Leaving Keck behind? The free movement of goods after the rulings in Commission v Italy and Mickelsson and Roos

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***E.L. Rev. 914** This article considers two recent judgments of the European Court of Justice in which rules severely restricting the use of products were found to be measures having equivalent effect to quantitative restrictions on market access grounds.*

It is not clear from the rulings whether the Keck *selling-arrangements doctrine has been consigned to the history books; yet, it is argued, in recent years, the* Keck *exception has been applied so seldomly that whether* Keck *is abandoned or not would make little practical difference. The Court's open embracement of an unqualified market access test raises questions both as to the boundaries of Art.28 EC and to the theoretical basis which justifies a market access approach. As for the former, it is argued that it is not only restrictions to market access that are now caught by the EC Treaty but also restrictions to the* market. *As to the latter, the aims and priorities of the internal market have evolved to reflect also the need to ensure the competitiveness and efficiency of the 27 national markets as a whole.*

Introduction

In two recent rulings, the Court of Justice was asked to consider the extent to which rules, and bans, on the use of goods fall within the scope of Art.28 EC. [1] In particular, the point of contention was whether such rules should be assimilated to "certain selling arrangements" so as to be caught by the EC Treaty only when discriminatory or preventing market access [2]; or whether they should fall within the general *Dassonville* formula so that a case-by-case assessment would be necessary to determine whether or not they constitute an obstacle to intra-Community trade. [3] The three Advocates General ***E.L. Rev. 915*** who considered the cases decided not to depart from the *Keck* ruling, but nonetheless found, for different reasons, that the rules at issue should be qualified as a barrier to intra-Community trade falling within the scope of Art.28 EC and that, in both cases, they could not be justified. The Court, on the other hand, refined its *Keck* approach in favour of a market access test. Contrary to the findings of its Advocates General, however, it found the rules to be justified.

The Court's rulings, even though not altogether surprising, call into question the extent to which the *Keck* differentiation between selling arrangements and other rules is still useful: for sure, the Court did not openly overrule *Keck,* and yet the market access formula might suggest, in fact if not in law, the end of the *Keck* dichotomy. Whether this is a welcome step depends very much on the view that one has of the internal market, since the approach taken has far-reaching consequences on further subjecting national regulatory choices to the proportionality and necessity scrutiny demanded by the mandatory requirements doctrine. Furthermore, the rulings also raise broader questions about the constitutional justification underpinning a market access approach: the expansion of the scope of the EC Treaty at the expense of national regulatory autonomy must be justified by sound hermeneutic principles or else its legitimacy might be doubted.

After having recalled the opinions of the Advocates General and the rulings of the Court, we will turn to assess their impact on the definition of "measure having equivalent effect". In particular, we will focus on the meaning of the notion of market access and investigate whether the broadening of the scope of "measure having equivalent effect to a quantitative restriction" can be rooted in firm constitutional justifications.

The Opinions of the Advocates General

Commission v Italy arose as a result of infringement proceedings in relation to an Italian rule which prohibited the towing of trailers by mopeds, motorcycles, tricycles and quadricycles, so that trailers could be towed only by "motor vehicles". [4] The case was first assigned to a chamber which was not going to hold a hearing since none of the parties had requested it. However, after A.G. Léger delivered his Opinion, [5] the Court decided to reopen the oral procedure and assign the case to the Grand Chamber. [6] In particular, the Court invited the parties and Member States to submit views as to the extent to which rules governing the use of goods, which apply without distinction to imported and domestic goods, should be regarded as measures having equivalent effect to quantitative restrictions on imports. Besides Italy, eight Member States submitted observations [7]: of those, five argued that the *Keck* "certain selling arrangements" criterion should be extended to rules on the use of a product, so that rules merely limiting, rather than prohibiting, use should not fall within the scope of Art.28 EC unless discriminatory. [8] Greece took a similar viewpoint with the caveat that if the use of the product is a feature of the movement, then the measure should be assessed on a case by case basis. The Netherlands ***E.L. Rev. 916*** argued in favour of abandoning the *Keck* case law and replacing it with a market access test as suggested by A.G. Jacobs in *Leclerc-Siplec* [9]; whilst the Commission considered that the *Dassonville* formula should apply to use of goods rules so that the existence of a barrier to intra-Community trade should be assessed on a case-by-case basis. Italy, from what we are told, argued that the answer to the question posed by the Court would depend on whether the product could be used for other purposes. In any event, the Italian Government argued that the rules at issue in the case were justified by road safety considerations.

Whilst A.G. Léger had analysed the issue only having regard to the *Dassonville* formula, A.G. Bot engaged in a critical analysis of the *Keck* ruling and argued that it should not be extended to rules concerning the use of a product. In particular, after making clear his dislike for the *Keck* distinction between product requirements and selling arrangements and his preference for a market access test, Mr Bot, without suggesting that the Court overrule itself, explained that the extension of the *Keck* test to measures regulating the use of goods would run against the aims of the internal market. Rather obscurely, the Advocate General argued that such an extension would undermine Art.28 EC since,

"it would once more make it possible for Member States to legislate in areas which, on the contrary, the legislature wished to "communitarise"'. [10]

In any event, the approach advocated by Mr Bot is, substantially, a traditional *Dassonville* approach--broad definition of barrier to trade so as to allow the Court to police the necessity and proportionality of national measures, even when those regulate use. Despite his earlier statement as to the fact that it was not yet the moment to replace *Keck,* Mr Bot suggested a market access test for all measures: thus, rules that prevent, impede, or render more difficult access to the market for imported products would fall within the scope of Art.28 EC and would therefore need to be justified. [11] Mr Bot also made clear that the notion of "impediment to movement" would encompass any limit to market access. [12]

The Advocate General then found that the rules at issue, which constituted a total ban on use of the goods, prevented market access, in that they made it almost impossible to penetrate the Italian market and that they were disproportionate to the aim pursued. In particular, Mr Bot suggested that more proportionate rules should take into account different road conditions (mountain roads; highways; particularly trafficked roads) so as to impose selective bans only where truly necessary to guarantee traffic safety.

The case of *Mickelsson and Roos* also concerned measures regulating use, and in particular Swedish rules on use of personal watercraft. [13] These rules provided that personal watercrafts could be used only on general navigable waterways and on those waterways identified by the county administrative boards. In any event, such bodies were under an obligation to allow use outside the general navigable waterways in certain circumstances (such as already trafficked waterways where there would be no environmental concerns, etc.). Mr Mickelsson and Mr Roos were prosecuted for having used a personal watercraft on waters on which such use was not permitted, and in their defence argued that the Swedish rules breached Art.28 EC.

After ascertaining that the issue was not covered by the Recreational Craft Directive, [14] A.G. Kokott suggested that the Court extend the *Keck* criteria to the arrangements for use since, in her opinion, the,

"characteristics of arrangements for use and selling arrangements … are comparable in terms of the nature and intensity of their effects on trade in goods". [15]

Therefore, the Advocate General suggested that such rules should fall outside the scope of Art.28 EC, provided they are not product-related; they are neither directly nor indirectly discriminatory [16] ; and they do not prevent market access. [17] In the case at issue, it was for the national court to assess whether the rules prevented market access; however, the Advocate General held that there were several reasons suggesting that such a restriction was present. In particular, the Swedish rules, at least until such time as the county administrative boards designated the other waters available for the use of personal watercraft, laid down a prohibition with a very limited exception. Turning to the issue of justification, Ms Kokott found that whilst the rules might have been justified in principle, they were not justified in the case at issue. This was the case since during the transitional period, i.e. until that time in which the waterways available for use of personal watercraft had been designated, the general rule was a prohibition with a limited exception and the state had set no deadline for the county administrative boards to designate the other waterways available.

The rulings of the Court

The rulings of the Court partially departed from the opinions of the Advocates General. In *Commission v Italy,* the Grand Chamber redefined the notion of barrier to intra-Community trade, espousing a market access test. Thus, it stated that Art.28 EC "reflects the obligation to respect the principles of non-discrimination and mutual recognition" as well as "the principle of

ensuring *free access* of Community products to national markets". [18] After having recalled the familiar product requirements/ selling arrangements dichotomy, and restating the *Keck* exception, the Court held that,

"measures adopted by a Member State the object or effect of which is to treat products from other Member States less favourably are to be regarded as measures having equivalent effect to quantitative restrictions on imports within the meaning of Article 28 EC, as are the measures referred to in paragraph 35 [i.e. product requirements]. *Any other measure* which hinders *access of products* originating in other Member States to the market of a Member State is also covered by that concept". [19]

E.L. Rev. 918 As a result, the Court found that the Italian prohibition on the possibility for motorcycles to tow trailers constituted an obstacle caught by Art.28 EC, since it had a considerable influence on consumers' behaviour and it therefore affected market access. However, unlike Mr Bot, the Court found that such rules were justified by the need to ensure road-safety. Rejecting the Advocate General's suggestion that Italy could have identified those roads where towing would have represented a threat, the Court found that the:

"Member State cannot be denied the possibility of attaining an objective such as road safety by the introduction of *general and simple rules* which will be easily understood by drivers and easily managed and supervised by the competent authorities." [20]

In *Mickelsson and Roos,* the Second Chamber, without even mentioning the *Keck* ruling, recalled the above quoted definition of barrier to trade in *Commission v Italy,* so as to reaffirm a market access test. [21] It consequently found that the rules restricting the use of personal watercrafts were a barrier to market access, but that they were, in principle, justified on grounds of protection of animals, plants and humans as well as on environmental protection grounds. However, it added a caveat so that the rules would be proportionate only provided,

"that, first, the competent national authorities are required to adopt such implementing measures, secondly, those authorities have actually made use of the power conferred on them in that regard and designated the waters which satisfy the conditions provided for by the national regulations and, lastly, such measures have been adopted within a reasonable period after the entry into force of those regulations". [22]

Whilst the assessment of proportionality was left to the national court, the Court indicated that given that at the time of the proceedings the national regulations had been in force only for three weeks, the fact that the county administrative board had yet to implement them would not be disproportionate. The Court added, finally, that if, since proceedings were first brought, the implementing measures had been adopted and the waterways where Mr Mickelsson and Mr Roos were using their watercraft had been designated as navigable waters, then the accused should be able, as a matter of Community law, to rely on that new designation to escape liability. This was the case because of the general principle of Community law of retroactive application of the most favourable criminal law and the most lenient penalty. [23]

E.L. Rev. 919 **Analysis**

The two cases summarised above raise two main issues: first of all, it appears that the Court has finally embraced a market access test, even though it is not clear whether this step signals an abandonment of the *Keck* doctrine. Secondly, the market access test is in no way qualified, thus raising questions about both the boundaries of Art.28 EC and the theoretical underpinning justifying such a broad interpretation of the free movement of goods provisions.

The concept of measure having equivalent effect

The most important part of both rulings concerns the (re)definition of what constitutes a measure having equivalent effect to a quantitative restriction for the purposes of Art.28 EC. It can be recalled that after the *Keck* ruling, the following tests applied in relation to non-directly discriminatory measures:

• product requirements always fall within the scope of Art.28 EC and therefore always need to be justified [24] ;

• *certain* selling arrangements fall outside the scope of Art.28 EC provided that they are non-discriminatory (in law or in fact) [25] ; and that they do not totally prevent market access [26] ;

• residual rules, i.e. those rules which cannot be qualified as either product requirements or *certain* selling arrangements, fall within the scope of Art.28 EC to the extent to which they fall within the *Dassonville* formula, i.e. if they affect actually or potentially, directly or indirectly, intra-Community trade. [27]

The automatic inclusion of product requirements within the scope of Art.28 EC has never been particularly contentious: it is both required by, and consistent with, the needs of the internal market. On the other hand, the case law relating to certain selling arrangements has been more disputed: many authors have argued that the a priori exclusion of a given type of rule from the scope of Art.28 EC is not consistent with the aims of the internal market and have proposed to replace the *Keck* ruling with a market access test, often qualified so as to avoid an overbroad interpretation of the notion of measures having equivalent effect. [28] Other authors noted how the case law in the past decade ***E.L. Rev. 920*** had not always been consistent and was becoming increasingly artificial. [29] In particular, the Court never provided clear guidelines as to which selling arrangements should *not* be included in the *Keck* exemption; [30] and it increasingly adopted a broad (and in many cases artificial) interpretation of indirect discrimination to bring rules on marketing within the scope of Art.28 EC. [31] As a result, in recent years, most of the marketing rules scrutinised by the Court have been found to fall within the scope of Art.28 EC: indeed, aside from Sunday-trading type rules, and since *De Agostini,* [32] it is only in two cases, *Burmanjer* and *A-Punkt,* [33] that selling arrangements were found to be non-discriminatory and fall altogether outside the scope of Art.28 EC (see attached table). If the aim of *Keck* was to provide clearer guidelines as to the scope of Art.28 EC, its increasingly flexible application made it more difficult to draw the exact boundaries of the Treaty free movement of goods provisions. [34]

As for the "residual rules", i.e. those rules which are neither product requirements nor selling arrangements, such as authorisation requirements, [35] licence requirements, [36] restrictions on transport, [37] but also prohibitions on use, [38] the traditional *Dassonville* formula applied, so that if the rule had an actual or potential, direct or indirect, effect on intra-Community trade, it would have to be justified. [39]

The two cases under analysis could, therefore, have been easily decided without departing from existing case law. Indeed, in *Toolex Alpha,* [40] the Court had already made clear that a total (or almost total) ban on use, much as a total ban on sales, [41] falls within the scope of ***E.L. Rev. 921*** Art.28 EC. This is entirely consistent with the very notion of measures having equivalent effect to a quantitative restriction. After all, there is hardly any point in importing goods in order to sell them if no customer is allowed to use them. However, this interpretative path would have not answered the broader question as to how measures regulating, rather than altogether banning, use should be treated.

The decision to give a ruling which both addressed the broader issue as to the qualification of measures regulating use and redefined the approach to be adopted in relation to Art.28 EC, in favour of a market access test, is not, therefore, unreasonable. And yet, first, it is not clear whether *Commission v Italy* signals a total abandonment of the *Keck* ruling; secondly, the new market access test is wholly unqualified, and might well give rise to some definitional problems. We shall address these two issues in turn.

Having your Keck *and eating it?*

It is not clear whether the cases discussed here have substituted the *Keck* exception in favour of a unified market access test. Thus, it might be recalled that in *Commission v Italy,* the Court, before examining the substance of the Commission's complaint, summarised the scope of Art.28 EC. It restated that discriminatory measures and product requirements are always caught by Art.28 EC; and that certain selling arrangements are caught only insofar as they are directly or indirectly discriminatory, prevent market access, or affect it more than they affect access of domestic products. The Court then concluded its general analysis with a paragraph which seems to "summarise the summary": it repeated that product requirements are always caught by the Treaty, then to state that:

"*Any other measure* which hinders *access of products* originating in other Member States to the market of a Member State is also covered by that concept [measure having equivalent effect]." [42]

It is therefore unclear whether *any other measure* refers to *any* measure which is neither a *Keck* selling arrangement nor a product requirement, in which case it would be much ado about nothing since the *Dassonville* formula is broad enough to encompass market access barriers. Or, whether it refers to *any* non-discriminatory measure, including selling arrangements, aside from

product requirements (where a hindrance to market access need not be proven because of the absolute presumption that they always affect intra-Community trade). Nor does subsequent case law help in clarifying the matter: whilst in *Fachverband der Buch,* [43] the Second Chamber adopted a traditional *Keck* approach to assess the compatibility of rules on minimum prices for books, the same Chamber in *Mickelsson and Roos* failed to refer to *Keck* altogether.

From a practical viewpoint, the choice between a narrow interpretation of *Commission v Italy,* which would confine the relevance of the market access test to those rules which are neither selling arrangements nor product requirements, and a broader interpretation, that would dispose altogether of the *Keck* distinction, might not make much difference.

E.L. Rev. 922 On the one hand, as mentioned above and shown in the attached table, most selling arrangements in recent years have been found to fall within the scope of the Treaty either through a broad (and not always convincing) interpretation of discrimination or by excluding the applicability of the certain selling arrangements category. [44] On the other hand, it might be safe to say that the key rationale underpinning the *Keck* revolution would not be affected by leaving the latter behind: rules which have as their only effect a modest contraction in sales, such as Sunday-trading rules and closing time rules, would most likely also be found not to a have any effect on market access (or, in any event, would not have such an effect for the purposes of the application of Art.28 EC) [45] and would continue, therefore, to fall outside the scope of the Treaty.

However, from a legal certainty as well as hermeneutic consistency perspective, the choice between the narrow and the broader interpretation is of fundamental importance and one might be excused to feel a certain sense of frustration at the Grand Chamber's lack of clarity. Here, if the *Keck* ruling is still good law, *Commission v Italy* only impacts on the test to assess whether residual rules fall within the scope of the Treaty. Thus, product requirements are always caught by Art.28 EC; certain selling arrangements are caught only insofar as discriminatory or if they prevent market access; and all other rules are caught to the extent to which they hinder access to the market of the importing Member State. So, for residual rules, the Court would have substituted the *Dassonville* formula (actually or potentially, directly or indirectly) for a market access test; and would have clarified that rules on use are excluded from the *Keck* exception. This slight change in perspective is more significant than it might seem at first sight. The exclusion of certain selling arrangements from the reach of Art.28 EC could be explained in a very simple way: those rules did not affect intra-Community trade for the purposes of the *Dassonville* formula. There is no attempt to deny that they might have an effect on intra-Community trade; simply any such effect is not relevant for the application of Art.28 EC as defined by the Court.

However, if we switch to a market access test, whilst still excluding certain selling arrangements from the scope of the Treaty, it becomes more difficult to explain why some rules which clearly affect market access, such as rules on advertising, rules on internet selling, but also very limiting rules about where and when a product can be sold, are caught only when discriminatory; whilst other rules which might have a lesser effect on market access, say an obligation to provide data for statistics, [46] would be caught by the Treaty regardless of discrimination. Furthermore, and as noted by A.G. Kokott in *Mickelsson and Roos,* [47] rules on modalities of sale are very similar in nature to rules on ***E.L. Rev. 923*** use and, in some cases, might altogether overlap: thus, for instance, measures restricting the sale of alcoholic products on grounds of age might be seen as both marketing rules (in that they regulate when and to whom a product can be sold) and rules on use (in that they regulate who might lawfully use/consume a given product). Limiting the reach of Art.28 EC in relation to marketing rules but not in relation to usage rules would thus make very little sense. Of course, one could argue that *Keck* should be maintained, since it limits the reach of Art.28 EC and is therefore more respectful of national regulatory autonomy; and yet, as noted above, the flexible way in which *Keck* has been used in recent years, so that most selling arrangements in any case end up being caught by Art.28 EC, might well raise the broader question as to whether there is any substance to the *Keck* certain selling arrangements exception.

For all of these reasons, and even though the writer has never been a fan of the market access test, it would be more consistent to accept that whilst *Keck* might have been very useful in clarifying that a mere reduction in the overall volume of sales is not enough to constitute a measure having equivalent effect (i.e. it should not be construed as a hindrance to market access) *and* that Sunday-trading type rules, provided they do not impose an absolute or excessively restrictive ban on sales, are in principle compatible with Community law, it has now passed its sell-by date.

In any case, and whatever the answer as to whether *Keck* is now a thing of the past, one should query what "market access" really means. In other words, is the notion of market access capable of clearly defining the boundaries of Art.28 EC or, rather, is it an open concept that might encompass most rules which have an effect on an economic operator's economic freedom?

The boundaries of the market access test and its significance

In the context of the free movement provisions, little effort has been devolved to defining the concept of market access; thus, so far, the concept has been used in an intuitive way, [48] rather than resting on accurate economic analysis. [49] This intuitive approach to market access carries, of course, the risk of an overbroad interpretation of the notion of a barrier caught by the Treaty and, therefore, of upsetting the delicate balance between national regulatory autonomy and negative integration. In other words, once we embrace a market access test, it becomes difficult to identify which, if any, national rules fall outside the scope of the Treaty and therefore need not be justified.

It is for this reason that those who advocated the market access test in the past have always attempted to qualify it so as to identify a threshold (through *de minimis* or notions such as a substantial hindrance to market access) below which national rules would not need to be justified. [50] However, in both *Commission v Italy* and *Mickelsson and Roos,* ****E.L. Rev. 924*** the Court makes no such attempt: rather, *any (other) measure which hinders access of products originating in other Member States to the market of a Member State* is to be considered a measure having equivalent effect in need of justification. Thus, not only is there no threshold to be met before the measure might come under the Court's scrutiny; but also, the definition embraces *all* rules and not only *market* or *market-related* rules. Furthermore, it seems, both from *Mickelsson and Roos* and from the case law on the free movement of persons, [51] that the market access test does not embrace only those measures which impose a barrier for goods (or persons) to *enter* a market, such as for instance an authorisation requirement, but also those measures which limit the available market once the product has accessed it.

In this respect, consider that in *Mickelsson and Roos,* the issue was not really whether personal watercraft imported from other Member States could *access* the Swedish market but rather how *useful* it would have been for an importer to access that market given that the restrictions on use severely limited the consumer base that might have been interested in purchasing personal watercraft. But once we apply an *effet utile* approach to market access, so that any rule which not only directly limits access to a given market is caught by Art.28 EC but also that which discourages an importer from accessing that market, then it is difficult to identify which rules, if any, would actually fall outside the market access test. In this respect, *Commission v Italy* and *Mickelsson and Roos* seem to have brought the case law on goods in line with the case law on persons. In that context, the test to assess whether a rule falls within the scope of the Treaty is not merely one of market access but a broader one of discouragement: if a rule is liable to hinder or discourage movement, then it has to be justified according to the mandatory requirements doctrine. [52] In the same way, it seems that, at least in *Mickelsson and Roos* but also in other preceding cases, [53] the real issue is not whether the product can *access* the market, but whether the measure in place regulating use, or any other rule for that matter, is such as to discourage the importer from attempting to penetrate that market either because it reduces the consumer base or because it increases costs. In other words, the importer not only has a right to access the market; she has a right to access as wide (and cheap) a market as possible, so that rules which restrict the market, rather than market access, have to be necessary and proportionate to the aim pursued. But if that is so, one should query the constitutional justification to give the Treaty such a broad interpretation, which goes much beyond the notion of barrier to movement and which comes at the expense of national regulatory autonomy.

In this respect, I have argued in the past that the case law on the free movement of persons is underlined not so much by a market access approach, but rather by a liberal ****E.L. Rev. 925*** (economic) constitutional approach. [54] Thus, in the field of persons, the Court has moved towards requiring justification of *any* restriction on individual economic freedom, so that any market rule must in principle be justified: it must be necessary and imposed in a proportionate (and rational) way. [55] If the rationale behind this evolution cannot, in my opinion, be found in a *movement/intra-Community trade* telos, it might be found in the broader aim of ensuring the competitiveness of the internal market as a whole, i.e. the competitiveness of the sum of the 27 national markets, and the need to dispose of those rules which, either because of the way they are drafted or because of economic and technological developments, are sub-optimal or altogether unnecessary. In other words, the aims of the internal market have evolved with the times, not least thanks to the progress achieved through negative and positive integration. Thus if, in a first stage, the main task was to dismantle discriminatory barriers, and genuine barriers to movement, there is no reason why the interpretation of the Treaty free movement provisions should not evolve to encompass the need to ensure that the internal market is a "dynamic and competitive" [56] economy. Unnecessary regulation reduces competitiveness both because it is expensive and because it stifles innovation. The broadening of the scope of the Treaty, then, could be seen as a contribution not so much to deregulation but rather to better regulation, through a process of continuous self-reflection, and of continuous dialogue between regulators, traders and the Court.

This process is not new, and it is visible both in the way the proportionality principle is applied and in the change of the personal scope of the Treaty which is no longer confined to situations where a trans-border element is *actually* present. We shall next examine these two issues in turn.

The changing telos, justifications and the proportionality assessment

In relation to the assessment of justifications, the expansion of the scope of Art.28 EC brings about two consequences. First of all, the Court must be careful in not overstepping its judicial function by calling into question what are genuine policy choices of the regulator. Secondly, the details of the *way* such policies are implemented become increasingly important in assessing the compatibility of national rules with Community law. In this respect, the proportionality scrutiny becomes both less and more intensive. Take for instance, the ruling in *Commission v Italy*: there, the Court found that even though the path suggested by the Advocate General of limiting the prohibition on towing to those roads where there are road safety issues (mountain roads, etc.) would have been clearly less restrictive than the absolute prohibition imposed by the Italian rules at issue, Member States could not be denied the possibility of imposing simple and general (and therefore admittedly, in some cases, unnecessary) rules to guarantee road safety. This is clearly a light scrutiny of the proportionality of the rules under consideration.

E.L. Rev. 926 On the other hand, consider the caveats imposed in *Mickelsson and Roos*: there, the Court accepted that restricting the use of personal watercrafts was a legitimate policy choice, and yet it attached a number of conditions to the *way* such policy was implemented. The county administrative boards *must* be under a duty to implement the legislation so as to identify those waterways where personal watercrafts might be used; and they have to do so in good time. Thus, if the rules are proportionate when considered in the abstract (restricting use of noisy and polluting appliances is in principle compatible with Community law), this does not mean that they are also proportionate in the concrete sense (but, in order to be proportionate, the rules must be drafted in a given way). This development from abstract to concrete proportionality assessment had already emerged in two preceding cases: *Commission v Germany* and *Commission v Austria.* [57] There, the Court found that rules introducing a new recycling scheme and rules limiting transport of goods by wheels respectively might have been, in principle, compatible with Community law since they were justified on environmental protection grounds. However, the Court also found that, in the cases at issue, such rules were disproportionate since they had been adopted without leaving enough time for economic operators to adapt. Thus, the free movement of goods provisions, much as is happening with the citizenship and free movement of persons provisions, [58] become also a tool to impose a Community view of good governance, [59] so that the way in which legislation is adopted or implemented, the finer details, will become increasingly important in determining the compatibility of national rules with the Treaty. Again, this could be seen as an emergent aspect of an interpretation driven by an economic freedom rationale/economic efficiency rationale. This might not be a bad thing, leading as it can to increased economic efficiency; and yet it is also problematic, in that it further directs (and constrains) the discretion of the national regulator. [60]

The changing telos and the shift from actual to potential intra-Community trade

The second emerging trend in the case law is the evolution in the definition of the intra-Community element necessary to trigger the Treaty. [61] Thus, it should be recalled that the ***E.L. Rev. 927*** traditional approach to the Treaty freedoms has been to require the existence of an *actual* intra-Community element [62] : this would typically result in the need for the product/service to be imported; and, in the case of persons, in the need for the claimant to be either a foreigner or a returning migrant. The classic orthodoxy was that since the Treaty was concerned mainly with the removal of obstacles to the *movement* of goods, services and persons, situations which were wholly internal to a Member State were not relevant for the application of the Treaty since there was no *movement* capable of justifying its application. However, as the definition of barrier to intra-Community trade/movement expanded, the need to prove the actual existence of the intra-Community element started relaxing. This happened first in a mediated way, when the Court accepted jurisdiction to give a preliminary reference in purely internal cases so as to clarify the interpretation of Community law for national courts willing to apply their own constitutional provisions on equal treatment to ensure that no reverse discrimination occurred. [63] In a second stage, and as the definition of barrier to movement expanded to encompass also rules which had no intra-Community specific effect, the Court accepted that the fact that the economic operator might potentially enter into an economic relationship with a provider/client in another Member State was enough to satisfy the need for an intra-Community dimension. Thus, for instance in *Gourmet,* the free movement of services provisions could be invoked against the Member State of establishment since *potentially* the company might have had clients abroad willing to buy its advertisement spaces; similarly, in *Freskot,* Art.49 EC could be invoked since *potentially* the claimant could have wanted to buy insurance services from a provider in another Member State. [64] In *Parking Brixen,* the Court went even further. [65] In that case, the Court was asked to determine the compatibility with the Treaty of rules which allowed the award of a public contract without a call for tender in a situation in which the public procurement directive did not apply. [66] The Court found

that the situation fell within the scope of Arts 43 and 49 EC and that, therefore, the general principles of non-discrimination and transparency applied. Faced with the objection that the situation at issue in the case was purely internal, since the claimants were companies established in the Member State the rules of which were under attack, the Court clarified that it was possible that undertakings in other Member States might have been interested in the contracts and, therefore, the situation fell within the scope of Community law. [67]

E.L. Rev. 928 As noted also by Tryfonidou, [68] the switch from actual to potential intra-Community relevance is entirely consistent with the market access/market freedom rationale [69] : after all, the very existence of some rules might have a market foreclosure effect so that the market in a given service (or product) does not develop because of the very existence of such rules. If one of the underlying rationales in the interpretation of the free movement provisions is one of economic efficiency, then it would be meaningless as well as wasteful to wait for a foreign claimant to bring a case. In an internal market, the situation is, by definition, always of potential intra-Community relevance. If this is true for the market in services, there is no reason why it should not be true for the free movement of goods. Thus, it is not surprising that in *Mickelsson and Roos,* there is no discussion as to whether there was an intra-Community element--i.e. whether Mr Mickelsson and Mr Roos were foreigners or using an imported watercraft, or whether the situation that gave raise to the preliminary reference was purely internal to Sweden.

Of course, this is not to say that there are not instances when the origin of the goods and the actual, rather than merely potential, trans-border dimension is very relevant: in the case of product requirements, the effect of Art.28 EC is to apportion regulatory competences between Member States, so that whilst the imposition of such requirements to domestic goods (which are not regulated elsewhere) does not need to be justified, the imposition of such requirements to foreign goods, which have already complied with one set of rules, is in principle to be excluded. [70] On the contrary, those cases which relate to rules on marketing or use are not based on a repartition of regulatory competences approach but on a freedom to trade approach and, therefore, a purely potential intra-Community effect is sufficient to bring the situation within the scope of the Treaty.

Conclusions

The rulings in *Commission v Italy* and *Mickelsson and Roos* clarify what, in many respects, was already evident from previous case law: the *Keck* distinction based on the ***E.L. Rev. 929*** type of rules is no longer relevant; what matters is the effect of the rules on market access. However, the significance of the rulings goes beyond a mere change in the test adopted to determine whether a national rule can be defined as a measure having equivalent effect to a quantitative restriction on imports. Rather, these rulings seem to realign the case law on goods with the case law on the free movement of persons, so that barriers to economic freedom, to the freedom to trade, might now well be caught by Art.28 EC and need to be justified. Further, these rulings confirm the trends already evident in previous case law both in relation to the changing demands imposed on the national regulators through the proportionality assessment and in relation to the increasing irrelevance of an actual intra-Community element in order to trigger the Treaty free movement provisions.

Of course, this case law also raises important constitutional issues in relation to the balance between the demands of the internal market and the need to respect national regulatory autonomy. Indeed, the suggested interpretation of the rulings, and the suggestion that market access is a rather deceiving term that masks the evolution to a "freedom to trade" interpretation of the free movement provisions, is far from being unproblematic. The author is well aware of the impact that such a suggestion has in constitutional terms: and yet, the case law is here, and probably here to stay, and it would be hypocritical to try to hide its true significance. It is therefore essential at least to attempt to provide a strong constitutional foundation for those developments and to acknowledge that the needs and aims of the internal market naturally develop with time, also as a result of progress already made in dismantling barriers to movement. Thus, it could be argued that the broadening of the scope of the free movement of persons provisions first, and of goods now, signals the latest stage in a long and tortuous path from the common market to a competitive internal market; it might be a useful tool to increase the efficiency and the competitiveness of the 27 markets that are continuously under challenge because of globalisation. Of course, this step is far from being unproblematic: the *Sunday trading* trap is still there, and some national regulators might be less than happy to see their discretion further curtailed. Furthermore, the Court will necessarily have to leave a wide margin of appreciation to the Member States in order to avoid usurping the policy making role which does not pertain to it. Overall, though, this seems a reasonable step to take and much preferable to the confused "exception to the exception" approach that we have witnessed in recent years.

Table 1: ***Outline of the post*****-Keck** ***case law on certain selling arrangements***

Case	Rule	Outcome

C-401/92 *Tankstation*	Sunday trading	CSA not caught
C-391/92 *Commission v Greece* (milk)	Product sold only in pharmacies	CSA not caught
C-292/92 *Hünnermund*	Advertising outside pharmacies	CSA not caught
C-412/93 *Leclerc Siplec*	Advertising	CSA not caught
C-418/93 *Semeraro*	Sunday trading	CSA not caught
C-323/93 *La Crespelle*	Obligation to store imported bovine semen in authorised centres	Requirement applies at the stage immediately following importation and is expensive, so liable to restrict volume of imports--no discussion of CSA
C-387/93 *Banchero*	Sales of tobacco products limited to authorised retailers	CSA not caught since no discrimination
C-69/93 *Punto Casa*	Sunday trading	CSA not caught
C-418/93 *Semeraro Casa Uno*	Sunday trading	CSA not caught
C-63/94 *Belgapom*	Prohibition of sale that yields a very low profit margin	CSA not caught
C-34/95, etc. *De Agostini*	Total ban on advertising aimed at children	CSA--caught if discrimination proven (some confusion as it needed justification anyway)
C-189/95 *Franzén*	Licensing requirement	Barrier to intra-Community trade--not a CSA
C-254/98 *TK-Heimdienst*	Sales on rounds and door to door sales restricted to those having a place of business in the relevant or bordering district	CSA caught--indirectly discriminatory
C-401/92 *Tankstation*	Opening hours	CSA not caught
C-6/98 *Pro Sieben Media*	Net principle in advertising	Minor point on CSA--not caught
C-255/97 *Pfeiffer*	Rules on trademark	No identification of measure as CSA or otherwise--Art.28 EC excluded
C-390/99 *Canal Satellite*	Registration requirement in order to sell de-coders	Restriction of free movement of goods and services AND in some cases need to alter the product
C-405/98 *Gourmet*	Ban on alcohol advertising	CSA caught by Art.28 EC (either because indirectly discriminatory or because it prevented market access)
C-12/00 *Commission v Spain* (Chocolate) (also C-463/01 *Commission v Germany* on packaging of mineral water)	Prohibition on marketing of chocolate products containing fats other than cocoa butter	Rules require product to be altered never a CSA--restriction to Art.28 EC
C-416/00 *Morellato*	Rules on packaging of baking off products (i.e. bakery products which undergo only last stage of baking in-store)	Not a product requirement because packaging in state of destination--CSA--discriminatory because Italy did not produce the products
C-322/01 *DocMorris*	Rules on internet and postal sales of medicinal products	CSA--Indirectly discriminatory
C-71/02 *Karner*	Rules on advertising sale of goods from insolvent estate	CSA non-discriminatory but fundamental rights as general principle of Community law apply
C-239/02 *Douwe Egberts NV*	Prohibition of statements concerning "health qualities" of products in labelling (harmonised) and advertisement (Art.28 EC)	CSA--Indirectly discrimination (impedes market access more than domestic products with which consumers are more familiar)

C-20/03 *Burmanjer*	Prior authorisation for itinerant sale of subscriptions to periodicals	CSA but non-discriminatory
C-158/04 *Alfa Vita*	Rules on equipment to bake bread (even bake-off products)	Restriction to Art.28 EC--not a CSA since it does not take into account the specific nature of the products; it entails additional costs and makes the marketing of those products more difficult
C-434/04 *Jan-Erik Anders Ahokainen*	Prior authorisation for import of alcohol above 80%	MEE not CSA
C-441/04 *A-Punkt*	Door to door selling of silver	CSA but non-discriminatory
C-244/06 *Dynamic Medien*	Rules prohibiting sale by post of videos and DVDs not certified by national authorities as to age group restriction	Not a CSA
C-141/07 *Commission v Germany*	Geographical proximity of pharmacies to supply medicinal products to hospitals	CSA--indirectly discriminatory
C-531/07 *Fachverband der Buch*	Minimum price for books--directly discriminatory	CSA--discriminatory

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Footnotes

1 *Commission v Italy* (C-110/05) [2009] 2 C.M.L.R. 34; *Mickelsson and Roos* (C-142/05), not yet reported, June 4, 2009.
2 *Criminal Proceedings against Keck and Mithouard* (C-267 & C-268/91) [1993] E.C.R. I-6097; [1995] C.M.L.R. 101 at [16] and [17].
3 *Procureur du Roi v Dassonville* (8/74) [1974] E.C.R. 837; [1974] 2 C.M.L.R. 436.
4 *Commission v Italy* (C-110/05).
5 *Commission v Italy* (C-110/05) Opinion of October 5, 2006.
6 *Commission v Italy* (C-110/05) Order of the Court of March 7, 2007.
7 The Czech Republic, Denmark, Germany, Greece, France, Cyprus, the Netherlands and Sweden.
8 Denmark, Germany, France, Cyprus, the Netherlands, and Sweden. It is not clear from the Opinion what was argued by the Czech Republic as we are only told that the submissions of the above Member States were "in contrast to" what was argued by the Czech Republic.
9 *Societe d'Importation Edouard Leclerc-Siplec v TF1 Publicite SA* (C-412/93) [1995] E.C.R. I-179; [1995] 3 C.M.L.R. 422.
10 *Commission v Italy* (C-110/05) Opinion of July 8, 2008 at [91].
11 *Commission v Italy* (C-110/05) Opinion of July 8, 2008 at [111].
12 *Commission v Italy* (C-110/05) Opinion of July 8, 2008 at [112] et seq.
13 *Mickelsson and Roos* (C-142/05).
14 Directive 2003/44 amending Directive 94/25 on the approximation of the laws, regulations and administrative provisions of the Member States relating to recreational craft [2003] OJ L214/18.
15 *Mickelsson and Roos* (C-142/05) Opinion of December 14, 2006 at [52].
16 *Mickelsson and Roos* (C-142/05) Opinion of December 14, 2006 at [56].

17 *Mickelsson and Roos* (C-142/05) Opinion of December 14, 2006 at [66]; the analysis of the market access issue is not crystal clear (see [57] to [72]).

18 *Commission v Italy* (C-110/05) at [34], emphasis added.

19 *Commission v Italy* (C-110/05) at [37], emphasis added.

20 *Commission v Italy* (C-110/05) at [67], emphasis added.

21 See *Mickelsson and Roos* (C-142/05) at [24]: "It must be borne in mind that measures taken by a Member State, the aim or effect of which is to treat goods coming from other Member States less favourably and, in the absence of harmonisation of national legislation, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods, even if those rules apply to all products alike, must be regarded as "measures having equivalent effect to quantitative restrictions on imports' for the purposes of Article 28 EC (see to that effect, Case 120/78 *Rewe-Zentral (Cassis de Dijon)* [1979] E.C.R. 649, paragraphs 6, 14 and 15; Case C-368/95 *Familiapress* [1997] E.C.R. I-3689, paragraph 8; and Case C-322/01 *Deutscher Apothekerverband* [2003] E.C.R. I-14887, paragraph 67). Any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept (see Case C-110/05 *Commission* v *Italy* [2009] E.C.R. I-0000, paragraph 37)."

22 *Mickelsson and Roos* (C-142/05) at [39], and operative part of the judgment.

23 The fact that the principle of most favourable criminal law and most lenient penalty is a general principle of Community law had been already established in *Criminal Proceedings against Berlusconi* (C-387/02, C-391/02, C-403/02) [2005] E.C.R. I-3565; [2005] 2 C.M.L.R. 32.

24 *Keck* (C-267 & C-268/91) at [15].

25 *Keck* (C-267 & C-268/91) at [16] and [17].

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

27 e.g. *Decker v Caisse de Maladie des Employés Privés* (C-120/950) [1998] E.C.R. I-1831; [1998] 2 C.M.L.R. 879; *Criminal Proceedings against Franzén* (C-189/95) [1997] E.C.R. I-5909; [1998] 1 C.M.L.R. 1231. Also in relation to residual rules, when the effect of a non-trading rule on intra-Community trade is too uncertain and indirect, Art.28 EC is excluded with no need to assess compatibility with the mandatory requirements doctrine, see e.g. *H Krantz GmbH & Co v Ontvanger der Directe Belastingen* (C-69/88) [1990] E.C.R. I-583; [1991] 2 C.M.L.R. 677; and post-*Keck, Criminal Proceedings against Peralta* (C-379/92) [1994] E.C.R. I-3453.

28 e.g. A.G. Jacobs' Opinion in *Leclerc-Siplec* (C-412/93); S. Weatherill, "After *Keck*: some thoughts on how to clarify the clarification" (1996) 33 C.M.L. Rev. 885; C. Barnard, "Fitting the remaining pieces into the goods and persons jigsaw?" (2001) 26 E.L. Rev. 35; N. Nic Shuibhne "The free movement of goods and Article 28 EC: an evolving framework" (2002) 27 E.L. Rev. 408.

29 P. Koutrakos, "On Groceries, Alcohol and Olive Oil: More on the Free Movement of Goods after *Keck*" (2001) 26 E.L. Rev. 391; E. Spaventa, "The Outer Limits of the Treaty Free Movement Provisions: Some Reflections on the Significance of *Keck,* Remotness and *Deliège*" in C. Barnard and O. Odudu (eds), *The Outer Limits of European Union Law* (Oxford: Hart Publishing, 2009), p.245.

30 e.g. compare the ruling in *Morellato v Comune di Padova* (No.2) (C-416/00) [2003] E.C.R. I-9343; [2006] 1 C.M.L.R. 31, with the ruling in *Alfa Vita Vissilopoulos AE (formerly Trofo Super-Markets AE) v Greece* (C-158/04) [2006] E.C.R. I-8135; [2007] 2 C.M.L.R. 2.

31 e.g. *Schutzverband gegen Unlauteren Wettbewerb v TK-Heimdienst Sass GmbH* (C-254/98) [2000] E.C.R. I-2487; [2002] 1 C.M.L.R. 25.

32 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB* (C-34/95) [1997] E.C.R. I-3843; [1998] 1 C.M.L.R. 32.

33 *Criminal Proceedings against Burmanjer* (C-20/03) [2005] E.C.R. I-4133; [2006] 1 C.M.L.R. 24; *A-Punkt Schmuckhandels GmbH v Schmidt* (C-441/04) [2006] E.C.R. I-2093; [2006] 2 C.M.L.R. 33; in *Herbert Karner Industrie Auktionen GmbH v Troostwijk GmbH* (C-71/02) [2004] E.C.R. I-3025; [2004] 2 C.M.L.R. 5, the selling arrangements under scrutiny were also found to fall outside the scope of Art.28 EC since they were non-discriminatory. However, the case is rather confusing since despite this finding, the Court held that the situation fell within the scope of Community law and that therefore fundamental rights as general principles of Community law applied.

34 On this point, see further E. Spaventa, "The Outer Limits of the Treaty Free Movement Provisions" in C. Barnard and O. Odudu (eds), *The Outer Limits of European Union Law,* 2009, p.245.

35 *Decker v Caisse de Maladie des Employés Privés* (C-120/95).

36 *Criminal Proceedings against Franzén* (C-189/95).

37 *Monsees v Unabhängiger Verwaltungssenat für Kärnten* (C-350/97) [1999] E.C.R. I-2921; [2001] 1 C.M.L.R. 2.

38 *Kemikalienspektionen v Toolex Alpha AB* (C-473/98) [2000] E.C.R. I-5681; more recently see also *Commission v Portugal (tinted windows)* (C-265/06) [2008] E.C.R. I-2245; [2008] 2 C.M.L.R. 41 also referred to by the Court in *Commission v Italy* (C-110/05) at [57].

39 Unless the effect of a non-trading rule on intra-Community trade is too uncertain and indirect, in which case the rule would fall altogether outside the scope of Art.28 EC, see, e.g. *Peralta* (C-379/92).

40 *Kemikalienspektionen v Toolex Alpha AB* (C-473/98); more recently, see also *Commission v Portugal (tinted windows)* (C-265/06), referred to by the Court in *Commission v Italy* (C-110/05) at [57].

41 e.g. *Criminal Proceedings against Brandsma* (C-293/94) [1996] E.C.R. I-3159; [1996] 3 C.M.L.R. 904; *Harpegnies* (C-400/96) [1998] E.C.R. I-5121.

42 *Commision v Italy* (C-110/05) at [33]-[37].

43 *Fachverband der Buch- und Medienwirtschafti v LIBRO Handelsgesellschaft mbH* (C-531/07) [2009] 3 C.M.L.R. 26.

44 On this point, see more thoroughly E. Spaventa, "The Outer Limits of the Treaty Free Movement Provisions" in C. Barnard and O. Odudu (eds) *The Outer Limits of European Union Law,* 2009, p.245.

45 e.g. see the ruling in *Semeraro Casa Uno Srl v Sindaco del Comune di Ebrusco* (C-418/93 et al.) [1996] E.C.R. I-2975; [1996] 3 C.M.L.R. 648, where the Court examined the compatibility of Sunday-trading rules with both Art.28 EC and Art.43 EC. In relation to the former, obviously, the *Keck* (C-267 & C-268/91) ruling applied. In relation to Art.43 EC, the scope of which already encompassed the broad notion of discouragement to movement, the Court found that the effect of the rules at issue on the freedom of establishment was too uncertain and indirect to constitute a barrier. On this point, see more thoroughly E. Spaventa, "The Outer Limits of the Treaty Free Movement Provisions" in C. Barnard and O. Odudu (eds) *The Outer Limits of European Union Law,* 2009, p.245

46 *Criminal Proceedings against Kieffer* (C-114/96) [1997] E.C.R. I-3629; [1997] 3 C.M.L.R. 1446.

47 *Mickelsson and Roos* (C-142/05) Opinion at [52].

48 See E. Spaventa, "From *Gebhard* to *Carpenter*: towards a (non-)Economic European Constitution" (2004) 41 C.M.L. Rev. 743; and *Free Movement of Persons in the European Union--Barriers to Movement in their Constitutional Context* (Kluwer Law International, 2007), Ch.5.

49 cf. also Mr Bot's Opinion, *Commission v Italy* (C-110/05) at [116], which explicitly states that the analysis of the Court should not involve any complex economic assessment.

50 e.g. A.G. Jacobs' Opinion in *Leclerc-Siplec* (C-412/93); S. Weatherill, "After *Keck*: some thoughts on how to clarify the clarification" (1996) 33 C.M.L. Rev. 885.

51 e.g. in the context of services *KO v Gourmet International Products AB (GIP)* (C-405/98), where the issue, as far as Art.49 EC was concerned, was that of being able to create a domestic market for selling advertising services for alcoholic products to advertisers outside Sweden.

52 e.g. *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.

53 e.g. *Alfa Vita Vassilopoulos* (C-158/04), where the rules at issue restricted the possibility to sell bake-off products to establishments meeting the requirements laid down for bakeries, were found not to be selling arrangements because they increased costs and made the marketing of those products more difficult.

54 See E. Spaventa, "From *Gebhard* to *Carpenter*: towards a (non-)Economic European Constitution" (2004) 41 C.M.L. Rev. 743; and *Free Movement of Persons in the European Union--Barriers to Movement in their Constitutional Context,* 2007.

55 Thus, for instance, allowing advertisement for cosmetic surgery on local television but banning it on national television is not justified on public health grounds exactly because of the inconsistency inherent in allowing television advertising in some cases but not in others, see *Corporación Dermoestética SA v To Me Group Advertising Media* (C-500/06) [2008] 3 C.M.L.R. 33; see also *Commission v Portugal* (C-265/06).

56 cf. Presidency Conclusions, Lisbon European Council, March 23 and 24, 2000; see also Art.2 EC.

57 *Commission v Germany (reusable packaging)* (C-463/01) [2004] E.C.R. I-11705; [2005] 1 C.M.L.R. 34; especially at [79]; *Commission v Austria (ban on heavy lorries)* (C-320/03) [2005] E.C.R. I-9871; [2006] 2 C.M.L.R. 12 especially at [90].

58 e.g. in the context of citizenship *Garcia Avello v Belgium* (C-148/02) [2003] E.C.R. I-11613; [2004] 1 C.M.L.R.1; in the context of persons, e.g. *Carpenter v Secretary of State for the Home Department* (C-60/00) [2002] E.C.R. I-6279; [2002] 2 C.M.L.R. 64.

59 In *Commission v Austria (ban on heavy lorries)* (C-320/03), the Court also indicated that before introducing such trade restring measures as a ban on transport on wheels, the Member State should carry out a very careful assessment as to whether there were any less restrictive alternatives, etc.

60 For an interesting analysis on justifications, see C. Barnard "Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected?" in C. Barnard and O. Odudu (eds) *The Outer Limits of European Union Law,* 2009, p.273.

61 For an analysis of the purely internal situation in the context of Art.28 EC, see A. Tryfonidou, "The Outer limits of Article 28 EC: Purely Internal Situations and the Development of the Court's Approach through the Years" in C. Barnard and O. Odudu (eds), *The Outer Limits of European Union Law,* 2009, p.197; on the purely internal situation in the context of the free movement of persons, see N. Nic Shuibhne, "Free Movement of Persons and the Wholly Internal Rule: Time to Move On?" (2002) 39 C.M.L. Rev. 731; E. Spaventa, "Seeing the Woods despite the Trees? On the Scope of Union Citizenship and its Constitutional effects" (2009) 45 C.M.L. Rev. 13; C. Dautricourt and S. Thomas, "Reverse Discrimination and Free Movement of Persons under Community Law: All for Ulysses, nothing for Penelope?" (2009) 34 E.L. Rev. 405.

62 e.g. *R. v Saunders* (175/78) [1979] E.C.R. 1129; [1979] 2 C.M.L.R. 216; *Kremzow v Austria* (C-299/95) [1997] E.C.R. I-2629; [1997] 3 C.M.L.R. 1289.

63 e.g. *Dzodzi* (C-297/88 and 197/89) [1990] E.C.R. 3763; *Criminal Procceding against Guimont* (C-444/98) [2000] ECR I-10663; [2003] 1 C.M.L.R. 3; and more explicitly *Karner* (C-71/02).

64 *KO v Gourmet International Products AB (GIP)* (C-405/98); *Freskot AE v Elliniko DimosioFreskot AE* (C-355/00) [2003] ECR I-5263; see also *Payroll Data Service* (C-79/01) [2002] E.C.R. I-8923; [2004] 3 C.M.L.R. 36 (shares in foreign hands enough for cross-border element).

65 *Parking Brixen GmbH v Gemeinde Brixen* (C-458/03) [2005] E.C.R. I-8612; [2006] 1 C.M.L.R. 3; similarly, see also *Karner* (C-71/02) at [20].

66 The Directive applicable at the time of the main proceedings was Directive 92/50 relating to the coordination of procedures for the award of public service contracts [1992] OJ L209/1; this has since been replaced by Directive 2004/18 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114.

67 *Parking Brixen* (C-458/03) at [55]; in the context of the free movement of workers, see recently *Government of the French Community v Flemish Government* (C-212/06) [2008] E.C.R. I-1683; [2008] 2 C.M.L.R. 31.

68 A. Tryfonidou "The Outer limits of Article 28 EC: Purely Internal Situations and the Development of the Court's Approach through the Years" in C. Barnard and O. Odudu (eds) *The Outer Limits of European Union Law,* 2009, p.197.

69 On the other hand, such a step does not make sense insofar as the free movement rights are confined to a prohibition on non-discrimination; however, since the ruling in *Dassonville* (8/74), the scope of the free movement of goods has been broader than a mere prohibition on discrimination, so that an interpretation focussed on the *potential intra-Community effects* of a measure, rather than on the fact that the measure under scrutiny applied to imports in *that particular case* might also have been possible before. The textual limitation of Art.28 EC, which refers only to quantitative restrictions on *imports* and measures having equivalent effect to quantitative restrictions on *imports,* is problematic for this interpretation only up to a point, since it is possible (although rather hypocritical) to draw a distinction between interpretation of Community law and application of national rules (or common sense) that allow internal claimants to rely on such rules (this is the path followed by the Court in several cases such as *Pistre, Re* (C-321/94 to C-324/94) [1997] E.C.R. I-2343; [1997] 2 C.M.L.R. 565). Or, as noted above, one could point out that, in any event, the scope of Art.28 EC has gone much beyond the prohibition of measures which specifically affect *imports* or that have intra-Community specificity. The matter is too complex to be addressed here but, from a practical viewpoint and leaving aside hermeneutic justifications, one might be safe in the belief that, at least in the case of goods, the ambit of the purely internal situation rule has been eroded to the point of becoming rather fictional.

70 On this issue, see N. Bernard, "La libre circulation des marchandises, des personnes et des services dans le Traité CE sous l'angle de la compétence" (1998) 33 C.D.E. 11; and *Multi Level Governance in the European Union* (London: Kluwer Law International, 2002), especially Ch.2.

