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internal market**

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Obsah / Table of contents

Introduction	1
1 Creating the internal market: understanding the market access approach through integration methods	5
1.1 Topical background	5
1.2 Implications within the integration process	6
2 The notion of measures having equivalent effect to quantitative restrictions: anything but trivial pursuit.....	10
2.1 <i>Dassonville</i>	10
2.2 <i>Cassis de Dijon</i>	13
2.3 Sunday trading cases and <i>Keck</i> backlash	15
3 Problematic aspects and the move towards the market access approach	22
3.1 Advertising restrictions	23
3.2 Rules on use: <i>Trailers</i> , <i>Mickelsson</i> and their layout	30
3.2.1 <i>Trailers</i>	31
3.2.2 <i>Mickelsson and Roos</i>	32
3.2.3 And what to make of them?	32
3.2.4 “Any other measure...”	34
4 The Concept	40
4.1 Scope	40
4.1.1 Potentiality	46
4.1.2 <i>De Minimis</i>	52
4.2 Constitutional dimension	57
4.2.1 Article 18 TFEU and not beyond?	58
4.2.2 Article 3(3) TEU and establishing an internal market as the utmost objective?	61
4.2.3 The role of Article 4(2) TEU	63
5 Perspectives	67
5.1 Market access approach and general perspective of legal certainty	67
5.2 Market access approach and economic actors within the internal market.....	72
5.3 Market access approach and Member States	77
Conclusion.....	83
Seznam zkratek / List of abbreviations	I
Seznam použitých zdrojů / List of references	II
Abstrakt	XV
Abstract.....	XVI

Introduction

In September 2015 The President of the European Commission Jean-Claude Juncker articulated his vision of “more Europe”, particularly through deepening the internal market,¹ as a panacea for various struggles of the European Union.² In January 2017 the British Prime Minister Theresa May confirmed the priorities of Brexit³ are to remove the UK from the jurisdiction of the CJEU and eventually to leave the single market.⁴ In March 2017 the Commission issued a White Paper on the Future of Europe, which outlines various more or less integration-oriented scenarios of the EU possible development also in terms of the internal market.⁵

In the light of the above, the significance of the internal market as an area, in which free movement is ensured, is self-evident. The free movement law lies at the core of European integration and, as for instance Brexit proves, has considerable implications in terms of European affairs in general. The interpretation of free movement law advanced by the Court is then of paramount importance as it defines its final scope as well as the scope of EU law.

Particularly, one of the main dilemmas that have been at the centre of debates is an interpretation of restriction to free movement. One might expect more than four decades since the first landmark judgments to be enough for the Court to create unequivocal and especially settled case law on what measures constitute restriction to free movement. However, recent development in free movement case law suggests the opposite.

Besides other things, the confusion stems from the Court’s market access approach to the interpretation of restriction to free movement. In outline, the Court’s rationale behind the market access approach is that any measure which hinders access to the market

¹ The terms “internal market“ and “single market“ are for the purposes of this thesis being used interchangeably giving preference to the former as it complies with the language of the Treaty on European Union (TEU) and the Treaty on functioning of the European Union (TFEU).

² “State of the Union 2015: Time for Honesty, Unity and Solidarity”, speech of Jean-Claude Juncker, the President of the European Commission, Strasbourg, 9 September 2015.

³ The term Brexit refers to “the (proposed) withdrawal of the United Kingdom from the European Union, and the political process associated with it”, see <http://www.oed.com/view/Entry/54763375?redirectedFrom=brexit#eid>, accessed 30 January 2017.

⁴ “Brexit: UK to leave single market, says Theresa May”, *BBC News*, 17 January 2017, accessed 31 January 2017.

⁵ Commission, “White Paper on the Future of Europe: Reflections and scenarios for the EU27 by 2025” COM(2017)2025.

constitutes a restriction to free movement and is therefore incompatible with EU law.⁶ Clearly, the width of such interpretation is immense. It allows the Court to reinforce negative integration and push for better functioning of the internal market and the free movement within it. However, under the veil of removing barriers to the free movement, it also serves as an instrument to strike down an overwhelming amount of national measures.

The emergence of the market access approach is problematic for several reasons. First, significant uncertainty remains as to what exactly are the factors that the Court takes into account when interpreting the notion of restriction to free movement. Second, the Court has not been especially instructive in regard of how the increasingly used market access test relates to its previous case law and, in particular, to the non-discrimination principle. Third, it appears that broadening the scope of restriction to free movement and the reach of EU law in general becomes particularly contestable by Member States whose national measures, although adopted without any false intentions, are deemed to fall within the ambit of restriction. Consequently, the issue of intrusion into national regulatory autonomy has emerged in relation to the market access approach.

The number of dilemmas caused by the Court's advancement of the market access approach and the complexity of the concept was decisive for my choice of topic for this master's thesis. Specifically, I find it rather paradoxical that while the area of internal market and the free movement law has been one of the most significant as for the caseload faced by the Court,⁷ it is still a source of much ambiguity and legal uncertainty.⁸ Yet, even

⁶ Of course, a measure can be still upheld if it is justified on grounds of Article 36 TFEU derogations or mandatory requirements. A general analysis of a measure consists of three stages, which are preceded by a consideration whether a measure falls within the scope of EU law. If the answer is affirmative, the Court (i) assesses whether a measure constitutes a restriction. In case it does, a measure has to be (ii) justified and (iii) proportionate to be considered in compliance with EU law. The main focus of this thesis is on the first stage: identifying a restriction to free movement. For a general discussion on the three stages analysis, see e.g. Shuibhne, Niamh Nic, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice*, (Oxford, Oxford University Press, 2013), ISBN 978-0-199-59295-1, p. 24-29.

⁷ Court of Justice of the European Union, "Annual Report 2015: The Year in Review of the Court of Justice of the European Union", p. 28.

⁸ However, it should be already here noted that while many share this view, there are also opposite opinions to be found. For instance, Oliver argues that legal certainty and stability are in terms of the concept of MEEQR of a very high degree, in fact much higher than is perceived. His main claim is that the vast majority of cases concerns measures, which are easy to classify as falling within the scope of Article 34 TFEU or not. In my view the years for which the Court has been trying to balance its rulings on the matter and the amount of pages written thereon provides a self-evident counter-argument. Furthermore, I believe a quantitative argument of such kind cannot disregard the impact of the approach as such, albeit on relatively small amount of cases. See Oliver, Peter J., 'Measures of Equivalent Effect I: General' in Oliver, Peter J., and Stefan Enchelmaier, *Oliver on Free Movement of Goods in the European Union* (5th edn, Oxford; Portland, Hart, 2010), ISBN 978-1-84113-810-7, p. 132.

more importantly, it has been the implications and effects of the Court's market access approach on national legal orders that were striking to me. In the context of increasing Eurosceptic or even separation tendencies within the EU, I believe that the market access approach as a concept broadening the reach of EU law deserves proper attention not only on a legally technical level. In particular, I suspect that the market access approach extends the scope of restriction to free movement to a degree that Member States might find difficult to consider legitimate. This would be acceptable provided that the broad market access approach can be justified on grounds of other perspectives; otherwise it raises a concern whether the Court should not rethink the approach.

Hence, the main question this thesis aims to answer is whether the market access approach can be deemed legitimate within the limits of what is acceptable in terms of establishing the internal market. In other words, what are the limits of negative integration and where the boundaries of scope of EU law lie?⁹ For that purpose it is desirable to have a closer look on the question of what made the Court to move towards the market access approach as well as how can be the market access approach grasped as a concept.

Considerable amount of European academic work has been produced on the topic of market access approach. In order to conduct my research as set above, I turn my attention to work of several distinguished authors, among which Catherine Barnard, Peter J. Oliver, Niamh N. Shuibhne, Jukka Snell, Eleanor Spaventa and Stephen Weatherill are in the lead. Yet, as much as the Court sets off into different directions in its case law, the academic contributions often advocate very diverging positions.

In this thesis I therefore attempt to compare the diverging views and explore whether there is a common ground between them. Considering that in the course of my research I have not come across a comprehensive work on which of the Treaties'¹⁰ provisions could provide sufficient constitutional basis of the market access approach, I also commit myself, although partially, to examine in light of which of the Treaties' provisions should the notion of restriction be interpreted and whether any of them can

⁹ Weatherill, Stephen, *The Internal Market as a Legal Concept* (Oxford, Oxford University Press, 2017), ISBN 978-0-19-879481-3, p. 33.

¹⁰ The term Treaties is further used in the thesis when provisions of both Treaty on European Union (TEU) and Treaty on Functioning of the European Union (TFEU) are referred to.

serve as constitutional basis for the market access approach. Furthermore, by this thesis, I would like to, albeit fractionally, heal the lack of study on the matter within the Czech legal debate on EU law. I believe that bringing up the topic of the market access approach could initiate further discussion within the Czech legal environment on how to reconcile the pro-integration tendencies with the interests to maintain control over the national legal order. This might become pertinent all the more so in the future should anti-EU voices become stronger in the Czech Republic as well. If anything else, I hope this thesis could provide law students with a useful material to broaden their knowledge behind of what is covered in a standard European law course and reveal a new dimension of free movement law to them.

The thesis is divided into five chapters. At the outset, further topical background is provided with the aim to place the topic of market access approach in the context of establishing the internal market through the process of negative integration. The second chapter explores development of the notion of restriction to free movement in the Court's case law. The third chapter follows in the same vein, drawing attention to the most pressing moments in the case law, which subsequently lead to the emergence of the market access approach in the famous judgment in *Commission v. Italy (Trailers)*.¹¹ In order to address the development of the notion of restriction with regard to all its peculiarities, case law concerning free movement of goods is discussed as it depicts the problematic aspects of the market access approach best. For as comprehensive view on the concept as possible is presented, further discussion is not limited to free movement of goods anymore and refer to the concept in terms of other freedoms as well. The core of the thesis then lies in the fourth and the fifth chapter. The fourth chapter considers the concept of the market access approach as such. The scope of the approach is first analysed. Subsequently, the thesis examines the constitutional basis for the market access approach by analysing several Treaties' provisions. Drawing upon the findings of the fourth chapter, different perspectives are taken to assess the legitimacy of the market access approach in the fifth chapter. Within this part a very brief look on the most recent developments in terms of the Court's interpretation of free movement restriction is also provided by addressing some recent case law.

¹¹ Judgment of 10 February 2009, *Commission v. Italy (Trailers)*, C-110/05, ECLI:EU:C:2009:66.

1 Creating the internal market: understanding the market access approach through integration methods

1.1 Topical background

Article 3(3) TEU reads that “the Union shall establish the internal market”. Under Article 26(2) TFEU “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”. One of the tasks to achieve the goal is to remove regulatory barriers to cross-border trade.¹² The Treaty ensures this in different ways as it does not contain universal definition of restriction.¹³ With regard to free movement of goods Article 34 TFEU prohibits “quantitative restrictions on imports and all measures having equivalent effect [...] between Member States”. In terms of free movement of workers Article 45 TFEU sets forth that “[f]reedom of movement for workers shall be secured within the Union” and “freedom of movement shall entail the abolition of any discrimination based on nationality”. As regards freedom of establishment, services and capital, Articles 49, 56 and 63 TFEU respectively maintain that “restrictions” on the freedoms in respect of nationals of other Member States and between Member States shall be prohibited. For practical reasons general term “restriction” is used throughout the thesis. Only where free movement of goods is referred to the term “restriction” is used interchangeably with the term “measures having equivalent effect to quantitative restrictions”.

As already explained in the introduction, the development of the Court’s interpretation of restriction to free movement leading to emergence of the market access approach will be especially in the following two chapters addressed with regard to free movement of goods. This is not because the case law on other freedoms would not face

¹² Schütze, Robert, *European Union Law* (Cambridge, Cambridge University Press, 2015), ISBN 978-1-107-41653-6, p. 499. Apart from removing regulatory barriers it is also necessary to remove all fiscal barriers, such as custom duties and charges having equivalent effect. See Article 30 TFEU.

¹³ There is quite an intense debate regarding to what extent there is and should be a convergence of case law on all four freedoms, i.e. whether the Court’s move to the market access approach signals that the Court intends to adopt a general test applicable across the freedoms. Nonetheless, as this issue reaches far beyond the recommended extent of this thesis, it is not dealt with herein. For further discussion see e.g. Barnard, Catherine. 'Fitting the Remaining Pieces into the Goods and Persons Jigsaw?', *European Law Review*, vol. 26/no. 1, (2001), p. 53, 56; or Tryfonidou, Alina. 'Further Steps on the Road to Convergence among the Market Freedoms', *European Law Review*, vol. 35/no. 1, (2010), pp. 36.

challenges arisen in connection of the market access approach but the challenges have been most completely formulated in the context of free movement of goods.¹⁴ Therefore a provision that is in the spotlight in subsequent chapters is Article 34 TFEU under which “quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States”. Quantitative restrictions were defined in *Geddo* as “measures which amount to a total or a partial restraint of, according to circumstances, imports, exports, or goods in transit”.¹⁵ By contrast, MEEQR proved to be much more difficult to grasp. Starting with a very broad interpretation of what constitutes a MEEQR in the judgement in *Dassonville*¹⁶ and taking on the role of discrimination in relation to the term later in *Cassis de Dijon*,¹⁷ the Court subsequently narrowed down the interpretation in *Keck*¹⁸. Yet, as might be expected, the Court did not continue in this narrowing tendency anymore and instead moved towards the extensive market access approach. Since then the notions of MEEQR and restriction are even more concealed.

1.2 Implications within the integration process

With regard to creating the internal market, it is undeniable that the market access approach, of which removing obstacles to cross-border trade and promoting the internal market is the major purpose, plays a key role in the game of integration. For that reason, positioning the approach within the integration process seems appropriate. I submit not only is it a tool for deepening the integration, but it also represents a product of the process.

There are two methods or techniques of economic integration.¹⁹ The main and notorious task consists in “the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close

¹⁴ Barnard, Catherine, *The Substantive Law of the EU: The Four Freedoms* (5th edn, Oxford, Oxford University Press, 2016), ISBN 978-0-19-874995-0, p. 117.

¹⁵ In other words, these are either quotas or a total ban on imports. See Judgment of 12 July 1973, *Geddo*, Case 2/73, ECLI:EU:C:1973:89, para. 7.

¹⁶ Judgment of 11 July 1974, *Dassonville*, Case 8/74, ECLI:EU:C:1974:82.

¹⁷ Judgment of 20 February 1979, *Cassis de Dijon*, Case 120/78, ECLI:EU:C:1979:42.

¹⁸ Judgment of 24 November 1993, *Keck*, Joined cases C-267/91 and C-268/91, ECLI:EU:C:1993:905

¹⁹ Craig, Paul, and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (6th edn, Oxford, Oxford University Press, 2015), ISBN 978-0-19-871492-7, p. 608.

as possible to those of a genuine internal market”.²⁰ Being of essentially deregulatory nature, this method has been termed as negative integration.²¹ Considering the Member States’ regulatory autonomy, it is only logical that national rules will be likely drafted in a way preferring national interests or simply in way that restricts trade between Member States. The Court is then entitled to disapply such national rules with the aid of free movement provisions.²² The complementary method of positive integration is based on the contrary. Diverging national rules can be harmonized through enacting relevant legislation on the EU level and thus brought closer together.²³ However, the legislative process pursuant especially to Articles 114 and 115 TFEU requires certain political will.

Although positive integration can be rather wide-stretching, there is no particular way of telling which technique is of a greater impact. It is safe to say that in building the internal market the role of the Court has apparently not been any less essential than that of the EU’s legislative bodies.²⁴ Moreover, the Court has definitely been engaging in both techniques – being a “primary arena for negative integration” as much as a “supervisor of the positive integration”.²⁵

As observed by Craig and de Búrca especially the development around Article 34 TFEU and interpretation of MEEQR has been much affected by the relationship between the two integration techniques.²⁶ Consequently, the market access approach can be seen as one of the results of this interplay, in which negative integration has obviously played first fiddle. Legislative process as such and the then requirement of unanimity in the Council as well as inability of the legislation to keep up with continuous technological development rendered the positive integration not the most efficient and suitable method for the

²⁰ Judgment of 5 May 1982, *Gaston Schul*, Case 15/81, ECLI:EU:C:1982:135, para 33. See e.g. Lenaerts, Koenraad, Piet van Nuffel, Robert Bray, et al., *European Union Law* (3th edn, London, Sweet & Maxwell, 2011), ISBN 978-1-84703-743-5, p. 195; Oliver, Peter J., and M. Martinez Navarro, 'Free Movement of Goods' in Barnard, Catherine, and Steve Peers, *European Union Law* (Oxford; New York; Oxford University Press, 2014), ISBN 978-0-19-968611-7, p. 326.

²¹ Craig, de Búrca (n19) p. 608.

²² Lenaerts, van Nuffel (n20) p. 196.

²³ Craig, de Búrca (n19) p. 608.

²⁴ Snell, Jukka, 'The Internal Market and the Philosophies of Market Integration' in Barnard, Catherine, and Steve Peers, *European Union Law* (Oxford; New York; Oxford University Press, 2014), ISBN 978-0-19-968611-7, p. 301.

²⁵ Stone Sweet, Alec, *The Judicial Construction of Europe* (Oxford, Oxford University Press, 2004), ISBN 978-0-19-927553-3, p. 238-239, as cited in Craig, de Búrca (n19) p. 66.

²⁶ Craig, de Búrca (n19) p. 665-66.

purposes of establishing the internal market.²⁷ In fact, one of the very few attempts to tackle the interpretation difficulties of the term MEEQR through positive integration was Directive 70/50, which set forth in its Article 2(3) what can constitute such measures.²⁸ Since then Article 34 and the term MEEQR have been attempted to be understood rather through negative integration. The market access approach, which arose later in the years to come, can be therefore seen as a result of this strategical choice to favour dynamics and efficiency over legal certainty and foreseeability of the rules. The bulk of case law dealing with interpretation of Article 34 TFEU as opposed to amount of legislation on the term of MEEQR is proof enough of it.

While there is not much doubt about the limits of positive integration enshrined in Articles 2 – 6 TFEU, the same cannot be said in terms of negative integration. Since the two are deemed independent of each other, the scope of the former has never been of much help in delimiting the scope of the latter.²⁹ Thus, the big question of what are the boundaries of negative integration and, ultimately, what is the scope of application of EU law remain.³⁰ Undoubtedly, the principle of conferral set forth by Article 5 TEU can provide some guidance as to where should negative integration and the EU law stop.³¹ However, the Treaties otherwise say very little on the particular rules that should delimit the boundaries of negative integration and the EU law in general.³² For instance, as Weatherill rightly points out “the brevity of Article 34 is out of all proportion to its immense significance as an instrument for the creation of a market in which the free

²⁷ Originally, pursuant to Article 94 EC Treaty/100 EEC (what is now Article 115 TFEU) the Council was required to act unanimously in order to adopt directives, which directly affected the establishment or functioning of the internal market. It was only the Single European Act 1986 (SEA) that introduced Article 95 EC Treaty/100a EEC and is now Article 114 as the main source of the EU’s legislative power while only requiring qualified majority in the Council. See Craig, Paul, 'Development of the EU' in Barnard, Catherine, and Steve Peers, *European Union Law* (Oxford; New York; Oxford University Press, 2014), ISBN 978-0-19-968611-7, p. 19.

²⁸ Commission Directive 70/50 EEC of 22 December 1969 based on the provisions of Article 33(7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty [1970] OJ L 13/29. The directive was only applicable during the Community’s transitional period, see Craig, de Búrca (n19) p. 667.

²⁹ Schütze (n12) p. 476.

³⁰ See e.g. Barnard (n14) p. 117; Schütze (n12) p. 477; Weatherill (n9) p. 33.

³¹ Craig, de Búrca (n19) p. 666; Lianos, Ioannis. 'In Memoriam Keck: The Reformation of the EU Law on the Free Movement of Goods', *European Law Review*, vol. 40/no. 2, (2015), p. 225, Barnard, Catherine. 'Restricting Restrictions: Lessons for the EU from the US?', *The Cambridge Law Journal*, vol. 68/no. 3, (2009), p. 577; Snell (n24) p. 301.

³² Weatherill (n9) preface.

circulation of goods is ensured”.³³ It is then the Court that has a major say in the matter of free movement rules and the internal market in general and has become “an arbiter in this field”.³⁴ And it is the debate about market access approach, in which the scope of negative integration resonates immensely and which shall be assessed with that regard.

³³ Weatherill, Stephen, *Cases and Materials on EU Law* (9th edn, Oxford, Oxford University Press, 2010), ISBN 978-0-19-956225-1, p. 313.

³⁴ Ibid. Similarly in Oliver, Peter, and Wulf-Henning Roth. 'The Internal Market and the Four Freedoms', *Common Market Law Review*, vol. 41/no. 2, (2004), p. 413. It is also not a coincidence that the Court has gained a label of “the motor of integration“. See in Grimm, Andreas. ‘The European Court of Justice and the Myth of Judicial Activism in the Foundational Period of Integration through Law’, *European Journal of Legal Studies*, vol. 07/no. 2, (2014), p. 62.

2 The notion of measures having equivalent effect to quantitative restrictions: anything but trivial pursuit

In order to understand the development and the rationale behind the market access approach key judgments concerning interpretation of MEEQR will be discussed in this chapter. Since time seems to be of immense importance in this matter, chronological criterion will be followed in this thesis as in most of the works in the field.³⁵

2.1 *Dassonville*

The famous *Dassonville* judgment involved the question of legality of Belgian rules under which an import of goods bearing a designation of origin was only lawful if such goods were accompanied by a certificate issued by the government of exporting country and confirming the right to bear the designation. Dassonville was importing Scotch whisky from France into Belgium and found it extremely difficult to get the certificate since the goods in question were already in free circulation. As he was lacking the certificate, he was prosecuted and the Belgian court asked if the national rules constituted MEEQR. The Court's well-known answer, which is often called as "*Dassonville* formula",³⁶ was 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".³⁷

There are several particularities that can be read out of the decision. To start with, the breadth of the MEEQR definition is noticeable. Not only is it the effect of a measure and not the purpose of it that is taken account of in the assessment, but it is enough to constitute a MEEQR even if the restricting effects are only potential.³⁸ That was later repeated again, noting that Article 34 TFEU cannot be held inapplicable only because there are no other actual cases connected to another Member State at the present time.³⁹ Similarly, the potentiality also brings about an irrelevance of any statistical and economic data in assessing whether a measure falls within the term MEEQR or not. In *Commission v.*

³⁵ See e.g. Oliver and Martinez Navarro (n20) p. 334.

³⁶ Ibid. See also Schütze (n12) p. 502.

³⁷ Judgment of 11 July 1974, *Dassonville*, Case 8/74, ECLI:EU:C:1974:82, para. 5.

³⁸ See e.g. Oliver and Martinez Navarro (n20) p. 334-35; Craig, de Búrca (n19) p. 668.

³⁹ Judgment of 7 May 1997, *Pistre*, Joined cases C-321/94 - C-324/94, ECLI:EU:C:1997:229, para. 44.

Ireland ('*Buy Irish*') the defendant argued that the campaign promoting domestic products over imported ones has not had any restrictive effects on imports because the amount of the latter has in fact increased in proportion to the former since the campaign has been launched.⁴⁰ The Court swiftly dismissed the argument by replying that the lack of actual positive impact of the campaign on sales of domestic goods does not mean it did not have any effect since the imports could have increased even more if it was not for the campaign.⁴¹ Furthermore, from rejecting another argument of the Irish government that a measure needs to have binding effects to possibly fall within the term of a MEEQR it is again clear that in the Court's view the essence of a measure prevails over the form.⁴²

Especially in the context of *Buy Irish* and unlike stated by majority of commentators,⁴³ in my view it is questionable whether there is a substantial difference between the purpose of a measure and its potential effect and to what extent is the purpose actually disregarded. If there is no actual effect to the detriment of imported goods, what then forms the potentiality? Is it not perhaps the latent purpose of a measure that is a source of the hypothetical effect? By including "potential effects" the *Dassonville* formula certainly takes the approach further away from *de minimis* rule, but on the other hand brings it closer to regarding the purpose as one of determining factors. It appears that a discriminatory intention is not a requirement *sine qua non* to constitute a MEEQR supposing it has restrictive effects on imports, but if there are no actual effects thereof, it can be the purpose that attracts attention as to what makes a measure potentially restrictive. Regardless of the above mentioned it is possible to concur with the opinion that the Court generally tends to appraise the substance of a measure.⁴⁴

However, the Court's refusing approach to *de minimis* rule has been rather obvious and will be more discussed in subchapter 4.1.2. At this point it is worth mentioning that it was as early as in *van de Haar*, when the Court clarified that a measure must be regarded

⁴⁰ Judgment of 24 November 1982, *Commission v. Ireland (Buy Irish)*, Case 249/81, ECLI:EU:C:1982:402, para. 22.

⁴¹ *Ibid.*, para. 25. See also Oliver and Martinez Navarro (n20) p. 334-35, Craig, de Búrca (n19) p. 670.

⁴² Judgment of 24 November 1982, *Commission v. Ireland (Buy Irish)*, Case 249/81, ECLI:EU:C:1982:402, para. 28.

⁴³ See e.g. Oliver and Martinez Navarro (n20) p. 335: „obvious [...] that it refers exclusively to the *effects* of a measure, not its purpose” (emphasis in the original); Weatherill (n33) p. 316.

⁴⁴ Craig, de Búrca (n19) p. 670.

as a MEEQR “even though the hindrance is slight and even though it is possible for imported products to be marketed in other ways”.⁴⁵

Getting back to *Dassonville* judgment, two attempts to limit its scope can be identified. Firstly, as Barnard recognizes there is a room for certain measures not to be caught by the formula pursuant to so-called “rule of remoteness” or sometimes also referred to as “*Peralta* principle”.⁴⁶ It has been established later by the Court that had the possibility of restrictive effects on imports been “too uncertain and indirect” to conclude a measure is liable to hinder cross-border trade, such measure would have been deemed outside the scope of Article 34 TFEU.⁴⁷ Although indicating many differences in perceptions, this can be roughly compared to Schütze’s observations of Article 3 of the Directive 70/50, which implies that as long as the restrictive effects of an equally applicable measure related to marketing of products do not exceed what is intrinsic to trade rules, they are considered “inherent in the disparities between rules applied by Member States” and are not held to fall within the term of MEEQR.⁴⁸

Secondly, the Court also softened the all-embracing formula and laid the groundwork for so-called “rule of reason” doctrine, which was later developed in the famous *Cassis de Dijon* case.⁴⁹ The Court reflected that in the absence of positive harmonization on the EU level, Member States might introduce reasonable measures to preserve certain objectives, such as consumer’s faith in authenticity of the designation of a product’s origin in the case, provided that these are not a hindrance to trade between Member States.⁵⁰

Although there are several implications of the judgment, many of them became apparent only years later and there have not been much guidance that could have been excerpt from the ruling at the time it was delivered. Despite some indications of narrowing

⁴⁵ Judgment of 5 April 1984, *van de Haar*, Joined cases 177 and 178/82, ECLI:EU:C:1984:144, para. 13.

⁴⁶ For the term “rule of remoteness” see e.g. Oliver and Martinez Navarro (n20) p. 335; or Shuibhne (n6) p. 157-188. For the term “*Peralta* principle” see e.g. Oliver (n8) p. 133.

⁴⁷ See e.g. Judgment of 7 March 1990, *Krantz*, C-69/88, ECLI:EU:C:1990:97, para. 11; Judgment of 14 July 1994, *Peralta*, C-379/92, ECLI:EU:C:1994:296, para. 24.

⁴⁸ Commission Directive 70/50 [1970], OJ L 13/29; Schütze (n12) p. 501. Cf. White, Eric L. 'In Search of the Limits to Article 30 of the EEC Treaty', *Common Market Law Review*, vol. 26/no. 2, (1989), p. 246.

⁴⁹ Craig, de Búrca (n19) p. 668.

⁵⁰ Judgment of 11 July 1974, *Dassonville*, Case 8/74, ECLI:EU:C:1974:82, para. 6.

Dassonville definition down, the Court certainly took up the opportunity to push for further integration and upheld the broad interpretation of the term MEEQR.

2.2 *Cassis de Dijon*

Before further advancing the case law overview, the already mentioned Directive 70/50 on the abolition of MEEQR on imports needs to be briefly revisited.⁵¹ It was as early as before the *Dassonville* judgement when the distinction between measures equally applicable to domestic and imported goods has been acknowledged by the Directive. Article 2 was drafted so as to cover only those measures whose effect was to treat imported goods less favourably, thus hindering imports. Although the general rule aimed only at distinctly applicable measures⁵², the Commission had recognised in Article 3 of the Directive that, although confined to measures of a certain type and provided their restrictive effect exceeds effects intrinsic to trade rules, even indistinctly applicable measures can constitute impediments to trade between Member States and it outlawed these as MEEQR, too. As manifested above, in *Dassonville* the Court has embraced this broad conception set up by the Commission, however it did not refer to the distinction between distinctly and indistinctly applicable national measures.⁵³ The role of discrimination was apparent neither from the Court's reasoning nor from the facts of the case. It proved evident that measures making imported goods subject to stricter conditions in order to enter host-state market, such as those in the case, were precluded. The *Dassonville* definition seemed to disregard discriminatory nature of a measure, which would suggest it does include even indistinctly applicable measures, but there has been no proof of that assumption.

⁵¹ Commission Directive 70/50 [1970] OJ L13/29, Articles 2-3.

⁵² At this point, a few words need to be devoted to clarifying terminology. Throughout the academic work on free movement and MEEQR as well as this thesis, terms "discriminatory" and "non-discriminatory", "discriminatory in law" and "discriminatory in fact", "directly and indirectly discriminatory" and "distinctly and indistinctly applicable" measures are used. The dividing line between these is not always straightforward as they are sometimes used interchangeably. However, there are particularities they can be distinguished by. The term (in)distinctly applicable measure concerns whether a measure is equally applicable to domestic and imported products or situation in general or not. Distinctly applicable measures are those discriminatory on their face, i.e. in law, and they are directly discriminatory. Indistinctly applicable measures are not discriminatory in law, yet they can be discriminatory in fact, i.e. indirectly discriminatory. Hence, the term (in)distinctly applicable relates to the applicability of a measure, whereas the term discriminatory refers to the actual effects thereof. See e.g. Barnard (n14) p. 90. For a discussion of the terminology pitfalls see Shuibhne, Niamh Nic. 'The Free Movement of Goods and Article 28 EC: An Evolving Framework', *European Law Review*, vol. 27/no. 4, (2002), p. 408-412.

⁵³ Lenaerts, van Nuffel (n20) p. 214-215.

It has been the judgment in *Cassis de Dijon*, which remarkably reconciled the existent confusions about whether a measure needs to be discriminatory to be classified as a MEEQR.⁵⁴ As Craig and de Búrca put it “the seeds that were sown in Directive 70/50 and *Dassonville* came to fruition” in this seminal decision.⁵⁵ The notorious case concerned compatibility of a German rule, which set minimum alcohol content of 25% as a condition for a product to be marketed in Germany as liqueurs or other potable spirits. The plaintiff wished to import ‘Cassis de Dijon’ liqueur from France, where it was freely marketed, to Germany, but was rejected an authorization to import the beverage as it only contained between 15 and 20 % of alcohol content. He argued the provision in question constituted a MEEQR contrary to what is now Article 34 TFEU. The Court did agree. It has lived up to its substance-based focus and endorsed the view concentrating on effects of the measure. In particular, it stated that “the principle effect of requirements of such nature is to promote alcoholic beverages [...] by excluding from the national market products of other Member States which do not answer that description” and that such “unilateral requirement [...] constitutes an obstacle to trade”.⁵⁶ It thereby confirmed that indistinctly applicable measures do not escape the prohibitory effects of Article 34 TFEU.

It has also been one of the most integrationist principles of mutual recognition that had been established in *Cassis de Dijon*.⁵⁷ At first the Court reiterated its view previously taken in *Dassonville*⁵⁸ that Member States are free to adopt measures in areas that are not harmonized and impose them on their territory, yet the narratives significantly shifted. In paragraph 14, line 4 of the judgment the Court asserted that products, which have been lawfully produced and marketed in one Member State, can be automatically marketed in another Member State. A Member State can only rely on its own provisions in so far those are necessary to accommodate mandatory requirements and provided they are indistinctly applicable.⁵⁹ Given that a number of national measures otherwise covered by the term of

⁵⁴ Judgment of 20 February 1979, *Cassis de Dijon*, Case 120/78, ECLI:EU:C:1979:42.

⁵⁵ Craig, de Búrca (n19) p. 674, 668.

⁵⁶ Judgment of 20 February 1979, *Cassis de Dijon*, Case 120/78, ECLI:EU:C:1979:42, para. 14.

⁵⁷ The term ‘mutual recognition’ is a product of the doctrine, not of the Court itself. Barnard points out that the inspiration is drawn from the Full Faith and Credit clause contained in Art. VI of the US Constitution, requiring the States to recognise each other’s Acts, Records and judicial Proceedings. See Barnard (n14) p. 91.

⁵⁸ Judgment of 11 July 1974, *Dassonville*, Case 8/74, ECLI:EU:C:1974:82, para. 6.

⁵⁹ Judgment of 20 February 1979, *Cassis de Dijon*, Case 120/78, ECLI:EU:C:1979:42, para. 8(2). Mandatory requirements are, for instance, the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.

MEEQR seek to promote public policy objectives in the general interest, the Court appreciated Member States' need to uphold such measure if there is a legitimate reason for it.⁶⁰ Thereby the rule of reason has been reaffirmed.

Grounds for deepening the European integration could have hardly been better prepared. *Cassis de Dijon* has clearly followed the trend set by *Dassonville* and removed any doubts as for possible limits of the formula. With the integration objectives in mind indistinctly applicable measures were not saved from the ambit of Article 34. Aware of encroaching upon national regulatory autonomy, the Court allowed for certain justifiable exceptions. Still, the rule of reason doctrine appeared to be by far one of the only limitations of the overtly wide approach.

2.3 Sunday trading cases and *Keck* backlash

Integration-wise well-shaped *Cassis de Dijon* naturally projected into a line of judgments.⁶¹ In *Gilli and Andres* the importers were prosecuted under Italian rules because of marketing vinegar from Germany, which was not based on acid derived from wine fermentation, while the Italian rules however requested so. *Rau* concerned Belgian law, which set forth that margarine can only be sold in cube-shaped boxes so that consumers do not confuse it with similar products. Similarly, a German law on beer purity in *Commission v. Germany* did not allow use of 'beer' designation for products made from ingredients other than malted barley, hops, yeast and water, although these are in other Member States lawfully marketed as 'beer'.

All these cases and many others have one thing in common. Although the measures at hand are all indistinctly applicable, their effect on domestic and imported goods is not by any means the same. While distinctly applicable measures discriminate directly against imports "on their face",⁶² national regulations dealt with in *Cassis de Dijon* and the likes, even though equally applicable, still put imported goods in a less favourable position. By requiring imported goods to comply with a Member State's rules or standards that are

⁶⁰ Lenaerts, van Nuffel (n20) p. 218.

⁶¹ Judgment of 26 June 1980, *Gilli and Andres*, Case 788/79, ECLI:EU:C:1980:171; Judgment of 10 November 1982, *Rau*, Case 261/81, ECLI:EU:C:1982:382; Judgment of 12 March 1987, *Commission v. Germany (Beer)*, Case 178/84, ECLI:EU:C:1987:126.

⁶² Oliver and Martinez Navarro (n20) p. 336.

different from those of the exporting country, the imports although subjected to the same provisions as domestic goods are liable to additional costs that manufactures have to incur to meet those requirements. That is known as indirect discrimination or also as discrimination in fact.⁶³

Nevertheless, there are also national rules that do apply both to domestic and imported goods equally. Yet, an answer to the question of whether these come under scrutiny of Article 34 has been anything but clear. The sticking point in the matter is commonly shared perception that ultimately any rule or a requirement by its mere regulatory nature, which is inherent in each and every of them, is essentially of the effect of restricting economic freedoms and activities of economic operators and therefore limiting trade as a whole.

It first appeared that the Court did not adopt such an extremely wide approach. In *Oebel* it excluded the application of what is now Article 34 TFEU while basing its argumentation on a claim that rules governing working hours in bakeries productions and transporting of bakery products at night as being genuinely indistinctly applicable and not discriminatory whatsoever are on top of that parts of economic and social policy of the Member State seeking legitimate public interests.⁶⁴ Not quite the same view took the Court couple of years later in *Cinéthèque*. While first acknowledging the measure, which abolished sale or hire of any video-cassettes bearing films within the first year after their release in the cinemas, is not of protectionist purpose, the Court did consider it to be equivalent to quantitative restrictions even though it applied equally to domestic and imported products and was later justified.⁶⁵

Needless to say such an approach significantly responsive to economic operators favouring deregulation in general was not left without reaction. The Court encountered an immense influx of preliminary references on cases, in which indistinctly applicable national legislation had been challenged.⁶⁶ The confusion as for whether the turnabout in *Cinéthèque* would be upheld escalated in the first one of so-called Sunday trading cases. A well-known judgement in *Torfaen* assessed compatibility of a ban on trading on Sunday

⁶³ Ibid.

⁶⁴ Judgment of 14 July 1981, *Oebel*, Case 155/80, ECLI:EU:C:1981:177, para. 16.

⁶⁵ Judgment of 11 July 1985, *Cinéthèque*, Joined cases 60 and 61/84, ECLI:EU:C:1985:329, para. 21-22.

⁶⁶ See e.g. Oliver, Peter. 'Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurling in a New Direction?', *Fordham International Law Journal*, vol. 33/no. 5, (2010), p. 1435.

with the provision on prohibition of MEEQR.⁶⁷ The ruling has been perceived as markedly equivocal and became the grounds for completely opposing interpretations approached by national courts.⁶⁸ The Court recognized that rules such as those at issue are an expression of economic and social policy and then, referring to Article 3 of Directive 70/50, employed proportionality test to be used by national courts stating that what is now Article 34 TFEU does not cover rules in question “where the restrictive effects on Community trade which may result therefrom do not exceed the effects intrinsic to rules of that kind”.⁶⁹ The judgment has been mostly read as backing the opinion formulated in *Cinéthèque*.⁷⁰ Following the inconsistency of national courts’ rulings, more thorough guidance on how to assess the proportionality of national measures was however only given later in subsequent case law.⁷¹

At any rate, litigants’ persistence in challenging national measures in terms of Article 34 and increasing number of academic voices disagreeing with the direction, in which the case law had set off, made the Court reconsider its previous work. From all the calls for rationalizing the approach in order to focus on rules that indeed render the internal market fragmented, already back then White had suggested to employ distinction between rules related to “the *characteristics* required of imported products and the *circumstances* in which they may be sold” as any reduction in total sales as a consequence of the latter “does not arise out of disparities between national rules but rather out of the existence” thereof.⁷² Not only was the push for change apparent from outside the Court, but also AG Tesaro’s opinion in *Hünernmund*, in which he stressed inconsistencies, contradictions and improper use of Article 34 TFEU, gave a clear signal that the existent case law needs to be reconsidered.⁷³

⁶⁷ Judgment of 23 November 1989, *Torfaen*, C-145/88, ECLI:EU:C:1989:593.

⁶⁸ Weatherill (n33) p. 370. See also Arnall, Anthony. ‘What Shall we do on Sunday?’, *European Law Review*, vol. 16/no. 2, (1991), p. 112.

⁶⁹ Judgment of 23 November 1989, *Torfaen*, C-145/88, ECLI:EU:C:1989:593, para. 13-17.

⁷⁰ See e.g. Oliver and Martinez Navarro (n20) p. 336; Craig, de Búrca (n19) p. 680; Schütze (n12) p. 504. The paragraph 17 of the judgement is in this context to be read as an exception from the implicit rule that such measures fall within the scope of Article 34.

⁷¹ Judgment of 16 December 1992, *Stoke-on-Trent*, C-169/91, ECLI:EU:C:1992:519.

⁷² White (n48) p. 246 (emphasis in the original).

⁷³ Opinion of AG Tesaro delivered on 27 October 1993, *Hünernmund*, C-292/92, ECLI:EU:C:1993:863, para. 25-26. It shall be noted that the urge was indeed rather for reconsideration of the case law as such than reconsideration in favour of market access approach since AG Tesaro did not appear to be supporting the latter.

Four years after White's contribution and only one month after giving the opinion in *Hünermund*, the Court delivered its judgment in *Keck*.⁷⁴ The facts of the case involved two French citizens against whom there were criminal proceedings brought on the grounds they had been reselling unaltered products at a loss, which was contrary to French law. The accused claimed the law is incompatible with what is now Article 34. While acknowledging the need to re-examine⁷⁵ and clarify its case law given the aforementioned background, the Court actually embraced White's suggestion and firmly stated that, supposing they apply to domestic and imported goods equally (the first condition) and "affect them in the same manner, in law and in fact" (the second condition), "national provisions restricting or prohibiting certain selling arrangements [...] fall outside the scope of Article 30 of the Treaty" due to the fact that these are 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".⁷⁶

In this way distinction has been made between so-called "product-bound" measures or "product requirements" on one side, which relate to the very characteristics of products and set requirements products have to comply with in order to be lawfully marketed in a Member State, and measures dealing with "certain selling arrangements" or "methods of sales" on the other.⁷⁷ While the former remained subject to previous case law, the latter was exempted from *Dassonville* formula and, unless discriminatory either in law or in fact, held lawful.

The ruling has been premised on a belief that the two types of measures have different effects in terms of partitioning the internal market. While the former can be characterised as maintaining or deepening disparities between national markets, the latter is

⁷⁴ Judgment of 24 November 1993, *Keck*, Joined cases C-267/91 and C-268/91, ECLI:EU:C:1993:905. It is deemed that the Court drew significant inspiration both from White and AG Tesouro. See e.g. Oliver (n8) p. 113; Snell, Jukka. 'The Notion of Market Access: A Concept Or a Slogan?', *Common Market Law Review*, vol. 47/no. 2, (2010), p. 447.

⁷⁵ Judgment of 24 November 1993, *Keck*, Joined cases C-267/91 and C-268/91, ECLI:EU:C:1993:905, para. 16: "contrary to what has previously been decided".

⁷⁶ *Ibid.*, para. 16-17 (emphasis added).

⁷⁷ Although the Court does not use the terms of "product-bound measures" and "product requirements" as such, it does provide examples of such measures, which therefore deal with designation, form, size, weight, composition, presentation, labelling or packaging of a product. The very term "product requirements" was first employed by AG Van Gerven in *Boermans* and then accepted by the doctrine. On the other hand the terms "certain selling arrangements" and "methods of sales" have been created by the Court itself. See Judgment of 24 November 1993, *Keck*, Joined cases C-267/91 and C-268/91, ECLI:EU:C:1993:905, para. 13, 15-16; Judgment of 2 June 1994, *Boermans*, Joined cases C-401/92 and C-402/92, ECLI:EU:C:1994:220.

conceived to be less dangerous for market integration. Product requirements different from those of importing country can have a disparate impact on domestic and imported goods as the latter will often have to be altered accordingly and will always constitute indirect discrimination. Such measures can be then justified either pursuant to Article 36 TFEU or through mandatory requirements doctrine before held a MEEQR. Essentially, the discriminatory effect on imported goods is required for both types of measures; however, no particular evidence of discrimination is needed regarding product requirements since their application itself on imported products is *per se* deemed discriminatory, even though such discrimination can be justified.⁷⁸

Hence, more straightforward and predictable sort of “categorizing” approach was given preference over what Barnard calls “restrictions” approach and possibly also “balancing” approach.⁷⁹ However, the difficulty with categorizing approach remains that subtle nuances do not always have to be reflected by all the categories and it can provide overly rigid solution disregarding particularities of a case. Unlike the product-bound measures the Court was at first reluctant to define the term of certain selling arrangements as a separate category of national measures. It was only subsequent case law that offered some clarification on the matter.⁸⁰ If in doubt as for which category a measure belongs to, the Court as a rule of thumb seemed to apply product-bound category, although, as Oliver and Martinez Navarro observe, this has never qualified as a principle.⁸¹ As the distinction proved to be fairly incomprehensive, the judgment was subjected to increasing criticism both from scholars and Advocates General.⁸²

However, the core rationale behind the *Keck* distinction, being that indistinctly applicable national provisions dealing with certain selling arrangements are as such less restrictive than measures requiring the alteration of a product according to specific national standards, was not flawless. First, it came to a head that certain measures, for example

⁷⁸ See e.g. Bernard, Nicolas. 'Discrimination and Free Movement in EC Law', *International and Comparative Law Quarterly*, vol. 45/no. 1, (1996), p. 92-93.

⁷⁹ Barnard (n31) p. 577.

⁸⁰ See e.g. Judgment of 2 June 1994, *Boermans*, Joined cases C-401/92 and C-402/92, ECLI:EU:C:1994:220. Oliver and Martinez Navarro list examples of selling arrangements according to therein cited case law as follows: restrictions on when, where, or by whom goods may be sold, advertising restrictions and price controls. See Oliver and Martinez Navarro (n20) p. 337.

⁸¹ See Oliver and Martinez Navarro (n20) p. 337.

⁸² See e.g. Oliver and Martinez Navarro (n20) p. 337; Weiss, Friedl, and Clemens Kaupa, *European Union Internal Market Law* (Cambridge, Cambridge University Press, 2014), 978-1-107-63600-2, p. 66.

those regulating advertising of a product, which following the *Keck* line of arguments could have certainly been qualified as selling arrangements and thus saved from the ambit of Article 34, in fact constituted a restriction on trade since they did not affect domestic and imported products in the same manner as stressed in paragraph 16 of *Keck*.⁸³ Their classification as selling arrangements therefore became arguable. Second, deciding within which category a measure should fall is naturally liable to cause problems⁸⁴ as for instance drawing a line between measures related to packaging of products and those regulating their advertising does not always have to be apparent. Third, not every rule fits into any of the two categories. That arose especially in connection with measures regarding restrictions on use of a product as will be shown in the next chapter.

Keck has been widely perceived as an attempt to find outer boundaries of Article 34 TFEU and EU law in general.⁸⁵ To reflect the existence of various types of measures depending on a matter they deal with and specific effects they have, the approach based on categories of measures has been pursued by this judgment. Notwithstanding its undeniable effort to address widening scope of Article 34 as in the aftermath of *Cassis de Dijon*, criticism on *Keck's* account has been persistent, claiming it introduced malfunctioning and artificial distinction that disregards the reality.⁸⁶ The Court's reaction that followed brought the market access approach to interpretation of MEEQR more into the spotlight. It ought to reflect the fact that there are national measures, which are difficult if not impossible to tackle by the *Keck* "product requirements" and "selling arrangements" dichotomy. These are either such not to be caught by Article 34 TFEU through the lenses of *Keck* but

⁸³ Opinion of AG Jacobs delivered on 24 November 1994, *Leclerc-Siplec*, C-412/93, ECLI:EU:C:1994:393, para. 44.

⁸⁴ As in Judgment of 26 June 1997, *Familiapress*, C-368/95, ECLI:EU:C:1997:325, where the principal question was whether including a crossword puzzles in a magazine, for which consumers were offered a prize, while this was forbidden by Austrian law, should be classified as a selling arrangement or product requirement, since that was determining as to who will bear the burden of proof. The Court chose the latter. To demonstrate the ambiguity it is worth mentioning Judgment of 18 September 2003, *Tommaso Morellato v Comune di Padova*, C-416/00, ECLI:EU:C:2003:475, in which the Court perceived requirements on packaging as selling arrangements because they applied only at the final stage of marketing, although it may as well have been asserted they forced importers to modify the products. Yet again, the ruling is in a stark contradiction with an earlier Judgment of 6 July 1995, *Mars*, C-470/93, ECLI:EU:C:1995:224, where the Court assessed the measure as product-related and thus in need of justification. Later, these disjointed interpretations were attempted to be tackled by introducing a doctrinal view that distinguished between "static" and "dynamic" selling arrangements. See e.g. Craig, de Búrca (n19) p. 692.

⁸⁵ See e.g. Craig, de Búrca (n19) p. 695; Weatherill (n33).

⁸⁶ See particularly Opinion of AG Jacobs delivered on 24 November 1994, *Leclerc-Siplec*, C-412/93, ECLI:EU:C:1994:393.

otherwise having prohibited differential impact on domestic and imported products or those that could potentially fall under both categories or those, which do not fit into any. In this respect, measures concerning advertising restrictions and measures containing rules on use, which are of the greatest interest and lie in the heart of the market access problematics, will be discussed in the subsequent chapter.

3 Problematic aspects and the move towards the market access approach

It should be noted that White himself admitted the categorizing approach he had suggested breaks down if measures relating to circumstances under which products can be sold are so restrictive that they are actually equal to complete prohibition of relevant products, such as for instance a possibility to buy a certain product only on Christmas Day. These as well as outright prohibitions deny the products' access to the national market.⁸⁷

The hitherto case law of the Court has been mainly driven by the principle of non-discrimination, which, as Barnard reminds us, forms “the cornerstone of the four freedoms”.⁸⁸ It was believed that promoting equal treatment and eliminating all effects stemming from discrepancies between Member States' national legal orders will ensure proper functioning of the internal market and free movement freedoms within it. As discussed above, amid the development of *Dassonville* and *Cassis de Dijon* case law, it yet emerged that such purpose embedded in the Treaties requires going further than relying on the non-discrimination principle.

I would argue that the non-discrimination principle could be understood rather as a feature than a condition when it comes to triggering Article 34 TFEU. A discriminatory measure will *prima facie* fall within the scope of MEEQR and will be held unlawful unless justified by Article 36 TFEU. On the other hand a measure does not necessarily have to be discriminatory by intent to be qualified as a MEEQR. Nevertheless, it became clear that there exist measures, which go beyond the realm of the non-discrimination principle and whose effects cannot be effectively assessed thereby. In addition, realising the *Keck* ruling is not sufficient anymore and pursuing the aim of further integration through removing all barriers to the internal market, the Court moved towards the market access approach to the interpretation of Article 34 TFEU and the notion of restriction in general. As mentioned above, national measures on advertising restrictions and rules on use, which represent exactly those measures that cannot be completely captured by the *Keck* distinction, served as an incentive for such move.

⁸⁷ White (n48) p. 258.

⁸⁸ Barnard (n14) p. 17-18.

3.1 Advertising restrictions

Despite the ambiguities outlined earlier, the point of departure that advertising restrictions come under the category of selling arrangements has been chosen.⁸⁹ Respecting the *Keck* distinction one would thus tend to come to conclusion that advertising restrictions falls outside the ambit of Article 34 TFEU. Yet, they may fail to comply with the proviso of paragraph 16 of *Keck* requiring that the measure in question affects domestic and imported goods in the same manner, in law and in fact.⁹⁰ That situation emerged in case *Leclerc-Siplec*.⁹¹ And that was the case which put arguments in favour of the market access approach forward.

In fact, it is the criticism of *Keck* expressed by AG Jacobs in his Opinion to *Leclerc-Siplec*, in which one of the main and earliest supports of the market access approach actually lies. The case concerned a French rule under which advertising in regard of certain economic operators, namely distributors, was prohibited on television.⁹²

AG Jacobs set off by pointing out that advertising as such is an essential tool for producers located in one Member State to penetrate the market in another Member State. It enables producers to change consumers' purchasing habits and make them buy a new product, which they otherwise would have less likely bought had there not been the advertisement.⁹³ While acknowledging the *Keck*'s attempt to provide clarification of the equivocal preceding case law, AG Jacobs then reveals his standpoint – the *Keck* distinction is unsatisfactory.⁹⁴ First, he perceives it “inappropriate to make rigid distinction between different categories of rules, and to apply different tests” to them, as there is only one kind of restriction in effect.⁹⁵ Moreover, some selling arrangements, such as measures permitting sale only in a very limited amount of shops or during very limited opening hours, can be extremely restrictive, possibly almost amounting to a complete ban. Second, he condemns introducing a test of discrimination in relation to selling arrangements in the form of “affecting in the same manner, in law and in fact” proviso of paragraph 16 of

⁸⁹ See e.g. Oliver (n66) p. 1439-1440.

⁹⁰ Judgment of 24 November 1993, *Keck*, Joined cases C-267/91 and C-268/91, ECLI:EU:C:1993:905, para. 16.

⁹¹ Opinion of AG Jacobs delivered on 24 November 1994, *Leclerc-Siplec*, C-412/93, ECLI:EU:C:1994:393.

⁹² *Ibid.*, para. 2.

⁹³ *Ibid.*, para. 20-21.

⁹⁴ *Ibid.*, para. 34, 38.

⁹⁵ *Ibid.*, para. 38.

Keck. To that account he claims that since the main objective of the free movement provisions is to prevent any unjustified obstacles to trade between Member States, it appears unacceptable to hold such an obstacle lawful on the grounds that it affects both domestic and imported products in the same manner. In other words, “an obstacle to inter-State trade [...] cannot cease to exist simply because an identical obstacle affects domestic trade.”⁹⁶ As long as the restrictions on trade will be assessed by local conditions, the internal market will remain fragmented. Hence, he is of the opinion that given the overall and central concern of the Treaties to establish an internal market, discrimination as a criterion is of little help.⁹⁷

Remark shall be made on the account of discrimination objective. Provided that the initial intention behind creating the category of selling arrangements was to shield such rules from the *Cassis de Dijon* type of criteria, i.e. criteria disregarding discriminatory nature of a measure, by setting down less stringent rules for assessing measures related to circumstances of sale, I find it surprising that the proviso of paragraph 16 of *Keck* does contain the discrimination test. A question whether it does not then make the category redundant by denying its actual purpose necessarily arises. The issue here is that *Cassis de Dijon* established that Article 34 TFEU catches indistinctly applicable measures but these do not inevitably have to be discriminatory in effect. I agree with Shuibhne who notes that this confusion stems from inconsistent usage of the terms indistinctly applicable and non-discriminatory and is one of the major causes of uncertainty in respect of Article 34 TFEU.⁹⁸ She further asserts the Court only complicated things by separating selling arrangements since the same criterion, i.e. equal applicability in law and in fact, would have already served to get selling arrangements out of the scope of Article 34 TFEU. Therefore, *Keck* added little to what could have already been ruled upon *Cassis de Dijon* and its correct use of discrimination.⁹⁹ Yet, it should be noted that while AG Jacobs did not see any benefit of employing discrimination test whatsoever, Shuibhne challenges the selling arrangement category but not discrimination as a criterion itself.

Regardless on what grounds is *Keck* distinction liable to debates, AG Jacobs’s point was to shift focus away from discrimination test and move towards the market access

⁹⁶ Ibid., para. 39.

⁹⁷ Ibid., para. 40.

⁹⁸ Shuibhne (n52) p. 409.

⁹⁹ Ibid., p. 410-412.

approach. He suggested that the underlying principle for such test is that “all undertaking which engage in a legitimate economic activity in a Member State should have unfettered access to the whole Community market, unless there is a valid reason for denying them full access to a part of that market.”¹⁰⁰ Consequently, the actual test would be “whether there is a substantial restriction on that access”, which can only be decided by employing a *de minimis* test into the scrutiny.¹⁰¹ Measures that are “overtly discriminatory” would nevertheless fall within the ambit of Article 34 TFEU as they are *per se* discriminatory regardless their actual effect.¹⁰²

It thus follows from AG Jacobs’ opinion that the substantiality condition would be applied only as regards indistinctly applicable measures. It would be presumed that those, which would in fact prevent goods manufactured and lawfully marketed in another Member State from accessing another Member State’s market unless being adapted, are substantially impeding access to that market. On the contrary, an impact of measures restricting certain selling arrangements will be shaped by various aspects, for instance to how many types of goods they apply, whether there remain other methods of sale available, whether the impact is direct or indirect, immediate or remote, or to which extent it is only hypothetical or even uncertain. Altogether, degree of impediments will be thoroughly assessed with aid of *de minimis* test.¹⁰³

To draw another comparison, whereas Shuibhne dismisses the *Keck* distinction as redundant and speaks for keeping the non-discrimination principle at the forefront, AG Jacobs makes actually a good use of the dichotomy of the two types of measures although challenging its essence. Thus, in my view the reason why AG Jacobs has considered *Keck* unsatisfactory is rather its use of the non-discrimination principle than the distinction of different categories of rules as such.

Despite of having been criticised for not suggesting a more workable test, AG Jacobs’ opinion immensely resonates in all subsequent debates on the market access approach.¹⁰⁴ In the end, in *Leclerc-Siplec* the Court did not depart from *Keck*.¹⁰⁵ Yet, AG

¹⁰⁰ Opinion of AG Jacobs delivered on 24 November 1994, *Leclerc-Siplec*, C-412/93, ECLI:EU:C:1994:393, para. 41.

¹⁰¹ *Ibid.*, para. 42.

¹⁰² *Ibid.*, para. 43.

¹⁰³ *Ibid.*, para. 44-45.

¹⁰⁴ Oliver (n8) p. 123.

Jacobs' insistence on rethinking the discriminatory effects of measures even if these were classified as selling arrangements had a notable influence in a number of cases related to advertising restrictions decided in the *Keck* aftermath.¹⁰⁶ To mention a few, in *De Agostini* the Court recognised the Swedish ban on TV advertisements targeted at children under 12 and a ban on misleading commercials for cosmetic products as selling arrangements. Nevertheless, it promptly admitted that the restriction, which amount to an outright ban, as there might not remain any other effective ways of promoting products coming from other Member States, may have "a greater impact" on such products and hence do not fulfil the second condition of paragraph 16 of *Keck*.¹⁰⁷ The products would then be prevented from accessing the market whatsoever. Similarly in *Gourmet*, which concerned another Swedish ban on alcohol advertisements on radio, TV as well as most of the periodicals, the Court rejected that measures preventing access to the market by products from another Member States should fall outside the ambit of Article 34 TFEU.¹⁰⁸

This assessment is of significant importance in regard of who bears the burden of proof. On one hand, if a measure is classified as a product requirement, then the presumption is that it does constitute a restriction to free movement (it is MEEQR *per se*) and would have to be justified by Article 36 TFEU or under one of the mandatory requirements. That necessarily shifts burden of proof from an economic operator who intends to access the relevant market to a Member State.¹⁰⁹ This was predominantly the practice in pre-*Keck* cases.¹¹⁰ On the other hand, in *De Agostini* the Court chose *Keck* as a point of departure and declared the measure to constitute a selling arrangement. Such measure is then presumed not to have impeding effects on free movement (it is *per se* legal) and escapes the ambit of a restriction. If a measure is classified as selling arrangement it is an economic operator who will most likely have to substantiate his or her arguments with statistical evidence to prove actual effects of a measure.¹¹¹ Needless to say how difficult obtaining relevant statistical data relating to trade as a whole can be. However, if the measure does not affect both domestic and imported products in the same

¹⁰⁵ Judgment of 9 February 1995, *Leclerc-Siplec*, C-412/93, ECLI:EU:C:1995:26, para. 21.

¹⁰⁶ Barnard (n14) p. 130.

¹⁰⁷ Judgment of 9 July 1997, *De Agostini*, Joined cases C-34/95 - C-35/95 and C-36/95, ECLI:EU:C:1997:344, para. 42.

¹⁰⁸ Judgment of 8 March 2001, *Gourmet*, C-405/98, ECLI:EU:C:2001:135, para. 18.

¹⁰⁹ Barnard (n14) p. 130; Oliver (n8) p. 120.

¹¹⁰ See e.g. text to n65.

¹¹¹ Barnard (n13) p. 45.

manner, such rule constitutes a restriction but can still be justified by a Member State. This would be for the national court to be determined.¹¹²

Nonetheless, the Court, clearly inclining to the market access approach, went even further and declared that not only preventing market access breaches Article 34 TFEU but also the capability of impeding or hindering access to the market of imported products more than for domestic products constitutes prohibited obstacles to trade. It did so in *Heimdienst*, which did not concern advertising restrictions anymore but an Austrian rule pursuant to which bakers, butchers and grocers were allowed to carry out selling on rounds only if they had a permanent establishment in the respective administrative area as well.¹¹³ The Court recognised that although the measure in question was certainly a selling arrangement, traders from other Member States were obviously forced to incur additional costs as they would need to establish themselves in Austria first before being able to access the Austrian market in terms of sales on rounds.¹¹⁴ Likewise in *DocMorris*, German rules that prohibited on-line sales of pharmaceutical products were found in breach of Article 34 TFEU. While German pharmacies were still able to market pharmaceuticals in their dispensaries, pharmacies from other Member States could not do so unless establishing themselves in the country and thus suffered significant disadvantage.¹¹⁵ Even though equally applicable to all operators regardless a country of establishment, the measure did discriminate in fact, and if anything else, limited the access to the market.

The influence of AG Jacobs' opinion in *Leclerc-Siplec* is apparent even much later.¹¹⁶ As AG Maduro in *Alfa Vita* suggested, the *Keck* distinction itself still serves well to the internal market purposes, although there needs to be a thorough clarification provided.¹¹⁷ In an attempt to reconcile the existing case law with such need, he articulated unambiguous criteria as follows. Firstly, any discrimination based on nationality, be it direct or indirect, shall be prohibited. Secondly, a measure the result of which is additional costs incurred by an importer is to be considered as a MEEQR if such a result stems from a country's failure to take into account the particular situation of the imported products but

¹¹² Barnard (n14) p. 130-31.

¹¹³ Judgment of 13 January 2000, *Heimdienst*, C-254/98, ECLI:EU:C:2000:12, para. 3.

¹¹⁴ *Ibid.*, para. 26.

¹¹⁵ Judgment of 11 December 2003, *DocMorris*, C-322/01, ECLI:EU:C:2003:664, para. 74.

¹¹⁶ Oliver (n66) p. 1445.

¹¹⁷ Opinion of AG Poiares Maduro delivered on 30 March 2006, *Alfa Vita*, Joined cases C-158/04 and C-159/04, ECLI:EU:C:2006:212, para. 35.

not if it only derives from the discrepancies between national legislations. In effect, product requirements will always be MEEQR while selling arrangements will be subject to the examination. Thirdly, a measure falls foul of Article 34 TFEU if it greatly hinders access to the market and “putting into circulation” of imported products. More specifically, a measure will be of such nature if it has a protective effect to the benefit of particular operators on a national market or if it makes a cross-border trade more complicated than remaining on a national market.¹¹⁸

Rather surprisingly he concluded that such an approach traceable in the Court’s case law can be defined as “identifying *discrimination against the exercise of freedom of movement*”.¹¹⁹ Even though the criteria, and especially the third one, at first sight appear to comply with the idea of the market access approach, AG Maduro himself referred to the principle of non-discrimination. From my point of view, this is at least confusing considering the initial similarity between the opinion in *Leclerc-Siplec* and the one in *Alfa Vita*, which suddenly changed to differing stances on the role of discrimination in identifying the content of Article 34 TFEU. Furthermore, I shall point out the imprint of *Keck* in the second criterion, even though Maduro clearly prefers the actual effects of a measure to serve as a point of departure when formulating the criteria rather than using *Keck* distinction as such.

However, taking a closer look on the three criteria, I suggest that the guiding principle to all of them is prohibition of discrimination by intent or at least by negligence. It implies that AG Maduro’s view is actually similar to the one advocated by Shuibhne. She contends that the non-discrimination principle and the market access approach are not mutually exclusive. In particular, she contends that there is no need to make a choice between the two as the market access criterion will always be a part of the assessment whether a measure is (indirectly) discriminatory or not. It is only when there is no discrimination at all that the market access test serves as a sole criterion for identifying a restriction to free movement. Also, according to Shuibhne, a mere evasion of the term discrimination does not inevitably mean there is a pure market access test applicable.¹²⁰ Unfortunately, despite of his own calls for bringing up more clarity to the issue, AG

¹¹⁸ Ibid., para. 42-45.

¹¹⁹ Ibid., para. 46 (emphasis in the original).

¹²⁰ Shuibhne (n52) p. 413-414.

Maduro himself did not provide any hints as to what extent he regards the interrelation between the non-discrimination principle and the market access approach as antagonistic.

To reflect on the above stated, I submit the following. In the light of measures imposing advertising restrictions it has arisen that the categories of product requirements and certain selling arrangements might not be sufficient. Therefore, a natural suggestion would be to extend the categories of rules. However, in this regard, I agree with AG Jacobs that it is not a sustainable and conceptual solution for it can never be excluded that a measure, which does not fit into any category, emerges. With the wisdom of hindsight, I cannot help but contemplate whether the categorizing approach had not still been a workable solution in regard of legal certainty and foreseeability of judicial decisions, especially in contrast to the market access approach in the form that will have been advanced later. Yet, for the time being, my view is that creating another category of rules is not desirable.

Hence, I find it appropriate to draw attention to the interrelation between the non-discrimination principle and the market access criterion. To start with I shall address AG Jacobs' claim about the unsuitability of the non-discrimination principle in terms of identifying a restriction to free movement. I also incline to think that with regard to some types of measures it has become clear that the Court will necessarily have to start thinking out of the box of the non-discrimination principle. The emergence of the market access considerations is therefore understandable. Nonetheless, I do not agree with his assertion that the non-discrimination principle is not a helpful criterion whatsoever. In this respect I advocate the view held by Shuibhne that in majority of cases the non-discrimination principle remains to be functional criterion to identify a restriction to free movement. I suggest that to a large degree this will depend on how much extensive interpretation is assigned to the term of indirect discrimination (or discrimination in fact).¹²¹ However, I do not completely share Shuibhne's opinion that it is not necessary to choose between the non-discrimination principle and the market access criterion. Admittedly, there are surely

¹²¹ I suppose that in many cases differential effects of a measure on goods, services and persons coming from another Member State can be translated into incurring additional costs or simply facing more burdensome situation. The question obviously is to what extent such situations can still be dealt with using an extensive interpretation of indirect discrimination (or discrimination in fact). Obviously, the necessity of the market access criterion is then called into question should it become clear that the non-discrimination principle covers most of situations conceivable. Yet, as it will be shown later, there are measures that fall outside the reach of the non-discrimination principle.

measures that can be found to constitute a restriction on grounds of both criteria. Yet, at a certain point, there emerge measures whose effects reach behind what can be grasped by the non-discrimination principle. This is the moment the choice needs to be done. Then, if the Court intends to substantiate its finding that such measure constitutes a restriction, it has to use another, much broader criterion: the market access approach. I believe that this is precisely when the need to define this market access criterion arises. In particular, the Court should make it apparent what factors it takes into account in order to arrive at a conclusion that a measure hinders the access to the market.

From all the cases mentioned it is obvious that the Court, as a reaction to the far more complex issue of measures discriminatory in fact, deliberately departed from what Weatherill has named as “rigid formalism” designed by *Keck*.¹²² Furthermore, by acknowledging the importance of e-commerce in *DocMorris* it gave a strong indication that opening up the internal market is of major focus. In that vein, it certainly is possible to agree with Barnard who notes that although still using a veil of discrimination principle “the need to secure market access pervades the judgment”, and not only this one.¹²³ Nonetheless, as it is apparent from the AG Maduro’s view, confusion is embedded in the dilemma of positioning market access approach in relation to the principle of non-discrimination. While some argue that the non-discrimination principle is not a helpful criterion and the market access approach shall be advanced, others claim that in most of the cases the non-discrimination still serves well. New contours of the market access approach, although not exactly sharper, were to surface in connection with another type of problematic measures: rules on use.

3.2 Rules on use: *Trailers*, *Mickelsson* and their layout

While rules on advertising of products can still be subsumed under the category of selling arrangements and, despite undoubtable difficulties, further dealt with by rules outlined earlier, this did not work for measures restricting use of products.¹²⁴ When the

¹²² Weatherill, Stephen. 'After Keck: Some Thoughts on how to Clarify the Clarification', *Common Market Law Review*, vol. 33/no. 5, (1996), p. 886.

¹²³ Barnard (n14) p. 133.

¹²⁴ Not only “rules on use” entail provisions restricting or prohibiting use, but the category also encompasses those rules, which subject the use to certain conditions, such as for example authorization and licence

question of their compatibility with Article 34 TFEU emerged, it appeared that the time for another clarification from the Court was ripe.

Looking back at the judgment in *Keck*, the Court already back then showed its considerable preoccupation with the access to the market.¹²⁵ Although, as Barnard points out, it was addressed rather as a consequence than a condition,¹²⁶ there was a clear signal that such concept will be revisited in the future. It did indeed happen when the Court delivered its judgments in cases *Commission v. Italy (Trailers)* and *Mickelsson and Roos*.¹²⁷

3.2.1 Trailers

Starting with the former, the well-known case concerned compatibility of Italian Highway Code with the prohibition of MEEQR because the national law precluded trailers being towed by motorcycles and the likes. First, the Court made it clear that the focus needs to be put on trailers specially designed for motorcycles since general-purpose trailers can still be towed by other vehicles and their use is therefore not precluded.¹²⁸ After establishing that possibilities for use of trailers specially designed to be towed by motorcycles are very limited if not excluded, the Court found such prohibition on use of a product to constitute a MEEQR since it “has a considerable influence on the behaviour of consumers”, who have no interest in buying such product as they cannot use it and that “affects the access of that product to the market of that Member State”.¹²⁹

Before arriving to the conclusion, it resorted to come to terms with previous case law. The landmark cases such as *Dassonville*, *Cassis de Dijon* and *Keck* were referred

requirements. However, it is imaginable that for example rules imposing an obligation to provide statistical data could be considered as being of the same nature as rules on use. See e.g. Spaventa, Eleanor. 'Leaving Keck Behind? the Free Movement of Goods After the Rulings in Commission v. Italy and Mickelsson and Roos', *European Law Review*, vol. 34/no. 6, (2009), p. 920, 922.

¹²⁵ Judgment of 24 November 1993, *Keck*, Joined cases C-267/91 and C-268/91, ECLI:EU:C:1993:905, para. 17.

¹²⁶ Barnard (n14) p. 123.

¹²⁷ Judgment of 10 February 2009, *Commission v. Italy (Trailers)*, C-110/05, ECLI:EU:C:2009:66; Judgment of 4 June 2009, *Mickelsson and Roos*, C-142/05, ECLI:EU:C:2009:336. It is necessary to note that the judgments in Trailers and Mickelsson and Roos are not seminal because they would provide the only right answer to the dilemma of the market access, but rather because they were expected to move us closer towards the solution of this dilemma.

¹²⁸ Judgment of 10 February 2009, *Commission v. Italy (Trailers)*, C-110/05, ECLI:EU:C:2009:66; Judgment of 4 June 2009, para. 51-53.

¹²⁹ *Ibid.*, para. 56-58.

to.¹³⁰ Yet, it is by no means clear if confirmed. That is because the Court immediately continued by stating: “Consequently, (i) 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 within the meaning of Article 34 EC, as are (ii) the measures referred to in paragraph 35 of the present judgment. (iii) Any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept”.¹³¹

3.2.2 *Mickelsson and Roos*

The other case of *Mickelsson and Roos* concerned a Swedish law prohibiting the use of personal watercraft (i.e. jet-skis) in areas other than general navigable waterways and those specifically designated for such purposes by local authorities, which however were not designated yet at the time of deciding the case.¹³² Here the Court did not take any stand on *Keck* but fully aligned with *Trailers* by confirming that the national provision at issue falls within the scope of Article 34 TFEU. It held that the measure had been of discouraging effects on consumers’ willingness to buy products at hand. It is only a result of the Court’s further deliberation that the measure was found to be justified.¹³³ Yet, the breadth of the approach adopted in the judgment is particularly significant, and that even compared to *Trailers*. As much as the definition therein seemed to encompass any measures thinkable, in *Mickelsson and Roos* the Court held that the aim or effect of the measures do not even have to be such as to treat imported goods less favourably – mere potential of its influence on consumers’ behaviour is enough to trigger the Article 34 TFEU.¹³⁴

3.2.3 And what to make of them?

The focus shall be however turned back to the judgment in *Trailers* as it serves best for the purposes of understanding the Court’s intentions in terms of interpretation of a

¹³⁰ Ibid., para. 33-36.

¹³¹ Ibid., para. 37 (the numbering added).

¹³² Judgment of 4 June 2009, *Mickelsson and Roos*, C-142/05, ECLI:EU:C:2009:336, para. 2, 11, 12, 25.

¹³³ Ibid., para. 24, 28, 40.

¹³⁴ Ibid., para. 26.

restriction to free movement, particularly of goods. There has been widespread confusion as for what the suggested threefold distinction drawn earlier is supposed to mean and in what way did it change the hitherto case law and the scope of Article 34 TFEU itself. Contrary to what has been decided in *Keck*, here the Court did not explicitly articulate an intention to depart from its previous rulings. There have been views that the ruling in *Trailers* is rather reformulation than reversal and that at the most the Court might be setting the stage for possible changes in the future,¹³⁵ yet there still is considerable uncertainty in terms of the character of the ruling.¹³⁶ Quite on the other hand, some have believed the Court had wished to modify *Keck* approach while still keeping the essence of it.¹³⁷

The first and the second limb of paragraph 37 of the judgment do not raise that many questions. Yet, even in respect of these two there are several attempts to provide interpretation as for what they refer to. While Oliver is of the opinion that the first limb relates to classical *Dassonville* formula and the second limb specifically concerns *Cassis de Dijon* type product requirements as well as distinctly applicable measures, Barnard argues that it is the first limb behind which distinctly applicable measures can be found and the second limb that is reserved for indistinctly applicable product requirements. Considering the wording of the first limb, according to which not only the object but also the effect of a measure ought to be considered, I suggest the interpretation is wider than to comprise distinctly applicable measures. That is mainly for the reason that the effect of a measure is exactly what comes under scrutiny when identifying indistinctly applicable measures. Regarding the fact that Barnard herself notes that such measures might be either of protective purpose or effect, the distinction proposed by her does not sound completely convincing.¹³⁸

The different perceptions most likely stem from the Court's diverging case law as regards protective effect of a measure. It is mainly because it has considered protective

¹³⁵ See e.g. Oliver (n8) p. 130.

¹³⁶ As it follows from Barnard's „*Commission v Italy (trailers)* and *Mickelsson (probably)* do not reverse *Keck*“ (emphasis added). See Barnard (n14) p. 136.

¹³⁷ Opinion of AG Poiares Maduro delivered on 30 March 2006, *Alfa Vita*, Joined cases C-158/04 and C-159/04, ECLI:EU:C:2006:212, para. 25; Opinion of AG Bot delivered on 8 July 2008, *Commission v. Italy (Trailers)*, C-110/05, ECLI:EU:C:2008:386, para. 85, as cited in Oliver (n8) p. 130.

¹³⁸ Barnard (n14) p. 90.

effect of a measure in the past,¹³⁹ however, as Barnard asserts, it does not seem to amount to settled practice.¹⁴⁰ As a consequence, academic views on the role of protective effect of national measures again differ – ones arguing protective effect is the rationale behind Article 34 TFEU,¹⁴¹ the others rebutting it.¹⁴² However, it is safe to say that the Court would consider a national measure whose purpose is to regulate trade as falling within the scope of Article 34 TFEU.¹⁴³

In the light of the above mentioned, Spaventa's view that the first and the second limb of the paragraph 37 can be understood as "summarizing the summary" given earlier in the judgment on the account of previous case law appears reasonable.¹⁴⁴ In the same vein, Oliver contemplates that the paragraph 37 of the judgment is merely describing the previous case law.¹⁴⁵ Both the first and the second limb might simply be an expression of the non-discrimination model developed up to that moment.

3.2.4 "Any other measure..."

However, the first and the second limb are not of the greatest interest in this respect as they are not the carriers of the judgement's novelty. No matter how the distinction drawn in these two relate to the previous case law, the consequences of possible interpretations thereof are the same. The major focus shall be turned on the third limb.

The Court's "any other measure which hinders access of products [...] to the market" has stirred up the debate in the attempt of positioning the market access approach in relation to the principles of non-discrimination, mutual recognition and an exception of selling arrangements. As Snell puts it, the relationship is "by no means clear".¹⁴⁶ There is a common agreement that in this way the Court embraced the market access approach.¹⁴⁷

¹³⁹ Judgment of 13 March 1984, *Prantl*, Case 16/83, ECLI:EU:C:1984:101, para. 21

¹⁴⁰ Barnard (n14) p. 90.

¹⁴¹ G. Marengo, Pour une interpretation traditionnelle de la notion de mesure d'effet equivalent à une restriction quantitative, (1984) 20 Cahiers de Droit Européen 291, as cited in Barnard (n14) p. 90.

¹⁴² Chalmers, Damian. 'Repackaging the Internal Market - the Ramifications of the Keck Judgment', *European Law Review*, vol. 19/no. 4, (1994), p. 393-94.

¹⁴³ A contrario argument to Judgment of 24 November 1993, *Keck*, Joined cases C-267/91 and C-268/91, ECLI:EU:C:1993:905, para. 12 as cited in Barnard (n14) p. 90.

¹⁴⁴ Spaventa (n124) p. 921.

¹⁴⁵ Oliver (n8) p 130.

¹⁴⁶ Snell (n74) p. 437.

¹⁴⁷ See e.g. Spaventa (n124) p. 914.

Yet, for instance, it is not clear whether it abandoned the *Keck* distinction.¹⁴⁸ Essentially, in relation to the hitherto established categories, the question is whether “any other measure” refers to “any measure that is neither a *Keck* selling arrangement nor a product requirement, [...] or whether it refers to any non-discriminatory measure, including selling arrangements, aside from product requirements”.¹⁴⁹

In outline, the inquiry can be framed in the following way. Should the market access approach be understood and applied as an overarching principle¹⁵⁰ governing the use of free movement provisions altogether or does it only remain to be a residual category applicable to measures that cannot be tackled with existing rules developed by the case law?¹⁵¹ As explained by Craig and de Búrca, the idea preceding to the suggested interpretations is that according to the Court’s ruling there are three types of measures to distinguish: discriminatory measures, measures imposing product requirements and measures that hinder market access. Measures regulating sales do not *prima facie* fall within the third category provided they are not discriminatory either in law or in fact. Should the market access be an overarching principle, the first two types of rules would be the main but not the only examples of measures impeding market access and the third type would work as an universal (or catch-all) category; the set of rules captured by the market access approach would thus remain open. On the contrary, the other interpretation could be that the market access only takes the field if a measure cannot be classified either as discriminatory or containing a product requirement and thus falling into the third limb of *Trailers*’ relating to “any other measures”.¹⁵²

From my point of view, this distinction as presented here is relevant insofar as it rightly illustrates the gravity and the reach of the market access test that can be possibly assigned to it and in this sense justifies the demands that are appropriate to impose on the

¹⁴⁸ Spaventa (n124) p. 919-921. Similarly e.g. Barnard (n14) p. 136; Horsley, Thomas. 'Case C-110/05, Commission v. Italy, Judgment of the Court (Grand Chamber) of 10 February 2009, Not Yet Reported; Case C-142/05, Åklagaren v. Percy Mickelsson and Joakim Roos, Judgment of the Court (Second Chamber) of 4 June 2009, Not Yet Reported; Case C-265/06, Commission v. Portugal, Judgment of the Court (Third Chamber) of 10 April 2008, [2008] ECR I-2245', *Common Market Law Review*, vol. 46/no. 6, (2009), p. 2008; Tryfonidou (n13) p. 50; Lianos (n31) p. 232.

¹⁴⁹ Spaventa (n124) p. 921.

¹⁵⁰ Some commentators use a term “global test”, “general test” or “generalization of the market access test”. See e.g. Barnard (n13) p. 52; Horsley (n148) p. 2014; or Pecho, Peter. 'Good-Bye Keck?: A Comment on the Remarkable Judgment in Commission v. Italy, C-110/05', *Legal Issues of Economic Integration*, vol. 36/no. 3, (2009), p. 258 respectively.

¹⁵¹ See e.g. Craig, de Búrca (n19)p. 689-90; or Oliver (n8) p. 129.

¹⁵² Craig, de Búrca (n19) p. 689-90.

test. The interpretation suggesting the test is applicable only to residual measures is markedly less controversial. It mainly responds to difficulties that have arisen in connection with the finding that the established categories of measures (product requirements and selling arrangements) and the rules applicable to them insufficiently cover all situations conceivable. Still, it does respect the existing case law.

Yet, an objection was raised in this context that if the market access test was applicable only to residual measures, these would be subject to markedly stricter conditions than selling arrangements while having, in principle, the same or even smaller impact on intra-Union trade. According to this view such differentiating then lacks any substance.¹⁵³

In order to briefly reflect on the question of similarity between selling arrangements and rules on use, as one of the potential solutions to the dilemma of the notion of restriction, a small detour shall be taken. The aforementioned opinion is in line with the one offered by AG Kokott in *Mickelsson and Roos*, where she construed an analogy between selling arrangements and rules on use. As her point of departure was that *Dassonville* formula is too broad for the purposes of rules on use, she first acknowledged *Peralta* principle. This principle suggests that measures, whose effect on trade is “too uncertain and indirect”,¹⁵⁴ should be excluded from the scope of Article 34 TFEU. She however refused it forthwith saying the principle is “difficult to clarify and [does] not contribute to legal certainty”.¹⁵⁵ According to her, rules on use should be subject to *Keck* criteria as their nature and effects are comparable to those of selling arrangements mainly because they both apply after the act of importation and affect the intra-Union trade through influencing consumers’ choices.¹⁵⁶ As to her notion of the scope of Article 34 TFEU, there would not be much room for applying market access test whatsoever since even residual measures could be treated by established *Keck* criteria.

¹⁵³ Spaventa (n124) p. 922. Similarly Snell (n74) p. 456. Snell does not speculate whether the market access was meant to apply all measures or only the residual ones as he finds it clear the former holds true. However he also criticizes this incoherence expressed by differential approach to the two categories.

¹⁵⁴ See text to n46.

¹⁵⁵ Opinion of AG Kokott delivered on 14 December 2006, *Mickelsson and Roos*, C-142/05, ECLI:EU:C:2006:782, para. 46.

¹⁵⁶ *Ibid.*, para. 47, 52-53.

AG Kokott's suggestion has been both appraised¹⁵⁷ and rebutted. Oliver contested the analogy, claiming that unless indeed fulfilling the *Peralta* criteria, rules on use represent a more serious hindrance than selling arrangements. He also added that the fact they apply after being imported is of no relevance¹⁵⁸ and that excluding another type of rules from the ambit of Article 34 TFEU and subjecting it only to discrimination test would "unduly" limit the scope of the latter.¹⁵⁹ To make this reference more comprehensive, his proposal on how to grasp rules on use in terms of Article 34 TFEU should not go unnoticed. He submits that interpretation of Article 34 TFEU should remain governed by *Dassonville* formula, part of which he considers to be the *Peralta* principle. According to him, the only type of measures to fall outside this scope is selling arrangements, which shall not cease to succumb to *Keck* criteria.¹⁶⁰ Clearly, Oliver favours upholding *Dassonville* and *Keck* line of case law over the market access test. In this respect, there is not much new one could make use of in the attempt of finding boundaries of the test if that one is used at the end of the day. Still, a point of his that can be taken into account while contemplating the dilemma of the scope of market access approach is that it should not be used as an overarching principle defying *Keck* exception.

To set back on the path, the other possible reading of the scope of the market access test causes notably more heated debates. On the understanding that it qualifies as an overarching principle pertinent to free movement provisions, the approach is put into question in the light of its overruling effects on the previous case law. It naturally follows that such a reversing effect should be explicitly expressed and thoroughly explained and justified. Importantly, if this was the interpretation favoured by the Court itself, it has done neither of that so far.¹⁶¹

In the *Keck* aftermath the Court was faced with a problem of how to deal with indistinctly applicable measures that neither could have been classified as product

¹⁵⁷ Horsley (n148) p. 2010. Horsley has expressed many concerns about whether such differential approach is tenable. See p. 2016.

¹⁵⁸ This point was made with reference to the Judgment of 14 September 2006, *Alfa Vita*, C-158/04 and C-159/04, ECLI:EU:C:2006:562, para. 19.

¹⁵⁹ Oliver (n8) p. 127.

¹⁶⁰ *Ibid.*, p. 133.

¹⁶¹ Weatherill, Stephen. 'Free Movement of Goods', *International and Comparative Law Quarterly*, vol. 61/no. 2, (2012), p. 545.

requirements nor selling arrangements. Already with regard to advertising restrictions, which oscillate somewhere between selling arrangements and these “uncovered” measures, the Court indicated its tendency to move further from the established distinction between the two categories and advance the market access criterion. This materialized when the landmark judgment in *Trailers* (and also *Mickelsson and Roos*) was delivered. The Court was expected to resolve the conundrum of how to tackle rules on use within the framework of a restriction to free movement. After referring to its previous case law, the Court held that “any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by [the concept of MEEQR]”. In this way the Court has advanced the market access test. However, this third limb of paragraph 37 of the judgment has not been unambiguous. Since *Trailers* there has been a constant uncertainty as for what measures then constitute a restriction, i.e. MEEQR. It appears then that since *Trailers* the term MEEQR covers (i) distinctly applicable measures, (ii) product requirements and (iii) any other measure which hinders market access.¹⁶² Yet the third limb causes significant interpretation problems. The core question is whether the market access test in the form of the third limb is only a residual category or whether it is meant to be used as an overarching principle governing the interpretation of MEEQR and restriction to free movement in general. This particularly matters with regard to *Keck* exception of selling arrangements. Should the third limb apply only as a residual category then selling arrangements, unless proved discriminatory, would still be presumed not to constitute MEEQR. However, in case the third limb is supposed be an overarching principle this would make even selling arrangements subject to the market access approach contained therein. Specifically, selling arrangements would constitute a restriction even if they merely hinder the access to the market. The *Keck* exception would thus be rendered redundant.

Nonetheless, no matter if the approach should be read as a far-reaching overarching principle or a residual category, there still remains a concern to reflect, which is inherent to the approach as such. First and foremost, the market access test has to prove itself to be in compliance with the Treaties and fundamental legal principles. Its lawfulness, legitimacy and reasonability needs to be examined in regard of the aims pursued by the Treaties. Said with Spaventa, the choice between the two interpretations of the scope of market access

¹⁶² See e.g. Barnard (n14) p. 89, 137; Snell (n74) p. 455.

test “might not make much difference [...] from a practical viewpoint but is of fundamental importance [...] from a legal certainty as well as hermeneutic consistency perspective.”¹⁶³ And to this extent the distinction discussed above is worthy of attention.

Consequently, the concept of the market access as such will be discussed in the following chapter. An attempt will be made to explore two aspects of the concept: the overall scope, particularly with regard to potentiality element of the concept and a role of *de minimis* corrective and constitutional foundations of the concept.

¹⁶³ Spaventa (n124) p. 922.

4 The Concept

There are certainly an infinite number of perspectives through which can be the market access approach and its legitimacy and viability assessed. However, for the purposes of this thesis and considering the features inherent to the market access approach as apparent from previous lines, following aspects have been chosen.

First, the scope and possible boundaries of the approach will be discussed in light of different interpretations of a restriction free movement. Two particular features of the market access approach in respect of its scope will be then explored: (i) potentiality as an important aspect of the concept especially with regard to its broadening impact on the concept and (ii) a role of *de minimis* rule within the concept as a possible tool with exactly opposite effects. Since both features often overlap and work rather as communicating vessels, the relation between them will be also discussed.

Second, the concept will be examined with regard to its constitutional foundations. It is held that these should form the biggest support for the legitimacy of the concept. Several provisions of the Treaties will be discussed in order to demonstrate in light of which of them can the market access approach be considered legitimate and deep-rooted in the Treaties and, on the contrary, which provisions suggest that the approach reaches behind what is conferred by the Treaties.

4.1 Scope

As it follows from what has been outlined earlier, the scope and corresponding meaning of the market access approach is of paramount importance in order to assess legitimacy of the test as such. In spite of the fact there are as many opinions on this matter as there are experts in the field and analysing each and every one's approach would be far beyond the extent of this thesis, two main lines of arguments can be traced.

On one hand, there is a quite widespread belief that if the market access approach does not represent the one criterion underlying the interpretation of what constitutes a

prohibited restriction to intra-Union trade, as advocated by some commentators, it does at least amount to a remarkable impetus for searching a definition of such criterion.¹⁶⁴

To address this opinion from rather a general perspective, Spaventa has proposed three views on what the market access approach means and how can be a barrier to market access understood.¹⁶⁵ First, a measure constitutes a barrier if it has an effect of imposing additional costs on economic operators coming from other Member States.¹⁶⁶ The second, immensely broad, view is the one that considers any regulation to represent a barrier as any regulation *per se* generate and implies compliance costs.¹⁶⁷ The only way for a Member State to save such a regulative measure from the ambit of the Treaties' prohibitions is then to demonstrate the measure is not arbitrary and to properly justify it. While these two interpretations are more of an economic nature, Spaventa identifies the third one, which she calls "intuitive" and which seems to oscillate between the two. This approach seeks to identify a functioning test that would distinguish between measures neutral in regard of intra-Union trade and measures affecting access to the market and the trade as such, which can thus be subjected to the Court's assessment.

Markedly, the intuitive character of the market access approach has been observed by many scholars as one of the most problematic aspects of the market access approach.¹⁶⁸ To the more specific account, Barnard offers an example of *Laval* case where "the right of trade unions [...] to take collective actions by which undertakings established in other Member States may be forced to sign the collective agreement [...] is *liable to make it less*

¹⁶⁴ See e.g. Barnard, Catherine. 'Trailing a New Approach to Free Movement of Goods?', *The Cambridge Law Journal*, vol. 68/no. 2, (2009), p. 290; Prechal, Sacha, and Sybe de Vries. 'Seamless Web of Judicial Protection in the Internal Market?', *European Law Review*, vol. 34/no. 1, (2009), p. 8; Snell (n74) p. 460.

¹⁶⁵ Spaventa, Eleanor. 'From Gebhard to Carpenter: Towards a (Non-)Economic European Constitution', *Common Market Law Review*, vol. 41/no. 3, (2004), p. 757-58.

¹⁶⁶ As the advertising restrictions in the Judgment of 8 March 2001, *Gourmet*, C-405/98, ECLI:EU:C:2001:135. Barnard proposes another example of case *Commission v. Italy (motor insurance)*, p. 21. In this case the Court held that an obligation imposed on insurance companies to contract in order to provide third party insurance „involves changes and costs [...] for those undertakings [...] and renders access to the Italian market *less attractive* and [...] reduces the ability [...] to compete effectively." (emphasis added) See Judgment of 28 April 2009, *Commission v. Italy (Motor insurance)*, C-518/06, ECLI:EU:C:2009:270, para. 70, as cited in Barnard (n14) p. 21.

¹⁶⁷ Another example of case law fitting this interpretation is the judgment in *Golden Share* concerning free movement of capital, where the contested measure limited the percentage of shares to be acquired by one person. The Court said: "although the relevant restrictions [...] apply without distinction to both residents and non-residents, [...] they affect a position of a person [...] as such and are thus *liable to deter investors* from other Member States [...] and, consequently, affect access to the market." (emphasis added) See Judgment of 13 May 2003, *Commission v. UK*, C-98/01, ECLI:EU:C:2003:273, para. 47, as cited in Barnard (n14) p. 22.

¹⁶⁸ See e.g. Barnard (n14) p. 141; Snell (n74) p. 469.

attractive, or more difficult [...] to carry out the construction work in Sweden, and therefore constitutes a restriction”.¹⁶⁹ An obvious question arises – does this then mean that a Member State’s law is challengeable solely for the fact that compared to other Member States it sets forth less attractive conditions be it for the access to the market or for the exercise of the freedom?¹⁷⁰ Can an obligation of compliance with other Member States’ legal orders be considered as “costs”? An affirmative answer is likely to imply incentives to the regulatory competition between Member States.¹⁷¹ However, such interpretation seems to be largely suggestive of what has been already refused in the past, for example, by AG Maduro in *Alfa Vita*¹⁷² and several times by the Court itself:¹⁷³ a prohibition does not constitute a restriction merely because other Member States apply less strict rules. It therefore remains very unclear whether the Court lost its inhibitions and left this seemingly unwavering opinion behind or whether it unintentionally extended its perception of a restriction. Not only is it needless to say how difficult is to accept the latter explanation, but it also looks like “any other measure” limb was tailored to embrace exactly such intuitive approach.

On the other hand, there is an opposing view that the principles settled by preceding case law, mainly the non-discrimination, are still those governing the interpretation of restriction to free movement since the judgments in *Trailers* and *Mickelsson and Roos* did not put an end to these. It is deemed that the market access approach expressed therein did not introduce that many changes altogether as it may seem and should be assigned complementary nature.¹⁷⁴

¹⁶⁹ Judgment of 18 December 2007, *Laval*, C-341/05, ECLI:EU:C:2007:809, para. 99, as cited in Barnard (n14) p. 22 (emphasis in the original).

¹⁷⁰ There persists another problem related to the term of market access. It is not clear whether the term should be interpreted verbatim so that it concerns solely restriction on the actual access to the market or whether it should apply to restrictions on exercising the freedoms as well. For the purposes of this thesis the term is used to refer both to the access and exercise. Due to the complexity of this issue and to the extent of this thesis, the matter is further discussed only marginally, and that in relation to the constitutional foundations of the market access concept (Chapter 4.2). For further analysis of the problem see e.g. Barnard (n14) p. 23-24.

¹⁷¹ Barnard, Catherine, and Simon Deakin, 'Market Access and Regulatory Competition' in Barnard, Catherine, and Joanne Scott, *The Law of the Single European Market: Unpacking the Premises* (Oxford, Hart Publishing, 2002), ISBN 1-84113-271-3, p. 197.

¹⁷² See text to n117.

¹⁷³ See e.g. Judgment of 14 July 1981, *Oebel*, Case 155/80, ECLI:EU:C:1981:177, para. 9; Judgment of 14 July 1994, *Peralta*, C-379/92, ECLI:EU:C:1994:296, para. 48; Judgment of 10 May 1995, *Alpine Investments*, C-384/93, ECLI:EU:C:1995:126, para. 27, as cited in Barnard (n14) p. 22.

¹⁷⁴ Wenneras, Pal, and Ketil Boe Moen. 'Selling Arrangements, Keeping Keck', *European Law Review*, vol. 35/no. 3, (2010), p. 396.

The restrictive (narrow) interpretation of a barrier to trade has been endorsed by AG Kokott in *Mickelsson and Roos*, where, in the light of *Keck*, she suggested that a measure constitutes such barrier if it “prevents access to the market”¹⁷⁵. In her submission, that means either complete exclusion of the possibility to use a product or making such possibility only marginal.¹⁷⁶ This line has been taken up by Wennerås and Moen who argue that the Court inclined to AG Kokott’s opinion both in *Trailers* and *Mickelsson and Roos* and put forward several reasons for it.¹⁷⁷

To begin with, they contend that in *Trailers* the Court engaged in a very precise analysis of the effects of the prohibition at hand on consumers’ behaviour exactly in order to figure out whether these are so grave to meet this “high threshold” definition of a barrier to trade offered by AG Kokott in *Mickelsson and Roos*.¹⁷⁸ Secondly, they point out the high threshold is apparent from the Court’s preoccupation in *Mickelsson and Roos* with the assertion that the more specific and inherent purposes, for which a product was meant to be used, are curtailed by a contested measure, the more it amounts to a prohibited restriction on intra-Union trade.¹⁷⁹ Further, AG Kokott’s suggestion then appears to be reflected in the formulation stressing the “effect of preventing [...] or of greatly restricting [the] use”.¹⁸⁰ Eventually, according to their view, in *Mickelsson and Roos* the Court showed respect to Member States’ autonomy by leaving the final say in whether an obstacle to trade exists upon the national court.¹⁸¹ To sum up, Wennerås and Moen claim that the market access criterion in the form of the third limb of *Trailers* is therefore to be explained as only

¹⁷⁵ Opinion of AG Kokott delivered on 14 December 2006, *Mickelsson and Roos*, C-142/05, ECLI:EU:C:2006:782, para. 65.

¹⁷⁶ *Ibid.*, para. 67.

¹⁷⁷ Wennerås, Moen (174) p. 393-95. The course of action was that upon the delivery of AG Kokott’s opinion in *Mickelsson and Roos*, a reference for a preliminary ruling which was in fact made 20 days after the action against Italy in *Trailers* was filed with the Court, the Court decided to refer the *Trailers* case from a five-judge Chamber to the Grand Chamber and open an oral proceedings. The Court thus obtained two opinions in the case, the first one from AG Legér and the second one from AG Bot in the latter stage of the proceedings before the Grand Chamber.

¹⁷⁸ As already discussed earlier, here the Court did find that the prohibition prevented any demand from existing. See Judgment of 10 February 2009, *Commission v. Italy (Trailers)*, C-110/05, ECLI:EU:C:2009:66, para. 56-58; or see text to n129.

¹⁷⁹ Judgment of 4 June 2009, *Mickelsson and Roos*, C-142/05, ECLI:EU:C:2009:336, para. 28, as cited in Wennerås and Moen (n174) p. 394.

¹⁸⁰ *Ibid.*

¹⁸¹ Wennerås and Moen (n174) p. 387, 394. Judgment of 4 June 2009, *Mickelsson and Roos*, C-142/05, ECLI:EU:C:2009:336, para. 28.

having a marginal effect next to/in relation to/compared to the principle of non-discrimination.¹⁸²

In addition, some claim that even the problematic measures, which actually triggered the development of the market access approach, can be dealt with by the non-discrimination principle and the market access test is therefore redundant. The argument is that there are either measures that impose dual burden on economic operators and thus the non-discrimination principle is sufficient to assess them, or there are equal burden measures, which, it is argued, do not put economic operators in the relative competitive position, hence do not impede market access. As a result, according to this line of argument, the problematic measures actually do not exist.¹⁸³

While all of these observations certainly have merit, few issues should be borne in mind. The first one relates to the argumentation that due to the high threshold there will be only limited amount of measures to which the market access test is applicable. Even if this is correct, I am of the opinion that the fact that a category of measures subjected to the test is small in numbers does not render the market access criterion less important to be qualified.

Secondly, as for the claimed redundancy of the market access approach, it is conceivable that measures implying some additional costs to the detriment of economic operators, as referred to by Spaventa, could be deemed as discriminatory in fact and therefore dealt with by the principle of non-discrimination. However, I hold the view that it is very difficult to imagine how to square with the (non-) discriminatory vision those measures, which are liable to render the market access “less attractive or more difficult”, as was the case in *Laval*.

Furthermore, it is appropriate to remind ourselves of yet another consequence of how the Court conceives of the third limb of *Trailers* and the market access criterion as such. As we have seen, within the framework of the non-discrimination principle it does matter whether a measure is classified as a product requirement or a selling arrangement as

¹⁸² Wennerås and Moen (n174) p. 399.

¹⁸³ Davies, G. T. 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law', *German Law Journal*, vol. 11/(2010), p. 671, 679.

it results in different presumptions and outcomes as for who bears the burden of proof.¹⁸⁴ While product requirements are presumed to hinder market access (they are illegal *per se*), the presumption as regards certain selling arrangements is that they do not impede market access (they are legal *per se*).¹⁸⁵ Regardless of what approach would apply to “any other measures”, it is essential that these presumptions and the burden of proof are in this respect well-established so that there is a minimum space for any doubts how to treat these measures subjected to the market access approach and what can be required from those, who benefit from them. This is particularly essential for the legitimacy of the approach.

Eventually, although it is agreeable that the Court imposed some threshold in both cases, it clearly did not employ the same language. While in *Mickelsson and Roos* it was “prevention or great restriction”¹⁸⁶ of the use, or, in a broader sense, an access to the market or exercise of a freedom, which was of interest, in *Trailers* the Court was looking for “considerable influence on the behaviour of consumers”.¹⁸⁷ In another case of *Commission v. Italy (motor insurance)* the Court sought “substantial interference in the freedom to contract”,¹⁸⁸ which “renders the access to the Italian market less attractive and [...] reduces the ability of the undertakings concerned to compete effectively”.¹⁸⁹ As much as the difference between the formulations could be deemed subtle, the Court is obviously far from adopting one universal formula grasping the market access test as it used to in the past with other principles, particularly those formulated in *Dassonville* and *Keck*. Admittedly, it is easier for the Court to find a measure establishing a complete ban to constitute a restriction but the Court clearly manifested readiness to consider wider implications of a contested measure.

¹⁸⁴ The difference is stressed mainly because it may appear that the categories here are without relevance since both indistinctly applicable product requirements and discriminatory selling arrangements involve rules, which impose the same burden in law but different burden in fact. See Barnard (n14) p. 134. Cf. Spaventa (n124) p. 929, whose claim is that the categories are no longer relevant as it is the effects of a measure that matter.

¹⁸⁵ Barnard (n14) p. 134.

¹⁸⁶ Judgment of 4 June 2009, *Mickelsson and Roos*, C-142/05, ECLI:EU:C:2009:336, para. 28.

¹⁸⁷ Judgment of 10 February 2009, *Commission v. Italy (Trailers)*, C-110/05, ECLI:EU:C:2009:66, para. 56 (emphasis added).

¹⁸⁸ Judgment of 28 April 2009, *Commission v. Italy (Motor insurance)*, C-518/06, ECLI:EU:C:2009:270, para. 66 (emphasis added).

¹⁸⁹ *Ibid.*, para. 70.

All things considered, one therefore cannot but share the view that the market access constitutes an “inherently nebulous”¹⁹⁰ criterion, or, as Snell puts it, “a sophisticated sounded garb that conceals decisions based on intuition”.¹⁹¹ It has been shown that the boundaries of the market access test are very blurry depending on different perceptions and its scope can thus be interpreted in a considerably extensive way.

There is a source of the market access’s extensive impact that will be presented separately for its specific nature. It appears that mere potential impediments caused by a national measure are enough for the Court to put such measure under its judicial scrutiny. Potentiality element as an inherent aspect of the market access approach widening its scope will be therefore discussed.

4.1.1 Potentiality

In my view, many heated debates on the scope of the market access approach stem from its perceptiveness to even only potential hindrances that a national measure can constitute in relation to the internal market. The potentiality is one of the features of the market access test that significantly extend its boundaries as well as boundaries of free movement law and therefore puts the legitimacy of the market access approach into question. For these reasons a closer look will be taken on the Court’s handling of this element and academic response to it. It will be also shown in light of which perceptions the broadening effect of potentiality can be justified and legitimate.

As the notion of barrier to intra-Union trade has been constantly evolving, in rather expanding manner, so has been the definition of the intra-Union element required to apply the Treaties. The recent trend suggests that no actual hindrance to trade needs to be shown because the mere potentiality that an economic operator will engage in intra-Union trade and therefore face implications stemming from differences in Member States’ legislations is sufficient to bring about Union dimension. Consequently, wholly internal situations might appear within the ambit of the Treaties.¹⁹²

¹⁹⁰ Oliver, Peter, and Stefan Enchelmaier. 'Free Movement of Goods: Recent Developments in the Case Law', *Common Market Law Review*, vol. 44/no. 3, (2007), p. 674.

¹⁹¹ Snell (n74) p. 469.

¹⁹² Spaventa (n124) p. 926-27.

Looking back to *Trailers* judgment, yet another relevant remark made by AG Léger was that the prohibition at hand was applicable only to mopeds registered in Italy.¹⁹³ Although not being the main issue in the case, one may not fail to notice a clear example of reverse discrimination. Despite the fact reverse discrimination does not come under the prohibition of Article 34 TFEU and is considered as purely internal situation,¹⁹⁴ this inconsistency lying in that mopeds registered in another Member State are not precluded from towing trailers certainly does not contribute to the legitimacy of Italy's road safety argument. What is even more noteworthy is the Court's case law, which indicates that Article 34 TFEU could actually be applicable also to purely national situations.¹⁹⁵ Yet again, that clearly signals the width of the market access approach. The argumentation relies on the fact that differential treatment, albeit to the detriment of domestic and not imported goods, creates potential hindrance of intra-Union trade, which is enough to bring the national legislation at hand into the scope of Article 34 TFEU.¹⁹⁶ Admittedly, such rhetoric is absolutely consonant with the logic of the market access approach and is thus another proof of increasing tendency towards the concept. As Barnard observes, it appears that the Court have inclined to its view expressed in terms of free movement of persons that no actual substantial hindrance needs to be shown since it is enough if a measure is liable to have such an effect and is not reluctant to find a cross-border element when it wishes so. That leaves us with somewhat grey area between measures potentially interfering with the freedoms and those reflecting purely internal situation.¹⁹⁷

However, indications of potentiality being one of the referencing points in relation to free movement provisions are anything but new – the very early *Dassonville* formula provides a self-evident example.¹⁹⁸ To remind us, it was also in *Buy Irish* where the Court found the measure promoting domestic products over the imports to constitute a MEEQR since it was “*liable* to affect the volume of sales between the Member States” and that even

¹⁹³ Opinion of AG Léger delivered on 5 October 2006, *Commission v. Italian Republic (Trailers)*, C-110/05, ECLI:EU:C:2006:646, para. 58.

¹⁹⁴ Barnard (n13) p. 36.

¹⁹⁵ Barnard (n13) p. 36; Spaventa (124) p. 926-27; Weiss, Kaupa (n82) p. 342.

¹⁹⁶ Judgment of 7 May 1997, *Pistre*, Joined cases C-321/94 - C-324/94, ECLI:EU:C:1997:229, para. 45; Judgment of 5 December 2000, *Guimont*, C-448/98, ECLI:EU:C:2000:663, para. 17.

¹⁹⁷ Barnard (n13) p. 39.

¹⁹⁸ See text to n37.

though in fact sales of domestic products decreased.¹⁹⁹ Similarly, in *Keck* the Court stated that “such legislation could restrict the volume of sales and hence the volume of sales of products from other Member States”,²⁰⁰ which after all was the argument later used by defendants in *Mickelsson and Roos*.²⁰¹ In the judgment to the last mentioned case, account has been also taken of potential effects of the national legislation on consumers’ behaviour.²⁰²

Hence, although it is deemed that the Court shifted from rather traditional approach requiring actual hindrance to the potential one,²⁰³ it appears that the potentiality element has been present nearly ever since. Recent considerations of potentiality within the market access approach are appropriate all the more so. That is mainly justifiable on several grounds as explained by Spaventa.²⁰⁴ First, as already noted, the mere existence of a rule might have deteriorating effects on the internal market. Second, provided that it is an economic efficiency that should guide the interpretation of free movement rules, making the full use of this principle dependant on whether or not a measure will be challenged by a claimant *in concreto* would be of little sense. Furthermore, extending the scope of free movement provisions by adhering to the market access approach can be a powerful means in successful competition within globalised markets. As Spaventa therefore concludes, “in an internal market, the situation is, by definition, always of potential intra-Community relevance,” and although acknowledging remarkable problems this approach entails, she considers it still preferable to the one based on categorization and exceptions to set up rules.²⁰⁵

The pertinence of potentiality is also apparent from case law concerning free movement of services and establishment. The Court has picked up on potentiality for instance by recognising that it can never be excluded that nationals of other Member States would at some point like to engage in providing services or establish themselves in another

¹⁹⁹ Judgment of 24 November 1982, *Commission v. Ireland (Buy Irish)*, Case 249/81, ECLI:EU:C:1982:402, para. 25 (emphasis added).

²⁰⁰ Judgment of 24 November 1993, *Keck*, Joined cases C-267/91 and C-268/91, ECLI:EU:C:1993:905, para. 13.

²⁰¹ Opinion of AG Kokott delivered on 14 December 2006, *Mickelsson and Roos*, C-142/05, ECLI:EU:C:2006:782, para. 41.

²⁰² Judgment of 4 June 2009, *Mickelsson and Roos*, C-142/05, ECLI:EU:C:2009:336, para. 26.

²⁰³ Spaventa (n124) p. 928.

²⁰⁴ Spaventa (n124) p. 928-29.

²⁰⁵ Ibid.

Member State.²⁰⁶ Accordingly, every wholly internal situation ceases to exist once a foreign operator decides to exercise his or her freedom and the market shall be constantly open to this.²⁰⁷

Generally, it is the flexibility of the market access approach that has been appreciated the most,²⁰⁸ and which is to a large extent shaped exactly by the potentiality. The test, as it was formulated in *Trailers*, has also been by some welcomed for its unification and simplification effect, thus clarifying the whole matter of definition of a restriction to the market. However, interestingly enough, even those who believe the Court meant to use the market access approach as an overarching principle, do not raise their voices in favour of its use to potential hindrances to the market. Pecho, who appears to be of firm opinion that paragraph 37 of *Trailers* prefaced with the word “consequently” indubitably suggests the market access test represents the only relevant criterion for identifying a restriction to free movement, argues that unlike *Dassonville* and *Cassis de Dijon* tests, the one of the market access shall be of “a more real and economic nature”. As he further explains, hindrances that are merely potential, too hypothetical or uncertain (*Peralta* principle) and only depend on “succession of eventualities” should not fall within the meaning of a restriction.²⁰⁹

It does seem rather agreeable among commentators that the Court’s examination of a measure should not be based only on assumptions and vague evidence as at least some particular element or indication of a hindrance on Union trade is required to classify a measure as a restriction.²¹⁰ While Weatherill stressed the need for a criterion “drawing the line between barriers to product market integration [...] and expressions of local regulatory autonomy unconnected with the imperatives of market-building in Europe [...]”,²¹¹ to me it seems difficult to imagine how the market access test in a form of the third limb of *Trailers* could serve to draw such line and help to solve problems connected with identifying the

²⁰⁶ See e.g. Judgment of 31 January 2008, *Centro Europa*, C-380/05, ECLI:EU:C:2008:59, para. 66; Judgment of 1 June 2010, *Blanco Pérez*, Joined cases C-570/07 and C-571/07, ECLI:EU:C:2010:300, para. 40.

²⁰⁷ Enchelmaier, Stefan. 'Always at Your Service : The ECJ's Case Law on Article 56 TFEU', *European Law Review*, vol. 36/no. 5, (2011), p. 618.

²⁰⁸ Tryfonidou (n13) p. 49.

²⁰⁹ Pecho (n150) p. 262, 264.

²¹⁰ Prete, Luca. 'Of Motorcycle Trailers and Personal Watercrafts: The Battle Over Keck', *Legal Issues of Economic Integration*, vol. 35/no. 2, (2008), p. 151.

²¹¹ Weatherill, Stephen. 'Recent Developments in the Law Governing the Free Movement of Goods in the EC's Internal Market', *European Review of Contract Law*, vol. 2/no. 1, (2006), p. 97.

degree of potentiality of a hindrance. The terminological labyrinth maintained both by the Court and academia, in which “potential” might not be used interchangeably with “being liable or capable to hinder” or is suddenly swapped for being “far from inconceivable”²¹² and where “hypothetical” rather means “too insignificant and uncertain”²¹³ than “not actual” suggests that searching for the interpretation, which would make the role of potentiality eventually more apparent, on the basis of the wording used now and then is of vain effort. Moreover, in relation to the previous case law it appears highly questionable what the market access test actually adds to the approach that could have been already adhered to on the grounds of *Dassonville* formula and *Peralta* principle.

As will be shown later in terms of the constitutional framework of the market access approach (subchapter 4.2.2) the economic efficiency argument undoubtedly provides relevant grounds for legitimizing widening effects of potentiality element within the market access concept.

Still, it has been argued that it is the effects of a measure (be it only potential) and not its purpose or an intention behind it to come under the judicial scrutiny in terms of a breach of free movement law.²¹⁴ Hilson offers two main reasons that drive this approach. First, an intention as such might often be difficult to prove. Second, it is a matter of significant political sensitivity to assess Member State’s protectionist intent. Nonetheless, as Hilson further claims, such an approach is not meant to completely exclude any considerations of protectionist intent behind a measure, as that one although not necessary is sufficient to establish an incompatibility with free movement law.²¹⁵

I do agree with Hilson. In regard of the above stated, I advocate the view that focus should be put on protectionist intent of a measure in order to figure out whether a measure qualifies as a restriction in case there is no actual hindrance to the Union market caused but

²¹² Judgment of 1 June 2010, *Blanco Pérez*, Joined cases C-570/07 and C-571/07, ECLI:EU:C:2010:300, para. 40.

²¹³ Judgment of 26 May 2005, *Burmanjer*, C-20/03, ECLI:EU:C:2005:307, para. 31.

²¹⁴ See e.g. Spaventa (n124) p. 929.

²¹⁵ Hilson, Chris. 'Discrimination in Community Free Movement Law', *European Law Review*, vol. 24/no. 5, (1999), p. 447-448. Interestingly, in *Commission v. Portugal (tinted film foils)* the Court consented to the opinion of AG Trstenjak, who argued that the measure at hand constitutes a restriction because it is „aimed towards and capable of hindering or even making impossible the marketing“ of the product. This might suggest that the Court is not completely indifferent as to protectionist intent behind a national measure but seems reluctant to acknowledge it. See Opinion of AG Trstenjak delivered on 13 December 2007, *Commission v. Portugal*, C-265/06, ECLI:EU:C:2007:784, para. 38 (emphasis added); Judgment of 10 April 2008, *Commission v. Portugal (tinted film foils)*, C-265/06, ECLI:EU:C:2008:210, para. 33.

concerns about its potential effects remain. Such considerations could heal the lack of actual hindrance, which would otherwise better justify a finding that a measure constitutes a restriction. On this account it is also worth mentioning that the Court

In this respect I particularly find appropriate and helpful Hilson's interpretation of intention in an objective sense, i.e. intention that is obvious to a reasonable person.²¹⁶ Conceivably, an intention could be judged for instance by objectives outlined in preparatory works to legislative proposals should the incompatible measure be of such nature. An account could be also taken of general public and political debate on the matter. It is beyond doubt that such assessment would in fact still allow the Court to review Member States' policy choices and thus interfere with national regulatory autonomy just as in the case of immediately finding a national measure to constitute a potential restriction. However, regarding the situation as it is, I am of the opinion that if the Court is prepared to found its reasoning on mere possibility that a measure will cause impediments to the internal market by making access to the market impossible, more difficult or less attractive, there is no reason to think it could not resort to similarly daring step such as a review of a Member State's regulatory intentions. An assessment of protectionist intent could at least serve as grounds for finding a measure to amount to a restriction. Not only would this to certain extent legitimize the Court extensive market access approach encompassing even mere potential impediments but it might also allow Member States to better reflect on the Court's deliberations in the future (particularly in terms of infringement proceedings initiated by the Commission).

The discussion on potentiality element inherent to the market access approach has further elaborated on the broad interpretation of a restriction in terms of free movement law. The Court's tendency suggests that even if a measure only potentially discourages economic operators from accessing the market, it is enough for the Court to consider such measure as a restriction. While some argue that this approach is in line with the need to keep the internal market constantly open, others object that this makes any purely internal situation potentially falling within the scope of EU law. I have then suggested that if the

²¹⁶ See text to fn. 11 in Hilson (n215) p. 447: „Although establishing an objective intention will not always be easy, establishing *subjective* intention on the part of a Member State government composed of numerous individuals would be difficult if not impossible.“ (emphasis in the original)

Court resorts to considering even potential impediments to free movement it should take account of protectionist intent behind a measure.

In order to provide a counterbalance to the extensive potentiality element, an instrument of *de minimis* rule that shows promise of narrowing the broad scope of the concept will be discussed.

4.1.2 *De Minimis*

The criticism of broad interpretation of a restriction pursuant to the market access approach has prompted efforts to place the test at least within some limits. One of the expressions of these efforts suggests an introduction of *de minimis* rule into free movement case law as a corrective to the broad impact of the market access approach. The rule narrows the scope of interpretation of a restriction and has a potential to make the market access approach more “qualified”.²¹⁷ Especially, as the rule is believed to bring more clarity and certainty into the issue it could also contribute to the market access legitimacy. It is for this reason that the topic will be addressed.²¹⁸

De minimis rule sets a quantitatively appreciable threshold under which a measure that could have otherwise been considered a restriction is not prohibited as it is not deemed to sufficiently disturb the market.²¹⁹ The language that the Court deploys and which suggests an application of *de minimis* rule includes notions such as “considerable”²²⁰ or “substantial”.²²¹ However, what causes confusion is interplay between *de minimis* rule and the potentiality aspect in terms of the market access approach. There seems to be logical

²¹⁷ See e.g. Spaventa (n124) p. 923.

²¹⁸ In fact, as Oliver points out, not exactly *de minimis* approach but certain considerations on gravity of effects caused by a measure can be spotted already in the times of *Keck*. Therein established category of non-discriminatory selling arrangements fell outside the scope of a restriction because the rules affected both foreign and domestic goods in the same manner although hindering access to the market. While the *Keck* exception was founded on rather a “rule-like test” based on into which category of rules a measure falls, a test applicable to other (non-discriminatory) measures that are neither product requirements nor selling arrangements and can therefore be subsumed under the *Trailer’s* category of “any other measure” is more of a “standard-like” test as it assesses a measure on the basis of its effects and not its features typical for a certain category of measures. See Oliver (n8) p. 121; Kaplow, Louis. 'Rules Versus Standards: An Economic Analysis', *Duke Law Journal*, vol. 42/no. 3, (1992), p. 560-62, as cited in Wils, Wouter P. J. 'The Search for the Rule in Article 30 EEC: Much Ado about Nothing?', *European Law Review*, vol. 18/no. 6, (1993), p. 480-82.

²¹⁹ Shuibhne (n6) p. 157.

²²⁰ Judgment of 10 February 2009, *Commission v. Italy (Trailers)*, C-110/05, ECLI:EU:C:2009:66, para. 56.

²²¹ Judgment of 28 April 2009, *Commission v. Italy (Motor insurance)*, C-518/06, ECLI:EU:C:2009:270, para. 66.

tension should they be used simultaneously. Assuming that even potential hindrances fall within the scope of restriction, does it mean that the hindrance has to be potentially above a certain threshold? Or does it mean that the requirement that a hindrance has to be of certain degree automatically excludes merely potential hindrances from the ambit of a restriction? And if so, is this what the Court wanted to capture by the *Peralta* principle concerning impediments “too uncertain or indirect”? The line between potentiality aspect and *de minimis* rule appears to be very thin and blurry, also due to the Court’s inconsistency in using the terminology.²²² Nevertheless, an explanation that sheds light on the issue is that there are two tests distinguishable. Toner argues that to fall within the notion of restriction a measure either has to have either “direct effect” or “substantial or significant effect”.²²³ According to Shuibhne, the former is an expression of rule of remoteness (*Peralta* principle), the latter of *de minimis* rule. The difference rests in that while *de minimis* is about appreciability, i.e. a situation is related to EU law but is too negligible for EU law to engage, remoteness is about causation, i.e. a situation is not even connected to EU law.²²⁴ The question is to what extent this distinction matters considering that, at the end of the day, the result of both tests is the same – measures either fall foul of free movement provisions or not and in both cases this depends on the Court’s discretion. With regard to the Court’s inconsistent use of terminology it can be expected that a Member State or a defendant in general will deploy all of this terminology to defend a measure.

However, most importantly, despite the fact the issue has been at least from a scholarly point of view partially disentangled, confusion remains as for the Court’s approach itself. Not only has not the Court openly acknowledged that its use of “considerable” or “substantial” refers to *de minimis* rule but it has been quite steadily rejecting the idea of employing the rule in the context of free movement provisions by claiming that no matter how slight the effects of a measure are it can still constitute a prohibited restriction.²²⁵

²²² Judgment of 26 May 2005, *Burmanjer*, C-20/03, ECLI:EU:C:2005:307, para. 31: “effect [...] too insignificant and uncertain”.

²²³ Toner, Helen. 'Non-Discriminatory Obstacles to the Exercise of Treaty Rights - Articles 39, 43, 49, and 18 EC', *Yearbook of European Law*, vol. 23/no. 1, (2004), p. 288.

²²⁴ Shuibhne (n6) p. 157-188, esp. 157.

²²⁵ Judgment of 5 April 1984, *van de Haar*, Joined cases 177 and 178/82, ECLI:EU:C:1984:144, para. 13.; Judgment of 14 December 2004, *Commission v. Germany*, C-463/01, ECLI:EU:C:2004:797, para. 63; Judgment of 1 April 2008, *Walloon Government v. Flemish Government*, C-212/06, ECLI:EU:C:2008:178, para. 52: “[t]he articles of the Treaty relating to the free movement of goods, persons, services and capital are

The idea of *de minimis* rule operating within this area of law has suffered from much criticism altogether. AG Bot in *Trailers* held that the Court should not engage in any economic assessment.²²⁶ An unsuitability of economic data as part of the Court's analysis has been also stressed by Snell who claims that it will be burdensome for the litigants to produce such data and provide sufficient evidence.²²⁷ Moreover, the result of this quantitative assessment could be that legality of a measure would be rendered a fluctuating quality as it might be subject to frequent changes depending on how the data vary over the time and in relation to a territory.²²⁸ Gormley then argues that *de minimis* would become "a carte blanche" for Member States to escape their obligations under the Treaties, which he considers completely contrary to the concept of internal market, and that any Member States' attempt to get a measure outside the scope of free movement scope should be tested at the justification stage of a measure assessment.²²⁹

On the opposite account, a famous favourable approach towards the use of *de minimis* rule within free movement law is the one of AG Jacobs in *Leclerc-Siplec* where he advocated the "substantial" threshold.²³⁰ As for more specific solution, a suggestion is worth mentioning. Jansson and Kalimo propose that the gravity of a restriction could be measured in at least three possible respects: "1) as the (absolute) size of the affected market; 2) as the size of the affected part of the market in relation to the size of the entire relevant market or 3) as the size of the restrictive effect on an individual trader".²³¹ It would then be upon consideration whether all these respects would have to be present cumulatively or perhaps only two of them would be sufficient to classify a measure as a restriction.²³²

fundamental Community provisions and *any restriction, even minor*, of that freedom is prohibited"(emphasis added).

²²⁶ Opinion of AG Bot delivered on 8 July 2008, *Commission v. Italy (Trailers)*, C-110/05, ECLI:EU:C:2008:386, para. 116.

²²⁷ Snell (n74) p. 459.

²²⁸ Oliver and Martinez Navarro (n20), p. 335; Snell (n74) p. 459.

²²⁹ Gormley, Laurence W. 'Inconsistencies and Misconceptions in the Free Movement of Goods', *European Law Review*, vol. 40/no. 6, (2015), p. 936-7.

²³⁰ Opinion of AG Jacobs delivered on 24 November 1994, *Leclerc-Siplec*, C-412/93, ECLI:EU:C:1994:393, para. 45-46, 49.

²³¹ Jansson, Max S., and Harri Kalimo. 'De Minimis Meets "Market Access": Transformations in the Substance - and the Syntax - of EU Free Movement Law?', *Common Market Law Review*, vol. 51/no. 2, (2014), p. 531.

²³² *Ibid.*, p. 534.

Yet, the above stated opinions, albeit in favour of the rule or not and despite their provoking power, are of little help when one seeks to find out what the Court's stance on the issue is. An explanation might be that *Trailers* and *Commission v. Italy (motor insurance)* suggest a shift from the Court's rejecting approach towards *de minimis* rule in the context of free movement law. Only until attention is drawn to *Bonnarde* case, in which the Court held that a requirement for a registration document of demonstration vehicles has to state information that it was a "demonstration vehicle" in order to be granted an ecological subsidy "may influence the behaviour of consumers and, consequently affect the access of those vehicles to the market" and thus constitutes a restriction.²³³ Curiously, the Court did live up to expectations to refer to *Trailers*, mainly because of certain similarity in the subjects of both cases. However, as for example Weatherill notes, it completely omitted the requirement for "considerable" influence on consumers' behaviour this time.²³⁴ Does it mean that the Court once again rejected *de minimis* rule, therefore making *Trailers* and *Commission v. Italy (motor insurance)* cases only a mysterious interlude, or is it rather a result of textual carelessness?

What I find even more striking is that the "may influence" formula does not actually relate to *de minimis* considerations, as follows from Weatherill's observation, but rather to potentiality aspect of the market access approach. This supports my previous remark that the line between *de minimis* and potentiality element is anything but clear. However, in respect of my suggestion that, when operating in mere potential terms, the Court should at least pay attention to protectionist intent behind a measure, *Bonnarde* case does not bring much satisfaction. This is because the Court held that "even if the national legislation [...] does not have the aim of treating products from other Member States less favourably" it "may influence the behaviour of consumers".²³⁵ On the other hand, it has to be admitted that the Court unwillingness to inquire into protectionist intent behind national measures corresponds to its attitude toward *de minimis* rule within free movement law.

This being said, it appears that at least in *Bonnarde* the Court did not take up the opportunity to shape *de minimis* rule for the purposes of free movement law. In my view this is a rather lost opportunity on the Court's side to try to make *de minimis* a useful tool

²³³ Judgment of 6 October 2011, *Bonnarde*, C-443/10, ECLI:EU:C:2011:641, para. 30-31.

²³⁴ Weatherill (n161) p. 543.

²³⁵ Judgment of 6 October 2011, *Bonnarde*, C-443/10, ECLI:EU:C:2011:641, para. 30.

for placing the market access approach within some boundaries, which I believe would definitely enhance the concept's legitimacy. I find the Court's persistent rejection to take economic data into consideration when assessing effects of national measures at odds with the fact that the Court does reflect on economic reality. In particular, it does so by broadening its judicial review through potentiality element of the market access approach so as to cover any measure (potentially) hindering access to the market or making such access less attractive or more difficult.

There seem to be roughly three ways out of this conundrum.²³⁶ First of all, the Court could completely eliminate the language of *de minimis* rule, thereby confirming its rejecting attitude. I would argue that this might not help in finding the boundaries of the market access approach, let alone in bringing them closer, but it would at least contribute to legal certainty within free movement law. Second, the Court could revisit the rule-like test as in *Keck* with selling arrangements and use sort of *de minimis* rationale once more to establish certain type of measures whose effects would have to be somehow qualified to fall within the notion of restriction. However, I hold the view that this categorization-driven solution already proved unsuitable enough with regard to unpredictable amount of different types of measures that might emerge in the future. Lastly, the Court could openly acknowledge that *de minimis* rule is part of its consideration and explore possible ways it could function within free movement law. Qualifying the threshold would definitely not be an easy task as it would inevitably depend on fluctuating economic data. Still, I believe that at this point of the time this is clearly a preferable solution. Applying *de minimis* rule within the market access approach would represent a necessary compromise. This means a compromise between the Court's interest to maintain rather broad market access test and national interests to retain sufficient level of regulatory autonomy. It surely cannot be excluded that at the end of the day it will be found that *de minimis* rule is not appropriate tool to deploy when making the market access approach more qualified and therefore legitimate. Yet, I argue that silence and denial from the Court's side are not solutions either.

²³⁶ See e.g. Jansson, Kalimo (n231) p. 557; Shuibhne (n6) p. 255.

Regardless of how far the potentiality element can take the reach of free movement provisions and whether or how the Court can modify it using *de minimis* rule, the market access approach is here to stay. The cases before the Court concerning measures, which could not have been assessed solely with aid of established principles of non-discrimination and *Keck* exception, proved that there, indeed, is room for considering the approach as a judicial tool to tackle fragmentation of the internal market. Therefore, with regard to the reality consisting of these hard-to-grasp measures coming up across the Member States, this capability of the market access seems to present its important prerequisite to be deemed legitimate.

Still, there seems to be an agreement that the Court has been ruling rather on a case-by-case basis than operating “in terms of grand theory” and that it is overall reasonableness of a measure that comes under the Court’s scrutiny.²³⁷ Shuibhne makes even more disturbing remark, confirming assertions that the Court’s approach is to large extent based on intuition: “[...] in the overwhelming majority of free movement judgments, the Court is working on a legal instinct, on a pragmatic sense of logic, maybe even on something as amorphous as a gut-feeling”.²³⁸ To my mind, these claims are quite alarming and suggest, conversely, that there are more demands to be placed on the market access approach to be legitimate than variety of measures that cannot be otherwise tackled. Therefore, I argue that no matter how unsettled and ambiguous the use of the market access approach might be, it shall be supported by solid constitutional basis. Consequently, the next chapter will examine what could be the points of intersection between the market access approach and the Treaties.

4.2 Constitutional dimension

The constitutional dimension of the market access approach is striking. The concept determines the reach of the internal market law and EU law in general to a great extent. It is firm constitutional basis that are *conditio sine qua non* for lawfulness of the market

²³⁷ Gormley, Laurence W. 'Free Movement of Goods and their use - what is the use of it?', *Fordham International Law Journal*, vol. 33/no. 6, (2010), p. 1626. Similarly Barnard (n14) p. 141.

²³⁸ Shuibhne, Niamh Nic. 'Case C-76/05 Schwarz and Gootjes-Schwarz v. Finanzamt Bergisch Gladbach, Judgment of the Grand Chamber of 11 September 2007, not yet reported; Case C-318/05, Commission v. Germany, Judgment of the Grand Chamber of 11 September 2007, not yet reported; Joined Cases C-11/06 & C-12/06 Morgan v. Bezirksregierung Köln; Bucher v. Landrat des Kreises Düren Judgment of the Grand Chamber of 23 October 2007, not yet reported', *Common Market Law Review*, vol.45/no. 3, (2008), p. 783.

access approach and considerably enhance its legitimacy. As a criterion with such a potentially significant impact on the boundaries of EU law it ought to be clear whether and where the market access approach finds its constitutional support. To be more precise, which of the Treaties' provisions that are possibly underlying the interpretation of free movement law provide sufficient constitutional support for the market access approach. As Shuibhne rightly observes, the Treaties are essentially agnostic in terms of which are these provisions that should guide the interpretation of the free movement law.²³⁹ The choice largely depends on what idea one holds of aims and functions of the internal market and, after all, of the EU on the whole.

Taken as a starting point, the dilemma can be expressed by AG Tesauro's framing in *Hünermund*, which even though addressed in terms of free movement of goods resonates throughout other freedoms as well: is what is now Article 34 TFEU "a provision intended to liberalize intra-Community trade or is it intended more generally to encourage the unhindered pursuit of commerce in individual Member States?"²⁴⁰ Generally speaking, the core question is whether the aim of the Treaties is merely to eradicate any discrimination causing cross-border barriers to intra-Union trade or to ensure undisturbed and full enjoyment of the fundamental freedoms? Several Treaties' provisions related to these both perspectives will be therefore discussed as well as the position of the market access approach within them.

4.2.1 Article 18 TFEU and not beyond?

Referring back to the above stated question, AG Tesauro himself favoured the former perspective.²⁴¹ He was inclined to think that although a measure was capable of reducing imports, this was only as a result of reducing sales and hence such measure had "nothing to do with trade, still less with the integration of the markets".²⁴²

²³⁹ Shuibhne (n6) p. 245.

²⁴⁰ Opinion of AG Tesauro delivered on 27 October 1993, *Hünermund*, C-292/92, ECLI:EU:C:1993:863, para. 1.

²⁴¹ Notably, as Barnard observes, the judgment in *Keck* was to a large extent inspired by the propounded answer of AG Tesauro in *Hünermund*. See Barnard (n13) p. 42 and also text to fn. 81-83.

²⁴² Opinion of AG Tesauro delivered on 27 October 1993, *Hünermund*, C-292/92, ECLI:EU:C:1993:863, para. 24. Moreover, he specifically warned before traders to be allowed to challenge national legislation of this nature on the grounds of what is now Article 34 TFEU in order to actually avoid particular obligations imposed on them as this could render the provisions on other freedoms nugatory. The reason is that the

Similarly, as regards freedom of establishment, in *Caixa Bank AG* Tizzano rejected that mere decrease in attractiveness of exercising one of the freedoms could constitute a restriction to free movement. In his view, the Treaties were drafted with the intention to create an internal market in which economic operators can fully exercise their freedoms but not to create a market in which “rules are prohibited as a matter of principle”, that is to say a market without any rules.²⁴³

Eventually, in respect of chronological order, the same line of thinking was demonstrated by AG Maduro in *Alfa Vita*. He admitted that attacks on certain national measures might stem from a problematic distinguishing between measures, whose aim is to protect national economic actors from external competition, and measures, which protect from potential competition on the market in general. The fact that these often overlap leads to that the latter group is considered to put restrictions on the access to the market. However, according to him, this is not to say that the Treaties would provide “an absolute right to economic or commercial freedom”. While he considers opening-up national markets to be one of the objectives of the internal market, encouraging of “a general deregulation of national economies” is not.²⁴⁴

The triad of opinions clearly suggests that the main concern of the interpretation of free movement provisions is to remove any cross-border barriers based on differential treatment. An interesting support for this view has been offered by Davies, who draws a link between interpretation of free movement provisions and the one inherent to provisions on state aid, public procurement or the law related to harmonization under Article 114 TFEU. The aim therefore should be “removal of competitive distortions rather than the reduction of regulation as such [and] to maintain a level playing field for all market actors”.²⁴⁵ In the similar vein, it has been submitted that the purpose of the free movement

obligation might in fact be related rather to free movement of establishment or services but these could not be relied upon as traders would face purely internal situation. See para. 27.

²⁴³ Opinion of AG Tizzano delivered on 25 March 2004, *CaixaBank*, C-442/02, ECLI:EU:C:2004:187, para. 62-63. This case is of particular interest since the Court arrived at exactly the opposite conclusion than AG Tizzano: “All measures which prohibit, impede or render less attractive the exercise of that freedoms must be regarded as such restrictions.” See Judgment of 5 October 2004, *CaixaBank*, C-442/02, ECLI:EU:C:2004:586, para. 11.

²⁴⁴ Opinion of AG Poiares Maduro delivered on 30 March 2006, *Alfa Vita*, Joined cases C-158/04 and C-159/04, ECLI:EU:C:2006:212, para. 37-38.

²⁴⁵ Davies (n183) p. 680.

provisions should remain to liberalize intra-Union trade and not trade *per se* in order to maximize commercial freedom.²⁴⁶

Obviously, the rationale behind these perspectives on the interpretation of free movement provisions is respect to and the least possible intrusion into national regulatory autonomy as well as keeping the EU competences within legal and, especially, reasonable boundaries. Accordingly, the best legal basis accommodating these central concerns appears to be the so many times reiterated general principle of non-discrimination.²⁴⁷

More precisely, the principle of non-discrimination stems from different legal sources. On one hand it is the constitutional traditions common to the Member States. On the other, it is the EU law. Within the latter, the principle enjoys a position of one of the general principles of EU law, but is also embedded in the Treaties, which are the focal point here.²⁴⁸ First and foremost, it is the Article 18 TFEU, which precludes any discrimination on grounds of nationality and can be seen as a textual imprint of the general principle and also *lex generalis*. Particular free movement provisions then contain specific prohibition of discrimination and are thus regarded as *leges speciales*.²⁴⁹

As already outlined several times, the non-discrimination model, sometimes called discrimination theory or an anti-protectionism model, applied to interpretation of free movement provisions represents the view that unless a national measure interfering with the four freedoms is discriminatory, it does not fall under the scrutiny of the EU law and it is upon the Member States to decide what the measure sets forth.²⁵⁰

Hence, if this line of reasoning described above is given preference and it is held that the principle of non-discrimination should be the sole principle governing the interpretation of free movement provisions and the notion of restriction to intra-Union

²⁴⁶ Horsley (n148) p. 2008, 2011.

²⁴⁷ See e.g. Opinion of AG Poiares Maduro delivered on 30 March 2006, *Alfa Vita*, Joined cases C-158/04 and C-159/04, ECLI:EU:C:2006:212, para. 46.

²⁴⁸ McCrudden, Christopher, and Sacha Prechal, 'The Concepts of Equality and Non-Discrimination in Europe: A practical approach', European Network of Legal Experts in the Field of Gender Equality, (2009), p. 2-6. It shall be noted, that the authors identify the third source of the principle of non-discrimination in human rights law, particularly the European Convention on Human Rights, which, however, will not be discussed in this thesis due to the space constraints and also very specific and problematic relationship between the EU Law and the European Convention on Human Rights.

²⁴⁹ Oliver, Roth (n34) p. 411.

²⁵⁰ Snell, Jukka, *Goods and Services in EC Law: A Study of the Relationship between the Freedoms* (Oxford, Oxford University Press, 2002), ISBN 0-19-925009-X, p. 35; Spaventa (n165) p. 744.

trade, there clearly is no wiggle room for the market access approach. It follows that in such case the legitimacy of the market access can hardly be established.

4.2.2 Article 3(3) TEU and establishing an internal market as the utmost objective?

Nevertheless, the interpretation of free movement provisions and of what constitutes a prohibited restriction may as well be built on a belief that there is more to the Treaties' intent than to secure equal treatment and to remove all direct and indirect discrimination, which could hamper the intra-Union trade.

In regard of steps leading towards well-functioning internal market, Spaventa has articulated the idea of two staged process. According to her, in the earlier stages of the integration process it was indeed first necessary to tackle discriminatory rules. However, as she argues, the interpretation of the free movement provisions develops alongside the needs of the internal market.²⁵¹ Hence, it is only in the natural course of events that the efforts should be made to dispose of all rules that, although not being discriminatory in any way, hinder the internal market and put obstacles on its way to become a “dynamic and competitive” economy. The rationale behind is that “[u]nnecessary regulation reduces competitiveness both because it is expensive and because it stifles innovation”.²⁵² Furthermore, speaking of the objection of undesirable deregulation,²⁵³ Spaventa holds the view that broad interpretation of the free movement provisions could actually lead to more deliberated, debated and therefore better regulation.²⁵⁴

The goal of building up the internal market as a dynamic and competitive economy does appear to be essential in terms of the EU development as it, for instance, follows from the European Council conclusions adopted during the past three years. Some of the main concerns stressed therein are “delivering deeper and fairer Single Market”,²⁵⁵ tackling market fragmentation,²⁵⁶ removing remaining barriers to free movement of goods and

²⁵¹ Spaventa, Eleanor, 'The Outer limits of the Treaty free movement provisions: Some reflections on the significance of Keck, remoteness and Deliege' in Barnard, Catherine, and Okeoghene Odudu (eds.), *The Outer Limits of European Union Law* (Oxford, Hart Publishing, 2008), ISBN 978-1-84-731496-3, p. 270.

²⁵² Spaventa (n124) p. 925.

²⁵³ See text to n244.

²⁵⁴ Spaventa (n124) p. 925.

²⁵⁵ European Council, “Conclusions adopted at the meeting on 28 June 2016” EUCO 26/16, para. 10.

²⁵⁶ European Council, “Conclusions adopted at the meeting on 25 and 26 June 2015” EUCO 22/15, para. 12.

services, especially unjustified geo-blocking within the e-commerce²⁵⁷ as well as supporting innovation and enhancing growth and competitiveness, particularly with respect to the EU membership in the WTO by keeping the markets open and fighting protectionism.²⁵⁸

Therefore, even if the initial primary aim of the Treaties as regards the internal market was removal of all discrimination within the intra-Union trade, there is no reason to think these aims are not now competitiveness of the internal market and overall economic prosperity and efficiency.²⁵⁹ In essence, this would be the same kind of change of perception of the internal market dimension as for example the recognition of need not only to ensure the free movement of persons as such but also need of these persons to be provided with certain social security benefits.²⁶⁰ Moreover, it is not unconceivable that in order to legitimize the market access approach the Court could actually rely on a principle of *effet utile* should the objective of economic effectiveness be perceived as effectiveness of the internal market law in general.²⁶¹ However, needless to say how fragile would such legitimacy be and to what extent would the issue turn into a political dimension rather than the legal one.

Importantly, it is believed that the Treaties do contain a provision that can be interpreted as corresponding with these goals of prosperity and economic efficiency and in light of which should be free movement provisions interpreted. It is the very Article 3(3) TEU, which, among other things, provides that “[t]he Union shall establish an internal market”, accompanied by Article 26(1) TFEU, which further confirms “the aim of establishing or ensuring the functioning of the internal market”. “[P]roper functioning of the internal market” is then reiterated several times in the TFEU.²⁶²

Undoubtedly, considerably broad and vague manner in which are especially the first two mentioned Articles drafted has to be acknowledged. Yet, one may argue that from the Treaties authors’ perspective there could hardly be more sophisticated way of

²⁵⁷ European Council, “Conclusions adopted at the meeting on 25 and 26 June 2015” EUCO 22/15, para. 12; European Council, “Conclusions adopted at the meeting on 28 June 2016” EUCO 26/16, para. 10.

²⁵⁸ European Council, “Conclusions adopted at the meeting on 23 June 2017” EUCO 8/17, para. 13, 16.

²⁵⁹ For the relevance of economic efficiency see Spaventa (n124) p. 928.

²⁶⁰ Article 3(3) TEU recognizes “a highly competitive social market economy”. See also Barnard (n14) p. 26-27.

²⁶¹ For the possible role of *effet utile* in connection with the market access approach see Spaventa (n124) p. 924.

²⁶² See for example Article 65 TFEU or Article 81 TFEU.

designing the Articles to allow for sufficient leeway for the future development of needs of the internal market. In this respect the market access approach seems to be a judicial mirror image of these motives, accommodating the same tendencies. As Craig and Búrca put it, “market access is a means to an end, the end being to maximize sales/profits for the individual producer, and to enhance optimal allocation of resources in the EU”.²⁶³

The appropriateness of the market access approach for accomplishing the purposes of the internal market has gained support elsewhere, too. As already cited earlier,²⁶⁴ AG Jacobs in *Leclerc-Siplec* rejected to interpret free movement provisions regarding goods solely in light of principle of non-discrimination as “the central concern of the Treaty [...] is to prevent unjustified obstacles to trade between Member States” regardless of whether such obstacle is of discriminatory nature or not.²⁶⁵ Although the function of collocation “between Member States” can be surely a matter for debate,²⁶⁶ inclination to the market access approach is blatant. Likewise, as there is a clear tendency to create “an economic constitution, [within] which Union citizens have the right to participate in the market without any unreasonable restrictions standing in their way”,²⁶⁷ the market access approach is more consistent with this and the “general objective of building an internal market”.²⁶⁸

Altogether, should free movement provisions be interpreted in the light of Article 3(3) TEU and Article 26(1) TFEU and with the underlying idea of achieving the highest possible economic efficiency it can be deduced that these Articles provide ample constitutional grounds for the market access approach as the concept is of significant help to approaching the above stated goal. In this regard, the market access approach can be deemed lawful and legitimate.

4.2.3 The role of Article 4(2) TEU

It has been shown that it is Article 3(3) TEU and Article 26(1) TFEU that can be perceived as providing the most appropriate constitutional support for the market access

²⁶³ Craig, de Búrca (n19) p. 692.

²⁶⁴ See text to n96.

²⁶⁵ Opinion of AG Jacobs delivered on 24 November 1994, *Leclerc-Siplec*, C-412/93, ECLI:EU:C:1994:393, para. 39.

²⁶⁶ Cf. Weiss and Kaupa (n82) p. 342, who seem to perceive the collocation as a sign of “inner nature” of obstacles to trade, that is the relevance of obstacles in terms of the intra-Union trade, rather than the impact of obstacles on outer competitiveness of the internal market.

²⁶⁷ Tryfonidou (n13) p. 49-50.

²⁶⁸ Barnard (n13) p. 54.

approach. However, this premise of constitutional rooting of the market access approach is considerably shaken in the context of other Treaties' provisions that shall not be disregarded. Notably, the approach as an instrument to broad interpretation of a restriction to free movement is challenged by principles of conferral and principle of subsidiarity enshrined in Article 5 TEU. Both principles tend towards the narrow understanding of a restriction to free movement. I will further discuss in more details yet another TEU provision that is essentially of the same effect.

Article 4(2) TEU sets forth that “[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. [...]”.

The provision has been recognised by the Court as an important tool at Member States' disposal to stand the test of justification of a national measure that had been considered to constitute a restriction on free movement rights.²⁶⁹ The relevance of national identity concerns within the justification phase of assessing a measure in terms of its compliance with free movement rules has been stressed by academia as well, pointing out that Article 4(2) TEU is “the door through which [these concerns] enter free movement law”.²⁷⁰ And yet, it is questionable whether the justification phase followed by proportionality review provides the most appropriate framework, within which numerous free movement dilemmas should be tackled.²⁷¹

I submit that Article 4(2) TEU confirming respect for national identities shall be taken into consideration already at the stage of identifying a restriction prohibited by free movement law. It is self-evident that a non-discriminatory national measure, which is

²⁶⁹ See e.g. Judgment of 24 May 2011, *Commission v. Luxemburg*, C-51/08, ECLI:EU:C:2011:336, para. 124 or Judgment of 22 December 2010, *Sayn-Wittgenstein*, C-208/09, ECLI:EU:C:2010:806, para. 92, as cited in Weatherill (n161) p. 546.

²⁷⁰ See Weatherill (161) p. 546-47. Similarly in Shuibhne, Niamh Nic, 'Primary Laws: Judging Free Movement Restrictions after Lisbon' in Koutrakos, Panos, Niamh Nic Shuibhne, and Phil Syrpis, *Exceptions from EU Free Movement Law: Derogation, Justification, and Proportionality* (Oxford; Portland, Hart Publishing, 2016), ISBN 978-1-84-946620-2, p. 312-318.

²⁷¹ See e.g. Shuibhne (n270) p. 317. For a discussion on the Court's increased preoccupation with justification and proportionality phases within a national measure analysis rather than providing concise definition of a restriction see also Connor, Tim, "Market Access" or Bust? Positioning the Principle Within the Jurisprudence of Goods, Persons, Services, and Capital', *The German Law Journal*, vol.13/no. 6, (2012), p. 750.

found, deploying the market access approach, *prima facie* to constitute a prohibited restriction because it renders the access to the market less attractive or more difficult, may as well be perceived as exactly the expression of the essential state function of maintaining law and order. Undoubtedly, one may object that if a measure is justifiable on the grounds of Article 4(2) TEU it will escape the ambit of a restriction under the free movement provisions anyway later at the justification stage. However, as Weatherill noted, identifying appropriate interpretative guidelines provided by the Treaties and defining the scope of free movement provisions is of significantly more importance than leaving the final scrutiny of a national measure to justification and proportionality considerations.²⁷² Besides a logical requirement for legal certainty in the context of the scope of free movement law, one of the main reasons for this is the already mentioned issue of presumptions of national measures legality and allocation of the burden of proof. Although it was observed that with regard to the extensive interpretation of the scope of free movement rules the Court has seemed to counterbalance this deficiency, at least in terms of free movement of services, by imposing the burden of proof in infringement proceedings pursuant to Article 258 TFEU rather on the Commission,²⁷³ this tendency might actually suggest that the Court is very much aware of this problem. With regard to references for preliminary rulings under Article 267 TFEU the burden of proof is not an issue due to the nature of the proceedings but it appears probable that a complainant, most likely a trader, will be required to provide sufficient evidence to support his or her claim in the national proceedings.

Therefore, should free movement provisions be interpreted in light of Article 4(2) TEU as well, restrictive reading of Article 3(3) TEU shall prevail and it becomes highly arguable whether the Article still provides sufficient constitutional basis for the market access approach that would support its legitimacy. Davies asserts that by enshrining respect for national identity and states' functions in the Treaties "the Member States made

²⁷² Weatherill, Stephen, 'The Court's case law on the internal market: "A circumloquacious statement of the result, rather than a reason for arriving at it"?' in Adams, Maurice, *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Oxford, Hart Publishing, 2013), ISBN 978-1-84-946335-5, as cited in Shuibhne (n6) p. 49.

²⁷³ Hatzopoulos, Vassilis. 'The Court's Approach to Services : From Case Law to Case Load?', *Common Market Law Review*, vol. 50/no. 2, (2013), p. 474-75.

it a concept”.²⁷⁴ The question then is whether the market access approach can still be deemed legitimate against this competing concept.

It has been shown that identifying constitutional basis of the market access approach depends on in light of which other Treaties’ provisions shall be free movement law interpreted. This entails deliberation on the objectives of the internal market. The most appropriate constitutional basis appears to lie in Article 3(3) TEU setting a general objective of establishing an internal market. Nevertheless, it is suggested that the legitimacy of the market access approach shall not be assessed only in light of this provision but also with regard to Article 4(2) TEU concerning respect for national identities of Member States. As the latter provision encroaches upon the former, constitutional basis and legitimacy of the market access approach are considerably challenged if not made non-existent.

²⁷⁴ Davies, Gareth, 'Free Movement, the Quality of Life and the Myth that the Court Balances Interests' in Koutrakos, Panos, Niamh Nic Shuibhne, and Phil Syrpis, *Exceptions from EU Free Movement Law: Derogation, Justification, and Proportionality* (Oxford; Portland, Hart Publishing, 2016), ISBN 978-1-84-946620-2, p. 229.

5 Perspectives

As for any other ambiguous and controversial topic, opinions on the market access approach and its legitimacy differ depending on divergent perspectives. Before taking those economic actors involved in the internal market and Member States, the concept will be briefly addressed from a general perspective of legal certainty that is of paramount importance for all stakeholders and an essential prerequisite for the legitimacy of the concept.

5.1 Market access approach and general perspective of legal certainty

The principle of legal certainty resonates throughout the topic of the market access approach. And its position in respect of the concept and interpretation of free movement provisions seems to be rather woeful, if not in tatters.

Firstly, previous discussion of the concept as such demonstrated that the market access test remains rather unqualified and it is not very clear how precisely the Court intends to approach national measures once they are found to be subjected to the test. Especially, significant uncertainty persists as to the use of any threshold of effects that needs to be reached for a measure to constitute a restriction.

Secondly, most of legal uncertainty stems from undefined scope of the test. In particular, there are doubts as to whether the Court handles the test as an overarching principle or a residual category and whether the distinction between product requirements and selling arrangements in terms of free movement of goods still holds good. A separate study of post-*Trailers* case law would have to be conducted in order to present a thorough analysis of the Court's reasoning and to draw well-founded conclusions from the findings. As much as this thesis does not have the ambition to do so, few strands of the Court's post-*Trailers* decision-making in respect of the use of the market access approach will be outlined. Since giving rise to most of legal uncertainty, case law on free movement of goods will be focused on.

The view that the market access test is rather a residual category and does not reverse previous case law appears to be the most prevailing one among commentators.²⁷⁵ Indeed, the same signals can be found in the Court's case law as well. As early as two months after delivering the judgment in *Trailers* the Court in *LIBRO* upheld *Keck* distinction and classified the measure at issue as a selling arrangement.²⁷⁶ However, although still citing *Keck*, the Court performed a strange shift in *Ker-Optika*, where it stated that "national provisions restricting or prohibiting certain selling arrangements [are] such as to hinder [...] trade between Member States [...], unless those provisions apply to all relevant traders".²⁷⁷ As Barnard observes, this would suggest that even selling arrangements are presumed to constitute a restriction unless proved indistinctly applicable, which would in effect totally deny the whole purpose of *Keck* distinction.²⁷⁸ Only a week after the decision in *Ker-Optika*, the Court ruled in *Humanplasma* that a national measure, which allowed importing and marketing of blood from other Member States only if there has not been any payment made for the donation, constituted a restriction in spite of being indistinctly applicable.²⁷⁹ In the light of these judgments and also the very much pro-market access *Bonnarde* case delivered at that time, it could have been concluded that the Court had chosen to depart from *Keck* case law and even more embrace the market access approach.²⁸⁰

A couple of cases citing *Dassonville*, *Trailers* and *Ker-Optika* and referring to principles of non-discrimination, mutual recognition and to the market access followed,²⁸¹ but their perception differs. Specifically with regard to *ANNET*, while some consider the reiteration of the above mentioned principles as a confirmation that market access has not subsumed the previous tests,²⁸² Shuibhne feels that the absence of any discussion as to whether the measure in question can be identified as a product requirement or a selling

²⁷⁵ See e.g. Barnard (n114) p. 105; Gormley (n229) p. 936; Jansson, Kalimo (n231) p. 557; Snell (n74) p. 455.

²⁷⁶ Judgment of 30 April 2009, *LIBRO*, C-531/07, ECLI:EU:C:2009:276, para. 20, as cited in Barnard (n14) p. 136)

²⁷⁷ Judgment of 2 December 2010, *Ker-Optika*, C-108/09, ECLI:EU:C:2010:725, para. 51.

²⁷⁸ Barnard (n14) p. 135.

²⁷⁹ Judgment of 9 December 2010, *Humanplasma*, C-421/09, ECLI:EU:C:2010:760, para. 26-30.

²⁸⁰ Judgment of 6 October 2011, *Bonnarde*, C-443/10, ECLI:EU:C:2011:641, para. 30. See also text to n233.

²⁸¹ Judgment of 18 October 2012, *Elenca*, C-385/10, ECLI:EU:C:2012:634, para. 22-23; Judgment of 1 March 2012, *Asociación para la Calidad*, C-484/10, ECLI:EU:C:2012:113, para. 52-53; Judgment of 26 April 2012, *ANETT*, C-456/10, ECLI:EU:C:2012:241, para. 32-35.

²⁸² Barnard (n14) p. 105; Snell (n74) p. 455.

arrangement signifies a departure from the preceding case law.²⁸³ Similarly, in much connected²⁸⁴ *Commission v. Poland* and *Commission v. Lithuania* cases, which dealt with registering right-hand controlled vehicles in Member States where registration of these has been precluded, the Court applied a clear market access approach.²⁸⁵ MacCulloch observes that the Court did not make any attempt to explore the possibility that the national measures at hand falls within the category of product requirements and rather approached the case directly using the market access test.²⁸⁶ Interestingly, an absolute indifference towards dealing with previous case law is apparent from *Ålands Vindkraft*, where the Court prefaced otherwise pure market access test only with classical *Dassonville* formula.²⁸⁷ As it is the Grand Chamber judgment one tends to wonder whether the Court has perceived the issue of interpretation of a restriction already clear enough to make do with somehow automatic and unelaborated approach.

And yet, *Keck* ruling does not seem to be completely forgotten. In *Visnappu* the Court first classified a measure requiring traders to hold a retail sale license in order to import alcohol to Finland as a selling arrangement and then also analysed whether both conditions of paragraph 16 of *Keck*, i.e. (i) equal application to domestic and foreign traders and (ii) effects same in law and in fact, are satisfied.²⁸⁸ Although eventually finding the first condition had not been fulfilled, the acknowledgment of *Keck* has sent out a strong message that the Court might have been still aware of its responsibility to take its previous case law into account. However, the impression that the Court is determined to deploy *Keck* when appropriate has not lasted for long. In *Scotch Whisky Association* the Court merely stated that the measure at issue setting minimum alcohol pricing is capable of hindering the access to the UK market and in this way directly used the market access test although a discussion whether the measure could not be deemed a selling arrangement

²⁸³ Shuibhne (n6) p. 233. Since the case at hand concerned national law, which prohibited retailers from importing tobacco directly from other Member States and made them acquire the product from authorized wholesalers, it is conceivable that such law could have been assessed as a certain selling arrangement.

²⁸⁴ So much that the Court even copy-pasted the exact same formulation, yet unfortunately, without changing the Member States' names.

²⁸⁵ Judgment of 20 March 2014, *Commission v. Poland*, C-639/11, ECLI:EU:C:2014:173, para. 52; Judgment of 20 March 2014, *Commission v. Lithuania*, C-61/12, ECLI:EU:C:2014:172, para. 57.

²⁸⁶ See also MacCulloch, Angus, "Right-Hand, or Wrong-Hand, Drive? Market Access and Proportionality", 2 April 2014, available at <https://eutopialaw.com/2014/04/02/right-hand-or-wrong-hand-drive-market-access-and-proportionality/>, accessed 20 November 2017.

²⁸⁷ Judgment of 1 July 2014, *Ålands vindkraft AB*, C-573/12, ECLI: EU:C:2014:2037, para. 66-75.

²⁸⁸ Judgment of 12 November 2015, *Visnapuu*, C-198/14, ECLI:EU:C:2015:751, para. 102-108.

might have been of relevance.²⁸⁹ This approach was repeated shortly afterwards in *Canadian Oil Company*.²⁹⁰ The Court apparently welcomed that the parties to the case did not object to the finding that the measure was a restriction and thus avoided categorizing it.²⁹¹

The last one from recent cases to be mentioned in order to demonstrate persisting oscillation between the principle of non-discrimination and the market access approach would be *Deutsche Parkinson Vereinigung*, a case that was extremely similar to *DocMorris*²⁹² and concerned price-fixing for prescription-only medicinal products.²⁹³ The Court first acknowledged that the measure at hand was indistinctly applicable, but then, as in *DocMorris*, reflected on greater economic impact of the measure on pharmacies established in other Member States and in the end found the measure to constitute a restriction.²⁹⁴ Although the Court seemed to have set off from rather rationalized non-discrimination point of view, the driving force of the market access approach emanates from the judgement.

To draw any, albeit superficial, conclusion in regard of the Court's stance on the role of the market access test in terms of the interpretation of a restriction to free movement is extremely difficult. Nonetheless, general view of the recent case law suggests that the Court's prefers to leave its hands untied and keep several tests at its disposal. In terms of free movement of goods it ventures employing *Keck* as long as it feels comfortable to do so and categorizing a measure as a selling arrangement does not cause major problems; otherwise the market access approach capable of catching all types of measures seems to be applied. Similar "bewildering variety of approaches" has been observed with regard to services as well.²⁹⁵ Of course, the question is to what extent is keeping the variety of approaches the Court's intention and to which it is a result of the

²⁸⁹ Judgment of 23 December 2015, *Scotch Whisky*, C-333/14, ECLI:EU:C:2015:845, para. 31-32.

²⁹⁰ Judgment of 17 March 2016, *Canadian Oil Company*, C-472/14, EU:C:2016:171, para. 43.

²⁹¹ See MacCulloch, Angus, "Protecting Health, or Protecting Trade? A fine balance in the Scotch Whisky Association judgment", 23 December 2015, available at <http://eulawanalysis.blogspot.cz/2015/12/protecting-health-or-protecting-trade.html>, accessed 20 November 2017..

²⁹² See text to n115.

²⁹³ Judgment of 19 October 2016, *Deutsche Parkinson Vereinigung*, C-148/15, ECLI:EU:C:2016:776.

²⁹⁴ Judgment of 19 October 2016, *Deutsche Parkinson Vereinigung*, C-148/15, ECLI:EU:C:2016:776, para. 21-27.

²⁹⁵ Enchelmaier (n207) p. 619.

fact that more chambers of the Court is deciding on the same legal questions at the same time,²⁹⁶ thus producing different but perhaps equally valid case law.²⁹⁷

It has been argued that variability of tests is jurisprudentially welcomed.²⁹⁸ Indeed, should the interpretation of free movement provisions be guided by the objective of establishing the internal market enshrined in Article 3(3) TEU as discussed in subchapter 4.2.2, the variability of tests seems to be very appropriate means.

However, I agree with the opposing view that the large number of tests available to the Court have been significantly to the detriment of legal certainty in the area of free movement law and free movement of goods in particular.²⁹⁹ As long as it remains highly challenging to anticipate the Court's position on individual cases, I do not see this practice to be possibly jurisprudentially welcomed. Furthermore, the legal uncertainty about which national measures are incompatible with free movement provisions in the Court's view is even multiplied when national courts engage in the matter. The lack of clarity of the Court's judgments makes it more difficult for national courts to apply free movement law as interpreted by the Court and fulfil their obligation to disapply national legislation incompatible with EU law.³⁰⁰

Consequently, I hold the view that legal uncertainty connected to the market access approach and its position within free movement jurisprudence considerably disrupts the legitimacy of the approach as such. Not only that the meaning of the approach is notably concealed but the way the Court applies the approach is absolutely unforeseeable. It is a common ground that predictability of judicial decisions forms one of the cornerstones of Member States' legal cultures and rule of law in general. Judicial approach that does not correspond with these essential requirements can hardly be deemed legitimate. And the Court should prove conscious of its constitutional responsibility³⁰¹ to create legitimate and foreseeable jurisprudence.

²⁹⁶ Woods, Lorna. 'Consistency in the Chambers of the ECJ: a Case Study on the Free Movement of Goods', *Civil Justice Quarterly*, vol. 31/no. 3, (2012), p. 365-66.

²⁹⁷ Shuibhne (n6) p. 43

²⁹⁸ Connor (n271) p. 699.

²⁹⁹ Pecho (n150) p. 258.

³⁰⁰ Craig, de Búrca (n19) p. 693.

³⁰¹ The term "constitutional responsibility" has been used particularly by Shuibhne. See Shuibhne (n6). See also Enchelmaier (n270) p. 650.

The importance of legal certainty within the market access approach has been addressed in this subchapter. The main strands of post-*Trailers* case law on free movement of goods have been outlined. The core question, which persists, is whether the Court intends to keep applying previous case law, especially *Keck*, or whether it adopts the market access approach as an overarching principle. It has emerged that the Court has occasionally touched upon *Keck* line of case law, however, has still demonstrated preference for the market access test whenever it has found it difficult to tackle a measure in question. Therefore, I have argued that this unsettled jurisprudence is to the detriment of legal certainty and, as a consequence, to the legitimacy of the market access approach.

5.2 Market access approach and economic actors within the internal market

Should there be a perspective from which the market access approach gains much support, it is definitely the one of economic actors involved in the internal market. Market access approach aims to tackle fragmentation of the internal market that has negative effects on traders, producers, services providers and businesses in general as well as on consumers and other economic actors (or migrants) wishing to fully enjoy their right to move freely. Of course, depending on which freedom is considered particular economic actors' perspectives would have to be referred to. Considering this would be a task beyond the extent of this thesis, I will address two groups of economic actors, whose perspectives are of the best aid to demonstrate other implications of the market access approach. Therefore traders' point of view will be first briefly addressed, followed by a more detailed discussion of consumers' perspective.³⁰²

Since the effect of the approach is to remove any, even only potential, impediments to free movement, traders are allowed to expand their activities, allocate resources effectively, react more flexibly to consumers' demands and increase profits. The broader the market access approach is conceptualized, the more liberalized and therefore beneficial is the market, within which traders already operate or which they wish to access.

³⁰² The term "traders" is being used here as referring to all subject pursuing business interests in general. It should also be noted that consumers' perspective, which relates mainly to free movement of goods and services, is in essence very similar to the one of workers and other migrants in terms of free movement of persons.

Accordingly, attempts to limit the scope of the market access concept, for instance by *de minimis* rule, have been considered to have harmful effects on traders. While some impediments might be marginal from the overall perspective of the internal market, the same impediments might be felt as particularly burdensome by a group of traders or individual traders operating on or intending to access a smaller part of the market.³⁰³ Hence, it follows that from traders' perspective broadening the scope of a restriction to free movement through the market access approach is not only welcomed but also legitimate.

The market, within which businesses thrive and healthy competition functions, also means greater choice for consumers. The argument follows the same logic: the broader the market access approach, the more restrictions are caught by free movement provisions and the more liberalized the internal market becomes, from which consumers benefit. We have witnessed much of the Court's preoccupation with consumers' behaviour and demand when considering hindering effects of national measures.³⁰⁴ It appears that the consumers' behaviour has become decisive factor for interpretation of free movement provisions and the advancement of the market access approach. Moreover, it has been observed that the market access approach creates a clearer space for regulatory competition, from which consumers also benefit.³⁰⁵ Therefore, from consumers' perspective the approach seems to be legitimate, too.

However, it is questionable whether the Court's recent perception of the consumer reflected in the market access approach is appropriate or whether it actually curtails legitimacy of the approach. In my opinion, the problem stems from the fact that the consumer as a factor has been considered in two rather contradicting situations.

On one hand, defence of the consumer has been used by Member States as one of the mandatory requirements, on grounds of which national measures incompatible with free movement provisions can be justified.³⁰⁶ On the other hand, as it was shown earlier, the Court itself has been using the optics of the consumer when interpreting free movement

³⁰³ See Oliver (n8) p. 121 and Jansson, Kalimo (231) p. 532-33.

³⁰⁴ See e.g. Judgment of 24 November 1982, *Commission v. Ireland (Buy Irish)*, Case 249/81, ECLI:EU:C:1982:402, para. 28; Judgment of 10 February 2009, *Commission v. Italy (Trailers)*, C-110/05, ECLI:EU:C:2009:66, para. 56-57; Judgment of 6 October 2011, *Bonnarde*, C-443/10, ECLI:EU:C:2011:641, para. 30-31.

³⁰⁵ Barnard (n13) p. 55. However, it should also be borne in mind that in terms of regulatory competition there is always a risk of a race to the bottom – in order to adopt most attractive legislation Member States might start lower standards. See Barnard (n14) p. 27.

³⁰⁶ Judgment of 20 February 1979, *Cassis de Dijon*, Case 120/78, ECLI:EU:C:1979:42, para. 8.

provisions, often arriving at a conclusion that challenged national measures hinder the market access because they are capable to affect consumers' behaviour and therefore they are incompatible with EU law. In terms of the first situation mentioned, we have seen in the past that the Court had relied upon the notion of "reasonably circumspect"³⁰⁷ consumer or else, "an average consumer who is reasonably well-informed and reasonably observant and circumspect".³⁰⁸ It therefore showed readiness to dismiss a Member State's attempt to justify a national law on grounds of consumer protection.³⁰⁹ As for the second situation mentioned, in the recent free movement case law the Court has more often approached the argument that the mere fact that a national legislation is capable to make the access to the market less attractive or more difficult, i.e. dissuade consumers from exercising their freedoms and decreasing overall demand, is enough to find this legislation in breach of free movement provisions.³¹⁰

In both situations the Court's goal is the same – to remove national regulation that impedes the access to the market and creates obstacles to the free movement in any way in order to create an open internal market, within which economic operators, ultimately consumers, will prosper. Nonetheless, I find the two lines of arguments somehow irreconcilable. In the first situation, the Court has applied "robust common sense" when ruling that the consumer is able to take care of his or her interests and is not in need of protective national regulation.³¹¹ It has demonstrated its preference for rather critical assessment of to what extent consumers' behaviour can shape free movement law. In the second situation, the Court has seemed to perceive consumers' behaviour less critically, making it its focal, if not absolute, point when interpreting free movement law and the notion of restriction and almost elevating it above other concerns, such as national regulatory autonomy, for instance.

This paradoxical situation generates questions. Have not the Court's considerations on the consumer got too far, thus jeopardizing legitimacy of the Court's market access

³⁰⁷ Judgment of 6 July 1995, *Mars*, C-470/93, ECLI:EU:C:1995:224, para. 24.

³⁰⁸ Judgment of 16 July 1998, *Gut Springenheide*, C-210/96, ECLI:EU:C:1998:369, para. 31.

³⁰⁹ Judgment of 6 July 1995, *Mars*, C-470/93, ECLI:EU:C:1995:224, para. 23.

³¹⁰ See e.g. Judgment of 24 November 1982, *Commission v. Ireland (Buy Irish)*, Case 249/81, ECLI:EU:C:1982:402, para. 28; Judgment of 10 February 2009, *Commission v. Italy (Trailers)*, C-110/05, ECLI:EU:C:2009:66, para. 56-7; Judgment of 6 October 2011, *Bonnarde*, C-443/10, ECLI:EU:C:2011:641, para. 30-31.

³¹¹ Weatherill, Stephen. 'Recent Case Law Concerning the Free Movement of Goods: Mapping the Frontiers of Market Deregulation', *Common Market Law Review*, vol. 36/no. 1, (1999), p. 57-58.

approach? Should not be these consumers related concerns reserved rather for justification stage of the analysis and for positive harmonization within shared competence of the EU and Member States? I argue in the affirmative for these reasons.

It is a common ground that the EU has been extremely active in the area of consumer protection as it is one of the priorities within its long-term strategy for facilitating growth in general and creating stronger, deeper and extended internal market in particular.³¹² However, the implementation of EU policies is mainly a task for other EU institutions, specifically the European Commission, the Council and the European Parliament; not the Court.

I submit that it is not the Court's primary role to interpret free movement law in a way to create incentives for consumers and encourage them to engage more with the free movement. Davies claims that an individual, thus a consumer in this case, who objects to a national rule or to whom detriment a national rule might be of, "act as agent of the EU interest in integration".³¹³ Yet, I am not convinced by his further assertion that the fact that, as a consequence, there are legitimate policy-makers on both sides (the EU and Member States) justifies the Court's intrusive review.

I incline to think that the Court should actually be aware of how problematic using consumers as agents to push for further European integration can be. In that way it adopts the "idea of behavioural theory" within the market access approach.³¹⁴ It has been rightly noted that there is, however, a good deal of other non-economic factors influencing consumer's behaviour.³¹⁵ The Court's approach would thus become extremely unpredictable, depending on which other factors might the Court take into account next time. Admittedly, by adopting such consumers' behaviour driven approach the Court does reflect the reality of the internal market, which may well be understood in a positive

³¹² Commission, 'Green Paper on European Union Consumer Protection' COM(2001) 531 final, 2.1: "It is the cross-border movement of goods and services that allows consumers to search out bargains and innovative products and services and thus ensures that they optimise their consumption decisions". Commission, 'EUROPE 2020 A strategy for smart, sustainable and inclusive growth' COM(2010) 2020 final, 3.1. One of the most recent EU initiatives in the area of consumer protection is an abandonment of unjustified geo-blocking: Commission, 'Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC' COM(2016) 289 final.

³¹³ Davies (n274) p. 227.

³¹⁴ Jansson, Kalimo (n231) p. 552.

³¹⁵ Ibid.

manner. Yet, I am doubtful that this pro-consumer engagement of the Court outweighs its drawbacks. Particularly, excessive consumers' behaviour concerns within the market access approach render the Court's review much more policy-focused and considerably less judicial. At this point of the discussion, it is beyond clear that this necessarily is at the expense of the legitimacy of the approach and the Court's role in general.³¹⁶ Furthermore, with regard to the fact that the EU as a whole and its policies are not perceived by its citizens unequivocally positively, I suggest that the Court should exercise significant self-restraint when it comes to engaging in policy issues. Therefore, in my view it is undesirable that the Court's broad market access approach to the interpretation of free movement provisions is unduly consumer-driven since, although seeking legitimate aim of consumers' prosperity, it has wider implications, which cannot be seen unambiguously legitimate.

Essentially, the broad market access approach tends to create more liberalized internal market without any barriers. Such an internal market would then allow traders and businesses in general to better allocate production and react more flexibly to consumers' demand. In the same vein, consumers and other migrants would benefit from the internal market free from any restrictions. Thus, in economic operators' perspective the aim of the market access approach is legitimate. The Court has based much of its market access argumentation on consumers' interests. In some cases it considered a national measure to be a restriction to free movement because it dissuaded consumers' from accessing the market. Although this appears to be legitimate approach from consumers' perspective, I suggest that it has wider implications that do not add to its legitimacy. In my opinion, it is not the Court's role to engage in attractive consumers' policy making as this task primarily remains with political institutions of the EU.

³¹⁶ As Weiler has drawn on Rasmussen's work: "[The Court's] activism [...] brings the judiciary into disrepute and delegitimizes their position." See Weiler, J. H. H., 'The Court of Justice on trial – A Review of Hjalte Rasmussen: On law and policy in the European Court of Justice', *Common Market Law Review*, [online journal] vol. 24/no. 3, (1987), p. 569.

5.3 Market access approach and Member States

Finally, the perspective of Member States is the one from which the market access approach causes the most controversy and, accordingly, pervades this thesis the most. The concept has become a tool for the Court to tackle fragmentation of the internal market, being a result of differences between national legislations in those areas of law that had not been harmonized. However, it has also become an instrument, whose effect is the Court's intrusion into Member States' national regulatory autonomy. It is self-evident that from Member States' perspective the legitimacy of the market access approach is at stake, if not undermined. The core points of the perspective will be outlined.

By extending its approach to the interpretation of free movement law and the notion of restriction beyond considerations on discrimination the Court has expanded the reach of free movement law and intensified its interference with Member States' measures. Be it in terms of infringement proceedings or references for a preliminary ruling, as a result of the Court's interpretation of free movement provisions Member States are made to defend their policy preferences within the EU derogation and mandatory requirements framework although they had not been shown to protect national markets.³¹⁷ Should the Court not find a national measure justified and proportionate, Member States need to review their policy choices and alter the measure at hand or at least disapply it.

The Court's broad market access approach brings within the scope of a restriction to free movement an extensive amount of measures that can be, from Member States' perspective, considered exactly as expressions of such policy choices. In this regard, it is also conceivable that such approach will encourage economic operators to challenge national measures at the prospect of avoiding obligations imposed on them. Needless to say how much this is suggestive of the infamous Sunday trading cases practice in the context of free movement of goods.³¹⁸ Considering the fact that under the market access approach national measures, which hinder market access, are presumed to be incompatible (*prima facie* illegal) with free movement provisions, Member States are therefore more often likely to find themselves in a position to defend their national measures and to bear

³¹⁷ Horsley (n148) p. 2011.

³¹⁸ Jesse, Moritz. 'What about Sunday Trading.? – the Rise of Market Access as an Independent Criterion Under Article 34 TFEU', *European Journal of Risk Regulation*, vol. 3/no. 3, (2012), p. 441. One tends to wonder why is the case law on free movement of goods setting out back to the times before *Keck* if these were so much criticized back then and *Keck* was exactly the reaction to tackle the problematic caseload.

the burden of proof. In the context of national regulatory autonomy, this is particularly alarming in a situation when particular measures have not been intended to protect the national market whatsoever and when the alleged restrictive effects of such measures have actually not materialized but are merely potential.

Clearly, narrowing the scope of the market access approach would accommodate Member States' concerns about the intrusion into their national regulatory autonomy. In regard of softening effects on the market access approach I shall address two following issues: *de minimis* rule and a role of justification and proportionality analysis.

Firstly, as I have claimed earlier in this thesis *de minimis* rule appears to be a promising tool for narrowing the market access approach. While this effect might not be quite favourable from economic operators' perspective, its use within the market access approach can be definitely perceived positively by Member States. *De minimis* rule would allow Member States to preserve substantive level of national regulatory autonomy as they would not be required to justify and prove proportionate measures whose hindering effects had not reached a certain threshold. Therefore, I am of the opinion that *de minimis* rule could limit the reach of the market access approach, thereby making it more qualified and legitimate. For this reason I propound that the Court should reconsider its steadily rejecting attitude towards *de minimis* rule within free movement law.

Secondly, in the attempt to accommodate concerns about the Court's intrusion into Member States' regulatory autonomy some commentators draw attention to justification and proportionality stages of judicial review. They point out that although adopting the far-reaching market access test the Court has seemed to be willing to acknowledge the broad scope of a restriction and has performed some self-restraints in a form of allowing much more leeway for Member States with respect to these two stages of the analysis.³¹⁹ Few objections shall be raised in this regard. First, Spaventa observed that the Court has performed a switch from abstract assessment of proportionality to the concrete one. Using the judgment in *Mickelsson and Roos* as an example, she notes that the Court conceded that the rules restricting use of noisy and polluting jet-skis are proportionate in abstract but in the concrete case can only be deemed proportionate if implemented in a way that

³¹⁹ As, for instance, in the landmark *Trailers* and *Mickelsson and Roos* cases. See e.g. Barnard (n164) p. 290; Wennerås, Moen (n174) p. 400.

economic actors have enough time to adapt to the rules.³²⁰ In my view, this clearly entails case-by-case decision-making. Hence, it will be once again very difficult to draw any patterns from such jurisprudence and, moreover, it will not contribute to legal certainty in any way. Second, as has been already mentioned earlier, even if this was the Court's practice indeed, Member States' position will not be comforted given that they will still have to put forward sufficient evidence in order to prove that a measure does not constitute a restriction and only then, should they be unsuccessful, can defend the measure in the course of justification and proportionality assessment. Therefore, I suspect that the intrusion to national regulatory autonomy is not reduced even if the Court applies rather generous justification and proportionality assessment.

Essentially, the scope of free movement law and the notion of restriction to free movement in particular is shaped by two rather opposing positions: "the desire for integration, that is the desire to limit the influence of national governments on people's activities throughout the Community, and the desire for government intervention, translated [...] into a desire for national regulation."³²¹ As it is impossible to develop such an interpretation of free movement law that would accommodate interests of all stakeholders, the utmost aim is to strike an appropriate balance between the two stances.³²² It has been shown in subchapter 4.2 that the Treaties provide support for both the EU interests in establishing the internal market and the respect for national regulatory autonomy. Yet, they remain silent on how these should be balanced. Snell claims it is then political and judicial arenas where the balance has to be established.³²³

Accordingly, the Court shall adopt such an approach, the result of which will be striking this balance between the competing Union and national interests. Only then can the Court's approach be deemed legitimate. The crucial question therefore is: does the market access approach accommodate the need for a balance between the objective to establish the internal market and the respect for national regulatory autonomy? In my view, the answer is negative.

³²⁰ Spaventa (n124) p. 926.

³²¹ Wils (n 218) p. 478.

³²² See e.g. Maduro, Miguel Poiares, *We the Court: The European Court of Justice and the European Economic Constitution. A Critical Reading of Article 30 of the EC Treaty* (Oxford, Hart Publishing, 1998), ISBN 1-901362-25-6, p. 53-54.

³²³ Snell, Jukka, 'Economic Justifications and the Role of the State' in Koutrakos, Panos, Niamh Nic Shuibhne, and Phil Syrpis, *Exceptions from EU Free Movement Law: Derogation, Justification, and Proportionality* (Oxford; Portland, Hart Publishing, 2016), ISBN 978-1-84-946620-2, p. 30.

The market access approach clearly prefers the Union's integrationist interests to those of Member States, which consist of attaining certain level of national regulatory autonomy. With regard to its breadth the approach seems to be fully consonant with Mortelman's maxim "*in dubio pro Communitate*" or now *in dubio pro Unione*.³²⁴ Admittedly, as it has been pointed out, the approach provides a favourable interpretation of free movement provisions in the light of the competitiveness and efficiency of the internal market in respect of globalisation³²⁵ as well as in the context of "trade liberalisation/economic integration projects worldwide",³²⁶ and is thus completely in line with the internal market rationale.³²⁷ Nonetheless, using former judge Jann's words, "[d]iscussions must concentrate on the common market that truly exists and not on the ideal market that has no failures. The latter simply does not exist".³²⁸ I am of the opinion that the internal market that truly exists is the one in which national regulatory autonomy concerns play significant role. Only if these are reflected can the internal market be established in a way that is attainable in the long term. Among other things, this means that it is established in a way that Member States consider legitimate.

The Member State's perception of the legitimacy of the Court's market access approach as a tool to establish the internal market largely depends on to what extent Member States identify themselves with the integration interests promoted by the Court and the EU in general. A logical assumption would be that the more Member States benefit, mainly in economic terms, from the EU membership the more they are able to recognize and value advantages stemming from deepening the integration and promoting intra-Union trade. Yet, as the current reality within the Union suggests, this assumption is not flawless. In my opinion, Brexit and rising Euroscepticism throughout the EU have proved that there is not a direct proportion between economic prosperity and positive

³²⁴ Mortelmans, Kamiel. 'Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?', *Common Market Law Review*, vol. 28/no. 1, (1991), p.131, as cited in Oliver, FMG, p. 117.

³²⁵ Spaventa (n124) p. 929.

³²⁶ Lianos (n31) p. 245.

³²⁷ Tryfonidou, Alina, "The Outer limits of Article 28 EC: Purely Internal Situations and the Development of the Court's Approach through the Years" in Barnard, Catherine and Odudu O. (eds), *The Outer Limits of European Union Law* (2009) p.197, as cited in Spaventa (n124) p. 928.

³²⁸ Tomasz, K., 'Trybunał Sprawiedliwości i integracja: Rozmowa z sędzią Trybunału Peterem Jannem', *Radca Prawny* vol.95/no. 2(2002), p. 100, as cited in Hojnik, Janja. 'The EU Internal Market and National Tradition and Culture: Any Room for Market Decentralisation?', *Croatian Yearbook of European Law & Policy*, vol.8, (2012), p. 138.

perception of the EU.³²⁹ Hence, opening up the internal market with the aim of increasing its overall economic efficiency and competitiveness is not exactly what gains the legitimacy of the EU. It follows that the Court's approach to the interpretation of free movement provisions should thus not be hurtling in the direction, which favours economically-driven integrationist interests over the respect to national interests. It is mainly because, as Sweeney rightly recognizes, the Court's free movement jurisprudence has an immense impact on the interaction of local and broader European values.³³⁰

Already cited former judge Jann said: "today the Court is aware that the judges must establish a balance for a successful market. [On] one hand, we must do all we can to remove barriers, at the same time, however, we must be aware that there are national interests that must be protected, even if this protection means keeping certain barriers in the functioning of the ideal internal market".³³¹ Nevertheless, some years later, it appears as if the Court was not aware of this imperative. The Court's market access approach is considerably underpinned by an idea of this ideal internal market without any obstacles whatsoever. The Treaties' provisions considering the respect for national identity (Article 4(2) TEU) and principles of conferral and subsidiarity (Article 5 TEU) seem to be rather disregarded. For that reason it emerges that the legitimacy of the market access approach is, from Member States perspective, considerably compromised, if not lacking. I submit that if the Court wants to meet its constitutional responsibility it shall acknowledge the need for the balance between the interest in creating an ideal internal market and the national interests of Member States and alter its approach accordingly.

I have claimed that the perception of the market access approach differs depending on whose perspective is taken. The market access approach has an effect of liberalizing and opening up the internal market. Besides the fact that creating such an internal market is

³²⁹ The UK citizens chose to leave the EU although the economic analysis has shown the UK's economic situation will rather deteriorate outside the EU than improve. See e.g. "What has the EU done for the UK?", *The Financial Times*, 31 March 2017, available at <https://www.ft.com/content/202a60c0-cfd8-11e5-831d-09f7778e7377>, accessed 29 November 2017. Similarly, the Euroscepticism is on the rise even in Member States that have been contributing to the EU budget with less money than they have received from it. See Commission, Financial Report 2015, available at http://ec.europa.eu/budget/financialreport/2015/lib/financial_report_2015_en.pdf, accessed 29 November 2017.

³³⁰ Sweeney, James A. 'A 'Margin of Appreciation' in the Internal Market: Lessons from the European Court of Human Rights', *Legal Issues of Economic Integration*, vol. 34/no. 1, (2007), p. 49.

³³¹ Hojnik (n 328) p. 142.

one of the main aims of the EU, it is also truly beneficial for economic operators. Thus, from economic operators' perspective the approach could be deemed legitimate. On the contrary, the market access approach has intrusive effects on national regulatory autonomy of Member States. Hence, from Member States' perspective the legitimacy of the approach is, at least, harmed. These two opposing perspectives can only be reconciled if there is a right balance found between them. However, it has emerged that the Court's excessive preoccupation particularly with consumers as one group of economic operators has wider implications. I have suggested that the Court should not unreasonably engage with consumers' behaviour as a factor for its decision-making. Reflecting on consumers' interests shall primarily be a task for the EU political authorities. By interfering with such policy-making the Court is risking its judicial reputation and legitimacy. Consequently, the legitimacy of its market access approach is compromised. In addition to that, it has been illustrated that the market access approach is surrounded with serious legal uncertainty. The Court has still not fully specified the content of the approach and it remains unclear to what measures is the approach actually meant to be applied. Altogether, the legitimacy of the market access approach can be questioned at least on three grounds: intrusion into Member States' regulatory autonomy, excessive preoccupation with consumers' policy and tremendous lack of legal certainty. With regard to the above stated I have suggested that the Court thoroughly revisits its approach to the interpretation of free movement provisions to make it more legitimate.

Conclusion

Establishing and ensuring the functioning of the internal market as set forth in Article 26(2) TEU is one of the main objectives of the EU. To achieve this goal it is essential that free movement of goods, persons, services and capital is secured. For this reason all barriers to free movement shall be removed. This can be pursued either by positive or negative integration. While the former requires political will to adopt EU legislation harmonizing particular areas of law, the latter presupposes considerable engagement of the Court of Justice of the European Union as a judicial institution entrusted with binding interpretation of Treaties and EU law in general. The Court's interpretation of free movement provisions embedded in the TFEU has thus become one of the most powerful instruments in pursuing the aim of deepening the EU integration. Mindful of this fact, the Court has advanced market access approach to the interpretation of free movement provisions.

Specifically, the Court has increasingly used the market access approach to the interpretation of a restriction to free movement, in particular, the interpretation of measures having equivalent effect to quantitative restrictions in the context of free movement of goods. In 2009, the landmark judgment in *Commission v. Italy (Trailers)* was delivered. Therein the Court held that any measure which hinders access to the market constitutes a restriction and is therefore *prima facie* incompatible with EU law unless proved justified and proportionate. The Court substantiated its finding on the following argument. It ruled that the measure at hand prohibiting use of a certain product had a considerable influence on consumers' behaviour as it discouraged them from buying the product, which as a consequence, affected the access of the product to the market of that Member State. Therefore, the measure hindered the access to the market and fell within the ambit of a prohibited restriction to free movement. Since then the Court has often adhered to this market access approach rationale. For instance, it ruled that a measure hinders the access to the market if it makes the access less attractive or more difficult.

Obviously, by applying the market access approach the Court has adopted immensely broad interpretation of what national measures can be classified as a restriction to free movement. Instead of focusing on removing directly or indirectly discriminatory obstacles to the internal market, general freedom to trade has been taken as the point of

departure. Hence, it seems that the Court has completely committed itself to contributing to establishing the internal market and to further integration within the EU. While this can surely be a welcomed step from the EU side, the matter is far from being black and white. In the thesis I have demonstrated that the market access approach has some serious implications. In particular, these are of great relevance for answering the main question asked at the beginning of this thesis: can the market access approach be deemed legitimate?

First of all, significant legal uncertainty surrounds the concept of market access approach. In the context of free movement of goods, the Court has not explained how the market access approach relates to other tests used for identifying a restriction to free movement, mainly the non-discrimination principle. Especially, it remains unclear whether the market access test is meant to be used as an overarching principle or a residual category. This is of importance in regard of certain selling arrangements category of measures, which following the famous judgment in *Keck* were exempted from the scope of prohibited MEEQR. The Court has not explicitly overruled its earlier case law. However, recent judgments suggest that the Court increasingly inclines to the market access approach even in cases where a measure could be conceived a selling arrangement. Needless to say how many difficulties will national courts and Member States' governments face due to this legal uncertainty.

Moreover, the content of the concept is significantly concealed as well. In order to grasp the essence of it, two particular aspects of the concept were examined: potentiality element and *de minimis* rule. Upon the assessment it has become clear that it is enough for the Court to identify a restriction even if a measure merely potentially dissuades economic actors from accessing the market. This approach certainly works towards opening-up the internal market, yet, it makes any purely internal situation liable to fall within the scope of EU law. In this regard, I have suggested that if the Court aims to examine even merely potential impediments to free movement, it should at least employ certain considerations on protectionist intent behind a measure. The breadth of the market access approach caused by the potentiality element within it could be conceivably moderated by *de minimis* rule. Despite the fact the Court has been consistently rejecting to employ *de minimis* rule into its assessment, it has often used language suggesting there could be a certain threshold for identifying a restriction to free movement. I have argued that although *de minimis* rule

might in the end prove inappropriate for these purposes, it would place the market access approach at least within some limits. If anything else, this would contribute to the legitimacy of the approach. Hence, I have suggested that the Court should openly acknowledge the existence of *de minimis* considerations in its case law and explore ways in which it could work within the concept.

Considering the significant amount of uncertainties as regards the scope and the content of the market access approach, an attempt has been made to identify constitutional basis for the market access approach. These could serve as guidance for better understanding of the concept and also legitimize its breadth. Several Treaties' provisions, in light of which the interpretation of a restriction could be conducted, were examined. Should the non-discrimination guaranteed by Article 18 TFEU and other Treaty provisions be the underlying principle, the market access approach does not seem to gain enough constitutional support as it reaches far beyond the need to eliminate discrimination within the internal market. The legitimacy of the approach is thus questionable. On the other hand, it has been found out that Article 3(3) TEU in connection with Article 26(1) TFEU confirming the objective to establish the internal market can be considered the most appropriate constitutional basis for the market access approach. Nonetheless, I have suggested that it is also Article 4(2) TEU embedding the respect for national identity as well as principles of conferral and subsidiarity under Article 5 TEU that should shape the interpretation of a restriction. And it is in light of these provisions that the legitimacy of the market access approach is contestable.

I have argued that the final conclusion on the legitimacy of the approach depends to a large extent on which perspective is taken. On one hand, the market access approach to the interpretation of free movement provisions significantly contributes to establishing the internal market. Not only is this one of the main objectives of the EU but it is also of great benefit to economic operators. From this perspective it can thus be argued that the concept pursues legitimate aims. On the other hand, it has been demonstrated that the market access approach considerably intrudes into national regulatory autonomy. At the risk that a national measure might be considered to constitute a restriction, Member States are forced to defend their policy choices or even review them. Such a grave interference with their regulatory autonomy and sovereignty over national legal orders compromises the legitimacy of the market access approach. In addition, I have submitted that the Court's

excessive pro-consumers orientation pursued within the market access approach is actually to the detriment of the Court's legitimacy and, consequently, to the legitimacy of the market access approach as such. I believe that consumers' behaviour should primarily serve as an incentive to the EU political institutions to shape the EU policies, not as a decisive factor for the Court's adjudicating practice.

Clearly, the interpretation of the notion of restriction to free movement is a matter of trade-offs. Opposing interests in further EU integration and those of maintaining sufficient level of national regulatory autonomy have to be balanced. However, there seem to be too many reasons for questioning the legitimacy of the market access approach not to suggest that the approach should be reconsidered. The concept is significantly at odds with the principle of legal certainty. The intrusion into national regulatory autonomy is immense. One might object that deepening the EU integration and making the internal market more economically beneficial provides a sufficient reason to legitimize the concept. Nonetheless, I am of the opinion that at the time when Euroscepticism within the EU is on the rise and separation tendencies emerge, the Court should not risk its legitimacy as well as the legitimacy of the EU as a whole and take due account of national interests, too.

Seznam zkratek / List of abbreviations

AG	Advocate General
CJEU	Court of Justice of the European Union
Commission	European Commission
Court	Court of Justice of the European Union
EU	European Union
Member States	Member States of the European Union
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
Treaties	Treaty on the European Union and Treaty on the Functioning of the European Union
Treaty	Treaty on the Functioning of the European Union
UK	United Kingdom
Union	European Union
WTO	World Trade Organization

Seznam použitých zdrojů / List of references

EU legal documents

Consolidated version of the Treaty on European Union (2016) OJ C 202

Consolidated version of the Treaty on the Functioning of the European Union (2016) OJ C 202

Commission Directive 70/50 EEC of 22 December 1969 based on the provisions of Article 33(7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty [1970] OJ L 13/29

EU non-legal documents

Commission, “EUROPE 2020 A strategy for smart, sustainable and inclusive growth” COM(2010) 2020 final.

Commission, “Financial Report 2015”, available at http://ec.europa.eu/budget/financialreport/2015/lib/financial_report_2015_en.pdf, accessed 29 November 2017.

Commission, “Green Paper on European Union Consumer Protection” COM(2001) 531 final.

Commission, “Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC” COM(2016) 289 final.

Commission, “White Paper on the Future of Europe: Reflections and scenarios for the EU27 by 2025” COM(2017)2025.

Court of Justice of the European Union, “Annual Report 2015: The Year in Review of the Court of Justice of the European Union”, available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-10/qdaq16001enn.pdf>, accessed 31 January 2017.

European Council, “Conclusions adopted at the meeting on 25 and 26 June 2015” EUCO 22/15.

European Council, “Conclusions adopted at the meeting on 28 June 2016” EUCO 26/16.

European Council, “Conclusions adopted at the meeting on 23 June 2017” EUCO 8/17.

Case law

Judgment of 12 July 1973, *Riseria Luigi Geddo v Ente Nazionale Risi*, Case 2/73, ECLI:EU:C:1973:89, cited as “Judgment of 12 July 1973, *Geddo*, Case 2/73, ECLI:EU:C:1973:89”

Judgment of 11 July 1974, *Procureur du Roi v Benoît and Gustave Dassonville*, C-8/74, ECLI:EU:C:1974:82, cited as “Judgment of 11 July 1974, *Dassonville*, Case 8/74, ECLI:EU:C:1974:82”

Judgment of 20 February 1979, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, C-120/78, ECLI:EU:C:1979:42, cited as “Judgment of 20 February 1979, *Cassis de Dijon*, Case 120/78, ECLI:EU:C:1979:42”

Judgment of 26 June 1980, *Criminal proceedings against Herbert Gilli and Paul Andres*, Case 788/79, ECLI:EU:C:1980:171, cited as “Judgment of 26 June 1980, *Gilli and Andres*, Case 788/79, ECLI:EU:C:1980:171”

Judgment of 14 July 1981, *Summary proceedings against Sergius Oebel*, Case 155/80, ECLI:EU:C:1981:177, cited as “Judgment of 14 July 1981, *Oebel*, Case 155/80, ECLI:EU:C:1981:177”

Judgment of 5 May 1982, *Gaston Schul Douane Expéditeur BV v Inspecteur der Invoerrechten en Accijnzen, Roosendaal*, Case 15/81, ECLI:EU:C:1982:135, cited as “Judgment of 5 May 1982, *Gaston Schul*, Case 15/81, ECLI:EU:C:1982:135”

Judgment of 24 November 1982, *Commission of the European Communities v Ireland*, Case 249/81, ECLI:EU:C:1982:402, cited as “Judgment of 24 November 1982, *Commission v. Ireland (Buy Irish)*, Case 249/81, ECLI:EU:C:1982:402”

Judgment of 10 November 1982, *Walter Rau Lebensmittelwerke v De Smedt PVBA*, Case 261/81, ECLI:EU:C:1982:382, cited as “Judgment of 10 November 1982, *Rau*, Case 261/81, ECLI:EU:C:1982:382”

Judgment of 5 April 1984, *Criminal proceedings against Jan van de Haar and Kaveka de Meern BV*, Joined cases 177 and 178/82, ECLI:EU:C:1984:144, cited as “Judgment of 5 April 1984, *van de Haar*, Joined cases 177 and 178/82, ECLI:EU:C:1984:144”

Judgment of 13 March 1984, *Criminal proceedings against Karl Prantl*, Case 16/83, ECLI:EU:C:1984:101, cited as “Judgment of 13 March 1984, *Prantl*, Case 16/83, ECLI:EU:C:1984:101”

Judgment of 11 July 1985, *Cinéthèque SA and others v Fédération nationale des cinémas français*, Joined cases 60 and 61/84, ECLI:EU:C:1985:329, cited as “Judgment of 11 July 1985, *Cinéthèque*, Joined cases 60 and 61/84, ECLI:EU:C:1985:329”

Judgment of 12 March 1987, *Commission of the European Communities v Federal Republic of Germany*, Case 178/84, ECLI:EU:C:1987:126, cited as “Judgment of 12 March 1987, *Commission v. Germany (Beer)*, Case 178/84, ECLI:EU:C:1987:126”

Judgment of 7 March 1990, *H. Krantz GmbH & Co. v Ontvanger der Directe Belastingen and Netherlands State*, C-69/88, ECLI:EU:C:1990:97, cited as “Judgment of 7 March 1990, *Krantz*, C-69/88, ECLI:EU:C:1990:97”

Judgment of 23 November 1989, *Torfaen Borough Council v B & Q plc*, C-145/88, ECLI:EU:C:1989:593, cited as “Judgment of 23 November 1989, *Torfaen*, C-145/88, ECLI:EU:C:1989:593”

Judgment of 16 December 1992, *Council of the City of Stoke-on-Trent and Norwich City Council v B & Q plc*, C-169/91, ECLI:EU:C:1992:519, cited as “Judgment of 16 December 1992, *Stoke-on-Trent*, C-169/91, ECLI:EU:C:1992:519”

Judgment of 24 November 1993, *Criminal proceedings against Bernard Keck and Daniel Mithouard*, Joined cases C-267/91 and C-268/91, ECLI:EU:C:1993:905, cited as “Judgment of 24 November 1993, *Keck*, Joined cases C-267/91 and C-268/91, ECLI:EU:C:1993:905”

Judgment of 14 July 1994, *Criminal proceedings against Matteo Peralta*, C-379/92, ECLI:EU:C:1994:296, cited as “Judgment of 14 July 1994, *Peralta*, C-379/92, ECLI:EU:C:1994:296”

Judgment of 2 June 1994, *Criminal proceedings against Tankstation 't Heukske vof and J. B. E. Boermans*, Joined cases C-401/92 and C-402/92, ECLI:EU:C:1994:220, cited as “Judgment of 2 June 1994, *Boermans*, Joined cases C-401/92 and C-402/92, ECLI:EU:C:1994:220”

Judgment of 10 May 1995, *Alpine Investments BV v Minister van Financiën*, C-384/93, ECLI:EU:C:1995:126, cited as “Judgment of 10 May 1995, *Alpine Investments*, C-384/93, ECLI:EU:C:1995:126”

Judgment of 9 February 1995, *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA*, C-412/93, ECLI:EU:C:1995:26, cited as “Judgment of 9 February 1995, *Leclerc-Siplec*, C-412/93, ECLI:EU:C:1995:26”

Judgment of 6 July 1995, *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH*, C-470/93, ECLI:EU:C:1995:224, cited as “Judgment of 6 July 1995, *Mars*, C-470/93, ECLI:EU:C:1995:224”

Judgment of 7 May 1997, *Criminal proceedings against Jacques Pistre (C-321/94), Michèle Barthes (C-322/94), Yves Milhau (C-323/94) and Didier Oberti (C-324/94)*, Joined cases C-321/94- C-324/94, ECLI:EU:C:1997:229, cited as “Judgment of 7 May 1997, *Pistre*, Joined cases C-321/94 - C-324/94, ECLI:EU:C:1997:229”

Judgment of 9 July 1997, *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB (C-34/95) and TV-Shop i Sverige AB (C-35/95 and C-36/95)*, Joined cases C-34/95 - C-35/95 and C-36/95, ECLI:EU:C:1997:344, cited as “Judgment of 9 July 1997, *De Agostini*, Joined cases C-34/95 - C-35/95 and C-36/95, ECLI:EU:C:1997:344”

Judgment of 26 June 1997, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*, C-368/95, ECLI:EU:C:1997:325, cited as “Judgment of 26 June 1997, *Familiapress*, C-368/95, ECLI:EU:C:1997:325”

Judgment of 16 July 1998, *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung*, C-210/96, ECLI:EU:C:1998:369, cited as “Judgment of 16 July 1998, *Gut Springenheide*, C-210/96, ECLI:EU:C:1998:369”

Judgment of 13 January 2000, *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH*, C-254/98, ECLI:EU:C:2000:12, cited as “Judgment of 13 January 2000, *Heimdienst*, C-254/98, ECLI:EU:C:2000:12”

Judgment of 5 December 2000, *Criminal proceedings against Jean-Pierre Guimont*, C-448/98, ECLI:EU:C:2000:663, cited as “Judgment of 5 December 2000, *Guimont*, C-448/98, ECLI:EU:C:2000:663”

Judgment of 8 March 2001, *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)*, C-405/98, ECLI:EU:C:2001:135, cited as “Judgment of 8 March 2001, *Gourmet*, C-405/98, ECLI:EU:C:2001:135”

Judgment of 18 September 2003, *Tommaso Morellato v Comune di Padova*, C-416/00, ECLI:EU:C:2003:475, cited as “Judgment of 18 September 2003, *Tommaso Morellato v Comune di Padova*, C-416/00, ECLI:EU:C:2003:475”

Judgment of 13 May 2003, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, C-98/01, ECLI:EU:C:2003:273, cited as “Judgment of 13 May 2003, *Commission v. UK*, C-98/01, ECLI:EU:C:2003:273”

Judgment of 11 December 2003, *Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval*, C-322/01, ECLI:EU:C:2003:664, cited as “Judgment of 11 December 2003, *DocMorris*, C-322/01, ECLI:EU:C:2003:664”

Judgment of 14 December 2004, *Commission of the European Communities v Federal Republic of Germany*, C-463/01, ECLI:EU:C:2004:797, cited as “Judgment of 14 December 2004, *Commission v. Germany*, C-463/01, ECLI:EU:C:2004:797”

Judgment of 5 October 2004, *CaixaBank France v Ministère de l'Économie, des Finances et de l'Industrie*, C-442/02, ECLI:EU:C:2004:586, cited as “Judgment of 5 October 2004, *CaixaBank*, C-442/02, ECLI:EU:C:2004:586”

Judgment of 26 May 2005, *Criminal proceedings against Marcel Burmanjer, René Alexander Van Der Linden and Anthony De Jong*, C-20/03, ECLI:EU:C:2005:307, cited as “Judgment of 26 May 2005, *Burmanjer*, C-20/03, ECLI:EU:C:2005:307”

Judgment of 14 September 2006, *Alfa Vita Vassilopoulos AE (C-158/04) and Carrefour Marinopoulos AE (C-159/04) v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon*, C-158/04 and C-159/04, ECLI:EU:C:2006:562, cited as “Judgment of 14 September 2006, *Alfa Vita*, C-158/04 and C-159/04, ECLI:EU:C:2006:562”

Judgment of 10 February 2009, *Commission of the European Communities v Italian Republic*, C-110/05, ECLI:EU:C:2009:66, cited as “Judgment of 10 February 2009, *Commission v. Italy (Trailers)*, C-110/05, ECLI:EU:C:2009:66”

Judgment of 4 June 2009, *Åklagaren v Percy Mickelsson and Joakim Roos*, C-142/05, ECLI:EU:C:2009:336, cited as “Judgment of 4 June 2009, *Mickelsson and Roos*, C-142/05, ECLI:EU:C:2009:336”

Judgment of 18 December 2007, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, C-341/05, ECLI:EU:C:2007:809, cited as “Judgment of 18 December 2007, *Laval*, C-341/05, ECLI:EU:C:2007:809”

Judgment of 31 January 2008, *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*, C-380/05, ECLI:EU:C:2008:59, cited as “Judgment of 31 January 2008, *Centro Europa*, C-380/05, ECLI:EU:C:2008:59”

Judgment of 1 April 2008, *Government of Communauté française and Gouvernement wallon v Gouvernement flamand*, C-212/06, ECLI:EU:C:2008:178, cited as “Judgment of 1 April 2008, *Walloon Government v. Flemish Government*, C-212/06, ECLI:EU:C:2008:178”

Judgment of 10 April 2008, *Commission of the European Communities v Portuguese Republic*, C-265/06, ECLI:EU:C:2008:210, cited as “Judgment of 10 April 2008, *Commission v. Portugal (tinted film foils)*, C-265/06, ECLI:EU:C:2008:210”

Judgment of 28 April 2009, *Commission of the European Communities v Italian Republic*, C-518/06, ECLI:EU:C:2009:270, cited as “Judgment of 28 April 2009, *Commission v. Italy (Motor insurance)*, C-518/06, ECLI:EU:C:2009:270”

Judgment of 30 April 2009, *Fachverband der Buch- und Medienwirtschaft v LIBRO Handelsgesellschaft mbH*, C-531/07, ECLI:EU:C:2009:276, cited as “Judgment of 30 April 2009, *LIBRO*, C-531/07, ECLI:EU:C:2009:276”

Judgment of 1 June 2010, *José Manuel Blanco Pérez and María del Pilar Chao Gómez v Consejería de Salud y Servicios Sanitarios (C-570/07) and Principado de Asturias (C-571/07)*, Joined cases C-570/07 and C-571/07, ECLI:EU:C:2010:300, cited as “Judgment of 1 June 2010, *Blanco Pérez*, Joined cases C-570/07 and C-571/07, ECLI:EU:C:2010:300”

Judgment of 24 May 2011, *European Commission v Grand Duchy of Luxemburg*, C-51/08, ECLI:EU:C:2011:336, cited as “Judgment of 24 May 2011, *Commission v. Luxemburg*, C-51/08, ECLI:EU:C:2011:336”

Judgment of 2 December 2010, *Ker-Optika Bt. v ÁNTSZ Dél-dunántúli Regionális Intézete*, C-108/09, ECLI:EU:C:2010:725, cited as “Judgment of 2 December 2010, *Ker-Optika*, C-108/09, ECLI:EU:C:2010:725”

Judgment of 22 December 2010, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, C-208/09, ECLI:EU:C:2010:806, cited as “Judgment of 22 December 2010, *Sayn-Wittgenstein*, C-208/09, ECLI:EU:C:2010:806”

Judgment of 9 December 2010, *Humanplasma GmbH v Republik Österreich*, C-421/09, ECLI:EU:C:2010:760, cited as “Judgment of 9 December 2010, *Humanplasma*, C-421/09, ECLI:EU:C:2010:760”

Judgment of 18 October 2012, *Elenca Srl v Ministero dell'Interno*, C-385/10, ECLI:EU:C:2012:634, cited as “Judgment of 18 October 2012, *Elenca*, C-385/10, ECLI:EU:C:2012:634”

Judgment of 6 October 2011, *Philippe Bonnarde v Agence de Services et de Paiement*, C-443/10, ECLI:EU:C:2011:641, cited as “Judgment of 6 October 2011, *Bonnarde*, C-443/10, ECLI:EU:C:2011:641”

Judgment of 26 April 2012, *Asociación Nacional de Expendedores de Tabaco y Timbre (ANETT) v Administración del Estado*, C-456/10, ECLI:EU:C:2012:241, cited as “Judgment of 26 April 2012, *ANETT*, C-456/10, ECLI:EU:C:2012:241”

Judgment of 1 March 2012, *Asociación para la Calidad de los Forjados (Ascafor) and Asociación de Importadores y Distribuidores de Acero para la Construcción (Asidac) v Administración del Estado and Others*, C-484/10, ECLI:EU:C:2012:113, cited as “Judgment of 1 March 2012, *Asociación para la Calidad*, C-484/10, ECLI:EU:C:2012:113”

Judgment of 20 March 2014, *European Commission v Republic of Poland*, C-639/11, ECLI:EU:C:2014:173, cited as “Judgment of 20 March 2014, *Commission v. Poland*, C-639/11, ECLI:EU:C:2014:173”

Judgment of 20 March 2014, *European Commission v Republic of Lithuania*, C-61/12, ECLI:EU:C:2014:172, cited as “Judgment of 20 March 2014, *Commission v. Lithuania*, C-61/12, ECLI:EU:C:2014:172”

Judgment of 1 July 2014, *Ålands vindkraft AB v Energimyndigheten*, C-573/12, ECLI:EU:C:2014:2037, cited as “Judgment of 1 July 2014, *Ålands vindkraft AB*, C-573/12, ECLI:EU:C:2014:2037”

Judgment of 12 November 2015, *Valev Visnapuu v Kihlakunnansyyttäjä (Helsinki) and Suomen valtio – Tullihallitus*, C-198/14, ECLI:EU:C:2015:751, cited as “Judgment of 12 November 2015, *Visnapuu*, C-198/14, ECLI:EU:C:2015:751”

Judgment of 23 December 2015, *Scotch Whisky Association and Others v The Lord Advocate and The Advocate General for Scotland*, C-333/14, ECLI:EU:C:2015:845, cited as “Judgment of 23 December 2015, *Scotch Whisky*, C-333/14, ECLI:EU:C:2015:845”

Judgment of 17 March 2016, *Canadian Oil Company Sweden AB and Anders Rantén v Riksåklagaren*, C-472/14, EU:C:2016:171, cited as “Judgment of 17 March 2016, *Canadian Oil Company*, C-472/14, EU:C:2016:171”

Judgment of 19 October 2016, *Deutsche Parkinson Vereinigung eV v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV*, C-148/15, ECLI:EU:C:2016:776, cited as “Judgment of 19 October 2016, *Deutsche Parkinson Vereinigung*, C-148/15, ECLI:EU:C:2016:776”

Opinion of Advocate General Tesauro delivered on 27 October 1993, *Ruth Hünermund and others v Landesapothekerkammer Baden-Württemberg*, C-292/92, ECLI:EU:C:1993:863, cited as “Opinion of AG Tesauro delivered on 27 October 1993, *Hünermund*, C-292/92, ECLI:EU:C:1993:863”

Opinion of Advocate General Jacobs delivered on 24 November 1994, *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA*, C-412/93, ECLI:EU:C:1994:393, cited as “Opinion of AG Jacobs delivered on 24 November 1994, *Leclerc-Siplec*, C-412/93, ECLI:EU:C:1994:393”

Opinion of Advocate General Tizzano delivered on 25 March 2004, *CaixaBank France v Ministère de l'Économie, des Finances et de l'Industrie*, C-442/02, ECLI:EU:C:2004:187, cited as “Opinion of AG Tizzano delivered on 25 March 2004, *CaixaBank*, C-442/02, ECLI:EU:C:2004:187”

Opinion of Advocate General Poiares Maduro delivered on 30 March 2006, *Alfa Vita Vassilopoulos AE (C-158/04) and Carrefour Marinopoulos AE (C-159/04) v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon*, Joined cases C-158/04 and C-159/04, ECLI:EU:C:2006:212, cited as “Opinion of AG Poiares Maduro delivered on 30 March 2006, *Alfa Vita*, Joined cases C-158/04 and C-159/04, ECLI:EU:C:2006:212”

Opinion of Advocate General Léger delivered on 5 October 2006, *Commission of the European Communities v Italian Republic*, C-110/05, ECLI:EU:C:2006:646, cited as “Opinion of AG Léger delivered on 5 October 2006, *Commission v. Italian Republic (Trailers)*, C-110/05, ECLI:EU:C:2006:646”

Opinion of Advocate General Bot delivered on 8 July 2008, *Commission of the European Communities v Italian Republic*, C-110/05, ECLI:EU:C:2008:386, cited as “Opinion of AG Bot delivered on 8 July 2008, *Commission v. Italy (Trailers)*, C-110/05, ECLI:EU:C:2008:386”

Opinion of Advocate General Kokott delivered on 14 December 2006, *Åklagaren v Percy Mickelsson and Joakim Roos*, C-142/05, ECLI:EU:C:2006:782, cited as “Opinion of AG Kokott delivered on 14 December 2006, *Mickelsson and Roos*, C-142/05, ECLI:EU:C:2006:782”

Opinion of Advocate General Trstenjak delivered on 13 December 2007, *Commission of the European Communities v Portuguese Republic*, C-265/06, ECLI:EU:C:2007:784, cited as “Opinion of AG Trstenjak delivered on 13 December 2007, *Commission v. Portugal (tinted film foils)*, C-265/06, ECLI:EU:C:2007:784”

Books

Barnard, Catherine, *The Substantive Law of the EU: The Four Freedoms* (5th edn, Oxford, Oxford University Press, 2016), ISBN 978-0-19-874995-0.

Craig, Paul, and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (6th edn, Oxford, Oxford University Press, 2015), ISBN 978-0-19-871492-7.

Lenaerts, Koenraad, Piet van Nuffel, Robert Bray, et al., *European Union Law* (3th edn, London, Sweet & Maxwell, 2011), ISBN 978-1-84703-743-5.

Maduro, Miguel Poiares, *We the Court: The European Court of Justice and the European Economic Constitution. A Critical Reading of Article 30 of the EC Treaty* (Oxford, Hart Publishing, 1998), ISBN 1-901362-25-6.

Schütze, Robert, *European Union Law* (Cambridge, Cambridge University Press, 2015), ISBN 978-1-107-41653-6.

Shuibhne, Niamh Nic, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice*, (Oxford, Oxford University Press, 2013), ISBN 978-0-199-59295-1.

Snell, Jukka, *Goods and Services in EC Law: A Study of the Relationship between the Freedoms* (Oxford, Oxford University Press, 2002), ISBN 0-19-925009-X.

Weatherill, Stephen, *Cases and Materials on EU Law* (9th edn, Oxford, Oxford University Press, 2010), ISBN 978-0-19-956225-1.

Weatherill, Stephen, *The Internal Market as a Legal Concept* (Oxford, Oxford University Press, 2017), ISBN 978-0-19-879481-3.

Weiss, Friedl, and Clemens Kaupa, *European Union Internal Market Law* (Cambridge, Cambridge University Press, 2014), 978-1-107-63600-2.

Book chapters

Barnard, Catherine, and Simon Deakin, 'Market Access and Regulatory Competition' in Barnard, Catherine, and Joanne Scott, *The Law of the Single European Market: Unpacking the Premises* (Oxford, Hart Publishing, 2002), ISBN 1-84113-271-3.

Craig, Paul, 'Development of the EU' in Barnard, Catherine, and Steve Peers, *European Union Law* (Oxford; New York; Oxford University Press, 2014), ISBN 978-0-19-968611-7.

Davies, Gareth, 'Free Movement, the Quality of Life and the Myth that the Court Balances Interests' in Koutrakos, Panos, Niamh Nic Shuibhne, and Phil Syrpis, *Exceptions from EU Free Movement Law: Derogation, Justification, and Proportionality* (Oxford; Portland, Hart Publishing, 2016), ISBN 978-1-84-946620-2.

Oliver, Peter J., and M. Martinez Navarro, 'Free Movement of Goods' in Barnard, Catherine, and Steve Peers, *European Union Law* (Oxford; New York; Oxford University Press, 2014), ISBN 978-0-19-968611-7.

Oliver, Peter J., 'Measures of Equivalent Effect I: General' in Oliver, Peter J., and Stefan Enchelmaier, *Oliver on Free Movement of Goods in the European Union* (5th edn, Oxford; Portland, Hart, 2010), ISBN 978-1-84113-810-7.

Shuibhne, Niamh Nic, 'Primary Laws: Judging Free Movement Restrictions after Lisbon' in Koutrakos, Panos, Niamh Nic Shuibhne, and Phil Syrpis, *Exceptions from EU Free Movement Law: Derogation, Justification, and Proportionality* (Oxford; Portland, Hart Publishing, 2016), ISBN 978-1-84-946620-2.

Snell, Jukka, 'Economic Justifications and the Role of the State' in Koutrakos, Panos, Niamh Nic Shuibhne, and Phil Syrpis, *Exceptions from EU Free Movement Law: Derogation, Justification, and Proportionality* (Oxford; Portland, Hart Publishing, 2016), ISBN 978-1-84-946620-2.

Snell, Jukka, 'The Internal Market and the Philosophies of Market Integration' in Barnard, Catherine, and Steve Peers, *European Union Law* (Oxford; New York; Oxford University Press, 2014), ISBN 978-0-19-968611-7.

Spaventa, Eleanor, 'The Outer limits of the Treaty free movement provisions: Some reflections on the significance of Keck, remoteness and Deliege' in Barnard, Catherine, and Okeoghene Odudu (eds.), *The Outer Limits of European Union Law* (Oxford, Hart Publishing, 2008), ISBN 978-1-84-731496-3.

Journal Articles

Arnall, Anthony. 'What Shall we do on Sunday?', *European Law Review*, vol. 16/no. 2, (1991), pp. 112.

Barnard, Catherine. 'Fitting the Remaining Pieces into the Goods and Persons Jigsaw?', *European Law Review*, vol. 26/no. 1, (2001), pp. 35.

Barnard, Catherine. 'Restricting Restrictions: Lessons for the EU from the US?', *The Cambridge Law Journal*, vol. 68/no. 3, (2009), pp. 575.

Barnard, Catherine. 'Trailing a New Approach to Free Movement of Goods?', *The Cambridge Law Journal*, vol. 68/no. 2, (2009), pp. 288.

Bernard, Nicolas. 'Discrimination and Free Movement in EC Law', *International and Comparative Law Quarterly*, vol. 45/no. 1, (1996), pp. 82.

Chalmers, Damian. 'Repackaging the Internal Market - the Ramifications of the Keck Judgment', *European Law Review*, vol. 19/no. 4, (1994), pp. 385.

Connor, Tim. "Market Access" or Bust? Positioning the Principle Within the Jurisprudence of Goods, Persons, Services, and Capital', *The German Law Journal*, vol.13/no. 6, (2012), pp. 679.

Davies, G. T. 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law', *German Law Journal*, vol. 11/(2010), pp. 671.

Enchelmaier, Stefan. 'Always at Your Service : The ECJ's Case Law on Article 56 TFEU', *European Law Review*, vol. 36/no. 5, (2011), pp. 615.

Gormley, Laurence W. 'Free Movement of Goods and their use - what is the use of it?', *Fordham International Law Journal*, vol. 33/no. 6, (2010), pp. 1589.

Gormley, Laurence W. 'Inconsistencies and Misconceptions in the Free Movement of Goods', *European Law Review*, vol. 40/no. 6, (2015), pp. 925.

Grimmel, Andreas. 'The European Court of Justice and the Myth of Judicial Activism in the Foundational Period of Integration through Law', *European Journal of Legal Studies*, vol. 07/no. 2, (2014).

Hatzopoulos, Vassilis. 'The Court's Approach to Services : From Case Law to Case Load?', *Common Market Law Review*, vol. 50/no. 2, (2013), pp. 459.

Hilson, Chris. 'Discrimination in Community Free Movement Law', *European Law Review*, vol. 24/no. 5, (1999), pp. 445.

Hojnik, Janja. 'The EU Internal Market and National Tradition and Culture: Any Room for Market Decentralisation?', *Croatian Yearbook of European Law & Policy*, vol.8, (2012), pp. 117.

Horsley, Thomas. 'Case C-110/05, Commission v. Italy, Judgment of the Court (Grand Chamber) of 10 February 2009, Not Yet Reported; Case C-142/05, Åklagaren v. Percy Mickelsson and Joakim Roos, Judgment of the Court (Second Chamber) of 4 June 2009, Not Yet Reported; Case C-265/06, Commission v. Portugal, Judgment of the Court (Third Chamber) of 10 April 2008, [2008] ECR I-2245', *Common Market Law Review*, vol. 46/no. 6, (2009), pp. 2001.

Jansson, Max S., and Harri Kalimo. 'De Minimis Meets "Market Access": Transformations in the Substance - and the Syntax - of EU Free Movement Law?', *Common Market Law Review*, vol. 51/no. 2, (2014), pp. 523.

Jesse, Moritz. 'What about Sunday Trading.? – the Rise of Market Access as an Independent Criterion Under Article 34 TFEU', *European Journal of Risk Regulation*, vol. 3/no. 3, (2012), pp. 437.

Kaplow, Louis. 'Rules Versus Standards: An Economic Analysis', *Duke Law Journal*, vol. 42/no. 3, (1992), pp. 557.

Lianos, Ioannis. 'In Memoriam Keck: The Reformation of the EU Law on the Free Movement of Goods', *European Law Review*, vol. 40/no. 2, (2015), pp. 225.

Mortelmans, Kamiel. 'Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?', *Common Market Law Review*, vol. 28/no. 1, (1991), pp. 115.

Oliver, Peter. 'Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurling in a New Direction?', *Fordham International Law Journal*, vol. 33/no. 5, (2010), pp. 1423.

Oliver, Peter, and Stefan Enchelmaier. 'Free Movement of Goods: Recent Developments in the Case Law', *Common Market Law Review*, vol. 44/no. 3, (2007), pp. 649.

Oliver, Peter, and Wulf-Henning Roth. 'The Internal Market and the Four Freedoms', *Common Market Law Review*, vol. 41/no. 2, (2004), pp. 407.

Pecho, Peter. 'Good-Bye Keck?: A Comment on the Remarkable Judgment in Commission v. Italy, C-110/05', *Legal Issues of Economic Integration*, vol. 36/no. 3, (2009), pp. 257.

Prechal, Sacha, and Sybe de Vries. 'Seamless Web of Judicial Protection in the Internal Market?', *European Law Review*, vol. 34/no. 1, (2009), pp. 5.

Prete, Luca. 'Of Motorcycle Trailers and Personal Watercrafts: The Battle Over Keck', *Legal Issues of Economic Integration*, vol. 35/no. 2, (2008), pp. 133.

Shuibhne, Niamh Nic. 'Case C-76/05 Schwarz and Gootjes-Schwarz v. Finanzamt Bergisch Gladbach, Judgment of the Grand Chamber of 11 September 2007, not yet reported; Case C-318/05, Commission v. Germany, Judgment of the Grand Chamber of 11 September 2007, not yet reported; Joined Cases C-11/06 & C-12/06 Morgan v. Bezirksregierung Köln; Bucher v. Landrat des Kreises Düren Judgment of the Grand Chamber of 23 October 2007, not yet reported', *Common Market Law Review*, vol. 45/no. 3, (2008), pp. 771.

Shuibhne, Niamh Nic. 'The Free Movement of Goods and Article 28 EC: An Evolving Framework', *European Law Review*, vol. 27/no. 4, (2002), pp. 408.

Snell, Jukka. 'The Notion of Market Access: A Concept Or a Slogan?', *Common Market Law Review*, vol. 47/no. 2, (2010), pp. 437.

Spaventa, Eleanor. 'From Gebhard to Carpenter: Towards a (Non-)Economic European Constitution', *Common Market Law Review*, vol. 41/no. 3, (2004), pp. 743.

Spaventa, Eleanor. 'Leaving Keck Behind? the Free Movement of Goods After the Rulings in Commission v. Italy and Mickelsson and Roos', *European Law Review*, vol. 34/no. 6, (2009), pp. 914.

Sweeney, James A. 'A 'Margin of Appreciation' in the Internal Market: Lessons from the European Court of Human Rights', *Legal Issues of Economic Integration*, vol. 34/no. 1, (2007), pp. 27.

Toner, Helen. 'Non-Discriminatory Obstacles to the Exercise of Treaty Rights--Articles 39, 43, 49, and 18 EC', *Yearbook of European Law*, vol. 23/no. 1, (2004), pp. 275.

Tryfonidou, Alina. 'Further Steps on the Road to Convergence among the Market Freedoms', *European Law Review*, vol. 35/no. 1, (2010), pp. 36.

Weatherill, Stephen. 'After Keck: Some Thoughts on how to Clarify the Clarification', *Common Market Law Review*, vol. 33/no. 5, (1996), pp. 885.

Weatherill, Stephen. 'Free Movement of Goods', *International and Comparative Law Quarterly*, vol. 61/no. 2, (2012), pp. 541.

Weatherill, Stephen. 'Recent Case Law Concerning the Free Movement of Goods: Mapping the Frontiers of Market Deregulation', *Common Market Law Review*, vol. 36/no. 1, (1999), pp. 51.

Weatherill, Stephen. 'Recent Developments in the Law Governing the Free Movement of Goods in the EC's Internal Market', *European Review of Contract Law*, vol. 2/no. 1, (2006), pp. 90.

Weiler, J. H. H., 'The Court of Justice on trial – A Review of Hjalte Rasmussen: On law and policy in the European Court of Justice', *Common Market Law Review*, vol. 24/ no. 3, (1987), pp. 555.

Wennerås, Pal, and Ketil Boe Moen. 'Selling Arrangements, Keeping Keck', *European Law Review*, vol. 35/no. 3, (2010), pp. 387.

White, Eric L. 'In Search of the Limits to Article 30 of the Eec Treaty', *Common Market Law Review*, vol. 26/no. 2, (1989), pp. 235.

Wils, Wouter P. J. 'The Search for the Rule in Article 30 EEC: Much Ado about Nothing?', *European Law Review*, vol. 18/no. 6, (1993), pp. 475.

Woods, Lorna. 'Consistency in the Chambers of the ECJ: a Case Study on the Free Movement of Goods', *Civil Justice Quarterly*, vol. 31/no. 3, (2012), pp. 339.

News Articles

“‘You can’t have one foot in and one foot out’: Juncker says EU must be firm over UK’s Brexit manoeuvring”, *The Telegraph*, 7 October 2016, available at <http://www.telegraph.co.uk/news/2016/10/07/juncker-says-eu-must-be-firm-over-uks-brexit-manoevring/>, accessed 30 January 2017.

“Angela Merkel hints Brexit talks could include wriggle room on free movement”, *The Guardian*, 16 November 2016, available at <https://www.theguardian.com/politics/2016/nov/16/angela-merkel-brexit-free-movement-eu>, accessed 30 January 2017.

“Brexit: UK to leave single market, says Theresa May”, *BBC News*, 17 January 2017, available at <http://www.bbc.com/news/uk-politics-38641208>, accessed 31 January 2017.

“Results: UK votes to leave the EU”, *BBC News*, available at http://www.bbc.com/news/politics/eu_referendum/results, accessed 1 February 2017.

“What has the EU done for the UK?”, *The Financial Times*, 31 March 2017, available at <https://www.ft.com/content/202a60c0-cfd8-11e5-831d-09f7778e7377>, accessed 29 November 2017.

“Theresa May’s Florence speech: the key points”, *The Guardian*, 22 September 2017, available at <https://www.theguardian.com/politics/2017/sep/22/theresa-mays-florence-speech-key-points>, accessed 3 December 2017.

Speeches

“State of the Union 2015: Time for Honesty, Unity and Solidarity”, speech of Jean-Claude Juncker, the President of the European Commission, Strasbourg, 9 September 2015, available at http://europa.eu/rapid/press-release_SPEECH-15-5614_en.htm, accessed 30 January 2017.

Other sources

Brexit definition, <http://www.oed.com/view/Entry/54763375?redirectedFrom=brexit#eid>, accessed 30 January 2017.

McCrudden, Christopher, and Sacha Prechal, “The Concepts of Equality and Non-Discrimination in Europe: A practical approach”, European Network of Legal Experts in the Field of Gender Equality, (2009).

MacCulloch, Angus, “Protecting Health, or Protecting Trade? A fine balance in the Scotch Whisky Association judgment”, 23 December 2015, available at <http://eulawanalysis.blogspot.cz/2015/12/protecting-health-or-protecting-trade.html>, accessed 20 November 2017.

MacCulloch, Angus, “Right-Hand, or Wrong-Hand, Drive? Market Access and Proportionality”, 2 April 2014, available at <https://eutopialaw.com/2014/04/02/right-hand-or-wrong-hand-drive-market-access-and-proportionality/>, accessed 20 November 2017.

Kritérium „přístupu na trh“ v rámci problematiky vnitřního trhu

Abstrakt

Kritérium „přístupu na trh“ je využíváno Soudním dvorem EU k výkladu pojmu omezení volného pohybu v rámci vnitřního trhu, resp. základních tržních svobod. Jak vyplývá z rozsudku ve věci *Komise v. Itálie (přípojný vozík)*, základní myšlenkou kritéria je tvrzení, že jakékoliv opatření, které brání v přístupu na trh členského státu, spadá pod pojem omezení, a je tedy *prima facie* zakázanou překážkou základních tržních svobod neslučitelnou s právem EU, ledaže by takové omezení bylo ospravedlnitelné a přiměřené. Zdá se, že uplatňováním kritéria „přístupu na trh“ se SDEU odchýlil od své původní judikatury zejména v tom smyslu, že pro závěr o neslučitelnosti s právem EU již nevyžaduje, aby posuzované opatření bylo jakkoliv diskriminační. Naproti tomu je pro takový závěr SDEU dostačující, že dané opatření odrazuje ekonomické subjekty od přístupu na trh členského státu nebo činí přístup na trh méně atraktivní či obtížnější.

Interpretace pojmu omezení ve světle kritéria „přístupu na trh“ na jedné straně umožňuje SDEU prohloubit evropskou integraci a přispět tak k vytvoření a zajištění fungování vnitřního trhu, v rámci kterého budou veškerá omezení odstraněna. Na druhé straně však tato interpretace výrazně rozšiřuje rozsah pojmu omezení, a tedy obecně rozsah aplikace práva EU. Zejména pak umožňuje SDEU prohlásit za neslučitelné s právem EU obrovské množství opatření přijatých členskými státy, a tímto zásadně zasahuje do jejich autonomie. Nabízí se proto otázka: s ohledem na jeho rozsah, lze kritérium „přístupu na trh“ považovat za legitimní?

Pro účely zodpovězení této otázky si předkládaná práce klade za cíl poukázat na komplexnost tématu kritéria „přístupu na trh“ a postihnout nejzávažnější problémy s tímto tématem spojené. Práce nejdříve mapuje vývoj judikatury SDEU, který vyústil právě v přijetí výkladu pomocí kritéria „přístupu na trh“. Následně je kritérium rozebíráno s hlediska jeho rozsahu a možných ústavních základů obsažených ve Smlouvách. Závěrem je posouzeno z pohledu právní jistoty a perspektiv ekonomických subjektů a členských států. S ohledem na závažné důsledky používání kritéria SDEU dochází autorka práce k závěru, že pokud není kritérium přímo nelegitimní, pak je jeho legitimita minimálně značně diskutabilní. Bylo by tedy vhodné, aby SDEU použití tohoto kritéria přehodnotil.

Klíčová slova: právo EU, vnitřní trh, přístup na trh, překážka, opatření s účinkem rovnocenným kvantitativním omezením

Market access approach in relation to the internal market

Abstract

The market access approach refers to a way of interpretation of the notion of restriction to free movement advanced by the Court of Justice of the European Union. The rationale behind the concept, as it emerged from the landmark judgment in *Commission v. Italy (Trailers)*, is that any measure that hinders access to the market is *prima facie* considered as a restriction to free movement and is therefore held incompatible with EU law unless the Court finds it justified and proportionate. Applying the market access approach the Court seems to have departed from its previous case law as it does not require a measure to be discriminatory in any way. Instead, a measure is already found to constitute a restriction if it is liable to discourage economic operators from accessing the market of a Member State or making such access less attractive or more difficult.

On one hand, this interpretation allows the Court to strengthen integration and contribute to establishing the internal market free from any obstacles. On the other hand, it considerably extends the scope of the notion of restriction to free movement and therefore the scope of EU law in general. Particularly, the market access approach allows the Court to strike down an immense amount of national measures and thus intrude into national regulatory autonomy. A necessary question arises: considering its breadth, can the market access approach be deemed legitimate?

In order to provide a possible answer to this question, this thesis aims to demonstrate the complexity of the market access approach and identify the most problematic issues arising in connection to the concept. First, the Court's move towards the market access approach is discussed. Subsequently, the concept with regard to its scope and its constitutional basis is explored. Finally, the lack of legal certainty surrounding the concept is addressed and different perspectives of economic actors and Member States are assessed. Serious implications of the market access approach make the author of this thesis arrive at a conclusion that the legitimacy of the market access is at least questionable, if not impaired. In this regard, the author suggests that the Court reconsiders its approach to the interpretation of the notion of restriction to free movement.

Key words: EU law, internal market, market access, restriction, measures having equivalent effect to quantitative restrictions