measures related to the marketing of vitamin-enriched foodstuffs within Holland).

[45] *Id.* at para. 26 (emphasis added).

[46] *Rewe-Zentral*, 1979 E.C.R. 649.

[47] *Id.* at para. 14 (emphasis added).

[48] *Id.* at para. 15 (noting the judgment was decided on the basis that "[t]he concept of 'measures having an effect equivalent to quantitative restrictions on imports' contained in Article 30 of the Treaty is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a Member State also falls within the prohibition laid down in that provision where the importation of alcoholic beverages *lawfully produced and marketed in another Member State* is concerned" (emphasis added)).

[49] *Keck and Mithouard*, 1993 E.C.R. I-6097.

[50] *Id.* at para. 17 (referencing to the imported good, French law was held "not by nature such as to prevent their *access* to the market or to impede *access* any more than it impedes the *access* of domestic products" (emphasis added)).

The respect, shown in such judgments as *Commission v. Italy*,[51] *Sandoz*,[52] *Rewe,*[53] and *Keck*[54] is effective to prove an established respect for the principle of market access. It is a respect which may be latent, as the judgments of *Sandoz*,[55] *Rewe,*[56] and *Keck and Mithouard*[57] suggest. However, it may instead be a patent respect, as exemplified by the judgments of *Commission v. Italy*[58] and *Mickelsson*.[59]

II. Market Access: First Amongst Equals?

In assessing the importance of the principle of market access within the jurisprudence of goods, a question to be addressed is whether the principle is to be employed as "first among equals" or whether the Court is to have recourse to the principles of nondiscrimination[60] or mutual recognition[61] in the context of the application of Article 34 TFEU. Is the principle of market access to take a place as only one of a number of principles, the use of any of which may trigger the application of the Treaty free movement provision? This section first examines the positioning of the principles of nondiscrimination and mutual recognition with respect to that of market access within the jurisprudence of the free movement of goods.[62] It then examines the role that the principle of market access has played in the context of the wider scrutiny of its use within the jurisprudence of persons,[63] services,[64] and capital.[65]

---

[51] *Commission v. Italy*, 2009 E.C.R. I-519, para. 34.

[52] *Sandoz BV*, 1993 E.C.R. 2445, para 26.

[53] *Rewe-Zentral*, 1979 E.C.R. 649, paras. 6, 14–15.

[54] *Keck and Mithouard*, 1993 E.C.R. I-519, para. 17.

[55] *Sandoz BV*, 1983 E.C.R. 2445.

[56] *Rewe-Zentral*, 1979 E.C.R. 649.

[57] *Keck and Mithouard*, 1993 E.C.R. I-6097.

[58] *Commission v. Italy*, 2009 E.C.R. I-519, para. 34.

[59] *Mickelsson*, 2009 E.C.R. I-4273, para. 28.

[60] TFEU, *supra* note 1, at art. 18 (noting that the general Treaty provision in this respect provides "within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited").

[61] *Rewe-Zentral*, 1979 E.C.R. 649, para. 14 (introducing the market access principle).

[62] TFEU, *supra* note 1, at art. 34.

[63] TFEU, *supra* note 1, at art. 45 (respecting the worker); *see also* TFEU, *supra* note 1, at art. 49 (respecting establishment); *Maatschapij*, 1999 E.C.R. I-2329, para. 107 (noting this jurisprudence).

[64] TFEU, *supra* note 1, at art. 56.

1. Nondiscrimination

With respect to the principle of nondiscrimination, *Dassonville*[66] held that national measures must not "directly or indirectly" hinder trade between Member States.[67] This offers an explanation of the jurisprudential references to both direct and indirect discrimination.[68] It is in this context that one commentator, prior to the judgment of *Keck and Mithouard*, expressed the view that

> Prior to the landmark decision of the Court of Justice in the *Cassis* case it was generally assumed—and the Court's case law was consistent with this assumption—that Article 30 (now Article 34 TFEU) had no application to a national measure unless it could be proved that the measure in question discriminated in some way . . . between either imports and domestic products or between channels of intra Community trade.[69]

Yet, a pertinent question may arise as to the relationship between the principles of market access and discrimination. Can the judgments relating to the legality of national measures tainted by discrimination in the field of free movement of goods be represented in terms of a reliance on the principle of market access? The composition of a number of judgments in relation to the free movement of goods lends support to the validity of this argument. Aside from *Commission v. Italy*,[70] other judgments indicate that a certain symbiosis exists between the operation of the two principles of market access and

---

[65] TFEU, *supra* note 1, at art. 63.

[66] *Dassonville*, 1974 E.C.R. 837.

[67] *Id.* at para. 5 ("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.").

[68] Direct and indirect discrimination are alternatively termed distinctly and indistinctly discriminatory. Commission Directive 70/50, art. 2(2), 1970 O.J. (L 13) 29 (EC) (initiating Court use of these terms).

[69] DERRICK WYATT & ALAN DASHWOOD, EUROPEAN COMMUNITY LAW, 221 (3d ed. 1993) (emphasis added). Note that consideration of the concept of discrimination was also important in the context of the judgment of *Keck. Keck and Mithouard*, para. 17.

[70] *Commission v. Italy*, 2009 E.C.R. I-519, para. 34 (explaining that "Article 28 EC [now TFEU art. 34] reflects the obligation to respect the principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of Community products to national markets").

discrimination. In *Commission v. Ireland*,[71] for example, which concerned the discriminatory nature of a "buy Irish" campaign,[72] there was an implicit recognition of the principle of market access. The Irish law was held "*liable to affect the volume of trade* between Member States."[73] So too, in *Henri Cullet and Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers v. Centre Leclerc à Toulouse and Centre Leclerc à Saint-Orens-de-Gameville*, it was held that the effect of a system of fixing prices of partitioning petroleum products "is to *partition off* the national market."[74] A stronger indication of a simmering symbiosis between the principles of nondiscrimination and market access was delivered in *Ker-Optika bt v. ÀNTSZ Dél-dunántúli Regionális Intézete*, in which a Hungarian measure prohibiting the sale of contact lenses by mail order was held to deprive importers[75] "of a particularly effective means of selling those products and *thus significantly impedes access* of those traders to the market of the Member State concerned."[76] In *Commission v. UK*, it was held that discriminatory national legislation relating to origin marking affected the access of the imported good to the national market on the basis that it was "liable to have the effect of increasing the production costs of imported goods and making it more difficult to sell them on the United Kingdom market."[77]

2. Mutual Recognition

Within the jurisprudence relating to the free movement of goods,[78] which has applied the principle of mutual recognition,[79] there is arguably some inherent respect for the principle

---

[71] Case C-249/81, Comm'n v. Ireland, 1982 E.C.R. 4005, para. 25.

[72] *Id.* at para. 20. The introduction of the "guaranteed Irish" symbol was indirectly discriminatory of the imported product. *Id.* at para 26.

[73] *Id.* at para. 25 (emphasis added).

[74] Case 231/83, Henri Cullet and Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers v. Centre Leclerc à Toulouse and Centre Leclerc à Saint-Orens-de-Gameville, 1985 E.C.R 305, para. 20 [hereinafter *Cullet*] (emphasis added).

[75] Case C-108/09, Ker-Optika bt v. ÀNTSZ Dél-dunántúli Regionális Intézete, judgment of 2 December 2010 [hereinafter *Ker-Optika*] (noting that hence the Hungarian measure was discriminatory).

[76] *Id.* at para. 54 (noting the requirements laid down by the Hungarian law for the marketing of contact lenses affected the selling of imported products to a greater degree than the domestic product) (emphasis added).

[77] Case 207/83, Comm'n v. United Kingdom of Great Britain and Northern Ireland, 1985 E.C.R. 1201, para 18.

[78] TFEU, *supra* note 1, at art. 34.

[79] *See Rewe-Zentral*, 1979 E.C.R. 649, para. 14 (introducing this principle); *see, e.g.*. Case C-390/99, Canal Satélite Digital SL v. Adminstración General del Estado; Distribuidora de Televisión Digital SA (DTS), 2002 E.C.R. I-607; Case C-123/00, Bellamy and English Shop Wholesale, 2001 E.C.R. I-2795, para. 18.

of market access.[80] The concept that "[t]here is therefore no valid reason why [goods], provided that they have been lawfully produced and marketed in one of the Member States . . . should not be introduced into any other Member State" is imbued with notions of market access.[81] In jurisprudence wherein there has been a reliance on the principle of *mutual recognition*, a respect for the principle of market access has been more prominent. For example, in *Criminal proceedings against Jan-Erik Anders Ahokainen and Mati Leppik*, a Finnish system of prior authorisation with respect to the import of ethyl alcohol was held "capable of . . . *impeding access* to the market for goods."[82] In *Commission v. Portugal*, the

---

[80] *Commission v. Italy*, 2009 E.C.R. I-519, para. 34 ("It is also apparent from settled caselaw that Article 28 EC [now TFEU 34] reflects the obligation to respect the principle of . . . mutual recognition of products lawfully manufactured and marketed in other Member States, *as well as* the principle of ensuring free access of Community products to national markets." (emphasis added)).

[81] *Rewe-Zentral*, 1979 E.C.R. 649, para. 14. The use of the market access principle is in evidence on many occasions. *See, e.g.*, Case 27/80, Criminal proceedings against Anton Adriaan Fietje, 1980 E.C.R. 3839, para. 15; Case 53/80, Officier van justitie v. Koninklijke Kaasfabriek Eyssen BV, 1981 E.C.R. 409, para. 11 ("In view of this disparity of rules it cannot be disputed that the prohibition by certain Member States of the marketing on their territory of processed cheese containing added nisin is of such a nature as to affect imports of that product from other Member States where, conversely, the addition of nisin is wholly or partially permitted and that it for that reason constitutes a measure having an effect equivalent to a quantitative restriction."); Case 6/81, BV Industrie Diensten Groep v. J.A. Beele Handelmaatschappij BV, 1982 E.C.R. 707, paras. 6–7; Case 261/81, Walter Rau Lebensmittelwerke v. De Smedt PVBA, 1982 E.C.R. 3961, para. 20 (noting the principle of mutual recognition was in operation, where a Belgian packaging measure was held unlawful in application to margarine imports "lawfully produced and marketed in [other Member] state[s]"); Case 788/79, Criminal proceedings against Herbert Gilli and Paul Andres, 1980 E.C.R. 2071, para. 12; Case 220/81, Criminal proceedings against Timothy Frederick Robertson and others, 1982 E.C.R. 2349, para. 12; Case C-293/93, Criminal proceedings against Ludomira Neeltje Barbara Houtwipper, 1994 E.C.R. I-4249, paras. 14–15 (respecting a law indicating their fineness in relation to the quantity of pure precious metal used); Case C-30/99, Comm'n v. Ireland, 2001 E.C.R. I-4619, para. 30; Case C-12/00, Comm'n v. Kingdom of Spain, 2003 E.C.R. I-459, para. 80 (holding the prohibition on the sale of cocoa and chocolate products to which vegetable fats other than cocoa butter had been added being marketed as "chocolate" in Spain liable to obstruct intra-Community trade in those products lawfully manufactured in other Member States); Case C-14/00, Comm'n v. Italian Republic, 2003 E.C.R. I-513, paras. 70–78; Case C-366/04, Georg Schwarz v. Bürgermeister der Landeshauptstadt Salzburg, 2005 E.C.R. I-10139, paras. 29–30 (respecting the principle of "mutual recognition" which underpinned the judgment that an Austrian measure prohibiting the sale from vending machines of non-packaged products from vending machines was a hindrance to trade, noting "*those same goods* can be marketed abroad, in particular in Germany, *without packaging*" (emphasis added)); *see also* Case 178/84, Comm'n v. Fed. Republic of Germany, 1987 E.C.R. 1227, para. 29; Case 176/84, Comm'n v. Hellenic Republic, 1987 E.C.R. 1193, para. 31 (relying on the principle of mutual recognition which operated to render unlawful a Greek law prohibiting marketing of imported beers manufactured from materials other than those stipulated from domestic law); Case 130/80, Criminal proceedings against Fabriek voor Hoogwaardige Voedingsprodukten Kelderman BV, 1981 E.C.R. 527, para. 16.

[82] Case C-434/04, Criminal proceedings against Jan-Erik Anders Ahokainen and Mati Leppik, 2006 E.C.R. I-9171, para. 21. There was a respect too in this instance for the principle of mutual recognition. The national law was capable of "impeding access to the market for goods which are *lawfully produced and marketed* in other Member States." *Id.* (emphasis added). It is noted that the Finnish measure was also considered a "*restriction on trade*." *Id.* at para. 22 (emphasis added).

refusal to recognise the equivalence of approval certificates[83] issued by another Member State was held to "*restrict access to the market*" of the host state.[84] An obligation to obtain a transfer license prior to using an imported vehicle was held in *Commission v. Republic of Finland* to be "capable of hindering intra-Community trade in motor vehicles and *impeding access to the market* for goods which are lawfully produced and/or sold in other Member States."[85] Finally in *Commission v. Belgium*, a Belgian requirement relating to the prior approval of automatic fire detection systems was held to "restrict . . . access to the market of the importing Member State."[86]

III. Selling Arrangements: Market Access

1. Scrutiny

Positioning the principle of market access within the jurisprudence relating to the free movement of goods[87] requires an examination of the position of the selling arrangement in this context. The judgment of *Keck and Mithouard*[88] introduced the concept of the selling arrangement into the jurisprudence relating to the free movement of goods.[89] *Keck* held that a category of measures—"certain selling arrangements"[90]—would fall outside the scrutiny of Article 34 TFEU.[91] The concept of the "certain selling arrangement" provided an exception to the armoury of Article 34 TFEU in the attack on national measures that hinder free movement. A precondition to the operation of the selling arrangement is the requirement that the national measure under scrutiny is nondiscriminatory and does not

---

[83] Case C-432/03, Comm'n v. Portuguese Republic, 2005 E.C.R. I-9665 (relating to polyethylene pipes).

[84] *Id*. at para. 41 (emphasis added).

[85] Case C-54/05, Comm'n v. Finland, 2007 E.C.R. I-2473, para. 32 (emphasis added).

[86] Case C-254/05, Comm'n v. Belgium, 2007 E.C.R. I-4269, para. 41.

[87] TFEU, *supra* note 1, at art. 34.

[88] *Keck and Mithouard*, 1993 E.C.R. I-6097, para. 16.

[89] TFEU, *supra* note 1, at art. 34.

[90] *Keck and Mithouard*, 1993 E.C.R. I-6097, para. 16 ("National provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment (Case 8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.").

[91] *Dassonville*, 1974 E.C.R. 837, para. 5. (remaining inside that scrutiny, therefore, are product requirements, or "requirements to be met" by the goods, such as such as those relating to designation, form, size, weight, composition, presentation, labeling, and packaging, and residual rules to the extent that they fall within the definition of a measure having equivalent effect as given in *Dassonville*).

prevent the access of the imported good[92] to the host market. A national measure that satisfies the criteria for a "selling arrangement" is removed from the scrutiny of Article 34 TFEU, and therefore regarded as lawful. The jurisprudence of the free movement of goods since *Keck*[93] is littered with examples of national measures which have been deemed "certain selling arrangements."[94] Later cases such as *Commission v. Italy*[95] and *Mickelsson*[96] affected the concept of the selling arrangement and the relationship that this concept enjoys vis-à-vis the principle of market access. In both cases, the characterization of the measures as "selling arrangements" was based upon "traditional" application of

---

[92] *Keck and Mithouard*, 1993 E.C.R. I-6097, para. 16 ("By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.").

[93] *Id.*

[94] *See* Case C-401/92, Criminal proceedings against Tankstation 't Heukske vof and J. B. E. Boermans, 1994 E.C.R. I-2199, para. 15 (determining that a Dutch law relating to the opening hours of shops fell into the category of "certain selling arrangements"); *see also* Case C-391/92, Comm'n v. Greece, 1995 E.C.R. I-1621, para. 21 (applying the same "classification" to a reservation that processed milk be sold only in pharmacies); Case C-292/92, Hünermund and others v. Landesapothekerkammer Baden-Württemberg, 1993 E.C.R. I-6787 [hereinafter *Hünermund* case] (regarding the German advertising rules prohibiting the advertising of quasi-pharmaceutical outside); Case C-412/93, Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA, 1995 E.C.R. I-179, para 48 (concerning French measures relating to television advertising); Case C-418/93, Semeraro Casa Uno Srl v. Sindaco del Comune di Erbusco et al, 1996 E.C.R. I-2975, para. 28 (concerning Italian legislation relating to shop opening times); Case C-387/93, Criminal proceedings against Giorgio Domingo Banchero, 1995 E.C.R. I-4663, paras. 34–35 (concerning Italian customs legislation limiting tobacco sales to authorised retailers); Joined Cases C-69/93 & C-258/93, Punto Casa SpA v. Sindaco del Comune di Capena et Comune di Capena and Promozioni Polivalenti Venete Soc. Coop, 1994 E.C.R. I-2355, para. 15. (concerning Italian measures relating to Sunday retail closing hours). For further examples of "selling arrangements," see Case C-441/04, A-Punkt Schmuckhandels GmbH v. Claudia Schmidt, 2006 E.C.R. I-2093, para. 17 (relating to an Austrian prohibition on the door stop selling and collecting of silver jewelry); Case C-63/94, Groupement National des Négociants en Pommes de Terre de Belgique v. ITM Belgium SA and Vocarex SA, 1995 E.C.R. I-2467 (relating to Belgian measures which related to the sale of potatoes with a low profit margin); Case C-20/03, Criminal proceedings against Marcel Burmanjer, René Alexander Van Der Linden and Anthony De Jong, 2005 E.C.R. I-4133 (relating to measures by Belgium relating to the obtaining of prior authorisation with respect to the itinerant sales of subscriptions to periodicals); Case C-6/98, Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) v. PRO Sieben Media AG, supported by SAT 1 Satellitenfernsehen GmbH, Kabel 1, K 1 Fernsehen GmbH, 1999 E.C.R. I-7599, paras. 48, 51 (relating to a rule concerning the net principle with respect to television broadcasters was held to concern "selling arrangement"); Case C-71/02, Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH, 2004 E.C.R. I-3025, para. 39 (concerning Austrian legislation prohibiting references in advertisements to the commercial origin of goods was similarly classified so as to fall beyond the clutches of Article 28 EC (now TFEU art. 34), and in holding that the national legislation was not subject to Article 28 EC scrutiny, the judgment respected the balance between the interests of freedom of expression and " each of the goals justifying restrictions on that freedom").

[95] *Commission v. Italy*, 2009 E.C.R. I-519.

[96] *Mickelsson*, 2009 E.C.R. I-4273.

Article 28 EC (now Article 34 TFEU) rather than the application of the principles established in *Keck*. The respective Swedish and Italian measures were held to have the "effect of *hindering the access* to the domestic market" in relation to personal watercraft[97] and to trailers specially designed for motorcycles.[98] It is noted that in the recent judgment of *Commission v. Portugal*,[99] for example, the invitation by Portugal to categorise the "restriction" on the free movement of capital as a "selling arrangement" was ignored. The measure, though applying equally to both residents and non-residents, was held to *affect access*[100] to the market place because it had been effective to deter the non-resident investor.

2. Market Access: Identification

In both *Commission v. Italy* and *Mickelsson*, the Court of Justice showed a willingness to engage with the principle of market access in the process of determining the legality of a national measure with respect to the application of Article 34 TFEU. Such engagement appears significant, because the Court could have arguably engaged more readily with the principle of the "selling arrangement."[101] In *Commission v. Italy*,[102] the nondiscriminatory national rule was held a "measure having equivalent effect"[103] on the basis that it had "a considerable influence on the behaviour of consumers, which, in its turn, *affects the access of that product to the market* of that Member State."[104]

---

[97] *Id.* at para. 28. Note, however, that the Opinion of Advocate General Kokott in *Mickelsson* concluded that that the Swedish measures relating to the use of watercraft be regarded as *arrangements for use for products* falling into the "selling arrangement" category "so long as it applies to all relevant traders operating within the national territory and so long as it affects in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States, and is not product-related." *Id.* at para. 114(2).

[98] *Commission v. Italy*, 2009 E.C.R. I-519, para. 58. Both national laws could be considered to be "measures having equivalent effect" and hence unlawful; subject to "justification pursuant to Article 30 EC [now TFEU art. 36] or . . . overriding public interest requirements." *Mickelsson*, 2009 E.C.R. I-4273, para. 28; *see also Commission v. Italy*, 2009 E.C.R. I-519, para. 58 (having a similar application).

[99] Case C-212/09, Comm'n v. Portuguese Republic, judgment of 10 November 2011 [hereinafter *Comm'n v. Portugal*].

[100] *Id.* at para. 65.

[101] *See Mickelsson,* 2009 E.C.R. I-4273, para. 44 (Advocate General Kokott's remarks).

[102] *Commission v. Italy*, 2009 E.C.R. I-519, para. 24.

[103] *Id.* at para. 58. *See also* TFEU, *supra* note 1, at art. 34 (providing "quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States").

[104] *Commission v. Italy*, 2009 E.C.R. I-519, para. 56. The Court also relied on the judgment of *Commission v. Italy* in *Mickelsson*, in which a restriction on the use of personal watercraft was likewise held to be a "measure having equivalent effect." *Mickelsson*, 2009 E.C.R. I-4273, para. 24.

Such willingness to engage with the principle of market access in *Commission v. Italy*[105] and *Mickelsson*[106] may prove to be significant in the context of questions relating to the future use of the concept of the "selling arrangement" in particular, and for the wider sphere relating to the jurisprudence of goods, in general. To date, there has been an evident respect within the jurisprudence relating to the concept of the "selling arrangement." In *Hünermund and others v. Landesapothekerkammer Baden-Württemberg*,[107] for example, "selling arrangements"—here, national prohibitions on advertising of non-medical products outside pharmacies—were held not to affect the *access* of the imported product to the German market place.[108] In *Criminal proceedings against Tankstation't Heukske vof and J. B. E. Boermans*,[109] while the conditions laid down in *Keck* were technically "fulfilled,"[110] the Court held that "[t]he application of such rules to the sale of products from another Member State meeting the requirements laid down by that State *is not* by nature such as to *prevent their access to the market or to impede access any more than it impedes the access of domestic products*."[111] In *Commission v. Greece*, there was an acknowledgment that the national legislation reserving the sale of processed milk for infants exclusively to pharmacies did not "thereby prevent . . . access to the market of products from other Member States or specifically place them at a disadvantage."[112] In *Semeraro Casa Uno Srl v. Sindaco del Comune di Erbusco et al*, in which the regulation of the opening hours of retail outlets was held to be a selling arrangement, it was found that "[t]here is *no evidence* that the aim of the rules at issue is *to regulate trade* in goods between Member States or that, viewed as a whole, they could lead to unequal treatment between national products and imported products as regards *access to the market*."[113] Likewise, Italian legislation reserving "the retail sale of manufactured tobacco products,

---

[105] *Commission v. Italy*, 2009 E.C.R. I-519.

[106] *Mickelsson*, 2009 E.C.R. I-4273.

[107] Case C-292/92, Hünermund and others v. Landesapothekerkammer Baden-Württemberg, 1993 E.C.R. I-6787.

[108] *Id.* at paras. 19, 21, 22 ("It is not the purpose of a rule of professional conduct prohibiting pharmacists from advertising quasi-pharmaceutical products outside the pharmacy, drawn up by a professional association, to regulate trade in goods between Member States."). *See also* Opinion of Advocate General Tesauro, *Hünermund*, para. 29(c).

[109] Joined cases C-402/92 & C-401/92, Criminal proceedings against Tankstation 't Heukske vof and J. B. E. Boermans, 1994 E.C.R. I-2199 [hereinafter *Boermans* case].

[110] *Id.* at para. 18.

[111] *Id.* (emphasis added).

[112] Case C-391/92, Comm'n v. Hellenic Republic, 1995 E.C.R. I-1621, para. 20.

[113] Case 418/83, Semeraro Casa Uno Srl v. Sindaco del Comune di Erbusco et al., 1996 E.C.R. I-2975, para. 24 (emphasis added). *See also* Joined Cases C-69/93 & C- 258/93, Punto Casa SpA v. Sindaco del Comune di Capena and Comune di Capena et al., 1994 E.C.R. I-2355, para. 12 (relating to Italian legislation on the closure of retail outlets on Sundays in which this issue was decided in the same manner).

irrespective of their origin, to authorized distributors . . . does *not* thereby *bar access to the national market* for products from other Member States or does *not impede such access* more than it impedes access for domestic products within the distribution network."[114] In *Douwe Egberts*, a Belgian law which prohibited the advertising of product characteristics was held liable *to impede access* of the imported foodstuff more than the domestic product.[115] Further, in *A-Punkt Schmuckhandels GmbH v. Claudia Schmidt*, whether imported goods in relation to jewelry sales were affected to a greater degree than the domestic Austrian jewelry[116] by a law relating to doorstop selling was left for the national court to determine.[117]

3. Advocate General Jacobs

Advocate General Jacobs, in his opinion in *Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA,*[118] argued that the "selling arrangement"—a French measure relating to broadcasting[119]—would fall outside the scope of Article 28 EC[120] on an alternative basis.[121] Although the restriction on shop opening hours may have resulted "in

---

[114] Case C-387/93, Criminal proceedings against Giorgio Domingo Banchero, 1995 E.C.R. I-4663, para. 44 (emphasis added). *See also* Case C-93/94, Groupement National des Négociants en Pommes de Terre de Belgique v. ITM Belgium SA and Vocarex SA, 1995 E.C.R. I-2467, para. 12 (noting how a Belgian rule prohibiting the sale of potatoes at a very low profit margin was held in to be a selling arrangement as it was "not by nature such as to prevent access [of goods] to the market or to impede access any more than it impedes the access of domestic products").

[115] Case C-239/02, Douwe Egberts NV v. Westrom Pharma NV and Christophe Souranis, Carrying on Business Under the Commercial Name of "Etablissements FICS' and Douwe Egberts NV v. FICS- World BVBA, 2004 E.C.R. I-7007, paras. 53–54.

[116] Case C-441/04, A-Punkt Schmuckhandels GmbH v. Claudia Schmidt, 2006 E.C.R. I-2093, para. 25. *See also id.* at para. 23 ("Such a provision constitutes a measure having equivalent effect only if the exclusion of the relevant marketing method affects products from other Member States more than it affects domestic products.").

[117] *Id.* at para. 25.

[118] Case C-412/93, Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA, 1995 E.C.R. I-179 [hereinafter *Leclerc-Siplec*].

[119] *Id.* at paras. 22–24.

[120] See TFEU art. 34 (replacing EC art. 28).

[121] Opinion of Advocate General Jacobs, *Leclerc-Siplec*, 1995 E.C.R. I-179, para. 55 (explaining his view that the measure fell outside the scope of Art 30 EC (now Art 34 TFEU) because "[t]he restriction affects only one form of advertising, although the most effective as far as mass consumer goods are concerned and advertisement of the goods themselves is not affected other than indirectly. As in the case of legislation restricting the opening hours of shops . . . the measure may result in a slight reduction in the total volume of sales of goods, including imports. But it *cannot be said to have a substantial impact on access to the market*. It therefore falls in my view outside the scope of Article 30.")(emphasis added).

a slight reduction in the total volume of sales of goods, including imports,"[122] the Advocate General was of the opinion that "it cannot be said to have a substantial impact on access to the market."[123] The Advocate General was of the view that "one guiding principle"[124] existed in the application of Article 34 TFEU,[125] noting that "all undertakings which engage in a legitimate economic activity in a Member State should have *unfettered access* to the whole of the Community market."[126] Such a view defers to the operation of the principle of market access; its acceptance by the Court would have had ramifications for the continued maintenance of the concept of the selling arrangement. The test, the Advocate General argued, should be stated as follows: "If the principle is that all undertakings should have unfettered access to the whole of the Community market, then the appropriate test in my view is whether there is a *substantial restriction* on that *access*."[127] Advocate General Jacobs concluded that the adoption of this reasoning in situations which would otherwise have involved considerations relating to the selling arrangement would "amount to introducing a de minimis test into Article 30 [now Article 34 TFEU]."[128] This observation possibly now should be tempered in view of the more recent judgment in *Commission v. Germany*.[129] In similar circumstances,[130] the Court held that the contested measures were liable to hinder intra-Community trade and hence were to be considered "measures having equivalent effect."[131] Such was "*without it being necessary* to prove that they have had an appreciable effect on such trade."[132] Nevertheless, it is clear that, for

---

[122] *Id*.

[123] *Id*.

[124] *Id*. at para. 41.

[125] *See* EC art. 30.

[126] Opinion of Advocate General Jacobs, *Leclerc-Siplec*, 1995 E.C.R. I-179, para. 41 (emphasis added).

[127] *Id*. at para. 42 (emphasis added). The opinion continues: "Once it is recognized that there is a need to limit the scope of Article 30 (now Art 34 TFEU) in order to prevent excessive interference in the regulatory powers of the Member States, a test based on the extent to which a measure hinders trade between Member States by restricting market access seems the most obvious solution." *Id*.

[128] *Id*. at para. 42.

[129] Case C-141/07, Comm'n v. Fed. Republic of Germany, 2008 E.C.R. I-6935 [hereinafter *Comm'n v. Germany*].

[130] *Id*. at para. 35 (noting that arrangements for sale of medicinal products held to make the supply of medical products to German hospitals more difficult and more costly for pharmacies established outside Germany).

[131] TFEU, *supra* note 1, at art. 34.

[132] Case C-141/07, Comm'n v. Fed. Republic of Germany, 2008 E.C.R. I-6935, para. 43 (emphasis added). *See also* Case C-166/03, Comm'n v. France, 2004 E.C.R. I-6535, para. 15. Elsewhere there are express statements that even minor restrictions are prohibited and that the effects of a national measure do not need to be appreciable. *See, e.g.*, Case C-309/02, Radlberger Getränkegesellschaft mbH & Co. and S. Spitz KG v. Land Baden-Württembergpara, 2004 E.C.R. I-11763, para. 68 (rejecting a suggestion that the slight effect of rules or the

Advocate General Jacobs, what is of consequence is h*ow* substantial the restriction[133] on the free movement right has been. A significant obstacle to free movement is caught within the application of Article 34 TFEU; an insignificant obstacle would not be so caught and would therefore be regarded as lawful.[134] The Court of Justice did not, however, accept the test proposed by Advocate General Jacobs. It had previously rejected the idea that slight hindrances could escape the scrutiny of Article 34 TFEU,[135] and, in *Leclerc-Siplec*, the Court followed the *Keck* approach.

However the Court finally settles the balance in the resort to the concept of the selling arrangement vis-à-vis that of the principle of market access, for the present it is an issue that remains to be determined. The perception of commentators is that the judgments in *Commission v. Italy* and *Mickelsson* have at least renewed the discussion as to the future direction of the selling arrangement through the appeal in those judgments to the principle of market access.[136] As a consideration in that context, the assessment of legality of the national measure by the yardstick of market access would, for example, leave unsullied the classification of national measures in *Commission v. Greece*[137] and *Semeraro Casa Uno Srl v. Sindaco del Comune di Erbuscoet al*[138] as "selling arrangements."[139]

---

availability of marketing of the products could remove the measures from the ambit of Article 34 TFEU); Case 177/82, Criminal proceedings against Jan van de Haar and Kaveka de Meern BV, 1984 E.C.R. 1797, para. 14; Case C-212/06, Gov't of Communauté française and Gouvernement wallon v. Gouvernement flamand, 2008 E.C.R. I-1683, para. 51 (in the context of the free movement of persons).

[133] Case C-141/07, Comm'n v. Fed. Republic of Germany, 2008 E.C.R. I-6935 (noting a substantial restriction to market access could include product rules and, for example, the requirement to alter the import in the host state).

[134] *See* Jukka Snell, *The Notion of Market Access: A Concept or a Slogan?,* 47 COMMON MKT. L. REV. 437, 450, 455–60 (2010).

[135] Joined Cases 177 & 178/82, Criminal proceedings against Jan van de Haar and Kaveka de Meern BV, 1984 E.C.R. 1797, para. 13.

[136] *See, e.g.*, Barnard, *supra* note 27, at 290; Snell, *supra* note 134, at 437–72, 455–58; Eleanor Spaventa, *Leaving* Keck *Behind? The Free Movement of Goods After the Rulings in* Commission v Italy *and* Mickelsson and Roos, 34 Eur. L. Rev. 914, 921 (2009); Alina Tryfonidou, *Further Steps on the Road to Convergence Among the Market Freedoms*, 35 EUR. L. REV. 36, 50 (2010); Pal Wenneras & Ketil Boe Moen, *Selling Arrangements, Keeping* Keck, 35 Eur. L. Rev 387, 399–400 (2010).

[137] Case C-391/92, Comm'n v. Hellenic Republic, 1995 E.C.R. I-1621, para. 20.

[138] Case 418/93, Semeraro Casa Uno Srl v. Sindaco del Comune di Erbuscoet al, 1996 E.C.R. I-2975, paras. 24, 28. *See also* Joined Cases C-69/93 & C-258/93, Punto Casa SpA v. Sindaco del Comune di Capena and Comune di Capena et al., 1994 E.C.R. I-2355, para. 12 (relating to Italian legislation on the closure of retail outlets on Sundays which this issue was decided in the same manner).

[139] *Semeraro*, 1996 E.C.R. I-2975, para. 24 (noting the national law "cannot . . . be regarded as limiting access to the market"). *See also* Case C-239/02, Douwe Egberts NV v. Westrom Pharma NV and Christophe Souranis, Carrying on Business Under the Commercial Name of "Etablissements FIC" and Douwe Egberts NV v. FICS-World

C. Commentary

I. General Support

It should be acknowledged that the general support for the principle of market access within the jurisprudence should be positioned against the background of an abiding respect for the principles of nondiscrimination and mutual recognition as elements in the process of the application of Article 34 TFEU to national measures. The judgment of *Commission v. Italy* was clear to reinforce the existence of such respect;[140] that reinforcement plays an important role in the assessment of the future prospects for the use of the principle of market access within the jurisprudence relating to the free movement of goods.[141] That aside, what is possibly of more significance to the instant context is the observation by academic writers that, in effect, the judgments of *Commission v. Italy* and *Mickelsson* signaled "that the notion of market access *may ultimately be the criterion defining the scope of art. 34 TFEU* (thus also in effect replacing *Dassonville*)."[142] The same writers argue that these two judgments may be seen as "a departure from orthodox jurisprudence and the beginning of a universal and strict 'market access' era."[143] Support for such a proposition may be had from Advocate General Jacobs in his opinion delivered in *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA*. The Advocate General argued "[t]here is *one guiding principle* which seems to provide an appropriate test: that principle is that all undertakings which engage in a legitimate economic activity in a Member State should have *unfettered access* to the whole of the Community market."[144] Rather of more importance for present circumstances was Advocate General Jacobs's contextualisation of the presence of this principle within the jurisprudence:

BVBA, 2004 E.C.R. I-7007, para. 53–54 (noting that an absolute prohibition on the advertising of characteristics of a product the national law was liable *to impede the access* of the imported foodstuff to the Belgian market, thus deserving scrutiny under Article 34 TFEU).

[140] *Commission v. Italy*, 2009 E.C.R. I-519, para. 34 ("It is also apparent from settled case-law that Article 28 EC reflects the obligation to respect the principles of nondiscrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States as well as the principle of ensuring free access of community products to national markets.").

[141] *Id.* (vis-à-vis the use of the other principles of nondiscrimination and of mutual recognition in the mechanics of the application of Article 34 TFEU).

[142] Wenneras & Moen, *supra* note 136, at 399–400.

[143] *Id.* at 387. *See also* Barnard, *supra* note 27; Thomas Horsley, *Anyone for* Keck*?* 46 COMMON MKT. L. REV. 2001 (2009); Spaventa, *supra* note 136, at 921; Peter Pecho, *Good-Bye* Keck*?: A Comment on the Remarkable Judgment in* Commission v. Italy, C-110/05, 36 LEGAL ISSUES ECON. INTEGRATION 257 (2009); Snell, *supra* note 134, 455–60; Stephen Weatherill, *Free Movement of Goods*, 58 INT'L & COMP. L.Q. 985, 987 (2009).

[144] *Leclerc-Siplec*, 1995 E.C.R. I-179, para. 41 (emphasis added).

> In spite of occasional inconsistencies in the reasoning of certain judgments, that seems to be the underlying principle which has inspired the Court's approach from *Dassonville* through *Cassis de Dijon* to *Keck*. *Virtually all* of the cases are, in their result, *consistent with the principle*, even though some of them *appear to be based on different reasoning*.[145]

Further indirect support for the proposition made by Wenneras and Moen may be had from *Commission v. Italy*, in which it was held that Article 34 TFEU not only respects the principles of nondiscrimination and mutual recognition, but also renders unlawful "[a]ny other measure *which hinders access of products* originating in other Member States to the market of a Member State."[146]

II. Renaissance?

Commission v. Italy and *Mickelsson* offer strong evidence in support of the claim that there is a renaissance in the use of the market access principle. Whether, however, it is a renaissance at the expense of the other available means[147] of proving the compatibility of national measures with Treaty free-movement provisions is another matter. It may yet be too early to suggest that, in such an equation of application, the two principles of nondiscrimination and mutual recognition could suffer the indignity of relegation to the role of bit-part players. Both principles have an integral part to play in locating the legality of national measures within the jurisprudence of goods.[148] Arguably, according automatic prominence to the principle of market access in such circumstances may serve to obfuscate, in particular instances, the rationale for the application of Article 34 TFEU. The cause of the failure in particular instances of the imported goods to gain access to the host market may in reality arise from the presence of discrimination in the national measure against the imported product. Any obfuscation of the causal reality for a ruling of illegality would not serve well the cause of transparency in such matters; such a result may also not be intended by the Court of Justice. The continued use of the principles of nondiscrimination and mutual recognition in the equation that is the application of Article 34 TFEU not only gains credence by circumstances of the appropriate acknowledgment in

---

[145] *Id.* (opinion of Advocate General Jacobs) (emphasis added).

[146] *Commission v. Italy*, 2009 E.C.R. I-519, para. 37 (emphasis added). *See also* Wenneras & Moen, *supra* note 136, at 398 (2010) (alluding to this aspect).

[147] For example, nondiscrimination and mutual recognition.

[148] TFEU, *supra* note 1, at art. 34.

Commission v. Italy,[149] but also, as illustrated previously in this article, by the infusion of those principles within the jurisprudence of goods.[150]

There is too abundant evidence that the respect for those principles will continue. It will be recalled that Article 34 TFEU[151] provides that "[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."[152] This provision is the blank canvas upon which the Court has been able to write its script in the promotion of the free movement of goods. It is a promotion which has employed and developed an eclectic descriptive terminology with respect to the national measure. Measures have been held unlawful[153] where they restrict,[154] hinder,[155] or act as a barrier[156] or obstacle[157] to the exercise of the free movement right. The adoptive nomenclature is

---

[149] *Commission v. Italy*, 2009 E.C.R. I-519.

[150] TFEU, *supra* note 1, at art. 34.

[151] *See also* EC art. 28 (replaced by TFEU art. 34).

[152] TFEU, *supra* note 1, at art. 34.

[153] Although facially some measures would be found unlawful because of their effects on trade, the Court may not hold them unlawful if those measures can be *justified*. In the context of *goods*, justification of national measures is accomplished either through the application of Article 36 TFEU or through the concept of the mandatory requirement. Article 36 TFEU provides: "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States." Mandatory requirements introduced and identified in *Rewe-Zentral* as "relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer." *Rewe-Zentral*, 1979 E.C.R. 649.

[154] In *Joh. Eggers Sohn & Co. v. Freie Hansestadt Bremen*, for example, the national law was held a *restriction* which "merely consolidates the partitioning of the markets." Case 13/78, Joh. Eggers Sohn & Co. v. Freie Hansestadt Bremen, 1978 E.C.R. 1935. The same rationale was applied in *Cullet*, 1985 E.C.R. 305; Case 4-75, Rewe-Zentralfinanz eGmbH v. Landwirtschaftskammer, 1975 E.C.R. 843; Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich, 2003 E.C.R. I-5659.

[155] Note the *Dassonville* formula with respect to defining the "measures having an equivalent effect" for Article 34 TFEU purposes. *Dassonville*, 1974 E.C.R. 837. *See also* Case C-17/93, Criminal proceedings against J.J.J. Van der Veldt, 1994 E.C.R. I-3537 [hereinafter *Van der Veldt*]; Joined Cases C-158/04 & C-159/04, Alfa Vita Vassilopoulos AE v. Elliniko Dimosio, 2006 E.C.R. I-8135 [hereinafter *Alfa Vita*]; *Comm'n v. Germany*, 2008 E.C.R. I-6935; Case C-192/01, Comm'n v. Denmark, 2003 E.C.R. I-9693 [hereinafter *Comm'n v. Denmark*].

[156] *See* Case C-387/99, Comm'n v. Germany, 2004 E.C.R. I-3751 [hereinafter *German Vitamins Case*]; Case C-150/00, Comm'n v. Austria, 2004 E.C.R. I-3887 [hereinafter *Austrian Vitamins Case*]; Case C-389/96, Aher-Waggon GmbH v. Bundesrepublik Deutschland, 1998 E.C.R. I-4473; Case C-297/05, Comm'n v. Netherlands, 2007 E.C.R. I-7467; Alfa Vita, 2006 E.C.R. I-8135.

[157] *See Cullet*, 1985 E.C.R. 305; *Comm'n v. Germany*, 2008 E.C.R. I-6935; Case 153/78, Comm'n v. Germany, 1979 E.C.R. 2555; Case 68-76, Comm'n v. France, 1977 E.C.R. 515; Criminal proceedings against Herbert Gilli and Paul

wide enough to embrace allusions to any, all, or a combination of the principles of discrimination, mutual recognition or market access in the context of the enquiry process involved in the application of Article 34 TFEU to national measures. It is, it seems, a nomenclature that is anything but prescriptive in context. It arguably permits the possibility of access not to just one, but rather to a range of principles available to measure the legality of the national measure in question. Stirring into the pot of enquiry a range of ingredient principles arguably strengthens the potency of the application of Article 34 TFEU. The adoption of such eclectic nomenclature descriptive of national measures allows for the promotion not only of the principle of market access [158] in such matters, but also of the maintenance of a continuing respect for the principle of nondiscrimination [159] and of mutual recognition[160] as integral parts of the equation. Such an inclusive equation arguably represents a more honest intent of Treaty aspirations with respect to the free movement of goods.[161] The judgments of *Commission v. Italy*[162] and *Mickelsson*[163] arguably appear to have arrested an unbridled march of the use of the concept of the "selling arrangement" which has in some ways trampled through the jurisprudence relating to goods. While the emphasis in these two judgments on the principle of market access

---

Andres, 1980 E.C.R. 2071; Criminal proceedings against Fabriek voor Hoogwaardige Voedingsprodukten Kelderman BV, 1981 E.C.R. 527.

[158] Note the reference to the position occupied by these two principles in the jurisprudence relating to the free movement of goods in *Commission v. Italy*. *See Commission v. Italy*, 2009 E.C.R. I-519.

[159] *See* Case 20/64, SARL Albatros v. Société des pétroles et des combustibles liquides (Sopéco), 1965 E.C.R. 29. In the first instance, subdivisions of direct and indirect discrimination were identified and developed by the Court of Justice. The terminology used was distinctly and indistinctly applicable. The classification, at least in the initial jurisprudence, had important consequences for the process of the *justification* of such measures. *See* Commission Directive 70/50 1969 O.J. (L 13) 29 (EC). Note the recent statement by the Court that "in order to provide the referring court with a useful answer, the questions referred must be examined from the perspective of Article 12 EC, [now Article 18 TFEU] which enshrines the general principle of nondiscrimination on grounds of nationality." Case C-382/08, Neukirchinger v. Bezirkshauptmannschaft Grieskirchen, judgment of 25 January 2011 [hereinafter *Neukirchinger*]. For the recourse to that principle, see Case C-531/07, Fachverband der Buch-und Medienwirtschaft v. LIBRO Handelsgesellschaft mbH, 2009 E.C.R. I-3717 [hereinafter *Fachverband*].

[160] *See, e.g.*, *German Vitamins Case*, 2004 E.C.R. I-3751; *Comm'n v. Denmark*, 2003 E.C.R. I-9693; *Van der Veldt*, 1994 E.C.R. I-3537; Case C- 457/05, Schutzverband der Spirituosen-Industrie eV v. Diageo Deutschland GmbH, 2007 E.C.R. I-8075; Case C-358/95, Morellato v. Unità sanitaria locale (USL) n. 11 di Pordenone, 1997 E.C.R. I-1431; Austrian Vitamins Case, *supra* note 156; Rewe-Zentral AG, *supra* note 5; Criminal proceedings against Fabriek voor Hoogwaardige Voedingsprodukten Kelderman BV, 1981 E.C.R. 527; Georg Schwarz v. Bürgermeister der Landeshauptstadt Salzburg, 2005 E.C.R. I-10139.

[161] Given the internal market, presumably the same arguments could be applied in relation to applications of the Treaty provisions relating to: goods, TFEU art. 34; workers, TFEU art. 45; services, TFEU art. 56; establishment, TFEU art. 49; and capital, TFEU art. 63. The internal market "shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties." TFEU, *supra* note 1, at art. 26(2).

[162] *See Comm'n v. Italy*, 2009 E.C.R. I-519.

[163] *See Mickelsson*, 2009 E.C.R. I-4273.

may yet signify resurgence in the use of that principle, there is some argument for suggesting that recourse to that principle cannot be to the detriment of a respect for the principles of nondiscrimination or mutual recognition. Further, if there is to be a triumvirate of principles—market access, nondiscrimination and mutual recognition—available to the Court in such matters, the principle of market access should not be positioned at its pinnacle. Rather, in the process of scrutinizing the national measure for compatibility with Treaty free movement rights in relation to goods,[164] it should be positioned as but one of a number of principles from which the Court may choose for appropriate usage where a hindrance to the free movement of goods[165] is suspected at the national level.

Jurisprudentially, the availability of a variety of principles under which the Court can scrutinize national measures alleged to impede free movement of goods is to be welcomed. On a micro level, this variety presents an array of principles from which the attack on the national measure can be launched. On a macro basis, the availability of the three principles—market access, nondiscrimination, and mutual recognition—potentially will increase the potency and penetration of the Treaty's promise of free movement of goods.[166]

Rather than the Court nailing its colours solely to the mast of "market access," the adoption of a broader approach to the scrutiny of national measures would translate into the Court gaining/retaining a much greater flexibility in the process of scrutinizing national measures suspected of hindering the free movement of goods. In this context, the observation by Wenneras and Moen that *Commission v. Italy* and *Mickelsson* are generally viewed as signaling that "the notion of 'market access' may ultimately be the criterion defining the scope of [Article] 34 TFEU (thus also in effect replacing *Dassonville*)"[167] might indeed prove to be correct. Nevertheless, were this to transpire in the jurisprudence, it is arguable that the Court would be robbed of a certain amount of litheness in its ability to respond to suspicions that hindrances to imports have occurred at the national level.

III. Market Access: Affecting Keck

Within the context of the free movement of goods,[168] commentators have expressed the view that the judgments of *Commission v. Italy* and *Mickelsson* have "introduced a strict

---

[164] TFEU, *supra* note 1, at art. 34.

[165] *Id.*

[166] *Id.*

[167] Wenneras, *supra* note 136, at 387.

[168] TFEU, *supra* note 1, at art. 34.

market access test, the effect of which is to replace or at least severely restrict the *Keck* doctrine."[169] The specific ways in which these judgments will prove to affect the future use of the *Keck* doctrine must, at this stage, remain uncertain. It would seem, however, that *Commission v. Italy* and *Mickelsson* do not reverse *Keck*;[170] rather, a more informed view may suggest that *Keck* is a judgment that should be confined within the limits of arrangements for sale.[171] Barnard notes that "other types of measures will therefore not benefit from the *Keck* presumption of legality, are likely to be considered rules hindering market access and so will breach Article 34,[172] leaving Member States to justify their existence."[173] With respect to national rules held to be hindering "market access," a recent example is provided by *Ker-Optika bt v. ÀNTSZ Dél-dunántúli Regionális Intézete*.[174] In *Ker-Optika*,[175] the Hungarian law was held to be categorised as "an arrangement for sale."[176] In that instance, the measure was not considered to be a "selling arrangement"[177] because national legislation "does not affect in the same manner the selling of contact lenses by Hungarian traders and such selling as carried out by traders from other Member States."[178] What is of more particular importance to present considerations is that the Court in *Ker-Optika* then proceeded to judgment on the basis that the deprivation by the national law of a means by which the importer could sell the product in Hungary "*significantly impedes access* of those traders to the market of the Member State concerned."[179] With respect to the concept of market access vis-à-vis the continued recourse to the principle of nondiscrimination in the context of the free movement of goods, it is arguable that

---

[169] Wenneras, *supra* note 136, at 387.

[170] *See Keck and Mithouard,* 1993 E.C.R. I-6097; *see also Fachverband*, 2009 E.C.R. I-3717.

[171] CATHERINE BARNARD, THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS 140 (3d ed. 2010).

[172] Such a view would strike an accord with the observation that the two judgments represent "a departure from orthodox jurisprudence and the beginning of a universal and strict market access era." Wenneras, *supra* note 136, at 387.

[173] "The Court appears to have adopted a new category of measure which is neither a product requirement nor a certain selling arrangement: measures which hinder 'access of products originating in other Member States to the market of a Member State.'" BARNARD, *supra* note 171, at 140.

[174] Case C-108/09, judgment of 2 December 2010.

[175] *Id.*

[176] *Id.*

[177] Note that, with respect to the "selling arrangement," the Court held that "[a]s regards the first condition, it is clear that the legislation applies to all relevant traders involved in selling contact lenses, which means that that condition is satisfied." *Id.*

[178] *Id.*

[179] Article 34 TFEU was applied on this basis. The onus was then on the state to *justify* the national measure. In this instance, it failed to do so on account of proportionality. *Id.*

Commission v. Italy and *Mickelsson* "have consolidated and clarified what was implicit in *Keck,* namely that [Article] 34 TFEU prohibits measures that discriminatorily, in law or in fact, restrict market access for imported products or which prevent/hinder market access."[180] At the same time, however, both judgments "ostensibly introduced a new category of measures falling within the scope of [Article] 34 TFEU, non-discriminatory measures which 'hinder access to the market.'"[181]

For the present, however, the intriguing prospect remains that there has finally been an attempt to restrict the influence of the concept of the "selling arrangement" and that future scrutiny of national measures other than those which may be categorised as "arrangements for sale" has been returned to the firmer footing of scrutiny clearly within the confines of Article 34.[182] Neither is the prospect of respecting the principle of market access in such circumstances necessarily detrimental to the cause of the use of the other principles in the application of Article 34 TFEU. While "*the most obvious solution*"[183] may indeed be the recourse to the use of market access test in such circumstances, it is an equation which would not preclude the use of the other principles of nondiscrimination and mutual recognition.[184]

D. Market Access: A Wider Theatre?

I. Introduction

The recent jurisprudence with respect to the free movement of goods appears in part at least both to have been refocused on the issues surrounding the re-establishment of the market access principle as a (crucial) component in the assessment of the legality of the national law under scrutiny. It has been argued that the market access tests of *Commission v. Italy* and *Mickelsson*, both delivered in 2009, appear to have severely restricted the *Keck* doctrine and have together signaled that the principle of market access may ultimately be adopted as the criterion which defines the scope of Article 34 TFEU.[185] These particular contemplations aside, even at a primary level of argument, the reemergence of the market access test within the jurisprudence of goods raises issues

---

[180] Wenneras, *supra* note 136, at 398.

[181] *Id*. at 399.

[182] TFEU, *supra* note 1, at art. 34.

[183] *Leclerc-Siplec*, 1995 ECR I-179 (as stated by Advocate General Jacobs).

[184] Note particularly the respect shown for these principles in *Commission v. Italy*, 2009 E.C.R. I-519.

[185] *But see* Wenneras, *supra* note 136, at 387.

which relate to the wider use of that test beyond the theatre of goods and to the use of that principle within the jurisprudence of persons,[186] services,[187] and capital.[188]

This next section considers the question of the realistic establishment of universal use relating to the principle of market access which would extend across all free-movement jurisprudence; a presentation of homogeneity with respect to the mechanics of the application of Treaty free-movement provisions to national measures.

This paper will now examine the jurisprudence relating to persons,[189] services,[190] and capital[191] and the use therein of the market access principle in the assessment of national measures in the context of the TEFU free-movement provisions. To place the use of the principle of market access in its proper context in relation to free movement jurisprudence in this wider theatre, this article will first assess the interpretation the Treaty demands with respect to the application of the free movement rights to national measures.

II. Restrictions

It is evident that the Treaty provisions which source free movement rights in relation to persons,[192] services,[193] and capital[194] bear reliance upon the prohibition of national measures which restrict free movement rights. For example, with respect to the right of the establishment of the migrant EU national in the host state, Article 49 TFEU provides: "Within the framework of the provisions set out below, *restrictions* on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited."[195] So too, with respect to the right of the migrant to supply services, Article 56 TFEU[196] provides: "Within the framework of the provisions set out below,

---

[186] *See* TFEU, *supra* note 1, at arts. 45, 49.

[187] *See id.* at art. 56.

[188] *See id.* at art. 63.

[189] *See id.* at arts. 45, 49.

[190] *See id.* at art. 56.

[191] *See id.* at art. 63.

[192] *See id.* at arts. 45, 49.

[193] *See id.* at art. 56.

[194] *See id.* at art. 63.

[195] *See id.* at art. 49.

[196] *See id.* at art. 56.

restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended."[197]

The prohibition of restrictions—the phraseology of the TFEU with respect to provisions establishing the right of free movement—is, in this context, reflected in jurisprudence which has upheld free movement rights. In the cause of locating the position of the principle of market access as a lubricant for the application of Treaty free movement rights, it should first be assessed how the Court has sought to extend the application of these provisions for national measures.

It is arguable that in the application of free movement principles to national measures, the Court of Justice has taken its cue from Treaty terminology. There is logic to this argument. The jurisprudence reflects the aims and terminology of the Treaty by clearly attacking the *restriction* to the free movement right presented by the national measure.[198]

In its assessment of the mechanics of application of Treaty free movement rights, this study now directs its attention to an analysis of the formulation of the free movement provisions[199] of the Treaty on the Functioning of the European Union.[200]

1. Treaty Provision: The Worker

The construction of the Treaty free movement provisions with respect to persons,[201] services,[202] and capital[203] lends focus on the prohibition of national measures which restrict the free movement right. Such focus has been reinforced in the jurisprudence of the Court of Justice. With respect to the freedoms relating to establishment and services, for example, it was held in *Commission v. France*[204] that "it must be recalled that Article 43

---

[197] *Id.* (emphasis added). With respect to the free movement of capital, "all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited." *Id.* at art. 63 (emphasis added).

[198] The Court of Justice has further equated the nomenclature of *restriction* with that of *obstacle*.

[199] *See* TFEU, *supra* note 1, at arts. 45, 49, 56, 63.

[200] *See* TFEU, *supra* note 1.

[201] *See id.* at arts. 45, 49.

[202] *See id.* at art. 56.

[203] *See id.* at art. 63.

[204] Case C-389/05, Comm'n v. France, 2008 E.C.R. I-5337 [hereinafter *Bovine Case*].

EC[205] requires the elimination of *restrictions* on the freedom of establishment,"[206] and that "Article 49 EC[207] requires . . . the abolition of *any restriction*"[208] on the right to provide services.

The terminology of *restriction* to the free movement right, presented within the Treaty free movement provisions relating to services, establishment, and capital, is not reflected in the terminology of Article 45 TFEU[209] with respect to the worker. That article provides merely that "[f]reedom of movement for workers shall be secured within the Union."[210] In this context, reference to (national) restrictions on such right is noticeably absent. This lacuna has nonetheless been filled by the Court of Justice, which has determined that the Treaty free-movement provision with respect to the *worker* is to operate in the same manner as the other Treaty free-movement provisions[211] relating to persons,[212] services,[213] and capital.[214]

The following analyzes the jurisprudence relating to free movement rights of establishment,[215] services,[216] workers,[217] and capital[218] focusing on an assessment of the restriction to the Treaty free movement right presented by the national measure.

---

[205] *See* TFEU, *supra* note 1, at art. 49; *see also* Case C-433/04, Comm'n v. Belgium, 2006 E.C.R. I-10653; Case C-208/05, ITC Innovative Tech. Ctr. GmbH v. Bundesagentur für Arbeit, 2007 E.C.R. I-181; Case C-219/08, Comm'n v. Belgium, 2009 E.C.R. I-9213 [hereinafter *Belgian Posting Case*].

[206] *Bovine Case*, 2008 E.C.R. I-5337 (emphasis added). *See also* C-442/02, CaixaBank France v. Ministère de l'Économie, des Finances et de l'Industrie, 2004 E.C.R. I-8961 [hereinafter *CaixaBank*]; Case C-79/01, Payroll Data Servs. Srl, ADP Europe SA & ADP GSI SA, 2002 E.C.R. I-8923 [hereinafter *Payroll*]; Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd., 2003 E.C.R. I-10155 [hereinafter *Kamer*].

[207] *See* TFEU, *supra* note 1, at art. 56.

[208] *Bovine Case*, 2008 E.C.R. I-5337 (emphasis added).

[209] *See* TFEU, *supra* note 1, at art. 45.

[210] *Id.*

[211] *See Comm'n v. France*, 1986 E.C.R. 1475.

[212] *See* TFEU, *supra* note 1, at art. 49.

[213] *Id.* at art. 56.

[214] *Id.* at art. 63.

[215] *Id.* at art. 49.

[216] *Id.* at art. 56.

[217] *Id.* at art. 45.

[218] *Id.* at art. 63.

2. Restrictions

2.1 Worker

Free movement jurisprudence remains focused on the removal of measures *restrictive* of the free movement of the *worker.* In the early judgment of *Commission v. France* [219] for example, it was held that "in so far as the [national] rules have the effect of *restricting* . . . freedom of movement for workers, they are compatible with Treaty only if . . . justified."[220] In the later case of *Commission v. Belgium*, national measures obliging security undertakings to have their place of business in that state were held to "constitute *restrictions* on the free movement of *workers*."[221] In *Commission v. Italy*, Italian nationality measures were acknowledged to be "*restrictions* on the free movement of *workers*."[222] In *Criminal proceedings against Hans van Lent*, Belgian measures prohibiting migrant workers from driving motor vehicles unless they were registered in Belgium were held restrictive of the free movement right.[223] So too were Italian laws in *Commission v. Italy* requiring dentists to reside within the district of registration,[224] and minimum capital[225] requirements imposed by Holland.[226] Such measures were held to constitute *restrictions*

---

[219] In this instance, national rules related to the occupation of doctor or dental practitioner and also concerned the free movement rights relating to establishment and services, s*ee id.* at arts. 49, 56.

[220] *Comm'n v. France*, 1986 E.C.R. 1475 (emphasis added). The Court continued: "That is not the case where the *restrictions* are liable to create discrimination against practitioners established in other Member States or raise obstacles to access" (emphasis added). *Id.* With respect to the *worker*, *Regina v. Stanislaus Pieck* held that "the only restriction which Article 48 of the Treaty [EC, now Article 45 TFEU] lays down concerning freedom of movement in the territory of Member States is that of limitations justified on grounds of public policy, public security or public health." Case 157/79, Regina v. Stanislaus Pieck, 1980 E.C.R. 2171, para. 9 [hereinafter *Stanislaus Pieck*].

[221] Case C-355/98, Comm'n v. Belgium, 2000 E.C.R. I-1221, para. 24 (emphasis added). Also of "freedom of establishment and the freedom to provide services." *Id.*

[222] Case C-283/99, Comm'n v. Italy, 2001 E.C.R. I-4363, para. 9 [hereinafter *Italian Private Security Case*] (emphasis added). Also of the "freedom of establishment and freedom to provide services." *Id.*

[223] Case C-232/01, Criminal proceedings against Hans van Lent, 2003 E.C.R. I-11525, para. 22.

[224] Case C-162/99, Comm'n v. Italy, 2001 E.C.R. I-541, para. 20.

[225] *Kamer*, 2003 E.C.R. I-10155, para. 27 ("Pursuant to Article 4(1) of the WFBV, the subscribed capital of a formally foreign company must be at least equal to the minimum amount required of Netherlands limited companies by Article 2:178 of the Burgerlijke Wetboek (Netherlands Civil Code, 'the BW'), which was EUR 18 000 on 1 September 2000 (Staatsblad 2000, N 322). The paid-up share capital must be at least equal to the minimum capital (Article 4(2) of the WFBV, referring back to Article 2:178 of the BW).").

[226] *Id.* at para. 104.

on both the freedoms of establishment and the *worker*,[227] as were UK measures that restricted employment on board fishing vessels by requiring that 75% of the crew reside in the UK as a precondition for the authorisation of the migrant vessel for fishing against UK quotas.[228]

2.2 Establishment and *Services*

With respect to the Treaty freedoms of establishment and services,[229] the early judgment of *Lynne Watson and Alessandro Belmann*[230] held that Italian rules concerning the control of foreign nationals in principle "do not involve *restrictions* on freedom of movement for persons."[231] Other jurisprudence has adopted the same approach; the focus is placed on the removal of the *restriction*[232] to the free movement right. In *Commission v. Italy*, for example, Italian nationality provisions with respect to private security activities were held to "constitute . . . an unjustified *restriction* on freedom of establishment and freedom to provide services,"[233] as were Austrian measures in relation to doctors, which prohibited

---

[227] *See Kamer*, 2003 E.C.R. I-10155, para. 104. *See also* Joined Cases C-151/04 & C-152/04, Criminal proceedings against Nadin, Nadin-Lux SA & Durré, 2005 E.C.R. I-11203, paras. 5, 6 [hereinafter *Nadin*].

[228] Case C-3/87, The Queen v. Ministry of Agric., Fisheries & Food, ex parte Agegate Ltd., 1989 E.C.R. 4459, para. 41.

[229] Case 118/75, Watson & Belmann, 1976 E.C.R. 1185, para. 11 [hereinafter *Watson*]. "Articles 52 [now Article 49 TFEU] and 59 [now Article 56 TFEU] provide that restrictions on the freedom of establishment and the freedom to provide services within the Community shall be abolished." *Id. See also* Case C-243/01, Piergiorgio Gambelli & Others, 2003 E.C.R. I-13031, paras. 46, 54 [hereinafter *Piergiorgio*]. With respect to *services*, see Case 62/79, SA Compagnie générale pour la diffusion de la télévision, Coditel, & Others v. Ciné Vog Films & Others, 1980 E.C.R. 881, para. 15; Case C-272/94, Criminal proceedings against Michel Guiot and Climatec SA, 1996 E.C.R. I-1905, para. 10 [hereinafter *Guiot*].

[230] *Watson*, 1976 E.C.R. 1185.

[231] *Id.* (emphasis added). *See also* Case 36/74, B.N.O. Walrave & L.J.N. Koch v. Ass'n Union Cycliste Int'l, Koninklijke Nederlandsche Wielren Unie & Federación Española Ciclismo, 1974 E.C.R. 1405 [hereinafter *Walrave*] (confirming that Article 56 TFEU "makes no distinction between the source of the *restrictions* to be abolished") (emphasis added). It has been held that "the principle of freedom to provide services established in Article 59 of the Treaty, [now Art 56 TFEU] which is one of its fundamental principles, includes the freedom for the recipients of services to go to another Member State in order to receive a service there, without being obstructed by *restrictions*." Case C-348/96, Criminal proceedings against Donatella Calfa, 1999 E.C.R. I-11 [hereinafter *Calfa*] (emphasis added). *See also* Case 186/87, Cowan v. Trésor Public, 1989 E.C.R. 195.

[232] It also ascribed the nomenclature of *obstacle* to free movement. For example, in *Piergiorgio Gambelli and Others* it was held that "[w]here a company established in a Member State . . . pursues the activity of collecting bets through the intermediary of an organisation of agencies established in another Member State . . . any *restrictions* on the activities of those agencies constitute *obstacles* to the freedom of establishment." *Piergiorgio*, 2003 E.C.R. I-13031 (emphasis added).

[233] *Italian Private Security Case*, 2001 E.C.R. I-4363, para. 22 (emphasis added). The Dutch *restriction* on multi-disciplinary partnerships between members of the Bar and accountants was justifiable; it was thus not contrary

the exercise in Austria of the profession of Heilpraktiker.[234] Other jurisprudence has held unlawful French measures which restricted the right of establishment and services in controlling the number of operators permitted to open and manage insemination centres[235] and French requirements that cross-border distributors of bovine semen use artificial insemination centres for storage.[236]

Further examples of national laws held to be restrictions on the right to supply services include: national legislation which prohibited operators established in other Member States from offering games of chance via the internet within Portugal;[237] French requirements to pay employer contributions in relation to bad-weather stamps in two Member States;[238] requirements on financial institutions to conclude agreements between initial guarantor and credit institutions;[239] Swedish measures which affected the cross-border supply of advertising space with respect to alcoholic beverages;[240] and an obligation imposed on a provider of services residing in the Netherlands to request the competent

---

the free movement provisions of services and establishment. Case C-309/99, J.C.J. Wouters, J.W. Savelbergh & Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten, 2002 E.C.R. I-1577, para. 122.

[234] This is also a profession recognised in Germany. *See* Case C-294/00, Deutsche Paracelsus Schulen für Naturheilverfahren GmbH v. Kurt Gräbner, 2002 E.C.R. I-6515, para. 40 [hereinafter *Deutsche Paracelsus*].

[235] *Bovine Case*, 2008 E.C.R. I-5337. The French legislation was held to be "a restriction on the freedom of establishment and the freedom to provide services." *Id. See also CaixaBank*, 2004 E.C.R. I-8961; *Payroll*, 2002 E.C.R. I-8923 (respecting the rights of establishment). In the context of *services*, see *Watson*, 1976 E.C.R. 1185. In the context of the *worker*, it has, for example, been held that "[t]he only restriction which Article 48 [now 45 TFEU] of the Treaty lays down concerning freedom of movement in the territory of Member States is that of limitations justified on grounds of public policy, public security or public health." *Stanislaus Pieck*, 1980 E.C.R. 2171, para. 9.

[236] *Bovine Case*, 2008 E.C.R. I-5337, para. 55–56.

[237] *See* Case C-42/07, Liga Portuguesa de Futebol Profissional & Bwin Int'l Ltd. v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa, 2009 E.C.R. I-7633, paras. 52–53 [hereinafter *Liga*]. The Portuguese rule was justified. *Id.* at para. 72.

[238] *Guiot*, 1996 E.C.R. I-1905, para. 13.

[239] *See* Case C-410/96, Criminal proceedings against André Ambry, 1998 E.C.R. I-7875 ("[R]ules such as those in issue in the main proceedings, which require financial institutions situated in another Member State to conclude an additional agreement, must be held to constitute a *restriction* on the freedom to provide services laid down by Article 59 [now Article 56 TFEU] of the Treaty." (emphasis added)). Rules "requiring professional or semi-professional athletes or persons aspiring to take part in a professional or semi-professional activity to have been authorised or selected by their federation in order to be able to participate in a high-level international sports competition" were held not of themselves a restriction on the freedom to provide services. Joined cases C-51/96 & C-191/97, *Deliège v. Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo & François Pacquée*, 2000 E.C.R. I-2549, para. 69.

[240] *See* Case C-405/98, Konsumentombudsmannen v. Gourmet Int'l Products AB, 2001 E.C.R. I-1795, para. 39 [hereinafter *Gourmet Int'l.*].

German tax authority to issue a certificate of exemption as a precondition of escaping additional tax on his income in Germany.[241] Finally, French rules in *Bacardi France SAS* were held to "entail a *restriction* on freedom to provide advertising *services* insofar as the owners of the advertising hoardings must refuse, as a preventive measure, any advertising for alcoholic beverages if the sporting event is likely to be retransmitted in France."[242]

2.3 Capital

Examination of the jurisprudence applying the right of the free movement right in relation to *capital* has also focused on the prohibition of national restrictions to that right. In *Klaus Konle v. Republik Österreich*, for example, an Austrian system of prior authorisation for the acquisition of land was held restrictive of that right,[243] and in *Westdeutsche Landesbank Girozentrale v. Friedrich Stefan and Republik Österreich*, a measure of the same Member State was held restrictive of the freedom of movement of capital where it required a mortgage securing a debt payable in the currency of another Member State to be registered in the national currency.[244] In the recent judgment of *Commission v. Portugal*, national measures which restricted the free movement of capital relating to the holding of privileged ("golden") shares by Portugal[245] were held to be restrictions on the free movement of capital.[246] Likewise, in *Commission v. Belgium*, the exclusion of certain types of purchasers of immovable property situated in the Flemish Region from the benefit of the portability system with respect to taxation on the purchase of immovable property intended as a new principal residence were considered restrictive of the right to the free movement of capital, although ultimately the Court held that the restrictions were justified.[247]

---

[241] *See* Case C-290/04, FKP Scorpio Konzertproduktionen GmbH v. Finanzamt Hamburg-Eimsbüttel, 2006 E.C.R. I-9461, para. 56. It was an obstacle that was justified "in order to ensure the proper functioning of the procedure for taxation at source." *Id.* at para. 59.

[242] Case C-429/02, Bacardi France SAS v. Télévision française 1 SA, Groupe Jean-Claude Darmon SA & Girosport SARL, 2004 E.C.R. I-6613 (emphasis added). The French rules were regarded as proportionate. *Id.*

[243] *See* Case C-302/97, Klaus Konle v. Republik Österreich, 1999 E.C.R. I-3099.

[244] *See* Case C-464/98, Westdeutsche Landesbank Girozentrale v. Friedrich Stefan and Republik Österreich, 2001 E.C.R. I-173, para. 19.

[245] *Comm'n v. Portugal*, judgment of 10 November 2011, para. 81.

[246] *Id.*

[247] The court's decision was on the basis that such was discriminatory. Case C-250/08, Comm'n v. Belgium, judgment of 1 December 2011, paras. 62, 82.

The foregoing analysis has related to examples within persons,[248] services,[249] and capital,[250] and has focused on examples where there is a reflection in the judgment of Treaty exhortations to prohibit national measures which *restrict* the rights of free movement. In other jurisprudence applying those same rights, the unlawful measures have been held as *obstacles* to the exercise of such rights. The following section considers this jurisprudence based on the *obstacle* terminology rather than the *restriction*-based approaches surveyed above.

3. Obstacles to Free Movement

The free movement provisions of the Treaty on the Functioning of the European Union[251] prohibit restrictions to such rights. However the Court has not relied solely on the vocabulary of *restrictions* when deciding that national measures are unlawful; the Court has also used the nomenclature of *obstacle* to reach such decisions. The two adjectives—*restriction* and *obstacle*—are used interchangeably by the Court of Justice in the description of the national measure.[252] For example, Spanish nationality conditions in *Commission v. Spain* held to be "restrictions on freedom of establishment, freedom to provide services and freedom of movement for workers"[253] were identified by the Court as *obstacles*[254] to such rights. Numerous other examples exist of such transferred nomenclature.

In the early judgment of *Lynne Watson and Alessandro Belmann*,[255] it was established that the Treaty free-movement provisions involved the removal of *obstacles* to those freedoms.[256] In *Walrave and Koch*, for example, that "[t]he abolition . . . of *obstacles* to

---

[248] *See* TFEU, *supra* note 1, at arts. 45, 49.

[249] *Id*. at art. 56.

[250] *Id*. at art. 63.

[251] *See* TFEU, *supra* note 1.

[252] For example, in the context of justification, "according to the case-law of the Court it is a further condition that, among other things, the *restriction* which that *obstacle* places on the freedom of movement of workers does not go beyond what is necessary to achieve the objective pursued." Case C-285/01, Burbaud v. Ministère de l'Emploi et de la Solidarité, 2003 E.C.R. I-8219 [hereinafter *Burbaud*] (emphasis added).

[253] Case C-114/97, Comm'n v. Spain, 1998 E.C.R. I-6717.

[254] *See id.*

[255] *Watson*, 1976 E.C.R. 1185. *See also* Case C-57/95, French Republic v. Comm'n, 1997 E.C.R. I-1627.

[256] The judgment of *Criminal proceedings against Michel Choquet* was phrased in similar terminology. Case 16/78, Criminal proceedings against Michel Choquet, 1978 E.C.R. 2293. In the context of Treaty rights with respect to the *worker*, services and establishment, German measures could be "*obstacles* to the recognition of a driving licence issued by another Member State [where they were] are not in fact in due proportion to the requirements

freedom of movement for persons and to freedom to provide services, . . . would be compromised if the abolition of barriers of national origin could be neutralized by *obstacles* resulting from the exercise of their legal autonomy by associations."[257] The Court in *Walrave* also made reference to the nomenclature of *obstacle* as according with the "fundamental objectives of the Community contained in Article 3(c) of the Treaty," that "the activities of the Community shall include, (c) an internal market characterized by the abolition, as between Member States, of *obstacles* to the free movement of goods, persons, services and capital."[258]

The use of the nomenclature of *obstacle* with respect to the worker[259] is exemplified by *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*.[260] It was held in *Singh* that the right of free movement "cannot be fully effective if such a person may be deterred from exercising them by *obstacles* raised in his or her country of origin."[261] In *Commission v. Denmark*, it was held that "[l]egislation which relates to the conditions in which an economic activity is pursued may constitute an *obstacle* to freedom of movement for *workers*."[262] In other jurisprudence, the issue of a provisional residence document by Belgium was held to "constitute a genuine *obstacle*"[263] to the exercise of the same freedom as was the disproportionate treatment by Germany of

---

for the safety of highway traffic." *Id*. at para. 8 (emphasis added). In the context of the deportation of a *worker*, a Member State was "not justified in imposing a penalty so disproportionate to the gravity of the infringement that it becomes an *obstacle* to the free movement of persons." *Stanislaus Pieck*, 1980 E.C.R. 2171 (emphasis added). *See also Bovine Case*, 2008 E.C.R. I-5337; *CaixaBank*, 2004 E.C.R. I-8961; *Payroll*, 2002 E.C.R. I-8923.

[257] *Walrave*, 1974 E.C.R. 1405 (emphasis added). Note also a recent and general statement to this effect in Case C-438/05, Int'l Transp. Workers Fed'n & Finnish Seamen's Union v. Viking Line ABP & OÜ Viking Line Eesti, 2007 E.C.R. I-10779. *See also*, with respect to the *worker*, Case 53/81, D.M. Levin v. Staatssecretaris van Justitie, 1982 E.C.R. 1035.

[258] *Walrave*, 1974 E.C.R. 1405. The reference to the same was made in *Watson*, 1976 E.C.R. 1185.

[259] *See* TFEU, *supra* note 1, at art. 45.

[260] Case C-370/90, The Queen v. Immigration Appeal Tribunal & Surinder Singh, ex parte Sec. of State for Home Dep't, 1992 E.C.R. I-4265.

[261] *Id*. at para. 23 (concerning restrictive national laws relating to the entry and residence of the spouse of the worker. Provisions which 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 therefore constitute an obstacle to that freedom. *See* Case C-464/02, Comm'n v. Denmark, 2005 E.C.R. I-7929 [hereinafter *Danish Motor Vehicles Case*]; Case C-415/93, Union royale belge des sociétés de football association ASBL v. Bosman, Royal club liégeois SA v. Bosman; and Union des associations européennes de football (UEFA) v. Bosman, 1995 E.C.R. I-4921, para. 96 [hereinafter *Bosman Case*].

[262] *Danish Motor Vehicles Case*, 2005 E.C.R. I-7929 ("Legislation which relates to the conditions in which an economic activity is pursued may constitute an *obstacle* to freedom of movement for *workers*." (emphasis added)). The judgment related to Danish legislation concerning the taxation of motor vehicles. *See Danish Motor Vehicles Case*, 2005 E.C.R. I-7929, paras. 35, 37.

[263] Case C-344/95, Comm'n v. Belgium, 1997 E.C.R. I-1035, para. 6 (emphasis added).

migrant nationals in relation to the imposition of fines for failure to carry identity cards.[264] In *Clean Car Autoservice GesmbH v. Landeshauptmann von Wien*, Austrian legislation[265] requiring legal persons to appoint as manager a person residing in the country "would constitute restrictions,"[266] as did German legislation which required legal trainees undergoing practical training in another Member State to bear the cost of travel relating to the stretches of the journey outside their home country themselves.[267] In *Hanns-Martin Bachmann v. Belgium*,[268] a national law obliging termination of a contract concluded with an insurer in another Member State in order to be eligible for a tax reduction was a *restriction* of the freedom of movement for the *worker*, who in this case was a German national employed in Belgium.[269]

Other examples of national measures held *obstacles* to free movement were: Dutch rules relating to the avoidance of double taxation which excluded the migrant *worker* from tax concessions;[270] Italian rules preventing operators in other Member States from taking bets on sporting events;[271] and the obligation imposed by Italy on architects to submit certificates of nationality and qualifications.[272] In *Herbert Schwarz and Marga Gootjes-Schwarz v. Finanzamt Bergisch Gladbach,* German legislation which had the effect of deterring taxpayers resident in Germany from sending their children to schools established

---

[264] *See* Case C-24/97, Comm'n v. Germany, 1998 E.C.R. I-2133 [hereinafter *German Residency Case*]; *see also* Case C-265/88, Criminal proceedings against Lothar Messner, 1989 E.C.R. 4209. That the Treaty provision with respect to the *worker* is concerned with the prohibitions of restrictions on such freedom is stated by implication in *Württembergische Milchverwertung-Südmilch AG v. Salvatore Ugliola*, in which it was held that Article 48 EC (now Article 45 TFEU) permits "no reservations other than the *restriction* set out in [Article 48] paragraph (3) concerning the public policy, public security and public health." Case 15-69, Württembergische Milchverwertung-Südmilch AG v. Salvatore Ugliola, 1969 E.C.R. 363 (emphasis added).

[265] Case C-350/96, Clean Car Autoservice GesmbH v. Landeshauptmann von Wien, 1998 E.C.R. I-2521.

[266] *Id.* Restrictions were discriminatory. *Id.* at para. 21.

[267] *See* Case C-109/04, Kranemann v. Land Nordrhein-Westfalen, 2005 E.C.R. I-2421, para. 29. (holding that the German requirements were an obstacle to the free movement of workers). *Id*.

[268] Case C-204/90, Bachmann v. Belgium, 1992 E.C.R. I-249.

[269] See *id.* In addition, it was also an obstacle to the free movement of services. *Id.* at paras. 13, 31.

[270] *See* Case C-385/00, F.W.L. de Groot v. Staatssecretaris van Financien, 2002 E.C.R. I-11819, para. 95.

[271] *See* Case C-67/98, Questore di Verona v. Diego Zenatti, 1999 E.C.R. I-7289. Such were restrictions held to be "*obstacle*[*s*] to the freedom to provide services." *Id.* at para. 27 (emphasis added).

[272] *See* Case C-298/99, Comm'n v. Italy, 2002 E.C.R. I-3129, para. 37 [hereinafter *Italian Architect Case*]. This obligation "gives rise to additional obstacles for all architects applying for recognition of their qualifications." *Id*. Note in addition that the Italian rule was also described by the Court as "an impediment to the freedom of establishment and to the freedom to provide services enshrined in Article 52 of the EC Treaty (now, after amendment, Article 43 EC) and Article 59 of the Treaty." *Id.* The judgment was concerned with *restrictions* on the freedoms of establishment and services. *Id.* at paras. 3, 5.

in another Member State was held to "constitute . . . an *obstacle* to the freedom to provide services."[273]

The nomenclature of *obstacles* operates in the context of the jurisprudence of *services*[274] and *establishment* as well.[275] In *Commission v. Germany*, German requirements of establishment on national territory for construction undertakings contracting out workers from other countries were similarly identified as *obstacles* to Treaty free movement rights[276] as were Polish taxation provisions which applied to cross border economic activities.

With respect to obstacles at the national level which have restricted the free movement of capital,[277] it was held in *Peter Svensson and Lena Gustavsson v. Ministre du Logement et de l'Urbanisme* that

> Provisions implying that a bank must be established in a Member State in order for recipients of loans residing in its territory to obtain an interest rate subsidy from the State out of public funds are liable to dissuade those concerned from approaching banks established in another Member State and therefore constitute an obstacle to movements of capital such as bank loans.[278]

Similarly, *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften* held that a German law relating to tax exemptions on rental income tax might constitute "an *obstacle* to the free movement of capital and payments"[279] for the EU company operating in the host state.

---

[273] Case C-76/05, Schwarz v. Finanzamt Bergisch Gladbach, 2007 E.C.R. I-6849.

[274] *See* TFEU, *supra* note 1, at art. 56.

[275] *See id.* at art. 49.

[276] *See* Case C-493/99, Comm'n v. Germany, 2001 E.C.R. I-8163, para. 18 ("The requirement of a permanent establishment is the very negation of the fundamental freedom to provide services in that it results in depriving Article 59 [now Article 56 TFEU] of the Treaty of all effectiveness, a provision whose very purpose is to abolish restrictions on the freedom to provide services of persons who are not established in the State in which their services are to be provided." (emphasis added)).

[277] *See* TFEU, *supra* note 1, at art. 63.

[278] Case C-484/93, Svensson v. Ministre du Logement et de l'Urbanisme, 1995 E.C.R. I-3955, para. 10.

[279] Case C-386/04, Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften, 2006 E.C.R. I-8203, para. 27.

The terminology of *restriction* or *obstacle* in the context of identifying national measures hindering free movement rights appears to be interchangeable. In *Criminal proceedings against Piergiorgio Gambelli and Others*,[280] it was held that "any *restrictions* on the activities of [intermediate betting agencies] constitute *obstacles* to the freedom of establishment . . . [and] . . . constitute a *restriction* on the freedom of such a provider to provide services."[281] Furthermore, in *Criminal proceedings against Donatella Calfa*, the automatic penalty of expulsion for life applied against Community nationals by Greece was held to be "a *restriction* which clearly constitutes an *obstacle* to the freedom to provide services,"[282] and in *Staatssecretaris van Financiën v. B.G.M. Verkooije*, an income tax exemption granted according to the place of the company was held a *restriction* and *obstacle* to the free movement of capital.[283]

In this section, the discussion has focused on the scrutiny of the national measures as *restrictions* or *obstacles* to free movement. The use of the word "restriction" emanates from the terminology of Treaty free movement provisions.[284] The inclusion of the term "obstacle" in this analysis is the result of the jurisprudence of the Court of Justice.[285] There is evidence too of some interchangeability between the two terms within the jurisprudence.[286]

It is arguable that maintaining the focus within the composition of jurisprudence on the *restriction* or *obstacle* to the free movement right allows for a platform of principles to be employed as options for attack on the national measure suspected of hindering free movement rights. Principles such as market access, nondiscrimination, and mutual

---

[280] *Piergiorgio*, 2003 E.C.R. I-13031. *See also Staatssecretaris van Financiën v. B.G.M. Verkooijen*, in which Dutch measures restricted migrant nationals residing in Holland from investing in foreign companies was held to be a restriction on capital movements. Case C-35/98, Staatssecretaris van Financiën v. B.G.M. Verkooijen, 2000 E.C.R. I-4071 [hereinafter *B.G.M. Verkooijen*].

[281] *Piergiorgio*, 2003 E.C.R. I-13031 (emphasis added). Note also *Commission v. Belgium* in which it was held that "[t]he conditions laid down for the registration of aircraft must . . . not discriminate on grounds of nationality or form an *obstacle* to the exercise of that freedom." Case C-203/98, Comm'n v. Belgium, 1999 E.C.R. I-4899 (emphasis added).

[282] *Calfa*, 1999 E.C.R. I-11 (emphasis added).

[283] *B.G.M. Verkooijen* 2000 E.C.R. I-4071.

[284] *See* TFEU, *supra* note 1, at arts. 49, 56.

[285] *See, e.g.*, Case C-114/97, Comm'n v. Spain, 1998 E.C.R. I-6717 (holding that Spanish nationality conditions were "restrictions on freedom of establishment, freedom to provide services and freedom of movement for workers" and were therefore *obstacles* to such rights).

[286] *See Italian Architect Case*, 2002 E.C.R. I-3129, paras. 2, 5, 37 (respecting the variable classification of national measures as *impediment*, *restriction*, and *obstacle* to the free movement right). *See also* Case C-155/09, Comm'n v. Hellenic Republic, judgment of 20 January 2011, para. 74 (referencing examples of *obstacles* and *restrictions*).

recognition could be all readily available to the Court and operated, in various combinations, as needed in the scrutiny of various national measures.

While the jurisprudence explored in this section focuses on *restrictions* and *obstacles* to free movement rights, the following section examines judgments which have shown an inherent or latent respect for the application of the principle of market access in addition to judgments in which that respect has been patent.

4. Other Nomenclature

The Court has more recently used various descriptive terminologies to embellish the category of national measures held to be "restrictive" of Treaty free movement rights. Measures have, for example, been held by the Court of Justice as "liable to hamper or to render less attractive,"[287] "liable to prohibit or otherwise impede,"[288] to "hinder or make less attractive"[289] and to "prohibit, impede, or render less attractive."[290]

Whatever the description accorded by the Court of Justice to the national measure, the judgments concern the prohibition of national measures where they have been *restrictive of* or an *obstacle to* the free movement rights of persons,[291] services,[292] and capital.[293] Nonetheless, the various adjectives used to describe national measures are a relatively recent innovation. The adjectival descriptions bear overtones of *access* to the market. In

---

[287] Case C-19/92, Dieter Kraus v. Land Baden-Wurttemberg, 1993 E.C.R. I-1663, para. 32 [hereinafter *Dieter Kraus*]. *See* Case C-234/03, Contse SA and Others v. Instituto Nacional de Gestion Sanitaria, 2005 E.C.R. 1-9315, para. 25 [hereinafter *Contse SA*]; Case C-131/01, Comm'n v. Italy, 2003 E.C.R. 1-1659, para. 26 [hereinafter *Italian Patents Case*]; Case C-58/98, Josef Corsten, 2000 E.C.R. I-7919, para. 33 [hereinafter *Corsten*].

[288] *See* Case C-275/92, Her Majesty's Customs & Excise v. Schindler, 1994 E.C.R. I-1039, para. 43 [hereinafter *Her Majesty's Customs*]; Case C-451/03, Servizi Ausiliari Dottori Commercialisti Srl v. Calafiori, 2005 E.C.R. I-3875, para. 31 [hereinafter *Servizi*]; Case C-389/95, Siegfried Klattner v. Elliniko Dimosio, 1997 E.C.R. I-2719, para. 16, 19.

[289] *See* Case C-246/00, Comm'n v. Netherlands, 2003 E.C.R. I-7485, para. 66; Case C-465/05, Comm'n v. Italy, 2007 E.C.R. I-11091, para. 109 [hereinafter *Italian Security Guard Case*]; *Contse SA*, 2005 E.C.R. 1-9315, para. 25; Case C-330/03, Colegio de Ingenieros de Caminos, Canales y Puertos v. Administración del Estado, 2006 E.C.R. I-801, para. 25.

[290] *See* Case C-76/90, Manfred Säger v. Dennemeyer & Co. Ltd., 1991 E.C.R. I-4221, para. 12 [hereinafter *Säger*]; Joined Cases C-369/96 & C-376/96, Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL and Bernard Leloup, Serge Leloup and Sofrage SARL, 1999 E.C.R. I-8453, para. 33 [hereinafter *Arblade*]; Joined Cases C-430/99 & C-431/99, Inspecteur van de Belastingdienst Douane, district Rotterdam v. Sea-Land Service Inc., 2002 E.C.R. I-5235, para. 38 [hereinafter *Douane*].

[291] *See* TFEU, *supra* note 1, at arts. 45, 49.

[292] *See id*. at art. 56.

[293] *See id*. at art. 63.

the present context of the assessment of the place of market access in free movement jurisprudence, it is a terminology which may prove to be important. The existence of such nomenclature in this context should be acknowledged.

4.1 Measures Liable to Hamper or to Render Less Attractive

The Court of Justice has held, for example, that "[i]t is settled case law that Article 43 EC [with respect to establishment] precludes any national measure which . . . is *liable to hamper or to render less attractive* the exercise by Community nationals of the freedom of establishment guaranteed by the Treaty."[294] The terminology has been used to describe national measures held as either *restrictions* or *obstacles* to the free movement of the worker[295] and the right to supply services.[296] In *Dieter Kraus v. Land Baden-Württemberg*, for example, obstacles imposed by Germany concerning the use of an academic title obtained in another Member State were held unlawful as "liable to hamper or to render less attractive the exercise by [all] Community nationals . . . of fundamental freedoms guaranteed by the Treaty."[297] So too, the same description was extended to the obstacle to the freedom of establishment in *Commission v. The Netherlands*;[298] the measure at issue in that case required those in charge of a company in that Member State to possess European Community nationality. In *Isabel Burbaud v. Ministère de l'Emploi et de la Solidarité*,[299] the requirement imposed by France on the worker to pass a recruitment competition was an obstacle[300] to the exercise of that right similarly so described by the Court.[301]

4.2 Liable to Prohibit or Otherwise Impede

---

[294] Case C-299/02, Comm'n v. Netherlands, 2004 E.C.R. I-9761, para. 15 [hereinafter *Netherlands Shipping Case*] (emphasis added) ("[E]ven though it is applicable without discrimination on grounds of nationality."). *See also Dieter Kraus*, 1993 E.C.R. I-1663, para. 32; *Säger*, 1991 E.C.R. I-4221, para. 12.

[295] *See* TFEU, *supra* note 1, at art. 45; *Burbaud*, 2003 E.C.R. I-8219, para. 4.

[296] *See* TFEU, *supra* note 1, at art. 56; *Italian Patents Case*, 2003 E.C.R. 1-1659, para. 26. *See also Corsten*, 2000 E.C.R. I-7919, para. 33; Case C-43/93, Vander Elst v. Office des Migrations Internationales, 1994 E.C.R. I-3803, para. 14 [hereinafter *Vander Elst*]; *Guiot*, 1996 E.C.R. I-1905, para. 10; Case C-3/95, Reisebüro Broede v. Sandker, 1996 E.C.R. I-6511, para. 25 [hereinafter *Reisebüro*]; Case C-222/95, Parodi v. Banque H. Albert de Bary, 1997 E.C.R. I-3899, para. 18; *Arblade*, 1999 E.C.R. I-8453, para. 33.

[297] *Dieter Kraus*, 1993 E.C.R. I-1663. In issue here were the Treaty free movement rights relating to the *worker* and to establishment. *Id.*

[298] *Netherlands Shipping Case*, 2004 E.C.R. I-9761, para. 20.

[299] *Burbaud*, 2003 E.C.R. I-8219.

[300] *Id.* at para. 95.

[301] *Id.*

It has been held, for example, that the Treaty right to supply services[302] "requires . . . the abolition of any restriction *liable to prohibit or otherwise impede* the activities of a provider of services established in another Member State where he lawfully provides similar services."[303] In *Commission v. Luxembourg*,[304] national legislation making the supply of services by patent agents subject to a requirement to elect domicile with an approved agent was held "liable to prohibit or otherwise impede" the activities of the service provider.[305]

Obstacles and restrictions at the national level held *liable to prohibit or otherwise impede* the right of free movement have included: German legislation which prevented a UK company offering specialist patent renewal services in Germany;[306] United Kingdom measures affecting the importation of lottery tickets in the context of Treaty rights to provide services;[307] French laws requiring migrant undertakings but providing services in France to obtain work permits when employing third country nationals;[308] Greek rules that prescribed organizing tourist programmes through a mandatory, legal employment relationship between tourists and travel agencies;[309] an obligation imposed by Germany requiring foreign employers to employ workers in the national territory to translate into German certain documents required to be kept at the place of work;[310] and the Greek

---

[302] *See* TFEU, *supra* note 1, at art. 56.

[303] Case C-478/01, Comm'n v. Luxembourg, 2003 E.C.R. I-2351, para. 18 (emphasis added). *See,* e.g., Case C-266/96, Corsica Ferries France S. Gruppo Antichi Ormeggiatori del Porto di Genova Coop. arl and Others, 1998 E.C.R. I-03949 (holding that there was no restriction on the freedom to provide maritime transport services when considering the fees imposed by Italy for mooring services).

[304] *Commission v. Luxembourg*, 2003 E.C.R. I-2351, para. 18.

[305] *Id*.; s*ee also Corsten*, 2000 E.C.R. I-7919, para. 33; *Italian Patents Case*, 2003 E.C.R. 1-1659, para. 42.

[306] *See Säger*, 1991 E.C.R. I-4221, para. 14 (holding that there was a *restriction* on the right to supply services).

[307] *Her Majesty's Customs*, 1994 E.C.R. I-1039, paras. 43, 59 (holding the measures were an obstacle to the free movement of services).

[308] Case C-43/93, Raymond Vander Elst v. Office des Migrations Internationales, 1994 E.C.R. I-3803, para. 14 (holding the measures were a *restriction* on the free movement right).

[309] Case C-398/95, Syndesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion v. Ypourgos Ergasias, 1997 E.C.R. I-3091, paras. 16, 19 [hereinafter *Syndesmos Case*] (finding both a *restriction* and *barrier* to the free movement right).

[310] Case C-490/04, Comm'n v. Germany, 2007 E.C.R. I-6095, para. 68 (constituting a *restriction* on the free movement of services).

licensing of self-employed migrant tourist guides who were prevented from supplying services if they were not qualified in Greece.[311]

4.3 Impediment to Free Movement

In other judgments in the free movement jurisprudence, there has been a focus upon the *impediment* to free movement presented by the national measure.[312]

In *Bosman*, for example, it was held that transfer rules between football clubs "directly affect players' access to the employment market in other Member States and are thus capable of *impeding* freedom of movement for workers."[313] Other national laws held *impediments* to the exercise of free movement rights include: a Danish obligation on a migrant company to register a company car made available to employees residing in that state;[314] a precondition that architects wishing to practice their profession in Italy should first submit an original diploma to that state;[315] Spanish provisions setting a minimum number of persons employed by security undertakings;[316] and Finnish national rules relating to the operation of gaming machines.[317]

4.4 Prohibit, Impede, or Render Less Attractive

In *Corporación Dermoestética SA v. To Me Group Advertising Media*, for example, it was held that "restrictions on the freedom of establishment and the freedom to provide services referred to in Articles 43 EC and 49 EC (now Articles 49 TFEU and 45 TFEU)

---

[311] Case C-398/95, *Syndesmos Case*, paras. 16, 19 (finding that the national law provided a *barrier* to free movement).

[312] Case C-134/03, Vicacom Outdoor SrL v. Giotto Immobilier SARL, 2005 E.C.R. I-1167 para. 39. In *Viacom*, the issue was whether a municipal tax constituted an impediment to freedom to provide services contrary to TFEU art. 56, para. 33. The Italian law was held to be lawful.

[313] *Bosman Case*, 1995 E.C.R. I-4921, para. 103 (emphasis added).

[314] *Nadin*, 2005 E.C.R. I-11203, para. 36.

[315] *See* Case C-298/99, Comm'n v. Italy, 2002 E.C.R. I-3129, para. 37 (relating to both the rights of services and establishment).

[316] Case C-514/03, Comm'n v. Spain, 2006 E.C.R. I-963, para. 48 (finding the provisions made the formation of secondary establishments or subsidiaries in Spain more onerous and dissuaded foreign private security undertakings from offering their services within the Spanish market).

[317] Case C-124/97, Markku Juhani Läärä v. Kihlakunnansyyttäjä (Jyväskylä), 1999 E.C.R. I-6067, para. 29.

respectively are measures that *prohibit, impede or render less attractive* the exercise of such freedoms."[318]

The "prohibit, impede or render less attractive" terminology ascribed to the *restriction* on the free movement right has been used on other occasions by the Court of Justice.[319] Examples of such occasions include national measures relating to the payment of remuneration on sight accounts;[320] restrictions imposed by France "to store semen in authorized artificial insemination centers"; restrictions relating to the recognition of diplomas in Italy;[321] Italian legislation restricting the staffing of data processing centers only to employees with Italian qualifications;[322] and to the retention by the same state of obstacles to free movement such as national and regional rules regarding trade fairs, markets, and exhibitions.[323]

---

[318] Case C-500/06, Corporación Dermoestética SA v. To Me Group Advertising Media, 2008 E.C.R. I-5785, para. 32 (emphasis added). *See, e.g.*, Case C-96/08, CIBA Speciality Chemicals Central v. Adó- és Pénzügyi Ellenrzési Hivatal (APEH) Hatósági Fosztály, judgment of 15 April 2010, para. 19; Case C-157/07 Finanzamt für Körperschaften III in Berlin v. Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH 2008 E.C.R. I-8061, para. 30; Case C-439/99, Comm'n v. Italy, 2002 E.C.R. I305, para. 22; Case C-451/03, Servizi Ausiliari Dottori Commercialisti Srl v. Giuseppe Calafiori, 2006 E.C.R. I-2941, para. 31; Case C-65/05, Comm'n v. Greece, 2006 E.C.R. I-10341, para. 48; Case C-248/06, Comm'n v. Spain, 2008 ECR I-47, para. 21. *See also CaixaBank*, 2004 E.C.R. I-8961, para. 12; C-518/06, Comm'n v. Italy, 2009 E.C.R. I-3491, para. 62.

[319] All such measures "must be considered to be restrictions" on the Treaty free movement rights of services and establishment. Case C-294/00, Deutsche Paracelsus Schulen für Naturheilverfahren GmbH v. Kurt Gräbner, 2002 E.C.R. I-6515, para. 38. In the context of the right of establishment, see Case C-168/91, Christos Konstantinidis v. Stadt Altensteig, 1993 E.C.R. I-1191, para. 15. In the context of the freedom to provide services, see Case C-205/99, Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) v. Administración General del Estado, 2001 E.C.R. I-1271, para. 21; Case C-429/02, Bacardi France SAS v. Télévision française, 1 SA (TF1), C-429/02 Groupe Jean-Claude Darmon SA and Girosport SARL, 2004 E.C.R. I-6613, para. 31; Case C-262/02, Comm'n v. France, 2004 E.C.R. I-6569, paras 27-29; *Arblade*, 1999 E.C.R. I-8453, para. 33; Case C-294/00 Deutsche Paracelsus Schulen für Naturheilverfahren GmbH v. Kurt Gräbner 2002 E.C.R. I-6515, para. 38. *See also* Case C-42/07, Liga Portuguesa de Futebol Profissional and Bwin International Ltd v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa, 2009 E.C.R. I-7633, para. 51; Case C- 451/03, Servizi Ausiliari Dottori Commercialisti Srl v. Giuseppe Calafiori, 2006 E.C.R. I-2941 para. 33; Case C-298/05, Columbus Container Services, 2007 E.C.R. I-10451, para. 33.

[320] The French measure rendered a restriction which was liable to "prohibit, impede or render less attractive the exercise of that freedom." *CaixaBank*, 2004 E.C.R. I-8961, para. 11.

[321] Case C-153/02, *Valentina Neri v. European School of Economics (ESE Insight World Educ. Sys. Ltd)*, 2003 E.C.R. I-13555, para. 44 (finding that the restriction "is likely to deter students from attending these courses and thus *seriously hinder* the pursuit by ESE of its economic activity in that Member State" (emphasis added)).

[322] Case C-79/01, Payroll Data Services (Italy) Srl, ADP Europe SA and ADP GSI SA, 2002 E.C.R. I-8923, para. 26.

[323] Case C-439/99, Comm'n v. Italy, 2002 E.C.R. I-305, para. 22.

National measures imposing *restrictions* on the free movement right relating to *services*[324] have similarly been described. For example, a Dutch rule requiring payment of a tariff by sea-going vessels longer than forty-one meters was held "a restriction on their free circulation"[325] because it was "liable to *prohibit, impede or render less attractive* the activities of a provider of services established in another Member State."[326] Similarly so described were: a Belgian requirement that a service provider should furnish a simple prior declaration certifying that the situation of the workers posted to that State who were nationals of non-member States was lawful;[327] an Austrian requirement that private inspection bodies of organically farmed products be established within Austria as a precondition to offering inspection services;[328] and national measures restricting the right to supply services in relation to a Spanish provision requiring maritime cabotage services be subject to prior administrative authorization.[329] Other examples include, national provisions requiring debt collecting agencies in Germany to carry out judicial debt-collection work for others only through the intermediary of a lawyer,[330] a Belgian requirement that undertakings in the construction industry providing services pay employers' contributions duplicating contributions paid in the state where established,[331] and French legislation requiring employed workers from non-member countries to obtain

---

[324] TFEU, *supra* note 1, at art. 56. *See also* Case C-49/98 Finalarte Sociedade de Construção Civil Ld. 2001 E.C.R. I-7831, para. 30 (relating to German measures imposing an obligation on undertakings in the construction sector supplying a service to apply the system of paid leave applicable in the host Member State to workers de ployed for that purpose). A national rule which involved the services provider in expense and additional administrative and economic burdens would fall into this category. *See, e.g.*, Case C-165/98, Criminal proceedings against André Mazzoleni and Inter Surveillance Assistance SARL, as the Party Civilly Liable, Third Parties: Eric Guillaume and Others 2001 E.C.R. I-2189, para. 24 (concerning Belgian measures requiring an undertaking established in another Member State which provides services in the territory of the first State to pay its workers the minimum remuneration fixed by the national rules of that State).

[325] *Douane*, 2002 E.C.R. I-5235, para. 38.

[326] *Id.* at para. 32 (emphasis added).

[327] Case C-219/08 Comm'n v. Belgium, 2009 E.C.R. I-9213, para. 13 (describing the measures as being "liable to prohibit, impede or render less advantageous").

[328] Case C-393/05, Joined opinion of Advocate General Sharpston, 2007 E.C.R. I-10195, paras. 31–32 (deciding on the grounds that the national law "renders impossible, in Austria, the provision of the services in question by private bodies established only in other Member States"). A similar French requirement in relation to biomedical analysis laboratories was held unlawful on the same basis. *See* Case C-496/01, Comm'n v. France, 2004 E.C.R. 1-2351, para. 65.

[329] Case C-205/99, Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others v. Administración General del Estado, 2001 E.C.R. I-1271, para. 22.

[330] *Reisebüro*, 1996 E.C.R. I-6511, paras. 25–26.

[331] *Guiot,* 1996 E.C.R. I-1905, para. 10.

work permits.[332] This language was also applied to the prohibition by Germany of the provision of a patent monitoring and renewal service,[333] a German law providing that an undertaking using the services of an undertaking established in another Member State to act as a guarantor in respect of the minimum remuneration of workers employed by the other undertaking,[334] and the establishment by the French courts of a register for experts.[335] Recently, a less favorable Belgian tax regime was held liable to prohibit, impede, or render less attractive the free movement of services, and was classified as a restriction based on this phraseology.[336]

4.5 Hinder or Make Less Attractive

Dutch rules in relation to information held on driving licences were held "liable to hinder or make less attractive" the exercise of Treaty free movement rights,[337] as were Italian measures imposed on the private security sector relating to the obligation to lodge a guarantee with a deposits and loans office.[338] The Court has referred to the concept of national measures "liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty" in the context of the ability of Member States to *justify* national measures.[339] Recently, in the context of the exercise of establishment rights in Spain, the Court ruled that national rules which concerned the establishment of

---

[332] *Vander Elst*, 1994 E.C.R. I-3803, para. 14.

[333] *Säger*, 1991 E.C.R. I-4221, para 12. *See also Arblade*, 1999 E.C.R. I-8453, para. 33.

[334] Case C-60/03, Wolff & Müller GmbH & Co. KG v. José Filipe Pereira Félix, 2004 E.C.R. I-9553, para 31 ("To the extent that it involves expenses and additional administrative and economic burdens."). *See also* Case C-164/99, Portugaia Construções, 2002 E.C.R. I-787, para. 18 (making a similar comment with respect to collective agreements and minimum wages in Germany); Case C-404/05 Comm'n v. Germany, 2007 E.C.R. I-10239, para. 30.

[335] Joined Cases C-372/09 & C-373/09, Josep Peñarroja Fa, judgment of 17 March 2011, para. 50 (holding a restriction on the freedom to supply services).

[336] Case C-9/11, Waypoint Aviation SA v. État belge-SPF Finances, judgment of 13 October 2011, para. 22.

[337] Case C-246/00, Comm'n v. Netherlands, 2003 E.C.R. I-7485, para. 66.

[338] Case C-465/05, Comm'n v. Italy, 2007 E.C.R. I-11091, para. 109 (holding likely to hinder or make less attractive the exercise of the freedom of establishment and the freedom to provide services).

[339] Case C-55/94, Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165, para. 39; Case C-212/97, Centros Ltd. v. Erhvervs-og Selskabsstyrelsen, 1999 E.C.R. I-1459 para. 34; Case C-108/96, Criminal proceedings against Dennis Mac Quen, SA, 2001 E.C.R. I-837, para. 26; Case C-294/00, Deutsche Paracelsus Schulen für Naturheilverfahren GmbH v. Kurt Gräbner, 2002 E.C.R. I-6515, para. 39; *Kamer*, 2003 E.C.R. I-10155, para. 133; *Contse SA*, 2005 E.C.R. I-9315, para. 25; Case C-234/03 Colegio de Ingenieros de Caminos, Canales y Puertos v. Administración del Estado, 2005 E.C.R. I-9315, para. 25; Case C-514/03, Comm'n v. Spain, 2006 E.C.R. I-963, para. 26; Case C-155/09, Comm'n v. Greece, judgment of 20 January 2011, para. 51; Case C-152/05, Comm'n v. Germany, 2008 E.C.R. I-00039, para. 26; Case C-294/00, Deutsche Paracelsus Schulen für Naturheilverfahren GmbH v. Kurt Gräbner, 2002 E.C.R. I-6515, paras. 39–40.

shopping centers in Catalonia "ha[ve] the effect of *hindering or of rendering less attractive* the exercise by economic operators from other Member States of their activities"[340] in Catalonia.[341] In *Commission v. Hungary*, a property purchase tax having a dissuasive effect on persons who wished to settle in Hungary was held a restriction on the free movement rights of the worker[342] and establishment[343] on the basis that it would "hinder or make less attractive the exercise of [those] fundamental freedoms guaranteed by the Treaty."[344]

The forgoing analysis commenced with an examination of jurisprudence which had reflected the honest intent of Treaty free movement provisions in the removal of national restrictions[345] to such rights. This section then considered the jurisprudence of the free movement of persons,[346] services,[347] and capital[348] from the perspective of implementing Treaty exhortations with respect to the removal of *restrictions* or *obstacles* to free movement, together with cases evidencing a respect for "market access" through the overlay terminology of "liable to hamper or to render less attractive," "to prohibit or otherwise impede," and "to prohibit, impede or render less attractive or to hinder or make less attractive." It is jurisprudence which displayed respect for the principle of "market access" through the descriptive terminology accorded to the national measure. It is now pertinent to examine jurisprudence in which the respect for the principle of "market access" has been more overtly delivered. The analysis begins with an exploration of the jurisprudence which has relied upon the principle of "market access" as the conduit used to establish whether a *restriction* or *obstacle* on the free movement right has existed at the national level.

III. Restrictions—Market Access

---

[340] Case C-400/08, Comm'n v. Spain, judgment of 24 March 2011, para. 70 (emphasis added).

[341] Case C-148/10, DHL International NV v. Belgisch Instituut voor Postdiensten en Telecommunicatie, judgment of 13 October 2011, para. 63 (applying such terminology to hold that the imposition of a mandatory complaints procedure on postal services providers did not "hinder or render less attractive the exercise by Union nationals of the freedom of establishment that is guaranteed by the Treaty").

[342] TFEU, *supra* note 1, at art. 45.

[343] TFEU, *supra* note 1, at art. 49.

[344] Case C-253/09, Comm'n v. Hungary, judgment of 1 December 2011, para. 69.

[345] Note with respect to the worker, the Treaty *omission* of the terminology of restriction has been rectified by jurisprudence such as Case 96/85, Comm'n v. France, 1986 E.C.R. 1475, para. 11. The adjective is used interchangeably with obstacle in the jurisprudence relating to the worker.

[346] For *worker*, see TFEU, *supra* note 1, at art. 45; for establishment, see TFEU, *supra* note 1, at art. 49.

[347] TFEU, *supra* note 1, at art. 56.

[348] TFEU, *supra* note 1, at art. 63.

This section now concludes with an examination of the jurisprudence of persons,[349] services,[350] and capital.[351] In these contexts, the reliance on the principle of "market access" within the equation of the application of the Treaty provisions to national laws has been distinctly overt. This is jurisprudence wherein the national law has been held unlawful, specifically insofar as it has hindered *access* to the market of the host state.

With respect to the worker,[352] for example, in the judgment of *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens and others*,[353] there was arguably a reliance on the operation of the principle of *market access*,[354] as the Court held that "free *access to employment* is a fundamental right which the Treaty confers individually on each *worker* in the Community."[355]

The *restriction* on the registration of motor vehicles[356] has been described in *Criminal proceedings against Claude Nadin, Nadin-Lux SA and Jean-Pascal Durré*[357] as constituting "a barrier to freedom of movement"[358] which "impedes the access of persons resident in Belgium to self-employed work in the other Member States."[359] In the context of the employed and the self-employed migrant, it has recently been stated in *Angelo Rubino v. Ministero dell'Università e della Ricerca* that both "Articles 39 EC and 43 EC [now Articles 45 and 49 TFEU] *guarantee* to the nationals of the Member States *access* to activities, in a

---

[349] For *worker*, see TFEU, *supra* note 1, at art. 45; for establishment, see TFEU, *supra* note 1, at art. 49.

[350] For services, see TFEU, *supra* note 1, at art. 56.

[351] TFEU, *supra* note 1, at art. 63.

[352] TFEU, *supra* note 1, at art. 45.

[353] Case 222/86, Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens, 1987 E.C.R. 4097 [hereinafter *Unectef*].

[354] Member States' courts are required to give reasons for judgments when judicially reviewing a decision about the equivalence of diplomas held by migrant nationals.

[355] *Unectef,* 1987 E.C.R. 4097, para. 14 (emphasis added). It was an approach that was arguably confirmed in the *Bosman* judgment in the context of rendering nationality clauses in football unlawful. *Bosman Case*, 1995 E.C.R. I-4921, para. 129.

[356] Relating to instances wherein the employer was established in another Member State.

[357] *Nadin*, 2005 E.C.R. I-11203, para. 39.

[358] *Id.* at para. 36.

[359] *Id.* at para. 37.

self-employed or employed capacity, without discrimination based on nationality."[360] In *Commission v. France*, national measures restricting the number of insemination centers was held to "hamper the *access* of other operators, including those from other Member States, to the insemination market."[361]

In *Volker Graf v. Filzmoser Maschinenbau GmbH*, the national legislation[362] deterring a migrant national from leaving the home state was held to constitute an *obstacle* to the free movement[363] where it affects "*access* of workers to the labor market."[364] So too, under the law at issue in *Commission v. Denmark*, cross-border workers resident in Denmark were prevented from using company vehicles registered where the undertaking of the employer was established; that national law was held "liable to *affect access* to that activity."[365] Furthermore, the requirement that private security guards swear an oath of allegiance to the Italian Republic was held to constitute, for the operator not established in Italy, "an impediment to the pursuit of its activities in that Member State, which impairs its *access to the market*."[366]

---

[360] Case C-586/08, Angelo Rubino v. Ministero dell'Università e della Ricerca, 2009 ECR I-12013, para. 34 ("In particular, that, in the context of a selection procedure such as that leading to registration as a holder of the NAQ, qualifications obtained in other Member States are accorded their proper value and are duly taken into account.") (emphasis added).

[361] In the context of the free movement of *services* and *establishment*, see Case C-389/05, Comm'n v. France, 2008 E.C.R. I-5337, para. 53 (emphasis added).

[362] This concerns Austrian provisions relating to compensation on termination of employment upon moving to commence employment in another Member State. The operation of the principle is noted in the recent judgment of *Krzysztof Peśla v. Justizministerium Mecklenburg-Vorpommern* to underpin the rationale for the direct entry of the migrant to the legal profession of the host state. *See* Case C-345/08, Krzysztof Peśla v. Justizministerium Mecklenburg-Vorpommern, 2009 E.C.R. I-11677, para. 53 (holding that "[i]f such an obligation did not exist, the fact of not having the diploma normally required by nationals of the host Member State could of itself constitute a decisive *obstacle to access* to the legal professions in that Member State" (emphasis added)).

[363] *See also Bosman Case* where Belgian transfer rules, effective to prevent a migrant worker moving to play for a French club, constituted an *obstacle* to that freedom. *Bosman Case*, 1995 E.C.R. I-4921, para. 96. *See also* Case C-10/90, Maria Masgio v. Bundesknappschaft, E.C.R. I-1119, para. 18; Case C-228/88, Giovanni Bronzino v. Kindergeldkasse, 1990 E.C.R. I-531; Case C-12/89, Gatto v. Bundesanstalt fuer Arbeit, 1990 E.C.R. I-557, para. 2.

[364] Case C-190/98 2000 E.C.R. I-00493, para. 23 (emphasis added). "Provisions 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 therefore constitute an obstacle to that freedom [providing they] '*affect access* of workers to the labour market.'" *Id.* (emphasis added).

[365] Case C-464/02, Comm'n v. Denmark, 2005 E.C.R. I-07929, para. 37 ("Legislation which relates to the conditions in which an economic activity is pursued may constitute an obstacle to freedom of movement." (emphasis added)).

[366] Case C-465/05, Comm'n v. Italy, 2007 E.C.R. I-11091, para. 46 (emphasis added).

So too, in the context of the freedom of establishment,[367] *Fidium Finanz AG v. Bundesanstalt für Finanzdienstleistungsaufsicht* held that German rules relating to the granting of credit by migrant companies[368] without branch or central administration in Germany impeded "*access to* the German financial market for companies established in non-member countries."[369] In *CaixaBank France v. Ministère de l'Économie, des Finances et de l'Industrie*[370] held that:

> [A] national prohibition on the remuneration of sight accounts constitutes, for companies from Member States other than the French Republic, a serious obstacle to the pursuit of their activities via a subsidiary in the latter Member State, affecting their *access to the market* . . . . Access to the market by those establishments is thus made more difficult by such a prohibition.[371]

In *Européenne et Luxembourgeoise d'investissements SA (ELISA) v. Directeur général des impôts and Ministère public*, the Court held that "it is clear from the case-law of the Court that freedom of establishment, which is conferred . . . on Community nationals . . . *entails for them access to*, and pursuit of, activities as self-employed persons."[372] In addition, national laws imposing minimum distances between service stations in Italy was a *restriction* which "by being more advantageous to operators who are already present on the Italian market, is liable to deter, or even *prevent, access* to the Italian market by operators from other Member States."[373] Note also that, in *Valentina Neri v. European School of Economics (ESE Insight World Education System Ltd),* national legislation under which certain degrees awarded in other member states were not recognised in Italy was

---

[367] TFEU, *supra* note 1, at art. 49.

[368] Where Germany granted credit on a commercial basis, on national territory, by a migrant company, subject to prior authorization that was refused where the company does not have its central administration or a branch in that territory.

[369] Case C-452/04, Fidium Finanz AG v. Bundesanstalt für Finanzdienstleistungsaufsicht, 2006 E.C.R. I-09521, para. 49 (emphasis added).

[370] *CaixaBank*, 2004 E.C.R. I-8961.

[371] *Id.* at paras. 12, 14 (emphasis added). "That prohibition is therefore to be regarded as a restriction within the meaning of Article 43 EC." *Id.* at paras. 11, 12. *See also* C-518/06, Comm'n v. Italy, 2009 E.C.R. I-3491, para. 64.

[372] Case C-451/05, Européenne et Luxembourgeoise d'investissements SA (ELISA) v. Directeur général des impôts and Ministère public, 2007 E.C.R. I-08251, para. 62 (emphasis added).

[373] In relation to the right of establishment, see TFEU, *supra* note 1, at art. 49; Case C-384/08, Attanasio Group Srl v. Comune di Carbognan, judgment of 11 March 2010, para. 45 (emphasis added).

held to restrict the right of establishment, because such recognition would "*facilitat*[*e*] *. . . access to the employment market*."[374]

The language of "market access" was also evident in *Corporación Dermoestética SA v. To Me Group Advertising Media,* where the prohibition of TV advertising with respect to surgical treatments provided by healthcare establishments was held by the Court of Justice to be "liable to make it *more difficult* for such economic operators to *gain access* to the Italian market."[375]

With respect to the Treaty right to supply services,[376] it was held recently that a Dutch measure[377] constituted "an impediment to *market access* for persons" other than the nationals of the host state.[378] In *Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA, v. QC Leisure*,[379] UK legislation prohibiting foreign decoding devices which gave access to satellite broadcasting services from another Member State was held to prevent *access* to those services from being received by persons outside the UK.[380]

---

[374] Case C-153/02, Valentina Neri v. European School of Economics (ESE Insight World Education System Ltd), 2003 E.C.R. I-13555, para. 42 ("The recognition of those degrees by the authorities of a Member State is of considerable importance." (emphasis added)).

[375] Case C-500/06 2008 E.C.R. I-5785, para. 34 (emphasis added). Such was a *restriction* and a "serious obstacle" to the exercise of the free movement of establishment and services, *id.* at para. 33. Reference in the judgment was made to the national measure which is *liable to impede or render less attractive* the exercise of the basic freedoms guaranteed by TFEU art. 49 and 56, *id.* at para 32.

[376] TFEU, *supra* note 1, at art. 56.

[377] Relating to a payment of remuneration.

[378] Case C-346/06, Dirk Rüffert v. Land Niedersachsen, 2008 E.C.R. I-1989, para. 14. Also, there has been recent confirmation that the freedom of establishment "entails for [Community nationals] access to, and pursuit of, activities as self-employed persons and the forming and management of undertakings." *See* Case C-471/04, Finanzamt Offenbach am Main-Land v. Keller Holding GmbH, 2006 E.C.R. I-2107, para. 29; *see also* Case C-451/05, Européenne et Luxembourgeoise d'investissements SA (ELISA) v. Directeur général des impôts and Ministère public, 2007 E.C.R. I-8251, para. 62; Case C-386/04, Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften, 2006 E.C.R. I-8203 para. 17; Case C-307/97, Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v. Finanzamt Aachen-Innenstadt, 1999 E.C.R. I-6161, para. 34; C-446/03, Marks & Spencer plc v. David Halsey, 2005 E.C.R. I-10837, para. 30.

[379] Joined Cases C-403/08 & C-429/08, Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA, v. QC Leisure, judgment of 4 October 2011.

[380] *Id.* at para. 88. The obstacle providing a *restriction* on the right to provide services. See also TFEU, *supra* note 1, at art. 56.

With respect to the Treaty right to supply services,[381] other judgments applying the same rationale include *Alpine Investments BV v. Minister van Financiën*,[382] in which the prohibition of cold calling[383] was held "[to] directly affect . . . *access* to the market in *services* in the other Member States and is thus capable of hindering intra-Community trade in services."[384] In *Servizi Ausiliari Dottori Commercialisti Srl v. Giuseppe Calafiori,* the right to pursue tax advice only at centers formed under the authorization of the Spanish Ministry was held "completely [to] prevent . . . *access to the market* for the *services* in question by economic operators established in other Member States."[385] Similarly, *Federico Cipolla v. Rosaria Fazari, née Portolese and Stefano Macrino and Claudia Capoparte v. Roberto Melon et al* held that the Italian fee scale was "liable to render *access to the Italian legal services market more difficult* for lawyers established in [another] Member State."[386]

In *Commission v. Italy*, Italian legislation imposed a requirement to provide third-party liability motor insurance. The Court held that "such a measure affects the relevant operators' *access to the market*" and "*renders access* to the Italian market less attractive and, if they obtain *access* to that market, reduces the ability of the undertakings concerned to compete effectively."[387] The *restriction* imposed by Italy was held to "affect *access* to the market for undertakings from other Member States and thereby *hinder intra-Community trade*."[388]

The test of "market access" has also operated within the jurisprudence of the free movement of capital.[389] In *Commission v. Spain*, for example, Spanish restrictions on investment operations[390] were held to "affect the position of a person acquiring a

---

[381] TFEU, *supra* note 1, at art. 56.

[382] In the context of the application of the provisions of TFEU art. 56.

[383] "Cold calling" refers to the practice of telephoning potential clients in another Member State without prior consent.

[384] Case C-384/93, Alpine Investments BV v. Minister van Financië, 1995 E.C.R. I-1141, para. 38 (emphasis added).

[385] Case C-451/03, Servizi Ausiliari Dottori Commercialisti Srl v. Giuseppe Calafiori, 2006 E.C.R. I-294, para. 33 (emphasis added).

[386] Joined Cases C-94/04 & C-202/04, Federico Cipolla v. Rosaria Fazari, née Portolese and Stefano Macrino and Claudia Capoparte v. Roberto Melon et al., 2006 E.C.R. I-11421, para. 58 ("And therefore is likely to restrict the exercise of their activities providing services in that Member State.").

[387] Case C-518/06, Comm'n v. Italy, 2009 E.C.R. I-3491, para. 70.

[388] *Id.* at paras. 67, 70 (emphasis added).

[389] TFEU, *supra* note 1, at art. 63.

[390] The restrictions apply without distinction to both residents and non-residents.

shareholding as such and are thus liable to deter investors from other Member States from making such investments and, consequently, *affect access* to the market."[391] Further, the United Kingdom's provisions limiting the acquisition of voting shares in BAA and PLC, and imposing consent requirements for the disposal of the company's assets, were held in *Commission v. UK* to be "liable to deter investors from other Member States from making such investments and, consequently, *affect access* to the market."[392]

Further examples of recent judgments concerned with the application of the test of "market access" include *Krzysztof Pela v. Justizministerium Mecklenburg-Vorpommern*,[393] which held in the context of the application of Article 45 TFEU[394] that "the fact of not having the diploma normally required by nationals of the host Member State could of itself constitute a decisive *obstacle to access* to the legal professions in that Member State."[395] In *Vicoplus SC PUH*,[396] the right to impose work permits on Polish nationals at the time of Poland's accession to the EU was held a "measure *regulating access* of Polish nationals to the labour market of that State."[397] *Attanasio Group Srl v. Comune di Carbognano Italian*[398] held that "[t]he construction of roadside service stations by the legal persons referred to in Article 48 EC (now Article 54 TFEU) necessarily implies that *they have access* to the territory of the host Member State."[399] Finally, in relation to the free movement of capital, the influence of the principle of market access is found in the recent judgment of *Commission v. Portugal*. In that case, the creation of so-called "golden" shares in Portugal

---

[391] Case C-463/00, Comm'n v. Spain, 2003 E.C.R. I-4581, para. 61 (emphasis added).

[392] Case C-98/01, Comm'n v. U.K., 2003 E.C.R. I-4641, para. 47 (emphasis added).

[393] Case C-345/08, Krzysztof Pela v. Justizministerium Mecklenburg-Vorpommern, 2009 E.C.R. I-11677 (emphasis added).

[394] Formerly Article 39 EC.

[395] Case C-345/08, Krzysztof Pela v. Justizministerium Mecklenburg-Vorpommern, 2009 E.C.R. I-11677, para. 53.

[396] Joined Cases C-307/09 to C-309/09, Vicoplus SC PUH, BAM Vermeer Contracting sp. zoo and Olbek Industrial Services sp. zoo v. Minister van Sociale Zaken en Werkgelegenheid, judgment of 10 February 2011.

[397] *Id.* at para. 32 (emphasis added); *see also* C-113/89, Rush Portuguesa, 1990 E.C.R. I-141, paras 20 & 21.

[398] Case C-96/08, CIBA Speciality Chemicals Central and Eastern Europe Szolgáltató, Tanácsadó és Keresdedelmi kft v. Adó- és Pénzügyi Ellenrzési Hivatal (APEH) Hatósági Fosztály, judgment of 15 April 2010, para. 44 [hereinafter *CIBA Case*]. The case concerns regional legislation laying down mandatory minimum distances between roadside service stations. The rule, a restriction on the right of establishment, "makes access to the activity of fuel distribution subject to conditions and, by being more advantageous to operators who are already present on the Italian market, is liable to deter, or even prevent, access to the Italian market by operators from other Member States." *Id.* at para. 45. Note the use of the term "deter."

[399] C-384/08, Attanasio Group Srl v. Comune di Carbognano, judgment of 11 March 2010, para. 39.

Telecom SGPS SA to be held by Portugal were held unlawful,[400] as such preferential stock treatment was "liable to deter investors from other Member States from making such investments and, consequently, affect *access* to the market."[401]

IV. Market Access: Relationship with Nondiscrimination?

The foregoing analysis concerned the recourse in free movement jurisprudence to the principle of "market access" in the location of the *obstacle* or *restriction* to the free movement right. In other jurisprudence locating the *restriction* or *obstacle* to the free movement right, the principle of *nondiscrimination* has either occupied the premier position in this process or has been allowed to coalesce alongside the principle of market access in the processes scrutinizing national measures. The importance of the principle of nondiscrimination in this context was recently confirmed in *Commission v. Greece*, where the Court explained that "the principle of nondiscrimination, whether it has its basis in Article 12 EC[402] or Articles 39 EC[403] or 43 EC,[404] requires that comparable situations must not be treated differently and that different situations must not be treated in the same way."[405] This is verification that the principle of nondiscrimination remains *inherent* within the Treaties.[406] In the context of positioning the principle of market access within the jurisprudence of free movement,[407] such a reminder of the status principle of

---

[400] TFEU, *supra* note 1, at art. 63 (providing that "[a]ll restrictions on the movement of capital between Member States . . . shall be prohibited").

[401] Case C-171/08, Comm'n v. Portugal, judgment of 8 July 2010, (emphasis added). See also the language used recently in the *CIBA Case*, judgment of 15 April 2010, para. 44.

[402] The general charging provision in relation to nondiscrimination is now found under TFEU art. 18.

[403] TFEU, *supra* note 1, at art. 45.

[404] TFEU, *supra* note 1, at art. 49.

[405] Case C-155/09, Comm'n v. Greece, judgment of 20 January 2011, para. 68. The principle was expressed recently in *Commission v. Hungary* as arising "only through the application of different rules to comparable situations or the application of the same rule to different situations." Case C-253/09, Comm'n v. Hungary, judgment of 1 December 2011, para. 50. *See also* C-279/93 Finanzamt Köln-Altstadt v. Roland Schumacker 1995 E.C.R. I-225, para. 30; Case C-383/05 Raffaele Talotta v. Belgian State, 2007 E.C.R. I-2555, para. 18; Case C-182/06, État du Grand Duchy of Luxemburg v. Hans Ulrich Lakebrink and Katrin Peters-Lakebrink, 2007 E.C.R. I-6705, para. 27.

[406] Articles 7, 48, 59 have in common the prohibition, in their respective spheres of application, of any discrimination on grounds of nationality. *See Walrave*, 1974 E.C.R. 1405, para. 16. It is clear too from *Comm'n v. Italy* that the jurisprudence of goods reflects not only "the principle of ensuring the free access of Community products to national markets' but also of nondiscrimination." Case C-110/05, Comm'n v. Italy, 2009 E.C.R. I-519, para. 34.

[407] For provisions relating to the *worker*, see TFEU, *supra* note 1, at art. 45; for establishment, see TFEU *supra* note 1, at art. 49; see for services, TFEU, *supra* note 1, at art. 56; and for capital, see TFEU, *supra* note 1, at art. 63.

nondiscrimination may be apposite. Arguably it is a signal that the Court will continue to rely on the principle of nondiscrimination in its jurisprudence. In the recent case of *Commission v. Greece*, for example, a national provision reserving entitlement to a tax exemption solely to permanent residents in Greece was held to disadvantage persons not residing in Greece.[408]

The Court has previously held that

> Article 48 . . . give[s] effect to the principle of nondiscrimination laid down in Article 7 of the EEC Treaty and are thus intended to give workers established in the different countries of the Community free *access* to employment available in countries of the Community other than the one in which they are established, without regard to their nationality, by prohibiting any restriction on their movement within the Community, whether in the form of restrictions on *access* to the national territory or restrictions on free movement within a national territory, which would prevent them from effectively exercising that right.[409]

Michael Neukirchinger v. Bezirkshauptmannschaft Grieskirche[410] reaffirms that the principle of nondiscrimination remains fundamental to the operation of the Treaty free movement provisions.[411] In *Neukirchinger*, decided 25 January 2011, the Court held:

---

[408] Case C-155/09, Comm'n v. Greece, judgment of 20 January 2011, para. 48.

[409] Case 298/84, Paolo Iorio v. Azienda autonoma delle ferrovie dello Stato, 1986 E.C.R. 247, para. 13 (emphasis added). TFEU, *supra* note 1, at art. 18 ("Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."). It was held in *Cathy Schulz-Delzers, Pascal Schulz v. Finanzamt Stuttgart III* that TFEU art. 18 "lays down a general prohibition of all discrimination on grounds of nationality, applies independently only to situations governed by European Union law for which the Treaty lays down no specific rules of non discrimination." Case C-240/10, Cathy Schulz-Delzers, judgment of 15 September 2011, para. 29. *See also* Case C-269/07, Comm'n v. Germany 2009 E.C.R. I-7811, paras. 98–99.

[410] The Court of Justice held that "in order to provide the referring court with a useful answer, the questions referred must be examined from the perspective of Article 12 EC, which enshrines the general principle of non-discrimination on grounds of nationality." *See* Case C-382/08, Michael Neukirchinger v. Bezirkshauptmannschaft Grieskirche, judgment of 25 January 2011, para. 30; *see also* Case C-40/05 Kaj Lyyski v. Umeå universitet, 2007 E.C.R. I-99, para. 33; Case C-222/07, Unión de Televisiones Comerciales Asociadas (UTECA) v. Administración General del Estad, 2009 E.C.R. I-1407, para. 37.

[411] *See supra* note 407.

> It is settled case-law that the rules regarding equality of treatment between nationals and non-nationals forbid not only overt discrimination by reason of nationality or, in the case of a company, its seat, but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead to the same result.[412]

More recently, in *Commission v. Portugal*, restrictions on the free movement of capital imposed by Portugal were held to

> apply without distinction to both residents and non-residents, it must none the less be held that they affect the position of a person acquiring a shareholding as such and are thus liable to deter investors from other Member States from making such investments and, consequently, affect access to the market.[413]

In this judgment, the Court of Justice acknowledged that *access* to the Portuguese market had been restricted on the basis that the national law had indirectly discriminated against non-residents.

Not only has recent jurisprudence relied on the principle of nondiscrimination, but where it has been required, it has also been a principle inextricably mixed with the principle of *market access*. In *Commission v. Italy*, for example, the Court of Justice held that

> *the general principle* prohibiting discrimination on grounds of nationality, which is laid down by Articles 48, 52 and 59 of the Treaty in the particular spheres which they govern, means that freedom of movement for workers, freedom of establishment and freedom to supply services include *access* to activities of employed or self-employed persons on conditions defined by the legislation of the host Member State for its own nationals.[414]

---

[412] Case C-382/08, *Neukirchinger*, judgment of 25 January 2011, para. 32. National measures in connection with the requirement to apply for an operating license to operate balloon flights in Austria were held discriminatoryon the grounds of nationality. *See* C-115/08, Land Oberösterreich v. EZ as, 2009 E.C.R. I-10265, para. 92.

[413] Case C-212/09, Comm'n v. Portugal, Case C-212/09: judgment of 10 November 2011, para. 65.

[414] Case C-58/90, Comm'n v. Italian Republic, 1991 E.C.R. I-4193, para. 9. In this context, the judgment made reference to Case 167/73, Comm'n v. France, 1974 E.C.R. 359, para. 45; Case 2/74, Jean Reyners v. Belgian State,

The general prohibition in relation to nondiscrimination[415] was described by the Court in *Commission v. France* as "absolute."[416] Other examples exist evidencing the same fusion between the principle of *market access* and *non-discrimination*.[417] With respect to the worker, for example, Article 45(2) TFEU[418] has been held to have "the effect of allowing in each state, *equal access* to employment to the nationals of other Member States."[419] Finally, in the recent case of *Donat Cornelius Ebert v. Budapesti Ügyvédi Kamara*,[420] the Hungarian court was instructed to ascertain whether the Budapesti Ügyvédi Kamara had applied national rules affecting access to the profession of lawyer in a non-discriminatory manner.[421]

1974 E.C.R. 631; and Case 33/74, Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, 1974 E.C.R. 1299.

[415] TFEU, *supra* note 1, at art. 18.

[416] Case 167/73, Comm'n v. France, 1974 E.C.R. 359, para. 45.

[417] In *Commission v. Spain*, it was held that the Treaty free movement provisions "require the elimination of any discrimination against Community nationals on grounds of nationality with regard to access to employment, establishment and the provision of services." Case C-375/92, Comm'n v. Spain, 1994 E.C.R. I-923, para. 9 (emphasis added).

[418] In this context it has operated, for example, to ensure migrant nationals' access to permanent employment in French public hospitals. Case 307/84, Comm'n v. France, 2006 E.C.R. 1725. *Commission v. Greece* concerned access to employment and the prohibiting or restriction of access for non-Greek nationals already employed in Greece to posts of director or teacher in "frontistiria" and in private music and dancing schools. Case 147/86 Comm'n v. Greece, 1988 E.C.R. 1637. The prohibition of discrimination extends to a context wider than the mere exercise of the Treaty right of free movement with respect to the *worker*. "It thus follows from the general character of the prohibition on discrimination in TFEU art. 45 and the objective pursued by the abolition of discrimination that discrimination is prohibited even if it constitutes only an obstacle of *secondary* importance as regards the equality of access to employment." Case 167/73, Comm'n v. France, 1974 E.C.R. 359, para. 46 (emphasis added).

[419] Case 167/73, Comm'n v. France 1974 E.C.R. 359, para. 45 (emphasis added). This finds expression in discrimination noted by the Court as raising "obstacles to access to the profession" that resulted in rendering unlawful a national law requiring de-registration of doctors in the home state as a precondition to registration in France. Case 96/85 Comm'n v. France, 1986 E.C.R. 1475, para. 11. Similar sentiments were expressed as "discrimination on grounds of nationality, which hinders or restricts engagement in paid employment, is contrary to Article 48 of the Treaty on freedom of movement for workers." Case 147/86, Comm'n v. France, 1988 E.C.R. 1637, para. 19.

[420] Case C-359/09, Donat Cornelius Ebert v. Budapesti Ügyvédi Kamara, judgment of 3 February 2011.

[421] *Id.* at para. 41. In the context of the right of establishment, the Court in *Criminal proceedings against Vítor Manuel dos Santos Palhota and Others* confirmed that "Article 56 TFEU requires . . . the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State." Case C-515/08, Criminal proceedings against Vítor Manuel dos Santos Palhota and Others, judgment of 7 October 2010, para. 29. *See also* Joined Cases C-372/09 & C-373/09, Josep Peñarroja Fa, judgment of 17 March 2011, para. 83; Case C-458/08 Comm'n v. Portugal, judgment of 18 November 2010, para. 82.

It appears that whatever the future positioning of the *market access* test within free movement jurisprudence,[422] the language of recent judgments such as *Neukirchinger*[423] and *Commission v. Greece*[424] would suggest that the role of the nondiscrimination principle in the available methods of inquiry as to the legality of national measures is not to be diminished and is set to continue. Rather, the language of *Neukirchinger*[425] and *Commission v. Greece*[426] suggests a strengthening of the role of the nondiscrimination principle within the applicable jurisprudence. These are cases that exhibit a subtle linkage between the tools of "market access" and nondiscrimination. This claim may be supported by jurisprudence such as *Donat Cornelius Ebert*.[427] A particular reading of the recent jurisprudence is that these are judgments which evidence that the Court is maneuvering towards implanting a number of conduits into in the process of enforcement of Treaty free movement rights with respect to national measures.

E. Comment

It is evident that there is one purpose motivating the jurisprudence relating to the worker,[428] services,[429] establishment,[430] and capital[431] in the application of free movement provisions in EU treaties to national laws: To hold unlawful national measures that are *restrictive* of or have proven to be an *obstacle* to the exercise by the migrant EU national of Treaty free movement rights. Emphatically retaining that purpose, the language of *restriction*s or *obstacles*[432] properly reflects the focus of Treaty free movement provisions.[433] It is a language that disregards the plethora of descriptions ascribed to

---

[422] *See supra* note 407.

[423] Case C-382/08, *Neukirchinger*, judgment of 25 January 2011, para. 32.

[424] Case C-155/09, Comm'n v. Greece, judgment of 20 January 2011, para. 45.

[425] *Neukirchinger*, judgment of 25 January 2011, para. 32.

[426] Case C-155/09, *Comm'n v. Greece*, judgment of 20 January 2011, para. 45.

[427] Case C-359/09, Donat Cornelius Ebert v. Budapesti Ügyvédi Kamara, judgment of 3 February 2011.

[428] TFEU, *supra* note 1, at art. 45.

[429] TFEU, *supra* note 1, at art. 56.

[430] TFEU, *supra* note 1, at art. 49. *See also Maatschapij*, 1999 E.C.R. I-2329, para. 107.

[431] TFEU *supra* note 1, at art. 63 .

[432] THE SHORTER OXFORD ENGLISH DICTIONARY (1973) (defining "restriction" as "a limitation imposed upon a person" and "obstacle" as "a hindrance, impediment, obstruction." *).*

[433] With respect to the right of establishment, TFEU art. 49 provides: "Within the framework of the provisions set out below, *restrictions* on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited" (emphasis added). The right to supply *services* provides: "Within the

national measures, such as those measures found to "hamper or to render less attractive," "prohibit or otherwise impede," "impede or render less attractive," or "hinder or make less attractive." In this context, the latter descriptions by the Court of Justice with respect to national measures arguably may be regarded as superfluous, adding nothing further of substance to the scrutiny process which is applied to the national measure. Impressive as such eclectic descriptive terminology is, its existence arguably serves only to camouflage the critical essence of the inquiry. The removal of the assigned descriptive terminology with respect to national measures may in reality serve to refocus the free movement jurisprudence[434] on the removal of the *obstacle* or r*estriction* to the free movement right. Arguably, it is a removal that would result in a transparent appraisal of Treaty exhortations within free movement jurisprudence.[435] Support for such proposition may be had from a "reorientation" of earlier jurisprudence as exemplars. The judgment of *Commission v. Netherlands*,[436] for example, records *obstacles* or *restrictions*,[437] unlawful Dutch residence requirements as being "liable to hamper or to render less attractive"[438] the exercise of rights of establishment.[439] So too, specialist patent renewal services in *Säger*[440] that were deemed liable to "prohibit or otherwise impede" the freedom to provide services[441] were nonetheless restrictions on the right to provide services.[442]

Examination of other free movement jurisprudence readily uncovers a similar approach. Dutch rules,[443] for example, held *restrictions*[444] in relation to the payment of tariffs for sea

framework of the provisions set out below, *restrictions* on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended" (emphasis added). *See* TFEU, *supra* note 1, at art. 56. With respect to the free movement of capital, TFEU art. 63 provides that "[a]ll *restrictions* on the movement of capital between Member States and between Member States and third countries shall be prohibited" (emphasis added).

[434] *See supra* note 407.

[435] Note the considerations made earlier with the concept of *restrictions* and the *wording* used in TFEU art. 56; TFEU art. 49. *See, e.g.*, Case T-266/97, Vlaamse Televisie Maatschapij NV v. Comm'n, 1999 E.C.R. I-2329, para. 107; TFEU, *supra* note 1, at art. 63.

[436] Case C-299/02, Comm'n v. Netherlands, 2004 E.C.R. I-9761.

[437] *Id.* at paras. 20–21.

[438] *Id.* at para. 15.

[439] *Id.*

[440] *Säger*, 1991 E.C.R. I-4221, para. 14.

[441] *Id.* at para 12.

[442] *Id.* at para 17.

[443] *Douane*, 2002 E.C.R. I-5235.

[444] *Id.* at para. 38.

going vessels were designated as liable to "prohibit, impede or render less attractive the right to provide services."[445] So too Belgian rules that were found to be *restrictions* on the right to provide services in relation to the posting of workers were described as liable to prohibit, impede, or render less attractive that Treaty right.[446] Jurisprudence such as this bears the overtones of the influence of the market access principle. The national measures in issue are in reality *restrictions* on the respective free movement rights. It is perfectly permissible to measure the legality of the national measure by reference to the principle of market access, but this should always be placed in the context of the availability of a number of principles[447] which exist for the that same purpose and any of which may be used where appropriate. A mere passing reference to the market access principle by referencing the national measure to phrases such as "liable to hamper or to render less attractive" is arguably insufficient. In use, the market access principle is one that ought to be founded on an economic basis; not merely one founded on passing reference and intuition.[448]

F. Particular Considerations

This paper has been concerned with the locating the position occupied by the market access principle in the process of the application to national measures of Treaty free movement rights relating to goods,[449] persons,[450] services,[451] and capital.[452] The perception from recent jurisprudence across all such freedoms appears to be that the test of market access is one that is currently more readily adopted by the Court of Justice to facilitate the scrutiny process relating to assessing the lawfulness of national measures vis-

[445] *Id*. at para. 32.

[446] Case C-219/08, Comm'n v. Belgium, 2009 E.C.R. I-9213, paras. 13–14. The same description (with respect to the establishment of companies) applied to Hungarian restrictions in the *CIBA Case*, judgment of 15 April 2010, paras. 19, 44. Note also the same descriptive analogy to restrictions applied to Belgian legislation requiring a Portuguese company to file individual accounts in respect of Portuguese workers posted to Belgium. *See* Case C-515/08, Criminal proceedings against Vítor Manuel dos Santos Palhota and Others, judgment of 7 October 2010, paras. 29, 40.

[447] An example is nondiscrimination and mutual recognition.

[448] For a discussion on the issue of *market access* and *intuition*, see Spaventa, *supra* note 136, at 914–32. Note, however, a contrary view in Advocate General Bot's Opinion that "the analysis to be carried out by the Court *should not involve any complex economic assessment*" (emphasis added). *See also* Opinion of Advocate General Bot, Case C-110/05, Comm'n v. Italy, 2009 E.C.R. I-519, para. 116.

[449] TFEU, *supra* note 1, at art. 34.

[450] For provisions relating to *workers*, see TFEU, *supra* note 1, at art. 45; for establishment, see TFEU, *supra* note 1, at art. 49.

[451] TFEU, *supra* note 1, at art. 56.

[452] TFEU, *supra* note 1, at art. 63.

à-vis the strictures of European Union law. This article has identified and sought to address issues raised by this perception, and now seeks to offer some observations on particular considerations which may properly arise if the market access test crystallises further into a permanent and universal usage within the free movement jurisprudence across goods,[453] persons,[454] services,[455] and capital.[456] In the first instance, attention is given to the issue of the prospect of a convergence within the mechanics relating to the application of the Treaty free movement provisions[457] to national measures. Evidence seems to be emerging from the jurisprudence of the Court of Justice which evidences a positioning of the test of market access as a primary component in the equation relating to the assessment of the lawfulness of the national measure vis-à-vis Treaty free movement rights.

I. Convergence Within Jurisprudence?

There is an argument to suggest that both the judgments of *Commission v. Italy*[458] and *Mickelsson and Roos*[459] have moved the jurisprudence relating to the free movement of goods[460] towards that of persons,[461] services,[462] and capital.[463] In deciding whether the respective national laws were "were measures having equivalent effect," it is argued that the key issue for *Commission v. Italy*[464] and *Mickelsson*[465] was whether there had been a *hindrance to access* to the host market.[466] This approach is reflective of that adopted by

---

[453] TFEU, *supra* note 1, at art. 34.

[454] *See supra* note 450.

[455] TFEU, *supra* note 1, at art. 56.

[456] TFEU, *supra* note 1, at art. 63.

[457] *See supra* note 407.

[458] *Comm'n v. Italy*, 2009 E.C.R. I-519.

[459] *Mickelsson*, 2009 E.C.R. I-4273.

[460] TFEU, *supra* note 1, at art. 34.

[461] *See supra* note 450.

[462] TFEU, *supra* note 1, at art. 56.

[463] TFEU, *supra* note 1, at art. 63.

[464] *Comm'n v. Italy*, 2009 E.C.R. I-519.

[465] *Mickelsson*, 2009 E.C.R. I-4273.

[466] *See* Snell, *supra* note 136, at 49.

the Court of Justice in jurisprudence relating to other Treaty freedoms.[467] The thread of "access to the market" that is now winding its way ubiquitously within the jurisprudence of Treaty freedoms[468] perhaps presents some evidence of a movement towards convergence in a defined route with respect to the application of Treaty free movement provisions to national measures. Analysis contained in this article would in this context add some support for this contention. An assumption of movement towards convergence may arguably have been driven to an extent by current jurisprudence relating to the development of Union citizenship.[469] In that jurisprudence, it is arguable that recent judgments have propelled that concept away from the basis of a market driven citizenship[470] and "towards a fully-fledged, meaningful, notion of Union citizenship that bestows upon all Union citizens a number of basic rights."[471] Article 20(2) TFEU provides that "Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties."[472] Importantly for the present context, the Treaty provisions have been used as a conduit in order to prohibit discrimination on the grounds of nationality.[473]

In the light of Article 20(2) TFEU, the Treaty provisions should arguably be re-read as sourcing rights to which all Union citizens are entitled.[474] Were this interpretation to prove correct—if rights, which are economic in nature, are bestowed on all citizens—there is then some sense in the Court abandoning the maintenance of the differing interpretations and rules relating to the application of all Treaty free movement provisions. Advocate General Maduro, for example, has taken this argument even further:

---

[467] *Id.* at 55.

[468] For provisions relating to goods, see TFEU, supra note 1, at art. 34; for workers, see TFEU, *supra* note 1, at art. 45; for establishment, see TFEU *supra* note 1, at art. 49; and for services, see TFEU, *supra* note 1, at art. 56.

[469] *See* TFEU, *supra* note 1, at art. 20 ("Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.").

[470] *See* Tryfonidou, *supra* note 136, at 40; Michele Everson, *The Legacy of the Market Citizen, in* NEW LEGAL DYNAMICS OF EUROPEAN INTEGRATION (J. Shaw & G. More eds., 1995).

[471] *See* Tryfonidou, *supra* note 136, at 40 ("Such as the right to free movement and residence and the right to be free from discrimination on grounds of nationality with regards to matters that fall within the material scope of EC law.").

[472] *See* TFEU, *supra* note 1, at art. 20(2) ("Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States.").

[473] *See, e.g.*, Case C-85/96, María Martínez Sala v. Freistaat Bayern, 1998 E.C.R I-2691, paras. 55, 62, 64; C-148/02, Carlos Garcia Avello v. Belgian State, 2003 E.C.R. I-11613, para. 29.

[474] There is authority for this proposition within the jurisprudence of the Court of Justice, see C-138/02, Brian Francis Collins v. Secretary of State for Work and Pensions, 2004 E.C.R. I-2703, para. 63; Joined Cases C-22/08 and C-23/08, Athanasios Vatsouras and Josif Koupatantze v. Arbeitsgemeinschaft (ARGE) Nürnberg 900, 2009 E.C.R. I-4585, para. 37; C-258/04, Office national de l'emploi v. Ioannis Ioannidis, 2005 E.C.R. I-8275, para. 22.

> *[S]uch a harmonisation of the systems of free movement seems . . . to be essential in the light of the requirements of genuine Union citizenship*. It would be desirable for the same system to be applied to all the citizens of the Union wishing to use their freedom of movement or freedom to move services, goods or capital as well as their freedom to reside or to set up the seat of their activities in the Community.[475]

Tryfonidou supports such reasoning in that the arguments expressed by Advocate General Maduro could lead to the proposition that, as a consequence of translating the economic freedoms into citizenship rights, the Court of Justice has placed the market freedoms on the road that leads to convergence.[476]

Any assumption relating to an adoption of a pure market access test with respect to the issue of the application of (all) Treaty free movement rights to national measures is an intriguing prospect. Nevertheless, elevating the market access test to a central, dominant position within the process used to assess the legality of the national measure would raise some concerns. Some of those concerns are addressed below.

II. Reviewing the Reviewers

There has been a long history of the use of the market access test within the jurisprudence of goods,[477] persons,[478] services,[479] and capital.[480] The market access test is referenced in

---

[475] Opinion of Advocate Gen. Poiares Maduro, Joined Cases C-158 & 159/04, Alfa Vita Vassilopoulos AE, formerly Trofo Super-Markets AE v. Greece, 2006 E.C.R. I-8135, para. 51 (emphasis added). *See also* Opinion of Advocate Gen. Bot, Case C-110/05, Comm'n v. Italy, 2009 E.C.R. I-519, paras. 83, 118.

[476] *See* Tryfonidou, *supra* note 136, at 36, 55 (suggesting it is a "novel idea" to place the argument in the context of the "broader developments which have taken place in the context of Union Citizenship," even if the move to convergence has been an "unspoken" determination). *See also* Case 205/07, Lodewijk Gysbrechts and Santurel Inter BVBA, 2008 E.C.R. I-9947; Case C-441/04, A-Punkt Schmuckhandels GmbH v. Claudia Schmidt, 2006 E.C.R. I-2093; C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093.

[477] *See* TFEU, *supra* note 1, at art. 34.

[478] *See supra* note 450.

[479] *See* TFEU, *supra* note 1, at art. 56.

[480] *See* TFEU, *supra* note 1, at art. 63.

key judgments,[481] opinions of Advocates General,[482] and discussions in academic papers.[483] Nonetheless, despite the appearance of a tangible and increasing readiness to resort to the use of the market access test as a central plank in the assessment of the legality of national measures, the test remains without judicial definition.[484] In addition, there has been academic argument to the effect that the market access test is one that does not readily open itself to particular definition[485] and that there is a measure of "*uncertainty* which surrounds this . . . concept."[486] Snell, for example, suggests that "the very ambiguity of the term may explain its use by and the usefulness for the Court."[487] He argues that the reference to market access may allow the Court to avoid difficult choices in relation to the reach of free movement law.[488] Uncertainty in this context allows "maximum freedom of manoeuvre"[489] and the lack of clear content gives the Court freedom "either to approve or to condemn measures that it happens to like or dislike."[490]

---

[481] *See Keck and Mithouard*, 1993 E.C.R. I-6097, para. 17; Case C-384/93, Alpine Investments BV v. Minister van Financiën, 1995 E.C.R. I-1141, para. 38; *Gourmet Int'l.*, 2001 E.C.R. I-1795, para. 18, 20; C-110/05 Comm'n v. Italy, 2006 E.C.R. I-2093, paras. 34, 36, 37. *See also* Snell, *supra* note 134.

[482] *See* Opinion of Advocate Gen. Jacobs, Case C-412/93, Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA, 1995 E.C.R. I-179, paras. 39–56; Opinion of Advocate Gen. Fennelly, Case C-190/98, Volker Graf v. Filzmoser Maschinenbau GmbH, 2000 E.C.R. I-493; Opinion of Advocate Gen. Tizzano, *CaixaBank*, 2004 E.C.R. I-8961; Opinion of Advocate Gen. Maduro, *Alfa Vita*, 2006 E.C.R. I-8135; Opinion of Advocate Gen. Kokott, *Mickelsson*, 2009 E.C.R. I-4273. *See also* Snell, *supra* note 134.

[483] This is well documented, not only in this Article but in articles such as Catherine Barnard, *Fitting the Remaining Pieces into the Goods and Persons Jigsaw?*, 26 Eur. L. Rev. 35 (2001); Peter Oliver and Stefan Enchelmaier, *Free movement of Goods: Recent Developments in the Case Law*, 44 Common Mkt. L. Rev. 649, 674 (2007); Snell, *supra* note 134; Eleanor Spaventa, *From Gebhard to Carpenter: Towards a (non-)economic European Constitution*, 41 COMMON MKT. L. REV. 743 (2004); Stephen Weatherill, *After* Keck*: Some Thoughts on how to Clarify the Clarification*, 33 COMMON MKT. L. REV. 885 (1996); Spaventa, *supra* note 136. *See also* BARNARD, *supra* note 171, at 21–24; PAUL P. CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES AND MATERIALS 694–95 (4th ed. 2008) in the context of the free movement of goods.

[484] Adequate definitions relating to nondiscrimination have been provided. With respect to the Treaty rights of establishment and the right to supply services, it has been held that "the principle of equal treatment . . . prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result." *Case* C-3/88, Comm'n v. Italy, 1989 E.C.R. 4035, para. 8.

[485] In the context of a discussion in relation to *Keck and Mithouard*, the concept has been identified as "inherently nebulous." *See* Oliver and Enchelmaier, *supra* note 483.

[486] BARNARD, *supra* note 171, at 21 (emphasis added).

[487] Snell, *supra* note 134, at 468.

[488] *See id.* at 469.

[489] *Id.*

[490] *Id.*

1. Definition: Advocates General and Commentators

An increasing use of the market access test by the Court of Justice lends support to an argument for the provision of judicial definition.[491] Definitions of the test have been suggested by academic writers; Spaventa, for example, presents an *economic* interpretation of the notion of "barrier to market access."[492] At one extreme in this interpretation exists a barrier to entry created through either circumstances or legislation;[493] in contrast, the other economic extreme presents a potential barrier imposed by *any* regulation.[494] In the context of European Union law, Spaventa argues that the concept of market access has adopted an *intuitive*[495] rather than an economic approach.[496] The intuitive approach is located somewhere between the two identified economic extremes.[497] It is an approach that attempts "to provide a test which would allow . . . [distinction] between rules which should subjected to judicial scrutiny and rules considered neutral as regards intra Community trade."[498] The latter rules would fall

[491] *See, e.g.*, *id.*

[492] *See* Spaventa, *From Gebhard*, *supra* note 483, at 757.

[493] *See id.* (making a comparative assessment about "[t]he ability for an economic actor to gain access to a market *on an equal footing* with other economic operators" (emphasis added)). Spaventa adds that "[t]his definition seems entirely consistent with the Court's view taken in *Keck,* but for the fact that the Court makes it clear that a rule preventing market access (i.e., a total barrier) falls within the definition, regardless of discrimination." *Id.*

[494] *See id.* at 757 (noting that "*any* regulation imposes and implies compliance costs" (emphasis added)).

[495] *See* Snell, *supra* note 134, at 468–69 (noting that, in the context of a lack of clear content in the test of market access, "[m]arket access may simply provide a sophisticated-sounding garb that conceals decisions based on intuition").

[496] *See* Spaventa, *From Gebhard*, *supra* note 483, at 758. A later article expresses the same view that "[i]n the context of the free movement provisions, little effort has been devolved to defining the concept of market access; thus, so far, the concept has been used in an intuitive way rather than resting on accurate economic analysis." Spaventa, *supra* note 136, at 923. *See also* Opinion of Advocate Gen. Bot, Case C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093, para. 116 ("As regards, . . . other categories of measures, it is necessary to examine their specific impact on patterns of trade, but the analysis to be carried out by the Court *should not involve any complex economic assessment*." (emphasis added)).

[497] *See* Spaventa, *From Gebhard*, *supra* note 483, at 757.

[498] *Id.* at 758. Spaventa observes that those who would support the "market access" test would reject "a purely discriminatory assessment." *Id.* There is, however, "an attempt to provide a test which would allow us to distinguish between rules which should be subjected to judicial scrutiny, and rules considered neutral as regards intra-Community trade which should fall altogether outside the scope of the Treaty free movement provisions." *Id.* Note in this content the view of Advocate General Lenz that there should exist "a distinction between rules which regulate *access* to an occupational activity (which should be scrutinized), and rules which regulate the *exercise* of that activity (which should not be scrutinised)." *Id.* at 758 n.48.

outside the scope of the Treaty free movement provisions.[499] Spaventa warns that the adoption of a default intuitive approach and the failure of the Court to use economic analysis "carries with it the risk of an overbroad interpretation of the notion of a barrier caught by the Treaty."[500] It is for this reason it is argued that the use of the market access test has always been qualified by the proponents of that test; such qualification has been through the route of "*de minimis* or notions such as a substantial *hindrance* to market access."[501] It is in the latter context that both *Commission v. Italy*[502] and *Mickelsson*[503] are arguably significant judgments, because both employ the market access test *without* such qualification. The reality of these judgments is that "[t]he Court makes no such attempt [to qualify the application of the market access test]; rather, *any (other) measure which hinders access of products originating in other Member States to the market of a Member State* is to be considered a measure having equivalent effect in need of justification."[504]

Given the manner in which the market access test was relied upon in both *Commission v. Italy*[505] and *Mickelsson*[506] without qualification, together with the previous record of the adoption by the Court of Justice of an *intuitive* approach to that test, it is arguable at least that it becomes a more compelling reason for the Court of Justice to provide a workable definition[507] of the concept. The problem at present appears to be a seeming inability to establish accurately which national rules are to be covered by the concept and which are not. It is in the present context that market access could be seen as a blunt instrument, covering national measures that impose a barrier to entry to the host market as well as those measures that impose restrictions on the product or migrant after entry.

---

[499] *See id.* at 758.

[500] Spaventa, *supra* note 136, at 923. Hence "it becomes difficult to identify which, if any, national rules fall outside the scope of the Treaty and therefore need not be justified." *Id.*

[501] *Id.* at 923 ("Below which national rules would not need to be justified") (emphasis added).

[502] C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093.

[503] *Mickelsson*, 2009 E.C.R. I-4273.

[504] Spaventa, *supra* note 136, at 924 (emphasis added).

[505] C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093.

[506] *Mickelsson*, 2009 E.C.R. I-4273.

[507] Spaventa, *supra* note 136, at 924: "But once we apply an *effet utile* approach to market access, so that any rule which not only directly limits access to a given market is caught by Art. 28 EC but also that which discourages an importer from accessing that market, then it is difficult to identify which rules, if any, would actually fall outside the market access test. In this respect, *Commission v Italy* and *Mickelsson and Roos* seem to have brought the case law on goods in line with the case law on persons." *Id.*

There have been other elaborations of the substance of market access. Weatherill, while addressing but not confined to the issue of the "selling arrangement," proposed a test of "direct or substantial hindrance" to "market access."[508] He writes,

> Measures introduced by authorities in a Member State which apply equally in law and in fact to all goods or services without reference to origin and which impose no *direct or substantial hindrance* to the access of imported goods or services to the market of that Member State escape the scope of the application of Articles 30 and 59.[509]

It would follow that measures "which either apply unequally in law . . . or fact to goods and services with reference to origin or which impose a direct and substantial hindrance to the access of imported goods or services"[510] to the host market will fall within the scope of the application of the provisions relating to goods[511] and to services.[512]

In the context of *Keck*, Weatherill's observation addresses the need to place national rules, which do not threaten the internal market, outside the scope of EU law. It is an observation that could, however, apply to free movement jurisprudence in general.[513] The problematic identification of a national measure being of *direct or substantial hindrance* to access was illustrated in the following terms: "Complete bans on the sale of goods and services through the national territory may apply equally in law and in fact to all goods and services, but the ban impedes market access and accordingly must be justified."[514] There

---

[508] Weatherill, *supra* note 483, at 896–97. *See also* Spaventa, *From Gebhard*, *supra* note 483, at 758. *See also* Barnard *supra* note 483, at 52–53 (discussing the possibility of a general test for *market access* based on the "prevention or direct and *substantial hindrance* of access to the market" (emphasis added)).

[509] Weatherill, *supra* note 483, at 896–97 (emphasis added). *See also* TFEU, *supra* note 1, at arts. 34, 56.

[510] *Weatherill, supra* note 483, at 897.

[511] TFEU, *supra* note 1, at art. 34.

[512] TFEU, *supra* note 1, at art. 56.

[513] *See* Weatherill, *supra* note 483, at 897. The effect of the "formula" places the onus then on the issue of *justification*. *Id.* "Non-discriminatory national measures that cross the threshold of a sufficient restriction on market access are compatible with EC law only provided: they are justified by mandatory requirements in the general interest; that they are apt to achieve the objective which they pursue; and that they do not go beyond what is necessary in order to attain it." *Id. See also Dieter Kraus*, 1993 E.C.R. I-1663; Case C-55/94, Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165; *Rewe-Zentral*, 1979 E.C.R. 649.

[514] Weatherill, *supra* note 483, at 896–97, 899. *See Her Majesty's Customs*, 1994 E.C.R. I-1039; Case C-34/79, Regina v. Maurice Donald Henn and John Frederick Ernest Darby, 1979 E.C.R. 3795.

will be other instances wherein the national measure will not be deemed to be a direct or substantial hindrance.[515]

Advocate General Jacobs has proposed that in the instant context "the appropriate test . . . is whether there is a *substantial restriction* on . . . access."[516] He argued that "a test based on the extent to which a measure hinders trade between Member States by restricting market access seems the most obvious solution."[517] The Advocate General noted that, in the instances wherein measures are applicable without distinction, it "would it be necessary to introduce a requirement that the restriction, actual or potential, on access to the market must be substantial."[518] Such argument would broach consideration of what the imposition of *substantial restriction* in this context actually requires. Is it, for example, an issue of an assessment of how many goods are affected, or a qualitative question relating to the type of measure under scrutiny?[519] It may be noted that the judgments of *Commission v. Italy*[520] and *Mickelsson and Roos*,[521] in relation to the free movement of *goods*,[522] arguably seem to have embraced the idea of *substantial hindrance* as proposed by Advocate General Jacobs. *Commission v. Italy*[523] decided that there had

---

[515] *See* Case C-379/92, Criminal proceedings against Matteo Peralta, 1994 E.C.R. I-3453, para. 24 (stating that the effect of Italian rules on the freedom to provide services was *too uncertain and indirect* as to hinder trade between *Member States*). *See also* Weatherill, *supra* note 483, at 896–97, 899 (arguing that such amounts to "a statement of no direct restriction on market access.").

[516] Opinion of Advocate General Jacobs, Case C-412/93, Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA, 1995 E.C.R. I-179, para. 42 ("That would of course amount to introducing a de minimis test into Article 30") (emphasis added). The Opinion was delivered in the context of TEC art. 30 (now 34 TFEU) vis-à-vis the application of the concept of the "selling arrangement." The Advocate General was of the opinion that Article 30 (now 34 TFEU) be regarded as applying to non-discriminatory measures which are liable substantially to restrict access to the market. *Id.* at para. 49.

[517] *Id*. *See also, e.g.*, Opinion of Advocate Gen. Stix-Hackl, Case C-322/01, Deutscher Apothekerverband eV v. 0800 DocMorris NV and Jacques Waterval, 2003 E.C.R. I-14,887, para. 78.

[518] Opinion of Advocate Gen. Jacobs, Case C-412/93, Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA, 1995 E.C.R. I-179, para. 44. So, for example, where there is a denial of access altogether, there is "a *substantial barrier* to market access." *Id*. (emphasis added). By contrast, where the measure merely restricts the goods (as in the case of a selling arrangement), its impact will depend, for example, upon whether the measure applies to most goods, certain goods or to all goods. *Id.* at para. 45.

[519] *See, e.g.*, Tryfonidou, *supra* note 466, at 51 (explaining that the first category would broach the adoption of a de minimis test, whereas a qualitative identification of the measure on the other hand relates for example to the type of measure scrutinised and whether it is harmful to interstate trade).

[520] C-110/05, Comm'n v. Italy 2006 E.C.R. I-2093.

[521] *Mickelsson*, 2009 E.C.R. I-4273.

[522] TFEU, *supra* note 1, at art. 34.

[523] C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093.

been a restriction[524] because the national rules limited the use of trailers in Italy and consequently reduced the opportunities for trade.[525]

2. Market Access: Notion

Given that there is an absence of a definitive jurisprudential definition of "market access," and that an economic basis for the test is appealing because it at least offers some certainty, it might be appropriate to give some consideration to the conceptual basis which underpins the test of market access.

With respect to the notion of market access[526] within EU free movement jurisprudence relating to persons,[527] the Court has distinguished between *access* and *exercise* relating to the free movement right. This division, as noted by Snell, translates to "the take-up and pursuit of an *activity*, or an entry to and operation in the market."[528] Advocates General have produced different opinions on such a division. Advocate General Lenz in *Bosman* expressed some support in favour of this distinction. He was of the opinion[529] that the football transfer rules "do not concern the possibility of *access* for foreign players as such, but the *exercise of* the occupation."[530] Support for this view is also found in Advocate General Fennelly's opinion in *Volker Graf v. Filzmoser Maschinenbau GmbH*:

> The imposition of conditions regarding entry to the market or the taking up of economic activity is itself sufficient to establish the existence of a restriction . . . .

[524] *See id.* at para. 64 (justifying the measure in that instance by reasons of road safety).

[525] *Id.* at para. 58. It was stated that Article 34 TFEU reflects the obligation to respect the principle of ensuring free access of Union products to national markets. *See id.* at summary.

[526] *See* Snell, *supra* note 134, at 443. The notion of "market access" is an autonomous one. It appears within competition and WTO law but Snell notes that "[t]he way the concepts of barriers to entry and market access have developed in these contexts are fundamentally different from EU free movement law and as a result, any borrowing would be counterproductive." *Id.*

[527] For provisions relating to the worker, see TFEU, *supra* note 1, at art. 45; for establishment, see TFEU, *supra* note 1, at art. 49; for services, see TFEU, *supra* note 1, at art. 56.

[528] Snell, *supra* note 134, at 443 (reflecting the right in TFEU art. 45 "(a) to accept offers of employment actually made; . . . (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State."). Snell notes that (a) relates to access to employment and seems to be "absolute." On the other hand (c) relates to rights after such access, "when the actual occupation has been exercised." *Id.* at 444.

[529] *See Bosman Case*, 1995 E.C.R. I-4921 (arguing that the evenhanded nature of the rules was of no relevance, since they affected *access* to the labour market).

[530] *Id.* at para. 210 (emphasis added).

> The same, broadly speaking, can probably also be said of formal conditions imposed regarding matters which are intimately connected with successful access to the market, such as those governing recognition of a qualification which is necessary or beneficial to the exercise of many professional activities.[531]

In contrast to the Opinions of Advocates General Lenz and Fennelly, however, Advocate General Alber has argued that "[r]ules on the exercise of a profession . . . must . . . be complied with directly by a citizen of the Union who wishes to assert the fundamental freedom under Article 48 of the EC Treaty."[532]

Snell labels the distinction between access and exercise a "superficial appeal" because "the impact of a measure on cross-border situations is a function of its restrictiveness, and does not depend on the stage at which it operates."[533]

3. Nondiscrimination

One of the important features of the judgments of *Commission v. Italy*[534] and *Mickelsson*[535] is the adoption of a "market access" test, which was free of any reference to discrimination.[536] Tryfonidou has observed that, in the context of the market freedoms other than those related to goods*;* the Court "appears to be moving towards convergence through the adoption of a pure market access approach and has dispensed with the need

---

[531] Opinion of Advocate General Fennelly, Case C-190/98, Volker Graf v. Filzmoser Maschinenbau GmbH, 2000 E.C.R. I-493, para. 30.

[532] Opinion of Advocate General Alber, Case C-176/96, Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v. Fédération royale belge des sociétés de basket-ball ASBL (FRBSB), 2000 E.C.R. I-2681, para. 48. *See also* TFEU, *supra* note 1, at art. 45.

[533] Snell, *supra* note 134, at 445 (noting that the distinction is not accepted by the Court of Justice). The Court held in *Commission v. Denmark* that "[t]he manner in which an activity is pursued is liable also to affect access to that activity. Consequently, legislation which relates to the conditions in which an economic activity is pursued may constitute an obstacle to freedom of movement within the meaning of that case-law." Case C-464/02, Comm'n v. Denmark, 2005 E.C.R. I-7929, para. 37.

[534] C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093.

[535] *Mickelsson*, 2009 E.C.R. I-4273.

[536] *See* Tryfonidou, *supra* note 136, at 48. However, it should be noted that, in the context of TFEU art. 34 (ex TEC art. 28), *Keck and Mithouard* was imbued with a respect for the principle of nondiscrimination "because it only refers to, and, apparently, solely brings within the scope of art. 28 EC, measures that either totally prevent access to the market (which are inherently discriminatory in nature) or discriminate against imported products as regards access to the market." *Id.*

of proving discrimination in law or in fact."[537] Such observation may indeed prove correct, but at present there remains a strong argument for a continued use of the principle of nondiscrimination in the jurisprudence relating to the free movement of goods.[538] In *Commission v. Italy*, for example, the Court substituted reference to the "selling arrangement" by declaring "[c]onsequently, measures adopted by a Member State the object or effect of which is to *treat* products coming from other Member States *less favourably* are to be regarded as measures having equivalent effect to quantitative restrictions on imports."[539] Such statement arguably would appear to be an explicit acknowledgement by the Court that the principle of nondiscrimination is an essential element in the application of Article 34 TFEU.[540] A recent judgment with respect to the free movement of goods[541] has been more unequivocal. *Asociación para la Calidad de los Forjados (Ascafor), Asociación de Importadores y Distribuidores de Acero para la Construcción (Asidac) v. Administración del Estado, et al* held that "Article 34 TFEU reflects the obligation to comply with the principles of non-discrimination."[542] With respect to jurisprudence relating to freedoms other than those applicable to goods,[543] one commentator has recently written that

> It is an anomaly in the sense that the Court, in the context of the other market freedoms, appears to be moving towards convergence through the adoption of a pure market access approach and has dispensed with the need of proving discrimination in law or in fact before a measure can be caught by the market freedoms.[544]

---

[537] *Id.* at 54.

[538] *See* TFEU, *supra* note 1, at art. 34.

[539] Case C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093, para. 37 (emphasis added).

[540] *See* Case C-205/07, Lodewijk Gysbrechts and Santurel Inter BVBA, 2008 E.C.R. I-9947, paras. 40–44 (holding that the scope of Article 35 TFEU with respect to the free movement of exports was defined by the principle of nondiscrimination); Wenneras & Moen, *supra* note 136, at 393; Anthony Dawes, *A Freedom Reborn? The New Yet Unclear Scope of Article 29 EC*, 34 EUR. L. REV. 639, 641–43 (2009).

[541] *See* TFEU, *supra* note 1, at art. 34.

[542] Case C-484/10, Asociación para la Calidad de los Forjados (Ascafor), Asociación de Importadores y Distribuidores de Acero para la Construcción (Asidac) v. Administración del Estado, et al, judgment of 1 March 2012.

[543] *See* TFEU, *supra* note 1, at art. 34.

[544] *See* Tryfonidou, *supra* note 466, at 54.

Yet there is also, for example, reliance on the concept of nondiscrimination within the jurisprudence relating to citizenship. The concept of citizenship[545] itself has been argued to form the genesis of the convergence in free movement law, which focuses on market access.[546] Citizenship judgments such as *María Martínez Sala v. Freistaat Bayern* [547] and *Carlos Garcia Avello v. Belgian State*[548] have held that the principle of nondiscrimination on the grounds of nationality applies as equally to the citizen of the Union as well as to the other free movement provisions.[549]

There are, however, general issues arising from the operation of the principle of nondiscrimination within free movement jurisprudence vis-à-vis its relationship with the other principles. Snell observes, for example, that "the relationship between the term [of market access] and other concepts such as 'discrimination' . . . is by no means clear."[550] Advocate General Jacobs's Opinion in *Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA*[551] classified the reality of *Keck*[552] "as concerning discrimination."[553] However, the Advocate General in that opinion was of the view that, in the context of establishing a single market, nondiscrimination was "not a helpful criterion."[554] He also observed that "the application of the discrimination test would lead to the fragmentation of the Community market,"[555] since the concept set up the prevailing "local conditions" as the benchmark for the application of Article 34 TFEU. In conclusion, the Advocate General was of the opinion that "[a] discrimination test is therefore inconsistent as a matter of principle with the aims of the Treaty";[556] the measurement, he

[545] *See* TFEU, *supra* note 1, at art. 20 ("Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.").

[546] *See* Tryfonidou, *supra* note 136, at 36, 55.

[547] Case C-85/96, María Martínez Sala v. Freistaat Bayern, 1998 E.C.R I-2691, paras. 55, 62, 64.

[548] C-148/02, Carlos Garcia Avello v. Belgian State, 2003 E.C.R. I-11613, para. 29.

[549] *See supra* note 407.

[550] Snell, *supra* note 134, at 437.

[551] *Leclerc-Siplec*, 1995 E.C.R. I-179.

[552] *Keck and Mithouard*, 1993 E.C.R. I-6097.

[553] Opinion of Advocate Gen. Jacobs in Case C-412/93, *Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA,* 1995 E.C.R. I-179, paras. 39–40.

[554] *Id.* at para. 40.

[555] *Id.*

[556] *Id.*

argued, ought instead to be one of "access to the entire [EU] market."[557] The standard measurement should not be established relative to prevailing local conditions.[558]

G. Conclusion

There is abundant evidence from perusal of free movement jurisprudence that the principle of "market access" occupies a prominent position in the equation applied in the assessment of the legality of the national measure by the Court of Justice in the context of the free movement provisions[559] of European Union law. The "market access" test has been used beyond goods,[560] Prechal comments that free movement jurisprudence has indicated that "market access has become the main criterion for adjudicating national measures under the prohibitive rules on free movement, which entails that national rules preventing or hindering market access are unlawful, irrespective of whether they discriminate against other persons, services or capital."[561] There appears to be abundant evidence that the claim by Prechal is either correct or is at least currently proving to be a fair representation which will reflect the future composition of free movement jurisprudence.

This article has shown that the language and ethos of "market access" is firmly embedded in free movement jurisprudence and that the principle is enjoying resurgent influence across all such jurisprudence in the process of application of Treaty rights to national law. In the realm of persons[562] and services,[563] for example, judgments holding certain measures "liable to hamper or to render less attractive," "liable to prohibit or otherwise impede," or "prohibit, impede or render less attractive" the exercise of free movement are infused with the principle of market access.[564] There appears to be no weakening of the Court's desire to make use of the test of market access as an integral element in the process of the assessment of the legality of the national measure.[565] The continued use of

[557] *Id.* Although the opinion was set in the context of the application of TFEU art. 34, the rationale of the Advocate General's argument could be applied equally across other Treaty free movement rights.

[558] *See id.*

[559] *See supra* note 407.

[560] *See* Sacha Prechal & Sybe A. de Vries, *Seamless Web of Judicial Protection in the Internal Market?*, 34 EUR. L. REV. 5, 8 n.15 (2009).

[561] *See id.*; BARNARD, *supra* note 171, at 21.

[562] *See supra* note 450.

[563] *See* TFEU, *supra* note 1, at art. 56.

[564] *See* BARNARD, *supra* note 171, at 19.

[565] The recent discussion on *citizenship* would appear to confirm this.

the market access test in free movement jurisprudence has distinct advantages. Based upon the articulation in *Cassis de Dijon* that goods lawfully produced in one Member State should enjoy free and unrestricted access to the market of the host state, the use of the market access principle arguably contributes towards achieving a single market.[566] The effect of pegging the enquiry to the issue of market access is that restrictions[567] on the imported good or migrant EU national can be removed.[568] The advantage of the market access approach is that it allows the adoption of strategies to control the marketplace on a pan-European basis, protecting that wider marketplace from the sectionalised interests of Member States. In the pan-European marketplace, the producer of goods benefits from economies of scale, and the consumer benefits from greater choice. In the realm of the free movement of persons[569] and services,[570] the migrant EU national can engage in a trade or profession and is able to receive services in all Member States across the EU market. Assessing market access is not a narrow prescription. On the contrary, it encourages both macro- and micro-economic activity within an internal market of 500 million people.[571] The benefits of encouraging market access accrue both to the individual producer/exporter and to the migrant EU national, and to the European Union market as a whole.

There are, however, disadvantages to the use of the market access principle within the jurisprudence of the free movement of goods,[572] persons,[573] services,[574] and capital.[575] It is a principle that permits more intrusion into national competences, because national measures held unlawful will be struck down unless *justified* by the Member State.[576] One

---

[566] *See Rewe-Zentral*, 1979 E.C.R. 649, para. 14 ("There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, [goods] should not be introduced into any other Member State.").

[567] Or *obstacles*.

[568] It would be rendered unlawful. The onus is then placed on the Member State to *justify* the *restriction* or *obstacl*e to the free movement right.

[569] *See supra* note 450.

[570] TFEU, *supra* note 1, at art. 56.

[571] The "provisional value" for the EU's population in 2011 is 502476606 people. *See Eurostate News Release*, EUROPEAN UNION (July 28, 2011), http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-28072011-AP/EN/3-28072011-AP-EN.PDF (last visited May. 23, 2012).

[572] *See* TFEU, *supra* note 1, at art. 34.

[573] *See supra* note 450.

[574] *See* TFEU, *supra* note 1, at art. 56.

[575] *See* TFEU, *supra* note 1, at art. 63.

[576] *See Dassonville,* 1974 E.C.R. 837. Note that, in the context of the free movement of *goods*, the problem arising in relation to the application of TFEU art. 34 arose from the presentation of an extremely wide definition of the

concern relates to *how* particular national measures are to be targeted for the scrutiny of European Union law. There is a certain unpredictability of usage; virtually *all* national measures arguably affect trade between Member States in some way, even if the effect on that trade is extremely slight. In this respect, there may be some cause for apprehension: the Court's use of the test without limiting principles (such as de minimis or remoteness) in the context of goods in *Commission v. Italy*[577] and *Mickelsson*[578] alerts to the possible danger of blunt usage of the market access principle. In extreme circumstances, the use of the market access principle may lead to an unrestrained intrusion into the national markets of Member States. In the absence of any inherent limiting principles, nothing prevents the market access test from being applied as an unrefined instrument, the purpose of which would be to scythe down national measures deemed intuitively by the Court of Justice to have hindered trade between Member States. That the principle of market access appears practically to be based on the Court's intuition may prove to be an issue that has to be addressed within forthcoming jurisprudence. Replacing *intuition* as the basis of the assessment of market access with an economic assessment related to the specific instances of scrutiny of national measures would build in some degree of certainty in the application of Treaty free movement jurisprudence to national measures.

Although it would be welcomed by some, the establishment of a tangible economic basis to underpin the principle of market access does not represent an absolutely failsafe solution. The adoption of an economic basis to the assessment of market access in free movement jurisprudence raises other issues. One disadvantage of embracing an economic basis in such circumstances is that the litigant would presumably have the difficult task of producing qualitative data relating to alleged hindrance to the free movement right. The advantage in the particular instances wherein such data could be produced would result from the element of objectivity[579] that would be thereby introduced into the equation used to apply Treaty free movement law to national measures.

A further observation in the context of positioning the place of the market access test across free movement jurisprudence is that the market access test of *Commission v. Italy*[580]

---

concept of the "measure having equivalent effect" through *Dassonville*. The link between TFEU art. 34 and the internal market had thereby been pushed too far in favour of general review of national market regulation. The jurisprudence in consequence was dissociated from a need to show a hindrance to trading activities aimed at the realization of the internal market. *See* Weatherill, *supra* note 483, at 896–97, 905.

[577] C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093.

[578] *Mickelsson*, 2009 E.C.R. I-4273.

[579] By contrast, an *intuitive* assessment of whether the national law has hindered "market access" is, on the other hand, open to the charge that the resulting assessment may be tainted with an element of subjectivity.

[580] Case C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093, para. 56.

and *Mickelsson*[581] arguably gives the importer/migrant EU national not only a right of *access* to the market, but also a right not to be restricted *within* the market of the host state. If this analysis is correct, then arguably the jurisprudence of goods has moved closer to reflect that of persons,[582] which has evidenced a movement towards placing the onus on Member States being required to justify any restriction on individual.[583]

It has been observed that the recent use of the market access test presents "a fine contribution to the process towards convergence among the market freedoms."[584] There is much merit in such an observation. However, it remains far from clear at the present time that adoption of the market access test, either as the key or sole element in the assessment determining the legality of national measures, would represent the most propitious way forward for free movement jurisprudence. The use of the test across all four freedoms seems to represent the Court's current thinking as it seeks to develop EU free-movement jurisprudence as "fit for purpose" in the market place of the twenty-first century.

However, this article raises doubts about the concept that the market access test should be regarded as a nirvana which would deliver a uniform application of Treaty free movement rights across the twenty-seven Member States of the European Union. In any headlong dash towards the creation of an internal market for the EU, it is arguable that the role of principles aside from that of market access within the process of applying the Treaty free movement provisions to national measures ought not to be overlooked. Indeed, at least when pertaining to goods, the old familiar workhorses of justification and proportionality were evident within the process of enquiry as to the legality of the national measures in *Commission v. Italy*[585] and *Mickelsson*.[586] The reliance in these judgments on the traditional constituent principles that have been integral parts of the framework for the Court's enquiry into the legality of national measures properly raises the issue of whether free movement jurisprudence can be either sustained or be as effective when the market access principle is the sole focus in the assessment of the legality of the national measure.

---

[581] *Mickelsson*, 2009 E.C.R. I-4273.

[582] *See* Spaventa, *supra* note 136, at 924–25. Jurisprudence which, Spaventa has argued, concerns not only *access* to the market but probably—and more importantly—rules which *restrict* activities within the market place. These are described as national rules which discourage the importer's market penetration in that the consumer base is reduced or the costs of the migrant are increased.

[583] The application of the "market access" test must in principle then be *justified* in the particular circumstances along with the benchmark requisites of necessity and proportionality. *See id.* at 925.

[584] Tryfonidou, *supra* note 136, at 55.

[585] Case C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093.

[586] *Mickelsson*, 2009 E.C.R. I-4273.

The methodology of current jurisprudence appears to represent a precursor to the establishment of some degree of convergence in the translations of Treaty free movement rights through the principle of market access with respect to national measures. It has been argued elsewhere that it would be more genuine for the Court of Justice to maintain an "openness" in its reliance on the principles used as tools in its jurisprudence. It may be instructive at this juncture, for example, to recall that both the judgments of *Commission v. Italy*[587] and *Mickelsson*[588] were structured around restriction, justification, and proportionality, as well as the notation[589] in *Commission v. Italy*[590] that, in addition to respecting free access to Community markets, the provision relating to the free movement of goods respected the principles of nondiscrimination and mutual recognition.[591] Support for such proposition arguably is found in Wenneras's observation that "[i]t is at the outset striking how the Court has been at pains to show that the ruling amounts to an application and consolidation of existing principles rather than marking a new twist in the case law."[592]

"Back to the future" may well be the appropriate metaphor in the context of identifying the process of the judicial application of these various principles to national measures. In the future, free movement jurisprudence may clarify the restriction to the free movement right through the old chestnut principles of nondiscrimination and mutual recognition, as well as, that of market access in situations where this test will add value to the resulting mix. Clarification of these issues by the Court of Justice might indeed represent the pot of gold at the end of the jurisprudential rainbow in the context of assessing the application of Treaty free movement law to national measures. In the instant context, it might also be useful to dispense with the diverse nomenclature ascribed to the national measures, such as "liable to hamper or to render less attractive," "liable to prohibit or otherwise impede," "prohibit, impede or render less attractive," and "hinder or make less attractive."

---

[587] Case C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093.

[588] *Mickelsson*, 2009 E.C.R. I-4273.

[589] *See* TFEU, *supra* note 1, at art. 34.

[590] Case C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093.

[591] Case C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093, para. 34 (explaining that TFEU art. 34 "reflects the obligation to respect the principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of Community products to national markets").

[592] Wenneras & Moen, *supra* note 136, at 392 ("This follows from the structure and wording of the reasoning, in which the Court emphasizes that art. 34 TFEU reflects the principles of non-discrimination and of mutual recognition; 'hence,' product requirements are caught by art. 34 TFEU, whereas 'in contrast' selling arrangements may be caught only if proven discriminatory."). This reasoning is reminiscent of that set out in *Keck*. There is also in this context nothing jurisprudentially mischievous in the maintenance of the focus of enquiry upon the national *restriction* to the free movement right. *See infra* Part D.II.3.

Although such adjectives are redolent of the principle of market access, it would be a more honest reflection of the exhortations of Treaty free movement rights if these descriptions were omitted in deference to clear focusing in each instance of the employment of the applicable principle[s] of European Union law. In appropriate instances, this may well be the principle of market access, but in the instances in which that particular test arises, it ought to be incumbent on the Court to articulate how the specific national measure in issue has restricted the access of the import or migrant national to the host market.

The virtue of positioning judicial focus in the first instance on the *restriction* to free movement rights is not only reflective of Treaty exhortations; it also allows the employment and development of a range of principles to ensure that free movement rights are upheld. The principles of nondiscrimination, mutual recognition, and—importantly, in the context in which its use is appropriate—market access[593] are all tools which form the available arsenal to employ against the national measure alleged to be restrictive of free movement rights. The existence and potential deployment of each one of those tools in particular instances allows for a flexible approach to the process of judging the legal status of the national measure vis-à-vis the application of Treaty free movement rights. The availability of such tools of analysis common to all freedoms thus allows for a certain symbiosis to attach to their development by the Court of Justice. By contrast, to allow ubiquitous homogeneity in such matters would arguably not be a mature and rational response to the issues within the process of the scrutiny of national measures by the Court.

Finally, in the context of the free movement of services,[594] a recent judgment may prove to be a significant pointer with respect to the future use of the market access principle across *all* free market jurisprudence,[595] and in particular to the use of that principle in the context of the free movement of *persons*. The judgment in question was given in relation to the provision of services;[596] its language was "borrowed" from that used previously in the jurisprudence of goods.[597] *Zeturf Ltd v. Premier ministre*,[598] a judgment delivered 30 June 2011, appears to adopt both the language and rationale of the free movement of goods,[599]

[593] Together with the ubiquitously available *justification* process.

[594] TFEU, *supra* note 1, at art. 56.

[595] For provisions relating to workers, TFEU, *supra* note 1, at art. 45; for establishment, TFEU, *supra* note 1, at art. 49 (particularly in this context in relation to *persons*).

[596] TFEU, *supra* note 1, at art. 56.

[597] *Ker-Optika*, judgment of 2 December 2010.

[598] Case C-212/08, Zeturf Ltd v. Premier minister, judgment of 30 June 2011.

[599] *Ker-Optika*, judgment of 2 December 2010.

with specific reference to the judgment of *KerOptika*[600] to identify the restriction[601] on the free movement right to provide services. *Zeturf* held

> any restriction concerning the supply of games of chance over the internet is more of an obstacle to operators established outside the Member State concerned, in which the recipients benefit from the services; those operators, as compared with operators established in that Member State, would thus be *denied a means of marketing that is particularly effective for directly accessing that market*.[602]

The language employed in *Zeturf*[603] represents a cross-fertilisation of ideas poached from the arena of goods.[604] It is language clearly representative of an extending influence of the market access principle across Treaty freedoms. If *Zeturf*[605] represents a move towards establishing homogeneity as well as the use of the market access principle across all free movement jurisprudence, the Court of Justice should first reflect on the importance of other principles such as those of nondiscrimination and mutual recognition. For all their imperfections, the existence of these principles ought not to be overlooked. The strength of this sentiment is all the more appropriate, not least because the Treaty free movement provisions are not themselves homogenized; they display significant differences. The respect for human rights, for example, plays a more significant role within the freedoms relating to persons[606] and services[607] than it does in relation to that of the free movement of goods.[608] With respect to regulation in relation to the freedoms for the movement of

---

[600] *See id.* para. 54. *See also* Case C-322/01, Deutscher ApothekerverbandeV v. 0800 DocMorris NV and Jacques Waterval, 2003 E.C.R. I-14887, para. 74.

[601] *See Zeturf*, judgment of 30 June 2011, para. 74.

[602] *Id.* (emphasis added).

[603] *Id.*

[604] *See* Ker-Optika, judgment of 2 December 2010, para. 54 ("It is clear that the prohibition on selling contact lenses by mail order *deprives* traders from other Member States of a *particularly effective means of selling* those products and thus significantly *impedes access* of those traders to the market of the Member State concerned." (emphasis added)).

[605] *See Zeturf*, judgment of 30 June 2011, para. 74.

[606] *See supra* note 450.

[607] *See* TFEU, *supra* note 1, at art. 56.

[608] *See* TFEU, *supra* note 1, at art. 34.

goods[609] and services,[610] the home state is the principal regulator, but it is by contrast the host state with respect to a migrant EU national who exercises the freedom of movement as a worker[611] or the right of establishment as a migrant.[612] It may be that, with respect to the jurisprudence of goods, that an unfettered access to the market is the guiding principle. That it is a "guide" and not the sole measure may, however, be its rightful place.[613] Such argument further adds support for resisting any proposition that advocates that the principle of market access ought to take an automatic precedence to the detriment of the principles of nondiscrimination and mutual recognition where an attack on national measures restrictive of free movement rights is in issue.[614]

If the composition of the jurisprudence is now truly reflective of a headlong surge towards establishing an internal market within the European Union, it may be appropriate to remember that "all that glitters is not gold."[615] It may be short-sighted not to accord proper prominence to the availability of the plethora of other principles and routes to free movement other than mere market access. Nondiscrimination, mutual recognition, and the process of justification[616] remain available to achieve the same ends. There must be some acknowledgment that if the market access principle is now to become the sole modus operandi for scrutinizing these matters, then in the cause of completing the internal market there may be a danger of a triumph of form over substance. The most effective way of achieving an internal market is to have strong, effective, and workable Treaty free movement principles. It is an equation in which a variety of principles ought to remain available to the Court. These available principles should include market access where appropriate, though its use ought not to be at the expense of the other principles available to the Court for this purpose.

---

[609] *See* TFEU, *supra* note 1, at art. 34.

[610] *See* TFEU, *supra* note 1, at art. 56.

[611] *See* TFEU, *supra* note 1, at art. 45.

[612] *See* TFEU, *supra* note 1, at art. 49; BARNARD, *supra* note 171, at 25; Peter Oliver, *Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurtling in a New Direction?,* 33 FORDHAM INT'L L.J. 1423 (2011).

[613] Note, however, that, in the context of the application of TFEU art. 34, Advocate General Jacobs has expressed the view that "it would be more appropriate to measure restrictions against a *single test* formulated in the light of the purpose of art. 30." *See* Case C-412/93, Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA, 1995 E.C.R. I-179, para. 38.

[614] Note in this context that *Commission v. Italy* held "[i]t is . . . apparent from settled case-law that Article 28 EC (now 34 TFEU) reflects the obligation to respect the principle . . . of ensuring free access of Community products to national markets." C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093, para. 34.

[615] WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 2, sc. 7.

[616] The process importantly allowing for the operation of the principle of proportionality specifically directing the focus of the application of Treaty free movement law in particular instances.

On the other hand, as Tryfonidou has observed, if there is to be a permanent move towards convergence following the employment of a pure market access test across the freedoms, "this appears to be the right time for the Court to provide a clear explanation as to what, exactly, falls within the scope of the market freedoms."[617] There is some evidence in recent jurisprudence, however, that the Court of Justice may support the view that a multifaceted and varied armoury should be available to the Court in the application of the free movement provisions of EU law to national measures. In *Asociación para la Calidad de los Forjados (Ascafor), Asociación de Importadores y Distribuidores de Acero para la Construcción (Asidac) v. Administración del Estado, et al*,[618] it was held with respect to the free movement of goods[619] that "Article 34 TFEU reflects the obligation to comply with the principles of nondiscrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as, the principle of ensuring free access of European Union products to national markets."[620] In a judgment comparable for its similar reinforcement of the applicability of these principles, *Marcello Costa, Ugo Cifone*[621] likewise provided a recent support for the proposition that other Treaty free movement provisions also reflect the principles of "non-discrimination on the ground of nationality" together with the principle of equal treatment. *Asociación para la Calidad de los Forjados (Ascafor)*[622] and *Marcello Costa*[623] appear to indicate a recognition by the Court of Justice of the existence of a weaponry potpourri. It is a potpourri of principles that appears by design to stretch beyond the single rule of market access. The availability to the Court of all such principles arguably would reinforce the ability to scrutinize national measures suspected of hindering the exercise of Treaty free movement rights.

[617] Tryfonidou, *supra* note 136, at 56.

[618] Case C-484/10, Asociación para la Calidad de los Forjados (Ascafor), Asociación de Importadores y Distribuidores de Acero para la Construcción (Asidac) v. Administración del Estado, et, [hereinafter *Asociación para la Calidad*], judgment of 1 March 2012.

[619] *See* TFEU, *supra* note 1, at art. 34.

[620] Case C-484/10, *Asociación para la Calidad*, judgment of 1 March 2012, para. 53. *See* C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093, para. 34.

[621] *See* Joined Cases C-72/10 & C-77/10, Marcello Costa, Ugo Cifone, judgment of 16 February 2012, para. 54.

[622] Case C-484/10, *Asociación para la Calidad*, judgment of 1 March 2012.

[623] *See* Joined Cases C-72/10 & C-77/10, Marcello Costa, Ugo Cifone, judgment of 16 February 2012, para 54.

Appendix 3

ii. *Goods, Persons, Services and Capital in the European Union: Jurisprudential Routes to Free Movement* 11 German Law Journal 159-209 (2010)

Articles

Goods, Persons, Services and Capital in the European Union: Jurisprudential Routes to Free Movement

Tim Connor[*]

Abstract

This Paper considers the jurisprudence of the Court of Justice in relation to the free movement provisions of European Community law in relation to goods, persons, services and capital within the European Union. It examines the bases used by the Court in its application of Community free movement provisions to national measures that may seek to hinder the exercise of such rights. From limited enquiry originally founded on considerations of non discrimination based on nationality, to one most recently focussed on the 'restriction' to the free movement right, the Paper examines the methods employed by the Court of Justice in its scrutiny of the national measure appearing to conflict with Treaty free movement rights.

The examination of the applicable free movement jurisprudence attempts to demonstrate the want of a thematically consistent underpinning within free movement case law. The Paper draws attention to the complexities and even the confusions that appear to be inherent within free movement jurisprudence and arguably evidenced within the Court's journey from 'discrimination' to 'restriction' as the basis of the enquiry with regard to the application of Treaty free movement rights. In its consideration of Case C-110/05 *Commission v Italy*, Case C-142/05 *Åklagaren v. Percy Mickelsson v. Joakim Roos*, recent jurisprudence with respect to the free movement of goods, the Paper notes that in the context of the 'measure having equivalent effect', the emphasis in the assessment of the national rule has shifted to an examination of the effect on market access, rather than a distinction based on the type of rule.

A. Preface

This article examines the jurisprudence of the European Court of Justice in relation to the achievement of free movement Treaty rights in the context of *goods*,[1] *persons*,[2] *services*[3] and *capital*.[4]

[*] Lecturer in Law, Bradford University Law School, School of Management, University of Bradford. T.Connor@bradford.ac.uk

Founded upon the application of Treaty provisions, together with an assessment of the national measure by the benchmark of *justification*, the Court of Justice is the arbiter of the application of free movement rights with respect to the migrant, be it in the context of goods, persons, services or capital. It is an arbitration that fundamentally has been immersed in an assessment of the concept of non-discrimination on nationality grounds. It now appears, however, that the reliance on the application of that principle has been sublimated in a move by the Court to consider the *restriction* imposed on free movement rights by the national measure.

This paper examines the recent jurisprudence of the Court of Justice, attempting to explain the ramifications resulting from the change in the enquiry which has now embraced examination of the restriction to the free movement rights of goods, persons, services and capital. It offers some explanation of the change that consequently has been wrought upon the process of justification of the national measure deemed restrictive of free movement rights. It examines the application of the concept of discrimination in free movement jurisprudence in so far as that examination underpins an explanation of the recent developments. Finally, the article examines the continued maintenance of the ad hoc position respecting the jurisprudence of the free movement of goods in relation to the latent retention of the distinction between directly and indirectly discriminatory measures, and the recent developments in the jurisprudence with respect to the 'selling arrangement'.

B. Discrimination

'Discrimination' denotes less favorable treatment of the imported good and the migrant Community national by comparison to that given to the domestic good and to the host national. Article 12 EC renders "discrimination on grounds of nationality"[5] unlawful. It provides "Within the scope of application of this Treaty…any discrimination on grounds of nationality shall be prohibited." Article 12 EC is a general prohibition; it applies unless

[1] Art. 28 (ex 30) EC. Consolidated Version of the Treaty Establishing the European Community, Official Journal of the European Communities 2002, C 325,24/12/2004, p.47.

[2] Relating to the worker, Art 39 (ex 48) EC and to rights of establishment, Art. 43 (ex 52) EC. See *supra*, note 1 Art 39 (ex 48), p. 51; Art 43 (ex 52) EC, p. 52.

[3] Arts. 49 & 50 (ex 59 & 60) EC. See *supra*, note 1 Art 49 & 50 (ex 59 & 60) EC, pp. 54-55.

[4] Arts. 56 EC – 60 EC. See *supra*, note 1 Articles 56-60 (ex 73(b) – (g)), pp. 56-57.

[5] "Within the scope of application of this Treaty…any discrimination on grounds of nationality shall be prohibited." Art 12 (ex 6) EC. The Treaty provisions in relation to this prohibition with respect to free movement jurisprudence have direct effect. Case 13/76, *Gaetano Dona v. Mario Mantero,* 1976 E.C.R. 1333, para. 20.

discrimination is prohibited in specific circumstances by the Treaty.[6] Article 12 EC "requires perfect equality of treatment in Member States…in a situation governed by Community law and nationals of the Member State."[7]

The prohibition encompasses both direct and indirect discrimination.[8] In *Jean Reyners v. Belgian State*,[9] an example of the former, Belgian law permitted only the host national[10] to become lawyers.[11] Where the measure appears to be nationality-neutral, the discrimination is indirect[12] if the national measure is intrinsically liable to have a greater effect on the migrant national in comparison to the host national.[13]

I. Goods

Direct discrimination means the imported good has received different and usually less favorable treatment by comparison with the treatment which the domestic good has received. For example, in *R. v. Henn and Darby*[14] and *Conegate Limited v. HM Customs & Excise*[15] discriminatory national laws resulted directly in a total prohibition with respect to the imported good.

---

[6] Case C-176/96, *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v. Federation royale belge des societies de basket-ball (FRBSB),* 2000 E.C.R. I-2681, para. 37.

[7] Case C-43/95, *Data Delecta Aktiebolag and Ronny Forsberg v. MSL Dynamics Ltd,* 1996 E.C.R. 1-4661, para. 16.

[8] "The rules regarding equality of treatment, … in the Treaty … forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result." Case 152/73, *Giovanni Maria Sotgiu v. Deutsche Bundespost,* 1974 E.C.R. 153, para. 11.

[9] In the context of the right of establishment, Art 52 (now 43) EC. *Jean Reyners v. Belgian State* Case 2/74, 1974 E.C.R. 631.

[10] A Dutch national excluded from the profession of avocat on the ground of nationality, para 2.

[11] Note also the restrictions on the employability of migrants on fishing vessels, in the ratio of three French to one non French national. Case 167/73, *Commission of the European Communities v. French Republic,* 1974 E.C.R. 359, para. 46.

[12] "The application of other criteria of differentiation, lead[s] to the same result" as discrimination which is direct. Case C-175/88, *Klaus Biehl v. Administration des contributions du grand-duche de Luxembourg,* 1990 E.C.R. I-1779, para. 13.

[13] A greater burden in fact. In relation to the *worker*, for example Case 152/73, *Giovanni Maria Sotgiu v. Deutsche Bundespost,* 1974 E.C.R. 153, para. 11; with respect to establishment and services Case C-3/88, *Commission of the European Communities v. Italian Republic,* 1989 E.C.R. 4035, para. 8.

[14] Case 34/79, *Regina v. Maurice Donald Henn and John Frederick Ernest Darby,* 1979 E.C.R. 3795, para. 22.

[15] Case 121/85, 1986 E.C.R. 1007.

The following instances of direct discrimination have, for example, resulted in the designation of "measures having equivalent effect to quantitative restrictions:"[16] phytosanitary inspections imposed by Germany only on imported apples,[17] a national measure relating to the purity of beer,[18] the imposition of a minimum price for fuel which resulted in the import being unable to benefit from lower cost prices in the country of origin,[19] an Irish law which required petrol importers to buy 35 per cent of their requirements from the state-owned old refinery at a centrally fixed price[20] and a Swedish law prohibiting private individuals from importing alcoholic beverages.[21]

The national measure will be held to be indirectly discriminatory where trade rules, not themselves discriminatory as to product origin, impose a greater impact on the imported good. The barrier to the free movement of goods is caught by Art 28 (ex 30) EC.[22] The *Dassonville* definition of the "measure having equivalent effect" clearly contemplates this.[23] Such was confirmed by *Rewe-Zentral A.G. v. Bundesmonopolverwaltung fur Branntwein* (*Cassis de Dijon*)[24] where German trade rules relating to minimum alcoholic content levels constituted an obstacle to the free movement of cassis between France and Germany.[25] The national rules were effective to bar French *cassis* from the German market.

---

[16] Art. 28 (ex 30) EC.

[17] Case 4/75, *Rewe-Zentralfinanz eGmbH v. Landwirtschaftskammer,* 1975 E.C.R. 843. Other examples for example include Case 153/78, *Commission of the European Communities v. Federal Republic of Germany,* 1979 E.C.R. 2555, para. 15. concerning the prohibition by Germany of imports of meat products manufactured from meat not coming from the country of manufacture of the finished product and Case C-398/98, *Commission of the European Communities v. Hellenic Republic,* 2001 E.C.R. I-7915 where Greece required petroleum companies storing their products in Greek refineries to buy supplies from those refineries.

[18] Case 178/84, *Commission of the European Communities v. Federal Republic of Germany,* 1987 E.C.R. 1227, para. 40.

[19] Case 231/83, *Henri Cullet and Chambre syndicale des reparateurs automobiles et detaillants de produits petroliers v. Centre Leclerc a Toulouse and Centre Leclerc a Saint-Orens-de-Gameville,* 1985 E.C.R. 305, para. 34.

[20] Case 72/83, *Campus Oil Limited and others v. Minister for Industry and Energy and others,* 1984 E.C.R. 2727, para. 20.

[21] Case C-170/04, *Klas Rosengren and others v. Riksåklagaren,* 2007 E.C.R. I-4071, para. 36.

[22] Note also the possibility of Art. 30 (now 28) EC embracing the indistinctly applicable measure was broached by the Commission in 1970; Art. 3 Council Directive 70/50/EEC of 22 December 1969, Official Journal L 13, 19/01/1970 p. 29 [OJ Sp. Ed. 1970 L13/29]. See also Case C-434/04, *Criminal proceedings against Jan-Erik Anders Ahokainen, Mati Leppik Jan-Erik Anders Ahokainen,* 2006 E.C.R. I-9171, para. 18.

[23] Case 8/74, *Procureur du Roi v. Benoit and Gustave Dassonville,* 1974 E.C.R. 837, para. 5.

[24] Case 120/78, 1979 E.C.R. 649.

[25] *Id.,* para. 14.

Further examples of indirect discrimination include the *Commission of the European Communities v. Ireland*,[26] in which the Irish Goods Council promoted Irish goods to the detriment of the imported product, and *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*,[27] where national rules relating to designation of origins were held unlawful.[28]

II. Persons and Services

In relation to the worker, examples include the precondition of French nationality for permanent employment of public sector nurses,[29] based on the application of Art 48(2) (now 39) EC [30] wherein the conditions of work and employment favored Italian researchers,[31] and where the German foreign ministry distinguished between local staff having German nationality and those who did not.[32] In relation to rights of establishment for example, a French measure required doctors established in other Member States to cancel their registration in that state as a precondition to practicing in France.[33] In *D. H. M. Segers v. Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen*,[34] the host national was favored in respect of admission to national

[26] Case 249/81, 1982 E.C.R. 4005, para. 30.

[27] Case 207/83, 1985 E.C.R. 1201, para. 23.

[28] Other examples include Case 193/80, *Commission of the European Communities v. Italian Republic,* 1981 E.C.R. 3019, para. 12, a national measure, which determined that vinegar could only be used for products obtained from the acetic fermentation of wine, was held unlawful. The typically national product thereby favoured to the detriment of the various categories of natural vinegar produced in other Member States.

[29] Case 307/84, *Commission of the European Communities v. French Republic,* 1986 E.C.R. 1725, para. 17.

[30] Based on the application of Art 48(2) (now 39(2)) EC. The Article specifically implements the prohibition relating to discrimination. The provisions of Regulation (EEC) No 1612/68 of 15 October 1968, Official Journal L 257, 19/10/1968 p. 2. [OJ Sp.Ed. 1968, No. L257/2, p. 475] implement the principle of non-discrimination contained in Art 39(2) (ex 48(2) EC with respect to the *worker*, "but do[es] not extend its scope". Case C-90/96, *David Petrie and Others v. Universita degli studi di Verona and Camilla Bettoni,* 1997 E.C.R. I-6527, para. 25.

[31] Case 225/85, *Commission of the European Communities v. Italian Republic,* 1987 E.C.R. 2625, para. 14.

[32] Case C-214/94, *Ingrid Boukhalfa v. Bundesrepublic Deutschland,* 1996 E.C.R. I-2253, paras. 17 & 22.

[33] Case 96/85, *Commission of the European Communities v. French Republic,* 1986 E.C.R. 1475. Other examples in the context of establishment include Case 63/86, *Commission of the European Communities v. Italian Republic,* 1988 E.C.R. 29, para. 20 where an Italian measure permitted only host nationals to purchase socially built housing; a restriction in Case 147/86, *Commission of the European Communities v. Hellenic Republic,* 1988 E.C.R. 1637, para. 21 on the migrant setting up private music and dance schools and in Case C-311/97, *Royal Bank of Scotland Plc v. Greece,* 1999 E.C.R. I-2651, paras. 14 & 15, where higher tax rates were charged on foreign companies.

[34] Case 79/85, *D. H. M. Segers v. Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen* 1986 E.C.R. 2375, para. 13.

sickness insurance benefits - the discrimination in the Dutch law based on the location of the registered office.[35]

Finally, in relation to the right to provide services, a residence requirement imposed by Holland in the context of undertaking a professional activity made it "impossible for persons residing in another member State to provide services."[36]

With respect to the free movement of persons, much jurisprudence exists which has been founded on the application of the principle of discrimination, which is indirect in nature. With regard to the worker, for example, the imposition of a time limit on the duration of the employment relationship between universities and foreign language assistants was held to be indirectly discriminatory.[37] An Italian law regarding employment of temporary teachers acted to the detriment of the migrant national.[38] In relation to the right of establishment, the United Kingdom stipulated the possession of UK nationality as precondition for ship ownership.[39] In relation to the right to provide services, a Belgian rule for example was held unlawful where it provided that fee charging employment agencies should be subject to the grant of a license.[40] Finally, in *Servizi Ausiliari Dottori*

[35] *Id.,* para. 19.

[36] Case 39/75, *Robert-Gerardus Coenen and others v. Sociaal-Economische Raad,* 1975 E.C.R. 1547, para. 12. See also Case C-294/89, *Commission of the European Communities v. French Republic,* 1991 E.C.R. I-3591, para. 37, where the national law required the migrant lawyer providing *services* to work with a French lawyer and in C-353/89, *Commission of the European Communities v. Kingdom of the Netherlands,* 1991 E.C.R. I-4069, paras. 16-17, an obligation imposed on national broadcasting bodies established in the Netherlands to have all or some of their programmes made by a Dutch undertaking was directly discriminatory.

[37] Case 33/88 *Pilar Allue and Carmel Mary Coonan v. Universita degli studi di Venezia,* 1989 E.C.R. 1591, para. 19. Other examples relate to Case C-272/92 *Maria Chiara Spotti v. Freistaat Bayern,* 1993 E.C.R. I-5185, para. 18, where the awarding of fixed term contracts in respect of language posts filled mainly by foreign-assistants and Case 16/78 *Criminal proceedings against Michel Choquet,* 1978 E.C.R. 2293, para. 8. where an insistence that the migrant worker obtain a fresh driving license, thereby duplicating one held in the home state, could have indirectly prejudiced exercise of free movement rights. The latter example represents an extension of the principle of non-discrimination through the conduit of Art 7(2) Regulation (EEC) No. 1612/68 of Council of 15 October 1968, of 15 October 1968, Official Journal L 257, 19/10/1968 p. 2. [OJ Sp. Ed. 1968, No. L257/2, pg 475].

[38] Case C-90/96, *David Petrie and Others v. Universita degli studi di Verona and Camilla Bettoni,* 1997 E.C.R. I-6527, para. 55.

[39] For example Case C-221/89, *The Queen v. Secretary of State for Transport ex parte Factortame and Others,* 1991 E.C.R.-3905; Case C-334/94, *Commission v. France,* 1996 E.C.R. I-1307. Further, in Case 154/87, *Rijksinstituut voor de sociale verzekering des zelfstandigen (RSVZ) v. Heinrich Wolf et NV Microtherm Europe and others,* 1988 E.C.R. 3897, para. 9., it was held that self employed migrants were to be exempted on an equal basis with host nationals from social security contributions.

[40] Joined cases 110 & 111/78, *Ministere public and 'Chambre syndicale des agents artistiques et impresarii de Belgique' ASBL v. Willy van Wesemael and others,* 1970 E.C.R., para. 39. Other examples include Case 205/84, *Commission v. Germany,* 1986 E.C.R. 3755, para. 57. in which legislation required insurance undertakings providing direct insurance services to have a permanent establishment in the state in which the service was provided . So too, in Case C-360/89, *Commission of the European Communities v. Italian Republic,* 1992 E.C.R. 1-

Commercialisti Srl v. Calafiori, an Italian law providing that tax assistance was to be exclusively given by authorized Italian tax advice centers financed by Italy was held indirectly discriminatory.[41]

The concept of 'indirect' discrimination has been deemed by the Court to embrace the imposition of dual burden rules on the migrant national. Examples of such rules include the requirement to hold particular qualifications[42] or licenses.[43] In such instances, the migrant satisfies two different sets of rules (those of the home and host states); the host national by comparison satisfies only one set of rules; those of the host state. The resultant 'dual burden' placed on the migrant has occasionally been referred to by the Court as an "indistinctly applicable measure."[44] Although it is a classification that may help to explain services jurisprudence; the application of the nomenclature of 'discrimination' is, however, less satisfactorily applied with respect to workers and to establishment. The performance of the latter activities is controlled only by one regulation regime; that of the host state. The classification by the Court of the double burden rule as 'indirectly discriminatory' raises conceptual difficulties; not all 'indirectly discriminatory' rules necessarily impose a dual burden.[45] The Court has skirted this issue by presenting a broad definition of the concept of 'indirect' discrimination. The concept embraces instances where the national measure "is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage."[46] The consequences of a focus on the potential effect on the free movement right has resulted in more national rules being cast within the ambit of the Treaty. One consequence of this has related to the need to justify national rules on grounds other than the narrow express derogations given in the Treaty.[47]

3401, para. 23. Here an Italian measure was unlawful where it concerned the reservation of public works for companies having offices in the region of those works. Another example, in Case 59/82, *Schutzverband gegen Unwesen in der Wirtshaft v. Weinverttiebs-Gmbh,* 1983 E.C.R. 1217 related to the marketing of vermouth. The import contained a lower alcohol content than the minimum prescribed in the exporting Member State, para. 12.

[41] Case C-451/03, *Servizi Ausiliari Dottori Commercialisti Srl v. Calafiori* 2005 E.C.R. I-3875, para. 36.

[42] Case C-340/89, *Irène Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg,* 1991 E.C.R. 1-2357, para. 15.

[43] Case 292/86, *Claude Gullung v. Conseil de l"ordre des avocats du barreau de Colmar et de Saverne,* 1988 E.C.R. 111, para. 31.

[44] Case 143/87, *Christopher Stanton and SA belge d"assurances "L'Étoile 1905" v. Institut national d"assurances sociales pour travailleurs indépendants (Inasti),* 1988 E.C.R. 3877, para. 9.

[45] For example rules concerning qualifications and licences.

[46] Case C-237/94, *John O'Flynn v. Adjudication Officer,* 1996 E.C.R. I-2617, paras. 18-19.

[47] For a discussion of the consequence of this issue see CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS* 262 Oxford University Press 2nd ed., 2007).

III. Capital

Article 56(1) EC prohibits "all restrictions on the movement of capital between Member States." Direct and indirect discrimination have been prohibited. In *Klaus Konle v. Republik Österreich*, the Austrian law which exempted the host national from the requirements of authorization pre-land acquisition was held directly discriminatory to migrant nationals in respect of capital movements between Member States.[48] In *Alfredo Albore*, the requirement placed on solely the migrant national of prior authorization with respect to the purchase of property in areas of military importance was similarly held unlawful.[49] In *Blanckaert*, it was noted that "Less favorable tax treatment for non-residents only might deter the latter from investing in property in the Netherlands."[50]

IV. Discrimination - Key issues

It is clear from the forgoing analysis that the early jurisprudence of the Court of Justice relating to the achievement of free movement of goods, persons, services and capital was founded on the application of the principle of the abolition of "any discrimination on grounds of nationality."[51] The recent redirection of that enquiry to the examination of "restrictions/obstacles" raises a key issue for determination. Why was the concept of discrimination allowed to remain for so long in the vanguard of the attack on the national measure that hindered the exercise of the free movement right?

1. Sole basis for justification?

The principle of "non-discrimination on grounds of nationality" represents a general principle[52] of Community law that has been specifically applied by free movement jurisprudence. Without the application of that principle, for example, Ms. Coonan, as a UK national and worker in Italy, would have been excluded from that country's social security scheme,[53] Mr. Petrie, working as a foreign assistant in Verona, would not have been eligible for appointment to fill a temporary teaching vacancy, and the import of apples by

[48] Case C-302/97, *Klaus Konle v. Republik Österreich* 1999 E.C.R. I-3099, para. 23.

[49] Case C-423/98, *Alfredo Albore* 2000 E.C.R. I-05965, para. 17.

[50] C-512/03, *Blanckaert v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerle,* 2005 E.C.R. I-07685, para. 39.

[51] Art. 12 (ex 6) EC. Also for example, Art. 39(2) (ex 48(2)) EC in relation to the *worker.*

[52] Art. 12 EC.

[53] Case 33/88, *Pilar Allue and Carmel Mary Coonan v. Universita degli studi di Venezia,* 1989 E.C.R. 1591.

Rewe Zentralfinanz eGmbH[54] would have been hindered by phytosanitary inspections imposed by Germany. Despite the attainment of free movement rights in these instances, none of the Treaty provisions with respect to goods, persons, services and capital are specifically directed towards discrimination *per se* as the sole arbitrator of the application of free movement rights.[55]

It appears difficult to understand why the platform of restrictions/obstacle on which the enquiry is now based was not adopted from inception by the jurisprudence relating to the free movement of goods, persons, services and capital. With respect to *persons*, the reality would suggest otherwise. For example, the judgment of *Procureur du Roi v. Marc J.V.C. Debauve and others*,[56] with respect to the provision of *services* as late as 1980,[57] refused to recognize the non-discriminatory restriction as a conduit for achieving Treaty free movement rights.[58] This judgment may seem perplexing, given both the recent emphasis on the examination of the restriction/obstacle to the free movement right and also the language that has been adopted by the Treaty itself. With respect to the latter, it must be noted that the only Treaty free movement right to identify specifically the concept of discrimination is that accorded to the worker.[59] Not only is the concept notably absent from the other free movement Treaty provisions, but those provisions clearly embrace the language of restriction/obstacle. The prohibition contained in Art 43 (ex 52) EC relates to "restrictions on the freedom of establishment." Art 49 (ex 59) EC is similarly directed, "restrictions on freedom to provide services"[60] shall be prohibited. The prohibition contained in Article 56(1) EC, "all restrictions on the movement of capital" is expressed in the same terms. It is arguable that had free movement jurisprudence from inception

---

[54] Case 4/75, *Rewe-Zentralfinanz eGmbH v. Landwirtschaftskammer,* 1975 E.C.R. 843, para. 3.

[55] Only Art. 39 (ex 48) EC relating to the worker specifically identifies the concept of discrimination. That Article provides "Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of Member States."

[56] Case 52/79, *Procureur du Roi v. Marc J.V.C. Debauve and others* 1980 E.C.R. 833.

[57] Judgment delivered 18 March 1980.

[58] "The answer must therefore be that Articles 59 and 60 of the Treaty do not preclude national rules prohibiting the transmission of advertisements by cable television - as they prohibit the broadcasting of advertisements by television - if those rules are applied without distinction as regards the origin, whether national or foreign, of those advertisements, the nationality of the person providing the service, or the place where he is established" *supra*, note 56*,* para. 16.

[59] Art. 39(2) (ex 48(2)) EC. "Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of Member States."

[60] Similarly, in relation to the free movement of goods, the language of Art. 28 EC is reflective of this sentiment. The Article, is expressed as the "measure having equivalent effect;" equivalent to the quantitative *restriction*. Note also the definition of Art 30 (now 28) EC provided by Case 8/74, *Procureur du Roi v. Benoit and Gustave Dassonville,* 1974 E.C.R. 837, para. 5.

followed this gentle prod provided by the Treaty to examine the restriction to the free movement right, implementing such rights might have been less problematic. Judgments such as *Debauve*[61] might have quarried a different conclusion.[62] Further, it is a terminology reflective of the expression of the general principles of the Treaty, "the abolition…of obstacles to the free movement of…persons, services."[63] It is a conclusion given added force by the reference, for example, within the early judgment of *Lynne Watson and Alessandro Belmann* to the general principles of the Treaty in the context of the free movement of persons.[64] Further, judgments such as *Criminal Proceedings against Michel Choquet*[65] for example, acknowledge that conditions imposed relating to holders of driving licenses were an obstacle[66] to exercise of free movement rights of the worker,[67] establishment,[68] and the right to receive services.[69] Indeed, many of the judgments concerned with the issue of discrimination acknowledge the existence of a restriction/obstacle to the free movement right.[70] It is arguable that the terminology of *restriction* and *obstacle* in the context of asserting free movement rights bears a more honest reflection of the intent of Treaty free movement provisions. Both terms in this context are synonymous.[71] Their use would necessarily encompass the discriminatory

[61] Case 52/79, *Procureur du Roi v. Marc J.V.C. Debauve and others* 1980 E.C.R. 833.

[62] One possible argument standing in opposition to these sentiments would appear to be that had that approach been adopted, Member States would have been saddled with the grounds provided by the Treaty with respect to justification of the national measure. It would follow that the subsequent circumvention of those grounds in instances of indirect discrimination would have remained closed to the Court and may never have therefore occurred.

[63] Art. 3 (1)(c) EC.

[64] Case 118/75, *Lynne Watson and Alessandro Belmann* 1976 E.C.R. 1185, para. 23.

[65] Case 16/78, *Criminal Proceedings against Michel Choquet* 1978 E.C.R. 2293.

[66] *Id.,* para 8.

[67] Art. 48 (now 39) EC.

[68] Art. 52 (now 43) EC.

[69] Arts. 59 & 60 (now 49 & 50) EC.

[70] For example Case 2/74, *Jean Reyners v. Belgian State* ECR 631, para 49; Case 33/74 *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid,* 1974 E.C.R. 1299, para. 23, Case 107/83, *Ordre des avocats au Barreau de Paris v. Onno Klopp,* 1984 E.C.R. 2971, para. 8; Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein,* 1979 E.C.R. 649, para. 14; Case 71/76, *Jean Thieffry v. Conseil de l"ordre des avocats a la cour de Paris,* 1977 E.C.R. 765, para. 27.

[71] "In so far as such elements (in relation to health services of home respiratory treatments) are not obstacles to the establishment of the undertakings on Spanish territory it must be held, first of all, that no restriction on freedom of establishment exists in this case" (emphasises added). Also Case C-234/03, *Contse SA, Vivisol Srl and Oxigen Salud SA v. Instituto Nacional de Gestion Sanitaria (Ingesa), formerly Instituto Nacional de la Salud (Insalud),* 2005 E.C.R. 1-9315, para. 27.

measure, but the advantage of re-branding to the equation of restriction/obstacle is removing the need for identification of the presence of discrimination; whether direct or indirect. The jurisprudential consequences of that division[72] are thus easily removed. It is arguable that it would not have been an insurmountable hurdle for the Court in the first instance to envisage an equation encompassing obstacles rather than one routed in discrimination. It is ironic perhaps that *Procureur du Roi v. Marc J.V.C. Debauve and others*,[73] which, in judgment eschewing examination of the non-discriminatory measure, should have had recourse to the descriptive language of restriction in the context of measures concerning television advertising.[74] There may be some force in the suggestion that the maintenance of the concept of discrimination as the standard bearer of attaining free movement rights has effectively had a detrimental effect on the general development of free movement jurisprudence.

The success that the non-discriminatory requirement has achieved with respect to achieving the reality of free movement arguably explodes any residual notion that the concept of discrimination alone was ever the sole battle-ground with respect to the achievement of the right of free movement. The jurisprudence which extends the enquiry beyond the concept of discrimination is considered in the next section.

C. Beyond Discrimination

This section of the paper is concerned with the methods adopted by the Court of Justice in the pursuit of free movement rights with respect to goods, persons, services and capital on bases other than discrimination in the national measure.

I. Goods

The nomenclature of recent judgments with respect to the application of Treaty provisions in relation to goods is directed at the assessment of the restriction to the right of free movement. It is a terminology that does not focus on an assessment of discrimination. For example, a Finnish requirement of prior authorization which applied in relation to products subject to excise duty was held to be "a restriction on trade between Member States."[75]

---

[72] Particularly with respect to the difficulty in the use of the Treaty grounds with respect to issues of justification in the context of direct discrimination.

[73] Case 52/79, *Procureur du Roi v. Marc J.V.C. Debauve and others* 1980 E.C.R. 833.

[74] *Id.*, para. 15.

[75] Case C-434/04, *Criminal proceedings against Jan-Erik Anders Ahokainen, Mati Leppik,* 2006 E.C.R. I-9171, para. 22.

Likewise, Greek provisions governing production conditions for bakery products restricted the free movement of goods,[76] and the failure by Austria to prevent the closure of the Brenner motorway resulting from demonstration for nearly 30 hours was held a "restriction which was capable of restricting intra-community trade in goods.".[77] The optional use of a quality label was held in *Commission of the European Communities v. Federal Republic of Germany*,[78] at least potentially to have "restrictive effects" on the free movement of goods.[79]

On the ground that it restricted access of the import of Italian and Spanish pipes to the Portuguese market, the national measure was held to be prohibited.[80] German measures relating to re-usable packaging were held a "barrier to trade,"[81] as were measures obliging producers to alter certain information on packaging.[82] On the same grounds, Italian measures which rendered the marketing of foods for sports persons more difficult and expensive fell within Art 28 (ex 30) EC scrutiny.[83] The restrictions imposed by Holland with respect to the marketing of foodstuffs fortified with vitamins and minerals were held to "hinder trade between Member States,"[84] as did the requirement of proof of nutritional need *Commission of the European Communities v. Kingdom of Denmark*.[85]

---

[76] Joined cases C-158/04, & C-159/04, *Alfa Vita Vassilopoulos AE and Carrefour Marinopoulos AE v. Elliniko Dimosio and Nomarchiaki Aftodioikisi,* 2006 E.C.R. I-8135.

[77] Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzuge v. Republik Osterreich,* 2003 E.C.R. I-5659, paras. 62 & 64.

[78] Case C-325/00, *Commission of the European Communities v. Federal Republic of Germany* 2002 E.C.R. I-9977, para. 23.

[79] *Id.,* para. 23.

[80] Case C-432/03, *Commission of the European Communities v. Portuguese Republic,* 2005 E.C.R. I-9665, para. 41.

[81] Case C-309/02, *Radlberger Getrankegesellschaft mbH & Co. and S. Spitz KG v. Land Baden-Wurttemberg,* 2004 E.C.R. I-11763, para. 60.

[82] Case C-463/01, *Commission of the European Communities v. Federal Republic of Germany,* 2004 E.C.R. I-11705, paras. 53, 68 & 69.

[83] Case C-270/02, *Commission of the European Communities v. Italian Republic,* 2004 E.C.R. I-1559, para. 19.

[84] Case C-41/02, *Commission of the European Communities v. Kingdom of the Netherlands,* 2004 E.C.R. I-11375, para. 41. Similar Austrian measures were held to be "a barrier to trade" and French measures merely "measures having equivalent effect" in Case C-24/00, *Commission of the European Communities v. French Republic,* 2004 E.C.R. I-1277, para. 23; Case C-150/00, *Commission of the European Communities v. Republic of Austria,* 2004 E.C.R. I-3887, para. 82, as were German measures in Case C-387/99, *Commission of the European Communities v. Federal Republic of Germany,* 2004 E.C.R. I-3751, para. 65.

[85] Case C-192/01 *Commission of the European Communities v. Kingdom of Denmark,* 2003 E.C.R. I-9693, para. 41.

Spanish requirements relating to the labeling and packaging of cocoa and chocolate products containing vegetable fats other than cocoa butter were held to be an obstacle to the free movement of goods,[86] as was a dispute regarding the name given to a cleaning product.[87] The procedure requiring previously tested vehicles to be tested again as to general condition prior to registration in the Netherlands, constituted a restriction on the free movement of goods.[88]

II. Persons and Services

It is clear from judgments such as *Bosman*[89] and *Volker Graf v. Filzmoser Maschinenbau GmbH*[90] that "Article 48 [now 39] of the Treaty prohibits not only all discrimination, direct or indirect, based on nationality but also national rules which are applicable irrespective of the nationality of the workers concerned but impede their freedom of movement."[91] *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* had made the same recognition of terminology with respect to the provision of services[92] by the migrant in the host state.[93]

Free movement jurisprudence has not been slow to explore application of the principle that the Treaty free movement provisions extend to the migrant a right of access to the marketplace in the host state. In seeking to achieve this objective, various adjectival terminologies have been used. The following jurisprudence examines more closely the

[86] Case C-12/00, *Commission of the European Communities v. Kingdom of Spain,* 2003 E.C.R. I-459, para. 73. This resulted in the need to alter the packaging or the labelling of imported products. See also Case C-14/00 *Commission of the European Communities v. Italian Republic,* 2003 E.C.R. I-513, para. 73.

[87] Case C-358/01, *Commission of the European Communities v. Kingdom of Spain,* 2003 E.C.R. I-13145, para. 44.

[88] C-297/05, *Commission of the European Communities v. Kingdom of the Netherlands,* 2007 E.C.R. I-7467, para. 74.

[89] C-415/93, *Union royale belge des societes de football association ASBL v. Jean-Marc Bosman, Royal club liegeois SA v. Jean-Marc Bosman and others and Union des associations europeennes de football (UEFA) v. Jean-Marc Bosman,* 1995 E.C.R, 1-4921, para. 96.

[90] Case C-190/98, *Volker Graf v. Filzmoser Maschinenbau GmbH* 2000 E.C.R. I-493.

[91] *Id.,* para 18.

[92] Art. 59 (now 49) EC. In the context of an habitual residence requirement imposed by the Dutch Bar on migrant nationals seeking to provide legal services in Holland. See also Case C-208/05, *ITC Innovative Technology Center GmbH v. Bundesagentur für Arbeit,* 2007 E.C.R. 00, para. 11; Case C-490/04 *Commission of the European Communities v. Federal Republic of Germany,* 2007 E.C.R. I-6095, para. 63.

[93] Case 33/74, 1974 E.C.R. 1299, para. 11.

approach taken by the Court in the application of free movement rights where the national measure in issue applies irrespective of the nationality of the migrant.

1. "Liable to hamper or to render less attractive"

Measures which governed the conditions under which an academic title obtained in another Member State could be used would be unlawful if "liable to hamper or to render less attractive…fundamental freedoms[94] guaranteed by the Treaty."[95] Spanish measures dictating a regional presence for undertakings tendering for services for home respiratory treatments were similarly held to render less attractive the exercise of free movement rights,[96] as was a registration requirement imposed on migrant patent agents as a precondition to providing services in Italy.[97]

2. "Liable to prohibit or otherwise impede"

In *Manfred Sager v. Dennemeyer & Co*,[98] national legislation prevented a patent renewal company from providing a monitoring service in Germany. The German legislation was held "liable to prohibit or otherwise impede"[99] the service activities of the UK company. United Kingdom measures affecting the importation of lottery tickets by the United Kingdom, were held "liable to prohibit or otherwise impede" the right to provide services,[100] as was the Greek licensing of self-employed migrant tourist guides who were prevented from supplying those services if they had not qualified in that state.[101]

---

[94] In the context of Arts. 48 (now 39) EC and 52 (now 43) EC.

[95] Case C-19/92, *Dieter Kraus v. Land Baden-Wurttemberg,* 1993 E.C.R. I-1663, para. 32.

[96] Case C-234/03, *Contse SA and Others v. Instituto Nacional de Gestion Sanitaria,* 2005 E.C.R. 1-9315, para. 25.

[97] Case C-131/01, *Commission of the European Communities v. Italian Republic*, 2003 E.C.R. 1-1659, para. 26. The same language was used in Case C-58/98, *Josef Corsten,* 2000 E.C.R. I-7919, para. 33 with respect to pursuing a skilled trades activity in Germany.

[98] C-76/90, *Manfred Sager v. Dennemeyer & Co* 1991 E.C.R. 1-4221.

[99] *Id.,* para 12.

[100] Case C-275/92, *Her Majesty's Customs and Excise v. Gerhart Schindler and Jorg Schindler,* 1994 E.C.R. I-1039, para. 43. Also Case C-451/03, *Servizi Ausiliari Dottori Commercialisti Srl v. Calafiori*, 2005 E.C.R. I-3875, para. 31 with respect to the right of establishment and the provision of services.

[101] Case C-389/95, *Siegfried Klattner v. Elliniko Dimosio* (Greek State), 1997 E.C.R. I-2719, para. 16 & 19. In Case C-134/03, *Viacom Outdoor SrL v. Giotto Immobilier SARL* 2005 ECR I-1167. Article 49 EC was held not to preclude the levying of a municipal tax on advertising, para 39. In Case C-266/96, *Corsica Ferries France SA v. Gruppo Antichi Ormeggiatori del Porto di Genova Coop. arl and Others,* 1998 E.C.R. I-3949, there was held no restriction on the freedom to provide maritime transport services when considering the fees imposed by Italy for mooring services.

3. An impediment to free movement

In *Cotswold Microsystems Ltd*, Finnish legislation reserving to a single body exclusive rights to operate slot machines, was described by the Court as "an impediment to freedom to provide services".[102] Likewise, the Dutch imposition relating to minimum capital in respect of company formation and directors' liability was held an impediment to freedom of establishment.[103] In *Dirk Rüffert v. Land Niedersachsen*, national rules relating to an obligation to comply with collective agreements with respect to public works contracts constituted "an impediment to market access" in respect of migrants wishing to provide services in Germany.[104]

4. Impeding access/hindrance to trade

A Dutch prohibition on cold calling deprived Dutch operators of a marketing technique and "therefore directly affects access to the market in services in the other Member States."[105] In *Servizi Ausiliari Dottori Commercialisti Srl v. Giuseppe Calafiori*[106] an Italian law[107] providing tax assistance to be given exclusively by authorized Italian tax advice centers "completely prevents access to the market."[108]

In *Graf*[109] an Austrian law, genuinely non-discriminatory, was held "too uncertain and indirect a possibility…to be…liable to hinder the free movement" of migrant workers in

---

In Case C-544/03, *Mobistar SA v. Commune de Fleron* and *C-545/03 Belgacom Mobile SA v. Commune de Schaerbeek,* 2005 E.C.R. I-7723, Belgium taxes with respect to mobile phone operators were held not to be a restriction on the freedom to provide services, para. 32.

[102] The Finnish measure "directly or indirectly prevents operators in other Member States from…making slot machines available to the public." Case C-124/97, 1999 E.C.R. I-6067, para. 29.

[103] Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd,* 2003 E.C.R. I-10155, para. 107.

[104] Case 346/06, *Dirk Rüffert v. Land Niedersachsen* 2008 E.C.R.I-1989, para. 14.

[105] "And is thus capable in hindering intra-Community trade in services". Case C-384/93, *Alpine Investments BV v. Minister Van Financiën,* 1995 E.C.R. I-1141, para. 38.

[106] Case C-451/03, 2006 E.C.R. I-2941.

[107] In the context of a restriction on the right to provide *services* and the right of *establishment.*

[108] Case C-451/03, *Servizi Ausiliari Dottori Commercialisti Srl v. Giuseppe Calafiori* 2006 E.C.R. I-2941, para. 33. The Italian law "is liable to make more difficult, or even completely prevent, the exercise by economic operators from other Member States of their right to establish themselves in Italy with the aim of providing the services in question," para. 34.

[109] Case C-190/98, 2000 E.C.R. I-493.

Austria.[110] The denial of compensation on termination of employment was too remote in *Graf*[111] to affect the free movement right; the language driven by a concern for access to the Austrian labor market by the migrant national. Constraints imposed on the posting of workers to Luxembourg were held "likely to hinder the exercise of freedom to provide services."[112]

5. Restrictions/obstacles

Jurisprudence to reinforce the observation that the focus of the Treaty right of free movement is the restriction/obstacle to free movement rights is presented here. In *Questore di Verona v. Diego Zenatti*, for example, Italian legislation reserving to certain bodies the right to take bets on sporting events and preventing operators in other Member States from taking bets was held a *restriction* on the free movement of services,[113] as was Belgian legislation which required cable operators to broadcast programs transmitted by certain private broadcasters.[114] Likewise, the requirement of pre-conditional establishment in the host state was held an obstacle to the provision of services with respect to the contracting out of workers,[115] and rules imposed by Belgium preventing a professional footballer from playing with a new football club unless a transfer fee had been paid was held to be an obstacle to the freedom of movement for workers.[116] More recently, in *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)*, a difference in treatment of tax losses between resident and non-resident subsidiaries was held to

[110] "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," para. 25.

[111] Case C-190/98, 2000 E.C.R. I-493.

[112] Case C-319/06 *Commission of the European Communities v. Grand Duchy of Luxemburg,* 2008 E.C.R. I-4323., para. 58.

[113] Case C-67/98, *Questore di Verona v. Diego Zenatti,* 1999 I-7289, para. 28. In Case 243/01 *Gambelli and others,* 2003 E.C.R. I-13031 para. 49, Italian betting legislation was held a restriction on the right of establishment and the right to provide services.

[114] Case C-250/06 *United Pan-Europe Communications Belgium SA and Others v. Belgian State,* 2007 E.C.R. I-11135, para. 38.

[115] Case C-493/99 *Commission of the European Communities v. Federal Republic of Germany,* 2001 E.C.R. I-8163, para. 18. In Joined Cases C-51/96 & C-191/97 *Christelle Deliege v. Ligue francophone de judo et disciplines associees ASBL, Ligue belge de judo ASBL, Union europeenne de judo and François Pacquee,* 2000 E.C.R. I-2549, a requirement of prior authorisation before participation in an international judo competition did "[not] constitute a restriction on the freedom to provide services" (emphasis added), para. 69.

[116] C-415/93 *Union royale belge des societes de football association ASBL v. Jean-Marc Bosman, Royal club liegeois SA v. Jean-Marc Bosman and others and Union des associations europeennes de football (UEFA) v. Jean-Marc Bosman,* 1995 E.C.R. 1-4921, paras, 100 & 104.

constitute a restriction on the freedom of establishment,[117] and in *Criminal proceedings against Claude Nadin, Nadin-Lux SA and Jean-Pascal Durre*, the obligation to register a company car in Denmark was held to "constitute a barrier … to freedom of movement"[118] of self-employed workers. Finally, in *Commission of the European Communities v. Kingdom of Belgium* the national measure imposing joint and several liability for the tax debts of contracting partners who were not registered in Belgium was held to "constitute a restriction on the freedom to provide services".[119] German taxation legislation which had the effect of deterring taxpayers resident in Germany from sending children to schools established in other Member States was held an obstacle to the free movement of services.[120] In *Commission of the European Communities v. Federal Republic of Germany* a national rule which required practice as a psychotherapist under a German sickness security scheme which included a German residence requirement was held a restriction on the freedom of establishment.[121] Recently, a French rule which allowed only persons holding an inseminator's license to provide the service of artificial insemination of bovine animals, was held an obstacle to the free movement of establishment and services.[122]

III. Capital

The jurisprudence with respect to the free movement of capital has embraced the *Sägar*[123] formulation developed with respect to services. In *Commission v. Portugal*,[124] for example, it was confirmed that the prohibition of Article 56 "goes beyond the mere elimination of unequal treatment, on grounds of nationality,"[125] the Court holding that rules relating to the acquisition by investors from other Member States "were liable to impede the acquisition of shares in the undertakings"[126] in the host state. The language of restriction[127]

[117] Case C-446/03, 2005 E.C.R. I-10837, para. 34.

[118] Joined Cases C-151/04 & C-152/04, 2005 E.C.R. I-11203, para. 36.

[119] Arts. 49 & 50 EC.; Case C-433/04, 2006 E.C.R. I-10653, para. 32.

[120] Case C-76/05, *Herbert Schwarz and Marga Gootjes-Schwarz v. Finanzamt Bergisch Gladbach,* 2007 E.C.R. I-06849, para. 67.

[121] Case C-456/05, 2007 E.C.R. I-10517, para. 57.

[122] Case C-389/05, *Commission of the European Communities v. French Republic,* 2008, E.C.R. I-5337 , para. 66.

[123] Case C-76/90, 1991 I-4221, para. 12.

[124] Case C-367/98, 2002 E.C.R. I -4731.

[125] See, *supra,* note 125, para. 44.

[126] See, *supra,* note 125, para. 45.

[127] See BARNARD (note 47), 528 (Oxford University Press 2nd ed., 2007).

is increasingly used. The Court has held unlawful a procedure of prior authorization which "entails, by its very purpose, a restriction on the free movement of capital."[128] So, too, a Belgian law concerning the deductibility of debts with respect to a deceased's estate was held a restriction on the free movement of capital.[129]

The language of restriction varies. The German law, effective so that resident companies holding depreciated shares in non-resident companies were in a less favorable situation than those holding such shares in resident companies was held "to have a restrictive effect in relation to companies established in other States, representing, as far as the latter are concerned, an obstacle to the raising of capital in Germany."[130] The difference in treatment with respect to apportionment of the tax burden, between the heirs residing in the host state and those who were not was held to be "a restriction on the free movement of capital."[131]A Dutch exclusion of a concession (relating to the taxation at source of dividends received abroad) in relation to dividends originating in certain Member States, was held "liable to deter investment in a Member States in which the taxation of dividends does not give rise to the concession, and accordingly constitutes a restriction on the free movement of capital."[132]

IV. Beyond Discrimination – Key issues

A number of key issues arise vis-à-vis the free movement provisions of the Treaty of Rome, with respect to persons and services, in the context of the non-discriminatory national measure. The first issue arises from the proposition that the cause of free movement rights may not have been furthered by the initial focus on the identification of discrimination in persons and services jurisprudence. The second issue addresses an apparent subsuming of the concept of discrimination within the umbrella of the non-discriminatory restriction. Finally, the *ad hoc* position in relation to the jurisprudence of the free movement of goods is addressed.

---

[128] Case C-302/97, *Klaus Konle v. Republik Österreich,* 1999 E.C.R. I-3099, para. 39.

[129] Case C-11/07, *Hans Eckelkamp and Others v. Belgische Staat,* [2008] E.C.R. I-6845 , para. 54.

[130] Case C-377/07, *Finanzamt Speyer-Germersheim v. STEKO Industriemontage GmbH,* 2009 Judgment of the Court of Justice of the European Communities (First Chamber), 22 January 2009, para. 27.

[131] Case C-43/07, *D. M. M. A. Arens-Sikken v. Staatssecretaris van Financiën,* [2008] E.C.R. I-6887, para. 46.

[132] C-194/06 *Staatssecretaris van Financiën v. Orange European Smallcap Fund NV*, 2008 E.C.R . I-3747, para. 56.

1. Discrimination – an improper focus?

There is some argument for a proposition that an initial focus of non-discrimination on nationality grounds[133] as a tool for the attainment of EC Treaty free movement rights served only to obfuscate the attainment of those rights. The recent redirection of jurisprudence with respect to persons and services in favor of the examination of the non-discriminatory measure lends support for this view.

Whatever nomenclature used in that jurisprudence, be it manifested in impeding access/hindrance to trade or the terminology of "liable to hamper or to render less attractive," it is crucial to appreciate that the common objective in all such jurisprudence is the removal of the restriction to exercise the free movement right. In *Sager*[134] for example, the prohibited German legislation[135] was a restriction on the right of the UK company to provide patent renewal services,[136] the prohibition on cold calling in *Alpine Investments*,[137] similarly identified as a restriction to the right to provide services and the minimum capital requirement in respect of company formation, a restriction on the free movement of the worker and of establishment.[138] The removal at the national level of such restrictions[139] is clearly at the focus of recent free movement jurisprudence. Judgments such as *Zenatti*[140] and *Marks & Spencer*[141] are yet further evidence of this.

Recent free movement jurisprudence lifts the enquiry beyond the realm of the mere identification of discrimination. From the perspective of jurisprudence such as *Zenatti*[142] and *Marks & Spencer*,[143] it seems entirely logical that elimination of the restriction to the free movement right should form the central issue in such matters. Yet it is arguable, historically at least, that this has not always been reflected in free movement

[133] Art. 12 (ex 6) EC. Also for example, Art 39(2) EC in relation to the worker.

[134] C-76/90, 1991 E.C.R. 1-4221.

[135] See, *supra,* note 135, para. 21.

[136] See, *supra,* note 135, para. 14.

[137] Case C-384/93, *Alpine Investments BV v. Minister Van Financiën,* 1995 E.C.R. I-1141, para. 39.

[138] Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd,* 2003 E.C.R. I-10155, para. 104.

[139] Or obstacle.

[140] Case C-67/98, *Questore di Verona v. Diego Zenatti*, 1999 E.C.R. I-7289.

[141] Case C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes),* 2005 E.C.R. I-10837.

[142] Case C-67/98, *Questore di Verona v. Diego Zenatti,* 1999 E.C.R. I-7289.

[143] Case C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes),* 2005 E.C.R. I-10837.

jurisprudence. The focus on the prohibition of "any discrimination on grounds of nationality"[144] as the sole *modus operandi* which for some time had been effective to extinguish other forms of enquiry, may perversely have ill-served the cause of free movement attainment by presenting restricted grounds for attack on the national measure. It is evident that the modus operandi represents only a partial solution to achieving free movement. The initial focus on the concept of discrimination arguably served only to obfuscate and to frustrate, at least in part, the real purpose of the free movement provisions in relation to *persons* and *services*. It is puzzling why such an approach was adopted by the Court, particularly as some of the jurisprudence in question was clearly orchestrated to attack the restriction to such rights and the concentration solely on prohibition of discrimination is not fully transparent of Treaty objectives with respect to the free movement provisions.

2. Discrimination subsumed?

The displacement of the concept of discrimination from jurisprudence concerned with the attainment of free movement rights was noted by Advocate General Jacobs in *R v. Danner*.[145] In *Danner*,[146] Finish legislation relating to voluntary pension insurance scheme, itself overtly discriminatory[147] was described as a restriction on the right to supply services.[148] The same trait is displayed in other judgments. In *Erich Ciola v. Land Vorarlberg* for example, an Austrian law relating to boat owners resident in other Member States clearly was directly discriminatory; judgment on those grounds was avoided. It was held that the moorings quota was "contrary to the freedom to supply services."[149] In *Hanns-Martin Bachmann v. Belgian State*, directly discriminatory Belgian legislation relating to the deductibility of sickness contributions was held to constitute a restriction on the free movement for workers. Likewise, there were discriminatory issues surrounding the grant to a single body of the rights to operate slot machines in *Markku Juhani Laara, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v. Kihlakunnansyyttaja (Jyvaskyla) and Suomen valtio (Finnish State)*.[150] However, in that instance, the national law was categorised as "an impediment to the freedom to provide services…directly or indirectly"

[144] Art. 12 (ex 6) EC.

[145] Case C-136/00, *R v. Danner* 2002 E.C.R. I-8147, para. 36.

[146] *Id*.

[147] Case 136/00 *R* v. *Danner,* 2002 E.C.R. I-8147, para. 34.A.G. (opinion ofAG Jacobs).

[148] *Id.,* para. 57.

[149] Within the meaning of Art 49 EC, para. 34.

[150] Case C-124/97, 1999 E.C.R. I-6067.

preventing migrant operators from making slot machines available to the public.[151] In *Commission of the European Communities v. Italian Republic,* the national measure which prohibited the undertaking of private security work by migrant firms, though clearly directly discriminatory was held a restriction on the right of free movement. In *Commission of the European Communities v. Kingdom of Belgium*,[152] the national measure concerning a withholding obligation and the imposition of joint liability in respect of contractors not registered in Belgium was clearly directly discriminatory of the migrant national supplying services in that state; the measure was identified not as discriminatory, but as constituting a restriction on the performance of that Treaty right.[153]

Similarly in relation to the free movement of goods, the recent spotlight on the restriction/obstacle has been at the expense of proceeding with an analysis focusing on discrimination. For example, in *Criminal proceedings against Jan-Erik Anders Ahokainen, Mati Leppik Jan-Erik Anders Ahokainen*, the prior import authorization system was clearly directed at the imported product,[154] and in *Alfa Vita Vassilopoulos AE, formerly Trofo Super-Markets AE*[155] specified the production conditions for all[156] bakery products. Recently, in the context of compliance of all automatic fire detection systems with Belgian law the Court analyzed the obstacle to the free movement of goods as being "applicable without distinction" to both imports and to the host product.[157] This, it seems, provides a clear recognition that whilst restriction/obstacle maybe the umbrella language with respect to Art 28 EC scrutiny, nonetheless the taint of discrimination in the national measure will trigger the application of the prohibition.

Whilst a number of judgments in relation to the free movement of persons and services shelve the categorization of discrimination, nonetheless it is clear that with respect to the application of those provisions, the use of the principle of discrimination on a "stand-alone basis" has not been abandoned.[158] On the contrary, the Court will refer to it and in some instances will apply it.[159] In relation to the free movement of the worker for example, the

---

[151] *Id.*, para. 29.

[152] Case C-433/04, 2006 E.C.R. I-10653.

[153] *Id.,* para. 32.

[154] Case C-434/04, 2006 E.C.R. I-9171, para. 18.

[155] Joined cases C-158/04 & C-159/04, 2006 E.C.R. I-8135, para. 20.

[156] Both imported and exported product.

[157] C-254/05 *Commission of the European Communities v. Kingdom of Belgium,* 2007 E.C.R. I-4269, para. 32.

[158] Noted by Advocate-General Jacobs. Case 136/00, *R v. Danner,* 2002 E.C.R. I-8147, para. A.G. 35.

[159] An observation made by Advocate-General Jacobs. See, *supra,* note 159, para. 35.

court has recently confirmed that Article 39 EC and Article 3 of Regulation No 1612/68[160] "guarantee…fully…equal treatment."[161] For example, in *Commission of the European Communities v. Hellenic Republic*, a judgment handed down in 2001,[162] an obligation imposed by Greece relating to the compulsory maintenance of emergency stocks of petroleum products was held discriminatory of products from refineries situated in other Member States.[163] Likewise, in *Royal Bank of Scotland plc v. Elliniko Dimosio (Greek State)*,[164] national taxation legislation was held discriminatory,[165] and in *Commission of the European Communities v. Federal Republic of Germany*,[166] decided in January 2006,[167] a reference was made to the operation of the principle of discrimination.[168]

In a pertinent comment, Craig and de Búrca have expressed the view that "internal-market case law on what constitutes discrimination, whether direct or indirect…is highly confused."[169] Perhaps the approach taken by the Court in the recent judgment o*f Contse SA, Vivisol Srl and Oxigen Salud SA v. Instituto Nacional de Gestion Sanitaria (Ingesa), formerly Instituto Nacional de la Salud (Insalud)*[170] may go some way to address these concerns. In *Contse*,[171] admission conditions with respect to tenders for home respiratory treatment were held "applicable without distinction" to any person concerned in the tendering process.[172] It was for "the national court to determine whether that condition may in practice be met more easily by Spanish operators than by those established in

[160] Regulation (EEC) No 1612 of 15 October 1968, Official Journal L 257, 19/10/1968 p. 2. OJ Sp.Ed. 1968, No. L257/2, p. 475.

[161] Case C-278/03, *Commission of the European Communities v. Italian Republic*, 2005 E.C.R. I-3747, para. 16, in respect of an Italian failure "to have regard to those rights in respect of access of Community nationals to recruitment competitions for teaching staff in the State schools of that Member State."

[162] 25 October 2001.

[163] Case C-398/98, 2001 E.C.R. 1-7915, para. 26.

[164] Case C-311/97, 1999 E.C.R. I-2651.

[165] *Id.,* para. 30.

[166] Case C-244/04, 2006 E.C.R. I-885.

[167] 12 January 2006.

[168] "Such restrictions, if discriminatory, are prohibited by Article 49 EC, unless they are justified by the combined provisions of Articles 46 EC and 55 EC," para. 12.

[169] *BARNARD* (note 47), *803* (Oxford University Press 4th ed., 2007).

[170] Case C-234/03, 2005 E.C.R. 1-9315.

[171] See, *supra*, note 171.

[172] See, *supra*, note 171, para. 37.

another Member State".[173] The former relates to the non-discriminatory restriction; the latter reference imports connotations of indirect discrimination.

It is arguable that *Contse*[174] goes some way to the adoption of a workable approach in free movement jurisprudence with respect to persons and services. It appears to affirm that the enquiry has been refocused on the obstacle/restriction to the exercise of the right. This presents a capacity for an acknowledgement of the presence of discrimination in the national measure where this is appropriate.[175] The judgment in *Contse*[176] may have signaled an attempt to weave a seamless strand of enquiry within the jurisprudence relating to persons and services; one capable of embracing recognition of the slivers of discrimination and the strands of the non-discriminatory requirement.

The terminology of *restriction* appears to be reflective of Treaty intent. The significance of the approach taken in *Contse*[177] is twofold. Not only is the language of jurisprudence aligned with that of the Treaty, but the pragmatic approach that *Contse*[178] evidences a conceptual honesty with respect the process of enquiry conducted into the legality of the national measure. In this respect, it is an approach to be welcomed. In addition, it is arguable that the adoption of the restriction terminology by jurisprudence relating to the free movement of capital gently reinforces a perceived convergence of the tests for the application of all Treaty free movement provision. The effect of this may be to render the practical importance of the interaction between those differing Treaty provisions rather less important than before.[179]

The focus on the obstacle/restriction to the exercise of the free movement right with respect to persons and services is important in one crucial respect; the issue relating to the justification of the national measure. The effect of the reclassification on rights justification is considered below.

---

[173] See, *supra*, note 171, para. 37.

[174] Case C-234/03, 2005 E.C.R. 1-9315.

[175] This is to some extent confirmed by Case C-471/04 *Finanzamt Offenbach am Main-Land v. Keller Holding GmbH,* 2006 E.C.R. I-2107, para. 30. "The provisions concerning freedom of establishment are directed to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation."

[176] Case C-234/03, 2005 E.C.R. 1-9315.

[177] See, *supra*, note 177.

[178] See, *Supra*, note 177.

[179] See *BARNARD* (note 47), *555* (Oxford University Press 2nd ed., 2007)

D. Justification

A national measure that is held unlawful, either on the grounds of discrimination,[180] on the grounds of nationality, or as a restriction on the free movement right, may be justified by the Member State.[181]

The concept of *justification* is an "assessment of balance;" the response by the Member State vis-à-vis the interest that it is purporting to protect must be proportionate. The test of proportionality was succinctly expressed in *Criminal proceedings against J.J.J. Van der Veldt* as "an obligation of that kind must be fulfilled by means which are *not out of proportion to the desired result and which hinder as little as possible* the importation of products which have been lawfully manufactured and marketed in other Member States" (emphasis added).[182]

The framework within which the process[183] of justification operates with respect to free movement provisions of Community law is distinguished by a division in treatment between the discriminatory and the non-discriminatory national measure. The former is further subdivided and is dependent upon whether the discrimination is *de facto* direct or indirect.

I. Direct discrimination

Where the national measure is directly discriminatory to the exercise of the free movement right, the framework with respect to justification is provided by reference to provisions of the Treaty of Rome.[184]

---

[180] On the grounds of nationality. See for example Art. 12 (ex 6) EC.

[181] Consideration of the issue of *justification* is not however obligatory. In Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein,* 1979 E.C.R. 649, the issue of *justification* did not arise. The fixing of a minimum alcohol content for alcoholic beverages was considered contrary to Art 30 (now 28) EC, para. 15.

[182] Case C-17/93, 1994 E.C.R. I-3537, para. 30.

[183] The onus is on the Member State to provide *proof* of justification. For example, in Case C-283/99 *Commission of the European Communities v. Italian Republic*, 2001 E.C.R. I-4363, para. 26, it was held that Italy "had not shown the existence of any grounds of public policy or public security" which was capable of justifying the provision that private security work be carried out only by Italian security firms which employed Italian nationals. The same applies to the *justifications* in relation to the free movement of goods. For example in Case 121/85 *Conegate Limited v. HM Customs & Excise,* 1986 E.C.R. 1007, paras. 15 & 16 the United Kingdom failed in an attempted justification, national law permitted the host national to supply the same goods; they were freely available in that state.

[184] With respect to the fee movement of goods, Art 30 (ex 36) EC; to the *worker*, Art 39(3) (ex 48(3)) EC; the provision of services, Art 55 (ex 66) EC and the right of establishment, Art 46 (ex 56) EC.

1. Goods

The justification of the national rule which is directly discriminatory of the imported product is by reference to the provisions contained in Art 30 (ex 36) E.C.[185] The Treaty grounds for justification include inter alia "public policy, public security or public health."[186] It has been held that the grounds listed in Art 30 (ex 36) E.C. are exhaustive, they "constitute…a derogation from the basic rule that all obstacles to the free movement of goods between Member States shall be eliminated and must be interpreted strictly…The exceptions listed therein cannot be extended to cases other than those specifically laid down."[187] For example, "neither the protection of consumers nor the fairness of commercial transactions are included amongst the exceptions set out in Article 36, those grounds cannot be relied upon as such in connection with that Article."[188]

Underlying the process of justification of national measures relating to the free movement of goods is the principle of proportionality. In *R v. Henn and Darby*,[189] for example, a total ban on imports of pornographic materials was held proportionate. The prohibition on import of such materials genuinely applied for the protection of public morality. That ground, however, could not apply where similar goods to the prohibited imports were freely manufactured in the U.K.[190]

In *Commission of the European Communities v. Hellenic Republic*,[191] a measure requiring the maintenance of emergency stocks of petroleum products was held not proportionate; the stocks could have been equally obtained on the open market from other producers.[192] In *Klas Rosengren and others v. Riksåklagaren*, a Swedish prohibition on the import of

[185] See, *supra*, note 187.

[186] Art. 30 (ex 36) EC provides: "The provisions of Arts 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security the protection of health and life of humans, animals or plants the protection of national treasures possessing artistic, historic or archaeological value or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

[187] Case 113/80, *Commission of the European Communities v. Ireland,* 1981 E.C.R. 1625, para. 7. Case 46/76 *W. J. G. Bauhuis v. The Netherlands State,* 1977 E.C.R. 5, para. 12.

[188] Case 113/80, *Commission of the European Communities v. Ireland,* 1981 E.C.R. 1625, para. 8.

[189] Case 34/79, *Regina v. Maurice Donald Henn and John Frederick Ernest Darby,* 1979 E.C.R. 3795, para. 22.

[190] Case 121/85, *Conegate Limited v. HM Customs and Exercise,* 1986 E.C.R. 1007.

[191] Case C-398/98, 2001 E.C.R. 1-7915.

[192] Case C-398/98 *Commission of the European Communities v. Hellenic Republic* 2001 E.C.R. 1-7915, para. 44 (opinion of AG Ruiz-Jarabo Colomer).

alcohol by private individuals to protect young people against the harmful effects of such consumption was held to be disproportionate.[193] This objective could have been achieved by requiring the purchaser to certify on import that he was more than 20 years of age.[194]

2. Persons & Services

Direct discrimination on account of the origin[195] of the migrant national is justifiable only[196] on Treaty grounds of "public policy, public security or public health."[197] Economic aims are not included,[198] nor are grounds of cultural policy.[199] In the context of persons and services, it has been held that Treaty derogations "must be interpreted strictly."[200] The loss of free movement rights, for example through deportation, representing "the most draconian steps a host state can take."[201]

As with the free movement of goods, with respect to persons and services, the operation of the principle of proportionality is the cornerstone of the justification process. The Treaty

---

[193] Case, *C-170/04 Klas Rosengren and others v. Riksåklagaren* 2007 E.C.R. I-4071, para. 58.

[194] Case, *C-170/04 Klas Rosengren and others v. Riksåklagaren* 2007 E.C.R. I-4071, para. 56.

[195] "And which are therefore discriminatory". Case 352/85, *Bond van Adverteerders and others v. The Netherlands State,* 1998 E.C.R. 2085, para. 32.

[196] Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media*, 1991 E.C.R. I-4007, para. 11. For example in Case 352/85, *Bond van Adverteerders and others v. The Netherlands State,* 1998 E.C.R. 2085, paras. 32 & 33 in relation to *services*, only the ground of "public policy" was available as justification.

[197] Provided by Art. 39(2) (ex 48(2)) EC; Art. 46 (ex Art 56) EC; Art. 55 (ex 66) EC.

[198] "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." Case 352/85, *Bond van Adverteerders and others v. The Netherlands State,* 1998 E.C.R. 2085, para. 34. See also Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media,* 1991 E.C.R. I-4007, para. 11; Case C-17/92, *Federacion de Distribuidores Cinematograficos v. Estado Español et Union de Productores de Cine y Television,* 1993 E.C.R. I-2239, para. 16.

[199] In the context of the provisions of *services*. Case C-17/92, *Federacion de Distribuidores Cinematograficos v. Estado Español et Union de Productores de Cine y Television,* 1993 E.C.R. I-2239, para. 20. The same observation is made in relation to the right of establishment and art 46 (ex 56) EC by Advocate General M. Jean Mischo. Case 3/88, *Re Data Processing Contracts: E.C. Commission v. Italy,* 1989 E.C.R. 4035, para. 33.

[200] "So that [the] scope of the free movement provisions cannot be determined unilaterally by each Member State". Case 41/74, *Yvonne van Duyn v. Home Office,* 1974 E.C.R. 1337, para. 18; Case 147/86, *Commission v. Greece,* 1998 E.C.R. 1637, para. 7; Case C-114/97, *Commission of the European Communities v. Kingdom of Spain,* 1998 E.C.R. 1-6717, para. 34.

[201] See CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU*: *THE FOUR FREEDOMS* BARNARD (note 47).253 (Oxford University Press 2nd ed., 2007).

justifications "must be interpreted in such a way that its effects are limited to that which is necessary in order to protect the interests which it seeks to safeguard."[202] Dutch rules, such as those relating to the distribution of cable programs transmitted by migrant broadcasters[203] in *Bond van Adverteerders and others v. The Netherlands State*,[204] were held disproportionate to the intended objective, "that of maintaining the non-commercial and, thereby, pluralistic nature of the Netherlands broadcasting system."[205] In *Bond*,[206] it was admitted[207] "that there are less restrictive, non-discriminatory ways of achieving the intended objectives."[208] In *D. H. M. Segers v. Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen*,[209] the discriminatory treatment of migrant companies could not be justified on Treaty grounds, the Dutch response was disproportionate to the need to combat fraud. In *Segers*, it was held "Although [it] may therefore justify a difference of treatment in certain circumstances, the refusal to accord a sickness benefit to a director of a company formed in accordance with the law of another Member State cannot constitute an appropriate measure in that respect."[210]

II. Indirect discrimination

1. Goods

National rules with respect to goods are not prohibited by art 28 EC[211] where they are necessary in order to satisfy "mandatory requirements."[212] The concept of the "mandatory

---

[202] Case 352/85, *Bond van Adverteerders and others v. The Netherlands State,* 1998 E.C.R. 2085, para. 36.

[203] Making distribution of cable programmes transmitted by broadcasters established in other Member States conditional upon the absence of advertisements together with the prohibition of the subtitling of those programmes in Dutch. The Dutch rules were therefore discriminatory in relation to origin.

[204] Case 352/85, *Bond van Adverteerders and others v. The Netherlands State,* 1998 E.C.R. 2085, para. 37, in relation to Article 56 (now 46) EC.

[205] *Id.*, para. 35.

[206] See, *supra*, note 205.

[207] By the Dutch Government.

[208] "For instance, broadcasters of commercial programmes established in other Member States could be given a choice between complying with objective restrictions on the transmission of advertising, such as a prohibition on advertising certain products," *id.*, para. 37.

[209] Case 79/85, 1986 E.C.R. 2375, para. 13.

[210] *Id.*, para. 17.

[211] See *supra*, note 1 Art 28 (ex 30) EC. p.47.

requirement"[213] was introduced in *Rewe-Zentral A.G. v. Bundesmonopolverwaltung fur Branntwein*.[214] It is the benchmark of the justification of indistinctly discriminatory measures with respect to the free movement of goods. In *Rewe* the attempted justification of the mandatory fixing of minimum alcohol contents was on the grounds of the fairness of commercial transactions.[215] It was held, "Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may…[relate] in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer."[216] However, the meaning of "mandatory requirement" is elastic in nature. The concept has since been extended, for example, to embrace the protection of the environment,[217] press diversity,[218] and the protection of the cinema in France.[219]

Related to the concept of the mandatory requirement is the application of the principle of proportionality. "If a Member State has a choice between various measures for achieving the same aim, it should choose the means which least restricts the free movement of goods."[220] It is a test importing considerations of legality and merit. In *Rewe*[221] for example,

---

[212] Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein,* 1979 E.C.R. 649, para. 8. Increasingly, the terms of "imperative requirements" or "overriding reasons in the general interest" are used in the judgments.

[213] The fundamental assumption is that there should be "no valid reason why, provided that [goods] … have been lawfully produced and marketed in one of the Member States, [they] should not be introduced into any other Member State." Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein,* 1979 E.C.R. 649, para. 14. It is a presumption that can be rebutted when further measures are *necessary* to protect the interest concerned, the actions of the Member State must be *proportionate*. The burden of proving that a measure is *necessary* is onerous. See for example Case 16/83, *Criminal proceedings against Karl Prantl,* 1984 E.C.R. 1299; Case 182/84, *Criminal proceedings against Miro BV,* 1985 E.C.R. 3731; Case 286/86, *Ministere public v. Gerard Deserbais,* 1988 E.C.R. 4907. Note also Case C-317/91, *Deutsche Renault AG v. AUDI AG,* 1993 E.C.R. I-6227.

[214] Case 120/78, 1979 E.C.R. 649, para. 8.

[215] *Id.,* para. 12.

[216] *Id.*, para 8. The defences of consumer protection and fair trading are only available to the "mandatory requirement". Case 434/85, *Allen and Hanburys Ltd v. Generics (UK) Ltd,* 1988 E.C.R. 1245, para. 35; Case 113/80, *Commission of the European Communities v. Ireland,* 1981 E.C.R. 1625, para. 10.

[217] On the ground that protection of the environment is "one of the Community's essential objectives". Case 302/86, *Commission of the European Communities v. Kingdom of Denmark,* 1988 E.C.R. 4607, paras. 8- 9. In this judgment national rules establishing a deposit and return system for empty drinks containers were justified, para. 13.

[218] Case 368/95, *Vereinigte Familiapress Zeitungsverlags-und vertriebs GmbH v. Heinrich Bauer Verlag,* 1997 E.C.R. I-3689, para. 34.

[219] Case 60/84, *Cinetheque SA and others v. Federation nationale des cinemas français,* 1985 E.C.R. 2605, para. 23.

[220] Case 302/86, *Commission of the European Communities v. Kingdom of Denmark,* 1988 E.C.R. 4607, para. 6.

the national law could not be justified; the requirements relating to the minimum alcohol content were held not to serve a purpose which could be deemed to be in the general interest.[222] In *Cinetheque SA and others v. Federation nationale des cinemas français*, for example, a French measure, designed to encourage the creation of cinematographic works irrespective of origin, which gave for a limited period a priority of distribution through that medium, was held proportionate.[223] The system was designed to encourage the creation of cinematographic works irrespective of origin through that medium. In *Walter Rau Lebensmittelwerke v. De Smedt PVBA*, national law required margarine to be packed in cube shaped boxes so consumers could distinguish between margarine and butter. It was held that the same objective could have been achieved by other means (such as labeling) which would be less of a hindrance to trade.[224]

In *Ministere public v. Gerard Deserbais*, in relation to a French measure imposing a minimum fat content for Edam cheese, it was held that "The Member State into which they are imported cannot prevent the importation and marketing of such cheeses where adequate information for the consumer is ensured."[225] In *Commission of the European Communities v. Federal Republic of Germany*, a general ban on additives in beer was held not proportionate[226] to the stated aim of the protection of "public health."[227] The ban had applied to *all* additives,[228] not just those for which there was concrete scientific evidence of risk.[229] By contrast, in *Criminal proceedings against Ditlev Bluhme*,[230] national protection of the Danish bee was justified on the grounds of the protection of the "health and life of…animals".[231] The establishment of a protection area for the Lso brown bee aimed at the survival of that species was "an appropriate measure in relation to the aim pursued."[232]

---

[221] Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein,* 1979 E.C.R. 649.

[222] *Id.*, para. 14.

[223] Case 60/84, 1985 E.C.R. 2605, para. 23.

[224] Case 261/81, 1982 E.C.R. 3961, para. 20.

[225] Case 286/86, 1988 E.C.R. 4907, para. 12.

[226] Case 178/84, 1987 E.C.R. 1227, para. 53.

[227] Art. 36 (now 30 EC). Case 178/84, 1987 E.C.R. 1227, para. 26.

[228] Lawfully in circulation in other Member States, *Id.*, para. 47.

[229] See, *supra*, note 227, para. 47.

[230] Case C-67/97, 1998 E.C.R. I-8033, para. 37.

[231] Art. 36 (now 30) EC.

[232] Case C-67/97, *Criminal proceedings against Ditlev Bluhme,* 1998 E.C.R. I-8033, para. 37.

2. Persons & services

Where the national measure is indirectly discriminatory of the exercise of the free movement right with respect to persons and services, it may be "objectively justified."[233] The grounds of justification are broad and not confined to the Treaty exceptions. In *Finanzamt Koln-Altstadt v. Roland Schumacker*[234] Belgian discrimination directed at a cross-border worker who could not benefit from tax allowances could in certain circumstances be justified where, for example, there was a difference in position between resident and non-resident worker. Likewise, it has been held that a national law which similarly discriminates against the migrant in the context of establishment[235] and services could be objective justified. For example, *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* contains a reference to "professional rules justified by the general good."[236]

The process of justification in the theatre of free movement of persons is inextricably linked to the application of the concept of proportionality. In *John O'Flynn v. Adjudication Officer*,[237] in relation to the worker, for example, a United Kingdom measure relating to the payment of burial expenses was held not proportionate; entitlement to a lump sum payment, paid with reference to United Kingdom burial costs would have sufficed.[238] In the same way, an Italian measure placing a six year limit on the employment of foreign language assistants was held not necessary to enable universities to terminate the contracts of teaching staff that proved incompetent.[239] In *Clean Car Autoservice GesmbH v. Landeshauptmann von Wien*,[240] the requirement of residence in the host state so that managers could be served with notice of fines could have equally have been achieved by notification at the registered office.

In relation to rights of establishment, Dutch conditions imposed on the structure of foreign broadcasting bodies were disproportionate in the context of safeguarding the freedom of expression; that aim could have been achieved by the reformulating the composition of

---

[233] For example Case C-237/94, *John O'Flynn v. Adjudication Officer,* 1996 E.C.R. I-2617, para. 23.

[234] 1995 E.C.R. I-225, para. 40. See also Case C-204/90, *Bachmann v. Belgium,* 1992 E.C.R. I-249, para. 28.

[235] Case 111/85, *Lynne Watson and Alessandro Belmann,* 1976 E.C.R. 1185, para. 22.

[236] Case 33/74, 1974 E.C.R. 1299, para. 12.

[237] See, *supra*, note 234. para. 23.

[238] *Id.*, para. 29.

[239] Case 33/88, *Pilar Allue and Carmel Mary Coonan v. Universita degli studi di Venezia,* 1989 E.C.R. 1591, para. 16.

[240] Case C-350/96, 1998 E.C.R. 1-2521.

national broadcasting bodies.[241] Similarly, the scale of restrictions, the requirement of a license and examination success as pre-conditions for tourist guides in Italy was held disproportionate in the context of achieving the purported objective of preserving cultural heritage.[242]

III. The non-discriminatory requirement

1. Goods

In recent jurisprudence where the national measure has been classified as a restriction on free movement rights relating to goods, justification has been measured either "by one of the public-interest grounds set out in Article 30 E.C. or by one of the overriding requirements laid down by the Court's case-law where the national rules are applicable without distinction."[243] Where the measure is tainted by direct discrimination, the grounds of Art 30 E.C. are available for justification. In other instances, recourse to "overriding requirements" will be appropriate.

a) Public interest grounds

Where there is *de facto* direct discrimination in the national measure held restrictive of the free movement of goods, the process of justification appears to be by reference to "public interest" grounds of Art 30 EC. In *Criminal proceedings against Jan-Erik Anders Ahokainen and Mati Leppik*[244] for example, a Finish system relating to the commercial importation

[241] Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media,* 1991 E.C.R. I-4007 paras. 22 & 24.

[242] Case C-180/89, *Commission of the European Communities v. Italian Republic,* 1991 E.C.R. I-709, para. 24. See also Case C-154/89, *Commission of the European Communities v. French Republic,* 1991 E.C.R. I-659, para. 21. and Case C-198/89, *Commission of the European Communities v. Hellenic Republic,* 1991 E.C.R. I-727, para. 21.

[243] Joined cases C-158/04 & C-159/04, *Alfa Vita Vassilopoulos AE and Carrefour Marinopoulos AE v. Elliniko Dimosio and Nomarchiaki Aftodioikisi,* 2006 E.C.R. I-8135, para. 20; Case C-54/05, *Commission of the European Communities v. Republic of Finland,* 2007 E.C.R. I-2473, para. 38. The terminology used in the latter instance was that of "imperative requirements." See also Case 120/78, *Rewe-Zentral* (*Cassis de Dijon*), 1979 E.C.R. 649, para. 8. and C-297/05, *Commission of the European Communities v. Kingdom of the Netherlands,* 2007 E.C.R. I-7467, para. 74.

[244] Case C-434/04, 2006 E.C.R. I-9171.

alcoholic drinks[245] was considered by reference to the Art 30 EC ground of public policy and the protection of health.[246]

b) Overriding interests

Determination of "overriding requirements" is referenced to "the meaning of the case-law initiated by *Rewe-Zentral*[247] (*Cassis de Dijon*)."[248] In *Alfa Vita Vassilopoulos AE, formerly Trofo Super-Markets AE*,[249] for example, it was held in relation to the baking of frozen bread without a license,[250] that the process of justification of the Greek measure could be by reference to one of the overriding requirements.[251]

In relation to various German measures relating to avoiding the environmental impact of packaging, the ground for justification[252] was based on the protection of the environment,[253] as were Dutch practices making the existence of an actual nutritional need a precondition for the granting of derogation from the application of national measures.[254]

---

[245] Importing issues of direct discrimination. *Id.*, para. 6.

[246] *Id.*, para. 23.

[247] Case C-120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein (Cassis de Dijon),* 1979 E.C.R. 649, para. 8.

[248] Case C-441/04, *A-Punkt Schmuckhandels GmbH v. Claudia Schmidt* para. 26. See also Joined cases C-158/04 & C-159/04, *Alfa Vita Vassilopoulos AE and Carrefour Marinopoulos AE v. Elliniko Dimosio and Nomarchiaki Aftodioikisi,* 2006 E.C.R. I-8135, para. 20.

[249] Joined cases C-158/04 & C-159/04, 2006 E.C.R. I-8135, para. 20.

[250] The measure was clearly indirectly discriminatory. *Id.*, para. 10.

[251] In this instance, "consumer or health protection". See, *supra,* note 250, para. 23.

[252] In circumstance where the marketing of the national drinks and that of the import was not affected in the same manner. Case C-463/01, *Commission of the European Communities v. Federal Republic of Germany,* 2004 E.C.R. I-11705, para. 69.

[253] *Id.*, para. 75. On similar facts, see also Case C-309/02 *Radlberger Getrankegesellschaft mbH & Co. and S. Spitz KG v. Land Baden-Wurttemberg,* 2004 E.C.R. I-11763, para. 74. The German rules applied without distinction, para. 61.

[254] The measure was indirectly discriminatory; "the protection of human health is one of the objectives of the Community policy on the environment". Case C-41/02, *Commission of the European Communities v. Kingdom of the Netherlands,* 2004 E.C.R. I-11375, paras. 23 & 45. See also Case C-150/00, *Commission of the European Communities v. Republic of Austria,* 2004 ECR I-3887, para 84; Case C-387/99 *Commission of the European Communities v. Federal Republic of Germany,* 2004 E.C.R. I-3751, para. 67; Case C-24/00, *Commission of the European Communities v. French Republic,* 2004 E.C.R. I-1277, para. 53; Case C-270/02, *Commission of the European Communities v. Italian Republic,* 2004 E.C.R. I-1559, para. 23; Case C-95/01, *Criminal proceedings against John Greenham and Leonard Abel, 2004* E.C.R. I-1333, para. 34; Case C-192/01, *Commission of the European Communities v. Kingdom of Denmark,* 2003 E.C.R. I-9693, para. 42.

It has been held that a "legitimate aim of demonstration" may be an objective of general interest.[255] In *Commission of the European Communities v. Kingdom of Spain*[256] the issue of the justification of the prohibition on marketing of cocoa products containing fats other than cocoa butter was by reference to "consumer protection."

c) Determination at the national level

The availability of grounds for justification, the choice between the public interest grounds of Art 30 EC or the reference in the process to the use of "imperative requirements" has recently (in some instances) been dependent upon determination by the referring court of the nature of the national measure.[257] It is a determination pertaining to the issue of discrimination. The reference will be to imperative requirements if the "court finds that the prohibition…affects products originating from other Member States more than it affects domestic products as regards access to the domestic market."[258]

II. Persons and services

In the context of the justification of the non-discriminatory requirement, and in instances wherein the nomenclature of restriction has been used in relation to persons and services, it has been held that "It is for the national court to verify whether, having regard to the specific rules governing its application, the national legislation is genuinely directed to realizing the objectives which are capable of justifying it."[259]

The process of justification of the non-discriminatory requirement with respect to persons and services thus involves identification of an interest that is worthy of protection.[260] The

[255] Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzuge v. Republik Osterreich,* 2003 E.C.R. I5659, para. 80.

[256] Case C-12/00, 2003 E.C.R. I-459, para. 83.

[257] Case C-441/04, *A-Punkt Schmuckhandels GmbH v. Claudia Schmidt,* 2006 E.C.R. I-2093, para. 26.

[258] *Id.,* para. 26. in the context of national measures concerning promotional parties held in relation to the selling of jewelry.

[259] Case C-67/98, *Questore di Verona v. Diego Zenatti,* 1999 I-7289, para. 37. See also Case C-446/03 *Marks & Spencer plc v. David Halsey (Her Majesty"s Inspector of Taxes),* 2005 E.C.R. I-10837, para. 35; Case C-250/95, *Futura Participations and Singer,* 1997 E.C.R. I-2471, para. 26; Case C-9/02, *De Lasteyrie du Saillant,* 2004 E.C.R. I-2409, para. 49; Case C-19/92, *Dieter Kraus v. Land Baden-Wurttemberg,* E.C.R. I-1663, para. 32; Case C-124/97, *Markku Juhani Laara, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v. Kihlakunnansyyttaja (Jyvaskyla) and Suomen valtio (Finnish State),* 1999 E.C.R. I-6067, para. 36.

[260] Together with an evaluation of the *proportionality* of the appropriateness of such response by the Member State in the circumstances.

grounds for justification are outlined in *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*.[261] The measures "must be applied in a non-discriminatory manner[262] they must be justified by imperative requirements in the general interest, they must be suitable for securing the attainment of the objective which they pursue and they must not go beyond what is necessary in order to attain it."[263] It appears that the *Gebhard*[264] test applies universally across the free movement provisions relating to persons.[265] This has recently been confirmed in *Corporación Dermoestética SA v. To Me Group Advertising Media* which held that "the protection of public health is one of the overriding reasons based on the general interest."[266]

In the application of the *Gebhard* test with respect to the issue of justification, the Court has used an interchangeable nomenclature of public/general interest. The application of this standard is examined below.

a) Public interest

The 'public interest' is an eclectic and versatile concept.[267] With respect to the provision of services, for example, *Manfred Sager v. Dennemeyer & Co. Ltd* held that justification of patent monitoring legislation would be measured by reference to "imperative reasons relating to the public interest."[268]

---

[261] Case C-55/94, 1995 E.C.R. I-4165, para. 37.

[262] *Gebhard*, arose from the suspension of a German national by the Milan bar for the use of the title of that bar.

[263] See*, supra,* note 262, para 37. See also C-19/92, *Kraus v. Land Baden-Wuerttemberg,* 1993 E.C.R. I-1663, para. 32.

[264] See, *supra,* note 262.

[265] Cross reference has for example been made with respect to the *worker* in C-415/93, *Union royale belge des societes de football association ASBL v. Jean-Marc Bosman, Royal club liegeois SA v. Jean-Marc Bosman and others and Union des associations europeennes de football (UEFA) v. Jean-Marc Bosman,* 1995 E.C.R. I-4921. See, inter alia, the judgment in Case C-19/92 *Kraus v Land Baden-Wuerttemberg,* 1993 E.C.R. I-1663, para. 32. and Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano,* 1995 E.C.R. I-04165, paras. 37 and 104.

[266] Case C-500/06, *Corporación Dermoestética SA v. To Me Group Advertising Media* 2008 E.C.R., para. 37.

[267] See for example the list given in Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media,* 1991 E.C.R. I-4007, para. 14.

[268] Case C-76/90, 1991 E.C.R. 1-4221, para. 15. The measure issue did not pass the test of *proportionality*, para. 20.

The concept has been applied to the award of academic titles,[269] the protection of workers,[270] the protection of consumers,[271] the maintenance of order in society,[272] and concerns relating to social policy and the prevention of fraud.[273] It has encompassed the objective of guaranteeing the quality of skilled work,[274] the protection of consumers and the maintenance of order in society in the context of the prevention of migrant operators from taking bets in Italy,[275] and the provision of legal advice by qualified persons.[276]

Into the public interest category has also fallen the protection of investor confidence, the prohibition of "cold calling" in the Dutch financial markets,[277] a "proper appreciation of the artistic and archaeological heritage of a country,"[278] the maintenance of a level of service and occupational skills in the skilled trade sector,[279] and the need to access the aptitude and ability of persons called to practice as advocates.[280] Further, in the differential tax treatment of company losses, economic objectives have been held to fall within the "public interest" criteria.[281]

---

[269] Case C-19/92, *Dieter Kraus v. Land Baden-Wurttemberg,* 1993 E.C.R. I-1663, para. 33.

[270] Case C-79/01, *Payroll Data Services (Italy) Srl and Others,* 2002 E.C.R. 1-8923, para. 31.

[271] Consider for example, in relation to the remuneration of sight accounts in euros, the encouragement of medium and long term savings. Case C-442/02, *Caixa-Bank France v. Ministere de L"Economie, des Finances, De L"Industrie (Banque Fédérale des Banques Populaires and Others),* 2004 E.C.R. I-8961, para. 24.

[272] Case C-124/97, *Markku Juhani Laara, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v. Kihlakunnansyyttaja (Jyvaskyla) and Suomen valtio (Finnish State),* 1999 E.C.R. I-6067, para. 33.

[273] Case C-275/92, *Her Majesty's Customs and Excise v. Gerhart Schindler and Jorg Schindler,* 1994 E.C.R. 1-1039, para. 63.

[274] Case C-215/01, *Bruno Schnitzer,* 2003 E.C.R. I-14847, para. 35.

[275] Case C-67/98, *Questore di Verona* v. *Diego Zenatti,* 1999 I-7289, para. 36.

[276] C-76/90, *Manfred Sager v. Dennemeyer & Co. Ltd,* 1991 1-4221, para. 16.

[277] Case C-384/93, *Alpine Investments BV v. Minister Van Financiën,* 1995 E.C.R. I-1141, para. 39.

[278] Case C-198/89, *Commission of the European Communities v. Hellenic Republic,* 1991 E.C.R. 1-727, para. 21. See also Case C-153/02, *Valentina Neri v. European School of Economics (ESE Insight World Education System Ltd),* 2003 E.C.R. 1-13555, para. 45 with respect to ensuring high standards in University education.

[279] Case C-58/98, *Josef Corsten,* 2000 E.C.R. I-7919, para. 33.

[280] Case C-250/03, *Mauri v. Ministero Della Giustizia and Commissione Per Gli Esami Di Avvocato Presso La Corte D'Appello Di Milano,* 2005 E.C.R. I-1267, para. 11.

[281] Case C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes),* 2005 E.C.R. I-10837, para. 51.

b) General interest

In *Gebhard*, in the context of the recognition of knowledge in a professional context, the language of "imperative requirements in the general interest"[282] has been used. In the relatively recent judgment of *Commission v. Greece,* the objective of protecting public health was described in the same manner[283] and in *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media*, conditions imposed by Holland which affected the structure of foreign broadcasting bodies were not regarded as being objectively necessary to safeguard the general interest in maintaining a national radio system which secured pluralism.[284]

In other instances, both the terms public and general interest have been used interchangeably. In *Commission of the European Communities v. Grand Duchy of Luxembourg*,[285] for example, in relation to the social protection of workers the national measure served "an objective of general interest,"[286] but could be justified by reference to "overriding requirement relating to the public interest."[287]

There appears also to be a flexible approach to the application of the public/general interest criterion. In *Schindler*,[288] the United Kingdom's justification relating to the social ills of gambling was accepted by the Court, despite the knowledge that the National Lotteries Act had been passed by Parliament. By contrast, in *Questore di Verona v. Diego Zenatti*,[289] an Italian law prohibiting the taking of bets on sporting competitions, except through specially appointed bodies was thoroughly investigated by the Court.

---

[282] Case C-55/94, *Reinhard Gebhard v. Consiglio dell"Ordine degli Avvocati e Procuratori di Milano,* 1995 E.C.R. I-4165, para. 37.

[283] Case C-140/03, *Commission v. Greece,* 2005 E.C.R. I-3177, para. 34.

[284] Case C-288/89, 1991 E.C.R. I-4007, para. 25.

[285] Case C-445/03, 2004 E.C.R. 1-10191, para. 21.

[286] *Id.*, para. 14.

[287] See*, supra*, note 286, para. 21.

[288] Case C-275/92, *Her Majesty's Customs and Excise v. Gerhart Schindler and Jorg Schindler,* 1994 E.C.R. I-1039, para. 43.

[289] Case C-67/98, 1999 I-7289. These issues were sent to the national court for determination, para. 37.

III. Capital

The justification of national rules prohibited by the free movement provisions relating to capital have followed the approach taken in *Gebhard*.[290] The jurisprudence with respect to the free movement of capital is however less extensive than that relating to the other freedoms, primarily due to the breath of the express derogations listed in Article 58 EC. That Article provides that the member state shall:

"[T]ake all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security."

There are similarities and overlaps between the derogations here, and those found elsewhere in the Treaty. The Court draws on the jurisprudence relating to the other freedoms when interpreting the derogations relating to Article 58 EC.[291]

E. Proportionality

I. Goods

In the context of an assessment of proportionality of measures deemed 'restrictive' of the free movement of goods, where either a public interest ground or an imperative interest element has been identified, a twofold condition must be met. The measure must be both "appropriate to ensure the attainment of the objective pursued and does not go beyond what is necessary to attain that objective."[292] The Member State must show that the measure complies with these conditions. The assessment of compliance is for the national court after detailed guidance from the Court of Justice.[293]

[290] Case C-55/94, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano,* 1995 E.C.R. I-4165.

[291] See for example Case 203/80, *Casati,* 1981 E.C.R. 2595, para. 27.

[292] Case C-441/04, *A-Punkt Schmuckhandels GmbH v. Claudia Schmidt,* 2006 E.C.R. I-2093, para. 27.

[293] Case C-434/04, *Criminal proceedings against Jan-Erik Anders Ahokainen, Mati Leppik Jan-Erik Anders Ahokainen*, 2006 E.C.R. I-9171, paras. 31 & 38.

With respect to issues of justification on public interest[294] grounds, in *Criminal proceedings against Jan-Erik Anders Ahokainen, Mati Leppik,*[295] Finland had to show that the measures taken had been effective to combat abuse arising from the consumption of spirits.[296] Where the public health[297] ground is used in support of the national measure, a detailed assessment of the risk alleged by the Member State will be required.[298] In *Commission of the European Communities v. Kingdom of the Netherlands*[299] the Court asked for a detailed assessment of the risk to health on which the proof of the nutritional need in the Dutch population had been based.[300] In *Commission of the European Communities v. Federal Republic of Germany*,[301] it was held that the national measure which automatically classified vitamin preparations lawfully marketed in other Member States as medicines products was not proportionate; a less restrictive approach would have been to fix a threshold value for each group of vitamins.

An example of an assessment of justification by the standard of the imperative requirement is evident in *Alfa Vita Vassilopoulos AE, formerly Trofo Super-Markets AE*.[302] In *Alfa*, the Greek objective of removing confusion between traditional and 'bake off' bakery products was held not to have been satisfied by a requirement that the later product be subject to manufacturing and marketing requirements imposed on the baking of traditional bread. Objectives such as public health and consumer protection could have

---

[294] Pertaining to Art. 30 (ex 36) EC.

[295] Case C-434/04, 2006 E.C.R. I-9171, para. 22.

[296] Could less restrictive means have been used to ensure a similar result? *Id.,* para. 38.

[297] Art. 30 (ex 36) EC.

[298] Case C-95/01, *Criminal proceedings against John Greenham and Leonard Abel,* 2004 E.C.R. I-1333, paras. 41 & 47. Case C-192/01, *Commission of the European Communities v. Kingdom of Denmark,* 2003 E.C.R. I-9693, para. 47.

[299] Case C-41/02, *Commission of the European Communities v. Kingdom of the Netherlands,* 2004 E.C.R. I-11375, para. 41.

[300] Case C-41/02, *Commission of the European Communities v. Kingdom of the Netherlands,* 2004 E.C.R. I-11375 para. 41. A similar request was made for example in Case C-150/00, *Commission of the European Communities v. Republic of Austria,* 2004 E.C.R. I-3887, para. 84. In Case C-24/00, *Commission of the European Communities v. French Republic,* 2004 E.C.R. I-1277, French measures were held disproportionate. It was noted that no detailed assessment as to the effects on public health resulting from the addition of vitamins and minerals to confectionary and drinks, para. 62. In Case C-270/02, *Commission of the European Communities v. Italian Republic,* 2004 E.C.R. I-1559, the national measure was held disproportionate, the Italian Government had not shown that the imposition of a prior authorisation procedure for the marking of sports food had was in response to a health risk, para. 24.

[301] Case C-387/99, 2004 E.C.R. I-3751, para. 67.

[302] Joined Cases C-158/04, and C-159/04, 2006 E.C.R.. 1-8135.

been achievable by less restrictive means, such as product labeling.[303] In other instances, the issue of proportionality has not been satisfied where, for example, only a six month implementation period for a deposit and return system had been imposed on the mineral water producers.[304] By contrast, in relation to the closure of the Brenner motorway, the authorities were reasonably entitled to consider the legitimate aim of demonstration; an aim which could not have been achieved by measures less restrictive of intra-Community trade.[305] A national measure prohibiting the use of fat other than cocoa butter in chocolate products was held disproportionate. "The inclusion in the label of a neutral and objective statement informing consumers of the presence in the product of vegetable fats other than cocoa butter would be sufficient to ensure that consumers are given correct information."[306]

II. Persons & services

With respect to persons and services it has been held that "Those requirements must be objectively necessary in order to ensure compliance with professional rules and to guarantee the protection of the recipient of services and they must not exceed what is necessary to attain those objectives."[307]

The referring national court *may* be given a detailed indication of the form of that enquiry.[308] Examples of the application of the proportionality principle include *Payroll Data Services (Italy) Srl and Others* where Italian restrictions on data processing activities concerning registration with certain professional organizations were held to be beyond what was necessary to attain the objective of the protection of workers.[309] Further, in

[303] *Id.,* para. 25.

[304] Case C-463/01, *Commission of the European Communities v. Federal Republic of Germany,* 2004 E.C.R. I-11705, para. 79. The same question with respect to proportionality, that of the imposition of a reasonable transitional period, arose in Case C-309/02, *Radlberger Getrankegesellschaft mbH & Co. and S. Spitz KG v. Land Baden-Wurttemberg,* 2004 E.C.R. I-11763, para. 81.

[305] Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzuge v. Republik Osterreich,* 2003 E.C.R. I-5659, para. 93.

[306] Case C-12/00, *Commission of the European Communities v. Kingdom of Spain,* 2003 E.C.R. I-459, para. 93.

[307] Case C-76/90, *Manfred Sager v. Dennemeyer & Co. Ltd,* 1991 E.C.R. 1-4221, para. 15; Case C-67/98, *Questore di Verona v. Diego Zenatti,* 1999 I-7289, para. 37.

[308] Case C-19/92, *Dieter Kraus v. Land Baden-Wurttemberg*, 1993 E.C.R. I-1663, para. 42. In the context of postgraduate titles and the facilitation of access to the host profession, was the verification procedure solely intended to verify that the award to the migrant was made properly? Was the authorisation procedure easily accessible, not for example dependent upon payment of excessive fees? Was the verification procedure carried out with respect for fundamental rights? Were any penalties imposed proportionate? paras. 37-41.

[309] Case C-79/01, *Payroll Data Services (Italy) Srl and Others,* 2002 E.C.R. 1-8923, para. 37.

Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes),[310] a differential tax treatment of company losses went beyond what was necessary to attain the economic objective[311] of the United Kingdom measure.[312] In *Manfred Sager v. Dennemeyer*,[313] the possession of a qualification such as patent agent "goes beyond what is necessary"[314] in making the possession of a professional qualification "quite specific and disproportionate to the needs of the recipients."[315] A French measure, a prohibition of migrant companies remunerating sight accounts, was held disproportionate;[316] it prevented those companies from raising capital. Likewise, Greek legislation imposing a license requirement in respect of tourist guides was disproportionate to the held objective of a proper appreciation of places of historical interest.[317] So, too, an Italian practice relating to the non-recognition of certain degrees awarded to Italian nationals was held not proportionate.[318] On the other hand, in *Josef Corsten* it was held proportionate to maintain a trades register in the host state, provided that this did not involve additional administrative expense for the migrant.[319] In *Questore di Verona v. Diego Zenatti*, it was for the national court to determine the issue of proportionality in relation to social policy objectives behind the reservation to certain bodies of the right to take bets on certain sporting events.[320] In *Commission of the European Communities v. French Republic*, national legislation allowing only France to check to abilities of migrant inseminators "even if it is appropriate for ensuring the protection of animal health and the health of the operator carrying out the insemination, goes beyond what is necessary to attain the objective pursued."[321]

---

[310] Case C-446/03, 2005 E.C.R. I-10837.

[311] Regarding competence in tax matters with respect to companies. *Id.,* para. 36.

[312] See, *supra*, note 311, para. 55.

[313] C-76/90, 1991 E.C.R. 1-4221, para. 17.

[314] *Id.*, para. 17.

[315] See, *supra*, note 314, para. 17.

[316] Case C-442/02, *Caixa-Bank France v. Ministere de L'Economie, des Finances, De L'Industrie (Banque Fédérale des Banques Populaires and Others),* 2004 E.C.R. I-8961, para. 21.

[317] Case C-198/89, *Commission of the European Communities v. Hellenic Republic,* 1991 E.C.R. 1-727, para. 25.

[318] Case C-153/02, *Valentina Neri v. European School of Economics (ESE) Insight World Education System Ltd,* 2003 E.C.R. 1-13555, para. 48.

[319] Case C-58/98, 2000 E.C.R. I-7919, para. 49.

[320] Case C-67/98, 1999 I-7289, para. 37.

[321] Case C-389/05, *Commission of the European Communities v. French Republic* 2008 E.C.R., I-5337, para. 97.

III. Justification - key issues

1. Circumvention of the natural order

That direct discrimination has been justified by reference to Treaty provisions, and indirect discrimination by reference to the concept of public/general interest, has traditionally represented the 'natural order' in persons and services jurisprudence. The refocus of the enquiry upon restriction/obstacle to the right of free movement rather than an assessment of the effect of discrimination appears to have been effective, partially, at least to displace that natural order. It has been effective to render redundant considerations of the Treaty grounds for justification in instances wherein previously the classification of directly discriminatory measures would have been used. The importation of the concepts relating to public and general interest has handed to the Member State the option of a wider range of grounds on which to justify the national measure in circumstances wherein the measure has been held restrictive of the free movement right. The public/general grounds relating to the protection of workers,[322] the protection of consumers,[323] the maintenance of order in society,[324] and to the recognition of knowledge in a professional context,[325] for example, stand in stark contrast to the limited grounds of justification provided by the Treaty.[326] The potential expansiveness of such grounds has been highlighted recently in *Commission of the European Communities v. Kingdom of Belgium*[327] in which the attempted justification of national fiscal measures was set in the context of compromising the objectives of the Treaty.[328] It is a timely reminder by the Court that the relevant context surrounding the justification of the restriction is expansive rather than limited. It should be remembered that in this instance, presumably the restriction in question would have formerly been designated as directly discriminatory, and the process of justification in turn restricted to the grounds provided in the Treaty.[329]

---

[322] Case C-79/01, *Payroll Data Services (Italy) Srl and Others,* 2002 E.C.R. 1-8923, para. 31.

[323] See for example in relation to the remuneration of sight accounts in euros, the encouragement of medium and long term savings. Case C-442/02, *Caixa-Bank France v. Ministere de L'Economie, des Finances, De L'Industrie (Banque Fédérale des Banques Populaires and Others),* 2004 E.C.R. I-8961, para. 24.

[324] Case C-124/97, *Markku Juhani Laara, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v. Kihlakunnansyyttaja (Jyvaskyla) and Suomen valtio (Finnish State),* 1999 E.C.R. I-6067, para. 33.

[325] Case C-55/94, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano,* 1995 E.C.R. I-4165 para. 37.

[326] Art. 30 (ex 36) EC.

[327] Case C-433/04, 2006 E.C.R. I-10653.

[328] *Id.*, para. 35. The measure was not justified, paras. 37 & 42.

[329] Art. 55 (ex 66) EC.

The wider range of grounds[330] now available to justify directly discriminatory measures now classified as restrictions/obstacles to the exercise of the free movement right with respect to persons and services have, it seems, effectively placed the operation of proportionality into the forefront of preservation of free movement rights. Having placed that greater onus on the application of proportionality, it is arguably incumbent on the Court to provide guidelines as to the *de facto* implementation of that principle. It seems that, to date, it is an obligation given only *ad hoc* attention by the Court. In *Josef Corsten* for example, full guidance was supplied to the national court as to how it should apply the principle of proportionality.[331] By contrast, however, in *Questore di Verona v. Diego Zenatti*[332] it was left to the national court to determine the application of that principle. In the new era of examination of the restriction/obstacle in free movement jurisprudence with respect to persons and services with the increased emphasis on the principle of proportionality, it may be argued that as far as the preservation of Treaty free movement rights is concerned, the apparent lack of guidance in judgments such as *Zenatti*[333] represents an abdication of responsibility on the part of the Court.

2. Justifications – fusion at source?

a) Persons and Services

The focus on the obstacle/restriction on the free movement right in relation to persons and services has further effect. The repositioning of the enquiry, *i.e.* the withdrawal from identification of discrimination, causes a reconsideration of the distinction in use between Treaty grounds for justification and those attributable to the grounds of public/general interest. Has the maintenance of that distinction now become artificial and unnecessary?

The arguments relating to the inappropriateness of having different grounds for the justification of measures relating to persons and services dependent upon whether the measure is classified as discriminatory or as a non-discriminatory restriction[334] were put with some force by Advocate General Jacobs in *Rolf Dieter Danner*.[335] The Advocate General argued, "Once it is accepted that justifications other than those set out in the

[330] Public/general interest.

[331] Case C-58/98, 2000 E.C.R. I-7919, paras. 40 – 49.

[332] Case C-67/98, 1999 I-7289, para. 27.

[333] *Id.,* para. 37.

[334] In the context of the free movement of goods, these questions were regarded by Advocate General Jacobs as "preliminary one[s]." Case C-379/98, *Preussenelektra AG Schleswag AG,* 2001 E.C.R. 1-2099, para. 225.

[335] Case C-136/00, 2002 E.C.R. I-8147, para. 40.

Treaty may be invoked, there seems no reason to apply one category of justification to discriminatory measures and another category to non-discriminatory restrictions."[336] His rationale was based on the premise that Treaty free movement provisions with respect to the provision of services "does not refer to discrimination but speaks generally of restrictions on freedom to provide services."[337] There appears to be much merit in this argument. The use of the language of restriction in recent jurisprudence is much more transparent and reflective of Treaty objectives.[338] The analysis rightly places the onus on an assessment of "whether the ground invoked is a legitimate aim of general interest"[339] and a proper application of the principle of proportionality.[340] The Advocate General underpins this argument by proposing that grounds for justification are "no less legitimate and no less powerful"[341] because they do not appear in the Treaty. It seems illogical, for example, that Belgium could not prevent the storage and dumping of hazardous waste in Wallonia which had originated from other Member States simply because there were no Treaty grounds available and upon which the national measure could have been justified.[342]

Given that in practice it is difficult to apply the distinctions between direct and indirect discrimination and the non-discriminatory measure, it would seem that the amalgam proposed by Advocate General Jacobs is a propitious one. It may be that maintaining rigid distinctions between direct and indirect justification are superficial. Arguably, the ramifications of such distinctions are covered elsewhere within in the equation of justification. It is much more likely, for example, that the more the measure is *de facto* tainted with discrimination, the less likely it will satisfy the principle of proportionality.[343]

b) Goods

Similar, persuasive arguments for an analogous treatment of the grounds of justification exist with respect to jurisprudence relating to the free movement of goods. An indication that "the Court is reconsidering its earlier case law" in favor of the same fusion of grounds

---

[336] *Id.*, para. 40.

[337] *See, supra*, note 336, para. 40.

[338] The activities of the Community include "an internal market characterised by the abolition of … obstacles to then free movement of goods, persons and services" (emphasis added). Art. 3(c) EC.

[339] See, *supra*, note 336, para. 40.

[340] Id.

[341] Id.

[342] Case C-2/90, *Commission of the European Communities v. Kingdom of Belgium,* 1992 E.C.R. I-4431, para. 34.

[343] As noted by Advocate General Jacobs, Case C-136/00, *Rolf Dieter Danner,* 2002 E.C.R. I-8147, para. 40.

for justification as that which it has applied to persons and services was noted by Advocate General Jacobs in *Preussenelektra A.G. Schleswag A.G.*.[344] Aside subsequent jurisprudence concerning the assessment of issues relating to public health,[345] it is noticeable however that the "reconsideration of earlier case law" noted by the Advocate General may prove to be a premature observation.[346] In circumstances of justification other than recourse to public health, the Court appears to have maintained the distinction between the application of Article 30 EC and the justifications whose grounds arise from within free movement jurisprudence. This places the jurisprudence of the free movement of goods in a unique position in relation to the issue of justification by comparison to that of persons and services. The language of restriction in the latter has fermented a fusion with respect to the traditional bases of justification; with respect to the former, it appears to have failed to remove the traditional distinctions of the justification of the directly discriminatory measure and that of the measure that has applied without distinction. It is disappointing to contemplate, for example, that had the measure in *Schmidberger* been directly discriminatory, the legitimate aims of demonstration, recognized as a fundamental right by the Court,[347] would then have had to be ignored as a ground for justification.

Not only is the development of a symbiosis,[348] which reflects that of free movement of persons and services desirable with respect to the justification of measures relating to goods, it may in certain circumstances prove crucial. There may be instances which highlight the desirability of permitting the justification of directly discriminatory measures on environmental grounds.[349] For example, in *Commission of the European Communities v. Kingdom of Belgium*,[350] the grounds of imperative requirements were not available in

[344] Case C-379/98, 2001 E.C.R. 1-2099, paras. 225-228. In respect of the judgment in Case 389/96, *Aher-Waggon GmbH v. Bundesrepublik Deutschland,* 1998 E.C.R. I-4473. In that case, the German measure appeared to discriminate directly against the import; the issue of justification was by reference to considerations of 'public health' and 'environmental protection.' In judgment the Court did not consider the issue of direct discrimination.

[345] Case C-41/02, *Commission of the European Communities v. Kingdom of the Netherlands,* 2004 E.C.R. I-11375, para. 41; Case C-387/99, *Commission of the European Communities v. Federal Republic of Germany,* 2004 E.C.R. I-3751, para. 81.

[346] See, *supra*, note 345, paras. 225-228.

[347] "Expressly recognised by the ECHR". Case C-112/00, 2003 E.C.R. I-5659, para. 79.

[348] This does not extend to the justification of the national provision relating to *capital*. Here there is a more extensive range of express derogations available to the Member State than in comparison to those available in relation to measures concerning the free movement of *goods*, *persons* and *services*.

[349] Noted by Advocate General Jacobs. Case C-379/98, *Preussenelektra AG Schleswag AG,* 2001 E.C.R. 1-2099, AG, para. 226.

[350] Case C-2/90, 1992 E.C.R. I-4431.

circumstances relating to an absolute prohibition on the dumping of imported hazardous waste.[351]

F. The Selling Arrangement

The cases of *Commission v. Italian Republic*[352] and *Åklagaren v. Percy Mickelsson and Joakim Roos*[353] currently before the Court have provided renewed focus on the boundaries that lie between Article 28 EC and the "selling arrangement." A judicial creation, the "selling arrangement" relates to non-discriminatory[354] national rules concerning "the sale of products from another Member State meeting the requirements laid down by that State."[355] The imposition of such requirements on the import "is not by nature such as to prevent…access to the market or to impede access any more than it impedes access of the domestic product."[356] In concept, the "selling arrangement" has remained undefined within free movement of goods jurisprudence; only a "non-exhaustive inventory" has been provided on a case by case basis.[357] The invitation to the Court presented by both *Commission v. Italy*[358] and by *Roos*[359] is to extend the concept of the selling arrangement to rules beyond those relating to the sale of the product, to embrace arrangements for the use of goods.[360]

---

[351] The rigidity of the Treaty justifications was thereby respected, Advocate General Jacobs. See, *supra*, note 350, para. 34.

[352] Case C-110/05, *Commission of the European Communities v. Italian Republic*, Judgment of the Court of Justice of the European Communities (Grand Chamber),10 February 2009.

[353] Case C-142/05, *Åklagaren v. Percy Mickelsson and Joakim Roos*, Judgment of the Court of Justice of the European Communities (Second Chamber) 4 June 2009.

[354] "So long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States". Joined cases C-267/91 & C-268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard,* 1993 1 E.C.R. 6097, para. 16.

[355] *Id.*, para. 17.

[356] See, *supra*, note 355, para. 17.

[357] Case C-110/05, *Commission of the European Communities v. Italian Republic*, Judgment of the Court of Justice of the European Communities (Grand Chamber),10 February 2009, para. 77 (opinion of AG Bot).

[358] *Id.*

[359] See, *supra,* note 354.

[360] See, *supra*, note 358, Advocate General Bot, para. 1.

In *Commission v. Italy*,[361] there was a total prohibition of the use of trailers towed by motor cycles, in *Roos*,[362] a partial prohibition had been imposed on the use of jet skis in Sweden. In the former case, Advocate General Bot was of the opinion that the Italian rule should fall within the application of Article 28 EC.[363] By contrast, Advocate General Kokott in *Roos*, had argued that it "appears logical to extend the Court's Keck case-law to arrangements for use" of the product.[364]

Advocate General Bot's argument that national measures concerning the *use* of products should be scrutinized by Article 28 EC was founded on the claim that "a distinction between different categories of measures is not appropriate,"[365] and may "be artificial."[366] In demarcation, the division between "selling arrangement, "or "requirements to be met,"[367] "may be uncertain."[368] In reality, the restriction in issue argued Advocate General Bot might have arisen from other factors, not attributable to that demarcation, for example the application of the rules in question or their specific effects on trade.[369] As the examination of restrictions to free movement is "based on a single criterion, that of access to the market,"[370] Advocate General Bot was of the opinion that the adoption of a *Keck* based criteria in the circumstances of measures concerning the use of goods, would create differences by comparison with the rules applicable to the other freedoms.[371] It "would result in the introduction of a new category of exemption from the application of Article 28 EC."[372] According to Advocate General Bot, such would be contrary to the objectives of the Treaty;[373] the handing to the Member States of an ability to legislate would undermine the "usefulness" of Article 28 EC.[374]

---

[361] See, *supra*, note 358.

[362] See, *supra*, note 354.

[363] See, *supra,* note 358, para. 159.

[364] See, *supra*, note 354, para. 55.

[365] See, *supra*, note 358, paras. 79 & 81.

[366] See, *supra*, note 358, para. 81.

[367] See, *supra*, note 355.

[368] See, *supra*, note 358, para. 81.

[369] See*, supra*, note 358, para. 80.

[370] See, s*upra*, note 358, para. 83.

[371] See, *supra*, note 358, para. 82.

[372] See, *supra*, note 358, para. 88.

[373] The creation of a single and integrated market. See, *supra*, note 358, para. 91.

[374] See, *supra*, note 358, para. 91.

By contrast, the rationale behind the argument of Advocate General Kokott that rules as to use of the product be treated as selling arrangements was that such restrictions are not product related, and do "not therefore require any modifications to the personal watercraft themselves."[375] The Swedish rules in *Roos* "also apply to all relevant traders operating within the national territory, since they do not discriminate according to the origin of the products in question."[376]

The respective opinions of the Advocates General delivered in *Commission v. Italian Republic* and *Roos* focus sharply on the opposing ends of the conceptual spectrum of arguments relating to the rightful place of the selling arrangement within Community free movement of goods jurisprudence. Advocate General Kokott's claim "that it appears logical to extend the Court's Keck case law to arrangements for use"[377] has much merit. The Swedish rules appear to fall within the *Keck*[378] criteria, as was implicitly acknowledged by Advocate General Bot in his opinion in *Commission v. Italy*.[379] Though technically correct, the position taken by Advocate General Kokott's arguments, however, present some difficulties. Reflecting perhaps some of the problems experienced by the Court to interpretation of *Keck*, the jurisprudence of the selling arrangement has been "Resolve[d] only on a case-by-case basis."[380] As a result, the *Keck* criteria has neither clarified the scope of Article 28 EC nor facilitated its use.[381] Against this background, the argument presented by Advocate General Bot that *Keck* served to introduce an inappropriate distinction between different categories of measures appears persuasive.[382] It is a distinction that would be prolonged if rules governing arrangements for the use of the product[383] were to be classified as selling arrangements. It has been noted that other free movement jurisprudence by comparison is based on the single criterion of access to the market.[384]

---

[375] See, *supra*, note 354, Advocate General Kokott, para. 57.

[376] *Id.*, para. 58.

[377] Opinion delivered 14 December 2006, *Id.*, para. 55.

[378] See, *supra,* note 355, para. 16.

[379] See, *supra*, note 358, para. 86.

[380] See, s*upra*, note 358, para. 75.

[381] Joined Cases C-158/04 and C-159/04, *Alfa Vita Vassilopoulos and Carrefour-Marinopoulos,* 2006 E.C.R. I-8135. See, *supra,* note 358, para. 84.

[382] See, *supra*, note 358, para. 79.

[383] See, s*upra*, note 358, para. 86.

[384] See, s*upra*, note 358, para. 77.

The subjection of national rules governing arrangements for the use of the product to the same criterion would represent a move in the direction of building a cohesive approach within the jurisprudence to the attainment of the right of free movement, whatever Treaty right is claimed. This latter option clearly exists in part at least, after the invitation to the Court from Advocate General Bot to impose the judicial review of the Court in accordance with the "traditional analytical pattern"[385] in the circumstances of product use. The advantage of the application of Article 28 EC would be twofold: it "makes it possible for the Court to monitor Member States" compliance with Treaty provisions" whilst allowing "necessary room for maneuver to defend their legitimate interests."[386]

It may be that now is an opportune moment for the Court to re-examine the nature of the selling arrangement, and to establish a uniformity in its approach to the attainment of all Treaty free movement rights. That such reassessment should occur is not only preferable, but has been clearly contemplated by Advocate Generals Maduro[387] and more recently Bot in *Commission v. Italy*,[388] as well as a host of academic writers.[389] Whether or not the opportunity is seized by the Court in *Roos* to fully reassess the role of the selling arrangement within free movement of goods jurisprudence at this juncture can only be the subject of conjecture. Even the Advocate General in *Commission v. Italy* was of the opinion that "at the present time it is (not) appropriate to depart from"[390] the jurisprudence established by *Keck and Mithouard*.[391]

It is noted, however, that in the judgment of *Commission v. Italy*, the Court has chosen to follow the line of reasoning proposed by the Opinion of Advocate General Bot. In that judgment, the Italian arrangements for the use of motorcycles towing a trailer were

---

[385] See s*upra*, note 358, para. 93.

[386] See, *supra*, note 358, para. 94.

[387] Joined Cases C-158/04 and C-159/04, *Alfa Vita Vassilopoulos and Carrefour-Marinopoulos,* 2006 E.C.R. I-8135, para. 25.

[388] See, *supra,* note 358, para 85. A *de minimis* approach was recommended by Advocate General Jacobs in his Opinion in Case C-412/93, *Leclerc-Siplec,* 1995 E.C.R. I-179, para. 42.

[389] See, in particular, Picod, F., "*La nouvelle approche de la Cour de justice en matière d"entraves aux échanges*", Vol 34 No 2, Revue trimestrielle de droit européen, p. 169, (1998); Mattera, A., "*De l'arrêt Dassonville à l'arrêt Keck: l'obscure clarté d'une jurisprudence riche en principes novateurs et en contradictions*", Revue du Marché Unique Européen, No 1, 1994, p. 117; Weatherill, S., "*After Keck: some thoughts on how to clarify the clarification*", 33 C.M.L. Rev, p. 885, (1996); Kovar, R., "*Dassonville, Keck et les autres: de la mesure avant toute chose*", Vol 42 No 2, Revue trimestrielle de droit européen, p. 213, (2006); Poiares Maduro, M., "*Keck: The End? The Beginning of the End? Or just the End of the Beginning?*", I.J.E.L. Vol 3 No 1, p. 30, (1994).

[390] See, *supra*, note 358, para. 85.

[391] See, *supra*, note 355.

brought within Article 28 EC scrutiny.[392] What is somewhat disappointing, however, is that although an assessment of the hindrance to the access to the Italian market for trailers was pivotal to this judgment and consequently to the applicability of Article 28 EC, there was no proper evaluation by the Court of the role of the selling arrangement within the jurisprudence relating to the free movement of goods. It is an evaluation that might have conceivably occurred on delivery of the judgment in *Åklagaren v. Percy Mickelsson and Joakim Roos*.[393] However, whilst it was to be hoped that the Court would have seized that opportunity to make a full assessment of the place of the selling arrangement, the judgment was delivered without a mention of the *Keck* ruling. It reaffirmed the use of the market access test, finding that rules restricting the use of personal watercraft were a barrier to market access. The effect of the use of the market access test has been to restrict *Keck* to situations which concern arrangements for sale and which will now be construed in the narrowest possible sense. It is a judgment in which the Court has taken for itself an ability to scrutinize an even wider category of measures for Article 28 EC compatibility.

G. Conclusions

The jurisprudence of recent years with respect to the free movement of *goods*, *persons, services* and *capital* has been one that has been characterized by a process of revaluation and reassessment by the Court of Justice. The procedure of translating Treaty rights into free movement reality has been refocused; it now involves an assessment of the *restriction* to the free movement right. It is a process in which the shackles of slavish adherence to Treaty strictures with respect to the justification have been removed, and an increased reliance has been placed upon the operation of the principle of *proportionalit*y. It therefore appears that a uniformity of approach by the Court extending to all free movement jurisprudence now exists.

The concentration on the identification of the restriction to Treaty free movement rights is to be welcomed. It is a terminology representative of Treaty exhortations prohibiting restrictions to free movement rights.[394] It encompasses, but is broader than, the discriminatory measure. No longer does discrimination *per se* have to be identified, nor instances of direct discrimination justified, by recourse to the grounds provided by the Treaty.

---

[392] Judgment 10 February 2009, para. 58.

[393] Case C-142/05, , 2006. *Åklagaren v. Percy Mickelsson and Joakim Roos*, Judgment of the Court of Justice of the European Communities (Second Chamber) 4 June 2009.

[394] With respect for example to rights of establishment, Art. 43 EC and *services*, Art. 49 EC.

There now appears an apparent uniformity in the approach taken by the Court within free movement jurisprudence to attack national measures restrictive of free movement rights. The identification of the restriction, the availability of grounds of justification *(*which are themselves broad in concept),[395] are integral elements presenting an aura of uniformity in the current approach. Any such move by the Court of Justice is to be welcomed as a move towards clarity and transparency. Nevertheless, any pretensions that a procedural uniformity has been adopted by the Court may be misguided. With respect to the free movement of goods, for example, it is evident that despite the uniformity of language, there remains an adherence to the identification of discrimination.[396] The old nuances associated with this division remain in the context justification. Arguably, this could be regarded as a sleight of hand; the language is modern, that of the examination of the *restriction* to the free movement of the imported good. The reality, however, appears to be the maintenance of the strict adherence to Treaty grounds for justification in instances wherein there has been *de facto* discrimination.

It is evident that the jurisprudence relating to the free movement of goods, persons, services and capital exhibits a common purpose; the removal at the national level of restrictions on the exercise of those free movement rights. Whether the unity of that purpose is served by the latent maintenance of the arbitrary distinction of discrimination within the field of the free movement of goods with respect to the issues of justification remain another matter. On the other hand, there is evidence that the latent acknowledgment of this distinction may become superfluous. There is increasingly a cross-fertilization of the grounds of justification in free movement of goods jurisprudence.[397]

There is at present a methodology in free movement jurisprudence separating the attainment of the free movement right in relation to goods as separate and distinct from that relating to persons and services. Whether the jurisprudence pertinent to the implementation of all Treaty free movement rights is aligned in the future by the Court must remain a moot point. At present, the jurisprudence of the free movement of goods occupies a rather *ad hoc* position, with an eye to the future, a foot in the past. The inherent reliance on academic distinctions relating to discrimination, insofar as the issue of justification is concerned, to some extent sits uneasily with the adoption of the universal approach of addressing the restriction presented by the national measure to the exercise of the right of free movement. In the cause of greater transparency with respect to free movement of goods, it is a reliance that ought not to continue. So too within free

[395] The Treaty grounds are to be strictly interpreted.

[396] So too with respect to the jurisprudence in matters related to taxation. See BARNARD (note 47), 319.

[397] Note the observation of the observation of Advocate General Jacobs in Case C-136/00, *Rolf Dieter Danner,* 2002 E.C.R. I-8147, para. 40.

movement of goods jurisprudence, the cases of *Commission* v. *Italian Republic*[398] and *Åklagaren v. Percy Mickelsson and Joakim Roos*[399] present a timely reminder to the Court that the contradictions and uncertainties imposed by the introduction of the concept of the selling arrangement must at some stage be adequately dealt with. It is arguable that whilst the refusal to extend the concept of the selling arrangement to yet another category of goods in *Commission v. Italy*[400] is to be welcomed, it was also an opportunity missed by the Court to explain fully its reasoning. The argument presented in the opinion of A.G. Bot in *Commission v. Italy* that the "selling arrangement" effectively be brought within the umbrella of the traditional structure imposed by Article 28 EC has much merit.[401] The ensuing introduction by the judgment in that case of the market access test signifies the embracing of wider powers by the Court with respect to the scrutiny of the national measure. Such introduction is at the expense of a restriction on the future application of *Keck*. It is arguable however, that the subsequent opportunity presented by *Åklagaren v. Percy Mickelsson and Joakim Roos*[402] both to clarify and to re-impose uniformity within the jurisprudence relating to goods was avoided. In result, the tensions and contortions inherent within the jurisprudence relating to the free movement of goods appear to be set to continue. Such tensions and contortions arguably remain to be addressed by the Court at some future time. In the cause of reinforcing the move towards transparency, certainty, and uniformity across all free movement jurisprudence resulting from the focus on the restriction to free movement presented by the national measure, arguably it is a pity that the opportunity for the establishment of clarity in this context was overlooked by Court in *Roos*.[403]

---

[398] Case C-110/05, *Commission of the European Communities v. Italian Republic*, Judgment of the Court of Justice of the European Communities (Grand Chamber), 10 February 2009.

[399] Case C-142/05. *Åklagaren v. Percy Mickelsson and Joakim Roos*, Judgment of the Court of Justice of the European Communities (Second Chamber) 4 June 2009

[400] See, *supra*, note 400.

[401] See, *supra*, note 400. paras. 91-93.

[402] See, *supra*, note 400.

[403] See, *supra*, note 400.

Appendix 3

iii. *Accentuating the Positive: the "Selling arrangement", the First Decade and Beyond* (2005) 54 ICLQ 127-160

Accentuating the Positive: The 'Selling Arrangement', The First Decade, and Beyond

Tim Connor

International and Comparative Law Quarterly / Volume 54 / Issue 01 / January 2005, pp 127 - 160
DOI: 10.1093/iclq/54.1.127, Published online: 17 January 2008

ACCENTUATING THE POSITIVE: THE 'SELLING ARRANGEMENT', THE FIRST DECADE, AND BEYOND

TIM CONNOR*

I. PREFACE

The 'selling arrangement' is a judicial device which removes national law from the scrutiny of European Community law relating to the free movement of goods. National provisions affecting the marketing of products may fall for consideration as 'selling arrangements' where the treatment of the domestic and imported goods has been even handed. Measures relating to the *substance* of the goods remain subject to Community law rules on the free movement of goods. The prime example of the selling arrangement is the advertisement, but in the years since creation, other areas of national activity with respect to the free movement of goods have been enveloped in the selling arrangement. Certain measures which have related to the conduct of business may also fall for similar treatment as selling arrangements. A recent development would appear to mean that the concept of the selling arrangement may apply where the obligation imposed by the national measure has been identified as being *general*, as opposed to *specific* in nature. Were this to be so, the selling arrangement would have the potential to break free of the traditional boundaries established for it under *Criminal Proceedings against Bernard Keck and Daniel Mithouard*.[1]

II. INTRODUCTION

A. Community law: free movement of goods

With respect to Community law relating to the free movement of goods, Article 28 (ex 30) EC[2] provides: 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.'[3] The selling arrangement operates to limit the scope of application of

* University of the West of England, Bristol.

1 Case C-267/91 and C-268/91 [1993] ECR I-6097, para 16.

2 With respect to exports, Art 29 (ex 34) EC provides: 'Quantitative restrictions on *exports* and all measures having equivalent effect, shall be prohibited between Member States' [emphasis added].

3 Both Art 28 (ex 30) EC and Art 29 (ex 34) EC are directly effective. With respect to imports, this was confirmed by Case C-46/93 *Brasserie du Pécheur SA v Germany* [1996] ECR I-1029, para 23.

[*ICLQ* vol 54, January 2005 pp 127–160]

Article 28 (ex 30) EC. Where the selling arrangement applies, the trading rule[4]

> is not such as to hinder, directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville*[5] judgment, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.[6]

Where these conditions are fulfilled, the application of the trading rule to the import 'is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products'.[7] Where these factors apply, the selling arrangement dictates that 'such rules fall outside the outside the scope of Article 30' (now 28) EC.[8]

The concept of the selling arrangement was introduced as a response to the propensity of traders to attempt to use Article 30 (now 28) EC for purposes unintended by Community law.[9] It was the response of the Court of Justice to the issue of Article 30 (now 28) EC intrusion into national competencies arising from the application of the *Dassonville*[10] formula relating to the 'measure having equivalent effect'.[11] As introduced in *Keck and Mithouard*, the selling arrangement[12] represents an attempt to place some limits on the reach of Community free movement law with respect to goods that arose inherently from the judgment of *Dassonville*.[13] It is to the jurisprudence prior to *Keck and Mithouard*,[14] which explains the need for a change of direction in Article 30 (now 28) EC application, that attention is now given.

B. Case law prior to Keck and Mithouard

As previously identified, Article 28 (ex Article 30) EC[15] relates to the 'quantitative restriction'[16] and to the 'measure having equivalent effect'.[17] The 'quantitative restriction' is readily identifiable; the prohibition renders unlaw-

[4] The measure at the national level governing the conduct of trade.

[5] The full judgment in this respect is as follows: '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.' Case 8-74 *Procureur du Roi v Benoit Gustave Dassonville* [1974] ECR 837, para 5. See above.

[6] Case C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097, para 16.

[7] ibid. [8] ibid. [9] ibid.

[10] Case 8-74 *Procureur du Roi v Benoit Gustave Dassonville* [1974] ECR 837.

[11] ibid para 5.

[12] Case C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097, para 16.

[13] Case 8-74 *Procureur du Roi v Benoit Gustave Dassonville* [1974] ECR 837.

[14] Case C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097.

[15] Part Three, Community Policies. Title 1 = Free Movement of Goods. Chapter 2—Prohibition of Quantitative Restrictions between Member States.

[16] See above. [17] See above.

ful total or partial restraints on imports[18] between Member States.[19] By contrast, the 'measure[s] having equivalent effect'[20] is amorphous in concept and indeterminate in meaning without the jurisprudence of the Court of Justice. That jurisprudence has exposed the nature and the substance of the 'measure having equivalent effect'.[21] *Procureur du Roi v Benoit Gustave Dassonville*[22] provided the definition:

> 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.[23]

The definition has formed the basis of the application of Article 30 (now 28) EC[24] since that time. It is as a direct result of the *Dassonville* formula,[25] '[a]ll trading rules . . .' that the 'measure having equivalent effect'[26] is extremely wide of application in respect of the trading rule at the national level. In consequence, *any* rule governing the conduct of trade[27] now falls within the ambit of Article 28 (ex 30) EC[28] scrutiny.

It is arguable that the *Dassonville* formula[29] imbued 'the measure having equivalent effect' with all the destructive subtly of a flamethrower, rendering at one go *all* trading rules imposed at the national level capable of aggressive examination by Article 30 (now 28) EC.[30] The transmutation of the 'measure having equivalent effect' into a potential weapon of mass destruction with the capability of ubiquitous use to attack the national trading rule led to an aggressive use of Article 30 (now 28) EC. In addition it was a fundamental principle that a measure does not lie outside the scope of Article 30 (now 28) EC on the grounds that it applies *without distinction* to domestic and to imported products. In those circumstances, where the product has been lawfully marketed in one Member State, its sale in another Member State cannot be prevented on grounds of non-compliance with the legislation with that State[31] unless it satisfies 'mandatory requirements'. The introduction in *Rewe-Zentral v Bundesmonopolverwaltung fur Branntwien*

[18] Including exports and goods in transit. (2/73) *Riseria Luigi Geddo v Ente nazionale Risi* [1973] ECR 865, para 7.

[19] This would include a prohibition on goods, for example pornographic materials (34/79) *R v Henn and Darby* [1979] ECR 3795. A quota on imports would also be caught.

[20] Art 30 (now 28) EC Art 34 (now 29) EC.

[21] Art 28 (ex 30) EC and Art 29 (ex 34) EC.

[22] Case 8-74 *Procureur du Roi v Benoit Gustave Dassonville* [1974] ECR 837.

[23] ibid para 5.

[24] Also Art 29 (ex 34) EC.

[25] Case 8-74 *Procureur du Roi v Benoit Gustave Dassonville* [1974] ECR 837 para 5.

[26] Art 28 (ex 30) EC.

[27] In the United Kingdom, for example, this would be by statutory instrument.

[28] Also Art 29 (ex 34) EC.

[29] Case 8-74 *Procureur du Roi v Benoit Gustive Dassonville* [1974] ECR 837 para 5.

[30] Also Art 29 (ex 34) EC.

[31] The principle of 'mutual recognition'. Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein* [1979] ECR 649 para 14.

(commonly known as the '*Cassis de Dijon*' judgment)[32] of the concept of the 'mandatory requirement',[33] available as 'justifications' where the national measure has applied *equally* to the import and domestic product alike, appears to have fuelled recourse to Article 30 (now 28) EC litigation. Arguably there was some evidence of a kneejerk recourse to *Dassonville*[34] where measures at the national level were considered restrictive of trade.[35] The introduction of the 'mandatory requirement',[36] whose grounds are wider than those provided in the Treaty,[37] shifted the emphasis from *application* of Article 30 (now 28) EC to *justification*, at least where 'indistinctly applicable'[38] measures are concerned. After *Cassis de Dijon*[39] the wide purview given by the *Dassonville* formula[40] in respect of Article 30 (now 28) EC application could now be tempered by the possibility of *justification* freed from the strictures of Article 36 (now 30) EC. It would seem that the 'new kid on the block', the mandatory requirement, had almost unconsciously and seamlessly become the control mechanism which could be used to reign in the unlimited consequences of *Dassonville*.[41] In *Oosthoek's Uitgeversmaatschappij BV*,[42] *R Buet and Educational Business Services (EBS) SARL) v Ministère public*,[43] and *Schutzverband gegen Unwesen in der Wirtschaft e V v Yves Rocher GmbH*[44] the scope of the *Dassonville* formula[45] was limited by *justification*. However, it would seem preferable that despite the imperfections of the selling arrangements[46] such measures escape altogether Article 30 (now 28) EC

[32] Case 120/78 [1979] ECR 649.

[33] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein*. [1979] ECR 649 para 8. 'Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating . . . to *the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer'* [emphasis added].

[34] Case 8-74 *Procureur du Roi v Benoit Gustave Dassonville* [1974] ECR 837 para 5.

[35] In the following judgments, Case C-23/89 *Quietlynn Limited and Brian James Richards v Southend Borough Council* [1990] ECR I-3059 paras 10 and 11. Case 155/80 *Summary Proceedings against Sergius Obel* [1981] ECR 1993 para 20 and Case 75/81 *Joseph Henri Thomas Blesgen v Belgian State* [1982] ECR 1211 paras 9 and 10, for example, the Court held there was no connection with intra-Community trade. It is arguable that this may have evinced an 'over positive' approach on the part of litigants to the outcome of litigation.

[36] The rule of reason, 'the first Cassis principle'. See above.

[37] In respect of the distinctly applicable measure. Art 30 (ex 36) EC provides: 'The provisions of Article 28 . . . shall not preclude prohibitions or restrictions on imports, . . . justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.'

[38] The measure that is non-discriminatory of the imported product.

[39] Case 120/78 [1979] ECR 649.

[40] Case 8-74 *Procureur du Roi v Benoit Gustave Dassonville* [1974] ECR 837 para 5.

[41] ibid.

[42] Case 286/81 [1982] ECR 4575.

[43] Case 382/87 [1989] ECR 1235.

[44] Case C-126/91 [1993] ECR I-2361.

[45] Case 8-74 *Procureur du Roi v Benoit Gustave Dassonville* [1974] ECR 837 para 5.

[46] Introduced by Case C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097 para 16.

scrutiny. If this were so, the uncertainty pertaining to the process of justification would thereby be removed.[47]

The reaction of the Court of Justice to the proliferating use of *Dassonville*[48] appears to have been twofold. The measure has been held either to have fallen outwith the scope of the Treaty prohibition in Article 30 (now 28) EC or Article 34 (now 29) EC or deemed to have fallen within that prohibition;[49] the mandatory requirement[50] has then been applied as justification.[51]

1. Measures outwith Article 30 (now 28) EC

With respect to measures falling outside Community law, *Quietlynn Limited and Brian James Richards v Southend Borough* Council,[52] for example, held that UK legislation which prohibited the sale of unlawful sex articles from unlicensed sex establishments fell into this category. It was not an absolute prohibition, the measure accounted for only an insignificant proportion of sales of such articles. The measure regulated the outlets through which the products may be marketed, it was 'merely a rule regarding their distribution'.[53] The Court held that '[i]n principle, therefore, the *marketing* of products imported from other Member States is not rendered any more difficult than that of domestic products' [emphasis added].[54] Likewise in *Summary Proceedings against Sergius Obel*,[55] the measures were concerned with marketing. German rules prohibiting the production of baker's wares and their transport and delivery during night time related to the distribution of the goods and fell outside the application of Article 30 EC and 34 EC.[56] So too in *Joseph Henri Thomas Blesgen v Belgian State*:[57] a Belgian provision concerning the sale of strong spirits for consumption in all places open to the public related to the marketing of the product, it fell outside the scope of Article 30 (now 28) EC.

2. Application of the 'mandatory requirement'

In *Ouietlynn*,[58] *Obel*,[59] and *Blesgen*,[60] the scope of Article 30 (now 28) EC

[47] Cf, eg, *Wellingborough Borough Council v Payless D.I.Y. Limited and Another* [1990] 1 CMLR 773. *B & Q Ltd v Shrewsbury & Atcham Borough Council* [1990] 3 CMLR 535. See above.

[48] Case 8-74 *Procureur du Roi v Benoit Gustave Dassonville* [1974] ECR 837 para 5.

[49] Either Art 30 (now 28) EC with respect to imports and Art 34 (now 29) EC with respect to exports.

[50] See above.

[51] In circumstances in which the measure has applied *equally* to the import and to the domestic product.

[52] Case C-23/89 [1990] I-3059, para 12.

[53] ibid para 9.

[54] ibid.

[55] Case 155/80 [1981] ECR 1993.

[56] Now Art 28 EC and Art 29 EC respectively.

[57] Case 75/81 [1982] ECR 1211.

[58] Case C-23/89 [1990] I-3059.

[59] Case 155/80 [1981] ECR 1993.

[60] Case 75/81 [1982] ECR 1211.

had been interpreted narrowly, In other judgments, that scope received a broad interpretation. The issue then has become one of *justification*, by recourse to the 'mandatory requirement'.[61] In *Oosthoek*,[62] for example, the national law forced the importer to adopt a different advertising scheme. Deemed a 'measure having equivalent effect,' it was held capable of *justification* on the grounds of 'consumer protection and fair trading'.[63] Likewise in *Roger Buet*,[64] a French prohibition on canvassing in relation to the sale of educational material deprived traders of an ability to realize almost all of their sales. As an obstacle to imports it could be *justified* by the need to protect consumers.[65] Moreover in *Rocher*,[66] under Article 30 (now 28) EC a measure precluding catalogue mail order sales from using eye-catching price advertisements where reference was made to a higher price shown in a previous catalogue was a 'measure having equivalent effect'. To compel the adoption of advertising or sales promotion schemes which differ from State to State or to discontinue a particularly effective scheme may amount to an obstacle to imports.[67] These trading rules were held open for justification[68] on grounds relating to consumer protection and to fair trading.[69] In *Torfaen Borough Council v B & Q plc*,[70] national law resulted in the prosecution of a retail chain for opening for prohibited sales on Sundays. The legislation fell within Article 30 (now 28) EC and would bear justification[71] if 'so arranged as to accord with national or regional socio-cultural characteristics'.[72]

The trading rules thus identified are marketing measures, all have applied equally to the domestic product and to the import. Where Article 30 EC and Article 34 EC[73] have been held not to apply, as in *Ouietlynn*, [74] *Obel*,[75] and *Blesgen*,[76] the measures have been held not to be of the nature to impede intra-Community trade.[77] By contrast, common to the instances of Article 30 (now 28) EC application, the Court held that the identified measures had little potential to hinder imports but had the ability to affect imports in an overall manner. In *Oosthoek*[78] and *Rocher*,[79] for example, the measures did not directly affect the import; the Court held however that the restriction of marketing opportunities in each instance may have affected the overall volume of imports. It was

[61] See above.
[62] Case 286/81 [1982] ECR 4575.
[63] ibid para 16.
[64] Case 382/87 [1989] ECR1235 para 17.
[65] ibid. On the 'mandatory requirements' ground of the 'protection of consumers and fair trading'.
[66] Case C-126/91 [1993] ECR I-2361.
[67] ibid para 10.
[68] In fact this was failed on the question of *proportionality*.
[69] Case C-126/91 [1993] ECR I-2361 para 12.
[70] Case 145/88 [1989] ECR 3851.
[71] Without naming the 'mandatory requirement'.
[72] 145/88 [1989] ECR 3851 para 14.
[73] Now Art 28 EC and Art 29 EC.
[74] Case C-23/89 [1990] I-3059 para 12.
[75] Case 155/80 [1981] ECR 1993 para 21.
[76] Case 75/81 ECR 1211 para 11.
[77] Case C-23/89 *Quietlynn Limited and Brian James Richards v Southend Borough Council* [1990] I-3059 para 10. Case 155/80 *Summary Proceedings against Sergius Obel* [1981] ECR 1993 para 20. Case 75/81 *Joseph Henri Thomas Blesgen v Belgian State* ECR 1211 para 9.
[78] Case 286/81 [1982] ECR 4575 para 15.
[79] Case C-126/91 [1993] ECR I-2361 paras 10 and 11.

on these grounds that the measures were prohibited.[80] It is arguable that these two disparate approaches employed by the Court to the assessment of measures having equal impact on both imports and domestic products explain the impetus for some clarity in the application of Article 30 (now 28) EC which the change in direction signified in *Criminal Proceedings against Bernard Keck and Daniel Mithouard*[81] attempted to give. *Keck and Mithouard*[82] was to remove the selling arrangement from the application of Article 30 (now 28) EC by adopting an approach similar to that taken in *Quietlynn*,[83] Obel,[84]and *Blesgen*;[85] the removal of the trading rule from Article 30 (now 28) EC scrutiny. Whatever the imperfections subsequently displayed in the approach taken in *Keck and Mithouard*,[86] at least the selling arrangement represented an attempt to impose some certainty in this area. It is arguable that the approach taken in *Oosthoek*[87] and *Rocher*,[88] in which the possibility of the hindrance to trade was countenanced, though technically a more precise representation of the ramification of *Dassonville*[89]only served to cloud the waters[90] of Article 30 (now 28) EC application.

3. Justification: difficulties at the national level

The slender thread of distinction[91] that results in the measure either outwith the scope of Article 30 (now 28) EC or requiring justification, in the judgments considered above was unsatisfactory. The availability of the concept of the selling arrangement after the judgment of *Keck and Mithouard*[92] would have brought the prospect of a certainty of non-scrutiny by Article 30 (now 28)

[80] They fell within the application of Art 30 (now 28) EC and were then subject to justification. Compare *Roger Buet* where the trading rule was held to be a measure having equivalent effect on the basis that it deprived the trader of a method of marketing whereby 'he realises almost all of his sales'. Case 382/87 [1989] ECR 1235 para 8.

[81] Case C-267/91 and C-268/91 [1993] ECR I-6097 para 16.

[82] ibid.

[83] Case C-23/89 [1990] I-3059.

[84] Case 155/80 [1981] ECR 1993.

[85] Case 75/81 ECR 1211.

[86] Case C-267/91 and C-268/91 [1993] ECR I-6097 para 16.

[87] Case 286/81 [1982] ECR 4575 para 15.

[88] Case C-126/91 [1993] ECR I-2361 para 10.

[89] Case 8-74 *Procureur du Roi v Benoit Gustave Dassonville* [1974] ECR 837 para 5.

[90] In many respects, eg, *Torfaen* in which the issue of justification arose, was a hybrid judgment, taking in aspects of the two identified approaches. The Sunday trading legislation was recognized as a marketing rule, yet it was held that the 'rules are not designed to govern the patterns of trade between Member States'. Case 145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR 3851 para 14. It is noted however that in Case C-322/01 *Deutscher Apothekerverband e V v 0800 DocMorris NV, and Jacques Waterval*, judgment of 8 Dec 2001, not yet published, the Court confirmed: 'Even if a measure is not intended to regulate trade in goods between Member States, the determining factor is its effect, actual or potential, on intra-Community trade' para 67.

[91] In *Quietlynn*, for example, there was no connection with intra-Community trade, only an insignificant proportion of sales were held affected. In *Torfaen*, Sunday trading rules were held not designed to govern the patterns of trade between Member States. Clearly in that instance there was an effect on trade. The question then became, were the Sunday trading rules proportionate?

[92] Case C-267/91 and C-268/91 [1993] ECR I-6097 para 16.

EC in the circumstances of its application. In addition, the process of *justification* in some of the pre *Keck and Mithouard*[93] judgments was not straightforward for the national court. The failure, for example in *Torfaen*,[94] of the Court of Justice to elucidate upon the concepts of 'socio-cultural characteristics' together with the issue of *proportionality* led to some difficulty and inconsistency of interpretation at the national level.[95] For example, in *Wellingborough Borough Council v Payless DIY Limited and Another*,[96] Northampton Crown Court held that the objective of Section 47 of the Shops Act[97] was to preserve the traditional English and Welsh Sunday as a non-trading day, it was proportionate in achieving that objective. By contrast, a different conclusion was reached by Shrewsbury Crown Court in *B & Q Ltd v Shrewsbury & Atcham Borough Council*.[98] It found that the objective of the [Shops] Act could 'be achieved by other means less restrictive of inter-State trade' [emphasis added].[99] In many respects, *Torfaen*[100] highlights the issue that it is preferable for these issues to be removed entirely from the ambit of Article 30 (now 28) EC.

It would seem from the foregoing that it was evident that there was a need for some certainty of approach in instances where national rule had been non-discriminatory in nature and there had been minimal hindrance to trade. The impetus for a change, created by judgments such as *Torfaen*[101] and *Obel*,[102] was to lie behind the important shift in approach to dealing with such situations signalled by the Court in *Keck and Mithouard*.[103]

III. THE SELLING ARRANGEMENT

The judgment in *Keck and Mithouard*[104] represented an attempt by the Court of Justice to address some of the confusion created by the contradictions in the jurisprudence to that time.[105] As introduced in *Keck and Mithouard*,[106] the selling arrangement was an unrefined concept, it lacked accompanying clarity as to form or to content. The nebulous terminology used by the Court of

[93] ibid.
[94] Case 145/88 [1989] ECR 3851.
[95] An Art 177 (now 234) EC reference from Cymbran Magistrates' Court.
[96] [1990] 1 CMLR. 773 para 29.
[97] S 47. 'Every shop shall, save as otherwise provided by this Part of this Act, be closed for the serving of customers on Sunday: Provided that a shop may be open for the serving of customers on Sunday for the purposes of any transaction mentioned in the Fifth Schedule to this Act.'
[98] [1990] 3 CMLR 535 para 7.
[99] ibid para 14.
[100] Case 145/88 [1989] ECR 3851.
[101] ibid.
[102] Case 155/80 [1981] ECR 1993.
[103] Case C-267/91 and C-268/91 [1993] ECR I-6097 para 16.
[104] ibid.
[105] See Advocate General Jacobs. Case 412/93 *Societe d'Importation Edouard Leclerc-Siplec v TFI Publicite SA and M6 Publicite SA* [1995] ECR I-179 para 34.
[106] Case C-267/91 and C-268/91 [1993] ECR I-6097 para 16.

Justice to surround the introduction of the device of the selling arrangement gave rise to some uncertainty as to its application. In an Opinion delivered exactly one year after the judgment of *Keck and Mithouard*,[107]Advocate General Jacobs took the view that 'the effect of the *Keck* judgment is still uncertain'.[108]

To the present time, the jurisprudence of the Court of Justice has wrestled with the consequences of the concept of the selling arrangement it boldly introduced in *Keck and Mithouard*.[109] It is a journey which to a large extent has sought to clarify both the substance and the form of the selling arrangement together with the circumstances of its application. It is to an examination of the selling arrangement that we now turn. This article seeks to highlight its positive elements, it shows that the concept is capable of being moulded by the Court of Justice into a tool which is sensitive to the maintenance of the balance between Community free trade and national interests with respect to the free movement of goods.

A. Key issues

1. Hindrance to trade

A key issue in the operation of Article 28 (ex 30) EC is whether the national measure has resulted in a hindrance to trade. In *Keck and Mithouard*,[110] the Court imposed a subtlety of enquiry with respect to the issue of whether the national law had been designed to regulate trade between Member States.[111] Where traders had only been deprived of a 'method of sales promotion', then Article 30 (now 28) EC would not apply. In these circumstances, the Court has recognized that though the volume of sales[112] of both imported and domestic

[107] Case C-267/91 and C-268/91 [1993] ECR I-6097.

[108] Its effect was described as 'best understood as excluding from the scope of Article 30 only measures of an entirely general character which do not preclude imports, which operate at the point of sale, and which have no effect on trade other than to reduce the overall quantity of goods sold and which in doing so affect imports and domestic products alike'. Case 412/93 *Societé d'Importation Edouard Leclerc-Siplec v TFI Publicite SA and M6 Publicite SA* [1995] ECR I-179 para 34.

[109] Case C-267/91 and C-268/91 [1993] ECR I-6097.

[110] ibid.

[111] In Case C-267/91 and C-268/91. *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097, para 12 the national legislation which had imposed a general prohibition on resale of goods 'at a loss [was] *not designed to regulate trade* in goods between Member States' [emphasis added]. This approach had surfaced pre *Keck and Mithouard* in Case 145/88 *Torfaen Borough Council v B & Q plc* Case 145/88 [1989] ECR 3851 para 14. See also Case C-322/01 *Deutscher Apothekerverband e V v 0800 DocMorris NV, and Jacques Waterval* judgment of 8 Dec 2001, not yet published, para 67. See above.

[112] Reminiscent of the approach taken in Case 286/81 *Oosthoek's Uitgeversmaatschappij BV* [1982] ECR 4575. Case 382/87 *R. Buet and Educational Business Services (EBS) SARL) v Ministère public*. [1989] ECR 1235. Case C-126/91*Schutzverband gegen Unwesen in der Wirtschaft e V v Yves Rocher GmbH* [1993] ECR I-2361.

goods alike may be restricted,[113] it is a restriction that of itself would not characterize the national law as a 'measure having equivalent effect'.[114]

It should be re-emphasized that a national measure may display the characteristics of a selling arrangement, yet where the import has not received even handed treatment with respect to the domestic product, Article 28 (ex 30) EC will continue to apply.

2. Applicability without distinction

The national measure must apply equally with respect to the marketing of the domestic product and that of products from other Member States.[115] Where there is an inequality of treatment, the national measure cannot be regarded as a selling arrangement.[116] In *Lucien Ortscheit GmbH v Eurim-Pharm Arzeneimittel* GmbH,[117] for example, the German law[118] had not been even-handed in its treatment of the domestic and the imported product. The measure, though in the nature of a selling arrangement,[119] did not have the same effect on the marketing of domestic medicinal products.[120] In consequence Article 30 (now 28) EC applied and the national law was prohibited.

In *Schutverband gegen unlauteren Wettbewerb and TK-Heimdeinst Sass GmbH*,[121] Austrian law[122] reserved the sale of groceries on rounds exclusively

[113] Eg in Case C-71/02 *Herbert Karner Industrie-Auktionen Gmbh v Troostwijk GmbH*, judgment of 25 Mar 2004 [2004] 2 CMLR 5 (not yet published in ECR), it was held that a national law which prohibited the reference to origin, where goods had originated from an insolvent estate, would merely limit the total volume of sales in that Member State. It would not affect the marking of the import in a different manner from the marketing of the domestic product.

[114] Within the meaning of Art 30 (now 28) EC.

[115] Eg it was noted by the Court of Justice in Joined Cases C-418-421, 460-462, and 464/93, C-9-11, 14–15, 23–4, and 332/94 *Semeraro Casa Uno Srl and others v Sindaco del Comune di Erbusco and Others*. [1996] ECR I-2975 para 24 that the national law in relation to shop hours would not lead to unequal treatment between national products and imported products as regards access to the market.

[116] This would accord with the view taken by the Court of Justice which referred to '*certain* selling arrangements' [emphasis added]. Case C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* Case C-267/91 and C-268/91 [1993] ECR I-6097 para 16.

[117] Case C-320/93 [1994] ECR I-5243.

[118] Section 8(2) Act on Advertising of Medicinal Products [Heilmittelwerbegesetz]. Case C-320/93 *Lucien Ortscheit GmbH v Eurim-Pharm Arzeneimittel GmbH* [1994] ECR I-5243 para 5.

[119] The national prohibition 'must be regarded as a provision prohibiting certain "selling arrangements" within the meaning of *Keck and Mithouard*'. Advocate General Gulmann. Case C-320/93 *Lucien Ortscheit GmbH v Eurim-Pharm Arzeneimittel GmbH* [1994] ECR I-5243 para 7.

[120] 'The prohibition of advertising at issue may restrict the volume of imports of medicinal products not authorised in Germany, since it deprives pharmacists and doctors whose participation is essential for . . . import . . ., of a source of information on the existence and availability of such products.' Case C-320/93 *Lucien Ortscheit GmbH v Eurim-Pharm Arzeneimittel GmbH* [1994] ECR I-5243 para 10.

[121] Case C-254/98 *Schutverband gegen unlauteren Wettbewerb and TK-Heimdeinst Sass GmbH* [2000] ECR I-151.

[122] Art 53(1)(a) Gewerbeordnung 1994 (Austrian Code of Business and Industry 1994). Case C-254/98 *Schutverband gegen unlauteren Wettbewerb and TK-Heimdeinst Sass GmbH* [2000] ECR I-151 para 3.

to sellers[123] established in the locality.[124] The national law related to selling arrangements[125] for certain goods: 'It lays down the geographical areas in which each of the operators concerned may sell his goods by that method.'[126] However, the Austrian law did '*not affect in the same manner the* marketing of domestic products and that of products from other Member States' [emphasis added].[127] Goods from other Member States could not be sold on rounds in administrative districts in Austria.[128] Traders, bakers, butchers, and grocers were required to have a permanent establishment[129] as a pre-condition to operating a business. As a consequence, the national law did not apply equally to all economic operators; local traders 'already meet the requirement with respect to permanent establishment'.[130] By contrast, '[t]he importer does not enjoy the same access to the market . . . they have to bear additional costs.'[131] Community trade had been affected by the national measure. Though in the nature of a selling arrangement, the national measure fell within the scope of Article 30 (now 28) EC.

Nonetheless, *Schutverband*[132] places the responsibility for the conduct of business at the national level. It is a responsibility that is set within the framework of Community law. The application of the latter will occur where the national measure 'is capable of impeding intra-Community trade'.[133] The judgment of *Schutverband*[134] is important in that it reinforces national preferences in the context of free movement of goods. In concept, the selling

[123] By bakers, butchers, and grocers.

[124] By traders carrying on trade from a permanent establishment in that Verwaltungsbezirk (Austrian administrative district covering several municipalities or in a municipality adjacent thereto).

[125] Case C-254/98 *Schutverband gegen unlauteren Wettbewerb and TK-Heimdeinst Sass GmbH* [2000] ECR I- 151 para 24.

[126] ibid.

[127] The 'selling arrangement' does not fall within Art 30 (now 28) EC so long as it applies 'to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of the domestic product and of those from other Member States'. Case C-254/98 *Schutverband gegen unlauteren Wettbewerb and TK-Heimdeinst Sass GmbH* [2000] ECR I-151 para 23. Per *Criminal Proceedings against Bernard Keck and Daniel Mithouard* Case C-267/91 and C-268/91 [1993] ECR I-6097.

[128] In the situation of the trader TK-Heimdienst Sass GmbH. Case C-254/98 *Schutverband gegen unlauteren Wettbewerb and TK-Heimdeinst Sass GmbH* [2000] ECR I-151 para 31.

[129] Either in the administrative district or in an adjacent municipality.

[130] Case C-254/98 *Schutverband gegen unlauteren Wettbewerb and TK-Heimdeinst Sass GmbH* [2000] ECR I-151 para 26.

[131] ibid.

[132] Case C-254/98 *Schutverband gegen unlauteren Wettbewerb and TK-Heimdeinst Sass GmbH* [2000] ECR I-151.

[133] Had trade not been affected, the national measure would have resulted in goods from other Member States never being offered for sale in Austrian Administrative districts. Case C-254/98 *Schutverband gegen unlauteren Wettbewerb and TK-Heimdeinst Sass GmbH* [2000] ECR I-151 para 31.

[134] Case C-254/98 *Schutverband gegen unlauteren Wettbewerb and TK-Heimdeinst Sass GmbH* [2000] ECR I-151.

arrangement extends not merely to business opening hours, but to internal measures relating to the conduct of business. This aspect will be considered later.

Where the measure concerns the *characteristics* of the product, so too it is precluded from consideration as a selling arrangement.

3. Product characteristics

In *Vereinigte Familiapress Zeitungsverlags-und vertriebs GmbH v Heinrich Bauer Verlag*,[135] an Austrian law required the German publisher to remove prize crossword puzzles from periodicals. It was a law directed against a 'method of sales promotion',[136] yet the facts dictated that the competitions formed 'an *integral part* of the magazine in which they appear[ed], . . . the *actual content* of the products' was affected [emphasis added].[137] The requirement 'to alter the content . . . impairs access of the product concerned'[138] to the domestic market; in consequence the free movement of goods was hindered. Likewise, in *Criminal proceedings against Ditlev Bluhme* a Dutch law[139] involved 'a general prohibition on the importation onto Lso and neighbouring islands of living bees and reproductive material for domestic bees'.[140] The Dutch law was held to concern the 'intrinsic characteristics' of the bees.[141] In consequence the national legislation 'cannot be a matter of a selling arrangement',[142] it was a 'measure having equivalent effect'.[143] By contrast, in *Giorgio Domingo Banchero*, Italian legislation[144] regulated the sale of manufactured tobacco products. It did 'not relate to the *characteristics* of the products but concerns solely the *arrangements for the retail sale* of manufactured products' [emphasis added].[145] The measure related to wholesale distribution of tobacco products, it was a selling arrangement outside the scope of Article 30 (now 28) EC.

[135] Case C-368/95 [1997] ECR I-3689.

[136] Section 9a Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Act). Case C-368/95 *Vereinigte Familiapress Zeitungsverlags-und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689 para 4.

[137] Case C-368/95 *Vereinigte Familiapress Zeitungsverlags-und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689 para 11.

[138] ibid para 12.

[139] Dutch Law, Art 14a, Law No 115 of 31 Mar 1982 on bee-keeping (*Lov om biavl*). Introduced by Law No 267, 6 May 1993. Case C-67/97 *Criminal Proceedings against Ditlev Bluhme* [1998] ECR I-8033 para 6.

[140] Case C-67/97 *Criminal Proceedings against Ditlev Bluhme* [1998] ECR I-8033 para 19.

[141] It sought to preserve an indigenous animal population. Case C-67/97 *Criminal Proceedings against Ditlev Bluhme* [1998] ECR I-8033 para 21.

[142] ibid para 21. See also Case C-368/95 *Vereinigte Familiapress Zeitungsverlags-und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689 para 11.

[143] Case C-67/97 *Criminal Proceedings against Ditlev Bluhme* [1998] ECR I-8033, para 23. The measure was justified [1998] ECR I-8033 para 38 under Art 36 EC on the grounds of the protection of the health and life of humans.

[144] Case C-387/93 [1995] ECR I-4663 para 3.

[145] In Case C-387/93 *Criminal proceedings against Giorgio Domingo Banchero* [1995] ECR I-4663 para 36.

(a) 'Characteristics' identified

Where the national law is concerned with 'product characteristics', the measure cannot be regarded as a selling arrangement, Article 28 (ex 30) EC scrutiny will then arise. Though this appears to be an absolute criterion, it is arguable that some clarity is needed in this context with respect to what is to be regarded as a *characteristic* of the product. It is an assessment in which the Court has not used consistent terminology. In *Banchero*[146] the national legislation did not relate to the 'characteristics'[147] of the product. In *Ditlev Bluhme*[148] the Court made reference to the 'intrinsic characteristics' of the bees.[149] In *Familiapress*,[150] the reference was to the 'actual contents' of the products. The meaning of 'intrinsic' is much more specific for example than 'contents',[151] that of 'characteristics' different again from the latter. In all probability, these terms, as used in the instant context, are probably interchangeable. The important factor in any assessment is that the 'measure' has required that the content of the goods *in some way* be altered.[152] In consequence, the market access of the import with respect to the domestic market would be made more difficult. Nevertheless, it would be useful if this matter were to be clarified by the Court of Justice, so that any doubts that may lurk as to the existence of semantic differences would evaporate. The mechanics of identification of product characteristics are important, they strike at the boundary between the application of Article 28 (ex 30) EC and of the selling arrangement.

The issue of the identification of the characteristics of a product raises another matter. Would *all* alterations bear upon the characteristics of the product? For example, in *Familiapress*, a magazine produced in Germany was also distributed in Austria.[153] The magazine contained one prize crossword puzzle with two prizes of 500DM, a second crossword with a single prize of 1,000DM, and a third prize competition. If the requirement had been to

[146] Case C-387/93 [1995] ECR I-4663.

[147] Case C-387/93 *Criminal proceedings against Giorgio Domingo Banchero* [1995] ECR I-4663 para 36.

[148] Case C-67/97 [1998] ECR I-8033.

[149] Case C-67/97 *Criminal Proceedings against Ditlev Bluhme* [1998] ECR I-8033 para 21.

[150] Case C-368/95 [1997] ECR I-3689.

[151] Intrinsic: 'Belonging to the thing itself; inherent, essential.' Per *The Shorter Oxford English Dictionary* (3rd edn OUP Oxford 1983).

[152] In *Familiapress* the competitions formed an integral part of the magazine. In *Ditlev Bluhme*, the prohibition on the introduction or keeping of bees (or their reproductive material) amounted to an intrinsic characteristic of the bees. By contrast in *Banchero*, the national legislation concerned solely arrangements for retail sale. National legislation penalized the unlawful possession of manufactured tobacco products from other Member States on which excise duty in accordance with Community law had not been paid where the retail sale of those products was reserved to distributors authorized by the State.

[153] Issue 9. 9 Feb 1995. Referred to by the national court. Subsequent issues of 'Laura' had competitions of the same type with the same prizes on offer. Case C-368/95 *Vereinigte Familiapress Zeitungsverlags-und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689 para 3.

remove only one of the crosswords, the content[154] of the product would have been affected. Yet can an alteration in content be regarded as synonymous with either an alteration in the intrinsic contents or indeed the characteristics of the magazine? The content of the import would have been altered where there was removal of any item, no matter how small in relation to the whole product. A minor adjustment, which by its nature would affect the content, would not necessarily intrinsically affect the product. In all probability, whichever terminology is used, *any* enforced alteration affecting access to the market of the import would have been sufficient to remove the measure from consideration as a selling arrangement. Clarity of consistent terminology in this respect would however be useful. Finally, had the national law merely required the magazine to contain a notice that the prizes offered were not claimable in Austria, presumably it would be arguable that the contents of the magazine were not subject to alteration; *all* printed copies would contain the same material. The notice could be included in the initial print run of the magazine. In such circumstances, the measure could be considered to be a selling arrangement. Another view would be that any notice, even if inserted at the time of printing, originating from a requirement in the importing State, would fall into the category of 'requirements to be met' by the goods, with respect to labelling and packaging.[155] As such, the measure would then fall within the scope of Article 30 (now 28) EC; it would then be subject of justification by the Member State.[156]

(b) Trespass into national law

One final observation in relation to the assessment by the Court of the product characteristic is required. In both *Familiapress*[157] and in *Ditlev Bluhme*[158] the Court made reference to the respective national law relating to the contents of the product. In this respect, both judgments appear to have trespassed into a prohibited area. Both cases resulted from references from the national courts. Article 234 EC references[159] in principle maintain a strict dividing line between interpretation and application of Community law. In *Familiapress*,[160] for example, the Court held: 'The national legislation . . . *as applied to the facts of the case* is not concerned with a selling arrangement within the meaning of the judgment in *Keck and Mithouard*' [emphasis added].[161] The judg-

[154] The phrase used in Case C-368/95 *Vereinigte Familiapress Zeitungsverlags-und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689 para 11.

[155] Within the terms imposed by *Criminal Proceedings against Bernard Keck and Daniel Mithouard* Case C-267/91 and C-268/91 [1993] ECR I-6097 para 16.

[156] Either under Art 30 (ex 36) EC or by reference to the 'mandatory requirement'.

[157] Case C-368/95 [1997] ECR I-3689.

[158] Case C-67/97 [1998] ECR I-8033.

[159] Formerly Art 177 EC. The jurisdiction of the Court of Justice relates to '(a) the interpretation of [the EC] Treaty; (b) The validity and interpretation of acts of the institutions of the Community…(c) The interpretation of the statutes of bodies established by an act of the Council'.

[160] Case C-368/95 [1997] ECR I-3689.

[161] Case C-368/95 [1997] ECR I-3689 para 11. Similarly in Case C-67/97 *Criminal proceed-*

ments represent a rather blatant transgression into national territory in this matter. It is more important to establish the parameters with respect to the characteristics of the product, than it is to identify specific national laws which are concerned with the same. In this respect the judgments do nothing for certainty in the continued development of the selling arrangement.

In the first instance, the selling arrangement was successfully applied in the context of the advertisement. However, the flexibility of the concept of the selling arrangement has allowed it to encompass measures relating to business activity. In an examination of the jurisprudence relating to the selling arrangement, it is to the advertisement that we now turn.

4. The advertisement

It is a retrospective assessment which confirms that advertising is the most obvious of candidates for consideration as a selling arrangement.[162] The fact that the selling arrangement extended to the advert was not readily apparent. Advocate General Jacobs, in an Opinion delivered exactly one year after the introduction of the selling arrangement in *Keck and Mithouard*,[163] recorded: 'Were it not for the judgment in *Hünermund* it would perhaps not have been clear that the phrase "national provisions restricting or prohibiting certain selling arrangements" in *Keck* covered rules on advertising.'[164]

That the national rule concerning advertising cannot per se be regarded as a selling arrangement was confirmed in *Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB and TV-Shop I Sverige AB*.[165]

(a) Total prohibition

In De *Agostini*,[166] the ban on advertising was total. Advertising directed at children less than 12 years of age was prohibited by Sweden.[167] 'Television advertising was the only effective form of promotion enabling it to penetrate the Swedish market.'[168] That law would be regarded as a selling arrangement unless 'it is shown that the ban does not affect in the same way, in fact and in

ings against Ditlev Bluhme [1998] ECR I-8033 para 21, the Court held '[i]n those circumstances, its application to the facts of the case cannot be a matter of a selling arrangement.'

[162] A truism not readily apparent from Case C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard*. Case C-267/91 and C-268/91 [1993] ECR I-6097.

[163] C-267/91 and C-268/91 [1993] ECR I-6097 para 16.

[164] Case C-412/93 *Societé d'Importation Edouard Leclerc-Siplec v TFI Publicité SA and M6 Publicité SA* [1995] ECR I-179 para 37.

[165] Joined Cases C-34/95-36/95 [1997] ECR I-3843.

[166] Joined Cases C-34/95-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB and TV- Shop I Sverige AB* [1997] ECR I-3843.

[167] The national law also concerned misleading advertising. Joined Cases C-34/95-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB and TV- Shop I Sverige AB* [1997] ECR I-3843 para 9.

[168] Pleaded in evidence by De Agostini. Joined Cases C-34/95-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB and TV- Shop I Sverige AB* [1997] ECR I-3843 para 43.

law, the marketing of national products and of products from other Member States'.[169] Where the marketing of the domestic and the imported product is not affected in the same way, the national law will be fall within the scope of Article 30 (now 28) EC, a 'measure having equivalent effect'.[170] It was significant that it was held that '[i]t cannot be excluded that an outright ban, applying in one Member State, of a type of promotion for a product which is lawfully sold there *might have a greater impact on products from other Member States*' [emphasis added].[171] A total ban on advertising would naturally be even-handed with respect to the import and to the domestic product, yet the emphasis is on the equality of treatment with respect to the marketing of all products. Whilst however an equality of treatment *in law* is relatively easy to assess, that the domestic and the imported product have received *in fact* the same treatment from the national law is more difficult to ascertain. This could be particularly relevant for the importer who, operating at arms length in that other Member State, is likely to have limited access to relevant market statistics. There is a danger of an inbuilt bias against the importer who seeks to prove the reality of an inequality of treatment at the hands of the national law. Nevertheless, it would be prudent for the potential litigant to undertake a market analysis of the effect of the national measure on both imported and domestic products before embarking on litigation. It is an assessment which in all probability will not be easy for the importer, though the Court of Justice noted from the pleadings of De Agostini that '[t]elevision advertising was the only effective form of promotion enabling it to penetrate the Swedish market.'[172] This is a strong indication that the referring court *in this instance* ought to consider the 'total ban' as being subject to Article 30 (now 28) EC scrutiny.[173] It is arguable however that Court of Justice is gently pushing the national court into serious recognition of the de facto effects of the national measure, rather than a mere passive acceptance that a total ban will apply equally to all products to which it is directed. A consideration of the de

[169] That is for the national courts to determine by further enquiry. 'The efficacy of the various types of promotion is a question of fact to be determined in principle by the referring court.' Joined Cases C-4/95-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB and TV- Shop I Sverige AB* [1997] ECR I-3843 para 43.

[170] Then subject to 'justification'. Provided that the provisions 'are necessary for meeting overriding requirements of general public importance or one of the aims laid down in Article 36 [now 30] of the Treaty, are proportionate for that purpose, and those aims or overriding requirements could not have been met by measures less restrictive of intra-Community trade.' Joined Cases C-34/95-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB and TV- Shop I Sverige AB* [1997] ECR I-3843 para 47.

[171] Joined Cases C-34/95-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB and TV- Shop I Sverige AB* [1997] ECR I-3843 para 42.

[172] 'Since it had no other advertising methods for reaching children and their parents.' Joined Cases C-34/95-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB and TV- Shop I Sverige AB* [1997] ECR I-3843 para 43.

[173] This is to be assessed at the national level. Joined Cases C-34/95-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB and TV- Shop I Sverige AB* [1997] ECR I-3843 para 45.

facto effects of the national law is self evident,[174] but the insistence by the Court that such effects are examined where the ban is outright in nature is significant. Provided that the importer can cull the relevant market information before embarking on litigation, the route of Article 30 (now 28) EC may still remain open even where the advertising ban is total.

(b) Partial prohibition

The application of the concept of the selling arrangement has arisen in the context of the advert in subsequent judgments of the Court. The status of the advert in relation to Article 30 (now 28) EC was again at issue in *Societé d'Importation Edouard Leclerc-Siplec v TFI Publicité SA and M6 Publicité SA*.[175] This time the prohibition was partial.[176] French law[177] prohibited the broadcasting of televised adverts inter alia relating to the distribution of goods. Television companies in France refused to broadcast advertisements for petrol stations owed by Leclerc-Siplec. The Court held that the national law was a selling arrangement, it was not a measure having equivalent effect.[178] It prohibited 'a particular form of promotion (televised advertising) of *a particular method of marketing* products (distribution)' [emphasis added].[179] The French law was not designed to regulate trade in goods between Member States.[180] It was even-handed, it applied

> regardless of the type of product to all traders in the distribution sector, even if they are both producers and distributors [and] affect[ed] the marketing of products from other Member States and that of domestic products in the same manner.[181]

[174] This aspect is an inextricable part of the *Keck and Mithouard* formula established with respect to the selling arrangement. Case C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* Case C-267/91 and C-268/91 [1993] ECR I-6097 paras 16 and 17. Joined Cases C-34/95-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB and TV- Shop I Sverige AB* [1997] ECR I-3843 para 43.

[175] Case C-412/93 [1995] ECR I-179.

[176] By contrast, the advertising prohibition had been total in relation to pharmacists in Case C-292/92 *Ruth Hünermund and Others v Landesapothekerkammer Baden-Wurttemberg* [1993] ECR I-6787 para 1.

[177] Art 8. Decree 92/280 27 Mar 1992. Case C-412/93 *Societé d'Importation Edouard Leclerc-Siplec v TFI Publicité SA and M6 Publicité SA* [1995] ECR I-179 para 2.

[178] Within the meaning of Art 30 (now 28) EC.

[179] Case C-412/93 *Societé d'Importation Edouard Leclerc-Siplec v TFI Publicité SA and M6 Publicité SA*. [1995] ECR I-179 para 22.

[180] 'Within the meaning of *Dassonville* . . . to all relevant traders operating within the national territory…affect[ing] in the same manner, in law and in fact the marketing of domestic products and of those from other Member States. . . . The application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products.' Case C-412/93 *Societé d'Importation Edouard Leclerc-Siplec v TFI Publicité SA and M6 Publicité SA* [1995] ECR I-17 para 21.

[181] Case C-412/93 *Societé d'Importation Edouard Leclerc-Siplec v TFI Publicité SA and M6 Publicité SA*. [1995] ECR I-179 para 23.

So too, the partial[182] prohibition in *Herbert Karner Industrie-Auktionen Gmbh v Troostwijk GmbH*[183] was even-handed. The national provision prohibited reference to origin, where goods were offered for sale by an insolvent company.[184] It was held that the Austrian law did 'not affect the marketing of products originating from other Member States more than it affects the marketing of products from the [host] Member State'.[185]

With respect to advertising, the effect of the measure in *Ruth Hünermund and Others v Landesapothekerkammer Baden-Wurttemberg*[186] had been relatively insignificant in the context of the market for quasi-pharmaceutical products.[187] The prohibition had not affected the right of traders other than pharmacists to advertise those products.[188] So too, in *Leclerc-Siplec*,[189] the refusal to broadcast an advertisement concerning the distribution of fuel was of limited effect, the distributors deprived only of one particular form of advertising.[190] However, in other circumstances, advertising prohibitions could have more serious consequences in the context of market integration. Whilst the restrictions in relation to both pharmaceutical products and television advertising had been partially detrimental as methods of sales promotion had been lost, in other respects those markets as a whole had been left free to operate under normal market forces. Circumstances however might have dictated otherwise. The effect on trade between Member States might have been very significant indeed, a larger proportion of the market in parapharmaceutical products might have been affected, the ban on the advertising of petrol for example might have been total. In such instances, would the selling arrangement per se protect the advertisement from Article 28 (now 30) scrutiny?[191]

(c) Advertising; professional conduct rules

The judgment of *Hünermund*[192] was the first application by the European

[182] The measure related only to the internet advertisement of auction of goods from insolvent companies.

[183] Case C-71/02 Judgment of 25 Mar 2004 [2004] 2 CMLR 5 (not yet published in the ECR).

[184] On the grounds of consumer protection.

[185] Case C-71/02 Judgment of 25 Mar 2004 [2004] 2 CMLR 5, para 42 (not yet published in the ECR).

[186] Case C-292/92 [1993] ECR I-6787.

[187] See Advocate General Jacobs Case C-412/93 *Societé d'Importation Edouard Leclerc-Siplec v TFI Publicité SA and M6 Publicité SA* [1995] ECR I-179 para 37.

[188] Case C-292/92 *Ruth Hünermund and Others v Landesapothekerkammer Baden-Wurttemberg* [1993] ECR I-6787 para 19.

[189] Case C-412/93 [1995] ECR I-179.

[190] Case C-412/93 [1995] ECR I-179 para 22.

[191] 'For example, legislation under which parapharmaceutical products may be sold only in pharmacies' or 'under which alcoholic beverages may be sold only in licensed stores for consumption off premises.' These two examples were used by AG Jacobs Case C-412/93 *Societé d'Importation Edouard Leclerc-Siplec v TFI Publicité SA and M6 Publicité SA* [1995] ECR I-179 para 26.

[192] Case C-292/92 [1993] ECR I-6787.

Court of Justice of the concept of the selling arrangements after its introduction in *Keck and Mithouard*.[193] In *Hünermund*[194] had not the concept existed, the professional rules of conduct in issue would have been subject to the scrutiny of Article 30 (now 28) EC.[195] *Hünermund*[196] concerned the prohibition of advertising by pharmacists of quasi-pharmaceutical products outside pharmacies.[197] The rule applied without distinction as to origin:[198] all pharmacists operating within that region were bound.[199] The marketing of the import was not affected any differently from the marketing of the domestic product.[200] A method of selling the products had been restricted, however this was not sufficient to characterize the rule as a measure having equivalent effect.[201]

The raison d'être for existence of the selling arrangement had been the increasing tendency of traders to use Article 30 (now 28) EC for improper purposes.[202] It is perhaps ironic that the challenge at the national level to the pharmacists' rule in *Hünermund*[203] represented a blatant attempt to circumvent rules of conduct imposed to ensure a proper supply of medical products. The purpose of those rules was 'clearly to prevent excessive competition between pharmacists',[204] it 'is not designed to regulate trade in goods between Member States'.[205] The conduit of recourse to Article 28 (ex 30) EC as the battering ram and potential panacea for aggrieved traders reacting against the unpopular rule of professional conduct had been neutered, purely by the application of the concept of the selling arrangement.

[193] Case C-267/91 and C-268/91 [1993] ECR I-6097 para 16.
[194] Case C-292/92 [1993] ECR I-6787.
[195] Subject to justification by reference to the 'mandatory requirement'. See above.
[196] Case C-292/92 [1993] ECR I-6787.
[197] It related to the imposition by a professional association of pharmacists operating in within Land Baden-Wuerttemberg of a rule of professional conduct. Case C-292/92 [1993] ECR I-6787, para 1.
[198] Case C-292/92 [1993] ECR I-6787 para 23.
[199] Para 10(15) Berufsordnung (Professional Code) of the Professional Association for the Land Baden-Wuerttemberg. Case C-292/92 [1993] ECR I-6787 para 3.
[200] Case C-292/92 *Ruth Hünermund and Others v Landesapothekerkammer Baden-Wurttemberg* [1993] ECR I-6787 para 23.
[201] ibid paras 20–3.
[202] Case C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097 para 14.
[203] Case C-292/92 [1993] ECR I-6787.
[204] Noted also by AG Jacobs. Case C-412/93 *Societé d'Importation Edouard Leclerc-Siplec v TFI Publicité SA and M6 Publicité SA* [1995] ECR I-179 para 35.
[205] ibid para 19. As Advocate General Tesauro reflected, in Case C-292/92 *Ruth Hünermund and Others v Landesapothekerkammer Baden-Wurttemberg* [1993] ECR I-6787 para 28, the purpose of Art 30 (now 28) EC is 'to ensure the free movement of goods in order to establish a single integrated market, . . . *not* to strike down the most widely differing measures . . . to ensure *the greatest possible expansion of trade* [emphasis added].'

5. Traditional social practices

The approach to the 'selling arrangement' in the context of advertising was further refined in *Konsumentombudsnannen (KO) and Gourmet International Products AB (GIP)*.[206] Hybrid in essence, the Swedish law had established a two-tier approach concerning the advertising of alcohol in the press. Advertising directed at the consumer was prohibited, advertising directed at the licensing trade was lawful.[207] With respect to the consumer, the total prohibition on advertising was held to be not necessarily even-handed, the national law 'might have a greater impact on products from other Member States'.[208] This is a reiteration of the approach adopted in *De Agostini*.[209] What was perhaps novel in *Gourmet*[210] were the additional detailed observations provided by the Court as guidance for assessment at the national level with respect to the de facto effects of the national legislation. The Court concluded that there was no need for 'a precise analysis of the facts'.[211] Rather, in the context of this marketplace, it held that

> in the case of products like alcoholic beverages, the consumption of which is linked to *traditional social practices and to local habits and customs*, a prohibition of all advertising directed at consumers in the form of advertising in the press[212] . . . is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, *with which consumers are instantly more familiar* [emphasis added].[213]

The references to social practices, habits, and customs[214] introduces an objective element. The assessment of the effect of the national measure in relation to market access of the import vis-à-vis the domestic product is thereby made

[206] Case C-405/98 [2001] ECR I-1795.

[207] Swedish Law *Lagen 1978: 763*. Laying down provisions on the marketing of alcoholic beverages 1 July 1979. *Alkohollagen 1994: 738* (Swedish Law on Alcohol). Case C-405/98 *Konsumentombudsnannen (KO) and Gourmet International Products AB (GIP)* [2001] ECR I-1795 para 3.

[208] C-405/98 *Konsumentombudsnannen (KO) and Gourmet International Products AB (GIP)* [2001] ECR I-1795 para 19, referring to Joined Cases C-34/95-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB and TV- Shop I Sverige AB* [1997] ECR I-3843 para 42.

[209] Joined Cases C-34/95-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB and TV- Shop I Sverige AB* [1997] ECR I-3843 para 42. 'It cannot be excluded that an outright ban, applying in one Member State of a type of promotion for a product which is lawfully sold there might have a greater impact on products from other Member States.'

[210] Case C-405/98 [2001] ECR I-1795.

[211] Case C-405/98 *Konsumentombudsnannen (KO) and Gourmet International Products AB (GIP)* [2001] ECR I-1795 para 21.

[212] 'On the radio and on television, the direct mailing of unsolicited material or the placing of posters on the public highway.' Case C-405/98 *Konsumentombudsnannen (KO) and Gourmet International Products AB (GIP)* [2001] ECR I-1795 para 21.

[213] Case C-405/98 *Konsumentombudsnannen (KO) and Gourmet International Products AB (GIP)* [2001] ECR I-1795 para 21.

[214] Similar references to 'national or regional socio-cultural characteristics' were made by the Court in Case 145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR para 14 to justify UK Sunday trading rules; above.

easier. The importer may be relieved from a requirement to produce a statistical analysis of that particular product market or to establish the precise effect on product sales of the national measure. The identification of cause and effect with respect to perceived problems of market access may be circumvented by recourse to objective factors rather than the potential assessment of a myriad of minutiae with respect to the detail of the domestic market.

That the advertising rule in *Hünermund*[215] was regarded as a selling arrangement was not surprising; it met the requirements imposed in the application of that concept.[216] The jurisprudence with respect to advert has been considerably refined since that time. It is apparent that the advertisement per se will not be regarded as a selling arrangement. It is a matter of subtle enquiry. Even the total ban on advertising, the most obvious potential candidate for the even-handed rule, will be subject to scrutiny. There is no automatic acceptance that a national measure affects in the same way, in law and in fact, the marketing of the domestic product and the import.[217] The answer is not necessarily obvious. What for example, if there are no other means available to the importer to advertise?[218] There is rightly a heavy reliance on de facto evidence at the national level. Stir into the pot factors such as 'traditional social practices . . . local habits and customs',[219] and the focus of enquiry is clearly laid at the door of the national court. *All* these factors must be accounted for in the assessment of the *effect* of the national measure on the access to the market of the imported product.

In the context of the advertisement, it is crucial to the selling arrangement that the importer has maintained ability to promote the imported product. Where, however, the *intrinsic* qualities of the product are at issue, Article 28 (ex 30) EC will continue to operate, regardless of the nature of the national measure. The distinction between promotion of the product and content examined so far does not however represent the full spectre of application with respect to the selling arrangement. The conditions of application of the selling arrangement established in *Keck and Mithouard*,[220] make the selling arrangement a tool of ubiquitous application, wider in application than the mere advertisement. It is that application in the wider context that is now the subject of examination.

The selling arrangement may encompass lost sales opportunities for the importer, the deprivation of a means of advertisement which may result in a

[215] Case C-292/92 *Ruth Hünermund and Others v Landesapothekerkammer Baden-Wurttemberg* [1993] ECR I-6787.
[216] Case C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097 para 16.
[217] Joined Cases C-34/95-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB and TV- Shop I Sverige AB* [1997] ECR I-3843 para 43.
[218] ibid.
[219] Case C-405/98 *Konsumentombudsnannen (KO) and Gourmet International Products AB (GIP)* [2001] ECR I-1795 para 21.
[220] C-267/91 and C-268/91 [1993] ECR I-6097 para 16.

loss of turnover to the business. The advertising function as far as business is concerned is by no means ephemeral, it is an integral part of the commercial process. At one level, application of the concept of the selling arrangement, with the attendant operation of the national measure may cause a redirection and reallocation of the advertising budget; at another level the concept is capable of greater intrusion into the organization and business practice of the commercial concern.

6. Business activity

The selling arrangement can extend to measures which cover the conduct of business in a more direct manner. National laws relating to 'the times and places at which the goods . . .may be sold'[221] fall for consideration within this context. National rules concerning shop closing times have been regarded as selling arrangements. In *Criminal proceedings against Tankstation't Heukske vof and JBE Boermans*,[222] shop opening hours were restricted by Dutch law.[223] Exemptions[224] had been granted to the defendant's petrol stations on condition that goods sold related only to road travel.[225] The defendants opened their petrol stations in contravention of these restrictions.[226] Likewise in *Semeraro Casa Uno Srl and others v Sindaco del Comune di Erbusco and Others*,[227] national rules which concerned the closing times of shops were regarded as selling arrangements.[228]

However, it is arguable that the regulation of shop opening hours is more intrusive of business activity than is the advertising restriction. Whilst advertising restrictions may limit sale opportunities, shop opening hours impose restrictions on the time and the place in which goods are sold. The restriction on advertisements may close a sales opportunity; regulation of opening hours strikes at the ability to sell the product itself. During this period the selling arrangement applies where circumstances of sale were affected 'without distinguishing between the origin of the products . . . and [does] not affect the

[221] Joined cases C-401-402/92 *Criminal proceedings against Tankstation't Heukske vof and JBE Boermans* [1994] ECR I-2199 para 14.
[222] ibid.
[223] By Art 3 Winkelsluitingswet. (Act on Shop Closing) 1976. Joined cases C-401-402/92 [1994] ECR I-2199 para 3.
[224] Art 3(1) Decree 6 Dec 1977 as amended Decree 13 Dec 1988. Joined cases C-401-402/92 [1994] ECR I-2199 paras 3 and 4.
[225] To the petrol stations operated by the defendants.
[226] Without indicating opening hours and offered for sale a number of articles not linked to road travel in contravention of the national law.
[227] Joined Cases C-418-421, 460–2 and 464/93, C 9-11, 14–15, 23–4 and 332/94 *Semeraro Casa Uno Srl and others v Sindaco del Comune di Erbusco and Others* [1996] ECR I-2975.
[228] Italian Act 558 28 July 1971. Joined Cases C-418–21, 460–2, and 464/93, C 9–11, 14–15, 23–4, and 332/94 *Semeraro Casa Uno Srl and others v Sindaco del Comune di Erbusco and Others* [1996] ECR I-2975 para 28.

marketing of the products from other Member States in a manner different from that in which they affect domestic products'.[229] During the applicable period, the opportunity to sell all products, imports and exports alike, will be lost; however, the crucial factor is that there has been an equality of treatment as between the import and the export as regards *access* to the market.[230] In relation to shop opening hours, the question of even-handedness between import and domestic product remains one of fact.[231] The result is not always certain.[232] In another context, it was noted that the TV advertising in issue was the only method of advertising open to the plaintiff; the clear indication from the Court was that the measure should fall for consideration under Article 30 (now 28) EC.[233] So too, the regulation of shop opening hours must be handled with care, the even-handedness of the national measure is not a forgone conclusion. Where, for example, the trade is in perishables, would the restriction of business hours be even-handed with respect to market access in the context of the import? The issue is probably one of degree, but at the margins there are clear instances where such a restriction may evidently make it more difficult for the import to reach the point of sale at the appropriate time.[234] Adding this sort of finesse to the assessment of the affect of market access does little for certainty, but would represent a true reflection of the effect of the national law. The Court is prepared to consider the effect of a total ban in the context of advertising;[235] the same rationale could equally be applied in relation to national laws regulating the times and places in which goods are to be sold.

7. Market access and remoteness

The impact of a measure that applies equally to the import and to the domestic

[229] Joined cases C-401-402/92 *Criminal proceedings against Tankstation't Heukske vof and J.B.E Boermans* [1994] ECR I-2199 para 14.

[230] Joined Cases C-418-421, 460–2 and 464/93, C 9–11, 14–15, 23–4, and 332/94 *Semeraro Casa Uno Srl and others v Sindaco del Comune di Erbusco and Others* [1996] ECR I-2975 para 24.

[231] Determined at the national level; ibid paras 16 and 17.

[232] 'National legislation such as that at issue pursues an aim which is justified under Community law, and that national rules restricting the opening of shops on Sundays reflect certain choices relating to particular national or regional socio-cultural characteristics. It is for the Member States to make those choices in compliance with the requirements of Community law'. Joined Cases C-418–21, 460–2, and 464/93, C 9–11, 14–15, 23–4, and 332/94 *Semeraro Casa Uno Srl and others v Sindaco del Comune di Erbusco and Others* [1996] ECR I-2975 para 25.

[233] Joined Cases C-34/95–36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB and TV- Shop I Sverige AB* [1997] ECR I-3843 para 43.

[234] Particularly where long journey times are involved. Eg the import by road by the United Kingdom of soft fruit from Spain.

[235] Joined Cases C-34/95–36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB and TV- Shop I Sverige AB* [1997] ECR I-3843 paras 42–4.

product that is in the nature of a selling arrangement[236] will depend on whether the measure is 'direct, indirect, or purely speculative'.[237]

(a) Market access

In the context of the barrier to trade, the restriction on access to the market may de facto vary wildly, from 'the insignificant to a quasi prohibition'.[238] The jurisprudence since *Dassonville*,[239] through *Cassis de Dijon*[240] and *Keck and Mithouard*[241] has proceeded on the principle that undertakings engaged in lawful economic activities in Member States should have unfettered access[242] to the whole of the Community marketplace.[243] In *Keck and* Mithouard,[244] for example, the national rules in issue were held 'not by nature such as to prevent . . . access [of the import] to the market or to impede access any more that it impedes the access of domestic products'.[245]A law restricting the resale of goods at less than cost price is unlikely to have significant impact on the marketing as far as the import is concerned.[246] Had market access in that instance been restricted, the concept of the selling arrangement would have been unavailable and the French law would have been subject to Article 30 (now 28) EC scrutiny. By contrast, for example, in *Gourmet*,[247] the prohibi-

[236] Where the rules lay down requirements to be met by the goods, for example, relating to designation, form, size, weight, composition, presentation, labelling, and packaging. Case C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard*. [1993] ECR I-6097 para 15.

[237] Case C-169/91 *Council of the City of Stoke-Trent and Norwich City Council v B & Q plc* [1992] ECR 6635 para 15. See also Case C-69/88 *Krantz v Ontranger der Directe Belastingen* [1990] ECR 583 para 11, Case C-93/92 *CMC Mottorradcentre v Pelin Baskiciogullari* [1993] ECR I-5009 para 12. Advocate General Jacob in his Opinion in Case C-412/93 *Societé d'Importation Edouard Leclerc-Siplec v TFI Publicité SA and M6 Publicité SA* [1995] ECR I-179 para 45 used the description 'whether the effect of the measure is *direct or indirect, immediate or remote, or purely speculative*' [emphasis added].

[238] Advocate General Jacobs Case C-412/93 *Societé d'Importation Edouard Leclerc-Siplec v TFI Publicité SA and M6 Publicité SA* [1995] ECR I-179 para 45.

[239] An actual or potential impact. Case 8-74 *Procureur du Roi v Benoit Gustive Dassonville* [1974] ECR 837.

[240] Case 120/78 [1979] ECR 649.

[241] Case C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097.

[242] Unless there exists a valid reason for denial, in circumstances of the application of either Art 30 (ex 36) EC of the 'mandatory requirement'. Identified by Advocate General Jacobs (n 238) para 42.

[243] A potent Art 30 (now 28) EC without the constraints of the 'selling arrangement' would have achieved this aim, or at least extended the process of scrutiny to all trading rules imposed at the national level.

[244] Case C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097.

[245] ibid para 17.

[246] 'It has no significant effect on the global volume of imports and it does not prevent a trader in another Member State from enjoying full access to the market.' Advocate General Jacobs (n 238) para 48.

[247] Case C-405/98 [2001] ECR I-1795.

tion of *all* advertising was held liable to impede the access to the market of the import more than the domestic product,[248] and in *Ditlev Bluhme*[249] the Danish law was held to have 'a direct and immediate impact on trade'. [250] On the basis of the import's restricted market access in both *Gourmet*[251] and *Ditlev Bluhme*,[252] the national law was subject to Article 30 (now 28) EC scrutiny.[253]

(b) Remoteness

The issue of market access may also be determined on whether the effect of the national measure is considered too remote. If the hindrance to trade is considered 'too uncertain and indirect',[254] the national rules will be held compatible with Article 30 (now 28) EC. The issue of remoteness has arisen in the context of the selling arrangement. For example, an Italian law required shops to obtain a licence as a precondition to opening;[255] the supply of petroleum products was regulated by the State;[256] Italian vessels were required to carry costly equipment in relation to the transportation of chemical substances.[257] In all these instances, the effect of the measure on trade between Member States was considered too remote.[258] In consequence the national rules were held compatible with Article 30 (now 28) EC.

Whether in such circumstances the measure is considered to be a selling arrangement or the concept of remoteness is applied is in many ways is irrelevant to the final outcome of the judgment; the measure will fall outwith the scope of Article 30 (now 28) EC. In this context, the actual structure of the judgment appears to be one of form not substance, the end result is removal from Article 30 (now 28) EC scrutiny. However, such an assessment would be superficial. Recourse to the tool of *remoteness* as a factor to limit the application of the selling arrangement is not entirely without its problems. The appearance of the concept in this context can be likened to that of the introduction of a 'wild card' in a game of poker. There is some difficulty in the

[248] Case C-405/98 [2001] ECR I-1795 para 21. Likewise in Joined Cases C-34/95–36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB and TV-Shop I Sverige AB* [1997] ECR I-3843 para 42, the Court held 'it cannot be excluded that an outright ban, applying in one Member State, of a type of promotion for a product . . . might have a greater impact on products from other Member States'.

[249] Case C-67/97 [1998] ECR I-8033.

[250] ibid para 22.

[251] Case C-405/98 [2001] ECR I-1795.

[252] Case C-67/97 [1998] ECR I-8033.

[253] In both instances though, the measures were justified by recourse to Art 36 (now 30) EC.

[254] See, eg, Case C-69/88 *Krantz v Ontranger der Directe Belastingen* [1990] ECR 583 para 11. Case C-93/92 *CMC Mottorradcentre v Pelin Baskiciogullari* [1993] ECR I-5009 para 12.

[255] C-140-142/94 *DIP SpA v Comune di Bassano del Grappa et al.* [1995] ECR I-3257 para 3.

[256] Case C-134/94 *Esso Espanola SA v Comunidad Autonoma de Canarias* [1995] ECR I-4223 para 24.

[257] Case C-379/92 *Criminal proceedings against Matteo Peralta* [1994] ECR I-3453 para 23.

[258] By contrast the Court has held that the national legislation has a direct and immediate impact on trade. Case C-67/97 *Criminal Proceedings against Ditlev Bluhme* [1998] ECR I-8033 para 22.

assessment of when the Court will choose to play that card. The cause of certainty in the application of the concept of the selling arrangement is not helped. For example, in *DIP SpA v Comune di Bassano del Grappa et al*,[259] the effect of the precondition of a license to trade was held to be 'too uncertain and indirect'[260] in the context of hindrance to trade. 'But for' the issue of remoteness, the Italian law could have fallen within the concept of the selling arrangement. The consideration of the issue of remoteness is important in the context of the application of Article 30 (ex 28) EC as evidenced by *DIP SpA*,[261] however it remains unclear as to exactly wherein lies the boundary beyond which Article 30 (ex 28) EC shall not penetrate. The lack of transparency and objectivity in the judgments with respect to the application of the concept of remoteness has made it extremely difficult to predict with any precision the circumstances in which remoteness will feature as an issue in the future.[262] The effects on intra-Community trade may be indeed be 'too uncertain and indirect', but in *DIP SpA*[263] where the opening of a new shop was conditional upon the possession of a license, an opportunity for trade will have been lost completely where that license was not held. Likewise, in *Esso Espanola SA v Comunidad Autonoma de Canarias*, the obligation on wholesalers to supply a certain number of islands forming part of the territory of a Member State was held to be 'too uncertain and indirect' to affect trade between Member States.[264] Again no explanation was offered by the Court in respect of this conclusion.

By contrast to *DIP SpA*[265] and *Esso Espanola*,[266] in *Ditlev Bluhme*, a Dutch law, a national measure prohibiting the import of bees from other Member States onto part of a Dutch territory was held to have a 'direct and immediate impact on trade'.[267] The distinguishing feature here may be that the latter obligation is a negative requirement, whereas the obligation to supply petroleum in *Esso Espanola*[268] was positive in nature. Nevertheless, distinct factual similarities exist between the national measures identified. It remains not at all obvious why the two situations have been treated differently. The reality is that Article 30 (now 28) EC would not have applied whichever approach to the classification of the national measure had been adopted by the Court; that however is not the issue. Rather, what is at issue is that the finding that the

[259] C-140–142/94 [1995] ECR I-3257. [260] ibid para 29.
[261] ibid.
[262] Other than in the most obvious of circumstances, for example, a local authority by-law restricting market opening times in a provincial town.
[263] Case C-140, 141, and 142/94 [1995] ECR I-3257.
[264] Case C-134/94 [1995] ECR I-4223 at 4249.
[265] Case C-140-142/94 [1995] ECR I-3257.
[266] Case C-134/94 [1995] ECR I-4223.
[267] 'Not effects too uncertain and too indirect for the obligation which it lays down not to be capable of being regarded as being of such a kind as to hinder trade between Member States.' Case C-67/97 *Criminal Proceedings against Ditlev Bluhme* [1998] ECR I-8033 para 22.
[268] Case C-134/94 [1995] ECR I-4223 para 24.

measure has 'too uncertain and indirect' an effect on trade[269] will stultify any further enquiry either into the applicability of Article 30 (now 28) EC or the availability of the concept of the selling arrangement. It is possible to argue that the curtailment of detailed examination by the Court in this context represents a lost opportunity for explanation, development, and refinement of the concept of the selling arrangement. It is incumbent on the Court to explain its findings in these instances rather than merely to deem the measure to have too remote an effect on intra-Community trade. In the context of lost opportunities for explaining further the concept of the 'selling arrangement', it is particularly irritating where the presence of novel circumstances[270] would have otherwise dictated an elucidation and an enlightenment relating to the boundaries of the 'selling arrangement'. It is noted for example that Advocate General Fennelly in *DIP SpAl*[271] was of the opinion that if the measure in that judgment was to be 'regarded as being subject to scrutiny under Article 30 of the Treaty at all, [it] ought to be classified as a selling arrangement'.[272]

The equation of market access, of barriers to trade, is crucial in both the operation of Article 30 (now 28) EC and of the selling arrangement. The stirring in of the concept of remoteness, with its consequent ability to stultify enquiry and explanation with regard to the operation of the selling arrangement is not a welcome addition to the mix. There will be occasions where remoteness may truly be a factor in the equation of the application or otherwise of the selling arrangement. It would be helpful for clearer guidance to be offered by the Court as to the boundaries of the use of this concept, the use of which alone can negate any attempt at an assessment of market access. Unless this occurs, a suspicion may linger that opportunities are being lost for explanation and development of the concept.

[269] Note that in *Procureur du Roi v Benoit and Gustave Dassonville* [1974] ECR 837 para 5, the Court held that Art 30 (now 28) EC applies where the measure is '*capable* of hindering trade' [emphasis added]. This has a bearing on the question of remoteness. However, in the context of the *selling arrangement*, '[i]t can no longer be presumed that *every* national provision capable of hindering, directly or indirectly, actually or potentially, intra-Community trade falls within the scope of Article 30 EC.' Advocate General Gerven. Joined cases C-401-402/92 *Criminal proceedings against Tankstation't Heukske vof and J.B.E Boermans* [1994] ECR I-2199 para 24.

[270] Eg the requirement to obtain a license before a new shop could be opened. See C-140-142/94 *DIP SpA v Comune di Bassano del Grappa et al* [1995] ECR I-3257 para 3.

[271] C-140-142/94 *DIP SpA v Comune di Bassano del Grappa et al* [1995] ECR I-3257 at 3289–90.

[272] ibid para 71. It is noted that other attributes of the 'selling arrangement' were present. The Court held: 'The Italian Law makes no distinction according to the origin of the goods . . . that their purpose is not to regulate trade in goods with other Member States.' C-140–142/94 *DIP SpA v Comune di Bassano del Grappa et al* [1995] ECR I-3257 para 29.

IV. PARTICULAR ISSUES FOR CLARIFCATION

A. Market access and the 'similar' product

An equality of treatment with respect to market access of the import and the domestic product is crucial to the selling arrangement. It is an assessment however that may not be straightforward. Into such an examination has been stirred the concept of the 'similar product'. In *Semeraro Casa*[273] the Court held

> that national rules whose effect is to limit the marketing of a product generally, and consequently its importation, cannot on that ground alone be regarded as limiting access to the market for those imported products to a greater extent than for *similar* national products [emphasis added].[274]

It is unclear what is meant by the concept of the similar product in this context, though it is evident that enquiry into the product market at the national level is to be more subtle than a 'like for like' basis. A market assessment in relation to discriminatory taxation[275] for example includes a concept of the similar product. In that context, the concept has been extended to enquiry as to whether the products 'have similar characteristics and meet the same needs from the point of view of consumers . . . not according to whether they are strictly identical but whether there use is similar or comparable'.[276] This necessarily involves an in-depth analysis of the marketplace. The enquiry is subtle, an attempt to reflect accurately the extent of the marketplace with respect to that particular product. Though in this respect any attempt to make a meaningful comparison between the import and domestic product in this context is to be welcomed, the task of assessment may be inherently more difficult for the importer than it is for the producer of the domestic product. As a consequence it is more difficult the importer to judge whether the application of Article 28 (now 30) EC is appropriate in the first instance.

It is unclear at the time of writing whether or not the term 'similar product'[277] is to have a meaning reflective of that used in the context of Article 90 (ex 95) EC.[278] An approach akin to that taken in *Commission v Denmark*[279] would be eminently appropriate in the present context. In an assessment of the

[273] Joined Cases C-418–21, 460–2, and 464/93, C-9–11, 14–15, 23–4, and 332/94 *Semeraro Casa Uno Srl and others v Sindaco del Comune di Erbusco and Others* [1996] ECR I-2975.
[274] ibid para 24.
[275] 'No Member States shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on *similar* domestic products' [emphasis added]. Art 90 (ex 95) EC.
[276] Case 106/84 *Commission v Denmark* [1986] ECR 833 para 12. Note also the concept of the 'relevant product market' for purposes of Art 82 (ex 86) EC in the context of European Community Competition law.
[277] In the context of the *selling arrangement*, the concept of the 'similar product' was introduced in case C-391/92 *Re Milk Imports: EC Commission v Greece* [1995] ECR I-1621 para 18.
[278] Above.
[279] Case 106/84 *Commission v Denmark* [1986] ECR 833.

marketplace, the introduction of the concept of the similar product is important, it has widened the benchmark, injected an element of objectivity into the process of comparison. That the product market is not confined to a like for like basis is an attempt to reflect reality. A marketplace rarely operates in product isolation; it would be unusual for a market to be composed of single product items for which there is a high inelasticity of demand.[280]

B. General v Specific obligation

In the context of the packaging of products, a distinction in treatment in relation to the selling arrangement has been forged distinguishing the type of obligation arising from the national measure. The measure imposing a *general* obligation will be capable of treatment as a selling arrangement,[281] those that impose a *specific* obligation will continue to fall within the scope of Article 28 (ex 30) EC. The distinction was first made in *Sapod Audic v Eco-Emballages SA*.[282] Under French law[283] producers and importers were obliged to identify packaging in the context of disposal and recovery of packaging waste. The legislation did not establish 'an obligation to apply a mark or label . . . only a *general* obligation to identify the packaging collected for disposal' [emphasis added].[284] What was novel was the drawing of a distinction as to the nature of the obligations arising from the national measure. The *general* obligation 'does not relate as such to the product or its packaging, . . . [it] does not, of itself, constitute a rule laying down requirements to be met by goods'.[285] Whilst the general obligation may be considered a selling arrangement,[286] it was held that the measure imposing a specific obligation will fall for scrutiny within the scope of Article 28 (ex 30) EC.[287]

[280] An example of a marketplace wherein demand would arguably remain constant whatever the product price would be that for the Manchester United football strip and probably the England football strip. Such high inelasticity of demand would however be a relatively unusual occurrence. Even if demand inelasticity has been attained in a particular marketplace, such status is not absolute, it is subject to fluctuation. For example, could demand for the England football strip after the result of European Cup Competition 2004 be maintained at an inelastic level [assuming that had been achieved in the first instance]?

[281] Provided of course that the relevant conditions are met for exemption from the scope of application of Art 28 (ex 30) EC, that the provision 'applies to all relevant traders operating within the national territory and that it affects in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States'. Case C-159/00 *Sapod Audic v Eco-Emballages SA* [2002] ECR I-5031 para 73.

[282] Case C-159/00 *Sapod Audic v Eco-Emballages SA* [2002] ECR I-5031.

[283] Art 4 Decree No 92-377. Case C-159/00 *Sapod Audic v Eco-Emballages SA* [2002] ECR I-5031 para 8.

[284] Case C-159/00 *Sapod Audic v Eco-Emballages SA* [2002] ECR I-5031 para 71.

[285] ibid para 72. See also Case C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097 para 15.

[286] It is for the national courts to verify that the relevant conditions under Case C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097 para 16 are met.

[287] The obligation can be regarded as a barrier to trade as it is imposed by a Member State. Case C-159/00 *Sapod Audic v Eco-Emballages SA* [2002] ECR I-5031 para 74.

Analysis of the type of obligation imposed by the national measure is a refinement which conceivably may limit the scope of Article 28 (ex 30) EC. A measure imposing a general obligation is removed from Article 28 (ex 30) EC scrutiny,[288] future national legislation may be drafted so as to escape the scrutiny of Community free movement of goods law. Undoubtedly, the judgment in *Sapod Audic*[289] is technically correct.[290] Article 30 (now 28) EC[291] applies only to measures imposed at the national level, the obligation to affix the 'Green Dot' logo to the packaging arose from a contractual agreement. It is an agreement that could not be regarded as a barrier to trade, since a Member State had not imposed it.[292] Yet the agreement between the individual parties would not have existed 'but for' the provision of national law.[293] Is *Sapod Audic*[294]a triumph of form over substance? Is the transmutation of the specific[295] into the general in terms of obligation, sufficient to render nugatory the application of Article 28 (now 30) EC? It may be argued that to identify obligations imposed at the national level as being in nature either specific or general is unnecessary. It imposes a level of sophistication into the process of enquiry with respect to the national measure that had hitherto not been apparent. At the present time it is unclear if this approach to enquiry is to be repeated only with respect to the scrutiny of the packaging measure, or to be adopted in a context wider than those measures. There is a danger that the weapon of Article 28 (ex 30) EC used in the fight against national practices restrictive of trade may be rendered less effective. It is arguable that a considered approach would instead seek to achieve a balance between free trade and the respect for national preferences. It would seem that the division between the specific and the general in terms of obligation that occurred in *Sapod Audic*[296] fails to achieve this balance. To allow such a distinction to exist renders the scrutiny of national measures hanging by the slender thread relating to the type of obligation imposed at the national level. On a practical level,

[288] Case C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097 para 16. 'Those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.'

[289] Case C-159/00 *Sapod Audic v Eco-Emballages SA* [2002] ECR I-5031.

[290] A private contract is not a barrier to trade between Member States. Case C-159/00 *Sapod Audic v Eco-Emballages SA* [2002] ECR I-5031.

[291] 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between *Member States*' [emphasis added].

[292] See Case C-159/00 *Sapod Audic v Eco-Emballages SA* [2002] ECR I-5031 para 74.

[293] It had been made in pursuance of Art 4, Decree No 92-377. See Case C-159/00 *Sapod Audic v Eco-Emballages SA* [2002] ECR I-5031 para 74.

[294] Case C-159/00 *Sapod Audic v Eco-Emballages SA* [2002] ECR I-5031.

[295] 'Since the obligation to identify the packaging prescribed by [national law] does not seem to imply an obligation to mark or label that packaging, that obligation does not appear necessarily to refer to the product or its packaging as such.' Case C-159/00 *Sapod Audic v Eco-Emballages SA* [2002] ECR I-5031 para 30. The Court however noted that it is for the national court to interpret national law under Art 234 EC para 31.

[296] Case C-159/00 [2002] ECR I-5031.

the distinction between the general and the specific in terms of the obligation imposed could be rather fine, giving rise to uncertainty, even inconsistency, in interpretation at the national level.

In the cause of consistency, it is arguable that the Court in *Sapod Audic*[297] ought to have maintained the approach adopted in *Commission of the European Communities v Kingdom of Spain*.[298] In the latter judgment, in the context of requirements relating to labelling and packaging of cocoa and chocolate products, it was held that 'the need to *alter* the packaging or the labelling of imported products *prevents* such requirements from being selling arrangements' [emphasis added].[299] It 'may compel the traders concerned to adjust the presentation of their products according to the place where they are marketed and consequently to incur additional packaging costs'.[300] *Any* alteration to packaging, any adjustment to presentation, would have the same effect, an obstruction to intra-Community trade.[301] A similar approach adopted in *Sapod Audic*[302] would have translated to the same fate, Article 28 (ex 30) EC. scrutiny. In that instance, the subdivision in the type of obligation imposed, identification as either general or specific would then not have been necessary.

Recently, a variant on *Commission of the European Communities v Kingdom of Spain*[303] has been introduced in which the circumstances of alteration in the product's packaging can be accounted for in the assessment of the applicability of the selling arrangement.[304] Without specifically identifying that the national measure was a selling arrangement, *Tommaso Morellato v Comune di Padova*[305] the Court held that 'the requirement for prior packaging, since it *relates only to . . . marketing . . .* is in principle such as to fall outside Article 30 of the Treaty' [emphasis added].[306] In *Morellato*[307] the production process, the baking of the bread, was incomplete at the time of import from France, 'The relevant question is whether the requirement for prior packaging . . . makes it necessary to alter the product in order to comply.'[308] The measure was held by the Court to relate only to marketing; in consequence it fell outside the scope of Article 30 (now 28) EC.[309]

[297] ibid.

[298] Case C-12/00 [2003] ECR I-459. See also Case C-33/97 *Colim NV v Bigg's Continent Noord NV* [1999] ECR I-3175 para 37.

[299] Case C-12/00 [2003] ECR I-459 para 76.

[300] ibid para 80.

[301] See Case C-12/00 *Commission of the European Communities v Kingdom of Spain*. [2003] ECR I-459 para 80. Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Koln e. V v Mars Gmbh* [1995] 1-1923 para 13.

[302] Case C-159/00 [2002] ECR I-5031.

[303] Case C-12/00 [2003] ECR I-459.

[304] The Court reiterated that the need to *alter* the product packaging or the labelling prevents the national requirement from constituting a 'selling arrangement'. Case C-416/00 *Tommaso Morellato v Comune di Padova*. Judgment of 18 Sept 2003, not yet published, para 29.

[305] Case C-416/00. Judgment of 18 Sept 2003, not yet published.

[306] 'Provided that it does not in reality constitute discrimination against imported products.' Case C-416/00, ibid para 36.

[307] ibid.

[308] ibid para 36.

[309] ibid para 36.

What is worthy of some comment is that in *Morellato*,[310] the production process was not yet finished at the time of import—the baking of the bread imported from France had yet to be completed before marketing the bread in Italy. This is a recognition that as long as the national measure truly relates to marketing, it matters not that the products are in an unfinished state. This 'simple transformation' of the goods after import does not alter the nature of what has been identified as a marketing measure. This seems logical in the overall context of the requirement that a need to alter the product precludes application of the selling arrangement. Products may well be imported in an unfinished or unprocessed state. Where this is so, the transformation of the product after importation should not change the nature of a marketing rule.[311] *Morellato*[312]is a sensible recognition by the Court of Justice that marketing rules apply across the spectrum, the de facto stage of production of particular products is irrelevant in this context.

V. CONCLUSIONS

During the 10 or so years since the introduction of the selling arrangement in *Keck and Mithouard*,[313] there has been much analysis of that concept by academic writers.[314] So too, the Opinions of the Advocates-General in the Court of Justice have contributed in large part to that analysis.[315] Neither has the jurisprudence of the Court of Justice been static in this respect. In accentuating the positive with respect to the selling arrangement it should be remembered that its attributes, the criteria for application of the selling arrangement as identified in *Keck and Mithouard*,[316] remain unaltered. Those attributes have been a constant; subsequent jurisprudence has explained and applied them. In the first instance, for example, it was unclear that the concept would

[310] ibid.

[311] In instances wherein there has been no discrimination against the imported product.

[312] Case C-416/00. Judgment of 18 Sept 2003, not yet published.

[313] Case C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097.

[314] See, eg, S Weatherill 'After Keck: Some thoughts on how to clarify the clarification' (1996) 33 CMLR 885–906; C Barnard 'Fitting the remaining pieces into the goods and persons jigsaw?' (2001) 26 ELRev 35-59; P Koutrakos 'On Groceries, Alcohol and Olive Oil: More on Free Movement of Goods After Keck' (2001) 26 ELRev 291–407; N Nic Shuibhne 'The Free Movement of Goods and Art 28 EC: An evolving framework' (2002) 27 ELRev 408–25.

[315] Eg Mr Van Gerven. Joined cases C 401-402/92 *Criminal proceedings against Tankstation't Heukske vof and J.B.E Boermans* [1994] ECR I-2199 at 2201. Mr Francis Jacobs. Case C-412/93 *Societe d'Importation Edouard Leclerc-Siplec v TFI Publicite SA and M6 Publicite SA* [1995] ECR I-179 at 182. Joined Cases C-34/95-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB and TV- Shop I Sverige AB* [1997] ECR I-384 at 3847. Mr Tesauro. Case C-368/95 *Vereinigte Familiapress Zeitungsverlags-und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689 at 3714.

[316] Case C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097.

apply to the advertisement.[317] From the current perspective, that view seems now seems difficult to countenance.

Basic rules that precondition the existence of a selling arrangement have been established by the Court of Justice. The national measure must apply to the import and to the domestic product without distinction; it must not involve the characteristics of the products. The concept of the selling arrangement has encroached into areas of business activity, national preferences with respect to the closing hours of shops have been respected. In this respect, the selling arrangement is being moulded into a tool capable of achieving a fine balance between free trade and respect for national traditions and practices. It is not a marketplace of homogeneity that is to be created, but one where the Member State brings its own benefits and traditions to that market. The concept of the 'selling arrangement' is reflective of a mature view of the marketplace and it recognizes that it may even be detrimental to free trade to ignore traditional differences that exist at the national level with respect to the circumstances in which trade is conducted.

There has been some perceptive application of the selling arrangement by the Court of Justice in relation, for example, to advertising and issues relating to general trading conditions such as shop opening hours. Those measures are not directed at the product itself; it is proper that they are not then subject to Article 28 (ex 30) EC scrutiny. A greater clarity of application in the concept of the selling arrangement with respect to these matters has emerged during the last 10 or so years since the judgment of *Keck and Mithouard*.[318] However, with respect to the circumstances of other applications for the selling arrangement the jurisprudence has been rather less helpful. When for example will the hindrance to trade be regarded as being 'too uncertain and indirect'? So too in the assessment of 'market access' for example, the concept of the *similar* product has been a refinement that may be more reflective of reality: it is however an assessment the importer will in all probability find more difficult to attempt.

It seems that the jurisprudence in relation to the selling arrangement has maintained the boundaries established by *Keck and Mithouard*,[319] There is arguably one exception to this. It is surprising that *Sapod Audic v Eco-Emballages SA*[320] chose to make a distinction in the *type* of obligation imposed by the national measure. This would appear to be a retrograde step, where a slight of hand at the national level now seems all that is necessary to remove the measure from Article 28 (ex 30) EC scrutiny. The judgment has wide consequences, wider than the packaging laws of the case concerned. It is

[317] See Advocate General Jacobs. Case C-412/93 *Societé d'Importation Edouard Leclerc-Siplec v TFI Publicité SA and M6 Publicité SA* [1995] ECR I-179 para 37.
[318] Case C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097.
[319] ibid.
[320] Case C-159/00. [2002] ECR I-5031.

a judgment needing clarification by the Court of Justice; at present it has shifted the balance too much in favour of the legislature of the Member State. The important balance between achieving free trade and respecting national preferences is out of kilter.

The last 10 years or so has seen the Court of Justice add flesh to the skeletal bones. During that time, a process of fashioning the selling arrangement into an accessible tool capable of identifying the limits to the scope of Community free movement of goods law has occurred as if almost by osmosis. The process of exposition and conceptual refinement started in *Hünermund*[321] by the Court of Justice as yet appears incomplete. The more practical view is that in the selling arrangement, a living organism was created. Its boundaries are not fixed. In the subsequent jurisprudence the Court of Justice has never used prerequisites other than those laid down in *Keck and Mithouard*.[322] Though the basic application of the selling arrangement has become clear, there is an inherent ability to manipulate it to changing circumstances. Why should the concept of the selling arrangement be capable of precise definition? The latter may indeed be the pertinent question. That the concept arose in the first place was in response to '*[t]he increasing tendency of traders to invoke Article 30 of the Treaty* as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States' [emphasis added].[323] If the advent of the selling arrangement has imbued an enforced circumspection among traders, a wariness to use the national courts with respect to Article 28 (ex 30) EC issues, then the rationale for its introduction identified in *Keck and Mithouard*[324] may well be justified.

[321] Case C-292/92 [1993] ECR I-6787.
[322] Case C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097.
[323] ibid para 14.
[324] ibid.

Appendix 3

iv. '*Trade Mark Protection: Market Partitioning. Objective Test Imported where Trade Mark Replaced'*, L.M.C.L.Q. 301 – 308

TRADE MARK PROTECTION AND MARKET PARTITIONING

L.M.C.L.Q 301-308

1. *Pharmacia & Upjohn SA, formerly Upjohn SA* v. *Paranova A/S* (Case C-379/97) (12 October 1999) Unreported.

301 *Pharmacia & Upjohn* v. *Paranova*
The recent judgment of the European Court of Justice in *Pharmacia & Upjohn* v. *Paranova* 1 provides clarity with respect to the application of the concept of market 302 partitioning in Community trade mark law in the context of assertion of trade mark rights. Goods had been marketed by the trade mark holder throughout the European Community under a number of differing trade marks. Action was taken to prevent a parallel importer replacing the trade mark used in the state of purchase with the mark used by the holder in the state of sale. The court held that an objective element is to be imported in the test of artificial partitioning of the market between Member States. Reliance by the trade holder in such circumstances would contribute to partitioning of the markets between Member States.

Introduction

The specific purpose of a trade mark is to guarantee the trade mark proprietor "the exclusive right to use that trade mark for the purpose of putting the product on the market for the first time…to protect…against competitors wishing to take advantage of the status and reputation of the trade mark by selling products which bear it unlawfully".2 The trade mark acts as a guarantee of the origin of the goods, that they have not been tampered with in the marketing process without the consent of the trade mark holder.3

With respect to the free movement of goods within the European Community, EC, Art. 28 provides "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States".4 In circumstances of trade mark reliance, the prevention by the trade mark holder of the importation and sale of goods that have been lawfully placed on the market, by or with the trade mark owner's consent would amount to a "quantitative restriction" or a "measure having equivalent effect" within the meaning of EC, Art. 28.5 In *Pharmacia & Upjohn* v. *Paranova* the ECJ was concerned with

the application of the provisions relating to the free movement of goods in the context of trade mark rights.

In the context the exercise of trade mark rights and the application of EC, Art. 306 the ECJ developed the principle of the exhaustion of rights.7 The court has been consistent, the right in the trade mark could not be invoked "in order to prevent the importation and sale of goods which had been placed on the market with his consent in another Member State".8

2. *Hoffman-La Roche* v. *Centrafarm (Case 102/77)* [1978] ECR 1139; [1978] 3 C.M.L.R. 217 (para. 15); *Bristol Myers Squibb and Others* v. *Paranova (Cases C-427/93, C-429/93 and C-436/93)* [1996] I ECR 3457.
3. "In such a way as to affect the original condition of the product." *Hoffman-La Roche* v. *Centrafarm (Case 102/77)* [1978] ECR 1139; [1978] 3 C.M.L.R. 217 (para. 16); *Bristol Myers Squibb and Others* v. *Paranova (Cases C–427/93, C–429/93 and C–436/93)* [1996] I ECR 3457 (para. 15).
4. *ex* EC, Art. 30.
5. *Ibid.*
6. *ex* EC, Art. 36. The applicable part of EC Art. 30 is the justification based on the grounds of "the protection of industrial and commercial property".
7. The early cases of *Centrafarm BV* v. *Winthrop BV (Case 16/74)* [1974] ECR 1183; 2 C.M.L.R. 480; and *Hoffman-La Roche* v. *Centrafarm (Case 102/77)*[1978] ECR 1139; [1978] 3 C.M.L.R. 217.
8. Judgment, para. 22. See *Centrafarm BV* v. *Winthrop BV (Case 16/74)* [1974] ECR 1183, 1194–1195; 2 C.M.L.R. 480.

The principle of the exhaustion of trade mark rights is now enshrined in legislation. Directive 89/104,9 Art. 7(1) provides "1. The trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent. 2. Paragraph 1 shall not apply where there exists legitimate reasons for the proprietor to oppose further commercialisation of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market".

In circumstances wherein the parallel importer has repackaged and reaffixed the trade mark to products before placing the goods on the market in a Member State the ECJ has held in *Bristol Myers Squibb and Others* v. *Paranova A/S* 10 that the proprietor of the mark who seeks to oppose this action has recourse to the justifications provided by EC, Art. 30.11 EC, Art. 30 provides justification on "the protection of industrial and commercial property".12

It is clear from *Bristol Myers Squibb* that EC, Art. 30 justification is available where reliance on the trade mark is sought in circumstances of repackaging and reaffixing of the trade mark. However, EC, Art. 3013 further provides: "Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."14 In *Bristol Myers Squibb* the ECJ held that trade mark reliance may constitute a "disguised restriction" under EC, Art. 3015 if the proprietor, "having regard to the marketing system which he has adopted, will contribute to *the artificial partitioning of the markets between Member States".* 16 Reliance on trade mark rights would contribute to the partitioning of markets between Member States "in particular where the owner has placed an identical…product on the market in several Member States in various forms of packaging".17

In *Bristol Myers Squibb* the parallel importer had repackaged the imported product and reaffixed the original trade mark. By contrast, in *Pharmacia & Upjohn,* the parallel importer had replaced the original trade mark used by the proprietor in the Member State of export by the trade mark which the proprietor used in the Member State of import. The reference from the national court18 in *Pharmacia & Upjohn* raised two

issues. First was the appropriate measure by which trade mark rights in such circumstances were to be assessed. Was that to be Directive 89/104,19 and/or EC, Arts 28 and 30? The second issue arising concerned the use by the trade mark proprietor of different marks in the Member State in which the importer had purchased the product from that in which the importer sells the product. In the assessment of whether the markets have been artificially

9. Council Directive 89/104 EEC of 21/12/88. [1989] O.J. L 040, 0001–0007.
10. *Bristol Myers Squibb and Others* v. *Paranova (Cases C-427/93, C-429/93 and C-436/93)* [1996] I ECR 3457.
11. *ex EC* Art. 36.
12. EC Art. 30 (*ex* EC Art. 36) first sentence.
13. *ex* EC, Art. 36.
14. *Ibid.,* second sentence.
15. *ex EC,* Art. 36.
16. *Bristol Myers Squibb and Others* v. *Paranova (Cases C-427/93, C-429/93* and *C–436/93* [1996] I ECR 3457, 3533 (emphasis added).
17. *Ibid.,* 3533.
18. The Sø-og Handelsret.
19. Council Directive 89/104 EEC of 21/12/88 [1989] O.J.L 040, 0001–0007.

partitioned by the trade mark proprietor, could account either be taken of objective circumstances or circumstances subjective to the proprietor?

Two parallel approaches existed with respect to the assessment of market partitioning. In *Centrafarm* v. *American Home Products,* 20 the trade mark had been replaced. In a situation comparable to *Pharmacia & Upjohn* the court in *Centrafarm* stated that defeat for the trade mark owner would occur where the use of the different marks was "a practice to be followed…as *part of a system of marketing intended to partition the markets artificially* ".21 This test imports a subjective element on the part of the trade mark holder.

By contrast, in *Bristol Myers Squibb,* the concept of "artificially partitioning the markets between Member States" had imported an objective element.22 The court adopted "new criteria"23 in respect of determining the scope of the importer's right to repackage. In *Bristol Myers Squibb* the trade mark had been reaffixed. The ECJ held that "the use of the words artificial partitioning of the markets does not imply that the importer must demonstrate that, by putting an identical product on the market in varying forms of packaging in different Member States, the trade mark owner deliberately sought to partition the markets between Member States. By stating that the partitioning in question must be artificial, the…owner of a trade mark may always rely on his rights…to oppose the marketing of repackaged products when such action is justified by the need *to safeguard the essential function of the trade mark,* in which case the resultant partitioning could not be regarded as artificial".24

In *Bristol Myers Squibb* the ECJ deliberately rejected the notion of intention as an element integral to the test to be applied in establishing whether the markets had been artificially partitioned. In that case, the trade mark product had been repackaged. In *Pharmacia & Upjohn,* the trade mark had been replaced. The reference from the national court25 in *Pharmacia & Upjohn* had raised the question of the scope of the parallel importer's right to change the trade mark. Ought the criteria as adopted in *Bristol Myers Squibb* be extended so as to determine the rights of the parties in *Pharmacia & Upjohn* ? 26

The facts

The Upjohn group of companies marketed an antibiotic, clindamycin, in a variety of forms.27 Within the European Community, the antibiotic was marketed under the trade mark "Dalacin C". However, in Denmark, Germany and Spain clindamycin was marketed

20. *(Case 3/78)* [1978] ECR 1823; [1979] 1 C.M.L.R. 326.
21. *(Case 3/78)* [1978] ECR 1823, 1841; [1979] 1 C.M.L.R. 326 (emphasis added).
22. See also *Hoffman-La Roche* v. *Centrafarm (Case 102/77)* [1978] ECR 1139; [1978] 3 C.M.L.R. 217.
23. As described by the Advocate General: para. 35.
24. *Bristol Myers Squibb* [1996] I ECR 3457, 3536 (emphasis added).
25. The Sø-og Handelsret.
26. That issue had arisen in *Pfizer* v. *Eurim-Pharm (Case 1/81)* [1982] ECR 2913; [1982] 1 C.M.L.R. 406. However, the ECJ did not rule on that aspect of the case.
27. The subject of the present action was the sale of clindamycin that had been sold both in capsule form and as injection fluid.

under the name “Dalacin”. In France, Upjohn marketed the drug under the name “Dalacine”.28

Paranova,29 a Danish company, purchased clindamycin capsules in France.30 The company also purchased injection phials of clindamycin in Greece. Paranova then repackaged the goods before marketing them under the trade mark “Dalacin”. It was the parallel importation of goods manufactured by Upjohn and the subsequent sale by Paranova of those goods in Denmark under an Upjohn trade mark that gave rise to the present dispute.

Upjohn applied for an injunction before the national court in Denmark.31 The application sought to prevent Paranova from marketing clindamycin in that State under the “Dalacin” trade mark. That application was dismissed. The decision was reversed on appeal by the Østre Landsret32 and the application for an injunction was granted. Subsequent proceedings were held in Denmark to confirm that injunction.33 It was in those proceedings before the Sø-og Handelsret that the instant reference to the ECJ was made. In support of the injunction, Upjohn argued that the use of different trade marks in Greece, France and Denmark with respect to the marketing of clindamycin could be justified objectively in Community law. Paranova argued that, since in reality Upjohn had used the same trade mark, in consequence, the trade mark rights of Upjohn had been exhausted. In the alternative, Paranova submitted that the marketing arrangements operated by Upjohn had artificially partitioned the market.34

The judgment

The judgment in *Pharmacia & Upjohn* involved two main considerations. The first was whether the opposition of Upjohn, the trade mark proprietor, to the action of the parallel importer was to be assessed by reference to Art. 7 of Directive 89/10435 or to EC, Arts 28 and 30.36 Secondly, a clarification of the constituent elements involved in the concept of market partitioning. Was the approach adopted by the ECJ in *Bristol Myers Squibb* 37 to be

28. The existence of the differing trade marks is explained by an agreement concluded in 1968 between the Upjohn Group and American Home Products Corporation. It was an agreement whereby the latter agreed not to object to the use by the Upjohn Group of the trade mark "Dalacin" in Uruguay. In return, the Upjohn Group agreed to restrict the use of the trade mark "Dalacin" to the form "Dalacin" with the addition of the letter C or with other additions. However, in a number of countries, the Upjohn Group experienced difficulties in securing the registration of the trade mark "Dalacin C". As a result, American Home Products authorized Upjohn to use the trade mark "Dalacin" in those countries. See the judgment, para. 7.
29. Belonging to the Paranova Group.
30. In France, clindamycin capsules had been sold by Upjohn in packets of 100.
31. The Fogedret (Bailiff s Court) in Ballerup.
32. Eastern Regional Court.
33. Before the Sø-og Handelsret.
34. Paranova's primary argument before the Sø-og Handelsret was that the different trade marks used by Upjohn in Greece, France, and Denmark in reality constituted the same trade mark. As a result, it argued that the trade mark rights of the Upjohn Group had been exhausted. It argued that the marketing system operated by Upjohn contributed to artificial partitioning of the market. See the judgment, para. 10.
35. *Supra,* fn, 9.
36. *ex* EC, Arts 30 and 36.
37. [1996] I ECR 3457.

preferred to that of *Centrafarm* v. *American Home Products* with respect to instances of replacement of the trade mark?

Dispensing first with the issue of the application of either the statutory provisions of the Directive or Arts 30 and 36,38 the ECJ held that, where the proprietor of the trade mark had used different trade marks in different Member States,39 it was "in the light of Article 36 of the Treaty that the legality of the trade mark proprietor's opposition to the replacement of the trade mark falls to be assessed".40

The judgment in *Pharmacia & Upjohn* was primarily concerned with establishing an approach to the assessment of market partitioning. The court held: "The condition of artificially partitioning of the markets between Member States, as defined by the Court in *Bristol Myers Squibb* applies where a parallel importer *replaces* the original mark by that used by the proprietor in the Member State of import".41 The test with respect to assessment of market partitioning provided in *Bristol Myers Squibb* imports an objective element. In *Bristol Myers-Squibb* the ECJ held that reliance on trade mark rights to oppose the actions of the parallel importer "*would contribute to* the partitioning of markets between Member States"42 in circumstances in which the trade mark had been reaffixed. In previous instances involving trade mark replacement, the assessment of market partitioning had involved a subjective element. In *Centrafarm* 43 in a situation comparable to *Pharmacia & Upjohn,* the court held that the use of different trade marks by the proprietor may be a practice followed "as part of a system of marketing intended to partition the markets artificially".44 This imports a subjective element in the equation of market partitioning. To the extent that the judgment in *Pharmacia & Upjohn* has replaced the subjective with the objective, the judgment has served to clarify the position with respect to assessment of market partitioning. Regardless of whether the parallel importer has replaced or reaffixed the trade mark, integral to the assessment of market partitioning is now an objective element. Where the trade mark has been replaced, the approach adopted in *Centrafarm* with respect to market partitioning is no longer good law.

The condition of market partitioning as formulated in *Bristol Myers Squibb* and its application in the context of trade mark replacement

implies that an act of replacement must be "objectively necessary".45 This condition is satisfied if "the prohibition imposed on the importer against replacing the trade mark *hinders effective access* to the markets of

38. Now EC, Arts 28 and 30 respectively.
39. In Denmark, France and Greece, the Upjohn Group had marketed clyndamycin-based pharmaceutical products under different trade marks: Judgment, para. 29.
40. Judgment, para. 29. "It is clear that the answer to the questions referred will in any event be the same whether the issue is analysed by reference to the Treaty provisions or Article 7", Advocate General's Opinion, para. 17.
41. Judgment, para. 40 (emphasis added). "It is clear that the answer to the questions referred will in any event be the same whether the issue is analysed by reference to the Treaty provisions or Article 7", Advocate General, para. 17.
42. *Bristol Myers Squibb* v. *Paranova* [1996] I ECR 3457, 3534 (emphasis added).
43. *Supra,* fn. 20.
44. [1978] ECR 1823, 1841; [1979] C.M.L.R. 326.
45. It is for the national courts to determine whether in each instance this condition has been met: Judgment, para. 45.

the importing Member State".46 It is a condition which will not be satisfied where the replacement of the trade mark "is explicable solely by the parallel importer's attempt to secure a commercial advantage".47

Comment

First there was disparity, now there is uniformity. As regards application of the concept of market partitioning in the context of reliance on trade mark rights, the ECJ in *Pharmacia & Upjohn* has chosen the new over the old, the objective over the subjective. Insofar as the adoption of the condition of artificial partitioning of the markets as defined in *Bristol Myers Squibb* is concerned, the judgment in *Pharmacia & Upjohn* provides a welcome clarification of the court's approach to assessment of the condition of market partitioning. Whether it be trade mark replacement or reaffixing of the mark, the assessment of the proprietor's right will now encompass an objective element.
After *Pharmacia & Upjohn,* the apparent test of intent to partition the markets as laid down in*Centrafarm,* incorporating a subjective element, is now no longer good law.

What effect then will the stirring into the pot of market intention of an element of objectivity have in instances of replacement of the trade mark? In the first instance, it will be more difficult for the trade mark holder to rely successfully on trade mark rights.
In *Centrafarm* circumstances subjective to the trade mark holder were accounted for in the equation of assessment of the *de facto* use of different trade marks. Following *Pharmacia & Upjohn,* that approach has now been jettisoned. For the trade mark holder, however, an objective measurement may prove a far higher hurdle to overcome in the attempt to seek reliance on trade mark rights. Successful reliance on the trade mark will encompass reference to circumstances prevailing at the time of marketing, making it necessary for the parallel importer to replace the trade mark. Secondly, there is a practical advantage in the imposition of the criteria as formulated in *Bristol Myers Squibb.* As identified by the ECJ,48 the importation of the objective element "does not require national courts to assess evidence of intention, which is notoriously difficult to prove".49 In *Bristol Myers Squibb,* Jacobs, AG, had argued that the "parallel importer who wishes to repackage goods

needs to be able to determine with a reasonable degree of certainty whether he may lawfully do so. The legality of his conduct *should not depend on the subjective intentions of another person* ".50The forcefulness of this argument is clear, uncertainty will reign where the rights of the parallel importer are allowed to hinge upon an accident of fact, the mere cosmetic difference between repackaging the goods and replacement of the trade mark.51 The solution adopted by the ECJ in *Pharmacia & Upjohn* is practical, an objective

46. Judgment, para. 43: "That would be the case if the rules or practices in the importing Member State prevent the product in question from being marketed in that State under its trade mark in the exporting Member State. This is so where a rule for the protection of consumers prohibits the use, in the importing Member State, of the trade mark used in the exporting Member State on the ground that it is liable to mislead consumers."
47. Judgment, para. 44.
48. Judgment, para. 41. Also noted by Advocate General F.G.Jacobs, Opinion, paras 40–42.
49. Judgment, para. 41.
50. *Bristol Myers Squibb* [1996] I ECR 3457, 3495 (emphasis added); referred to in *Pharmacia & Upjohn,* Opinion, para. 40.
51. A point made with some force by Advocate General F.G.Jacobs, Opinion, para. 41.

assessment,52 yet one that retains a flexibility to account for evidence of an *intention* 53 that the use of differing trade marks should partition the market.54

The judgment in *Pharmacia & Upjohn* is evidence of the continued support shown by the ECJ for furthering the concept of the free movement of goods in Community law and for free trade in general. In the context of *Pharmacia & Upjohn,* the effect of that support is to the detriment of national trade mark law. In consequence of *Pharmacia & Upjohn,* the shield of protection offered by national trade mark law to the trade mark holder will be likely to be less effective. It is now more difficult for the trade mark holder to oppose replacement of the mark. There are practical concerns with respect to the present context. With particular reference to the pharmaceutical market, problems caused by differences in national legislation relating to product packaging and marketing will always arise. Only future harmonizing measures in the EU pharmaceutical field will alleviate the problem caused by differences at the national level. Nevertheless, the "harmonizing" effect of *Pharmacia & Upjohn* with respect to the assessment of market partitioning has provided a clarity that was lacking. It is certainly arguable that the fact that the success or otherwise of the trade mark holder in seeking reliance on the mark could be allowed ultimately to depend on a mere accident of fact, as either replacement or reaffixing of the mark seemed difficult to justify. The importation of the test with respect to market partitioning, as formulated in *Bristol Myers Squibb,* provides at the very least that the trade mark holder in seeking reliance on the mark is to be treated in the same way regardless of whether the mark has been replaced or reaffixed.

Timothy Connor*

52. In respect of the necessity to replace the original trade mark.
53. As the Advocate General observed: "Formulating the criterion of artificial partitioning of the markets without including intention does not…mean, …that intention will always be irrelevant": Opinion, para. 42.
54. This would occur where there had been an attempt to secure a commercial advantage. Judgment, para 44.

* Senior Lecturer in Law, University of the West of England.

Appendix 3

v. *'Article 39 (ex 48) E.C. Offers no Protection where Restriction on Free Movement rights arises from act of Migrant Worker: Citibank International PLC v. Kessler: Court of Appeal'*, (1999) 24 E.L.Rev, 525 - 530

1999

Case Comment

Article 39 (ex 48) E.C. offers no protection where restriction on free movement rights arises from act of migrant worker

Timothy Connor

Subject: Banking and finance. **Other related subjects:** European Union. Landlord and tenant
Keywords: EC law; Free movement of persons; Leases; Mortgagees powers and duties
Legislation: EC Treaty Art.48 (now, after amendment, Art.39 EC)
Case: Citibank International Plc v Kessler [1999] Lloyd's Rep. Bank. 123 (CA (Civ Div))

E.L. Rev. 525

A recent judgment of the Court of Appeal involved the application of the free movement rights of a "worker", a migrant Community national who had migrated to another Member State for the purposes of employment. The Community national claimed he was prevented from taking up employment in the home State due to the terms of a mortgage deed signed during the time of the exercise of free movement rights in the United Kingdom. The Court held that Article 39 did not render unlawful the mortgagee's insistence on the mortgagor's compliance with the terms of the mortgage deed.

Facts

In *Citibank International v. Kessler and Another,*[1] the judgment of the Court of Appeal concerned the scope and application of the right of free movement under Article 39 E.C.[2] Peter Kessler, a German national, had exercised free movement rights under Article 39 E.C.[3] within the United Kingdom.[4] A family home in Wokingham was purchased during that time. The property was acquired with the aid of two loans,[5] both advanced by Citibank Trust Limited ("the Bank"). Repayment of the loans was secured by legal charge[6] executed in favour of the Bank on December 19, 1988.[7] The conditions incorporated in the legal charge contained a covenant by the mortgagor not, without the prior written consent of the mortgagee, to lease or to agree to lease the whole or any part of the mortgaged property.[8]

In September 1991 Mr Kessler left the United Kingdom and returned to Germany to work as a business consultant. The Wokingham property had by this time become unsaleable.[9] To avoid incurring liability for running costs, Mr Kessler sought to let the property. The terms of the legal charge required the mortgagor to obtain the prior written consent of the mortgagee bank prior to an agreement to lease of a lease of the property.[10] Permission ***E.L. Rev. 526*** from the Bank was sought for a lease of the property to Coca Cola of Great Britain and Northern Ireland.[11] That permission was refused.

By the end of 1993,[12] Mr Kessler had fallen into arrears with respect to the repayments of both the loans secured on the property. The interest of

Citibank Trust as mortgagee became vested in the Bank with effect from December 31, 1993. In 1994, the Bank commenced possession proceedings in the County Court in relation to Mr Kessler's property.[13] Judgment was given in favour of Mr Kessler.[14] The Bank appealed from the judgment of the County Court to the Court of Appeal.[15] Mr Kessler, the respondent, in the action by the Bank for repossession of the property in Wokingham, argued[16] that the legal charge taken by the Bank contained an implied term that consent to letting would not be unreasonably withheld.[17] Pleading in the alternative, Mr Kesslers' defence stated "If the term is not to be implied as a matter of law, the requirements of E.C. law under the E.C. Treaty Article[s] 48 [now 39] prevail over terms of the Legal Charge by virtue of sections 2(1) and 2(4) of the European Communities Act 1972.[18] Further, that by the Plaintiff acting in breach of Article[s] 48 [now 39] of the EC Treaty, the Plaintiff has committed tortious wrongs against " Mr Kessler.[19] Mr Kessler claimed that the Bank's refusal to consent[20] to the letting of the property was unreasonable and in breach of the alleged implied term contained in the Mortgage Conditions.[21] Mr Kessler quantified his loss as "£400,000 or thereabouts".[22] He alleged that he would have been able to repay[23]the loans to the Bank had he been free to let the property.[24]

The outcome

A Community national may migrate as a *worker* to another Member State for the purposes of employment therein.[25] The judgment in *Citibank International* considered the applicability of Community free movement rights of the *worker* in the context of the allegation by the respondent that a restriction on their exercise had been caused by the enforcement ****E.L. Rev. 527*** of the terms of a mortgage deed. The Court of Appeal held that the scope of Article 39 E.C.[26] did not protect the migrant worker against strict enforcement of the terms of that deed. The respondent in an action for repossession, a Community national, was bound by the terms of the mortgage deed, even though the claim was that he thereby was unable to accept a three year contract of employment in Germany.[27]

In *Citibank International,* the judgment of the Court of Appeal can be divided into two parts. First, the Court considered the appropriateness of recourse to the free movement rights provided to the migrant Community national by Article 39 E.C.[28] This involved an assessment of both the scope and applicability[29] of Article 39 E.C.[30] Secondly, the Court examined the unrelated question whether the mortgage deed contained an implied term that consent to letting would not be unreasonably withheld.[31] In addressing the first consideration, the Court of Appeal rejected the respondent's contention of an incompatibility with Community free movement rights. The respondent's reliance upon the judgments of the European Court of Justice in *Walrave and Koch v. Association Union Cycliste Iternationale and others* [32] and *Union Royale Belge des Sociétés Association ASBL and others v. Bosman* [33] was rejected by the Court, the restrictions in issue in both those cases having been levied on the exercise on the right of free movement *itself.* In *Walrave and Koch,* the relevant rules were "rule aimed at regulating in a collective manner gainful employment".[34]

Freedom of movement in this context is expressed in terms of the right to "to accept offers of employment".[35] Both *Walrave and Koch* and *Bosman* concerned a challenge to the very heart of the right itself. In the

Court's view, *Citibank International* did not present the *same* challenge to free movement rights. In consequence, the claim by Mr Kessler that his inability to discharge existing financial commitments in the United Kingdom[36] had hindered his ability to take up employment in Germany was dismissed by the Court of Appeal. The Court was of the opinion that "the obstacle is the Bank's wish to rely on its own judgment as to the continuing need for the protection of its security. In my view that is *simply not the sort of obstacle to which the provisions of Article 48 [now 39] of the Treaty are directed* [emphasis added].[37] Consequently, the Bank's insistence "on the ***E.L. Rev. 528*** protection which clause 2.17.2 of the mortgage was intended to provide is not incompatible with the provisions of Article 48 [now 39] of the Treaty".[38]

Having held that Article 39[39] protection could not be afforded the migrant, the Court proceeded with an examination of the alternative claim put forward by the respondent that tortious liability in damages would arise where the plaintiff Bank sought to rely on the terms of the mortgage deed to the detriment of free movement rights. There were "three routes" by which this contention was advanced. First, a term should be implied into the mortgage "that the mortgagee will not be entitled unreasonably to withhold consent to a letting by the mortgagor".[40] Secondly, that the terms of the mortgage deed[41] were "in some way" to be subordinated to Article 39 E.C. rights.[42] Thirdly, tortious liability should be imposed where the refusal by the mortgagee "hinder[s] the mortgagor in giving effect to his wish, as a worker, to move freely within the Community".[43]

As to the first contention of the respondent, that the mortgagee would not unreasonably withhold consent "to letting the property,"[44] the Court held that "A term in the form *pleaded would go far beyond* anything needed to give effect to any requirement imposed by Article 48 [now 39]"[45] E.C. [Emphasis added]. Neither could it be implied by events which had occurred subsequent to the execution of the legal charge which Mr Kessler had pleaded in his defence. Consequently, the contention that an implied term existed to this effect[46] was struck out by the Court.[47] As to the "second route" to the imposition of tortious liability, the Court examined the conditions of the mortgage deed in the light of Article 39. The Court held that provisions in question applied regardless of the nationality of the mortgagor and there was no discrimination on the grounds of nationality. "In so far as they do hinder freedom of movement they do so as much in the case of a United Kingdom national who wishes to seek work in Germany as they do in the case of a German national who wishes to return to work in Germany".[48] The Court continued "Nor can it be said that the provisions of [the mortgage deed] curtail, or in any way cut down, abrogate or limit, the right to do any of the things specified in" Article 39(3). "The right to accept offers of employment, the right to move freely within the territory of the United Kingdom or between the United Kingdom and other Member States for the purpose of employment, the right to stay in the United Kingdom for the purpose of employment or after having been employed here *all continue to exist unaltered* "[49] ***E.L. Rev. 529*** [emphasis added]. By contrast, in *Walrave and Koch,*[50] the Court of Justice had held that the plaintiffs could not accept offers of employment as pacemakers to a stayer of a different nationality. "The right of Bosman to move for the purposes of employment was limited by the rules of the international federation. In consequence, the Court of Appeal in *Citibank International* concluded that the respondent could not rely on Article 39 and consequently was bound by the terms of the mortgage deed.[51]

Comment

It is perhaps unsurprising that the Court of Appeal in *Citibank International* found for the plaintiff bank. According to United Kingdom law, the Bank was legally entitled to refuse consent to the creation of a lease over the mortgaged property by the mortgagor in favour of Coca Cola Ltd.[52] However, the issues arising in *Citibank International* are wider than the mere power to enforce the covenant contained in a domestic mortgage deed. They present a wider concern, that of the *application* of Community law in the sometimes difficult area of the interface between Community and national law.

The ease with which the Court of Appeal dismissed the defendant's arguments belie the importance of the issue arising in *Citibank International,* that of the potency of Community law free movement rights, in particular those granted by Article 39 E.C. The Court had distinguished both *Walrave and Koch* and *Bosman* on the grounds that the restrictions on free movement related specifically to the contract of employment. In the instant case however, the defendant's claim in substance was the same: only by reference to the domestic rules of contract rather than other rules imposed at the national level, did it differ. Rather than dismiss the defendant's claim, a proper assessment by the Court of the merits of that claim would have encompassed analysis of the outer limits of Article 39. It was not sufficient for the Court to hold that it is "impossible to understand how events subsequent to the execution of the legal charge can be relied upon as a basis for implying a contractual term into the transaction evidenced or effected by that charge".[53] If *de facto* free movement rights had been restricted by the Bank's actions, the Court of Appeal ought to have given some consideration to the question as to whether Article 39 protection was merited. The remark by the Court that the situation arising in *Citibank International* "is simply *not the sort of obstacle to which the provisions of Article 48 [now 39] of the Treaty are directed*"[54] [emphasis added], does not go far enough.[55] What is required is a proper analysis of the extent of the free movement right under Article 39.[56] With regard to that right, the Court of Justice has in another context for example looked ****E.L. Rev. 530*** beyond the narrow basis of the contract of employment. In *Ministère Public v. Even* [57] it held that the right to "social advantages"[58] does not depend solely on the existence of the contract of employment. By analogy therefore, it is arguable that restrictions need not only apply to the right itself. Conceivably *any* de facto restriction on the right could be subject to Article 39 scrutiny. In relation to the instant case, the Court argued that "there must be a danger that banks would be less willing to lend to those whose occupation was such that they would wish to move between Member States for the purpose of seeking employment; if there were a risk that provisions which were included in the loan documentation for the protection of the lender would be held unenforceable in those circumstances. They would prefer to lend to United Kingdom nationals".[59] This is wide of the mark. The Court of Appeal at this point openly courts the prospect of discrimination against the migrant national. However, it is clear that in Community law this would be unlawful.[60] Neither does the prospect that United Kingdom nationals seeking work in Germany would be treated in the same way help. While this might be an accurate statement of fact, it remains a comparison that is at best unhelpful. The issue here must remain the lawful treatment of the migrant Community national. If the achievement of that end means that the home national suffers reverse discrimination, then so be

it.[61] Article 39 E.C. has been held to be horizontally directly effective, so the rights provided by it can be enforced against individuals.[62] A finding by the Court in *Citibank International* that free movement rights had been impeded would have resulted in the imposition of liability upon the bank.

The judgment in *Citibank International* obfuscates the issue of the scope and the application of the free movement rights of Article 39, because it failed to examine fully the boundaries of Article 39 protection. Whilst the conclusion reached by the Court of Appeal may indeed be an accurate representation of the *scope* of Community free movement rights, a judgment which considered more overtly the issues in the context of an attempt to locate the boundaries of those rights would have been more helpful. The arguments raised by the defence were as innovative as they were far reaching. It is a pity that they have not received an airing before the Court of Justice.[63] The issues raised in *Citibank International* remain too important to be left for national courts to decide.[64]

UWE Bristol
E.L. Rev. 1999, 24(5), 525-530

1.
[1999] 2 C.M.L.R. 603.
2.
"Freedom of movement for workers shall be secured within the Community". Article 39 E.C. [ex Art. 48 E.C.]
3.
Supra.
4.
Mr Kessler originally entered the United Kingdom from Germany in 1978 for the purpose of setting up a United Kingdom subsidiary of BMW.
5.
Together amounting to £220,150.
6.
Incorporating the Citibank Savings Mortgage Conditions (1986).
7.
By Mr Peter Kessler and his wife, Mrs Liv Kessler.
8.
Clause 2.17.2. Citibank Savings Mortgage Conditions (1986).
9.
Due to substantial structural and building defects at the first floor level. In addition, a caution had been entered on the title to the property in respect of a boundary dispute involving an owner of the adjoining property.
10.
Clause 2.17.2. Citibank Savings Mortgage Conditions (1986).
11.
In January 1993. The lease was to have been for a three year period at an annual rent of £42,000.
12.
Arrears had arisen on the larger of the two loans from September 1991. By the end of 1993, there were arrears on the second loan.
13.
March 17, 1994, Reading County Court. Although the particulars of claim were served on September 26, 1994, no significant progress was made over the following three years. A re-amended defence and counterclaim was served by Mr Kessler on April 7, 1997. An application by the Bank to strike out certain paragraphs in the re-amended defence and counterclaim was dismissed by His Honour Judge Catlin on September 15, 1998.
14.
September 15, 1998.
15.
The judgment of the Court of Appeal was March 10, 1999.
16.
"Such a term must be implied at law in order to give effect to Article 48 [now 39]". Para. 13, of Mr Kessler's re-amended defence.

17.
Clause 2.17 Standard Mortgage Conditions.
18.
"All rights created under the Treaty are to be given legal effect". Section 2(1) European Communities Act 1972. "Any provision as might be made by Act of Parliament shall be construed and have effect" subject to Community law. Para. 26, Re-amended defence.
19.
Para. 27, Re-amended defence.
20.
On two separate occasions. Para. 28 and Para. 14. Re-amended defence.
21.
Para. 13, Re-amended defence.
22.
This amounted to "(I) loss of rent of one or other of the two lettings which (but for the Bank's refusal to consent) would have been effected and (ii) loss of earnings in respect of a job offer in Germany which he was unable to take up". Para. 29. Re-amended defence.
23.
supra.
24.
Para. 31. Re-amended defence.
25.
supra.
26.
supra.
27.
Para. 14(12) Re-amended defence and counterclaim. See judgment para. 100.
28.
supra.
29.
The defendant had detailed this in para. 14, Re-amended defence and counterclaim.
30.
"The question is whether the provisions of Article 48 [now 39] are incompatible with the exercise by the Bank of the power to withhold consent to a letting of the mortgaged property in circumstances in which to withhold consent would hinder the free movement of the mortgagee (as a worker) within the Community". Para 100.
31.
Para. 100.
32.
Case 36/74 [1974] E.C.R. 1405, [1975] 1 C.M.L.R. 320.
33.
Case C-415/93 [1995] E.C.R. I-4921; [1996] 1 C.M.L.R. 645.
34.
Case 36/74 *Walrave and Koch v. Association Union Cycliste Internationale and other.* [1974] E.C.R. 1405, 1418. [1975] 1 C.M.L.R. 320. Likewise in *Union Royale Belge des Sociétés Association ASBL and others v. Bosman* the Court of Justice held "Article 48 applies to rules aimed at regulating gainful employment in a collective manner": Case C-415/93 [1995] E.C.R. I-4921, 5064-5066; [1996] 1 C.M.L.R. 645.
35.
Article 39(3)(a).
36.
Due to the existence of the legal charge.
37.
Para. 100.
38.
Para. 100. In consequence, the Court of Appeal regarded "the contentions raised by paragraphs 26 and 27 of the re-amended defence and counterclaim as unarguable".
39.
supra.
40.
Para. 100. Paragraph 13 Re-amended defence and counterclaim.
41.
Clause 2.17.2.
42.
Para. 100. Paragraph 26 Defence.
43.
Para. 100.
44.
The defence in this matter had been refined. "Further or in the alternative, it was an implied term of the Legal Charge that the mortgagee will not unreasonably withhold consent under clause 2.17

of the plaintiff's Standard Mortgage Condition if the mortgagor seeks such consent in order not to be hindered in the exercise of Community law rights of free movement under Articles 48 [now 39] or 52 [now 43] of the E.C. Treaty". Para 13 Re-amended defence. Para 100.
45.
Para. 100.
46.
Para 13 Re-amended defence. Also the associated allegation in paragraph 28.
47.
Para. 100.
48.
Para. 100.
49.
Para. 100.
50.
supra.
51.
The contentions raised by the respondent in paragraphs 26 and 27 of the re-amended defence and counterclaim were regarded as unarguable. Para. 100.
52.
Section 99(1), Law of Property Act 1925 provides that a mortgagor in possession is given a statutory power to grant leases which will bind the mortgagee. A condition in the mortgage deed can make the exercise of that power conditional upon the mortgagor first obtaining the mortgagee's consent.
53.
Para. 100.
54.
Para. 100.
55.
The obstacle to free movement as expressed by the Court was "the Bank's wish to rely upon its own judgment as to the continuing need for the protection of its security".
56.
For example, discrimination on the grounds of nationality applies not only to "gainful employment" but also to actions of public authorities. Case 36/74 *Walrave and Koch v. Association Union Cycliste Internationale and others* [1974] E.C.R. 1405, 1418.
57.
Case 207/78 *Ministère Public v. Even* [1979] E.C.R. 2019; [1980] 2 C.M.L.R. 71.
58.
"The worker" shall enjoy the same social advantages as national workers". Article 7(2) Regulation 1612/68. [O.J. Sp. Ed. 1968, No. L257/2, p. 475]
59.
Para. 100.
60.
"Within the scope of application of this Treaty, any discrimination on the grounds of nationality shall be prohibited". With respect of the *worker,*Article 39(2) E.C. provides "freedom of movement shall entail the abolition of any discrimination based on nationality".
61.
See for example Case C-175/78 *R. v. Saunders* [1979] E.C.R. 1129; [1979] 2 C.M.L.R. 216.
62.
See for example; Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL and others v. Bosman* [1995] E.C.R. I-4921, 5068; [1996] 1 C.M.L.R. 645.
63.
By way of an Article 234 (ex 177) Reference.
64.
Leave to appeal to the House of Lords was refused.

Appendix 3

vi. *'Non-Community Spouses: Interpretation of Community Residence Rights'. Boukssid v. Secretary of State for the Home Department'*, (1999) 24 E.L.Rev, 99 - 105

Non-Community spouses: interpretation of Community residence rights

Timothy C. Connor

Subject: European Union. **Other related subjects:** Immigration
Keywords: EC law; Free movement of persons; Right of abode; Spouses
Case: R. v Secretary of State for the Home Department Ex p. Sahota [1999] Q.B. 597 (CA (Civ Div))
E.L.R. 184

A recent Court of Appeal Judgment considered a claim for "indefinite leave to remain" in the United Kingdom by the spouses of two United Kingdom nationals who had returned to the United Kingdom after exercising free movement rights elsewhere within the European Community. The spouses were of Algerian and Indian nationality. The facts as presented, give rise to a consideration of the Community law right of residence given to a member of the family of a "worker". The Court of Appeal chose to assess the residence rights of the Algerian and Indian spouses in accordance with national law. Court of Appeal (Civil Division) *R. v. Secretary of State for the Home Department, ex parte Mohammed Zeghraba and Sarabjit Singh Sahota*[1997] 3 C.M.L.R. 575.

Background

A Community national is entitled to take up employment within the territory of any Member State of the European Community. Considered to be a *worker* in Community law,[1] the migrant is the recipient of rights[2] given by Community law. Associated with the *worker* status, the purpose of these rights is to facilitate the exercise by the worker of the right of free movement.

Not only have Community law rights been extended to the worker, *qua* worker, but also to members of the family of the worker.[3] It is one of the rights, the right of residence, afforded to the spouse of the worker that was the subject of the judgment of the Court of Appeal in *R. v. Secretary of State for the Home Department, ex parte Mohammed Zeghraba and Sarabjit Singh Sahota.* It is an interpretation of that Community law right by the national court that is the subject of this commentary.

According to Article 4(1), Directive 68/360, the spouse has a right of residence with the worker, in the state of migration.[4] It is a right given irrespective of the nationality of the spouse.[5] The right is to be evidenced by a residence permit.[6] The spouse who is a national of a third state, "shall be issued with a residence document which shall have the *same* ***E.L.R. 185*** *validity* as that issued to the worker ". [emphasis added][7] It is clear from the directive that the residence document given to the spouse must mirror that given to the worker. Where for example, the worker is entitled to a residence document of unlimited duration, the spouse is similarly so entitled.

The appeals in *Zeghraba and Sahota* arose before the Court of Appeal because two non-Community nationals, married to United Kingdom nationals, had been refused "indefinite leave to remain" in the United Kingdom. Both applicants had claimed that Community law required an acknowledgment that their residence in the United Kingdom was to be on the same terms as that extended to their spouses as United Kingdom nationals.[8]

The judgment of the Court of Appeal in *Zeghraba and Sahota* raised questions as to the nature of the Community law right of residence given to the spouse of a worker, where that spouse is not a Community national.

Facts

Sarabjit Singh Sahota was a citizen of India. Mohammed Zeghraba was an Algerian citizen. Their spouses were United Kingdom nationals.[9] Between 1989 and 1994, Mrs Amarjit Kaur Sahota resided and worked in Germany.[10] In 1990 she married Sarabjit Singh Sahota.[11] In 1994, she returned to the United Kingdom accompanied by her husband. Mr Sahota was given leave to enter the United Kingdom as a visitor for six months.[12] An application later in that year by Mr Sahota for indefinite leave to remain in the United Kingdom was refused.[13] The Home Office however issued a residence document of limited duration, valid only until November 24, 1999.[14] The authorities indicated that Mr Sahota's request for indefinite leave to remain in the United Kingdom would be considered once his wife had " completed four years in employment in the United Kingdom".[15] Only at that time would he be issued with a residence document of unlimited duration.

Maria Zeghraba, a United Kingdom national married Mohammed Zeghraba, an Algerian citizen in the United Kingdom in 1992. In 1993 they moved to the Republic of Ireland, where Mrs Zeghraba worked for a few months. In 1994 they returned to the United Kingdom, Mrs Zeghraba commencing work at a restaurant in Ealing. Mr Zeghraba then applied for leave to remain in the United Kingdom on the basis that he was " the husband of an EEC worker",[16] his spouse being a British citizen settled and working in the United Kingdom.

E.L.R. 186 Mr Zeghraba was granted leave to remain in the United Kingdom. However, the right was made subject to a temporal restriction, until May 9, 1999.[17] An application was then made by Mr Zeghraba for indefinite leave to remain in the United Kingdom on the basis that he was the spouse of a Community worker exercising free movement rights within the Community.[18]

The claim by Mr Zeghraba for indefinite leave to remain was rejected.[19] He was given a five year residence permit. The United Kingdom authorities stated that future consideration for indefinite leave to remain would be made upon Mr Zeghraba's application only "after his wife has been living and working in the United Kingdom for four years and continues to do so ".[20]

Both applicants had been given leave to remain in the United Kingdom. At issue on appeal was the identification of the terms on which that leave to remain had been given. The Immigration Appeals Tribunal sitting in two different constitutions had reached inconsistent and conflicting decisions. Mr Sahota had been accorded indefinite leave to remain, "a right of residence in

line with the right of residence granted to his wife".[21] However, in *Zeghraba,* the tribunal held that the United Kingdom national, on return to the United Kingdom had ceased to exercise free movement rights. In consequence, her spouse was not entitled to the right of residence extended to members of the family of a worker.[22] Mr Zeghraba was granted leave to appeal to the Court of Appeal against the decision of the Immigration Appeal Tribunal by Hirst L.J.

Mr Sahota appealed in the first instance to the adjudicator against the refusal by the United Kingdom authorities to grant him indefinite leave to remain. The adjudicator dismissed that appeal. Mr Sahota's subsequent appeal to the Immigration Appeal Tribunal was allowed. The Secretary of State was granted leave to appeal to the Court of Appeal.

The outcome

The judgment of the Court of Appeal in *Zeghraba and Sahota* was founded on an interpretation that the right of residence given in Community law to the spouse of the worker is a right which could be restricted in duration. After reviewing the provisions of Community law with respect to that right, the Court of Appeal was of the opinion that " an unlimited right to reside is not an entitlement envisaged by any relevant Community regulation or directive ".[23] It was a judgment that gave some credence to the view previously expressed by the Immigration Appeals Tribunal in *Zeghraba* that once the United Kingdom nationals had returned to the United Kingdom, they had ceased to exercise free movement rights. The protection under Community law, previously given to their families thereby ceased.

Having found that Community law rights were not the applicable sources of residence rights, with respect to Mr Zeghraba and Mr Sahota, the Court of Appeal then turned its ***E.L.R. 187** attention to consideration of national law as a source of such rights. Although the Home Office acknowledged that in both instances the application for an indefinite leave had been made under Community law,[24] the authority for imposition of the five year restriction was taken from national law.[25] The court was of the view that an extension of an unlimited right to reside would in the circumstances extend a privilege "to United Kingdom citizens not enjoyed by citizens of other Member States entering the United Kingdom in exercise of identical rights of free movement".[26] Community law provided a "different and more restricted" right of residence than the one offered by United Kingdom law. The rights given by national law to United Kingdom nationals, such as the right of abode,[27] were not similarly acquired automatically on marriage by the spouses who were not of United Kingdom nationality. United Kingdom law distinguishes between British citizens with a right of abode and Community nationals exercising free movement rights.[28] The right of abode was defined by the Court of Appeal as "an unlimited right to reside".[29] A United Kingdom national with a right of abode cannot be deported from that country.[30] By contrast, the Community law right of residence contemplated a more restrictive right of residence. In consequence, the Court of Appeal was of the view that to grant both Mr Zeghraba and Mr Sahota an unlimited right to reside would in the circumstances "involve a discriminatory distinction in Community law against citizens of Member States other than the United Kingdom".[31]

The judgment of the Court of Appeal held to be lawful the decisions by the United Kingdom authorities to impose temporal limits on the applicants' residence in the United Kingdom. Both Zeghraba and Sahota in the first instance were to be entitled to remain in the United Kingdom for only five years.[32] Their right of residence was limited because at the time of the application, the strictures imposed by national law could not be complied with. "Indefinite leave" would be granted only after the applicant's spouse had been present in the United Kingdom for four years as a family member.[33]

Comment

The Court of Appeal in *Zeghraba and Sahota* held that recognition of an entitlement to an indefinite leave to remain would have been a step too far given the circumstances. A hybrid situation had arisen, one for which the Community law had not specifically articulated a right of residence. Taken as an apparent lacuna in Community law with respect to the provision of residence rights afforded to the spouse of a worker, the authorities had responded by creating the fiction of United Kingdom nationals being entitled to a residence permit of only five years in duration. Using that fiction, the residence document given to the non-Community spouse were similarly limited in ***E.L.R. 188*** duration. The requirement imposed by Article 4(4), Directive 68/360, that the spouse of the worker be issued with a document of "the same validity" as that given to the worker was thereby apparently satisfied.[34]

The fiction of the "deemed" residence[35] granted to the United Kingdom national appears unconvincing. Its creation by the United Kingdom authorities were merely convenient. It has however served only to derail the national court from a proper consideration the application of a Community law right. The Court of Appeal acknowledged that the applicants' claim for residence was founded in Community law.[36] Such rights are available to a worker who has exercised free movement rights.[37] Yet national law was chosen as the basis for the assessment of that right. That consideration of Community law was jettisoned in favour of national law must be a cause of some concern.

It is arguable that the temporal limitations placed on the applicants' right of residence do not adequately reflect the extent of their Community law right. The extension of a limited right of residence may be unlawful. In an equivalent situation,[38] the Court of Justice in *R. v. IAT and Surrinder Singh, ex parte Secretary of State for the Home Department,* held that the spouse, the non-Community national, "must enjoy at least the same rights of residence as would be granted under Community law if his or her spouse chose to reside in another Member State".[39] Both Mrs Zeghraba and Mrs Sahota were United Kingdom nationals, each with a right of abode in that country.[40] The Immigration Act 1971 states that a right of abode means "a right to be free to live in, the United Kingdom".[41] Based on the concept of the right of abode as an "unlimited right to reside"[42] it is arguable that residence rights afforded to the spouse as a non-Community national, should accurately reflect the same. The returning workers, the United Kingdom nationals, had an unrestricted right of residence on their return to the United Kingdom. Community law demands that like should be treated with like, the non-Community spouses of those nationals were entitled to an acknowledgment of residence rights equivalent to an indefinite leave to remain.

The effect of the refusal of the national court to consider properly the source of residence rights may have far reaching consequences for the assertion of Community rights. It was held in *Royer* that the right of residence is a right "conferred directly, on any persons falling within the scope of Community law, by the Treaty, especially Article[s] 48, [and] by its implementing provisions".[43] For the spouse therefore, as part of the worker's ***E.L.R. 189*** family, the right of residence is a directly enforceable right. The refusal of the Court of Appeal to acknowledge Community law as the source of residence rights is to be deprecated. It is a refusal which has been effective to remove the protection offered by a directly enforceable Community law right.

As far as the United Kingdom judiciary are concerned, *Zeghraba and Sahota,* represents a resurgence of a reluctance to refer to the Court of Justice. In *Re Sandhu,* [44] the House of Lords held that separation and divorce ended the rights of the non-Community spouse.[45] Where a question of interpretation of Community law arises, the House of Lords, as a court of "last resort" is under a duty to refer to the Court of Justice.[46] In *Sandhu,* no such reference was made. Whether the Court of Appeal can be considered to be a court of "last resort" in the present instance, is less clear. Leave to appeal to the House of Lords being refused, the judgment of the Court of Appeal in *Zeghraba and Sahota,* was prima facie a decision against which there was "no judicial remedy under national law".[47] However, the Court of Appeal has previously emphasised that leave to appeal to the House of Lords can be sought by the parties themselves.[48] Although the precise nature of the duty to refer in the present circumstances therefore remains unclear, it is arguable that as the judgment of the national court is concerned with the nature and the extent of a Community right,[49] then a reference should have been made to the Court of Justice.

It is regrettable that no reference to the Court of Justice was made in *Zeghraba and Sahota.* The Court of Justice in *Diatta v. Land Berlin,* [50]for example held that a spouse, a non-Community national, did not thereby lose Community residence rights on account of merely living apart from the worker. Though the parameters of the Community law right of residence offered to the spouse of a worker are at present unclear, it is arguable that the Court of Justice would err on the side of extending a security of residence to the non-Community spouse. An extension to the applicants of an unlimited right to reside in the United Kingdom would appear to be an adequate reflection of the residence rights extended by Community law in respect of members of the worker's family. The position will however remain unclear unless national courts refer the issues raised in *Zeghraba and Sahota* to the Court of Justice for exposition before that court.

Finally, had *Zeghraba and Sahota* been heard before the Court of Justice, an additional avenue of argument might have been available to the applicants in support of their claim for indefinite leave to remain. There is merit in the argument that not to extend to the non-Community spouse an unrestricted right to reside, might be an infringement of the principle of respect for family life enshrined in the Convention for the Protection of Human Rights.[51] An obligation has been placed on the Community to respect human ***E.L.R. 190*** rights guaranteed in the Convention.[52] The adoption of such an approach was rejected as "immaterial" by the Court of Appeal in *Zeghraba and Sahota.* [53] In view of the developing jurisprudence of the Court of Justice[54] with respect to the recognition of human rights in Community law, such rejection might indeed appear hasty.

Senior Lecturer in Law, UWE Bristol.
E.L. Rev. 1998, 23(2), 184-190

1.
Article 48 E.C.
2.
For example the right of residence. Article 48(3)(c) E.C., Article 4(1), Directive 68/360. [O.J. Spec. Ed. 1964, No. 850/64, p. 117].
3.
Article 10(1), Regulation 1612/68. [O.J. Spec. Ed. 1968, No. L257/2, p. 475].
4.
ibid.
5.
ibid.
6.
Article 4(2), Directive 68/360.
7.
Article 4(4), Directive 68/360.
8.
Strictly, a Community national does not need "indefinite leave to remain". Now acknowledged by section 1 of the Immigration Act 1988. Para. 33.
9.
Amarjit Kaur Sahota and Maria Zeghraba.
10.
As "workers". Article 48 E.C.
11.
In Germany.
12.
Given on April 26, 1994.
13.
December 2, 1994.
14.
Para. 151, Immigration Rules HC 251. The letter lifted a previous restriction on Mr Sahota seeking employment.
15.
Letter June 13, 1995: Immigration and Nationality Department.
16.
Article 10, Council Regulation 1612/68.
17.
May 11, 1994.
18.
Article 48 E.C.
19.
Letter, Immigration and Nationality Department, August 15, 1994.
20.
Para. 9.
21.
Para. 12.
22.
Para. 13.
23.
Para. 35.
24.
Refusal document, *Sahota,* December 2, 1994. Letter, *Zeghraba,* August 15, 1994. Confirmed by the Court of Appeal, para. 32.
25.
ibid.
26.
Para. 35.
27.
Immigration Act 1971, s.1(1).
28.
Immigration Act 1988, s.7(1).
29.
Para. 35.
30.

Para. 35.
31.
Para. 35.
32.
Para. 151, HC 251: Immigration Rules.
33.
Para. 151, HC 251.
34.
ibid.
35.
There is no specific authority in national law.
36.
Para. 32.
37.
Joined Cases 35 & 36/82 *Morson and Jhanjan v. Netherlands* [1982] E.C.R. 3723; [1983] 2 C.M.L.R. 221.
38.
Mrs Singh, a British citizen returned to the U.K. after exercising free movement rights to work in the U.K. Her spouse was an Indian national.
39.
Case C-370/90 [1992] E.C.R. I-4265 at 4294; [1992] 3 C.M.L.R. 358. The later divorce was ignored for the purposes of the judgment.
40.
Referred to in para. 32.
41.
Section 1(1) of the Immigration Act 1971.
42.
Para. 35.
43.
Case 48/75 [1976] E.C.R. 497 at 515 [1976] 2 C.M.L.R. 619.
44.
The Times, May 10, 1985.
45.
It was held that the right of residence of the third party national in the U.K. did not survive the return of the spouse, a U.K. national, to Germany.
46.
Para. 3 Article 177, E.C. In *Zeghraba and Sahota,* leave to appeal to the House of Lords was refused.
47.
Article 177 E.C.
48.
Chiron Corporation v. Murex Diagnostics Corporation [1995] 1 W.L.R. 243.
49.
This would accord with the requirements of Article 5 E.C.
50.
Case 267/83 [1985] E.C.R. 567; [1986] 2 C.M.L.R. 164.
51.
Article 8.
52.
Article F, Treaty on European Union. See, *e.g.* Case 31/94 *P. v. S and Cornwall County Council* [1996] E.C.R. I-2143.
53.
Para. 32.
54.
Article 8 examples, Case 249/86 *Commission v. Germany* [1989] E.C.R. 1263; [1990] 3 C.M.L.R. 540.

Appendix 3

vii. '*United Kingdom, Non-Community Spouses: Interpretation of Community Residence Rights: R v. Secretary of State for the Home Department, ex parte Zeghraba and Sahota*', (1998) 23 E.L.Rev, 184 - 190

Non-Community spouses: interpretation of Community residence rights

Timothy C. Connor

Subject: European Union. **Other related subjects:** Immigration
Keywords: EC law; Free movement of persons; Right of abode; Spouses
Case: R. v Secretary of State for the Home Department Ex p. Sahota [1999] Q.B. 597 (CA (Civ Div))
E.L.R. 184

A recent Court of Appeal Judgment considered a claim for "indefinite leave to remain" in the United Kingdom by the spouses of two United Kingdom nationals who had returned to the United Kingdom after exercising free movement rights elsewhere within the European Community. The spouses were of Algerian and Indian nationality. The facts as presented, give rise to a consideration of the Community law right of residence given to a member of the family of a "worker". The Court of Appeal chose to assess the residence rights of the Algerian and Indian spouses in accordance with national law.

Court of Appeal (Civil Division) *R. v. Secretary of State for the Home Department, ex parte Mohammed Zeghraba and Sarabjit Singh Sahota*[1997] 3 C.M.L.R. 575.

Background

A Community national is entitled to take up employment within the territory of any Member State of the European Community. Considered to be a *worker* in Community law,[1] the migrant is the recipient of rights[2] given by Community law. Associated with the *worker* status, the purpose of these rights is to facilitate the exercise by the worker of the right of free movement.

Not only have Community law rights been extended to the worker, *qua*worker, but also to members of the family of the worker.[3] It is one of the rights, the right of residence, afforded to the spouse of the worker that was the subject of the judgment of the Court of Appeal in *R. v. Secretary of State for the Home Department, ex parte Mohammed Zeghraba and Sarabjit Singh Sahota.* It is an interpretation of that Community law right by the national court that is the subject of this commentary.

According to Article 4(1), Directive 68/360, the spouse has a right of residence with the worker, in the state of migration.[4] It is a right given irrespective of the nationality of the spouse.[5] The right is to be evidenced by a residence permit.[6] The spouse who is a national of a third state, "shall be issued with a residence document which shall have the *same* ***E.L.R. 185*** *validity* as that issued to the worker ". [emphasis added][7] It is clear from the directive that the residence document given to the spouse must mirror that given to the worker. Where for example, the worker is entitled to a residence document of unlimited duration, the spouse is similarly so entitled.

The appeals in *Zeghraba and Sahota* arose before the Court of Appeal because two non-Community nationals, married to United Kingdom nationals, had been refused "indefinite leave to remain" in the United Kingdom. Both applicants had claimed that Community law required an acknowledgment that their residence in the United Kingdom was to be on the same terms as that extended to their spouses as United Kingdom nationals.[8]

The judgment of the Court of Appeal in *Zeghraba and Sahota* raised questions as to the nature of the Community law right of residence given to the spouse of a worker, where that spouse is not a Community national.

Facts

Sarabjit Singh Sahota was a citizen of India. Mohammed Zeghraba was an Algerian citizen. Their spouses were United Kingdom nationals.[9]Between 1989 and 1994, Mrs Amarjit Kaur Sahota resided and worked in Germany.[10] In 1990 she married Sarabjit Singh Sahota.[11] In 1994, she returned to the United Kingdom accompanied by her husband. Mr Sahota was given leave to enter the United Kingdom as a visitor for six months.[12] An application later in that year by Mr Sahota for indefinite leave to remain in the United Kingdom was refused.[13] The Home Office however issued a residence document of limited duration, valid only until November 24, 1999.[14] The authorities indicated that Mr Sahota's request for indefinite leave to remain in the United Kingdom would be considered once his wife had " completed four years in employment in the United Kingdom".[15] Only at that time would he be issued with a residence document of unlimited duration.

Maria Zeghraba, a United Kingdom national married Mohammed Zeghraba, an Algerian citizen in the United Kingdom in 1992. In 1993 they moved to the Republic of Ireland, where Mrs Zeghraba worked for a few months. In 1994 they returned to the United Kingdom, Mrs Zeghraba commencing work at a restaurant in Ealing. Mr Zeghraba then applied for leave to remain in the United Kingdom on the basis that he was " the husband of an EEC worker",[16] his spouse being a British citizen settled and working in the United Kingdom.

E.L.R. 186 Mr Zeghraba was granted leave to remain in the United Kingdom. However, the right was made subject to a temporal restriction, until May 9, 1999.[17] An application was then made by Mr Zeghraba for indefinite leave to remain in the United Kingdom on the basis that he was the spouse of a Community worker exercising free movement rights within the Community.[18]

The claim by Mr Zeghraba for indefinite leave to remain was rejected.[19] He was given a five year residence permit. The United Kingdom authorities stated that future consideration for indefinite leave to remain would be made upon Mr Zeghraba's application only "after his wife has been living and working in the United Kingdom for four years and continues to do so ".[20]

Both applicants had been given leave to remain in the United Kingdom. At issue on appeal was the identification of the terms on which that leave to remain had been given. The Immigration Appeals Tribunal sitting in two different constitutions had reached inconsistent and conflicting decisions. Mr Sahota had been accorded indefinite leave to remain, "a right of residence in

line with the right of residence granted to his wife".[21] However, in *Zeghraba,* the tribunal held that the United Kingdom national, on return to the United Kingdom had ceased to exercise free movement rights. In consequence, her spouse was not entitled to the right of residence extended to members of the family of a worker.[22] Mr Zeghraba was granted leave to appeal to the Court of Appeal against the decision of the Immigration Appeal Tribunal by Hirst L.J.

Mr Sahota appealed in the first instance to the adjudicator against the refusal by the United Kingdom authorities to grant him indefinite leave to remain. The adjudicator dismissed that appeal. Mr Sahota's subsequent appeal to the Immigration Appeal Tribunal was allowed. The Secretary of State was granted leave to appeal to the Court of Appeal.

The outcome

The judgment of the Court of Appeal in *Zeghraba and Sahota* was founded on an interpretation that the right of residence given in Community law to the spouse of the worker is a right which could be restricted in duration. After reviewing the provisions of Community law with respect to that right, the Court of Appeal was of the opinion that " an unlimited right to reside is not an entitlement envisaged by any relevant Community regulation or directive ".[23] It was a judgment that gave some credence to the view previously expressed by the Immigration Appeals Tribunal in *Zeghraba* that once the United Kingdom nationals had returned to the United Kingdom, they had ceased to exercise free movement rights. The protection under Community law, previously given to their families thereby ceased.

Having found that Community law rights were not the applicable sources of residence rights, with respect to Mr Zeghraba and Mr Sahota, the Court of Appeal then turned its ***E.L.R. 187** attention to consideration of national law as a source of such rights. Although the Home Office acknowledged that in both instances the application for an indefinite leave had been made under Community law,[24] the authority for imposition of the five year restriction was taken from national law.[25] The court was of the view that an extension of an unlimited right to reside would in the circumstances extend a privilege "to United Kingdom citizens not enjoyed by citizens of other Member States entering the United Kingdom in exercise of identical rights of free movement".[26] Community law provided a "different and more restricted" right of residence than the one offered by United Kingdom law. The rights given by national law to United Kingdom nationals, such as the right of abode,[27] were not similarly acquired automatically on marriage by the spouses who were not of United Kingdom nationality. United Kingdom law distinguishes between British citizens with a right of abode and Community nationals exercising free movement rights.[28] The right of abode was defined by the Court of Appeal as "an unlimited right to reside".[29] A United Kingdom national with a right of abode cannot be deported from that country.[30] By contrast, the Community law right of residence contemplated a more restrictive right of residence. In consequence, the Court of Appeal was of the view that to grant both Mr Zeghraba and Mr Sahota an unlimited right to reside would in the circumstances "involve a discriminatory distinction in Community law against citizens of Member States other than the United Kingdom".[31]

The judgment of the Court of Appeal held to be lawful the decisions by the United Kingdom authorities to impose temporal limits on the applicants' residence in the United Kingdom. Both Zeghraba and Sahota in the first instance were to be entitled to remain in the United Kingdom for only five years.[32] Their right of residence was limited because at the time of the application, the strictures imposed by national law could not be complied with. "Indefinite leave" would be granted only after the applicant's spouse had been present in the United Kingdom for four years as a family member.[33]

Comment

The Court of Appeal in *Zeghraba and Sahota* held that recognition of an entitlement to an indefinite leave to remain would have been a step too far given the circumstances. A hybrid situation had arisen, one for which the Community law had not specifically articulated a right of residence. Taken as an apparent lacuna in Community law with respect to the provision of residence rights afforded to the spouse of a worker, the authorities had responded by creating the fiction of United Kingdom nationals being entitled to a residence permit of only five years in duration. Using that fiction, the residence document given to the non-Community spouse were similarly limited in ***E.L.R. 188*** duration. The requirement imposed by Article 4(4), Directive 68/360, that the spouse of the worker be issued with a document of "the same validity" as that given to the worker was thereby apparently satisfied.[34]

The fiction of the "deemed" residence[35] granted to the United Kingdom national appears unconvincing. Its creation by the United Kingdom authorities were merely convenient. It has however served only to derail the national court from a proper consideration the application of a Community law right. The Court of Appeal acknowledged that the applicants' claim for residence was founded in Community law.[36] Such rights are available to a worker who has exercised free movement rights.[37] Yet national law was chosen as the basis for the assessment of that right. That consideration of Community law was jettisoned in favour of national law must be a cause of some concern.

It is arguable that the temporal limitations placed on the applicants' right of residence do not adequately reflect the extent of their Community law right. The extension of a limited right of residence may be unlawful. In an equivalent situation,[38] the Court of Justice in *R. v. IAT and Surrinder Singh, ex parte Secretary of State for the Home Department,* held that the spouse, the non-Community national, "must enjoy at least the same rights of residence as would be granted under Community law if his or her spouse chose to reside in another Member State".[39] Both Mrs Zeghraba and Mrs Sahota were United Kingdom nationals, each with a right of abode in that country.[40] The Immigration Act 1971 states that a right of abode means "a right to be free to live in, the United Kingdom".[41] Based on the concept of the right of abode as an "unlimited right to reside"[42] it is arguable that residence rights afforded to the spouse as a non-Community national, should accurately reflect the same. The returning workers, the United Kingdom nationals, had an unrestricted right of residence on their return to the United Kingdom. Community law demands that like should be treated with like, the non-Community spouses of those nationals were entitled to an acknowledgment of residence rights equivalent to an indefinite leave to remain.

The effect of the refusal of the national court to consider properly the source of residence rights may have far reaching consequences for the assertion of Community rights. It was held in *Royer* that the right of residence is a right "conferred directly, on any persons falling within the scope of Community law, by the Treaty, especially Article[s] 48, [and] by its implementing provisions".[43] For the spouse therefore, as part of the worker's ***E.L.R. 189*** family, the right of residence is a directly enforceable right. The refusal of the Court of Appeal to acknowledge Community law as the source of residence rights is to be deprecated. It is a refusal which has been effective to remove the protection offered by a directly enforceable Community law right.

As far as the United Kingdom judiciary are concerned, *Zeghraba and Sahota,* represents a resurgence of a reluctance to refer to the Court of Justice. In *Re Sandhu,* [44] the House of Lords held that separation and divorce ended the rights of the non-Community spouse.[45] Where a question of interpretation of Community law arises, the House of Lords, as a court of "last resort" is under a duty to refer to the Court of Justice.[46] In *Sandhu,* no such reference was made. Whether the Court of Appeal can be considered to be a court of "last resort" in the present instance, is less clear. Leave to appeal to the House of Lords being refused, the judgment of the Court of Appeal in *Zeghraba and Sahota,* was prima facie a decision against which there was "no judicial remedy under national law".[47] However, the Court of Appeal has previously emphasised that leave to appeal to the House of Lords can be sought by the parties themselves.[48] Although the precise nature of the duty to refer in the present circumstances therefore remains unclear, it is arguable that as the judgment of the national court is concerned with the nature and the extent of a Community right,[49] then a reference should have been made to the Court of Justice.

It is regrettable that no reference to the Court of Justice was made in*Zeghraba and Sahota.* The Court of Justice in *Diatta v. Land Berlin,* [50]for example held that a spouse, a non-Community national, did not thereby lose Community residence rights on account of merely living apart from the worker. Though the parameters of the Community law right of residence offered to the spouse of a worker are at present unclear, it is arguable that the Court of Justice would err on the side of extending a security of residence to the non-Community spouse. An extension to the applicants of an unlimited right to reside in the United Kingdom would appear to be an adequate reflection of the residence rights extended by Community law in respect of members of the worker's family. The position will however remain unclear unless national courts refer the issues raised in *Zeghraba and Sahota* to the Court of Justice for exposition before that court.

Finally, had *Zeghraba and Sahota* been heard before the Court of Justice, an additional avenue of argument might have been available to the applicants in support of their claim for indefinite leave to remain. There is merit in the argument that not to extend to the non-Community spouse an unrestricted right to reside, might be an infringement of the principle of respect for family life enshrined in the Convention for the Protection of Human Rights.[51] An obligation has been placed on the Community to respect human ***E.L.R. 190*** rights guaranteed in the Convention.[52] The adoption of such an approach was rejected as "immaterial" by the Court of Appeal in *Zeghraba and Sahota.* [53] In view of the developing jurisprudence of the Court of Justice[54] with respect to the recognition of human rights in Community law, such rejection might indeed

appear hasty.

Senior Lecturer in Law, UWE Bristol.
E.L. Rev. 1998, 23(2), 184-190

1.
Article 48 E.C.
2.
For example the right of residence. Article 48(3)(c) E.C., Article 4(1), Directive 68/360. [O.J. Spec. Ed. 1964, No. 850/64, p. 117].
3.
Article 10(1), Regulation 1612/68. [O.J. Spec. Ed. 1968, No. L257/2, p. 475].
4.
ibid.
5.
ibid.
6.
Article 4(2), Directive 68/360.
7.
Article 4(4), Directive 68/360.
8.
Strictly, a Community national does not need "indefinite leave to remain". Now acknowledged by section 1 of the Immigration Act 1988. Para. 33.
9.
Amarjit Kaur Sahota and Maria Zeghraba.
10.
As "workers". Article 48 E.C.
11.
In Germany.
12.
Given on April 26, 1994.
13.
December 2, 1994.
14.
Para. 151, Immigration Rules HC 251. The letter lifted a previous restriction on Mr Sahota seeking employment.
15.
Letter June 13, 1995: Immigration and Nationality Department.
16.
Article 10, Council Regulation 1612/68.
17.
May 11, 1994.
18.
Article 48 E.C.
19.
Letter, Immigration and Nationality Department, August 15, 1994.
20.
Para. 9.
21.
Para. 12.
22.
Para. 13.
23.
Para. 35.
24.
Refusal document, *Sahota,* December 2, 1994. Letter, *Zeghraba,* August 15, 1994. Confirmed by the Court of Appeal, para. 32.
25.
ibid.
26.
Para. 35.
27.
Immigration Act 1971, s.1(1).
28.
Immigration Act 1988, s.7(1).
29.
Para. 35.

30.
Para. 35.
31.
Para. 35.
32.
Para. 151, HC 251: Immigration Rules.
33.
Para. 151, HC 251.
34.
ibid.
35.
There is no specific authority in national law.
36.
Para. 32.
37.
Joined Cases 35 & 36/82 *Morson and Jhanjan v. Netherlands* [1982] E.C.R. 3723; [1983] 2 C.M.L.R. 221.
38.
Mrs Singh, a British citizen returned to the U.K. after exercising free movement rights to work in the U.K. Her spouse was an Indian national.
39.
Case C-370/90 [1992] E.C.R. I-4265 at 4294; [1992] 3 C.M.L.R. 358. The later divorce was ignored for the purposes of the judgment.
40.
Referred to in para. 32.
41.
Section 1(1) of the Immigration Act 1971.
42.
Para. 35.
43.
Case 48/75 [1976] E.C.R. 497 at 515 [1976] 2 C.M.L.R. 619.
44.
The Times, May 10, 1985.
45.
It was held that the right of residence of the third party national in the U.K. did not survive the return of the spouse, a U.K. national, to Germany.
46.
Para. 3 Article 177, E.C. In *Zeghraba and Sahota,* leave to appeal to the House of Lords was refused.
47.
Article 177 E.C.
48.
Chiron Corporation v. Murex Diagnostics Corporation [1995] 1 W.L.R. 243.
49.
This would accord with the requirements of Article 5 E.C.
50.
Case 267/83 [1985] E.C.R. 567; [1986] 2 C.M.L.R. 164.
51.
Article 8.
52.
Article F, Treaty on European Union. See, *e.g.* Case 31/94 *P. v. S and Cornwall County Council* [1996] E.C.R. I-2143.
53.
Para. 32.
54.
Article 8 examples, Case 249/86 *Commission v. Germany* [1989] E.C.R. 1263; [1990] 3 C.M.L.R. 540.

Appendix 3

viii. '*Migrant Community Nationals: Remedies for Refusal of Entry by Member States Joined Cases C-65/95 & 111/95 The Queen v. Secretary of State for the Home Department ex parte Shingara and Radiom* [1997] E.C.R. I-3343', (1998) 23 E.L.Rev, 157 - 164

Migrant Community nationals: remedies for refusal of entry by Member States

Timothy C. Connor

Subject: Immigration. **Other related subjects:** Constitutional law. European Union
Keywords: Appeals; EC law; Exclusion orders; State security
Legislation: Council Directive 64/221 on special measures concerning the movement and residence of foreign nationals Art.8
Council Directive 64/221 on special measures concerning the movement and residence of foreign nationals Art.9
Case: R. v Secretary of State for the Home Department Ex p. Shingara (C65/95) [1997] E.C.R. I-3343 (ECJ)
E.L.R. 157

The Court of Justice has ruled that Community nationals exercising free movement rights have access to the "general remedies" provided by the Member State with respect to is own nationals and in respect of challenges to acts of the administration. In satisfying the requirement of Article 8 of Directive 64/221, entitlement to "the same legal remedies" the Court rejected the interpretation that the migrant would be entitled to the specific remedies provided by the state for its own nationals in respect of such acts. Prior to the execution of the administrative decisions identified in Article 9, an opinion of a "competent authority" must be obtained in the circumstances identified in paragraph 1 of that Article. Decisions identified in paragraph 2, refusal of a first residence permit, and expulsion before issue of that permit, therefore require an opinion if there is "no right of appeal to a court of law" or where only "the legal validity of the decision" can be appealed, or "where the appeal cannot have suspensory effect." The failure of the migrant to appeal against a decision on a previous occasion will not prejudice future appeal rights against acts of the administration.

Court of Justice, Judgment of June 17, 1997, Joined Cases C-65/95 & 111/95 *The Queen v. Secretary of State for the Home Department ex parte Mann Singh Shingara and Abbas Radiom* [1997] E.C.R. I-3343; [1997] 3 C.M.L.R. 703.

Background

A system of procedural guarantees in Community law is available to Community nationals who have been denied the free movement rights of entry and residence which attach to worker status. The reality of that system of guarantees may be rendered in part illusory if the obligations imposed in this respect by Directive 64/221, Articles 8 and 9^{1} are not converted by Member States into tangible measures which are available to nationals exercising free movement rights under Article 48 E.C. The cases of *The Queen v. Secretary of State for the Home Department ex parte Mann Singh Shingara and The Queen v. Secretary of State for the Home Department ex parte Abbas Radiom,* raise important questions as to the nature of two aspects of those procedural guarantees.

An obligation is placed on Member States by Article 8, to make available to the community national seeking to exercise free movement rights, the "same legal remedies" as those available to nationals of the host state in respect of decisions concerning entry, renewal of residence permits or expulsion. The nature of that procedural protection has been examined in *Radiom* and *Shingara* in the context of the denial by the Home Secretary ***E.L.R. 158*** of the rights of entry and residence to two migrant Community nationals seeking to enter the United Kingdom for the purposes of work.

Where there is no appeal to a court of law on the merits of a decision, Article 9, paragraph 1 imposes on the administrative body responsible, an obligation to delay implementation of the decision to refuse the renewal of a residence permit or the expulsion of the holder of a residence permit from the territory " until an opinion has been obtained from a competent authority of the host country ". The second paragraph of the same Article provides that in the instance of a refusal to issue a first resident permit, or an expulsion before that residence permit has been obtained, the migrant is to have the right to request a review of that decision by the competent authority. The administrative authority whose decision is reviewed must consider the opinion of the competent authority.

The provisions of the directive as identified secure a minimum level of procedural protection to migrants affected by decisions relating to refusals of entry, residence and expulsions.

Facts

Under United Kingdom law, Radiom and Shingara had made separate applications for judicial review by the High Court of Home Office decisions to deny them entry to the United Kingdom. In the course of reviewing these decisions, the High Court made a preliminary reference to the Court of Justice.

Radiom, an Iranian national, was a Community national by virtue of acquisition of Irish nationality in 1982. He had worked in the United Kingdom for the Iranian consular service between 1983 and 1989. In May 1983, based upon his marriage to a British citizen, Radiom had been granted indefinite leave to remain[2] in the United Kingdom.[3]
In 1989, the United Kingdom severed diplomatic relations with Iran and in consequence, the Foreign Office informed Radiom that if he did not leave the United Kingdom within seven days, he would be detained and deported,[4] on grounds of national security.[5] Radiom left the United Kingdom without waiting for that threat of detention and deportation to be carried out. A Home Office communication[6] to Radiom, threatening a future refusal of entry and residence without appeal[7]formed the genus of the present action.[8] A later ***E.L.R. 159*** application by Mr Radiom for a residence permit to stay in the United Kingdom was refused, again, according to the Home Office, without right of appeal.[9]

Shingara, a French national had been refused entry to the United Kingdom in 1991 on the grounds of public policy and public security.[10]He was informed by the Home Office that there was no right of appeal against this

decision.[11] Some years later, Shingara was admitted to the United Kingdom on production of his French identity card. On that occasion he was arrested, and detained as an illegal immigrant. Shingara's application for judicial review of that detention was granted at the same time as he was released and returned to France.[12]

Under national law, both Community nationals had been refused the opportunity of an appeal against the separate decisions to deny them entry to the United Kingdom. Where Community nationals are concerned, that denial of appeal rights directly conflicts with the provisions of Article 8, which provides that the migrant is "to have the same legal remedies" as nationals of the host state. Although the absence of recourse to an appeals process would clearly be unlawful, the failure of the Member State to provide access to the appeals process raises the issue of the nature of the procedural protection offered to the migrant by the directive.

The second aspect to the judgment arose because both applicants for judicial review had previously been excluded from the United Kingdom on the grounds of public policy or public security. On expulsion, both migrant nationals had left the United Kingdom, so the procedural guarantees of Articles 8 and 9 were available to them. However, no appeal was raised, no advisory opinion sought from a competent authority with regard to the decision to exclude. Only when both Radiom and Shingara subsequently sought to return to the United Kingdom did the effect of their failure to take advantage of the procedural protection offered by Directive 64/221 on expulsion became an issue. Does the right of reference to an independent competent authority given by Articles 8 and 9 extend to migrants in the position of Radiom and Shingara who then subsequently return to the Member States concerned?

The compatibility with Community law of lack of rights of appeal given under United Kingdom law was the central issue in both cases. The two separate actions were joined before the Court of Justice because both involved the status of Articles 8 and 9.
Judicial review is a remedy which is available in the United Kingdom against acts of the administration generally. Were the applicants to be entitled to seek this general remedy or the remedy specifically available in national law in respect of refusals of entry?

*E.L.R. 160 The outcome

Central to the judgment in *Radiom* and *Shingara* was the examination of substantive issues arising from the existence of the system of procedural guarantees concerning appeal rights established by Directive 64/221.[13] The first issue considered in the judgment concerned the de facto translation into national law of the procedural rights given by Article 8. Such rights are either a guarantee of exposure to the general system of appeals which exist in the Member State "in respect of acts of the administration" or to the particular appeal rights provided in specified circumstances.

Article 8 gives to the migrant national " the *same legal remedies*[emphasis added] in respect of any decision concerning entry, as are available to nationals of the State concerned in respect of acts of the administration". The Advocate General[14] concluded that the obligation thus placed on the Member State was to make available to the migrant national the legal remedies that

are generally available to nationals of that State in respect of acts of the administration. In the judgment of *Radiom* and *Shingara* the Court of Justice affirmed this view. It held that:

> "On a proper construction of Article 8 of the directive, where under the national legislation of a Member State remedies are available in respect of acts of the administration generally and different remedies are available in respect of decisions concerning entry by nationals of that Member State, the obligation imposed on the Member States by that provision is satisfied if nationals of other Member States enjoy the same remedies as those available *against acts of the administration generally* in that Member State" [emphasis added].[15]

The obligation in Article 8 is therefore satisfied if the migrant national has access to the general remedies provided by the national law of that Member State in relation to decisions concerning the entry of its own nationals. In adopting this interpretation as to the extent of the procedural guarantees of Article 8, the court rejected the applicants' contention that the guarantee should extend to cover specific remedies established by the Member State in respect of entry refusals.[16]

The judgment in *Radiom* and *Shingara* proceeded to explain why the entitlement of the migrant national should extend only to the remedies generally available against acts of the administration. The right of entry[17] is extended to Community nationals by virtue of the exercise of the right of free movement.[18] The right of free movement is not absolute. The source of free movement rights in the present context, Article 48,[19] permits Member States to deny the right of free movement on grounds of public policy, public security or public health.[20] The State is given a margin of discretion, albeit within Community law ***E.L.R. 161*** boundaries as to denial of the exercise of free movement rights.[21] By contrast, the consequence of holding the nationality of a Member State is that a person has a right of entry to that State.[22] In decisions relating to entry, the Member State has no discretion, it cannot deny its own nationals the right of entry to is territory.[23] Founded on the presence or absence of discretion in decisions involving the migrant national or the host national, the Court in *Radiom* and *Shingara* distinguished the two situations as being "in no way comparable". In consequence, the obligation place by Article 8 on Member States, the right to "the same legal remedies", was held to be satisfied where the migrant enjoyed a right to the general remedies provided by the Member State in respect of entry and expulsion taken for reasons of public order and public security. As was observed by the Advocate General, this conclusion would accord with the rationale behind Article 8. It would not be logical for the procedural protection of Article 8 to extend to the specific remedies available under national law because "nationals of the Member States do not need to challenge acts of the administration denying them entry or directing their expulsion they cannot be the subject of such measures".[24]

Where the decision made by an administrative authority specifically concerns either the issue of a first residence permit or expulsion before the issue of that first residence permit, Article 9, paragraph 2 gives the migrant national the right to request that the decision be reviewed by an independent authority. Paragraph 2 remains silent as to the conditions of exercise of that right. In *Radiom* and *Shingara,* the Court of Justice held that the circumstances listed in Article 9, paragraph 1 are to be transposed as

condition precedents to the exercise of the rights contained in paragraph 2.[25] In *R. v. Secretary of State for the Home Department, ex parte John Gallagher,* the Court of Justice held that the distinction between paragraphs 1 and 2 is one of temporality. The Opinion in Article 9, paragraph 1 must be obtained before the decision, those in paragraph 2 being obtained after the decision has been made and only at the request of the migrant national.[26] As the Advocate General observed, the distinction between the two paragraphs is "merely attributable to drafting",[27] it is a cosmetic difference.

A decision involving either refusal of the first residence permit, or expulsion even before the first residence permit has been obtained, is therefore reviewable in circumstances in which there is either no provision for an appeal to an appellate court within that state, or if such an appeal exists, it concerns only the legal validity of the decision, or the appeal cannot have suspensory effect.[28] The Court held that if appeals were to be allowed in circumstances other than these, the effect would be that the right of appeal would exist***E.L.R. 162*** even where the remedy made available under national law entailed a review of the substance together with an exhaustive examination of all the facts and the circumstances. This is not the purpose of the legislation, since the Court of Justice in *Pecastaing v. Belgian State* [29] held that the procedure of referral for consideration and opinion provided for in Article 9 is intended to mitigate the deficiencies in the remedies referred to in Article 8 of the Directive. Intervention by the competent authority referred to in Article 9(1) is made before a final decision is taken. Its purpose is to enable an exhaustive examination of all the facts and circumstances of the particular case, including the expediency of the proposed measure.[30]

The final issue in the judgment in *Radiom* and *Shingara* was whether the migrant's right of recourse to an independent competent authority provided under Article 9(2) of Directive 64/221 would remain unaffected by failure to utilise its provisions at the time of previous refusal of entry. The Court acknowledged the position it had taken in *Adoui and Cornuaille* that a Community national expelled from a Member State may apply for a fresh residence permit if that application is made a reasonable time after the first decision to expel. The application must be examined by the competent administrative authority in that State. If there is then found to be a material change in the circumstances which justified the first decision ordering expulsion, then the migrant would be entitled to a residence permit. Based upon that part of the judgment in *Adoui and Cornuaille,* the Court held that the migrant's failure to appeal a previous decision or to seek an opinion does not affect the exercise of such rights on a subsequent occasion.

Commentary

The judgment of the Court of Justice in *Radiom* and *Shingara* was concerned with delivery to the migrant of the promises of Community law regarding procedural rights given to migrant nationals in respect of entry, residence and expulsion.

Article 8: the requirement of the "the same legal remedies"

In two respects, the obligation to afford the migrant national access to the general remedies provided by the Member State against acts of the administration ought to be viewed as an effective safeguard for the protection of rights. An equality of treatment exists with respect to access to a system of appeals, the migrant national cannot be offered a remedy which is less effective than one which is available to the host national. The remedy offered to the migrant must accord with Community law.
The obligation placed on the Member State is to provide the migrant national with the "*same* legal remedies",[31] [emphasis added] it does not exhaust legal rights where the source of such rights is Community law. Member States are required to afford complete ***E.L.R. 163*** and effective protection to individuals in instances where they have directly enforceable rights under Community law.[32]

The evidence of the parity of treatment between migrant and host national will be one of fact. It will depend upon the court structure and functions peculiar to those courts in any one Member State. Where, for example the administrative courts are not empowered to grant a stay of execution or the migrant is not protected with regard to an interim stay of execution, that power belonging to the ordinary courts of that State, then the migrant is entitled to appeal to the latter on the same terms as the host nationals.[33] The protection for the migrant is that any deficiency in the national legal machinery, in that it does not properly reflect the provisions of Community law, must be rectified.[34] Specifically in the context of the right of free movement for the worker, it has been held that the existence of a remedy of a judicial nature in respect of administrative decisions refusing free movement "is essential in order to secure for the individual effective protection for his right".[35]

In the United Kingdom, under the national legal system the general means of challenging or appealing against acts of the administration is judicial review. Allowing the migrant access to this system on the same terms as host nationals will satisfy the requirements of Article 8. In rejecting the alternative interpretation of Article 8, that the migrant is to be entitled to the specific remedies established by the Member State in respect of appeals against refusals of entry, residence and expulsion, the Court of Justice has not concerned itself with the problem of ruling as to the efficacy of an appeal to a lower tribunal. Jurisprudentially, this is correct, as the Court has been called upon to interpret the provisions of Article 8,[36] not to examine specific remedies provided by the Member State against acts of the administration. Although the decisions of the national courts in the process of judicial review must conform with the requirements of Community law, it is clearly part of the *acquis communautaire* that decisions of all bodies involved in the judicial process are subject to the same requirements. Whilst the migrant, in theory is well served by enjoying a right of recourse to judicial review, there is a forceful argument that appeal rights should also encompass a right of recourse to the specific bodies existing within the Member State, as the decisions of all such appeal bodies[37] must clearly accord with Community law. Whilst in no way detracting from access to the general right of judicial review, the availability of other conduits of redress would bolster the armoury of the migrant national seeking to enforce the provisions of Community law with respect to free movement rights.

Appeals to a competent authority

In providing for recourse to a "competent authority", the purpose of Article 9 is to compensate for the absence of appeal rights to the national courts. The judgment in ***E.L.R. 164** *Radiom* and *Shingara* now means that the right of recourse to the "competent authority" is extended and now exists where the decision involves a refusal to issue a first residence permit or an expulsion of the migrant before this stage is reached. The practical implication for the migrant national is that these decisions are now subject to detailed examination by the "competent authority"[38] before any final decision is taken, and that the decision is now subject to a stay of execution, if appropriate. Whilst there is a logicality that the procedural protection given by Article 9 should extend to all the decisions identified therein, the purpose of that Article is to remedy deficiencies in national legislation under which acts of the administration can be challenged. It provides the migrant, challenged as to the exercise of free movement rights a "minimum procedural safeguard"[39] to attack those decisions. The judgment in *Radiom* and *Shingara* in this respect should not be read in isolation, as it does not serve to eclipse the requirement that all administrative decisions taken by the Member State should accord with Community law. It is of no relevance that the migrant has previously failed to exercise appeal rights in similar circumstances. The identification by the Court of the terms on which the procedural protection is given in paragraph 2, goes some way to ensuring that this is attained.

Senior Lecturer in Law, UWE Bristol.
E.L. Rev. 1998, 23(2), 157-164

1.
Directive 64/221. [1963-1964] O.J. Eng. Spec. Ed. 117.
2.
Immigration Act 1971, s.3(1)(b). Leave to remain is granted as a matter of discretion to those who have no leave but are already in the U.K.
3.
"Indefinite leave to remain" was granted under U.K. law; Immigration Act 1971. The Home Office were not on record as being aware at that time of the acquisition by Radiom of Irish nationality in 1982.
4.
"A person who is not a [a British citizen] shall be liable to deportation from the United Kingdom (b) if the Secretary of State deems his deportation to be conducive to the public good; ". Immigration Act 1971, s.3(5)(b). It appears that at the time he was told that he was to be deported on the grounds of national security, but no further details were given.
5.
It seems that Radiom was informed that this was the ground for deportation. No further details were given by the Home Office.
6.
In response to enquiry by Radiom's solicitors inviting the Home Office to state what the position would be if, as a Community national Radiom returned to the U.K.
7.
"A person shall not be entitled to appeal against a decision to make a deportation order against him if the ground of the decision was that his deportation is conducive to the public good as being in the interests of national security ". Immigration Act 1971, s.15(3).
8.
"should Mr Radiom now attempt to enter the United Kingdom he will be refused entry on conducive grounds and will have no right of appeal. Should he be found to be in the United Kingdom removal action will be instigated and again Mr Radiom will have no right of appeal."
9.
Letter of November 23, 1992.
10.
Directive 64/221, Article 2(1).
11.
Immigration Act 1971, s.15(3). The notice excluding him stated, "You are not entitled to appeal against refusal of leave to enter because this was in obedience to directions given by the

Secretary of State personally ", on grounds of public policy and public security. This was confirmed later by the Home Office.

12.
Mr Shingara wanted the decision to treat him as an illegal entrant, to detain him and to remove him from the U.K. quashed together with a declaration that he was entitled to appeal against that exclusion or to have his case referred to an independent authority.

13.
See n. 1, *supra.*

14.
Advocate General Ruiz-Jarabo Colomer.

15.
Para. 31 of the judgment.

16.
For example, an appeal to an adjudicator against a refusal of "leave to enter the United Kingdom". Immigration Act 1971, s.13(1).

17.
Case 48/75 *Royer* [1976] E.C.R. 497 at 511; [1976] 2 C.M.L.R. 619.

18.
Extended for economic purposes by the E.C. Treaty: Article 48, Workers; Article 52, self-employed; or Article 59, providers of services.

19.
E.C. Treaty.

20.
Article 48(3). Expanded on by Directive 64/221. [1963-1964] O.J. Eng. Spec. Ed.

21.
Decisions taken on public policy and public security grounds must be based on the "personal conduct" of the individual concerned. Article 3(1), Directive 64/221.

22.
Case C-370/90 *Singh* [1992] E.C.R. I-4265 at 4294; [1992] 3 C.M.L.R. 358.

23.
Article 3, Fourth Additional Protocol to the European Convention on Human Rights. Not yet ratified by the U.K.

24.
Para. 48 of the Opinion.

25.
Those circumstances now being equally applicable to decisions taken either to renew a residence permit or to permit expulsion of its holder.

26.
Case C-175/94 *R. v. Secretary of State for the Home Department, ex parte John Gallagher* [1995] E.C.R. I-4253; [1996] 1 C.M.L.R. 557.

27.
Para. 108 of the Opinion.

28.
Directive 64/221, Article 9, para. 1 provides "Where there is no right of appeal to a court of law, or where such an appeal may only be in respect of the legal validity of a decision, or where the appeal cannot have suspensory effect ".

29.
98/79 *Pecastaing v. Belgian State* [1980] E.C.R. 691 at 715; [1980] 3 C.M.L.R. 685.

30.
Case 131/79 *R. v. Secretary of State for Home Affairs, ex parte Santillo*[1980] E.C.R. 1585 at 1599; [1980] 2 C.M.L.R. 308. Joined Cases 115 & 116/81 *Adoui and Cornuaille v. Belgian State* [1982] E.C.R. 1665 at 1710; [1982] 3 C.M.L.R. 631. Joined Cases C-175/94 *R. v. Secretary of State for the Department, ex parte Gallagher* [1995] E.C.R. I-4253 at 4276-4277; [1996] 1 C.M.L.R. 557.

31.
Article 8. Note that the reference in the recitals to Directive 64/221 is to: "*adequate* legal remedies" [emphasis added].

32.
Case C-213/89 *The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and Others* [1990] I-E.C.R. 2433 at 2473; [1990] 3 C.M.L.R. 375.

33.
Joined Cases C-297/88 & 197/89 *Dzodi v. Belgian State* [1990] E.C.R. I-3763 at 3800-3801.

34.
For example, Case C-213/89 *The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and Others* [1990] I-E.C.R. 2433; [1989] 3 C.M.L.R. 1.

35.
Case 222/86 *Unectef v. Heylens* [1987] E.C.R. 4079 at 4117; [1989] 1 C.M.L.R. 901.

36.

Article 177 proceedings. The Court has no jurisdiction to rule on the application of Community law by the national courts.

37.

For example, see n. 16, *supra.*

38.

For example, in Case 131/79 *R. v. Secretary of State for Home Affairs ex parte Santillo* [1980] E.C.R. 1585; [1980] 2 C.M.L.R. 308, it was held that a recommendation for deportation made under U.K. legislation by a criminal court may constitute an Opinion for the purposes of Article 9.

39.

Case 131/79 *R. v. Secretary of State for Home Affairs, ex parte Santillo* [1980] E.C.R. 1585 at 1599 [1980] 2 C.M.L.R. 308.

Appendix 4.

Publications – General List

Publications

Author	*Title*	Citation
Barnard, C	*Restricting restrictions: lessons for the EU from the US?*	C.L.J. 2009, 68(3), 575-606
Barnard, C	*Trailing a new approach to free movement of goods*	C.L.J. 2009, 68(2), 288-290
Barnard, C	*Keck (Re)applied (Case Comment)*	C.L.J. 1998, 57(3), 464-467
Barnard, C	*Fitting the remaining pieces into the goods and persons jigsaw?*	E.L. Rev. 2001, 26(1), 35-59
Bernard, N	*Discrimination and free movement in EC law*	I.C.L.Q. 1996, 45(1), 82-108
Castro, O	*Workers and other persons: step-by-step from movement to citizenship - case law 1995-2001*	C.M.L. Rev. 2002, 39(1), 77-127
Chalmers, D	*Repackaging the internal market - the ramifications of the Keck judgment*	E.L. Rev. 1994, 19(4), 385-403
Costello, C	*Metock: Free movement and*	C.M.L. Rev. 2009, 46(2), 587-622

	“normal family life” in the Union	
Dabbah, M	*The dilemma of Keck - the nature of the ruling and the ramifications of the judgment.*	I.J.E.L. 1999, 8(1/2), 84-113
Dashwood, A	*Non-discriminatory trade restrictions after Keck*	C.L.J. 2002, 61(1), 35-38
Derlén, M Lindholm, J	*Article 28 E.C. and rules on use: a step towards a workable doctrine on Measures Having Equivalent Effect to Quantitative Restrictions*	16 Colum. J. Eur.L. 191 2009-2010
Enchelmaier, S	*Always at your service (within limits): the ECJ's case law on article 56 TFEU (2006-11)*	E.L. Rev. 2011, 36(5), 615-650
Enchelmaier, S	*The ECJ's Recent Case Law on the Free Movement of Goods: Movement in All Sorts of Directions*	Y. E.L 2007, 26, 115-156
Enchelmaier, S	*The awkward selling of a good idea, or a traditionalist interpretation of Keck*	Y.E.L. 2003, 22, 249-322

Gormley, L	*Free Movement of Goods and Their Use -- What Is the Use of It?*	33 Fordham Int'l L.J. 1589 (2011) Available at: http://ir.lawnet.fordham.edu/ilj/vol33/iss6/1
Gormley, L	*Silver Threads Among the Gold . . . 50 Years of the Free Movement of Goods*	31 Fordham Int'l L.J. 1637 (2007).
Hatzopoulos, V; Do,T	*The Case Law of the ECJ concerning the Free Provision of Services: 2000-2005*	C.M.L. Rev. 2006, 43(4), 923-991
Hilson, C	*Discrimination in Community free movement law*	E.L. Rev. 1999, 24(5), 445-462
Kaczorowska, A	*Gourmet can have his Keck and eat it!*	E.L.J. 2004, 10(4), 479-494.
Koutrakos, P	*On groceries, alcohol and olive oil: more on free movement of goods after Keck*	E.L. Rev. 2001, 26(4), 391-407
Mortelmans, K	*The relationship between the Treaty rules and Community measures for the establishment and functioning of the Internal Market - towards a concordance rule*	C.M.L. Rev. 2002, 39(6), 1303-1346
Mortelmans, K	*Towards convergence in the application of the*	C.M.L. Rev. 2001, 38(3), 613-649

	rules on free movement and on competition?	
Oliver, P; Enchelmaier, S	*Free movement of goods: recent developments in the case law*	C.M.L. Rev. 2007, 44(3), 649-704
Oliver, P	*Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurtling in a New Direction?*	33 Fordham Int'l L.J. 1423 (2011) Available at: http://ir.lawnet.fordham.edu/ilj/vol33/iss5/4
Oliver, P Roth, WR	*The Internal Market and the Four Freedoms*	C.M.L. Rev 2004, 41(2), 407-441
Pecho P	*Good-bye Keck? A comment on the remarkable judgment in Commission v Italy, C-110/05*	Legal I.E.I. 2009, 36(3), 257-272
Prechal, S De Vries, S	*Seamless web of judicial protection in the internal market?*	E.L. Rev. 2009, 34(1), 5-24
Shuibhne, N	*The free movement of goods and Article 28 EC: an evolving framework*	E.L. Rev. 2002, 27(4), 408-425
Snell, J	*The notion of market access: a concept or a slogan?*	C.M.L. Rev. 2010, 47(2), 437-472
Snell, J	*Goods and Services in EC Law: A Study of the Relationship*	C.M.L. Rev. 2003, 40(3), 771-777

	between the Freedoms	
Snell, J	*Who's got the power? Free movement and allocation of competences in EC law.*	Y.E.L. 2003, 22, 323-351
Spaventa, E	*Leaving Keck behind? The free movement of goods after the rulings in Commission v Italy and Mickelsson and Roos*	E.L. Rev. 2009, 34(6), 914-932
Spaventa, E	*From Gebhard to Carpenter: towards a (non) economic European Constitution*	C.M.L. Rev. 2004, 41(3), 743-773
Szydlo, M	*Export restrictions within the structure of free movement of goods. Reconsideration of an old paradigm*	C.M.L. Rev. 2010, 47(3), 753-789
Tryfonidou, A	*Further steps on the road to convergence among the market freedoms*	E.L. Rev. 2010, 35(1), 36-56
Tryfonidou, A	*In search of the aim of the EC free movement of persons provisions: has the Court of Justice missed the point?*	C.M.L. Rev. 2009, 46(5), 1591-1620

Weatherill, S	*Free movement of goods*	I.C.L.Q. 2012, 61(2), 541-550
Weatherill. S	*Free movement of goods*	I.C.L.Q. 2009, 58(4), 985-993
Weatherill. S	*Free movement of goods*	I.C.L.Q. 2006, 55(2), 457-467
Weatherill, S	*After Keck: some thoughts on how to clarify the clarification*	C.M.L. Rev. 1996, 33(5), 885-906
Wenneras P; Moen, K.B	*Selling arrangements, keeping Keck*	E.L. Rev. 2010, 35(3), 387-400
Woods, L	*Consistency in the chambers of the ECJ: a case study on the free movement of goods*	C.J.Q. 2012, 31(3), 339-367

Appendix 5

Articles relied on – with details

Article Title	Journal	Reference	Word Count	R = referred P = Available in public domain * = sole author
"Market Access" or Bust? Positioning the Principle Within the Jurisprudence of Goods, Persons, Services, and Capital	German Law Journal	13 German Law Journal 679-756 (2012)	35,672	R, P, *
Goods, Persons, Services and Capital in the European Union: Jurisprudential Routes to Free Movement	German Law Journal	11 German Law Journal 159-209 (2010)	21,661	R, P, *
Accentuating the Positive: the "selling arrangement", the first decade and beyond	The International and Comparative Law Quarterly	(2005) 54 ICLQ 127-160	17,524	R, P, *
'*Trade Mark Protection: Market Partitioning. Objective Test Imported where Trade Mark Replaced'*,	Lloyd's Maritime and Commercial Law Quarterly	L.M.C.L.Q. 301 – 308	3725 (Approx)	R, P, *
'Article 39 (ex 48) E.C. Offers no Protection where Restriction on Free Movement rights arises from act of	European Law Review	(1999) 24 E.L.Rev, 525 - 530	3551 (Approx)	R, P, *

Migrant Worker: Citibank International PLC v. Kessler: Court of Appeal',				
'Non-Community Spouses: Interpretation of Community Residence Rights'. Boukssid v. Secretary of State for the Home Department',	European Law Review	(1999) 24 E.L.Rev, 99 - 105	3575 (Approx)	R, P, *
'*United Kingdom, Non-Community Spouses: Interpretation of Community Residence Rights: R v. Secretary of State for the Home Department, ex parte Zeghraba and Sahota*',	European Law Review	(1998) 23 E.L.Rev, 184 - 190	3235 (Approx)	R, P, *
'*Migrant Community Nationals: Remedies for Refusal of Entry by Member States Joined Cases C-65/95 & 111/95 The Queen v. Secretary of State for the Home Department ex parte Shingara and Radiom* [1997] E.C.R. I-3343',	European Law Review	(1998) 23 E.L.Rev, 157 - 164	4438 (Approx)	R, P, *
Total			93,381 (Approx.)	