KLUWER LAW INTERNATIONAL

COMMON MARKET LAW REVIEW

CONTENTS Vol. 47 No. 2 April 2010

Wolters Kluwer
Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of Community Law within the Member States and elsewhere, and for the dissemination of legal thinking on Community Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

Common Market Law Review is published bimonthly.
Subscription prices 2010 [Volume 47, 6 issues] including postage and handling:
EUR 682.00/USD 965.00/ GBP 502.00 (print)
This journal is also available online. Online and individual subscription prices are available upon request. Please contact our sales department for further information at +31(0)172 641562 or at sales@kluwerlaw.com.
Periodicals postage paid at Rahway, N.J. USPS no. 663–170.
U.S. Mailing Agent: Mercury Airfreight International Ltd., 365 Blair Road, Avenel, NJ 07001.
Published by Kluwer Law International, P.O. Box 316, 2400 AH Alphen aan den Rijn, The Netherlands

---

Printed on acid-free paper.

COMMON MARKET LAW REVIEW

Associate Editor: Alison McDonnell
Common Market Law Review
Europa Instituut
Steenschuur 25
2311 ES Leiden
The Netherlands
e-mail: a.m.mcdonnell@law.leidenuniv.nl
tel. + 31 71 5277549
fax + 31 71 5277600

Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of Community Law, and for the dissemination of legal thinking on Community Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

Editorial policy
The editors will consider for publication manuscripts by contributors from any country. Articles will be subjected to a review procedure. The author should ensure that the significance of the contribution will be apparent also to readers outside the specific expertise. Special terms and abbreviations should be clearly defined in the text or notes. Accepted manuscripts will be edited, if necessary, to improve the general effectiveness of communication.

If editing should be extensive, with a consequent danger of altering the meaning, the manuscript will be returned to the author for approval before type is set.

Submission of manuscripts
Manuscripts should be submitted, together with a covering letter, to the Associate Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within three to nine weeks.

Authors are requested to submit two copies of their manuscript, typed and double spaced, together with a summary of the contents. Manuscripts may range from 3,000 to 8,000 words, approximately 10-24 pages in length. The title of an article should begin with a word useful in indexing and information retrieval. Short titles are invited for use as running heads. All notes should be numbered in sequential order, as cited in the text.

The author should submit biographical data, including his or her current affiliation.

Common Market Law Review **47**: 437–472, 2010.

THE NOTION OF MARKET ACCESS: A CONCEPT OR A SLOGAN?

JUKKA SNELL*

1. Introduction

Market access is a centrally important notion in EU internal market law. The key judgments contain references to it, with the rulings in *Keck*, *Alpine Investments*, *Bosman*, *Graf*, *Gourmet*, and *Commission* v. *Italy* (*trailers*)[1] reasoned in terms of impact on market access. The most discussed Opinions of Advocates General, such as that of Jacobs in *Leclerc-Siplec*, Fennelly in *Graf*, Tizzano in *CaixaBank*, Poiares Maduro in *Alfa Vita*, and Kokott in *Mickelsson and Roos*,[2] have been articulated using market access analysis. Unfortunately, the ubiquity of the term is matched by its opacity. The notion has been used with qualifiers such as direct impact, substantial impact or disparate impact on market access. The relationship between the term and other concepts such as "discrimination" and "obstacle" is by no means clear.

The purpose of the present article is to explore what the notion market access means. Is it a useful legal concept, or is it perhaps a slogan that can be employed to cast a particular view in a more attractive light? Does the notion add something to the more classic concepts such as discrimination and obstacle, or is it superfluous? The paper begins with a brief comparative study and examines the competition law concept of barriers to entry and the WTO law concept of market access to determine whether the notion has acquired a stable definition that can be borrowed by the EU internal market law. It will then move to

* Professor of European Law, Swansea University. Earlier versions of this paper were presented at University of Leicester in April 2009 and at a Workshop on Trust, Distrust and Economic Integration organized by Dr. Ioannis Lianos (UCL) and Dr. Okeoghene Odudu (Cambridge) on 30 June 2009. I wish to thank Prof. Catherine Barnard, Dr Niamh Nic Shuibhne, the reviewers of CML Rev., the members of the International and European Law Research Group of the Swansea Law School, as well as the Workshop organizers and participants for their helpful comments.

1. Joined Cases C-267-268/91, *Keck*, [1993] ECR I-6097; Case C-384/93, *Alpine Investments*, [1995] ECR I-1141; Case C-415/93, *Bosman*, [1995] ECR I-4921; Case C-190/98, *Graf*, [2000] ECR I-493; Case C-405/98, *Gourmet International Products*, [2001] ECR I-1795; and Case C-110/05, *Commission* v. *Italy* (*trailers*), judgment of 10 Feb. 2009, nyr.

2. Case C-412/93, *Leclerc-Siplec*, [1995] ECR I-179; Case C-442/02, *Caixa-Bank France*, [2004] ECR I-8961; Joined Cases C-158-159/04, *Alfa Vita Vassilopoulos*, [2006] ECR I-8135; and Case C-142/05, *Mickelsson and Roos*, judgment of 4 June 2009, nyr.

analyse the basic idea that there is a difference between the regulation of access to and exercise of an activity. This will be followed by a review of cases where the notion has been used with various qualifiers, an examination of recent decisions on use restrictions and business methods, and a study of rulings where no impact on market access was found. Finally, the function of the term is discussed, followed by a brief conclusion. It will be argued that, when pressed, the notion of market access collapses into economic freedom or anti-protectionism, and as a consequence it obscures more than it clarifies. The term could be abandoned with little loss to the law.

2. Market access and competition law

The concept of barriers to entry has for a long time played an important role in competition law. Intuitively, it would seem closely related to the notion of market access in free movement law and thus worthy of study. Unfortunately, the concept has been the topic of a fierce debate in competition law circles that mirrors the debate in the area of internal market law, with two basic views put forward.[3]

The first view is associated with Joe Bain[4] and the structure-conduct-performance paradigm. It defines barriers to entry as advantages enjoyed by established sellers allowing them to maintain prices above the competitive level without attracting new firms to the industry. A very large number of factors are seen to fall within the scope of the concept, including scale economies and product differentiation, and it seems that ultimately "anything that hinders entry and has the effect of reducing or limiting competition" may come within its remit.[5]

The views of Bain have been challenged by Chicago scholars such as George Stigler.[6] They argue that the correct understanding of the concept is a differential or relative rather than an absolute one. Instead of asking whether it is difficult to enter the market, they enquire whether the entry is more difficult for a newcomer than it was for the incumbent. Features of the market that may make access tricky or costly are just that, features of the market. The fact that the incumbent company has successfully dealt with those features is an indication of its efficiency and as such a cause for applause rather than condemnation.[7] Only if a hurdle is higher for a newcomer, such as in the case of a

3. See generally Jones and Sufrin, *EC Competition Law*, 3rd ed. (OUP, 2007), pp. 84–92.
4. Bain, *Barriers to New Competition* (Harvard University Press, 1956), pp. 11–19.
5. OECD, "Barriers to entry" DAF/COMP(2005)42, 17.
6. Stigler, *The Organization of Industry* (Irwin, 1968), pp. 67–70.
7. Bork, *The Antitrust Paradox* (Macmillan, 1993), pp. 310–311, and pp. 328–329.

licensing law that has resulted in a licence being allocated freely to the existing operator while a new entrant has to purchase one, is there a true barrier to entry. The Chicago definition of barriers to entry is thus narrower and results in fewer barriers being detected.

The more recent scholarship has argued that the flawed nature of the structure-conduct-performance paradigm limits the validity of Bain's analysis, and that Stigler's approach, while correct in principle, focuses too much on the very long run to be useful for practical purposes. The question posed by the economists about the factors allowing a company in the very long term to charge supracompetitive prices is simply not the same question as that asked by anti-trust authorities. In short, the relevance of the whole economic debate described above has been challenged, and instead the focus has shifted to the specific role entry barriers play in competition law.[8] Currently the goal of consumer welfare is increasingly important, even on this side of the Atlantic.[9] It is protected both directly and indirectly, through the protection of the structure of the market and the competitive process.[10] Consumers can typically only be harmed by undertakings that have market power, which is defined as the power to sustain prices[11] profitably above the competitive level. In the absence of market power, there is as a rule no threat to consumer welfare and therefore generally no need for competition law to intervene.[12] The market power of a company depends on the competitive constraints it faces from its current and

8. Carlton, "Why barriers to entry are barriers to understanding", 94 *The American Economic Rev.* (2004), 466–469. See also Posner, *Antitrust Law*, 2nd ed. (University of Chicago Press, 2001), p. 74 and the distinction between economic and antitrust barriers drawn by McAfee, Mialon, and Williams, "What is a barrier to entry?", 94 *The American Economic Rev.* (2004), 463.

9. For a thoughtful discussion of the US debate, see Jacobs, "An essay on the normative foundations of antitrust economics", 74 North Carolina L.R. (1995), 219.

10. Case C-8/08, *T-Mobile Netherlands*, judgment of 4 June 2009, nyr, para 38. In para 58 of her Opinion, which was referred to by the Court, A.G. Kokott argued that "Article [101 TFEU (ex 81 EC)], like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the *structure of the market* and thus *competition as such (as an institution)*. In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared." See also Joined Cases C-501, 513, 515 & 519/06 P, *GlaxoSmith-Kline Services*, judgment of 6 Oct. 2009, nyr, overturning Case T-168/01, G*laxoSmithKline Services* v. *Commission*, [2006] ECR II-2969, and Guidelines on the Application of Art. 81(3) of the Treaty, O.J. 2004, C 101/97, para 13.

11. Or its functional equivalent, such as the ability to lower the quality of products, reduce choice or limit innovation.

12. This can be seen e.g. in the *de minimis* doctrine created in Case 5/69, *Völk* v. *Vervaecke*, [1969] ECR 295 and further operationalized in Notice on Agreements of Minor Importance, O.J. 2001, C 368/13, as well as in the market share thresholds set out in the various block exemptions. See e.g. Whish, *Competition Law*, 6th ed. (OUP, 2009), p. 650.

potential competitors.[13] To assess this, it is necessary to define the market where the company operates and its share of that market. This describes the constraints that the current competitors impose on it. To measure the constraints created by potential competition, the barriers to entry, or – to be more precise – the scale, timeliness and likelihood of entry must be assessed. The question is simply whether there are reasons to believe that an increase in the price of a product would not attract new entry into the market for a period of some years, thus making it profitable for the incumbent to increase its price above the competitive level. If the answer is that new entry would not happen, then there may be a reason for intervention by the authorities. By contrast, if a timely and sufficient new entry is likely to take place in response to the supracompetitive pricing by the incumbent, the market power of the existing operator is constrained by potential competition and intervention may not be needed.[14]

While the debates about the absolute or relative nature of entry barriers resemble those conducted in the field of free movement law, ultimately the usefulness of the concept for comparative purposes is limited. Widely differing views have been put forward and, more importantly, modern scholarship has emphasized the specialized role entry barriers play in competition law as a measure of the ability of potential competition to limit the market power of the incumbent.[15] As a result, it seems unlikely that the concept of barriers to entry can really help internal market law in its quest for the definition of market access.

3. Market access in WTO law

Another obvious object of comparison is the law of the WTO, as the term market access has been used for a long time in this context. Article XI of GATT contains a "General Elimination of Quantitative Restrictions".[16] These measures, together with customs duties and charges covered by Article II, are often

13. As well as on any possible countervailing power.

14. See Commission Communication, "Guidance on the Commission's enforcement priorities in applying Article 82 EC Treaty to abusive exclusionary conduct by dominant undertakings", O.J. 2009, C 45/7 in particular at para 16. See generally on the role of market power in competition law e.g. Monti, *EC Competition Law* (Cambridge University Press, 2007), pp. 124–127.

15. See also OECD, cited *supra* note 5 in particular at 25–26 and DG Competition discussion paper on the application of Art. 82 of the Treaty to exclusionary abuses (Brussels, 2005), para 35.

16. The text provides that "[n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of

called border or market access restrictions. The text of Article XI could potentially be understood as a very wide prohibition indeed. However, its scope is clarified by Ad Note to Article III,[17] which specifies that only measures taking place at the border and treating domestic and imported products differently are prohibited as such. If a measure is applied internally "behind the border" or is equally applicable to imports and like domestic products, it is only subject to the national treatment requirement of Article III. In other words, to constitute a market access restriction under GATT, a measure has to be a border measure relating solely to imports.[18] Article XVI GATS is titled "Market Access" and prohibits Members from taking six types of measures in sectors where they have committed to market access, provided they have not scheduled specific exceptions.[19] For other types of measures, Article XVII of GATS imposes an obligation of national treatment, provided again that the Member has scheduled commitments and not recorded exceptions.

There is a basic difference between the way market access is understood in WTO law and its usage in the EU. In the WTO, market access is a formal and narrow notion. Whether a measure is a market access restriction depends on its form, not on its effects. In GATT, if it takes the form of a quota, customs duty, import licence or whatever origin-specific border measure, it is an obstacle to market access. In GATS, if it is of the type listed in Article XVI:2, it is

the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party".

17. The text provides that "[a]ny internal tax or other internal charge, or any law, regulation or requirement … which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement...".

18. Pauwelyn, "*Rien ne Va Plus?* Distinguishing domestic regulation from market access in GATT and GATS", 4 *World Trade Rev.* (2005), 142–145.

19. The prohibited measures are: "(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;

(b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;

(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;

(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and

(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment."

a market access measure and prohibited if a commitment has been scheduled by the Member. If a measure has similar consequences in that the quantity of imports is reduced, but takes a different form, it is policed under national treatment provisions.[20] By contrast, EU free movement law is all about the effects of a measure, and its form is much less significant. Article 34 TFEU (ex 28 EC) itself makes this clear by targeting quantitative restrictions and measures having an equivalent *effect*. The issue is thus whether the impact of a national rule is similar to the impact of a quota, not whether its form is analogous to a quantitative restriction. The problem with this is of course that quotas have two distinct effects. First, they reduce the volume of imports. Secondly, they discriminate against imported products. It is unclear which effect the Treaty on the Functioning of the EU refers to.[21]

It could perhaps be argued that in the *US-Gambling*[22] case the WTO Appellate Body has moved away from the pure form-based understanding of market access restrictions in Article XVI GATS towards a broader, more effects-based notion. At issue was the legality of the US ban on internet gambling. The US argued that this did not amount to a market access restriction as the prohibition neither stated any numerical units nor was in the form of a quota, as required by the wording of the provision. The Appellate Body disagreed, upholding the finding of the Panel. It held that the ban amounted to a zero quota, and as such constituted a quantitative limitation within the scope of Article XVI:2, emphasizing "that the words 'in the form of' must not be interpreted as prescribing a rigid mechanical formula."[23] However, it would be wrong to draw any far-reaching inferences from this ruling. First, the form of the measure was still decisive. The US rule could be described as quantitative rather than qualitative. It stipulated the number of remote gambling operators allowed in the market, namely zero. It was not simply the restrictive effect of the measure that permitted the Appellate Body to classify it as a barrier to market access, but the fact that the ban resulted in a precise numerical limit.[24] In other words, the ultimate focus was again on the form – numerical limit – rather than on the restrictive effect of the measure.[25] Further, the ruling has

20. See Krajewski, "Playing by the rules of the game?", 32 LIEI (2005), 431–432.

21. In line with the wording of Art. 34 TFEU, the case law of the ECJ has always focused on the effects rather than the form. See e.g. Case 8/74, *Dassonville*, [1974] ECR 837, para 5; and Case C-55/94, *Gebhard*, [1995] ECR I-4165, para 37. See generally Gormley, "Silver threads among the gold … 50 years of the free movement of goods", 31 Fordham Intl L.J. (2008), 1688–1689.

22. *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, 7 April 2005.

23. Ibid., para 231.

24. Ibid., paras. 225, 227, and 232.

25. Regan, "A *Gambling* paradox: why an origin-neutral 'zero-quota' is not a quota under GATS Article XVI", 41 JWT (2007), 1302. See also Delimatsis, "Don't gamble with GATS – the

attracted a storm of critical comments from WTO scholars who argue that the Appellate Body went too far and imposed excessive limits on the regulatory autonomy of States.[26] The criticism may well result in a more cautious approach in the future. Finally, it is in any event somewhat dangerous to compare GATS and the EU free movement provisions. GATS does not contain generally applicable prohibitions unlike the free movement Articles of the Treaty on the Functioning of the EU. Instead, it only applies in those sectors where States have expressly scheduled concessions, and allows Members to schedule exceptions. A rule that operates in a number of predetermined sectors subject to individually scheduled exceptions may not really be comparable to an across-the-board prohibition.[27]

It seems that the EU cannot really draw from the WTO law when it seeks to define the notion of market access. The narrow and formal nature of that term in the WTO context makes it ill-suited for EU free movement law, where the basic concern is the effect of a measure rather than its form. Somewhat paradoxically, the supporters of market access in Europe have typically wished to introduce the notion to counteract what they see as a narrow focus on discrimination, and the excessive formalism in the Court's case law, while in the WTO market access is actually understood in narrow and formal terms and attempts to broaden the notion are met with fierce criticism.

4. Access to and exercise of an activity

It has now been established that neither competition law nor WTO law offer much comparative help. The way the concepts of barriers to entry and market access have developed in these contexts are fundamentally different from EU free movement law and as a result any borrowing would be counterproductive. If there is a legal concept of market access in EU free movement law, it has to be a fully autonomous one.

Perhaps the most logical starting point for an examination of an autonomous EU law notion of market access is the distinction between access and exercise or, in other words, the take-up and pursuit of an activity, or an entry to and operation in a market. This distinction can arguably be seen in the language

interaction between Articles VI, XVI, XVII and XVIII GATS in the light of the US – Gambling case", 40 JWT (2006), 1076.

26. See e.g. Pauwelyn, op. cit. *supra* note 18; Prévost, "Services and public policy in WTO law: The example of the US-Gambling case" in Van de Gronden (Ed.), *The EU and WTO Law on Services* (Kluwer, 2009), pp. 231–232; and Regan, op. cit. *supra* note 25.

27. More generally, any comparisons between the EU and WTO need to be approached with caution due to the more limited ambitions of the latter.

of Article 45(3) TFEU (ex 39(3) EC), which on the one hand contains "the right … to accept offers of employment actually made", but on the other mentions "the right … to stay in a Member State for the purposes of employment in accordance with the provisions governing the employment of nationals of that State". The first right relates to the access to employment and seems to be an absolute one, albeit subject to a number of exceptions. There is no need for any comparison between a migrant worker and a national when the right is applied. The second right becomes relevant after the employment market has been accessed when the actual occupation is exercised, but is only a relative one, namely a right to be treated in the same way as nationals. When the right is applied, a comparison has to be made between migrant workers and nationals.

Advocate General Lenz argued in favour of distinguishing between access and exercise in his Opinion in *Bosman*.[28] In issue was the legality of football transfer rules that required the receiving club to pay a transfer fee to the releasing club. In the absence of a payment, the player could not move from one club to another. The rules were non-discriminatory, as a similar fee was payable regardless of whether the clubs were situated in different countries. However, Mr Lenz argued that the even-handed nature of the rules was of no relevance, as they affected the access to the labour market. According to him, such a measure constitutes a restriction even if non-discriminatory, in contrast to a measure relating to the exercise of an occupation where a differential impact is needed. To illustrate the distinction, Mr Lenz cited a rule fixing the number of clubs playing in a professional league. According to him, the limitation of the number of clubs, while reducing the employment opportunities available to footballers, would not contravene Article 45 TFEU (ex 39 EC), as it did not concern the "possibility of access for foreign players as such, but the exercise of the occupation."[29] Support was also offered by Advocate General Fennelly in *Graf*, where he argued that "[t]he imposition of conditions regarding entry to the market or the taking up of economic activity is itself sufficient to establish the existence of a restriction, even if the condition can be relatively easily satisfied … The same, broadly speaking, can probably also be said of formal conditions imposed regarding matters which are intimately connected with successful access to the market, such as those governing recognition of a qualification which is necessary or beneficial to the exercise of many professional activities."[30] By contrast to these formal barriers to market access, "neutral national rules could only be deemed to constitute material barriers to

28. *Bosman*, cited *supra* note 1, para 205. See also A.G. Gulmann in Case C-275/92, *Schindler*, [1994] ECR I-1039, para 56.

29. *Bosman*, cited *supra* note 1, para 210.

30. *Graf*, cited *supra* note 1, para 30.

market access, if it were established that they had actual effects on market actors akin to exclusion from the market."[31]

However, not all Advocates General have come out in favour of the distinction. Advocate General Alber argued in *Lehtonen* that it should not be introduced into Article 45 TFEU. According to him, "[R]ules on exercise [of a profession] must, like product-related rules [in the field of goods], be complied with directly by a citizen of the Union who wishes to assert the fundamental freedom under Article [45 TFEU]. He must take account of new rules of exercise and acquire corresponding qualifications, possibly after every cross-frontier change of employment."[32]

Despite the superficial appeal of the distinction between access and exercise, a formal differentiation between measures that regulate access and measures that regulate exercise suffers from a number of problems. First, the normative justification for the approach is dubious. As a matter of logic, rules that limit economic freedom also reduce the profits of some operators, as they are prevented from doing something that they would otherwise wish to do to maximize profits. Any reduction in the perceived profitability will have a deterrent effect on the take-up of an activity, due to opportunity costs. In other words, if the activity is not seen as sufficiently lucrative, operators at the margin will choose to engage in other activities or become inactive. Whether or not the limitation of economic freedom operates at the access stage or at the exercise stage is irrelevant, all that matters is how much the profitability is reduced. To put it differently, the impact of a measure on cross-border situations is a function of its restrictiveness, and does not depend on the stage at which it operates. As a consequence, it is not at all clear why the law should adopt a tougher line on rules regulating the take-up of an activity than on rules regulating its pursuit if the effect on free movement is the same.[33] None of the Opinions discussed above tackle this question head on, apart from pragmatic references to the need to somehow limit the number of national rules that are examined by the Court. Secondly, the distinction is difficult to apply in practice.[34] This is clearly demonstrated by the different views expressed by Advocates General Alber and Fennelly in respect of professional qualifications, which the former interpreted as relating to the exercise of an activity and the

31. Ibid., para 32.

32. Case C-176/96, *Lehtonen*, [2000] ECR I-2681, para 48.

33. See Craig and de Búrca, *EU Law*, 4th ed. (OUP, 2007), p. 694.

34. See Chalmers, Hadjiemmanuil, Monti, and Tomkins, *European Union Law* (Cambridge University Press, 2006), p. 706. Arnull, *The European Union and its Court of Justice*, 2nd ed. (OUP, 2006), p. 456, describes the distinction drawn by A.G. Lenz in *Bosman* as "unduly rigid", while Doukas, "Untying the market access knot: Advertising restrictions and the free movement of goods and services", 9 CYELS (2006–7), 196 characterizes a distinction between access to and exercise of a professional activity as "unworkable".

latter described "as formally affecting access or, at the very least … as being sufficiently closely bound up with market access as to be subjected to a similar regime."[35] Finally, some provisions of the Treaty and EU legislation seem to favour an identical treatment for both access and exercise regulations. For example, Article 49(2) TFEU (ex 43(2) EC) on the freedom of establishment simply talks about the "right to take up and pursue activities" under national treatment, while Article 16(1) of the Services Directive[36] refers to "free access to and free exercise of a service activity".

In any event, the Court has refused to embrace the formal distinction. In *Commission* v. *Denmark*, a case concerning limitations to the private use of company cars registered abroad, the Court stated that "[t]he manner in which an activity is pursued is liable also to affect access to that activity. Consequently, legislation which relates to the conditions in which an economic activity is pursued may constitute an obstacle to freedom of movement within the meaning of that case law."[37] This collapses the formal distinction as an analytical tool. It is no longer possible to argue that neutral measures concerning the exercise of an activity are automatically outside the scope of the Treaty. The regulation of the pursuit of an activity may also affect access, and consequently the formal classification of a rule as one governing the pursuit tells us nothing about its legality. The effect on market access needs to be looked at in all cases, which then invites the question what is meant by the notion. The Court's case law beginning from the notorious *Keck*[38] judgment, as well as several Advocates General, have sought to provide an answer.

5. Market access and the *Keck* line of cases

The effect on market access featured large in the ruling of the Court in *Keck*. In issue was the legality of a French rule preventing supermarkets from selling products at a loss. For many years, the Court had included measures of this type within the *Dassonville*[39] formula and viewed them as restrictions in need of justification. This had resulted in an increase in case load, as speculative

35. *Graf*, cited *supra* note 1, para 33.

36. European Parliament and Council Directive 2006/123 on services in the internal market, O.J. 2006, L 376/36.

37. Case C-464/02, *Commission* v. *Denmark*, [2005] ECR I-7929, para 37. See also e.g. *Caixa-Bank France*, cited *supra* note 2, and Spaventa, "Leaving *Keck* behind? The free movement of goods after the rulings in *Commission v Italy* and *Mickelsson and Roos*", 34 EL Rev. (2009), 924 for a discussion of more recent case law to the same effect.

38. *Keck*, cited *supra* note 1.

39. *Dassonville*, cited *supra* note 21.

attacks were mounted against all types of national rules limiting the economic freedom of traders, and there was unease about the legitimacy of the Court's approach, resulting in some contradictions in the case law.[40] In *Keck*, the Court famously changed its mind, holding that in the light of the increased tendency of traders to challenge national measures, a distinction had to be made between product rules, which automatically fall within the scope of Article 34 TFEU (ex 28 EC), and rules concerning selling arrangements, which only violate the provision if they discriminate against imports. The result was that the French measure was allowed to stand.

Importantly, the Court cited the effect on market access as the justification for the new approach. It stated that the application of non-discriminatory rules relating to selling arrangements "to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article [34 TFEU]".[41] *A contrario*, it is therefore possible to conclude that two types of measures do constitute *prima facie* violations of the provision, namely rules that prevent market access and rules that have an unequal impact on the market access of imports when compared with domestic products.

The term "prevention of market access" sounds straightforward, but is anything but. Conceptually, it seems an absolute notion, not requiring a comparison with national products. Clearly, it encompasses at least situations where there is a total ban on imports, as in the case of *Conegate*[42] concerning the UK customs and excise legislation that prohibited the importation of indecent and obscene articles. In such a case, the measure takes place at the border and stops the relevant goods from entering a market that exists within the country, due to domestic products being allowed. By contrast, a total ban of a product, as distinct from a total prohibition of just imports, is conceptually a much more difficult issue. Although an imported product is clearly prevented from entering, it can be argued that no market exists for those goods due to the prohibition and therefore access to any market is not prevented.[43] Finally, it can be

40. See the Opinion of A.G. Tesauro in Case C-292/92, *Hünermund*, [1993] ECR I-6787 for analysis. His Opinion was followed by the Court in *Keck*.

41. *Keck*, cited *supra* note 1, para 17.

42. Case 121/85, *Conegate*, [1986] ECR 1007. See also Case 34/79, *Henn and Darby*, [1979] ECR 3795.

43. Regardless of such conceptual niceties, A.G. Kokott favoured a wide view of the notion of prevention in her Opinion in *Mickelsson and Roos*, cited *supra* note 2, para 67, arguing in the context of use restrictions that market access should be considered prevented both in the case of rules that totally prohibit the use of a product and in the case of rules that leave only a marginal possibility of use.

asked whether product rules should also be conceptualized as preventing market access.[44] On the one hand, they may stop a product from entering a market as is; the product has to be modified before it can gain access. On the other hand, they may be easy to comply with if the modification is straightforward, in which case it is slightly awkward to talk about market access being "prevented".[45]

Whatever the exact meaning of "prevention", in practice it is the unequal access part of *Keck* that has proven significant.[46] For example, in *Gourmet International Products* the Court condemned a Swedish ban on alcohol advertising as "liable to impede access to the market by products from other Member States more than it impedes access by domestic products".[47] It reasoned that the consumption of alcohol was linked to traditional social practices and to local habits and customs. An advertising ban was likely to crystallize these consumer habits. A new unfamiliar imported product could not be brought to the attention of consumers, with the result that they would continue to buy familiar local products.[48]

From a normative perspective, the idea that rules with an unequal impact on market access should be censured is uncontroversial. Nobody seems opposed to the basic premise that if foreign products are impeded more than domestic ones, EU free movement law should intervene. The more detailed application of the idea can of course be contested. Should the Court be ready to make an assumption that advertising restrictions favour familiar domestic products and therefore fall within Article 34 TFEU, or should it require more evidence, perhaps in line with the GATT jurisprudence on national treatment?[49] However, from the point of view of the conceptual analysis attempted in the present article, the more important question is why the term market access is used at all? If the concern is that imports are affected more than domestic

44. See the Opinion of A.G. Tesauro in Case C-368/95, *Familiapress*, [1997] ECR I-3689, para 9. In any event, they clearly do have a differential impact on market access.

45. Barnard, "Fitting the remaining pieces into the goods and persons jigsaw?", 26 EL Rev. (2001), 44, adopts an even wider view of the term prevention, which however has been contradicted by the more recent case law, where advertising prohibitions have been viewed as impacting unequally on market access, as discussed below.

46. See also Nic Shuibhne, "The Common Market at 50", 15 IJEL (2008), 118. Differential impact on market access has also featured in the context of other freedoms. See e.g. Joined Cases C-94 & 202/04, *Cipolla*, [2006] ECR I-11421 in the context of services.

47. *Gourmet International Products*, cited *supra* note 1, para 21.

48. See also A.G. Poiares Maduro in *Alfa Vita*, cited *supra* note 2.

49. See the discussion in Wilsher, "Does Keck discrimination make any sense? An assessment of the non-discrimination principle within the European Single Market", 33 EL Rev. (2008), 3. In my view, the adoption of the methodology of the WTO would be highly undesirable. In the WTO context, the litigants are States and can therefore be expected to furnish information and evidence that the private litigants in Art. 34 TFEU context could not possible provide.

products, would it not be preferable to speak simply of factual, indirect or material discrimination, or refer to differential impact if the term discrimination is seen as too loaded, rather than resort to a vague notion of market access?

Altogether the use of the term market access in the *Keck* line of cases appears unnecessary. The Court does not employ the notion on its own, but only in conjunction with the word "prevent" or with terms that refer to an unequal impact. According to *Keck*, instead of market access *simpliciter*, Article 34 TFEU is concerned with two types of measures. The first category is rules that prevent the importation of products from other Member States. The second category is rules that hinder imports more than national products, i.e. rules that discriminate. It is unclear what the notion market access adds to this.

6. Effect on market access: Substantial or direct?

Keck[50] failed to settle the controversy over the reach of free movement rules. A powerful challenge was articulated by Advocate General Jacobs, who argued for an approach based on whether there is a *substantial* restriction on market access. Initially, the Court refused to follow him, and preferred to ask in the fields of services and workers whether a *direct* impediment on market access could be found. However, in 2009 the criterion of significance seems to have finally found favour.

In his Opinion in *Leclerc-Siplec*[51] Advocate General Jacobs recognized that *Keck* was in reality about discrimination, and criticized the judgment for it. According to the Advocate General "[t]he central concern of the Treaty provisions on the free movement of goods is to prevent unjustified obstacles to trade between Member States. If an obstacle to inter-State trade exists, it cannot cease to exist simply because an identical obstacle affects domestic trade …. Equally, from the point of view of the Treaty's concern to establish a single market, discrimination is not a helpful criterion …. Restrictions on trade should not be tested against local conditions which happen to prevail in each Member State, but against the aim of access to the entire Community market."[52]

The vision of the Advocate General of the single market, and in particular of institutional competences, differed significantly from the view put forward by Judge Joliet, one of the judges who had decided *Keck*.[53] The Advocate General was deeply sceptical of Member State legislatures. He clearly expected

50. *Keck*, cited *supra* note 1.
51. *Leclerc-Siplec*, cited *supra* note 2.
52. Ibid., paras. 39–40.
53. Joliet, "The free circulation of goods: the *Keck and Mithouard* decision and the new directions in the case law", 1 CJEL (1995), 436.

there to be a good number of national rules that were not merely protectionist but simply arbitrary and needed to be scrutinized and possibly disapplied by a more rational Court.[54] By contrast, Judge Joliet openly acknowledged the limitations of judicial institutions and the need to adopt a deferential approach towards Member State laws. Obviously no deference could be displayed if a measure had a differential impact to the detriment of imports, but in the case of truly non-discriminatory rules, the judicial institutions should bow to the wisdom of political ones and assume that the legislatures were acting rationally.[55]

This difference in view also resulted in the articulation of a radically different test to determine the scope of Article 34 TFEU (ex 28 EC). According to Advocate General Jacobs, "[i]f the principle is that all undertakings should have unfettered access to the whole of the Community market, then the appropriate test in my view is whether there is a substantial restriction on that access. That would of course amount to introducing a *de minimis* test into Article [34 TFEU]."[56] Examples of measures amounting to substantial restrictions on market access included product rules, as the requirement that products be modified could be presumed to substantially impede access, and those rules relating to selling arrangements that were of sufficient magnitude, depending on factors "such as whether [the rule] applies to certain goods … or to most goods … or to all goods, … on the extent to which other selling arrangements remain available, and on whether the effect of the measure is direct or indirect, immediate or remote, or purely speculative and uncertain."[57] The test would only apply to facially neutral national measures. Overtly discriminatory rules would be prohibited *per se*.

The test proposed by Advocate General Jacobs was conceptually clear. What matters is how substantial a restriction is. A significant obstacle would be caught, an insignificant one would be allowed to stand. The test flowed logically from his view of the single market and from the premise that Member State legislatures are liable to adopt or maintain arbitrary rules that the Court can usefully police. However the Court did not accept the test. Already in *Van de Haar* in 1984 it had rejected the idea that "slight" hindrances could escape the reach of Article 34 TFEU.[58] In *Leclerc-Siplec* itself the Court stuck to the

54. See e.g. para 39 of the Opinion in *Keck*, cited *supra* note 1.

55. Joliet, op. cit. *supra* note 53, in particular at 445.

56. Para 42. For academic support, see Weatherill, "After *Keck*: Some thoughts on how to clarify the clarification", 33 CML. Rev. (1996), 885, at 896–879, who proposes a test based on "direct or substantial hindrance". Barnard, *The Substantive Law of the EU*, 2nd ed. (OUP, 2007), p. 165, argues that the test of substantial hindrance to market access "provides the best fit with the case law on persons, services, and capital."

57. Para 45.

58. Joined Cases 177–178/82, *Van de Haar*, [1984] ECR 1797, para 13.

Keck orthodoxy. In *Bluhme*[59] in 1998 it held that a Danish rule that only allowed the keeping of a particular subspecies of bees on the small island of Laesø amounted to a restriction on Article 34 TFEU, even though the impact of the measure was minimal in volume terms.[60]

The reluctance of the Court to adopt a test based on the significance of the hindrance in the context of selling arrangements was not surprising. In fact, this had been proposed already in 1992 by Steiner in an article in the Common Market Law Review.[61] There were also strong similarities with the test put forward by Advocate General Van Gerven in *Torfaen* but rejected by the Court in that case in 1989.[62] In *Keck* in 1993, the Court refused to accept this advice and opted for a more radical solution of expressly overruling some of its earlier decisions. It would have been astonishing if it had changed its mind again so quickly.

Instead of concentrating on the significance of a hindrance, the Court originally chose to focus on its directness, at least in the field of services and workers.[63] In *Alpine Investments*[64] the Court examined the legality of a Dutch measure that prevented financial service providers based in the Netherlands from cold-calling potential clients. The Dutch and British governments defended the rule, categorizing it as a non-discriminatory selling arrangement. The Court disagreed, on the ground that it "directly affects access to the market in services in the other Member States".[65] Similarly, in *Bosman* the Court justified its finding that a non-discriminatory football transfer fee system violated the free movement of workers by referring to its direct impact on the "players' access to the employment market in other Member States".[66] This was welcomed by Advocate General Tizzano in *Caixa-Bank*, where he argued that the freedom of establishment is violated if a measure either discriminates or directly affects market access, but not if its only effect is to reduce profit margins and hence the attractiveness of the pursuit of an activity.[67]

59. Case C-67/97, *Bluhme*, [1998] ECR I-8033.

60. Nevertheless, the proposal was resurrected by a number of Advocates General. See e.g. A.G. Stix-Hackl in Case C-322/01, *DocMorris*, [2003] ECR I-14887 and A.G. Geelhoed in Case C-239/02, *Douwe Egberts*, [2004] ECR I-7007.

61. Steiner, "Drawing the line: Uses and abuses of Article 30 EEC", 29 CML Rev. (1992), 767–772.

62. Case C-145/88, *Torfaen Borough Council* v. *B & Q plc*, [1989] ECR 3851.

63. In the academic literature, Toner, "Non-Discriminatory Obstacles to the Exercise of Treaty Rights – Articles 39, 43, 49, and 18 EC", 23 YEL (2004), 285–289, and Weatherill, op. cit. *supra* note 56, 896–901 have argued for a test focusing on direct *or* substantial effect.

64. *Alpine Investments*, cited *supra* note 1.

65. Ibid., para 38.

66. *Bosman*, cited *supra* note 1, para 103.

67. A.G. Tizzano in *Caixa-Bank*, cited *supra* note 2, in particular paras. 62 and 66 of his Opinion.

What then amounts to a direct impediment on market access? How is the notion to be defined? In *Alpine Investments* the Court emphasized that the measure affected "not only offers made by [the service provider] to addressees who are established in [the home] State or move there in order to receive services but also offers made to potential recipients in another Member State."[68] This in the Court's view distinguished the case from the rules concerning selling arrangements in issue in *Keck*.[69] Thus, what seemed to be decisive was that the measure touched directly on cross-border movement, as in the case of a cold-call that could not be made to a potential client in another Member State and as opposed to the selling of a product at a loss in a supermarket after the importation has already taken place, where the impact of the measure on imports was more indirect. In the same way, the rule in *Bosman* impeded the actual movement of the player to take up employment in a club in another Member State; it did not simply regulate how the activity was to be pursued once the movement had taken place.[70]

The criterion of directness makes sense from a personal, concrete, rights-based perspective.[71] It could be argued that an individual has a right to sell the product abroad, or move across the border, and so on. Anything that directly interferes with that right can be seen as a restriction. By contrast, a measure that simply makes the exercise of the right less desirable, for example by reducing the profit margin of an activity, has only an indirect impact and therefore does not qualify as a restriction in the absence of discrimination. In other words, it could be argued that, from the point of view of the individual, there is a subjective absolute right to a cross-border movement, subject to exceptions on grounds such as those enumerated in Article 36 TFEU (ex 30 EC) and in the doctrine of overriding requirements,[72] but once the movement has been completed there is only a comparative or relative right to be treated equally.

Despite the initial attractiveness of the individual-rights based conception, the criterion of directness is not without its problems. First, directness is a matter of degree, and therefore uncertain in its reach. For example, the effect of the measure in issue in *Alpine Investments* was not totally direct. It did not stop the provision of the financial service itself, it simply prohibited one way

68. *Alpine Investments*, cited *supra* note 1, para 38.

69. *Keck*, cited *supra* note 1.

70. See also the Opinion of A.G. Stix-Hackl in *DocMorris*, cited *supra* note 60, para 77.

71. See Eeckhout, "Recent case law on free movement of goods: refining Keck and Mithouard", 9 EBLR (1998), 270–271. Recently, A.G. Trstenjak talked of "individual right of citizens of the Union to market access" in Case C-445/06, *Danske Slagterier*, judgment of 24 March 2009, nyr, para 83.

72. Case 120/78, *Rewe-Zentral AG* v. *Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649.

of marketing that service, namely cold-calling. The impact on the actual cross-border service provision was somewhat indirect. Another example of uncertainty is provided by *Caixa-Bank*, where the relevant French rule prevented a local subsidiary of a Spanish bank from offering interest on sight current accounts. Advocate General Tizzano described the effect of the measure as direct. The rule, argued the Advocate General, deprived foreign banks "of the only effective means of acquiring customers in the French market" and consequently "impeded directly the access of the subsidiaries of foreign banks to the French market."[73] Here the analysis risked conflating the issues of significance and directness that the Court has held to be conceptually distinct.[74] The focus seemed to be on the magnitude of the impact of the measure. Given that the entry to the banking market would have been possible, albeit not particularly lucrative, had the bank utilized the interbank market to finance its activities, [75] the Advocate General implied that measures with a sufficiently significant impact on the profitability of entry affect market access directly. The potential for uncertainty was also in evidence in the Opinion of Advocate General Trstenjak in *Gysbrechts*, where she unsuccessfully argued for a "direct impact on market exit" approach to Article 35 TFEU (ex 29 EC),[76] a provision that had traditionally been construed restrictively by the Court.[77] In the course of her argument, she submitted that the *Dassonville* formula,[78] which classifies all hindrances to intra-Union trade as restrictions, could be applied to exports. In her view, this would not lead to an overextension of Article 35 TFEU. She argued that national measures setting production conditions and increasing production costs would not amount to export restrictions, as the effect of such factors would be too indirect.[79] This might be true for many national production rules,[80] but it is easy to imagine for example an environmental measure that increases production costs so much that exportation is in practice made impossible.[81] Would the impact of such a measure be deemed indirect? Secondly, directness is a formal matter. The critics of *Keck* who have argued for a less formalistic approach should not be eager to embrace directness

73. *Caixa-Bank*, cited *supra* note 2, para 89.

74. Case C-126/91, *Yves Rocher*, [1993] ECR I-2361, para 21.

75. *Caixa-Bank*, cited *supra* note 2, para 87 of the Opinion.

76. Case C-205/07, *Gysbrechts and Santurel Inter BVBA*, judgment of 16 Dec. 2008, nyr, see in particular para 65 of the Opinion. See generally annotation by Roth in this *Review*.

77. Case 15/79, *Groenveld*, [1979] ECR 3409.

78. *Dassonville*, cited *supra* note 21.

79. Opinion of the A.G. in *Gysbrechts and Santurel Inter BVBA*, cited *supra* note 76, paras. 54–56 of the Opinion.

80. See e.g. Case 155/80, *Oebel*, [1981] ECR 1993.

81. See by analogy Case C-300/89, *Commission* v. *Council* (*Titanium Dioxide*), [1991] ECR I-2867.

as a substitute.[82] Thirdly, the normative justification for attacking direct impediments but accepting indirect ones is highly unclear. Should the law pounce on a measure that has only a slight impact if it qualifies as direct, and yet ignore a national rule that has an indirect but substantial effect on free movement? Fourthly, the focus on directness is at odds with the very starting point of free movement case law, namely the edict in *Dassonville* that both direct and indirect hindrances to intra-Union trade are caught,[83] unless of course subtle distinctions are made according to the degree of indirectness involved.

Finally, the distinction between direct and indirect effects has been tested to destruction in the case law of the US Supreme Court on the dormant or negative Commerce Clause of the US Constitution.[84] Following the 1851 decision in *Cooley*,[85] which established that the commerce power was not held exclusively by the Congress, but that the States had a concurrent regulatory competence in appropriate circumstances, the Court was faced with the task of fashioning a test to distinguish between permissible and impermissible use of that State power. For decades, the Court focused primarily on the distinction between direct and indirect burdens, accepting rules that affected interstate commerce only "indirectly, incidentally, and remotely"[86] and invalidating measures that imposed a direct burden.[87] In *Di Santo*[88] in 1927 Justice Stone mounted an influential attack on the direct/indirect test. In a dissent from the Court's ruling that struck down a Pennsylvania regulation on the licensing of steamboat ticket sellers as a direct burden on commerce, Justice Stone argued that "the traditional test of the limit of State action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities to be of value. In thus making use of the expressions 'direct' and 'indirect interference' with commerce, we are doing little more than using labels to describe a result, rather than any trustworthy formula by which it is reached."[89] The ideas contained in the dissent were expanded in particular by Professor Dowling in an article published in 1940[90] and finally in 1945 the Court re-examined and clarified its

82. Davies, *Nationality Discrimination in the European Internal Market* (Kluwer, 2003), p. 100.

83. *Dassonville*, cited *supra* note 21, para 5.

84. Art. 1, Section 8, Clause 3. See e.g. Roth, *Freier Warenverkehr und Staatliche Regelungsgewalt in einem Gemeinsamen Markt*, (Beck, 1977) and, more recently, Barnard, "Restricting restrictions: lessons for the EU from the US?", 68 CLJ (2009), 575 for comparative studies.

85. *Cooley* v. *Board of Wardens* 53 US (12 How) 299 (1851).

86. *Smith* v. *Alabama* 124 US 465 (1888), 482.

87. Tribe, *American Constitutional Law, Vol 1*, 3rd ed. (Foundation Press, 2000), pp. 1046–1049.

88. *Di Santo* v. *Pennsylvania* 273 US 34 (1927).

89. Ibid., 44.

90. Dowling, "Interstate commerce and state power", 27 Virginia L. Rev. (1940), 1.

earlier case law in *Southern Pacific*,[91] abandoning the language of directness and indirectness. The US debate has not by any means been settled, with process-based[92] and anti-protectionist theories[93] of the negative Commerce Clause continuing to vie for supremacy, but it seems that the distinction between direct and indirect burdens has been buried for good.

Most recently, the notion of market access has featured in the case law of the European Court of Justice on use restrictions under free movement of goods, as well as in the field of establishment and services in respect of business methods. In these cases the Court seems to have finally embraced the idea of a substantial hindrance, as proposed by Advocate General Jacobs. As regards goods, the issue surfaced in *Commission* v. *Italy* (*trailers*),[94] where Advocate General Léger argued that the national rules, which prohibited the towing of trailers by motorcycles, amounted to a restriction, as they limited the use of trailers in Italy and consequently reduced opportunities for trade. Two months later the same issue was considered by Advocate General Kokott in *Mickelsson and Roos*,[95] a case that concerned Swedish restrictions on areas where jet skis could be used. She submitted by contrast that use restrictions ought to be treated analogously to rules regulating selling arrangements. In other words, only a differential impact on market access or the prevention of market access should be caught by Article 34 TFEU (ex 28 EC). Following the transfer of the *Commission* v. *Italy* (*trailers*) to the Grand Chamber, a second Opinion was delivered by Advocate General Bot, who argued for a general approach based on market access and suggested that the Italian rules fell foul of this test.

The Court decided in *Commission* v. *Italy* (*trailers*) that there was indeed a restriction, although it could be justified by reasons of road safety. It stated that in addition to the principles of non-discrimination and mutual recognition, Article 34 TFEU reflects the obligation to respect the principle of ensuring free access of Union products to national markets. As a result, three types of rules are prohibited: those that discriminate, those that impose product requirements on imports, and those that hinder market access. When applying this to the facts of the case, the Court chose to focus on the effects of the rules on trailers, as motorcycles could easily be used without them. It further

91. *Southern Pacific Co* v. *Arizona* 325 US 761 (1945), which concerned transportation. The subsequent case law has clarified that the distinction has been abandoned more generally; see e.g. *Pike* v. *Bruce Church, Inc.* 397 US 137 (1970).

92. See e.g. Tribe, op. cit. *supra* note 87, pp. 1051–1057.

93. See e.g. Regan, "The Supreme Court and state protectionism: Making sense of the Dormant Commerce Clause", 84 Michigan L. Rev. (1986), 1091.

94. *Commission* v. *Italy*, cited *supra* note 1.

95. Opinion of the A.G. in *Mickelsson and Roos*, cited *supra* note 2. See Oliver and Enchelmaier, "Free movement of goods: Recent developments in the case law", 44 CML Rev. (2007), 678–679 for trenchant criticism.

distinguished between two types of trailers, those specifically designed for motorcycles and others. As regards the latter category, the Court held that the Commission had failed to establish a hindrance to market access. However, the market access of trailers specifically designed to be towed by motorcycles was affected. The Court noted that while they could in certain circumstances be towed by other vehicles, such use remained insignificant or even hypothetical. As a result, the consumer demand for such trailers did not exist in Italy and their importation to the market was hindered. Unsurprisingly, the Second Chamber adopted the same market access approach in *Mickelsson and Roos*.[96] It noted the argument that the Swedish rules on the areas where jet skis could be used left only marginal opportunities for their use. It stated that depending on its scope, a national use restriction may have a considerable influence on the behaviour of consumers and, consequently, market access. A national rule that greatly restricts the use of jet skis, a matter for the referring national court to decide, hinders the access to the market and therefore *prima facie* violates Article 34 TFEU.

The ruling in *Commission* v. *Italy* (*trailers*) gives the notion of market access a key role in the application of Article 34 TFEU. Free access is described as one of the three principles of free movement of goods. Outside the established categories of product requirements and rules relating to selling arrangements, which continue to be governed by *Cassis de Dijon*[97] and *Keck*[98] given the express quotation of these cases, and as confirmed by *LIBRO*,[99] the decisive question is whether there is a hindrance of market access. Unfortunately this introduces a contradiction into the law of Article 34 TFEU. Rules concerning selling arrangements are only prohibited if they *prevent* market access or have a *differential impact* on market access to the detriment of imports. By contrast, use restrictions are already caught if they *hinder* market access. The Grand Chamber does not explain this difference in terminology. There is also a tension with the case law on Article 35 TFEU (ex 29 EC) on export restrictions. This provision has always been interpreted more narrowly than Article 34 TFEU,[100] and in *Gysbrechts*[101] some two months before the ruling in *Commission*

96. *Mickelsson and Roos*, cited *supra* note 2. See generally case note by Horsley in 46 CML Rev. (2009), 2001–2019.

97. *Cassis de Dijon*, cited *supra* note 72.

98. *Keck*, cited *supra* note 1.

99. Case C-531/07, *LIBRO*, judgment of 30 April 2009, nyr, para 17. A.G. Bot stated in *Commission* v. *Italy* (*trailers*), cited *supra* note 1, para 85 that it was not appropriate at the present time to depart from the *Keck* case law, although he later, at para 109, argued for a general criterion of market access that would apply for all types of rules, including those concerning selling arrangements.

100. *Groenveld*, cited *supra* note 77.

101. *Gysbrechts*, cited *supra* note 76.

v. *Italy* (*trailers*) the Grand Chamber of the Court rejected a call by Advocate General Trstenjak for a market access approach, instead analysing the national rule in issue against a discrimination framework.

In the field of establishment and services, market access emerged in another infringement action against Italy,[102] this time in respect of motor insurance. The relevant Italian rules imposed an obligation to contract on all insurance companies offering third-party liability motor insurance in Italy. Such companies were required to provide insurance to any potential customer, under terms and rates the company had to publish in advance. Further, there were some limitations on the freedom of the companies to set their premiums, and heavy penalties could be imposed if the rules were breached or circumvented. The Commission argued that the obligation to contract discouraged companies from other Member States and thus impaired their access to the market. The Grand Chamber of the Court, following Advocate General Mazák, agreed. It noted that the formal right of access to the Italian market was not impaired, as the rules did not affect the administrative authorizations necessary to take up insurance activity. However, there was a substantial interference in the freedom to contract. In the view of the Court, this affected market access, in particular as there were also requirements to moderate premium rates. In terms of organization and investment, significant additional costs might be imposed on a foreign insurance company and a re-think of its business strategy could be required. While the Court did not explain this finding in more detail, the Advocate General and the Commission had referred to small companies that would have to expand their operations dramatically to cope with the obligation to contract and to niche operators that would now need to be prepared to serve a much wider market. Consequently, the Court stated: "Inasmuch as it involves changes and costs on such a scale for those undertakings, the obligation to contract renders access to the Italian market less attractive and, if they obtain access to that market, reduces the ability of the undertakings concerned to compete effectively, from the outset, against undertakings traditionally established in Italy".[103] Therefore, the existence of an obstacle had been established.

In the two *Commission* v. *Italy* rulings and in *Mickelsson and Roos* the Court demonstrates again the critical role the notion of market access plays in its reasoning. The Court does not define the term, but clear hints as to its meaning may be gleaned from the judgments. First, market access can be hindered by a rule that influences the behaviour of consumers or makes entry to a market less attractive. This means that the hindrance does not have to be direct, but

102. Case C-518/06, *Commission* v. *Italy* (*motor insurance*), judgment of 28 April 2009, nyr.
103. Ibid., para 70.

can be felt for example through a reduction in demand.[104] Secondly, the decisive question seems to be the magnitude of the impact.[105] In *Commission* v. *Italy* (*trailers*) the access of trailers specifically designed for motorcycles was hindered, due to consumers having practically no interest in buying such a trailer when its designated use was prohibited. By contrast, the effect on the market access of motorcycles did not need to be analysed at all and a hindrance on the market access of other trailers had not been demonstrated. In both situations, the reason seems to be that the effect of the measure was insignificant. The assumption was that few motorcycles are bought specifically to tow trailers and few trailers that are suitable for all vehicles are acquired for use with motorbikes. The impact on demand was very limited. In line with this, the Court in *Mickelsson and Roos* talked about the "scope" of the use restriction and perceived a restriction arising if the use is "greatly" restricted,[106] while in *Commission* v. *Italy* (*motor insurance*) it explicitly referred to a "substantial interference in the freedom to contract", to "significant additional costs", "considerable" expansion required, and the "scale" of changes and costs.[107]

The analysis of the Court seems to correspond closely to the *de minimis* test suggested by Advocate General Jacobs in *Leclerc-Siplec*.[108] Unfortunately, this is at odds with a large number of judgments, some of them very recent, where the Court has expressly stated that even minor restrictions are prohibited and that the effects of a measure do not need to be appreciable.[109] For example, the Grand Chamber in 2004 rejected in *Commission* v. *Germany* and *Radlberger Getränkegesellschaft* any suggestion that the slight effect of the rules or the availability of other ways of marketing the products could remove the measures from the ambit of Article 34 TFEU,[110] and in *Government of the French Community and Walloon Government*[111] in 2008 it repeated this in the context of free movement of persons.[112]

104. Similarly A.G. Kokott in *Mickelsson and Roos*, cited *supra* note 2, para 53. However, in *Keck*, cited *supra* note 1, para 13, the Court found that an even-handed reduction in the volume of sales would not violate Art. 34 TFEU.

105. See also Case C-265/06, *Commission* v. *Portugal*, [2008] ECR I-2245, paras. 33–35.

106. *Mickelsson and Roos*, cited *supra* note 2, paras. 26 and 28.

107. *Commission* v. *Italy* (*motor insurance*), cited *supra* note 102, paras. 66, 68, 69, and 70.

108. *Leclerc-Siplec*, cited *supra* note 2. See also the repeated references to "serious inconvenience" in Case C-353/06, *Grunkin-Paul*, [2008] ECR I-7639, paras. 22–29.

109. A.G. Bot argued somewhat contradictorily at para 113 that the Court should "examine the extent of the obstacle", but then at para 116 that a breach of Art. 34 TFEU does not depend on the "magnitude of the effects".

110. Case C-463/01, *Commission* v. *Germany*, [2004] ECR I-11705, para 63; and Case C-309/02, *Radlberger Getränkegesellschaft*, [2004] ECR I-11763, para 68.

111. Case C-212/06, *Government of the French Community and Walloon Government* v. *Flemish Government*, [2008] ECR I-1683, para 52.

112. However, in Case C-500/06, *Corporación Dermoestética* v. *To Me Group Advertising Media*, [2008] ECR I-5785, para 33, the Second Chamber, following A.G. Bot, reasoned that an

Further, even if one were in full agreement with Advocate General Jacobs on the nature of the internal market and the respective roles of national legislatures and the Court, there are practical problems in the application of a test that hinges on the significance of an obstacle.[113] The assessment of whether a measure creates a substantial restriction on market access will either have to be based on quantitative data that will be difficult for the litigants to produce or become a highly intuitive exercise lacking in predictability. Additionally, as a matter of logic, a particular measure may be illegal in one country but not in another, for one type of product but not for another, and during a certain period but not during another. Take the example of a ban on newspaper advertising of a specific product. How significant an effect such a ban has on imports depends on factors such as the circulation of newspapers in the country, the importance of printed media *vis-à-vis* television and radio, the development of internet advertising and broadband penetration, and so on. As a result, each case needs to be decided individually on its own merits by national courts, the pronouncements of the European Court have limited value as precedents, and the cause of legal certainty is unlikely to be furthered.[114]

The problems can be seen most clearly in the context of goods.[115] For example, in the most notorious of pre-*Keck* cases, *Torfaen*, the national court found that the Sunday trading ban in issue reduced sales by approximately 10 percent.[116] Would a reduction of this magnitude amount to a hindrance to market access now?[117] If not, how large does the reduction need to be? Also, why does it matter whether the rule regulates use or selling arrangements? Moreover, there are likely to be a large number of instances where national measures can be characterized as use restrictions. In particular, the regulation of manufacturing can be seen in this light.[118] For example, a rule that horsemeat cannot

Italian law prohibiting the advertising of medical services in national television amounted to a restriction on Art. 49 TFEU (ex 43 EC), as it constituted a "serious obstacle" and was therefore "liable to make it more difficult … to gain access to the Italian market". The Second Chamber's focus on the significance of the obstacle may be contrasted with the ruling of the Fourth Chamber in Case C-141/07, *Commission* v. *Germany*, [2008] ECR I-6935, para 43 some months later which rejected the suggestion that a hindrance to free movement of goods must be appreciable for Art. 34 TFEU to be infringed.

113. Gormley, "Two years after *Keck*", 19 Fordham Intl L.J. (1996), 882–883.

114. See on pre-*Keck* problems e.g. Arnull, "What shall we do on Sunday", 16 EL Rev. (1991), 112.

115. *Contra*: Prete, "Of motorcycle trailers and personal watercrafts: The battle over *Keck*", 35 LIEI (2008), 155.

116. *Torfaen*, cited *supra* note 62, para 7.

117. A.G. Bot argued at para 117 that the obstacle does not need to be actual or significant but must at least be possible. At first sight, a 10% reduction would seem to fulfil this criterion.

118. See White, "In search of limits to Article 30 of the EEC Treaty", 26 CML Rev. (1989), 253–255. He argued that use restrictions should fall outside the scope of Art. 34 TFEU.

be used in the production of sausages can now be cast as an import restriction of horsemeat.[119] Indeed, there are a number of cases where such arguments have been made, with varying success. For instance, the Court held in *Toolex Alpha* that a general ban on the industrial use of a particular chemical product, trichloroethylene, fell within the scope of Article 34 TFEU as it reduced the volume of imports.[120] By contrast, in *Forest* a milling quota limiting the quantity of wheat that a producer could use and in *Nertsvoederfabriek Nederland* a rule that allowed only the four licensed rendering plants to use poultry offal were not deemed to amount to import restrictions on wheat or poultry offal.[121] Unfortunately, allowing these kinds of challenges to national production rules contradicts the basic starting point of *Cassis de Dijon* that in the absence of common rules it is for the Member States to regulate all matters relating to the production on their own territory, but such products must be mutually recognized by other countries.[122]

Ultimately, the Grand Chamber rulings in the two infringement actions against Italy in early 2009 are a clear signal the Court sees market access as the key notion in its free movement jurisprudence.[123] This statement of intent is particularly apparent given that it was not actually necessary for the Court to take an expansive view of the reach of Articles 34, 49, and 56 TFEU (ex 28, 43, and 49 EC) to decide the cases on their facts. In both rulings the Court in the end found for the defendant Member State at the justification stage, despite strong urgings to the contrary by the Advocates General. The wide approach to the scope of free movement rules did not ultimately have any impact on the outcome of the cases.

7. No effect on market access

In addition to the cases where an impediment to market access has been found, there have been decisions where the Court has explicitly stated that the measure under scrutiny does not impact on market access at all. Of particular importance is the judgment of the Full Court in *Graf*.[124] The case concerned an Austrian

119. Compare *Groenveld*, cited *supra* note 77.

120. Case C-473/98, *Toolex Alpha*, [2000] ECR I-5681.

121. Case 148/85, *Forest*, [1986] ECR 3449; and Case 118/86, *Nertsvoederfabriek Nederland*, [1987] ECR 3883.

122. White, op. cit. *supra* note 118, 254.

123. *Commission* v. *Italy (trailers)*, cited *supra* note 1; *Commission* v. *Italy* (*motor insurance*), cited *supra* note 102.

124. *Graf*, cited *supra* note 1. It should be noted that, strictly speaking, the case concerned market exit, although the Court reasoned in terms of access. The issues are best seen as two sides of the same coin, and the criticism directed towards market access applies, *mutatis mutandis*,

rule that provided an employee with compensation on termination of employment, unless the employee himself gave notice or was otherwise responsible for dismissal. It was argued that this amounted to an obstacle under Article 45 TFEU (ex 39 EC), as the rule could deter workers such as Mr Graf, who had moved from Austria to Germany, from exercising their rights. The Court held that the Austrian law did not breach the free movement of workers. It stated that:

> "in order to be capable of constituting such an obstacle, [the measure] must affect access of workers to the labour market … Legislation of the kind at issue in the main proceedings is not such as to preclude or deter a worker from ending his contract of employment in order to take a job with another employer, because the entitlement to compensation on termination of employment is not dependent on the worker's choosing whether or not to stay with his current employer but on a future and hypothetical event, namely the subsequent termination of his contract without such termination being at his own initiative or attributable to him … Such an event is too uncertain and indirect a possibility for legislation to be capable of being regarded as liable to hinder freedom of movement for workers".[125]

The judgment seemed to establish two things. First, national measures would only fall foul of Article 45 TFEU if they affect market access. Secondly, market access would not be affected in the case of rules whose impact is too uncertain and indirect. The second point connected the ruling to *Alpine Investments*,[126] where the directness of the impact had been decisive.[127] It also evoked the long-standing case law where the remoteness of the measure had resulted in the Court finding no breach of the free movement rules.[128] Thus, *Graf* offered a promise of some consistency in the case law.

The consistency was not to last. First, in *Deliège* the Full Court less than three months later found that there was no restriction, despite the fact that market access seemed to be affected. The case concerned Ms Deliège, a highly successful Belgian judoka, who had not been selected to various international tournaments by the Belgian judo federations, due to her "attitude problems". According to the rules of the European Judo Union, the national federations

equally to a market exit approach, such as that set out by A.G. Trstenjak in *Gysbrechts*, cited *supra* note 76.

125. *Graf*, cited *supra* note 1, paras. 23–25.

126. *Alpine Investments*, cited *supra* note 1.

127. However, the test of remoteness is conceptually different from the *de minimis* test, as stated explicitly by the Court in *Yves Rocher*, cited *supra* note 74, para 21. For discussion, see Oliver, "Some further reflections on the scope of Articles 28–30 (ex 30–36) EC", 36 CML Rev. (1999), 789.

128. See e.g. Case C-69/88, *Krantz*, [1990] ECR I-583.

could nominate one or two judokas per weight category and only those judokas could participate in the competitions. As stated by Advocate General Cosmas, the rules "do not relate merely to the way in which a service is organized, but are concerned directly with the question of access to that service. Both the rule concerning one (or two) sportsmen or sportswomen per category and the principle that participants in certain international competitions should be selected by the national federations alone apply directly to access for high-level non-amateur athletes, such as Ms Deliège, to the market in services in other Member States."[129] By contrast, the Court asserted without any reasoning that the rules "do not determine the conditions governing access to the labour market",[130] and proceeded to hold that there was no restriction, due to the limitations imposed by the selection rules being inherent in the conduct of high-level international sports events. The Court's statement on market access is deeply unconvincing.[131] There was nothing uncertain or indirect about the impact of the selection rules. They directly prevented athletes such as Ms Deliège from offering their services to tournament organizers established abroad and substantially diminished their ability to provide publicity for any sponsors. Further, two days after the delivery of the ruling in *Deliège*, the Sixth Chamber stated in *Lehtonen*, which had to do with basketball transfer deadlines that prevented a team from fielding certain players during the playoffs, that "a rule which restricts [the] participation [of players in matches] obviously also restricts the chances of employment of the player concerned",[132] and therefore constituted an obstacle to free movement of workers. It is difficult to see the difference, in market access terms, between the rules stopping Ms Deliège from competing in judo tournaments and those restricting the ability of Mr Lehtonen to play in playoffs.[133]

Secondly, the Court has persisted in finding restrictions on free movement even in the absence of any perceptible effects on market access, contrary to its assertion in *Graf* that such an impact is a necessary condition for a breach of free movement provisions. The most notorious of these cases is *Carpenter*, where the Full Court ruled that the deportation of the wife of a service provider by his State of establishment would amount to a restriction, due to the

129. Ibid., para 66 of the Opinion.

130. Ibid., para 61 of the judgment.

131. Van den Bogaert, "The Court of Justice on the Tatami: Ippon, Waza-Ari or Koka?", 25 EL Rev. (2000), 560–561.

132. *Lehtonen*, cited *supra* note 32, para 50. Indeed Spaventa, "The outer limit of the Treaty free movement provisions: Some reflections on the significance of *Keck*, remoteness and *Deliège*" in Barnard and Odudu (Eds.), *The Outer Limits of European Union Law* (Hart Publishing, 2009), pp. 266–270 notes that the *Deliège* exception has not been applied again, but interestingly argues that it might provide a way for understanding the tax rulings of the Court.

133. Spaventa, *Free Movement of Persons in the European Union* (Kluwer, 2007), p. 68.

detrimental effect "to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom."[134] The Court did not even mention market access in its judgment, and on the facts it would have been very difficult to argue that the expulsion of the wife of a service provider by the home State affected his access to the service markets abroad.[135]

Carpenter is the most extreme example of the Court ignoring the market access criterion when finding a restriction, but by no means the only one.[136] The Court made equally far-reaching statements in *Commission* v. *Netherlands*[137] in relation to golden shares held by the Dutch Government which allowed it to veto certain critical decisions, such as significant investments and mergers. In particular, the Court held that the golden shares "may have a deterrent effect on portfolio investments … A possible refusal by the Netherlands State to approve an important decision, proposed by the organs of the company concerned as being in the company's interests, would be capable of depressing the (stock market) value of the shares of that company and thus reduces the attractiveness of an investment in such shares."[138] Again the concept of market access was not referred to,[139] and the scope of Article 63 TFEU (ex 56 EC) was extended significantly, with the Court indicating that measures which may reduce the stock market value of a company amount to restrictions. Taken at face value, this would open most national rules to challenge under Article 63 TFEU, as any interference with economic freedom is likely to depress the share prices in some companies.

The same pattern can be observed in *Government of the French Community and Walloon Government*.[140] The case concerned a compulsory care insurance scheme established by the Flemish Community, which covered anybody working and residing in the Dutch-speaking region of Belgium, as well as workers and self-employed persons living in other Member States. However, the residents of the other parts of Belgium could not join the scheme, regardless of their nationality, even if they did work in the Dutch-speaking region. The Grand

134. Case C-60/00, *Carpenter*, [2002] ECR I-6279, para 39.

135. For criticism, see e.g. Editorial Comments, "Freedoms unlimited? Reflections on Mary Carpenter v. Secretary of State", 40 CML Rev. (2003), 537 and Toner, op. cit. *supra* note 63, 289–292.

136. See also e.g. the treatment of free movement of services in *Gourmet*, cited *supra* note 1, and Case C-213/04, *Burtscher* v. *Stauderer*, [2005] ECR I-10309 where a non-discriminatory registration formality was condemned as a restriction on the free movement of capital.

137. Joined Cases C-282-283/04, *Commission* v. *Netherlands*, [2006] ECR I-9141.

138. Ibid., para 27.

139. Although the Court did briefly dismiss the argument that the restrictive effects were too uncertain or indirect at paras. 29–30. A.G. Poiares Maduro mentioned the notion at para 24 of his Opinion.

140. *Government of the French Community and Walloon Government*, cited *supra* note 111.

Chamber of the Court, following Advocate General Sharpston, ruled that the residence requirement amounted to a restriction on free movement rights. It held that migrant workers and self-employed persons could be dissuaded from moving to Belgium by the fact that they would only be entitled to participate in the care insurance scheme if they chose to live in a certain part of the country. The restrictive effect, continued the Court, was not too indirect and uncertain, and the fact that the impact could well be marginal was simply irrelevant, as even minor restrictions were prohibited. Again, the Court failed to employ the notion of market access, instead using terms such as "dissuade".[141] Again, the scope of Articles 45 and 49 TFEU (ex 39 and 43 EC) was interpreted very widely. A migrant worker would have been covered by the scheme if he or she had commuted from another Member State or had moved to the Dutch-speaking region of Belgium. Only if the migrant worker chose to live in another region but work in the Dutch-speaking one was there any impact. The scheme did not just confer benefits but also involved compulsory contributions, so many might have seen it as a disadvantage rather than an advantage. Consequently, it can be questioned whether anybody's access to the labour market in the Dutch-speaking regions of Belgium would really be affected by the non-eligibility of the scheme to the residents of the other regions of the country.[142] Further, nothing in the reasoning suggests that the judgment is limited to regional measures.[143] Presumably local authorities will similarly be called to justify themselves if they reserve any benefits or services solely to residents and frontier workers and have not thought to include the category of migrant workers residing in the other municipalities of the same country.

Metock provides further evidence of the same trend, in particular when compared with the earlier judgment in *Akrich*.[144] In both cases the Court considered whether a non-EU national spouse of a Union citizen working in another Member State had the right to reside in the host State if he or she had not previously been lawfully resident in the home State of the worker. In *Akrich* the

141. Ibid., para 48.

142. It is interesting to compare the judgment with Case C-387/01, *Weigel*, [2004] ECR I-4981, para 55 concerning an Austrian car registration tax, where the Court held that while the tax was likely to have a negative bearing on the decision of migrant workers to exercise their right to freedom of movement, "the Treaty offers no guarantee to a worker that transferring his activities to a Member State other than the one in which he previously resided will be neutral as regards taxation. Given the disparities in the legislation of the Member States in this area, such a transfer may be to the worker's advantage in terms of indirect taxation or not, according to circumstance."

143. It should also be noted that the Court is more respectful of regional autonomy in its State aid jurisprudence. See e.g. Joined Cases C-428-434/06, *UGT Rioja*, [2008] ECR I-6747.

144. Case C-109/01, *Akrich*, [2003] ECR I-9607 and Case C-127/08, *Metock*, [2008] ECR I-6241, which explicitly overruled the previous judgment.

Full Court reasoned that there was no "less favourable treatment".[145] The spouse had no residence right in the home State. Therefore, the lack of residence right in the host State could not act as deterrence to the exercise of free movement rights. The move to a different country in no way worsened the legal position of the worker.[146] By contrast, five years later in *Metock* the Grand Chamber came to the exactly opposite conclusion, stating that "[t]he refusal of the host Member State to grant rights of entry and residence to the family members of a Union citizen is such as to discourage that citizen from moving or residing in that Member State, even if his family members are not already lawfully resident in the territory of another Member State",[147] but without providing any reasons to support this assertion.[148] Again, the term market access did not feature in the ruling.

Altogether, cases such as *Carpenter*, C*ommission* v. *Netherlands*, *Government of the French Community and Walloon Government* and *Metock* create a certain sense of *déjà vu*. Just like in the field of goods prior to *Keck*, the Court adopts a very wide view of the scope of the free movement provisions, tackling rules that are capable of impeding or dissuading free movers or making the exercise of free movement rights less attractive.[149] The main limit to the test seems to be that purely hypothetical restrictions are not caught, just like with Article 34 TFEU (ex 28 EC) in the 1980s, when the Court on occasion, and rather unpredictably,[150] found that the impact of a particular measure was too uncertain and indirect to violate Article 34 TFEU.[151] The term market access is not mentioned and does not seem to have any particular influence on these judgments.[152] It might of course be countered that market access boils down to the examination of whether the effect of a rule is too indirect and uncertain. If so, the notion adds nothing to the pre-*Keck* case law where remoteness was also recognized[153] and which the Court deemed in need of an overhaul.[154]

145. *Akrich*, cited *supra* note 144, para 53. See also the Opinion of A.G. Geelhoed, para 133.

146. See also the Opinion of A.G. Geelhoed in Case C-1/05, *Jia* v. *Migrationsverket*, [2007] ECR I-1, paras. 69–71 and 90.

147. *Metock*, cited *supra* note 144, para 64.

148. Costello, "*Metock*: free movement and "normal family life" in the Union", 46 CML Rev. (2009), 604 notes that the "scope of the citizenship provisions becomes limitless."

149. See generally also Deakin, "Regulatory competition after *Laval*", 10 CYELS (2007–8), 606–608.

150. See e.g. the scathing criticism in Gormley, "'Actually or potentially, directly or indirectly'? Obstacles to the free movement of goods", 9 YEL (1989), 198–200.

151. See e.g. *Krantz*, cited *supra* note 128.

152. See also generally Gilliaux, "Les entraves à la libre circulation des personnes", 44 CDE (2008), 418.

153. See Spaventa, op. cit. *supra* note 132, pp. 262–264 on the relationship between *Keck* and remoteness.

154. See also Edward and Nic Shuibhne, "Continuity and change in the law relating to services" in Arnull, Eeckhout, and Tridimas (Eds.), *Continuity and Change in EU Law: Essays in*

Finally, it should be noted that the Court does not necessarily mention market access when it declines to find a restriction, either. In *Viacom Outdoor*[155] in issue was the legality of an Italian municipal advertising tax. Viacom Outdoor, an Italian company, had paid some €200 in tax while providing advertising services and now sought reimbursement from its French client, who countered by claiming that the tax violated Article 56 TFEU (ex 49 EC). Neither the Court nor Advocate General Kokott mentioned market access. Instead, the Court ruled that the tax was indistinctly applicable and modest, and therefore did not constitute an obstacle. In another tax case, *Mobistar*, the Court found that a Belgian tax on mobile telecommunications infrastructure did not infringe the free movement of services, stating that "measures, the only effect of which is to create additional costs in respect of the service in question and which affect in the same way the provision of services between Member States and that within one Member State, do not fall within the scope of Article [56 TFEU]."[156] Again the term market access did not feature, despite the fact that there was nothing uncertain about the effects of the Belgian tax rule, as the amounts involved were significant[157] and quantifiable in precise monetary terms. Moreover, the Union legislature has chosen not to refer to market access when defining the outer limits of the Services Directive.[158] Instead, Recital 9 states that the Directive "does not apply to requirements, such as road traffic rules, rules concerning the development or use of land, town and country planning, building standards as well as administrative penalties imposed for non-compliance with such rules which do not specifically regulate or specifically affect the service activity but have to be respected by providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity."[159]

Honour of Sir Francis Jacobs (OUP, 2008), p. 257 who warn of the difficulties the concept of remoteness entails and argue that it should be treated as an aspect of the question "is there an obstacle" rather than a self-standing test.

155. Case C-134/03, *Viacom Outdoor*, [2005] ECR I-1167.

156. Joined Cases C-544 & 545/03, *Mobistar*, [2005] ECR I-7723, para 31.

157. See Hatzopoulos and Do, "The case law of the ECJ concerning the free provision of services 2000-2005", 43 CML Rev. (2006), 958.

158. European Parliament and Council Directive 2006/123, cited *supra* note 36.

159. For discussion, see Barnard, "Unravelling the Services Directive", 45 CML Rev. (2008), 336–339 and Snell, "Freedom to provide services in the case law and in the Services Directive: Problems, solutions, and institutions" in Neergaard, Nielsen, and Roseberry (Eds.), *The Services Directive* (DJOF Publishing, 2008), pp. 186–187.

8. The function of market access

To sum up: the Court's case law and the Advocates General often mention the term market access. Unfortunately the precise content of the notion remains elusive and it is not clear what the normative justification for distinguishing formally between access and exercise or direct and indirect effects is. Further, the case law lacks coherence. In some decisions, the Court indicates that the impact on market access is the decisive criterion for the application of free movement provisions, but in others it is prepared to find a restriction or dismiss a case without even mentioning the term. In its most recent rulings, the Court has focused on the magnitude of the effects of national measures, yet it has consistently rejected arguments based on the minor impact of national rules.[160]

It is not surprising that market access has proved difficult to define.[161] When pressed, the notion may collapse into economic freedom.[162] National regulation of economic activity imposes a burden also on cross-border situations. Ultimately the burden is felt through the impact on profitability. If a rule prevents profit-maximizing behaviour that an undertaking wishes to engage in, it reduces the expected profitability of and thus the incentives for entering a market. How serious the impact is depends on the facts, and is independent of the form of the measure, or the stage at which it is applied. For example, a rule regulating the composition of a product or a service may be easy to get around by a cheap modification or because the cost can be passed on to consumers and in practice has an insignificant impact on entry, or it may make entry impossible if consumers are not willing to bear the extra costs. A rule regulating market circumstances may make entry impossible for example by imposing maximum prices that compromise profitability or by limiting the size of the market so severely that it is not worth penetrating, or it may have an entirely trivial effect. Further, a measure that makes entry impossible for one operator may not create any significant difficulties for another. For instance, a rule reducing the volume of sales may render the market insufficiently profitable

160. A further example of incoherent approach to market access is the contrast between the treatment of good and services in Case C-380/03, *Germany* v. *European Parliament and Council*, [2006] ECR I-11573.

161. Borgmann-Prebil, *A Rights Approach to European Constitutionalism and European Citizenship* (PhD Thesis, University of Sussex, 2006), section 2.3 argues that differentiation between measures regulating the exercise of and the access to a profession has not proven easy in the context of Art. 12 of the German Basic Law. See further Jarass and Pieroth, *Grundgesetz für die Bundesrepublik Deutschland*, 6th ed. (Beck, 2002), pp. 336–337.

162. For example, in *Commission* v. *Italy* (*trailers*), cited *supra* note 1, A.G. Bot called for a market access approach, arguing *inter alia* at paras. 85 and 151 that the traditional pattern of analysis established in cases such as *Dassonville*, cited *supra* note 21 above is fully satisfactory. Yet this was rejected in *Keck*, cited *supra* note 1, paras. 14 and 16.

for a large company to contest, while a small firm may not be dissuaded.[163] In other words, all limitations to economic freedom have more or less significant effects on market access, depending ultimately on the impact on profits on the facts. If the law were to prohibit each and every hindrance to market access, it would as a matter of logic have to ban all rules limiting the commercial freedom of traders.[164]

Secondly, it may be argued that the notion of market access also collapses into anti-protectionism. Any measure which reduces the ability of or incentives for new operators to enter a market will protect the position of the established operators. Given the historical starting point of separate national economies, this usually means that domestic actors are sheltered. In other words, all impediments to market access can be seen as discriminatory, and a market access test can be portrayed as a weapon in the fight against protectionism.[165]

As a result, the notion of market access has in practice had several different usages. When Advocate General Poiares Maduro in *Alfa Vita* suggested the use of a market access criterion, he did so to combat discrimination against free movers or free movement.[166] When Advocate General Jacobs and those following in his footsteps referred to market access, they did so to criticize the anti-discrimination approach and to tackle significant burdens on free movement.[167] When the Court employed the notion of a direct impediment to market access, it was the direct impact of the measure that mattered.[168] What is unclear is why the term market access is used at all. If the main concern is discrimination, why not use that term, or another formulation such as "disparate impact" if the concept of discrimination is seen as too loaded or restrictive? If the main concern is substantial or direct obstacles to trade and movement, why not simply use those terms? What does the use of market access language achieve?

Ultimately, the notion of market access conceals rather than clarifies.[169] The very ambiguity of the term may explain its use by and usefulness for the Court. A reference to market access may serve as a response to the critics who argue that the Court should not limit itself to policing discriminatory restrictions. By

163. In *Commission* v. *Italy* (*motor insurance*), cited *supra* note 102, A.G. Mazák discussed the particular difficulties faced by companies operating in niche or specialized markets.

164. See also text to note 30 and Craig and de Búrca, op. cit. *supra* note 33, 694.

165. See also the Opinion of A.G. Poiares Maduro in *Alfa Vita*, cited *supra* note 2, in particular paras. 38, 41, and 45–46.

166. Ibid., in particular paras. 45–46.

167. *Leclerc-Siplec*, cited *supra* note 2, in particular paras. 39–42.

168. *Alpine Investments*, cited *supra* note 1, para 38.

169. Similarly Spaventa, op. cit. *supra* note 133, p. 110. See also Spaventa, "From *Gebhard* to *Carpenter*: Towards a (non-)economic European constitution", 41 CML Rev. (2004), 743 for an earlier version of the same argument.

citing market access, the Court is able to assert that it has not narrowed down the scope of the free movement provisions excessively. Equally, the notion can be put forward to counter any fears of overreach. The Court can provide assurances that it is not going to return to the pre-*Keck* bad old days by claiming that its focus is now firmly on market access. In other words, the reference to market access may allow the Court to avoid difficult choices concerning the reach of the free movement law; it grants it the maximum freedom of manoeuvre. As the term lacks a clear content, the Court may use it freely either to approve or to condemn measures that it happens to like or dislike.[170] Market access may simply provide a sophisticated-sounding garb that conceals decisions based on intuition.[171]

The freedom of manoeuvre is enhanced further by the extreme terseness of the Court's reasoning. For example, in *Commission* v. *UK,*[172] the defendant government argued forcefully that the golden share held by the British Government, which entitled it to veto key decisions and prevented anybody from holding more than 15 precent of the voting shares, did not amount to a restriction on the free movement of capital, as it neither discriminated nor restricted access to the market. Advocate General Ruiz-Jarabo Colomer described the argument as very persuasive,[173] but the Full Court dismissed it by simply stating "that [the rules] affect the position of a person acquiring a shareholding as such and are thus liable to deter investors from other Member States from making such investments and, consequently, affect access to the market."[174] With respect, this statement is cryptic in the extreme and it is difficult to disagree with Enchelmaier who describes it as a "counter-assertion."[175]

The terseness of reasoning and the ambiguous concepts may be expedient, but probably not wise in the long term. Disapplying national rules, in particular laws passed by parliaments, on grounds of free movement should never be seen as a minor matter, but always a decision of constitutional significance. It should not be done on the basis of judicial intuition, but only for convincing reasons. Further, such rulings are increasingly questioned by politicians and

170. Compare the practice of the US Supreme Court on the negative Commerce Clause, where Tribe, op. cit. *supra* note 87, p. 1104 argues in the context of State treatment of out-of-State corporations that "[t]he plainly manipulable and at times anachronistically metaphysical character of [the] doctrines and the dubious consistency of their complex exceptions suggest that the Supreme Court has preserved them with an eye to their discretionary application".

171. See also Davies, op. cit. *supra* note 82, pp. 94–96 and 104.

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

173. Ibid., para 49 of the Opinion.

174. Ibid., para 47 of the judgment.

175. Enchelmaier, "The ECJ's recent case law on the free movement of goods: Movement in all sorts of directions", 26 YEL (2007), 151.

interest groups.[176] The only way to guard against these challenges is through a careful articulation of the reasons underpinning the judgments.[177] Finally, the failure to lay down the reasons for decisions may result in the case law losing its bearings if formulaic statements in previous rulings whose rationale is now lost or contested are applied mechanistically to new situations.[178] It is arguable that this is what happened in the field of goods in the 1980s, with the consequent embarrassing course correction in *Keck*. In this respect the notion of market access is particularly problematic. Because of its ambiguity,[179] it carries a permanent risk of being extended to cover situations that the original proponents of the term may not have envisaged.

9. Conclusion

The notion of market access obscures rather than illuminates. The most fundamental question for free movement law remains whether the law is about discrimination and anti-protectionism, in which case a relative or comparative test based on a perceptible disparate impact is appropriate, or whether it is about economic freedom, in which case an absolute test not involving comparisons is necessary.[180] The notion of market access promises that this stark

176. See e.g. the reaction to Case C-147/03, *Commission* v. *Austria*, [2005] ECR I-5969 in the interview with the Austrian Chancellor Schüssel in the Financial Times, 20 April 2006, 8, and to Case C-341/05, *Laval un Partneri*, [2007] ECR I-11767 in Lundby-Wedin and Monks, "Europe loses when it legitimises low wages", *Financial Times*, 3 March 2008. See generally Editorial Comments, "The Court of Justice in the limelight – again", 45 CML Rev. (2008), 1571.

177. See Snell, "Free movement of services and the Services Directive: The legitimacy of the case law" in Van de Gronden (Ed.), *The EU and WTO Law on Services* (Kluwer, 2009), pp. 51–54 for a fuller exposition of this argument.

178. See also Azoulai, "The Court of Justice and the social market economy: The emergence of an ideal and the conditions for its realization", 45 CML Rev. (2008), 1339–1340 who talks of a "collage effect".

179. See also Spaventa, op. cit. *supra* note 132 above 270 who writes that "when the [free movement] cases are closely scrutinized one might be excused for feeling a slight desperation as to the chaotic picture arising from the Court's jurisprudence". The European Court of Justice is not alone. In the context of the negative Commerce Clause jurisprudence of the US Supreme Court, Justice Scalia scathingly refers to "various tests from our wardrobe of ever-changing negative Commerce Clause fashions" in *American Trucking Associations, Inc* v. *Michigan Public Service Commission* 545 US 429 (2005), Justice Thomas describes the negative Commerce Clause as "virtually unworkable in application" in *Camps Newfound/Owatonna, Inc* v. *Town of Harrison* 520 US 564 (1997), while Tribe, op. cit. *supra* note 87, p. 1102 writes that the approach "often appears to turn more on *ad hoc* reactions to particular cases than on any consistent application of coherent principles."

180. See Poiares Maduro, *We The Court: The European Court of Justice and the European Economic Constitution* (Hart Publishing, 1998), pp. 58–60. Koutrakos, "On groceries, alcohol

choice does not have to be made. It envisages a third way between anti-protectionism and economic freedom.[181] Yet the more than fifteen years of case law following the ruling in *Keck*[182] has failed to clarify where exactly this middle ground between the right not to be discriminated against and the right not to be subjected to unjustified regulation lies.[183] Currently, the Court's analysis in the main seems to focus on the significance of the impact of the measure, with all the uncertainties this approach entails. At the same time, it denies that rules with an insignificant effect fall outside the scope of the Treaty and employs discrimination analysis for certain categories of measures, such as export restrictions on goods and national tax rules.[184] As a result, the precise meaning of market access remains elusive. It may well be that there is no middle ground. It may be that the notion of market access simply conceals the need to choose between the competing paradigms of free movement law.[185] If so, the term should be abandoned as an unhelpful slogan.[186] Instead we should consider which of the two approaches we wish to adopt and how they should be refined,[187] or indeed whether we should opt for one standard for situations

and olive oil: More on free movement of goods after Keck", 26 EL Rev. (2001), 401–402 suggests that the answer may not be static. Compare in the context of the WTO Howse and Regan, "The product/process distinction – an illusory basis for disciplining "unilateralism" in trade policy", 11 EJIL (2000), 276.

181. See e.g. Weatherill, op. cit. *supra* note 56, 904.

182. *Keck*, cited *supra* note 1.

183. See also Kingreene, "Fundamental freedoms" in von Bogdandy and Bast (Eds.), *Principles of European Constitutional Law* (Hart Publishing, 2006), pp. 570–572 and 577.

184. See Banks, "The application of the fundamental freedoms to Member State tax measures: Guarding against protectionism or second-guessing national policy choices?", 33 EL Rev. (2008), 505–506, Kingston, "A light in the darkness: Recent developments in the ECJ's direct tax jurisprudence", 44 CML Rev. (2007), 1335–1341, and Snell, "Non-discriminatory tax obstacles in Community law", 56 ICLQ (2007), 339.

185. Contra Doukas, op. cit. *supra* note 34, who argues for a comprehensive market access test in particular to bridge the divergences between goods and services, and Straetmans, "Market access, the outer limits of free movement of goods and … the law?" in Bulterman, Hancher, McDonnell and Sevenster (Eds.), *Views of European Law from the Mountain: Liber Amicorum Piet Jan Slot* (Kluwer, 2009), who commends market access for its flexibility.

186. More optimistically, Oliver and Roth, "The internal market and the four freedoms", 41 CML Rev. (2004), 407, at 414 write that "the Court has not yet achieved sufficient clarity as to the circumstances under which market access is held to be impeded. Future case law will have to achieve the necessary legal certainty in this respect." Oliver and Enchelmaier, op. cit. *supra* note 95, 674 describe the barrier to market access criterion as "inherently nebulous" while Spaventa, op. cit. *supra* note 133, p. 89 refers to "a concept in search of a definition" and in note 37, 929 considers it "a rather deceiving term".

187. Even if we in the end decide to opt for one unified approach, we should recognize that the notion of market access cannot possibly serve as a basis for it. The term would introduce an inappropriate distinction into the field of persons, as it cannot be utilized in the context of non-economic free movers relying on Art. 21 TFEU (ex 18 EC), who are not seeking to access any market.

concerned with goods, companies, capital, and cross-border supply of services without physical movement, where subsidiarity-related concerns predominate and another for free movement of natural persons where fundamental rights[188] are in issue.[189]

188. As demonstrated e.g. by Arts. 15(2) and 45 of the Charter of Fundamental Rights, Finland's *Perustuslaki* 731/1999 §9, Germany's *Grundgesetz* Art. 11, Italy's *Costituzione della Repubblica Italiana* Art. 16, Sweden's *Regeringsformen* 1974:152 2:8, Art. 2 of Protocol 4 to ECHR, and Art. 13 of the Universal Declaration of Human Rights.

189. Snell, "And then there were two: Products and citizens in Community law" in Tridimas and Nebbia (Eds.), *European Union Law for the Twenty-first Century: Rethinking the New Legal Order. Vol II* (Hart Publishing, 2004) and Snell, "Who's got the power? Free movement and allocation of competences in EC law", 22 YEL (2003), 323. See also Nic Shuibhne, "The outer limits of EU citizenship: Displacing economic free movement rights?" in Barnard and Odudu (Eds.), *The Outer Limits of European Union Law* (Hart Publishing, 2009), pp. 172–174 and pp. 182–194, Oliver and Roth, op. cit. *supra* note 186, 440–441, the link drawn by Spaventa, op. cit. *supra* note 133, pp. 135–156 between the citizenship discourse and free movement of persons, and the discussion in Edward and Nic Shuibhne, op. cit. *supra* note 154, pp. 247 and 257–258.

COMMON MARKET LAW REVIEW

Subscription information
The institutional subscription prices for 2010 (Volume 47, 6 issues) are: EUR 682.00/USD 965.00/GBP 502.00 (print). This journal is also available online. Online and individual subscription prices are available upon request. Please contact our sales department for further information at +31 172641562 or at sales@kluwerlaw.com.

Payments can be made by bank draft, personal cheque, international money order, or UNESCO coupons.

A half-price subscription to the Common Market Law Review is available for personal subscribers. For details, and to apply for personal subscriptions, please contact the Publishers at the address in Alphen aan den Rijn given below.

Subscription orders should be sent to:

Kluwer Law International
c/o Turpin Distribution Services Ltd
Stratton Business Park
Pegasus Drive
Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
e-mail: sales@kluwerlaw.com

All requests for further information and specimen copies should be addressed to:

Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands
fax: +31 172641515

or to any subscription agent

For advertisement rates apply to Kluwer Law International, Marketing Department, P.O. Box 316, 2400 AH Alphen aan den Rijn, The Netherlands.

Please visit the Common Market Law Review homepage at http://www.kluwerlawonline.com for up-to-date information, tables of contents and to view a FREE online sample copy.

Microfilm and Microfiche editions of this journal are available from University Microfilms International, 300 North Zeeb Road, Ann Arbor, MI 48106, USA.

The Common Market Law Review is indexed/abstracted in Current Contents/Social & Behavioral Sciences; Current Legal Sociology; Data Juridica; European Access; European Legal Journals Index; IBZ-CD-ROM: IBZ-Online; IBZ-lnternational Bibliography of Periodical literature on the Humanities and Social Sciences; Index to Foreign Legal Periodicals; International Political Science Abstracts; The ISI Alerting Services; Legal Journals Index; RAVE; Social Sciences Citation Index; Social Scisearch.