The Influence of the (post) *Keck* Case Law on the Freedom to Provide Services

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A. Introduction

Restrictions of the free movement of goods are prohibited by Art 34 TFEU. Art 56 and Art 57 TFEU provide the same prohibition with regard to the freedom to provide and receive services. Up until now, the case law on restrictions of the free movement of goods has been far more extensive and nuanced, especially with the distinction between "product requirements" and "certain selling arrangements" made in the famous *Keck*-decision. However, with an increasing case load the Court's attention seems to have gradually shifted to Art 56 and Art 57 TFEU.[1]

Even though goods and services are covered by separate Treaty provisions, it has been argued that the restriction of those two market freedoms requires equal treatment because of their substantial similarities and the fact that they are economically often strongly related.[2] This close relation is, for example, visible in the area of advertising. In answering the question of whether a national ban on advertising is restricting, the focus could lie either on the advertised product or on the advertising service.[3] The Court itself has held that, in the field of telecommunications, it is difficult to determine generally whether it is

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[1] See Meulman/de Waele, "A Retreat from *Säger*? Servicing or Fine-Tuning the Application of Article 49 EC", 33(3) LIEI (2006), 207, at 208 f; Hatzopoulos/Do, "The Case Law of the ECJ Concerning the Free Provision of Services: 2000–2005", 43 CML Rev. (2006), 923, at 923 f. The Court decided 40 service cases between 1995-1999 and 140 between 2000-2005.

[2] See the Commission's Guide to the Free Movement of Goods, SEC(2009) 673 final, at p. 47; see also Maduro, "Harmony and Dissonance in Free Movement" in Andenas/Roth (Eds.), *Services and Free Movement in EU Law* (OUP, 2002), p. 41, at p. 67; Spaventa, "From *Gebhard* to *Carpenter*: Towards a (Non-)Economic European Constitution", 41 CML Rev. (2004), 743, at 748.

[3] Compare Vilaça, "On the Application of *Keck* in the Field of Free Provision of Services" in Andenas/Roth (Eds.), *Services and Free Movement in EU Law* (OUP, 2002), p. 25, at pp. 36 ff.

free movement of goods or freedom to provide services which should take priority, because the two aspects are often intimately linked.[4] As A.G. Jacobs pointed out in *Säger*, it is sometimes even difficult to distinguish between goods and services. An educational service could for example be provided by sending books or video-cassettes to a recipient in another Member State. In this situation there are both reasons to deal with this situation under Art 34 TFEU, as well as under Art 56 TFEU.[5] Sometimes a differentiation becomes even more elusive. In situations where only the service itself moves – for example by cable or through the internet – the only difference to the sale of goods is the immaterial nature of the offered service in contrast to the material nature of the good.[6] Because of this close relation between goods and services, a different treatment of restrictions according to the choice of legal basis would seem arbitrary in many cases.

In this paper, I will analyse the relationship between restrictions of the free movement of goods and the freedom to provide services; Is there a uniform restriction approach under Art 34 and Art 56 TFEU, and can the *Keck*-distinction between product requirements and certain selling arrangements be transposed into the field of services? I argue that both restriction-tests are based on the same principles of mutual recognition and non-discrimination. Further, there is no need for a separate principle of market access because market access is the aim of the restriction test rather than an independent restriction

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4 Case C-390/99, *Canal Satélite Digital*, [2002] ECR I-607, para 32.

5 Opinion of A.G. Jacobs in Case C-76/90, *Säger*, [1991] ECR I-4421, paras. 24 ff.

6 Snell/Andenas, "Exploring the Outer Limits: Restrictions on the Free Movement of Goods and Services" in Andenas/Roth (Eds.), *Services and Free Movement in EU Law* (OUP, 2002), p. 69, at p. 79.

criteria. Finally, it will be demonstrated that there is a need for the establishment of the categories of service requirements and arrangements for the provision of services under Art 56 TFEU equivalent to the *Keck*-judgment.

B. Restriction of the Free Movement of Goods

1. Product Requirements and Certain Selling Arrangements

1.1 *Dassonville*

Art 34 TFEU prohibits quantitative restrictions on imports and all measures having equivalent effect. The wording of the provision, especially with regards to equivalently effective measures, is not inherently clear. As a consequence, the Court of Justice was given great discretion in interpreting and defining the scope of application of Art 34 TFEU. The *Dassonville*[7] case in 1974 was the first opportunity the Court took to address the question of what national legislation could, in principle, constitute a measure having equivalent effect. The Court decided to give Art 34 TFEU a very broad meaning and stated that such measures are, "all trading rules enacted by Member States which are capable of hindering directly or indirectly, actually or potentially, intra-[union] trade".[8]

In the important decision *Cassis de Dijon*[9] the Court also established the principle of

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[7] Case 8/74, *Dassonville*, [1974] ECR 837.

[8] Case 8/74, *Dassonville*, [1974] ECR 837, para 5.

[9] Case 120/78, *Cassis de Dijon*, [1979] ECR 649.

mutual recognition.[10] According to this, Member States are prohibited from restricting the sale of goods that have been lawfully produced under the rules of another Member State. The restriction is prohibited even if it results from the application of national regulations that do not distinguish between national and imported products (indistinctly applicable measures). The principle of mutual recognition seeks to prevent putting a double burden on imported products by requiring them to comply with two different sets of rules. If the product complies with the home State rules, any other Member State must in general accept that product on its market.

Controversy arises when the principle of mutual recognition and the principle of home State control are used synonymously.[11] In a broad interpretation mutual recognition is defined as a mechanism of allocation of regulatory competence to the country of origin designed to avoid a dual regulatory burden.[12] Others put the focus on functional parallelism and the created further regulatory space for the host State control through the creation of the mandatory requirements exception.[13] The host State can invoke those

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[10] Recently, as part of the Commission's 2007 "Package on Internal Market for Goods" the Mutual Recognition Regulation has been adopted (Regulation 764/2008, [2008] OJ L218/21). It basically requires a dialogue between the host State and the economic operator whenever the host State has taken or intends to take measures regarding product requirements.

[11] For an overview of the controversy see for example Fichtner, "The Rise and Fall of the Country of Origin Principle in the EU's Services Directive – Uncovering the Principle's Premises and Potential Implications", 54 Essays in Transnational Economic Law (2006), 1, at 12 ff.

[12] See Bernard, "Flexibility in the European Single Market" in Barnard/Scott (Eds.), *Law of the Single European Market* (Oxford, 2002), p. 101, at p. 105.

[13] See for example Weiler, "The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods" in Craig/De Búrca (Eds.), *The Evolution of EU Law* (OUP, 1999), p. 349, at pp. 365 ff; Armstrong, "Mutual Recognition" in Barnard/Scott (Eds.), *Law of the Single European Market* (Oxford, 2002), p. 225, at pp. 235 f; Weatherill, "Pre-emption, Harmonisation

mandatory requirements, also known as public interest requirements, to justify the national rule and thus keep its regulatory power. However one wants to look at it, it is clear from the case law that there is no automatic recognition or unrestricted regulatory power of the home State because it is limited by the acceptance of mandatory requirements and the principle of functional equivalence.[14] Therefore whenever home State control is mentioned, it has to be borne in mind that it is just a general assumption of the allocation of regulatory power which can be rebutted.

As a consequence of the extensive interpretation of Art 34 TFEU by the Court in *Dassonville*, nearly every national regulation could be brought under judicial scrutiny because it potentially constituted a hindrance to trade. While many consider *Dassonville* to be judicial activism beyond acceptable bounds,[15] it must be seen in the context of the action or non-action of other European powers.[16] Before the *Dassonville* decision Member States made little systematic effort to remove non-tariff barriers. The unanimity requirement for Council decisions led to political quasi-inactivity in the 1960s. In response, the Commission issued in 1969 the Directive 70/50[17] which gave measures with

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and the Distribution of Competence to Regulate the Internal Market" in Barnard/Scott (Eds.), *Law of the Single European Market* (Oxford, 2002), p. 41, at pp. 43 ff.

[14] See Barnard, *Substantive Law*, p. 625; for the principle of equivalence see Case 188/84, *Commission* v. *France (woodworking)*, [1986] ECR 419.

[15] To the role of the Court see for example Tridimas, "The Court of Justice and Judicial Activism", 21 EL Rev. (1996), 199.

[16] See Stone Sweet, *The Judicial Construction of Europe* (OUP, 2004), pp. 109 ff.

[17] Directive 70/50/EEC, [1970] OJ L13/29.

equivalent effect an expansive reading and listed 19 types of prohibited rules and practises. All these factors influenced the Court in taking quasi-legislative action, becoming itself the driving force for the building of a common market.[18] The most important consequence of *Dassonville* and following cases was that the Court empowered the main interest group for removing trade barriers, the European traders and producers, to challenge national legislation.[19] Therefore, the pressure was on the Member States to justify legislation contrary to Art 34 TFEU.

1.2 Limitation by *Keck*

The Court's case law constituted a great incentive to move towards a common market, but the breadth of the *Dassonville*-formula turned out to be a double-edged sword. The formula, which did not seem to provide limits to judicial review, was increasingly used as an instrument to attack any national legislation which stood in the way of free trade – like the famous Sunday trading cases show[20] – and this led to an overload of cases. Moreover, national courts clearly signalled their disagreement with the lack of sensible limits and guidelines by simply not applying the formula.[21] Finally, the Court faced heavy criticism

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[18] Stone Sweet, *Judicial Construction*, pp. 133 f; see also Maduro, "Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights", 3(1) ELJ (1997), 55, at 59.

[19] For the direct effect see Case 74/76, *Iannelli & Volpi* v. *Meroni*, [1977] ECR 557.

[20] See Cases C-145/88, *Torfaen*, [1989] ECR 3851 and C-169/91, *Stoke-on-Trent*, [1992] ECR I-6635; for the academic discussion see for example Barnard, "Sunday Trading: A Drama in Five Acts", 57(3) MLR (1994), 449; Micklitz, *The Politics of Judicial Co-operation in the EU* (CUP, 2005), pp. 43 ff.

[21] See Jarvis, *The Application of EC Law by National Courts – The free movement of Goods* (OUP, 1998), pp. 439 ff; Stone Sweet, *Judicial Construction*, p. 140; see to these developments also Maduro in

in academic literature.[22] These developments led to the important *Keck*[23] decision in 1993. In this decision the Court limited the scope of judicial review regarding indistinctly applicable measures by adopting a differentiation suggested by academics.[24] The differentiation was made between product requirements on the one hand, which regulate the composition, packaging or presentation of a product, and certain selling requirements on the other, which only regulate the place, time and manner of selling products. According to the Court, product requirements are always considered to have equivalent effect to a quantitative restriction on trade, because they put a double burden on foreign products which already had to comply with their national requirements.[25] In contrast, certain selling arrangements do not fall within the scope of Art 34 TFEU, provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States. This is because they do not prevent the access of foreign goods to the market or impede the access of foreign goods more than they impede the access of domestic products. With *Keck* the Court moved on from its approach in *Dassonville* and decided that, whereas the producing State is responsible for

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Andenas/Roth, pp. 51 ff.

22 For an overview see Micklitz, *Judicial Co-operation*, pp. 154 ff.

23 Joined Cases C-267 & 268/91, *Keck*, [1993] ECR I-6097, paras. 16 and 17.

24 White, "In the Search of the Limits to Articles 30 of the EEC Treaty", 26 CML Rev. (1989), 235 and Morteknabbs, "Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition", 28 CML Rev. (1991), 115.

25 See for example Maduro, 3(1) ELJ (1997), 59.

rules on product requirements which have to be recognised by the importing State (which had already been decided in *Cassis*), the importing State has in general the sole regulatory competence regarding certain selling arrangements provided that they do not discriminate products from other Member States in law or in fact.[26] With the decisions in *Cassis* and *Keck* and the creation of mandatory requirements, the Court established a complex framework for the split in competence between the home State and the host State.[27]

Even though the *Keck*-decision was much criticised,[28] the court nevertheless continuously applied the established distinction between product requirements and certain selling arrangements in later cases.[29] It ruled, for example, that there was no breach of Art 34 TFEU in cases of time limitations to the sale of goods[30] or the provision that certain products can be sold only by licensed retailers[31]. Nevertheless, if the selling arrangement is either discriminatory (in fact)[32] or capable of imposing a double burden[33], the Court will

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[26] Compare Bernard in Barnard/Scott, p. 105.

[27] Compare Weatherill in Barnard/Scott, p. 43.

[28] See for example Maduro, "Keck: The End? The Beginning of the End? Or Just the End of the Beginning?", 3 IJEL (1994), 30.

[29] See Commission`s Guide to the Free Movement of Goods, SEC(2009) 673 final, at pp. 14 ff.

[30] Joined Cases C-401 & 402/92, *Tankstation 't Heukske*, [1994] ECR I-2199.

[31] Case C-391/92, *Commission* v. *Greece* (*Greek milk*), [1995] ECR I-1621; Case C-387/93, *Banchero*, [1995] ECR I-4663.

[32] For example Cases C-322/01, *DocMorris*, [2003] ECR I-14887 and C-254/98, *TK-Heimdienst*, [2000] ECR I-151.

[33] See Cases C-368/95, *Familiapress*, [1997] ECR I-3689 and C-470/93, *Mars*, [1995] ECR I-1923; to that see Maduro in Andenas/Roth, pp. 55 f.

find a breach of Art 34 TFEU. Although the distinction has its shortcomings, especially because certain measures, such as advertisement regulations, cannot be put in one of the two categories, the Court has continually and successfully applied the *Keck* framework until today.[34]

However, in addition to the distinction between product requirements and certain selling arrangements, the rather elusive notion of "market access" and "market access test" has played a more and more prominent part in the academic discussion and in the Court's case law. Two recent cases – *Commission* v. *Italy* (*trailers*)[35] and *Mickelsson and Roos*[36] – have given again cause to argue that the Court has put the focus back on a purely non-discriminatory market access approach. I will now first analyse the notion of market access and then address the question of whether a market access test fulfils a separate function beside the distinction between product requirements and certain selling arrangements. I contend that the case law on market access can be traced back to the same principles that underlie the *Keck*-case law, being non-discrimination and mutual recognition, and that there is thus no need for a restriction test based on market access.

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[34] Oliver/Enchelmaier, "Free Movement of Goods – Recent Developments in the Case Law", 44 CML Rev. (2007), 649, at 704.

[35] Case C-110/05, *Commission* v. *Italy (trailers)*, [2009] ECR I-519.

[36] Case C-142/05, *Mickelsson and Roos*, [2009] ECR I-4273.

2. Market Access Test

2.1 Notion of Market Access

The notion of market access used in the two recent decisions is not new, but has been used before in different contexts. However, the meaning of market access is far from clear.[37]

(a) Academic Discussion

Market access has been used by several authorities as an element to develop a new restriction test regime.[38] Most prominently, this new test regime is also used to create a unified restriction approach among all four market freedoms.[39] I will only discuss two of those suggestions in this context. In his famous opinion in *Leclerc-Siplec*, A.G. Jacobs has suggested the introduction of a general non-discriminatory market access test as a replacement of the *Keck*-approach. He argued that an obstacle to inter-State trade cannot cease to exist simply because an identical obstacle affects domestic trade. The underlying principle to the market freedoms is that all undertakings should have unfettered access to the whole of the Union market. According to A.G. Jacobs the most obvious solution for an

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[37] See Horsley, "Anyone for Keck?", 46 CML Rev. (2009), 2001, at 2014.

[38] This has been the case to different extents. Compare for example Weatherill, "After *Keck*: Some Thoughts on how to Clarify the Clarification", 33 CML Rev. (1996), 885, at 896 ff; Barnard, "Fitting the Remaining Pieces into the Goods and Persons Jigsaw" 26(1) EL Rev. (2001), 35, at 52 ff; Shuibhne, "The Free Movement of Goods and Article 28 EC: An Evolving Framework", 27(4) EL Rev. (2002), 408, at 413 ff; Prete, "Of Motorcycle Trailers and Personal Watercrafts: the Battle over *Keck*", 35(2) LIEI (2008), 133, at 155; Spaventa, 34 EL Rev. (2009) 923 ff.

[39] See recently Spaventa, 34 EL Rev. (2009) 929.

appropriate restriction test is therefore based on the extent to which a measure hinders trade between Member States by restricting market access. In case of a substantial restriction on that access (*de minimis test*), the measure establishes a restriction in the sense of Art 34 TFEU.[40] In his opinion in *Alfa Vita*[41], A.G. Maduro also referred to market access in trying to define a general harmonised restriction approach on the freedoms of movement. Contrary to A.G. Jacobs, A.G. Maduro focused on the discriminatory element of a measure. In his analysis, he defined three principal criteria found in the case law that identify discrimination against the exercise of freedom of movement and thus establish a restriction. First, any direct or indirect discrimination based on nationality is prohibited. Second, the imposition of supplementary costs on goods in circulation in the Union or on traders carrying out a cross-border activity creates a barrier to trade. However, such costs only constitute a restriction if they do not take into account the particular situation of imported products, i.e. that they already had to comply with the rules of their State of origin. Third, any measure which impedes to a greater extent the access to the market and the putting into circulation of products from other Member States is considered to be a measure having equivalent effect. According to A.G. Maduro, the application of these three criteria appears to be necessary and sufficient to decide, in every case and for all kinds of rules, whether there exists a barrier to trade.

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[40] See Opinion of A.G. Jacobs in Case C-412/93, *Leclerc-Siplec*, [1995] ECR I-179.

[41] Joined Cases C-158 & 159/04, *Alfa Vita Vassilopoulos*, [2006] ECR I-8135.

(b) Part of Keck

In the academic discussion, market access has been used mainly in the context of finding a replacement for *Keck*. However, it should be noted that, initially, the Court used market access as a part of the distinction between product requirements and certain selling arrangements established in *Keck*. The Court reasoned that certain selling arrangements do not restrict the free movement of goods because they do not prevent a*ccess to the market* or impede access of foreign goods any more than the access of domestic products.[42] Hence, the Court used the market access criterion to explain that certain selling arrangements do not fall within the scope of Art 34 TFEU.

Bearing *Keck* and following decisions in mind, the Court seems to do two different things with the notion of market access. On the one hand, the Court often uses the market access criterion to show that a provision is indirectly discriminatory. This is the case if a provision does affect foreign products to a greater extend then national products and therefore does not have the same effect on market access in fact. The discriminatory limb of the *Keck*-test is uncontroversial, even though the actual finding of a discrimination in fact can be a difficult task for the courts. This use of market access can be found for example in *Gourmet International*[43], where the ban on alcohol advertising was found to impede the access to the market of foreign products to a greater extent than for domestic

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[42] Joined Cases C-267 & 268/91, *Keck*, [1993] ECR I-6097, para 17.

[43] Case C-405/98, *Gourmet International*, [2001] ECR I-1795, para 21.

products. Consumers were more likely to buy familiar products and because of the ban on advertising unfamiliar foreign products could not be brought to their attention. In *DocMorris*[44] the sale of medical products by mail order was prohibited. This breached the market access test because it affected pharmacies outside Germany to a greater extent than those inside. In the recent case *Ker-Optika*[45], the Court had to deal with a similar national provision, which authorised the sale of contact lenses only in shops which specialise in the sale of medical devices and consequently prohibited the sale of contact lenses via the Internet. Again, the Court decided that the provision, although a selling arrangement, breached Art 34 TFEU. Even though the Court´s reasoning is not entirely clear, the decision was based on the same decisive factor as *DocMorris*; the provision did affect foreign products to a greater extent, because it deprived the seller from other Member States from a particularly effective means of selling.[46]

On the other hand, the Court uses the market access in the meaning of the second limb of the *Keck*-test: non-discriminatory market prevention. The meaning of market prevention is much more controversial than the discriminatory limb of the test. In *Keck* the Court differentiated between "prevention" of market access and "hindrance" of market access. Whereas "hindrance" of market access only triggers Art 34 TFEU in case of a discrimination between domestic and imported products, "prevention" of market access

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[44] Case C-322/01, *DocMorris*, [2003] ECR I-14887, para 74.

[45] Case C-108/09, *Ker-Optika*, [2010] nyr.

[46] Ibid., paras. 54 and 55.

does not require such discriminatory element but is alone sufficient to constitute a measure having equivalent effect. Therefore, it could be argued, that the Court intentionally used that language of "prevention" to establish that a mere "hindrance" of market access without any discriminatory element does *not* constitute a measure having equivalent effect. Consequently, in the case of a non-discriminatory measure, only "prevention" in the meaning of a ban or a restriction with an equal effect could be considered to fall under Art 34 TFEU. However, in the two recent judgments *Commission* v. *Italy* (*trailers*) and *Mickelsson and Roos* the Court used a market access test in purely non-discriminatory situations. Domestic products were affected by the restrictions on use in the same way as imported products. On the surface the decisions did not concern measures that banned a product but mere use restrictions. Moreover, instead of referring only to the prevention of market access, the court also used the term "hindrance" of market access in relation to non-discriminatory situations.

I will now discuss how these recent developments in the notion of "market access" fit into the established case law, addressing first the specific provisions regarding use restrictions in the two decisions and then the more general question of what implications the use of the term market "hindrance" instead of "prevention" by the Court has.

2.2 Recent Developments – Restrictions on Use

Both judgments dealt with the question of whether a restriction on use constitutes a measure having equivalent effect in the sense of Art 34 TFEU. I argue that these judgments are consistent with the established case law. The restrictions on use provisions constituted restrictions not because of market hindrance, but because they breached the

principle of mutual recognition established in *Cassis*. There was, therefore, no need to refer to a market access/hindrance criterion.

In *Commission* v. *Italy*[47] the use of a certain product namely trailers for motorcycles was prohibited by an Italian rule. In *Mickelsson and Roos*[48] the use of personal watercraft such as jet-skis on waters other than general navigable waterways was forbidden.[49] A.G. Kokott asked the Court to generally exclude restrictions on use from the scope of Art 34 TFEU under the same regime as certain selling arrangements, given that they do not prevent the access to the market or impede access any more than they impede the access of domestic products.[50] In its decisions the Court did not follow A.G. Kokott`s suggestion to give a general ruling on how to treat restrictions on use in the light of free movement restrictions. Instead, the Court argued that the specific restrictions on use in question had a considerable influence on the behaviour of consumers, which affects the *access of that product to the market* of the Member State. Therefore a breach of Art 34 TFEU was found in both cases.

It should be noted that *Keck* could not be directly applied in these cases because the specific facts did not fall within the *Keck*-distinction. They did not concern a situation where the product had already successfully been placed on the market of another Member

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47 Case C-110/05, *Commission* v. *Italy (trailers)*, [2009] ECR I-519.

48 Case C-142/05, *Mickelsson and Roos*, [2009] ECR I-4273.

49 See also Case C-219/07, *Nationale Raad van Dierenkwekers en Liefhebbers VZW*, [2008] ECR I-4475.

50 Opinion of A.G. Kokott in Case C-142/05, *Mickelsson and Roos*, [2009] ECR I-4273, paras. 42 ff.

States and was subject to national selling arrangement rules. Instead, the Italian and Swedish rules prevented the producer from having a real opportunity to put the product on the market of a Member State in the first place. The category of certain selling arrangements is thus not useful in this context.[51]

Instead of using the *Keck*-criteria, I suggest that both cases have to be interpreted in the light of the original meaning of Art 34 TFEU and the *Cassis* principle of mutual recognition. First, the total ban of the sale of a product – or the restriction of its use, which has the same effect – comes much closer to the original meaning of Art 34 TFEU as a quantitative import restriction than many cases concerning product requirements, for example, package requirements. If measures that merely require the adaptation of a product constitute restrictions, then surely measures having the effect of banning the sale of a product must also be regarded as restrictions. According to the *Cassis* principle a Member State has to recognise a product that has been lawfully produced in another Member State. This also means that the Member State is prohibited from banning the sale of such a product or restricting its use in a way that equals a ban. The producing Member State is, in principle, the sole regulator of the lawfulness of a product. This is because the lawfulness belongs to the production stage of a product, as do other regulations about product requirements. This is also true for a restriction on use which equals an economic ban of the sale of the product because, in effect, it also concerns the lawfulness of the

[51] See Case C-110/05, *Commission* v. *Italy (trailers)*, [2009] ECR I-519, paras. 41-42 and Case C-142/05, *Mickelsson and Roos*, [2009] ECR I-4273, paras. 25-27.

product. However, this argument is only valid for the restriction of the main intended use of a product. The prohibition only of a very specific secondary use of the product or the restriction by stricter laws[52] in the host country, for example stricter fire security rules, do not equal an economic ban. The product can still be reasonably used in the other country according to the stricter rules. Regardless of those rules, people will buy the product and therefore market access is not prevented in the sense of the *Keck*-decision.

Thus, it has to be realised that the underlying reason for the recent judgments of the Court is not a new non-discriminatory market access test but the principle of mutual recognition. Prevention of market access in that sense means that a Member State may not prevent the access of products which were lawfully produced in another Member State. This has been recognised by the Court regarding product requirements such as composition or packaging. I contend that the same can be said regarding the lawfulness of the product or the lawfulness of its (main) intended use. Therefore, I suggest that the lawfulness, too, is regarded equally to a product requirement. The aim of the principle of mutual recognition is to avoid a double burden for foreign products. A product should not have to comply with two different sets of rules in two different Member States. In line with this, a product should only have to comply with one set of rules regarding its lawfulness or the lawfulness of its intended use. Therefore if it is lawful in one Member State, this has to be recognised by another Member State and any prohibition of sale or the (main) use of the product has

[52] Which do not require a change of the product itself, because then again this would be considered to be a product requirement in the original meaning and therefore a measure having equivalent effect.

to be justified. In this context the principle of mutual recognition might not be solely explained by the unwanted imposition of a double burden. The ban of the sale of a product does not give rise to additional costs when the producer cannot enter the market of another Member State. The lack of recognition deprives him from having a market at all. There is not even a possibility for him to accept additional costs and alter the product according to the requirements of the foreign market because there is no foreign market. Therefore the principle of mutual recognition cannot, at least in this respect, be based on non-discrimination, because it goes beyond that.

Restrictions on use can have an effect on the placement on the market itself when their economic effect is such that it constitutes a ban on the sale of that product because it cannot be lawfully used (at all or in its main intended way). In my view the principle of mutual recognition only should be used in those cases to establish a breach of Art 34 TFEU. Indeed, the Court itself prominently mentions the principle in *Commission* v. *Italy* (*trailers*).[53] It did not need the additional argument of market access or hindrance.

2.3 Market Hindrance – Return to *Dassonville*?

I have just shown that the principle of mutual recognition governs the specific provisions which had been in question in the two recent judgments. I will now turn to the general statement the Court made in those decisions about what type of measures must be qualified as having an equivalent effect to quantitative restrictions on imports. According

[53] Case C-110/05, *Commission* v. *Italy* (*trailers*), [2009] ECR I-519, paras. 33-35, 58.

to the Court those are: first, measures which treat products coming from other Member States less favourably; second, measures which lay down additional requirements for such goods; and third, any other measure which *hinders market access*.[54]

What is particular about this statement is that the Court altered and possibly expanded the formula originally used in *Keck*. Before, the Court had only referred to the "prevention" of market access in a non-discriminatory situation.[55] Now, the Court stated that also any other measure merely "hindering" market access constitutes a restriction in the sense of Art 34 TFEU.[56]

Because of this new formula, reactions to the two recent decisions have been mixed. It has been argue that the *Keck*-distinction is no longer relevant.[57] The new approach has been both criticised for being too elusive and not providing any restrictive criteria[58] and at the same time welcomed for being able to bring more clarity and transparency[59]. Those who argue the former fear that, with the elusive notion of the market access test, including the wide notion of any hindrance of access, the case law could return to a pre-*Keck* situation.

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[54] Ibid., paras. 35-37.

[55] Joined Cases C-267 & 268/91, *Keck*, [1993] ECR I-6097, para 17.

[56] Without making a reference to discrimination between foreign and domestic products.

[57] Spaventa, 34 EL Rev. (2009) 928 f.

[58] Snell, "The Notion of Market Access: A Concept or Slogan?", 47 CML Rev. (2010), 437, at 467 ff.

[59] Prete, 35(2) LIEI (2008), 155; compare also Straetmans, 39 CML Rev. (2002), 1420, who argues in his case note to *Gourmet International* that a rigorous application of the market access test would not only be in conformity with the philosophy behind *Keck* but would also cut *Keck* down to size.

The use of market hindrance as a definition of a restriction seems to be very close to the original *Dassonville*-formula (which included all trading rules that are capable of hindering directly or indirectly, actually or potentially, intra-(union) trade). Thus, the new category could be used to reopen the flood gates that were closed with *Keck* because every national measure could potentially be seen as to hinder market access.[60] Those who argue the latter welcome the Court's decision as a convergence among all market freedoms to a uniform test which only looks at the potential hindrance to market access..[61]

Did the Court really establish such a far reaching "third" category or a new uniform test based on market hindrance? In my opinion, there are no convincing arguments that the Court had such an intention. The Court used the new formula only in the very specific context of "economic bans". Also, there are no signs that the Court shifted its focus from the general aim of liberalisation of intra-Union trade to a more general approach. I will show that from this, and also from the way the Court uses the term "hinder", it becomes clear that free unhindered market access is not a separate principle but rather the aim of the two principles of non-discrimination and mutual recognition.

(a) Economic Bans

Thus far, the Court used the category of "any other hindrance" to market access only in the

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[60] See Tryfonidou, "Further Steps on the Road to Convergence among the Market Freedoms", 35(1) EL Rev. (2010), 36, at 52 ff; Snell, 47 CML Rev. (2010), 467 ff; Barnard, *Substantive Law*, pp. 79 and 107 f; Horsley, 46 CML Rev. (2009), 2017.

[61] Prete, 35(2) LIEI (2008), 133, at 155.

context of very specific use restrictions. Both of the measures constituted a ban of the sale of the product in an economic sense, because they left no incentives for consumers to buy the product. In my opinion it was clear from the Court's reasoning that it addressed those economic bans only and did not want to include other situations which merely lead to a decrease of sales into the market access test.

In *Commission* v. *Italy* (*trailers*) use with a motorcycle was prohibited, which represented the main intended use for which the trailers were specially designed. Thus, the prohibition came close to a ban of the sale of the product itself. The Court expressed this by explicitly stating that consumers would have *no interest* in buying the product and that the law therefore results in a *prevention* of the existence of a demand in the market for such trailers in the first place and consequently hinders their importation.[62] So, when the Court referred to *Commission* v. *Italy* (*trailers*) in *Mickelsson and Roos*[63]*,* saying that any other measure that hinders access of products is caught by Art 34 TFEU, it has to be borne in mind that the previous decision referred only to a restriction on use which resulted in a *de facto* ban on the sale of the product. Consequentially, the Court applied the strict economic criteria established in *Commission* v. *Italy* (*trailers*) in *Mickelsson and Roos*. It stated that, due to the restriction, the actual possibilities for the use of personal watercraft in Sweden were "merely marginal".[64] Therefore in the case law of the Court the term "any other

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[62] Case C-110/05, *Commission* v. *Italy* (*trailers*), [2009] ECR I-519, para 57.

[63] Case C-142/05, *Mickelsson and Roos*, [2009] ECR I-4273, para 24.

[64] Ibid., para 25.

measure" only applies to a certain type of use restriction, namely one that equals a ban on the sale of a product.[65] This line of argumentation can also be found in earlier cases like *Monsees*[66], where the Court held that an Austrian rule which restricted the transport by road of animals for slaughter in fact made international transit almost impossible.[67]

The Court's use of a more general language of "market hindrance" could be deliberate in that an unspecified term allows for possible changes in the case law. The Court decided in a general way without restricting itself with regard to future decisions. To sum up, according to the argument presented here, the scope of Art 34 TFEU includes any discriminatory measure and any non-discriminatory provision having the effect of banning the sale of a product or an equivalent effect (a high threshold in the sense of a quantitative import restriction) because the lawfulness of a product has to be recognised by another Member State according to the principle of mutual recognition.[68]

For the sake of completeness I want to shortly address another line of argument, namely

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[65] Compare Opinion of A.G. Kokott in Case C-142/05, *Mickelsson and Roos*, [2009] ECR I-4273, paras. 65-67. She argues that restrictions on use should in principle be excluded from the scope of Art 34 TFEU, unless the restriction is such that only a marginal possibility of use remains for that product. It then prevents market access in the sense of the term "prevention" used in the *Keck*.

[66] Case C-350/97, *Monsees*, [1999] ECR I-2921.

[67] Ibid., para 29.

[68] For a high threshold in respect of non-discriminatory measures see Weiler in Craig/De Búrca, p. 372; Opinion of A.G. Kokott in Case C-142/05, *Mickelsson and Roos*, [2009] ECR I-4273, paras. 67-70, who states that the permitted use is marginal and does not affect the character of the Swedish regulation as a fundamental prohibition on the use; Wennerås/Moen, "Selling Arrangements, Keeping Keck", 35(3) EL Rev. (2010), 387, at 394 ff; but see Prete, LIEI (2008), 152, who argues that a hindrance only has to be possible and foreseeable; see also Straetmans, 39 CML Rev. (2002), 1419, who is against such a limitation; compare also the critic of Maduro in Andenas/Roth, pp. 64 f.

that the Court followed a *de minimis* test in these and other recent decisions.[69] The argument is based on the language of the Court. It *inter alia* supported its decisions by stating that the measures at stake were "greatly" restricting the use of the goods[70] and that there were "significant" additional costs and a "substantial" interference in the freedom of contract[71]. In general, it has always been a weakness of a market access based *de minimis* test that, instead of clarifying the case law, it raises the difficult question of measuring what constitutes a "substantial" hindrance and what impact is too small to do so.[72] Regardless of these difficulties, I argue that the Court did not follow a *de minimis* test. First, the Court has in many, also very recent, decisions expressly rejected the adoption of such a test.[73] Second, the language of the reasoning only demonstrates the lack of consumer interest and that the measure in question does in fact equal an economic ban of the product. The Court does not use a *de minimis* test but establishes a very high threshold to analyse whether a measure does in fact prevent market access. It does not analyse whether the restricting effect is more than marginal, but whether the restricting effect is so great that there is only a marginal area of freedom left.

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[69] Snell, 47 CML Rev. (2010), 458 and 471; see also Horsley, 46 CML Rev. (2009), 2017.

[70] Case C-142/05, *Mickelsson and Roos*, [2009] ECR I-4273, para 28.

[71] Case C-518/06, *Commission* v. *Italy* (*motor insurance*), [2009] ECR I-3491, paras. 66 and 68.

[72] See Snell, 47 CML Rev. (2010), 459; see also Snell/Andenas in Andenas/Roth, pp. 118 f.

[73] See for example Case C-463/01, *Commission* v. *Germany*, [2004] ECR I-11705; Case C-212/06, *Walloon Government*, [2008] ECR I-1683.

(b) Liberalisation of Intra-Union Trade

It has been shown that the Court used the concept of "market hindrance" only in very specific situations. Moreover, there is, in my view, no doubt that the Court did *not* want to change the underlying aim of Art 34 TFEU: the liberalisation of intra-Union trade.

A.G. Kokott convincingly argued in *Mickelsson and Roos* that if "hindrance" of market access is interpreted in a broad way, every restriction which leads to any decrease of sales – like the prohibition on driving cross-country vehicles off-road in forests – would constitute a measure having equivalent effect.[74] Even though the Court did not expressly follow her argument and used the strong language of market "hindrance", the decisions did not in substance depart from the A.G.`s opinion. First, as discussed above, the Court only decided that there was a breach of Art 34 TFEU in a very specific sort of cases (economic ban of the sale of a product). Second, the decisions did not include any suggestion that the Court wanted to depart from its past rulings. On the contrary, the decisions frequently refer to the established case law and do so in an affirmative manner. This question of consistency with past case law is closely connected to the question of the general aim of Art 34 TFEU. As A.G. Tesauro famously asked in *Hünermund*:

> "Is Article 30 (now Art 34) of the Treaty a provision intended to liberalise intra-Community (now intra-Union)[75] trade or is it intended more generally to

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[74] Opinion of A.G. Kokott in Case C-142/05, *Mickelsson and Roos*, [2009] ECR I-4273, paras. 42-45.

[75] With the Treaty of Lisbon the Union replaces and succeeds the Community (Art 1 TEU). See to that

encourage the unhindered pursuit of commerce in individual Member States?"[76]

In consensus with the A.G. and with most academic literature, the Court decided against the adoption of the latter much broader concept. It affirmed this with the continuing application of the *Keck*-distinction. In its two recent judgments the Court did not move away from that approach.[77] The Court decided in accordance with the established principle of mutual recognition. Moreover, there seems to be no sound reason to assume that the Court – implicitly, without any reference to it – went back to a pre-*Keck* situation, when it clearly stated in *Keck*:

> "In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter."[78]

In this light, the recent case law has to be interpreted and limited according to the aim of liberalising intra-Union trade.[79] To prevent State protectionism, a measure falls under Art

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Dougan, "The Treaty of Lisbon 2007: Winning Minds Not Hearts", 45 CML Rev. (2008), 617, at 622.

[76] Opinion of A.G. Tesauro in Case C-292/92, *Hünermund*, [1993] ECR I-6787, para 1.

[77] As suggested by Tryfonidou, 35(1) EL Rev. (2010), 41 f.

[78] Joined Cases C-267 & 268/91, *Keck*, [1993] ECR I-6097, para 14.

[79] In general this means that only a cross-border element can invoke Art 34 TFEU. But see Case C-34/09, *Ruiz Zambrano*, [2011] ECR nyr, where the Court granted rights based on Art 20 TFEU irrespective of the previous exercise of the right of free movement.

34 TFEU because it discriminates against foreign producers or does not recognise a product lawfully produced in another Member State. Thus, the recent judgments cannot be used as a basis to challenge any national provision merely hindering market access.

(c) Use of the Term "hinder"

Another argument for the consistency of the recent decisions with established case law is that the Court seems to use the term "hindrance" not in the sense of the *Dassonville*-formula but in the enhanced meaning of *Keck*. In *Commission* v. *Italy* (*trailers*) the Court stated that the settled case law reflects the obligation to respect the principles of non-discrimination, of mutual recognition and the principle of ensuring free access of Union products to national markets.[80] According to those principles, product requirements constitute measures having equivalent effect *because they hinder market access*. Contrary to this, the application of certain selling arrangements is *not as such to hinder* intra-Union trade, provided that it does not inherently prevent market access or impede access of imported products to a greater extent than domestic ones.[81] Consequentially, discriminatory measures, non-discriminatory product requirements and any other measure which hinders market access of products originating in other Member States are covered by the concept of Art 34 TFEU.[82]

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[80] Case C-110/05, *Commission* v. *Italy (trailers)*, [2009] ECR I-519, para 34.

[81] Ibid., paras. 35 f.

[82] Ibid., para 37.

At first sight, it seems that the Court adds a third principle, namely the principle of "ensuring free access to national markets". At a closer look, however, it uses the term "hindering" of market access to explain *why* product requirements do and certain selling arrangements do *not* constitute a restriction to intra-Union trade. It becomes clear that free market access is the *aim* of the two principles of non-discrimination and mutual recognition and not, as such, a new principle itself. Both the recognition of all product requirements, including the lawfulness of the product and that of its intended main use, as well as the prohibition of every discrimination, do *ensure* free access to national markets. To say that free market access was a principle on its own would be the same as to say that the aim of the market freedoms is not the liberalisation of intra-Union trade but the unhindered pursuit of commerce in individual Member States. As demonstrated above, the Court decided against such a broad concept. It seems that, by adding a "third principle", the Court wanted to make sure that all measures which do not fit within the categories product requirements and certain selling arrangements, but nevertheless have the same restricting effect, are also covered by Art 34 TFEU.

C. Restriction of the Freedom to Provide and Receive Services

In the first section I analysed the restriction test in the field of goods under Art 34 TFEU. I showed that it is governed by two underlying principles, non-discrimination and mutual recognition. The Court's case law, including the recent decisions on restrictions on use could be explained by the application of these principles. There is thus no need for a separate restriction test based on market access.

In this section I will show that this analysis also applies to the restriction test in the field of

services under Art 56 TFEU. The same principles govern restrictions of the freedom to provide services. Again, neither a broad restriction test nor an independent market access criterion is needed. Finally, I will also discuss how the distinction between certain selling arrangements and product requirements drawn in *Keck* can be assigned from goods to services.

1. Services

Before turning to this analysis, I will briefly discuss the scope of the Treaty provisions on services in Art 56 and Art 57 TFEU. Art 57 TFEU states that services shall only be considered as services in the meaning of the Treaties insofar as they are not governed by the provisions relating to the other freedoms. This wording suggests an order of priority between the freedom to provide services and the other fundamental freedoms like the free movement of goods. However, the Court of Justice clarified in *Fidium Finanz*[83] that Art 57 TFEU merely relates to the definition of the notion of services and does not establish any such order of priority.

What constitutes a service within the meaning of the Treaty? Art 57 (1) TFEU offers examples of services including activities of craftsmen and activities of a commercial character.[84] However, looking at the Court's case law, the notion of services is widely

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[83] Case C-452/04, *Fidium Finanz*, [2006] ECR I-9521.

[84] Some services are now governed by the Services Directive 2006/123/EC, [2006] OJ L376/36. For the relation between the Treaty and the Directive provisions see for example Barnard, "Unravelling the Services Directive", 45 CML Rev. (2008), 323, especially at pp. 340 ff; case note to *Cipolla* by Stuyck, 46 CML Rev. (2009), 941, at 953 ff.

understood. It includes lotteries[85] as well as the transmission of television signal[86] or insurances[87]. Art 57 TFEU states that services must be "normally provided for remuneration".[88] Essentially, the Court will look for a so called sufficient economic link.[89] Furthermore, only activities of a temporary nature are governed by Art 56 and Art 57 TFEU. Permanent provisions are subject to the freedom of establishment.[90] The application of Art 56 TFEU also requires a cross-border element. The Court of Justice applied Art 56 TFEU in cases, where the service provider[91] or the recipient[92] or both of them[93] travelled to another Member State as well as in cases, where the service itself travelled (trough cable or over the internet).[94] As in the field of goods, a very remote

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85 Case C-275/92, *Schindler*, [1994] ECR I-1039.

86 Case 155/73, *Sacchi*, [1974] ECR 409.

87 Case C-118/96, *Safir*, [1998] ECR I-1897.

88 Remuneration is generally characterised by the fact that it constitutes consideration for the service in question and is normally agreed upon between the provider and the recipient. See Case 263/86, *Humbel*, [1988] ECR 5365.

89 Such was for example found in Case C-281/06, *Jundt* v. *Finanzamt Offenburg*, [2007] ECR I-12231 (quasi-honorary teaching activity). The Court decided it was not necessary that the service provider was seeking to make a profit. In contrast, an essentially State funded public education did not fall under the scope of Art 57 TFEU in Case 263/86, *Humbel*, [1988] ECR 5365.

90 However, the fact that the activity is temporary does not preclude the service provider from equipping himself with some form of necessary infrastructure in the host Member State (including an office, chambers or consulting rooms). See Case C-55/94, *Gebhard*, [1995] ECR I-4165, para 27; see to that also the case note of Lonbay, 33 CML Rev. (1996), 1073, at 1076 ff; Case C-131/01 *Commission* v. *Italy* (*patent agents*) [2003] ECR I-1659, para 22.

91 See for example Case 33/74, *Van Binsbergen*, [1974] ECR 1299.

92 See for example Joined Cases 286/82 & 26/83, *Luisi and Carbone*, 1984] ECR 377.

93 See for example Case C-398/95, *SETTG* v. *Ypourgos Ergasias*, [1997] ECR I-3091.

94 See for example Case 352/85, *Bond van Adverteerders,* [1988] ECR 2085; Joined Cases C-34–36/95, *De Agostini*, [1997] ECR I-3843.

cross-border element has proved to be sufficient to trigger the Treaty provisions.[95]

2. Similarities between Goods and Services

As we have seen in section one, the restriction test in the field of goods was first and foremost established in the leading cases of *Dassonville*, *Cassis* and *Keck* in which the Court defined "measures having equivalent effect" in the meaning of Art 34 TFEU.

With regard to services Art 56 TFEU provides that:

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

Contrary to Art 34 TFEU, the Treaty provisions on services already expressly refer to the principle of non-discrimination on grounds of nationality. According to Art 57 TFEU

> "the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals."

How did the Court interpret the notion of restriction under Art 56 and Art 57 TFEU? The

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[95] Compare Opinion of A.G. Léger in Case C-208/05, ITC *Innovative Technology Center,* [2007] ECR I-181, paras. 118 ff; Spaventa, "Leaving Keck behind? The Free Movement of Goods after the Rulings in Commission v Italy and Mickelsson and Roos", 34 EL Rev. (2009) 914, at 927.

meaning of the case law is not entirely clear in this respect.[96] However, even thought the wording of the Treaty provisions on goods and services is very different, there is a general trend of analogous developments to Art 34 TFEU. Not only did the services case law mimic the mutual recognition and the non-discrimination approach, but also, as in the field of goods, the Court did make a more extensive use of the market access criterion in more recent cases. I will now turn to discuss those similarities in turn, showing that the case law on service is governed by the same principles as that on goods.

2.1 Mutual Recognition – *Säger*

In the fundamental decision *Säger*[97] the Court started to make use of what is sometimes called the "restriction test"[98] in the context of non-discriminatory measures. The Court stated that Art 56 TFEU required:

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

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[96] See Chalmer/Davies/Monti, *European Union Law*, 2nd ed., (CUP, 2010), p. 792.

[97] Case C-76/90, *Säger*, [1991] ECR I-4421.

[98] See for example Roth, "The European Court of Justice's Case Law on Freedom to Provide Services: Is *Keck* Relevant?" in Andenas/Roth (Eds.), *Services and Free Movement in EU Law* (OUP, 2002), p. 1, at p. 6.

lawfully provides similar services."[99]

In subsequent cases like *Arblade*[100] the Court continued to use this restriction approach but with a slightly altered formula that referred to a restriction which is liable to "prohibit, impede or render less advantageous" the activities of a service provider.[101] Sometimes the Court will also refer to "measures which prohibit, impede or render less attractive the exercise of" the freedom to provide services.[102] The restriction-test applies to all indistinctly applicable measures and consists of two parts. The first part defines the notion of restriction in the meaning of Art 56 TFEU, which is reminiscent of the broad definition in *Dassonville*.[103] The second part refers to the lawful provision of (similar) services in the home State of the service provider.

The second part of the test makes a reference to the home State law of the service provider.[104] This mimics the *Cassis* approach of mutual recognition which is based on the lawful production of a good in the home State of the trader. This was already argued by

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[99] Case C-76/90, *Säger*, [1991] ECR I-4421, para 12.

[100] Joined Cases C-369 & 376/96, *Arblade*, [1999] ECR I-8453; see also Cases C-165/98, *Mazzoleni and ISA*, [2001] ECR I-2189, para 22; C-49/98, *Finalarte*, [2001] ECR I-7831, paras. 22-23 and recently C-515/08, *Santos Palhota*, nyr.

[101] See for example Joined Cases C-369 & 376/96, *Arblade*, [1999] ECR I-8453, para 33.

[102] For example Case C-500/06, *Corporación Dermoestética*, [2008] ECR I-5785, para 32.

[103] Analysed in more detail below in C.3.3.2 (a).

[104] Note the discussion with regard to the home State principle in context of the Services Directive. See for example Barnard, 45 CML Rev. (2008), pp. 328 ff.

A.G. Jacobs in his opinion in *Säger.*[105] He remarked that the State where the service provider is established should as a general rule be the sole regulator of the provision of services. The service provider should not be obliged to comply with all the detailed regulations in force in each of those other Member States where he intends to provide his services. A.G. Jacobs therefore suggested treating services by analogy with goods. Non-discriminatory restrictions on the free movement of services should be approached under the *Cassis* line of case law. This view was, for example, supported by A.G. Maduro, who stated that the Court has, since *Säger,* adopted a test similar to the wide interpretation of *Cassis*.[106]

The principle of mutual recognition in the area of service means that the service provider is able to provide services in another Member State if he lawfully provides them in his home State. In *Säger* the Court decided that Germany could not reserve the provision of services for monitoring and renewing patents to persons holding a special professional qualification. Germany had to recognise that the foreign company lawfully offered such monitoring services in its home State. By offering those services in Germany, as well, the company made use of its freedom to provide the same services everywhere in the territory of the Union. The imposition of additional requirements regarding the professional qualifications of the service provider constituted a restriction of that freedom.[107] Similarly,

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[105] Opinion of A.G. Jacobs in Case C-76/90, *Säger*, [1991] ECR I-4421, paras. 23 ff.

[106] Maduro in Andenas/Roth, p. 60; Roth in Andenas/Roth, p. 3.

[107] Case C-76/90, *Säger*, [1991] ECR I-4421, paras. 13 f.

in *Schindler*[108] a German public body organising lotteries sent advertisements and application forms to the UK. It was prosecuted for breach of the national ban on lotteries because it invited people from the UK to participate in the German lottery. The Court decided that Germany had to recognise that the service itself was lawfully provided in the UK and could therefore be provided in other Member States as well. In *Gouda*[109], the Court stated that restrictions may arise as a result of indistinctly applicable national rules, when service providers established in the territory of another Member State already had to satisfy the requirements of that State's legislation. In *Webb,* the Court stated that there is an obligation on the State to "take into account the evidence and guarantees already furnished by the provider of the services for the pursuit of his activities in the Member State of his establishment".[110]

2.2 Discriminatory Measures

As noted above, Art 57 TFEU makes an express reference to the principle of non-discrimination on grounds of nationality. Equally to Art 34 TFEU it is undisputed that Art 56 and Art 57 TFEU do not only prohibit direct but also indirect discrimination. A measure is indirectly discriminatory when it is equally applicable to foreign and domestic service providers but has an unequal effect on them.[111]

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[108] Case C-275/92, *Schindler*, [1994] ECR I-1039, paras. 43 f.

[109] Case C-288/89, *Gouda*, [1991] ECR I-4007, para 12.

[110] Case 279/80, *Webb*, [1981] ECR 3305, para 20.

[111] See for example Roth in Andenas/Roth, pp. 10 f; Chalmer/Davies/Monti, *European Union Law*, p. 792.

In its case law[112] the Court clarified that this principle does not only refer to nationality. Art 56 and Art 57 TFEU also prohibit discrimination on the basis that the service provider is established in a Member State other than the one in which the service is provided. This mirrors a line of decisions in the context of Art 34 TFEU. In those decisions the traders with an establishment in the territory of the host Member State had an advantage compared to traders established in another Member State; In *DocMorris*[113] pharmacies established in the host State did not rely on mail order as much as pharmacies established in other Member States. In *Gourmet International*[114] the prohibition on the advertisement of alcohol did effect foreign products to a greater extent because consumers were already more familiar with traditional domestic products which were typically produced by traders established in the host State. In *TK-Heimdienst*[115] Austrian rules restricted door-to-door sales and sales on rounds of groceries to traders having an establishment within the district or a border district from where the sales took place. Therefore, foreign traders had to bear additional costs by being obliged to set up another permanent establishment, whilst local economic operators already meet that requirement.

2.3 Market Access

Another similarity in the case law on goods and services can be found with regard to the

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[112] Case 33/74, *Van Binsbergen*, [1974] ECR 1299, para 25; Case C-288/89, *Gouda*, [1991] ECR I-4007.

[113] Case C-322/01, *DocMorris*, [2003] ECR I-14887, para 74.

[114] Case C-405/98, *Gourmet International*, [2001] ECR I-1795, para 21.

[115] C-254/98, *TK-Heimdienst*, [2000] ECR I-151, para 26.

role of market access which has been used more frequently in recent cases. In *Commission* v. *Italy* (*motor insurance*)[116] the Court generally analysed the *status quo* of the case law and stated that:

> "The concept of restriction covers measures taken by a Member State which, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder intra-Community (now Union) trade.[117] (…) It is settled case-law that the term 'restriction' within the meaning of Articles 49 TFEU (former 43 EC) and 56 TFEU (former 49 EC) covers all measures which prohibit, impede or render less attractive the freedom of establishment or the freedom to provide services."[118]

However, in the field of services, as in the field of goods, the meaning of market access is far from clear. In academic literature it is sometimes considered to be a separate test[119], but sometimes the notions of the *Säger* restriction test and the market access test are used synonymously.[120] Thus, the same question discussed in section one arises now with regards to services. Is market access an independent principle within the concept of restriction?

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[116] Case C-518/06, *Commission* v. *Italy* (*motor insurance*), [2009] ECR I-3491.

[117] Ibid., para 64.

[118] Ibid., para 62.

[119] See the analyses by Meulman/de Waele, 33(3) LIEI (2006), 214 ff, who talk about the restrictions theory and the market access theory.

[120] See for example Roth in Andenas/Roth, p. 16 ff; Barnard, *Substantive Law*, p. 377.

As already shown above, the Court follows its approach under Art 34 TFEU in the field of services and bases a breach of Art 56 TFEU on the principle of mutual recognition and non-discrimination. I will now demonstrate that the use of the notion market access does not add anything to the restriction test. All service cases that mention market access as a criterion can be explained with those well established underlying principles.[121]

(a) Mutual Recognition

One line of case law making an express reference to market access can be traced back to the principle of mutual recognition.

The first significant case on services using the term market access was *Alpine Investments*[122] which concerned a ban on cold-calling in the financial services industry. Companies were prohibited from contacting individuals by telephone in order to offer them financial services without their prior consent in writing. The Court first confirmed the cross-border element of the case because the offer of services was made by a provider established in one Member State to a potential recipient established in another Member State. It then held that a provision which deprives the operators of a rapid and direct

[121] Maduro in Andenas/Roth, p. 63 argues that is could be possible to reconcile the case law of the different free movement rules regarding non-discriminatory measures. Two different types of measures would be considered to be restricting. First, measures which impose an additional burden on products, services or nationals of other Member States by reason of having to comply with a set of rules different from that which they have had to comply with in their country of origin. Second, measures which as a matter of law or fact, bar access to the market to products, services or nationals of other Member States. Nonetheless, Maduro criticises this test as being too formal and to ignore the different claims for judicial activism arising from the different institutional contexts of the different free movement provisions (at p. 66).

[122] Case C-384/93, *Alpine Investments*, [1995] ECR I-1141.

technique for marketing and for contacting potential clients in other Member States constitutes a restriction on the freedom to provide cross-border services. The situation in *Alpine Investments* can be described as a reverse mutual recognition.[123] It was the home State that had to recognise a host State provision and not the other way round.[124] The home State provision prohibited the use of a marketing method not only on its own territory, but on the *territory of the host State* where individuals were contacted.[125] Contrary to that, the host State itself allowed the practise of cold calling. The Court decided that the home State could not regulate the conditions of the provision of services beyond the borders if its own jurisdiction. The home State had to recognise that it was lawful on the territory of the host State to use such marketing methods.

Other cases concerned the imposition of additional requirements on the service provider. In *Fidium Finanz*[126] certain qualities of economic operators were required by the German Law on credit institutions to enter the German financial market. According to the Court, this constituted a prevention of market access and therefore a restriction under Art 56 TFEU. The Court held that if the requirement of authorisation already constitutes a restriction on the freedom to provide services, the requirement of a permanent

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[123] Compare Körber, *Grundfreiheiten und Privatrecht* (Mohr Siebeck, 2004), p. 330.

[124] Usually the host State has to recognise that a product was lawfully produced according to the product requirement rules of the home State.

[125] Compare the Opinion of A.G. Jacobs in Case C-384/93, *Alpine Investments*, [1995] ECR I-1141, paras. 47, 48, 51-56, according to whom *Keck* wasn't applicable in *Alpine Investments*, because there it was the exporting State that required compliance with its own rules of marketing not only for the provision of services in its territory but also in the territory of other Member States.

[126] Case C-452/04, *Fidium Finanz*, [2006] ECR I-9521.

establishment does so even more.[127] In *Commission* v. *Italy* (*private security activities*)[128] several Italian rules concerning the private security service market, which applied to Italian operators as well as to operators from other Member States, were found to breach Art 56 TFEU. The Court first referred to the general settled case law on the restriction test. It then found, for example, the obligation to swear an oath of allegiance to the State where the service is provided to constitute an impairment of market access for any operator not established in Italy.[129] In *Commission* v. *Belgium* (construction sector)[130] a Belgian regulation aimed at the prevention of tax fraud in the construction sector. Principals and contractors who had recourse to foreign contracting partners not registered in Belgium were obliged to withhold 15% of the sum payable for work carried out and were held jointly and severally liable for the tax debts of such contracting partners. Those rules applied equally to unregistered contracting partners both established in Belgium or in another Member State. The Court argued that the obligation to withhold a sum of money was liable to deter contracting partners from other Member States from accessing the Belgian market and that the joint and several liability made access to the Belgian market difficult for them. Even though non-registration did not lead to a total prohibition of the service performance, it nevertheless resulted in an economic disadvantage.[131]

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[127] Ibid., para 46.

[128] Case C-465/05, *Commission* v. *Italy* (*private security activities*), [2007] ECR I-11091.

[129] Ibid., paras. 46 ff.

[130] Case C-433/04, *Commission* v. *Belgium* (*construction sector*), [2006] ECR I-10653.

[131] Ibid., paras. 30 f.

These requirements, such as authorisation, swearing an oath or registration, infringe on the principle of mutual recognition. The economic actor lawfully provides services in his home State. The host State has to recognise this and is not allowed to make him comply with an additional set of rules.

Recently in *Commission* v. *Italy* (*motor insurance*)[132] Italian law required all insurance companies to offer third-party liability motor insurance. The companies were obliged to offer insurance to any potential customer under terms and rates the company had to publish in advance. Moreover, the freedom of the companies to set their premiums was limited by the law as well. The Court decided that the law constituted a restriction of the freedom of establishment and to provide services, because a foreign insurance company would be required to re-think its business strategy which could result in significant additional costs.[133] 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 against undertakings traditionally established in Italy. Again, the use of the market access criterion case can be returned to the principle of mutual recognition.[134] The terms of the insurance contract which concern the risk assessment and calculation of the premium should be regarded as the service or "product"

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[132] Case C-518/06, *Commission* v. *Italy* (*motor insurance*), [2009] ECR I-3491.

[133] Ibid., paras. 68 ff. Nevertheless the restriction could be justified by the aim of social protection for victims of road traffic accidents.

[134] But see also ibid., para 70. The Court seems to refer to a non-discrimination test, because it compared traditionally established undertakings to undertakings from outside, which could be interpreted as a comparison between traditional, mostly domestic, and new, mostly foreign, undertakings.

itself.[135] This equals a product requirement in the meaning of *Keck*.[136] Because the terms of the contract constituted a lawful service in another Member State, Italy had to recognise this in principle.

(b) Non-Discrimination

Most of the cases mentioning market access are an expression of the principle of mutual recognition established in *Cassis* and subsequently in *Säger*. However, in a second line of market access cases, the Court found a breach of Art 56 TFEU because the measures discriminated against foreign service providers.

In *United Pan-Europe Communications Belgium*[137] national legislation required certain cable operators (with a so called must-carry status) to broadcast television programmes transmitted by private broadcasters designated by the State. That must-carry status was more likely given to broadcasters established in Belgium because the essential purpose of the law was to guarantee Belgian citizens access to local and national news and to their own culture. The Court held that the national legislation directly determined the conditions for access to the market for services in the bilingual region of Brussels-Capital by imposing *a heavier burden* on the providers of services established in other Member States. Therefore the legislation was held liable to hinder the provision of services

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[135] See also Gkoutzinis, "Free Movement of Services in the EC Treaty and the Law of Contractual Obligations Relating to Banking and Financial Services", 41 CML Rev. (2004), 119, at 131.

[136] See also Gkoutzinis, 41 CML Rev. (2004), 173.

[137] Case C-250/06, *United Pan-Europe Communications Belgium*, [2007] ECR I-11135.

between Member States. Also, in *Commission* v. *Belgium* (*construction sector*) one of the underlying thoughts seemed to be discriminatory treatment. A.G. Tizzano argued that:

> "It cannot be ruled out, and even the Commission does not, in theory, exclude this, that, although the rules at issue appear to apply without discrimination, they are in fact discriminatory. (…) Unregistered operators will, in effect, be (almost) exclusively foreign operators, and, in particular, those wishing to provide services in Belgium only on an occasional basis, whereas national operators will be (almost) always registered as contractors as they have to meet that requirement specifically in order to be able to pursue their activities in Belgium."[138]

The focus on discrimination with regard to market access can also be found in cases dealing with advertising prohibitions. Restrictions of advertising are generally considered to be selling arrangements.[139] Nevertheless, the Court will find a breach of Art 34 or Art 56 TFEU, if the prohibition has the effect of treating products or services from another Member State less favourably. Because advertising is an effective means of penetrating a foreign market and of competing with established and well known domestic products, the Court has shown its willingness to find a discriminatory treatment. This had primarily been the case in decisions more closely related to goods[140], but recently also in the field of

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[138] Opinion in Case C-433/04, *Commission* v. *Belgium* (*construction sector*), [2006] ECR I-10653, para 36.

[139] However, the Unfair Commercial Practices Directive 2005/29/EC, [2005] OJ L149/22 harmonised certain aspects of advertising concerning comparative and misleading advertising.

[140] Case C-412/93, *Leclerc-Siplec*, [1995] ECR I-179; the freedom to provide services was not discussed because of the lack of a cross-border element, see to that the case note of Idot, 33 CML Rev. (1996),

services.[141]

With regard to services the Court indicated a different treatment in *Gourmet International*[142] and held that the prohibition on advertising had a particular effect on the cross-border supply of advertising space and thereby constituted a restriction within the meaning of Art 56 TFEU.[143] *Corporación Dermoestética*[144] concerned the prohibition of advertising for medical services. According to Italian law, the broadcasting of advertisements for medical and surgical treatments provided by private health care establishments was prohibited on national television and permitted on local television networks only after the fulfilment of certain conditions. The Court decided that this constituted a serious obstacle for companies established in Member States other than the Italian Republic. The rules were found liable to make it *more difficult* for such economic operators to gain access to the Italian market and to constitute a restriction on the freedom to provide services. Again, this shows that it was the principle of non-discrimination that was the decisive factor for the Court's reasoning.

113, at 121 ff.

[141] See to that development the Opinion of A.G. Bot in Case C-500/06, *Corporación Dermoestética*, [2008] ECR I-5785. He also argues that a discriminatory treatment will especially occur in the case when consumers are more familiar with domestic products because the consumption of the product is linked to traditional practises and local habits. With regard to earlier case law see Case 352/85, *Bond van Adverteerders,* [1988] ECR 2085 (the national rule prevented or limited national broadcasters from using the services of undertakings established in other Member States. Therefore the Court found the provision to be discriminatory. However, the Court did not mention market access in its reasoning.).

[142] Case C-405/98, *Gourmet International*, [2001] ECR I-1795.

[143] Note that the Court did not expressly mention market access with regard to services but only with regard to goods in that case.

[144] Case C-500/06, *Corporación Dermoestética*, [2008] ECR I-5785.

To sum up, the Court's case law on services which mentions market access as a criterion for a restriction under Art 56 TFEU can be either based on the principle of mutual recognition or non-discrimination. This leads to the same conclusion as under Art 34 TFEU. Market access is not a separate principle or criterion, but rather the aim of the two underlying principles. Thus the Court follows a uniform restriction test under Art 34 and Art 56 TFEU.

3. Product Requirements and Selling Arrangements for Services

As we have seen above, the restriction regime under Art 56 TFEU follows the same principles as the one under Art 34 TFEU. Consequentially, it should be asked whether the parallel treatment can be even further extended and an equivalent distinction between certain selling arrangements and product requirements can be found in the field of services. The question essentially is whether there are, on the one hand, requirements for the provision of services which generally constitute a restriction under Art 56 TFEU and, on the other hand, a type of measure which generally falls outside the scope of Art 56 TFEU? I will argue that the case law of the Court shows that there are such requirements for the provision of services. Moreover, there is a need for the limitation of the restriction test under *Säger*, because the aim Art 56 TFEU is only to liberalise intra-Union trade. Thus, certain rules on the arrangement for the provision of services do not in general restrict the freedom to provide services. Indeed, this has already been acknowledged by the Court.

3.1 Service Requirements

Additional requirements which a foreign provider has to fulfil in order to put his services on a foreign market have already played a major part in the Court's case law on Art 56 TFEU. Like product requirements, these requirements are in general considered to restrict the free movement of services because they breach the principle of mutual recognition.

However, the categorisation of service requirements is much more complex than the equivalent category of product requirements. Often not only the service itself travels, but also the service provider or the recipient. Therefore not only requirements regarding the service but also requirements regarding the qualifications of the service provider as a person restrict his freedom to offer services in another Member State. The host State must in principle recognise that those requirements are satisfied according to the foreign rules of the provider's home State. Like product requirements, requirements concerning the "production" of services, including rules on who is authorised to provide them, are solely regulated by the home State.[145] This means that questions such as whether the service provider fulfils the necessary professional and personal requirements or whether the service itself is lawful must in principle be answered according to the regulations of the providers home State. The host State is prohibited from imposing additional requirements. The service provider shall have to comply only with one set of rules.[146]

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[145] T. Körber, *Grundfreiheiten*, p. 330 f.

[146] However, the service provider has a choice. He can either comply with the home State regulations or adapt his product or service to the legal regime of the host State (compare Roth in Andenas/Roth, p. 23).

In the case law three main classes of measures imposing additional requirements can be distinguished that are considered to be restricting the freedom to provide services and thus, fall under the definition of service requirements. First, there are requirements concerning the qualifications of the service provider as a person. This includes every authorisation requirement like the requirement to enter into an official Register in order to carry on a specific trade activity.[147] Second, there are requirements in relation to the business of the service provider, for example, requirements as to his organisational structure, his workforce (like the requirement of individual work permits for the workers)[148] or place of establishment[149]. Third, there are requirements concerning the product "service" itself.[150] As in the field of goods[151] this includes the lawfulness of the services. This can be seen in *Commission* v. *Italy* (*motor insurance*) where the service consisted of the acceptance of a certain risk (terms of the contract).[152] Another example is *Gourmet International*[153] – which is, I would argue, wrongly used to demonstrate the application of a service category

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[147] Case C-58/98, *Corsten*, [2000] ECR I-7919; see also Case C-215/01, *Schnitzer*, [2003] ECR I-14847.

[148] Case C-445/03, *Commission* v. *Luxembourg* (*Employment of Foreign Workers*), [2004] ECR I-10191; see also Case C-244/04, *Commission* v. *Germany*, [2006] ECR I-885; Case C-168/04, *Commission* v. *Austria*, [2006] ECR I-9041; Case C-515/08, *Santos Palhota*, nyr.

[149] Case C-404/05, *Commission* v. *Germany*, [2007] ECR I-10239; Case C-338/09, *Yellow Cab Verkehrsbetriebs GmbH*, [2010] nyr.

[150] See Roth in Andenas/Roth, p. 17; Opinion of A.G. Jacobs in Case C-76/90, *Säger*, [1991] ECR I-4421 .

[151] Compare Cases C-110/05, *Commission* v. *Italy (trailers)*, [2009] ECR I-519 and C-142/05, *Mickelsson and Roos*, [2009] ECR I-4273.

[152] See Case C-518/06, *Commission* v. *Italy* (*motor insurance*), [2009] ECR I-3491.

[153] Case C-405/98, *Gourmet International*, [2001] ECR I-1795.

equivalent to "certain selling arrangements"[154] – where the decisive factor was that the lawfulness of the advertising service was not recognised in Sweden due to the ban on alcohol advertising.

3.2 Certain Arrangements for the Provision of Services

I have shown that the Court's case law on services does know an equivalent category of measures which are regarded as "product requirements" and that this category of service requirements can be divided into three main classes. But is there also a category equivalent to "certain selling arrangements"? I will show that due to the aim of Art 56 and Art 57 TFEU to liberalise intra-Union trade, there is a need for such a category. This is affirmed by examples in the case law which show that there are certain measures which do not in general restrict the freedom to provide services.[155] Therefore, even though the determination of measures falling into this category might be difficult, the transposition into the field of services is useful.

(a) Need for Limitation – Aim of Art 56 TFEU

As seen above, the restriction test in *Säger* refers only to a negative effect on the activities

[154] See Opinion of A.G. Mischo in Case C-289/02, *AMOK*, [2003] ECR I-15059, para 24; see Opinion of A.G. Cosmas in Joined Cases C-51/96 & C-191/97, *Deliège*, [2000] ECR I-2549, para 64.

[155] This view is for example supported by Vilaça in Andenas/Roth, pp. 39 ff; see also the Opinion of A.G. Maduro in Joined Cases C-158 & 159/04, *Alfa Vita Vassilopoulos*, [2006] ECR I-8135, para 50 and Snell/Andenas in Andenas/Roth, p. 111.

of the service provider or on the exercise of his freedom to provide services.[156]

It has been argued that the Court has never attributed such a wide scope to this restriction approach as in the area of Art 34 TFEU and that there was consequently no need for a *Keck*-like judgment to limit the scope of Art 56 TFEU.[157] However, the language of the restriction test does not support this argument. On the contrary, the definition of a restriction in the meaning of Art 56 TFEU includes any measure that merely makes the activity less advantageous without reference to a discriminatory or even a cross-border element. It is entirely open for interpretation and thereby recalls the wide scope of the *Dassonville*-formula.[158] The open meaning of the term "restriction" could equally be an invitation for service providers – as it was to traders of goods – to challenge potentially any national measure which makes the provision of services less attractive to them. Indeed, there has been a shift of attention to Art 56 TFEU and an increasing number of cases before the Court. The situation has thus been compared to the pre-*Keck* situation in the fields of goods, and it has been suggested that the Court will follow a similar approach in the fields of services.[159]

For the same reason that the Court limited the *Dassonville* restriction approach in the field

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[156] Case C-76/90, *Säger*, [1991] ECR I-4421, para 12.

[157] Roth in Andenas/Roth, pp. 6 and 15.

[158] Compare Meulman/de Waele, 33(3) LIEI (2006), 208 f; see also Barnard, *Substantive Law*, p. 258, who states that the meaning of the individual terms "hindrance", "obstacles", and "restrictions" is far from clear.

[159] See Meulman/de Waele, 33(3) LIEI (2006), 208 f; compare also Vilaça in Andenas/Roth, pp. 35 f.

of goods, it will also have to limit the restriction approach of *Säger* in the field of services. Both Art 34 and Art 56 TFEU aim at the establishment of an internal market. Art 26 (2) TFEU states that the internal market shall comprise of an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. Thus, the concept of the internal market does not distinguish between the individual market freedoms.[160] In *Hünermund* A.G. Tesauro asked whether the aim of Art 34 TFEU is the liberalisation of intra-Union trade or the unhindered pursuit of commerce in individual Member States.[161] The question was answered in favour of the former approach. Equally, the aim of Art 56 TFEU is only the liberalisation of intra-Union trade.[162] In *Alpine Investments* for example the Court stated that the measure directly affected access to the market and was thus capable of hindering intra-Union trade in services.[163]

From this, it follows that a service provider should be free to offer his services throughout the whole of the Union. However, Art 56 TFEU cannot be used to remove every obstacle he faces that may arise from the different national rules when he provides his services in another Member State. Consequentially, there must be a category of host State provisions that *do not* fall under the scope of Art 56 TFEU. This is the case if a rule does not discriminate in law or in fact and breach the principle of mutual recognition. Unless one

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[160] Therefore several authorities have suggested a uniform restriction approach for all market freedoms. See also Snell/Andenas in Andenas/Roth, pp. 78 f.

[161] Opinion of A.G. Tesauro in Case C-292/92, *Hünermund*, [1993] ECR I-6787, para 1.

[162] See Oliver/Roth, "The Internal Market and the Four Freedoms", 41 CML Rev. (2004), 407, at 419; see also Meulman/de Waele, 33(3) LIEI (2006), 211.

[163] Case C-384/93, *Alpine Investments*, [1995] ECR I-1141, para 38.

argues that the answer to the *Hünermund*-question must be a different one in the field of services, the existence of "certain selling arrangements" for services is a logical consequence.

Finally, the wording of Art 57 TFEU itself supports this argument. It states that the service provider must be able to temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals. This implies that there are conditions imposed by the host State which apply to the foreign service provider *as well as* the national providers.

(b) Acknowledgement by the Court

After analysing the reason and the need for a limitation of the restriction test, I will now demonstrate that the Court has already acknowledged a category of provisions that fall outside the scope of Art 56 TFEU. I will first show that the Court has attributed different regulatory powers to the host and the home State also in the field of services. I will then give examples of service provisions that, equivalent to "selling arrangements", fall within the regulatory power of the host State.

In *Alpine Investments*[164] it was suggested, that the prohibition on cold calling should be treated analogously to certain selling arrangements and should therefore fall outside the scope of Art 56 TFEU. The host State should be able to decide whether to ban such a

[164] Case C-384/93, *Alpine Investments*, [1995] ECR I-1141.

marketing method, because it only affected the way in which the services were offered, was general and non-discriminatory and did not put the national market at an advantage over providers of services from other Member States. However, the Court rejected this argument by stating that:

> "A prohibition such as that at issue is imposed by the Member State in which the provider of services is established and affects not only offers made by him to addressees who are established in that State or move there in order to receive services but also offers made to potential recipients in another Member State. It therefore directly affects access to the market in services in the other Member States and is thus capable of hindering intra-Community (now Union) trade in services."[165]

The meaning of the Court's decision in *Alpine Investments* for the introduction of a category equivalent to selling arrangements in the field of services is highly controversial. Some argue that the Court completely ignored the question.[166] Others, that the Court excluded the application of *Keck* to services.[167] Finally, it has also been argued that the Court implicitly accepted the potential application of *Keck*.[168] The reason for this

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[165] Ibid., para 38.

[166] Hatzopoulos, "Annotation to Case C-384/93, Alpine Investments v Minister van Financiën", 32 CML Rev. (1995), 1427.

[167] Opinion of A.G. Jacobs in Case C-405/98, *Gourmet International*, [2001] ECR I-1795, para 71; see also Idot, 33 CML Rev. (1996), 122.

[168] Maduro, "The Saga of Article 30 EC Treaty: To Be Continued", 5 Maastricht Journal of European and Comparative Law (1998), 298, at 315; Snell/Andenas in Andenas/Roth, p. 108.

controversy is that *Alpine Investments* dealt with rather unusual circumstances and was therefore not easy to compare with the *Keck*-case law on the free movements of goods. It concerned an export and not an import situation, since the service provider tried to acquire costumers from other Member States and the regulation in question (ban) was that of the exporting home State.[169] By contrast, the usual *Keck*-situation concerns the imposition of rules by the importing State.[170] As already discusses above, it was the home State that prohibited the use of a marketing method not only on its own territory, but on the *territory of the host State* where individuals were contacted.[171] Therefore the service provider was subject to two different sets of rules concerning the legality of a marketing method (which constituted a selling arrangement in the meaning of Art 34 TFEU) in the territory of the host State.[172] The Court decided in favour of the host State regulator. Consequently, it can be argued, that the Court implicitly decided in *Alpine Investments* that provisions regarding marketing methods of services are solely governed by the host State and not the home State. This would mean that there is a uniform approach in goods and services regarding the "divided competence" between host and home State. Whereas the home State is, in general, the sole regulator regarding product requirements, the host State is of

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[169] Weatherill in Barnard/Scott, p. 46.

[170] See Vilaça in Andenas/Roth, p. 29, who then argues that *Keck* is of no relevance at all.

[171] Compare the Opinion of A.G. Jacobs in Case C-384/93, *Alpine Investments*, [1995] ECR I-1141, paras. 47, 48, 51-56, according to whom *Keck* wasn't applicable in *Alpine Investments*, because there it was the exporting State that required compliance with its own rules of marketing not only for the provision of services in its territory but also in the territory of other Member States.

[172] See Snell/Andenas in Andenas/Roth, p. 108.

selling arrangements.[173]

In *Deliège*[174] Court affirmed the principle that the home State regulates the production stage of services. Ms Deliège, who very successfully practised judo on a professional level, was not selected to take part in several international competitions. A home State rule required any person to have been authorised or selected by their federation in order to be able to participate in a high-level international sports competition. Ms Deliège consequently argued that the selection rules restricted her freedom to provide services (sporting activities, and in particular her participation in international tournaments) in another Member State. However, the Court decided that the rule did not constitute a restriction. It stated that although such selection rules inevitably have the effect of limiting the number of participants in a tournament, this was inherent in the conduct of an international high-level sports event. Selection rules or criteria may not therefore in themselves be regarded as constituting a restriction on the freedom to provide services.[175] It is important to note, that the Court did not use a market access argument, but basically said that it is for the home State to regulate the conditions under which a service provider is allowed to put specific services on the market. Authorisation requirements *of the home State* do not constitute a restriction.[176]

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[173] See for example Snell/Andenas in Andenas/Roth, pp. 109, 115; with regard to goods see Bernard in Barnard/Scott, p. 105.

[174] Joined Cases C-51/96 & C-191/97, *Deliège*, [2000] ECR I-2549.

[175] Ibid., para 64.

[176] Compare in the context of the freedom of establishment the Case C-210/06, *Cartesio*, [2008] ECR I-9641 where it was up to the Member State of incorporation to decide whether a company would lose its

Alpine Investments and *Deliège* are examples of the Court's acceptance of the division of regulatory power in the field of services. I will now give examples of types of provisions that have been subsequently decided to generally fall outside the scope of Art 56 TFEU. These are conditions of the provision of legal services and the imposition of taxes.

AMOK[177] concerned the reimbursement of legal costs when one party had been represented in legal proceedings by a lawyer established in another Member State. The successful party had been represented in front of a German court by a lawyer who was established in Austria. The question arose whether the reimbursement of legal costs would be calculated according to the German scale regulated in the federal regulation on lawyers' fees or according to the Austrian scale which were significantly higher. The German court decided that the party may only claim the amount of legal costs which would have resulted from the involvement of a lawyer established in Germany.[178] The Court of Justice stated that it cannot be ruled out that the imposition of a national upper limit on the reimbursable fees for a lawyer established in another Member State, where the fees are higher, be liable to render less attractive the provision by lawyers of their services across borders.[179] However, Art 57 TFEU (then Art 50 EC) provides that the cross-border services may be provided "under the same conditions as are imposed by that State on its own nationals". With regard to legal services, Art 57 TFEU is defined in greater detail in the Lawyers`

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status as a company by transferring its seat to another Member State.

[177] Case C-289/02, *AMOK*, [2003] ECR I-15059.

[178] Ibid., para 13.

Directive.[180] Art 4 (1) of the Directive provides that the activity of representing a client in legal proceedings in another Member State must be pursued "under the conditions laid down for lawyers established in that State", with the exception of "any conditions requiring residence, or registration with a professional organisation, in that State". This means that, apart from the express exceptions, all other conditions and rules in the host State apply to the provision of cross-border services, including the calculation of the reimbursement of fees.[181] Therefore the host State could impose its limitation on reimbursement to the foreign lawyer without restricting his freedom to provide services.[182] *AMOK* shows that there are host State provisions that do fall outside the scope of Art 56 TFEU.

The decisions *Viacom II*[183] and *Mobistar*[184] concerned the non-discriminatory imposition

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[179] Ibid., para 27.

[180] Directive 77/249/EEC, [1977] OJ L78/17.

[181] Case C-289/02, *AMOK*, [2003] ECR I-15059, paras. 28 ff.

[182] But see in this context Joined Cases C-94 & 202/04, *Cipolla*, [2006] ECR I-11421. In that decision providers of legal services were prohibited by Italian legislation to derogate, by agreement, from the minimum fees set by a scale. Without referring to the Council Directive 77/249/EEC, the Court stated that this provision constituted a restriction on the free movement of services. It is not clear how this decision fit into the legal reasoning in *AMOK*. But the main reason for the different outcome of *Cipolla* could be seen in the fact, that the Court found the provision to be discriminatory. It said that the legislation is liable to render access to the Italian legal services market more difficult for lawyers established in other Member States. This was because foreign lawyers were deprived of the opportunity to compete more effectively with the established on a stable base in Italy by requesting fees lower than the scale. The fact, that lawyers wanted to charge clients lower instead of higher (*AMOK*) fees might also have also played a role for the different outcome in this judgment, because the Court generally seems to be more consumer friendly. See to *Cipolla* and more generally to the legitimacy of price fixing the case note of Stuyck, 46 CML Rev. (2009), 952 ff.

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

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

of taxes on service providers. The Court decided that they do not restrict the freedom to provide services in another Member State. In *Viacom II* the Court held that the tax was not liable to prohibit, impede or otherwise make less attractive the provision of advertising services[185] because it was indistinctly applicable and modest in relation to the value of the services provided.[186] Thus, the Court acknowledged that the collection of a tax for the provision of services on its territory lies within the regulatory competence of the host State. The measure only concerns the circumstances within which the service provider operates. It neither prevents market access nor discriminates foreign providers.

These examples show that the Court has recognised the division of regulatory powers between the host and the home State in the field of services. Consequentially, there are measures which fall into the host State competence and do not constitute a restriction under Art 56 TFEU.

(c) Remaining Difficulties

It has been shown that there is a certain category of national provisions that fall outside the scope of Art 56 TFEU, which is therefore equivalent to the category of "certain selling arrangements". However, the distinction between product requirements and certain selling arrangements has proved to be a difficult one. The finding of a clear cut distinction for

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[185] In the earlier Joined Cases C-430 & 431/99, *Sea-Land Service*, [2002] ECR I-5235 the Court had decided this question differently.

[186] Case C-134/03, *Viacom II*, [2005] ECR I-1167, paras. 37-38.

services will face similar difficulties, if not greater ones.[187] Past proposals to find a common approach for a distinction by establishing categories such as "intrinsic characteristics" and "rules relating to the extrinsic conditions" did not lead to a satisfying solution.[188] A.G. Stix-Hackl even argued the transposition of the distinction into the field of services is, as a whole, unpersuasive. Whenever there are sufficient international implications, a rule on arrangements for the provision of any service – irrespective of location – must constitute a restriction of relevance to Union law. The incorporeal nature of services prohibits any distinction at all between rules relating to arrangements for the provision of services and rules that relate directly to the services themselves.[189]

It is true that there are certain grey areas in the field of services. A good example of the difficulties that arise in respect to that is given by Snell/Andenas. A band from the UK is performing in Sweden. The concert has been shaped according to UK rules including

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[187] Opinion of Maduro in Joined Cases C-158 & 159/04, *Alfa Vita Vassilopoulos*, [2006] ECR I-8135, at para 50; Snell/Andenas in Andenas/Roth, p. 111: the finding of a *Keck*-like formula suitable for service would not be easy. However, they then argued that the Court is currently using a test based on a concept of market access which applies even if it does not create a multiple burden or discriminate otherwise against foreign interests in the field of workers and services (at p. 117).

[188] Vilaça in Andenas/Roth, p. 25, distinguishes between intrinsic characteristics and rules relating to the extrinsic conditions. Using advertising as an example, he explains that the intrinsic characteristics encompass the content or the nature of the images used. The method or technique of advertising or the way of presentation, which ought to be submitted to the proportionality test. In contrast, rules relating to extrinsic conditions in which services can be provided such as a total or partial ban ought to be selling arrangements within the meaning of *Keck*.

[189] Opinion of A.G. Stix-Hackl in Case C-36/02, *Omega*, [2004] ECR I-9609. However, *Omega* dealt with a question of service requirements. The prohibited game by Pulsar war lawfully marketed in the United Kingdom and prohibited in Germany. Therefore the lawfulness of the game was not recognised by Germany. In the end the restriction could be justified due to the protection of human dignity, see to that reasoning for example Chu, "Playing at Killing` Freedom of Movement", 33(1) LIEI (2006) 85, at 91 ff.

noise regulations. Snell/Andenas argue, that if the more restrictive Swedish noise regulations were applied, the competitive advantage of the service provider would be jeopardized, because the band would have to alter the show. Therefore, the application of the Swedish rules would create a *prima facie* restriction.[190] Provisions like noise restrictions are certainly difficult to decide. It has to be defined which parts of the performance are considered to be the service itself and which parts are merely circumstances in which the service is provided. Whereas regulations relating to where and when the band is allowed to perform are more likely to fall outside the scope of Art 56 TFEU, regulations relating to the sound or also light effects are more difficult to judge.

Sometimes European legislation itself will clarify the scope of service requirements and arrangements for the provision of services. Harmonisation of certain aspects of arrangement rules will limit the freedom of the national legislator to regulate.[191] In other cases European law makes an express reference to the freedom of the national legislator to impose its own regulations on foreign service providers. Art 4 (1) of Lawyers` Directive[192] for example contains a broad reference to national provisions. A much more complex recognition of national legislation which does not restrict the freedom to provide services is found in the 9th recital of the Services Directive.[193]

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[190] Snell/Andenas in Andenas/Roth, pp. 113 f.

[191] See for example Art 20 (2) of the Audiovisual Media Services Directive (2010/13/EU, [2010] OJ L95/1), which provides that certain TV programmes may be interrupted by television advertising only once for each scheduled period of at least 30 minutes.

[192] Directive 77/249/EEC, [1977] OJ L78/17.

[193] Services Directive 2006/123, [2006] OJ L376/36. With regard to the difficulties arising from the

However, such difficulties in finding the scope of selling arrangement are not unique to services, but also arise in respect of goods. Nevertheless, they did not stop the European Court of Justice to generally exclude certain selling arrangements from the scope of Art 34 TFEU. Equally, these difficulties should not do so in the field of services.

D. Conclusion

Goods and services require equal treatment with regard to the restriction-test under Art 34 and Art 56 TFEU. Not only do they share many economic features and are often closely linked, Art 34 and Art 56 TFEU also both aim at the liberalisation of intra-Union trade. This objective is accomplished through the principles of mutual recognition and non-discrimination. Consequentially, a national measure constitutes a restriction of the free movement of goods or the freedom to provide services if it breaches those underlying principles. A common restriction approach based on the two principles can be found in the case law on Art 34 as well as on Art 56 TFEU.

However, this is sometimes obscured by the fact that the Court often uses of the notion "market access" or "market hindrance" in relation to non-discriminatory measures. It has also done so in very recent decisions on restrictions on use. This practise has given rise to suggestions that the restriction approach should be replaced by a market access test which could serve as a uniform test among all market freedoms. To the contrary, I have argued

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interpretation of the 9th recital of the Services Directive see Barnard, 45 CML Rev. (2008), 323, at pp. 336 ff.

that market access is not a suitable basis for a restriction test, neither for services nor for goods. The aim of Art 34 and Art 56 TFEU is the liberalisation of intra-Union trade and not the unhindered pursuit of commerce in individual Member States. The criterion of market access is therefore too broad and would need further restriction by a *de minimis* criterion. This approach would, however, add nothing to clarify the case law. Moreover, the market access criterion is not needed to explain the Court's case law. Even though the Court mentions market access in many decisions, its reasoning can consistently be traced back to the underlying principles of mutual recognition and non-discrimination. A separate market access criterion is therefore unnecessary. Market access is better described as the aim of the underlying principles of mutual recognition and non-discrimination and not as a separate third principle.

In *Keck* the Court established the distinction between product requirements and certain selling arrangements for goods due to the need to limit the broad restriction formula established in *Dassonville*. Similarly, there is a need to limit the broad restriction test the Court established for services in *Säger*. Therefore, the categories of service requirements and certain arrangements for the provision of services should be generally introduced into the case law on services. On the one hand, the Court has already dealt with various service requirements which generally constitute a restriction under Art 56 TFEU. As the provision of services is more closely linked to the person of the provider, those cover a broader range of national measures. Three classes of service requirements could be found in the Court's case law: requirements concerning the qualifications of the service provider as a person, requirements in relation to his business and requirements regarding the product "service" itself. On the other hand, there are types of measures which generally fall

outside the scope of Art 56 TFEU. Those arrangements for the provisions of services do not preclude access to a foreign market because they neither breach the principle of mutual recognition nor discriminate in law or in fact against foreign service providers. The Court has already acknowledged this category in *Alpine Investments* and subsequent cases. Even though the finding of a clear cut line between service requirements and arrangements for the provision of services might prove to be difficult, it is nevertheless desirable that the Court will expressly draw this distinction in its future case law. Only then can an equal treatment between services and goods truly be achieved.

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