# Inconsistencies and misconceptions in the free movement of goods

**Laurence W. Gormley** *

Table of Contents



Journal Article

European Law Review

**E.L. Rev. 2015, 40(6), 925-939**

**Subject**
European Union

**Other related subjects**
Customs

**Keywords**
EU law; Free movement of goods

**Cases cited**
Procureur du Roi v Dassonville (8/74) EU:C:1974:82; [1974] E.C.R. 837; [1974] 7 WLUK 67 (ECJ)
Criminal Proceedings against Keck (C-267/91) EU:C:1993:905; [1993] E.C.R. I-6097; [1993] 11 WLUK 312 (ECJ)
Commission of the European Communities v Portugal (C-265/06) EU:C:2008:210; [2008] E.C.R. I-2245; [2008] 4 WLUK 268 (ECJ (3rd Chamber))
Commission of the European Communities v Italy (C-110/05) EU:C:2009:66; [2009] E.C.R. I-519; [2009] 2 WLUK 200 (ECJ (Grand Chamber))
Aklagaren v Mickelsson (C-142/05) EU:C:2009:336; [2009] E.C.R. I-4273; [2009] 6 WLUK 73 (ECJ (2nd Chamber))
Criminal Proceedings against Sandstrom (C-433/05) EU:C:2010:184; [2011] Env. L.R. D6; [2010] 4 WLUK 171 (ECJ (3rd Chamber))

**Legislation cited**
Treaty on the Functioning of the European Union art.34
Treaty on the Functioning of the European Union art.35

 

Treaty on the Functioning of the European Union art.36


## *E.L. Rev. 925 Abstract

*This article examines inconsistencies and misconceptions in the case law and literature on the free movement of goods, in particular relating to the role of Dassonville and Keck after the Use cases; the question of whether there is should be a de minimis threshold in* arts 34 *to* 36 TFEU*, and whether it is appropriate to assimilate the case law based justifications with those in the first sentence of* art.36 TFEU. *It concludes that Dassonville survives the Use cases, and that market access adds nothing to the basic principle in Dassonville ; Keck too survives, albeit inelegantly and ignobly. This article further demonstrates the absence and inappropriateness of a de minimis threshold in this area, and concludes by arguing that assimilation is undesirable and unnecessary.*


### Introduction

It is no secret that the free movement of goods—in particular measures having equivalent effect to quantitative restrictions on imports—has been a subject of intense academic debate certainly since the 1960s. While the areas of debate have varied over the years (nobody now believes that the free movement of goods provisions catch only discriminatory measures, for example), revisionist attempts to force a rewrite of key principles are seemingly ever-present. The Court of Justice of the EU has attempted from time to time to respond to academic criticism by purporting to clarify its case law. However, it has only succeeded in opening yet more cans of worms, not least because the formulation of its judgments is not infrequently inconsistent, opaque or even illogical; these problems affect both the question of the scope of measures having equivalent effect and justifications. This article seeks to lay these problems bare and suggest a preferred path to follow. Three themes stand out: *Dassonville* and *Keck* after the Use cases; whether there is or should be a de minimis threshold in the application of arts 34 and 35 TFEU; and whether the time is ripe to assimilate the case law based justifications to those in the first sentence of art.36 TFEU. ***E.L. Rev. 926*** [1]

### The basic principle in *Dassonville* remains good law—does *Keck* survive?

The basic principle in *Dassonville* that: "All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions" [2] is, usually shorn of the word "trading", still the key definition of measures having equivalent effect in what is now art.34 TFEU. This remains so even after the attempt at categorisation of measures having equivalent effect in the most curious of compromises, *Commission v Italy (C-110/05)*. [3] There is no requirement that there be an *intention* on the part of the national authorities concerned (at whatever level or in whatever manifestation) to hinder (now) intra-Union trade. Any measure having the object or effect of hindering intra-Union trade will be caught by the concept of measures having equivalent effect. [4] Thus the observation that the measures were not designed to hinder inter-Member State trade found in a number of judgments [5] is not an attempt to introduce intention as a criterion, but is actually irrelevant to the reasoning, and is mentioned more to try to lend respectability to the fact that the Court simply does not want to know about the measures concerned.

The Court's phrasing of the relationship between a measure having equivalent effect and justifications varies like the proverbial length of the Lord Chancellor's foot, [6] as the classic examples below demonstrate. A measure must be regarded as,

"constituting an obstacle to trade between Member States caught by Article [34] of the Treaty. However, such an obstacle may be justified by the protection of public health, a general interest ground recognised by Article 36 of the Treaty." [7]

Similarly,

"a measure having an effect equivalent to a quantitative restriction on imports may be justified only by one of the public-interest reasons laid down in Article [36 TFEU] or by one of the overriding requirements referred to in the judgments of the Court" [8]

and,

 

"a national rule which hinders the free movement of goods is not necessarily contrary to Community law if it may be justified by one of the public-interest grounds set out in Article [36 TFEU] or by one of the overriding requirements laid down by the Court's case-law where the national rules are applicable without distinction ***E.L. Rev. 927*** " [9]

and,

"a national measure having equivalent effect to a quantitative restriction on exports, which is in principle contrary to Article [35 TFEU], may be justified" [10]

and,

"the sectoral traffic prohibition must be regarded as constituting a measure having equivalent effect to quantitative restrictions, which in principle is incompatible with the obligations under Articles [34 and 35 TFEU], unless that measure can be justified." [11]

Sometimes, however, the Court says that particular measures,

"constitute measures of equivalent effect prohibited by Article [34]. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods." [12]

On other occasions, the Court states that a particular provision "constitutes a measure having equivalent effect to quantitative restrictions on imports within the meaning of Article [34 TFEU], unless it can be justified objectively" [13] and,

"such regulations have the effect of hindering the access to the domestic market in question for those goods and therefore constitute, save where there is a justification pursuant to Article [36 TFEU] or there are overriding public interest requirements, measures having equivalent effect to quantitative restrictions on imports prohibited by Article [34 TFEU]." [14]

This formulation in these latter judgments is, with such a level of respect as might be thought due, clearly entirely wrongly expressed. The variations in formulation might be in part due to the system of chambers: judges not in the deciding chamber no longer see the papers, so a chamber, and its members' legal secretaries, may lack deep knowledge of the relevant case law, without anybody able to make wise suggestions. In any event, the drafting is sloppy and the drafters should know better. A measure that is accepted as being justified [15] does not cease thereby to be a "measure having equivalent effect": it merely ceases to be prohibited. If it were otherwise, there would have been no need to have gone down the frankly disingenuous route of *Keck and Mithouard* [16] in which the Court found that selling arrangements which fulfilled two conditions [17] were, contrary to its previous case law, outside the scope of measures hindering, directly or indirectly, actually or potentially, trade between Member States for the purposes of the *Dassonville* case law. The difficulties that have arisen with this approach are well known and have been ***E.L. Rev. 928*** discussed at length in the literature. [18] While undoubtedly in *Commission v Italy (C-110/05)* the Court once more thought that it was shedding light on the scope of art.34 TFEU, the divergent views in the literature demonstrate that —as in *Keck* itself—the Court has done nothing of the sort. [19]

Market access, which seems to have become the buzzword of the month, actually adds nothing at all to the *Dassonville* basic principle. In *Commission v Italy (C-110/05)*, having confirmed the *Dassonville* basic principle, the Court set out the background to what is now art.34 TFEU, noting that it reflected the obligation to respect the principles of non-discrimination and the mutual recognition of products lawfully manufactured and marketed [20] in other Member States, as well as the principle of ensuring free access of EU products to national markets. The Court mentioned three categories of measures having equivalent effect: (1) measures treating imported products less favourably than domestic products; (2) equally applicable requirements made of products in the absence of harmonisation at EU level; and (3) any other measures which hinder access of products originating in other Member States to the market of a Member State. [21] This categorisation is merely illustrative, and not intended to be exhaustive. Hindrance of access is merely an example of hindering—directly or indirectly, actually or potentially—trade between Member States. Selling arrangements that satisfied the *Keck* criteria were confirmed as not hindering trade between Member States, as there was no prevention of market access or impediment to market access for imported products that was greater than there was for domestic products. Thus *Keck* survived the Use cases, [22] at ***E.L. Rev. 929*** least formally, [23]

and it is clear that the Court did not see itself retreating from that immaculate misconception, no matter how compelling the chorus of criticism that had been voiced against it. However, the well-known difficulties with applying *Keck* —the failure to say what judgments were being overruled and for what purposes,[24] and the steady erosion of willingness to find the second *Keck* condition satisfied[25] —point to clear embarrassment with *Keck* , as does the rejection of all attempts to expand the scope of *Keck* to the other internal market freedoms,[26] or to other types of measures than the notoriously undefined "selling arrangements".[27]

A market access test is in any event just as open to a wide interpretation as the basic principle in *Dassonville* itself; its only virtue as a term is that it seems, as Spaventa has observed,

"to realign the case law on goods with the case law on the free movement of persons, so that barriers to economic freedom, to the freedom to trade, might now well be caught by Article [34 TFEU] and need to be justified."[28]

In fact the case law on the other freedoms was coming into line with the *Dassonville* pre- *Keck* approach of taking a wide view of the scope of the prohibition so as to emphasise the potential and/or indirect aspect of the hindrance, not merely any actual and/or direct hindrance.[29] Snell rightly views the notion of market access as obscuring rather than illuminating,[30] and it is difficult to disagree with this view. Although there are judgments since the Use cases in which the Court has invoked market access, they have not been ***E.L. Rev. 930*** characterised by clarity or consistency. In *Ker-Optika v ÀNTSZ (C-108/09)*[31] the Court, in a rather convoluted judgment, effectively reached the same conclusion as in *Deutscher Apothekersverbund v 0800 Doc Morris (C-322/01)*,[32] but notably turned [16] of *Keck* round to hold that selling arrangements were prohibited unless the two *Keck* conditions were satisfied, as opposed to holding that selling arrangements fell outside art.34 TFEU provided that the two *Keck* conditions were satisfied. Although this would appear to change the presumption, the result—that both the *Keck* conditions must be satisfied if selling arrangements are to escape the prohibition in art.34 TFEU—is the same. In *Keck* terms the measure is outside the ambit of art.34 TFEU, but in *Ker Optika* terms, the measure would appear to be treated as justified. Although such an approach is, it is submitted, eminently preferable, Oliver is correct to opine that if such a change were intended, the case should have been decided by a Grand Chamber, not a five-judge Chamber.[33] In *Asociación Nacional de Expendedores de Tabaco y Timbre (ANETT) v Administración del Estado (C-456/10)*,[34] the Court's contorted reasoning is mysterious: having recited *Dassonville* and *Commission v Italy* , it then observed that there was nothing to indicate that the national legislation treated imports less favourably, nor that it concerned product requirements. This disposed of the first two of the illustrations in *Commission v Italy* , but left open the market access issue. The effect of the measure was that retailers could not independently import tobacco products; they had to take products from the range offered by the wholesalers. The closing off of the independent purchase route was found to hinder market access. In fact this case is really just like *Dassonville* , where parallel imports were hindered by the requirement of the certificate of origin that only a direct importer could obtain. The conclusion then was not surprising, but the Court's reasoning route was unnecessarily complex: it was unnecessary to tick off, as it were, the *Commission v Italy* boxes, and a more straightforward approach to this prohibition of parallel imports would have been preferable. There are also much more significant judgments that do not mention market access at all. In *Commission v France (C-333/08)*,[35] dealing with prior authorisation requirements, the Commission won on all points, save that the Court declined to follow its suggestion that a mutual recognition clause should be limited to providing that the provisions of the relevant national legislation shall not hinder the principle of the free movement of foodstuffs in the preparation of which processing aids have been used which do not comply with the provisions of that legislation but which come from other Member States of the Community where they are lawfully manufactured and/or marketed.[36] In *Humanplasma GmbH v Republik Österreich (C-421/09)*,[37] the Court examined equally applicable rules on donated blood prohibiting use of paid-for donations. It applied *Dassonville* without more ado, and found that treating reimbursement of travel expenses and the gift of small tokens and refreshments as payment was unacceptable.[38] Finally, in *Commission v Austria (C-28/09)*[39] (the second Brenner Motorway case), involving a prohibition of lorries weighing more than 7.5 tonnes carrying specified goods from using the Inn motorway, the Court found that the existence of other routes and other modes of transport did not "negate the existence of a restriction on the free movement of goods".[40]

The most invidious aspect of *Commission v Italy* is undoubtedly, however, the Court's analysis of the justification of the Italian measure: despite the fact that both A.G. Léger and A.G. Bot had found that the ***E.L. Rev. 931*** measure was excessive, the Court opted for what it perceived to be ease of application and decided that the ban on trailers was acceptable. On that basis, all traffic over 4.5 tonnes in weight should be banned because there are some streets and bridges on a route somewhere in Italy that cannot cope with vehicles above that weight. That the Court's approach is nonsense and takes no account of traffic management practice is evident when it is remembered that a simple sign is used to warn where certain types of traffic are prohibited because

 

of a weight restriction (or a height restriction), usually also indicating an alternative route. The same approach could have been used in respect of roads where the use of motorcycle trailers was deemed dangerous. The one-measure-fits-all approach was on any footing excessive. Yet another reason why the Italian ban on motorcycle trailers should have been found to be unjustified is that the prohibition only applied to Italian-registered motor cycles (irrespective of whether they were imported or domestically produced) and their trailers; foreign-registered motor cycles and their trailers were exempt from the prohibition. [41] The clear inconsistency of application was evidently beyond the understanding even of the Court, but *Commission v Italy* was clearly a compromise judgment. A majority in the Grand Chamber was rightly willing to uphold the line taken earlier by the Third Chamber in *Commission v Portugal* , by finding measures governing the use of goods to be caught by the basic principle in *Dassonville* . Thus the siren-call of A.G. Kokott in *Mickelsson and Roos* to extend the scope of the *Keck* approach to exclude such measures from the concept of measures having equivalent effect [42] was indeed firmly rejected. The price was the acceptance of the Italian measures, no matter how illogical, misconceived and distinctly disingenuous the argument advanced.

*Dassonville* clearly does survive the Use cases, and *Keck* does too, hanging on at least; but might it be too much to hope that *Keck* will be consigned to a learning experience and be, like the devil, ritually renounced? It never achieved its purported purpose, simply sowed seeds of confusion, and, as an almost desperate caseload reduction attempt that has manifestly failed, was an immaculate misconception from start to finish.

## *De minimis non curat lex?*

The Court has always been firm in stating that there is no de minimis rule in relation to the free movement of goods. This applies just as much to art.34 TFEU [43] as to the prohibition of charges having equivalent effect to customs duties. [44] A.G. Tesauro in *Hünermund* was unconvinced of the feasibility of a de minimis test: it would be a "very difficult, if not downright impossible exercise: quite apart from anything else, proving the degree of hypothetical effects would be a *probation diabolica*". [45] That has not, however, prevented voices pleading for the introduction of a de minimis rule, most famously A.G. Jacobs in *Leclerc-Siplec* . [46] Mr Jacobs (as he then was) pleaded for a de minimis approach for equally applicable ***E.L. Rev. 932*** measures as an alternative to the widely discredited *Keck* approach to selling arrangements (he felt though that de minimis would be inappropriate to deal with overtly discriminatory measures). However, this rapidly falls foul of the thin end of the wedge argument: where should the line be drawn? Several criteria might come to mind: a percentage of GDP; a percentage of the national market (and what would be the relevant market); the value of a day's imports, or the amount of the daily penalty for non-compliance with an ECJ judgment or failure to implement a directive adequately or at all. [47] Unsurprisingly, there has been no appetite for a de minimis approach.

That said, the Court's approach in the Use cases seems to have given some encouragement to those who feel that a de minimis approach in art.34 TFEU would be a good idea. This comes from the Court's observation in *Commission v Italy* that,

"a prohibition on the use of a product in the territory of a Member State has a considerable influence on the behaviour of consumers, which, in its turn, affects the access of that product to the market of that Member State." [48]

This is not, however, an introduction of a de minimis threshold by the back door. In the reasoning of the Court this sentence merely demonstrates that the effect is not hypothetical or so remote as to be unrealistic. If there is an obstacle to the use of a product, in the form of a prohibition or restriction, the (virtual) non-existence of a market for it is scarcely surprising. In *Mickelson and Roos* (which was decided at Chamber level, after the Grand Chamber's judgment in *Commission v Italy* ) the Court referred to the national regulations for the designation of the navigable waters and waterways having "the effect of preventing users of personal watercraft from using them for the specific and inherent purposes for which they were intended or of greatly restricting their use". Enchelmaier regards this as accepting that minor restrictions on use would fall outside the scope of art.34 TFEU. [49] He gives as probable examples: speed limits for cars; a ban on commercial flights at night; a prohibition on using hand-held mobile phones while driving a motor vehicle; bans on minors being served alcohol in restaurants or using ultra-violet sun-beds; and a ban on the use of mobile phones in hospitals, but he rightly acknowledges that such examples would be regarded as having a too uncertain or indirect effect to be regarded as hindering trade between Member States. Even if, which is unlikely, they were not to be so regarded, it is submitted that various justifications (such as road safety, environmental/health protection and avoiding threats to the integrity of hospital equipment) would be easily available to ensure that such measures would not be regarded as prohibited.

 

There have indeed been a handful of cases in which the Court has regarded the measure concerned as being too remote or the effect too uncertain or indirect, the leading case cited being *Peralta (C-379/92)*. ***E.L. Rev. 933*** [50] There the Court noted that the measure was equally applicable and was not designed to regulate trade in goods between Member States. The first of these points is not a matter which would per se take a measure outside the definition of measures having equivalent effect (as is shown by e.g. *Cassis de Dijon* ); and the second point is manifestly irrelevant to the analysis, given the object or effect approach of arts 34–36 TFEU. The final point, that the restrictive effects the measure might have on the free movement of goods were too uncertain or indirect, has rather more weight—a way of saying that the integrationist merit was very thin indeed—but these are extremely rare occurrences indeed. Another example of this can be seen in *Blesgen (75/81)*, [51] in which, having expressly noted that even if a measure did not directly affect imports, it might, according to the circumstances, affect prospects for importing products from other Member States, the Court concluded that the restrictions on the sale of strong spirits in places open to the public made no distinction whatsoever based on the nature or origin of the products; the measure, the Court stated, had in fact no connection with importation of the products and for that reason was not of such a nature as to impede trade between Member States. In relation to exports, in *ED Srl v Italo Fenocchio (C-412/97)*, [52] the Court found that different treatment of creditors under art.633 of the Italian Civil Code according to whether the debtor was resident in or outside Italy was too uncertain or indirect for the provision to be regarded as liable to hinder trade between Member States, but in that case, it could equally well be argued that, under the criterion in *P.B. Groenveld BV v Produktschap voor Vee en Vlees (15/79)*, [53] there was no particular advantage for national production or for the domestic Italian market. While in *ED* the Court cited that criterion (albeit referring to a later judgment), it was, with respect, misguided to do so because the *Groenveld* criterion was evolved in the context of measures applicable irrespective of the destination of the products, not in the context of different treatment. [54] These judgments are not actually examples of a de minimis test. [55] It is frankly misleading to characterise remoteness as being a form of de minimis. Famously, the Court rejected a remoteness argument in *Bluhme (67/97)* [56] which dealt with a prohibition on importing on to the island of Læsø bees other than the Læsø brown bee. This case, like others, demonstrates that even if the measure covers only a small part of national territory, it can still fall foul of art.34 TFEU. [57] Thus there is no de minimis approach in relation to the internal market, either in the economic extent of the measure or in its territorial scope, or in any other aspect.

The only real blot on the internal market landscape, however, is in relation to the freedom to provide services, in *Viacom Outdoor Srl v Giotto Imobilier Sàrl (C-134/03)*. [58] Here the Court examined a tax that was applied only to outdoor advertising activities involving the use of public space administered by the ***E.L. Rev. 934*** municipal authorities, the amount being fixed "at a level which may be considered modest in relation to the value of the services provided which are subject to it". The Court concluded that in these circumstances,

"the levying of such a tax is not on any view liable to prohibit, impede or otherwise make less attractive the provision of advertising services to be carried out in the territory of the municipalities concerned, including the case in which the provision of services is of a cross-border nature on account of the place of establishment of either the provider or the recipient of the services."

The case is rather special, however, as the Court was clearly determined to throw the matter out. There had already been an earlier reference, which had been rejected, [59] and while the Court accepted that the reference was this time properly explained and formulated, it was clearly unwilling to find incompatibility. The judgment was handed down by a five-judge chamber, but it seems extremely far-fetched to conclude that the Court was intending to create a general de minimis rule in relation to the internal market in these circumstances. The Court simply wanted to dispose of what it viewed as an unmeritorious case from start to finish. Perhaps the appropriate comparison can be found in mainstream EU tax law: *Commission v Belgium (356/85)* [60] demonstrates that even a discriminatory measure may escape the prohibition of the second paragraph of what is now art.110 TFEU, where the tax difference as an element in the overall price is simply lost in the noise, producing no protective effect. Even if (which may be doubted) the Court was thinking along the lines of this analogy, the judgment in *Viacom II* is decidedly infelicitously drafted.

Krenn [61] has argued, in the context of discussing horizontal direct effect and the free movement of goods, [62] for a de minimis test for the conduct of private individuals in the context of arts 34–36 TFEU. He seems to envisage de minimis as a form of remoteness, but, as explained above, the concepts are distinct. He discusses de minimis in competition law and free movement law, drawing three conclusions: (1) excluding from a provision's scope certain insignificant threats to its underlying goals would be a sign of maturity in the application of art.34 TFEU, which would allow an efficient control of measures presenting a significant peril to the internal market; (2) the threshold in competition and free movement law would be different, owing to the different actors that these norms address; the potentially far-reaching effects of State measures on trade (aggravated by

 

the fact that State authorities are less likely than private actors to respond to market incentives) is the traditional explanation for the reluctance to apply a de minimis threshold in free movement law; and (3) most importantly, in his view, the effect of the measures should serve as the critical yardstick to decide whether the de minimis threshold is passed or not, and he argues that the appropriate threshold is the effect on the internal market, as opposed to the effect on the individual's right derived from art.34 TFEU.

Unsurprisingly, in view of what has been submitted above, the present author finds Krenn's plea both unconvincing and undesirable. Taking his third point first, if one were to accept his argument, which the present author does not, then his yardstick of the effect on the internal market might at first sight appear be the more appropriate of the two, but it does not really work. Krenn did not suggest at what level of effect such a threshold should be set, and the reality is that it is impossible to make a one-size-fits-all threshold determination. In any event, for the purposes of any damages claim, the effect on the individual's rights may be appropriate for quantification of the loss, but it is not appropriate as a de minimis criterion. Moreover, an individual trader or other interested person (as the free movement of goods does not just benefit traders) may well feel decidedly short-changed if she or he is left to bear losses because the ***E.L. Rev. 935*** hindrance to the free movement of goods was found to be too slight to be of any consequence.[63] Krenn's second conclusion would probably be correct, if his basic premise were to be accepted, *quod non*. It is certainly appropriate to maintain, as the Court clearly showed in *Van de Haar & Kaveka de Meern BV (177 and 178/82)*,[64] the distinction between the fields of free movement of goods and competition. De minimis has of course had a long and well-known role in competition law, starting with *Völk v Ets. J. Vervaecke (5/69)*.[65] While *Völk* provided the inspiration for *Dassonville* ("an influence, direct or indirect, actual or potential"),[66] it refers to "patterns of trade between Member States", an expression that does not occur in *Dassonville* , even though it does surface in *Groenveld* . His first conclusion is in any event unsupportable. In a mature internal market, barriers to trade between Member States should be things of the past, not things that are allowed to creep in by the back door on the ground that their effects are small. The internal market is not meant to resemble a Swiss cheese (full of holes). All in all, Krenn's plea for de minimis is, with respect, fundamentally unworkable.

Jansson and Kalimo[67] have presented a very subtle analysis looking at de minimis and market access. They suggest that restrictive effects on market access might be differentiated from restrictive effects on trade at large by defining market access as an expression reflecting a de minimis rule; in such a vision, minimal restrictive effects which only reduce trade would not create an effect on market access, whereas restrictions on trade that were severe enough actually to hinder a trader from entering a market, or force an established trader to leave a market, would have an effect on market access; thus what would be severe enough would be determined by the de minimis threshold. Pausing there, the first reaction to this is that it ignores the fact that even only reducing trade must clearly be enough to found a breach of arts 34 or 35 TFEU, the purpose of which is to ensure free movement of goods through the removal of obstacles thereto. On that point alone, their analysis falls. Continuing on their reasoning, they purport to identify three substantive groups of de minimis thresholds: magnitude (severity); probability and causality. They argue that the introduction of a de minimis test would not necessarily involve a quantifiable threshold, but the limits could be expressed in rather abstract terms.[68] It is true that the Court's terminology on restrictions varies from time to time, and it is unsurprising that Jansson and Kalimo consider that a terminological analysis does not promise a useful path for distinguishing between negligible de minimis restrictions on trade from the prohibited ones.[69] Looking at the magnitude option, they distinguish three possibilities, should the Court contemplate a more positive stance towards de minimis tests: absolute size of the affected market; relative share of the affected market, and the effect on the individual operator. Jansson and Kalimo suggest various ways of understanding such thresholds: on the one hand requiring all three elements to ***E.L. Rev. 936*** be satisfied before a measure would be considered prohibited (impact on a market of sufficient size, on a sufficient share of the relevant market, and on an individual importer to a sufficient extent); on the other hand the view might be taken that a measure would only be de minimis if it was cumulatively so on all three aspects.[70] Another possibility, they observe, would be that only two of the three boxes would have to be ticked. They acknowledge, though, that each of these possibilities faces difficulties in view of the case law. They then proceed to discuss traces of the magnitude of the effect of a measure. Here, apart from the *Viacom II* judgment,[71] their examples are very much related to the factual analysis, but the Court is not using magnitude as a criterion, but as a clear expression of a very actual (not hypothetical or remote) effect. As explained above, *Viacom II* is hardly the sort of judgment that can be taken as giving rise to a principle. Jansson and Kalimo then set out to look at these cases in the light of the Use judgments. However, as explained above, the Use judgments are not introducing a de minimis criterion, no matter how much revisionists would like to think the contrary.

Causality (the third major plank of Jansson and Kalimo's typology) does not assist de minimis analysis at all, as already in *Dassonville* the Court had made it clear that measures "capable of hindering directly or indirectly, actually or potentially intra-

 

[Union] trade" were caught. There will be a prima facie prohibition if an effct that is too remote or purely hypothetical is absent. Thus even an indirect hindrance is sufficient (to answer Jansson and Kalimo's question). [72] The same applies in relation to their discussion of the probability of a restrictive effect, the second plank in their discussion. Words such as "potentially" or "is liable to" or "may" are not introducing a de minimis threshold! Jansson and Kalimo argue that market access in the Use cases is itself a de minimis threshold, distinguishing what is severe enough; this might be a total barrier to access or a substantial barrier, which might even render otiose the three separate tests which they discussed, although they feel that it might well actually overlap with those tests and be cumulative. Jansson and Kalimo acknowledge that legal certainty is the obvious objection to reliance on de minimis tests; one might also add sheer unworkability and impracticality. The assumption made by Jansson and Kalimo that market access is the rather limited third category of measures (set out in *Commission v Italy* ) rather than the one and overarching test in free movement law is certainly correct, although their stimulating discussion demonstrates more than anything else just how disruptive and unsystematic the introduction of a de minimis threshold (of whatever type) would be. Their conclusion is that the Court should cease consistently denying the existence of any de minimis thresholds, while letting considerations of degree in through the back door. A cynic might suggest that the Court had opened the back door already with the concept of case law based justifications in *Dassonville* and *Cassis de Dijon* , although it is clear that on the facts that back door was very rarely a means of refuge for the Member States (their measures very often fail the justification and proportionality analysis, and/or sometimes fall foul of the second sentence of art.36 TFEU). Analysis in terms of remoteness or insufficient hindrance really relates to cases where the Court sees the trader's argument as being an abuse or hypothetical, or simply misconceived. While in the Use judgments the Court has spoken of substantial effects, it is clear that substantiality is not actually a criterion for being caught, but a demonstration of the real nature of the hindrance to trade. Ultimately, then, although the discussion by Jansson and Kalimo is extremely stimulating, it fails to make the case for introducing a de minimis analysis in free movement case law stick. A perceived de minimis back door is but a mirage; the real back door is the non-Treaty-based justifications, but that has not been overwhelmed by a massive load of successful cases. Although some judgments have resulted in success for the Member States, the overwhelming majority of cases fail to penetrate the back door, yet alone the front driveway! ***E.L. Rev. 937***

Hojnik [73] has argued that while the Court has not expressly accepted a de minimis rule in the internal market freedoms, there are signs that it is gaining ground in the field of the internal market. However, as explained above, the cases on which she purports to find a de minimis approach are in fact remoteness cases, and there is a clear difference between the two concepts. Her argument is that "de minimis" has a rather different meaning under EU internal market law than in other fields, because "it increases the autonomy of national authorities, thereby strengthening democratic decision-making in the EU as a multilevel governance system". She argues that on this basis,

"Member States keep their competences in the field of market law with regard to rules which do not formally discriminate between domestic and foreign goods, people, services and capital, the purpose of which is not regulate trade with other Member States and whose potential restrictive effect on the functioning of the internal market are too uncertain to indirect for the obligation which they lay down to regarded as being in breach of the EU Treaties." [74]

With respect, this is merely a plea for a wider use of a remoteness test, not a plea for a de minimis test as usually understood. As has been demonstrated above, it is extremely important that even formally non-discriminatory rules can fall foul of the Treaty prohibitions and any alleged justification should be tested. It is also important to recognise that arts 30–36 TFEU (and the other freedoms) are effects-based provisions (or perhaps better object or effect). Accordingly, her analysis is, with respect, misguided. It is neither desirable nor practical to have a de minimis approach in the internal market, and, with the utmost possible respect, it is high time that the Lorelei stopped singing otherwise.

The regulatory powers of the Member States are often regarded by national administrations as almost sacred cows that should, absent discrimination, be sacrosanct, but that is not what the TFEU requires or seeks to achieve. The regulatory powers of the Member States do not form a field of reserved powers, any more than do the justifications accepted in art.36 TFEU or the case law. [75] While the Court of Justice is rightly not interested in wholly unmeritorious attempts to worm out of compliance with national laws, [76] it does set its face against any attempt to open a slippery slope of descent into the freedoms only being concerned with big problems. It is worthwhile recalling that so-called small cases have often been the real breakthrough for fundamental developments in EU law, [77] and it would be wholly contrary to the single internal market concept and to the role in EU law of the "vigilance of individuals concerned to protect their rights" [78] to adopt a de minimis rule that would, in fact, soon become a carte blanche or at the very least a slippery slope in the eyes of the Member States, to sidestep their obligations.

One last observation of Hojink that should not go unchallenged is that, ***E.L. Rev. 938***

 

"it is immoral (or at least democratically illegitimate) for EU law to prohibit all Member States' trading rules, as the European Court of Justice has proclaimed in its 40-year old judgment of *Dassonville* ." [79]

In *Dassonville* , while proclaiming the general principle, the Court actually opened the door for justifications not mentioned in art.34 TFEU. There is nothing at all immoral or democratically illegitimate in that. However entertaining such rhetoric may be, it should not get in the way of useful and accurate legal analysis!

**Assimilation of the justifications?**

As is well known, in *Dassonville* the Court first accepted that it could be possible to accept measures which hindered trade between Member States on the ground of justifications not mentioned in art.36 TFEU. [80] In *Cassis de Dijon* the Court made it clear that these grounds did not amount to a closed class (it gave other illustrations) and coined the term "mandatory requirements". [81] On the other hand, the Court has always steadfastly declined to enlarge the grounds of justification mentioned in the first sentence of art.36. [82] The justifications mentioned are clearly inspired by art.XX GATT 1947, but while there is some overlap, the grounds are not identical. While the Court's approach to the interpretation of art.36 and the case law based justifications shows a large degree of similarity, [83] there is one major difference, namely that the case law based justifications are available only to equally applicable measures. [84] This is still true, [85] even though in the field of environmental protection the Court has stood consistency on its head, declared discriminatory measures not to be discriminatory because of the special nature of the products involved [86] (a moment after having stated that waste was a product like any other product), [87] and sent the message, for good or otherwise, that environmental protection is a special case.

The Court has actually continued to expand the case law based justifications, even into areas which ought really to have fallen within the concept of the health and life of humans animals or plants, and thus ***E.L. Rev. 939*** been considered under art.36 itself. [88] Perhaps unsurprisingly, there has been some pressure from some quarters to assimilate the justifications. [89] The Court has rightly steadfastly ignored this pressure. Enchelmaier has identified a few apparent chinks in the armour, [90] but these still have not led to the Court expressly abandoning its stance, and are simply examples of the Court's paucity of internal consistency in reasoning, when led by result-seeking desires. The real problem is that if it were to do so, it would knock a gaping hole in the longstanding doctrine that exceptions to the free movement provisions are to be interpreted strictly and that the case law based justifications should only apply to equally applicable measures. This really would be open season for every puny justification.

A further reason is that the Court has seen that even though the Member States have had ample opportunities to amend what is now art.36 TFEU on the occasion of Intergovernmental Conferences for Treaty revision, they have manifestly failed to do so. In that case, while the Court has taken an essentially equitable stance [91] in accepting the availability of non-Treaty-based grounds of justification (without by any means regularly accepting the substantive argument) in the absence of EU legislation governing the interest or value concerned, it is not for the Court to rewrite the terms of the TFEU as such. This is after all the well-known riposte to pressure for reform of the Court's miserable record on the availability of standing under what is now art.263 TFEU. [92]

**Concluding observations**

The case law of the Court in this area is still riddled with inconsistencies and inadequate reasoning. This discussion has focused on three themes where lively discussion is apparent, concluding, first, that both *Dassonville* and, at least to an extent and no matter how sadly, *Keck* survives the Use cases; secondly, that there is not and should not be a de minimis rule applied in free movement cases; and, thirdly, that the case law based grounds of justification and the grounds of justification in the first sentence of art.36 TFEU should not be assimilated. The inconsistencies and unconvincing reasoning look like the product of what appears to be a highly divided Court. Misconceptions are not confined to the Court, and revisionist views prevalent in some circles in the literature have also been examined; the conclusion, not unpredictably, is that those views are, with respect, misconceived. It would be unwise to fall for the charms of the Lorelei, who seek to draw the unwary from the safe flowing current of the free movement principle and on to the treacherous rocks of local interests and (sometimes very thinly disguised) market partition. Judicious and well-reasoned use of the justifications acknowledged in the case law is still the best approach, although the Court does not always perform as well as it should in this balancing of interests. The broad scope of the fundamental freedoms and the unity of the internal market are as central to the achievement of the Union's objectives now as they were in the past. The voices of revisionists are not the sound of progress, but a wailing call to Ballygobackwards.

 

**Laurence W. Gormley**

*University of Groningen*

## Footnotes

1 As to the issue of the extent of the application of the free movement of goods provisions to the conduct of private parties: see L. Gormley, "Private Parties and the Free Movement of Goods: Responsible, Irresponsible, or a Lack of Principles?" (2015) 38 Fordh. Int'l. L.J. 993. See also P. Oliver, "L'article 34 TFEU peut-il avoir un effet direct horizontal?" (2014) 50 C.D.E. 77; B. van Leeuwen, "Private Regulation and Public Responsibility in the Internal Market" (2014) 33 Y.B.E.L. 277; C. Krenn, "A Missing Piece in the Horizontal Effect 'Jigsaw': Horizontal Direct Effect and the Free Movement of Goods" (2012) 49 C.M.L. Rev. 177, and the literature cited by those authors.

2 *Procureur du Roi v Dassonville (8/74) [1974] E.C.R. 837; [1974] 2 C.M.L.R. 436* at [5].

3 *Commission v Italy (C-110/05) [2009] E.C.R. I-519; [2009] 2 C.M.L.R. 34* at [34]–[37]. In *Commission v Italy* at [33] the Court of Justice repeated the *Dassonville* basic principle as pronounced, but more usually the Court simply refers to any measure or all measures.

4 See e.g. *Deutscher Apothekersverbund eV v 0800 Doc Morris NV (C-322/01) [2003] E.C.R. I-14887; [2005] 1 C.M.L.R. 46* at [67]; *Dynamic Medien Vertriebs GmbH v Avides Media AG (C-244/06) [2008] E.C.R. I-505; [2008] 2 C.M.L.R. 23* at [27]; and *Commission v Italy (C-110/05) [2009] E.C.R. I-519* at [37].

5 E.g. *Torfaen BC v B & Q Plc (C-145/88) [1988] E.C.R. I-3851; [1990] 1 C.M.L.R. 337* at [14]; *H. Krantz GmbH & Co v Ontvanger der Directe Belastingen (C-69/88) [1980] E.C.R. I-583; [1991] 2 C.M.L.R. 677* at [10]; *Quietlynn Ltd v Southend BC (C-23/89) [1990] E.C.R. I-3059; [1990] 3 C.M.L.R. 55* at [11]; and *Criminal Proceedings against Keck and Mithouard (C-267/91 and C-268/91) [1993] E.C.R. I-6097; [1995] 1 C.M.L.R. 101* at [12].

6 As to the Lord Chancellor's foot, see *E. Fry, "Life of John Selden" in F. Pollock (ed.), Table Talk of John Selden (London: Selden Society, 1927), p.177*.

7 *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP) (C-405/98) [2002] E.C.R. I-1795; [2001] 2 C.M.L.R. 31* at [25]–[26].

8 *Commission v Portugal (C-265/06) [2008] E.C.R. I-2245; [2008] 2 C.M.L.R. 41* at [37].

9 *Alfa Vita Vassilipoulos AE v Elliniko Dimosio, Nomarchiaki Aftodioikisi Ioanninon (C-158 and 159/04) [2006] E.C.R. I-8135; [2007] 2 C.M.L.R. 2* at [20].

10 *Kakavetsos-Fragkopoulos AE Epexergasias kai Emporias Stafidas, formerly K. Fragkopoulos kai SIA OE v Nomarchiaki Aftodioikisi Korinthias (C-161/09) [2011] E.C.R. I-915; [2011] 2 C.M.L.R. 39* at [51].

11 *Commission v Austria (C-28/09) [2011] E.C.R. I-13525* at [117].

12 E.g. *Keck & Mithouard (C-267/91 and 268/91) [1993] E.C.R. I-6097* at [15].

13 *Commission v Italy (C-110/05) [2009] E.C.R. I-2019* at [58].

14 *Åklagaren v Mickelsson and Roos (C-142/05) [2009] E.C.R. I-4273; [2009] All E.R. (EC) 842* at [28].

15 Whether under the case-law based justifications developed in the line of authority stemming from *Dassonville (8/74) [1974] E.C.R. 837* at [6] and *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon) (120/78) [1979] E.C.R. 649; [1979] 3 C.M.L.R. 494*, or under the Treaty-based justifications which are primarily to be found in art.36 TFEU.

16 *Keck and Mithouard (C-267/91 and 268/91) [1993] E.C.R. I-6097* at [16].

17 That the rules apply to all relevant traders operating in national territory and must affect in the same manner, in law and in fact, the marketing of both domestic products and those from other Member States. See *Keck and Mithouard (C-267/91 and 268/91) [1993] E.C.R. I-6097* at [16].

18 See e.g. the literature cited in *L. Gormley, EU Law of Free Movement of Goods and Customs Union (Oxford: Oxford University Press, 2009), pp.408–409 fn.75*; and by *P. Oliver, "Measures of Equivalent Effect I: General" in P. Oliver (ed.), Oliver on Free Movement of Goods in the European Union, 5th edn (Oxford:*

 

*Hart Publishing, 2010), p.84 at p.114* (Oliver describes writing about *Keck* as "a cottage industry in its own right"). See, further, e.g. L. Gormley, "Silver Threads Among the Gold … 50 Years of the Free Movement of Goods" (2008) 31 Fordh. Int'l L.J. 1637; E. Spaventa, "Leaving Keck behind? The Free Movement of Goods after the Rulings in Commission v Italy and Mickelsson and Roos" (2009) 34 E.L. Rev. 914; and T. Horsley, "Case C-110/05, Commission v Italy" (2009) 46 C.M.L. Rev. 2001.

19 See e.g. Spaventa, "Leaving Keck behind?" (2009) 34 E.L. Rev. 914; P. Oliver, "Of Trailers and Jet Skis: is the Case Law on Article 34 TFEU hurtling in a New Direction?" (2010) 33 Fordh. Int'l L.J. 1423; L. Gormley, "Free Movement of Goods and their Use: What is the Use of it?" (2010) 33 Fordh. Int'l LJ 1589; J. Snell, "The Notion of Market Access: A Concept or a Slogan?" (2010) 47 C.M.L. Rev. 437; and the various contributions in "What Standard after Keck?" (2012) 2 E.J.C.L.-R.E.D.C. 199.

20 As the present writer has noted on myriad occasions, the Court repeated an old mistake in *Cassis de Dijon* , and subsequently. The Court's wording in that judgment took no account of what was then art.9(2) EEC (now art.28(2) TFEU), perhaps because it was unnecessary to do so to decide the case, as *Cassis de Dijon* is a French product. However, in line with that provision, the judgments in *Criel v Procureur de la République (Lille) (41/76) [1976] E.C.R. 1921; [1977] 2 C.M.L.R. 535* at [17]–[19]; *SA des Grands Distilleries Peureux v Directeur des services fiscaux de la Haute-Sâone et du Territoire de Belfort (119/78) [1979] E.C.R. 975* at [25]–[26]; *Commission v Italy (C-128/89) [1990] E.C.R. I-3239; [1991] 3 C.M.L.R. 720* at [12] do make it clear that goods from third countries, in free circulation in another Member State, also benefit from the free movement of goods. This is also consistent with the Court's approach to fiscal measures under what was then art.95 EEC (now art.110 TFEU): see *Cooperativa Co-Frutta Srl v Amministrazione delle Finanze dello Stato (193/85) [1987] E.C.R. 2085* at [24]–[29]. See also *L. Gormley, "Third-Country Goods in the Internal Market: Some Issues" in I. Govaere and D. Hanf (eds), Scrutinizing Internal and External Dimensions of European Law (Liber Amicorum Paul Demaret) (Brussels: Peter Lang, 2013), p.313*.

21 *Commission v Italy (C-110/05) [2009] E.C.R. I-2019* at [37].

22 The Use cases are (in order of judgment) *Commission v Portugal (C-265/06) [2008] E.C.R. I-2245; [2008] 2 C.M.L.R. 41 (Third Chamber)*; *Commission v Italy (C-110/05) [2009] E.C.R. I-2019 (Grand Chamber)*; *Mickelsson and Roos (C-142/05) [2009] E.C.R. I-4273 (Second Chamber)*. See also subsequently, *Criminal Proceedings against Sandström (C-433/05) [2010] E.C.R. I-2885*. In order to understand the extensive dialogue going on at the Court, however, the chronology of the Opinions and the oral hearings, and the transfer of Commission v Italy to the Grand Chamber is crucial: see Gormley, "Free Movement of Goods and their Use" (2010) 33 Fordh. Int'l L.J. 1589, 1595–1608.

23 Although the relevance of *Keck* once the Court thinks in terms of market access has been seriously questioned; see e.g. Spaventa, "Leaving Keck behind?" (2009) 34 E.L. Rev. 914, 928–929. See also I. Lianos, "In Memoriam Keck: The Reformation of the EU Law on the Free Movement of Goods" (2015) 40 E.L. Rev. 225, which appeared at too late a stage to be discussed in the present article.

24 Some members of the Court attempted to claim, extra-judicially, that *Keck* overruled various specific cases, but the Court plainly could not form a clear view, otherwise it would have expressly stated in *Keck* which cases and for what purposes. It was left to academics and practitioners to work it out. The Court still cites, in relation to proportionality, cases which would likewise on their facts be classified as permissible selling arrangements: e.g. *Buet v Ministère Public (382/87) [1989] E.C.R. 1235; [1993] 3 C.M.L.R. 659* at [11] is cited in *Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH (C-315/92) [1994] E.C.R. I-317* at [16]; and *Re Yves Rocher (C-126/91) [1993] E.C.R. I-2361* at [12] is cited in *Verein gegen Unwesen in Handel und Gewerbe Köln eV v Mars GmbH (C-470/93) [1995] E.C.R. I-1923; [1995] 3 C.M.L.R. 1* at [15]. Less confusingly, *Criminal Proceedings against Oosthoek's Uitgeversmaatschappij BV (286/81) [1982] E.C.R. 4575* is cited in relation to whether all the components of a situation are confined to one Member State or not: e.g. *Re Pistre (C-321–324/94) [1997] E.C.R. I-2343; [1997] 2 C.M.L.R. 565* at [44]; *Criminal Proceedings against Guimont (C-448/98) [2000] E.C.R. I-10663; [2003] 1 C.M.L.R. 3* at [21]; *Carbonati Apuani Srl v Comune di Carrara (C-72/03) [2004] E.C.R. I-8027; [2004] 3 C.M.L.R. 59* at [26].

25 See e.g. *Konsumentenombudsmannen v De Agostini (Swenska) Förlag AB & TV-Shop Swergie AB (C-34–C-36/95) [1997] E.C.R. I-3843; [1998] 1 C.M.L.R. 32* at [42]–[44]; *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH (C-254/98) [2000] E.C.R. I-151; [2002] 1 C.M.L.R. 25* at [24]–[29]; *KO v GIP (C-405/98) [2001] E.C.R. I-1795* at [19]–[25]; (C-322/01 *Deutscher Apothekerverband v 0800 DocMorris [2003] E.C.R. I-14887* at [70]–[75]; *Ker-Optika v ÀNTSZ (C-108/09) [2010] E.C.R. I-12213* at [45]–[55].

 

26 E.g. *Alpine Investments BV v Minister van Financiën (C-384/93) [1995] E.C.R. I-114; [1995] 2 C.M.L.R. 209* at [33]–[38]; *Union Royale Belge des Sociétés de Football Association ASBL v Bosman (C-415/93) [1995] E.C.R. I-4921; [1996] 1 C.M.L.R. 645* at [102]–[103]. See also G. Tesauro, "The Community Internal Market in the Light of the Recent Case-law of the Court of Justice" (1995) 15 Y.E.L. 1, 7.

27 See the implied rejection in *Commission v Italy (C-110/05) [2009] E.C.R. I-2019* of A.G. Kokott's suggestion in *Mickelsson and Roos (C-142/05) [2009] E.C.R. I-4273* at [47]–[56] of her Opinion, that the *Keck* approach should be extended to measures governing the use of goods.

28 Spaventa, "Leaving Keck behind?" (2009) 34 E.L. Rev. 914, 929.

29 E.g. most celebratedly in *Union Royale Belge des Societes de Football Association (ASBL) v Bosman (C-415/93) [1995] E.C.R. I-4921; [1996] 1 C.M.L.R. 645* at [94]–[96] (citing earlier case law).

30 Snell, "The Notion of Market Access" (2010) 47 C.M.L. Rev. 437, 470.

31 *Ker-Optika v ÀNTSZ [2010] E.C.R. I-12213*.

32 *Deutscher Apothekersverbund v 0800 Doc Morris [2003] E.C.R. I-14887*.

33 P. Oliver, "The Scope of Article 34 TFEU after Trailers" (2012) 2 E.J.C.L.-R.E.D.C. 309, 317.

34 *Asociación Nacional de Expendedores de Tabaco y Timbre (ANETT) v Administración del Estado (C-456/10) EU:C:2012:24; [2012] 2 C.M.L.R. 45*.

35 *Commission v France (C-333/08) [2010] E.C.R. I-757; [2010] 2 C.M.L.R. 43*.

36 *Commission v France (C-333/08) [2010] E.C.R. I-757* at [64], [106]–[109].

37 *Humanplasma GmbH v Republik Osterreich (C-421/09) [2010] E.C.R. I-12869*.

38 *Humanplasma GmbH (C-421/09) [2010] E.C.R. I-12869* at [41]–[45].

39 *Commission v Austria (C-28/09) [2011] E.C.R. I-13525*.

40 *Commission v Austria (C-28/09) [2011] E.C.R. I-13525* at [116].

41 This was stated by the Italian Government: see *Commission v Italy (C-110/05) [2009] E.C.R. I-2019* at [47].

42 See Opinion of A.G. Kokott in *Mickelsson and Roos (C-142/05) [2009] E.C.R. I-4273* at [47]–[56].

43 E.g. *Criminal Proceedings against Prantl (16/83) [1984] E.C.R. 1299; [1985] 2 C.M.L.R. 238* at [20]; *Officier van Justitie v Van der Haar (177 and 178/82) [1984] E.C.R. 1797; [1985] 2 C.M.L.R. 566* at [13]; *Commission v France (269/83) [1985] E.C.R. 837; [1985] 2 C.M.L.R. 399* at [10]; *Commission v Italy (103/84) [1986] E.C.R. 1759* at [18]; *Radlberger Getränkegesellschaft mbH & Co v Land Baden-Württemberg (C-309/02) [2004] E.C.R. I-11763; [2005] 1 C.M.L.R. 35* at [68]. See also, more generally, *Corsica Ferries France v Direction générale des douanes françaises (C-49/89) [1989] E.C.R. 4441; [1991] 2 C.M.L.R. 227* at [8].

44 E.g. *Commission v Italy (24/68) [1969] E.C.R. 193; [1971] C.M.L.R. 611* at [9]; *Commission v Greece (229/87) [1988] E.C.R. 6347; [1990] 1 C.M.L.R. 741* at [19]; *Carbonati Apuani Srl v Comune di Carrara (C-72/03) [2004] E.C.R. I-8027; [2004] 3 C.M.L.R. 59* at [20].

45 *Hünermund v Landesapothekerkammer Baden-Württemberg (C-292/92) [1993] E.C.R. I-6787* at [17] of his Opinion.

46 *Société d'importation Édouard Leclerc v TFI Publicité SA (C-412/93) [1995] E.C.R. I-179; [1995] 3 C.M.L.R. 422* at [42]–[49] of his Opinion.

47 See, most recently, Commission Document COM(2014) 6767 final (September 17, 2014). The present writer has raised these objections before: see *L. Gormley, "The Definition of Measure Having Equivalent Effect" in A.M. Arnull, P. Eekhout and T. Tridimas (eds), Continuity and Change in EU Law (Essays in Honour of Sir Francis Jacobs) (Oxford: Oxford University Press, 2008), p.189 at p.202*; Gormley, "Private Parties and the Free Movement of Goods" (2015) 38 Fordh. Int'l. L.J. 993, 1011–1012.

48 *Commission v Italy (C-110/05) [2009] E.C.R. I-2019* at [56].

49 *S. Enchelmaier, "Measures of Equivalent Effect II: Specific Measures" in Oliver on Free Movement of Goods in the European Union (2010), p.157 at pp.191–192*. He sees restrictions on use being caught if (1) they constitute total bans on use; or (2) they prevent goods being employed for the "specific and inherent purposes for which they were intended"; or (3) they "greatly restrict their use". See also, making a similar analysis with some similar and some other examples, N. de Sadeleer, "L'examen, au regard de l'article 28 CE, des règles nationales régissant les modalités d'utilisation de certains produits" (2009) 162 J.D.E. 247, 248; and "Restrictions on the Use of Products" (2012) 2 E.J.C.L.-R.D.E.C. 231. 240. Enchelmaier regards these last two criteria as not being notable for their precision.

50 *Criminal Proceedings against Peralta (C-379/92) [1994] E.C.R. I-3453* at [24] (citing *Krantz v Ontvanger der Directe Belastingen (C-69/88) [1990] E.C.R. I-583; [1991] 2 C.M.L.R. 677* at [11], and *CMC Motorradcenter v Pelin Baskiciogullari (C-93/92) [1993] E.C.R. I-5009* at [12]). See also *Centro Servizi Spediporto (C-96/94) [1995] E.C.R. I-2883; [1996] 4 C.M.L.R. 613* at [41]; *DIP SpA et al v Commune di Bassano del Grappa (C-140–142/94) [1995] E.C.R. I-3257; [1996] 4 C.M.L.R. 157* at [29]; and *Corsica Ferries France SA v*

 

*Gruppo Antichi Ormeggiatori del Porto di Genova Coop. Arl (C-266/96) [1998] E.C.R. I-3949; [1998] 5 C.M.L.R. 402* at [31].

51 *Blesgen v Belgian State (75/81) [1982] E.C.R. 1211* at [9]–[10].

52 *ED Srl v Italo Fenocchio (C-412/97) [1999] E.C.R. I-3845; [2000] 3 C.M.L.R. 855* at [11].

53 *P.B. Groenveld BV v Produktschap voor Vee en Vlees (15/79) [1979] E.C.R. 3409; [1981] 1 C.M.L.R. 207* at [7].

54 The basic principle in *Dassonville* applies in respect of measures applicable solely to exports: see *Procureur de la République de Besançon v Bouhelier (225/78) [1979] E.C.R. 3151*.

55 While it is true that in *Corsica Ferries (C-266/96) [1998] E.C.R. I-3949* at [30] the Court noted that if only goods were considered, the costs of the mooring services offered by exclusive concessionnaires were very small indeed as an additional cost for transported products (approximately 0.05 per cent), [31] shows that the decision is actually based on the restrictive effects being "too uncertain and indirect".

56 *Criminal Proceedings against Bluhme (67/97) [1998] E.C.R. I-8033* at [22].

57 See *Aragonesa de Publicidad Exterior SA v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña (C-1/90 and 176/90) [1991] E.C.R. I-4151; [1994] 1 C.M.L.R. 887* at [24]; and *Ligur Carni Srl v Unità Sanitaria Locale No XV di Genova (C-277/91, C-318/91 and C-319/91) [1993] E.C.R. I-6621* at [37]. See also *Carbonati Apuani Srl v Comune di Carrara (C-72/03) [2004] E.C.R. I-8027; [2004] 3 C.M.L.R. 59* at [20]; and *Jersey Produce Marketing Organisation Ltd v States of Jersey (C-293/02) [2005] E.C.R. I-9543; [2006] 1 C.M.L.R. 29* at [62]–[67].

58 *Viacom Outdoor Srl v Giotto Imobilier SARL (C-134/03) (Viacom II) [2005] E.C.R. I-1167; [2006] 1 C.M.L.R. 47* at [38].

59 *Viacom Outdoor Srl v Giotto Imobilier SARL (C-190/02) (Viacom I) [2002] E.C.R. 1-8287*.

60 *Commission v Belgium (356/85) [1987] E.C.R. 3299; [1988] 3 C.M.L.R. 277* at [15]–[21] (the Commission was found to have failed to prove a protective effect).

61 C. Krenn, "A Missing Piece in the Horizontal Effect 'Jigsaw': Horizontal Direct Effect and the Free Movement of Goods" (2012) 49 C.M.L. Rev. 177.

62 On which see also P.-C. Müller-Graff, "Die horizontale Direktwirkung der Grundfreiheiten" (2014) 49 Europarecht 3 and the literature cited there.

63 The present author is indebted to Jukka Snell for his observation that private individuals are not in a position to provide market analysis or turnover details that large firms can provide in the context of competition law analysis. It should not be forgotten that many free movement cases, like many of the absolutely leading cases in EU law, involve private individuals, and their contribution to the development of EU law has been immense.

64 *Officier van Justitie v Van de Haar (177 and 178/82) [1984] E.C.R. 1797* at [11]–[14].

65 *Völk v Ets. J. Vervaecke (5/69) [1969] E.C.R. 295; [1969] C.M.L.R. 273* at [5], [7].

66 Similar language can be seen in *Ets. Consten Sàrl & Grundig-Verkaufs-GmbH v Commission (56 and 58/64) [1966] E.C.R. 429; [1966] C.M.L.R. 418* at [341]: "a threat, either direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between States."

67 M. Jansson and H. Kalimo, "De Minimis meets 'Market Access': Transformations in the Substance — and the Syntax — of EU Free Movement Law?" (2014) 51 C.M.L. Rev. 523.

68 Jansson and Kalimo, "De Minimis meets 'Market Access'" (2014) 51 C.M.L. Rev. 523, 527. They cite, as an example of an abstract application of de minimis, *Genc v Land Berlin (C-14/09) [2010] E.C.R. I-931; [2010] 2 C.M.L.R. 44* at [29]–[33]. However, a closer reading of that judgment does not reveal a de minimis test at all. The Court was explaining why it answers references for preliminary rulings in abstract terms, and at [27]–[28] had already made it clear that the there were factors capable of indicating that the activities of Ms Genc were real and genuine.

69 Jansson and Kalimo, "De Minimis meets 'Market Access'" (2014) 51 C.M.L. Rev. 523, 530.

70 Jansson and Kalimo, "De Minimis meets 'Market Access'" (2014) 51 C.M.L. Rev. 523, 534.

71 Discussed above.

72 Jansson and Kalimo, "De Minimis meets 'Market Access'" (2014) 51 C.M.L. Rev. 523, 543.

73 J. Hojnik, "De Minimis Rule within the EU Internal Market Freedoms: Towards a More Mature and Legitimate Market?" (2013) 6 E.J.L.S. 25.

74 Hojnik, "De Minimis Rule within the EU Internal Market Freedoms" (2013) 6 E.J.L.S. 25, 43–44.

75 See e.g. *Simmenthal SpA v Italian Minister for Finance (35/76) [1976] E.C.R. 1871* at [14] (2nd subpara.); *Commission v Germany (153/78) [1979] E.C.R. 2555; [1980] 1 C.M.L.R. 198* at [5]. See, further, *L. Gormley, Prohibiting Restrictions on Trade within the EEC (Amsterdam: North Holland, 1985), pp.124 and 357*.

 

76 In addition to the remoteness cases discussed above, see e.g. *Association des Centres distributeurs Édouard Leclerc v Sàrl "Au blé vert" (229/83) [1985] E.C.R. 1; 1985] 2 C.M.L.R. 286* (no genuine cross-border movement). See, generally, *A. Saydé, Abuse of EU Law and Regulation of the Internal Market (Oxford: Hart Publishing, 2014)*.

77 A couple of examples make the point: *Costa v ENEL (6/64) [1964] E.C.R. 585; [1964] C.M.L.R. 425*; *Defrenne v SA Belge de Navigation Aerienne (SABENA) (43/75) [1976] E.C.R. 455; [1976] 2 C.M.L.R. 98*; *Marshall v Southampton & South-West Hampshire Area Health Authority (Teaching) (152/84) [1986] E.C.R. 723; [1986] 1 C.M.L.R. 688*; and *Marshall v Southampton & South-West Hampshire Area Health Authority (C-271/91) [1993] E.C.R. I-4367; [1993] 3 C.M.L.R. 293*.

78 *NV Algemene Transport— en Expeditieonderneming van Gend en Loos v Nederlandse administratie der belastingen (26/62) [1963] E.C.R. 1* at 13 (there were no paragraph numbers at that time).

79 Hojnik, "De Minimis Rule within the EU Internal Market Freedoms" (2013) 6 E.J.L.S. 25, 44.

80 *Procureur du Roi v Dassonville (8/74) [1974] E.C.R. 837; [1974] 2 C.M.L.R. 436* at [6].

81 *Cassis de Dijon (120/78) [1979] E.C.R. 649* at [8].

82 See e.g. *Commission v Italy (7/68) [1968] E.C.R. 423; [1969] C.M.L.R. 1*; *Bauhuis v Netherlands (46/76) [1977] E.C.R. 5*; and *Association des Centres distributeurs Édouard Leclerc v Au blé Vert (229/83) [1985] E.C.R. 1* (no genuine cross-border movement). See, generally, *Saydé, Abuse of EU Law and Regulation of the Internal Market (2010)*.

83 There must be no harmomisation measure occupying the field, the criteria of necessity, appropriateness and proportionality are applied in the same way (and testing the consistency of application is sometimes involved); economic justifications will not be accepted, and the second sentence of art.36 TFEU applies also to the case law based justifications by analogy, as the Court made clear in *Dassonville* itself (*Dassonville (8/74) [1974] E.C.R. 837* at [7]).

84 E.g. *Criminal Proceedings against Gilli and Andres (788/79) [1980] E.C.R. 2071* at [6]; Commission v Ireland (113/80) [1981] E.C.R. 1625 at [7]–[8]; *Schutzverband gegen Unwesen in der Wirtschaft v Weinvertriebs GmbH (59/82) [1983] E.C.R. 1217* at [11]; *Aragonesa de Publicidad Exterior v Departamento de Sanidad de Cataluña (C-1/90 and C-176/90) [1991] E.C.R. I-4151* at [13]. However, the Court can look through equal applicability on the face of the measures to perceive discrimination in fact and thus deny the availabilty of a case law based justification, see *Commission v United Kingdom (207/83) [1985] E.C.R. 1201*.

85 Because even in *Commission v Belgium (C-2/90) [1992] E.C.R. I-4431; [1993] 1 C.M.L.R. 365* the Court expressly approved the non-applicability of the case law based justifications to measures which were not equally applicable in law or in fact (at [34]).

86 *Commission v Belgium (C-2/90) [1992] E.C.R. I-4431* at [34]-[36].

87 *Commission v Belgium (C-2/90) [1992] E.C.R. I-4431* at [23], [26] and [28].

88 In particular, road safety, safety of shipping, and product safety: see *Gormley, EU Law of Free Movement of Goods and Customs Union (2009), pp.520–521*.

89 See A.G. Jacobs in *PreussenElektra AG v Schleswag AG (C-379/98) [2001] E.C.R. I-2099* (at [227]–[228] of his Opinion, noting voices in the literature), and *Enchelmaier, "Measures of Equivalent Effect II" in Oliver on Free Movement of Goods in the European Union (2010), pp.216–220*.

90 In *Enchelmaier, "Measures of Equivalent Effect II" in Oliver on Free Movement of Goods in the European Union (2010), p.220*.

91 *Gormley, Prohibiting Restrictions on Trade within the EEC (1985), pp.51–57*; and *L. Gormley, "The Genesis of the Rule of Reason in the Free Movement of Goods" in A. Schrauwen (ed.), Rule of Reason (Groningen: Europa, 2005), pp.21–33*.

92 See *Union de Pequeños Agricultores v Council (C-50/00 P) [2002] E.C.R. I-6677; [2002] 3 C.M.L.R. 1* at [45].

 