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Unearthing buried treasure: art.34 TFEU and the exclusionary rules

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H Krantz GmbH & Co v Ontvanger der Directe Belastingen (C-69/88) [1991] S.T.C. 604 (ECJ (2nd Chamber))

Criminal Proceedings against Keck (C-267/91) [1993] E.C.R. I-6097 (ECJ)

***E.L. Rev. 734** *This article examines the substance, function and interaction of three key judicial devices developed by the Court of Justice in order to manage the scope of* art.34 TFEU*. It argues that, viewed collectively, these "exclusionary rules" can be read as a consistent and normatively sound attempt on the Court's part to exclude from the scope of that provision non-discriminatory national rules that simply define the conditions for economic activity within individual states. At a time when the Court is again demonstrating its willingness to scrutinise such rules as obstacles to intra-EU movement, it is submitted that it should change course and rationalise and reassert its exclusionary rules jurisprudence.*

Introduction

The Court of Justice's interpretation of art.34 TFEU on the free movement of goods has attracted considerable scholarly attention over the years.[2] Indeed, as Dougan notes, EU lawyers might rightly be accused of "fetishizing" in the study of this area.[3] In particular, academic commentators continue to discuss the extent to which the Court of Justice of the European Union (CJEU) reads—or should read—art.34 TFEU as prohibiting genuinely non-discriminatory national measures that exhibit (potential) effects on intra-EU trade. The debate in this context remains focused on unpacking the substance of the Court's preferred effects-based tests and discussing their interaction as guiding principles of EU free movement ***E.L. Rev. 735** law. In recent years, a test based on guaranteeing access to the market for imports has attracted particular attention, reflecting the Court's increased reliance on this concept in its case law.

This article offers a fresh take on the problem of identifying appropriate limits to the scope of art.34 TFEU. Rather than reflecting further on the precise meaning of (indirect) discrimination, mutual recognition or, now most commonly, market access,[4] it analyses the substance, function and interaction of the Court's "exclusionary rules". This label is given to the judicial devices that the Court has developed and applied in order to manage the scope of art.34 TFEU and, ultimately, draw a line between Union and Member State competence for the regulation of the internal market as a shared regulatory space. The exclusionary rules label covers the concept of "effects too uncertain and indirect"; the "certain selling arrangement" concept in *Keck* ; and the criterion of "insignificant" effects on intra-EU trade.[5] These devices are dubbed "exclusionary rules" by reason of the fact that they operate to remove from the scope of art.34 TFEU national measures that, applying the Court's own tests, would *otherwise* have constituted obstacles to intra-EU movement, requiring justification in EU law.

To date, there has been a remarkable absence of analysis of the function of the exclusionary rules as limits on the Court's reading of art.34 TFEU.[6] Of course, one specific exclusionary rule, the selling arrangement, has been subject to near-exhaustive critique in the legal scholarship.[7] Interest in this particular judicial device has not, however, led to a proliferation of broader studies into the function of the exclusionary rules. To a greater extent, academic commentators simply conclude that the Court's case law either does (does not)/should (should not) recognise individual exclusionary rules as limits to the scope of art.34 TFEU without exploring the detail of their meaning, function and interaction. For

example, it is often argued that the Treaty rules on goods should prohibit only “significant/substantial” obstacles to intra-EU movement or national measures that affect intra-EU trade in a manner that is not too uncertain and indirect.[8] However, what do such limits mean in practice? Are we dealing with quantitative or qualitative assessments? How do the three individual exclusionary devices interact? And to what extent are they (should they be) still applied to limit the scope of art.34 TFEU? ***E.L. Rev. 736***

This article argues that, viewed collectively, the exclusionary rules can be read as a consistent and normatively sound attempt on the Court’s part to place limits on the scope of art.34 TFEU. No special significance should be attached to the labels “effects too uncertain and indirect”, “certain selling arrangements” or “insignificant effects”. It is their common function that is important. Reviewing the case law closely, it is argued that the individual rules were all crafted to exclude “market circumstances” rules from the scope of that provision.[9] Market circumstances rules are genuinely non-discriminatory national measures that simply outline the conditions for economic activity within individual Member State markets. In other words, the term characterises national measures that do not prevent (block) the free movement of goods *between* the Member States or discriminate directly or indirectly in favour of the national market in any way. Such rules may have an impact on intra-EU movement; however, as the Court’s exclusionary rules jurisprudence indicates, this impact is not considered sufficient to trigger their review against art.34 TFEU.

Unfortunately, in its more recent case law, the Court appears to be taking us away from the substance of the exclusionary rules. Rather worryingly, the Court is once again broadening the scope of that provision to scrutinise, at least in certain cases, the very category of national measures that the exclusionary rules were specifically developed to protect: market circumstances rules. In order to ensure that appropriate—and workable—limits to the scope of art.34 TEFU are maintained, it is submitted that the Court should consider rationalising and reasserting its case law on the exclusionary rules. The call to rationalise and reassert the substance of these rules is not made simply to defend the coherence of the legal framework presented in this article. Rather, it is submitted that there are sound normative reasons to bring this particular strand of case law on art.34 TFEU back in line with the exclusionary rules, including, first and foremost, the restraining impact of the subsidiarity principle on the Court’s freedom to interpret the scope of that provision.

This article begins with a brief discussion of the framework of art.34 TFEU and the tension surrounding the identification of the outer limits of that provision. Thereafter, it turns to examine the substance, function and interaction of the individual exclusionary rules. It then offers some broader reflections considering, first, the normative justification for the exclusion of market circumstances rules and, secondly, the Court’s exceptional but increasing use of art.34 TFEU to scrutinise such rules as obstacles to intra-EU movement. Finally, this article concludes by outlining the required adjustment to the case law.

Identifying limits to the scope of Article 34 TFEU: where is the problem?

Article 34 TFEU prohibits “quantitative restrictions on imports and all measures having equivalent effect between Member States”. The concept of a quantitative restriction is clearly defined. It captures “measures ... which amount to a total or partial restraint of … imports”, such as quotas or total bans on imports.[10] By contrast, there remains a considerable degree of ambiguity surrounding the definition of measures having equivalent effect to quantitative restrictions (MEQRs). This ambiguity is constitutionally significant. The breadth of art.34 TFEU has a direct bearing on the division of competence between the Union and the Member States for the regulation of the internal market. Post-Lisbon, this regulatory space is now expressly listed as an area of shared competence. ***E.L. Rev. 737*** [11]

The debate over the scope of art.34 TFEU or, more precisely, the definition of MEQRs, is better described as a dispute over the extent to which the Court reads—or should read—that provision as prohibiting *genuinely non-discriminatory* national measures that exhibit (potential) effects on intra-EU trade. There is no dispute in the legal literature over the use of art.34 TFEU to scrutinise discriminatory national rules and/or those prescribing product characteristics.[12] With respect to non-discriminatory national measures, there is broad agreement among legal commentators that art.34 TFEU should extend to capture one specific category of non-discriminatory national measure: rules that prohibit (block) movement between the markets of the Member States.[13] Beyond this, however, opinion over the reach of art.34 TFEU as regards non-discriminatory measures continues to differ considerably. Some commentators take the view that the Court should respect the autonomy of

the Member States to regulate—without discrimination—the conditions for economic activity *within* their respective markets.[14] Adopting a different view, many more writers seek to defend the Court's competence, in principle, to use art.34 TFEU as a tool to scrutinise this same category of non-discriminatory national measures.[15] It is worth stressing that, despite all the attention devoted to this area in the literature, the underlying dispute here actually concerns only around 17 per cent of the Court's total case load on art.34 TFEU (MEQRs).[16]

The problems surrounding efforts to identify the outer limits of art.34 TFEU in connection with the review of non-discriminatory national measures follow directly from the Court's historical—and continued—preference for a broad effects-based reading of that provision. In *Dassonville*, the CJEU cast the net widely by defining the concept of MEQRs as capturing "all trading rules enacted by Member States, that are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade".[17] More recently, the Court has invoked the criterion of access to the market in the same spirit. According to the Court, art.34 TFEU extends, in principle, to capture not only discriminatory national measures and those prescribing product characteristics, but also "*any other measure* which hinders access of products originating in other Member States to the market of a Member State".[18] In common with the *Dassonville* formula which it now sits alongside, this test affords the Court, as a matter of principle, an extremely broad right of review over the non-discriminatory policy preferences of the Member States. ***E.L. Rev. 738***

The Court has responded to the need to place limits on the scope of art.34 TFEU in two key ways. First, it has created additional grounds for the justification of Member State measures as obstacles to intra-EU movement: the mandatory requirements.[19] This supplementary category of justifications enables Member States to defend indistinctly applicable national measures (i.e. those that apply without distinction to both imports and domestic products)[20] on the basis of a non-exhaustive list of public interest grounds, subject to a proportionality assessment.[21] Secondly, as well as expanding the justification framework, the Court has also developed a series of judicial devices that operate to qualify the scope of its broad effects-based reading of art.34 TFEU, as opposed to simply offering the Member States additional grounds upon which to justify particular national measures. Three key exclusionary rules can be identified in the case law on goods. First, the Court has excluded from the scope of art.34 TFEU national measures with effects on intra-EU movement that are "too uncertain and indirect".[22] Secondly, the Court continues to exclude Member State measures that regulate "certain selling arrangements" for goods within that state.[23] Thirdly, the CJEU has on occasion indicated that it is not concerned with national measures with "insignificant" effects on intra-EU movement.[24] With respect to the debate over the outer limits of art.34 TFEU, these exclusionary rules are of constitutional importance. To the extent that they remove national measures from the scope of the CJEU's broad art.34 TFEU obstacle test, these rules have a direct bearing on the division of competence between the Union and the Member States in connection with the regulation of the internal market. The following sections will now examine the substance, function and interaction of the individual exclusionary rules in detail in order to assess their impact on the ongoing debate over the outer limits of art.34 TFEU.

Effects too uncertain and indirect

The first of the exclusionary devices to be examined is the criterion of effects too uncertain and indirect. This criterion is commonly referred to as the remoteness test in the academic literature. This is notwithstanding the fact that the Court has yet to use this label expressly in its case law. To date, the Court has invoked the criterion of effects too uncertain and indirect on 10 occasions in order to shield national ***E.L. Rev. 739*** measures from review against art.34 TFEU.[25] The concept has also featured in the case law on persons and, most recently, in the case law on services.[26]

In the context of art.34 TFEU, the Court first referred to the criterion of effects too uncertain and indirect in *Krantz*.[27] That case concerned Dutch legislation that granted to the tax authorities in that state the power to seize movable property in order to recover tax debts. The applicant (Krantz GmbH) had sold machines (with reserved title pending full payment) to a Dutch company that had subsequently been declared insolvent. Krantz invoked art.34 TFEU in order to contest the Dutch authorities' action to seize these machines to recover the cost of unpaid taxes. It maintained that the Dutch legislation constituted an obstacle to the free movement of goods, noting that it would not have contracted with the defendant on instalment terms had it been aware of the contested Dutch legislation.[28] The Court rejected this challenge. It ruled that,

"the possibility that nationals of other Member States would hesitate to sell goods on instalment terms

to purchasers in the Member State concerned because such goods would be liable to seizure by the collector of taxes if the purchasers failed to discharge their Netherlands tax debts is *too uncertain and indirect* to warrant the conclusion that a national provision authorising such seizure is liable to hinder trade between Member States." [29]

The Court's ruling in *Krantz*, as confirmed in subsequent decisions, is most frequently read as confirming the existence of a causation test in EU free movement law.[30] This test requires applicants to demonstrate that there is an unbroken causal link between the existence of the contested measure and the alleged impact on intra-EU trade. As A.G. La Pergola observes, "the object of [the *Krantz* test] … is always to verify whether a causal link exists between the national measure concerned and the pattern of imports".[31] Similarly, Doukas has argued that,

"the remoteness test excludes from the ambit of the free movement provisions any situation where there is no causal link between the measures concerned and the impact on intra-Community trade, which is either lacking or dependent on unforeseen circumstances. ***E.L. Rev. 740*** " [32]

On this reading of the criterion of effects too uncertain and indirect, the contested Dutch rule on the seizure of moveable assets could be taken to have fallen outside the scope of art.34 TFEU by reason of the fact that its effect on intra-EU trade was conditional upon another (independent) variable: the insolvency of the purchaser.

Recent case law has injected fresh support for a causation-centred reading of the *Krantz* test. In Guarnieri & Cie the CJEU stated, for the first time, that the criterion of effects too uncertain and indirect, as introduced in *Krantz*, is specifically intended to ensure that there is a "causal link between the possible distortion of intra-Community trade and [in the present case] the difference in treatment at issue".[33] That case addressed Belgian legislation requiring certain applicants to provide security pending judgment when seeking to instigate civil proceedings against nationals of that Member State. By adopting this causation-based reading of the criterion of effects too uncertain and indirect, the Court is following the views of its Advocates General, who have consistently advanced this interpretation.[34]

Scrutinising the causation approach

At first sight, a causation reading seems to provide a convincing means of rationalising the criterion of effects too uncertain and indirect. It is entirely logical to require a causal link between the contested national measure and the alleged obstacle to intra-EU trade. Indeed, the Court had already acknowledged, in its case law in other areas, the requirement for such a link, albeit without reference to the criterion of effects too uncertain and indirect.[35] In *Moser*, for example, the CJEU concluded that the German authority's refusal to admit one of its own nationals to a teacher-training programme in that state did not infringe art.45 TFEU on the free movement of workers. This followed from the fact that admission to the teaching profession in other Member States (based on the mutual recognition of qualifications) was dependent on the applicant *first* completing the teacher-training programme in Germany. As this was not the case on the facts, the Court correctly ruled that any infringement of art.45 TFEU remained purely "hypothetical" rather than simply potential.[36]

While valid, the causation analysis is, however, unable to offer an entirely convincing rationalisation of the case law on effects too uncertain and indirect. This reading of the first exclusionary rule sits awkwardly with the *Dassonville* formula. A review of the *Krantz* ruling exposes this tension neatly. As noted earlier, in *Krantz*, the applicant objected to the very *existence* of the Dutch legislation. In his eyes, the contested Dutch rule had a "deterrent" effect on its decision to conclude intra-EU contracts with buyers established in that state. *Krantz* maintained that, had it been aware of the contested Dutch legislation, it would not have contracted with the defendant on instalment terms.[37] The issue of whether or not contracting buyers in the Netherlands *subsequently* entered into insolvency proceedings—the independent variable—was therefore wholly irrelevant. Rather, it was the fact that, should they do so, the Dutch tax authorities may then (lawfully) seize any goods supplied to them by the applicant. It was this potential risk that was liable to deter the applicant from exploiting the market for its products in that Member State. Interpreted through the lens of causation, the criterion of effects too uncertain and indirect does not really tell us why the above deterrent effect on intra-EU trade does not fall within the scope of the *Dassonville* formula. After all, on the above analysis, was the contested Dutch legislation not liable to "hinder directly or indirectly, actually or potentially, intra-[EU] trade"? ***E.L. Rev. 741***

Similar difficulties also arise in subsequent cases in which Court invoked the criterion of effects too uncertain and indirect in order to exclude national measures from the scope of art.34 TFEU. For example, in *Corsica Ferries*, the Court relied on this criterion to dismiss a challenge to Italian legislation requiring all vessels docking in ports within that Member State to make use of compulsory mooring services.[38] It is difficult to accept that this finding was based on the absence of any causal link between the contested measure and the alleged obstacle to intra-EU trade. It is absolutely clear that any increase in transportation costs could, within the meaning of the *Dassonville* formula, hinder intra-EU trade in goods. Indeed, the applicant pointed to the fact that the obligation to use the mandatory services (which he argued were provided above cost price) translated into an increased cost for the transportation of goods, including the importation of products from other Member States.[39] Equally, in *BASF* there was also an obvious causal link between the contested German law requiring the registration of patents and the alleged impact on the free movement of goods between the Member States. Undertakings were required to register (for a fee) their patents in the official language of that state. It is entirely conceivable that this obligation might discourage undertakings from registering patents in Germany and, in turn, reduce, at least potentially, cross-border trade in the products concerned.[40]

Interestingly, the same difficulty with the causation approach also underpins the Court's (more exceptional) use of the criterion of effects too uncertain and indirect across the other freedoms. The ruling in *Graf* (art.45 TFEU) is particularly instructive in this respect.[41] In that case, the applicant objected to fact that, by taking up employment in another Member State, he would necessarily lose his entitlement to insurance cover for involuntary redundancy, as provided by the first (host) Member State. In its reply to the referring court, the CJEU concluded that the contested Austrian legislation did not fall within the scope of art.45 TFEU, with express reference to the criterion of effects too uncertain and indirect.[42] To support this conclusion, the Court noted that,

"the legislation of the kind at issue … is not such as to preclude or deter a worker from ending his contract of employment in order to take a job with another employer, because the entitlement to compensation on termination of employment is not dependent on the worker's choosing whether to stay with his current employer but on a future and hypothetical event, namely the subsequent termination of his contract without such termination being at his own initiative or attributable to him." [43]

As with *Krantz*, the Court's reasoning in *Graf* appears, at first sight, to be based on the application of a straightforward test of causation. As the Court noted, the payment of the contested insurance benefit was not dependent on whether or not the applicant opted to remain in employment in Austria. Instead, it was conditional upon a future event that may never materialise. Yet, as in *Krantz*, there are genuine difficulties with the above line of argument. It is certainly true that *realisation* of the employment benefit at issue depended on a future hypothetical event (involuntary redundancy). However, this fact does not defeat the applicant's argument that, by choosing to exercise his rights to intra-EU movement, he was forced to forgo what was, in effect, a valuable form of employment insurance. This same benefit may not be available in other Member States and, for that reason, may indeed have a considerable impact on the applicant's decision to move. Applying the Court's own test, the loss of this right was clearly liable "to preclude or ***E.L. Rev. 742*** deter [Mr Graf] from ending his contract of employment in order to take a job with another employer".[44] In the end, the causation test simply cannot convincingly explain why this *particular* deterrent effect does not fall within the Court's broad definition of the scope of art.45 TFEU.[45]

Reconstructing effects too uncertain and indirect

The criterion of effects too uncertain and indirect cannot properly be defended as a straightforward causation test. Such a test—requiring a link between the contested national measure and the alleged effect on intra-EU movement—may (and should) exist in the case law on goods; however, it is not adequately captured using the criterion of effects too uncertain and indirect.[46] Instead, it is argued that the Court's introduction and application of this concept is motivated by another necessary concern, which kicks in *after* the causation test is met: the need to place sensible limits on the substance of its preferred obstacle test, the *Dassonville* formula.[47] It is self-evident that, on a literal reading, this formula could extend to permit the scrutiny of virtually any national measure against the Treaty. Yet decisions such as *Krantz*, *Corsica Ferries* and *BASF* indicate clearly that this is not the case. The open question is, therefore, what is behind the CJEU's decision in these cases not to apply the full force of the *Dassonville* test?

Several writers have already sought to rationalise the criterion of effects too uncertain and indirect

(using the remoteness label) as a limit to the scope of the *Dassonville* formula.[48] For example, Oliver et al. conclude that the existence of the remoteness concept is "a logical consequence of the *Dassonville* formula: by definition, some measures must fall outside Art 34 TFEU on the basis that they do not even constitute a potential or indirect restraint on imports".[49] Existing efforts to explain the Court's use of the criterion of effects too uncertain and indirect as a brake on the *Dassonville* formula do not, however, rigorously interrogate the reasoning behind its decision to use this criterion to remove certain measures from the scope of art.34 TFEU. On Gormley's analysis, for example, the Court's exclusion of the Dutch legislation on asset seizure in *Krantz* is justified simply by the assertion that the contested measure was "so remote from intra-[EU] trade as to have nothing to do with it in reality — the integrationist merit [was] thin beyond belief".[50] On this view, everything turns on the exercise of the Court's judgment or intuition on the facts of particular cases. ***E.L. Rev. 743*** [51]

Rather than accept judicial discretion as the guiding principle, it is argued that the case law on effects too uncertain and indirect can be better explained as a first attempt by the Court to place market circumstances rules beyond review against art.34 TFEU. To repeat: the label "market circumstance rules" refers to non-discriminatory national measures that simply define the conditions for the pursuit of economic activity within national markets. According to Mortelmans, such rules regulate such matters as *who* may sell particular products, *when, where* and *how*.[52] The potential reach of the market circumstances concept is, however, broader than this neat categorisation. The term captures any national measure that simply structures the national market. Put another way, market circumstances rules fall outside of what remains the paradigm art.34 TFEU framework. This captures all national measures that are liable (actually or potentially) to prevent (block) the free importation of goods into Member State markets and/or discriminate directly or indirectly in favour of the national market once those goods have secured market entry. National measures falling with the first category include, for example, rules prescribing product characteristics[53] ; import licences[54] ; and authorisation, inspection and/or certification requirements.[55] The second category of prohibited measures addresses rules that take effect once goods have secured entry into the national market. They typically include discriminatory marketing restrictions,[56] but have been extended by the Court to include national measures that discriminate in favour of *traders* established on the national territory.[57]

The national measures excluded from the scope of art.34 TFEU using the criterion of effects too uncertain and indirect are all market circumstances rules. The sole exception is the ruling in *Ed Srl*, in which the CJEU rather oddly overlooked the discriminatory nature of the contested rule.[58] Leaving that anomaly aside, the Court's decision to exclude the contested national rules from the scope of art.34 TFEU would ***E.L. Rev. 744*** appear to reflect its view that the measures in question did not *sufficiently* hinder directly or indirectly, actually or potentially intra-EU trade within the meaning of the *Dassonville* formula. Crucially, this does not amount to saying that the contested rules had no impact on intra-EU movement. On the contrary, the contested rules clearly had an impact here. In *Krantz*, the existence of the Dutch legislation was liable (potentially) to reduce the volume of trade (including within this the volume of intra-EU trade). In *Corsica Ferries*, the Italian rules on mooring services would undoubtedly increase the cost of economic activity within that Member State. Similarly, in *BASF*, the requirement to register product patents in the Member State in question was also associated with additional costs. At the same time, and to the extent those costs had a deterrent effect on the decision to register patents in the first place, the same requirement might additionally impact on the volume of trade (again: including within this the volume of intra-EU trade). Yet, in all these cases, the CJEU's use of the criterion of effects too uncertain and indirect can be taken to indicate that any such actual or potential effects on intra-EU movement was not considered to be sufficient to trigger the review of the contested measures against art.34 TFEU.

Reconstructed in the above terms, the case law on effects too uncertain and indirect places an important marker in the debate over the appropriate division of competence between the Union and the Member States as regards the regulation of the internal market. The jurisprudence on effects too uncertain and indirect can be read as a clear indication of the Court's unwillingness to engage in the scrutiny per se of the quality or even very existence of non-discriminatory national measures that simply structure the market. This is notwithstanding the fact that such rules may undoubtedly have some impact on intra-EU movement and, on its literal interpretation at least, could be considered to fall within the scope of the *Dassonville* formula.

Keck: the exclusion of certain selling arrangements

The second exclusionary rule to be considered is the concept of certain selling arrangements. At the time of writing, this concept has been used by the CJEU on 14 occasions to exclude a variety of

non-discriminatory national measures from the scope of art.34 TFEU. These measures include: rules governing product pricing[59] ; retail trading hours and conditions[60] ; advertising[61] ; doorstep selling[62] ; and itinerant sales.[63] To date, the CJEU has firmly rejected attempts to apply the selling arrangement criterion in the case law on workers, persons, services and capital.[64]

The Court developed the concept of certain selling arrangements in its landmark *Keck* ruling. In that case, the Court was requested to clarify its case law on the scope of art.34 TFEU with specific regard to French legislation prohibiting the sale of goods below cost price. The extent to which that provision should ***E.L. Rev. 745*** capture national measures that regulate marketing conditions for products within individual Member States had become a highly contentious issue, made all the more problematic by a body of contradictory decisions on this matter.[65] The *Keck* ruling offered a direct response to concerns about the scope of art.34 TFEU by introducing a distinction between two categories of national measure. On the one hand, it confirmed that Member State measures prescribing "product rules" (such as those relating to designation, form, size, weight, composition, presentation, labelling and packaging) constitute obstacles to intra-EU movement, even if indistinctly applicable.[66] On the other hand, and in a departure from aspects of its earlier case law, the CJEU held that national rules governing the conditions under which goods may be lawfully marketed, such as those at issue on the facts in *Keck*, fall outside of the scope of art.34 TFEU (as certain selling arrangements) provided that two cumulative conditions are met.[67] First, the contested national measure must apply to all traders operating within that state. Secondly, it must affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.[68]

The Court's "clarification" in *Keck* has been subject to extensive analysis by Advocates General and academic writers. The tone of much of this discussion is rather critical. While the ruling itself is not typically considered incorrect in result, the Court's method has been strongly criticised. In particular, the decision to differentiate between "product rules" and "certain selling arrangements" is generally viewed as excessively formalistic and, at least when applied mechanically, at odds with the belief that an effects-based approach to art.34 TFEU is more suitable.[69] To this end, it has been forcefully argued that the Court should re-orientate its case law on art.34 TFEU around the reference, at [17] of the *Keck* ruling, to ensuring that Member State measures—of any type—do not impede access to the market for imported goods.[70] This call for a subtle, but significant re-interpretation of the wording of *Keck* has not fallen on deaf ears. In recent years, the CJEU has paid ever-increasing attention to the market access criterion, culminating in its ruling in *Commission v Italy (Motorcycle Trailers)* —discussed further below.[71]

Certain selling arrangements versus effects too uncertain and indirect

Despite the attention that the *Keck* ruling continues to attract, there has been remarkably little discussion of the relationship between the selling arrangement concept and the (pre-existing) criterion of effects too uncertain and indirect.[72] The criterion of effects too uncertain and indirect is generally considered simply to have survived *Keck* as a distinct, residual test.[73] Several commentators have argued (or at least implied) ***E.L. Rev. 746*** that, in substance, the two exclusionary rules are closely related. Both concepts are interpreted as attempts on the Court's part to place appropriate limits on art.34 TFEU—the scope of which is defined using either the *Dassonville* formula or the "market access" test.[74] Spaventa, for example, has argued that:

"The rationale behind rules excluded pursuant to the application of [*Keck*] … and rules excluded because of the remoteness doctrine is the same: both rules do not have an effect on intra-[Union] trade relevant for the application of the Treaty." [75]

Barnard has also highlighted the close relationship between the functioning of the selling arrangement concept and the criterion of effects too uncertain and indirect. In her view:

"There is a striking similarity between the explanation for why Art [34 TFEU] should not apply to national measures whose effect on trade is 'too uncertain and indirect' and the justification set out in paragraphs 12 and 13 of *Keck* for its approach to certain selling arrangements which are not considered to hinder trade between Member State 'directly or indirectly actually or potentially'." [76]

It is submitted that this view of the relationship between the first two exclusionary rules is fundamentally correct. In effect, the two exclusionary rules are best read as expressions of the same underlying judicial choice: the decision to exclude market circumstances rules from the scope of

art.34 TFEU.

The link between the two exclusionary rules is apparent from the wording of the *Keck* ruling itself. As Barnard notes, the reasoning in that decision closely mirrors that underpinning the Court's case law on effects too uncertain and indirect. First, in *Keck*, the Court referred expressly to the finding that the contested national legislation around which the selling arrangement concept was crafted was "not designed to regulate trade in goods between Member States".[77] This same phrase has accompanied every application of the criterion of effects too uncertain and indirect, and confirms a common focus on the effects of national measures on intra-EU movement.[78] Secondly, with respect to those effects, it is clear that the case law on selling arrangements and effects too uncertain and indirect operate to achieve the same goal: the exclusion of market circumstances rules from the scope of art.34 TEFU. In its *Keck* jurisprudence, the ECJ has consistently applied the selling arrangement concept in order to shield from scrutiny against art. 34 TFEU a series of market circumstances rules that exhibited (at best) only abstract effects on the volume of trade (including within this the volume of intra-EU trade).[79] This follows exactly its case law on effects too uncertain and indirect in decisions such as *Krantz*. For example, the CJEU concluded in Hünermund, *Leclerc-Siplec*, *ARD*, *De Agostini* and *Karner* that, in the absence of any evidence of discrimination in favour of the domestic market, Member State rules on advertising constituted selling arrangements, falling ***E.L. Rev. 747*** outside the scope of art.34 TFEU.[80] Similarly, in *Boermans* and *Punto Casa*, the Court invoked the same concept in order to exclude from the scope of art.34 TFEU a series of non-discriminatory national measures regulating commercial trading hours within national markets.[81] In several of these cases, the Court notably referred expressly to the fact that the contested measures were liable only to have an impact on the volume of trade generally.[82]

Subsequent cases can be taken to demonstrate further the interchangeability of the selling arrangement concept and the pre-existing criterion of effects too uncertain and indirect.[83] In *Semeraro Casa Uno*, for example, the applicants invoked the Treaty rules on both goods and establishment in an attempt to review against the Treaty Italian legislation on the closing of retail outlets on Sundays and public holidays. Examining the national rules against art.34 TFEU, the CJEU applied *Keck* and ruled that the measure fell outside of the scope of that provision as a non-discriminatory selling arrangement.[84] By contrast, although reaching the same end result, the Court fell back on the doctrine of effects too uncertain and indirect in order to shield the very same measure from the Treaty provisions on establishment.[85] Both exclusionary rules therefore operated in harmony to shield the contested market circumstances rules from scrutiny against the Treaty.

The Court's *Keck* jurisprudence unquestionably exposes its interpretative choice regarding the exclusion of market circumstances rules from the scope of art.34 TFEU far more clearly than does its case law on effects too uncertain and indirect. In the first instance, the selling arrangements decisions articulate expressly the Court's belief that potential effects on the volume of trade are not enough to bring market circumstances rules within the scope of its review as obstacles to the free movement of goods. Thus, in *Semeraro Casa Uno*, the CJEU observed that:

"As the Court stated in paragraph 13 of *Keck and Mithouard*, the fact that national legislation may restrict the volume of sales generally, and hence the volume of sales of products from other Member States, is *not sufficient* to characterize such legislation as a measure having an effect equivalent to a quantitative restriction." [86]

In *Keck*, the Court is also much clearer in its efforts to outline the framework defining the application—and limits—of art.34 TFEU. In contrast to the ruling on effects too uncertain and indirect, that decision sets out a neat distinction between different categories of national measures caught by that provision—a division that neatly reflects the paradigm body of case law on art.34 TFEU. *Keck* at [15] indicates that art.34 TFEU captures without exception national measures that prevent market entry for imported products (specifically: product characteristic measures). Then [16] seeks to bring within the scope of art.34 TFEU national measures that are liable to discriminate in favour of the national market post-entry (as *discriminatory* selling arrangements). ***E.L. Rev. 748***

Krantz versus Keck : why the difference?

If the concept of certain selling arrangements is used to remove market circumstances rules from the scope of art.34 TFEU on the same basis as the criterion of effects too uncertain and indirect, why then did the Court not just fall back on the latter, pre-existing device in order to manage the scope of that provision? Would this not have provided a neater and more internally coherent obstacle

framework?

It is inherently difficult to second-guess the Court's motivations for introducing the selling arrangement concept in *Keck* as an additional exclusionary rule. Academic writers are not privy to the deliberative process and, of what we do see, it must be said that the Court's reasoning is often infuriatingly thin. These facts notwithstanding, it is possible to suggest several plausible explanations that might offer some insights into the Court's thinking. In the first instance, the decision not to invoke the criterion of effects too uncertain and indirect to resolve the factual dispute in *Keck* might have followed from the finding that this pre-existing device remained (and still remains) an "immature concept" in the case law.[87] As argued earlier, the real substance of this first exclusionary rule remains concealed in a body of under-theorised case law (both by the Court itself and in the commentary). An alternative explanation for the introduction of a new exclusionary rule might draw on the impact of notable contributions to the scholarship immediately prior to the *Keck* ruling. In the run-up to that decision, particular Advocates General and academic writers offered the Court possible solutions to the problem of defining the outer limits of art.34 TFEU.[88] These included the notable Opinion of A.G. Tesauro in *Hünermund*, and *White's seminal article "In Search of Limits to Art 30 of the EEC Treaty"*. [89] Interestingly, the criterion of effects too uncertain and indirect does not feature prominently as the solution in this body of literature, which could again possibly account for the decision to craft a new exclusionary rule. Finally, the Court's decision not to develop further its existing case law on effects too uncertain and indirect might have been motivated by institutional considerations.[90] Prior to *Keck*, the Court was under increasing pressure to offer clearer guidance to referring Member State courts regarding the outer limits of art.34 TFEU. As others have argued, the approach adopted in *Keck* offered national courts a relatively straightforward rule-based framework, which was likely to be well received by referring courts.[91] Looking at the data, this approach certainly appears to have achieved its aim, at least as a solution to the initial factual problem. The flow of cases to the CJEU addressing the paradigm "Sunday trading" legislation dried up entirely in the years immediately following the *Keck* ruling: the national courts clearly got their answer and can work with it.

Insignificant effects

The final key exclusionary device to consider is the concept of insignificant effects. In the case law on goods, this concept appears to date to have featured only once. In *Burmanjer*, the Court appeared to suggest that the effects of a measure regulating itinerant selling were "too insignificant" to constitute an obstacle to intra-EU trade.[92] More frequently, appeals to the insignificant effects of particular national measures on intra-EU movement can be found in the case law on the other Treaty freedoms. For example, in *Viacom* ****E.L. Rev. 749*** *Outdoor* ****E.L. Rev. 749*** , the Court pointed to the "modest" nature of a municipal tax imposed on outdoor advertising in connection with its decision not to scrutinise that measure as an obstacle to art.56 TFEU.[93] Similarly, in *Konstantindis* the CJEU concluded that a refusal by the German authorities to correct the spelling of the applicant's surname on an official register was contrary to art.49 TFEU "only in so far as their application causes a Greek national such a degree of inconvenience as in fact to interfere with his freedom to exercise [that right]".[94]

Scrutinising the Court's case law on insignificant effects

The case law on insignificant effects adds little to the preceding discussion of the exclusionary rules jurisprudence. At least insofar as art.34 TFEU is concerned, there is no difference between, on the one hand, the use of the concept of insignificant effects and, on the other hand, the application of the criterion of effects too uncertain and indirect and the selling arrangement concept. The three exclusionary rules all target national measures of the same nature: market circumstances rules. In *Burmanjer*, the contested Belgian legislation, regulating itinerant selling, was not shown to be discriminatory. Equally, it did not have the effect of preventing market entry for the products concerned. Rather, the legislation simply restricted the market opportunities within that state for the sale of all products by traders of any nationality. Of course, as the CJEU directed the national court to examine, it remained open to the defendants to adduce credible evidence that these assumptions were factually incorrect in order to trigger the protection of art.34 TFEU. This is the same burden of proof requirement established by the Court in *Keck* using the selling arrangement criterion (at [16]).

The sole point of distinction with respect to the case law on insignificant effects is the reference in Burmanjer to the potential application of this criterion to sanction the exclusion of *discriminatory* national measures. As with the ruling in *Ed Srl* on the criterion of effects too uncertain and indirect

(discussed earlier), this aspect of the Court's ruling appears out of step with an otherwise coherent body of exclusionary rules case law addressing genuinely *non-discriminatory* measures.[95] In *Burmanjer*, the CJEU stated that even if the contested measure was shown to affect the marketing of imported products to any greater degree than that of products from that state, this "would be too insignificant and uncertain to be regarded as being such as to hinder or otherwise interfere with trade between Member States".[96] To date, this potentially game-changing aspect of that decision has not been repeated. This would appear to indicate that the link to discriminatory national rules established in *Burmanjer* was more of a slip of the pen than a clear attempt to take the exclusionary rules jurisprudence in a radical new direction—i.e. by allowing the Court to exclude *insignificant discriminatory* national measures in addition to the exclusion of market circumstances rules.

Exclusionary rules and the ECJ's rejection of a de minimis threshold

Discussion of the exclusionary rules, and the Court's view that the national measures that they remove from the scope of art.34 TFEU do not sufficiently hinder intra-EU movement, raises questions about the ***E.L. Rev. 750*** relationship between this line of case law and the CJEU's position on the existence of a de minimis test in the jurisprudence on goods. Under the maxim *de minimis non curat lex*, the scope of art.34 TFEU would not extend to capture national measures the effects of which are too insignificant to warrant scrutiny against the Treaty. As a rule, the Court consistently takes the view that the application of art.34 TFEU is not subject to any such threshold. This follows from its decision in *Van den Haar*, in which it concluded that:

"[Article 34 TFEU] does not distinguish between measures having an effect equivalent to quantitative restrictions according to the degree to which trade between Member States is affected. If a national measure is capable of hindering imports it must be regarded as a measure having an effect equivalent to a quantitative restriction, even though the hindrance is slight." [97]

This rejection of the de minimis test in goods is widely accepted by Advocates General and academics.[98] Broadly speaking, both sets of writers simply reiterate the Court's pronouncement, accepting this at face value.[99] Of those who have reflected more closely on de minimis, it has been argued that the rejection of such a test in EU free movement law can be justified on several grounds. These include, for example, the fact that such a test would be difficult to apply,[100] relying in part on "complex economic assessments", and/or would risk delegating too much responsibility to referring national courts.[101] Furthermore, it has been suggested that arguments in favour of a de minimis threshold overlook important distinctions between the Treaty rules on intra-EU movement and those on anti-competitive behaviour (to which such a test is applied).[102]

Having examined the case law on effects too uncertain and indirect, the selling arrangement and insignificant effects, it may seem at first sight rather difficult to accept the Court's position in Van den Haar that there is no form of de minimis threshold operating to condition art.34 TFEU. The very thrust of the Court's decision to put market circumstances beyond its scrutiny against that provision is unambiguously underpinned by its view that the effects of such rules on intra-EU movement are simply insufficient to justify their review at Union level. To illustrate this point, it is useful to recall here, the CJEU's conclusions in *Semeraro Casa* that,

"the fact that national legislation may restrict the volume of sales generally, and hence the volume of sales of products from other Member States, is *not sufficient* to characterize such legislation as a measure having an effect equivalent to a quantitative restriction. ***E.L. Rev. 751*** " [103]

The case law on the exclusionary rules would seem therefore to sit uncomfortably alongside the Court's clear position regarding the de minimis threshold. On the one hand, the CJEU has made it clear that the application of art.34 TFEU is unconcerned with the significance or magnitude of a measure's effect on intra-EU movement:

"If a national measure is capable of hindering imports it must be regarded as a measure having an effect equivalent to a quantitative restriction, even though the hindrance is slight." [104]

Yet, on the other hand, its case law on the exclusionary rules points expressly to the insufficiency of particular effects on intra-EU movement for the purposes of triggering that same provision. How can this apparent contradiction be resolved?

Despite appearances, it is submitted that the jurisprudence on the exclusionary rules and the Court's rejection of the de minimis threshold are not actually in conflict. The two strands of case law can in

fact be reconciled convincingly. To resolve the tension, the CJEU's repeated assertion that art.34 TFEU "does not distinguish between measures having an effect equivalent to quantitative restrictions according to the degree to which trade between Member States is affected" must simply be construed as referring expressly to national measures that fall within the scope of that provision (i.e. rules preventing market entry for imports and/or discriminating favour of the national market).[105] It is with respect to the appraisal of such measures that there is no de minimis threshold. This interpretation necessarily renders discussion of the Court's rejection of the de minimis threshold in connection with the exclusionary rules entirely superfluous. As has been demonstrated, the latter rules serve the express purpose of removing market circumstances rules from the scope of that provision a priori. The de minimis threshold does not, therefore, come into play here, and any references by the Court to the insufficiency of particular effects on intra-EU movement in this context must be carefully distinguished from its remarks regarding the rejection of the former threshold.

Exclusionary rules: coherent and normatively sound limits on the scope of Article 34 TFEU

The preceding sections have examined the substance, function and interaction of three key legal devices that the Court has developed in order to manage the scope of art.34 TFEU. It has been argued that, in substance, the individual exclusionary rules are expressions of the same basic judicial choice: to prevent art.34 TFEU being used as a tool to scrutinise market circumstances rules. Put another way, the Court's exclusionary rules case law reflects a series of judgments regarding the insufficient nature of particular effects on intra-EU movement, including potential detrimental effects on the volume of intra-EU trade and/or the cost of pursing economic activity on the national market. These judgments must not to be confused with the rejected de minimis threshold. That concept is not relevant to the assessment of market circumstances rules. The exclusionary rules remove such rules from the scope of the Treaty a priori. There is, therefore, no need to engage with the case law on de minimis.

The Court's removal of market circumstances rules from the scope of art.34 TFEU using the exclusionary rules would appear to be based entirely on a qualitative assessment. In the exercise of its competence to interpret the scope of that provision, the CJEU has opted not to scrutinise non-discriminatory national rules that simply structure the market within individual Member States. This position is best interpreted as a judicial choice—a de facto policy decision over the appropriate division of competence between the Member States and the Union regarding the regulation of the internal market as an area of shared ***E.L. Rev. 752*** responsibility. The fact that, on occasion, the Court has made express reference to statistical data in support of its conclusion to put such non-discriminatory national rules beyond its review has no bearing on this evaluation.[106] Such information simply offers a greater insight into the likely effects of the contested measure on the applicant. However, once again, these insights are immaterial as soon as it is accepted that the Court is not concerned with the scrutiny of non-discriminatory rules that simply structure the market—as the exclusionary rules jurisprudence clearly demonstrates.

Normative support for the exclusionary rules

It is submitted that the Court's introduction and application of the exclusionary rules reflects a normatively sound decision regarding the appropriate scope for Union intervention in connection with the regulation of the internal market. In particular, it is argued that the subsidiarity principle lends strong support for the Court's decision, as expressed through the exclusionary rules, to preclude art.34 TFEU from being used to scrutinise market circumstances rules.[107] According to art.5(3) TEU, the subsidiarity principle permits the Union to exercise its competences in areas of shared responsibility.

"only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

EU lawyers have been very reluctant to acknowledge the implications of this principle for the Court. In the legal commentary, discussion of subsidiarity has focused almost entirely on the principle's impact on the actions of the Union's political rather than judicial institutions.[108] Even critics of the Court's alleged "activism" have overlooked subsidiarity in their analyses, preferring instead to criticise the Court for departing from a literal reading of the Treaty in favour of a broad, meta-teleological

approach that, so the argument goes, consistently privileges closer Union integration at the expense of Member State autonomy.[109]

In the author's view, the subsidiarity principle ought not, however, to be viewed exclusively as a restraint on the Union legislature.[110] Rather, it is argued that subsidiarity should also be considered to operate as an important source of restraint on the *exercise* [111] of the Court's own interpretative authority. Several other commentators have argued in support of this conclusion. Bermann, for example, has argued that the Court ***E.L. Rev. 753*** "should not consider that it discharges its responsibilities with respect to subsidiarity simply by conducting [a] limited monitoring of the Union's political branches".[112] Similarly, de Búrca has also called for the Court to engage more closely with the demands of subsidiarity in connection with the exercise of its interpretative functions:

"[Given] that the Court is an institutional actor with a role in the [Union] policy-making process, it is important that it should seek a way of addressing the complex concerns which underpin the subsidiarity principle when it chooses a particular policy direction in interpreting an open-ended Treaty provision." [113]

In line with the arguments of Bermann and de Búrca, it is difficult to see why the Court should, in principle, be immune from compliance with the subsidiarity principle. A strong argument can be made that the operating conditions for the application of that principle are met, at least with respect to the interpretation of the scope of art.34 TFEU. First, the wording of art.5(3) TEU refers broadly to the exercise of shared competences by the Union and the Member States. Article 13 TEU then expressly lists the Court of Justice as an institution of the Union. This establishes the required link between principle and addressee. Admittedly, both the wording of art.5(3) TEU and, indeed, the supplementary Subsidiarity Protocol are framed in language that speaks directly to the principle's effect as a brake on the Union legislature's activities.[114] However, this alone is no absolute bar on the application of subsidiarity outside this context. Rather, it merely reflects the fact that, presently, the principle has been employed and developed as a check on EU legislation. Secondly, the CJEU's interpretation of the scope of art.34 TFEU affects an area of shared regulatory competence: the regulation of the internal market.[115] Its preferred approach to defining the outer limits of that provision has a direct impact on the distribution of competence between the Union and the Member States. The Member States are required to justify in EU law only those national measures that are found to fall within the scope of that provision as obstacles to intra-EU movement.

Drawing on the above analysis, it is argued that the subsidiarity principle can be invoked to support the Court's efforts to exclude market circumstances rules from the scope of art.34 TFEU using the exclusionary rules. As Bermann has rightly argued, when interpreting the scope of the Treaty freedoms, the principle translates into a requirement to pay close attention to the effects of national measures on intra-EU movement. Subsidiarity demands that,

"the Court pay more attention in particular cases as to whether the exercise of regulatory authority by a Member State or its subcommunities *sufficiently* impairs cross-border mobility to justify suppression of the relevant measure in the interest of the common market." [116]

It seems obvious that the *Dassonville* formula sits uncomfortably with this requirement. A literal reading of this test would effectively furnish the Court with a general power of review over (virtually) all Member State policy preferences. This unquestionably undermines the substance of the subsidiarity principle and, as a consequence, the practical value of classifying the internal market as an area of "shared" regulatory competence. Put simply, applying the full force of the *Dassonville* test would afford the Court the power to review all Member States legislation that potentially affects trade (including within this intra-EU trade), rather than targeting Member State legislation that is shown to be capable of specifically affecting—actually or potentially—intra-EU trade. ***E.L. Rev. 754***

By taking the decision to exclude market circumstances rules from the scope of art.34 TFEU, the CJEU can be seen, therefore, to be aware of the need to place subsidiarity-compliant limits on the exercise of its competence to contribute to the regulation of the internal market as a shared regulatory space. The exclusionary rules represent a clear attempt on its part to put beyond the scope of its review non-discriminatory national measures that simply structure national markets. As argued earlier, such rules may have an impact on intra-EU trade (e.g. by affecting generally trade volumes or the costs of pursing economic activity); however, as the Court's exclusionary rules jurisprudence indicates, this impact is rightly not considered sufficient to trigger their review against art.34 TFEU. It is no coincidence, therefore, that the Court's clearest pronouncement on the exclusionary rules, the *Keck* decision, was delivered precisely at the time when subsidiarity was being formalised within the

Treaty framework as a guiding constitutional principle of EU integration. That ruling can be taken to demonstrate the CJEU's awareness of the introduction of that principle into the Treaty and, crucially, the consequences of that constitutional principle on its own freedom to interpret the scope of art.34 TFEU. Keck remains to date the clearest expression of its efforts to place market circumstances rules beyond scrutiny against that provision.

Recent developments: breaking with the exclusionary rules framework

The Court's awareness of the demands of subsidiarity seems to explain—and certainly justify—its reluctance to engage in the review of market circumstances legislation. This reluctance is confirmed by a statistical analysis of the case law. In the case law on goods between 1995 and 2011 (inclusive) the Court has ruled in only 9 out of a possible 33 cases on art.34 TFEU (MEQRs) that market circumstances rules constituted obstacles to intra-EU movement, requiring justification in EU law.[117]

The above headline statistic injects a welcome degree of perspective into the analysis of the outer limits of art.34 TFEU. At the same time, however, it masks a worrying trend developing in case law. From 2000 onwards, the Court has demonstrated increasingly its willingness to break with the substance of its exclusionary rules. Significantly, the expansion in the scope of the Treaty freedoms is not limited to the jurisprudence on art.34 TFEU. Rather, during the same period, the CJEU has also increasingly applied the provisions of services, persons and capital in order to scrutinise market circumstances rules.[118] With the exception of its case law on intra-EU capital movements, the Court typically concludes that the contested ****E.L. Rev. 755*** national measures can be justified in EU law. However, while demonstrating a degree of sensitivity to Member State autonomy, this does not detract from the constitutional significance of finding that the national measures in question fall within the scope of the Treaty freedoms in the first place.

With respect to goods, the turning point in the case law on market circumstances rules came in a series of decisions addressing national measures that prohibited or restricted the use of products within national markets.[119] As market circumstances rules, the contested national measures were genuinely non-discriminatory and did not prevent the free importation of the relevant products. Of course, the individual rules might impact on the volume of trade generally, including within this the volume of intra-EU trade. However, in the absence of any evidence of discrimination, it might have been expected that the CJEU would conclude, on the strength of its exclusionary rules jurisprudence, that art.34 TFEU did not catch these rules.[120] Yet, in a change of direction, the CJEU ruled in each case that the contested measures on product usage fell within the scope of that provision, therefore requiring justification by the Member States. For the Court, it was sufficient that the rules could potentially affect consumer interest in the products concerned. This, in turn, the Court ruled, could affect the "access to the market" for those goods.[121] As the Grand Chamber concluded in *Commission v Italy (Motorcycle Trailers)*, art.34 TFEU must now be read as prohibiting three categories of national measure: (1) discriminatory national rules; (2) indistinctly applicable national rules that prescribe product characteristics; and (3) "*any other measure which hinders access of products originating in other Member States to the market of a Member State* ".[122]

The evidence to date indicates that the "market access" limb introduced in *Commission v Italy (Motorcycle Trailers)* has adjusted rather than revolutionised the Court's case law on art.34 TFEU. The market access test is not to be read as synonymous with a literal reading of the *Dassonville* formula. It is carefully—though not necessarily convincingly—integrated into the existing framework of art.34 TFEU, which continues to recognise, at least to some degree, the limits placed by the exclusionary rules.[123] Indeed, in its recent case law, the Court has continued to apply both the selling arrangement concept and the criterion of effects too uncertain and indirect.[124] As an autonomous test in the case law on goods, market access appears instead to perform a specific function.[125] It enables the Court intuitively to expand the scope of art.34 TFEU on a case-by-case basis.[126] In other words, using the market access concept, the CJEU is able to break with the substance of the exclusionary rules in cases where it forms the view that the effects of particular market circumstances rules are, notwithstanding the absence of any specific effect on intra-EU trade, simply *too severe or restrictive*.[127] From a technical perspective, this is, of course, the very same act of judicial intuition that gave birth to the exclusionary rules. The fundamental difference, however, is that ****E.L. Rev. 756*** the Court is now opting to use its interpretative freedom to pursue a *different* qualitative choice; a choice that involves scrutinising the quality or indeed very existence of particular market circumstances rules.

Looking at the case law on goods, it seems that the Court will apply the market access test only rarely to scrutinise market circumstances rules. For a start, there is as yet no indication that the CJEU will

reverse its approach to the paradigm case law on selling arrangements (e.g. Sunday trading legislation). As noted already, the Court has continued to apply its *Keck* ruling following its recent revision of the art.34 TFEU framework. Furthermore, as Wennerås and Moen argue, the operative threshold required to trigger the new autonomous market access test currently appears to be set quite high.[128] For example, the contested measures found to infringe art.34 TFEU in Commission v Portugal (Tinted Film) and *Commission v Italy (Motorcycle Trailers)* imposed near total bans on product usage. To the same effect, in *Mickelsson and Roos*, the CJEU directed the referring court to rule that non-discriminatory restrictions on the use of jet-skis on public waterways within that state fall within the scope of art.34 TFEU *only* where such restrictions had the effect of *preventing or greatly restricting* the use of such products.[129]

The above approach, if followed, offers some relief to the Member States. It does not set all of their market circumstances legislation in conflict with art.34 TFEU. However, the Court's current reading of art.34 TFEU is not set in stone. There is no firm guarantee that the CJEU will not change its approach in the coming years to the further detriment of Member State autonomy. In addition, and more crucially, the Court's application of art.34 TFEU to review market circumstances rules—to whatever degree—remains squarely at odds with the demands of the subsidiarity principle.

Concluding remarks

This article has sought to offer a fresh take on the problem of defining the outer limits of art.34 TFEU by examining the substance, function and interaction of the Court's exclusionary rules. The three key exclusionary rules—the criterion of effects too uncertain and indirect; the selling arrangement; and the concept of insignificant effects—all operate to remove from the scope of that provision national measures that, applying the Court's own tests, would *otherwise* have constituted obstacles to intra-EU movement, requiring justification in EU law. It has been argued that, viewed collectively, the exclusionary rules all serve a common function: preventing art.34 TFEU from being used to scrutinise market circumstances rules. This label refers to genuinely non-discriminatory national measures that simply structure national markets. Such rules may have an impact on intra-EU movement; however, as the Court's exclusionary rules jurisprudence indicates, this impact is not considered sufficient to trigger their review against art.34 TFEU.

The Court's more recent decisions on the scope of art.34 TFEU evidence its willingness once again to scrutinise market circumstances rules. It is the present writer's view that this shift in approach to the scope of art.34 TFEU, and indeed also to the scope of the economic freedoms more generally, is problematic. The CJEU has effectively furnished itself with the power to review the substance of non-discriminatory Member State policies without any requirement to demonstrate a specific effect on intra-EU trade. The case law on art.34 TFEU indicates that it is unlikely that the Court will exercise this power to review every national measure that simply affects trade volumes, increases the cost of pursuing economic activity per se or otherwise restricts commercial freedom. However, this fact notwithstanding, the very *existence* of the CJEU's power to do so as and when it sees fit remains in tension with the demands of the subsidiarity principle to which the Court, as a Union institution, must also adhere.

To restore normative strength to its case law, the CJEU ought to consider signalling a clear break with its recent decision once again to broaden the scope of art.34 TFEU. The existence of the exclusionary ***E.L. Rev. 757*** rules attests to the fact that the Court is perfectly capable of making the required adjustment to its case law. All that is required is for the Court to reassert the basic qualitative and normatively sound judicial choice that underpins its exclusionary rules jurisprudence. To do so, the Court would simply need to make it clear that, in order to trigger the protection of art.34 TFEU, litigants must adduce credible evidence to demonstrate that particular national measures are liable to prevent (block) the free importation of products into that Member State and/or to operate in favour of the domestic market (e.g. by protecting domestic products or by shielding traders established on the national territory from intra-EU competition). ***E.L. Rev. 758*** Put another way, it ought to be made clear, to the benefit of litigants and Member States alike, that market circumstances rules do not fall within the scope of art.34 TFEU. They characterise the legitimacy policy choices of the Member States and contribute to the management of the internal market as a shared regulatory space.

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2. See, from a long list, e.g. N. Bernard, "Discrimination and Free Movement in EC Law" (1996) 45 I.C.L.Q. 82; S. Weatherill, "After Keck: Some Thoughts on How to Clarify the Clarification" (1996) 33 C.M.L. Rev. 885; *M. Poiares Maduro, We the Court: The European Court of Justice & the European Economic Constitution (Oxford: Hart Publishing, 1999)* ; C. Barnard, "Fitting the Remaining Pieces into the Goods and Persons Jigsaw" (2001) 26 E.L. Rev. 34; P. Koutrakos, "On Groceries, Alcohol and Olive Oil: More on the Free Movement of Goods after Keck" (2001) 26 E.L. Rev. 391; *J. Snell, Goods and Services in EC Law: A Study in the Relationship Between the Freedoms (Oxford: Oxford University Press, 2002)* ; N. Nic Shuibhne, "The Free Movement of Goods and Article 28 EC: An Evolving Framework" (2002) 27 E.L. Rev. 408; S. Enchelmaier, "The Awkward Selling of a Good Idea, or a Traditionalist Interpretation of Keck" (2003) 22 Y.E.L. 249; L. Gormley, "Silver Threads Among the Gold … 50 Years of the Free Movement of Goods" (2007–08) 31 Fordham Int'l L.J. 1637; and E. Spaventa, "Leaving Keck behind? The Free Movement of Goods after the Rulings in Commission v. Italy and Mickelsson and Roos" (2009) 36 E.L. Rev. 914.

3. M. Dougan, "Legal Developments" (2010) 48 J.C.M.S. 163, 163.

4. See here recently, e.g. J. Snell, "The Notion of Market Access: A Concept or a Slogan?" (2010) 47 C.M.L. Rev. 437; G. Davies, "Understanding Market Access: Exploring the Economic Rationality of Difference Conceptions of Free Movement Law" (2010) 11 G.L.J. 671; and S. Enchelmaier, "Always at Your Service (Within Limits): The ECJ's Case Law on Article 56 TFEU (2006–2007)" (2011) 36 E.L. Rev. 615. For a recent, alternative approach exploring parallels with the regulation of the US internal market, see C. Barnard, "Restricting Restrictions: Lessons for the EU from the US?" (2009) 68 C.L.J. 575.

5. *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 [16].

6. For an exception, see *E. Spaventa "The Outer Limit of the Treaty Free Movement Provisions: Some Reflections on the Significance of Keck, Remoteness and Deliège" in C. Barnard and O. Odudu (eds), The Outer Limits of European Law (Oxford: Hart Publishing, 2009), p.245*.

7. From many examples, see e.g. Weatherill, "After Keck" (1996) 33 C.M.L. Rev. 885; Enchelmaier, "The Awkward Selling of a Good Idea" (2003) 22 Y.E.L. 249; D. Wilsher, "Does Keck Discrimination Make Any Sense? An Assessment of the Non-discrimination Principle within the European Single Market" (2008) 33 E.L. Rev. 3; L. Prete, "Of Motorcycle Trailers and Personal Watercrafts: the Battle over Keck" (2008) 35 L.I.E.I. 131; T. Horsley, "Anyone for Keck?" Case Comment (2009) 46 C.M.L. Rev. 2001; P. Pecho, "Good-Bye Keck? A Comment on the Remarkable Judgment in Commission v. Italy, C-110/05" (2009) 36 L.I.E.I. 257; Spaventa, "Leaving Keck behind?" (2009) 36 E.L. Rev. 914; P. Wennerås and K.B. Moen, "Selling Arrangements, Keeping Keck" (2009) 35 E.L. Rev. 387, P. Oliver, "Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurtling in a New Direction?" (2010) 33 Fordham Int'l L.J. 1423; and L. Gormley, "Free Movement of Goods and their Use — What is the Use of It" (2009–10) 33 Fordham Int'l L.J. 1589.

8. See e.g. Opinion of A.G. Jacobs in *Société d'Importation Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA (C-412/93) [1995] E.C.R. I-179; [1995] 3 C.M.L.R. 422* at [42]; Weatherill, "After Keck" (1996) 33 C.M.L. Rev. 885, 896–897; *C. Barnard, The Substantive Law of the EU: The Four Freedoms, 3rd edn (Oxford: Oxford University Press, 2010), p.144* ; and Oliver, "Of Trailers and Jet Skis" (2010) 33 Fordham Int'l. L.J. 1423 at 1469.

9. For earlier uses of this label, see e.g. K. Mortelmans, "Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?" (1991) 28 C.M.L. Rev. 115; and *Barnard, The Substantive Law of the EU (2010), p.117*.

10. *Geddo v Ente (2/73) [1973] E.C.R. 865; [1974] 1 C.M.L.R. 13* at [7]. See e.g. R. v Henn and Darby (34/79) [1972] E.C.R. 3795 at [12]–[13]; Delhaize Frères v Promalvin SA (C-47/90) [1992] E.C.R. I-3369 at [12]–[14]; and *Rosengren v Riksåklagaren (C-170/04) [2007] E.C.R. I-4071; [2007] 3 C.M.L.R. 10* at [33].

11. Article 4(2)(a) TFEU.

12. See, with respect to the latter category of measure, e.g. Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein (Cassis de Dijon) (120/78) [1979] E.C.R. I-649; [1979] 3 C.M.L.R. 494; *Keck and Mithouard (C-267/91 and C-268/91) [1993] E.C.R. I-6097* at [15]; *Verein gegen Unwesen in Handel und Gewerbe Koln eV v Mars GmbH (C-470/93) [1995] E.C.R. I-1923; [1995] 3 C.M.L.R. 1* ; and *Commission v Spain (Chocolate) (C-12/00) [2003] E.C.R. I-459; [2005] 2 C.M.L.R. 33*.

13. See here e.g. Weatherill, "After Keck" (1996) 33 C.M.L. Rev. 885, 900; Barnard, "Fitting the Remaining Pieces into the Goods and Persons Jigsaw" (2001) 26 E.L. Rev. 34, 52–53; *N. Bernard, Multilevel Governance in the European Union (Amsterdam: Kluwer, 2002), pp.22–27* ; *Snell, Goods and Services in EC Law (2002), p.127* ; Nic Shuibhne, "The Free Movement of Goods and Article 28 EC" (2002) 27 E.L. Rev. 408, 412; S. Enchelmaier, "The ECJ's Recent Case Law on the Free Movement of Goods: Movement in all Sorts of Directions" (2007) 26 Y.E.L. 115, 128; and Spaventa, "Leaving

Keck behind?" (2009) 36 E.L. Rev. 914, 920–921.

14. e.g. N. Bernard, "The Future of European Economic Law in the Light of the Principle of Subsidiarity" (1996) 33 C.M.L. Rev. 633; *Bernard, Multilevel Governance in the European Union (2002)* ; *Snell, Goods and Services in EC Law (2002)* ; and Enchelmaier, "The ECJ's Recent Case Law on the Free Movement of Goods" (2007) 26 Y.E.L. 115.

15. e.g. Weatherill "After Keck" (1996) 33 C.M.L. Rev. 885; *Maduro, We the Court (1999)* ; Barnard, "Fitting the Remaining Pieces into the Goods and Persons Jigsaw" (2001) 26 E.L. Rev. 34; Gormley, "Silver Threads Among the Gold" (2007–08) 31 Fordham Int'l L.J. 1637; Prete, "Of Motorcycle Trailers and Personal Watercrafts" (2008) 35 L.I.E.I. 131; Pecho, "Good-Bye Keck?" (2009) 36 L.I.E.I. 257; Spaventa, "Leaving Keck behind?" (2009) 36 E.L. Rev. 914; A. Tryfonidou, "Further Steps on the Road to Convergence amongst the Market Freedoms" (2010) 35 E.L. Rev. 36; and Oliver, "Of Trailers and Jet Skis" (2010) 33 Fordham Int. L.J. 1423.

16. From 1995 to 2011 (inclusive), the disputed category of non-discriminatory rules made up 33 out of a total of 197 cases. Data taken from *http://eur-lex.europa.eu/en/index.htm* [Accessed October 26, 2012].

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

18. *Commission v Italy (Motorcycle Trailers) (C-110/05) [2009] E.C.R. I-519; [2009] 2 C.M.L.R. 34* at [35]–[37] (emphasis added).

19. See e.g. *Cassis de Dijon (120/78) [1979] E.C.R. I-649* at [8]; and *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (C-55/94) [1995] E.C.R. I-4165; [1996] 1 C.M.L.R. 603* at [37]. For detailed analysis, see *C. Barnard, "Derogations, Justifications and The Four Freedoms: Is State Interest Really Protected?" in The Outer Limits of European Union Law (2009), p.273*.

20. See e.g. *Aragonesa de Publicidad Exterior SA v Departmento de Sanidad y Seguridad Social de la Generalitat de Cataluna (C-1/90 and C-176/90) [1991] E.C.R. I-4151; [1994] 1 C.M.L.R. 887* at [13].

21. See e.g. *Rau Lebensmittelwerke v De Smedt PVBA (261/81) [1982] E.C.R. 3961* at [12]; and *Gebhard (C-55/94) [1995] E.C.R. I-4165* at [37]. For discussion of proportionality in EU free movement law, see e.g. J. Jans, "Proportionality Revisited" (2000) 27 L.I.E.I. 239.

22. e.g. *Krantz GmbH & Co v Ontvanger der Directe Belastingen (C-69/88) [1990] E.C.R. I-583; [1991] 2 C.M.L.R. 677* at [11]; *Criminal Proceedings against Peralta (C-379/92) [1994] E.C.R. I-3453* at [24]; *Esso Española SA v Comunidad Autonoma de Canarias (C-134/94) [1995] E.C.R. I-4223; [1996] 5 C.M.L.R. 154* at [24]; *DIP SpA v Comune di Bassano del Grappa (C-140/94, C-141/94 and C-142/94) [1995] E.C.R. I-3257; [1996] 4 C.M.L.R. 157* at [29]; BASF v Prasident des Deutschen Patentamts (C-44/98) [1998] E.C.R. I-6269; [2001] 2 C.M.L.R. 21 at [21]; and Francesco Guarnieri & Cie v Vandevelde Eddy VOF (C-291/09), judgment of the Court (First Chamber) April 7, 2011 at [17].

23. e.g. *Keck and Mithouard (C-267/91 and C-268/91) [1993] E.C.R. I-6097* ; *Hünermund v Landesapothekerkammer Baden-Württemberg (C-292/92) [1993] E.C.R. I-6787* ; *Leclerc-Siplec (C-412/93) [1995] E.C.R. I-179* ; and *A-Punkt Schmuckhandels GmbH v Schmidt (C-441/04) [2006] E.C.R. I-2093; [2006] 2 C.M.L.R. 33*.

24. e.g. *Criminal proceedings against Burmanjer (C-20/03) [2005] E.C.R. I-4133; [2006] 1 C.M.L.R. 24* at [31].

25. *Krantz (C-69/88) [1990] E.C.R. I-583* ; *CMC Motorradcenter GmbH v Baskiciogullari (C-93/92) [1993] E.C.R. I-5009* ; *Peralta (C-379/92) [1994] E.C.R. I-3453* ; *Centro Servizi Spediporto Srl v Spedizioni Marittima del Golfo Srl (C-96/94) [1998] E.C.R. I-2883; [1996] 4 C.M.L.R. 613* ; *Esso Española SA (C-134/94) [1995] E.C.R. I-4223* ; *DIP SpA (C-140/94, C-141/94 and C-142/94) [1995] E.C.R. I-3257* ; *BASF (C-44/98) [1998] E.C.R. I-6269* ; *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* ; *Ed Srl v Fenocchio (C-412/97) [1999] E.C.R. I-3845; [2000] 3 C.M.L.R. 855* ; and Francesco Guarnieri & Cie (C-291/09) April 7, 2011.

26. See respectively *Graf v Filzmoser Maschinenbau GmbH (190/98) [2000] E.C.R. I-493; [2000] 1 C.M.L.R. 741* at [25]; and *Commission v Spain (Hospital Care Abroad) (C-211/08) [2010] 3 C.M.L.R. 48*.

27. *Krantz (C-69/88) [1990] E.C.R. I-583*.

28. *Krantz (C-69/88) [1990] E.C.R. I-583* at [4].

29. *Krantz (C-69/88) [1990] E.C.R. I-583* at [11] (emphasis added).

30. See e.g. the Opinion of A.G. Fennelly in Criminal Proceedings against Bluhme (C-67/97) [1998] E.C.R. I-8033; [1999] 1 C.M.L.R. 612 at [19]; the Opinion of A.G. La Pergola in *BASF (C-44/98) [1998] E.C.R. I-6269* at [18]; D. Doukas, "Untying the Market Access Knot: Advertising Restrictions and the Free Movement of Goods and Services" (2006–07) 9 C.Y.E.L.S. 177, 206, A. Biondi, "In and Out of the Internal Market: Recent Developments on the Principle of Free Movement" (1999–2000) 19 Y.E.L. 469, 487–478; Pecho, "Good-Bye Keck?" (2009) 36 L.I.E.I. 257, 264; and *Spaventa, "The Outer Limit of the Treaty Free Movement Provisions" in The Outer Limits of European Law (2009), pp.250–254 and esp. at p.253*. For Spaventa, the causation test is restricted further. She argues that it is limited to the assessment of national measures that are not *intended* to regulate intra-EU trade.

31. The Opinion of A.G. La Pergola in *BASF (C-44/98) [1998] E.C.R. I-6269* at [19].

32. Doukas, "Untying the Market Access Knot" (2006–07) 9 C.Y.E.L.S. 177, 206.

33. Guarnieri & Cie (C-291/09) April 7, 2011 at [17].

34. Opinion of A.G. Fennelly in Bluhme (C-67/97) [1998] E.C.R. I-8033 at [19]; and the Opinion of A.G. La Pergola in *BASF (C-44/98) [1998] E.C.R. I-6269* at [18].

35. *Hans Moser v Land Baden-Württemberg (180/83) [1984] E.C.R. 2539*.

36. *Moser (180/83) [1984] E.C.R. 2539* at [18].

37. *Krantz (C-69/88) [1990] E.C.R. I-583* at [4].

38. *Corsica Ferries (C-266/96) [1998] E.C.R. I-3949* at [31]. See also *Peralta (C-379/92) [1994] E.C.R. I-3453* at [24].

39. *Corsica Ferries (C-266/96) [1998] E.C.R. I-3949* at [30].

40. *BASF (C-44/98) [1998] E.C.R. I-6269* at [13].

41. *Graf (190/98) [2000] E.C.R. I-493*. See also recently in the case law on art.56 TFEU, *Commission v Spain (C-211/08) [2010] 3 C.M.L.R. 48*.

42. *Graf (190/98) [2000] E.C.R. I-493* at [25].

43. *Graf (190/98) [2000] E.C.R. I-493* at [24].

44. *Graf (190/98) [2000] E.C.R. I-493* at [23].

45. According to the Court, art.45 TFEU extends to preclude national measures that are liable to "deter" or "discourage" Member State nationals from exercising their rights to intra-EU movement. For recent confirmation, see e.g. *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC (C-325/08) [2010] E.C.R. I-2177; [2010] 3 C.M.L.R. 14* at [34].

46. *CMC Motorradcenter (C-93/92) [1993] E.C.R. I-5009* is the exception here. In that case, the alleged deterrent effects giving rise to a potential reduction in the volume of intra-EU trade was not a consequence of the contested German legislation. Rather, it followed directly from the refusal of authorised German motorcycle dealers to service goods that had been imported into that state outside of the official distribution network. On this point, see [11] of the Court's decision.

47. See here also, *D. Edward and N. Nic Shuibhne, "Continuity and Change in the Law Relating to Services" in A. Arnull, P. Eeckhout and T. Tridimas (eds), Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs (Oxford: Oxford University Press, 2008), p.243 at p.256* ; *P. Oliver, Free Movement of Goods in the European Union, 5th edn (Oxford: Oxford University Press, 2010), p.95* ; and Gormley, "Free Movement of Goods and their Use" (2009–10) 33 Fordham Int'l L.J. 1589, 1599.

48. Oliver, "Of Trailers and Jet Skis" (2010) 33 Fordham Int. L.J. 1423, 1490, and *Oliver, Free Movement of Goods in the European Union (2010), p.95*. See also, Edward and Nic Shuibhne, who argue that remoteness should play such a role in the case law. See *Edward and Nic Shuibhne, "Continuity and Change in the Law Relating to Services" in Continuity and Change in EU Law (2008), p.256*.

49. *Oliver, Free Movement of Goods in the European Union (2010), p.204*. See here also Gormley, "Free Movement of Goods and their Use" (2009–10) 33 Fordham Int'l L.J. 1589, 1599.

50. Gormley, "Free Movement of Goods and their Use" (2009–10) 33 Fordham Int'l L.J. 1589, 1599.

51. See here e.g. *Oliver, Free Movement of Goods in the European Union (2010), p.96*.

52. Mortelmans, "Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances" (1991) 28 C.M.L. Rev. 115.

53. e.g. *Cassis de Dijon (120/78) [1979] E.C.R. I-649* ; *Rau (261/81) [1982] E.C.R. 3961* ; *Keck and Mithouard (C-267/91 and C-268/91) [1993] E.C.R. I-6097* at [15]; *Mars GmbH (C-470/93) [1995] E.C.R. I-1923* ; Morellato v Unità sanitaria locale (USL) (C-358/95) [1997] E.C.R. I-1431; *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v Bauer Verlag (C-368/95) [1997] E.C.R. I-3689; [1997] 3 C.M.L.R. 1329* ; *Commission v France (Hallmarking) (C-166/03) [2004] E.C.R. I-6535; [2004] 3 C.M.L.R. 6* ; De Groot en Slot Allium BV v Ministere de l'Economie, des Finances et de l'Industrie (C-147/04) [2006] E.C.R. I-245; [2009] 1 C.M.L.R. 22; *Criminal proceedings against Ahokainen and Mati Leppik (C-434/04) [2006] E.C.R. I-9171; [2007] 1 C.M.L.R. 11* ; *Commission v Belgium (Fire Detectors) (C-254/05) [2007] E.C.R. I-4269; [2007] 3 C.M.L.R. 13* ; and *Dynamic Medien Vertriebs GmbH v Avides Media AG (C-244/06) [2008] E.C.R. I-505; [2008] E.C.R. I-505*.

54. e.g. *Criminal proceedings against Franzén (C-189/95) [1997] E.C.R. I-5909; [1998] 1 C.M.L.R. 1231* ; *Commission v Finland (Vehicle Transfer Licences) (C-54/05) [2007] E.C.R. I-2473; [2007] 2 C.M.L.R. 33* ; and *Rosengren (C-170/04) (C-170/04) [2007] E.C.R. I-4071*.

55. e.g. *Dassonville (8/74) [1974] E.C.R. 837* ; *Rewe-Zentralfinanz Gmbh v Landwirtschaftskammer (4/75) [1975] E.C.R 843* ; *Officier van Justitie v Sandoz BV (174/82) [1983] E.C.R. 2445; [1984] 3 C.M.L.R. 43* ; *Commission v Netherlands (C-41/02) [2004] E.C.R. I-11375; [2006] 2 C.M.L.R. 11* ; and *Commission v France (Processing Aids) (C-333/08) [2010]*

2 C.M.L.R. 43.

56. e.g. *Tasca (65/75) [1976] E.C.R. 291* ; *Netherlands v Van Tiggele (82/77) [1978] E.C.R. 25* ; *Keck and Mithouard (C-267/91 and C-268/91) [1993] E.C.R. I-6097* at [16]; *Konsumentombudsmannen (KO) v De Agostini (C-34/95, C-35/95 and C-36/95) [1997] E.C.R. I-3843; [1998] 1 C.M.L.R. 32* ; *Konsumentombudsmannen (KO) v Gourmet International Products (C-405/98) [2001] E.C.R. I-1795; [2001] 2 C.M.L.R. 31* ; and *Radlberger Getränkegesellschaft v Land Baden-Wurttemberg (C-309/02) [2004] E.C.R. I-11763; [2005] 1 C.M.L.R. 35* at [64]–[65].

57. e.g. *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* ; Deutscher Apothekerverband eV v 0800 DocMorris NV (C-322/01) [2003] E.C.R. I-14887; [2005] 1 C.M.L.R. 46; *Alfa Vita Vassilopoulos AE Greece (C-158/04) [2006] E.C.R. I-8135; [2007] 2 C.M.L.R. 2* ; Commission v Germany (Pharmacies) (C-141/07) [2008] E.C.R. I-6935; [2008] 3 C.M.L.R. 48; *Fachverband der Buch- und Medienwirtschaft v LIBRO Handelsgesellschaft mbH (C-531/07) [2009] E.C.R. I-3717; [2009] 3 C.M.L.R. 26* ; and *Ker Optika bt v ANTSZ Del-dunantuli Regionalis Intezete (C-108/09) [2011] 2 C.M.L.R. 15*.

58. *Ed Srl (C-412/97) [1999] E.C.R. I-3845*.

59. *Keck and Mithouard (C-267/91 and C-268/91) [1993] E.C.R. I-6097* ; and *Groupement National des Negociants en Pommes de Terre de Belgique v ITM Belgium SA (Belgapom) (C-63/94) [1995] E.C.R. I-2467*.

60. *Commission v Greece (Infant Milk) (C-391/92) [1995] E.C.R. I-1621; [1996] 1 C.M.L.R. 359* ; Criminal proceedings against Tankstation 't Heukske vof and Boermans (C-401/92) [1995] E.C.R. I-2199; [1995] 3 C.M.L.R. 501; *Punto Casa SpA v Sindaco del Comune di Capena (C-69/93 and C-258/93) [1994] E.C.R. I-2355* ; *Criminal proceedings against Giorgio Domingo Banchero (C-387/93) [1995] E.C.R. I-4663; [1996] 1 C.M.L.R. 829* ; and *Semeraro Casa Uno (C-418/93) [1996] E.C.R. I-2975; [1996] 3 C.M.L.R. 648*.

61. *Hünermund (C-292/92) [1993] E.C.R. I-6787* ; *Leclerc-Siplec (C-412/93) [1995] E.C.R. I-179* ; *De Agostini (C-34/95, C-35/95 and C-36/95) [1997] E.C.R. I-3843* ; *ARD v PRO Sieben Media AG (C-6/98) [1999] E.C.R. I-7599; [1999] 3 C.M.L.R. 769* ; and Karner Industrie-Auktionen GmbH v Troostwijk GmbH (C-71/02) [2004] E.C.R. I-3025; [2004] 2 C.M.L.R. 5.

62. *A-Punkt Schmuckhandels (C-441/04) [2006] E.C.R. I-2093*.

63. *Burmanjer (C-20/03) [2005] E.C.R. I-4133*.

64. See e.g. *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 [102]–[104] (art.45 TEU); *Alpine Investments BV v Minister van Financiën (C-384/93) [1995] E.C.R. I-1141; [1995] 2 C.M.L.R. 209* at [33]–[38] (art.56 TFEU); and Commission v Spain (Golden Shares) (C-463/00) [2003] E.C.R. I-4581; [2003] 2 C.M.L.R. 18 at [59]–[61] (art.63(1) TFEU).

65. Contrast e.g. *Blesgen v Belgian State (75/81) [1982] E.C.R. 1211* at [7]–[11]; and *Summary Proceedings against Oebel (155/80) [1981] E.C.R. 1993* at [19] with the Court's approach in e.g. *Cinéthèque SA v Federation Nationale des Cinemas Francais (60 and 61/84) [1985] E.C.R. 2605; [1985] E.C.R. 2605* at [22]; and *Torfaen BC v B & Q Plc (C-145/88) [1989] E.C.R. 3851; [1990] 1 C.M.L.R. 337* at [12].

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

67. *Keck and Mithouard (C-267/91 and C-268/91)* at [16].

68. *Keck and Mithouard (C-267/91 and C-268/91)* at [16].

69. On this same point, see also Koutrakos, "On Groceries, Alcohol and Olive Oil" (2001) 26 E.L. Rev. 361, 391.

70. See here e.g. N. Reich, "The 'November Revolution' of the European Court of Justice: *Keck*, Meng and Audi Revisited" (1994) 31 C.M.L. Rev. 459; Opinion of A.G. Jacobs in Leclerc-Siplec (C-412/93) [1995] E.C.R. I-179; Weatherill "After Keck" (1996) 33 C.M.L. Rev. 885, 894 and 896; and Barnard, "Fitting the Remaining Pieces into the Goods and Persons Jigsaw" (2001) 26 E.L. Rev. 34, 42. For a more positive take on the decision, see Koutrakos, "On Groceries, Alcohol and Olive Oil" (2001) 26 E.L. Rev. 361; and Enchelmaier, "The Awkward Selling of a Good Idea, or a Traditionalist Interpretation of Keck" (2003) 22 Y.E.L. 249.

71. *Commission v Italy (Motorcycle Trailers) (C-110/05) [2009] E.C.R. I-519*.

72. For an exception, see *Spaventa, "The Outer Limit of the Treaty Free Movement Provisions" in The Outer Limits of European Law (2009), p.254*.

73. See e.g. Oliver, "Of Trailers and Jet Skis" (2010) 33 Fordham Int. L.J. 1423, 1469, Barnard, "Fitting the Remaining Pieces into the Goods and Persons Jigsaw" (2001) 26 E.L. Rev. 34, 53; *Spaventa, "The Outer Limit of the Treaty Free Movement Provisions" in The Outer Limits of European Law (2009).*

74. See here e.g. Weatherill "After Keck" (1996) 33 C.M.L. Rev. 885, 900; and *Spaventa, "The Outer Limit of the Treaty Free Movement Provisions" in The Outer Limits of European Law (2009), p.264*.

75. *Spaventa, "The Outer Limit of the Treaty Free Movement Provisions" in The Outer Limits of European Law (2009), p.264*. For Spaventa, the criterion of effects too uncertain and indirect can, however, be distinguished from the *Keck* selling arrangement concept: the former applies as a test of causation to the assessment of non-discriminatory

measures that are not *intended* to regulate trade.

76. See here also esp. Barnard, “Fitting the Remaining Pieces into the Goods and Persons Jigsaw” (2001) 26 E.L. Rev. 34, 51.

77. *Keck and Mithouard (C-267/91 and C-268/91) [1993] E.C.R. I-6097* at [12]. Contra: *Spaventa, “The Outer Limit of the Treaty Free Movement Provisions” in The Outer Limits of European Law (2009), p.252*.

78. In *Krantz*, the Court used the phrase “does not seek to control trade with other Member States” to the same effect.

79. At the same time, the Court has consistently rejected attempts to invoke the selling arrangement concept in order to safeguard *discriminatory* national rules from review against art.34 TFEU. See here e.g. *TK-Heimdienst (C-254/98) [2000] E.C.R. I-151* ; *Gourmet International Products (C-405/98) [2001] E.C.R. I-1795* ; *Deutscher Apothekerverband (C-322/01) [2003] E.C.R. I-14887* ; *Alfa Vita Vassilopoulos (C-158/04) [2006] E.C.R. I-8135* ; *Commission v Germany (Pharmacies) (C-141/07) [2008] E.C.R. I-6935* ; Fachverband der Buch- und Medienwirtschaft (C-531/07) [2009] E.C.R. I-3717; and *Ker Optika (C-108/09) [2011] 2 C.M.L.R. 15*.

80. *Hünermund (C-292/92) [1993] E.C.R. I-6787* ; *Leclerc-Siplec (C-412/93) [1995] E.C.R. I-179* ; *ARD (C-6/98) [1999] E.C.R. I-7599* ; *De Agostini (C-34/95, C-35/95 and C-36/95) [1997] E.C.R. I-3843* ; and *Karner (C-71/02) [2004] E.C.R. I-3025*.

81. *Boermans (C-401/92) [1995] E.C.R. I-2199* at [15]; and *Punto Casa SpA (C-69/93 and C-258/93) [1994] E.C.R. I-2355* at [15].

82. *Hünermund (C-292/92) [1993] E.C.R. I-6787* at [20]; *Leclerc-Siplec (C-412/93) [1995] E.C.R. I-179* at [20]; and *Karner (C-71/02) [2004] E.C.R. I-3025* at [42].

83. *Semeraro Casa Uno (C-418/93) [1996] E.C.R. I-2975*. Spaventa also draws attention to the Court’s use of both the criterion of effects too uncertain and indirect and the concept of certain selling arrangements in order to exclude the contested legislation from the scope of art.49 TEFU and art.34 TFEU respectively. See *Spaventa, “The Outer Limit of the Treaty Free Movement Provisions” in The Outer Limits of European Law (2009), p.252*.

84. *Semeraro Casa Uno (C-418/93) [1996] E.C.R. I-2975* at [9]–[28].

85. *Semeraro Casa Uno (C-418/93)* at [32].

86. *Semeraro Casa Uno (C-418/93)* at [24] (emphasis added).

87. The immaturity label is borrowed from *Edward and Nic Shuibhne, “Continuity and Change in the Law Relating to Services” in Continuity and Change in EU Law (2008), p.256*.

88. *Oliver, Free Movement of Goods in the European Union (2010), p.114*.

89. E. White, “In Search of Limits to Art 30 of the EEC Treaty” (1989) 6 C.M.L. Rev 235. See also esp. Mortelmans, “Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances” (1991) 28 C.M.L. Rev. 115.

90. See here *Poiares Maduro, We the Court (1999)* ; and, recently, P. De Sousa, “Through Contact Lenses, Darkly: Is Identifying Restrictions to Free Movement Harder than Meets the Eye? Comment on *Ker Optika* ” (2012) 37 E.L. Rev. 79.

91. See here e.g. *Snell, Goods and Services in EC Law (2002), pp.81 and 96* ; and De Sousa, “Through Contact Lenses, Darkly” (2012) 37 E.L. Rev. 79, 87.

92. *Burmanjer (C-20/03) [2005] E.C.R. I-4133* at [31].

93. *Viacom Outdoor Srl v Giotto Immobilier Sàrl (C-134/03) [2005] E.C.R. I-1167; [2006] 1 C.M.L.R. 47* at [38]. See also *Consorzio Aziende Metano (Coname) v Comune di Cingia de’ Botti (C-231/03) [2005] E.C.R. I-7287; [2006] 1 C.M.L.R. 2* at [20].

94. *Konstantinidis v Stadt Altensteig (C-168/91) [1993] E.C.R. I-1191; [1993] 3 C.M.L.R. 401* at [15] (emphasis added). For similar references in the case law on persons, see e.g. *Grunkin v Grunkin-Paul (C-353/06) [2008] E.C.R. I-7639; [2009] 1 C.M.L.R. 10* at [23]; *Sayn-Wittgenstein v Landeshauptmann von Wien (C-208/09) [2011] 2 C.M.L.R. 28* at [66]–[71]; and *Runevič-Vardyn v Vilniaus Miesto Savivaldybes Administracija (C-391/09) [2011] 3 C.M.L.R. 13* at [76].

95. *Ed Srl (C-412/97) [1999] E.C.R. I-3845*.

96. *Burmanjer (C-20/03) [2005] E.C.R. I-4133* at [31].

97. *Officier van Justitie v Van de Haar (177 and 178/82) [1984] E.C.R. 1797; [1985] 2 C.M.L.R. 566* at [13]. See thereafter e.g. *Criminal proceedings against Prantl (16/83) [1984] E.C.R 1299; [1985] 2 C.M.L.R. 238* at [20]; *Schutzverband gegen Unwesen in der Wirtschaft eV v Yves Rocher GmbH (126/91) [1993] E.C.R. I-2361* at [21]; and, more recently, Radlberger Getränkegesellschaft (C-309/02) [2004] E.C.R. I-11763 at [68].

98. See e.g. the Opinion of A.G. Lenz in *Commission v Greece (Infant Milk) (C-391/92) [1995] E.C.R. I-1621* at [17] and

[18]; Opinion of A.G. Fennelly in *Corsica Ferries (C-266/96) [1998] E.C.R. I-3949* at [29]; Gormley, "Silver Threads Among the Gold" (2007–08) 31 Fordham Int'l L.J. 1637, 1673 and *Oliver, Free Movement of Goods in the European Union (2010), p.91*.

99. See the Opinion of A.G. Lenz in *Commission v Greece (Infant Milk) (C-391/92) [1995] E.C.R. I-1621* at [17] and [18]; Opinion of A.G. Fennelly in *Corsica Ferries (C-266/96) [1998] E.C.R. I-3949* at [29]; and Opinion of A.G. La Pergola in BASF (C-44/98) [1998] E.C.R. I-6269 at [18].

100. Opinion of A.G. Tesauro in *Hünermund (C-292/92) [1993] E.C.R. I-6787* at [57]. See also e.g. Snell, "The Notion of Market Access: A Concept or a Slogan?" (2010) 47 C.M.L. Rev. 437, 459.

101. Opinion of A.G. Jacobs in *Leclerc-Siplec (C-412/93) [1995] E.C.R. I-179* at [42]; and *Snell, Goods and Services in EC Law (2002), pp.101–102*.

102. *Snell, Goods and Services in EC Law (2002), p.101*.

103. *Semeraro Casa Uno (C-418/93) [1996] E.C.R. I-2975* at [24] (emphasis added).

104. *Van de Haar (177 and 178/82) [1984] E.C.R. 1797* at [13].

105. See here e.g. *Prantl (16/83) [1984] E.C.R 1299* ; Bluhme (C-67/97) [1998] E.C.R. I-8033; and *Radlberger Getränkegesellschaft (C-309/02) [2004] E.C.R. I-11763* at [64]–[65].

106. See here esp. *Torfaen BC (C-145/88) [1989] E.C.R. 3851* at [7]; and *Corsica Ferries (C-266/96) [1998] E.C.R. I-3949* at [30]. In both cases, express reference was made to *quantitative* indicators.

107. This argument draws on earlier analysis of subsidiarity's impact as restraint on the Court of Justice qua Union institution developed in T. Horsley, "Subsidiarity and the Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?" (2012) 50 J.C.M.S. 267.

108. See e.g. *A. Estella, The EU Principle of Subsidiarity and Its Critique (Oxford: Oxford University Press, 2002)* ; G. Davies, "Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time" (2006) 43 C.M.L. Rev. 63; M. Kumm, "Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union" (2006) 12 E.L.J 503; J.-V. Louis, "National Parliaments and the Principle of Subsidiarity: Legal Options and Practical Limits" (2008) 4 E.C.L. Rev. 429; and R. Schütze, "Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?" (2009) 68 C.L.J. 525.

109. See e.g. *P. Neill, The European Court of Justice: A Case Study in Judicial Activism (London: European Public Policy Forum, 1995)* ; and, more recently, *G. Conway, The Limits of Legal Reasoning and the European Court of Justice (Cambridge: Cambridge University Press, 2012)*.

110. See here also e.g. G. Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States" (1994) 94 Columbia Law Rev. 331; T. Schilling, "A New Dimension of Subsidiarity: Subsidiarity as a Rule and a Principle" (1994) 14 Y.E.L. 203; and G. de Búrca, "The Principle of Subsidiarity and the Court of Justice as an Institutional Actor" (1998) 36 J.C.M.S. 217.

111. In line with the wording of art.5(3) TEU, subsidiarity does not affect the existence of the Court's competence to interpret the Treaty pursuant to art.19 TEU. See here, further, Horsley, "Subsidiarity and the Court of Justice" (2012) 50 J.C.M.S. 267, esp. 273–275.

112. Bermann, "Taking Subsidiarity Seriously" (1994) 94 Columbia Law Rev. 331, 400.

113. De Búrca, "The Principle of Subsidiarity and the Court of Justice as an Institutional Actor" (1998) 36 J.C.M.S. 217, 234.

114. Protocol (No.2) on the Application of the Principles of Subsidiarity and Proportionality [2010] OJ C83/206.

115. See now TFEU art.4(2)(a).

116. Bermann, "Taking Subsidiarity Seriously" (1994) 94 Columbia Law Rev. 331, 402 (emphasis added).

117. Kemikalieinspektionen v Toolex Alpha AB (C-473/98) [2000] E.C.R. I-5681 at [35]; *Schmidberger Internationale Transporte Planzuge v Austria (C-112/00) [2003] E.C.R. I-5659; [2003] 2 C.M.L.R. 34* at [55]–[64]; *Georg Schwarz v Burgermeister der Landeshauptstadt Salzburg (C-366/04) [2005] E.C.R. I-10139; [2006] 1 C.M.L.R. 34* at [28]–[29] and esp. [39]; *Commission v Austria (Lorries) (C-320/03) [2005] E.C.R. I-9871; [2006] 2 C.M.L.R. 12* at [66]–[69]; *Commission v Greece (Electronic Games) (C-65/05) [2006] E.C.R. I-10341; [2007] 1 C.M.L.R. 26* at [27]–[30]; *Commission v Portugal (Tinted Film) (C-265/06) [2008] E.C.R. I-2245; [2008] 2 C.M.L.R. 41* at [31]–[36]; *Commission v Italy (Motorcycle Trailers) (C-110/05) [2009] E.C.R. I-519* at [58]; *Mickelsson and Roos (C-142/05) [2009] E.C.R. I-4273* at [28]; and *Criminal Proceedings against Lars Sandström (C-433/05) [2011] Env. L.R. D6* at [32].

118. See e.g. (1) re non-discriminatory taxation: *Sandoz GmbH v Finanzlandesdirektion fur Wien, Niederosterreich und Burgenland (C-439/97) [1999] E.C.R. I-7041; [2001] 3 C.M.L.R. 63* ; Inspecteur van de Belastingdienst Douane, Rotterdam district v Sea-Land Service Inc (C-430/99 and C-431/99) [2002] E.C.R. I-5235; and *Commission v Finland (Vehicle Registrations) (C-232/03) [2007] E.C.R. I-27* ; (2) re non-discriminatory legislation regulating the conditions for the taking-up of economic activity within Member States on a permanent basis: *Criminal Proceedings against MacQuen (C-108/96) [2001] E.C.R. I-837; [2002] 1 C.M.L.R. 29* ; Deutsche Paracelsus Schulen v Kurt Gräbner (C-294/00) [2002]

E.C.R. I-6515; *Commission v Greece (Opticians) (C-140/03) [2005] E.C.R. I-3177; [2005] 3 C.M.L.R. 5* ; *Olympique Lyonnais SASP v Bernard (C-325/08) [2010] E.C.R. I-2177; [2010] 3 C.M.L.R. 14* ; and *Commission v Italy (Motor Insurance) (C-518/06) [2009] E.C.R. I-3491; [2009] 3 C.M.L.R. 22* ; and (3) re non-discriminatory "golden share" provisions reserving to state authorities certain rights over the management of undertakings: Commission v Portugal (Golden Shares) (C-367/98) [2002] E.C.R. I-4731; [2002] 2 C.M.L.R. 48; *Commission v Spain (Golden Shares) (C-463/00) [2003] E.C.R. I-4581; [2003] 2 C.M.L.R. 18* ; and *Commission v Portugal (Golden Shares) (C-171/08) [2011] 1 C.M.L.R. 10*.

119. *Commission v Portugal (Tinted Film) (C-265/06) [2008] E.C.R. I-2245* ; *Commission v Italy (Motorcycle Trailers) (C-110/05) [2009] E.C.R. I-519* ; *Mickelsson and Roos (C-142/05) [2009] E.C.R. I-4273* ; and *Sandström (C-433/05) [2011] Env. L.R. D6*. See also earlier, Toolex Alpha AB (C-473/98) [2000] E.C.R. I-5681; and *Commission v Portugal (Tinted Film) (C-265/06) [2008] E.C.R. I-2245*.

120. See esp. the Opinion of A.G. Kokott in *Mickelsson and Roos (C-142/05) [2009] E.C.R. I-4273* at [57]–[63].

121. *Commission v Italy (Motorcycle Trailers) (C-110/05) [2009] E.C.R. I-519* at [56]; and *Mickelsson and Roos (C-142/05) [2009] E.C.R. I-4273* at [28].

122. *Commission v Italy (Motorcycle Trailers) (C-110/05) [2009] E.C.R. I-519* at [35]–[37] (emphasis added).

123. For detailed discussion, see e.g. Horsley "Anyone for Keck?" (2009) 46 C.M.L. Rev. 2001; Spaventa, "Leaving Keck behind?" (2009) 36 E.L. Rev. 914; and Wennerås and Moen, "Selling Arrangements, Keeping Keck" (2009) 35 E.L. Rev. 387.

124. See e.g. *Fachverband der Buch- und Medienwirtschaft (C-531/07) [2009] E.C.R. I-3717* ; and Guarnieri & Cie (C-291/09) April 7, 2011.

125. Previously, market access had functioned only as a synonym for (indirect) discrimination in the case law on goods. See e.g. TK-Heimdienst (C-254/98) [2000] E.C.R. I-151 at [26]–[29]; and *Gourmet International Products (C-405/98) [2001] E.C.R. I-1795* at [25].

126. See recently, Snell, "The Notion of Market Access" (2010) 47 C.M.L. Rev. 437, 469.

127. Snell, "The Notion of Market Access" (2010) 47 C.M.L. Rev. 437, 469–471.

128. Wennerås and Moen, "Selling Arrangements, Keeping Keck" (2009) 35 E.L. Rev. 387, 395–396.

129. *Mickelsson and Roos (C-142/05) [2009] E.C.R. I-4273* at [28] (emphasis added).