EU Internal Market Law

Course held by

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Lecture No 5
"The three steps analysis: 2) The 'restriction' issue"

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Outline contents

(I) Preliminary Remarks: General Overview of the TFEU Provisions
(II) Definition of the concept of restriction on free movement
(III) The discriminatory model
(IV) Mutual recognition: the double burden test
(V) Going beyond the discrimination model?
(VI) Concluding remarks: assessment of the current law

(I) PRELIMINARY REMARKS: GENERAL OVERVIEW OF THE TFEU PROVISIONS

The fundamental freedoms as general prohibitions on restrictions of free movement between Member States

The EU fundamental freedoms

A few set of general provisions laid down by TFEU that prohibit any national measure which results in a restriction on

- Free movement of goods (Arts 30, 34-35, 110)
- Free movement of workers (Art 45)
- Freedom of establishment (Art 49)
- Free movement of services (Art 56)
- Free movement of capital (Art 63)

Free movement of goods
(intra-EU import/export)

Member States are prevented from creating obstacles resulting

a) either from ***fiscal*** measures (customs duties and charges levied internally within a Member State)

b) or from ***non-fiscal*** measures (quantitative restrictions & MEEs)

a) "Fiscal" or "tariff" barriers

I) Customs duties & Charges having equivalent effect (CEEs) are **generally and totally banned** on intra-EEA trade on goods (Art 30 TFEU)

II) Internal taxation on imported goods is **prohibited if discriminatory or protectionist** (Art 110 TFEU)

(i) Customs duty

A charge, determined on the basis of a tariff, specifying the rate of duty to be paid

a) By the importer to the host state (customs duties on imports)

b) By the exporter to the home state (customs duties on exports)

Measures having equivalent effect to customs duties

"Any pecuniary charge, however small and whatever its designation and mode of application, *which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier*…

even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product": Case 24/68, *Commission v. Italy (statistical levy case)*

(ii) Internal (indirect) taxation

(fiscal rules which apply internally within a MS)

MSs are free to determine their own taxation policy (***Principle of fiscal autonomy***)

BUT internal taxation has to be completely neutral as regards competition between domestic and imported products

-> MSs are prevented from taxing imported goods in a way

a) either **discriminatory**, directly or indirectly: Art 110(1)

b) or **protectionist**: Art 110(2)

b) "non-fiscal" or "non-tariff" barriers

Quantitative restrictions (QR)

&

measures having equivalent effect (MEE)

shall be prohibited

i) on imports between Member States (Art 34)

ii) on exports between Member States (Art 35)

Free movement of workers

It entails:

1) Art 45(2) → the **abolition of any discrimination based on nationality** between workers of the MSs as regards conditions of work and employment (ex. employment, remuneration)

2) Art 45(3) → the right, subject to justified limitations

i) to accept offers of employment actually made

ii) to move freely within the territory of MSs for this purpose

iii) to stay in a MS for the purpose of employment

iv) to remain in the territory of a MS after having been employed in that state

Freedom of establishment

I) Art 49 TFEU generally prohibits
i) **restrictions** on the freedom of establishment of nationals of a MS in the territory of another MS
ii) **restrictions** on the setting-up of agencies, branches or subsidiaries by nationals of any MS established in the territory of any MS

II) Art 49 also provides for the **right**
i) to take up and pursue activities as self-employed persons and
ii) to set up and manage undertakings

under the conditions laid down for its own nationals by the law of the country where such establishment is effected

Free movement of services

Under Art 56 TFEU, any **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

Free movement of capital

General prohibition on all **restrictions**

1) **on the movement of capital** – Art 63(1) TFEU – and
2) **on payments** – Art 63(2) TFEU

a) between Member States and
b) between Member States and third countries

Common denominator between all freedoms

1. General prohibition on restrictions on intra-EU free flow of products, production factors and economic participants…
2. …subject to a possible justification (with the sole exception of customs duties, that are totally banned)

→ even though restrictive, national measures are compatible with EU law if they serve an objective of general interest:

a) grounds of justifications under TFEU itself

b) mandatory requirements under case-law

The "restriction" issue is of paramount importance

A) The narrower the notion of "restriction" (obstacle to free movement) is interpreted

⇒ the lesser a national measure is needed to be justified under EU law

⇒ the lesser political choices made by national legislatures have to be scrutinised by the judiciary

B) For the sake of legal certainty, clear and foreseeable criteria are needed

The most draconian obstacles to free movement

As regards goods, **quantitative restrictions** on imports/exports breach Arts 34-35

Defining them is quite simple…

Case 2/73 *Geddo v Ente nazionale risi*: "Measures which amount to a total or partial restraint of… imports, exports or goods in transit"

As to migrant persons, **refusal of entry to**, or **deportation from**, a state are the equivalent to QRs for goods

Such orders are caught by Arts 45, 49 and 56

(II) THE PROBLEM WITH THE INTERPRETATION OF THE CONCEPT OF "RESTRICTION" ON FREE MOVEMENT

General remarks

i) Treaties' provisions clearly state that restrictions on free movement are *prima facie* unlawful, but they are of little or no help in interpreting such a concept

ii) Reference must essentially be made to the jurisprudence of the ECJ

iii) The case-law of the ECJ is not without ambiguity and therefore lends itself to different and even conflicting interpretations

iv) The case-law has indeed evolved over the years: ECJ has clarified its previous decisions and, on some occasions, has changed its mind

The evolution of the case-law

A) From a "pure discriminatory" model to a "restriction" model?
   i) The traditional approach in the early case-law → prohibition on restrictions = prohibition on direct or indirect discrimination
   ii) The most recent approach → a broader concept of "restriction" → encompassing non-discriminatory measures → focus on the effect of a national rule in discouraging the exercise of fundamental freedoms

B) Free movement of goods → pivotal role (gli sviluppi giurisprudenziali sono partiti da questa libertà per poi estendersi alle altre)

i) what are the criteria for assessing whether there is a restriction on free movement or not?
ii) Do similar criteria apply to all freedoms?
iii) What is the very purpose of free movement?

Broad (but too vague?) definitions

a) In the field of goods
The '*Dassonville* formula' (Case 8/74): all national rules which are **capable of hindering, directly or indirectly, actually or potentially, trade within the EU** are to be considered as MEEs to QRs" on imports
b) In the field of persons
All measures which **prohibit, impede or render less attractive** the exercise of freedom of establishment and freedom to provide services constitute restrictions prohibited under Arts 49 and 56 TFEU respectively (Case C-439/99 *Commission v. Italy*; cp., as to workers, Case C-19/92 *Kraus*)

A conceptualisation of the ECJ's approach: the *Trailers* case

In the field of goods → Case C-110/05 *Commissions v. Italy (trailers)*:
"Art 34 TFEU reflects the obligation to comply with the principles of
a) **non-discrimination**
b) **Mutual recognition** of products lawfully manufactured and marketed in other MSs
c) Ensuring **free access of EU products to national markets**"

Non-discrimination, mutual recognition and free access to the market

- → are they the guiding principles of the ECJ's jurisprudence?
- → are they confined to the free movement of goods or do they apply instead to all freedoms?

The "market access" test → beyond discrimination?

The "market access" test → which role?

a) A residual test
   → It applies to catch measures escaping the other two test
b) A far-reaching test
   → Any measure which impedes the access to the market of another MS is a restriction on free movement

(III) THE DISCRIMINATORY MODEL

The free movement law is about anti-discrimination and anti-protectionism

What is a discrimination?

(unequal treatment without objective justification)

By the application of some distinguishing criteria, **comparable** situations are treated in a **different** way

Such a difference in treatment is considered as discrimination where there is **no objective difference** to justify it

The discriminatory measure has a **different burden in law and in fact** on the two situations, one situation being treated less favourably than the other

From a broader perspective…

The ***Principle of equal treatment***, as a general principle of EU law which includes the principle of non discrimination on grounds of nationality, requires that

- **comparable situations must not be treated differently**
- **different situations must not be treated in the same way**

unless such treatment is objectively justified

Formal or direct discrimination

Discrimination which arises from treating comparable situations differently on grounds of

- ✓ ***origin*** (goods, services) or
- ✓ ***nationality*** (persons, undertakings)

to the detriment of the cross-border situation is prohibited by all of the fundamental freedoms

Prohibition of any discrimination on grounds of nationality "within the scope of application of the Treaties" is also a general principle of EU law: Art 18 TFEU - Art 21(2) Charter

Examples

Measures contrary to Art 34 TFEU:

- A rule of the importing MS fixing the minimum alcohol content for imported (but not domestic) vermouth
- A ban or other restriction on advertising foreign products, but not their domestic equivalents

Measures contrary to free movement of persons:

- Rules or practice, even adopted by a sporting organisation, which limit the right to take part in football matches as professional or semi-professional players solely to the nationals of the MS in question
- A legislation permitting only nationals to access a particular trade or profession (ex. civil-law notary)
- Where a MS requires a national of another MS who brings proceedings before one of its courts to give security for costs

Indirect or covert discrimination

"the principle of non-discrimination prohibits

- not only direct or overt discrimination on grounds of nationality
- but also **all covert forms of discrimination** which,

→by the application of other distinguishing criteria,

→lead to the same result"

(Joined Cases C-570/07, C-571/07 *Blanco Pérez)*

(Unless objectively justified and proportionate to its aim) a provision of national law must be regarded as indirectly discriminatory

i) if it is intrinsically liable to **affect the nationals of other MSs more** than the nationals of the State whose legislation is at issue and

ii) if there is a **consequent risk** that it will **place the former at a particular disadvantage**

The **criteria of differentiation** between domestic and cross-border situations, which are comparable in objective terms, are different from Nationality or Origin, but they lead in fact to the same result

Requirements which, while apparently nationality-neutral on their face (**same burden in law**), have a greater impact on nationals of other MSs (**different burden in fact**): while nationals almost always satisfy the condition, migrants do not

Ex. Requirements concerning permanent establishment (residence) in the State in question; language; rules requiring either a period of service or residence in the host state before enjoying a particular benefit

Who is the comparator? (The service provider is less closely linked to the Host MS than undertakings established there)

FREE MOVEMENT OF SERVICES

- Art 56 entails the abolition of any discrimination against a person providing services on account of his nationality or the fact that he is established in a MS other than the one in which the service is provided (Case C-288/89 *Gouda*)
- A MS may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the TFEU provisions whose object is, precisely, to guarantee the freedom to provide services (Case C-76/90 *Säger*)

Permanent establishment (residence, place of business) as a condition for carrying out an economic activity in the Host State is "*the very negation of the freedom to provide services*" (Case 205/84 *Commission* v. *Germany*): it makes it impossible for undertakings established in other MSs to provide services in that State

Rationale

A cross-border service provider cannot be compared with a provider of equivalent services established in the Host State:

- Establishment connotes more permanence than cross-border provision of services
- The service provider already has a place of establishment – the Home State

- To be a national of, and/or to be established in, the host state is required for carrying on a trade or profession in that State
- Foreign operators have to satisfy heavier requirements than national operators

DISCRIMINATIONS AGAINST "ACTIVE" MARKET ACTORS

The case

in order to be granted authorisation to carry on private security activities in Spain, undertakings

(i) must be constituted in Spain

(ii) their directors and managers must reside in Spain and

(iii) the security staff must have Spanish nationality

ECJ rulings (case C-114/97 *Commission* v *Spain)*

Such requirements constitute obstacles to free movement of persons, since they prevent undertakings established in other MSs from carrying on their activities in Spain through a branch or an agency and nationals of other MS from providing private security services in Spain

The case

Italian law confers exclusive powers on Tax Advice Centres ('CAF') to provide taxpayers with certain tax advice and assistance services; the ability to set up CAF is limited to those which are established in Italy

ECJ rulings (Case C-451/03 *Servizi Ausiliari Dottori Commercialisti*)

A) As regards the freedom to provide services, such national legislation, by reserving those activities to the CAF, completely prevents access to the market for the services in question by economic operators established in other MSs

B) As regards the freedom of establishment, such legislation, by restricting the ability to form CAF to legal entities with their registered office in Italy, is liable to make more difficult, or even completely prevent, the exercise by economic operators from other MSs of their right to establish themselves in Italy with the aim of providing the services in question

- Particular benefits or protection afforded to service recipients by the law of the Host State, but they are made conditional on nationality of, or habitual residence in, that State

DISCRIMINATIONS AGAINST "PASSIVE" MARKET ACTORS

Case 186/87 *Cowan*

"The prohibition of discrimination… (means) that in respect of persons whose freedom to travel to a MS, in particular as recipients of services, is guaranteed by EU law that State may not make the award of State compensation for harm caused in that State to the victim of an assault resulting in physical injury subject to the condition that he hold a residence permit or be a national of a country which has entered into a reciprocal agreement with that MS"

Case C-45/93 *Commission v. Spain*

Spanish rules, granting free admission to State museums only to Spanish nationals, foreigners resident in Spain and young persons under 21 years of age, are discriminatory against tourists from other MSs more than 21 years of age contrary to Arts 18 and 56 TFEU

(IV) MUTUAL RECOGNITION: THE DOUBLE BURDEN TEST

Prohibition on indistinctly applicable measures:

Where disparities between national legislations result in obstacles to free movement

Free movement of goods
ECJ 20 February 1979, Case 120/78 *Rewe-Zentral*

IV.1) THE '*CASSIS DE DIJON*' CASE

Directive 70/50/EEC (Art 3)

Measures governing the marketing of products (dealing in particular with shape, size, weight, composition, presentation) which are equally applicable to domestic and imported products must be abolished **where the restrictive effect** of such measures on the free movement of goods **exceeds the effects intrinsic to trade rules**

This is the case, in particular, where:

- the restrictive effects on the free movement of goods are out of proportion to their purpose
- the same objective can be attained by other means which are less of a hindrance to trade

Cassis de Dijon: the case

Cassis de Dijon, a blackcurrant fruit liqueur made in France has an alcohol content of 15-20 per cent. It complies with French rules relating to composition of fruit liqueurs and, thereby, it is lawfully marketed in France.

German law requires fruit liqueurs to have a minimum alcohol content of 25 per cent, irrespective of where they are made. As a consequence, Cassis de Dijon cannot be sold in Germany as a fruit liqueur in the same form as it is in France.

A broader view: the problem with "technical standards"

A considerable number of divergent national "technical standards", i.e. rules relating to manufacture and marketing ("product requirements"), exist for numerous goods. They often reflects the different local traditions (ex. Italian pasta, German beer).

The resulting obstacles to inter-state trade may certainly be abolished by harmonising such national requirements under now Art 114 TFEU.

But what the law should be in the absence of harmonisation at EU level?

Further, is it necessary to harmonise such rules (which entails 'standardisation') in order to secure free movement of goods?

ARGUMENTS OF THE PARTIES

Rewe-Zentral (plaintiff in the main proceedings)

The national rule in question breaches Art 34 TFEU, since it has an unequal impact on domestic and imported products (**material discrimination**)

- It renders it impossible, in Germany, to market and therefore to import from other MSs certain liqueurs which are known and marketed there in that form, including "Cassis de Dijon"
- The manufacture of those liqueurs in a form specifically designed for the German market would make their importation more difficult and more costly in relation to the disposal of national products

German Government

No breach of Art 34 TFEU since there is neither formal nor material discrimination against imported products

- Any obstacles to trade are due solely to the fact that the legal orders of Germany and France lay down different product requirements
- The mere fact that German law contains stricter requirements does not give national producers any material advantage and, therefore, does not lead to a material discrimination

The "race to the bottom" argument

What if the German rule were to be disapplied?

- The French liqueur would be marketed in Germany in accordance with the French rules: the marketing of imported products would no longer be governed by the stricter rules in the country of importation but by the lower rules in the country of production
- The stricter rules in the host MS could no longer be applied to domestic products, in order to avoid discrimination against them
- Ultimately, "the rules of the least exigent MS would be authoritative in all the others" → legislation for the whole EU would not be enacted by EU institutions (Council + PE) but by a single MS without the consent of the others

FINDINGS OF THE COURT

1) It is for the MSs to regulate their own market

In the absence of harmonisation of national laws at EU level, or even of a system of equivalence, it is for the Member States

- to regulate all matters relating to the production and marketing of goods on their own territory
- to define the conditions for the take-up and pursuit of economic activities

However, MSs must, when exercising their powers in this area, respect the basic freedoms guaranteed by the Treaties (Case C-65/05 *Commission v. Greece*)

2) Different national laws in a single market

- Economic activities within the EU single market are governed by national legal orders
- National laws may provide for different requirements to be satisfied for carrying out an economic activity
- It is clear that, in the Court's view, disparities between the applicable national rules, relating for example to the marketing of goods, may result in obstacles to free movement
- However, it is less clear why, and under what conditions, such differences may hinder free movement within the EU

3) The general principle: mutual recognition

- "There is no valid reason why, **provided that they have been lawfully produced and marketed in one of the MSs**, alcoholic beverages should not be introduced into any other MS" (*Cassis de Dijon*, para. 14)
- Applying rules of the Host State to an economic activity which already satisfy similar conditions laid down by the law of another MS results in an obstacle to free movement: accordingly, rules of the Host State must be disapplied
- The Host MS must recognize Home MS's standards as (presumed to be) equivalent to its own

4) The exception: mandatory requirements

Host MS's (indistinctly applicable) rules relating to the marketing of products can be applied to imported products – and the obstacles to free movement resulting therefrom must be accepted – in so far as those rules

1) may be recognized as being necessary in order to satisfy "mandatory requirements" (which are not already satisfied by the Home MS's rules) and
2) They are proportionate to the aim in view

If both such conditions are met, the presumption of equivalence or mutual recognition is rebutted

Some year later on the ECJ extends the principle of mutual recognition to the freedom to provide services across the frontiers

IV.2) A SIMILAR APPROACH TO FREE MOVEMENT OF SERVICES

Case C-288/89 *Gouda* (1991)

- The application of Host MS's rules which affect any person established in its territory to persons providing services established in the territory of another MS who already have to satisfy the requirements of that State's legislation may result in a restriction on the freedom to provide services
- Such restrictions breach Art 56 if the application of the national legislation to foreign persons providing services is not justified by overriding reasons relating to the public interest or if the requirements embodied in that legislation are already satisfied by the rules imposed on those persons in the MS in which they are established

Obstacles resulting from differences between national indistinctly applicable rules

The cumulative application of the laws of different countries owing to the crossing of the frontiers

IV.3) THE DUAL-BURDEN THEORY

Different rules within a single market

- If, in the absence of uniform or harmonised EU rules, it is for the MSs to regulate economic activities in their own territory, different national rules apply within a single European-wide market
- However, the mere fact that MSs apply different rules does not amount to an hindrance to free cross-border movement: "rules of a MS do not constitute a restriction … solely by virtue of the fact that other MSs apply less strict, or economically more favourable, rules to providers of similar services established in their territory" (Case C-475/11 *Konstantinides*)

The problem: cumulative application

The rules of the Host MS relating to the manufacture and marketing of goods apply to domestic and imported products alike

BUT imported goods, unlike the domestic ones, already comply with the rules of the country of production

So, applying the rules of the Host MS without distinction, i.e. without taking into account the difference above, creates

a) A double regulatory burden on imported goods, which have to satisfy 2 sets of rules (those of the Home and Host MSs)

b) A single regulatory burden on domestic products, which have to satisfy only one set of rules (those of the Host MS)

Cumulative application of the laws of different MSs owing to the crossing of the frontiers hampers free movement

The solution: replacing dual regulation with a single one

Two possible ways:

i) ***Harmonisation***: different national laws are replaced with common rules enacted at EU level

ii) ***Mutual recognition*** (*Cassis de Dijon* doctrine): Dual regulation of cross-border situations (Home MS + Host MS) is replaced with a single regulation (Home MS) which the Host State is required to respect in order to comply with fundamental freedoms

Principle of mutual recognition

The rules of the Host Member State are deemed to be a restriction on free movement – and, therefore, cannot be applied to cross-border situations (imported goods, foreign service providers) – provided that

- The cross-border situation already complies with the rules of another MS and
- Such rules are deemed to be equivalent to those of the Host MS

The Host MS does not give direct effect to the law of the Home MS but takes it into account in order to assess whether the application of its own law is compatible with free movement or not

Mutual recognition & Regulatory competition

As a result of the *Cassis de Dijon* approach

⇒ Harmonisation is confined to areas where MSs legitimately invoke a mandatory requirement

⇒ Outside those areas of harmonisation, the principle of mutual recognition applies and goods lawfully produced in one MS will enjoy access to the market in other MSs

⇒ Different regulatory traditions and different products will continue to coexist and will compete with each other

- The application of the rules of the Host country create a dual regulatory burden
- A true conflict between national laws arises

IV.4) THE REALM OF THE "*CASSIS DE DIJON* APPROACH"

- Disparities between national laws only hamper free movement when applying the rules of the Host MS imposes a dual regulatory burden on the cross-border situation
- 'Double burden' → two sets of rules apply to economic activities carried on across the borders (host MS + home MS)
- A double burden occurs only where the economic activity pursued abroad is still governed by the rules of the country of origin
- Only in such a case a 'true' conflict of laws (Host MS versus Home MS) arises

1993: Joined Cases C-267/91 and C-268/91 *Keck*
2009: Case C-110/05 *Commission v. Italy (trailers)*

IV.4.A) IN THE FIELD OF GOODS

Almost 20 years after *Dassonville*, and 14 after *Cassis de Dijon*, in view of the increasing tendency of traders to invoke Art 34 TFEU as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other MSs, ECJ found it necessary to re-examine and clarify its case on this matter, i.e. to point out some limitation to the reach of the notion of restriction on free movement of goods

Accordingly, an apparently formal distinction is drawn between:

a) Product requirements
b) Selling arrangements

What are "product requirements"?

Rules regulating products themselves, which lay down requirements to be met by goods in order to be lawfully produced and marketed

Some examples:

- ✓ Rules relating to composition, presentation, labelling, packaging of products
- ✓ requirements concerning the (generic) designation of a product (beer, chocolate)
- ✓ rules relating to "production conditions"

Cassis *applies to product requirements*

- Goods are manufactured in conformity with the product requirements laid down by the State of production
- Such rules do not cease to be applied when the product crosses the frontiers, but they "move with the product" (Ex. Italian beer sold in Germany has been produced according to the Italian standards)
- If similar requirements of the Host country were also applied → a true conflict of laws would arise → dual burden → restriction caught by Art 34 under the *Cassis* doctrine

Requirements as to holding particular authorisations, qualifications or licences create a double burden on migrants

IV.4.B) IN THE FIELD OF PERSONS

ECJ 9 July 1997, Case C-222/95 *Parodi*

REQUIREMENT FOR ADMINISTRATIVE AUTHORISATION

The main proceedings

- de Bary Bank, a company established in the Netherlands where it is authorised to pursue banking activity, grants a mortgage loan to Parodi, a company established in France.
- Before the French courts the borrower claims for declaring the contract to be void since the Dutch lender has not been authorised in France (as required by French Law).

The question referred to the ECJ

- The Cour de Cassation asks to the ECJ whether Art 56 TFEU precludes a Member State from requiring a credit institution already authorized in another Member State to obtain an authorization in order to be able to grant a mortgage loan to a person resident within its territory
- The requirement for administrative authorisation applies without distinction to national banking services provider and those of other Member States

The Court's rulings: The general principle

It is settled case-law that Art 56 requires

i) not only the elimination of *all discrimination on grounds of nationality* against providers of services who are established in another MS

ii) but also the abolition of *any restriction*, even if it applies without distinction to national providers of services and to those of other MSs, which is *liable to prohibit, impede or render less advantageous* the activities of a provider of services *established in another MS where he lawfully provides similar services*

The Court's rulings: the concrete application of the dual- burden theory

Even if it is not discriminatory, the French rule creates a restriction

- it makes it more difficult for a credit institution established in another MS and authorized by the supervisory authority of that MS to grant a mortgage loan in France
- in so far as it requires that institution to obtain a fresh authorization from the supervisory authority of the State of destination (dual regulatory burden)

ECJ 7 May 1991, Case C-340/89 *Vlassopoulou*

REQUIREMENT FOR PROFESSIONAL QUALIFICATION

The main proceedings

- The Ministry for Justice Land Baden-Wuerttemberg refuses to grant to Mrs Vlassopoulou, a Greek lawyer registered with the Athens Bar, admission as a Rechtsanwaeltin (lawyer), on the ground that she has not the qualifications laid down by German Federal law for the holding of judicial office, which are necessary for admission to the profession of Rechtsanwalt
- Those qualifications are acquired by studying law at a German university, passing the First State Examination, completing a preparatory training period and then passing the Second State Examination

The question referred to the ECJ for a preliminary ruling

- Mrs Vlassopoulou appeals against that decision
- The Bundesgerichtshof (Federal Supreme Court) asks to the ECJ whether Art 49 TFEU on freedom of establishment is infringed if a EU national who is already admitted and practising as a lawyer in her country of origin can be admitted as a lawyer in the host country only in accordance with the rules of that country

The Court's reasoning (dual burden test)

- Host MS law: access to a profession (lawyer) depends upon the possession of a diploma or a professional qualification
- No discrimination on the basis of nationality
- Nonetheless Host MS qualification requirements may hinder the right of establishment guaranteed to nationals of the other MSs
- This is the case if the Host MS rules create a ***double burden*** on migrants…
- Since they ***take no account of the knowledge and qualifications already acquired by the migrants in their country of origin***

- direct effect of Art 49 TFEU
- principle of sincere cooperation - Art 4(3) TEU

WHAT DO THE AUTHORITIES OF THE HOST MS ARE REQUIRED TO DO?

1. assessment of the equivalence of the qualifications

- *Take into consideration the diplomas, certificates and other evidence of qualifications* which the migrant has acquired in order to exercise the same profession in another MS
- *By making a comparison* between the specialized knowledge and abilities certified by those diplomas and the knowledge and qualifications required by the national rules
- Thus, authorities of the host MS should be enabled to verify whether the foreign diploma certifies that its holder has *knowledge and qualifications which are, if not identical, at least equivalent to those certified by the national diploma*

2. mutual recognition of qualifications

a) If the knowledge and qualifications certified by the foreign diploma **fully** correspond to those required by the national provisions, the Host MS must recognize that diploma as fulfilling the requirements laid down by its national provisions

b) If they correspond **only partially**, the Host MS is entitled to require the migrant to show that he has acquired the knowledge and qualifications which are lacking

c) If completion of a period of preparation or training is required by the Host MS rules, it must be determined whether professional experience acquired in the MS of origin may be regarded as satisfying that requirement in full or in part

Application of the rules of the Host country to cross-border situations and internal situations alike

⇒ indirect discrimination (different situations treated in the same way)

IV.5) THE DUAL-BURDEN THEORY AND THE DISCRIMINATION MODEL

The cross-border situation

Due to the fact that

(1) MSs regulate trade in their own territory and

(2) they do not take into account rules set out by other countries (which they do not recognise),

when they are carried on across the frontiers, economic activities may have to comply with more than one set of rules:

a) the one of the country of origin (i.e. where the good is manufactured or where the service provider is established) and

b) the other(s) of the countr(ies) of destination (i.e. where the good is marketed or where the service is provided)

To treat different situations alike

- In so far as they already satisfy the rules set out by the Home MS, cross-border activities are in a different situation than economic activities carried out in the territory of the Host MS
- Accordingly, applying the rules of Host MS to both situations without distinction, i.e. without taking into account that the cross-border activity is lawfully carried on in accordance with the rules of another State, means to treat different situations in the same way
- Such an (apparently) equal treatment leads to a covert discrimination against cross-border economic activities

(V) GOING BEYOND THE DISCRIMINATION MODEL?

(i) The market access approach
(ii) The pure 'restriction' approach
(iii) Is free movement law about 'economic freedom'?

- Free movement of goods
- ECJ 24 November 1993, Joined Cases C-267/91 and C-268/91 *Keck and Mithouard*

V.1) SELLING ARRANGEMENTS (OR MARKET CIRCUMSTANCES RULES)

Almost 20 years after *Dassonville*, and 14 after *Cassis de Dijon*, the ECJ found it necessary to reassess its earlier cases on Art 34 TFEU

An apparently formal distinction is drawn between:

a) **Product requirements**
   → the dual burden test under *Cassis* applies
b) Rules restricting or prohibiting certain selling arrangements (**market circumstances rules**)
   → if *Cassis* does not apply, which test applies for determining whether they fall under Art 34? → non-discrimination or market access?

What are "selling arrangements"?

- AG Jacobs, Case C-412/93 *Leclerc-Siplec* → Rules stating *when, where, how, by (and to) whom, and at what price goods may be sold*
- Case C-244/06 *Dynamic Medien* → rules which restrict the marketing of products, and which have the effect of limiting the commercial freedom of economic operators, without affecting the actual characteristics of the products referred to

Some examples

- Case C-71/02 *Karner* → rules concerning *inter alia (i)* the place and times of sale of certain products *(ii)* and advertising of those products as well as *(iii)* certain marketing methods
- Case C-20/03 *Burmanjer* → provisions regulating market methods (ex. prior authorisation to carry on itinerant activities)
- Case C-405/98 *Gourmet International Products* → provisions regulating advertising (ex. prohibiting advertising of alcohol on radio and television)

The problem with selling arrangements

- The rules at stake regulate the marketing of goods within a MS
- They generally affect the retailers and not the producers/importers → they do not affect inter-state trade (except cross-border distance sales)
- They do not affect the actual characteristics of goods → no dual burden (unlike product requirements)
- They limit the commercial freedom of traders, preventing them from selling when, where and how they chose → they are likely to restrict the volume of trade

Whether and under what conditions market circumstances rules fall under Art 34 TFEU

V.1.A) THE PRE-*KECK* CASE-LAW

Two contradictory tendencies with regard to national rules on market circumstances

a) In **some** cases, a **narrow** interpretation of the scope of Art 34
   → ex. Case 155/80 *Oebel*
b) In **most** cases, a **broad** interpretation of the scope of Art 34
   → ex. Case 286/81 *Oosthoek*; Case 382/87 *Buet*; Case C-126/91 *Yves Rocher*

Broad interpretation of the scope of Art 34 = market circumstances rules → reduce total volume of sales → hence, volume of imports

- Market circumstances rules do not directly affect imports…
- but they may be such as to restrict their volume…
- because they affect marketing opportunities for the imported products

To compel an economic operator either to adopt advertising or sales promotion schemes which differ from one MS to another or to discontinue a scheme which he considers to be particularly effective may constitute an obstacle to imports even if the legislation in question applies to domestic and imported products alike

V.1.B) THE DECISION IN *KECK*

The *Keck and Mithouard* case

Mr Keck and Mr Mithouard, who were in charge of supermarkets established in France, were prosecuted for selling certain goods at a price lower than their actual wholesale purchase price (resale at a loss), contrary to French rules.

The question was referred to the ECJ as to whether the general prohibition on resale at a loss under French law was compatible with, notably, Art 34 on free movement of goods.

Clarification or overturn of the earlier case-law?

THE COURT'S RULINGS

The starting point in the analysis

- General prohibition on resale at a loss is not designed to regulate intra-EU trade in goods
- Such rule, **in so far as it deprives traders of a method of sales promotion**, may
  - → reduce the volume of sales and, hence,
  - → the volume of sales of goods from other MSs
- It is therefore clear that such rule **adversely affects the commercial freedom** of traders operating in the French market
- But does it also **adversely affect the import of goods from other MSs** contrary to Art 34 TFEU?

The Court's answer

- It not only stated that market circumstances rules such as the French prohibition on resale at a loss do not infringe Art 34 TFEU
- but also launched a clear message to traders
  - → "in view of the increasing tendency of traders to invoke Art 34 as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other MSs…"
  - → it is necessary to "re-examine and clarify" the previous case-law

ECJ changes its mind: the "**paragraph 16 proviso**"

National provisions restricting or prohibiting certain selling arrangements **do not breach** Art 34 where two conditions are satisfied:

1) they **apply to all affected traders** operating within the national territory
2) they **affect in the same manner**, **in law and in fact**, **the marketing** of both domestic and out-of-state products (→ **non-discrimination?**)

The paragraph 17 proviso: a "Market Access" approach?

National "selling arrangements" rules satisfying the two conditions set out in para. 16 do not breach Art 34 (when they apply to the sale of products from another MS meeting the requirement laid by that State) because

- such rules do not **prevent the access** of imported goods **to the market**
- nor do they **impede access for foreign goods more than they impede access for domestic products**

What is the *Keck*'s rationale?

A) The **discriminatory approach**?
→Selling arrangements rules do not breach Art 34 unless they discriminate, in law or in fact, against out-of-state traders/goods
→Emphasis is on para. 16 proviso

B) A new approach founded on the **"Market Access" test**?
→selling arrangements rules breach Art 34 if they prevent/impede the access to the national market for foreign traders/goods
→Emphasis is on para. 17 proviso

Selling arrangements hindering the access to the national market

V.1.C) THE POST-*KECK* CASE-LAW

Selling arrangements and market access

- In *Keck*, the market access test is presented not as a condition of its own, but rather as a consequence of the fact that the para. 16 proviso is satisfied.
- Yet, in following cases, emphasis has shifted towards the unequal impact national rules may have on the market access of imports when compared with domestic products.
- Finally, in the *Commission v Italy (trailers)* the Court appears to have definitely changed its mind on this point.

National rules restricting advertising and other forms of sales promotion

Case C-405/98 *Gourmet International Products*

- Swedish law → total ban on advertising alcohol on the radio, on television, and in magazines
- Court's ruling → it affects the marketing of imports more heavily than the marketing of domestic products → obstacle to intra-EU trade on goods

The Market access argument

- The national rule not only prohibits a form of marketing a product but in reality prohibits producers and importers from directing any advertising messages at consumers
- In the case of products like alcoholic beverages, the consumption of which is linked to traditional social practices and to local habits and customs, such a total prohibition on advertising **is liable to impede access to the market** by products from other MSs more than it impedes access by domestic products, with which consumers are instantly more familiar

Case C-322/01 *0800 DocMorris*

The case

- DocMorris had a pharmacy in the Netherlands and also offered medicines for sale over the Internet. Both activities were licensed in that MS.
- It was going to sell medicines to German consumers over the Internet.
- German law → *(i)* medicines could be sold only in pharmacies; *(ii)* sales by mail order were prohibited.
- Does the prohibition on mail-order sales amount to a restriction on free movement of goods contrary to Art 34 TFEU?

The Court's ruling

- The prohibition on mail-order sales has a **greater impact on pharmacies established outside the national territory** and could **impede access to the market for products from other Member States more than it impedes access for domestic products**
- Consequently, such a prohibition does not affect the sale of domestic medicines in the same way as it affects the sale of medicines coming from other MSs → it hinders free intra-EU trade on goods

The Court's reasoning

Bearing in mind:

i) The 'marketing' of products on a domestic market → a number of stages between the time when the product is manufactured and the time when it is ultimately sold to the end consumer

ii) The emergence of the internet as a method of cross border sales → look at the scope and the effect of the prohibition on a broader scale

The prohibition on mail-order sales has an unequal impact on access to the German market (end consumers of medicinal products):

a) German pharmacies → cannot use the extra or alternative method of gaining access to the German market, but they are still able to sell the products in their dispensaries

b) Foreign pharmacies → the internet provides a more significant way to gain direct access to the German market

ECJ 10 February 2009,
Case C-110/05 *Commission v. (trailers)*

V.2) THE PRINCIPLE OF ENSURING FREE ACCESS OF EU PRODUCTS TO NATIONAL MARKETS

Case C-110/05
Commission v Italy (trailers)

"it is apparent from settled case-law" → three basic principles underpin free movement of goods (Art 34 TFEU)

- Principle of non-discrimination
- Principle of mutual recognition (of products lawfully manufactured and marketed in other Member States)
- (but also) Principle of free access of EU products to national markets

The concept of 'MEE to QRs on imports' within the meaning of Art 34 covers →

1) National measures the object of effect of which is to treat products from other MSs less favourably
2) Obstacles which are the consequence of applying, to goods coming from other MSs where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods even if they apply to all products alike
3) **Any other measure which hinders access of products originating in other MSs to the market of a MS**

- Case C-265/06 *Commission v Portugal*
- Case C-110/05 *Commission v Italy (trailers)*
- Case C-142/05 *Mickelsson and Roos*

V.2.A) RESTRICTIONS ON USE: A NEW CATEGORY?

National rules preventing or (severely) restricting the use of goods

- → They do not concern product requirements
- → They do not concern selling arrangements
- → Nevertheless they fall within Art 34 when
  - ❑ Although they are non-discriminatory
  - ❑ They hinder access by out-of-state products to the national market

Case C-110/05 *Commission v Italy (trailers)*

The case → Italian Highway Code prohibits motorcycles from towing trailers, even those specifically designed for use with such vehicles

Court's ruling → such a prohibition, to the extent that its effect is to hinder access to the Italian market for trailers which are specially designed for motorcycles and are lawfully produced and marketed in MSs other than Italy, breaches Art 34 TFEU

Why there is an hindrance to market access?

- A prohibition on the use of a product in the territory of a MS has a *considerable influence on the behaviour of consumers*, which, in its turn, affects the access of that product to the market of that MS.
- Consumers, knowing that they are not permitted to use their motorcycle with a trailer specially designed for it, have practically no interest in buying such a trailer → the Italian rule *prevents a demand from existing in the market* at issue for such trailers → it hinders their importation.

Case C-142/05 *Mickelsson and Roos*

The case → Swedish regulations prohibit the use of personal watercraft on waters other than general navigable waterways → The majority of navigable Swedish waters lie outside those waterways → The actual possibilities for the use of personal watercraft in Sweden are merely marginal

Court's ruling → such regulations have the effect of hindering the access to the domestic market for personal watercrafts → breach Art 34 TFEU, where they have the effect

(a) of preventing users from using those goods for the specific and inherent purposes for which they were intended or

(b) of greatly restricting their use

Why there is an hindrance to market access?

- Even if the national regulations at issue do not have the aim or effect of treating goods coming from other MSs less favourably
- the restriction which they impose on the use of a product in the territory of a MS may, depending on its scope, have a considerable influence on the behaviour of consumers, which may, in turn, affect the access of that product to the market of that MS
- Consumers, knowing that the use permitted by such regulations is very limited, have only a limited interest in buying personal watercrafts

- Case C-108/09 *Ker-Optika*

V.2.B) SELLING ARRANGEMENTS AFTER THE *TRAILERS* CASE

Case C-108/09 *Ker-Optika*

The case → Hungarian legislation authorises the selling of contact lenses only in shops which specialise in medical devices → it prohibits the selling of contact lenses by mail order (i.e., via the Internet)

Court's ruling → that 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 MSs (2nd condition in *Keck*'s para. 16 proviso) → it breaches Art 34 TFEU

The Keck's rationale → principle of free access to national markets → the second condition in 'para. 16 proviso' is construed in terms of impact on market access

- The prohibition on selling contact lenses via the Internet applies to contact lenses from other MSs which are sold by mail order and delivered to the home of customers resident in Hungary → it '***significantly'* impedes access of traders from other MSs to the Hungarian market**
- Why? → such prohibition deprives traders from other MSs of a **particularly effective means of selling** those products

Critical remarks: does it make any sense to draw formal distinctions between different categories of rules (selling arrangements, restrictions on use)?

It could be argued that, as regards any national rules (except only those imposing a double burden on imports), the questions are:

i) Are such rules discriminatory (either directly or substantially)?

ii) If not, do they (significantly) hinder access by out-of-state goods/traders to the domestic markets of MSs?

Prohibition on discriminatory measures only or also on indistinctly applicable rules (market access test)?

V.3) RESTRICTIONS ON EXPORTS (ART 35 TFEU)

Case 15/79 *Groenveld* → Discrimination test

- Art 35 applies only if there is a discrimination
- "MEEs to QRs on exports" → national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a *difference in treatment* between the domestic trade of a MS and its export trade in such a way as *to provide a particular advantage for national production or for the domestic market* of the State in question, at the expense of the production or of the trade of other MSs

Groenveld's rationale → dual burden test

- The rationale for making **Art 34** applicable to measures which do not discriminate → they impose a dual burden on the importer → it has to satisfy the relevant rules in its own MS and also the MS of import
- This is normally so in relation to **Art 35** → the application of the indistinctly applicable rules of the MS of export (product requirements) does not create a dual burden on the exporter
- Ex. quality standards for a product to be marketed in the MS of production → they do not render it more difficult for an exporter to penetrate markets in other MSs

Case C-205/07 *Gysbrechts* → Market access?

The case → Belgian rule on distance selling prohibit suppliers from *(i)* requiring an advance or any payment from consumers before expiry of the withdrawal period and *(ii)* requesting, before expiry of that period, the number of the consumer's payment card

Such prohibitions equally apply to internal and cross-border sales (Belgian supplier/foreign consumers)

Court's ruling → even if such prohibitions are applicable to all traders active in the national territory, **their actual effect is nonetheless greater on goods leaving the market** of the exporting MS than on the marketing of goods in the domestic market of that MS → they breach Art 35 TFEU

A greater impact on export trade than domestic trade? → Material discrimination or obstacle to "exit from the market"?

- The prohibitions under Belgian law *deprive the traders concerned of an efficient tool with which to guard against the risk of non-payment*
- The *adverse consequences are generally more significant in cross-border sales* made directly to consumers (in particular, in sales made by means of the internet)
- Why? → because of the *obstacles to bringing any legal proceedings in another MS against consumers* who default, especially when the sales involve relatively small sums

V.4) THE MARKET ACCESS APPROACH IN THE FIELD OF PERSONS

- Freedom to provide cross-border services under Art 56 TFEU
- Analogies with restrictions on exports (Art 35)
- Analogies with the case-law on 'selling arrangements' (Art 34)

CASE C-384/93 *ALPINE INVESTMENTS*

The *Alpine Investments* case

- Netherlands law → prohibits financial services providers established in the Netherlands from making unsolicited telephone calls to potential clients established in other MSs in order to offer their services ('cold calling')
- Does such a ban constitute a restriction on freedom to provide services within the meaning of Art 56?
- It is worth noticing that

a) the prohibition on cold calling is a condition for lawfully carrying on the business concerned in the Netherlands

b) no similar requirements are provided for by the law of the different MS where potential clients reside

It must be borne in mind that

i. The cold calling prohibition is laid down by the law of the Home State but it also applies to services offered to potential clients that reside in other MSs

→ restriction on exporting services (cf. case-law on Art 35 TFEU)?

ii. Such a prohibition affects only the way in which the services are offered

→ does it amount to a non-discriminatory selling arrangement? Does, then, *Keck* apply?

(A) Do differences between national laws matter?

Dutch providers who offer their services in another MS are subject to the prohibition on cold calling, while providers from the MS where clients reside are not subject to the same prohibition →

1) Does the Dutch rule hinder the freedom to provide services *solely because other MSs apply less strict rules* to providers of similar services established in their territory?

→ ECJ answers that it does not

2) Does the Dutch rule constitute a restriction *because it is likely to distort competition in the (foreign) market*, due to the fact that different requirements apply to providers operating therein?

→ ECJ does not address this issue

(B) Analogies with the case-law on restrictions on exports (Art 35 TFEU)?

B.1) The prohibition on cold calling is imposed by the Home State (where the services provider is established) and not by the Host State (where the service should be provided)

- → it does not matter
- → Art 56 TFEU covers not only restrictions laid down by the State of destination but also those laid down by the State of origin
- → an undertaking may rely on the right to freely provide services against its country of origin if the services are provided for person established in another MS

B.2) The prohibition on cold calling

- → is generally applicable and non-discriminatory
- → neither its object nor its effect is to put the national market at an advantage over providers of services from other MSs

Some parties argued → the national rule falls outside Art 56 (cf. *Groenveld* case)

The Court held → it can constitute a restriction on the freedom to provide cross-border services → it "**deprives the operators concerned of a rapid and direct technique for marketing and for contacting potential clients in other MSs**" (cf. DocMorris, *Gysbrechts* and *Ker-Optika* cases)

(C) Analogies with the case-law on selling arrangements under *Keck*?

Some parties argued → The prohibition on cold calling affects only the way in which the services are offered and is not discriminatory either in law or in fact → it is analogous to the non-discriminatory measures governing selling arrangements which, according to *Keck*, do not fall within Art. 34 → it falls outside the scope of Art 56

The Court held (para. 38) → such a ban is imposed by the Home MS and also affects offers to potential clients in another MS → it **directly affects access to the market in services in the other MSs** → it is capable of hindering intra-EU trade in services

Some critical remarks

- In the Court's view, the prohibition on cold calling (restriction) is not analogous to the rules on selling arrangements (no restriction)
- But is the *Alpine Investments*' rationale different from that underlying the *Keck* line of cases?
- The prohibition on cold calling constitute a restriction on free movement since → it deprives the services provider of a rapid and direct technique for marketing in other MSs → so that it directly affects access to the market in services in the other MSs
- In both cases, non-discriminatory rules are caught by fundamental freedoms where they substantially hinder access to/exit from the market

- Free movement of workers

CASE C-415/93 *BOSMAN*

The *Bosman* case

- Sporting associations such as URBSFA, FIFA or UEFA set out rules which determine the terms on which professional sportsmen can engage in gainful employment
- Rules laid down by sporting associations → a professional footballer who is a national of one MS may not, on the expiry of his contract with a club, be employed by a club of another MS unless the latter club has paid to the former a transfer, training or development fee
- Do the transfer rules form an obstacle to freedom of movement for workers prohibited by Art 45 TFEU?

(1) Preliminary remarks

- TFEU provisions on freedom of movement for persons → are intended to facilitate the pursuit by EU citizens of occupational activities of all kinds throughout the EU → preclude measures which might *place EU citizens at a disadvantage when* they wish to pursue an economic activity in the territory of another MS
- EU citizens directly derive from the TFEU *the right (i)* to leave their country of origin *(ii)* to enter the territory of another MS and *(iii)* reside there in order to pursue an economic activity → Provisions which *preclude or deter* a national of a MS *from leaving his country of origin* in order to exercise his right to freedom of movement constitute an obstacle to that freedom *even if they apply without regard to the nationality of the workers concerned*

(2) The transfer rules are an obstacle to free movement even if they do not discriminate

- The transfer rules apply also to transfers of players between clubs belonging to different national associations within the same MS
- Similar rules govern transfers between clubs belonging to the same national association
- However, those rules are likely to restrict the freedom of movement of players who wish to pursue their activity in another MS
  → *by preventing or deterring them from leaving the clubs to which they belong* even after the expiry of their contracts of employment with those clubs

(3) Analogies with the rules on selling arrangements for goods under *Keck*?

Some parties argued → The transfer rules are comparable to the rules on selling arrangements for goods → by analogy with *Keck* rulings, they should fall outside the ambit of Art. 34

Following its AG Lenz, the Court said that they are not comparable →
even if the transfer rules apply *without distinction* to *internal* transfers (within a MS) and to *cross-border* transfers (to another MS) → such rules *directly affect players' access to the employment market in other MSs* → they are capable of impeding freedom of movement for workers

The Court's reasoning

- The new club must pay the transfer fee to the player's former club, under pain of penalties (including its struck off for debt)
- Such a duty effectively prevents the new club (in France) from signing up a player from a club in another MS (Belgium)
- If a new club in another MS is prevented from employing him → the player is prevented or deterred from leaving his former club after the expiry of the employment contract
- the transfer rules directly affect players' access to the employment market in other MSs

Some critical remarks

- According to the *Keck* line of cases, non-discriminatory selling arrangements are obstacles to free movement if they have an *unequal impact on market access* of imports (or market exit of exports) when compared with domestic products → the impact on cross-border marketing of goods is greater than that on domestic marketing
- By contrast, in *Bosman*, there is *no disparate impact* on access to the employment market → does the notion of "direct restrictive effect on market access" collapse into economic freedom?

What is the Bosman's rationale?

- National rules at issue in *Bosman* → equal impact on access to the employment market
  - →the transfer rules render less attractive for clubs to sign up players from other clubs → the transfer fee due reduces the profitability of the transfer
  - →yet, similar rules apply to internal and cross-border transfers → the dissuasive effect is not greater in case of transfers of players to a club in another MS
- Does the dissuasive effect occur simply because those rules reduce the profitability of the transfer? → If so, the notion of "direct restrictive effect on market access" in *Bosman* appears to collapse into economic freedom

- Freedom of establishment

CASE C-442/02 *CAIXABANK FRANCE*

The *CaixaBank France* case

- French law → banks are prohibited from paying remuneration on sight accounts opened by residents of France
- CaixaBanque France is a company governed by French law with its seat in France. It is a subsidiary of Caixa Holding, a company governed by Spanish law with its seat in Spain
- CaixaBanque marketed in France a sight account remunerated at the rate of 2% per annum → French authorities prohibited it from concluding new contracts and ordered to rescind the clauses in existing contracts
- Does the French rule constitute an obstacle to freedom of establishment under Art 49?

a) Broader v. narrower reading of the ECJ case-law
b) The assessment criteria → discrimination and market access

THE AG TIZZANO OPINION

(I) Thorough analysis of the previous case-law on free movement of persons

- It has evolved from a 'discrimination' approach (national treatment) into a 'restriction' approach (dissuasive effect) → all measures which prohibit, impede or render less attractive the exercise of the freedom of movement constitute restrictions on such freedom
- Yet, it is not without ambiguity → it lends itself to different and even conflicting interpretations

a) a broader concept of restriction

b) A narrower concept of restriction

a) The broader concept of restriction

- Any national measure that reduces the profit margin on a particular economic activity → adversely affect the economic attractiveness of pursuing such an activity → makes it less attractive, even indirectly, to exercise the freedom of movement → constitute a restriction
- Consequence → in the absence of harmonisation, the MS that enforces the most severe legislation on the pursuit of a given economic activity automatically creates an impediment to free movement of persons from other MSs

AG Tizzano's arguments against that reading

i. It contradicts the system of powers set out by TFEU provisions on free movement

a) general powers to regulate economic activities are left to MSs (but obstacles to free movement resulting therefrom are prohibited)

b) only defined powers to harmonise national laws are conferred on EU legislature

ii. It would permit economic operators to abuse free movement principles → in order to oppose any national rule that, solely because it regulated the conditions for pursuing an economic activity, could → narrow profit margin → reduce the attractiveness of pursuing that activity

Abuse of right → the purpose of free movement principles

- Maintaining that there is a restriction whenever a national measure is likely to narrow profit margin → the purpose of free movement is → to establish a market in which rules are prohibited as a matter of principle, except for those necessary and proportionate to meeting imperative requirements in the public interest
- By contrast, in the AG's view, free movement aims at → creating an internal market in which conditions are similar to those of a single market and where operators can move freely

b) The narrower concept of restriction

- Assessment criteria proposed by AG Tizzano
  i) Where the principle of **non-discrimination** is respected = the conditions for taking-up and pursuit of an economic activity are equal **both in law and in fact** → a national measure does not hamper the freedom of movement of persons
  ii) Unless such a measure **directly affects market access**
- Such an approach makes it possible to reconcile the objective of merging national markets into a single market with the continuation of MSs' general power to regulate economic activities

Reconciling Keck with case-law on free movement of persons

- The *Keck*'s rationale lies in the dual criterion → access to the market and discrimination → see *Keck*'s para. 17 proviso
- The *Keck* line of cases in the field of goods establishes a test of the same tenor as that subsequently applied with regard to freedom of movement of persons → Cases *Alpine Investments* and C-190/98 *Graf*

(II) Assessment of the disputed French rule

The prohibition on remunerating 'sight' accounts

- is not intended to regulate access to banking activities (which is subject, under EU directives, to the granting of authorisation by the competent national authority), but merely affect a method of engaging in banking activities
- does not discriminate in law against foreign banks

Does such a prohibition

a) place French subsidiaries of foreign banks in a less favourable de facto position than banks originally established in France (substantial discrimination) or

b) because of its effects, directly affect access to the banking market in France?

It is for the national court to ascertain whether the French rules either are substantially discriminatory or directly impede the access to the French market

In this regard, it must be borne in mind that

1) To finance its banking activities, a bank needs to raise capital
   a) either by taking deposits from the public
   b) or by the interbank market
2) Solution *b*) entails higher costs than *a*)
3) Unlike subsidiaries of foreign banks, credit institutions traditionally established in France have a large branch network → they enjoy an advantageous position in the market for the public's deposit

- Access by subsidiaries of foreign banks to the French banking market:
  The taking of deposits from the public is the less costly means for banks to finance their activities → effective competition in the market for the public's deposit → effective means of acquiring customers
- Does the prohibition on remunerating 'sight' accounts deprive subsidiaries of foreign banks of the only effective means of acquiring customers in France or are other forms of deposit that can be freely remunerated easily available in France?

- If there are not effective means of acquiring clients other than remuneration of sight accounts

→ the subsidiaries of foreign banks are prevented from competing effectively in the market for the public's deposit with banks traditionally established in France

→ the French rules at issue are

i. likely to place the subsidiaries of foreign banks in a less favourable de facto situation than their domestic competitors

ii. also liable to impede directly access by them to the French banking market

FINDINGS OF THE COURT

There is an obstacle to freedom of establishment

1) All measures which *prohibit, impede or render less attractive the exercise of the freedom of establishment* must be regarded as restrictions on such freedom
2) A prohibition on the remuneration of sight accounts constitutes, for companies from MSs other than France, *a* ***serious obstacle*** *to the pursuit of their activities via a subsidiary in France,* ***affecting their access to the market*** → it is to be regarded as a restriction within the meaning of Art 49 TFEU → **Why?**

Court's reasoning in terms of market access

If one considers that

1) (unlike subsidiaries of foreign banks) credit institutions traditionally established in France have an extensive network of branches → the latter have greater opportunities than the former for raising capital from the public → *different situations in fact?*
2) competing by means of the rate of remuneration paid on sight accounts constitutes for subsidiaries of foreign banks *one of the most effective methods for entering the market of a MS*

It follows that a prohibition on the remuneration of sight accounts …

- → *deprives subsidiaries of foreign banks of the possibility of competing more effectively* – by paying remuneration on sights accounts – with credit institutions traditionally established in France (Host MS)
- → *hinders those subsidiaries in their activity of raising capital from the public* → the existence of other forms of account with remunerated deposits cannot remedy such an hindrance
- → *makes **more difficult** access to the French banking market by those subsidiaries* → ***unequal impact*** on access to the market?

- Market access test
- Freedom of establishment
- Freedom to provide cross-border services

CASE C-518/06 *COMMISSION V ITALY (MOTOR INSURANCE)*

- EU secondary law → third-party liability motor insurance is compulsory
- Italian law → obligation to contract imposed on all insurance undertakings operating on Italian territory, including those which have their head office in another MS → they must accept the proposals regarding third-party liability motor insurance submitted to them by any potential customer
- Court's ruling → Italian rules constitute a restriction on both freedom of establishment and freedom to provide services

Market access approach

- In a sector like that of insurance, Italian rules affect the relevant operators' access to the market, in particular where they subject insurance undertakings not only to an obligation to cover any risks which are proposed to them, but also to requirements to moderate premium rates
- The obligation to contract, inasmuch as it involves changes and costs for insurance undertakings,
  →renders access to the Italian market less attractive and
  →if they obtain access to that market, reduces the ability of the undertakings from other MSs to compete effectively, from the outset, against undertakings traditionally established there

Keck and free movement of persons

The ECJ does not rule that the rationale behind the *Keck* judgment do not apply to the freedom to provide cross-border services under Art. 56 TFEU, but only that applying the same rationale to different situations results in different solutions.

What is the *Keck*'s rationale?

In order to determine whether **rules on selling arrangements of goods or requirements relating to the exercise of a services activity** could cause a barrier to inter-state trade on goods and services, an **Access to the Market test** applies.

Those provisions fall within the scope of EC freedoms where:

(i) they prevent access by products from other MS to the market of the MS of importation or impede such access more than they impede access by domestic products (*Keck*, para. 17);

(ii) they directly affect access to the market in services in the other MS (*Alpine Investments*, para. 38).

(VI) CONCLUDING REMARKS: ASSESSMENT OF THE CURRENT LAW

Two possible readings of the case-law reflected in contrasting normative assessments of what free movement rules ought to cover

Conclusion

According to the case-law, a restriction to the freedom to provide services under Art. 56 TFEU can stem from the application of indistinctly applicable measures when either a **Double Burden Test** or an **Access to the Market test** is satisfied.

Double burden test

- Grossly speaking, it applies to **Product-related rules**, as regards Art. 34 TFEU, and to **requirements relating to the access to a services activity** (para. 15 of *Keck*).
- Goods, services and provider already comply with the regulation of the MS of origin, i.e. the home State (para. 12 of *Säger*).
- Application of functionally equivalent rules of the host State results in a double burden, then in a barrier.
- Indirect discrimination: double burden for the foreign services, whereas a single burden for the national?

Double burden test

- 1) it only deals with the indistinctly applicable measures of the **HOST** State;
- 2) it entails the application of the "mutual recognition": the law of the country of origin must be taken into account.

Access to the Market test

- 1) grossly speaking, it applies to **Selling Arrangements** (para. 16 of *Keck*), as regards Art. 34 TFEU, and to **requirements relating to the exercise of a services activity** (*Alpine Investments*);
- 2) it deals with the indistinctly applicable measures of both the host State and the home State (*Alpine Investments*);
- 3) "mutual recognition" has no role to play: the measure is considered *per se*.

In search of criteria for defining the nature of «obstacle» to intra-EU trade

Fixed points:

1) Restriction on free movement doubtless arise from **discriminatory** measures against products (goods, services) and economic operators from other MSs
2) But also **non-discriminatory** measures can hinder free movement
3) However, a rule in a MS cannot be deemed to be a restriction on free movement **solely because other MSs apply less strict rules**

Further reading

- C. BARNARD, *The Substantive Law of the EU*, Oxford University Press, 3rd ed., 2010
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- J. SNELL, *The Notion of Market Access: A Concept or a Slogan?*, in (2010) *CMLRev*, 437 ff.
- G. VITELLINO, *Rome II from an Internal Market Perspective*, in A. Malatesta, *The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe*, Cedam, 2006, 271 ff.