Articles

"Market Access" or Bust? Positioning the Principle Within the Jurisprudence of Goods, Persons, Services, and Capital

By Tim Connor[*]

A. Introduction

The Treaty on the Functioning of the European Union (TFEU) provides with respect to the free movement of goods that "[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited."[1] In contrast, the TFEU provides that, with respect to the free movement of persons, services, and capital, restrictions at the national level on such rights are similarly unlawful.[2]

The jurisprudence of the Court of Justice has applied the Treaty's free movement provisions to national measures. Such measures may be rendered unlawful unless *justified*.[3] Within the process of the assessment of the lawfulness of the national measure, the Court has had recourse to the principles of nondiscrimination,[4] mutual recognition[5] and market access.[6] Free movement jurisprudence respects the operation of the three principles in the assessment of the application of the free movement provisions to national

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[1] *See* Treaty on the Functioning of the European Union, art. 34, 13 Dec. 2007, 2010 O.J. (C083) 1 [hereinafter TFEU].

[2] This is not strictly true. With respect to the *worker,* it has been determined that Treaty free movement provisions operate in the same manner as the other Treaty free movement provisions. *See* Case 96/85, Comm'n v. France, 1986 E.C.R. 1475; *see also* TFEU art. 49 (respecting establishment); TFEU art. 56 (respecting services); TFEU art. 63 (with respect to capital).

[3] TFEU, *supra* note 1, at art. 36. With respect to goods, *justification* is either by recourse to TFEU art. 36 or to the "mandatory requirement"; *see also* TFEU art. 45(3) (worker); TFEU art. 52(1) (establishment); TFEU art. 56 (services).

[4] TFEU, *supra* note 1, at art. 18 ("Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.").

[5] Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649 [hereinafter *Rewe-Zentral*].

[6] Case 8/74, Procureur du Roi v. Benoît and Gustave Dassonville, 1974 E.C.R. 837 [hereinafter *Dassonville*] (originally introducing with respect to goods).

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measures.[7] The market access principle notably has been used recently within the jurisprudence relating to the free movement of goods. The judgment of *Commission v. Italy*[8] held unlawful an Italian law which prohibited mopeds from towing trailers,[9] and *Mickelsson and Roos*[10] held unlawful Swedish laws which prohibited the use of personal watercraft on waters other than generally navigable waterways.[11] Both respective measures were held to have prevented the *access* of the import to the respective national markets in those Member States. The use of the market access principle in relation to the assessment of the legality of the Italian and Swedish national measures is important not only for the jurisprudence relating to the free movement of goods, but also in the wider context of the jurisprudence for free movement in general. In particular, the use of the principle in *Commission v. Italy*[12] and *Mickelsson and Roos*[13] bears on the status of the *selling arrangement* in the context of the free movement of goods.

This article addresses issues raised by the use of the principle of market access in the free movement jurisprudence of goods,[14] persons,[15] services,[16] and capital.[17] It concentrates initially on the jurisprudence relating to the free movement of goods.[18] The use of the principle of market access in the wider context of all free movement jurisprudence is then considered. The article arose from the composition of the judgments of *Commission v.*

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[7] Case C-110/05, Comm'n v. Italian Republic, 2009 E.C.R. I-519, para. 35 [hereinafter *Commission v. Italy*]: "It is also apparent from settled caselaw that Article 28 EC [now Art. 34 TFEU] reflects the obligation to respect the principles of *non-discrimination* and of *mutual recognition* of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of Community products to national markets." (emphasis added).

[8] *Id.*

[9] *Id.* at para. 56 ("A prohibition on the use of a product in the territory of a Member State has a considerable influence on the behaviour of consumers, which, in its turn, affects the *access* of that product to the market of that Member State." (emphasis added)).

[10] Case C-142/05, Åklagaren v. Mickelsson, 2009 E.C.R. I-4273 [hereinafter *Mickelsson*].

[11] *Id.* at para. 28 ("Such regulations have the effect of *hindering* the *access* to the domestic market." (emphasis added)).

[12] See *Commission v. Italy*, 2009 E.C.R. I-519.

[13] See *Mickelsson*, 2009 E.C.R. I-4273.

[14] TFEU, *supra* note 1, at art. 34.

[15] See TFEU art. 45 (worker); *see also* TFEU art. 49 (establishment); Case T-266/97, Vlaamse Televisie Maatschapij NV v. Comm'n, 1999 E.C.R. I-2329 [hereinafter *Maatschapij*].

[16] TFEU, *supra* note 1, at art. 56.

[17] TFEU, *supra* note 1, at art. 63.

[18] TFEU, *supra* note 1, at art. 34.

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Italy[19] and *Mickelsson and Roos*[20] in the context of the use therein of the principle of *market access*. In the particular context of the free movement of *goods*, this article will examine the re-engagement with the market access principle which is evidenced in the judgments of the Court of Justice in *Commission v. Italy* and *Mickelsson*. In this particular context, is the principle of market access now to take precedence over the concept of the *selling arrangement*? This article will also examine a context wider than the free movement of goods.[21] Does the rejuvenation and re-engagement with the principle of market access within the jurisprudence of goods have ramifications for the jurisprudence beyond goods, including that of persons, services, and capital?[22] These are issues that are addressed within this article.

B. Positioning Market Access: Goods

I. Contextualisation

To contextualise the use of the principle of market access as a benchmark assessment point in the measurement of the legality of national measures, the market access principle was initially introduced with respect to the free movement of goods in 1974 in *Procureur du Roi v. Benoît and Gustave Dassonville*.[23] As a test in the field of the free movement of goods, its use became significantly curtailed some twenty years later by the judgment of *Criminal proceedings against Bernard Keck and Daniel Mithouard*,[24] which was delivered in 1993.[25] Eclipsed by *Keck and Mithouard*,[26] and recently described in the instant context as a "phoenix"[27] rising from the ashes, the recent recourse to the principle of market access in

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[19] See *Commission v. Italy*, 2009 E.C.R. I-519.

[20] See *Mickelsson*, 2009 E.C.R. I-4273.

[21] TFEU, *supra* note 1, at art. 34.

[22] *See* TFEU, *supra* note 1, at art. 45 (for workers); *see also* TFEU, *supra* note 1, at art. 49 (for establishment); TFEU, *supra* note 1, at art. 56 (for services); TFEU, *supra* note 1, at art. 63 (for capital).

[23] *Dassonville*, 1974 E.C.R. 837, para. 6 (holding unlawful Belgian requirements relating to proof of origin because they prevented access to the Belgian market of Scotch whisky which had imported through third party states). Such laws, it was held, "should not act as a hindrance to trade between Member States and should, in consequence, be *accessible* to all Community nationals" (emphasis added).

[24] See Joined Cases C-268/91 & C-276/91, Criminal proceedings against Bernard Keck and David Mithouard, 1993 E.C.R. I-6097, Case C-276/91, Comm'n v. French Republic, 1993 E.C.R. I-4413 [hereinafter collectively *Keck and Mithouard*].

[25] *Id*.

[26] *Id*.

[27] Catherine Barnard, *Trailing a New Approach to Free Movement of Goods?*, 68 CAMBRIDGE L.J. 288, 290 (2009).

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Commission v. Italy[28] and *Mickelsson*[29] may prove to have significant repercussions with respect to usage, not only in the theatre of goods, but also in the wider community of persons,[30] services,[31] and capital.[32]

In the jurisprudence relating to the application of the principle of the free movement of goods[33] between Member States, "free access of Community products to national markets" has been but one of the principles available to the Court as a benchmark of the legality of the national measure in relation to the requirements of European Union law.[34] Contextualising the use of that principle in relation to the free movement of goods[35] in *Commission v. Italy*, the Court of Justice held that:

> It is also apparent from settled case-law that Article 28 EC [Treaty Establishing the European Community; now Article 34 TFEU] reflects the obligation to respect the principles of *nondiscrimination*[36] and of *mutual recognition*[37] of products lawfully manufactured and marketed in other Member States as well as the principle of ensuring free access of community products to national markets.[38]

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[28] *Commission v. Italy,* 2009 E.C.R. I-519.

[29] *Mickelsson*, 2009 E.C.R. I-4273.

[30] TFEU, *supra* note 1, at art. 45 (for worker); *see also* TFEU, *supra* note 1, at art. 49 (establishment); *see generally Maatschapij*, para. 107.

[31] TFEU, *supra* note 1, at art. 56.

[32] TFEU, *supra* note 1, at art. 63.

[33] TFEU, *supra* note 1, at art. 34 (stating a fundamental Treaty principle); *see also* Case C-333/08, Comm'n v. France, judgment of 28 January 2010.

[34] *Commission v. Italy*, 2009 E.C.R. I-519, para. 1 (imposing this principle in the context of goods by Articles 34); *see also* TFEU, *supra* note 1, at art. 34 (providing that "[q]uantitative restrictions on imports, and all measures having equivalent effect, shall be prohibited between Member States").

[35] TFEU, *supra* note 1, at art. 34.

[36] *Commission v. Italy*, 2009 E.C.R. I-519, para. 34. There are many examples of the application of the principle of nondiscrimination in jurisprudence relating to the free movement of goods. *See, e.g.*, Tim Connor, *Goods, Persons, Services and Capital in the European Union: Jurisprudential Routes to Free Movement*, 11 GERMAN L.J. 159 (2010).

[37] *Rewe-Zentral*, 1979 E.C.R. 649 (introducing the principle of mutual recognition into jurisprudence relating to goods).

[38] *Commission v. Italy*, 2009 E.C.R. I-519, para. 38.

Even though interest in the market access principle has been renewed, this passage is evidence from the Court that other principles are available to smooth the application of Article 34 TFEU to national measures. *Commission v. Italy* confirmed the availability of such alternatives by referring to *Criminal proceedings against Sandoz BV*,[39] *Rewe Zentral*[40] and *Criminal proceedings against Bernard Keck and Daniel Mithouard*.[41] The *Sandoz BV*[42] judgment had proceeded on the basis of the application[43] of the principle of nondiscrimination.[44] The Court in that case held that "[t]he *objective pursued* by the principle of free movement of goods is precisely to ensure for products from the various Member States *access* to markets."[45] *Rewe Zentral*,[46] which held that national measures found to be effective in excluding the imported product were "an *obstacle* to trade,"[47] had been decided on the basis of the operation of the principle of mutual recognition.[48] In the judgment of *Keck*,[49] even in the context of the introduction of the concept of the selling arrangement, the Court acknowledged clear respect for the principle of market access.[50]

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[39] Case C-174/82, Criminal proceedings against Sandoz BV, 1983 E.C.R. 2445 [hereinafter *Sandoz BV*].

[40] *Rewe-Zentral*, 1979 E.C.R. 649.

[41] *Keck and Mithouard*, 1993 E.C.R. I-6097.

[42] *Sandoz BV*, 1983 E.C.R. 2445, para. 7.

[43] *Id.* (proceeding to the issue of justification and not considering the detail of this aspect).

[44] *Id*. (concerning, in essence, indirectly discriminatory Dutch measures related to the marketing of vitamin-enriched foodstuffs within Holland).

[45] *Id.* at para. 26 (emphasis added).

[46] *Rewe-Zentral*, 1979 E.C.R. 649.

[47] *Id.* at para. 14 (emphasis added).

[48] *Id.* at para. 15 (noting the judgment was decided on the basis that "[t]he concept of 'measures having an effect equivalent to quantitative restrictions on imports' contained in Article 30 of the Treaty is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a Member State also falls within the prohibition laid down in that provision where the importation of alcoholic beverages *lawfully produced and marketed in another Member State* is concerned" (emphasis added)).

[49] *Keck and Mithouard*, 1993 E.C.R. I-6097.

[50] *Id.* at para. 17 (referencing to the imported good, French law was held "not by nature such as to prevent their *access* to the market or to impede *access* any more than it impedes the *access* of domestic products" (emphasis added)).

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The respect, shown in such judgments as *Commission v. Italy*,[51] *Sandoz*,[52] *Rewe,*[53] and *Keck*[54] is effective to prove an established respect for the principle of market access. It is a respect which may be latent, as the judgments of *Sandoz*,[55] *Rewe,*[56] and *Keck and Mithouard*[57] suggest. However, it may instead be a patent respect, as exemplified by the judgments of *Commission v. Italy*[58] and *Mickelsson*.[59]

II. Market Access: First Amongst Equals?

In assessing the importance of the principle of market access within the jurisprudence of goods, a question to be addressed is whether the principle is to be employed as "first among equals" or whether the Court is to have recourse to the principles of nondiscrimination[60] or mutual recognition[61] in the context of the application of Article 34 TFEU. Is the principle of market access to take a place as only one of a number of principles, the use of any of which may trigger the application of the Treaty free movement provision? This section first examines the positioning of the principles of nondiscrimination and mutual recognition with respect to that of market access within the jurisprudence of the free movement of goods.[62] It then examines the role that the principle of market access has played in the context of the wider scrutiny of its use within the jurisprudence of persons,[63] services,[64] and capital.[65]

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[51] *Commission v. Italy*, 2009 E.C.R. I-519, para. 34.

[52] *Sandoz BV*, 1993 E.C.R. 2445, para 26.

[53] *Rewe-Zentral*, 1979 E.C.R. 649, paras. 6, 14–15.

[54] *Keck and Mithouard*, 1993 E.C.R. I-519, para. 17.

[55] *Sandoz BV*, 1983 E.C.R. 2445.

[56] *Rewe-Zentral*, 1979 E.C.R. 649.

[57] *Keck and Mithouard*, 1993 E.C.R. I-6097.

[58] *Commission v. Italy*, 2009 E.C.R. I-519, para. 34.

[59] *Mickelsson*, 2009 E.C.R. I-4273, para. 28.

[60] TFEU, *supra* note 1, at art. 18 (noting that the general Treaty provision in this respect provides "within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited").

[61] *Rewe-Zentral*, 1979 E.C.R. 649, para. 14 (introducing the market access principle).

[62] TFEU, *supra* note 1, at art. 34.

[63] TFEU, *supra* note 1, at art. 45 (respecting the worker); *see also* TFEU, *supra* note 1, at art. 49 (respecting establishment); *Maatschapij*, 1999 E.C.R. I-2329, para. 107 (noting this jurisprudence).

[64] TFEU, *supra* note 1, at art. 56.

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1. Nondiscrimination

With respect to the principle of nondiscrimination, *Dassonville*[66] held that national measures must not "directly or indirectly" hinder trade between Member States.[67] This offers an explanation of the jurisprudential references to both direct and indirect discrimination.[68] It is in this context that one commentator, prior to the judgment of *Keck and Mithouard*, expressed the view that

> Prior to the landmark decision of the Court of Justice in the *Cassis* case it was generally assumed—and the Court's case law was consistent with this assumption—that Article 30 (now Article 34 TFEU) had no application to a national measure unless it could be proved that the measure in question discriminated in some way . . . between either imports and domestic products or between channels of intra Community trade.[69]

Yet, a pertinent question may arise as to the relationship between the principles of market access and discrimination. Can the judgments relating to the legality of national measures tainted by discrimination in the field of free movement of goods be represented in terms of a reliance on the principle of market access? The composition of a number of judgments in relation to the free movement of goods lends support to the validity of this argument. Aside from *Commission v. Italy*,[70] other judgments indicate that a certain symbiosis exists between the operation of the two principles of market access and

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[65] TFEU, *supra* note 1, at art. 63.

[66] *Dassonville*, 1974 E.C.R. 837.

[67] *Id.* at para. 5 ("All trading rules enacted by Member States which are capable of hindering, *directly or indirectly*, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.").

[68] Direct and indirect discrimination are alternatively termed distinctly and indistinctly discriminatory. Commission Directive 70/50, art. 2(2), 1970 O.J. (L 13) 29 (EC) (initiating Court use of these terms).

[69] DERRICK WYATT & ALAN DASHWOOD, EUROPEAN COMMUNITY LAW, 221 (3d ed. 1993) (emphasis added). Note that consideration of the concept of discrimination was also important in the context of the judgment of *Keck*. *Keck and Mithouard*, para. 17.

[70] *Commission v. Italy*, 2009 E.C.R. I-519, para. 34 (explaining that "Article 28 EC [now TFEU art. 34] reflects the obligation to respect the principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of Community products to national markets").

discrimination. In *Commission v. Ireland*,[71] for example, which concerned the discriminatory nature of a "buy Irish" campaign,[72] there was an implicit recognition of the principle of market access. The Irish law was held "*liable to affect the volume of trade* between Member States."[73] So too, in *Henri Cullet and Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers v. Centre Leclerc à Toulouse and Centre Leclerc à Saint-Orens-de-Gameville*, it was held that the effect of a system of fixing prices of partitioning petroleum products "is to *partition off* the national market."[74] A stronger indication of a simmering symbiosis between the principles of nondiscrimination and market access was delivered in *Ker-Optika bt v. ÀNTSZ Dél-dunántúli Regionális Intézete*, in which a Hungarian measure prohibiting the sale of contact lenses by mail order was held to deprive importers[75] "of a particularly effective means of selling those products and *thus significantly impedes access* of those traders to the market of the Member State concerned."[76] In *Commission v. UK*, it was held that discriminatory national legislation relating to origin marking affected the access of the imported good to the national market on the basis that it was "liable to have the effect of increasing the production costs of imported goods and making it more difficult to sell them on the United Kingdom market."[77]

2. Mutual Recognition

Within the jurisprudence relating to the free movement of goods,[78] which has applied the principle of mutual recognition,[79] there is arguably some inherent respect for the principle

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[71] Case C-249/81, Comm'n v. Ireland, 1982 E.C.R. 4005, para. 25.

[72] *Id.* at para. 20. The introduction of the "guaranteed Irish" symbol was indirectly discriminatory of the imported product. *Id.* at para 26.

[73] *Id.* at para. 25 (emphasis added).

[74] Case 231/83, Henri Cullet and Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers v. Centre Leclerc à Toulouse and Centre Leclerc à Saint-Orens-de-Gameville, 1985 E.C.R 305, para. 20 [hereinafter *Cullet*] (emphasis added).

[75] Case C-108/09, Ker-Optika bt v. ÀNTSZ Dél-dunántúli Regionális Intézete, judgment of 2 December 2010 [hereinafter *Ker-Optika*] (noting that hence the Hungarian measure was discriminatory).

[76] *Id.* at para. 54 (noting the requirements laid down by the Hungarian law for the marketing of contact lenses affected the selling of imported products to a greater degree than the domestic product) (emphasis added).

[77] Case 207/83, Comm'n v. United Kingdom of Great Britain and Northern Ireland, 1985 E.C.R. 1201, para 18.

[78] TFEU, *supra* note 1, at art. 34.

[79] *See Rewe-Zentral*, 1979 E.C.R. 649, para. 14 (introducing this principle); *see, e.g.* Case C-390/99, Canal Satélite Digital SL v. Adminstración General del Estado; Distribuidora de Televisión Digital SA (DTS), 2002 E.C.R. I-607; Case C-123/00, Bellamy and English Shop Wholesale, 2001 E.C.R. I-2795, para. 18.

of market access.[80] The concept that "[t]here is therefore no valid reason why [goods], provided that they have been lawfully produced and marketed in one of the Member States . . . should not be introduced into any other Member State" is imbued with notions of market access.[81] In jurisprudence wherein there has been a reliance on the principle of *mutual recognition*, a respect for the principle of market access has been more prominent. For example, in *Criminal proceedings against Jan-Erik Anders Ahokainen and Mati Leppik*, a Finnish system of prior authorisation with respect to the import of ethyl alcohol was held "capable of . . . *impeding access* to the market for goods."[82] In *Commission v. Portugal*, the

[80] *Commission v. Italy*, 2009 E.C.R. I-519, para. 34 ("It is also apparent from settled caselaw that Article 28 EC [now TFEU 34] reflects the obligation to respect the principle of . . . mutual recognition of products lawfully manufactured and marketed in other Member States, *as well as* the principle of ensuring free access of Community products to national markets." (emphasis added)).

[81] *Rewe-Zentral*, 1979 E.C.R. 649, para. 14. The use of the market access principle is in evidence on many occasions. *See, e.g.*, Case 27/80, Criminal proceedings against Anton Adriaan Fietje, 1980 E.C.R. 3839, para. 15; Case 53/80, Officier van justitie v. Koninklijke Kaasfabriek Eyssen BV, 1981 E.C.R. 409, para. 11 ("In view of this disparity of rules it cannot be disputed that the prohibition by certain Member States of the marketing on their territory of processed cheese containing added nisin is of such a nature as to affect imports of that product from other Member States where, conversely, the addition of nisin is wholly or partially permitted and that it for that reason constitutes a measure having an effect equivalent to a quantitative restriction."); Case 6/81, BV Industrie Diensten Groep v. J.A. Beele Handelmaatschappij BV, 1982 E.C.R. 707, paras. 6–7; Case 261/81, Walter Rau Lebensmittelwerke v. De Smedt PVBA, 1982 E.C.R. 3961, para. 20 (noting the principle of mutual recognition was in operation, where a Belgian packaging measure was held unlawful in application to margarine imports "lawfully produced and marketed in [other Member] state[s]"); Case 788/79, Criminal proceedings against Herbert Gilli and Paul Andres, 1980 E.C.R. 2071, para. 12; Case 220/81, Criminal proceedings against Timothy Frederick Robertson and others, 1982 E.C.R. 2349, para. 12; Case C-293/93, Criminal proceedings against Ludomira Neeltje Barbara Houtwipper, 1994 E.C.R. I-4249, paras. 14–15 (respecting a law indicating their fineness in relation to the quantity of pure precious metal used); Case C-30/99, Comm'n v. Ireland, 2001 E.C.R. I-4619, para. 30; Case C-12/00, Comm'n v. Kingdom of Spain, 2003 E.C.R. I-459, para. 80 (holding the prohibition on the sale of cocoa and chocolate products to which vegetable fats other than cocoa butter had been added being marketed as "chocolate" in Spain liable to obstruct intra-Community trade in those products lawfully manufactured in other Member States); Case C-14/00, Comm'n v. Italian Republic, 2003 E.C.R. I-513, paras. 70–78; Case C-366/04, Georg Schwarz v. Bürgermeister der Landeshauptstadt Salzburg, 2005 E.C.R. I-10139, paras. 29–30 (respecting the principle of "mutual recognition" which underpinned the judgment that an Austrian measure prohibiting the sale from vending machines of non-packaged products from vending machines was a hindrance to trade, noting "*those same goods* can be marketed abroad, in particular in Germany, *without packaging*" (emphasis added)); *see also* Case 178/84, Comm'n v. Fed. Republic of Germany, 1987 E.C.R. 1227, para. 29; Case 176/84, Comm'n v. Hellenic Republic, 1987 E.C.R. 1193, para. 31 (relying on the principle of mutual recognition which operated to render unlawful a Greek law prohibiting marketing of imported beers manufactured from materials other than those stipulated from domestic law); Case 130/80, Criminal proceedings against Fabriek voor Hoogwaardige Voedingsprodukten Kelderman BV, 1981 E.C.R. 527, para. 16.

[82] Case C-434/04, Criminal proceedings against Jan-Erik Anders Ahokainen and Mati Leppik, 2006 E.C.R. I-9171, para. 21. There was a respect too in this instance for the principle of mutual recognition. The national law was capable of "impeding access to the market for goods which are *lawfully produced and marketed* in other Member States." *Id.* (emphasis added). It is noted that the Finnish measure was also considered a "*restriction on trade*." *Id.* at para. 22 (emphasis added).

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refusal to recognise the equivalence of approval certificates[83] issued by another Member State was held to "*restrict access to the market*" of the host state.[84] An obligation to obtain a transfer license prior to using an imported vehicle was held in *Commission v. Republic of Finland* to be "capable of hindering intra-Community trade in motor vehicles and *impeding access to the market* for goods which are lawfully produced and/or sold in other Member States."[85] Finally in *Commission v. Belgium*, a Belgian requirement relating to the prior approval of automatic fire detection systems was held to "restrict . . . access to the market of the importing Member State."[86]

III. Selling Arrangements: Market Access

1. Scrutiny

Positioning the principle of market access within the jurisprudence relating to the free movement of goods[87] requires an examination of the position of the selling arrangement in this context. The judgment of *Keck and Mithouard*[88] introduced the concept of the selling arrangement into the jurisprudence relating to the free movement of goods.[89] *Keck* held that a category of measures—"certain selling arrangements"[90]—would fall outside the scrutiny of Article 34 TFEU.[91] The concept of the "certain selling arrangement" provided an exception to the armoury of Article 34 TFEU in the attack on national measures that hinder free movement. A precondition to the operation of the selling arrangement is the requirement that the national measure under scrutiny is nondiscriminatory and does not

[83] Case C-432/03, Comm'n v. Portuguese Republic, 2005 E.C.R. I-9665 (relating to polyethylene pipes).

[84] *Id*. at para. 41 (emphasis added).

[85] Case C-54/05, Comm'n v. Finland, 2007 E.C.R. I-2473, para. 32 (emphasis added).

[86] Case C-254/05, Comm'n v. Belgium, 2007 E.C.R. I-4269, para. 41.

[87] TFEU, *supra* note 1, at art. 34.

[88] *Keck and Mithouard*, 1993 E.C.R. I-6097, para. 16.

[89] TFEU, *supra* note 1, at art. 34.

[90] *Keck and Mithouard*, 1993 E.C.R. I-6097, para. 16 ("National provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment (Case 8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.").

[91] *Dassonville*, 1974 E.C.R. 837, para. 5. (remaining inside that scrutiny, therefore, are product requirements, or "requirements to be met" by the goods, such as such as those relating to designation, form, size, weight, composition, presentation, labeling, and packaging, and residual rules to the extent that they fall within the definition of a measure having equivalent effect as given in *Dassonville*).

prevent the access of the imported good[92] to the host market. A national measure that satisfies the criteria for a "selling arrangement" is removed from the scrutiny of Article 34 TFEU, and therefore regarded as lawful. The jurisprudence of the free movement of goods since *Keck*[93] is littered with examples of national measures which have been deemed "certain selling arrangements."[94] Later cases such as *Commission v. Italy*[95] and *Mickelsson*[96] affected the concept of the selling arrangement and the relationship that this concept enjoys vis-à-vis the principle of market access. In both cases, the characterization of the measures as "selling arrangements" was based upon "traditional" application of

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[92] *Keck and Mithouard*, 1993 E.C.R. I-6097, para. 16 ("By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.").

[93] *Id.*

[94] *See* Case C-401/92, Criminal proceedings against Tankstation 't Heukske vof and J. B. E. Boermans, 1994 E.C.R. I-2199, para. 15 (determining that a Dutch law relating to the opening hours of shops fell into the category of "certain selling arrangements"); *see also* Case C-391/92, Comm'n v. Greece, 1995 E.C.R. I-1621, para. 21 (applying the same "classification" to a reservation that processed milk be sold only in pharmacies); Case C-292/92, Hünermund and others v. Landesapothekerkammer Baden-Württemberg, 1993 E.C.R. I-6787 [hereinafter *Hünermund* case] (regarding the German advertising rules prohibiting the advertising of quasi-pharmaceutical outside); Case C-412/93, Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA, 1995 E.C.R. I-179, para 48 (concerning French measures relating to television advertising); Case C-418/93, Semeraro Casa Uno Srl v. Sindaco del Comune di Erbusco et al, 1996 E.C.R. I-2975, para. 28 (concerning Italian legislation relating to shop opening times); Case C-387/93, Criminal proceedings against Giorgio Domingo Banchero, 1995 E.C.R. I-4663, paras. 34–35 (concerning Italian customs legislation limiting tobacco sales to authorised retailers); Joined Cases C-69/93 & C-258/93, Punto Casa SpA v. Sindaco del Comune di Capena et Comune di Capena and Promozioni Polivalenti Venete Soc. Coop, 1994 E.C.R. I-2355, para. 15. (concerning Italian measures relating to Sunday retail closing hours). For further examples of "selling arrangements," see Case C-441/04, A-Punkt Schmuckhandels GmbH v. Claudia Schmidt, 2006 E.C.R. I-2093, para. 17 (relating to an Austrian prohibition on the door stop selling and collecting of silver jewelry); Case C-63/94, Groupement National des Négociants en Pommes de Terre de Belgique v. ITM Belgium SA and Vocarex SA, 1995 E.C.R. I-2467 (relating to Belgian measures which related to the sale of potatoes with a low profit margin); Case C-20/03, Criminal proceedings against Marcel Burmanjer, René Alexander Van Der Linden and Anthony De Jong, 2005 E.C.R. I-4133 (relating to measures by Belgium relating to the obtaining of prior authorisation with respect to the itinerant sales of subscriptions to periodicals); Case C-6/98, Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) v. PRO Sieben Media AG, supported by SAT 1 Satellitenfernsehen GmbH, Kabel 1, K 1 Fernsehen GmbH, 1999 E.C.R. I-7599, paras. 48, 51 (relating to a rule concerning the net principle with respect to television broadcasters was held to concern "selling arrangement"); Case C-71/02, Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH, 2004 E.C.R. I-3025, para. 39 (concerning Austrian legislation prohibiting references in advertisements to the commercial origin of goods was similarly classified so as to fall beyond the clutches of Article 28 EC (now TFEU art. 34), and in holding that the national legislation was not subject to Article 28 EC scrutiny, the judgment respected the balance between the interests of freedom of expression and "each of the goals justifying restrictions on that freedom").

[95] *Commission v. Italy*, 2009 E.C.R. I-519.

[96] *Mickelsson*, 2009 E.C.R. I-4273.

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Article 28 EC (now Article 34 TFEU) rather than the application of the principles established in *Keck*. The respective Swedish and Italian measures were held to have the "effect of *hindering the access* to the domestic market" in relation to personal watercraft[97] and to trailers specially designed for motorcycles.[98] It is noted that in the recent judgment of *Commission v. Portugal*,[99] for example, the invitation by Portugal to categorise the "restriction" on the free movement of capital as a "selling arrangement" was ignored. The measure, though applying equally to both residents and non-residents, was held to *affect access*[100] to the market place because it had been effective to deter the non-resident investor.

2. Market Access: Identification

In both *Commission v. Italy* and *Mickelsson*, the Court of Justice showed a willingness to engage with the principle of market access in the process of determining the legality of a national measure with respect to the application of Article 34 TFEU. Such engagement appears significant, because the Court could have arguably engaged more readily with the principle of the "selling arrangement."[101] In *Commission v. Italy*,[102] the nondiscriminatory national rule was held a "measure having equivalent effect"[103] on the basis that it had "a considerable influence on the behaviour of consumers, which, in its turn, *affects the access of that product to the market* of that Member State."[104]

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[97] *Id.* at para. 28. Note, however, that the Opinion of Advocate General Kokott in *Mickelsson* concluded that that the Swedish measures relating to the use of watercraft be regarded as *arrangements for use for products* falling into the "selling arrangement" category "so long as it applies to all relevant traders operating within the national territory and so long as it affects in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States, and is not product-related." *Id*. at para. 114(2).

[98] *Commission v. Italy*, 2009 E.C.R. I-519, para. 58. Both national laws could be considered to be "measures having equivalent effect" and hence unlawful; subject to "justification pursuant to Article 30 EC [now TFEU art. 36] or . . . overriding public interest requirements." *Mickelsson*, 2009 E.C.R. I-4273, para. 28; *see also Commission v. Italy*, 2009 E.C.R. I-519, para. 58 (having a similar application).

[99] Case C-212/09, Comm'n v. Portuguese Republic, judgment of 10 November 2011 [hereinafter *Comm'n v. Portugal*].

[100] *Id.* at para. 65.

[101] *See Mickelsson,* 2009 E.C.R. I-4273, para. 44 (Advocate General Kokott's remarks).

[102] *Commission v. Italy*, 2009 E.C.R. I-519, para. 24.

[103] *Id.* at para. 58. *See also* TFEU, *supra* note 1, at art. 34 (providing "quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States").

[104] *Commission v. Italy*, 2009 E.C.R. I-519, para. 56. The Court also relied on the judgment of *Commission v. Italy* in *Mickelsson*, in which a restriction on the use of personal watercraft was likewise held to be a "measure having equivalent effect." *Mickelsson*, 2009 E.C.R. I-4273, para. 24.

Such willingness to engage with the principle of market access in *Commission v. Italy*[105] and *Mickelsson*[106] may prove to be significant in the context of questions relating to the future use of the concept of the "selling arrangement" in particular, and for the wider sphere relating to the jurisprudence of goods, in general. To date, there has been an evident respect within the jurisprudence relating to the concept of the "selling arrangement." In *Hünermund and others v. Landesapothekerkammer Baden-Württemberg*,[107] for example, "selling arrangements"—here, national prohibitions on advertising of non-medical products outside pharmacies—were held not to affect the *access* of the imported product to the German market place.[108] In *Criminal proceedings against Tankstation't Heukske vof and J. B. E. Boermans*,[109] while the conditions laid down in *Keck* were technically "fulfilled,"[110] the Court held that "[t]he application of such rules to the sale of products from another Member State meeting the requirements laid down by that State *is not* by nature such as to *prevent their access to the market or to impede access any more than it impedes the access of domestic products*."[111] In *Commission v. Greece*, there was an acknowledgment that the national legislation reserving the sale of processed milk for infants exclusively to pharmacies did not "thereby prevent . . . access to the market of products from other Member States or specifically place them at a disadvantage."[112] In *Semeraro Casa Uno Srl v. Sindaco del Comune di Erbusco et al*, in which the regulation of the opening hours of retail outlets was held to be a selling arrangement, it was found that "[t]here is *no evidence* that the aim of the rules at issue is *to regulate trade* in goods between Member States or that, viewed as a whole, they could lead to unequal treatment between national products and imported products as regards *access to the market*."[113] Likewise, Italian legislation reserving "the retail sale of manufactured tobacco products,

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[105] *Commission v. Italy*, 2009 E.C.R. I-519.

[106] *Mickelsson*, 2009 E.C.R. I-4273.

[107] Case C-292/92, Hünermund and others v. Landesapothekerkammer Baden-Württemberg, 1993 E.C.R. I-6787.

[108] *Id.* at paras. 19, 21, 22 ("It is not the purpose of a rule of professional conduct prohibiting pharmacists from advertising quasi-pharmaceutical products outside the pharmacy, drawn up by a professional association, to regulate trade in goods between Member States."). *See also* Opinion of Advocate General Tesauro, *Hünermund*, para. 29(c).

[109] Joined cases C-402/92 & C-401/92, Criminal proceedings against Tankstation 't Heukske vof and J. B. E. Boermans, 1994 E.C.R. I-2199 [hereinafter *Boermans* case].

[110] *Id.* at para. 18.

[111] *Id.* (emphasis added).

[112] Case C-391/92, Comm'n v. Hellenic Republic, 1995 E.C.R. I-1621, para. 20.

[113] Case 418/83, Semeraro Casa Uno Srl v. Sindaco del Comune di Erbusco et al., 1996 E.C.R. I-2975, para. 24 (emphasis added). *See also* Joined Cases C-69/93 & C- 258/93, Punto Casa SpA v. Sindaco del Comune di Capena and Comune di Capena et al., 1994 E.C.R. I-2355, para. 12 (relating to Italian legislation on the closure of retail outlets on Sundays in which this issue was decided in the same manner).

irrespective of their origin, to authorized distributors . . . does *not* thereby *bar access to the national market* for products from other Member States or does *not impede such access* more than it impedes access for domestic products within the distribution network."[114] In *Douwe Egberts*, a Belgian law which prohibited the advertising of product characteristics was held liable *to impede access* of the imported foodstuff more than the domestic product.[115] Further, in *A-Punkt Schmuckhandels GmbH v. Claudia Schmidt*, whether imported goods in relation to jewelry sales were affected to a greater degree than the domestic Austrian jewelry[116] by a law relating to doorstop selling was left for the national court to determine.[117]

3. Advocate General Jacobs

Advocate General Jacobs, in his opinion in *Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA,*[118] argued that the "selling arrangement"—a French measure relating to broadcasting[119]—would fall outside the scope of Article 28 EC[120] on an alternative basis.[121] Although the restriction on shop opening hours may have resulted "in

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[114] Case C-387/93, Criminal proceedings against Giorgio Domingo Banchero, 1995 E.C.R. I-4663, para. 44 (emphasis added). *See also* Case C-93/94, Groupement National des Négociants en Pommes de Terre de Belgique v. ITM Belgium SA and Vocarex SA, 1995 E.C.R. I-2467, para. 12 (noting how a Belgian rule prohibiting the sale of potatoes at a very low profit margin was held in to be a selling arrangement as it was "not by nature such as to prevent access [of goods] to the market or to impede access any more than it impedes the access of domestic products").

[115] Case C-239/02, Douwe Egberts NV v. Westrom Pharma NV and Christophe Souranis, Carrying on Business Under the Commercial Name of "Etablissements FICS' and Douwe Egberts NV v. FICS- World BVBA, 2004 E.C.R. I-7007, paras. 53–54.

[116] Case C-441/04, A-Punkt Schmuckhandels GmbH v. Claudia Schmidt, 2006 E.C.R. I-2093, para. 25. *See also id.* at para. 23 ("Such a provision constitutes a measure having equivalent effect only if the exclusion of the relevant marketing method affects products from other Member States more than it affects domestic products.").

[117] *Id.* at para. 25.

[118] Case C-412/93, Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA, 1995 E.C.R. I-179 [hereinafter *Leclerc-Siplec*].

[119] *Id.* at paras. 22–24.

[120] See TFEU art. 34 (replacing EC art. 28).

[121] Opinion of Advocate General Jacobs, *Leclerc-Siplec*, 1995 E.C.R. I-179, para. 55 (explaining his view that the measure fell outside the scope of Art 30 EC (now Art 34 TFEU) because "[t]he restriction affects only one form of advertising, although the most effective as far as mass consumer goods are concerned and advertisement of the goods themselves is not affected other than indirectly. As in the case of legislation restricting the opening hours of shops . . . the measure may result in a slight reduction in the total volume of sales of goods, including imports. But it *cannot be said to have a substantial impact on access to the market*. It therefore falls in my view outside the scope of Article 30.")(emphasis added).

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a slight reduction in the total volume of sales of goods, including imports,"[122] the Advocate General was of the opinion that "it cannot be said to have a substantial impact on access to the market."[123] The Advocate General was of the view that "one guiding principle"[124] existed in the application of Article 34 TFEU,[125] noting that "all undertakings which engage in a legitimate economic activity in a Member State should have *unfettered access* to the whole of the Community market."[126] Such a view defers to the operation of the principle of market access; its acceptance by the Court would have had ramifications for the continued maintenance of the concept of the selling arrangement. The test, the Advocate General argued, should be stated as follows: "If the principle is that all undertakings should have unfettered access to the whole of the Community market, then the appropriate test in my view is whether there is a *substantial restriction* on that *access*."[127] Advocate General Jacobs concluded that the adoption of this reasoning in situations which would otherwise have involved considerations relating to the selling arrangement would "amount to introducing a de minimis test into Article 30 [now Article 34 TFEU]."[128] This observation possibly now should be tempered in view of the more recent judgment in *Commission v. Germany*.[129] In similar circumstances,[130] the Court held that the contested measures were liable to hinder intra-Community trade and hence were to be considered "measures having equivalent effect."[131] Such was "*without it being necessary* to prove that they have had an appreciable effect on such trade."[132] Nevertheless, it is clear that, for

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[122] *Id*.

[123] *Id*.

[124] *Id*. at para. 41.

[125] *See* EC art. 30.

[126] Opinion of Advocate General Jacobs, *Leclerc-Siplec*, 1995 E.C.R. I-179, para. 41 (emphasis added).

[127] *Id.* at para. 42 (emphasis added). The opinion continues: "Once it is recognized that there is a need to limit the scope of Article 30 (now Art 34 TFEU) in order to prevent excessive interference in the regulatory powers of the Member States, a test based on the extent to which a measure hinders trade between Member States by restricting market access seems the most obvious solution." *Id.*

[128] *Id.* at para. 42.

[129] Case C-141/07, Comm'n v. Fed. Republic of Germany, 2008 E.C.R. I-6935 [hereinafter *Comm'n v. Germany*].

[130] *Id.* at para. 35 (noting that arrangements for sale of medicinal products held to make the supply of medical products to German hospitals more difficult and more costly for pharmacies establis hed outside Germany).

[131] TFEU, *supra* note 1, at art. 34.

[132] Case C-141/07, Comm'n v. Fed. Republic of Germany, 2008 E.C.R. I-6935, para. 43 (emphasis added). *See also* Case C-166/03, Comm'n v. France, 2004 E.C.R. I-6535, para. 15. Elsewhere there are express statements that even minor restrictions are prohibited and that the effects of a national measure do not need to be appreciable. *See, e.g.*, Case C-309/02, Radlberger Getränkegesellschaft mbH & Co. and S. Spitz KG v. Land Baden-Württembergpara, 2004 E.C.R. I-11763, para. 68 (rejecting a suggestion that the slight effect of rules or the

Advocate General Jacobs, what is of consequence is h*ow* substantial the restriction[133] on the free movement right has been. A significant obstacle to free movement is caught within the application of Article 34 TFEU; an insignificant obstacle would not be so caught and would therefore be regarded as lawful.[134] The Court of Justice did not, however, accept the test proposed by Advocate General Jacobs. It had previously rejected the idea that slight hindrances could escape the scrutiny of Article 34 TFEU,[135] and, in *Leclerc-Siplec*, the Court followed the *Keck* approach.

However the Court finally settles the balance in the resort to the concept of the selling arrangement vis-à-vis that of the principle of market access, for the present it is an issue that remains to be determined. The perception of commentators is that the judgments in *Commission v. Italy* and *Mickelsson* have at least renewed the discussion as to the future direction of the selling arrangement through the appeal in those judgments to the principle of market access.[136] As a consideration in that context, the assessment of legality of the national measure by the yardstick of market access would, for example, leave unsullied the classification of national measures in *Commission v. Greece*[137] and *Semeraro Casa Uno Srl v. Sindaco del Comune di Erbuscoet al*[138] as "selling arrangements."[139]

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availability of marketing of the products could remove the measures from the ambit of Article 34 TFEU); Case 177/82, Criminal proceedings against Jan van de Haar and Kaveka de Meern BV, 1984 E.C.R. 1797, para. 14; Case C-212/06, Gov't of Communauté française and Gouvernement wallon v. Gouvernement flamand, 2008 E.C.R. I-1683, para. 51 (in the context of the free movement of persons).

[133] Case C-141/07, Comm'n v. Fed. Republic of Germany, 2008 E.C.R. I-6935 (noting a substantial restriction to market access could include product rules and, for example, the requirement to alter the import in the host state).

[134] *See* Jukka Snell, *The Notion of Market Access: A Concept or a Slogan?,* 47 COMMON MKT. L. REV. 437, 450, 455–60 (2010).

[135] Joined Cases 177 & 178/82, Criminal proceedings against Jan van de Haar and Kaveka de Meern BV, 1984 E.C.R. 1797, para. 13.

[136] *See, e.g.*, Barnard, *supra* note 27, at 290; Snell, *supra* note 134, at 437–72, 455–58; 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. 914, 921 (2009); Alina Tryfonidou, *Further Steps on the Road to Convergence Among the Market Freedoms*, 35 EUR. L. REV. 36, 50 (2010); Pal Wenneras & Ketil Boe Moen, *Selling Arrangements, Keeping* Keck, 35 Eur. L. Rev 387, 399–400 (2010).

[137] Case C-391/92, Comm'n v. Hellenic Republic, 1995 E.C.R. I-1621, para. 20.

[138] Case 418/93, Semeraro Casa Uno Srl v. Sindaco del Comune di Erbuscoet al, 1996 E.C.R. I-2975, paras. 24, 28. *See also* Joined Cases C-69/93 & C-258/93, Punto Casa SpA v. Sindaco del Comune di Capena and Comune di Capena et al., 1994 E.C.R. I-2355, para. 12 (relating to Italian legislation on the closure of retail outlets on Sundays which this issue was decided in the same manner).

[139] *Semeraro*, 1996 E.C.R. I-2975, para. 24 (noting the national law "cannot . . . be regarded as limiting access to the market"). *See also* Case C-239/02, Douwe Egberts NV v. Westrom Pharma NV and Christophe Souranis, Carrying on Business Under the Commercial Name of "Etablissements FIC" and Douwe Egberts NV v. FICS- World

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C. Commentary

I. General Support

It should be acknowledged that the general support for the principle of market access within the jurisprudence should be positioned against the background of an abiding respect for the principles of nondiscrimination and mutual recognition as elements in the process of the application of Article 34 TFEU to national measures. The judgment of *Commission v. Italy* was clear to reinforce the existence of such respect;[140] that reinforcement plays an important role in the assessment of the future prospects for the use of the principle of market access within the jurisprudence relating to the free movement of goods.[141] That aside, what is possibly of more significance to the instant context is the observation by academic writers that, in effect, the judgments of *Commission v. Italy* and *Mickelsson* signaled "that the notion of market access *may ultimately be the criterion defining the scope of art. 34 TFEU* (thus also in effect replacing *Dassonville*)."[142] The same writers argue that these two judgments may be seen as "a departure from orthodox jurisprudence and the beginning of a universal and strict 'market access' era."[143] Support for such a proposition may be had from Advocate General Jacobs in his opinion delivered in *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA*. The Advocate General argued "[t]here is *one guiding principle* which seems to provide an appropriate test: that principle is that all undertakings which engage in a legitimate economic activity in a Member State should have *unfettered access* to the whole of the Community market."[144] Rather of more importance for present circumstances was Advocate General Jacobs's contextualisation of the presence of this principle within the jurisprudence:

BVBA, 2004 E.C.R. I-7007, para. 53–54 (noting that an absolute prohibition on the advertising of characteristics of a product the national law was liable *to impede the access* of the imported foodstuff to the Belgian market, thus deserving scrutiny under Article 34 TFEU).

[140] *Commission v. Italy*, 2009 E.C.R. I-519, para. 34 ("It is also apparent from settled case-law that Article 28 EC reflects the obligation to respect the principles of nondiscrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States as well as the principle of ensuring free access of community products to national markets.").

[141] *Id.* (vis-à-vis the use of the other principles of nondiscrimination and of mutual recognition in the mechanics of the application of Article 34 TFEU).

[142] Wenneras & Moen, *supra* note 136, at 399–400.

[143] *Id.* at 387. *See also* Barnard, *supra* note 27; Thomas Horsley, *Anyone for* Keck*?* 46 COMMON MKT. L. REV. 2001 (2009); Spaventa, *supra* note 136, at 921; Peter Pecho, *Good-Bye* Keck*?: A Comment on the Remarkable Judgment in* Commission v. Italy, C-110/05, 36 LEGAL ISSUES ECON. INTEGRATION 257 (2009); Snell, *supra* note 134, 455–60; Stephen Weatherill, *Free Movement of Goods*, 58 INT'L & COMP. L.Q. 985, 987 (2009).

[144] *Leclerc-Siplec*, 1995 E.C.R. I-179, para. 41 (emphasis added).

> In spite of occasional inconsistencies in the reasoning of certain judgments, that seems to be the underlying principle which has inspired the Court's approach from *Dassonville* through *Cassis de Dijon* to *Keck*. *Virtually all* of the cases are, in their result, *consistent with the principle*, even though some of them *appear to be based on different reasoning*.[145]

Further indirect support for the proposition made by Wenneras and Moen may be had from *Commission v. Italy*, in which it was held that Article 34 TFEU not only respects the principles of nondiscrimination and mutual recognition, but also renders unlawful "[a]ny other measure *which hinders access of products* originating in other Member States to the market of a Member State."[146]

II. Renaissance?

Commission v. Italy and *Mickelsson* offer strong evidence in support of the claim that there is a renaissance in the use of the market access principle. Whether, however, it is a renaissance at the expense of the other available means[147] of proving the compatibility of national measures with Treaty free-movement provisions is another matter. It may yet be too early to suggest that, in such an equation of application, the two principles of nondiscrimination and mutual recognition could suffer the indignity of relegation to the role of bit-part players. Both principles have an integral part to play in locating the legality of national measures within the jurisprudence of goods.[148] Arguably, according automatic prominence to the principle of market access in such circumstances may serve to obfuscate, in particular instances, the rationale for the application of Article 34 TFEU. The cause of the failure in particular instances of the imported goods to gain access to the host market may in reality arise from the presence of discrimination in the national measure against the imported product. Any obfuscation of the causal reality for a ruling of illegality would not serve well the cause of transparency in such matters; such a result may also not be intended by the Court of Justice. The continued use of the principles of nondiscrimination and mutual recognition in the equation that is the application of Article 34 TFEU not only gains credence by circumstances of the appropriate acknowledgment in

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[145] *Id.* (opinion of Advocate General Jacobs) (emphasis added).

[146] *Commission v. Italy*, 2009 E.C.R. I-519, para. 37 (emphasis added). *See also* Wenneras & Moen, *supra* note 136, at 398 (2010) (alluding to this aspect).

[147] For example, nondiscrimination and mutual recognition.

[148] TFEU, *supra* note 1, at art. 34.

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Commission v. Italy,[149] but also, as illustrated previously in this article, by the infusion of those principles within the jurisprudence of goods.[150]

There is too abundant evidence that the respect for those principles will continue. It will be recalled that Article 34 TFEU[151] provides that "[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."[152] This provision is the blank canvas upon which the Court has been able to write its script in the promotion of the free movement of goods. It is a promotion which has employed and developed an eclectic descriptive terminology with respect to the national measure. Measures have been held unlawful[153] where they restrict,[154] hinder,[155] or act as a barrier[156] or obstacle[157] to the exercise of the free movement right. The adoptive nomenclature is

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[149] *Commission v. Italy*, 2009 E.C.R. I-519.

[150] TFEU, *supra* note 1, at art. 34.

[151] *See also* EC art. 28 (replaced by TFEU art. 34).

[152] TFEU, *supra* note 1, at art. 34.

[153] Although facially some measures would be found unlawful because of their effects on trade, the Court may not hold them unlawful if those measures can be *justified*. In the context of *goods*, justification of national measures is accomplished either through the application of Article 36 TFEU or through the concept of the mandatory requirement. Article 36 TFEU provides: "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States." Mandatory requirements introduced and identified in *Rewe-Zentral* as "relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer." *Rewe-Zentral*, 1979 E.C.R. 649.

[154] In *Joh. Eggers Sohn & Co. v. Freie Hansestadt Bremen*, for example, the national law was held a *restriction* which "merely consolidates the partitioning of the markets." Case 13/78, Joh. Eggers Sohn & Co. v. Freie Hansestadt Bremen, 1978 E.C.R. 1935. The same rationale was applied in *Cullet*, 1985 E.C.R. 305; Case 4-75, Rewe-Zentralfinanz eGmbH v. Landwirtschaftskammer, 1975 E.C.R. 843; Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich, 2003 E.C.R. I-5659.

[155] Note the *Dassonville* formula with respect to defining the "measures having an equivalent effect" for Article 34 TFEU purposes. *Dassonville*, 1974 E.C.R. 837. *See also* Case C-17/93, Criminal proceedings against J.J.J. Van der Veldt, 1994 E.C.R. I-3537 [hereinafter *Van der Veldt*]; Joined Cases C-158/04 & C-159/04, Alfa Vita Vassilopoulos AE v. Elliniko Dimosio, 2006 E.C.R. I-8135 [hereinafter *Alfa Vita*]; *Comm'n v. Germany,* 2008 E.C.R. I-6935; Case C-192/01, Comm'n v. Denmark, 2003 E.C.R. I-9693 [hereinafter *Comm'n v. Denmark*].

[156] *See* Case C-387/99, Comm'n v. Germany, 2004 E.C.R. I-3751 [hereinafter *German Vitamins Case*]; Case C-150/00, Comm'n v. Austria, 2004 E.C.R. I-3887 [hereinafter *Austrian Vitamins Case*]; Case C-389/96, Aher-Waggon GmbH v. Bundesrepublik Deutschland, 1998 E.C.R. I-4473; Case C-297/05, Comm'n v. Netherlands, 2007 E.C.R. I-7467; Alfa Vita, 2006 E.C.R. I-8135.

[157] *See Cullet*, 1985 E.C.R. 305; *Comm'n v. Germany,* 2008 E.C.R. I-6935; Case 153/78, Comm'n v. Germany, 1979 E.C.R. 2555; Case 68-76, Comm'n v. France, 1977 E.C.R. 515; Criminal proceedings against Herbert Gilli and Paul

wide enough to embrace allusions to any, all, or a combination of the principles of discrimination, mutual recognition or market access in the context of the enquiry process involved in the application of Article 34 TFEU to national measures. It is, it seems, a nomenclature that is anything but prescriptive in context. It arguably permits the possibility of access not to just one, but rather to a range of principles available to measure the legality of the national measure in question. Stirring into the pot of enquiry a range of ingredient principles arguably strengthens the potency of the application of Article 34 TFEU. The adoption of such eclectic nomenclature descriptive of national measures allows for the promotion not only of the principle of market access[158] in such matters, but also of the maintenance of a continuing respect for the principle of nondiscrimination[159] and of mutual recognition[160] as integral parts of the equation. Such an inclusive equation arguably represents a more honest intent of Treaty aspirations with respect to the free movement of goods.[161] The judgments of *Commission v. Italy*[162] and *Mickelsson*[163] arguably appear to have arrested an unbridled march of the use of the concept of the "selling arrangement" which has in some ways trampled through the jurisprudence relating to goods. While the emphasis in these two judgments on the principle of market access

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Andres, 1980 E.C.R. 2071; Criminal proceedings against Fabriek voor Hoogwaardige Voedingsprodukten Kelderman BV, 1981 E.C.R. 527.

[158] Note the reference to the position occupied by these two principles in the jurisprudence relating to the free movement of goods in *Commission v. Italy*. *See Commission v. Italy*, 2009 E.C.R. I-519.

[159] *See* Case 20/64, SARL Albatros v. Société des pétroles et des combustibles liquides (Sopéco), 1965 E.C.R. 29. In the first instance, subdivisions of direct and indirect discrimination were identified and developed by the Court of Justice. The terminology used was distinctly and indistinctly applicable. The classification, at least in the initial jurisprudence, had important consequences for the process of the *justification* of such measures. *See* Commission Directive 70/50 1969 O.J. (L 13) 29 (EC). Note the recent statement by the Court that "in order to provide the referring court with a useful answer, the questions referred must be examined from the perspective of Article 12 EC, [now Article 18 TFEU] which enshrines the general principle of nondiscrimination on grounds of nationality." Case C-382/08, Neukirchinger v. Bezirkshauptmannschaft Grieskirchen, judgment of 25 January 2011 [hereinafter *Neukirchinger*]. For the recourse to that principle, see Case C-531/07, Fachverband der Buch-und Medienwirtschaft v. LIBRO Handelsgesellschaft mbH, 2009 E.C.R. I-3717 [hereinafter *Fachverband*].

[160] *See, e.g.*, *German Vitamins Case*, 2004 E.C.R. I-3751; *Comm'n v. Denmark*, 2003 E.C.R. I-9693; *Van der Veldt*, 1994 E.C.R. I-3537; Case C- 457/05, Schutzverband der Spirituosen-Industrie eV v. Diageo Deutschland GmbH, 2007 E.C.R. I-8075; Case C-358/95, Morellato v. Unità sanitaria locale (USL) n. 11 di Pordenone, 1997 E.C.R. I-1431; Austrian Vitamins Case, *supra* note 156; Rewe-Zentral AG, *supra* note 5; Criminal proceedings against Fabriek voor Hoogwaardige Voedingsprodukten Kelderman BV, 1981 E.C.R. 527; Georg Schwarz v. Bürgermeister der Landeshauptstadt Salzburg, 2005 E.C.R. I-10139.

[161] Given the internal market, presumably the same arguments could be applied in relation to applications of the Treaty provisions relating to: goods, TFEU art. 34; workers, TFEU art. 45; services, TFEU art. 56; establishment, TFEU art. 49; and capital, TFEU art. 63. 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." TFEU, *supra* note 1, at art. 26(2).

[162] *See Comm'n v. Italy*, 2009 E.C.R. I-519.

[163] *See Mickelsson*, 2009 E.C.R. I-4273.

may yet signify resurgence in the use of that principle, there is some argument for suggesting that recourse to that principle cannot be to the detriment of a respect for the principles of nondiscrimination or mutual recognition. Further, if there is to be a triumvirate of principles—market access, nondiscrimination and mutual recognition—available to the Court in such matters, the principle of market access should not be positioned at its pinnacle. Rather, in the process of scrutinizing the national measure for compatibility with Treaty free movement rights in relation to goods,[164] it should be positioned as but one of a number of principles from which the Court may choose for appropriate usage where a hindrance to the free movement of goods[165] is suspected at the national level.

Jurisprudentially, the availability of a variety of principles under which the Court can scrutinize national measures alleged to impede free movement of goods is to be welcomed. On a micro level, this variety presents an array of principles from which the attack on the national measure can be launched. On a macro basis, the availability of the three principles—market access, nondiscrimination, and mutual recognition—potentially will increase the potency and penetration of the Treaty's promise of free movement of goods.[166]

Rather than the Court nailing its colours solely to the mast of "market access," the adoption of a broader approach to the scrutiny of national measures would translate into the Court gaining/retaining a much greater flexibility in the process of scrutinizing national measures suspected of hindering the free movement of goods. In this context, the observation by Wenneras and Moen that *Commission v. Italy* and *Mickelsson* are generally viewed as signaling that "the notion of 'market access' may ultimately be the criterion defining the scope of [Article] 34 TFEU (thus also in effect replacing *Dassonville*)"[167] might indeed prove to be correct. Nevertheless, were this to transpire in the jurisprudence, it is arguable that the Court would be robbed of a certain amount of litheness in its ability to respond to suspicions that hindrances to imports have occurred at the national level.

III. Market Access: Affecting Keck

Within the context of the free movement of goods,[168] commentators have expressed the view that the judgments of *Commission v. Italy* and *Mickelsson* have "introduced a strict

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[164] TFEU, *supra* note 1, at art. 34.

[165] *Id.*

[166] *Id.*

[167] Wenneras, *supra* note 136, at 387.

[168] TFEU, *supra* note 1, at art. 34.

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market access test, the effect of which is to replace or at least severely restrict the *Keck* doctrine."[169] The specific ways in which these judgments will prove to affect the future use of the *Keck* doctrine must, at this stage, remain uncertain. It would seem, however, that *Commission v. Italy* and *Mickelsson* do not reverse *Keck*;[170] rather, a more informed view may suggest that *Keck* is a judgment that should be confined within the limits of arrangements for sale.[171] Barnard notes that "other types of measures will therefore not benefit from the *Keck* presumption of legality, are likely to be considered rules hindering market access and so will breach Article 34,[172] leaving Member States to justify their existence."[173] With respect to national rules held to be hindering "market access," a recent example is provided by *Ker-Optika bt v. ÀNTSZ Dél-dunántúli Regionális Intézete*.[174] In *Ker-Optika*,[175] the Hungarian law was held to be categorised as "an arrangement for sale."[176] In that instance, the measure was not considered to be a "selling arrangement"[177] because national legislation "does not affect in the same manner the selling of contact lenses by Hungarian traders and such selling as carried out by traders from other Member States."[178] What is of more particular importance to present considerations is that the Court in *Ker-Optika* then proceeded to judgment on the basis that the deprivation by the national law of a means by which the importer could sell the product in Hungary "*significantly impedes access* of those traders to the market of the Member State concerned."[179] With respect to the concept of market access vis-à-vis the continued recourse to the principle of nondiscrimination in the context of the free movement of goods, it is arguable that

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[169] Wenneras, *supra* note 136, at 387.

[170] *See Keck and Mithouard,* 1993 E.C.R. I-6097; *see also Fachverband*, 2009 E.C.R. I-3717.

[171] CATHERINE BARNARD, THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS 140 (3d ed. 2010).

[172] Such a view would strike an accord with the observation that the two judgments represent " a departure from orthodox jurisprudence and the beginning of a universal and strict market access era." Wenneras, *supra* note 136, at 387.

[173] "The Court appears to have adopted a new category of measure which is neither a product requirement nor a certain selling arrangement: measures which hinder 'access of products originating in other Member States to the market of a Member State.'" BARNARD, *supra* note 171, at 140.

[174] Case C-108/09, judgment of 2 December 2010.

[175] *Id.*

[176] *Id.*

[177] Note that, with respect to the "selling arrangement," the Court held that " [a]s regards the first condition, it is clear that the legislation applies to all relevant traders involved in selling contact lenses, which means that that condition is satisfied." *Id.*

[178] *Id.*

[179] Article 34 TFEU was applied on this basis. The onus was then on the state to *justify* the national measure. In this instance, it failed to do so on account of proportionality. *Id.*

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Commission v. Italy and *Mickelsson* "have consolidated and clarified what was implicit in *Keck,* namely that [Article] 34 TFEU prohibits measures that discriminatorily, in law or in fact, restrict market access for imported products or which prevent/hinder market access."[180] At the same time, however, both judgments "ostensibly introduced a new category of measures falling within the scope of [Article] 34 TFEU, non-discriminatory measures which 'hinder access to the market.'"[181]

For the present, however, the intriguing prospect remains that there has finally been an attempt to restrict the influence of the concept of the "selling arrangement" and that future scrutiny of national measures other than those which may be categorised as "arrangements for sale" has been returned to the firmer footing of scrutiny clearly within the confines of Article 34.[182] Neither is the prospect of respecting the principle of market access in such circumstances necessarily detrimental to the cause of the use of the other principles in the application of Article 34 TFEU. While "*the most obvious solution*"[183] may indeed be the recourse to the use of market access test in such circumstances, it is an equation which would not preclude the use of the other principles of nondiscrimination and mutual recognition.[184]

D. Market Access: A Wider Theatre?

I. Introduction

The recent jurisprudence with respect to the free movement of goods appears in part at least both to have been refocused on the issues surrounding the re-establishment of the market access principle as a (crucial) component in the assessment of the legality of the national law under scrutiny. It has been argued that the market access tests of *Commission v. Italy* and *Mickelsson*, both delivered in 2009, appear to have severely restricted the *Keck* doctrine and have together signaled that the principle of market access may ultimately be adopted as the criterion which defines the scope of Article 34 TFEU.[185] These particular contemplations aside, even at a primary level of argument, the reemergence of the market access test within the jurisprudence of goods raises issues

[180] Wenneras, *supra* note 136, at 398.

[181] *Id*. at 399.

[182] TFEU, *supra* note 1, at art. 34.

[183] *Leclerc-Siplec*, 1995 ECR I-179 (as stated by Advocate General Jacobs).

[184] Note particularly the respect shown for these principles in *Commission v. Italy*, 2009 E.C.R. I-519.

[185] *But see* Wenneras, *supra* note 136, at 387.

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which relate to the wider use of that test beyond the theatre of goods and to the use of that principle within the jurisprudence of persons,[186] services,[187] and capital.[188]

This next section considers the question of the realistic establishment of universal use relating to the principle of market access which would extend across all free-movement jurisprudence; a presentation of homogeneity with respect to the mechanics of the application of Treaty free-movement provisions to national measures.

This paper will now examine the jurisprudence relating to persons,[189] services,[190] and capital[191] and the use therein of the market access principle in the assessment of national measures in the context of the TEFU free-movement provisions. To place the use of the principle of market access in its proper context in relation to free movement jurisprudence in this wider theatre, this article will first assess the interpretation the Treaty demands with respect to the application of the free movement rights to national measures.

II. Restrictions

It is evident that the Treaty provisions which source free movement rights in relation to persons,[192] services,[193] and capital[194] bear reliance upon the prohibition of national measures which restrict free movement rights. For example, with respect to the right of the establishment of the migrant EU national in the host state, Article 49 TFEU provides: "Within the framework of the provisions set out below, *restrictions* on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited." [195] So too, with respect to the right of the migrant to supply services, Article 56 TFEU[196] provides: "Within the framework of the provisions set out below,

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[186] *See* TFEU, *supra* note 1, at arts. 45, 49.

[187] *See id.* at art. 56.

[188] *See id.* at art. 63.

[189] *See id.* at arts. 45, 49.

[190] *See id.* at art. 56.

[191] *See id.* at art. 63.

[192] *See id.* at arts. 45, 49.

[193] *See id.* at art. 56.

[194] *See id.* at art. 63.

[195] *See id.* at art. 49.

[196] *See id.* at art. 56.

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restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended."[197]

The prohibition of restrictions—the phraseology of the TFEU with respect to provisions establishing the right of free movement—is, in this context, reflected in jurisprudence which has upheld free movement rights. In the cause of locating the position of the principle of market access as a lubricant for the application of Treaty free movement rights, it should first be assessed how the Court has sought to extend the application of these provisions for national measures.

It is arguable that in the application of free movement principles to national measures, the Court of Justice has taken its cue from Treaty terminology. There is logic to this argument. The jurisprudence reflects the aims and terminology of the Treaty by clearly attacking the *restriction* to the free movement right presented by the national measure.[198]

In its assessment of the mechanics of application of Treaty free movement rights, this study now directs its attention to an analysis of the formulation of the free movement provisions[199] of the Treaty on the Functioning of the European Union.[200]

1. Treaty Provision: The Worker

The construction of the Treaty free movement provisions with respect to persons,[201] services,[202] and capital[203] lends focus on the prohibition of national measures which restrict the free movement right. Such focus has been reinforced in the jurisprudence of the Court of Justice. With respect to the freedoms relating to establishment and services, for example, it was held in *Commission v. France*[204] that "it must be recalled that Article 43

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[197] *Id.* (emphasis added). With respect to the free movement of capital, "all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited." *Id.* at art. 63 (emphasis added).

[198] The Court of Justice has further equated the nomenclature of *restriction* with that of *obstacle.*

[199] *See* TFEU, *supra* note 1, at arts. 45, 49, 56, 63.

[200] *See* TFEU, *supra* note 1.

[201] *See id.* at arts. 45, 49.

[202] *See id.* at art. 56.

[203] *See id.* at art. 63.

[204] Case C-389/05, Comm'n v. France, 2008 E.C.R. I-5337 [hereinafter *Bovine Case*].

EC[205] requires the elimination of *restrictions* on the freedom of establishment,"[206] and that "Article 49 EC[207] requires . . . the abolition of *any restriction*"[208] on the right to provide services.

The terminology of *restriction* to the free movement right, presented within the Treaty free movement provisions relating to services, establishment, and capital, is not reflected in the terminology of Article 45 TFEU[209] with respect to the worker. That article provides merely that "[f]reedom of movement for workers shall be secured within the Union."[210] In this context, reference to (national) restrictions on such right is noticeably absent. This lacuna has nonetheless been filled by the Court of Justice, which has determined that the Treaty free-movement provision with respect to the *worker* is to operate in the same manner as the other Treaty free-movement provisions[211] relating to persons,[212] services,[213] and capital.[214]

The following analyzes the jurisprudence relating to free movement rights of establishment,[215] services,[216] workers,[217] and capital[218] focusing on an assessment of the restriction to the Treaty free movement right presented by the national measure.

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[205] *See* TFEU, *supra* note 1, at art. 49; *see also* Case C-433/04, Comm'n v. Belgium, 2006 E.C.R. I-10653; Case C-208/05, ITC Innovative Tech. Ctr. GmbH v. Bundesagentur für Arbeit, 2007 E.C.R. I-181; Case C-219/08, Comm'n v. Belgium, 2009 E.C.R. I-9213 [hereinafter *Belgian Posting Case*].

[206] *Bovine Case*, 2008 E.C.R. I-5337 (emphasis added). *See also* C-442/02, CaixaBank France v. Ministère de l'Économie, des Finances et de l'Industrie, 2004 E.C.R. I-8961 [hereinafter *CaixaBank*]; Case C-79/01, Payroll Data Servs. Srl, ADP Europe SA & ADP GSI SA, 2002 E.C.R. I-8923 [hereinafter *Payroll*]; Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd., 2003 E.C.R. I-10155 [hereinafter *Kamer*].

[207] *See* TFEU, *supra* note 1, at art. 56.

[208] *Bovine Case*, 2008 E.C.R. I-5337 (emphasis added).

[209] *See* TFEU, *supra* note 1, at art. 45.

[210] *Id.*

[211] *See Comm'n v. France*, 1986 E.C.R. 1475.

[212] *See* TFEU, *supra* note 1, at art. 49.

[213] *Id.* at art. 56.

[214] *Id.* at art. 63.

[215] *Id.* at art. 49.

[216] *Id.* at art. 56.

[217] *Id.* at art. 45.

[218] *Id.* at art. 63.

2. Restrictions

2.1 Worker

Free movement jurisprudence remains focused on the removal of measures *restrictive* of the free movement of the *worker.* In the early judgment of *Commission v. France* [219] for example, it was held that "in so far as the [national] rules have the effect of *restricting* . . . freedom of movement for workers, they are compatible with Treaty only if . . . justified."[220] In the later case of *Commission v. Belgium*, national measures obliging security undertakings to have their place of business in that state were held to "constitute *restrictions* on the free movement of *workers*."[221] In *Commission v. Italy*, Italian nationality measures were acknowledged to be "*restrictions* on the free movement of *workers*."[222] In *Criminal proceedings against Hans van Lent*, Belgian measures prohibiting migrant workers from driving motor vehicles unless they were registered in Belgium were held restrictive of the free movement right.[223] So too were Italian laws in *Commission v. Italy* requiring dentists to reside within the district of registration,[224] and minimum capital[225] requirements imposed by Holland.[226] Such measures were held to constitute *restrictions*

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[219] In this instance, national rules related to the occupation of doctor or dental practitioner and also concerned the free movement rights relating to establishment and services, s*ee id.* at arts. 49, 56.

[220] *Comm'n v. France*, 1986 E.C.R. 1475 (emphasis added). The Court continued: "That is not the case where the *restrictions* are liable to create discrimination against practitioners established in other Member States or raise obstacles to access" (emphasis added). *Id.* With respect to the *worker*, *Regina v. Stanislaus Pieck* held that "the only restriction which Article 48 of the Treaty [EC, now Article 45 TFEU] lays down concerning freedom of movement in the territory of Member States is that of limitations justified on grounds of public policy, public security or public health." Case 157/79, Regina v. Stanislaus Pieck, 1980 E.C.R. 2171, para. 9 [hereinafter *Stanislaus Pieck*].

[221] Case C-355/98, Comm'n v. Belgium, 2000 E.C.R. I-1221, para. 24 (emphasis added). Also of "freedom of establishment and the freedom to provide services." *Id.*

[222] Case C-283/99, Comm'n v. Italy, 2001 E.C.R. I-4363, para. 9 [hereinafter *Italian Private Security Case*] (emphasis added). Also of the "freedom of establishment and freedom to provide services." *Id.*

[223] Case C-232/01, Criminal proceedings against Hans van Lent, 2003 E.C.R. I-11525, para. 22.

[224] Case C-162/99, Comm'n v. Italy, 2001 E.C.R. I-541, para. 20.

[225] *Kamer*, 2003 E.C.R. I-10155, para. 27 ("Pursuant to Article 4(1) of the WFBV, the subscribed capital of a formally foreign company must be at least equal to the minimum amount required of Netherlands limited companies by Article 2:178 of the Burgerlijke Wetboek (Netherlands Civil Code, 'the BW'), which was EUR 18 000 on 1 September 2000 (Staatsblad 2000, N 322). The paid-up share capital must be at least equal to the minimum capital (Article 4(2) of the WFBV, referring back to Article 2:178 of the BW).").

[226] *Id.* at para. 104.

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on both the freedoms of establishment and the *worker*,[227] as were UK measures that restricted employment on board fishing vessels by requiring that 75% of the crew reside in the UK as a precondition for the authorisation of the migrant vessel for fishing against UK quotas.[228]

2.2 Establishment and *Services*

With respect to the Treaty freedoms of establishment and services,[229] the early judgment of *Lynne Watson and Alessandro Belmann*[230] held that Italian rules concerning the control of foreign nationals in principle "do not involve *restrictions* on freedom of movement for persons."[231] Other jurisprudence has adopted the same approach; the focus is placed on the removal of the *restriction*[232] to the free movement right. In *Commission v. Italy*, for example, Italian nationality provisions with respect to private security activities were held to "constitute . . . an unjustified *restriction* on freedom of establishment and freedom to provide services,"[233] as were Austrian measures in relation to doctors, which prohibited

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[227] *See Kamer*, 2003 E.C.R. I-10155, para. 104. *See also* Joined Cases C-151/04 & C-152/04, Criminal proceedings against Nadin, Nadin-Lux SA & Durré, 2005 E.C.R. I-11203, paras. 5, 6 [hereinafter *Nadin*].

[228] Case C-3/87, The Queen v. Ministry of Agric., Fisheries & Food, ex parte Agegate Ltd., 1989 E.C.R. 4459, para. 41.

[229] Case 118/75, Watson & Belmann, 1976 E.C.R. 1185, para. 11 [hereinafter *Watson*]. "Articles 52 [now Article 49 TFEU] and 59 [now Article 56 TFEU] provide that restrictions on the freedom of establishment and the freedom to provide services within the Community shall be abolished." *Id. See also* Case C-243/01, Piergiorgio Gambelli & Others, 2003 E.C.R. I-13031, paras. 46, 54 [hereinafter *Piergiorgio*]. With respect to *services*, see Case 62/79, SA Compagnie générale pour la diffusion de la télévision, Coditel, & Others v. Ciné Vog Films & Others, 1980 E.C.R. 881, para. 15; Case C-272/94, Criminal proceedings against Michel Guiot and Climatec SA, 1996 E.C.R. I-1905, para. 10 [hereinafter *Guiot*].

[230] *Watson*, 1976 E.C.R. 1185.

[231] *Id.* (emphasis added). *See also* Case 36/74, B.N.O. Walrave & L.J.N. Koch v. Ass'n Union Cycliste Int'l, Koninklijke Nederlandsche Wielren Unie & Federación Española Ciclismo, 1974 E.C.R. 1405 [hereinafter *Walrave*] (confirming that Article 56 TFEU "makes no distinction between the source of the *restrictions* to be abolished") (emphasis added). It has been held that "the principle of freedom to provide services established in Article 59 of the Treaty, [now Art 56 TFEU] which is one of its fundamental principles, includes the freedom for the recipients of services to go to another Member State in order to receive a service there, without being obstructed by *restrictions*." Case C-348/96, Criminal proceedings against Donatella Calfa, 1999 E.C.R. I-11 [hereinafter *Calfa*] (emphasis added). *See also* Case 186/87, Cowan v. Trésor Public, 1989 E.C.R. 195.

[232] It also ascribed the nomenclature of *obstacle* to free movement. For example, in *Piergiorgio Gambelli and Others* it was held that "[w]here a company established in a Member State . . . pursues the activity of collecting bets through the intermediary of an organisation of agencies established in another Member State . . . any *restrictions* on the activities of those agencies constitute *obstacles* to the freedom of establishment." *Piergiorgio*, 2003 E.C.R. I-13031 (emphasis added).

[233] *Italian Private Security Case*, 2001 E.C.R. I-4363, para. 22 (emphasis added). The Dutch *restriction* on multi-disciplinary partnerships between members of the Bar and accountants was justifiable; it was thus not contrary

the exercise in Austria of the profession of Heilpraktiker.[234] Other jurisprudence has held unlawful French measures which restricted the right of establishment and services in controlling the number of operators permitted to open and manage insemination centres[235] and French requirements that cross-border distributors of bovine semen use artificial insemination centres for storage.[236]

Further examples of national laws held to be restrictions on the right to supply services include: national legislation which prohibited operators established in other Member States from offering games of chance via the internet within Portugal;[237] French requirements to pay employer contributions in relation to bad-weather stamps in two Member States;[238] requirements on financial institutions to conclude agreements between initial guarantor and credit institutions;[239] Swedish measures which affected the cross-border supply of advertising space with respect to alcoholic beverages;[240] and an obligation imposed on a provider of services residing in the Netherlands to request the competent

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the free movement provisions of services and establishment. Case C-309/99, J.C.J. Wouters, J.W. Savelbergh & Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten, 2002 E.C.R. I-1577, para. 122.

[234] This is also a profession recognised in Germany. *See* Case C-294/00, Deutsche Paracelsus Schulen für Naturheilverfahren GmbH v. Kurt Gräbner, 2002 E.C.R. I-6515, para. 40 [hereinafter *Deutsche Paracelsus*].

[235] *Bovine Case*, 2008 E.C.R. I-5337. The French legislation was held to be "a restriction on the freedom of establishment and the freedom to provide services." *Id. See also CaixaBank*, 2004 E.C.R. I-8961; *Payroll*, 2002 E.C.R. I-8923 (respecting the rights of establishment). In the context of *services*, see *Watson*, 1976 E.C.R. 1185. In the context of the *worker*, it has, for example, been held that "[t]he only restriction which Article 48 [now 45 TFEU] of the Treaty lays down concerning freedom of movement in the territory of Member States is that of limitations justified on grounds of public policy, public security or public health." *Stanislaus Pieck*, 1980 E.C.R. 2171, para. 9.

[236] *Bovine Case*, 2008 E.C.R. I-5337, para. 55–56.

[237] *See* Case C-42/07, Liga Portuguesa de Futebol Profissional & Bwin Int'l Ltd. v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa, 2009 E.C.R. I-7633, paras. 52–53 [hereinafter *Liga*]. The Portuguese rule was justified. *Id.* at para. 72.

[238] *Guiot*, 1996 E.C.R. I-1905, para. 13.

[239] *See* Case C-410/96, Criminal proceedings against André Ambry, 1998 E.C.R. I-7875 ("[R]ules such as those in issue in the main proceedings, which require financial institutions situated in another Member State to conclude an additional agreement, must be held to constitute a *restriction* on the freedom to provide services laid down by Article 59 [now Article 56 TFEU] of the Treaty." (emphasis added)). Rules "requiring professional or semi-professional athletes or persons aspiring to take part in a professional or semi-professional activity to have been authorised or selected by their federation in order to be able to participate in a high-level international sports competition" were held not of themselves a restriction on the freedom to provide services. Joined cases C-51/96 & C-191/97, *Deliège v. Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo & François Pacquée*, 2000 E.C.R. I-2549, para. 69.

[240] *See* Case C-405/98, Konsumentombudsmannen v. Gourmet Int'l Products AB, 2001 E.C.R. I-1795, para. 39 [hereinafter *Gourmet Int'l.*].

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German tax authority to issue a certificate of exemption as a precondition of escaping additional tax on his income in Germany.[241] Finally, French rules in *Bacardi France SAS* were held to "entail a *restriction* on freedom to provide advertising *services* insofar as the owners of the advertising hoardings must refuse, as a preventive measure, any advertising for alcoholic beverages if the sporting event is likely to be retransmitted in France."[242]

2.3 Capital

Examination of the jurisprudence applying the right of the free movement right in relation to *capital* has also focused on the prohibition of national restrictions to that right. In *Klaus Konle v. Republik Österreich*, for example, an Austrian system of prior authorisation for the acquisition of land was held restrictive of that right,[243] and in *Westdeutsche Landesbank Girozentrale v. Friedrich Stefan and Republik Österreich*, a measure of the same Member State was held restrictive of the freedom of movement of capital where it required a mortgage securing a debt payable in the currency of another Member State to be registered in the national currency.[244] In the recent judgment of *Commission v. Portugal*, national measures which restricted the free movement of capital relating to the holding of privileged ("golden") shares by Portugal[245] were held to be restrictions on the free movement of capital.[246] Likewise, in *Commission v. Belgium*, the exclusion of certain types of purchasers of immovable property situated in the Flemish Region from the benefit of the portability system with respect to taxation on the purchase of immovable property intended as a new principal residence were considered restrictive of the right to the free movement of capital, although ultimately the Court held that the restrictions were justified.[247]

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[241] *See* Case C-290/04, FKP Scorpio Konzertproduktionen GmbH v. Finanzamt Hamburg-Eimsbüttel, 2006 E.C.R. I-9461, para. 56. It was an obstacle that was justified "in order to ensure the proper functioning of the procedure for taxation at source." *Id.* at para. 59.

[242] Case C-429/02, Bacardi France SAS v. Télévision française 1 SA, Groupe Jean-Claude Darmon SA & Girosport SARL, 2004 E.C.R. I-6613 (emphasis added). The French rules were regarded as proportionate. *Id.*

[243] *See* Case C-302/97, Klaus Konle v. Republik Österreich, 1999 E.C.R. I-3099.

[244] *See* Case C-464/98, Westdeutsche Landesbank Girozentrale v. Friedrich Stefan and Republik Österreich, 2001 E.C.R. I-173, para. 19.

[245] *Comm'n v. Portugal*, judgment of 10 November 2011, para. 81.

[246] *Id.*

[247] The court's decision was on the basis that such was discriminatory. Case C-250/08, Comm'n v. Belgium, judgment of 1 December 2011, paras. 62, 82.

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The foregoing analysis has related to examples within persons,[248] services,[249] and capital,[250] and has focused on examples where there is a reflection in the judgment of Treaty exhortations to prohibit national measures which *restrict* the rights of free movement. In other jurisprudence applying those same rights, the unlawful measures have been held as *obstacles* to the exercise of such rights. The following section considers this jurisprudence based on the *obstacle* terminology rather than the *restriction*-based approaches surveyed above.

3. Obstacles to Free Movement

The free movement provisions of the Treaty on the Functioning of the European Union[251] prohibit restrictions to such rights. However the Court has not relied solely on the vocabulary of *restrictions* when deciding that national measures are unlawful; the Court has also used the nomenclature of *obstacle* to reach such decisions. The two adjectives—*restriction* and *obstacle*—are used interchangeably by the Court of Justice in the description of the national measure.[252] For example, Spanish nationality conditions in *Commission v. Spain* held to be "restrictions on freedom of establishment, freedom to provide services and freedom of movement for workers"[253] were identified by the Court as *obstacles*[254] to such rights. Numerous other examples exist of such transferred nomenclature.

In the early judgment of *Lynne Watson and Alessandro Belmann*,[255] it was established that the Treaty free-movement provisions involved the removal of *obstacles* to those freedoms.[256] In *Walrave and Koch*, for example, that "[t]he abolition . . . of *obstacles* to

[248] *See* TFEU, *supra* note 1, at arts. 45, 49.

[249] *Id*. at art. 56.

[250] *Id*. at art. 63.

[251] *See* TFEU, *supra* note 1.

[252] For example, in the context of justification, "according to the case-law of the Court it is a further condition that, among other things, the *restriction* which that *obstacle* places on the freedom of movement of workers does not go beyond what is necessary to achieve the objective pursued." Case C-285/01, Burbaud v. Ministère de l'Emploi et de la Solidarité, 2003 E.C.R. I-8219 [hereinafter *Burbaud*] (emphasis added).

[253] Case C-114/97, Comm'n v. Spain, 1998 E.C.R. I-6717.

[254] *See id.*

[255] *Watson*, 1976 E.C.R. 1185. *See also* Case C-57/95, French Republic v. Comm'n, 1997 E.C.R. I-1627.

[256] The judgment of *Criminal proceedings against Michel Choquet* was phrased in similar terminology. Case 16/78, Criminal proceedings against Michel Choquet, 1978 E.C.R. 2293. In the context of Treaty rights with respect to the *worker*, services and establishment, German measures could be "*obstacles* to the recognition of a driving licence issued by another Member State [where they were] are not in fact in due proportion to the requirements

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freedom of movement for persons and to freedom to provide services, . . . would be compromised if the abolition of barriers of national origin could be neutralized by *obstacles* resulting from the exercise of their legal autonomy by associations."[257] The Court in *Walrave* also made reference to the nomenclature of *obstacle* as according with the "fundamental objectives of the Community contained in Article 3(c) of the Treaty," that "the activities of the Community shall include, (c) an internal market characterized by the abolition, as between Member States, of *obstacles* to the free movement of goods, persons, services and capital."[258]

The use of the nomenclature of *obstacle* with respect to the worker[259] is exemplified by *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*.[260] It was held in *Singh* that the right of free movement "cannot be fully effective if such a person may be deterred from exercising them by *obstacles* raised in his or her country of origin."[261] In *Commission v. Denmark*, it was held that "[l]egislation which relates to the conditions in which an economic activity is pursued may constitute an *obstacle* to freedom of movement for *workers*."[262] In other jurisprudence, the issue of a provisional residence document by Belgium was held to "constitute a genuine *obstacle*"[263] to the exercise of the same freedom as was the disproportionate treatment by Germany of

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for the safety of highway traffic." *Id*. at para. 8 (emphasis added). In the context of the deportation of a *worker*, a Member State was "not justified in imposing a penalty so disproportionate to the gravity of the infringement that it becomes an *obstacle* to the free movement of persons." *Stanislaus Pieck*, 1980 E.C.R. 2171 (emphasis added). *See also Bovine Case*, 2008 E.C.R. I-5337; *CaixaBank*, 2004 E.C.R. I-8961; *Payroll*, 2002 E.C.R. I-8923.

[257] *Walrave*, 1974 E.C.R. 1405 (emphasis added). Note also a recent and general statement to this effect in Case C-438/05, Int'l Transp. Workers Fed'n & Finnish Seamen's Union v. Viking Line ABP & OÜ Viking Line Eesti, 2007 E.C.R. I-10779. *See also*, with respect to the *worker*, Case 53/81, D.M. Levin v. Staatssecretaris van Justitie, 1982 E.C.R. 1035.

[258] *Walrave*, 1974 E.C.R. 1405. The reference to the same was made in *Watson*, 1976 E.C.R. 1185.

[259] *See* TFEU, *supra* note 1, at art. 45.

[260] Case C-370/90, The Queen v. Immigration Appeal Tribunal & Surinder Singh, ex parte Sec. of State for Home Dep't, 1992 E.C.R. I-4265.

[261] *Id*. at para. 23 (concerning restrictive national laws relating to the entry and residence of the spouse of the worker. Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom. *See* Case C-464/02, Comm'n v. Denmark, 2005 E.C.R. I-7929 [hereinafter *Danish Motor Vehicles Case*]; Case C-415/93, Union royale belge des sociétés de football association ASBL v. Bosman, Royal club liégeois SA v. Bosman; and Union des associations européennes de football (UEFA) v. Bosman, 1995 E.C.R. I-4921, para. 96 [hereinafter *Bosman Case*].

[262] *Danish Motor Vehicles Case*, 2005 E.C.R. I-7929 ("Legislation which relates to the conditions in which an economic activity is pursued may constitute an *obstacle* to freedom of movement for *workers*." (emphasis added)). The judgment related to Danish legislation concerning the taxation of motor vehicles. *See Danish Motor Vehicles Case*, 2005 E.C.R. I-7929, paras. 35, 37.

[263] Case C-344/95, Comm'n v. Belgium, 1997 E.C.R. I-1035, para. 6 (emphasis added).

migrant nationals in relation to the imposition of fines for failure to carry identity cards.[264] In *Clean Car Autoservice GesmbH v. Landeshauptmann von Wien*, Austrian legislation[265] requiring legal persons to appoint as manager a person residing in the country "would constitute restrictions,"[266] as did German legislation which required legal trainees undergoing practical training in another Member State to bear the cost of travel relating to the stretches of the journey outside their home country themselves.[267] In *Hanns-Martin Bachmann v. Belgium*,[268] a national law obliging termination of a contract concluded with an insurer in another Member State in order to be eligible for a tax reduction was a *restriction* of the freedom of movement for the *worker*, who in this case was a German national employed in Belgium.[269]

Other examples of national measures held *obstacles* to free movement were: Dutch rules relating to the avoidance of double taxation which excluded the migrant *worker* from tax concessions;[270] Italian rules preventing operators in other Member States from taking bets on sporting events;[271] and the obligation imposed by Italy on architects to submit certificates of nationality and qualifications.[272] In *Herbert Schwarz and Marga Gootjes-Schwarz v. Finanzamt Bergisch Gladbach,* German legislation which had the effect of deterring taxpayers resident in Germany from sending their children to schools established

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[264] *See* Case C-24/97, Comm'n v. Germany, 1998 E.C.R. I-2133 [hereinafter *German Residency Case*]; *see also* Case C-265/88, Criminal proceedings against Lothar Messner, 1989 E.C.R. 4209. That the Treaty provision with respect to the *worker* is concerned with the prohibitions of restrictions on such freedom is stated by implication in *Württembergische Milchverwertung-Südmilch AG v. Salvatore Ugliola*, in which it was held that Article 48 EC (now Article 45 TFEU) permits "no reservations other than the *restriction* set out in [Article 48] paragraph (3) concerning the public policy, public security and public health." Case 15-69, Württembergische Milchverwertung-Südmilch AG v. Salvatore Ugliola, 1969 E.C.R. 363 (emphasis added).

[265] Case C-350/96, Clean Car Autoservice GesmbH v. Landeshauptmann von Wien, 1998 E.C.R. I-2521.

[266] *Id.* Restrictions were discriminatory. *Id.* at para. 21.

[267] *See* Case C-109/04, Kranemann v. Land Nordrhein-Westfalen, 2005 E.C.R. I-2421, para. 29. (holding that the German requirements were an obstacle to the free movement of workers). *Id*.

[268] Case C-204/90, Bachmann v. Belgium, 1992 E.C.R. I-249.

[269] See *id.* In addition, it was also an obstacle to the free movement of services. *Id.* at paras. 13, 31.

[270] *See* Case C-385/00, F.W.L. de Groot v. Staatssecretaris van Financien, 2002 E.C.R. I-11819, para. 95.

[271] *See* Case C-67/98, Questore di Verona v. Diego Zenatti, 1999 E.C.R. I-7289. Such were restrictions held to be "*obstacle*[*s*] to the freedom to provide services." *Id.* at para. 27 (emphasis added).

[272] *See* Case C-298/99, Comm'n v. Italy, 2002 E.C.R. I-3129, para. 37 [hereinafter *Italian Architect Case*]. This obligation "gives rise to additional obstacles for all architects applying for recognition of their qualifications." *Id.* Note in addition that the Italian rule was also described by the Court as "an impediment to the freedom of establishment and to the freedom to provide services enshrined in Article 52 of the EC Treaty (now, after amendment, Article 43 EC) and Article 59 of the Treaty." *Id.* The judgment was concerned with *restrictions* on the freedoms of establishment and services. *Id.* at paras. 3, 5.

in another Member State was held to "constitute . . . an *obstacle* to the freedom to provide services."[273]

The nomenclature of *obstacles* operates in the context of the jurisprudence of *services*[274] and *establishment* as well.[275] In *Commission v. Germany*, German requirements of establishment on national territory for construction undertakings contracting out workers from other countries were similarly identified as *obstacles* to Treaty free movement rights[276] as were Polish taxation provisions which applied to cross border economic activities.

With respect to obstacles at the national level which have restricted the free movement of capital,[277] it was held in *Peter Svensson and Lena Gustavsson v. Ministre du Logement et de l'Urbanisme* that

> Provisions implying that a bank must be established in a Member State in order for recipients of loans residing in its territory to obtain an interest rate subsidy from the State out of public funds are liable to dissuade those concerned from approaching banks established in another Member State and therefore constitute an obstacle to movements of capital such as bank loans.[278]

Similarly, *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften* held that a German law relating to tax exemptions on rental income tax might constitute "an *obstacle* to the free movement of capital and payments"[279] for the EU company operating in the host state.

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[273] Case C-76/05, Schwarz v. Finanzamt Bergisch Gladbach, 2007 E.C.R. I-6849.

[274] *See* TFEU, *supra* note 1, at art. 56.

[275] *See id.* at art. 49.

[276] *See* Case C-493/99, Comm'n v. Germany, 2001 E.C.R. I-8163, para. 18 ("The requirement of a permanent establishment is the very negation of the fundamental freedom to provide services in that it results in depriving Article 59 [now Article 56 TFEU] of the Treaty of all effectiveness, a provision whose very purpose is to abolish restrictions on the freedom to provide services of persons who are not established in the State in which their services are to be provided." (emphasis added)).

[277] *See* TFEU, *supra* note 1, at art. 63.

[278] Case C-484/93, Svensson v. Ministre du Logement et de l'Urbanisme, 1995 E.C.R. I-3955, para. 10.

[279] Case C-386/04, Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften, 2006 E.C.R. I-8203, para. 27.

The terminology of *restriction* or *obstacle* in the context of identifying national measures hindering free movement rights appears to be interchangeable. In *Criminal proceedings against Piergiorgio Gambelli and Others*,[280] it was held that "any *restrictions* on the activities of [intermediate betting agencies] constitute *obstacles* to the freedom of establishment . . . [and] . . . constitute a *restriction* on the freedom of such a provider to provide services."[281] Furthermore, in *Criminal proceedings against Donatella Calfa*, the automatic penalty of expulsion for life applied against Community nationals by Greece was held to be "a *restriction* which clearly constitutes an *obstacle* to the freedom to provide services,"[282] and in *Staatssecretaris van Financiën v. B.G.M. Verkooije*, an income tax exemption granted according to the place of the company was held a *restriction* and *obstacle* to the free movement of capital.[283]

In this section, the discussion has focused on the scrutiny of the national measures as *restrictions* or *obstacles* to free movement. The use of the word "restriction" emanates from the terminology of Treaty free movement provisions.[284] The inclusion of the term "obstacle" in this analysis is the result of the jurisprudence of the Court of Justice.[285] There is evidence too of some interchangeability between the two terms within the jurisprudence.[286]

It is arguable that maintaining the focus within the composition of jurisprudence on the *restriction* or *obstacle* to the free movement right allows for a platform of principles to be employed as options for attack on the national measure suspected of hindering free movement rights. Principles such as market access, nondiscrimination, and mutual

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[280] *Piergiorgio*, 2003 E.C.R. I-13031. *See also Staatssecretaris van Financiën v. B.G.M. Verkooijen*, in which Dutch measures restricted migrant nationals residing in Holland from investing in foreign companies was held to be a restriction on capital movements. Case C-35/98, Staatssecretaris van Financiën v. B.G.M. Verkooijen, 2000 E.C.R. I-4071 [hereinafter *B.G.M. Verkooijen*].

[281] *Piergiorgio*, 2003 E.C.R. I-13031 (emphasis added). Note also *Commission v. Belgium* in which it was held that "[t]he conditions laid down for the registration of aircraft must . . . not discriminate on grounds of nationality or form an *obstacle* to the exercise of that freedom." Case C-203/98, Comm'n v. Belgium, 1999 E.C.R. I-4899 (emphasis added).

[282] *Calfa*, 1999 E.C.R. I-11 (emphasis added).

[283] *B.G.M. Verkooijen* 2000 E.C.R. I-4071.

[284] *See* TFEU, *supra* note 1, at arts. 49, 56.

[285] *See, e.g.*, Case C-114/97, Comm'n v. Spain, 1998 E.C.R. I-6717 (holding that Spanish nationality conditions were "restrictions on freedom of establishment, freedom to provide services and freedom of movement for workers" and were therefore *obstacles* to such rights).

[286] *See Italian Architect Case*, 2002 E.C.R. I-3129, paras. 2, 5, 37 (respecting the variable classification of national measures as *impediment*, *restriction*, and *obstacle* to the free movement right). *See also* Case C-155/09, Comm'n v. Hellenic Republic, judgment of 20 January 2011, para. 74 (referencing examples of *obstacles* and *restrictions*).

recognition could be all readily available to the Court and operated, in various combinations, as needed in the scrutiny of various national measures.

While the jurisprudence explored in this section focuses on *restrictions* and *obstacles* to free movement rights, the following section examines judgments which have shown an inherent or latent respect for the application of the principle of market access in addition to judgments in which that respect has been patent.

4. Other Nomenclature

The Court has more recently used various descriptive terminologies to embellish the category of national measures held to be "restrictive" of Treaty free movement rights. Measures have, for example, been held by the Court of Justice as "liable to hamper or to render less attractive,"[287] "liable to prohibit or otherwise impede,"[288] to "hinder or make less attractive"[289] and to "prohibit, impede, or render less attractive."[290]

Whatever the description accorded by the Court of Justice to the national measure, the judgments concern the prohibition of national measures where they have been *restrictive of* or an *obstacle to* the free movement rights of persons,[291] services,[292] and capital.[293] Nonetheless, the various adjectives used to describe national measures are a relatively recent innovation. The adjectival descriptions bear overtones of *access* to the market. In

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[287] Case C-19/92, Dieter Kraus v. Land Baden-Wurttemberg, 1993 E.C.R. I-1663, para. 32 [hereinafter *Dieter Kraus*]. *See* Case C-234/03, Contse SA and Others v. Instituto Nacional de Gestion Sanitaria, 2005 E.C.R. 1-9315, para. 25 [hereinafter *Contse SA*]; Case C-131/01, Comm'n v. Italy, 2003 E.C.R. 1-1659, para. 26 [hereinafter *Italian Patents Case*]; Case C-58/98, Josef Corsten, 2000 E.C.R. I-7919, para. 33 [hereinafter *Corsten*].

[288] *See* Case C-275/92, Her Majesty's Customs & Excise v. Schindler, 1994 E.C.R. I-1039, para. 43 [hereinafter *Her Majesty's Customs*]; Case C-451/03, Servizi Ausiliari Dottori Commercialisti Srl v. Calafiori, 2005 E.C.R. I-3875, para. 31 [hereinafter *Servizi*]; Case C-389/95, Siegfried Klattner v. Elliniko Dimosio, 1997 E.C.R. I-2719, para. 16, 19.

[289] *See* Case C-246/00, Comm'n v. Netherlands, 2003 E.C.R. I-7485, para. 66; Case C-465/05, Comm'n v. Italy, 2007 E.C.R. I-11091, para. 109 [hereinafter *Italian Security Guard Case*]; *Contse SA*, 2005 E.C.R. 1-9315, para. 25; Case C-330/03, Colegio de Ingenieros de Caminos, Canales y Puertos v. Administración del Estado, 2006 E.C.R. I-801, para. 25.

[290] *See* Case C-76/90, Manfred Säger v. Dennemeyer & Co. Ltd., 1991 E.C.R. I-4221, para. 12 [hereinafter *Säger*]; Joined Cases C-369/96 & C-376/96, Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL and Bernard Leloup, Serge Leloup and Sofrage SARL, 1999 E.C.R. I-8453, para. 33 [hereinafter *Arblade*]; Joined Cases C-430/99 & C-431/99, Inspecteur van de Belastingdienst Douane, district Rotterdam v. Sea-Land Service Inc., 2002 E.C.R. I-5235, para. 38 [hereinafter *Douane*].

[291] *See* TFEU, *supra* note 1, at arts. 45, 49.

[292] *See id*. at art. 56.

[293] *See id*. at art. 63.

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the present context of the assessment of the place of market access in free movement jurisprudence, it is a terminology which may prove to be important. The existence of such nomenclature in this context should be acknowledged.

4.1 Measures Liable to Hamper or to Render Less Attractive

The Court of Justice has held, for example, that "[i]t is settled case law that Article 43 EC [with respect to establishment] precludes any national measure which . . . is *liable to hamper or to render less attractive* the exercise by Community nationals of the freedom of establishment guaranteed by the Treaty."[294] The terminology has been used to describe national measures held as either *restrictions* or *obstacles* to the free movement of the worker[295] and the right to supply services.[296] In *Dieter Kraus v. Land Baden-Württemberg*, for example, obstacles imposed by Germany concerning the use of an academic title obtained in another Member State were held unlawful as "liable to hamper or to render less attractive the exercise by [all] Community nationals . . . of fundamental freedoms guaranteed by the Treaty."[297] So too, the same description was extended to the obstacle to the freedom of establishment in *Commission v. The Netherlands*;[298] the measure at issue in that case required those in charge of a company in that Member State to possess European Community nationality. In *Isabel Burbaud v. Ministère de l'Emploi et de la Solidarité*,[299] the requirement imposed by France on the worker to pass a recruitment competition was an obstacle[300] to the exercise of that right similarly so described by the Court.[301]

4.2 Liable to Prohibit or Otherwise Impede

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[294] Case C-299/02, Comm'n v. Netherlands, 2004 E.C.R. I-9761, para. 15 [hereinafter *Netherlands Shipping Case*] (emphasis added) ("[E]ven though it is applicable without discrimination on grounds of nationality."). *See also Dieter Kraus*, 1993 E.C.R. I-1663, para. 32; *Säger*, 1991 E.C.R. I-4221, para. 12.

[295] *See* TFEU, *supra* note 1, at art. 45; *Burbaud*, 2003 E.C.R. I-8219, para. 4.

[296] *See* TFEU, *supra* note 1, at art. 56; *Italian Patents Case*, 2003 E.C.R. 1-1659, para. 26. *See also Corsten*, 2000 E.C.R. I-7919, para. 33; Case C-43/93, Vander Elst v. Office des Migrations Internationales, 1994 E.C.R. I-3803, para. 14 [hereinafter *Vander Elst*]; *Guiot*, 1996 E.C.R. I-1905, para. 10; Case C-3/95, Reisebüro Broede v. Sandker, 1996 E.C.R. I-6511, para. 25 [hereinafter *Reisebüro*]; Case C-222/95, Parodi v. Banque H. Albert de Bary, 1997 E.C.R. I-3899, para. 18; *Arblade*, 1999 E.C.R. I-8453, para. 33.

[297] *Dieter Kraus*, 1993 E.C.R. I-1663. In issue here were the Treaty free movement rights relating to the *worker* and to establishment. *Id.*

[298] *Netherlands Shipping Case*, 2004 E.C.R. I-9761, para. 20.

[299] *Burbaud*, 2003 E.C.R. I-8219.

[300] *Id.* at para. 95.

[301] *Id.*

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It has been held, for example, that the Treaty right to supply services[302] "requires . . . the abolition of any restriction *liable to prohibit or otherwise impede* the activities of a provider of services established in another Member State where he lawfully provides similar services."[303] In *Commission v. Luxembourg*,[304] national legislation making the supply of services by patent agents subject to a requirement to elect domicile with an approved agent was held "liable to prohibit or otherwise impede" the activities of the service provider.[305]

Obstacles and restrictions at the national level held *liable to prohibit or otherwise impede* the right of free movement have included: German legislation which prevented a UK company offering specialist patent renewal services in Germany;[306] United Kingdom measures affecting the importation of lottery tickets in the context of Treaty rights to provide services;[307] French laws requiring migrant undertakings but providing services in France to obtain work permits when employing third country nationals;[308] Greek rules that prescribed organizing tourist programmes through a mandatory, legal employment relationship between tourists and travel agencies;[309] an obligation imposed by Germany requiring foreign employers to employ workers in the national territory to translate into German certain documents required to be kept at the place of work;[310] and the Greek

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[302] *See* TFEU, *supra* note 1, at art. 56.

[303] Case C-478/01, Comm'n v. Luxembourg, 2003 E.C.R. I-2351, para. 18 (emphasis added). *See,* e.g., Case C-266/96, Corsica Ferries France S. Gruppo Antichi Ormeggiatori del Porto di Genova Coop. arl and Others, 1998 E.C.R. I-03949 (holding that there was no restriction on the freedom to provide maritime transport services when considering the fees imposed by Italy for mooring services).

[304] *Commission v. Luxembourg*, 2003 E.C.R. I-2351, para. 18.

[305] *Id.*; s*ee also Corsten*, 2000 E.C.R. I-7919, para. 33; *Italian Patents Case*, 2003 E.C.R. 1-1659, para. 42.

[306] *See Säger*, 1991 E.C.R. I-4221, para. 14 (holding that there was a *restriction* on the right to supply services).

[307] *Her Majesty's Customs*, 1994 E.C.R. I-1039, paras. 43, 59 (holding the measures were an obstacle to the free movement of services).

[308] Case C-43/93, Raymond Vander Elst v. Office des Migrations Internationales, 1994 E.C.R. I-3803, para. 14 (holding the measures were a *restriction* on the free movement right).

[309] Case C-398/95, Syndesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion v. Ypourgos Ergasias, 1997 E.C.R. I-3091, paras. 16, 19 [hereinafter *Syndesmos Case*] (finding both a *restriction* and *barrier* to the free movement right).

[310] Case C-490/04, Comm'n v. Germany, 2007 E.C.R. I-6095, para. 68 (constituting a *restriction* on the free movement of services).

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licensing of self-employed migrant tourist guides who were prevented from supplying services if they were not qualified in Greece.[311]

4.3 Impediment to Free Movement

In other judgments in the free movement jurisprudence, there has been a focus upon the *impediment* to free movement presented by the national measure.[312]

In *Bosman*, for example, it was held that transfer rules between football clubs "directly affect players' access to the employment market in other Member States and are thus capable of *impeding* freedom of movement for workers."[313] Other national laws held *impediments* to the exercise of free movement rights include: a Danish obligation on a migrant company to register a company car made available to employees residing in that state;[314] a precondition that architects wishing to practice their profession in Italy should first submit an original diploma to that state;[315] Spanish provisions setting a minimum number of persons employed by security undertakings;[316] and Finnish national rules relating to the operation of gaming machines.[317]

4.4 Prohibit, Impede, or Render Less Attractive

In *Corporación Dermoestética SA v. To Me Group Advertising Media*, for example, it was held that "restrictions on the freedom of establishment and the freedom to provide services referred to in Articles 43 EC and 49 EC (now Articles 49 TFEU and 45 TFEU)

[311] Case C-398/95, *Syndesmos Case*, paras. 16, 19 (finding that the national law provided a *barrier* to free movement).

[312] Case C-134/03, Vicacom Outdoor SrL v. Giotto Immobilier SARL, 2005 E.C.R. I-1167 para. 39. In *Viacom*, the issue was whether a municipal tax constituted an impediment to freedom to provide services contrary to TFEU art. 56, para. 33. The Italian law was held to be lawful.

[313] *Bosman Case*, 1995 E.C.R. I-4921, para. 103 (emphasis added).

[314] *Nadin*, 2005 E.C.R. I-11203, para. 36.

[315] *See* Case C-298/99, Comm'n v. Italy, 2002 E.C.R. I-3129, para. 37 (relating to both the rights of services and establishment).

[316] Case C-514/03, Comm'n v. Spain, 2006 E.C.R. I-963, para. 48 (finding the provisions made the formation of secondary establishments or subsidiaries in Spain more onerous and dissuaded foreign private security undertakings from offering their services within the Spanish market).

[317] Case C-124/97, Markku Juhani Läärä v. Kihlakunnansyyttäjä (Jyväskylä), 1999 E.C.R. I-6067, para. 29.

respectively are measures that *prohibit, impede or render less attractive* the exercise of such freedoms."[318]

The "prohibit, impede or render less attractive" terminology ascribed to the *restriction* on the free movement right has been used on other occasions by the Court of Justice.[319] Examples of such occasions include national measures relating to the payment of remuneration on sight accounts;[320] restrictions imposed by France "to store semen in authorized artificial insemination centers"; restrictions relating to the recognition of diplomas in Italy;[321] Italian legislation restricting the staffing of data processing centers only to employees with Italian qualifications;[322] and to the retention by the same state of obstacles to free movement such as national and regional rules regarding trade fairs, markets, and exhibitions.[323]

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[318] Case C-500/06, Corporación Dermoestética SA v. To Me Group Advertising Media, 2008 E.C.R. I-5785, para. 32 (emphasis added). *See, e.g.*, Case C-96/08, CIBA Speciality Chemicals Central v. Adó- és Pénzügyi Ellenrzési Hivatal (APEH) Hatósági Fosztály, judgment of 15 April 2010, para. 19; Case C-157/07 Finanzamt für Körperschaften III in Berlin v. Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH 2008 E.C.R. I-8061, para. 30; Case C-439/99, Comm'n v. Italy, 2002 E.C.R. I305, para. 22; Case C-451/03, Servizi Ausiliari Dottori Commercialisti Srl v. Giuseppe Calafiori, 2006 E.C.R. I-2941, para. 31; Case C-65/05, Comm'n v. Greece, 2006 E.C.R. I-10341, para. 48; Case C-248/06, Comm'n v. Spain, 2008 ECR I-47, para. 21. *See also CaixaBank*, 2004 E.C.R. I-8961, para. 12; C-518/06, Comm'n v. Italy, 2009 E.C.R. I-3491, para. 62.

[319] All such measures "must be considered to be restrictions" on the Treaty free movement rights of services and establishment. Case C-294/00, Deutsche Paracelsus Schulen für Naturheilverfahren GmbH v. Kurt Gräbner, 2002 E.C.R. I-6515, para. 38. In the context of the right of establishment, see Case C-168/91, Christos Konstantinidis v. Stadt Altensteig, 1993 E.C.R. I-1191, para. 15. In the context of the freedom to provide services, see Case C-205/99, Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) v. Administración General del Estado, 2001 E.C.R. I-1271, para. 21; Case C-429/02, Bacardi France SAS v. Télévision française, 1 SA (TF1), C-429/02 Groupe Jean-Claude Darmon SA and Girosport SARL, 2004 E.C.R. I-6613, para. 31; Case C-262/02, Comm'n v. France, 2004 E.C.R. I-6569, paras 27-29; *Arblade*, 1999 E.C.R. I-8453, para. 33; Case C-294/00 Deutsche Paracelsus Schulen für Naturheilverfahren GmbH v. Kurt Gräbner 2002 E.C.R. I-6515, para. 38. *See also* Case C-42/07, Liga Portuguesa de Futebol Profissional and Bwin International Ltd v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa, 2009 E.C.R. I-7633, para. 51; Case C- 451/03, Servizi Ausiliari Dottori Commercialisti Srl v. Giuseppe Calafiori, 2006 E.C.R. I-2941 para. 33; Case C-298/05, Columbus Container Services, 2007 E.C.R. I-10451, para. 33.

[320] The French measure rendered a restriction which was liable to "prohibit, impede or render less attractive the exercise of that freedom." *CaixaBank*, 2004 E.C.R. I-8961, para. 11.

[321] Case C-153/02, *Valentina Neri v. European School of Economics (ESE Insight World Educ. Sys. Ltd)*, 2003 E.C.R. I-13555, para. 44 (finding that the restriction "is likely to deter students from attending these courses and thus *seriously hinder* the pursuit by ESE of its economic activity in that Member State" (emphasis added)).

[322] Case C-79/01, Payroll Data Services (Italy) Srl, ADP Europe SA and ADP GSI SA, 2002 E.C.R. I-8923, para. 26.

[323] Case C-439/99, Comm'n v. Italy, 2002 E.C.R. I-305, para. 22.

National measures imposing *restrictions* on the free movement right relating to *services*[324] have similarly been described. For example, a Dutch rule requiring payment of a tariff by sea-going vessels longer than forty-one meters was held "a restriction on their free circulation"[325] because it was "liable to *prohibit, impede or render less attractive* the activities of a provider of services established in another Member State."[326] Similarly so described were: a Belgian requirement that a service provider should furnish a simple prior declaration certifying that the situation of the workers posted to that State who were nationals of non-member States was lawful;[327] an Austrian requirement that private inspection bodies of organically farmed products be established within Austria as a precondition to offering inspection services;[328] and national measures restricting the right to supply services in relation to a Spanish provision requiring maritime cabotage services be subject to prior administrative authorization.[329] Other examples include, national provisions requiring debt collecting agencies in Germany to carry out judicial debt-collection work for others only through the intermediary of a lawyer,[330] a Belgian requirement that undertakings in the construction industry providing services pay employers' contributions duplicating contributions paid in the state where established,[331] and French legislation requiring employed workers from non-member countries to obtain

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[324] TFEU, *supra* note 1, at art. 56. *See also* Case C-49/98 Finalarte Sociedade de Construção Civil Ld. 2001 E.C.R. I-7831, para. 30 (relating to German measures imposing an obligation on undertakings in the construction sector supplying a service to apply the system of paid leave applicable in the host Member State to workers de ployed for that purpose). A national rule which involved the services provider in expense and additional administrative and economic burdens would fall into this category. *See, e.g.*, Case C-165/98, Criminal proceedings against André Mazzoleni and Inter Surveillance Assistance SARL, as the Party Civilly Liable, Third Parties: Eric Guillaume and Others 2001 E.C.R. I-2189, para. 24 (concerning Belgian measures requiring an undertaking established in another Member State which provides services in the territory of the first State to pay its workers the minimum remuneration fixed by the national rules of that State).

[325] *Douane*, 2002 E.C.R. I-5235, para. 38.

[326] *Id.* at para. 32 (emphasis added).

[327] Case C-219/08 Comm'n v. Belgium, 2009 E.C.R. I-9213, para. 13 (describing the measures as being "liable to prohibit, impede or render less advantageous").

[328] Case C-393/05, Joined opinion of Advocate General Sharpston, 2007 E.C.R. I-10195, paras. 31–32 (deciding on the grounds that the national law "renders impossible, in Austria, the provision of the services in question by private bodies established only in other Member States"). A similar French requirement in relation to biomedical analysis laboratories was held unlawful on the same basis. *See* Case C-496/01, Comm'n v. France, 2004 E.C.R. 1-2351, para. 65.

[329] Case C-205/99, Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others v. Administración General del Estado, 2001 E.C.R. I-1271, para. 22.

[330] *Reisebüro*, 1996 E.C.R. I-6511, paras. 25–26.

[331] *Guiot,* 1996 E.C.R. I-1905, para. 10.

work permits.[332] This language was also applied to the prohibition by Germany of the provision of a patent monitoring and renewal service,[333] a German law providing that an undertaking using the services of an undertaking established in another Member State to act as a guarantor in respect of the minimum remuneration of workers employed by the other undertaking,[334] and the establishment by the French courts of a register for experts.[335] Recently, a less favorable Belgian tax regime was held liable to prohibit, impede, or render less attractive the free movement of services, and was classified as a restriction based on this phraseology.[336]

4.5 Hinder or Make Less Attractive

Dutch rules in relation to information held on driving licences were held "liable to hinder or make less attractive" the exercise of Treaty free movement rights,[337] as were Italian measures imposed on the private security sector relating to the obligation to lodge a guarantee with a deposits and loans office.[338] The Court has referred to the concept of national measures "liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty" in the context of the ability of Member States to *justify* national measures.[339] Recently, in the context of the exercise of establishment rights in Spain, the Court ruled that national rules which concerned the establishment of

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[332] *Vander Elst*, 1994 E.C.R. I-3803, para. 14.

[333] *Säger*, 1991 E.C.R. I-4221, para 12. *See also Arblade*, 1999 E.C.R. I-8453, para. 33.

[334] Case C-60/03, Wolff & Müller GmbH & Co. KG v. José Filipe Pereira Félix, 2004 E.C.R. I-9553, para 31 ("To the extent that it involves expenses and additional administrative and economic burdens."). *See also* Case C-164/99, Portugaia Construções, 2002 E.C.R. I-787, para. 18 (making a similar comment with respect to collective agreements and minimum wages in Germany); Case C-404/05 Comm'n v. Germany, 2007 E.C.R. I-10239, para. 30.

[335] Joined Cases C-372/09 & C-373/09, Josep Peñarroja Fa, judgment of 17 March 2011, para. 50 (holding a restriction on the freedom to supply services).

[336] Case C-9/11, Waypoint Aviation SA v. État belge-SPF Finances, judgment of 13 October 2011, para. 22.

[337] Case C-246/00, Comm'n v. Netherlands, 2003 E.C.R. I-7485, para. 66.

[338] Case C-465/05, Comm'n v. Italy, 2007 E.C.R. I-11091, para. 109 (holding likely to hinder or make less attractive the exercise of the freedom of establishment and the freedom to provide services).

[339] Case C-55/94, Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165, para. 39; Case C-212/97, Centros Ltd. v. Erhvervs-og Selskabsstyrelsen, 1999 E.C.R. I-1459 para. 34; Case C-108/96, Criminal proceedings against Dennis Mac Quen, SA, 2001 E.C.R. I-837, para. 26; Case C-294/00, Deutsche Paracelsus Schulen für Naturheilverfahren GmbH v. Kurt Gräbner, 2002 E.C.R. I-6515, para. 39; *Kamer*, 2003 E.C.R. I-10155, para. 133; *Contse SA*, 2005 E.C.R. I-9315, para. 25; Case C-234/03 Colegio de Ingenieros de Caminos, Canales y Puertos v. Administración del Estado, 2005 E.C.R. I-9315, para. 25; Case C-514/03, Comm'n v. Spain, 2006 E.C.R. I-963, para. 26; Case C-155/09, Comm'n v. Greece, judgment of 20 January 2011, para. 51; Case C-152/05, Comm'n v. Germany, 2008 E.C.R. I-00039, para. 26; Case C-294/00, Deutsche Paracelsus Schulen für Naturheilverfahren GmbH v. Kurt Gräbner, 2002 E.C.R. I-6515, paras. 39–40.

shopping centers in Catalonia "ha[ve] the effect of *hindering or of rendering less attractive* the exercise by economic operators from other Member States of their activities"[340] in Catalonia.[341] In *Commission v. Hungary*, a property purchase tax having a dissuasive effect on persons who wished to settle in Hungary was held a restriction on the free movement rights of the worker[342] and establishment[343] on the basis that it would "hinder or make less attractive the exercise of [those] fundamental freedoms guaranteed by the Treaty."[344]

The forgoing analysis commenced with an examination of jurisprudence which had reflected the honest intent of Treaty free movement provisions in the removal of national restrictions[345] to such rights. This section then considered the jurisprudence of the free movement of persons,[346] services,[347] and capital[348] from the perspective of implementing Treaty exhortations with respect to the removal of *restrictions* or *obstacles* to free movement, together with cases evidencing a respect for "market access" through the overlay terminology of "liable to hamper or to render less attractive," "to prohibit or otherwise impede," and "to prohibit, impede or render less attractive or to hinder or make less attractive." It is jurisprudence which displayed respect for the principle of "market access" through the descriptive terminology accorded to the national measure. It is now pertinent to examine jurisprudence in which the respect for the principle of "market access" has been more overtly delivered. The analysis begins with an exploration of the jurisprudence which has relied upon the principle of "market access" as the conduit used to establish whether a *restriction* or *obstacle* on the free movement right has existed at the national level.

III. Restrictions—Market Access

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[340] Case C-400/08, Comm'n v. Spain, judgment of 24 March 2011, para. 70 (emphasis added).

[341] Case C-148/10, DHL International NV v. Belgisch Instituut voor Postdiensten en Telecommunicatie, judgment of 13 October 2011, para. 63 (applying such terminology to hold that the imposition of a mandatory complaints procedure on postal services providers did not "hinder or render less attractive the exercise by Union nationals of the freedom of establishment that is guaranteed by the Treaty").

[342] TFEU, *supra* note 1, at art. 45.

[343] TFEU, *supra* note 1, at art. 49.

[344] Case C-253/09, Comm'n v. Hungary, judgment of 1 December 2011, para. 69.

[345] Note with respect to the worker, the Treaty *omission* of the terminology of restriction has been rectified by jurisprudence such as Case 96/85, Comm'n v. France, 1986 E.C.R. 1475, para. 11. The adjective is used interchangeably with obstacle in the jurisprudence relating to the worker.

[346] For *worker*, see TFEU, *supra* note 1, at art. 45; for establishment, see TFEU, *supra* note 1, at art. 49.

[347] TFEU, *supra* note 1, at art. 56.

[348] TFEU, *supra* note 1, at art. 63.

This section now concludes with an examination of the jurisprudence of persons,[349] services,[350] and capital.[351] In these contexts, the reliance on the principle of "market access" within the equation of the application of the Treaty provisions to national laws has been distinctly overt. This is jurisprudence wherein the national law has been held unlawful, specifically insofar as it has hindered *access* to the market of the host state.

With respect to the worker,[352] for example, in the judgment of *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens and others*,[353] there was arguably a reliance on the operation of the principle of *market access*,[354] as the Court held that "free *access to employment* is a fundamental right which the Treaty confers individually on each *worker* in the Community."[355]

The *restriction* on the registration of motor vehicles[356] has been described in *Criminal proceedings against Claude Nadin, Nadin-Lux SA and Jean-Pascal Durré*[357] as constituting "a barrier to freedom of movement"[358] which "impedes the access of persons resident in Belgium to self-employed work in the other Member States."[359] In the context of the employed and the self-employed migrant, it has recently been stated in *Angelo Rubino v. Ministero dell'Università e della Ricerca* that both "Articles 39 EC and 43 EC [now Articles 45 and 49 TFEU] *guarantee* to the nationals of the Member States *access* to activities, in a

[349] For *worker*, see TFEU, *supra* note 1, at art. 45; for establishment, see TFEU, *supra* note 1, at art. 49.

[350] For services, see TFEU, *supra* note 1, at art. 56.

[351] TFEU, *supra* note 1, at art. 63.

[352] TFEU, *supra* note 1, at art. 45.

[353] Case 222/86, Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens, 1987 E.C.R. 4097 [hereinafter *Unectef*].

[354] Member States' courts are required to give reasons for judgments when judicially reviewing a decision about the equivalence of diplomas held by migrant nationals.

[355] *Unectef,* 1987 E.C.R. 4097, para. 14 (emphasis added). It was an approach that was arguably confirmed in the *Bosman* judgment in the context of rendering nationality clauses in football unlawful. *Bosman Case*, 1995 E.C.R. I-4921, para. 129.

[356] Relating to instances wherein the employer was established in another Member State.

[357] *Nadin*, 2005 E.C.R. I-11203, para. 39.

[358] *Id.* at para. 36.

[359] *Id.* at para. 37.

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self-employed or employed capacity, without discrimination based on nationality."[360] In *Commission v. France*, national measures restricting the number of insemination centers was held to "hamper the *access* of other operators, including those from other Member States, to the insemination market."[361]

In *Volker Graf v. Filzmoser Maschinenbau GmbH*, the national legislation[362] deterring a migrant national from leaving the home state was held to constitute an *obstacle* to the free movement[363] where it affects "*access* of workers to the labor market."[364] So too, under the law at issue in *Commission v. Denmark*, cross-border workers resident in Denmark were prevented from using company vehicles registered where the undertaking of the employer was established; that national law was held "liable to *affect access* to that activity."[365] Furthermore, the requirement that private security guards swear an oath of allegiance to the Italian Republic was held to constitute, for the operator not established in Italy, "an impediment to the pursuit of its activities in that Member State, which impairs its *access to the market*."[366]

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[360] Case C-586/08, Angelo Rubino v. Ministero dell'Università e della Ricerca, 2009 ECR I-12013, para. 34 ("In particular, that, in the context of a selection procedure such as that leading to registration as a holder of the NAQ, qualifications obtained in other Member States are accorded their proper value and are duly taken into account.") (emphasis added).

[361] In the context of the free movement of *services* and *establishment*, see Case C-389/05, Comm'n v. France, 2008 E.C.R. I-5337, para. 53 (emphasis added).

[362] This concerns Austrian provisions relating to compensation on termination of employment upon moving to commence employment in another Member State. The operation of the principle is noted in the recent judgment of *Krzysztof Peśla v. Justizministerium Mecklenburg-Vorpommern* to underpin the rationale for the direct entry of the migrant to the legal profession of the host state. *See* Case C-345/08, Krzysztof Peśla v. Justizministerium Mecklenburg-Vorpommern, 2009 E.C.R. I-11677, para. 53 (holding that "[i]f such an obligation did not exist, the fact of not having the diploma normally required by nationals of the host Member State could of itself constitute a decisive *obstacle to access* to the legal professions in that Member State" (emphasis added)).

[363] *See also Bosman Case* where Belgian transfer rules, effective to prevent a migrant worker moving to play for a French club, constituted an *obstacle* to that freedom. *Bosman Case*, 1995 E.C.R. I-4921, para. 96. *See also* Case C-10/90, Maria Masgio v. Bundesknappschaft, E.C.R. I-1119, para. 18; Case C-228/88, Giovanni Bronzino v. Kindergeldkasse, 1990 E.C.R. I-531; Case C-12/89, Gatto v. Bundesanstalt fuer Arbeit, 1990 E.C.R. I-557, para. 2.

[364] Case C-190/98 2000 E.C.R. I-00493, para. 23 (emphasis added). "Provisions which, even if they are applicable without distinction, preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom [providing they] '*affect access* of workers to the labour market.'" *Id.* (emphasis added).

[365] Case C-464/02, Comm'n v. Denmark, 2005 E.C.R. I-07929, para. 37 ("Legislation which relates to the conditions in which an economic activity is pursued may constitute an obstacle to freedom of movement." (emphasis added)).

[366] Case C-465/05, Comm'n v. Italy, 2007 E.C.R. I-11091, para. 46 (emphasis added).

So too, in the context of the freedom of establishment,[367] *Fidium Finanz AG v. Bundesanstalt für Finanzdienstleistungsaufsicht* held that German rules relating to the granting of credit by migrant companies[368] without branch or central administration in Germany impeded "*access to* the German financial market for companies established in non-member countries."[369] In *CaixaBank France v. Ministère de l'Économie, des Finances et de l'Industrie*[370] held that:

> [A] national prohibition on the remuneration of sight accounts constitutes, for companies from Member States other than the French Republic, a serious obstacle to the pursuit of their activities via a subsidiary in the latter Member State, affecting their *access to the market* . . . . Access to the market by those establishments is thus made more difficult by such a prohibition.[371]

In *Européenne et Luxembourgeoise d'investissements SA (ELISA) v. Directeur général des impôts and Ministère public*, the Court held that "it is clear from the case-law of the Court that freedom of establishment, which is conferred . . . on Community nationals . . . *entails for them access to*, and pursuit of, activities as self-employed persons."[372] In addition, national laws imposing minimum distances between service stations in Italy was a *restriction* which "by being more advantageous to operators who are already present on the Italian market, is liable to deter, or even *prevent, access* to the Italian market by operators from other Member States."[373] Note also that, in *Valentina Neri v. European School of Economics (ESE Insight World Education System Ltd),* national legislation under which certain degrees awarded in other member states were not recognised in Italy was

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[367] TFEU, *supra* note 1, at art. 49.

[368] Where Germany granted credit on a commercial basis, on national territory, by a migrant company, subject to prior authorization that was refused where the company does not have its central administration or a branch in that territory.

[369] Case C-452/04, Fidium Finanz AG v. Bundesanstalt für Finanzdienstleistungsaufsicht, 2006 E.C.R. I-09521, para. 49 (emphasis added).

[370] *CaixaBank*, 2004 E.C.R. I-8961.

[371] *Id.* at paras. 12, 14 (emphasis added). "That prohibition is therefore to be regarded as a restriction within the meaning of Article 43 EC." *Id.* at paras. 11, 12. *See also* C-518/06, Comm'n v. Italy, 2009 E.C.R. I-3491, para. 64.

[372] Case C-451/05, Européenne et Luxembourgeoise d'investissements SA (ELISA) v. Directeur général des impôts and Ministère public, 2007 E.C.R. I-08251, para. 62 (emphasis added).

[373] In relation to the right of establishment, see TFEU, *supra* note 1, at art. 49; Case C-384/08, Attanasio Group Srl v. Comune di Carbognan, judgment of 11 March 2010, para. 45 (emphasis added).

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held to restrict the right of establishment, because such recognition would "*facilitat*[*e*] *. . . access to the employment market*."[374]

The language of "market access" was also evident in *Corporación Dermoestética SA v. To Me Group Advertising Media,* where the prohibition of TV advertising with respect to surgical treatments provided by healthcare establishments was held by the Court of Justice to be "liable to make it *more difficult* for such economic operators to *gain access* to the Italian market."[375]

With respect to the Treaty right to supply services,[376] it was held recently that a Dutch measure[377] constituted "an impediment to *market access* for persons" other than the nationals of the host state.[378] In *Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA, v. QC Leisure*,[379] UK legislation prohibiting foreign decoding devices which gave access to satellite broadcasting services from another Member State was held to prevent *access* to those services from being received by persons outside the UK.[380]

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[374] Case C-153/02, Valentina Neri v. European School of Economics (ESE Insight World Education System Ltd), 2003 E.C.R. I-13555, para. 42 ("The recognition of those degrees by the authorities of a Member State is of considerable importance." (emphasis added)).

[375] Case C-500/06 2008 E.C.R. I-5785, para. 34 (emphasis added). Such was a *restriction* and a "serious obstacle" to the exercise of the free movement of establishment and services, *id.* at para. 33. Reference in the judgment was made to the national measure which is *liable to impede or render less attractive* the exercise of the basic freedoms guaranteed by TFEU art. 49 and 56, *id.* at para 32.

[376] TFEU, *supra* note 1, at art. 56.

[377] Relating to a payment of remuneration.

[378] Case C-346/06, Dirk Rüffert v. Land Niedersachsen, 2008 E.C.R. I-1989, para. 14. Also, there has been recent confirmation that the freedom of establishment "entails for [Community nationals] access to, and pursuit of, activities as self-employed persons and the forming and management of undertakings." *See* Case C-471/04, Finanzamt Offenbach am Main-Land v. Keller Holding GmbH, 2006 E.C.R. I-2107, para. 29; *see also* Case C-451/05, Européenne et Luxembourgeoise d'investissements SA (ELISA) v. Directeur général des impôts and Ministère public, 2007 E.C.R. I-8251, para. 62; Case C-386/04, Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften, 2006 E.C.R. I-8203 para. 17; Case C-307/97, Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v. Finanzamt Aachen-Innenstadt, 1999 E.C.R. I-6161, para. 34; C-446/03, Marks & Spencer plc v. David Halsey, 2005 E.C.R. I-10837, para. 30.

[379] Joined Cases C-403/08 & C-429/08, Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA, v. QC Leisure, judgment of 4 October 2011.

[380] *Id.* at para. 88. The obstacle providing a *restriction* on the right to provide services. See also TFEU, *supra* note 1, at art. 56.

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With respect to the Treaty right to supply services,[381] other judgments applying the same rationale include *Alpine Investments BV v. Minister van Financiën*,[382] in which the prohibition of cold calling[383] was held "[to] directly affect . . . *access* to the market in *services* in the other Member States and is thus capable of hindering intra-Community trade in services."[384] In *Servizi Ausiliari Dottori Commercialisti Srl v. Giuseppe Calafiori,* the right to pursue tax advice only at centers formed under the authorization of the Spanish Ministry was held "completely [to] prevent . . . *access to the market* for the *services* in question by economic operators established in other Member States."[385] Similarly, *Federico Cipolla v. Rosaria Fazari, née Portolese and Stefano Macrino and Claudia Capoparte v. Roberto Melon et al* held that the Italian fee scale was "liable to render *access to the Italian legal services market more difficult* for lawyers established in [another] Member State."[386]

In *Commission v. Italy*, Italian legislation imposed a requirement to provide third-party liability motor insurance. The Court held that "such a measure affects the relevant operators' *access to the market*" and "*renders access* to the Italian market less attractive and, if they obtain *access* to that market, reduces the ability of the undertakings concerned to compete effectively."[387] The *restriction* imposed by Italy was held to "affect *access* to the market for undertakings from other Member States and thereby *hinder intra-Community trade*."[388]

The test of "market access" has also operated within the jurisprudence of the free movement of capital.[389] In *Commission v. Spain*, for example, Spanish restrictions on investment operations[390] were held to "affect the position of a person acquiring a

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[381] TFEU, *supra* note 1, at art. 56.

[382] In the context of the application of the provisions of TFEU art. 56.

[383] "Cold calling" refers to the practice of telephoning potential clients in another Member State without prior consent.

[384] Case C-384/93, Alpine Investments BV v. Minister van Financië, 1995 E.C.R. I-1141, para. 38 (emphasis added).

[385] Case C-451/03, Servizi Ausiliari Dottori Commercialisti Srl v. Giuseppe Calafiori, 2006 E.C.R. I-294, para. 33 (emphasis added).

[386] Joined Cases C-94/04 & C-202/04, Federico Cipolla v. Rosaria Fazari, née Portolese and Stefano Macrino and Claudia Capoparte v. Roberto Melon et al., 2006 E.C.R. I-11421, para. 58 ("And therefore is likely to restrict the exercise of their activities providing services in that Member State.").

[387] Case C-518/06, Comm'n v. Italy, 2009 E.C.R. I-3491, para. 70.

[388] *Id.* at paras. 67, 70 (emphasis added).

[389] TFEU, *supra* note 1, at art. 63.

[390] The restrictions apply without distinction to both residents and non-residents.

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shareholding as such and are thus liable to deter investors from other Member States from making such investments and, consequently, *affect access* to the market."[391] Further, the United Kingdom's provisions limiting the acquisition of voting shares in BAA and PLC, and imposing consent requirements for the disposal of the company's assets, were held in *Commission v. UK* to be "liable to deter investors from other Member States from making such investments and, consequently, *affect access* to the market."[392]

Further examples of recent judgments concerned with the application of the test of "market access" include *Krzysztof Pela v. Justizministerium Mecklenburg-Vorpommern*,[393] which held in the context of the application of Article 45 TFEU[394] that "the fact of not having the diploma normally required by nationals of the host Member State could of itself constitute a decisive *obstacle to access* to the legal professions in that Member State."[395] In *Vicoplus SC PUH*,[396] the right to impose work permits on Polish nationals at the time of Poland's accession to the EU was held a "measure *regulating access* of Polish nationals to the labour market of that State."[397] *Attanasio Group Srl v. Comune di Carbognano Italian*[398] held that "[t]he construction of roadside service stations by the legal persons referred to in Article 48 EC (now Article 54 TFEU) necessarily implies that *they have access* to the territory of the host Member State."[399] Finally, in relation to the free movement of capital, the influence of the principle of market access is found in the recent judgment of *Commission v. Portugal*. In that case, the creation of so-called "golden" shares in Portugal

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[391] Case C-463/00, Comm'n v. Spain, 2003 E.C.R. I-4581, para. 61 (emphasis added).

[392] Case C-98/01, Comm'n v. U.K., 2003 E.C.R. I-4641, para. 47 (emphasis added).

[393] Case C-345/08, Krzysztof Pela v. Justizministerium Mecklenburg-Vorpommern, 2009 E.C.R. I-11677 (emphasis added).

[394] Formerly Article 39 EC.

[395] Case C-345/08, Krzysztof Pela v. Justizministerium Mecklenburg-Vorpommern, 2009 E.C.R. I-11677, para. 53.

[396] Joined Cases C-307/09 to C-309/09, Vicoplus SC PUH, BAM Vermeer Contracting sp. zoo and Olbek Industrial Services sp. zoo v. Minister van Sociale Zaken en Werkgelegenheid, judgment of 10 February 2011.

[397] *Id.* at para. 32 (emphasis added); *see also* C-113/89, Rush Portuguesa, 1990 E.C.R. I-141, paras 20 & 21.

[398] Case C-96/08, CIBA Speciality Chemicals Central and Eastern Europe Szolgáltató, Tanácsadó és Keresdedelmi kft v. Adó- és Pénzügyi Ellenrzési Hivatal (APEH) Hatósági Fosztály, judgment of 15 April 2010, para. 44 [hereinafter *CIBA Case*]. The case concerns regional legislation laying down mandatory minimum distances between roadside service stations. The rule, a restriction on the right of establishment, "makes access to the activity of fuel distribution subject to conditions and, by being more advantageous to operators who are already present on the Italian market, is liable to deter, or even prevent, access to the Italian market by operators from other Member States." *Id.* at para. 45. Note the use of the term "deter."

[399] C-384/08, Attanasio Group Srl v. Comune di Carbognano, judgment of 11 March 2010, para. 39.

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Telecom SGPS SA to be held by Portugal were held unlawful,[400] as such preferential stock treatment was "liable to deter investors from other Member States from making such investments and, consequently, affect *access* to the market."[401]

IV. Market Access: Relationship with Nondiscrimination?

The foregoing analysis concerned the recourse in free movement jurisprudence to the principle of "market access" in the location of the *obstacle* or *restriction* to the free movement right. In other jurisprudence locating the *restriction* or *obstacle* to the free movement right, the principle of *nondiscrimination* has either occupied the premier position in this process or has been allowed to coalesce alongside the principle of market access in the processes scrutinizing national measures. The importance of the principle of nondiscrimination in this context was recently confirmed in *Commission v. Greece*, where the Court explained that "the principle of nondiscrimination, whether it has its basis in Article 12 EC[402] or Articles 39 EC[403] or 43 EC,[404] requires that comparable situations must not be treated differently and that different situations must not be treated in the same way."[405] This is verification that the principle of nondiscrimination remains *inherent* within the Treaties.[406] In the context of positioning the principle of market access within the jurisprudence of free movement,[407] such a reminder of the status principle of

[400] TFEU, *supra* note 1, at art. 63 (providing that "[a]ll restrictions on the movement of capital between Member States . . . shall be prohibited").

[401] Case C-171/08, Comm'n v. Portugal, judgment of 8 July 2010, (emphasis added). See also the language used recently in the *CIBA Case*, judgment of 15 April 2010, para. 44.

[402] The general charging provision in relation to nondiscrimination is now found under TFEU art. 18.

[403] TFEU, *supra* note 1, at art. 45.

[404] TFEU, *supra* note 1, at art. 49.

[405] Case C-155/09, Comm'n v. Greece, judgment of 20 January 2011, para. 68. The principle was expressed recently in *Commission v. Hungary* as arising "only through the application of different rules to comparable situations or the application of the same rule to different situations." Case C-253/09, Comm'n v. Hungary, judgment of 1 December 2011, para. 50. *See also* C-279/93 Finanzamt Köln-Altstadt v. Roland Schumacker 1995 E.C.R. I-225, para. 30; Case C-383/05 Raffaele Talotta v. Belgian State, 2007 E.C.R. I-2555, para. 18; Case C-182/06, État du Grand Duchy of Luxemburg v. Hans Ulrich Lakebrink and Katrin Peters-Lakebrink, 2007 E.C.R. I-6705, para. 27.

[406] Articles 7, 48, 59 have in common the prohibition, in their respective spheres of application, of any discrimination on grounds of nationality. *See Walrave*, 1974 E.C.R. 1405, para. 16. It is clear too from *Comm'n v. Italy* that the jurisprudence of goods reflects not only "the principle of ensuring the free access of Community products to national markets' but also of nondiscrimination." Case C-110/05, Comm'n v. Italy, 2009 E.C.R. I-519, para. 34.

[407] For provisions relating to the *worker*, see TFEU, *supra* note 1, at art. 45; for establishment, see TFEU *supra* note 1, at art. 49; see for services, TFEU, *supra* note 1, at art. 56; and for capital, see TFEU, *supra* note 1, at art. 63.

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nondiscrimination may be apposite. Arguably it is a signal that the Court will continue to rely on the principle of nondiscrimination in its jurisprudence. In the recent case of *Commission v. Greece*, for example, a national provision reserving entitlement to a tax exemption solely to permanent residents in Greece was held to disadvantage persons not residing in Greece.[408]

The Court has previously held that

> Article 48 . . . give[s] effect to the principle of nondiscrimination laid down in Article 7 of the EEC Treaty and are thus intended to give workers established in the different countries of the Community free *access* to employment available in countries of the Community other than the one in which they are established, without regard to their nationality, by prohibiting any restriction on their movement within the Community, whether in the form of restrictions on *access* to the national territory or restrictions on free movement within a national territory, which would prevent them from effectively exercising that right.[409]

Michael Neukirchinger v. Bezirkshauptmannschaft Grieskirche[410] reaffirms that the principle of nondiscrimination remains fundamental to the operation of the Treaty free movement provisions.[411] In *Neukirchinger*, decided 25 January 2011, the Court held:

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[408] Case C-155/09, Comm'n v. Greece, judgment of 20 January 2011, para. 48.

[409] Case 298/84, Paolo Iorio v. Azienda autonoma delle ferrovie dello Stato, 1986 E.C.R. 247, para. 13 (emphasis added). TFEU, *supra* note 1, at art. 18 ("Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."). It was held in *Cathy Schulz-Delzers, Pascal Schulz v. Finanzamt Stuttgart III* that TFEU art. 18 "lays down a general prohibition of all discrimination on grounds of nationality, applies independently only to situations governed by European Union law for which the Treaty lays down no specific rules of nondiscrimination." Case C-240/10, Cathy Schulz-Delzers, judgment of 15 September 2011, para. 29. *See also* Case C-269/07, Comm'n v. Germany 2009 E.C.R. I-7811, paras. 98–99.

[410] The Court of Justice held that "in order to provide the referring court with a useful answer, the questions referred must be examined from the perspective of Article 12 EC, which enshrines the general principle of non-discrimination on grounds of nationality." *See* Case C-382/08, Michael Neukirchinger v. Bezirkshauptmannschaft Grieskirche, judgment of 25 January 2011, para. 30; *see also* Case C-40/05 Kaj Lyyski v. Umeå universitet, 2007 E.C.R. I-99, para. 33; Case C-222/07, Unión de Televisiones Comerciales Asociadas (UTECA) v. Administración General del Estad, 2009 E.C.R. I-1407, para. 37.

[411] *See supra* note 407.

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> It is settled case-law that the rules regarding equality of treatment between nationals and non-nationals forbid not only overt discrimination by reason of nationality or, in the case of a company, its seat, but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead to the same result.[412]

More recently, in *Commission v. Portugal*, restrictions on the free movement of capital imposed by Portugal were held to

> apply without distinction to both residents and non-residents, it must none the less be held that they affect the position of a person acquiring a shareholding as such and are thus liable to deter investors from other Member States from making such investments and, consequently, affect access to the market.[413]

In this judgment, the Court of Justice acknowledged that *access* to the Portuguese market had been restricted on the basis that the national law had indirectly discriminated against non-residents.

Not only has recent jurisprudence relied on the principle of nondiscrimination, but where it has been required, it has also been a principle inextricably mixed with the principle of *market access*. In *Commission v. Italy*, for example, the Court of Justice held that

> *the general principle* prohibiting discrimination on grounds of nationality, which is laid down by Articles 48, 52 and 59 of the Treaty in the particular spheres which they govern, means that freedom of movement for workers, freedom of establishment and freedom to supply services include *access* to activities of employed or self-employed persons on conditions defined by the legislation of the host Member State for its own nationals.[414]

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[412] Case C-382/08, *Neukirchinger*, judgment of 25 January 2011, para. 32. National measures in connection with the requirement to apply for an operating license to operate balloon flights in Austria were held discriminatoryon the grounds of nationality. *See* C-115/08, Land Oberösterreich v. EZ as, 2009 E.C.R. I-10265, para. 92.

[413] Case C-212/09, Comm'n v. Portugal, Case C-212/09: judgment of 10 November 2011, para. 65.

[414] Case C-58/90, Comm'n v. Italian Republic, 1991 E.C.R. I-4193, para. 9. In this context, the judgment made reference to Case 167/73, Comm'n v. France, 1974 E.C.R. 359, para. 45; Case 2/74, Jean Reyners v. Belgian State,

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The general prohibition in relation to nondiscrimination[415] was described by the Court in *Commission v. France* as "absolute."[416] Other examples exist evidencing the same fusion between the principle of *market access* and *non-discrimination*.[417] With respect to the worker, for example, Article 45(2) TFEU[418] has been held to have "the effect of allowing in each state, *equal access* to employment to the nationals of other Member States."[419] Finally, in the recent case of *Donat Cornelius Ebert v. Budapesti Ügyvédi Kamara*,[420] the Hungarian court was instructed to ascertain whether the Budapesti Ügyvédi Kamara had applied national rules affecting access to the profession of lawyer in a non-discriminatory manner.[421]

1974 E.C.R. 631; and Case 33/74, Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, 1974 E.C.R. 1299.

[415] TFEU, *supra* note 1, at art. 18.

[416] Case 167/73, Comm'n v. France, 1974 E.C.R. 359, para. 45.

[417] In *Commission v. Spain*, it was held that the Treaty free movement provisions "require the elimination of any discrimination against Community nationals on grounds of nationality with regard to access to employment, establishment and the provision of services." Case C-375/92, Comm'n v. Spain, 1994 E.C.R. I-923, para. 9 (emphasis added).

[418] In this context it has operated, for example, to ensure migrant nationals' access to permanent employment in French public hospitals. Case 307/84, Comm'n v. France, 2006 E.C.R. 1725. *Commission v. Greece* concerned access to employment and the prohibiting or restriction of access for non-Greek nationals already employed in Greece to posts of director or teacher in "frontistiria" and in private music and dancing schools. Case 147/86 Comm'n v. Greece, 1988 E.C.R. 1637. The prohibition of discrimination extends to a context wider than the mere exercise of the Treaty right of free movement with respect to the *worker*. "It thus follows from the general character of the prohibition on discrimination in TFEU art. 45 and the objective pursued by the abolition of discrimination that discrimination is prohibited even if it constitutes only an obstacle of *secondary* importance as regards the equality of access to employment." Case 167/73, Comm'n v. France, 1974 E.C.R. 359, para. 46 (emphasis added).

[419] Case 167/73, Comm'n v. France 1974 E.C.R. 359, para. 45 (emphasis added). This finds expression in discrimination noted by the Court as raising "obstacles to access to the profession" that resulted in rendering unlawful a national law requiring de-registration of doctors in the home state as a precondition to registration in France. Case 96/85 Comm'n v. France, 1986 E.C.R. 1475, para. 11. Similar sentiments were expressed as "discrimination on grounds of nationality, which hinders or restricts engagement in paid employment, is contrary to Article 48 of the Treaty on freedom of movement for workers." Case 147/86, Comm'n v. France, 1988 E.C.R. 1637, para. 19.

[420] Case C-359/09, Donat Cornelius Ebert v. Budapesti Ügyvédi Kamara, judgment of 3 February 2011.

[421] *Id.* at para. 41. In the context of the right of establishment, the Court in *Criminal proceedings against Vítor Manuel dos Santos Palhota and Others* confirmed that "Article 56 TFEU requires . . . the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State." Case C-515/08, Criminal proceedings against Vítor Manuel dos Santos Palhota and Others, judgment of 7 October 2010, para. 29. *See also* Joined Cases C-372/09 & C-373/09, Josep Peñarroja Fa, judgment of 17 March 2011, para. 83; Case C-458/08 Comm'n v. Portugal, judgment of 18 November 2010, para. 82.

It appears that whatever the future positioning of the *market access* test within free movement jurisprudence,[422] the language of recent judgments such as *Neukirchinger*[423] and *Commission v. Greece*[424] would suggest that the role of the nondiscrimination principle in the available methods of inquiry as to the legality of national measures is not to be diminished and is set to continue. Rather, the language of *Neukirchinger*[425] and *Commission v. Greece*[426] suggests a strengthening of the role of the nondiscrimination principle within the applicable jurisprudence. These are cases that exhibit a subtle linkage between the tools of "market access" and nondiscrimination. This claim may be supported by jurisprudence such as *Donat Cornelius Ebert*.[427] A particular reading of the recent jurisprudence is that these are judgments which evidence that the Court is maneuvering towards implanting a number of conduits into in the process of enforcement of Treaty free movement rights with respect to national measures.

E. Comment

It is evident that there is one purpose motivating the jurisprudence relating to the worker,[428] services,[429] establishment,[430] and capital[431] in the application of free movement provisions in EU treaties to national laws: To hold unlawful national measures that are *restrictive* of or have proven to be an *obstacle* to the exercise by the migrant EU national of Treaty free movement rights. Emphatically retaining that purpose, the language of *restriction*s or *obstacles*[432] properly reflects the focus of Treaty free movement provisions.[433] It is a language that disregards the plethora of descriptions ascribed to

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[422] *See supra* note 407.

[423] Case C-382/08, *Neukirchinger*, judgment of 25 January 2011, para. 32.

[424] Case C-155/09, Comm'n v. Greece, judgment of 20 January 2011, para. 45.

[425] *Neukirchinger*, judgment of 25 January 2011, para. 32.

[426] Case C-155/09, *Comm'n v. Greece*, judgment of 20 January 2011, para. 45.

[427] Case C-359/09, Donat Cornelius Ebert v. Budapesti Ügyvédi Kamara, judgment of 3 February 2011.

[428] TFEU, *supra* note 1, at art. 45.

[429] TFEU, *supra* note 1, at art. 56.

[430] TFEU, *supra* note 1, at art. 49. *See also Maatschapij*, 1999 E.C.R. I-2329, para. 107.

[431] TFEU *supra* note 1, at art. 63 .

[432] THE SHORTER OXFORD ENGLISH DICTIONARY (1973) (defining "restriction" as "a limitation imposed upon a person" and "obstacle" as "a hindrance, impediment, obstruction." *).*

[433] With respect to the right of establishment, TFEU art. 49 provides: "Within the framework of the provisions set out below, *restrictions* on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited" (emphasis added). The right to supply *services* provides: "Within the

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national measures, such as those measures found to "hamper or to render less attractive," "prohibit or otherwise impede," "impede or render less attractive," or "hinder or make less attractive." In this context, the latter descriptions by the Court of Justice with respect to national measures arguably may be regarded as superfluous, adding nothing further of substance to the scrutiny process which is applied to the national measure. Impressive as such eclectic descriptive terminology is, its existence arguably serves only to camouflage the critical essence of the inquiry. The removal of the assigned descriptive terminology with respect to national measures may in reality serve to refocus the free movement jurisprudence[434] on the removal of the *obstacle* or r*estriction* to the free movement right. Arguably, it is a removal that would result in a transparent appraisal of Treaty exhortations within free movement jurisprudence.[435] Support for such proposition may be had from a "reorientation" of earlier jurisprudence as exemplars. The judgment of *Commission v. Netherlands*,[436] for example, records *obstacles* or *restrictions*,[437] unlawful Dutch residence requirements as being "liable to hamper or to render less attractive"[438] the exercise of rights of establishment.[439] So too, specialist patent renewal services in *Säger*[440] that were deemed liable to "prohibit or otherwise impede" the freedom to provide services[441] were nonetheless restrictions on the right to provide services.[442]

Examination of other free movement jurisprudence readily uncovers a similar approach. Dutch rules,[443] for example, held *restrictions*[444] in relation to the payment of tariffs for sea

framework of the provisions set out below, *restrictions* on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended" (emphasis added). *See* TFEU, *supra* note 1, at art. 56. With respect to the free movement of capital, TFEU art. 63 provides that "[a]ll *restrictions* on the movement of capital between Member States and between Member States and third countries shall be prohibited" (emphasis added).

[434] *See supra* note 407.

[435] Note the considerations made earlier with the concept of *restrictions* and the *wording* used in TFEU art. 56; TFEU art. 49. *See, e.g.*, Case T-266/97, Vlaamse Televisie Maatschapij NV v. Comm'n, 1999 E.C.R. I-2329, para. 107; TFEU, *supra* note 1, at art. 63.

[436] Case C-299/02, Comm'n v. Netherlands, 2004 E.C.R. I-9761.

[437] *Id.* at paras. 20–21.

[438] *Id.* at para. 15.

[439] *Id.*

[440] *Säger*, 1991 E.C.R. I-4221, para. 14.

[441] *Id.* at para 12.

[442] *Id.* at para 17.

[443] *Douane*, 2002 E.C.R. I-5235.

[444] *Id.* at para. 38.

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going vessels were designated as liable to "prohibit, impede or render less attractive the right to provide services."[445] So too Belgian rules that were found to be *restrictions* on the right to provide services in relation to the posting of workers were described as liable to prohibit, impede, or render less attractive that Treaty right.[446] Jurisprudence such as this bears the overtones of the influence of the market access principle. The national measures in issue are in reality *restrictions* on the respective free movement rights. It is perfectly permissible to measure the legality of the national measure by reference to the principle of market access, but this should always be placed in the context of the availability of a number of principles[447] which exist for the that same purpose and any of which may be used where appropriate. A mere passing reference to the market access principle by referencing the national measure to phrases such as "liable to hamper or to render less attractive" is arguably insufficient. In use, the market access principle is one that ought to be founded on an economic basis; not merely one founded on passing reference and intuition.[448]

F. Particular Considerations

This paper has been concerned with the locating the position occupied by the market access principle in the process of the application to national measures of Treaty free movement rights relating to goods,[449] persons,[450] services,[451] and capital.[452] The perception from recent jurisprudence across all such freedoms appears to be that the test of market access is one that is currently more readily adopted by the Court of Justice to facilitate the scrutiny process relating to assessing the lawfulness of national measures vis-

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[445] *Id*. at para. 32.

[446] Case C-219/08, Comm'n v. Belgium, 2009 E.C.R. I-9213, paras. 13–14. The same description (with respect to the establishment of companies) applied to Hungarian restrictions in the *CIBA Case*, judgment of 15 April 2010, paras. 19, 44. Note also the same descriptive analogy to restrictions applied to Belgian legislation requiring a Portuguese company to file individual accounts in respect of Portuguese workers posted to Belgium. *See* Case C-515/08, Criminal proceedings against Vítor Manuel dos Santos Palhota and Others, judgment of 7 October 2010, paras. 29, 40.

[447] An example is nondiscrimination and mutual recognition.

[448] For a discussion on the issue of *market access* and *intuition*, see Spaventa, *supra* note 136, at 914–32. Note, however, a contrary view in Advocate General Bot's Opinion that "the analysis to be carried out by the Court *should not involve any complex economic assessment*" (emphasis added). *See also* Opinion of Advocate General Bot, Case C-110/05, Comm'n v. Italy, 2009 E.C.R. I-519, para. 116.

[449] TFEU, *supra* note 1, at art. 34.

[450] For provisions relating to *workers*, see TFEU, *supra* note 1, at art. 45; for establishment, see TFEU, *supra* note 1, at art. 49.

[451] TFEU, *supra* note 1, at art. 56.

[452] TFEU, *supra* note 1, at art. 63.

à-vis the strictures of European Union law. This article has identified and sought to address issues raised by this perception, and now seeks to offer some observations on particular considerations which may properly arise if the market access test crystallises further into a permanent and universal usage within the free movement jurisprudence across goods,[453] persons,[454] services,[455] and capital.[456] In the first instance, attention is given to the issue of the prospect of a convergence within the mechanics relating to the application of the Treaty free movement provisions[457] to national measures. Evidence seems to be emerging from the jurisprudence of the Court of Justice which evidences a positioning of the test of market access as a primary component in the equation relating to the assessment of the lawfulness of the national measure vis-à-vis Treaty free movement rights.

I. Convergence Within Jurisprudence?

There is an argument to suggest that both the judgments of *Commission v. Italy*[458] and *Mickelsson and Roos*[459] have moved the jurisprudence relating to the free movement of goods[460] towards that of persons,[461] services,[462] and capital.[463] In deciding whether the respective national laws were "were measures having equivalent effect," it is argued that the key issue for *Commission v. Italy*[464] and *Mickelsson*[465] was whether there had been a *hindrance to access* to the host market.[466] This approach is reflective of that adopted by

[453] TFEU, *supra* note 1, at art. 34.

[454] *See supra* note 450.

[455] TFEU, *supra* note 1, at art. 56.

[456] TFEU, *supra* note 1, at art. 63.

[457] *See supra* note 407.

[458] *Comm'n v. Italy*, 2009 E.C.R. I-519.

[459] *Mickelsson*, 2009 E.C.R. I-4273.

[460] TFEU, *supra* note 1, at art. 34.

[461] *See supra* note 450.

[462] TFEU, *supra* note 1, at art. 56.

[463] TFEU, *supra* note 1, at art. 63.

[464] *Comm'n v. Italy*, 2009 E.C.R. I-519.

[465] *Mickelsson*, 2009 E.C.R. I-4273.

[466] *See* Snell, *supra* note 136, at 49.

the Court of Justice in jurisprudence relating to other Treaty freedoms.[467] The thread of "access to the market" that is now winding its way ubiquitously within the jurisprudence of Treaty freedoms[468] perhaps presents some evidence of a movement towards convergence in a defined route with respect to the application of Treaty free movement provisions to national measures. Analysis contained in this article would in this context add some support for this contention. An assumption of movement towards convergence may arguably have been driven to an extent by current jurisprudence relating to the development of Union citizenship.[469] In that jurisprudence, it is arguable that recent judgments have propelled that concept away from the basis of a market driven citizenship[470] and "towards a fully-fledged, meaningful, notion of Union citizenship that bestows upon all Union citizens a number of basic rights."[471] Article 20(2) TFEU provides that "Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties."[472] Importantly for the present context, the Treaty provisions have been used as a conduit in order to prohibit discrimination on the grounds of nationality.[473]

In the light of Article 20(2) TFEU, the Treaty provisions should arguably be re-read as sourcing rights to which all Union citizens are entitled.[474] Were this interpretation to prove correct—if rights, which are economic in nature, are bestowed on all citizens—there is then some sense in the Court abandoning the maintenance of the differing interpretations and rules relating to the application of all Treaty free movement provisions. Advocate General Maduro, for example, has taken this argument even further:

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[467] *Id.* at 55.

[468] For provisions relating to goods, see TFEU, supra note 1, at art. 34; for workers, see TFEU, *supra* note 1, at art. 45; for establishment, see TFEU *supra* note 1, at art. 49; and for services, see TFEU, *supra* note 1, at art. 56.

[469] *See* TFEU, *supra* note 1, at art. 20 ("Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.").

[470] *See* Tryfonidou, *supra* note 136, at 40; Michele Everson, *The Legacy of the Market Citizen, in* NEW LEGAL DYNAMICS OF EUROPEAN INTEGRATION (J. Shaw & G. More eds., 1995).

[471] *See* Tryfonidou, *supra* note 136, at 40 ("Such as the right to free movement and residence and the right to be free from discrimination on grounds of nationality with regards to matters that fall within the material scope of EC law.").

[472] *See* TFEU, *supra* note 1, at art. 20(2) ("Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States.").

[473] *See, e.g.*, Case C-85/96, María Martínez Sala v. Freistaat Bayern, 1998 E.C.R I-2691, paras. 55, 62, 64; C-148/02, Carlos Garcia Avello v. Belgian State, 2003 E.C.R. I-11613, para. 29.

[474] There is authority for this proposition within the jurisprudence of the Court of Justice, see C-138/02, Brian Francis Collins v. Secretary of State for Work and Pensions, 2004 E.C.R. I-2703, para. 63; Joined Cases C-22/08 and C-23/08, Athanasios Vatsouras and Josif Koupatantze v. Arbeitsgemeinschaft (ARGE) Nürnberg 900, 2009 E.C.R. I-4585, para. 37; C-258/04, Office national de l'emploi v. Ioannis Ioannidis, 2005 E.C.R. I-8275, para. 22.

> *[S]uch a harmonisation of the systems of free movement seems . . . to be essential in the light of the requirements of genuine Union citizenship*. It would be desirable for the same system to be applied to all the citizens of the Union wishing to use their freedom of movement or freedom to move services, goods or capital as well as their freedom to reside or to set up the seat of their activities in the Community.[475]

Tryfonidou supports such reasoning in that the arguments expressed by Advocate General Maduro could lead to the proposition that, as a consequence of translating the economic freedoms into citizenship rights, the Court of Justice has placed the market freedoms on the road that leads to convergence.[476]

Any assumption relating to an adoption of a pure market access test with respect to the issue of the application of (all) Treaty free movement rights to national measures is an intriguing prospect. Nevertheless, elevating the market access test to a central, dominant position within the process used to assess the legality of the national measure would raise some concerns. Some of those concerns are addressed below.

II. Reviewing the Reviewers

There has been a long history of the use of the market access test within the jurisprudence of goods,[477] persons,[478] services,[479] and capital.[480] The market access test is referenced in

[475] Opinion of Advocate Gen. Poiares Maduro, Joined Cases C-158 & 159/04, Alfa Vita Vassilopoulos AE, formerly Trofo Super-Markets AE v. Greece, 2006 E.C.R. I-8135, para. 51 (emphasis added). *See also* Opinion of Advocate Gen. Bot, Case C-110/05, Comm'n v. Italy, 2009 E.C.R. I-519, paras. 83, 118.

[476] *See* Tryfonidou, *supra* note 136, at 36, 55 (suggesting it is a "novel idea" to place the argument in the context of the "broader developments which have taken place in the context of Union Citizenship," even if the move to convergence has been an "unspoken" determination). *See also* Case 205/07, Lodewijk Gysbrechts and Santurel Inter BVBA, 2008 E.C.R. I-9947; Case C-441/04, A-Punkt Schmuckhandels GmbH v. Claudia Schmidt, 2006 E.C.R. I-2093; C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093.

[477] *See* TFEU, *supra* note 1, at art. 34.

[478] *See supra* note 450.

[479] *See* TFEU, *supra* note 1, at art. 56.

[480] *See* TFEU, *supra* note 1, at art. 63.

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key judgments,[481] opinions of Advocates General,[482] and discussions in academic papers.[483] Nonetheless, despite the appearance of a tangible and increasing readiness to resort to the use of the market access test as a central plank in the assessment of the legality of national measures, the test remains without judicial definition.[484] In addition, there has been academic argument to the effect that the market access test is one that does not readily open itself to particular definition[485] and that there is a measure of "*uncertainty* which surrounds this . . . concept."[486] Snell, for example, suggests that "the very ambiguity of the term may explain its use by and the usefulness for the Court."[487] He argues that the reference to market access may allow the Court to avoid difficult choices in relation to the reach of free movement law.[488] Uncertainty in this context allows "maximum freedom of manoeuvre"[489] and the lack of clear content gives the Court freedom "either to approve or to condemn measures that it happens to like or dislike."[490]

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[481] *See Keck and Mithouard*, 1993 E.C.R. I-6097, para. 17; Case C-384/93, Alpine Investments BV v. Minister van Financiën, 1995 E.C.R. I-1141, para. 38; *Gourmet Int'l.*, 2001 E.C.R. I-1795, para. 18, 20; C-110/05 Comm'n v. Italy, 2006 E.C.R. I-2093, paras. 34, 36, 37. *See also* Snell, *supra* note 134.

[482] *See* Opinion of Advocate Gen. Jacobs, Case C-412/93, Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA, 1995 E.C.R. I-179, paras. 39–56; Opinion of Advocate Gen. Fennelly, Case C-190/98, Volker Graf v. Filzmoser Maschinenbau GmbH, 2000 E.C.R. I-493; Opinion of Advocate Gen. Tizzano, *CaixaBank*, 2004 E.C.R. I-8961; Opinion of Advocate Gen. Maduro, *Alfa Vita*, 2006 E.C.R. I-8135; Opinion of Advocate Gen. Kokott, *Mickelsson*, 2009 E.C.R. I-4273. *See also* Snell, *supra* note 134.

[483] This is well documented, not only in this Article but in articles such as Catherine Barnard, *Fitting the Remaining Pieces into the Goods and Persons Jigsaw?*, 26 Eur. L. Rev. 35 (2001); Peter Oliver and Stefan Enchelmaier, *Free movement of Goods: Recent Developments in the Case Law*, 44 Common Mkt. L. Rev. 649, 674 (2007); Snell, *supra* note 134; Eleanor Spaventa, *From Gebhard to Carpenter: Towards a (non-)economic European Constitution*, 41 COMMON MKT. L. REV. 743 (2004); Stephen Weatherill, *After* Keck*: Some Thoughts on how to Clarify the Clarification*, 33 COMMON MKT. L. REV. 885 (1996); Spaventa, *supra* note 136. *See also* BARNARD, *supra* note 171, at 21–24; PAUL P. CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES AND MATERIALS 694–95 (4th ed. 2008) in the context of the free movement of goods.

[484] Adequate definitions relating to nondiscrimination have been provided. With respect to the Treaty rights of establishment and the right to supply services, it has been held that "the principle of equal treatment . . . prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result." *Case* C-3/88, Comm'n v. Italy, 1989 E.C.R. 4035, para. 8.

[485] In the context of a discussion in relation to *Keck and Mithouard*, the concept has been identified as "inherently nebulous." *See* Oliver and Enchelmaier, *supra* note 483.

[486] BARNARD, *supra* note 171, at 21 (emphasis added).

[487] Snell, *supra* note 134, at 468.

[488] *See id.* at 469.

[489] *Id.*

[490] *Id.*

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1. Definition: Advocates General and Commentators

An increasing use of the market access test by the Court of Justice lends support to an argument for the provision of judicial definition.[491] Definitions of the test have been suggested by academic writers; Spaventa, for example, presents an *economic* interpretation of the notion of "barrier to market access."[492] At one extreme in this interpretation exists a barrier to entry created through either circumstances or legislation;[493] in contrast, the other economic extreme presents a potential barrier imposed by *any* regulation.[494] In the context of European Union law, Spaventa argues that the concept of market access has adopted an *intuitive*[495] rather than an economic approach.[496] The intuitive approach is located somewhere between the two identified economic extremes.[497] It is an approach that attempts "to provide a test which would allow . . . [distinction] between rules which should subjected to judicial scrutiny and rules considered neutral as regards intra Community trade."[498] The latter rules would fall

[491] *See, e.g.*, *id.*

[492] *See* Spaventa, *From Gebhard*, *supra* note 483, at 757.

[493] *See id.* (making a comparative assessment about "[t]he ability for an economic actor to gain access to a market *on an equal footing* with other economic operators" (emphasis added)). Spaventa adds that "[t]his definition seems entirely consistent with the Court's view taken in *Keck,* but for the fact that the Court makes it clear that a rule preventing market access (i.e., a total barrier) falls within the definition, regardless of discrimination." *Id.*

[494] *See id.* at 757 (noting that "*any* regulation imposes and implies compliance costs" (emphasis added)).

[495] *See* Snell, *supra* note 134, at 468–69 (noting that, in the context of a lack of clear content in the test of market access, "[m]arket access may simply provide a sophisticated-sounding garb that conceals decisions based on intuition").

[496] *See* Spaventa, *From Gebhard*, *supra* note 483, at 758. A later article expresses the same view that "[i]n the context of the free movement provisions, little effort has been devolved to defining the concept of market access; thus, so far, the concept has been used in an intuitive way rather than resting on accurate economic analysis." Spaventa, *supra* note 136, at 923. *See also* Opinion of Advocate Gen. Bot, Case C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093, para. 116 ("As regards, . . . other categories of measures, it is necessary to examine their specific impact on patterns of trade, but the analysis to be carried out by the Court *should not involve any complex economic assessment*." (emphasis added)).

[497] *See* Spaventa, *From Gebhard*, *supra* note 483, at 757.

[498] *Id.* at 758. Spaventa observes that those who would support the "market access" test would reject "a purely discriminatory assessment." *Id.* There is, however, "an attempt to provide a test which would allow us to distinguish between rules which should be subjected to judicial scrutiny, and rules considered neutral as regards intra-Community trade which should fall altogether outside the scope of the Treaty free movement provisions." *Id.* Note in this content the view of Advocate General Lenz that there should exist "a distinction between rules which regulate *access* to an occupational activity (which should be scrutinized), and rules which regulate the *exercise* of that activity (which should not be scrutinised)." *Id.* at 758 n.48.

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outside the scope of the Treaty free movement provisions.[499] Spaventa warns that the adoption of a default intuitive approach and the failure of the Court to use economic analysis "carries with it the risk of an overbroad interpretation of the notion of a barrier caught by the Treaty."[500] It is for this reason it is argued that the use of the market access test has always been qualified by the proponents of that test; such qualification has been through the route of "*de minimis* or notions such as a substantial *hindrance* to market access."[501] It is in the latter context that both *Commission v. Italy*[502] and *Mickelsson*[503] are arguably significant judgments, because both employ the market access test *without* such qualification. The reality of these judgments is that "[t]he Court makes no such attempt [to qualify the application of the market access test]; rather, *any (other) measure which hinders access of products originating in other Member States to the market of a Member State* is to be considered a measure having equivalent effect in need of justification."[504]

Given the manner in which the market access test was relied upon in both *Commission v. Italy*[505] and *Mickelsson*[506] without qualification, together with the previous record of the adoption by the Court of Justice of an *intuitive* approach to that test, it is arguable at least that it becomes a more compelling reason for the Court of Justice to provide a workable definition[507] of the concept. The problem at present appears to be a seeming inability to establish accurately which national rules are to be covered by the concept and which are not. It is in the present context that market access could be seen as a blunt instrument, covering national measures that impose a barrier to entry to the host market as well as those measures that impose restrictions on the product or migrant after entry.

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[499] *See id*. at 758.

[500] Spaventa, *supra* note 136, at 923. Hence "it becomes difficult to identify which, if any, national rules fall outside the scope of the Treaty and therefore need not be justified." *Id.*

[501] *Id.* at 923 ("Below which national rules would not need to be justified") (emphasis added).

[502] C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093.

[503] *Mickelsson*, 2009 E.C.R. I-4273.

[504] Spaventa, *supra* note 136, at 924 (emphasis added).

[505] C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093.

[506] *Mickelsson*, 2009 E.C.R. I-4273.

[507] Spaventa, *supra* note 136, at 924: "But once we apply an *effet utile* approach to market access, so that any rule which not only directly limits access to a given market is caught by Art. 28 EC but also that which discourages an importer from accessing that market, then it is difficult to identify which rules, if any, would actually fall outside the market access test. In this respect, *Commission v Italy* and *Mickelsson and Roos* seem to have brought the case law on goods in line with the case law on persons." *Id.*

There have been other elaborations of the substance of market access. Weatherill, while addressing but not confined to the issue of the "selling arrangement," proposed a test of "direct or substantial hindrance" to "market access."[508] He writes,

> Measures introduced by authorities in a Member State which apply equally in law and in fact to all goods or services without reference to origin and which impose no *direct or substantial hindrance* to the access of imported goods or services to the market of that Member State escape the scope of the application of Articles 30 and 59.[509]

It would follow that measures "which either apply unequally in law . . . or fact to goods and services with reference to origin or which impose a direct and substantial hindrance to the access of imported goods or services"[510] to the host market will fall within the scope of the application of the provisions relating to goods[511] and to services.[512]

In the context of *Keck*, Weatherill's observation addresses the need to place national rules, which do not threaten the internal market, outside the scope of EU law. It is an observation that could, however, apply to free movement jurisprudence in general.[513] The problematic identification of a national measure being of *direct or substantial hindrance* to access was illustrated in the following terms: "Complete bans on the sale of goods and services through the national territory may apply equally in law and in fact to all goods and services, but the ban impedes market access and accordingly must be justified."[514] There

[508] Weatherill, *supra* note 483, at 896–97. *See also* Spaventa, *From Gebhard*, *supra* note 483, at 758. *See also* Barnard *supra* note 483, at 52–53 (discussing the possibility of a general test for *market access* based on the "prevention or direct and *substantial hindrance* of access to the market" (emphasis added)).

[509] Weatherill, *supra* note 483, at 896–97 (emphasis added). *See also* TFEU, *supra* note 1, at arts. 34, 56.

[510] *Weatherill, supra* note 483, at 897.

[511] TFEU, *supra* note 1, at art. 34.

[512] TFEU, *supra* note 1, at art. 56.

[513] *See* Weatherill, *supra* note 483, at 897. The effect of the "formula" places the onus then on the issue of *justification*. *Id.* "Non-discriminatory national measures that cross the threshold of a sufficient restriction on market access are compatible with EC law only provided: they are justified by mandatory requirements in the general interest; that they are apt to achieve the objective which they pursue; and that they do not go beyond what is necessary in order to attain it." *Id. See also Dieter Kraus*, 1993 E.C.R. I-1663; Case C-55/94, Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165; *Rewe-Zentral*, 1979 E.C.R. 649.

[514] Weatherill, *supra* note 483, at 896–97, 899. *See Her Majesty's Customs*, 1994 E.C.R. I-1039; Case C-34/79, Regina v. Maurice Donald Henn and John Frederick Ernest Darby, 1979 E.C.R. 3795.

will be other instances wherein the national measure will not be deemed to be a direct or substantial hindrance.[515]

Advocate General Jacobs has proposed that in the instant context "the appropriate test . . . is whether there is a *substantial restriction* on . . . access."[516] He argued that "a test based on the extent to which a measure hinders trade between Member States by restricting market access seems the most obvious solution."[517] The Advocate General noted that, in the instances wherein measures are applicable without distinction, it "would it be necessary to introduce a requirement that the restriction, actual or potential, on access to the market must be substantial."[518] Such argument would broach consideration of what the imposition of *substantial restriction* in this context actually requires. Is it, for example, an issue of an assessment of how many goods are affected, or a qualitative question relating to the type of measure under scrutiny?[519] It may be noted that the judgments of *Commission v. Italy*[520] and *Mickelsson and Roos*,[521] in relation to the free movement of *goods*,[522] arguably seem to have embraced the idea of *substantial hindrance* as proposed by Advocate General Jacobs. *Commission v. Italy*[523] decided that there had

[515] *See* Case C-379/92, Criminal proceedings against Matteo Peralta, 1994 E.C.R. I-3453, para. 24 (stating that the effect of Italian rules on the freedom to provide services was *too uncertain and indirect* as to hinder trade between *Member States*). *See also* Weatherill, *supra* note 483, at 896–97, 899 (arguing that such amounts to "a statement of no direct restriction on market access.").

[516] Opinion of Advocate General Jacobs, Case C-412/93, Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA, 1995 E.C.R. I-179, para. 42 ("That would of course amount to introducing a de minimis test into Article 30") (emphasis added). The Opinion was delivered in the context of TEC art. 30 (now 34 TFEU) vis-à-vis the application of the concept of the "selling arrangement." The Advocate General was of the opinion that Article 30 (now 34 TFEU) be regarded as applying to non-discriminatory measures which are liable substantially to restrict access to the market. *Id.* at para. 49.

[517] *Id*. *See also, e.g.*, Opinion of Advocate Gen. Stix-Hackl, Case C-322/01, Deutscher Apothekerverband eV v. 0800 DocMorris NV and Jacques Waterval, 2003 E.C.R. I-14,887, para. 78.

[518] Opinion of Advocate Gen. Jacobs, Case C-412/93, Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA, 1995 E.C.R. I-179, para. 44. So, for example, where there is a denial of access altogether, there is "a *substantial barrier* to market access." *Id.* (emphasis added). By contrast, where the measure merely restricts the goods (as in the case of a selling arrangement), its impact will depend, for example, upon whether the measure applies to most goods, certain goods or to all goods. *Id.* at para. 45.

[519] *See, e.g.*, Tryfonidou, *supra* note 466, at 51 (explaining that the first category would broach the adoption of a de minimis test, whereas a qualitative identification of the measure on the other hand relates for example to the type of measure scrutinised and whether it is harmful to interstate trade).

[520] C-110/05, Comm'n v. Italy 2006 E.C.R. I-2093.

[521] *Mickelsson*, 2009 E.C.R. I-4273.

[522] TFEU, *supra* note 1, at art. 34.

[523] C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093.

been a restriction[524] because the national rules limited the use of trailers in Italy and consequently reduced the opportunities for trade.[525]

2. Market Access: Notion

Given that there is an absence of a definitive jurisprudential definition of "market access," and that an economic basis for the test is appealing because it at least offers some certainty, it might be appropriate to give some consideration to the conceptual basis which underpins the test of market access.

With respect to the notion of market access[526] within EU free movement jurisprudence relating to persons,[527] the Court has distinguished between *access* and *exercise* relating to the free movement right. This division, as noted by Snell, translates to "the take-up and pursuit of an *activity*, or an entry to and operation in the market."[528] Advocates General have produced different opinions on such a division. Advocate General Lenz in *Bosman* expressed some support in favour of this distinction. He was of the opinion[529] that the football transfer rules "do not concern the possibility of *access* for foreign players as such, but the *exercise of* the occupation."[530] Support for this view is also found in Advocate General Fennelly's opinion in *Volker Graf v. Filzmoser Maschinenbau GmbH*:

> The imposition of conditions regarding entry to the market or the taking up of economic activity is itself sufficient to establish the existence of a restriction . . . .

[524] *See id.* at para. 64 (justifying the measure in that instance by reasons of road safety).

[525] *Id.* at para. 58. It was stated that Article 34 TFEU reflects the obligation to respect the principle of ensuring free access of Union products to national markets. *See id.* at summary.

[526] *See* Snell, *supra* note 134, at 443. The notion of "market access" is an autonomous one. It appears within competition and WTO law but Snell notes that "[t]he way the concepts of barriers to entry and market access have developed in these contexts are fundamentally different from EU free movement law and as a result, any borrowing would be counterproductive." *Id.*

[527] For provisions relating to the worker, see TFEU, *supra* note 1, at art. 45; for establishment, see TFEU, *supra* note 1, at art. 49; for services, see TFEU, *supra* note 1, at art. 56.

[528] Snell, *supra* note 134, at 443 (reflecting the right in TFEU art. 45 "(a) to accept offers of employment actually made; . . . (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State."). Snell notes that (a) relates to access to employment and seems to be "absolute." On the other hand (c) relates to rights after such access, "when the actual occupation has been exercised." *Id.* at 444.

[529] *See Bosman Case*, 1995 E.C.R. I-4921 (arguing that the evenhanded nature of the rules was of no relevance, since they affected *access* to the labour market).

[530] *Id.* at para. 210 (emphasis added).

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> The same, broadly speaking, can probably also be said of formal conditions imposed regarding matters which are intimately connected with successful access to the market, such as those governing recognition of a qualification which is necessary or beneficial to the exercise of many professional activities.[531]

In contrast to the Opinions of Advocates General Lenz and Fennelly, however, Advocate General Alber has argued that "[r]ules on the exercise of a profession . . . must . . . be complied with directly by a citizen of the Union who wishes to assert the fundamental freedom under Article 48 of the EC Treaty."[532]

Snell labels the distinction between access and exercise a "superficial appeal" because "the impact of a measure on cross-border situations is a function of its restrictiveness, and does not depend on the stage at which it operates."[533]

3. Nondiscrimination

One of the important features of the judgments of *Commission v. Italy*[534] and *Mickelsson*[535] is the adoption of a "market access" test, which was free of any reference to discrimination.[536] Tryfonidou has observed that, in the context of the market freedoms other than those related to goods; the Court "appears to be moving towards convergence through the adoption of a pure market access approach and has dispensed with the need

[531] Opinion of Advocate General Fennelly, Case C-190/98, Volker Graf v. Filzmoser Maschinenbau GmbH, 2000 E.C.R. I-493, para. 30.

[532] Opinion of Advocate General Alber, Case C-176/96, Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v. Fédération royale belge des sociétés de basket-ball ASBL (FRBSB), 2000 E.C.R. I-2681, para. 48. *See also* TFEU, *supra* note 1, at art. 45.

[533] Snell, *supra* note 134, at 445 (noting that the distinction is not accepted by the Court of Justice). The Court held in *Commission v. Denmark* that "[t]he manner in which an activity is pursued is liable also to affect access to that activity. Consequently, legislation which relates to the conditions in which an economic activity is pursued may constitute an obstacle to freedom of movement within the meaning of that case-law." Case C-464/02, Comm'n v. Denmark, 2005 E.C.R. I-7929, para. 37.

[534] C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093.

[535] *Mickelsson*, 2009 E.C.R. I-4273.

[536] *See* Tryfonidou, *supra* note 136, at 48. However, it should be noted that, in the context of TFEU art. 34 (ex TEC art. 28), *Keck and Mithouard* was imbued with a respect for the principle of nondiscrimination "because it only refers to, and, apparently, solely brings within the scope of art. 28 EC, measures that either totally prevent access to the market (which are inherently discriminatory in nature) or discriminate against imported products as regards access to the market." *Id.*

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of proving discrimination in law or in fact."[537] Such observation may indeed prove correct, but at present there remains a strong argument for a continued use of the principle of nondiscrimination in the jurisprudence relating to the free movement of goods.[538] In *Commission v. Italy*, for example, the Court substituted reference to the "selling arrangement" by declaring "[c]onsequently, measures adopted by a Member State the object or effect of which is to *treat* products coming from other Member States *less favourably* are to be regarded as measures having equivalent effect to quantitative restrictions on imports."[539] Such statement arguably would appear to be an explicit acknowledgement by the Court that the principle of nondiscrimination is an essential element in the application of Article 34 TFEU.[540] A recent judgment with respect to the free movement of goods[541] has been more unequivocal. *Asociación para la Calidad de los Forjados (Ascafor), Asociación de Importadores y Distribuidores de Acero para la Construcción (Asidac) v. Administración del Estado, et al* held that "Article 34 TFEU reflects the obligation to comply with the principles of non-discrimination."[542] With respect to jurisprudence relating to freedoms other than those applicable to goods,[543] one commentator has recently written that

> It is an anomaly in the sense that the Court, in the context of the other market freedoms, appears to be moving towards convergence through the adoption of a pure market access approach and has dispensed with the need of proving discrimination in law or in fact before a measure can be caught by the market freedoms.[544]

[537] *Id.* at 54.

[538] *See* TFEU, *supra* note 1, at art. 34.

[539] Case C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093, para. 37 (emphasis added).

[540] *See* Case C-205/07, Lodewijk Gysbrechts and Santurel Inter BVBA, 2008 E.C.R. I-9947, paras. 40–44 (holding that the scope of Article 35 TFEU with respect to the free movement of exports was defined by the principle of nondiscrimination); Wenneras & Moen, *supra* note 136, at 393; Anthony Dawes, *A Freedom Reborn? The New Yet Unclear Scope of Article 29 EC*, 34 EUR. L. REV. 639, 641–43 (2009).

[541] *See* TFEU, *supra* note 1, at art. 34.

[542] Case C-484/10, Asociación para la Calidad de los Forjados (Ascafor), Asociación de Importadores y Distribuidores de Acero para la Construcción (Asidac) v. Administración del Estado, et al, judgment of 1 March 2012.

[543] *See* TFEU, *supra* note 1, at art. 34.

[544] *See* Tryfonidou, *supra* note 466, at 54.

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Yet there is also, for example, reliance on the concept of nondiscrimination within the jurisprudence relating to citizenship. The concept of citizenship[545] itself has been argued to form the genesis of the convergence in free movement law, which focuses on market access.[546] Citizenship judgments such as *María Martínez Sala v. Freistaat Bayern* [547] and *Carlos Garcia Avello v. Belgian State*[548] have held that the principle of nondiscrimination on the grounds of nationality applies as equally to the citizen of the Union as well as to the other free movement provisions.[549]

There are, however, general issues arising from the operation of the principle of nondiscrimination within free movement jurisprudence vis-à-vis its relationship with the other principles. Snell observes, for example, that "the relationship between the term [of market access] and other concepts such as 'discrimination' . . . is by no means clear."[550] Advocate General Jacobs's Opinion in *Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA*[551] classified the reality of *Keck*[552] "as concerning discrimination."[553] However, the Advocate General in that opinion was of the view that, in the context of establishing a single market, nondiscrimination was "not a helpful criterion."[554] He also observed that "the application of the discrimination test would lead to the fragmentation of the Community market,"[555] since the concept set up the prevailing "local conditions" as the benchmark for the application of Article 34 TFEU. In conclusion, the Advocate General was of the opinion that "[a] discrimination test is therefore inconsistent as a matter of principle with the aims of the Treaty";[556] the measurement, he

[545] *See* TFEU, *supra* note 1, at art. 20 ("Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.").

[546] *See* Tryfonidou, *supra* note 136, at 36, 55.

[547] Case C-85/96, María Martínez Sala v. Freistaat Bayern, 1998 E.C.R I-2691, paras. 55, 62, 64.

[548] C-148/02, Carlos Garcia Avello v. Belgian State, 2003 E.C.R. I-11613, para. 29.

[549] *See supra* note 407.

[550] Snell, *supra* note 134, at 437.

[551] *Leclerc-Siplec*, 1995 E.C.R. I-179.

[552] *Keck and Mithouard*, 1993 E.C.R. I-6097.

[553] Opinion of Advocate Gen. Jacobs 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, paras. 39–40.

[554] *Id.* at para. 40.

[555] *Id.*

[556] *Id.*

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argued, ought instead to be one of "access to the entire [EU] market."[557] The standard measurement should not be established relative to prevailing local conditions.[558]

G. Conclusion

There is abundant evidence from perusal of free movement jurisprudence that the principle of "market access" occupies a prominent position in the equation applied in the assessment of the legality of the national measure by the Court of Justice in the context of the free movement provisions[559] of European Union law. The "market access" test has been used beyond goods,[560] Prechal comments that free movement jurisprudence has indicated that "market access has become the main criterion for adjudicating national measures under the prohibitive rules on free movement, which entails that national rules preventing or hindering market access are unlawful, irrespective of whether they discriminate against other persons, services or capital."[561] There appears to be abundant evidence that the claim by Prechal is either correct or is at least currently proving to be a fair representation which will reflect the future composition of free movement jurisprudence.

This article has shown that the language and ethos of "market access" is firmly embedded in free movement jurisprudence and that the principle is enjoying resurgent influence across all such jurisprudence in the process of application of Treaty rights to national law. In the realm of persons[562] and services,[563] for example, judgments holding certain measures "liable to hamper or to render less attractive," "liable to prohibit or otherwise impede," or "prohibit, impede or render less attractive" the exercise of free movement are infused with the principle of market access.[564] There appears to be no weakening of the Court's desire to make use of the test of market access as an integral element in the process of the assessment of the legality of the national measure.[565] The continued use of

[557] *Id.* Although the opinion was set in the context of the application of TFEU art. 34, the rationale of the Advocate General's argument could be applied equally across other Treaty free movement rights .

[558] *See id.*

[559] *See supra* note 407.

[560] *See* Sacha Prechal & Sybe A. de Vries, *Seamless Web of Judicial Protection in the Internal Market?*, 34 EUR. L. REV. 5, 8 n.15 (2009).

[561] *See id.*; BARNARD, *supra* note 171, at 21.

[562] *See supra* note 450.

[563] *See* TFEU, *supra* note 1, at art. 56.

[564] *See* BARNARD, *supra* note 171, at 19.

[565] The recent discussion on *citizenship* would appear to confirm this.

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the market access test in free movement jurisprudence has distinct advantages. Based upon the articulation in *Cassis de Dijon* that goods lawfully produced in one Member State should enjoy free and unrestricted access to the market of the host state, the use of the market access principle arguably contributes towards achieving a single market.[566] The effect of pegging the enquiry to the issue of market access is that restrictions[567] on the imported good or migrant EU national can be removed.[568] The advantage of the market access approach is that it allows the adoption of strategies to control the marketplace on a pan-European basis, protecting that wider marketplace from the sectionalised interests of Member States. In the pan-European marketplace, the producer of goods benefits from economies of scale, and the consumer benefits from greater choice. In the realm of the free movement of persons[569] and services,[570] the migrant EU national can engage in a trade or profession and is able to receive services in all Member States across the EU market. Assessing market access is not a narrow prescription. On the contrary, it encourages both macro- and micro-economic activity within an internal market of 500 million people.[571] The benefits of encouraging market access accrue both to the individual producer/exporter and to the migrant EU national, and to the European Union market as a whole.

There are, however, disadvantages to the use of the market access principle within the jurisprudence of the free movement of goods,[572] persons,[573] services,[574] and capital.[575] It is a principle that permits more intrusion into national competences, because national measures held unlawful will be struck down unless *justified* by the Member State.[576] One

[566] *See Rewe-Zentral*, 1979 E.C.R. 649, para. 14 ("There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, [goods] should not be introduced into any other Member State.").

[567] Or *obstacles*.

[568] It would be rendered unlawful. The onus is then placed on the Member State to *justify* the *restriction* or *obstacl*e to the free movement right.

[569] *See supra* note 450.

[570] TFEU, *supra* note 1, at art. 56.

[571] The "provisional value" for the EU's population in 2011 is 502476606 people. *See Eurostate News Release*, EUROPEAN UNION (July 28, 2011), http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-28072011-AP/EN/3-28072011-AP-EN.PDF (last visited May. 23, 2012).

[572] *See* TFEU, *supra* note 1, at art. 34.

[573] *See supra* note 450.

[574] *See* TFEU, *supra* note 1, at art. 56.

[575] *See* TFEU, *supra* note 1, at art. 63.

[576] *See Dassonville,* 1974 E.C.R. 837. Note that, in the context of the free movement of *goods*, the problem arising in relation to the application of TFEU art. 34 arose from the presentation of an extremely wide definition of the

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concern relates to *how* particular national measures are to be targeted for the scrutiny of European Union law. There is a certain unpredictability of usage; virtually *all* national measures arguably affect trade between Member States in some way, even if the effect on that trade is extremely slight. In this respect, there may be some cause for apprehension: the Court's use of the test without limiting principles (such as de minimis or remoteness) in the context of goods in *Commission v. Italy*[577] and *Mickelsson*[578] alerts to the possible danger of blunt usage of the market access principle. In extreme circumstances, the use of the market access principle may lead to an unrestrained intrusion into the national markets of Member States. In the absence of any inherent limiting principles, nothing prevents the market access test from being applied as an unrefined instrument, the purpose of which would be to scythe down national measures deemed intuitively by the Court of Justice to have hindered trade between Member States. That the principle of market access appears practically to be based on the Court's intuition may prove to be an issue that has to be addressed within forthcoming jurisprudence. Replacing *intuition* as the basis of the assessment of market access with an economic assessment related to the specific instances of scrutiny of national measures would build in some degree of certainty in the application of Treaty free movement jurisprudence to national measures.

Although it would be welcomed by some, the establishment of a tangible economic basis to underpin the principle of market access does not represent an absolutely failsafe solution. The adoption of an economic basis to the assessment of market access in free movement jurisprudence raises other issues. One disadvantage of embracing an economic basis in such circumstances is that the litigant would presumably have the difficult task of producing qualitative data relating to alleged hindrance to the free movement right. The advantage in the particular instances wherein such data could be produced would result from the element of objectivity[579] that would be thereby introduced into the equation used to apply Treaty free movement law to national measures.

A further observation in the context of positioning the place of the market access test across free movement jurisprudence is that the market access test of *Commission v. Italy*[580]

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concept of the "measure having equivalent effect" through *Dassonville*. The link between TFEU art. 34 and the internal market had thereby been pushed too far in favour of general review of national market regulation. The jurisprudence in consequence was dissociated from a need to show a hindrance to trading activities aimed at the realization of the internal market. *See* Weatherill, *supra* note 483, at 896–97, 905.

[577] C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093.

[578] *Mickelsson*, 2009 E.C.R. I-4273.

[579] By contrast, an *intuitive* assessment of whether the national law has hindered "market access" is, on the other hand, open to the charge that the resulting assessment may be tainted with an element of subjectivity.

[580] Case C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093, para. 56.

and *Mickelsson*[581] arguably gives the importer/migrant EU national not only a right of *access* to the market, but also a right not to be restricted *within* the market of the host state. If this analysis is correct, then arguably the jurisprudence of goods has moved closer to reflect that of persons,[582] which has evidenced a movement towards placing the onus on Member States being required to justify any restriction on individual.[583]

It has been observed that the recent use of the market access test presents "a fine contribution to the process towards convergence among the market freedoms."[584] There is much merit in such an observation. However, it remains far from clear at the present time that adoption of the market access test, either as the key or sole element in the assessment determining the legality of national measures, would represent the most propitious way forward for free movement jurisprudence. The use of the test across all four freedoms seems to represent the Court's current thinking as it seeks to develop EU free-movement jurisprudence as "fit for purpose" in the market place of the twenty-first century.

However, this article raises doubts about the concept that the market access test should be regarded as a nirvana which would deliver a uniform application of Treaty free movement rights across the twenty-seven Member States of the European Union. In any headlong dash towards the creation of an internal market for the EU, it is arguable that the role of principles aside from that of market access within the process of applying the Treaty free movement provisions to national measures ought not to be overlooked. Indeed, at least when pertaining to goods, the old familiar workhorses of justification and proportionality were evident within the process of enquiry as to the legality of the national measures in *Commission v. Italy*[585] and *Mickelsson*.[586] The reliance in these judgments on the traditional constituent principles that have been integral parts of the framework for the Court's enquiry into the legality of national measures properly raises the issue of whether free movement jurisprudence can be either sustained or be as effective when the market access principle is the sole focus in the assessment of the legality of the national measure.

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[581] *Mickelsson*, 2009 E.C.R. I-4273.

[582] *See* Spaventa, *supra* note 136, at 924–25. Jurisprudence which, Spaventa has argued, concerns not only *access* to the market but probably—and more importantly—rules which *restrict* activities within the market place. These are described as national rules which discourage the importer's market penetration in that the consumer base is reduced or the costs of the migrant are increased.

[583] The application of the "market access" test must in principle then be *justified* in the particular circumstances along with the benchmark requisites of necessity and proportionality. *See id.* at 925.

[584] Tryfonidou, *supra* note 136, at 55.

[585] Case C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093.

[586] *Mickelsson*, 2009 E.C.R. I-4273.

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The methodology of current jurisprudence appears to represent a precursor to the establishment of some degree of convergence in the translations of Treaty free movement rights through the principle of market access with respect to national measures. It has been argued elsewhere that it would be more genuine for the Court of Justice to maintain an "openness" in its reliance on the principles used as tools in its jurisprudence. It may be instructive at this juncture, for example, to recall that both the judgments of *Commission v. Italy*[587] and *Mickelsson*[588] were structured around restriction, justification, and proportionality, as well as the notation[589] in *Commission v. Italy*[590] that, in addition to respecting free access to Community markets, the provision relating to the free movement of goods respected the principles of nondiscrimination and mutual recognition.[591] Support for such proposition arguably is found in Wenneras's observation that "[i]t is at the outset striking how the Court has been at pains to show that the ruling amounts to an application and consolidation of existing principles rather than marking a new twist in the case law."[592]

"Back to the future" may well be the appropriate metaphor in the context of identifying the process of the judicial application of these various principles to national measures. In the future, free movement jurisprudence may clarify the restriction to the free movement right through the old chestnut principles of nondiscrimination and mutual recognition, as well as, that of market access in situations where this test will add value to the resulting mix. Clarification of these issues by the Court of Justice might indeed represent the pot of gold at the end of the jurisprudential rainbow in the context of assessing the application of Treaty free movement law to national measures. In the instant context, it might also be useful to dispense with the diverse nomenclature ascribed to the national measures, such as "liable to hamper or to render less attractive," "liable to prohibit or otherwise impede," "prohibit, impede or render less attractive," and "hinder or make less attractive."

[587] Case C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093.

[588] *Mickelsson*, 2009 E.C.R. I-4273.

[589] *See* TFEU, *supra* note 1, at art. 34.

[590] Case C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093.

[591] Case C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093, para. 34 (explaining that TFEU art. 34 "reflects the obligation to respect the principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of Community products to national markets").

[592] Wenneras & Moen, *supra* note 136, at 392 ("This follows from the structure and wording of the reasoning, in which the Court emphasizes that art. 34 TFEU reflects the principles of non-discrimination and of mutual recognition; 'hence,' product requirements are caught by art. 34 TFEU, whereas 'in contrast' selling arrangements may be caught only if proven discriminatory."). This reasoning is reminiscent of that set out in *Keck*. There is also in this context nothing jurisprudentially mischievous in the maintenance of the focus of enquiry upon the national *restriction* to the free movement right. *See infra* Part D.II.3.

Although such adjectives are redolent of the principle of market access, it would be a more honest reflection of the exhortations of Treaty free movement rights if these descriptions were omitted in deference to clear focusing in each instance of the employment of the applicable principle[s] of European Union law. In appropriate instances, this may well be the principle of market access, but in the instances in which that particular test arises, it ought to be incumbent on the Court to articulate how the specific national measure in issue has restricted the access of the import or migrant national to the host market.

The virtue of positioning judicial focus in the first instance on the *restriction* to free movement rights is not only reflective of Treaty exhortations; it also allows the employment and development of a range of principles to ensure that free movement rights are upheld. The principles of nondiscrimination, mutual recognition, and—importantly, in the context in which its use is appropriate—market access[593] are all tools which form the available arsenal to employ against the national measure alleged to be restrictive of free movement rights. The existence and potential deployment of each one of those tools in particular instances allows for a flexible approach to the process of judging the legal status of the national measure vis-à-vis the application of Treaty free movement rights. The availability of such tools of analysis common to all freedoms thus allows for a certain symbiosis to attach to their development by the Court of Justice. By contrast, to allow ubiquitous homogeneity in such matters would arguably not be a mature and rational response to the issues within the process of the scrutiny of national measures by the Court.

Finally, in the context of the free movement of services,[594] a recent judgment may prove to be a significant pointer with respect to the future use of the market access principle across *all* free market jurisprudence,[595] and in particular to the use of that principle in the context of the free movement of *persons*. The judgment in question was given in relation to the provision of services;[596] its language was "borrowed" from that used previously in the jurisprudence of goods.[597] *Zeturf Ltd v. Premier ministre*,[598] a judgment delivered 30 June 2011, appears to adopt both the language and rationale of the free movement of goods,[599]

[593] Together with the ubiquitously available *justification* process.

[594] TFEU, *supra* note 1, at art. 56.

[595] For provisions relating to workers, TFEU, *supra* note 1, at art. 45; for establishment, TFEU, *supra* note 1, at art. 49 (particularly in this context in relation to *persons*).

[596] TFEU, *supra* note 1, at art. 56.

[597] *Ker-Optika*, judgment of 2 December 2010.

[598] Case C-212/08, Zeturf Ltd v. Premier minister, judgment of 30 June 2011.

[599] *Ker-Optika*, judgment of 2 December 2010.

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with specific reference to the judgment of *KerOptika*[600] to identify the restriction[601] on the free movement right to provide services. *Zeturf* held

> any restriction concerning the supply of games of chance over the internet is more of an obstacle to operators established outside the Member State concerned, in which the recipients benefit from the services; those operators, as compared with operators established in that Member State, would thus be *denied a means of marketing that is particularly effective for directly accessing that market*.[602]

The language employed in *Zeturf*[603] represents a cross-fertilisation of ideas poached from the arena of goods.[604] It is language clearly representative of an extending influence of the market access principle across Treaty freedoms. If *Zeturf*[605] represents a move towards establishing homogeneity as well as the use of the market access principle across all free movement jurisprudence, the Court of Justice should first reflect on the importance of other principles such as those of nondiscrimination and mutual recognition. For all their imperfections, the existence of these principles ought not to be overlooked. The strength of this sentiment is all the more appropriate, not least because the Treaty free movement provisions are not themselves homogenized; they display significant differences. The respect for human rights, for example, plays a more significant role within the freedoms relating to persons[606] and services[607] than it does in relation to that of the free movement of goods.[608] With respect to regulation in relation to the freedoms for the movement of

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[600] *See id*. para. 54. *See also* Case C-322/01, Deutscher ApothekerverbandeV v. 0800 DocMorris NV and Jacques Waterval, 2003 E.C.R. I-14887, para. 74.

[601] *See Zeturf*, judgment of 30 June 2011, para. 74.

[602] *Id.* (emphasis added).

[603] *Id.*

[604] *See* Ker-Optika, judgment of 2 December 2010, para. 54 ("It is clear that the prohibition on selling contact lenses by mail order *deprives* traders from other Member States of a *particularly effective means of selling* those products and thus significantly *impedes access* of those traders to the market of the Member State concerned." (emphasis added)).

[605] *See Zeturf*, judgment of 30 June 2011, para. 74.

[606] *See supra* note 450.

[607] *See* TFEU, *supra* note 1, at art. 56.

[608] *See* TFEU, *supra* note 1, at art. 34.

goods[609] and services,[610] the home state is the principal regulator, but it is by contrast the host state with respect to a migrant EU national who exercises the freedom of movement as a worker[611] or the right of establishment as a migrant.[612] It may be that, with respect to the jurisprudence of goods, that an unfettered access to the market is the guiding principle. That it is a "guide" and not the sole measure may, however, be its rightful place.[613] Such argument further adds support for resisting any proposition that advocates that the principle of market access ought to take an automatic precedence to the detriment of the principles of nondiscrimination and mutual recognition where an attack on national measures restrictive of free movement rights is in issue.[614]

If the composition of the jurisprudence is now truly reflective of a headlong surge towards establishing an internal market within the European Union, it may be appropriate to remember that "all that glitters is not gold."[615] It may be short-sighted not to accord proper prominence to the availability of the plethora of other principles and routes to free movement other than mere market access. Nondiscrimination, mutual recognition, and the process of justification[616] remain available to achieve the same ends. There must be some acknowledgment that if the market access principle is now to become the sole modus operandi for scrutinizing these matters, then in the cause of completing the internal market there may be a danger of a triumph of form over substance. The most effective way of achieving an internal market is to have strong, effective, and workable Treaty free movement principles. It is an equation in which a variety of principles ought to remain available to the Court. These available principles should include market access where appropriate, though its use ought not to be at the expense of the other principles available to the Court for this purpose.

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[609] *See* TFEU, *supra* note 1, at art. 34.

[610] *See* TFEU, *supra* note 1, at art. 56.

[611] *See* TFEU, *supra* note 1, at art. 45.

[612] *See* TFEU, *supra* note 1, at art. 49; BARNARD, *supra* note 171, at 25; Peter Oliver, *Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurtling in a New Direction?,* 33 FORDHAM INT'L L.J. 1423 (2011).

[613] Note, however, that, in the context of the application of TFEU art. 34, Advocate General Jacobs has expressed the view that "it would be more appropriate to measure restrictions against a *single test* formulated in the light of the purpose of art. 30." *See* Case C-412/93, Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA, 1995 E.C.R. I-179, para. 38.

[614] Note in this context that *Commission v. Italy* held "[i]t is . . . apparent from settled case-law that Article 28 EC (now 34 TFEU) reflects the obligation to respect the principle . . . of ensuring free access of Community products to national markets." C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093, para. 34.

[615] WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 2, sc. 7.

[616] The process importantly allowing for the operation of the principle of proportionality specifically directing the focus of the application of Treaty free movement law in particular instances.

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On the other hand, as Tryfonidou has observed, if there is to be a permanent move towards convergence following the employment of a pure market access test across the freedoms, "this appears to be the right time for the Court to provide a clear explanation as to what, exactly, falls within the scope of the market freedoms."[617] There is some evidence in recent jurisprudence, however, that the Court of Justice may support the view that a multifaceted and varied armoury should be available to the Court in the application of the free movement provisions of EU law to national measures. In *Asociación para la Calidad de los Forjados (Ascafor), Asociación de Importadores y Distribuidores de Acero para la Construcción (Asidac) v. Administración del Estado, et al*,[618] it was held with respect to the free movement of goods[619] that "Article 34 TFEU reflects the obligation to comply with the principles of nondiscrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as, the principle of ensuring free access of European Union products to national markets."[620] In a judgment comparable for its similar reinforcement of the applicability of these principles, *Marcello Costa, Ugo Cifone*[621] likewise provided a recent support for the proposition that other Treaty free movement provisions also reflect the principles of "non-discrimination on the ground of nationality" together with the principle of equal treatment. *Asociación para la Calidad de los Forjados (Ascafor)*[622] and *Marcello Costa*[623] appear to indicate a recognition by the Court of Justice of the existence of a weaponry potpourri. It is a potpourri of principles that appears by design to stretch beyond the single rule of market access. The availability to the Court of all such principles arguably would reinforce the ability to scrutinize national measures suspected of hindering the exercise of Treaty free movement rights.

[617] Tryfonidou, *supra* note 136, at 56.

[618] Case C-484/10, Asociación para la Calidad de los Forjados (Ascafor), Asociación de Importadores y Distribuidores de Acero para la Construcción (Asidac) v. Administración del Estado, et, [hereinafter *Asociación para la Calidad*], judgment of 1 March 2012.

[619] *See* TFEU, *supra* note 1, at art. 34.

[620] Case C-484/10, *Asociación para la Calidad*, judgment of 1 March 2012, para. 53. *See* C-110/05, Comm'n v. Italy, 2006 E.C.R. I-2093, para. 34.

[621] *See* Joined Cases C-72/10 & C-77/10, Marcello Costa, Ugo Cifone, judgment of 16 February 2012, para. 54.

[622] Case C-484/10, *Asociación para la Calidad*, judgment of 1 March 2012.

[623] *See* Joined Cases C-72/10 & C-77/10, Marcello Costa, Ugo Cifone, judgment of 16 February 2012, para 54.

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