EU Internal Market Law

Dr Prof Gaetano Vitellino
gvitellino@liuc.it

A.Y. 2016/2017

Session No 6
"What is an "obstacle" to free movement according to the CJEU's case law?"

Dr Prof Gaetano Vitellino

A.Y. 2016/2017

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?

A.Y. 2016/2017

V. GOING BEYOND THE DISCRIMINATION MODEL?

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

A.Y. 2016/2017

Free movement of goods

CJEU 24 November 1993, Joined Cases C-267/91 and C-268/91 *Keck and Mithouard*

1) Selling arrangements
(or market circumstances rules)

A.Y. 2016/2017

Almost 20 years after *Dassonville*, and 14 after *Cassis de Dijon*, the CJEU reassesses its earlier cases on Art 34 TFEU

An apparently formal distinction between:

a) **Product requirements**
→ *Cassis* applies (dual burden test)
b) **Market circumstances rules** (restricting or prohibiting certain selling arrangements)
→ which test applies (other than *Cassis*)?

A.Y. 2016/2017

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

A.Y. 2016/2017

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)

A.Y. 2016/2017

The problem with selling arrangements

- They regulate the marketing of goods within a State
- 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

A.Y. 2016/2017

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

1.a) The pre-*Keck* case-law

Two contradictory tendencies

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

The legal reasoning

To compel an economic operator either to adopt advertising or sales promotion schemes which differ from one Member State 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

A.Y. 2016/2017

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

1.b) The decision in *Keck*

A.Y. 2016/2017

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
- Question referred to the CJEU: is the general prohibition on resale at a loss under French law compatible with, notably, Art 34 TFEU?

A.Y. 2016/2017

The court's rulings

Clarification or overturn of the earlier case-law?

A.Y. 2016/2017

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?

A.Y. 2016/2017

The Court's answer

1) Market circumstances rules such as the French prohibition do not infringe Art 34
2) A clear message is also launched 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

A.Y. 2016/2017

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

- National provisions restricting or prohibiting certain selling arrangements **do not breach** Art 34 TFEU
- 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

A.Y. 2016/2017

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

Selling arrangements rules do not fall within Art 34 because, if the conditions set out in para. 16 are met, their application to the sale of products from another Member State meeting the requirement laid by that State is not by nature such as

- to **prevent the access** of imported goods **to the market**
- to **impede access for foreign goods more than they impede access for domestic products**

A.Y. 2016/2017

What is the *Keck*'s rationale?

- The **discriminatory approach**?
  - → Selling arrangements rules breach Art 34 if they discriminate, in law or in fact, against out-of-state traders/goods
  - → Emphasis is on para. 16 proviso
- 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

A.Y. 2016/2017

Selling arrangements hindering the access to the national market

1.c) The post-*Keck* case-law

A.Y. 2016/2017

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

A.Y. 2016/2017

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

A.Y. 2016/2017

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

Bearing in mind that

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

A.Y. 2016/2017

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

A.Y. 2016/2017

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

2) The principle of ensuring free access to national markets

A.Y. 2016/2017

"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

A.Y. 2016/2017

The concept of 'MEE to QRs on imports' under 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**

A.Y. 2016/2017

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

3) Restrictions on use: a new category?

A.Y. 2016/2017

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

A.Y. 2016/2017

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

A.Y. 2016/2017

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

A.Y. 2016/2017

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

A.Y. 2016/2017

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

A.Y. 2016/2017

4) the Market Access approach in the field of persons

A.Y. 2016/2017

- 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 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?
   → CJEU 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?
   → CJEU does not address this issue

A.Y. 2016/2017

(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

A.Y. 2016/2017

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)

A.Y. 2016/2017

(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 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?

A.Y. 2016/2017

(1) Preliminary remarks

- TFEU provisions on freedom of movement for persons: *(i)* are intended to facilitate the pursuit by EU citizens of occupational activities of all kinds throughout the EU; *(ii)* 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*

A.Y. 2016/2017

(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

A.Y. 2016/2017

(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 → even if the transfer rules apply *without distinction* to *internal* transfers and to *cross-border* transfers → 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

A.Y. 2016/2017

Freedom of establishment

Case C-442/02 *Caixabank France*

The 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.Y. 2016/2017

a) Broader vs narrower reading of the CJEU case-law
b) The assessment criteria → discrimination and market access

The AG Tizzano opinion

A.Y. 2016/2017

(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.Y. 2016/2017

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

A.Y. 2016/2017

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

A.Y. 2016/2017

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

A.Y. 2016/2017

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

A.Y. 2016/2017

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?

A.Y. 2016/2017

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

A.Y. 2016/2017

Findings of the court

A.Y. 2016/2017

Obstacle to freedom of establishment? yes

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?**

A.Y. 2016/2017

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*

A.Y. 2016/2017

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?

A.Y. 2016/2017

- 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

- Italian rules affect the 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 undertakings from other MSs obtain access to that market, reduces their ability to compete effectively, from the outset, against undertakings traditionally established there