I. Introduction

The case law of the European Court of Justice (‘the Court’) on the free movement of goods and on the freedom to provide services began in the first half of the 1970s with the judgments in Dassonville and van Binsbergen.\(^1\) It reached another milestone later that decade in Cassis de Dijon, which had a precursor a few weeks earlier in the services case van Wesemael.\(^2\) The jurisprudence on the free movement of goods since Cassis has been described as the ‘pacemaker’ for the four freedoms.\(^3\) By the beginning of the 1990s, however, as a consequence of the ‘Sunday trading’ line of cases,\(^4\) it became clear that the case law needed a re-orientation. The judgment in Keck\(^5\) was supposed to deliver this, but it soon became clear that it raised as many questions as it answered.

These arose mainly in connection with the nebulous concept of ‘(rules relating to) selling arrangements’. Restrictions on use are a paradigm that was not entirely new, but that has received the Court’s specific attention (to say no more) only recently, in the judgments in Moped trailers and in Mickelsson & Roos.\(^6\) One of the questions that received a good deal of attention during the proceedings (if not in the judgment itself) was the question whether and how the idea of ‘selling arrangements’ could be applied to restrictions of use. These two judgments will be discussed below.

The development of the case law on the freedom to provide services was less spectacular, but it roughly describes a similar trajectory of the Court grappling with the legality under European law of indistinctly applicable measures. In both areas, goods and services, the Court has recently emphasised the idea of ‘market access’. Beyond this, in the jurisprudence on services we find a bewildering array of formulae for the assessment whether a national measure constitutes an obstacle to the freedom to provide services. We shall here consider how restrictions on the use of

\(^1\) Cases 8/74 Dassonville [1974] ECR 837; 33/74 van Binsbergen [1974] ECR 1299;
\(^4\) One of several examples is Case 145/88 Torfaen Borough Council v B&Q [1989] ECR 3851.
services might be dealt with, preferably avoiding the shortcomings of the approach suggested by the Court for the free movement of goods.

II. Moped Trailers: Grand Chamber, Small Progress

A. The Court’s ‘Preliminary Observations’

*Moped Trailers* has been discussed in detail elsewhere. The case arose from an action brought by the European Commission against Italy, where it was allowed to tow trailers only by car, certain types of bus, and tractor. In particular, it was not permissible to pull a trailer behind a moped. Before the Court, the Member States debated extensively whether and how *Keck* should apply to restrictions of use. The Grand Chamber ignored their arguments entirely. Instead, it invoked *Sandoz, Cassis de Dijon,* and *Keck* for its finding that Article [34 TFEU] reflects the obligation to respect the principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of Community products to national markets. Then follows passage that is lifted almost verbatim from paragraphs 16 and 17 of *Keck,* contrasting ‘product requirements’ with rules relating to ‘selling arrangements’. From all this, the Court concluded that:

‘... measures adopted by a Member State the object or effect of which is to treat products coming 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 34 EC, as are [‘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.’

So there appear to be three sorts of measures which, according to the ECJ, fall foul of the prohibition in Article 34: first, those whose object or effect is to treat imports less favourably than domestic products; secondly, those which impose adaptation costs of whatever sort on imports; and, thirdly, any other measures that hinder market access of imports.

The wording used by the ECJ to describe the first sort of rules is transferred to the interpretation of Article 34 from the case law on Article 35. That provision, according to the established *Groenveld* formula, ‘concerns national measures which have as their specific object or

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8 Case C-110/05 (above n 6), para 34; the references in the original are omitted.

9 Case C-110/05 (above n 6), para 37.
effect the restriction of patterns of exports’.10 ‘Object or effect’ encompasses both distinctly and indistinctly applicable measures. Distinctly applicable measures have as their ‘object’ an impediment to imports. In this context, ‘object’ does not imply ‘intention’. The same concept is used under Article 101, where the ‘object’ of an agreement etc means its objectively foreseeable consequences under the circumstances on a given market, regardless of the intentions of the parties.11 Distinctly applicable measures catch imports only, and impose on them burdens that domestic products do not have to bear. Such rules will of necessity affect market access of imports negatively, whether or not that is what the Member State set out specifically to achieve.

Indistinctly applicable measures, on the other hand, will not necessarily have such an ‘effect’, but might conjunction with other circumstances. This will be the case if abiding by the national rules imposes burdens on imports that domestic products do not have to shoulder: they will always have been made in conformity with national regulations (or would in all likelihood be so made in case there is presently no domestic competition). Imports, made in accordance with a different set of rules in another Member State, might have to be adapted to the standards of the Member State of importation. Member States may only insist on such adaptation, however, if it would be proportional to enforce the national rules. If not, ‘mutual recognition’ will have to take place as mentioned by the Court in its ‘preamble’ in Moped Trailers and as exemplified in Cassis de Dijon. This means that the importing Member State has to accept products made in other Member States as offering essentially equivalent guarantees of safety, wholesomeness, commercial fairness or whatever other policy aim is pursued by the national legislation.12

It is not quite clear what sort of rules the ECJ had in mind that make up the second category (‘product requirements’). More specifically, it is difficult to fathom the relation between these and the ‘effect’ joint of the preceding group. The Court here, by contrast with its description of the first group, does not mention competing domestic products. The presence of any domestic competition is, however, not necessary for a finding that a measure has equivalent effect to a quantitative restriction on imports. The Member State will have to justify its measures whenever any adaptation is required of imports (or if products of a sort lawful in other Member States are universally banned in the importing country, see below). It seems, therefore, that the second group is already included in the first.


11 See eg Case T-175/95 BASF Coatings v Commission [1999] ECR II-1581, paras 82–9, with further references.

The third group of measures according to the ECJ’s formula comprises ‘any other hindrances to market access’. Given that the first and second groups cover unequal treatment in law and in fact, the third must contain measures that do not entail unequal treatment (and if there is no justification, discrimination) of any description (direct/indirect, formal/material, overt/covert). Also, mere reductions in trade between Member States are not enough to qualify a measure as one having equivalent effect to a quantitative restriction. The third group must, therefore, comprise rules that prohibit all sales of the product, or that allow none of its ‘normally intended’ uses. Such universal bans do not have to be definitive. On the contrary, they are widespread but can normally be overcome by obtaining a licence or an approval, by opening suitable trading premises or hiring qualified personnel, by appointing a local representative etc.

Just as much as the ECJ’s explanation of the principles underlying Keck was sparse (to put it mildly), so is its elaboration of the present position. A meagre ‘consequently’ is all the Grand Chamber offers by way of deriving from, essentially, Dassonville, Cassis de Dijon and Keck: its new definition (if it is one) of what amounts to a measure having equivalent effect to a quantitative restriction. The Court offers less a deduction than a vague association, or even only an allusion to the sources of its formula. There is no hint in the judgment as to how the three types of measures translate (as presumably they are meant to do) the principles of non-discrimination, mutual recognition and free market access that the Court invoked in the immediately preceding paragraph.

Even taken on their own, the three categories of measures receive no definition, although some understanding can be gleaned from elsewhere. It is equally unclear how the three types

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13 Keck (above n 5), para 13: ‘[A prohibition of resale at a loss] may, admittedly, restrict the volume of sales, and hence the volume of sales of products from other Member States, in so far as it deprives traders of a method of sales promotion. But the question remains whether such a possibility is sufficient to characterise the legislation in question as a measure having equivalent effect to a quantitative restriction on imports.’ In the same sense, see Case C-71/02, Karner v Trastuwijk, [2004] ECR I-3025, para. 42: ‘[…] Although such a prohibition is, in principle, likely to limit the total volume of sales in that Member State and, consequently, also to reduce the volume of sales of goods from other Member States, it nevertheless does not affect the marketing of products originating from other Member States more than it affects the marketing of products from the Member State in question. […]’; Case C-20/03, Burmanjer [2005] ECR I-4133, paras. 30–31: ‘It is common ground that a national system such as the rules on itinerant sales is, in principle, likely to limit the total volume of sales of the goods in question in the Member State concerned and, consequently, also to reduce the volume of sales of goods from other Member States. […] However, the information available to the Court does not enable it to establish with certainty whether the national rules on itinerant sales affect the marketing of products from Member States other than the Kingdom of Belgium to any greater degree than that of products from that State. […]’

14 For a temporary ban, see Joined Cases 60/84 and 61/84 Cinéthique [1985] ECR 2605 (prohibition of selling or hiring video cassettes of a movie within a certain time of its first showing in cinemas – I. Prete, ‘Of Motorcycle Trailers and Personal Watercrafts: the Battle over Keck’, (2008) 35(2) LIef 133, 145, correctly derives from that judgment that discrimination is not a necessary element of a breach of Art 34, but has only ‘market access’ to offer (at 151) as to what else is caught, while coming close to the position here advocated at 150; see on this in and by above n 48); for registration requirements see eg Case C-150/00 Commission v Austria (‘Vitamins’) [2004] ECR I-3887, paras 83–7 (registration requirement for consumables containing vitamins and minerals); Case C-55/94 Gebhard [1995] ECR I-1465 (establishment); Case C-58/98 Corten [2000] ECR I-7919 (services); as an example of a requirement of type approval, see Joined Cases C-388/00 and C-429/00 Radiosistemi Srl v Prefetto di Genova [2002] ECR I-5845, para 43 (granting of a national mark of conformity).
relate to one another, whether they are complementary or alternative and, if the latter, whether there is any order of assessment. The first two overlap in substance, because the denial of mutual recognition renders indirectly discriminatory an indistinctly applicable measure that imposes additional burdens on imports. Moreover, the ECJ gives the apparently ‘catch-all’ category of ‘any other measures’ no contours whatsoever. The Court’s failure to do so came back to haunt it shortly thereafter, in the Mickelsson & Roos judgment discussed below.

B. The Application of the ECJ’s Principles

The Grand Chamber went on as it had started: the application of the above rules generated yet more uncertainty. The Court distinguished between trailers that were specifically designed to be towed by motorcycles, and those that were of general use. Access to the market of general use trailers was not hindered by the prohibition of their being towed behind a motorcycle. This was different with regard to motorcycle-only trailers. The Court found that although it was not inconceivable that these trailers could, in certain circumstances, be towed by other vehicles, in particular by automobiles, such use was ‘inappropriate’ and remained at least ‘insignificant’, if not ‘hypothetical’. The Court pointed out that ‘a prohibition on the use of a product in the territory of a Member State has a considerable influence on the behaviour of consumers, which, in its turn, affected the access of that product to the market of that Member State’. From this, the Court concluded that the prohibition prevented a demand from existing in the Italian market for trailers lawfully produced and marketed in other Member States. The Italian provisions therefore, in contravention of Article 34, hindered the importation of these trailers.16

This solution appears to be derived from an application of the third category of rules as described in the Court’s ‘preliminary observations’: the prohibition applied to all trailers specifically designed to be towed by motorcycles, no matter where these trailers came from. Also, it did not make the marketing of trailers imported from other Member States any more difficult than the marketing of Italian trailers. Demand would evenly dry up for all trailers of that design. The ban, therefore, passed muster under the first two categories. Since, however, such trailers were legally made and used in other Member States, Italy had by that prohibition denied its market from being part of a market in such trailers common to all Member States which had no similar restrictions in force. This can be read to confirm that the third group comprises universal (indistinctly applicable) bans imposed by Member States, whether by means of restrictions of sale

16 Case C-110/05 (above n 6), paras 49–58; the quotation is from para 56.
or of use of the products. Such bans go against the aim of Article 26 TFEU (ex Article 14 EC),
namely to create an internal market between all Member States.17

The judgment also gives clues as to when the ECJ thinks restrictions of use will amount to a
bar to market access. This will be the case where the remaining uses of the products in issue are
‘inappropriate’. For all we can tell, what is a product’s ‘proprium’ is a question of its qualities: it
depends on the ‘specific technical characteristics’ of the product. It is these that determine the
product’s ‘normal intended use’ (both expressions are from Bot AG’s opinion), or its ‘specific
and inherent purposes’ (thus the ECJ in Mickelsson & Roos, discussed below).

While the characteristics of the product will be reasonably clear and thus ‘specific’, its
purposes may not so be: these are essentially left to the imagination of the user. They are not, in
this sense, ‘inherent’ to the product. Quite often, the product’s characteristics will allow several
appropriate uses. While the ECJ did not expand on this in any way, from the context of the
judgment it would appear that a use is ‘inappropriate’ if the product as designed cannot, or at
least not without danger to the user or others, be put to that use. The problem with this
understanding is that ‘dangerous’ and ‘safe’ at least partly are normative concepts, that is, they
take their meaning from legislation as much as from intuition. If, however, the law determines
what is ‘appropriate’ and ‘inappropriate’, the Court would have to second-guess the legislature’s
risk assessment and declare remaining lawful uses ‘inappropriate’, only to find out whether the
restriction of use falls under Article 34.

What is more, the relationship between objective and subjective aspects is not clear. Taking
the latter into consideration creates a new problem: it allows the most far-reaching restrictions on
the uses occurring most often, as long as a lunatic fringe buys, say, moped trailers to use them as
flower pots, or as objects of art or idolatry: these uses are all perfectly safe and legal, if somewhat
exotic. Maybe this is why the ECJ held that if the remaining legal use or uses are not in this sense
inappropriate, they may be ‘insignificant’. For want of any guidance from the Court, this might be
the case if so few consumers would put the goods to one or several of these uses that importing
the goods on a commercial scale would not be a viable proposition. This, however, comes close
to a de minimis threshold which the Court rightly frowns on.18

17 I have explained this proposition in more detail in ‘The Awkward Selling of a Good Idea, or a Traditionalist

18 See, most recently, Case C-212/06 Government of the French Community and Walloon Government v Flemish Government
[2008] ECR I-1683, para 52: ‘[A]s regards the Flemish Government’s argument that that legislation could in any case
have only a marginal effect on freedom of movement, in view of the limited nature of the amount of benefits in
question and the number of persons concerned, it need merely be observed that, according to the Court’s case-law,
the articles of the Treaty relating to the free movement of goods, persons, services and capital are fundamental Community provisions and
any restriction, even minor, of that freedom is prohibited’ (references omitted, emphasis added); Case C-309/02 Radlberger
imports must be classified as a measure having equivalent effect to a quantitative restriction even though the
We can once more take the example of consumers buying a trailer in order to place it in their
garden for decorative purposes, planting flowers or vegetables in it. Such use is not inappropriate
(it is perfectly safe), but it would be somewhat extravagant if the trailer were specifically bought
for that purpose. For this reason, the use in this example might well be classified as
‘hypothetical’. By this, the ECJ seems to understand a use that is less likely to occur than even the
‘insignificant’ uses, a use that is ‘not inconceivable’ in theory but wholly unrealistic or improbable
in practice. Nevertheless, if insignificant uses are incapable of saving a restriction from being
classified as a bar to market access, nothing turns on these uses being even only hypothetical.
Quite why the Court opened this can of worms is not clear: the market mechanism will decide
whether the demand for ‘exotic’ purposes alone will exert enough ‘pull’ to lure suppliers onto
such a narrow market. As long as there are no legal obstacles to suppliers’ satisfying the
remaining demand, the market’s shrinking from the size before introduction of the restriction is a
mere reduction in turnover.

Nevertheless, ‘hypothetical’ must not be mistaken for ‘potential’. The ECJ has stressed time
and again that Member States must not by their national regulations ‘crystallise’ consumer habits
in favour of certain goods (typically made in the Member State of importation) and their uses.
The population will be already familiar with these, but (often) only with these. If, therefore, in
other Member States there is so much demand for goods that are habitually put to a number of
uses for economic operators to consider it worth their while to supply this market, these uses
cannot be discounted as merely ‘hypothetical’. To put it differently, what is usual in one Member
State can (rebuttably) be presumed to be not merely ‘hypothetical’ in another. These uses might
still be ‘hypothetical’, though, if objective conditions such as the climate and landscape in the
importing Member State imposing the restriction in issue do not lend themselves to uses that

19 It can only be mentioned in passing here that the apparent graduation from ‘insignificant’ to ‘hypothetical’ is yet
another sign of the unclear relationship between de minimis and the Krantz case law (see in and by below n 103); I
have explained elsewhere why I think the latter could be dropped without any loss: (2003) 22 YEL 249, 289–92.

20 The ‘crystallisation’ metaphor comes from the Court’s case law under Art 110 TFEU (ex Art 90 EC): see Case
170/78 Commission v United Kingdom (‘Beer and Wine’) [1983] ECR 2265, paras 7–8; under Art 34, see Case C-405/98
Konsumentombudsmannen v Gourmet International Products [2001] ECR I-1795, paras 37–9 for restrictions on advertising;
Case C-12/00 Commission v Spain (‘Chocolate’) [2003] ECR I-459, para 82; Case C-14/00 Commission v Italy (‘Chocolate’)
[2003] ECR I-513, para 77, in which Member States prescribed an unfamiliar and less appealing designation for
(primarily imported) products.
have some currency in other Member States. There is no indication that this applied to the use of motorcycle trailers in Italy, and it will rarely be the case with other products.

In all, therefore, the few innocent words in the ECJ’s judgment raise more questions than they answer. It remains to be seen, of course, whether they are meant to have any lasting significance, or whether they were tailored to the specific circumstances and can be ignored when they appear less suitable on another occasion. Needless to say, the latter would be the opposite of the principled guidelines that national courts need, and are entitled to expect, under Article 267 TFEU (ex Article 234 EC). Neither would it make life easier for the Commission as the ‘guardian of the Treaty’ under Article 258 TFEU (ex Article 226 EC).

III. Mickelsson & Roos: a Doctrine All at Sea – on a Jet Ski

Mickelsson & Roos concerned Swedish rules which prohibited the use of, among others, ‘jet-skis’ on all public waters and waterways (other than general navigable waterways), except where such use was specifically allowed. Local authorities had to allow the use of these crafts under certain conditions on waters to be designated. The conditions were, essentially, that the additional noise and disturbance as a consequence of the use of the craft did not significantly add to the burdens on the public and on the environment imposed by pre-existing human uses; or that the waters were of little value in the protection of the natural and cultural environment and other named public goods; or that there was no nuisance to the public nor a significant risk to fauna and flora. If these conditions were not fulfilled, local authorities were merely allowed (not compelled) to lift the prohibition of the use of jet-skis. Contraventions, such as those perpetrated by Messrs Mickelsson and Roos, were subject to a fine. The two defendants before the referring Swedish court, and the Commission, argued that these restrictions (and hence any fine) were in breach of Article 34. The judgment in Mickelsson & Roos followed Moped Trailers within a few months. For the assessment under Article 34, the ECJ’s Second Chamber took its cues from the Grand Chamber’s judgment in Moped Trailers.

21 Shortly after Moped Trailers, for instance, the Court reverted to a traditional discrimination analysis in Case C-531/07 Fachverband der Buch- und Medienwirtschaft v LIBRO Handelsgesellschaft [2009] ECR I-3717, paras 18–22; see also Case C-100/08 Commission v Belgium (‘Wild Birds’) [2009] ECR I-140*, Summ.pub., paras 81, 82, where the Court first cites para 34 of Moped Trailers, then para 35 for the Casis formula which decides the matter; the Dassonville formula without a trace of Moped Trailers was decisive in Case C-333/08 Commission v France (‘Positive List’) [2010] ECR I-0000 (28 January 2010), para 74 ff; the same (Third) Chamber as in the last-mentioned judgment had already decided on the same basis a case on restrictions of use, namely Case C-265/06 Commission v Portugal (‘Tinted Film’) [2008] ECR I-2245, para 31 ff, even after Kokott AG’s opinion in Mickelsson had lead to the reopening of the proceedings in Moped Trailers. All these may be taken as reasons for not getting too excited prematurely about the Court’s new approach and its longevity.

22 The exact wording of the Swedish provisions is reproduced in para 12 of the ECJ’s judgment, the Court’s own summary is at para 22.
The Court’s starting point was again the *Cassis* formula, as before modified in its wording with snippets from *Groenveld* and *Keck*: ‘[M]easures 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 [34 TFEU].’\(^{23}\) The Court cited *Cassis*,\(^ {24}\) *Familiapress*\(^ {25}\) and *DocMorris*\(^ {26}\) as sources of this formula, but not *Keck*. It then added 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 [the] concept [of a measure having equivalent effect to a quantitative restriction].’\(^ {27}\)

At the material time, no waterways had been designated for use by jet-skis in accordance with the rules set out earlier. Given the heavy commercial traffic on the general navigable waterways (which anyway made up only a minor portion of all navigable waters in Sweden), using jet-skis there was dangerous. The Court therefore found that the ‘actual possibilities’ for the use of personal watercraft in Sweden were ‘merely marginal’.\(^ {28}\) As in *Moped Trailers*, the Court pointed out that depending on their scope, restrictions of use had a considerable influence on the behaviour of consumers. Consequently, this might affect access of the product to the market in that Member State. This was because consumers, knowing that the use permitted was ‘very limited’, had only a limited interest in buying that product.\(^ {29}\)

From all this, the Court concluded that where the national regulations for the designation of navigable waters and waterways had the effect of *preventing* users of personal watercraft from using them for the ‘specific and inherent purposes for which they were intended’, such regulations had the effect of hindering the access to the domestic market in question for those goods. This was also the case where the regulations ‘greatly restricted’ these uses. In view, however, of the division of functions, under the preliminary reference procedure pursuant to Article 267, between the ECJ and the national courts, it was for the national court to ascertain

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\(^{23}\) Case C-142/05 (above n 6), para 24.

\(^{24}\) Above n 2.


\(^{27}\) Case C-142/05, para 24, referring to *Moped Trailers* (both above n 6), para 37.

\(^{28}\) Case C-142/05 (above n 6), para 25.

\(^{29}\) Case C-142/05 (above n 6), paras 26–7.
this. If that court found said effect, the regulation constituted a measure having equivalent effect to a quantitative restriction prohibited by Article 34.\textsuperscript{30}

As in Maped Trailers, the assessment here plays out under the category of ‘other measures’. The Court does not mention the fact that there were no Swedish-made jet-skis. Presumably, therefore, it did not consider it the ‘aim’ of the prohibition specifically to put imports at a disadvantage: there was no domestic production to protect. The question of the ‘effects’ of a rule (such as the one in issue) that ‘applies to all products alike’ is not pursued, either. This may be because the Court in its variation on Cassis refers to ‘requirements to be met by such goods’.

Possibly this is meant to capture (only?) the burdens occasioned by any necessary adaptation of the product itself to the regulations in the importing Member State, as discussed in Cassis. Prohibitions of use, by definition, do not require, nor could they here be overcome by, any adaptations of the jet-skis. All this, however, is ultimately left open, and passed on to the national court to contemplate.\textsuperscript{31}

In this way, the Court avoids any comparisons: between the rules in different Member States; between the impact of the rules on jet-skis to be imported and on those already in the country;\textsuperscript{32} between the effects on jet-skis and on other types of craft etc. In other words, the Court does not inquire whether any discrimination might have occurred. The express invocation of Cassis, then, if it makes sense any sense at all, might be meant to signify that this is indeed a test that is meant to be relevant beyond the present case. Nonetheless, of the whole formula the Court uses only the ‘access’ limb. The wording of the latter – ‘any other measure’ – would lead one to expect that it is of residual application, only to be drawn on when no unequal treatment (and, for want of a justification: discrimination) has come to light under the first two limbs.

These could of course be two different tests: discrimination, on the one hand, market access, on the other.\textsuperscript{33} Alternatively, the long first sentence (‘aim or effect’ etc) could be mere verbiage. Both hypotheses are unconvincing. If the tests were independent of each other, it would be misleading (to say the least) to mention them in the same breath, and expressly to refer and to subordinate one to the other (‘any other measure’). As to the second hypothesis, there was no reason to jettison Cassis, certainly not by first citing and then ignoring it. If anything can be

\textsuperscript{30} Ibid, para 28.

\textsuperscript{31} See the opening words in Case C-142/05 (above n 6), para 26: ‘Even if the national regulations at issue do not have the aim or effect of treating goods coming from other Member States less favourably, which is for the national court to ascertain, . . .’


\textsuperscript{33} As suggested by C Barnard, S Deakin, ‘Market Access and Regulatory competition’, in Barnard and Scott (above n 51), 207 ff; and, more recently, Spaventa (above n 18); \textit{contra} Enchelmaier (above n 17), 284 n 185.
concluded from this passage, it is that the Court is either not sure about, or oblivious to, a systematic exposition of how to assess cases under Article 34. Despite the lengthy discussion in two Advocates General’s opinions, ‘restrictions of use’ do not appear as any kind of special category, nor is their relationship with ‘selling arrangements’ in any way expounded, or Keck even mentioned after the initial reference. One can only wonder why it should have taken the Court four years to come up with so little.\textsuperscript{34}

The judgment is unsatisfactory in a number of ways. For a start, the ‘other measures’ are merely defined by their ‘hindering access of products originating in other Member States to the market of a Member State’. This aspect, however, appears already covered by the ‘obstacles to the free movement of goods’ in the preceding quotation from \textit{Cassis}: it is hard to see what ‘obstacles’ and ‘hindrances’ are if not synonymous. Maybe ‘obstacles’ are relevant, under \textit{Cassis}, only in so far as they are ‘the consequence of applying to goods from other Member States . . . rules that lay down requirements to be met by such goods’. If they result from, say, shop opening hours, minimum profit margins or restrictions of use, they might come under the category of ‘any other measures’. The ECJ does not, however, spell this out. Even if it did, the next question would be whether or to what extent these differences should be mirrored in different tests. If the test is meant to identify ‘measures of equivalent effect’, and if untrammelled ‘market access’ is the concern that underlies the prohibition of such measures, then it cannot matter how exactly the obstacle or hindrance came about, what the precise causation was that lead to the obstacle.\textsuperscript{35} As far as the category of ‘other measures’ is concerned, this means that it can (and need) only catch national measures that remain permissible under the traditional \textit{Cassis} test, ie those that ‘apply to all products alike’ and do not have as their ‘consequence’ obstacles specifically for goods from other Member States. For reasons explained above, this leaves only universal bans. If this context is lost, the ‘other measures’ lose their definition. In this way, we end up with the formula from the \textit{Sunday Trading} cases, according to which a reduction of the volume of trade equals a restriction in the sense of Article 34.

This is, arguably, what happened in \textit{Mickelsson & Roos}. The ECJ breaks down the ‘hindrance’ brought about by the ‘other measures’ into either ‘preventing users of personal watercraft from using them . . . or . . . greatly restricting their use’, so as to leave ‘merely marginal’ possibilities of

\textsuperscript{34} Oliver, \textit{Free Movement of Goods in the European Union}, 5th edn, Oxford and Portland, Oregon (Hart) 2010, para 6.88, rightly speaks of a ‘disappointment’.

\textsuperscript{35} See on this emphatically L Gormley, ‘The Definition of Measures Having Equivalent Effect’, in A Arnell, P Eeckhout, T Tridimas (eds), \textit{Continuity and Change in EU Law. Essays in Honour of Sir Francis Jacobs}, Oxford, (Oxford University Press) 2009, 189, 191: ‘It has been clear from the very beginning of the attempts to define the notion of measures having equivalent effect that it should be viewed as an effects doctrine rather than dependent upon the nature or contents – or even purpose – of the measure’. 
actual use for their specific and inherent purposes. This adopts, in essence, the last part of Kokott AG’s proposal, but without getting drawn into the discussion about the transferability of the concept of ‘selling arrangements’. As the Advocate General had proposed, the Court here uses an absolute measure: establishing that a piece of national legislation is caught by Article 34 does not depend on any comparison. The threshold beyond which it is so caught, however, is indeterminate. As explained above, one answer is as good as another when it comes to the question whether the remaining possibilities of use are ‘significant’ or ‘merely marginal’, or whether the uses are ‘greatly’ restricted or only slightly.

IV. Parallel developments in the case law on the freedom to provide services:

A. The beginnings: Alpine Investments and other cases

In Alpine Investments, the Court discussed the issue of the transferability of the Keck criteria expressly. The Dutch and British governments had argued that a prohibition in the Netherlands of financial firms’ contacting, unannounced, potential customers (so-called ‘cold calling’) for commodities futures contracts, was tantamount to a rule governing selling arrangements. The prohibition therefore, according to the governments, escaped Article 56 altogether (paragraph 33).

For an understanding of the Court’s response it is important to underline that the case concerned advertising for a service, not advertising as a service. A ban on ‘cold calling’ was at issue, not on the conclusion or execution of commodities futures contracts as such. Alpine Investments’ telephone calls to potential clients, made by the firm itself, were not services in the sense of the first subparagraph of Article 57, as they were not provided against remuneration. Their only purpose was to lead to a transaction – namely, commodities futures contracts – which would, in their turn, have involved services in the sense of the Treaty. The ban required, in effect, a switch by Alpine Investments to advertising in printed or broadcast media, with the attendant expenditure and inconvenience.

The ban thus prohibited the technique the company had traditionally used in order to gain access to clients in other Member States (paragraph 28). It made the provision of a lawful service across the borders – from the Netherlands into Belgium – more difficult than it would have been within Belgium alone, where cold calling was not unlawful. Comparison with Dutch providers

36 Case C-142/05 (above n 6), para 28 read jointly with para 25, last sentence.
37 Case C-384/93 Alpine Investments BV v Minister van Financiën [1995] ECR I-1141
39 Alpine Investments managed portfolios for its clients, gave them investment advice, and transmitted their orders to brokers operating on commodities futures markets, par. 4 of the judgment.
operating in the Netherlands does not yield this result. In the perspective of a common market, however, the comparison must comprise the situation in any Member State where Alpine Investments’ services were provided. The Court takes this perspective in paragraphs 29, 30 of the judgment. There, it held that the application of Article 56 was not excluded by the fact that the Member State of establishment regulated services provided in another Member State.

The Court cited paragraph 16 of Keck, and continued that the ban ‘directly affects access to the market in services in the other Member States’ (paragraph 38). This wording is somewhat unfortunate. The reason why Keck did not apply was that the Dutch rule imposed an additional burden on those, such as Alpine Investments, who wanted to provide services across the border into another Member State. That is, the condition in paragraph 16 of Keck was not fulfilled. Market access as such was, and remained, possible for Alpine Investments, but, as a consequence of the Dutch rule, not on equal terms with its Belgian competitors. Instead, the company had to overcome an obstacle its competitors were spared, namely the prohibition on using its habitual and convenient method of marketing over the telephone.

Because ‘cold calling’ was the very means by which Alpine Investments had hitherto acquired customers in other Member States, the prohibition ‘directly’ affected its market access. Paragraph 54 of the judgment in Alpine Investments makes it plain that the Court distinguishes between the issues of market access, and of additional burdens. In this paragraph, the Court emphasised that other techniques for making contact are still available, and that existing clients can always give written consent to further calls. Thus, Alpine Investments was not excluded from the Belgian market altogether.

Clarification on this point comes from a later judgment, TK-Heimdienst Sass, where the Court quoted Alpine Investments. An Austrian provision required that all bakers and butchers selling their wares on rounds have a fixed establishment in an Austrian administrative district adjacent to the area of the rounds. This requirement was indistinctly applicable, but indirectly discriminatory as it put operators from other Member States at a disadvantage without objective justification. The Court held that the provision ‘in fact impedes access to the market of the Member State of importation for products from other Member States more than it impedes access for domestic products’ (paragraph 29 with reference to Alpine Investments, emphasis added). The same situation prevailed in Alpine Investments which, hence, also hinges on the notion of discrimination (paragraphs 15, 16 of Keck), not market access in the sense of a universal ban (paragraph 17 of Keck).

Alpine Investments can also be read as a comment on the question, under Article 34, of national rules governing advertising campaigns. The position pre-Keck was that ‘the possibility cannot be

ruled out that to compel a producer either to adopt advertising or sales promotion schemes which differ from one Member State to another, or to discontinue a scheme which he considers to be particularly effective, may constitute an obstacle to imports even if the legislation in question applies to domestic products and imported products without distinction.\textsuperscript{42} Such a discontinuation of a tried and tested scheme is exactly what was required of Alpine Investments. If it qualifies as an additional burden under Article 56, then the same must be true under Article 34.\textsuperscript{43} This conclusion seems all the more plausible considering that the Court was specifically invited to classify the requirement in question as analogous to a ‘selling arrangement’ and thus as exempt from scrutiny. In turn, this further undermines the usefulness of ‘selling arrangements’ as a concept with legal significance.

The \textit{Deliège} case is another example of the convergence of the Court’s jurisprudence on the Four Freedoms. In issue in that case were rules of the Belgian judo federation for the participation of fighters in international tournaments. Ms. \textit{Deliège} was a Belgian judo fighter who had failed to qualify, under these rules, for a tournament in Paris. She argued that her freedom to provide services was impaired. The Court, however, found that the selection rules at issue did not determine the conditions governing access to the labour market for professional sportsmen and -women, and did not contain nationality clauses limiting the number of nationals from other Member States who may participate in a competition. Also, although such selection rules inevitably have the effect of limiting the number of participants in a tournament, this limitation is inherent in the conduct of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted. Such rules may not therefore, in themselves, be regarded as constituting a restriction on the freedom to provide services.\textsuperscript{44}

In this, the three \textit{Keck}-criteria are recognisable: the rules contained no nationality clause, \textit{i.e.} they were indistinctly applicable; it went without saying that the technique of judo, applied by all fighters, did not require (or even permit of) any adaptation by athletes coming from other Member States. The rules of judo are the same everywhere – only this makes international tournaments possible and interesting. The rules thus had the same factual impact on all fighters. Lastly, there was no bar to access to the labour market for professional judo fighters such as Ms. \textit{Deliège} – if she failed to qualify for one professional tournament, she could still participate in others she \textit{did} qualify for. Such rules of qualification are also necessary to spare the audience the spectacle of professional fighters wasting their time on inept challengers. There was, therefore, no need to justify the rules in the light of Article 56.

\textsuperscript{42} Case C-60/89 Criminal proceedings against Jean Monteil and Daniel Samanni [1991] ECR I-1547, par. 37, with references to earlier case law.
\textsuperscript{44} Joined Cases C-51/96 and C-191/97 Christelle Deliège v Ligue Francophone de Judo et al. [2000] ECR I-2549, pars. 61, 64
The addition of the market access criterion to the tools of the Court does not mean that the traditional discrimination assessment has been superseded. Most recently, in de Coster, the Court found that Belgian legislation allowing municipalities to limit the number of satellite dishes put broadcasters from other Member States at a disadvantage. Their programmes were under-represented on the cable networks, to which Belgian providers, by contrast, had unrestricted access. As a result, a justification for the national rules was required.

B. More recent judgments: ‘Restriction of market access/of the opportunity to compete more effectively’

In some recent judgments on Article 56 TFEU (ex-Article 49 EC), we find an approach to what amounts to a restriction on the freedom to provide services that is similar to the approach the Court adopted in Moped Trailers and Mickelsson & Roos. The Court here takes the perspective of the market and of the competition that takes place between service providers on that market. It will be remembered that the creation of the Internal Market is meant to throw the hitherto isolated national markets open to competition, that is, to the activities of competitors, from other Member States.

We thus read in the Court’s judgment in an action brought by the Commission against Luxembourg that the obligation that providers of building services from other Member States designate an ad hoc agent residing in Luxembourg to retain the documents necessary for monitoring by the competent national authorities ‘involves an additional administrative and financial burden for undertakings established in another Member State, so that the latter are not on an equal footing, from the point of view of competition, with employers established in the host Member State, and they may be dissuaded from providing services in the latter Member State.’ Similarly, the Court found that compulsory minimum rates in Italy deprived economic operators established in other Member States of the ‘opportunity to compete more effectively’, by offering charges lower than those in the scale of charges imposed, with the economic operators traditionally established in Italy.

45 Case C-17/00 François de Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort [2001] ECR I-9445, pars. 31–34, 36–38
46 Case C-319/06 Commission v Luxembourg (‘Posted workers’) [2008] ECR I-4323, para 85, emphasis added; similarly, the Court found in Case C-565/08 Commission v Italy (‘Lawyers’ fees’) [2011] ECR I-0000 (29 March), para 51 that a restriction would exist if lawyers were ‘deprived of the opportunity of gaining access to the market of the host Member State under conditions of normal and effective competition’.
47 Case C-134/05 Commission v Italy (‘Extrajudicial debt recovery’) [2007] ECR I-6251, paras 71–2; Joined Cases C-94/04 and C-202/04 Cipolla [2006] ECR I-11421, paragraph 70; the Court said the same in Joined Cases C-147/06 and C-148/06 SECAP and Santoro v Comune di Torino [2008] ECR I-3565, para 28, about a rule requiring the automatic exclusion of abnormally low tenders to contracts of certain cross-border interest. This argument about the restrictive effects of minimum price-legislation has a long tradition in the case law on goods, see P Oliver, Free Movement of Goods in the European Union, Oxford and Portland/Oregon 2010, paras 7.87–104.
There can be no doubt that every additional burden imposed on would-be providers from other Member State puts them at a disadvantage vis-à-vis their domestic competitors; for some, this might tip the scales against expanding their activities into the other Member State at all. It must be said, however, that this test – if it is one – would add unnecessary complexity to the assessment. Under the previous formulae, it was enough to find that national regulations imposed adaptation costs on providers from other Member States. Now, it seems, we have to take a wider perspective, and consider the competitive position of domestic providers also. The judgment could be read to mean that there will be a restriction only if on balance (as the net result, so to say), providers from other Member States are at a competitive disadvantage. We are not told which factors ought to go into the equation. Nevertheless, it would seem that all other regulatory burdens that domestic providers are subject to would also have to be taken into consideration.

An alternative and more plausible interpretation of this passage, however, is that the Court here does nor more than openly articulate the reason why no additional burdens should be heaped on providers from other Member States, and tells us the expected outcome (‘so that …’). Foreign providers normally have complied with one set of regulations already, namely that of their home Member State. To comply with the host Member State’s set on top of that can be costly, and these costs must be recouped. Domestic competitors have already paid this entry price, as it were, to the market of that state, their home Member State. They can, therefore, offer their services more cheaply. For this reason, it is enough to consider the position of providers from other Member States alone. Any wider perspective would be boundless: beyond the regulation immediately in issue, shall we (and how?) also quantify the impact the host Member State’s tax, environmental, planning, transport, and employment legislation, to name but a few? It is impossible to reach any justiciable conclusions in this respect. For this reason, the Court rightly turned its face against such balancing exercises in the field of taxes and charges having equivalent effect to customs duties.48

It is a truism to say that competition takes place on markets. Hence, the provision of services in one Member State by a provider established in another means the extension of that provider’s activity into a new market (at least in the typical paradigm of a provider who is active on his home market as well). To put it differently, in this situation the provider seeks access to the market in the other Member State. From the finding of competitive disadvantages imposed on foreign providers of services it is, therefore, only a small step to say that their market access is negatively affected, that is, restricted. Again, this is no surprise: the entire project of creating the Internal Market is about guaranteeing economic operators established in any Member State the

48 Case 132/78 Denkavit Loire [1979] ECR 1923, para 8: taxes on imported lard that were meant to offset the slaughter fees borne by domestic pork producers.
legal possibility of access to the markets *everywhere* in the Union; it is then for other policies to make actual entry into foreign markets a commercially attractive proposition.

Notice, however, that we are again speaking of motivations. The aim of creating, as between Member States, conditions that come close to a single market on a continental scale is in the Treaty translated into specific provisions, among them Article 56. This and the other freedoms are all about market access: the ‘restrictions’ they seek to remove are restrictions to market access. It adds nothing to our understanding, therefore, to say that we are in the presence of a restriction when market access is made more difficult – we already knew that. Market access is, so to say, about the ‘why’, not the ‘how’ of creating the Internal Market through addressing prohibitions at Member States. Market access is not a test but an objective. The crucial question is, what specifically must Member States not do that restricts market access?

The Court, therefore, turns in circles when it says that ‘the concept of restriction covers measures taken by a Member State which, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder intra-Community trade.’

The Court does not, however, allow itself to be distracted by this. In the same judgment, it goes on to say that the obligation imposed by Italian law on insurers to accept anyone as a customer for certain types of insurance is likely to lead, in terms of organisation and investment, to significant additional costs for providers from other Member States. These might be required to rethink their business policy and strategy by, inter alia, considerably expanding the range of insurance services offered. ‘Inasmuch as it involves changes and costs on such a scale for those undertakings,’ the Court continues, ‘the obligation to contract renders access to the Italian market less attractive and, if they obtain access to that market, reduces the ability of the undertakings concerned to compete effectively, from the outset, against undertakings traditionally established in Italy.’

This brings together a number of the elements already discussed above. The result is certainly correct, but the way the Court gets there is not exactly straightforward.

The judgment in *United Pan-Europe Communications Belgium* displays a similar pattern. The Court there explained that the Belgian legislation in issue directly determined the conditions for access

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*99 Case C-518/06 Commission v Italy (’Third party liability motor insurance’) [2009] ECR I-3491, para 64; also in Case C-565/08 Commission v Italy (’Lawyers’ fees’) [2011] ECR I-0000 (29 March), para 46. – Equally critical of the Court’s case law on this point is J Snell, ‘The notion of market access: a concept or a slogan?’, (2010) 47 CML Rev. 437, 468 ff.: ‘Ultimately, the notion of market conceals rather than clarifies. The very ambiguity of the term may explain its use by and usefulness for the Court. … Market access may simply provide a sophisticated-sounding garb that conceals decisions based on intuition.’ See also G Davies, ‘Understanding market access: exploring the economic rationality of different conceptions of free movement law’, (2010) 11 German Law Journal 469–501.

50 Case C-518/06 (n 49), paras 66–70. The Court reasoned in a similar manner in Case C-465/05 Commission v Italy (’Private security services’) [2007] ECR I-11091, para 125, with regard to administrative control of the fees providers were allowed to charge, and in Joined Cases C-147/06 and C-148/06 (n 47), para 28, concerning a rule requiring the automatic exclusion of abnormally low tenders which ‘could deprive economic operators from other Member States of the opportunity of competing more effectively with operators located in the Member State in question and thereby affect their access to the market in that State, thus impeding the exercise of freedom of establishment and freedom to provide services’ (emphasis added).
to the market. It did so by imposing on the providers of services from other Member States (in
case, broadcasters) which were not granted a certain privileged status under that legislation a
burden that was not imposed on the privileged providers of services — those who were granted ‘must
carry’ status did not have to negotiate the terms of access to cable networks, the others did. Such
legislation was accordingly liable to hinder the provision of services between Member States.

From this, the Court concluded that the national legislation had the effect of making the provi-
sion of services between Member States more difficult than the provision of services purely with-
in Belgium.51 ‘To hinder’, ‘to make more difficult’, and ‘to affect market access’ are used synony-
mously in this passage. In substance, however, the Court’s findings hinge on the unequal, that is,
additional burdens imposed on providers from other Member States and on some domestic pro-
viders, i.e. on all those who were denied privileged status.

Here again, therefore, we find a whole array of more or less helpful descriptions or illustra-
tions of what are ‘restrictions’ in the sense of Article 56.52 The various expressions accompany, as
a kind of mood music, what really matters, namely the examination of the burdens imposed on
domestic providers and those from other Member States, respectively. So much verbiage is apt to
confuse the national courts and others called upon to interpret and apply Union law. It can also
obfuscate the Court’s reasoning or, more worryingly, tempt it to substitute intuition for reason-
ing.

C. Discrimination versus market access?

To make sense of the Court’s jurisprudence, the distinction has been suggested between a (mere)
discrimination test’, applicable to ‘rules relating to selling arrangements’, and a (more stringent)
market access test’ for ‘product requirements’.53 There are hints to that effect in the wording of
some of the Court’s judgments but overall, the Court’s jurisprudence hardly tallies with it. In
Morellato, for example, both terms appear side by side. On the one hand, the Court held that the
wrapping requirement was ‘in principle such as to fall outside the scope of Article [34 TFEU],
provided that it does not in reality constitute discrimination against imported products.’54 ‘Rules
relating to selling arrangements’ hence seem to be subject to a discrimination test. On the other
hand, the Court goes on to say that in the absence of domestic competition, the wrapping

51 Case C-250/06 United Pan-Europe Communications Belgium and others [2007] ECR I-11135, paras 33, 36.
52 See also the doubts entertained by D Edward and N Nic Shuibhne, ‘Continuity and change in the law relating to
services’, in A Arnull, P Eckhout, T Tridimas (eds), Continuity and Change in EU Law. Essays in Honour of Sir Francis
Jacobs, Oxford, (Oxford University Press) 2009, 243 at 256: ‘If market access is ultimately the best criterion, applic-
able across the range of internal market law, there must nevertheless be some way of delimiting the scope of the
freedom in relation to non-discriminatory obstacles. Otherwise, there is a danger of setting off again down the false
piste that ended with Kock’ — too right, but in what sense, then, is market access ‘the best criterion’?
54 Case C-416/00 Morellato v Commune di Padova, [2003] ECR I-9343, para. 36.
requirement ‘discourages [imports] or makes them less attractive to the final consumer.’ This could be read as a ‘market access’ test. The quoted passage is preceded, however, by the words, ‘such a requirement, although it applies without distinction, disadvantages imported products only’ – the traditional test for indirect discrimination known since Cassis de Dijon. The language of ‘market access’ is also used in the advertising and distribution cases discussed above, but it always appears in the context of a comparison between domestic and imported products.

This points to the fundamental problem with the suggested scheme: discrimination hampers market access; conversely, when market access is hindered one can (often) describe the obstacle in terms of discrimination. Article 34 certainly prohibits hindrances to market access – this is but a negative way of saying that the provision aims at promoting the creation of the internal market. At the same time, discrimination is no doubt one way of frustrating the aims of Article 34. Market access, however, is an aim and as such uncontroversial; to prohibit discrimination is a means to that end, if perhaps not the only one. To declare each of them a ‘test’ and to contrast them with one another yields no clear-cut results: they are not opposed to each other but correlated. ‘Discrimination’ and ‘hindrances to market access’ are not separate species of the same overarching genus of ‘hindrances to market access’. Instead, we have to look for subdivisions within the means of achieving market access. The search is really for a means to guarantee market access for imports that consists in prohibiting something other than discrimination.

If one were to extract some general statement from the Court’s case law on discrimination, one could safely say that the concept is a wide one. It encompasses both direct discrimination as a consequence of distinctly applicable national measures without a justification, and indirect discrimination ensuing from unjustified indistinctly applicable provisions in Member States. The missing subdivision of ‘hindrances to market access’ would, hence, have to be a non-discriminatory measure, that is, one with the same repercussions in law and in fact on imports and on domestic products. It must, furthermore, not merely depress the overall level of an otherwise continuing trade between Member States. The only remaining hindrance to market access to answer this description is a universal (indistinctly applicable) ban.

V. Restrictions on the use of services

Restrictions on the use of services have not yet, as far as one can see, been the subject of any judgment by the Court. Nevertheless, it is not difficult to imagine a situation in which the

55 Morellato (above n 54), para 37.
57 For a detailed discussion of the concept of discrimination in the context of the free movement of goods and of the other freedoms, see Enchelmaier (above n 17), at 252–272, with references to various alternative proposals.
58 See in and by n
59 Concurring, Oliver and Roth (above n 53), 414, 415; see already above in and by n 14.
question would become relevant, modelled on the facts of **Mickelsso n & Roos**. As an example, we can take the prohibition in Member State A of using mobile phones while driving a vehicle on public roads. To make this into a problem for European law, let us presume that the police in Member State A have fined a driver whose provider of mobile telephony services is established in Member State B. For simplicity’s sake, let us further presume that this driver is a national of Member State A who has never lived or worked in another Member State and has no intentions of doing so. That driver will raise the usual ‘Euro defence’ against the fine, namely that Member State A’s prohibition can not be enforced against him or her because it puts an unjustified obstacle in the way of the freedom to provide services. For a solution to this, we must return to the two judgments on the free movement of goods. The Court’s solution has been criticised above. Here is an alternative suggestion which can also be applied to restrictions on the use of services.

When restrictions of use of goods are under scrutiny (rather than adaptation costs), the legal regimes can be compared outright that govern the use of a given product in various Member States. It is true that one Member State’s rules do not apply in another, as much as one and the same tangible object cannot normally be used in two different Member States at the same time. Nevertheless, this was no obstacle in the paradigm case, *Cassis*, either. The French rules in accordance with which the blackcurrant liqueur was made were relevant in that case not because they applied in Germany. Instead, they remained the point of reference for the finding that the German authorities’ insistence on compliance with the German rules would have imposed additional costs on importers and others marketing the French product in Germany. In the end, the importers etc did not have to bear the additional costs of a separate production run for the German market since the German rules could not be enforced against Cassis: a declaration of the alcohol content on the label of the Cassis bottles afforded German consumers adequate safeguards. This declaration, in turn, made the French rules on alcohol content visible to the German consumer. The liqueur, or more precisely, the French rules in accordance with which it was made, thus benefitted from ‘mutual recognition’.\(^{60}\) Seen in this light, the comparison is ultimately of the rules in force in the different Member States.

Moreover, the (hypothetical) additional costs would have reduced the benefit that consumers hoped to derive from obtaining the product as it was. It is this benefit from products coming from other Member States, be it an economic or any other benefit, that the creation of the internal market is meant to afford anyone anywhere in the Community. The reduction of this benefit, therefore, calls for a justification. In this respect, it does not matter whether the loss results from additional costs or missed opportunities of use: in both cases, what is legal anywhere

\(^{60}\) See Armstrong and Wilsher (both above n 12).
in the Community must in principle be legal everywhere, except where concerns of public policy, as found in Article 30 and beyond, allow the importing Member State to deny ‘mutual recognition’.

Because the whole of the internal market is the perspective of Articles 18, 26 (ex Articles 12, 14 EC) and 34 TFEU, the reference uses are not only those legal in the Member State of exportation. In principle, ie justified denials notwithstanding, a product that can lawfully be marketed and used in any one Member State must be so marketable and usable in every other. This is again the principle of mutual recognition that the ECJ invoked in its ‘preliminary observations’. It follows from these same observations that the principle is applicable not only to national rules affecting the composition, presentation or marketing of a product, but also its uses. In other words, even though a particular use may be illegal in both the Member State of manufacture or export, and in the Member State of import, Article 34 will still apply if the use is legal in a third Member State.

The application of this standard is straightforward if a given product has only one ‘appropriate’ use, such as motorcycle trailers. As these can lawfully be used on (most) public roads in other Member States, the Italian prohibition required a justification. For this, it would be irrelevant whether, say, a French-made trailer may in France be used on all or any roads, as long as such use is legal in, for instance, Denmark: if anyone may use the trailer in this way, a justification is required why people in Italy should denied this use, and vice versa.

Matters are more complicated where a product has several uses, such as chemical compounds used as raw materials or in another capacity in a number of different production methods for a whole host of intermediate or end products. One could either require a justification whenever a Member State bans or restricts a (single) use that is more lightly regulated in another Member State; or only when no use is permissible anymore in the importing Member State that is allowed in any other. This paradigm would include the situation that the importing Member State is the only (or last) to permit any use of the product. By prohibiting this use the importing Member State would close down the market for any existing foreign suppliers. This situation can arise because legal use of the product in the suppliers’ home Member State is not a precondition for their right to market the product in the Member State that now proposes to ban the product’s use.

Mere reductions in the volume of trade do not qualify as restrictions of either the free movement of goods, or of the freedom to provide services. From this, it follows that a justification should be required only when a Member State bans the last permissible use. The

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61 On the Court’s methodology in this respect, see Enchelmaier (above n 17), 276–8.
62 For a detailed discussion of this, see Enchelmaier (above n 17), 300–6.
63 For an example, see Case C-473/98 Kemikalieinspektionen v Toolex Alpha [2000] ECR I-5681.
restriction of individual uses will reduce demand from those consumers who sought that specific use, but not from others. The restriction of a single use would, in other words, reduce overall turnover. Nevertheless, the market would remain open as consumers with different needs would still demand the product and could lawfully use it. It is irrelevant whether it would be an attractive proposition for importers to continue to meet the (reduced) demand. Article 34, as much as Article 56, seeks to keep markets open, not to guarantee the precise balance of supply and demand found on the market at any one time. These articles are meant to ensure the legal possibility, not the economic viability, of economic exchange between Member States. In the same vein, ‘the market’ is the place (a real or virtual location) where supply and demand can meet. The market is not equivalent to the present, real suppliers and consumers. For this reason, it is not open to an individual who is only interested in one, now illegal, use to argue that ‘their’ market is closed as a consequence of the restriction. As the product or service has, ex hypothesi, several appropriate uses, the market continues to exist, if on a smaller scale.

The situation only changes when no ‘appropriate’ use remains legal, which will invariably mean that there is no ‘significant’ demand for the product anymore. Such a restriction would be tantamount to a universal ban on the marketing of the product or service, only this time targeted at the demand side of the market. Metaphorically speaking, with respect to the particular product the Member State has, as a consequence of the ban, ceased to be part of an ‘internal market common to all the Member States. This is contrary to Article 26 TFEU (ex Article 14 EC). The restriction would hence require a justification.

This requirement would, however, only apply to the last restriction that the Member State imposed. The ones that went before were outside the scope of Article 34, even though they may individually have shrunk the market more than the last. This may at first sight appear arbitrary. It is unavoidable, however, if one accepts the ECJ’s starting point in Keck that not every limitation of traders’ commercial freedom (and pace Moped Trailers, likewise not every conceivable restriction of consumers’ use of a product) can lay national regulations open to scrutiny under Article 34. For such scrutiny to take place, imports must be subject to further-reaching restrictions in law or in fact, or the restriction must amount to a ban on the marketing of domestic and imported products alike. There might even be an indirect benefit in subjecting to a proportionality assessment only the one restriction that removes the last significant use of a product. The hassle and the potential pitfalls of having to justify its legislation may spur the Member State on to pursue the more important concerns first. In this way, the regulation of these matters would still be subject to potential attack under national law, but at least safe from review under Article 34.

Several or all restrictions of use may, finally, be contained in one single legislative act. If between them, they leave no significant legal uses, they can all be jointly scrutinised, regardless of
their individual impact on the market. Given that the Member State by their joint enactment treats them all as equally important, there is no reason to embark on a clumsy and uncertain assessment of individual impacts. In substance, those restrictions that pursue weightier objectives will stand a better chance of being found justified, anyway. To sum up, the test would be as follows:

1) Is the restriction of use indistinctly applicable? If yes,

2) Does the restriction have the same factual repercussions on imports and domestic products (if there are any)? If yes,

3) Does the restriction prohibit the last remaining use in the Member State in question in a situation where either such use remains legal in at least one other Member State, or the importing Member State is the last to allow this use?

If the answer to 1) or 2) is ‘no’, or if it is ‘yes’ to 3), the measure has an effect equivalent to a quantitative restriction and therefore requires a justification. Otherwise, it does not because it leads to a mere reduction in the volume of trade. Because the use in Sweden of jet-skis remained permissible at least on private waters and on general navigable waterways (however unattractive, unless ‘inappropriate’), the restrictions were not in breach of Article 34.

To return to the example of the prohibition of using mobile telephones while driving a vehicle on public roads: firstly, the rule applies regardless of where the provider is established, in Member State A or in another Member State. Secondly, there is no indication the prohibition would affect providers from other Member States more gravely than those established in Member State A. Providers established in other Member State are more likely to have more customers in their Member State of establishment, but these are not going not to draw on their services merely because they would not be allowed to use their phones while on the wheel in Member State A. Likewise, residents of Member State A’s choice of a domestic or a foreign provider will not be affected by the prohibition. Thirdly, the prohibition in issue does not prohibit the last remaining use. Away from the vehicle, or even inside it while not participating in traffic on public roads, customers remain as free as ever to receive the telephony services from Member State B. In all, therefore, the prohibition does not require a justification.

The Court, finally, would probably reach the same conclusion, as the remaining uses for mobile telephones using the services of providers established in other Member States could with some conviction be described as both ‘appropriate’ and ‘significant’. Trouble is, the Court might as well decide otherwise. Although they suggest otherwise, these criteria are incapable of any only roughly foreseeable quantification.
VI. Conclusion

The Court’s jurisprudence on the reach of the free movement of goods and of the freedom to provide services is again in flux, and following Moped trailers and Mickelsson & Roos, its direction is not entirely clear, nor are the results entirely satisfactory. ‘Market access’ is no panacea for defining which measures amount to restrictions of the respective freedom, nor has the Court developed a convincing methodology for dealing with restrictions of use. These problems can, however, be solved with some traditional tools that the Court has developed earlier, before it got into experimenting with ill-defined concepts over ones that were reasonably established and predictable in their application.