

***To use or not to use – that’s the question***  
***On Article 34 and national rules restricting the use of lawfully marketed products***

Niels Fenger, Professor, dr.jur, University of Copenhagen  
Søren Schønberg, D.Phil, Cabinet of Commissioner Malmström, Brussels

**1. The definition of “measures having equivalent effect” under Article 34**

The purpose of this contribution is to analyse the relationship between Article 34 TFEU and national rules regulating when, where, how and by whom a lawfully imported and marketed product may be used.

According to that provision, “[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.” The Treaty is silent on how one should understand the words “all measures having equivalent effect”. In *Dassonville*, the Court held that these words cover “*all trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions.*” This definition is far from being as operational as is sometimes presumed, since it begs at least two questions. First, what measures constitute “trading rules” and, second, how serious an impact must a measure have before it is “hindering” intra-community trade. In its practice, the Court has attached very little, if any, importance to whether national rules aim to regulate trade in goods or whether they pursue other aims. Indeed, in the case law it uses interchangeably the phrases “trading rules”,<sup>1</sup> “all commercial rules”,<sup>2</sup> “all measures”,<sup>3</sup> “all rules”,<sup>4</sup> and “all legislation”,<sup>5</sup> thereby ruling out any limitation relating

---

<sup>1</sup> Case C-531/07 *Fachverband* [2009] ECR I-3717; Case C-244/06 *Dynamic Medien* [2008] ECR I-505; Case C-4343/04 *Ahokainen and Leppik* [2006] ECR I-9171; and Case C-108/09 *Ker-Optika*, judgment of 2. December 2010.

<sup>2</sup> Case C-192/01 *Commission v Denmark* [2003] ECR I-9693; Case C-254/05 *Commission v Belgium* [2007] ECR I-4269; and Case C-333/08 *Commission v France*, judgment of 28.1.2010.

<sup>3</sup> Case C-88/07 *Commission v Spain* [2009] ECR I-1353; Case C-319/05 *Commission v Germany* [2007] ECR I-9811; Case C-158/04 *Alfa Vita* [2006] ECR I-8135; and Case C-366/04 *Schwarz* [2005] ECR I-10139.

<sup>4</sup> Case C-265/06 *Commission v Portugal* [2008] ECR I-2245.

<sup>5</sup> Case C-141/07 *Commission v Germany* [2008] ECR I-6935; Case C-143/06 *Ludwigs-Apotheke* [2007] ECR I-9623; Case C-170/04 *Rosengren* [2007] ECR I-4097; and Case C-421/09 *Humanplasma*, judgment of 9 December 2010.

to the regulatory subject matter of the national rule in question. The Court's focus is thus on the effects, not the aim or purpose or the subject matter, of the measure in question.

Similarly, regarding the second condition that the national measure be capable of "hindering" intra-community trade, the Court has consistently refused in principle to apply any *de minimis* test under Article 34.<sup>6</sup> Measures which affect trade only indirectly or potentially therefore fall within the definition of a trade restriction.<sup>7</sup> Indeed, the Court in several cases has disregarded statistical evidence showing that imports have increased after a measure was introduced, on the basis that imports might have increased even more in the absence of such a measure.<sup>8</sup>

Consequently, the definition of a trade restriction has become almost all-encompassing, and the legality of huge swaths of national rules therefore depend on the proportionality and justification-test enshrined in Articles 34 and 36 (ex art. 30). This in turn reduces legal certainty for both Member States and traders, and implies a significant risk of judicial overload for the Court itself. As the Sunday-trading saga<sup>9</sup> illustrates, the Court is well aware of these concerns and its ruling in *Keck*<sup>10</sup>, in relation to a particular group of national rules (*i.e.*, selling arrangements), can be seen as an attempt to meet them. Moreover, in another line of cases, the Court in reality has come close to introducing a *de minimis* test (albeit at a very low threshold level) by holding that the restrictive effects which a national measure has on the free movement of goods may be too uncertain and too indirect for it to be regarded as capable of hindering trade between Member States (hereafter called the *Krantz case law*).<sup>11</sup>

---

<sup>6</sup> Case 177/82 *van de Haar* [1984] ECR 1797; Case C-184/96 *Commission v France* [1998] ECR I-6197; and Case C-67/97 *Bluhme* [1998] ECR I-8033.

<sup>7</sup> Case C-184/96 *Commission v France* ("foie gras") [1998] ECR I-6219.

<sup>8</sup> Cases 249/81 *Commission v Ireland* ("Buy Irish") [1982] ECR 4005, paras. 22 and 25, C-405/98 *Gourmet* [2001] ECR I-1795, para. 22, and C-463/01 *Commission v Germany* (mineral water) [2004] ECR I-11705, para. 65.

<sup>9</sup> Case C-145/88 *Torfaen Borough Council* [1989] ECR I-3851; and Case C-169/91 *Stoke-on-Trent* [1992] ECR I-6635.

<sup>10</sup> Joined cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

<sup>11</sup> Case C-69/88 *Krantz* [1990] ECR I-583; Case C-379/92 *Peralta* [1994] I-3453; Case C-140/94 *DIP* [1995] ECR I-3257; Case C-134/94 *Esso Española* [1995] ECR I-4223; Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949; Case C-412/97 *ED* [1999] ECR I-3845; and C-44/98 *BASF* [1999] ECR I-6269. See similarly the Opinion of AG Jacobs in Case C-112/00 *Schmidberger* [2003] ECR I-5659, para. 65 ff.

The difficulty of establishing the appropriate scope of Article 34 of the Treaty is illustrated by the fact that while the *Keck* jurisprudence has been criticised for being too inflexible and unable to catch all genuine barriers to trade, it has been argued that the *Krantz* case law is too difficult to apply and therefore generates legal uncertainty.<sup>12</sup>

## **2. Use restrictions as measures of equivalent effect**

Against this background, let us turn to the relationship between Article 34 and national measures which allow the importation and marketing of a given product, but restrict when, where, how or by whom it may be used (hereafter “use restrictions”). Such rules are very common in national legislation. As an example, one could mention a requirement for persons to have attained a particular age before acquiring or using the product, such as a rule preventing minors from purchasing and/or drinking alcohol. The notion also covers rules prohibiting the use of the product in certain places or at certain times, like a ban on the use mobile phones in airplanes or a prohibition on the use of fireworks save for a few days of the year. Other examples would be local planning rules prohibiting the use of a given kind of brick or tile for the construction of houses in a particular area or a ban of certain activities for which a good is normally used, for example a ban on hunting with dogs and horses.<sup>13</sup> Even a prohibition on wearing a particular type of clothing, such as a burka, in public places is arguably covered by this concept.

Considering the vast number of such rules, it is important to consider whether use restrictions should be regarded as trade restrictions at all, and if so, how intrusive they must be to be caught by Article 34.

On the one hand, the aim of such rules is normally not to regulate trade. Moreover, they generally do not affect the sale of imported goods more than they affect the sale of domestic goods. Finally, with a literal reading of Article 34 of the Treaty and the Court’s own ruling in *Dassonville*, it may be questioned how rules

---

<sup>12</sup> AG Kokott in Case C-142/05 *Mickelsson* [2009] ECR I-4273.

<sup>13</sup> In *Countryside Alliance and others v. HM Attorney General* [2006] EWCA Civ 817, the English Court of Appeal denied that a hunting ban constituted a restriction for the purposes of Article 34, since it was not aimed at products from other Member States and did not have a discriminatory effect on imported products. In a judgment on appeal of 27 November 2007, the House of Lords found it questionable whether the ban was caught by Article 34, but found that issue to be of little importance, as any restriction clearly was justified, see House of Lords Session 2007–08 [2007] UKHL 52.

which do not limit the importation and marketing of the relevant product, but merely regulate how it may be used after its sale, can be said to constitute “trading rules”.

On the other hand, it is clear that *some* limitations on how a product may be used can negatively affect sales and import to a very significant extent. Indeed, whereas a prohibition on using mobile phones in airplanes hardly has any such effect, a ban on using fireworks all year except on 31 December is likely to (greatly) reduce demand for, and thus sales and import of, that good. Similarly, one may imagine that a ban on the use of SUVs in congested urban zones would constitute an efficient means for diminishing sales and import of such cars to the benefit of more environmentally friendly vehicles.

Still, while it may be relatively easy to accept that rules completely banning the use of a given product constitute measures with equivalent effect to a quantitative restriction, it may be questioned whether rules merely limiting its lawful use need to be subject to a common European judicial control as to their legitimacy, suitability and necessity.

To answer this question, it is, in our view, necessary to consider the practical and economic effect on trade of rules restricting the lawful use of goods. An argument can be made that, with the exception of (virtually) complete bans on use, the effects of use restrictions differ fundamentally from the effects of product related rules, and that use restrictions should rather be compared to selling arrangements.<sup>14</sup> In a seminal article, White argued that:

*The different legal and economic environment of the Member State of origin finds its expression in the different characteristics of an imported product compared with the national product. Consequently, as the judgment of the Court in Cassis de Dijon clearly shows, Member States are not entitled to require that imported products have the same characteristics as are required of, or are traditional in, domestic products unless this is strictly necessary for the protection of some legitimate interest. There is not, however, the same need to require the rules relating to the circumstances in which certain goods may be sold or used in the importing Member State to be overridden for this*

---

<sup>14</sup> Horsley, Case note, CMLRev 2009, p. 2001 (2010) and, Pecho, Leaving Keck Behind? The Free Movement of Goods after the Rulings in *Commission v Italy* and *Mickelsson and Roos*, 2009 ELRev., p. 914 (922 -923). Compare Oliver, Of Trailers and Jet-Skis: is the Case Law on Article 34 TFEU (ex Article 28 EC) Careering in a New Direction?, Fordh. Int'l Law Journal, forthcoming.

*purpose as long as imported products enjoy equal access to the market of the importing Member State. In such a case the imported product is not deprived of any advantage it derives from the different legal and economic environment prevailing in the place of production. In fact, any reduction of total sales (and therefore imports) which may result from restrictions on the circumstances in which they may be sold does not arise out of disparities between national rules but rather out of the existence of the rules in the importing Member State.*<sup>15</sup>

On that basis, White suggested that state measures which are entirely neutral in their effect on foreign and domestic goods – because they merely regulate the circumstances in which all goods of the same kind may be sold or used – should not fall under Article 34. This should only be different when the restrictions on the circumstances in which the goods may be used depend on their characteristics (in which case they should be judged according to *Cassis de Dijon*) or are so severe that they amount to a virtual prohibition of the product (in which case they should be assimilated to prohibitions).<sup>16</sup> The judgment in *Keck*, in our view, is based on the same logic: national measures must ensure “*equality of chances*” for domestic and imported goods. The Court will interfere and assess the legitimacy of state measures only when they potentially affect imported goods relatively more than domestic goods. However, when the principle of equality of chances is respected, the Member States should be allowed to freely regulate their respective territories, even when that indirectly affects the total volume of sales of a given product.<sup>17</sup>

Going further, Horsley has argued that requiring use restrictions to be justified under Article 34 would turn that provision into a tool to increase the domestic market for the relevant product or even to create a market for that product where none existed previously. He objects to this on the basis that, in his view, Article 34 seeks only to prevent distortion of competition; it does not carry an obligation to allow for a market place where competition can take place.<sup>18</sup>

---

<sup>15</sup> White, In Search of the limits to Article 30 of the EEC Treaty, CMLRev 1989, p. 235 (246), underlined by White.

<sup>16</sup> *Ibid*, pp. 247, 253-254 and 258.

<sup>17</sup> Case C-441/04 *A-Punkt Schmuckhandel* [2006] ECR I-2093; Case C-20/03 *Burmanjer* 2005] ECR I-4133; Case C-71/02 *Karner*, cited above; and Case C-418/93 *Semeraro Casa Uno* [1996] ECR I-2975.

<sup>18</sup> *Horsley op. cit.*, pp. 2012, 2014 and 2017-8. See also Enchelmaier, The ECJ's Recent Case Law on the Free Movement of Goods: Movement in All Sorts of Directions, YEL 2007, p. 115 (130-132).

In our view, White's analysis strikes the appropriate balance. On the one hand, Article 34 can indeed, according to its own wording ("quantitative restrictions") and the Court's case law,<sup>19</sup> entail an obligation for a Member State to justify provisions which exclude *any* market whatsoever for a given product. On the other hand, there is little basis in the Treaty for the proposition that Article 34 encourages a general deregulation of national economies.<sup>20</sup> Although some liberalising effects are bound to flow from Article 34, its fundamental objective is to ensure that producers are put in a position to fully benefit from the right to carry out their activity at a cross-border level, while consumers are put in a position to access products from other Member States *in the same conditions* as domestic products.<sup>21</sup>

### 3. The Court's case law

Traditionally, however, the Court has not distinguished between national rules which ban *any* use of the product concerned and rules *limiting* its lawful use. In a series of cases concerned with relatively severe use restrictions, it has applied the classic *Dassonville* test and found such rules to be measures of equivalent effect without discussing the applicability of either the *Keck* reasoning or the *Krantz* case law. For example, in *Commission v Portugal*,<sup>22</sup> the question was whether a Portuguese prohibition on the affixing of tinted film to the windows of passenger or goods vehicles fell foul of Article 34. Noting that the only exception to the Portuguese ban concerned the affixing of tinted film to the goods compartments of goods vehicles and to non-wheeled vehicles, the Court held that "*potential customers, traders or*

---

Indeed, this was the very reasoning that led the UK Court of Appeal in the above-mentioned *Countryside Alliance* case to hold that English law did not constitute a trade restriction. For the Court of Appeal it did not matter that the rule had the practical effect of taking products off the market, as "*the implication of the argument is that a member state can be under an obligation to keep intact, or even possibly to create, a market for the benefit of importers from other member states. That cannot be so, at least where the state is equally depriving its own citizens of that benefit*".

<sup>19</sup> Case C-192/01 *Commission v Denmark* [2003] ECR I-9693.

<sup>20</sup> See similarly AG Maduro in paras. 37-40 of his Opinion in Case C-158/04 *Alfa Vita Vassilopoulos*, cited above; and AG Tizzano in para. 63 of his Opinion in Case C-442/02 *Caixa Bank*, cited above, arguing that such an interpretation "*would be tantamount to bending the Treaty to a purpose for which it was not intended: that is to say, not in order to create an internal market in which conditions are similar to those of a single market and where operators can move freely, but in order to establish a market without rules. Or rather, a market in which rules are prohibited as a matter of principle, except for those necessary and proportionate to meeting imperative requirements in the public interest*".

<sup>21</sup> For a broader view of the purpose of Article 34, see the Opinion of AG Jacobs in Case 412/93 *Leclerc* [1995] ECR I-179 and Spaventa, *Leaving Keck Behind? The free movement of goods after the ruling in Commission v Italy and Mickelsson and Roos*, ELRev 2009, p. 914 (925 and 929).

<sup>22</sup> Case C-265/06 *Commission v Portugal*, cited above.

*individuals have practically no interest in buying them in the knowledge that affixing such film to the windscreen and windows alongside passenger seats in motor vehicles is prohibited*".<sup>23</sup>

Further, the Community legislator seems to have viewed restrictions on use as being capable of constituting trade restrictions: some such rules are covered by the obligation to notify draft technical regulations under Directive 98/34 on the laying down of a procedure for the provision of information in the field of technical standards and regulations. According to the Court, that notification obligation applies not only with regard to full-fledged prohibitions on use, but also with regard to "*national measures which leave no room for any use which can reasonably be made of the product concerned other than a purely marginal one*".<sup>24</sup>

Recently, two cases offered the Court an opportunity to reconsider this case law. The first one, *Commission v Italy* (hereafter *Trailers*),<sup>25</sup> concerned an Italian prohibition on attaching trailers to motorcycles. In his Opinion, AG Léger found that the Italian rule in question did constitute a trade restriction (and, moreover, could not be justified). Following that Opinion, the Court referred the case to the Grand Chamber, re-opened the oral procedure and invited the parties and Member States to comment on whether national use restrictions are to be regarded as measures having equivalent effect to quantitative restrictions. Of those Member States presenting observations, nearly all argued that use restrictions should be assessed in the same way as selling arrangements and thus be excluded from the scope of Article 34 altogether, provided that the conditions laid down by the Court in the *Keck*-judgment were met. In his Opinion on the reopened case, AG Bot strongly opposed those arguments, and warned against extending *Keck* to cover use restrictions. In his view, to exclude such rules from the scope of Article 34 would undermine its *effet utile* and the Court's review of measures, which, in fact, may constitute serious obstacles to intra-Community trade. It was therefore, Bot submitted, preferable to

---

<sup>23</sup> Paras. 33-34 of the judgment. See also Case 60/84 *Cinéthèque* [1985] ECR 2605; Case C-67/97 *Bluhme*, cited above; Case C-473/98 *Toolex* [2000] ECR I-5681; and Case C-65/05 *Commission v Greece* [2006] ECR I-10341.

<sup>24</sup> Case C-276/03 *Lindberg* [2005] ECR I-3247. As will be shown later, this formulation is strikingly close to that adopted by the Court in the judgments discussed below concerning Case C-142/05 *Mickelsson*, cited above; and Case C-110/05, *Commission v Italy* [2009] I-519. Already directive 66/683 eliminating all differences between the treatment of national products required Member States to abolish measures which partially or totally prohibited the use of an imported product.

<sup>25</sup> Case C-110/05 *Commission v Italy*, cited above.

continue to examine measures of that kind under the classic test in *Dassonville* and *Cassis de Dijon*<sup>26</sup>, rather than to exclude them from the scope of the Treaty.

The second case, *Mickelsson*<sup>27</sup>, concerned a Swedish law that defined (and restricted) the waters in which lawfully imported and sold personal watercraft (sometimes referred to as jet-skis) could be used. These rules imposed a general ban on sailing with personal watercraft in all Swedish waters except in so-called general navigable waterways. Whereas there were about 300 such general navigable waterways, it also appeared that general navigable waterways did not exist in large portions of the country, they were not interconnected, they were difficult to reach, and for safety reasons they were often unsuitable for the use of a personal watercraft. In a criminal case concerning a violation of the prohibition against sailing outside such general navigable waterways, the defendants, Mickelsson and Roos, argued that Swedish law was contrary to Article (now) 34, as the prohibition greatly reduced potential consumers' interest in buying personal watercrafts. The Swedish Government disputed that the rules constituted a measure of equivalent effect (and argued that in any event they were justified) since the situation was not different from when a Member State regulates where land-based vehicles are allowed to drive. And who would ever argue that a prohibition for a 4WD vehicle to drive off the road in forests and mountains should be viewed as a trade restriction?

AG Kokott basically agreed with the approach of the Swedish Government. Drawing implicitly on the above-cited reasoning of White, she suggested that national rules regulating the use of a good should be dealt with in the same way as selling arrangements and thus be excluded from the scope of Article 34 altogether, provided that the conditions laid down by the Court in the *Keck* judgment were met. Otherwise, individuals would be able to invoke Article 34 to challenge national rules, the effect of which is merely to limit their general freedom of action. Moreover, arrangements for use and selling arrangements in her opinion were comparable in terms of the nature and the intensity of their effects on trade in goods. In her view, it followed from this analogy with *Keck* that such rules however will fall within the scope of Article 34 when in reality they prevent access to the market for the product in question. That would be the case not only for rules which

---

<sup>26</sup> Case 120/78 *Rewe-Zentral* [1979] ECR 649.

<sup>27</sup> Case C-142/05 *Mickelsson*, cited above. See on the same matter, Case C-433/05 *Sandström*, judgment of 15.4.2010.



result in complete exclusion, such as a general prohibition on using a certain product, but also when only a marginal possibility for using a product remains.<sup>28</sup>

In both cases, the Court started out by restating its classic case law that obstacles to the free movement of goods, which are the consequence of applying (to goods coming from other Member States where they are lawfully manufactured and marketed) rules that lay down requirements to be met by such goods, must be regarded as measures having equivalent effect to quantitative restrictions on imports for the purposes of Article 34. It then added that the same applies to “*any other measure which hinders access of products originating in other Member States to the market of a Member State*”.<sup>29</sup>

Tacitly refusing to apply an analogy of its case law concerning selling arrangements, as suggested by AG Kokott, the Court then approached the Italian and Swedish rules by looking at their likely effect on the behaviour of potential buyers of a trailer or a watercraft. According to the Court, it was not decisive that national regulations concerning where and how a product may be used normally do not have the aim or effect of treating goods coming from other Member States less favourably. What mattered was rather that a rule which restricts the use of a product might, depending on its scope, have a considerable influence on the behaviour of consumers, which may, in turn, affect the access of that product to the national market.

In *Trailers*, for some products the national rule prohibited the only relevant use of the relevant good (the towing of a trailer).<sup>30</sup> It was thus no big surprise that the Court, in line with its above-mentioned older case law, found such a rule to constitute a trade restriction. In comparison, in *Mickelsson* the Court went further by holding that Article 34 also encompasses certain national rules that merely regulate how, where and when a product may be used. In this respect, the Court found that the Swedish rules had the effect of preventing owners of personal watercrafts from using them for the specific and inherent purposes for which they were intended or, at least, greatly restricted their legal use. Thus, in economic terms such regulations had the effect of hindering access to the domestic market in

---

<sup>28</sup> For a critique of the Kokott’s reasoning see Oliver, *Oliver on Free Movement of Goods in the European Union*, 3ed, p. 127-128

<sup>29</sup> Para. 37 in *Trailers* and para. 24 in *Mickelsson*.

<sup>30</sup> As to dual use see below in section 6.

question for those goods and therefore constituted measures having equivalent effect to quantitative restrictions on imports prohibited by Article 34.

#### **4. Understanding and evaluating the Court's approach**

If there are, as argued above in Section 2, clear parallels between the effects on trade of selling arrangements and use restrictions, why did the Court reject the suggestions of AG Kokott to extend the *Keck* case law?

##### *4.1. The wish to maintain judicial control*

The first likely reason is that the Court found it appropriate to maintain its judicial control over rules regulating the use of lawfully marketed products. At the same time, the Court may have taken into account that, in contrast to what was the case concerning selling arrangements before *Keck*, there have not been many cases concerning restrictions on use.

These considerations concerning the Court's own powers and its workload however hardly provide the full picture. As discussed in more detail below in Section 6, in *Mickelsson* the Court found it decisive whether the Swedish rules had "*the effect of hindering the access to the domestic market*" and in that connection put emphasis on the fact that the actual possibilities for the use of personal watercraft were "*marginal*" such that the restriction of its legal use was liable to have "*a considerable influence on the behaviour of consumers*". In practical effects, although not in its theoretical approach, the Court's test thereby comes close to the *Keck*-based approach suggested by AG Kokott. As will be recalled, she suggested that a non-discriminatory measure restricting certain types of use should be classified as a measure of equivalent effect if it "*prevents access to the market for the product in question*". According to Kokott, this would be the case not only for rules that contain a general prohibition on using a certain product, but also for "*a situation where only a marginal possibility for using a product remains*".<sup>31</sup> There must therefore be additional reasons why the Court decided not to follow AG Kokott's suggestion to extend its practice concerning selling arrangements to cover also use restrictions.

##### *4.2. Alignment with the other freedoms*

---

<sup>31</sup> Para. 67 of the Opinion.

A second possible reason the Court chose not to apply the *Keck* approach in *Trailers* and *Mickelsson* is that it wished to align to some extent its practice in the field of free movement of goods with its case law concerning the other fundamental freedoms.<sup>32</sup> In relation to these other freedoms, the Court has never adopted the “selling arrangement” classification, but rather views as restrictions on freedom of movement all measures which prohibit, impede or render less attractive the exercise of the relevant freedom.<sup>33</sup> Hence, by combining a market access test with a refusal to apply an expanded *Keck* test, the Court has increased the unity and consistency of its case law concerning the different freedoms.<sup>34</sup> This is especially so as the case law concerning the other provisions on free movement also draws a distinction between, on the one hand, impediments to the market and, on the other hand, rules that merely limit the exercise of a given activity.<sup>35</sup> Similarly, the principle that a restriction may be too remote and uncertain has been applied in the case law concerning the other freedoms.<sup>36</sup>

#### 4.3. *Keck* does not cover all non-product related measures

A third possible reason the Court chose not to follow the approach suggested by *White* and *Kokott* is that it would have given *Keck* a substantially wider scope of application than so far accepted in the Court’s case law. Whereas *White* and *Kokott* seem to advocate that the relevant distinction is between product-related requirements and other national measures able to affect trade, the Court’s case law

---

<sup>32</sup> Such an alignment of the different freedoms was proposed by AG Maduro in paras. 37-40 of his Opinion in Case C-158/04 *Alfa Vita Vassilopoulos*, cited above. See also Oliver, Goods and Services: Two Freedoms Compared, in *Mélanges en l'honneur de Michel Waelbroeck* (1999) vol. 2 p. 1377; O’Keeffe and Bavasso, Four Freedoms, One Market and National Competence: In Search of a Dividing Line, in *Liber Amicorum in Honour of Lord Slynn of Hadley*, vol. 1, (2000) p. 541; Bernard, Fitting the remaining pieces in the goods and persons jigsaw, ELR 2001, p. 35; Straetmans, Case note on Case C-405/98 *Konsumtombudsmannen (KO) v Gourmet International Products AB (GIP)*, CMLRev 2002, p. 1407; and Snell, *Goods and Services in EC Law: A Study of the Relationship between the Freedoms* (2002).

<sup>33</sup> Case C-169/07 *Hartlauer* [2009] ECR I-1721; Case C-500/06 *Corporación Dermoestética* [2008] ECR I-5785; Case C-452/04 *Fidium Finanz* [2006] ECR I-9521; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941; Case C-442/02 *CaixaBank France* [2004] ECR I-8961; and Case C-384/3 *Alpine Investments* [1995] ECR I-1141.

<sup>34</sup> Pecho, Good-Bye *Keck*? A Comment on the Remarkable Judgment in *Commission v Italy*, C-110/05, LIEI 2009, p. 257 (264).

<sup>35</sup> Case 544/03 *Mobistar* [2005] ECR I-7723; para. 66 of the Opinion of AG *Tizzano* in Case C-442/02 *Caixa Bank*, cited above; and para. 205 in the Opinion of AG *Lenz* in Case C-415/93 *Bosman* [1995] ECR I-4921.

<sup>36</sup> Concerning Article 39 EC, see Case C-190/98 *Graf* [2000] ECR I-493. With regard to Article 49 EC, see Case C-134/03 *Viacom Outdoor* [2005] ECR I-1167.

tends to make a distinction between selling arrangements and all other measures, be that product-related measures or other types of measures. Indeed, when a measure is neither a selling arrangement nor regulating product characteristics, the Court has traditionally subjected them either to the traditional *Dassonville* and *Cassis* test<sup>37</sup> or applied the *Krantz* case law to find their effects on the free movement of goods too uncertain and indirect to be caught by Article 34. As shown above in Section 3, this has also been true for cases concerning restrictions on use.

#### 4.4. *Keck* does not encompass a case-by-case market access test

A fourth possible reason the Court refused to extend its case law concerning selling arrangements to use restrictions is that it would either make non-discriminatory rules of that kind immune from Community law or necessitate a reconstruction of the *Keck* test itself. Admittedly, as already mentioned in Section 3, in the end AG Kokott came to the conclusion that the Swedish regulation was so restrictive on trade that the test laid down in *Keck* itself led to its non-application in the case at hand. In arriving at that conclusion, she argued that it was part of an Article 34 examination of selling arrangements to assess whether the national measure in reality prevented access to the market for the product in question. However, in our opinion, *Keck* does not encompass the market access test that AG Kokott reads into the judgment.

It is of course correct that in *Keck* the Court held that when national selling arrangements satisfy the two conditions laid down in that judgment, such arrangements are not “*by nature such as to prevent their access to the market*” and consequently fall outside the scope of Article 34.<sup>38</sup> Moreover, by distinguishing various categories of measures, the Court evidently endeavoured to identify the conditions under which each of those categories may affect access to the market.

However, the Court’s just-cited statement only showed that it took the view that no access problem arises in situations where the two *Keck* conditions are fulfilled. In contrast, the Court has been much less willing to make the reverse finding suggested by AG Kokott that it is part of the *Keck* test to examine *on a case-by-case basis* whether the national rule in question actually restricts market access although it fulfils those two conditions. In fact, one of the main purposes of *Keck* was to avoid

---

<sup>37</sup> For example, Cases C-434/04 *Ahokainen and Leppik*, cited above; Case C-320/03 *Commission v Austria* [2005] ECR I-9871; and Case C-323/93 *Crespelle* [1994] ECR I-5077.

<sup>38</sup> Paras. 16-17 in *Keck*.

the need for such concrete assessments by making that evaluation once and for all with regard to the types of rules covered by the judgment, *i.e.*, rules concerning to whom, where and when a product might be sold. Or to put it differently, with the statement that no market access is restricted by non-discriminatory selling arrangements, the Court in *Keck* insisted on a legal fiction in the name of legal certainty and operability.<sup>39</sup> Somewhat sharply phrased, it could be argued that the reading of *Keck* suggested by AG Kokott introduces a third condition into a judgment that only has two and that her approach thus confuses what the Court saw as the consequence of fulfilling the test laid down in that judgment with the actual test itself.

It is true that, already before *Mickelsson* and *Trailers*, many commentators had seen a trend in the Court's case law towards the recognition of a broader market access test akin to that suggested by AG Kokott.<sup>40</sup> In this respect, reference was usually made to *Gourmet*, where the Court held that in order to escape Article 34, national selling arrangements "*must not be of such a kind as to prevent access to the market by products from another Member State or to impede access any more than they impede the access of domestic products*".<sup>41</sup> However, this statement was not decisive for the Court's conclusion in the case, and in its later case law the Court never referred to that part of the *Gourmet* judgment. Nor did the Court actually apply a market access criterion in relation to national selling arrangements that genuinely affected domestic and imported goods in the same way. Rather, the market test was applied in order to show that rules which protected the status quo of the national market could make it more difficult for foreign operators to penetrate the national market. In other words, the market test was not seen as a third condition to be applied case by case. Instead, it was used as a means to apply the second condition relating to factual equality between domestic and imported goods.<sup>42</sup> For non-discriminatory measures, the market test was applied only in the negative sense that

---

<sup>39</sup> Oliver, Some further Reflection on the Scope of Articles 28-30 (ex. 30-36), CMLRev 1999, p. 783 (797-799), who commends the Court for this approach and warns against an economic assessment on a case-by-case basis. See also Case C-98/01 *Commission v UK* [2003] ECR I-4641.

<sup>40</sup> On this issue, see Weatherill, After Keck: Some Thoughts on How to Clarify the Clarification, CMLRev 1996, p. 885 (887, 894 and 896-898); Straetmans, *op. cit.*, p. 1415; and Steiner and Woods, *EU Law*, 10 ed., pp. 435-436.

<sup>41</sup> C-405/98 *Gourmet* [2001] ECR I-1795.

<sup>42</sup> Case C-239/02 *Douwe Egberts* [2004] ECR I-7007 (but compare paras. 71-75 of the Opinion of AG Geelhoed); Case C-322/01 *Deutscher Apothekerverband*, cited above (but compare paras. 74-96 of the Opinion of AG Stix-Hackl); Case C-354/98 *TK-Heimdienst* [2000] ECR I-151; and Case C-34/95 *De Agostini* [1997] ECR I-3843.

as long as the two conditions laid down in *Keck* were fulfilled no market access problem would by definition arise.<sup>43</sup> And, as will be explained below, this remains the legal position.

#### 4.5 A desire to avoid rigid categorisation

A fifth, and final, possible explanation may be that the Court did not wish to face fierce academic criticism, of the kind levelled at the ruling in *Keck*, for relying on overly "rigid" categorisation of different types of national measures to delimit the scope of Article 34.<sup>44</sup> The Court is likely to have weighed that concern against the risk of criticism that the market access approach is inherently vague and will give rise to legal uncertainty for operators and Member States alike.<sup>45</sup> For example, it is far from evident how one would assess under the market access test a national rule that allocates 10 or 20% of all waters suitable for sailing with a personal watercraft as open for such use or a rule allowing the use of a personal watercraft, but restricting the speed limit to 10 knots per hour. However, the Court may have concluded, correctly in our view, that the legal uncertainty inherent in the market access test is in any event no greater, and possibly even lesser, than the uncertainty inherent in the general criteria laid down in *Dassonville* combined with the *Krantz* case law.

### 5. A unified market access test for all national measures?

Based on para. 37 of the judgment in *Trailers*, where the Court stated that Article 34 not only covers product rules, but "*any other measure which hinders access of products originating in other Member States to the market of a Member State*", it might be tempting to conclude that the Court has introduced market access as a new overarching test to be applied, on a case-by-case basis, to all national measures to determine whether they fall within the scope of Article 34.<sup>46</sup>

---

<sup>43</sup> C-141/07 *Commission v Germany*, cited above; Case C-244/06 *Dynamic Medien*, cited above; Case C-158/04 *Alfa Vita*, cited above; and Case C-71/02 *Karner* [2004] ECR I-3025.

<sup>44</sup> See, for example, Gormley, Reasoning Renounced? The Remarkable Judgment in *Keck* and *Mithouard* E.B.L.R. 1994, p. 63; Moore, case note, ELRev. 1994, p. 195; Reich, The November Revolution of the European Court of Justice: *Keck*, *Meng* and *Audi* Revisited CMLRev 1994, p. 459; Weatherill, op. cit., Gormley, The Definition of Measures Having Equivalent Effect, in *Continuity and EU Law: Essays in Honour of Sir Francis Jacobs* (2007), p. 189, and Silver Threads Among the Gold ... 50 Years of the Free Movement of Goods, *Fordh. Int'l Law Journal* 2008, v. 31, n. 6, June, pp. 1637-1691.

<sup>45</sup> For such criticism, see Oliver, op.cit, forthcoming, and Spaventa, op.cit, pp. 922-924.

<sup>46</sup> See Pecho, op.cit., p. 262.

On closer reflection, the market access test, however, may be rather less novel and practically significant. Ensuring market access for foreign products was always a major preoccupation of the Court even though it has used different terms to express that concern. Moreover, as already discussed above under section 4.5, the market access test does not provide precise operative criteria for how to assess whether a given national rule impedes market access sufficiently to be caught by Article 34. It is therefore conceivable that the test will not, in practice, lead to significant changes in terms of outcomes compared to previous case law. The novelty of the market access test thus, ultimately, may be more terminological than substantive.

This point is neatly illustrated by the position of selling arrangements under the post-*Trailers* case law. Based on para. 37 of the judgment, it has been argued that *Trailers* prescribes a case-by-case assessment of whether a non-discriminatory selling arrangement actually impedes market access.<sup>47</sup> However, immediately before stating that a market access criterion has now become the relevant yardstick, the Court restates *Keck* and maintains that a selling-arrangement fulfilling the two conditions on factual and legal equality “*is not by nature such as to prevent their access to the market*”. Therefore, it is more plausible to read *Trailers* as meaning that no individual assessment under the market access criterion needs to be made in relation to those categories of national measures for which the Court has already made that assessment. Indeed, if a market access test were to be carried out in all cases concerning selling arrangements in the same manner as in other cases concerning Article 34, what would then be the substance of the distinction between selling arrangements and other measures? And why would the Court in that case have chosen to restate that fully non-discriminatory selling arrangements do not by nature pose problems under a market access test?

Our interpretation, according to which non-discriminatory selling arrangements are not subject to a case-by-case market access test, is corroborated by the Court’s most recent case law. Indeed, in *Fachverband*, the Court continued to apply classic *Keck* reasoning and even referred to *Trailers* to support the proposition that selling arrangements do not need to be assessed under a new case-by-case

---

<sup>47</sup> *Ibid.*

market access test.<sup>48</sup> Similarly, in *Ker-Optika* concerning a national legislation authorising the selling of contact lenses only in shops which specialise in medical devices, the Court first restated the general market access in *Trailers*, but then referred to *Keck* and held that it was “*necessary to examine whether the national legislation at issue in the main proceedings .. applies to all relevant traders operating within the national territory and whether it affects in the same manner, in law and in fact, the selling of domestic products and the selling of those from other Member States*”, in other words, the classic *Keck* test.<sup>49</sup>

Thus, the better reading of *Trailers* and *Mickelsson* would seem to be that they introduce an overall market access test, the consequences of which the Court already spelled out in *Keck* with respect to selling arrangements so that no case-by-case analysis is required for such measures.<sup>50</sup>

Similarly, it is far from clear that the market access test will in practice affect the outcomes of for example cases concerning formalities to be respected in connection with the passing of a frontier. Hitherto, the Court has viewed such formalities as trade restrictions even where they are minor and not a precondition for the lawful import and marketing of the product.<sup>51</sup> It seems very likely that, as for selling arrangements, the Court will take the view that the consequences of the market access test for border formalities have already been spelled out by the existing case law.<sup>52</sup> In other words, while market access appears to have been established as the unifying test under Article 34, the application of that test is likely to vary significantly depending on the type of national measure at issue.

## 6. Finding the suitable threshold

To understand the implications of the new case law on use restrictions, we will examine two questions. First, should a national court faced with a case regarding a use restriction seek information as to the degree to which that restriction actually

---

<sup>48</sup> Case C-531/07 *Fachverband*, cited above.

<sup>49</sup> Case C-108/09 *Ker-Optika*, cited above.

<sup>50</sup> Oliver, *Oliver on Free Movement of Goods in the European Union*, 3ed, p. 130.

<sup>51</sup> Joined Cases 51-54/71 *Int. Fruit* [1971] ECR 1107.

<sup>52</sup> Another issue is whether these so-to-speak pre-decided subgroups correctly reflect the restrictive effects that they generally have. As noted by Spaventa, *op.cit.*, p. 922, one might question, e.g., whether an obligation to provide statistics (which has been and probably continues to be assessed under the *Dassonville* test, cf. Case C-114/96 *Kieffer* [1997] ECR I-3629) really hampers market access more than certain types of non-discriminatory advertising restrictions that, according to *Keck*, fall outside the scope of Art. 34 altogether.



reduces import volumes or rather examine the content of the contested rule and assess the extent to which it prevents normal use of the good in question? Second, how much must either import volumes be reduced, or normal use be restricted, before the national measure is caught by Article 34?

Regarding the first question, it is submitted that the national court does not have to engage in a sophisticated economic analysis of trade volumes, but may limit itself to examining the extent to which the national measure restricts – temporally, geographically, substantively and/or personally – the use of the good. Indeed, in *Mickelson* and in *Trailers*, the Court focused on the fact that the rules in question prevented the products from being used “for the specific and inherent purposes for which they were intended or of greatly restricting their use”<sup>53</sup> and that consumers on the whole therefore had “practically no interest in buying” or only “a limited interest in buying that product”.<sup>54</sup> In contrast, the Court did not invite the parties or the referring court to seek statistical information on the actual effects of the contested national rules. Hence, it was this limitation – inherent in the scheme of the measures themselves – rather than an economic analysis of their actual impact on imports that led the Court to consider them as measures of equivalent effect.

As for the second question, according to the classic *Dassonville* formula, Article 34 covers national measures that merely have the potential to hinder trade and hitherto the Court has refused to apply a *de minimis* test.<sup>55</sup> As noted by AG Kokott in *Mickelsson*, a literal application of that formula, however, risks entailing an unreasonably broad delimitation of what restrictions on use constitute measures of equivalent effect.<sup>56</sup> On that basis, it is suggested that national measures which merely limit to some extent the general usefulness of a product, and thereby have some potential effect on imports, should not be caught by Article 34. Rather, the threshold should be placed fairly high: Article 34 should apply only where all, or

---

<sup>53</sup> Para. 28 in *Mickelsson*.

<sup>54</sup> Para. 57 in *Trailers* and para. 27 in *Mickelsson* respectively. See similarly Case C-265/06 *Commission v Portugal*, cited above.

<sup>55</sup> See above in Section 1.

<sup>56</sup> Similarly Prete, *Of Motorcycle Trailers and Personal Watercrafts: the Battle over Keck*, LIEI 2008, p. 133 (141).

nearly all, normal uses of the good in question are excluded, and imports are therefore likely to be quite severely affected.<sup>57</sup>

Support for this suggestion can be found in the Court's own approach to national rules restricting some, but not all, of several purposes for which a good may be used: in *Trailers*, the Court refused to accept the existence of a trade restriction with regard to an Italian rule that prohibited motorcycles from towing trailers not specially designed for towing behind motorcycles, but equally intended to be towed by automobiles or other types of vehicles. Admittedly, the Court did not exclude explicitly that a restriction could persist even if there was still room for some legal use. It merely noted that the Commission had adduced no proof that the Italian rules hindered access to the market for that type of trailer. It is thus not clear how the Court would have reacted if the Commission had shown that the great majority of such trailers were in fact, on other markets, bought with a view to being towed by motorcycles. Some indications, however, can be found in the above-mentioned case in *Commission v. Portugal* concerning tinted film on car windows, where the Court held that a minor exception to a general rule prohibiting the use of a product for the purpose for which it has been designed was not sufficient to remove the prohibition from the ambit of Article 28.<sup>58</sup> Similarly, in *Commission v Greece*, concerning a prohibition on the installation and operation of certain games of chance on all public or private premises apart from casinos, the Court indicated that it will not be enough to escape Article 28 EC that the product is allowed for a very restricted group of potential buyers.<sup>59</sup> Although both those ruling predate *Trailers* and *Mickelsson*, it is submitted that they are still good law as to the threshold they lay down.

## 7. Concluding remarks

After some initial uncertainty about the relationship between Article 34 TFEU and national rules regulating when, where, how and by whom a lawfully imported and marketed product may be used, following the Court's ruling in *Trailers*, it is possible to conclude from the ensuing case law that such rules fall within the scope of Article

---

<sup>57</sup> Compare Oliver, op.cit., forthcoming, arguing that all use restrictions should be caught unless their effects on trade are too indirect using the meaning of the *Krantz* case law.

<sup>58</sup> Case C-265/06 *Commission v Portugal*, cited above.

<sup>59</sup> Case C-65/05 *Commission v Greece* [2006] ECR I-10341.

34 if they restricts (beyond a certain threshold) the use of the product in such a ways as to influence the behaviour of consumers and thus affect (beyond a certain threshold) the access of that product to the national market. In this contribution, we have argued that this market access test is not inherently novel and that its implications for the case law on Article 30 as a whole are likely to be limited. With respect to restriction on use specifically, we have warned against placing the threshold for applicability of Article 34 at too low a level: that provision should in our view apply only where all, or nearly all, normal uses of a good are excluded.