

Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law

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A. Introduction

There has been much discussion of the proper scope of the European Treaty articles on free movement. Central to this discussion has been a debate about the best concept around which to build free movement law, and in this debate “discrimination” has been opposed to “market access.” It is, however, the central thesis of this paper that the opposition is largely false. In general, measures which affect all market actors equally do not, as a matter of economic fact, impede market access. The non-discriminatory measures which impede market access, which some have felt it so important to bring within the Treaty, are therefore more mythical than real. This argument is made with reference to competition law and theory concerning barriers to market entry.

A secondary thesis of this paper is that the Court of Justice appears to understand this. While its choice of language when interpreting the free movement articles is variable and sometimes inconsistent, and does not make entirely clear what it believes the scope of these articles to be, the types of measures that it has found to be outside the Treaty are those which impose an equal burden on all products and actors in the relevant market, while the types of measures which it has found to be within the Treaty are those which impose greater burdens on a selection of products or actors in the relevant market. Whether a measure is fully equal in its market effects or in some sense selective appears to be the crucial factor in categorizing it as a restriction on cross-border trade or not.

The aim of the paper is to explore the way that different kinds of market-regulating measures actually work, and develop an economically coherent categorization which can be used as a basis for practical law. The suggestion is that a division into equal burden and selective measures captures the economic difference which matters, the difference between regulation per se and state intervention in the competitive relationship between market actors. It also offers an approach to the law which fits with the broader European approach to internal market regulation, where it is the equality of market actors—the level playing-field—which is the primary goal, not the removal of regulation as such.

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The paper divides into two parts. Following some background, the first substantive part offers a categorization of market-regulating measures, and analyzes the effects of each type of measure on market access and cross-border trade, before considering in the light of this finding whether it is plausible to see them as restrictions on cross-border trade in the Treaty sense. The second part looks at the case law of the Court concerning the four freedoms, and compares its view on what is within and outside the Treaty with the view that would be expected on the basis of the categorization that has been proposed.

B. The Background Debate

The Treaty itself contains several articles dealing with free movement and cross-border trade, which employ varying definitions. Regarding goods, the Treaty prohibits “quantitative restrictions on imports and all measures having equivalent effect.”¹ Regarding services, establishment and capital, the Treaty prohibits “restrictions” on cross-border activities, whereas where natural people are concerned, workers or citizens, the phrasing is less negative: “freedom of movement for workers shall be secured” and citizens shall have the right to “move and reside freely.”² Nevertheless, despite this degree of diversity, the Court often treats the freedoms as if they share a common conceptual basis, and commentators often analyze them as if this is, or could be, the case.³ This does not seem objectionable as a working presumption, since the core idea of (removing restrictions on) free movement between states is shared, as Article 26(2) TFEU makes clear.⁴ The search is therefore on for an idea, principle, concept or rule which explains and links all the freedoms and that can be used to determine their scope.

A classical offering for this role is non-discrimination, with the proposal being that measures should be prohibited when they directly or indirectly discriminate against goods,

¹ The Treaty on the Functioning of the European Union art. 34, Dec. 13, 2007 [hereinafter TFEU].

² TFEU arts. 49, 56 and 63 regulate services, establishment and capital. TFEU arts. 25 and 21 address the free movement of workers and citizens.

³ E.g. most recently Jukka Snell, *The notion of market access: a concept or a slogan?*, 47 COMMON MKT. L. REV. 437 (2010); Eleanor Spaventa, *From Gebhard to Carpenter: Towards a (non) economic European constitution*, 41 COMMON MKT. L. REV. 743 (2004); Peter Oliver and Wulf-Henning Roth, *The internal market and the four freedoms*, 41 COMMON MKT. L. REV. 407 (2004); Catherine Barnard, *Fitting the remaining pieces in the goods and persons jigsaw*, 26 EUR. L. REV. 35 (2001); Steven Weatherill, *After Keck: Some thoughts on how to clarify the clarification*, 33 COMMON MKT. L. REV. 885 (1996); Nicholas Bernard, *Discrimination and free movement in EC law*, 45 INT'L & COMP. L.Q. 82 (1996).

⁴ TFEU art. 26(2) “The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.” The Treaty on the Functioning of the European Union art. 26, Dec. 13, 2007.

persons, services or capital originating in other Member States.⁵ The most obvious merits of this idea are that (i) it is clear and graspable, even if indirect discrimination may sometimes be complex to define and identify, (ii) it has an obvious normative appeal, since most people can accept and understand the objection to discrimination, while the broader Treaty provides ample support for the view that discrimination against the foreign is against the very essence of the EU, and (iii) it corresponds to a prohibition on protectionism, since measures excluding the foreign are those which can be seen as protectionist. This makes a discrimination-based understanding of free movement economically defensible and easy to embed in wider discussions about free trade policy and law.

However, the most powerful objection to such an understanding is that it does not go far enough to achieve the Treaty goals of free movement. The claim is made that there are national measures which do not discriminate, but which nevertheless restrict cross-border trade, or in the terms commonly used by commentators, restrict access to the markets of other states.⁶ An example of the kind of measure put forward here might be a ban on advertising. This would apply to all market actors equally, and hinder their activities equally (in most cases), but would nevertheless apparently restrict cross-border trade, since advertising is a very important tool for generating sales. As Advocate-General Jacobs most pithily put it, "If an obstacle to inter-State trade exists, it cannot cease to exist simply because an identical obstacle affects domestic trade."⁷ Therefore, he and others argue, the goal of removing restrictions on trade or movement requires more than a mere discrimination ban. It requires the removal of any measure which hinders market access.⁸

The law, as interpreted by the Court of Justice, has long wavered between these positions. Within the free movement of goods the totality of the case law since *Keck* suggests protectionism, or discrimination against the foreign, as the central explanatory concept.⁹ The Court consistently refuses to find that measures are obstacles to free movement where no discriminatory or protectionist effect is apparent, albeit that some recent cases

⁵ Giuliano Marengo, *Pour une interprétation traditionnelle de la notion de mesure d'effet équivalent à une restriction quantitative*, CAHIERS DE DROIT EUROPEEN 291 (1984); Bernard, *supra* note 3; JUKKA SNELL, FREE MOVEMENT OF GOODS AND SERVICES IN EC LAW (2002); GARETH DAVIES, NATIONALITY DISCRIMINATION IN THE EUROPEAN INTERNAL MARKET (2003). See also Case C-158/04, *Alfa Vita Vassilopoulos AE v. Elliniko Dimosio, Nomarkhiaki Aftodiikisi Ioanninon*, 2006 E.C.R. I-8135; Case C-159/04, *Carrefour Marinopoulos AE v. Elliniko Dimosio, Nomarkhiaki Aftodiikisi Ioanninon* 2006 E.C.R. I-8135.

⁶ Advocate General in Case C-412/93, *Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA*, 1995 E.C.R. I-179; Weatherill, *supra* note 3; Barnard, *supra* note 3.

⁷ *Leclerc-Siplec*, para. 39.

⁸ See generally *Leclerc-Siplec*, *supra* note 3.

⁹ Joined Cases C-267 and 268/91, *Keck and Mithouard*, 1993 E.C.R. I-6097. See Peter Oliver and Stefan Enchelmaier, *Free movement of goods: recent developments in the case law*, 44 COMMON MKT. L. REV. 649 (2007).

have called this into question.¹⁰ By contrast, in the other areas of free movement discrimination and equality have long been seen as but one part of the law, with the Court emphasizing that even non-discriminatory measures which restrict movement or hinder market access are within the Treaty.¹¹

This paper tries to finesse the opposition at the heart of this debate. It takes the view that on the one hand, measures which affect all market actors equally do not in fact hinder market access. The idea of divorcing free movement from inequality therefore makes no sense. By contrast, it is the very fact that a measure affects some market actors more negatively than it affects others, and therefore changes their relative competitive positions, which makes market access harder for the disadvantaged parties.¹² On the other hand, it is not necessary that a measure primarily disadvantage foreign actors for it to exclude some of them. Even if most victims of the measure are domestic, some may not be. A market access-restricting measure is invariably unequal, but that inequality does not necessarily follow the lines of nationality, and does not need to for it to nevertheless exclude some foreign trade.

A position is therefore taken which is in between the extremes of the debate. It supports a reading of the Treaty in terms of market access, but argues that this does not replace thinking in terms of inequality. However, the equality to be sought is not just between nationalities, but between all actors in the market. The distinction to be made is therefore not between protectionist and non-protectionist, nor between domestic and foreign, but rather between measures which affect all actors equally, and those which help some gain a competitive advantage over others.

C. Types of Regulatory Measures

This paper divides measures which affect market actors or products into two groups. It considers the actual effects of each type of measure, and then, in the light of its effects, whether that category deserves to fall within the Treaty free movement rules.

¹⁰ See Case C-110/05, *Commission v. Italy*, 2009 E.C.R. I-519; Case C-142/05, *Mickelsson and Roos*, 2009 E.C.R. I-0000. See Pal. Wenneras & K. Boe Moen, *Selling arrangements, keeping Keck*, 35 EUR. L. REV. 387 (2010); Eleanor Spaventa, *Leaving Keck behind? The free movement of goods after the rulings in Commission v. Italy and Mickelsson and Roos*, 34 EUR. L. REV. 924 (2009).

¹¹ See e.g., Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, 1995 E.C.R. I-4165; Case C-369 and 376/96, *Arblade*, 1999 E.C.R. I-8453; Case C-415/93, *Union Royal Belge des Sociétés de Football Association v. Bosman*, 1995 E.C.R. I-4921.

¹² Similarly, *Ag Maduro in Alfa Vita*, *supra* note 5; *Snell*, *supra* note 3 at 468. This is similar to the WTO position on market access and import restrictions. See *Colombia - Ports of Entry* (2009; DS366/R) at 7.229 et seq, especially note 463.

The first group consists of measures which have an equal effect on all products and actors in the market. The measures may restrict permissible activities, or impose a cost burden, but they apply to all products and actors on the given market, and have no particular greater effect on one or some products or actors than on others. They are called here, for convenience, equal-burden measures. They can also be described as non-distorting measures, because they do not affect the relative competitive position of market actors.

The second group consists of measures which impose a greater burden or restriction on some products or actors in the given market than on their competitors. This unequal burden may be explicit in the measure, or be the actual effect of an apparently neutral measure. No distinction between these situations is made here. It is the effect, not the form of the measure, which matters. All these measures of unequal market effect are called here, for convenience, selective measures. This terminology is borrowed from the law on state aid, where the distinction between market-wide measures and those benefitting some actors more than others is also central. State aid law therefore prohibits the use of public money in a way which confers a “selective advantage” on some undertakings active on a market.¹³ Such selective advantage (or corresponding disadvantage) is seen as a *prima facie* distortion of competition and trade, where a market-wide burden or advantage would not be.¹⁴ State aid law is about the use of public money to confer competitive advantage, but the perspective on competitive relations and the underlying selective/non-selective distinction can just as well be applied to the conferral of advantage via regulatory measures. Selective measures can thus also be described as “apparently distorting” measures, because they change the relative competitive position of market actors, and if this cannot be justified by a need to correct another market failure then the measures will amount to distortions of competition. There is more on this at the end of this section.

The distinction is open to a number of criticisms. First, it may be doubted whether there is a clear line between the two groups. Certainly, it will not always be obvious where that line is. Some measures are obviously selective, such as product rules or qualification requirements which exclude products or actors not in conformity with their requirements.¹⁵ However others may or may not be selective, depending on market

¹³Joined cases C-428/06 to C-434/06, *Unión General de Trabajadores de La Rioja (UGT-Rioja) and Others v. Juntas Generales del Territorio Histórico de Vizcaya and Others*, 2008 E.C.R. I-6747; “In order to determine whether the measure at issue is selective, it is appropriate to examine whether, within the context of a particular legal system, that measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable legal and factual situation.” *Id.* at para. 46.

¹⁴Case C-730/79, *Philip Morris Holland BV*, 1980 E.C.R. I-2671; “When state financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-community trade the latter must be regarded as affected by that aid.” *Id.* at para. 11.

¹⁵See *e.g.*, Case C-120/78, *Cassis de Dijon*, 1979 E.C.R. 649; Case C-340/89, *Vlassopoulou v Ministerium für Justiz Bundes-und Europaangelegenheiten Baden-Württemberg*, 1991 E.C.R. I-2357.

circumstances. For example, restrictions on advertising or opening hours might be of more importance to some actors than others, but this might not be the case.¹⁶ Establishing an unequal effect requires market investigation. With such rules, which cannot be a priori established as selective, the Court has, famously, adopted something very close to a presumption of equal burden, leaving it to the foreign actor claiming disadvantage to rebut this presumption.¹⁷ This is addressed more below.¹⁸

It may be argued that such a presumption can always be rebutted with enough investigation. That is to say, no rule produces an equal burden if one examines its effects finely enough. Perhaps equal burden rules do not exist? While quite possibly true, it is suggested that this criticism is of limited force. All substantive economic rules must have a *de minimis* rule and exclude marginal effects, whether judges choose to admit this or not.¹⁹ The totality of the economy and its actors and regulators are bound together by infinitely complex and unexplored paths of cause and effect. Yet this does not render the law impractical or meaningless. An analogy may be drawn with anti-discrimination law: in reality no measure is sex or race neutral if one investigates thoroughly enough, but Courts seem able to distinguish between the marginal and theoretical disparate impact, and the disparity that deserves judicial attention, without either collapsing into incoherence or attracting undue discredit for the judicial process.²⁰ Judges can draw lines, if not perfectly, at least well enough to keep the legal system going.

In any case, although the distinction between equal burden and selective measures hides the reality that regulation occupies a spectrum from the least market-distorting to the most, this should not be allowed to obscure the fact that there are real and important differences between the various positions on that spectrum. Treating all actors equally, and treating some actors differently, are two importantly different regulatory approaches, however difficult some borderline cases may be.

A more principled objection to the distinction is that a selective measure is merely an equal burden measure to which some actors have adapted. Product standards, for example, usually apply to everyone in the given market. If some actors adapt, at cost to themselves, in what sense are actors who choose not to adapt being “excluded” other than by their

¹⁶ Cases C-34 to C-36/95, *De Agostini and TV Shop*, 1997 E.C.R. I-3843; Joined cases C-69 and C-258/93, *Punto Casa*, 1994 E.C.R. I-2355.

¹⁷ Joined Cases C-267 and 268/92, *Keck and Mithouard*, 1993 E.C.R. I-6097.

¹⁸ See *infra* note 69 and accompanying text et seq.

¹⁹ Case C-379/92, *Peralta*, 1994 E.C.R. I-3453; C-190/98; *Graf v. Filzmoser Maschinenbau*, 2000 E.C.R. I-493; Case C-20/03, *Criminal Proceedings against Burmanjer*, 2005 E.C.R. I-4133; Case C-69/88, *Krantz*, 1990 E.C.R. I-583.

²⁰ See CHRISTA TOBLER, *INDIRECT DISCRIMINATION: A CASE STUDY INTO THE DEVELOPEMENT OF THE LEGAL CONCEPT OF INDIRECT DISCRIMINATION UNDER EC LAW* (2005).

own choices? The selective/equal burden distinction may be seen as taking a very static view of the market. It takes no account of why some actors are caught and others are not, and how this situation came about, even though such “historical” and contextual data may be relevant to both the economics and the justice of treating these groups differently.

However, this criticism ignores the complexity of markets. Most goods are not sold directly by producers in all markets, but are traded by others, and pass through the hands of traders and retailers. As a matter of fact, when a product rule is applied, the trader with non-complying goods in his warehouse must go looking for somewhere else to sell them. This is quite independent of whether the ultimate producer ‘ought’ to have adapted or could have. The simple fact of denying access to goods, services, or actors, as selective rules do, should rightly create free movement concern, and the complexity of market interactions means there will rarely be a simple, unitary, justice-based rebuttal of that concern. In any case, selectivity is offered here as a criterion for invoking the Treaty, and is without prejudice to justification on other grounds. Context may perhaps be relevant to weighing a proffered justification for a measure.

Moreover, in almost all cases an exploration of context and history will confirm fears about the exclusionary effect of selective measures. It will almost always be incumbents, usually national, who comply with selective rules, either because they form a powerful lobby, and have ensured that national regulation complies with their business practices, or because as major market players it is efficient and economic for them to adapt in order to remain in the market.²¹ It will be the outsiders, usually foreign, who may doubt whether it is economic to invest in adaptation, and who may find that the rule takes no account of their particular production circumstances and practices. Thus the national producers who cry “we have to comply with national rules, why shouldn’t they?” are being naïve. In most cases there will be a greater synergy between the local regulation and their practices and needs than there will be with the needs and practices of the would-be market entrant.²²

A final note on selective measures is to contrast them with measures which discriminate on grounds of nationality. The line is obviously quite fine. In practice a selective measure will either disadvantage an equal proportion of national and foreign actors (non-discriminatory, but not equal burden), or it will disadvantage a greater proportion of foreign actors (a discriminatory or protectionist effect) or it will disadvantage a greater proportion of domestic actors (a reverse discriminatory effect). A selective measure is therefore a measure of discriminatory effect, but not necessarily on grounds of nationality.

²¹ Jacques Pelkmans, *Mutual recognition in goods and services: An economic perspective, working paper no. 16*, EURO. NETWORK OF ECON. POL’Y RES. INSTITUTES (2003); A.O. Sykes, *The (limited) role of regulatory harmonization in international goods and services markets*, J. INT’L ECON. L. 49 (1999); ALISON JONES & BRENDA SUFRIN, EC COMPETITION LAW (2008) at 88-92.

²² *Id.* See also *infra* text accompanying note 39.

However, the first and third of the sub-categories above are likely to be fairly hypothetical. Few measures will be truly equally balanced, and incumbents adapt, so that in practice outsiders will in most cases be more likely to be among those hindered by selective rules. There is therefore likely to be an overwhelming overlap between the category of selective measures and the category of measures with a discriminatory or protectionist effect. One might therefore ask why it is worthwhile introducing this new category, and not sticking with the tried and trusted label of discrimination as an explanatory factor in free movement law.

The preference for selectivity has several reasons. Firstly, it will often be easier to identify. It is easier to see whether a measure excludes some than it is to identify which actual actors those are, and where they are located: the first can often be identified a priori, whereas the second will often require market investigation. Moreover, the very notion of nationality may in some contexts be rather slippery and unstable, and not lend itself to legal clarity. If a multinational, with a history in one state but shareholders in another, produces its products in various places and sources its supplies according to demand in a way varying from day to day, then when are it and its products domestic and when are they foreign? There are concrete examples of these kinds of problems provided below.²³ Thirdly, discrimination is a reference to a global effect, the effect of the measure as a whole. It will be argued below that the effect on individual traders should also be taken into account, and that exclusion of an individual trader should be enough to invoke the Treaty, even if the measure in question has generally positive effects on foreign actors. Selectivity provides a reason to invoke the Treaty in such a situation, whereas discrimination does not. This issue is also returned to below.²⁴

Both categories, selective and equal burden, are defined by reference to the products and actors on the market in question. It is therefore necessary to define which market that is. In discussions of market access this is usually taken as obvious, which it perhaps is, but nevertheless some precision is worthwhile. Most importantly, the market is not the same as the Member State or its economy as a whole. An importer of dolls is not concerned about regulation restricting the sale of handguns, while a seller of insurance is not interested in regulation imposing costs on computer games. Rather, "the market" should be taken to refer to the relevant product market in the Member State in question, which is to say the market for products which are actually or potentially in competition with each other. This is the approach taken in competition law and theory, which has a sophisticated repertoire of market concepts of which the humble trade lawyer can only be jealous. Following the competition law approach, actual or potential competition is determined

²³ See *infra* text accompanying note 77.

²⁴ See *infra* Part D.IV.

largely by asking whether consumers would consider the given products as possible alternatives to each other.²⁵

The approach suggested in this paper is therefore more market-centric than traditional free movement law. When there is an apparent or alleged hindrance to market access it is suggested that the first step should be to define the relevant market, rather than to leap to the measure itself.²⁶ Only once we know the market can we see whether the measure affects all the actors within it equally or not. On this view it is not coherent to consider whether measures are hindrances to market access in abstract.²⁷ That accusation can only be leveled and made good within the context of a defined market, and a measure may be harmless in one market (equal burden), while exclusionary (selective) in another. An example is regulation limiting the opening times of bookshops, which is likely to be equal burden within the book market—no particular book producer is advantaged—but not within the market for book retailing, where internet bookshops will profit at the expense of physical stores.

The reason for offering the distinction above is that it reflects important differences in the effects and character of rules. Equal burden measures do not, by definition, lead to a change in the relative competitive position of actors in the market. They are a competition-neutral intervention. Not only does this, for reasons discussed below, mean that they do not in fact hinder market access, but it also suggests strongly that the motivations of the state are legitimate—that is to say that the measure is authentically intended to address some market failure or externality, rather than to protect domestic actors from foreign competition. By contrast, selective measures, by definition, change the relative competitive position of market actors. This is an active intervention in competition in the market place, and while that may be justified, there are good reasons for checking whether the preferring of some actors over others is based on sensible and objective considerations, or whether there is some protectionist or market-manipulating agenda.

In the language of competition, equal burden measures may be described as “non-distorting” measures, whereas selective measures are “apparently distorting.” The word “apparently” must be included because it may be that a selective measure in fact corrects for a market failure or externality, so that the change in market positions which it causes is not truly distorting. Whether this is the case is something to be examined at the stage of

²⁵ See Case C-6/72, *Europemballage and Continental Can*, 1973 E.C.R. 215; Case C-25/76, *United Brands v Commission*, 1978 E.C.R. 207; Case C-85/76, *Hoffman-La Roche*, 1979 E.C.R. 461; Case C-322/81, *Michelin v Commission*, 1983 E.C.R. 3461; *Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law*, OJ C 372-5 (1997); Jones & Sufrin, *supra* note 21 at 60-84 and 353-82.

²⁶ Daniel Wilsher, *Does Keck discrimination make any sense? An assessment of the non-discrimination within the European single market*, 33 EUR. L. REV. 3 (2008).

²⁷*Id.* It is no more coherent to consider discrimination without a defined market.

justification. The suggestion here is that non-distorting measures should be outside the Treaty altogether, while apparently distorting measures should be subject to its jurisdiction. If they can be justified by other market failures they should be permitted, but if they cannot then they are indeed actual market distortions, and should be prohibited.

This approach corresponds to the broader approach to internal market regulation which is focused on the removal of competitive distortions rather than the reduction of regulation as such. In the law concerning state aid, or public procurement, or taxation, or that concerning harmonization under Article 114 TFEU, the consistent concern is to maintain a level playing field for all market actors.²⁸ Hence the EU has no objection to economy-wide government support, for example via investment in infrastructure, nor does it prescribe any particular level of government purchasing or product taxation. The constraint which EU law imposes is merely that these activities must not be pursued in a way that promotes some actors or products relative to their competitors. Similarly, harmonization under Article 114 typically takes place where differences between national laws create inequality between actors in different states.²⁹ That harmonization does not necessarily result in a lighter burden for all actors; in fact usually it does not. This is not necessary.³⁰ What the harmonization must result in is the removal of competitive distortions whereby some actors are advantaged relative to others.³¹ Thus in the context of free movement it would be very consistent if that law were interpreted to address situations where national regulation creates inequalities between actors, but not to reduce regulatory burdens as a goal in itself.

D. Regulation and Market Access

If we want to ask which kinds of measures hinder market access, then once again it is worth turning to competition law and theory for theoretical background.³² The concept of the “barrier to entry” is used here to refer to a measure which hinders entry to a market. Competition law itself is primarily concerned with policing barriers to entry created by the

²⁸ See TFEU art. 107(1) (state aid); see also *supra* notes 13 and 14; Case C-221/06, *Stadtgemeinde Frohnleiten*, 2007 E.C.R. I-9643; Christopher Bovis, *The Regulation of Public Procurement as a Key Element of European Economic Law*, 4 EUR. L.J. 220–242 (1998); TFEU art. 110 (product taxation); Case C-376/98, *Germany v. Council*, 2000 E.C.R. I-8419 (on Article 114); Rob Van Der Laan & Andries Nentjes, *Competitive Distortions in EU Environmental Legislation: Inefficiency versus Inequity*, 11 EUR. J. L. & ECON. 131 (2001).

²⁹ See Case C-376/98, *Germany v. Council*, 2000 E.C.R. I-8419; Alan Dashwood, *The limits of European Community Powers*, 21 EUR. L. REV. 113 (1996); Steven Weatherill, *Harmonisation: how much, how little?*, 16 EUR. BUS. L. REV. 533 (2005).

³⁰ See *supra* note 29.

³¹ *Id.*

³² See Snell, *supra* note 3.

position and behavior of firms or undertakings. However, the definitions and theory of what constitutes a barrier are broader than this, and are unconcerned with the source of a measure, focusing only on its effects on market actors. The Commission describes entry barriers very clearly as “factors that prevent or hinder companies from entering a specific market.”³³ A restriction on free movement, or a hindrance on market access, to use the popular free movement phrases, can clearly both be understood as regulatory barriers to entry.³⁴

There are two major definitions offered of a barrier to entry, both of which continue to be used by competition regulators and theorists.³⁵ One comes from Bain, and defines a barrier to entry as something which allows incumbent firms to earn more than normal profits without threat of entry by competitors.³⁶ Normally, if prices go above average production costs others will enter the market. If that does not happen it is because something is keeping them out—a barrier to entry—and that something may be regulatory. The alternative definition is from Stigler and defines a barrier to entry as something which imposes a cost on a market entrant which was not imposed on incumbents when they entered the market.³⁷ As Jones and Sufrin note and discuss, modern economic practice draws on both theories, but also emphasizes other factors, notably the importance of “sunk costs.”³⁸ If a firm has already adapted to market regulation or circumstances, and thereby already incurred costs, it is at an economic advantage over a firm which has not yet incurred those costs, and the effect is to protect incumbents from new competitors.³⁹ This is particularly relevant to free movement where regulation requires producers to adapt their products to local regulation.⁴⁰ Such a requirement has an asymmetric effect, at the expense of the would-be market entrant.⁴¹ There continues to be economic debate about which of these definitions is preferable, and

³³ JONES & SUFRIN, *supra* note 21 at 85.

³⁴ Pelkmans, *supra* note 21.

³⁵ See GIORGIO MONTI, EC COMPETITION LAW (2007) at 144-48; JONES & SUFRIN, *supra* note 21 at 84-92; Snell, *supra* note 3.

³⁶ J.S. Bain, *Economies of Scale, Concentration and the Condition of Entry in Twenty Manufacturing Industries*, 44 AMER. ECON. REV. 15 (1954); J.S. BAIN, BARRIERS TO NEW COMPETITION (1956).

³⁷ G.J. STIGLER, THE ORGANIZATION OF INDUSTRY (1968).

³⁸ JONES & SUFRIN, *supra* note 21 at 88.

³⁹ *Id.*; D. Harbord & T. Hoehn, *Barriers to entry and exit in European competition policy*, 14 INT’L REV. L. & ECON. 411 (1994).

⁴⁰ Case C-120/78, Cassis de Dijon, 1979 E.C.R. 649.

⁴¹ See *supra* note 39.

about the kinds of factors which they encompass.⁴² Government regulation is but one factor on a long list of possible barriers. It is not the ambition of this paper to go further into this economic discussion.

However, there are two things for the free movement lawyer to take away from a consideration of barriers to entry. The first is that these are the same as hindrances to market access. The different definitions of a barrier to entry reflect different opinions on what will actually keep new entrants out of a market. However, there is no dispute that what is being sought is an accurate description of the measures, acts and circumstances which tend to exclude new entrants from a given market and thereby protect incumbents.⁴³ In other words, the definitions of barriers to entry are offered as definitions of hindrances to market access. As the plain language of the two phrases suggest, they mean the same thing. If free movement law wishes to engage in an economically sophisticated way with its goals and definitions, competition theory is therefore the place to begin. It may be that the trade-offs of legal certainty and adjudication costs against economic precision do not justify the depth of economic analysis commonly employed in a competition law case, but the underlying concept which should guide the law is no different.

Secondly, one factor common to all definitions of a barrier to entry is that it has a more negative effect on would-be market entrants than on incumbents. In all discussions and definitions of barriers to entry it is a common characteristic that they envisage that firms are not kept out of markets by costs or regulations per se, but by costs or regulations which create asymmetries between incumbents and new entrants.⁴⁴ One can find a great deal of analysis and description of the ways such asymmetries may be created, but one will search in vain for a measure, or type of measure, which is considered to be a barrier to entry despite having no unequal effects;⁴⁵ the mere fact that a market may be highly regulated, even inefficiently regulated, is not seen as a barrier to entry if this regulation does not strengthen the competitive position of incumbents relative to new entrants.

The reason for this focus on inequality is simple: as a matter of economic fact, regulation which does not affect relative competitive position does not make it more difficult or less advantageous to enter a market. Just as measures excluding new entrants protect incumbents, measures protecting incumbents make market access harder for new entrants. The restriction of market access or entry and the creating of relative advantage

⁴² See *supra* note 35.

⁴³ See *e.g.*, Snell, *supra* note 3, at 438, citing OECD *Barriers to entry*, 42 DAF/COMP 17 (2005).

⁴⁴ D. Harbord & T. Hoehn, *supra* note 39.

⁴⁵ See R.P. McAfee, H.M. Mialon & M.A. Williams, *What is a barrier to entry?*, 94 AMER. ECON. REV. 463 (2004).

for incumbents are two sides of the same coin, always present together. It is incoherent to separate them. Market access is *about* inequality.

Economists being superlatively uninterested in nationality, the theory of barriers to entry is only concerned with the distinction between incumbents and new entrants, not domestic and foreign firms. It is quite possible therefore that free movement law should not be concerned about all government-created barriers to entry, but only those with some nationality-specific effect. While a measure entrenching national incumbents is obviously a restriction on free movement, it is less obvious how the Treaty applies to a measure which protects foreign incumbents from new entry by domestic and/or foreign firms, or a measure which protects foreign and domestic incumbents from new entry by foreign and domestic firms. The superposition of the fault-lines of nationality onto the theory of market access is discussed further below.⁴⁶

1. The Effects of Equal Burden Measures on Market Access

These measures apply to all actors and products, and are not so designed that they impact significantly more on some than on others. For example, an obligation on retailers to accept and recycle old goods when selling new ones or rules on shop opening hours impose a cost or a restriction which applies equally in law, and—it seems likely—in fact.⁴⁷ All market actors may complain, but there is no particular reason to think that some will suffer significantly more from the rule than others, albeit that marginal inequalities in effect are unavoidable in all regulation.

The effect of such measures may be to add a cost to each transaction. If so that cost will inevitably be passed on to consumers so that profit per transaction will not be reduced. Another effect of such measures may be to reduce the total number of transactions. Either the product is made more expensive, so that consumers are discouraged from purchasing it, or the scope of the market is limited, for example through rules on opening hours, so that purchasing possibilities are reduced. Thus the primary effect of equal burden measures is to reduce the total market size, without significantly affecting the market shares of the relevant actors and products. Their relative competitive position is unchanged.

Such an effect will deter a supplier from trying to enter that market only in the sense that a smaller market is less attractive. It is no doubt more attractive to conquer Germany than the Netherlands. However, internationally traded goods continue to be available in the Netherlands, and in even smaller markets. It is suggested that unless equal burden regulation has the effect of shrinking the market to such a dramatic extent that it ceases to

⁴⁶ See *infra* Part D.IV.

⁴⁷ Joined Cases C-267 and 268/92, *Keck & Mithouard*, 1993 E.C.R. I-6097.

be profitable as a whole—so that it is simply not worth entering—this market reducing effect will not noticeably deter market entry.⁴⁸ Suppliers seek sales where they can. At most, regulation might have the effect of changing relative priorities. For example if Dutch regulation were to shrink a given market so much that it was smaller than the equivalent market in Belgium, then Belgium might be given a higher priority in international expansion plans. However, such effects are likely to be highly theoretical and fairly unlikely. Firstly, market entry decisions will be far more complex in reality than this. Secondly, most market regulation has far too marginal an effect on market size to cause such re-ordering.

Nor does equal burden regulation make it harder for a supplier to enter the market. It is true that by reducing sales outlets or marketing possibilities or imposing costs a supplier may be forced to invest more in marketing or use more expensive retail paths than they would like. However, this is equally true for all market actors. Thus these costs can be recouped from the consumer without loss of competitive position. A market-wide increase in costs is only a hindrance to market access if it cannot be recouped, or if certain actors have no access to initial capital. Given the premise that capital markets in the EU are also open, there is therefore no general reason why a market-wide equal burden rule should make market access harder.⁴⁹

This may be seen by considering a supplier who approaches a national retailer to sell his goods. The retailer's decision will be motivated by his chance of selling those goods to consumers, and the profit which he stands to make. An equal burden rule would not change either of these considerations. The goods might increase in price but so would competing goods. Neither the preferences of consumers for one brand or another, nor the advantages for the retailer of one brand or another, affected by equal burden rules. Therefore, the chance that a retailer agrees to adopt certain products is not affected. Equal burden rules, as a matter of fact, do not make it harder for a supplier to enter the retail market. The proviso here, once again, is that the rules in question do not have such a dramatic effect that the market is effectively eliminated, or reduced to such an extent that it is barely worth entering, so that incumbents are in fact protected.⁵⁰

II. Equal Burden Rules and the Treaty

⁴⁸ "A regulatory barrier arises when, as a result of regulatory policy or previous practice, entry into a particular market is made to be financially unprofitable and this situation is expected to persist." M. Cave & P. Crowther, *Pre-emptive competition policy meets regulatory antitrust*, 26 EUR. COMPETITION L. REV. 144 (2005).

⁴⁹ See TFEU art. 63.

⁵⁰ See Cave & Crowther, *supra* note 48.

Given these effects, there is little reason to classify equal burden rules as restrictions on cross-border trade in the Treaty sense. That is to say, there is little coherent reason to bring them within the Treaty. This follows from a consideration of the above in the light of the Treaty text and policy.

Firstly, the Treaty articles on free movement refer only to cross-border trade and movement.⁵¹ This implies specificity: that they are not intended to apply to measures having a general 'market reducing' effect, but rather to measures which specifically reduce cross-border trade, replacing it by domestic trade. If the intention was to catch measures which may reduce the number of cross-border transactions even if the number of domestic transactions is similarly decreased, then it would have been more accurate and appropriate for the Treaty to refer to prohibiting 'restrictions on trade'. The clear intention, however, was not to cast such a wide net.

This is particularly apparent from the wording of Article 34, on the free movement of goods. This refers to "measures having equivalent effect" to a quantitative restriction. Since it is the essence of a quantitative restriction that it replaces imported goods by domestically produced ones, it is obvious that a measure which has this effect by a more devious means is also caught. However, it is hard to argue that a measure which reduces domestic and cross-border transactions equally, and causes no trade diversion, is caught by Article 34 since it is evident that the effect of this measure is not at all the same as a quantitative restriction.⁵²

It may be argued that the effect on foreign suppliers of such a rule is the same as a quantitative restriction: if they cannot supply the goods they may not care whether the consumer is doing without or getting them elsewhere.⁵³ In fact this is doubtful. Given the premise of a single market, competitors in one state are likely to be competitors in other states. Indeed, this is the overt policy and intention of European integration. Thus if Piet in the Netherlands cannot supply Germany to the extent he would like, he cares very much whether this is because the consumer in Germany has been deterred from shopping for his product group at all, or because those consumers have been diverted to his German competitor Karl.

In any case, it is irrational to only look at the effects on importers and ignore the effects of a measure on the market as a whole.⁵⁴ The primary prohibition of Article 34 is of explicitly protectionist measures—MEQRs—and this is a very orthodox and unsurprising approach,

⁵¹ See TFEU arts. 21, 45, 49, 56 and 63.

⁵² Gareth Davies, *Can selling arrangements be harmonised?*, 30 EUR. L. REV. 370 (2005).

⁵³ Advocate General in *Leclerc-Siplec*, supra note 7 at par. 39.

⁵⁴ Cf. Case C-448/98, *Guimont*, 2000 E.C.R. I-10663.

reflecting the trade law and policy consensus against protectionism, the approach in the GATT and WTO, and the undoubted intention of many, perhaps most, of the Treaty writers.⁵⁵ It is the essence of such measures that their primary aim is to promote the position of domestic suppliers. However, since they do not—by definition—limit equivalent domestic trade they cannot be seen as market regulation as such, serving the goal of a fair, clean, transparent market. They are only about who supplies, not about other interests. By contrast, equal burden measures are not at all about who supplies, and only about other interests: lacking any protectionist effect, their sole purpose is to protect other concerns and interests in the market, such as consumer protection or the environment. To describe equal burden rules as ‘equivalent’ to quantitative restrictions is to ignore their diametrically opposed goals, their different range of effects and functions in the market, and their effect on the relative position of market actors. It is to read Article 34 entirely without reference to its economic or policy context. It is ironic that the argument for bringing equal burden rules within the Treaty is often put forward in terms of business realism.

Secondly, if the Treaty applies to all equal burden rules which may reduce cross-border transactions then it is unrealistically broad. Almost all regulation inhibits economic activity in some way, and therefore leads to the loss of some cross-border transactions. As has been often pointed out, this turns free movement law into a general proportionality review of economic regulation.⁵⁶ In particular, the quality of infrastructure, and of education, and indeed public services in general, as well as the personal tax system, and pretty much any other aspect of government or civil law one may think of, affect the costs of transactions, establishment, investment, and business in the state in question, and so will influence the number of cross-border transactions.

It is clearly unacceptable to subject the entire body of socio-economic regulation of a state to free movement proportionality review merely on the grounds that it affects the economy and therefore influences the volume of cross-border trade. This does not correspond to the Treaty text or policy, nor would it be constitutionally acceptable to the Member States, and it would be staggeringly inefficient and uncertain. If a businessperson can ask a judge to review the proportionality of national law on these grounds then legal certainty would be significantly undermined, and there would be a deterrent effect on national regulation. Another irony: making “economic impact” sufficient to engage free movement law would probably have a negative economic impact itself and so reduce trade volumes, as a result of the legal uncertainty and policy paralysis that it would cause.

⁵⁵ See Joost Pauwelyn, *Distinguishing domestic regulation from market access in GATT and GATS*, 4 *WORLD TRADE REV.* 142 (2005); Laurence Gormley, *Silver threads among the gold...fifty years of the free movement of goods*, 31 *FORDHAM INT’L L. J.* 1637 (2008).

⁵⁶ Spaventa, *supra* note 3; DAVIES, *supra* note 5.

Yet it is hard to coherently distinguish between socio-economic regulation which diminishes trade by inhibiting economic activity (on a given market, or on multiple markets) generally, and regulation which one might see as more authentically “about” trade and transactions, and more understandably want to bring within the Treaty. A criterion that a measure must have a “significant” or “substantial” effect on cross-border trade is inadequate.⁵⁷ Many macro-economic and social policies may demonstrably have very significant effects on trade. Rather, the relevant criterion here would more probably be one of “directness.” It is imaginable that certain rules might seem to be directly concerned with trade, and their subjection to the Treaty might therefore seem acceptable, whereas other, broader, regulatory measures might have an impact but would not primarily be “about” trade, and might be seen as therefore less direct restrictions.

However, defining the scope of free movement on the basis of the directness of the restriction on trade is problematic.⁵⁸ It is complex to analyze, because it may involve an understanding of business processes and the formulating of a business model. Moreover, it may not even be effective at distinguishing real trade measures from macro policy ones. The effect, for example, of investment in roads or education on trade may in some cases be demonstrably direct. Actors and products, particularly those dependent on transport or trained personnel, may experience extra costs and find their market reduced as a direct result of this sort of measure. This may even be true of public services: a significant cost for some kinds of economic activity might be the guaranteeing of healthcare and education benefits for employees, and the extent to which this is adequately covered by the state could be of immediate importance to business-plans.

Most decisively, a criterion of directness is economically arbitrary. Where market-reducing costs and burdens are imposed on economic activity it does not matter very much from an economic or integrationist perspective whether these costs and burdens are imposed immediately, transparently and directly, or whether they result from a more tortuous chain of consequences set in train by the regulation. It is the fact of the burden and the fact of the cause that matter from a market-policy perspective. To extend free movement law beyond the specifically cross-border into all economic regulation, and then to try and limit the consequences by use of an economically arbitrary and surprisingly complex principle of directness is to combine policy incoherence with textual disrespect and an evidentially-challenged legal formalism: a most unsavory and unlikely mix.

The third argument why equal burden rules should not be within free movement law develops the distinction made above between the effects of protectionist rules and equal burden rules. These have an entirely different economic role. A protectionist rule aims at

⁵⁷ For arguments in favour, see J. Steiner, *Drawing the line: uses and abuses of Article 30 EEC*, 29 COMMON MKT. L.REV. 767 (1992); Weatherill, *supra* note 3. For criticism, see Spaventa, *supra* note 3.

⁵⁸ Snell, *supra* note 3 at 453-5; Spaventa, *supra* note 3. *Contra* Weatherill, *supra* note 3.

substituting domestic production for foreign, albeit that it may be believed that this will benefit national employment, pride, wealth and so on. However, the economic consensus on protectionist rules is that they reduce efficiency and overall welfare and should be seen as market distortions.⁵⁹ The premise here is that, in the absence of special counter-indications, trade results in more efficient allocation of resources and increases welfare.

However, even classical economists accept that trade can have negative side effects, and in some circumstances may not result in efficient allocation.⁶⁰ Since market circumstances are not perfect, the welfare increasing effects of trade may not work out perfectly either. Thus there may be externalities (negative side-effects) and there may be times when the market does not do what we hope (market failure). Equal burden regulation is invariably addressed at one of these circumstances. Either it tries to redress an externality caused by economic activity, or it tries to restrain and steer market activity in order to prevent or redress market failure. In other words, protectionist measures try to deny the market, whereas equal burden measures try to correct it. The latter works with economic theory and with the philosophy of EU integration—trade is good, but so is appropriate regulation—whereas the former works directly against it.

Thus even while there might be a liberal argument for bringing equal burden rules within free movement law—governments tend to over-regulate, judges should restrain this, it will make us all better off—the necessary arguments and logic are quite different from those justifying the inclusion of protectionist measures. To lump the two groups together within a single logic of ‘market access’ and assume that the Treaty articles cover them both is to simply ignore all this, which is in turn to ignore the welfare-increasing goals of the internal market and the Treaty. It is once again a highly formalist approach: it prefers a simple slogan—“market access”—which judges can apply as they see fit, over a thought-through link between policy and law.

III. The Effects of Selective Measures

A selective measure has been defined here as one which imposes a greater burden or restriction on some market actors or products than on others. This may be because it only allows some actors or products access to the market, for example as in the case of product rules, or rules which require service suppliers to have a particular legal form. A characteristic which is not essential to participation in that market—something about the way the product is made or the actor is defined—is used to select and restrict a sub-set of market participants.

⁵⁹ JAGDISH BHAGWATI, *PROTECTIONISM* (1989).

⁶⁰ Paul Krugman, *Is free trade passé?*, 1 J. ECON. PERSP. 131 (1987); Paul Krugman, *The narrow and broad arguments for free trade*, 83 AMER. ECON. REV. 362 (1993); Jagdish Bhagwati, *The Generalized Theory of Distortions and Welfare*, in *TRADE, BALANCE OF PAYMENTS, AND GROWTH* 69, 90 (Jagdish Bhagwati et al. eds., 1971).

A selective measure disadvantages certain actors or products relative to their competitors. It changes the competitive position and market share of these, by comparison with what it would be without the measure. It is clear that it becomes, as a result of the measure, harder for these actors and products to access the relevant market, perhaps impossible. They become less attractive or available both to retailers and to consumers. It should here be noted that the competitive nature of markets means that a 10% cost disadvantage may well translate to far more than a 10% reduction in market share. Indeed, all other things being equal, one would expect that if two products are equivalent in price and quality, and one then experiences a minor increase in price, then rather than this product experiencing a correspondingly minor loss of market share it would in fact be entirely eliminated. All consumers prefer to pay less for the same if they can, and the survival of the product in such circumstances would only come about as a result of psychological complications, such as the tendency of some consumers to be willfully different, or to assume that higher price must mean higher quality even if this is not apparent. Thus a selective measure will tend to be a significant obstacle to market access.

IV. Selective Measures and the Treaty

It is relatively uncontroversial that measures of protectionist effect should fall within the Treaty.⁶¹ If a measure has the effect of primarily excluding foreign actors or products then it at the very least deserves investigation. This is without prejudice to the possibility that it may be justified by other interests.⁶²

However, even where a selective measure does not have such a protectionist effect, or not apparently, it is suggested that it should still be subject to Treaty control if it disadvantages any foreign actor or product at all. This may be argued to follow from the fact that free movement law is not applied to regulation in the abstract, but to specific cross-border cases and situations.⁶³ Thus if a market actor from another state claims (truthfully) that a measure applies to him, and diminishes his competitive position, making it harder for him to enter that market, then this should be enough to engage the Treaty, without there being a need to examine whether all or most of the disadvantaged group are foreign. There is, unequivocally, a restriction on cross-border trade by the actor in question, even if not on cross-border trade by others. Moreover, Treaty rights are for all, and respecting them in most cases is no defense to a claim that they are not being respected in another.⁶⁴

⁶¹ See *e.g.*, Gormley, *supra* note 55.

⁶² Case C-120/78, Cassis de Dijon, 1979 E.C.R. 649; TFEU arts. 36, 45, 52.

⁶³ Case C-108/98, RI-SAN, 1999 E.C.R. I-5219; Case C-98/86, Mathot, 1987 E.C.R. 809; Case C-448/98, Guimont, 2000 E.C.R. I-10663.

⁶⁴ KOEN LENAERTS, D. ARTS & I. MASELIS, *PROCEDURAL LAW OF THE EUROPEAN UNION* 132 (2006); Case C-157/03, *Commission v. Spain*, 2005 E.C.R. I-2911.

The choice between selectivity or protectionist effect (national selectivity) as a basis for engaging the Treaty is therefore essentially a choice between considering the legality of the measure as a whole, or considering its effects in a specific case. Are the free movement articles about controlling and steering national policy, or about protecting individual rights? There is certainly a macro-economic argument to be made for limiting Treaty jurisdiction to measures which are protectionist as a whole, since this serves the broad goal of integration and openness as a whole, and limits the degree of EU intervention in national policy, reflecting the importance of decentralized autonomy, subsidiarity and local diversity. Yet there is also much to be said for encouraging states to ensure that their policies exclude no foreign actors, and a reading of free movement in terms of individual rights is now the more common one.⁶⁵ For these reasons it is suggested that even a single individual whose cross-border activities are restricted should be able to call the Treaty in aid, without the need to consider macro-effects.

This approach also makes evidential issues much easier: establishing the overall effects of a rule in any serious way would often require extensive market investigation. Production in many markets is complex and scattered. An “Austrian” company may be owned by a German one, and have production facilities in many lands, and products actually marketed in Austria may come partly from the Austrian factory and partly from factories in other Member States and the proportion of each may vary from month to month, week to week, or even day to day, according to demand or other factors. Is it even practical in large goods markets to decide who is national and who is domestic, and whether a measure primarily helps domestic producers, or is it more sensible to ask the simpler question of whether the measure is equal burden or selective, and, if the latter, to then move to justification? This approach is (i) easier, and (ii) reflects the distinction between competition-influencing measures and non competition-influencing measures and (iii) will be in most cases a pretty good proxy for a national/non-national distinction anyway.

For all these reasons selectivity is a better criterion for Treaty invocation than discrimination on grounds of nationality. It is the presence of discrimination against some group (selectivity) that results in market access being restricted, but the structure of the victim group as a whole is not relevant to the consequences for, and the position and rights of, the individual trader who seeks to engage in cross-border trade.

⁶⁵ See Snell, *supra* note 3, at 452; Piet Eeckhout, *Recent case law on the free movement of goods: refining Keck and Mithouard*, 9 EUR. BUS. L. REV. 270 (1998); Andrea Biondi, *Free Trade, A Mountain Road, and the Right to Protest: European Economic Freedoms and Fundamental Individual Rights*, HUM. RTS. L. REV. 51 (2004); Miguel Poiãres Maduro, *Reforming the market or the state? Article 30 and the European Constitution: Economic freedom and political rights*, 3 EUR. L.J. 55 (1997); Alina Tryfonidou, *Further steps on the road to convergence among the market freedoms*, 35 EUR. L. REV. 36 (2010).

Additionally, it may be noted that in international markets selective measures will inevitably create some degree of trade diversion, even if not in favor of domestic goods. However, it is suggested that it is beyond reasonable doubt that the favoring of goods from one foreign land over those from another foreign land is also covered by Article 34 and by the Treaty ban on discrimination.⁶⁶ The disadvantaged must be foreign, but the advantaged need not be domestic. Thus a presumption that selective rules will be in some sense discriminatory on grounds of nationality is in fact reasonable.

If an individual trader succeeds in their claim of a hindrance to market access then Member States will often voluntarily withdraw the regulation as a whole.⁶⁷ It is not satisfactory to have regulation from which certain actors are exempt. This is not without its irony. It may be that the withdrawal of the regulation disadvantages other cross-border traders, and maybe even leads to less total cross-border trade than if the regulation had remained. It is not inconceivable that another individual could challenge the withdrawal on these grounds: I enjoyed an enviable competitive position as one of those not troubled by this selective rule, and by removing it you advantage my competitors. It remains to be seen how the Court would react to a claim based on withdrawing legislation, rather than actively regulating. It is a step closer to a claim based on a failure to regulate, which would bring many problems. However, the fact that various forms of claim are possible should not be troubling. They all flow from the premise that if states intervene in markets in ways that change the competitive position of market actors, to the detriment of at least some foreign actors, then they may be asked to justify their actions. However, it is the presence of the possibilities for justification which tempers all this law.⁶⁸ Selective legislation will often serve understandable goals, excluding products or actors because these present some risk or because their presence on the market has some undesirable effect. But the selective nature of the intervention does, and should, put an onus on the state to explain what these goals are and why their measures are needed.

E. Equal Burden and Selective Measures in the Case Law

The distinction between equal burden regulation and selective regulation broadly corresponds to the line between situations which the Court has found to fall outside the Treaty and situations which it has subjected to free movement scrutiny, whether or not a justification for the measure was ultimately found.

⁶⁶ Case C-8/75, *Procureur du Roi v Dassonville*, 1974 E.C.R. 837.

⁶⁷ Gareth Davies, *Is mutual recognition an alternative to harmonization? Lessons on trade and tolerance of diversity from the EU*, in *REGIONAL TRADE AGREEMENTS AND THE WTO TRADING SYSTEM*, (Lorand Bartels & Federico Ortino eds., 2006).

⁶⁸ Case C-120/78, *Cassis de Dijon*, 1979 E.C.R. 649; TFEU arts. 36, 45, 52.

The most obvious example of equal burden regulation is the selling arrangement.⁶⁹ In general, rules which impose limits on the way goods are marketed or the circumstances surrounding that marketing will not have greater effects on one actor than another. One may think here of rules on opening hours, labor law, transport regulations, and so on.⁷⁰ It may be, in specific markets, that, for example, some actors are particularly dependent upon certain types of marketing or retail outlet, so that a rule does in fact change the competitive position of actors and burden some more than others, but it is suggested that this will not typically be the case.⁷¹

Advertising is a more complex situation. In many cases advertising rules will also be equal burden, particularly where it is only certain channels which are restricted.⁷² Then all market actors will be forced to pay a little more, or to use television instead of the newspapers, without this being particularly more burdensome for some than others. However, where advertising restrictions are severe, or amount to something close to a ban, it may well be the case that the effect is to protect incumbents, particularly in markets where advertising is important to sales—for example because image is important, rather than merely price. Thus while a presumption that advertising rules are equal burden is perhaps defensible, it will not be unusual that the facts permit this presumption to be rebutted. This is of course precisely the approach the Court has taken since *Keck*, with its acknowledgment in *Gourmet* and *de Agostini* of the potentially unequal effects of advertising rules.⁷³

There are other selling arrangements that are also reasonably likely to have unequal effects, for example rules on prices, which will often disadvantage suppliers with different (foreign) cost structures.⁷⁴ In general, the Court's across-the-board presumption that all selling arrangements are equal burden could be criticized as a little optimistic. However, given that it allows the presumption to be rebutted this point is of limited importance.

⁶⁹ See Joined Cases C-267 and 268/92, *Keck and Mithouard*, 1993 E.C.R. I-6097; Joined Cases C-69 and 258/93, *Punto Casa*, 1994 E.C.R. I-2355; Case C-391/92, *Commission v Greece*, 1995 E.C.R. I-1621; Case C-418/93, *Semeraro Casa Uno*, 1996 E.C.R. I-2975.

⁷⁰ Case C-155/80, *Oebel*, 1981 E.C.R. 1993; Case C-169/91, *Stoke-on-Trent & Norwich City Council v B & Q*, 1992 E.C.R. I-6635.

⁷¹ Joined Cases C-34, 35 and 36/95, *Konsumentombudsmannen v. De Agostini*, 1997 E.C.R. I-3843; Case C-322/01, *Deutscher Apothekerverband v. DocMorris*, 2003 E.C.R. I-14887; Case C-20/03, *Burmanjer*, 2005 E.C.R. I-4133.

⁷² E.g. Case C-412/93, *Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA*, 1995 E.C.R. I-179; Case C-292/92, *Ruth Hünermund and others v. Landesapothekerkammer Baden-Württemberg*, 1993 E.C.R. I-6787.

⁷³ Case C-405/98, *Konsumentombudsmannen (KO) v. Gourmet International Products AB*, 2001 E.C.R. I-1795; Joined Cases C-34, 35 and 36/95, *Konsumentombudsmannen v. De Agostini*, 1997 E.C.R. I-3843.

⁷⁴ Case C-82/77, *van Tiggele*, 1978 E.C.R. 25; Case 231/83, *Cullet*, 1985 E.C.R. 305.

A greater disparity with the theory above is the fact that to bring selling arrangements within the Treaty it is necessary to show a discriminatory effect against foreign products or actors, not merely a selective effect. The Court suggests that a selling arrangement which on the whole benefits foreign actors, but disadvantages some of them, would not be within the Treaty, following the macro-policy approach discussed above rather than the suggested individual rights approach.⁷⁵

The importance of this disparity can be put in perspective. In practice, selective measures almost invariably will have some discriminatory effect, for the reasons discussed earlier in this paper.⁷⁶ The Court has developed a clear and practical rule of thumb and it is the essence of such rules that they sacrifice some policy integrity for simplicity of use. In any case, we may reasonably wonder how the Court would in fact react if confronted with such an odd situation: say a market is dominated by a few foreign suppliers, and a Member State decides to prohibit advertising in that market. The effect, as a result of the nature of the product, is to protect these incumbents and make it hard for new suppliers to break in. The majority of victims may be new or small national companies attempting to establish themselves on the market, but at least some non-established foreign suppliers may also be disadvantaged by the rule. If a foreign supplier challenged the advertising rule, bringing a case analytically identical to *Gourmet*, apart from the fact that the incumbents are foreign, how would the Court react? It has stated in the past that to show discrimination it is not necessary to show that all foreign actors are disadvantaged or all national actors are disadvantaged.⁷⁷

Moreover, this hypothetical situation reveals how difficult and sometimes artificial the distinction between foreign and domestic actors and products is. An incumbent almost invariably 'becomes' domestic, in the sense that it is established and familiar. In *Gourmet* the Court stated that national alcohol products were inevitably more familiar than foreign ones and so had less need of advertising. Thus Swedish products were protected by the Swedish advertising ban. But what is Swedish? Would it have made a difference if Skol or Absolut were in fact owned by British or Belgian or French firms? (Skol is largely in British/Belgian/Canadian hands and is brewed in Europe under license by Carlsberg, a Danish company; Absolut is owned by Pernod Ricard) Clearly not. If Absolut had recently moved its production over the border to Denmark, so that in fact an incumbent-protecting rule had the effect of primarily protecting foreign goods, would this have changed the outcome of the case? Absolut would still be Swedish in the eyes of the consumer, and the

⁷⁵Case C-416/00, *Morellato*, 2003 E.C.R. I-9343; see *supra* note 65.

⁷⁶ See *supra* text accompanying note 21.

⁷⁷ Case C-237/94, *O'Flynn*, 1996 E.C.R. I-2617; Case C-31/87, *Gebroeders Beentjes*, 1988 E.C.R. 4635; Joined Cases C-1/90 and C-176/90, *Aragonesa*, 1991 E.C.R. I-4151; Case C-67/97, *Bluhme*, 1998 E.C.R. I-8033.

advertising rule would still help it withstand the onslaught of other foreign market entrants. It is true that Article 34 is quite clear—what matters is the place of production of the goods. However, the policy picture, which aims at keeping markets open and free movement possible, suggests the focus should be on the excluded party, not the established one. It is suggested that it is far from obvious that if the incumbent brands had in fact centralized their production to a non-Swedish location this would have led the Court to look at the case in an entirely different light. In any case, we may note that as long as the incumbent brands produced in a different state from that of the claimant, a case of discrimination would still be quite possible.⁷⁸

Nevertheless, the difference between selectivity and discrimination as criteria for Treaty application may have concrete and undesirable consequences. These are highlighted by *Morellato*.⁷⁹ Here the Court found that a measure requiring bread baked from bought-in dough (as in *Alfa Vita*, see *infra*⁸⁰) to be put into a bag before it was sold was outside Article 34 because it did not require the imported product to be changed. It was a selling arrangement. The Court found that the measure would only fall within the Treaty if it discriminated against imports. However, such a rule is manifestly selective. Competing bread baked in the bakery could be sold without a bag, providing both a cost and a marketing advantage. While dough importers, therefore, would certainly find this rule to be a hindrance on market access, the Court suggests that the Treaty would only apply to it if dough is predominantly supplied from abroad, so that the rule is discriminatory on grounds of nationality. Such a reading does not guarantee free movement. Situations like this will be fairly unusual, but they clearly will sometimes occur.

Other than selling arrangements, other kinds of rules on goods which will be equal burden include many rules on use of goods. The fact that it is necessary to have a license to drive a car or to own a gun certainly limits the market for these goods, in the latter case very significantly. However, there is no apparent reason why there should be inequality of effect on different producers. It is suggested that it is unlikely that the Court would find driving licenses and gun licenses to be restrictions on free movement. If that is correct, it is clear that *Commission v. Italy* and *Mickelsson and Roos* do not show that rules on use are restrictions on free movement; this depends on their effects, and in turn on their severity and selectivity.⁸¹

⁷⁸ Case C-8/75, *Procureur du Roi v Dassonville*, 1974 E.C.R. 837.

⁷⁹ Case C-416/00, *Morellato*, 2003 E.C.R. I-9343.

⁸⁰ Case C-188/04, *Alfa Vita v. Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon*, 2006 E.C.R. I-8135.

⁸¹ Case C-110/05, *Commission v. Italy*, judgment of 10 Feb 2009; Case C-142/05, *Åklagaren v. Mickelsson and Roos*, judgment of 4 Jun 2009.

The Court has found a small number of services cases to involve measures falling outside the Treaty. *Mobistar* concerned a tax on telecoms masts, while *Viacom Outdoor* was about a tax on advertising via outdoor posters in Genoa.⁸² In both cases the Court's reasoning was that the measure had no more cross-border effect than domestic effect, and merely amounted to the imposition of a cost on the service in question. Such a "mere cost" was not a restriction on services. Given that all telecoms suppliers had to use the masts in question and so the tax hit them all equally, while there was no evidence that any suppliers of goods or services were more dependent upon bill-posting than others, these measures can plausibly be seen as non-selective. They will probably not have led to a change in the market share of the actors in the markets they affected. This is at least so if outdoor poster advertising is considered as a service market in itself, and not merely a part of a broader advertising market. This is not something the Court went into in detail, but it may be relevant to note that *Viacom Outdoor* is a company that provides exclusively outdoor advertising services via posters and billboards.⁸³ The suggestion is that this is indeed a market of its own.

By contrast to the above, where the Court has found that restrictions on free movement do exist, this has in all cases involved selective measures. The most obvious example is the product rule, which of its essence excludes from the market those products not made in accordance with its requirements. Analogously, requirements that a service provider have a particular legal form exclude those competitors who are otherwise constituted.⁸⁴ Mutual recognition can be seen in a similar light. A failure of mutual recognition is essentially a rule that only certain qualifications, or certifications, or documents, will be acknowledged or treated as adequate. It is selective exclusion of those with alternative qualifications etc.

More interesting are all the "difficult cases," which have attracted scholarly attention partly because they are not easy to place within a broader theory, but in particular because they seem to reject a role for inequality in free movement law: *Alpine Investments*, *Bosman*, *PRO Sieben Media*, *Caixabank*, *Commission v Italy* (insurance), *Commission v Italy* (trailers), *Mickelsson and Roos*, *Alfa Vita*, and perhaps *Gebhard*.⁸⁵

⁸² C-544/03, *Mobistar v. Commune de Fléron*, 2005 E.C.R. I-7723; Case C-134/03, *Viacom Outdoor v. Giotto Immobilier*, 2005 E.C.R. I-1167.

⁸³ Recently renamed CBS Outdoor, as part of a splitting of CBS from VIACOM. See CBS Outdoor, <http://www.viacomoutdoor.com/> (last visited Aug. 15, 2010); CBS Outdoor, <http://www.cbsoutdoor.com> (last visited Aug. 16, 2010).

⁸⁴ Case C-140/03, *Commission v. Greece*, 2005 E.C.R. I-3177; Case C-531/06, *Commission v. Italy*, judgment of 9 May 2009; Case C-243/01, *Gambelli*, 2003 E.C.R. I-13031

⁸⁵ Case C-384/93, *Alpine Investments v. Minister van Financiën*, 1995 E.C.R. I-1141; Case C-415/93, *Union Royal Belge des Sociétés de Football Association v. Bosman*, 1995 E.C.R. I-4921; Case C-6/98, *PRO Sieben Media*, 1999 ECR I-7599; Case C-442/02, *Caixabank France*, 2004 E.C.R. I-8961; Case C-518/06, *Commission v. Italy*, judgment of 28 Apr 2009; Case C-110/05, *Commission v. Italy*, judgment of 10 Feb 2009; Case C-142/05, *Åklagaren v. Mickelsson and Roos*, judgment of 4 Jun 2009; Case C-188/04, *Alfa Vita v. Elliniko Dimosio and Nomarchiaki*

The most recent, and complex, are the trio of goods cases: *Commission v Italy* (trailers), *Mickelsson and Roos*, and *Alfa Vita*.⁸⁶ The first two of these concerned prohibitions on the use of certain goods. In Italy there was a prohibition on the towing of trailers behind motorcycles, while in Sweden there was a de facto prohibition on the use of jet skis (The law required that they could be used only on designated waters, but the Swedish government had designated none. There were certain nuances, but in practice possibilities for use were “merely marginal.”⁸⁷).

The first point to note about these measures is that they amount to a ban on the product. In principle, there was no law against sale, but given that the only use to which they could be put was prevented entirely, or nearly entirely, such sale was made in practice as good as impossible. No manufacturer will attempt to enter a market where his goods cannot be used, and if he does attempt he will not succeed.

The first question to ask is whether motorcycle trailers and jet skis formed a self-contained market in these states, or whether they were part of broader markets. If the latter, then the measures in question were manifestly selective, and will have steered consumers towards competing products.

It seems quite likely that this is the case. Motorcycle trailers are functional objects and the person needing to transport things but finding this option not open will switch to panniers, or a side car, or a three-wheeled moped van such as one often sees in Italian streets, or some other carrying-system of comparable availability and function. Similarly, the seeker of water-based excitement may, denied their jet ski, go skiing or buy a cross-country motorbike, but they may also buy a motorboat or a catamaran. It does not seem implausible that there is a sufficiently defined range of primary alternatives to which consumers would turn that one could speak of a product market of which jet skis are a part.

However, this may not be the case. It is a matter for market analysis. Conceivably the response of consumers denied their trailers and jet skis is so diffuse—one goes on holiday, one gets a fridge and the third adds to their savings—that each product must be seen as comprising a product market on its own. In that case the measures are indeed equal burden, but may be seen as particularly special cases. They are among the few equal

Aftodioikisi Ioanninon, 2006 E.C.R. I-8135; Case C-55/94, Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano, [1995] E.C.R. I-4165.

⁸⁶ Case C-110/05, *Commission v. Italy*, judgment of 10 Feb 2009; Case C-142/05, *Åklagaren v. Mickelsson and Roos*, judgment of 4 Jun 2009; Case C-188/04, *Alfa Vita v. Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon*, 2006 E.C.R. I-8135.

⁸⁷ Case C-142/05, *Åklagaren v. Mickelsson and Roos* (June 4, 2009), at para. 25.

burden rules that have such a dramatic effect on market size that they do in fact create obstacles to access. It is, indeed, undeniable that a producer of either motorcycle trailers or jet skis would have found export to these states hindered in the extreme.

Thus the suggestion that the cases support a “market access” approach to goods may be true in one sense—the measures may be unlawful because they certainly do restrict market access. However, that does not support the view that equal burden measures *per se* are within the Treaty. Most equal burden measures, unlike these, do not restrict market access. These cases, given their effects, could hardly have been decided any other way. That is not true of other equal burden rules, which do not have those effects.

Alfa Vita concerned a Greek rule requiring shops selling bread to have a flour store and other facilities. That applied even if the bread they were selling was baked from bought-in dough, rendering the flour store entirely superfluous. The effect of the rule was that bread from bought-in dough could only be sold by shops which also baked their own bread, that is to say bakeries, since other shops would be unlikely to want to invest in bakery facilities that they would not use. Supermarkets and general groceries were not permitted to simply install ovens and bake bread from dough, as is increasingly common in most states.

This rule was highly selective and market distorting in several ways. In the market for the sale of bread, it effectively excluded a large number of actors—all non-bakers. This was the intention of the rule, which aimed to protect traditional bakeries. It would certainly have been possible for a foreign grocery chain to argue that its access to the Greek retail market was hindered. However, this path was not followed, and the case turned on the supply of bread to consumers.

It seems overwhelmingly likely that the rule disadvantaged bread from dough by comparison with freshly-baked dough, in comparison with the state of affairs without the rule. In the absence of the rule bread from dough would be available from a wide range of outlets, whereas the rule cut these down dramatically, whereas it had no impact on freshly-baked bread, which would only be available from bakers anyway. Thus this rule did not obviously place bread from dough at a disadvantage to fresh bread, but rather prevented bread from dough from capitalizing on an advantage which it would otherwise have enjoyed by virtue of its specific characteristics and production process. The rule, therefore, was not market neutral but was an intervention in the competitive position of the two products.

In fact it is very likely that the rule was more negative than this for dough-based bread, and placed it at a considerable disadvantage in the market. Bakers, having the facilities to bake fresh bread, might well be inclined to prefer this product, and might indeed make more profit on it, not having to outsource part of the production process. It is not obvious therefore that it would be easy for dough-based bread to gain widespread or universal access to retail outlets. It might be largely excluded from the market place.

In the area of establishment and services, *Gebhard*, *Commission v. Italy* (Insurance), *Caixabank* and *Alpine Investments* all speak the language of market access and are therefore taken to reject inequality as the basis of free movement.⁸⁸ Yet all the measures involved are highly selective, excluding a distinct sub-set of products and actors, and thereby changing the competitive relationship of the actors on the market. This is obviously true of the *Gebhard* rule that only those with an Italian law degree could register for the Milan Bar, but also true of the rule in *Commission v Italy* that motor insurance policies must be offered to all comers, and the rule in *Caixabank* prohibiting the offering of interest on current accounts.⁸⁹ By excluding certain kinds of products and business models these measures show a bias in favor of those using other models and marketing other products, and will tend to hinder market access for actors whose activity is based around the prohibited way of doing business. That is not to say that they cannot adapt, but adaption brings costs, whereas their current business model is presumably adopted because they think it advantageous. The rule therefore places them in a worse competitive position than they would be without the regulatory intervention, while leaving those doing business differently untouched: it is a selective measure.

Alpine Investments is perhaps the most dramatically selective of all these cases.⁹⁰ In this case the Dutch government prohibited financial services companies from cold-calling clients. The complaint concerned a company which wished to cold-call clients in Germany, but could not because of the rule. Given that Germany did not prohibit cold-calling it seemed an unnecessary interference by the Dutch government, although the rule was ultimately found to be justified by the protection of the reputation of the Dutch financial sector, cold-calling being a somewhat disreputable activity.

Yet the market on which *Alpine Investments* was active was the German market for financial services. On that market, most of its competitors could cold-call. The only actors which were denied this commercially useful channel were the Dutch ones. In effect, therefore, the measure was protectionist and discriminatory: it kept the Dutch out of the German market, by putting them at a disadvantage to their German competitors.

It is of course unusual that a state disadvantages its own actors on a foreign market. One would have expected the German government to be the one taking measures to keep the Dutch out. However, there is no reason why this oddity should be relevant for the

⁸⁸ P. Pecho, *Goodbye Keck? A comment on the remarkable judgment in Commission v Italy*, 36 LEGAL ISSUES ECON. INTEGRATION 257 (2009); Luca Prete, *Of motorcycle trailers and personal watercrafts: the battle over Keck*, 35 LEGAL ISSUES ECON. INTEGRATION 133 (2008).

⁸⁹ See *supra* note 85.

⁹⁰ Case C-384/93, *Alpine Investments v. Minister van Financiën*, 1995 E.C.R. I-1141.

purposes of free movement law. Free movement is effects-based, and aims at achieving certain goals.⁹¹ The “intentions” of a state are often obscure, even to the extent that the very idea is coherent. The issue therefore should be, and is, whether a measure has the effect of excluding or disadvantaging certain actors on a market or not, not the nationality of the regulator. Since this measure clearly excluded selectively, it was rightly subject to the Treaty.

While the measure could certainly be seen as a selling arrangement in the simple sense that it was about how things are sold, the contrast with a typical goods situation is easily apparent: when a state regulates methods of sale on its own territory this inevitably applies to all actors on that market, and will often have similar effects on them all. By contrast, when a state regulates the actions of its companies abroad, this regulation will almost inevitably have selective effects within those foreign markets. There are many ways in which states can distort competitive relationships, above and beyond the most obvious and the most intentionally protectionist.

PRO Sieben Media is, of the services cases, the greatest challenge to the view expressed in this paper.⁹² Here the German government imposed a limit on the amount of advertising that television channels could carry. The Court found that this had no discriminatory effect, yet was a restriction on the free movement of services nevertheless since it limited the possibilities to provide advertising services on TV channels in Germany.

This case is comparable to *Commission v Italy* (trailers) and *Mickelsson and Roos*, except that instead of imposing an effective ban, as in the latter two cases, *PRO Sieben Media* involves a quantitative restriction on the supply of services. However, what the cases share is that the market has a hard limit. It was simply not possible, even with all the investment in the world, for an advertising agency to offer more than a certain amount of services in Germany, since the market had a maximum size. Moreover, once contracts were concluded for the maximum amount of advertising permitted, other actors were, as a matter of law, excluded. In that sense, the measure may be described as a partial ban (after a certain point, the service in question is no longer prohibited), and bans on a product may legitimately be seen as a special case, as an equal burden measure which does, as argued above, in fact prevent market access. Alternatively, this measure can be seen as selective; it excludes latecomers. While the market may punish slow companies, it is not the intention of free movement law that states should intervene to close markets to them.

In the free movement of persons discrimination is a much more present concept than in the other freedoms. The notable exception to this rule is *Bosman*, in which the Court found

⁹¹ See Gormley, *supra* note 55.

⁹² Case C-6/98, *PRO Sieben Media*, 1999 E.C.R. I-7599.

that the football transfer rules were contrary to Article 45 TFEU, notwithstanding that they applied to all football transfers, whether within states or between them, without any reference to the nationality of the footballer, and there was no reason to think that they made cross-border transfers harder than internal ones.⁹³ While the rules, which made transfer of footballers between clubs dependent upon agreement between the clubs, have been described in terms of contemporary slavery, they seemed to be scrupulously comprehensive in their malignity, equal burden rather than selective.⁹⁴

Yet Mr. Bosman was clearly not being treated in the same way as all his competitors: there are many cross-border transfers, but his was being blocked. He may not have been unique, but he was certainly one of an unlucky minority of footballers who wanted to go somewhere that his club did not want. Others would be released, but he was not. In that sense the rules were clearly not being applied in a way that impacted equally on all footballers. Some would say that they had never had a problem; others would complain that they had been blocked.

Thus *Bosman* can be formulated in two ways. On the one hand, Mr. Bosman had a complaint about the behavior of his club, whose refusal to agree a transfer amounted to a ban on movement for him. The case is analogous to a measure by a state excluding a specific trader from the market; unequivocally selective and a hindrance to market access. No doubt the place which Dunkirk had wanted to give to Mr. Bosman was ultimately filled by another footballer, a competitor of his. On the other hand, the rules themselves can be seen as conflicting with free movement law insofar as they grant power to clubs without any mechanism to prevent this being used to prevent cross-border movement. This is analogous to the state which decentralizes autonomy, without requiring the decentralized bodies to respect EU law. One may plead that this law is directly effective, and therefore specific national rules requiring it to be respected are not necessary, but the Court has often made clear that states must not just respect their EU obligations in substance, but also explicitly in their national rules.⁹⁵ Similarly, the international football association granted control over movement to clubs, without any limitations on that control to ensure that Treaty free movement rights would be respected. Given that in individual cases these rights clearly were not respected there was a double failure: a failure to acknowledge the limits imposed by EU law, and a failure to respect those limits in practice. In particular, in not requiring clubs to have any kind of systematic or consistent approach to transfers the

⁹³ Case C-415/93, *Union Royal Belge des Sociétés de Football Association v. Bosman*, 1995 E.C.R. 1-4921.

⁹⁴ See D. McCauley, *They think it's all over...it might just be now: unravelling the ramifications for the European football transfer system post-Bosman*, 23 EUR. COMPETITION L. REV. 331 (2002).

⁹⁵ E.g. Case C-38/87, *Commission v. Greece*, 1988 E.C.R. 4415; Case C-145/99, *Commission v. Italy*, 2002 E.C.R. I-2235. See Koen Lenaerts et al, *supra* note 64 at 135.

rules did nothing to prevent them being used as selective market interventions. It is long established that granting (apparent) powers to violate EU law is in itself a violation.⁹⁶

F. Conclusion

There are two kinds of regulatory interventions in economic circumstances: one changes the relative competitive positions of market actors, and one does not. The Court does not consider the Treaty as applying to the second sort, and quite rightly. While even equal burden regulation may be silly and disproportionate and frustrating, it does not prevent, or even significantly deter, market entry. By contrast, the first kind of measure inevitably pushes some actors out of the market, and is subject to Treaty supervision.

There is much to be said for beginning this supervision by asking whether those excluded actors are primarily foreign, so that the Treaty only applies to measures with a protectionist effect. The Court certainly reiterates that it is concerned with measures which disadvantage the foreign and the cross-border, not those which primarily hurt the domestic. However, several arguments militate against this: firstly, it is arguable that the Court should be concerned with the position of the individual litigant, and whether their market access is hindered, not with the global effect of the rule. Thus even a rule tending to help foreign actors may nevertheless hinder some, who should still be able to assert their free movement rights. Secondly, establishing whether the global effects of a measure are protectionist or not may be extremely difficult, requiring market research as well as study of the often dynamic sources of particular goods and services. There are thus also practical reasons for considering the exclusion or disadvantaging of a single foreign actor sufficient to invoke the Treaty.

None of this is to prejudge justification, and it is likely that the less obvious a correlation between nationality and disadvantage, the more likely it is that the rule demonstrably pursues a sensible goal. By contrast, the more apparent such a nationality-correlation the more likely it is that the measure is disguised protection. Thus the strength of the nationality-correlation should not necessarily be ignored by courts, and may play a role in the ultimate legality of the measure.

This reading of the Treaty holds fast to the idea that market access should be possible for all undertakings and actors to all national markets in the EU, and that the free movement articles protect this right. However, it delves a little deeper than is usual into the effects of measures on markets to come to the conclusion that it is only the second type of measure, the competition-changing measure, which actually makes access harder. Equal burden regulation merely shrinks markets, usually marginally, and will neither deter, nor make it more difficult, to enter the market. Only in extreme cases where a market is extinguished,

⁹⁶ *Id.*

shrunk beyond the point of commercial viability, or partially closed by a fixed quota will an equal burden rule be a market access restriction, as may have been the case in *Commission v Italy* (trailers), *Mickelsson and Roos*, and *PRO Sieben Media*.

Keck is a practical rule-of-thumb which broadly, if imperfectly, reflects the stance above. The Court acknowledges that since selling arrangements are usually equal burden there is no need to consider them under the Treaty unless they can be shown to have some unequal effect. It establishes a rebuttable presumption which is mostly factually correct.

We may ask why this doctrine of selling arrangements has never been extended to services. The goods-services discrepancy has attracted much examination and speculation over the years. It may simply be that the presumption does not hold as well for services. Their mobility and abstract nature means that instead of being sold in shops, on the shelf next to their competitor products, they more often have individual marketing paths, with the result that particular selling arrangements are more likely to be of particular importance to certain providers, and selling regulation is more likely to be selective. *Alpine Investments* is perhaps an example—this classic selling arrangement regulation resulted in the structural disadvantaging of Dutch providers by comparison with German ones, obviously a Treaty problem. Such extra-territorial marketing legislation is less likely to arise where goods are concerned.

The analogy with the regulation in *Alpine* is really home-state product legislation. If the Netherlands imposes manufacturing standards on Dutch goods which are higher than those in Germany these are similarly disadvantaged on the German market. Indeed, this has often been pointed out by those criticizing the mutual-recognition-based approach to free trade embodied in *Cassis de Dijon*. One might say that if the Dutch government cannot impose consumer protection regulation on the German market as it tried in *Alpine*, then it should not be allowed to do so with goods either, and should exempt goods for export from its manufacturing standards. The most apparent conflict is not *Alpine-Keck*, but *Alpine-Cassis*.

Indeed, *Cassis* does represent a limited derogation from the usual thrust of internal market law, which is to create a level-playing field for all actors. By approving the competition of actors subject to different regulatory burdens, and rejecting even regulatory interventions by states which could be seen as attempts to equalize these burdens, it entrenches a limited form of market inequality. However, it does so for practical reasons: product regulation is more easily and effectively applied and enforced in the land of production, while a choice for state-of-sale regulation of product standards would create national market equality at the expense of a single EU market. Both equality and free movement can only be fully realized in a homogenous regulatory environment (if then) but such total harmonization is undesirable for other economic, constitutional and social reasons.

Cassis therefore chooses for a practical compromise between market fairness, national autonomy, and ease of enforcement, partially justified by the perceptions that differences between national rules are not so very big anyway. By contrast, *Alpine* follows the classical approach that market access is best served by market equality, just as *Keck* does. It is *Cassis* that for practical reasons goes off on a highly original and necessary legal detour.

In the internal market, multiple goals and interests are at play. There is the potential for great legal uncertainty, great incoherence, and ultimately great constitutional, economic and social harm: or at least a loss of possible gains. A first step toward optimal policy is reconciling legal rules with substantive goals. The tendency in legal writing about free movement is to gloss this: to speak of market access and discrimination without considering what they mean in practice and how they relate to each other, to types of regulation, and to the paths followed by market actors. This paper has attempted to address that gap by offering a more systematic analysis of the kinds of measures found in free movement cases and their impact and consequences. It has tried to show that free movement law should and does try to create the same market as competition law does, and is most coherently based on the same underlying economic perceptions. It is therefore the public and private distortion of competition which these two branches of law should and do seek to prevent. Neither free movement nor competition law aim at changing the substantive balance of power between public and private, or private and private, as a goal in itself. Rather they seek to police the exercise of that power to ensure that it is used in a non-distortive, non-exclusionary, way.