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Jean Monnet Working Paper 4/24

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A Recap 30 Years after Keck: Unbridgeable Differences or Recurring Tales in EU Market Jurisprudence?

NYU School of Law • New York, NY 10011
The Jean Monnet Working Paper Series can be found at
www.JeanMonnetProgram.org

ISSN 2161-0320 (online)
Copy Editor: Claudia Golden

New York University School of Law
New York, NY 10011 USA

Publications in the Series should be cited as:
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

A Recap 30 Years after *Keck:* Unbridgeable Differences or Recurring Tales in EU Market Jurisprudence?

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Contents

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Abstract

More than 30 years ago, the European Court of Justice ("ECJ" or "Court") adopted its famous decision in *Keck*. While the debate about the state of market jurisprudence has not caught much attention in recent years, discrepancies between *Keck* and subsequent case law, particularly the so-called market access test as arguably most prominently fleshed out by the ECJ in its 2009 judgment in *Italian Trailers*, remain. Both strands of case law have been subject to criticism (notwithstanding proponents on each side, of course). Put oversimplistically, it has been argued that *Keck* needs to be abandoned or its scope of application expanded, while *Italian Trailers* has been welcomed or criticised for over-expanding the notion of what constitutes a restriction of the free movement of goods rules, lacking contours, a nuanced legal test, and conferring vast supervisory power to the ECJ over national law. While acknowledging the advantages of both strands of case law, this article proposes a unified legal test that converges the two. In light of the restriction-justification approach that, as will be shown, currently predominates the free movement case law of the ECJ (while *Keck* has lost importance and even been applied inconclusively) this seems necessary to eliminate the arbitrariness inherent to the latter approach. Moreover, this approach would arguably render decisional outcomes more comprehensible and thus, from the perspective of a federal, multilevel political system with its shared competences, merit traceability and increased acceptance.

Keywords: *Dassonville*, *Keck*, *Italian Trailers*, Market Access Test, Restriction of the Free Movement of Goods Rules, Legal Empirical Study, Converging *Keck* and *Italian Trailers*, Certain Selling Arrangements, Market Jurisprudence, Negative Integration

A. Introduction

The state of market jurisprudence has not caught much attention in recent years.[1] However, as the famous landmark judgments of the ECJ in *Dassonville*[2] and *Keck*[3] recently celebrated their 40th and 30th jubilee it seems worth recapping and reflecting on the ECJ's market jurisprudence since then thereby reviving a debate that has become rather silent in the last few years, but, in my view, has by no means lost importance. Borrowed from *Enchelmaier* "[t]he provisions on the free movement of goods and their interpretation by the Court of Justice of the European Union … were and are central to the unification or Europe through law".[4]

As the reader of this journal very well knows, a couple of landmark cases mark the decades of existing market jurisprudence of the ECJ, namely *Dassonville*,[5] *Cassis de Dijon*[6] and *Keck*, as well as *Italian Trailers*,[7] arguably most prominently and explicitly fleshing out the so-called market access test, that can already be anticipated in earlier case law of the Court too.[8] While *Keck* was revolutionary as it curtailed the broad formula adopted in *Dassonville*, reiterated and emphasised in *Cassis de Dijon*, subsequent jurisprudence that has most prominently materialised in the landmark judgment of the Court in *Italian Trailers* in 2009 seems to prove another shift in paradigm.[9] The criticism of *Italian Trailers* mainly surrounds the ever-broadening interpretation of the ECJ of the notion of a restriction of the free movement rules.[10] Already the earlier decision in *Keck* brought along a vast body of discussion and contributions in the literature that is almost impossible to overlook

1 Apart from updated sections in the leading textbooks of course, i.e. *Barnard* (2022), *Craig/De Búrca* (2020); *Chalmers/Davies/Monti* (2024), as this author is aware, the more recent contributions in the literature are the following: *Schütze*, Eur. L. Rev. 2016/6, pp. 826–842; *Enchelmaier*, in: Craig/De Búrca (eds.), pp. 546–678. Other in-depth contributions were issued further back in time (see the references in this article in this regard).

2 CJEU, case 8/74, *Procureur du Roi v. Benoît and Gustave Dassonville*, ECLI:EU:C:1974:82.

3 CJEU, case C-267/91, *Keck and Mithouard*, ECLI:EU:C:1993:905.

4 *Enchelmaier*, in: Craig/De Búrca (eds.), p. 546.

5 CJEU, case 8/74, *Procureur du Roi v. Benoît and Gustave Dassonville*, ECLI:EU:C:1974:82.

6 CJEU, case C-120/78, *Rewe v. Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42.

7 CJEU, case C-110/05, *Commission v. Italy*, ECLI:EU:C:2009:66.

8 CJEU, case 229/83, *Leclerc v. Au blé vert*, ECLI:EU:C:1985:1, para. 26; CJEU, case C-405/98, *Konsumentombudsmannen (KO) v. Gourmet International Products AB (GIP)*, ECLI:EU:C:2001:135.

9 *Spaventa*, Eur. L. Rev. 2009/6. Dissenting: Also see: *Wenneras/Moen*, Eur. L. Rev. 2010/3.

10 To name a few only: *Snell*, Common Mkt. L. Rev. 2010/2; *Oliver*, p. 130; *Barnard*, Cambridge L.J. 2009/3, p. 593; *Lianos*, Eur. L. Rev. 2015/2; *Kingreen*, in: Callies/Ruffert (eds.), Art. 34 AEUV, para. 65; *Enchelmaier*, in: Craig/De Búrca (eds.), p. 575. Regarding the notion of a restriction to the free movement rules in a broader context, i.e. the context of other free movement rules see for example: *Schiek*, Eur. Const. L. Rev. 2017/4; *Spaventa*, Common Mkt. L. Rev. 2004/3.

in its entirety.[11] There are proponents and opponents, some argue *Keck* should be broadened to other categories and not be limited to certain selling arrangements only, others take the opposite view.[12] Meanwhile, the Court has arguably not been convinced by either of the proposed approaches, remaining silent and thus not changing (too) much. Hence, *Keck* and *Italian Trailers* do co-exist, notwithstanding the fact that, as will be shown in section C, the latter approach has gained in importance over the years.[13] A corollary of the predominance of the market access test is – broadly speaking – the inclusion of almost every measure of a Member State hindering market access or making it unattractive regardless of the fact that the national law or regulation is facially neutral and thus indistinctly applicable. In other words, the status quo in the market jurisprudence is characterised by a restriction-justification approach,[14] where a measure is easily caught by the notion of a restriction of the free movement (of goods) rules, while the burden to justify the latter, even those that apply indistinctly and thus do not discriminate (neither directly nor indirectly[15]), lies with the Member States. In fact, this is true even with respect to policy and regulatory areas that have actually remained within their national competences.[16]

Against this backdrop, the very origin of my engagement, which serves as the driving force behind this article, lies in the alleged emphasis on the market or market aspects in the case law of the ECJ. The socio-economic imbalance not only within the EU legal constitutional framework (characterised by a "social-deficit"[17]),

11 See, for many, *Enchelmaier*, in: Craig/De Búrca (eds.), p. 547 with further references; *Dietz/Streinz*, EuR 2015/1, p. 56 with further references; *Enchelmaier/Oliver*, Common Mkt. L. Rev. 2007/3, p. 649 with further references.

12 For an overview of the debate, see e.g. *Leible/Streinz*, in: Grabitz/Hilf/Nettesheim (eds.), Art. 34 AEUV, para. 82 et seq. illustrating the shortcomings of *Keck* as well as mapping out the divided positions in the literature; *Enchelmaier*, in: Craig/De Búrca (eds.), p. 547.

13 For an empirical proof of this contention, see section 3 below.

14 *Barnard* calls this very broad approach "restriction approach" (*Barnard*, Cambridge L.J. 2009/3); *Reynolds* uses the notion of "breach/justification methodology" (*Reynolds*, Common Mkt. L. Rev. 2016/3). I used the notion "restriction-justification approach" in *Zelger*, EuR 2023/2, p. 175 as well as in *Zelger*, wbl 2023/8, pp. 417 et seq.

15 For an illustration of directly and indirectly discriminating measures, see: *Enchelmaier*, in: Craig/De Búrca (eds.), p. 549.

16 For many: *Velyvyte*, Eur. L. Rev. 2023/6, p. 636; *Velyvyte*; I have articulated this argument also already in: Zelger, EuR 2023/2, p. 175.

17 *Joerges/Rödl*, Working Paper EUI LAW 2004/8.

but also within the jurisprudence of the ECJ is evident.[18] Arguably, the conferring of primary law status to the EU-Charter of Fundamental Rights[19] has not changed much in this respect.[20] Provocatively speaking, the potential threat of transforming "the European economic constitution into a neoliberal charter"[21] has become anything but an illegitimate criticism. This fuels not only the "social deficit", but also backs up the allegations of a "democratic deficit"[22] of the EU, as, borrowed from *Somek*, "[e]conomic liberalism is not democratic"[23]. Contributing to these difficulties is, arguably, the market jurisprudence of the ECJ itself. Looking at the ECJ's case law on (all four of) the Treaty free movement rules, the law has – over time – gradually developed towards a very wide concept for establishing a breach of the latter by means of the market-access test;[24] an approach that has not been without criticism,[25] as the market access test is non-nuanced, "intuitive"[26] and "based on an 'inherently nebulous' idea"[27]. Moreover, it confers a far-reaching "supervisory power over national law"[28] to the ECJ, while at the same time limiting the regulatory autonomy and power of EU Member States with respect to areas that have actually remained within their national competences.[29] From the perspective of a federal, multilevel political system this is as such contestable, as is whether it is the courts that should, by means of their rulings, make policy decisions for the polity

18 There is a vast body of literature regarding the socio-economic (im)balance of the EU constitutional framework and the EU courts case-law in this regard as debates regarding social dimension and balance between the market and social aspects have been accompanying the EU integration process ever since its very beginnings. The following is just an excerpt of existing contribution in the literature and does not claim to be exhaustive: *Detienne/Schmidt*, Utrecht L. Rev. 2019/2, pp. 81 et seq.; *Mulder*; *Garben*, Eur. Const. L. Rev. 2017/1, pp. 23 et seq.; various contributions of, inter alia and among others, *Bekker*, *Pochet/Degryse/van der Schyff/Lenaerts* and *Gutiérrez-Fons/Feenstra* in: Vandenbroucke/Barnard/De Baere (eds.); *Schiek*, Eur. Const. L. Rev. 2017/4, pp. 612 et seq.; *Reynolds*, Common Mkt. L. Rev. 2016/3, pp. 643 et seq.; *Mulder*, Eur. L.J. 2016/5, pp. 597 et seq.; *Ashiagbor*, Eur. L.J. 2013/3, pp. 303 et seq.; *Copeland*, Compar. Eur. Pol. 2012/4, pp. 476 et seq.; *Scharpf*, Socio-Econ. Rev. 2010/2, pp. 211 et seq.; *Barnard*, Cambridge L.J. 2009/3, pp. 575 et seq.; *Öhlinger*, in: Griller (ed.), pp. 269 et seq.; *Joerges/Rödl*, Working Paper EUI LAW, 2004/8, p. 3; *Spaventa*, Common Mkt. L. Rev. 2004/3; *Maduro*.

19 Since the Treaty of Lisbon the EU-Charter of Fundamental Rights enjoy primary law status, see Art. 6(1) TEU.

20 *Schiek*, Eur. Const. L. Rev. 2017/4, pp. 611 et seq., 614 et seq.; *Reynolds*, Common Mkt. L. Rev. 2016/3, pp. 643 et seq.

21 *Somek*, Eur. L.J. 2010/3, p. 332; further developing and elaborating on this argument in *Somek*, Eur. L.J. 2010/4, pp. 375 et seq.

22 *De Búrca*, U. Chi. L. Rev. 2018/2, p. 339.

23 *Somek*, Eur. L.J. 2010/3, p. 340.

24 CJEU, case C-110/05, *Commission v. Italy*, ECLI:EU:C:2009:66; *Van Cleyenbreugel/Miny*, in: Grégoire/Miny (eds.), pp. 275, 281.

25 To name a view only: *Barnard*, Cambridge L.J. 2009/3, p. 593; *Snell*, Common Mkt. L. Rev. 2010/2; *Enchelmaier*, in: Craig/De Búrca (eds.), p. 575.

26 *Spaventa*, Common Mkt. L. Rev. 2004/3, p. 758.

27 *Barnard*, Cambridge L.J. 2009/3, p. 593 referring to *Enchelmaier/Oliver*, Common Mkt. L. Rev. 2007/3, p. 674.

28 Ibid.

29 I have articulated this argument in *Zelger*, EuR 2023/2, p. 175.

in a federal, multilevel system at all.[30] Moreover, the EU courts are known for their "preference for the stability of the law"[31] and "inclination to follow precedents".[32] Therefore, they do not easily deviate from existing case-law.

This status quo appears to be, in my view, unsatisfactory and imbalanced. This is not to claim that facially neutral regulation should not be caught by the free movement provisions at all. Rather, what is needed is a test that is more nuanced and structured than the prevailing one, seemingly capturing almost any measure[33] so that a compatibility of the national law is in principle decided at the justification and proportionality level and thus subject to a balancing of interests by the Court. A too broad test or notion of what qualifies as a measure of equivalent effect to quantitative restrictions ("MEEQR") thus seems somehow arbitrary and, in my view, falls short of the legal certainty standard that is necessary in a political system of shared competences. Reducing the Member States' regulatory and legislative autonomy to a "freedom of choice"[34] as regards objectives that might potentially justify a restriction of the free movement rules (subject to the proportionality assessment of the Court) is, in my view, anything but pleasing.

In this article I will thus shed light on the notion of a restriction of the free movement rules with a glance through the lens of the free movement of goods case law. This seems justified by the fact that the latter is seen as "pacemaker among the four freedoms"[35]. Moreover, when looking at the vast body of jurisprudence of the ECJ that has evolved and developed over the decades, an interesting observation and claim can be made when it comes to expanding and curtailing the notion of a restriction of the free movement rules (i.e. particularly the notion of a MEEQR in case of indistinctly applicable rules). Arguably, the time has come for EU market jurisprudence history to repeat itself. In other words, what has been done by *Keck*, i.e. curtailing the very broad and vague formula as developed in *Dassonville* and confirmed and advanced in *Cassis de Dijon*, should be done now to limit the scope of an ever broadening notion of a restriction by means of the market access test that was (despite existing tendencies already in the very early case law of the ECJ[36]) most dominantly fleshed out by the 2009 landmark judgment of the Court in *Italian Trailers*. This demand is not new and neither is the criticism claiming that under the prevailing approach almost any national measure would be caught by the

30 *Young*, N.Y.U. L. Rev. 2002/6, p. 1643.
31 *Ibáñez Colomo/Lamadrid de Pablo*, in: Gerard/Merola/Meyring (eds.), pp. 348 et seq.; *Tridimas*, in: Dickson/Eleftheriadis (eds.), p. 307.
32 *Ibáñez Colomo/Lamadrid de Pablo*, in: Gerard/Merola/Meyring (eds.), pp. 348–349.
33 Opinion of AG *Kokott*, case C-142/05, *Åklagaren v. Percy Mickelsson and Joakim Roos*, ECLI:EU:C:2006:782, para. 42; *Barnard*, p. 28; *Leible/Streinz*, in: Grabitz/Hilf/Nettesheim (eds.), Art. 34 AEUV, para. 86 point at the risk of the free movement rules to turn into "liberalizing norms" (*Liberalisierungsnormen*); *Kingreen*, in: Callies/Ruffert (eds.), Art. 34 AEUV, para. 67 highlights the "infinite width of the free movement rules" at the level of what constitutes a "restriction" (translated by the author: *unendliche Weite der Grundfreiheiten auf der Beeinträchtigungsebene*).
34 *Enchelmaier*, in: Craig/De Búrca (eds.), p. 556.
35 Ibid, p. 546.
36 CJEU, case 229/83, *Leclerc v. Au blé vert*, ECLI:EU:C:1985:1, para. 27.

freedom of goods provisions. The very same argument has been articulated in the times preceding *Keck*.[37] Hence, I will argue and propose a possible way to converge the *Keck* and *Italian Trailers* lines in the case law to form a coherent framework that achieves both goals: providing a suitable, more nuanced yardstick (legal test) to tackle Member State regulations hindering market access through facially neutral (i.e. indistinctly applicable) rules, while at the same time putting an end to the restriction-justification trend. This approach will mitigate the presumption of illegality that currently benefits the free movement of goods rules, which arguably undermines Member States' regulatory autonomy to some extent. The reason why I consider such a unified, converged test valuable is twofold. First, a nuanced and structured test justifies the outcome of a decision by making it comprehensible. Hence, the trumping of market aspects over others might well be understood and even welcomed, if not caught by a vague and nebulous "catch-all-clause" (which the currently applied market access test arguably is). Second, a nuanced test leading to comprehensibility would, as another consequence, increase acceptance from a substantive perspective and thus change the perception of the current unbalanced interfering with national regulatory autonomy.[38]

Against this backdrop, Section B will briefly (to avoid carrying coals to Newcastle) illustrate the evolution of market jurisprudence throughout the years up until the decision of the Court in *Italian Trailers* by mapping out the relevant legal tests. Section C will then take a closer look upon the developments in the case law after *Italian Trailers* and prove, by means of an empirical analysis, that in most of the cases decided by the ECJ since 2009, the Court has predominantly applied the market access test. Therefore, while not abandoning *Keck* in its entirety, the logic underlying the aforementioned judgment has arguably lost importance. Section D will advocate for an approach acknowledging the underlying good of the *Keck*-logic and develop a way of bringing the two lines in the case law together. Moreover, the approach taken is not reinventing the wheel as, considering the grown and developed vast body of case law, such an approach would be a utopian vision. Rather the convergence of the different lines in the case law is proposed to be achieved by merging and fine-tuning what is actually already there (at least to a large extent). In this sense, I do propose one solution, but do not claim to have *the* solution, suitable for tackling some of the issues by fine-tuning and merging the tests currently applied. Section E provides a brief conclusion.

37 *Enchelmaier*, in: Craig/De Búrca (eds.), p. 563.

38 The need to increase acceptance seems backed by the finding of *Kelemen* and *Pavone* in: *Kelemen/Pavone*, Where Have the Guardians Gone?, p. 1, as the authors explain the plummeting of infringements launched by the Commission as deliberate choice and demonstrate "[…] that the Commission's political leadership grew alarmed that aggressive enforcement was exacerbating the erosion of intergovernmental support for its policy agenda". For this reason, so the authors argue, the Commission chose not to employ its legislative role as "engine of integration".

B. A brief history of EU market jurisprudence: from *Dassonville*, *Cassis de Dijon* and *Keck* to *Italian Trailers*

I. The early case law until *Keck*

Looking at the early case law of the Court in the area of the free movement of goods provisions, in *Dassonville* it introduced its well-known and very broad formula of what constitutes a MEEQR as stipulated in Article 34 TFEU. Accordingly, the notion shall capture all measures[39] "which are capable of hindering indirectly or directly, actually or potentially"[40] intra-Union[41] trade. The facts in *Dassonville* concerned a Belgian law that required Scotch whisky that was already duly imported into France to meet the requirement of an affixed "certificate of origin".[42] On the basis of not having complied with the Belgian statutory provisions, father and son Dassonville were accused of having engaged in forgery and thus faced court proceedings. In their defence, they claimed that the Belgian law opposed the free movement of goods provisions, i.e. in particular the notion of a MEEQR in what is today Article 34 TFEU; an argument that was accepted and affirmed by the Court and proved their position right.

The landmark judgment in *Dassonville* was followed by another significant case, *Cassis the Dijon*, which confirmed the broad formula while introducing the possibility that a breach of Art. 34 TFEU can be justified on grounds of general interest. This expanded the scope for justifying restrictions on the free movement of goods beyond the explicit exceptions listed in what is today Article 36 TFEU, by reference to a non-exhaustive list of mandatory requirements.[43] Moreover, the principle of mutual recognition has its roots in the latter judgment.[44] In *Cassis de Dijon*, the Court had to decide on the requirement of a minimum alcohol content of a certain liqueur, as stipulated by German law, in order for the liqueur to be sold in Germany. As the French liqueur "Cassis de Dijon" had less volume of alcohol it could not be imported and sold in Germany. Unsurprisingly, the ECJ qualified the law as a MEEQR according to Article 34 TFEU.

39 In the original decision in *Dassonville* the Court spoke of "trading rules", however, this has been replaced by referring to "rules" only: see CJEU, case C-412/93, *Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA*, ECLI:EU:C:1995:26, para. 18, as well as, in the more recent case law, by the notion of a "measure" of the Member States. For the latter see, for example, CJEU, case C-591/17 *Austria v. Germany*, ECLI:EU:C:2019:504, para. 120 and the case law cited.

40 CJEU, case 8/74, *Procureur du Roi v. Benoît and Gustave Dassonville*, ECLI:EU:C:1974:82, para. 5.

41 In *Dassonville*, the Court used the back-then appropriate term "intra-Community".

42 CJEU, case 8/74, *Procureur du Roi v. Benoît and Gustave Dassonville*, ECLI:EU:C:1974:82, p. 839.

43 CJEU, case C-120/78, *Rewe v. Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42, para. 8 with the non-exhaustive list that has continuously been expanded and is not exhaustive; see *Enchelmaier*, in: Craig/De Búrca (eds.), p. 556.

44 CJEU, case C-120/78, *Rewe v. Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42, paras. 14 et seq.

Both decisions mainly follow the logic of the principle of mutual recognition as well as the inherent idea that a double burden should not apply to products that have already been authorised to access the market in one of the Member States. However, the law as it stood after the Court's decisions in *Dassonville* and *Cassis the Dijon* was characterised by a very broad interpretation of what could be subsumed under the notion of a MEEQR.[45] A fact that was anything but uncontested and culminated in the landmark decision of the ECJ in *Keck* almost 20 years after *Dassonville*. The facts in *Keck* surrounded a French law that prohibited resellers from selling goods below the purchase price they had paid in the first place and thus banned them from selling the commodities at a loss.[46] The reality preceding the *Keck* ruling were calls to revise the case law particularly in light of a couple of cases that are known today as "Sunday trading cases"[47] during the period from the late 1980s until the early 1990s.[48] A fact that had become more and more delicate, arguably also from a political perspective.

In *Keck*, the Court thus narrowed down the scope of the notion of a MEEQR by stating in its famous paragraph 16 of the judgment that

> the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment …, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

Keck was welcome as it stipulated a rule that excluded certain selling arrangements from the scope of Article 34 TFEU altogether, given the respective rules (i) applied indistinctly and thus without differentiating between foreign and domestic goods (in other words the regulation needs to be facially neutral[49]), and (ii) affect in the same manner, in law and in fact, the marketing of domestic and foreign products. *Keck* was expected to have brought a change in paradigm, as it curtailed the broad interpretation of what constituted a MEEQR. However, the formula

45 *Doukas*, Cambridge Y.B. Eur. Legal Stud. 2007/9, p. 177; *Enchelmaier*, in: Craig/De Búrca (eds.), p. 563.

46 CJEU, case C-267/91, *Keck and Mithouard*, ECLI:EU:C:1993:905, para. 2.

47 E.g. CJEU, case C-145/88, *Torfaen Borough Council v. B & Q plc*, ECLI:EU:C:1989:593; CJEU, case C-169/91, *Council of the City of Stoke-on-Trent and Norwich City Council v. B & Q plc*, ECLI:EU:C:1992:519; CJEU, joined cases C-69/93 and C-258/93, *Punto Casa SpA v. Sindaco del Comune di Capena and Comune di Capena and Promozioni Polivalenti Venete Soc. coop. arl (PPV) v. Sindaco del Comune di Torri di Quartesolo and Comune di Torri di Quartesolo*, ECLI:EU:C:1994:226.

48 *Enchelmaier*, in: Craig/De Búrca (eds.), p. 546.

49 This expression is used in the US when writing about the same or at least a very similar issue in the context of the Dormant Commerce Clause. See, for to name view examples only: *Knoll*, Geo. Wash. L. Rev. 2023/1, pp. 21 et seq.; the US Supreme Court in its most recent decision on the Dormant Commerce Clause: *National Pork Producers Council et al.* v. *Ross*, 598 U.S. 356 (2023).

in *Keck* was limited to "certain selling arrangements" and thus (very) narrow in scope. Moreover, differentiating between product requirements and selling arrangements soon turned out to be a rather difficult exercise, particularly with respect to identifying a clear dividing line between the two in various real-life scenarios.[50] Hence, what was welcomed and appeared to have brought clarification "begot new controversies"[51]. Prime examples triggering controversy provide cases concerning advertisement restrictions,[52] restrictions on the use of goods,[53] bans or restrictions on transportation,[54] etc. While the Court qualified bans on advertisement in some cases as selling arrangements,[55] and thus exempted the latter (subject to the further requirements as established in *Keck*) from the ambit of Article 34 TFEU,[56] its approach is more market-friendly in other cases.[57] Hence, in the latter the Court did not exempt bans on advertisement by means of applying the *Keck* logic. Rather, the tendency towards the ever more expanding notion and concept of market access is clearly visible.[58] In addition, the Court has consistently been reluctant to expand

50 For an overview of the discussion and the different views and readings of *Keck* in the relevant literature, see *Enchelmaier*, in: Craig/De Búrca (eds.), pp. 568 et seq.

51 Ibid, p. 547.

52 CJEU, case C-292/92, *Ruth Hünermund and others v. Landesapothekerkammer Baden-Wiirttemberg*, ECLI:EU:C:1993:932, paras. 22, 24; CJEU, case C-412/93, *Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA*, ECLI:EU:C:1995:26, para. 24; CJEU, case C-6/98, *Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) v. PRO Sieben Media AG*, ECLI:EU:C:1999:532, paras. 47–48; CJEU, case C-71/02, *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, ECLI:EU:C:2004:181, paras. 39–40, 43. These cases contrast with the following decisions in the case law: CJEU, case C-34/95, *Konsumentombudsmannen v. De Agostini and TV-Shop,* ECLI:EU:C:1997:344; CJEU, case C-405/98, *Konsumentombudsmannen (KO) v. Gourmet International Products AB (GIP)*, ECLI:EU:C:2001:135.

53 E.g. CJEU, case C-142/05, *Mickelsson and Roos*, ECLI:EU:C:2009:336 on the restriction on the use of personal watercraft; CJEU, case C-473/98, *Kemikalieinspektionen v. Toolex Alpha AB*, ECLI:EU:C:2000:379 on the general prohibition on the use of trichloroethylene.

54 E.g. CJEU, case C-320/03, *Austria v. Commission*, ECLI:EU:C:2005:684 on a sectoral prohibition on the movement of lorries of more than 7.5 tonnes carrying certain goods; CJEU, case C-28/09, *Commission v. Austria*, ECLI:EU:C:2011:854, on the same matter.

55 CJEU, case C-292/92, *Ruth Hünermund and others v. Landesapothekerkammer Baden-Wiirttemberg*, ECLI:EU:C:1993:932, paras. 22, 24; CJEU, case C-412/93, *Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA*, ECLI:EU:C:1995:26, paras. 22 et seqq.; CJEU, case C-6/98, *Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) v. PRO Sieben Media AG*, ECLI:EU:C:1999:532, paras. 47 et seq.; CJEU, case, C-71/02, *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, ECLI:EU:C:2004:181, paras. 39–40, 43.

56 Ibid.

57 CJEU, case C-34/95, *Konsumentombudsmannen v. De Agostini and TV-Shop,* ECLI:EU:C:1997:344; CJEU, case C-405/98, *Konsumentombudsmannen (KO) v. Gourmet International Products AB (GIP)*, ECLI:EU:C:2001:135.

58 Ibid.

Keck to other types of measures altogether.[59] In the aftermath of *Keck*, it quickly became apparent that the hope it could provide *the* "more systematic solution"[60] for assessing indistinctly applicable rules was illusionary. Rather, the ECJ continued its broadening of the scope of Article 34 TFEU and the change in paradigm that some hoped *Keck* would bring along did thus not materialise. Nevertheless, the structure of the underlying legal test following the "traditional" *Dassonville-Keck* line in the case law reads as follows and shall briefly be displayed here to provide the basis for a convergence with the predominant market access approach in later case law as mapped out below (i.e. the market access test pursuant to the *Italian Trailers* case, see Section B.II).

Looking at the *Dassonville-Keck* strand of case law, three categories of measures can be abstracted qualifying as MEEQR. I will refer to this as "*Dassonville-Keck* logic" or "*Dassonville-Keck* approach" in the following. Accordingly, within the scope of a MEEQR fall(s)[61]

1. any measure (product requirements as well as certain selling arrangements) that differentiates between domestic and foreign products and therefore applies distinctly. Such measures are thus characterized by a discriminatory element.

   Examples: prohibition to sell *foreign* products via the internet only (while domestic products can be distributed online), a specific requirement that applies to the packaging of *foreign* chewing gums only (not however to the packaging of domestic chewing gums).

   (Referred to as "Category I" in the following)

2. product requirements that do not differentiate between domestic and foreign products and therefore apply indistinctly. Such a measure lacks a discriminatory element (as it applies to both, domestic and foreign products likewise). However, it constitutes a restriction as product requirements do, in principle and as a matter of fact, have a greater (negative) effect and put a greater burden on the marketing of foreign products.

   The underlying principle that is echoed in this logic is the principle of mutual recognition (*Cassis de Dijon*) and the idea that a double burden for foreign products to access the market of another Member State is inherent to product requirements.

59 The ECJ did, for example, not follow AG *Kokott* arguing to expand *Keck* to arrangements for use and thus exclude them from the scope of Article 34 TFEU in the same manner as certain selling arrangements; see Opinion of AG *Kokott*, case C-142/05, *Mickelsson and Roos*, ECLI:EU:C:2006:782, para. 47.

60 *Enchelmaier*, in: Craig/De Búrca (eds.), p. 547.

61 These categories are in parts inspired by *Barnard*, p. 600; *Enchelmaier*, in: Craig/De Búrca (eds.), pp. 568 et seq. I argued for a similar categorisation in: *Zelger*, wbl 2023/8, p. 421.

Examples: prohibition to sell non-packaged (*domestic and foreign*) chewing gum from vending machines,[62] prohibition to register a vehicle with a steering wheel on the left-hand side (by means of an obligation to reposition it to the right-hand side for registration).[63]

(Referred to as "Category II" in the following)

3. selling arrangements that do not differentiate between domestic and foreign products and therefore apply indistinctly, given they do, in fact, have a greater effect (put a greater burden) on the marketing of foreign products. Such a measure lacks a discriminatory element (as it applies to both, domestic and foreign products likewise). However, it constitutes a restriction if it has, in fact, a greater (negative) effect (puts a greater burden) on the marketing of foreign products. The decisive element in this assessment is the impact a measure has on the market access of a product. (This last limb is crucial and I will come back to this later!)

   Examples: prohibition on the sale of medication via the internet that applies to both domestic and foreign medication.[64]

   (Referred to as "Category III" in the following)

Category I, that is, measures with a discriminatory element, do not need much explanation. Eradicating discrimination is one of the main underlying principles of the free movement rules of the Treaties, and the harm and impediments that discrimination causes to market integration are obvious. However, upon a closer look, it arguably becomes apparent that the underlying logic of product requirements (2) and selling arrangements that are caught by the notion of a MEEQR (3), both of which are non-discriminatory and thus apply indistinctly, is identical.[65] As the impact of a product requirement results in a double burden for the foreign product, there is no need to assess the actual effect of the measure on the marketing and, consequently, the market access of the foreign product in a separate step. In other words, while it is clear that product requirements have, in fact, a greater impact on the marketing of foreign commodities, an *in extenso* assessment of the measure's impact, as is necessary in the context of selling arrangements, is not required.[66] Rather, the negative impact can be presumed. This is different in the case of selling arrangements. Their hindrance cannot be presumed but requires a further and thorough assessment of whether market access is impeded.

Moreover, when examining the categories, it becomes evident that many measures that are facially neutral and thus do not contain a discriminatory element

62 CJEU, case C-366/04, *Georg Schwarz v. Bürgermeister der Landeshauptstadt Salzburg*, ECLI:EU:C:2005:719.
63 CJEU, case C-639/11, *Commission v. Poland*, ECLI:EU:C:2014:173.
64 CJEU, case C-322/01, *Apothekerverband eV v. 0800 DocMorris NV und Jacques Waterval*, ECLI:EU:C:2003:664.
65 *Enchelmaier*, in: Craig/De Búrca (eds.), p. 570.
66 Arguing, essentially, in a similar way: *Enchelmaier*, in: Craig/De Búrca (eds.), p. 570.

are not adequately addressed by the system derived from the *Dassonville-Cassis de Dijon-Keck* triad. Examples to this effect include, as briefly illustrated above, advertisement restrictions, restrictions on the use of goods, bans or restrictions on transportation, etc. In light of this, the ECJ arguably intended to actually fill this gap with its decision and introduction of the test in *Italian Trailers*, notwithstanding the fact that such cases had already reached the Court in times preceding the aforementioned judgment.[67]

II. *Italian Trailers* – old wine in new bottles?

The case in *Italian Trailers* concerned a provision in the Italian Highway Code that stipulated a prohibition of using trailers together with a motorcycle. Hence, such usage was, due to road safety concerns, entirely banned from Italian roads and motorways. The general prohibition applied indistinctly, and thus, to foreign trailers in the same way as to domestic ones. Nevertheless the Court qualified the rules as restriction on the free movement rules (while exempting the latter at the justification level due to the very road safety concerns that formed the underlying reason for the Italian law in the first place).

In this light, *Italian Trailers* serves as a prime example of how far the restriction-justification approach has gone, whereby market logic very easily trumps every other legitimate interest and even fundamental rights,[68] while at the same time arguably undermining regulatory autonomy of the Member States. Road safety, and thus the respective legislation related thereto, such as the Italian Highway Code in *Italian Trailers* falls clearly within the array of competences of the Member States. However, a corollary of the very broad catch-all clause of the market access test arguably favouring liberalisation and following a pure market logic is that it was still caught by Article 34 TFEU.

In paragraph 37 of its judgment, the ECJ, after referring to its famous *Dassonville*-formula,[69] fleshed out a new test that had evolved over time. Tendencies of this development were clearly visible in earlier cases, such as *Leclerc*[70] (and thus even before the landmark judgment in *Keck*) as well as in *Gourmet International*[71] (in the context of advertising restrictions). The stipulated test of the Court can be abstracted and summed up in the following 3-step-test. Accordingly, the concept of a MEEQR captures all

1. measures adopted by a Member State the object or effect of which is to treat products coming from other Member States less favorably (referred to as "Level 1" in the following);

67 See all the case law cited, op. cit. *supra* note 52–59.
68 *Schiek*, Eur. Const. L. Rev. 2017/4; *Reynolds*, Common Mkt. L. Rev. 2016/3.
69 CJEU, case C-110/05, *Commission v. Italy*, ECLI:EU:C:2009:66, para. 33.
70 CJEU, case 229/83, *Leclerc v. Au blé vert*, ECLI:EU:C:1985:1, para. 26.
71 CJEU, case C-405/98, *Konsumentombudsmannen (KO) v. Gourmet International Products AB (GIP)*, ECLI:EU:C:2001:135.

2. 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.[72] The Court here refers, inter alia, to its landmark case in *Cassis de Dijon*.[73] (referred to as "Level 2" in the following) as well as
3. any other measure which hinders access of products originating in other Member States to the market of a Member State (referred to as "Level 3" in the following).

Upon a closer look, it becomes apparent that the three possible variants of the ECJ's test in *Italian Trailers* echo the above illustrated Categories I-III following the *Dassonville-Keck* approach. To a large extent, the latter are thus congruent. However, at Level 3 of the *Italian Trailers* test, the Court goes further and expands or stretches the notion of a MEEQR arguably to its very boundaries:

Looking at Category I of the *Dassonville-Keck* approach and Level 1 of *Italian Trailers*, both capture discriminatory measures of any nature, including product requirements, selling agreements, etc. Moreover, Level 2 is, from a substantive perspective, basically identical to Category II of the *Dassonville-Keck* logic. Both categories cover non-discriminatory measures, i.e. indistinctly applicable rules in the form of product requirements, and thus, encompass the principle of mutual recognition as developed in *Cassis de Dijon*. Level 3 is where it starts getting interesting, as it is at this level where the Court introduced its standalone market access test that lacks the contours that Category III following the *Dassonville-Keck* logic entails. By means of the very broad formulation that basically any other measure hindering market access of foreign products shall be covered by the concept of a MEEQR the Court went further than what Category III of the *Dassonville-Keck* logic is capable of covering. According to Category III it is non-discriminatory and thus indistinctly applicable rules (which affect foreign and domestic goods in the same manner *in law*) that are caught, given they do *in fact* affect the marketing of foreign commodities to a greater extent and thus put a greater burden on the latter's market access. Moreover, as mentioned above, the scope of *Keck* is limited to "certain selling arrangements" only and the Court has ever since this decision been rather reluctant to expand *Keck*'s scope.

In sum, the two strands in the case law are, in terms of substance, identical, except Level 3 and Category III, where *Italian Trailers* and thus Level 3 goes beyond Category III of the *Dassonville-Keck* logic. One potential intention and motivation of the ECJ to do so in *Italian Trailers* might have been to create a new category for measures that are neither discriminatory (according to Category I and Level 1 respectively) nor non-discriminatory product requirements (according to

72 The Court here refers to para. 35 of its judgment which refers, inter alia, to *Cassis de Dijon* (CJEU, case C-120/78, *Rewe v. Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42).

73 CJEU, case C-110/05, *Commission v. Italy*, ECLI:EU:C:2009:66, para. 35.

Category II and Level 2), to which a presumption of a greater *de facto* impact on the marketing of foreign products applies. In this vein, it thus replaced Category III following the *Dassonville-Keck* logic, which was arguably too limited in scope with the broader Level 3 test in *Italian Trailers*. Doing so it managed to now catch all the restrictions and obstacles on use, advertisement, transportation, etc, but has arguably overshot the mark and stretched the boundaries of the concept of a MEE-QR too far. Hence, while Category III of the *Dassonville-Keck* was not enough, Level 3 of *Italian Trailers* is arguably overdoing it. The result is a restoration of the very issues of the *Dassonville-Cassis de Dijon* saga from the very early days: a too broad notion of what constitutes a restriction on the free movement of goods rules lacking contours, nuances and a clear legal-test, which takes account of the very need of a balanced approach considering the federalist political system and thus competences of the Member States.[74] Consequently, it seems that a balanced approach would lie somewhere between Category III of the *Dassonville-Keck* logic and Level 3 according to *Italian Trailers*.

As a final remark, apart from the abovementioned decisions where a tendency towards the market access approach was already clearly visible in earlier case law of the Court (i.e. *Leclerc*[75] and *Gourmet International*[76]), the test according to Category III of the *Dassonville-Keck* logic is not free from the market access logic either. Rather, as illustrated above and detailed below (see Section D), the assessment of the *de facto* effect or impact of a non-discriminatory measure (i.e. an indistinctly applicable rule) on the marketing of a foreign product runs in the exact same vein.

C. Subsequent case law and the entrenchment of the restriction-justification approach

I. Analysis of the case law since *Italian Trailers*

The following section will shed light on the Court's case law since *Italian Trailers* up to its latest decision in March 2024. It will demonstrate the contended "entrenchment" of the restriction-justification approach by conducting a legal empirical study and analysing all decisions adopted in the context of the free movement of goods rules since *Italian Trailers* in 2009. The predominant test and logic applied by the ECJ in its recent cases clearly follows the market access logic. This approach arguably works to the detriment of a nuanced and structured test that justifies the outcome of a decision by making the trumping of market over other aspects comprehensible. Moreover, a nuanced test leading to comprehensibility and, as a consequence, an increase of acceptance would also change the perception of the

74 *Enchelmaier*, in: Craig/De Búrca (eds.), p. 574 raises a similar argument saying "(…) the Court's new formula will ultimately take us back to *Sunday trading*: anything that makes a cross-border trader's life more difficult restricts market access".

75 CJEU, case 229/83, *Leclerc v. Au blé vert*, ECLI:EU:C:1985:1, para. 26.

76 CJEU, case C-405/98, *Konsumentombudsmannen (KO) v. Gourmet International Products AB (GIP)*, ECLI:EU:C:2001:135.

current unbalanced interfering with national regulatory autonomy. Further details on the methodology and the table of cases including the analysis of each case can be found in Annex I.

Overall, there were 24 decisions of the Court concerning the notion of a MEE-QR[77] assessed, inter alia, against the benchmark of EU primary law, i.e. Article 34 TFEU. Categorizing the decisions by means of what measures were at stake (in terms of Category I-III or Level 1-3 categories), there were (i) four decisions concerning measures with a discriminatory element; (ii) twelve decisions concerned product requirements; and (iii) eight decisions concerned measures that could not be qualified as product requirement and were thus either selling arrangements or any other possible measure (see Chart 1). Indeed, in only two decisions the Court decided to apply the traditional *Keck* exemption,[78] and thus qualified the measures as selling arrangements according to *Keck*.

Furthermore, for an evaluation of the impact and significance of *Italian Trailers* the following grouped sets of decisions might be of interest.

The first set comprises all those decisions that concern indistinctly applicable rules that are any other measure but product requirements, i.e. basically Category III of the *Dassonville-Keck* approach for certain selling arrangements and Level 3 following *Italian Trailers* with its broader market access approach. While in 37% of the cases reference was made to *Italian Trailers* exclusively (Chart 2), looking at the decisions from a substantive perspective, in 75% of the cases concerning indistinctly applicable measures that were not product requirements, the ECJ actually operated complying with the logic of the market access test (Chart 3).

77 CJEU, case C-531/07, *Fachverband der Buch- und Medienwirtschaft v. LIBRO Handelsgesellschaft mbH*, ECLI:EU:C:2009:276; CJEU, case C-142/05, *Mickelsson and Roos*, ECLI:EU:C:2009:336; CJEU, case C-333/08, *Commission v. France*, ECLI:EU:C:2010:44; CJEU, case C-433/05, *Sandström*, ECLI:EU:C:2010:184; CJEU, case C-108/09, *Ker-Optika*, ECLI:EU:C:2010:725; CJEU, case C-421/09, *Humanplasma*, ECLI:EU:C:2010:760; CJEU, case C-443/10, *Bonnarde*, ECLI:EU:C:2011:641; CJEU, case C-28/09, *Commission v. Austria*, ECLI:EU:C:2011:854; CJEU, case C-484/10, *Ascafor and Asidac*, ECLI:EU:C:2012:113; CJEU, case C-456/10, *ANETT*, ECLI:EU:C:2012:241; CJEU, case C-171/11, *Fra.bo*, ECLI:EU:C:2012:453; CJEU, case C-150/11, *Commission v. Belgium*, ECLI:EU:C:2012:539; CJEU, case C-385/10, *Elenca*, ECLI:EU:C:2012:634; CJEU, case C-481/12, *Juvelta*, ECLI:EU:C:2014:11; CJEU, case C-573/12, *Ålands Vindkraft*, ECLI:EU:C:2014:2037; CJEU, case C-423/13, *Vilniaus energija*, ECLI:EU:C:2014:2186; CJEU, case C-354/14, *Capoda Import-Export*, ECLI:EU:C:2015:658; CJEU, case C-333/14, *Scotch Whisky Association*, ECLI:EU:C:2015:845; CJEU, case C-221/15, *Etablissements Fr. Colruyt NV*, ECLI:EU:C:2016:704; CJEU, case C-148/15, *Deutsche Parkinson Vereinigung*, ECLI:EU:C:2016:776; CJEU, case C-591/17, *Austria v. Germany*, ECLI:EU:C:2019:504; CJEU, case C-663/18, *B S and C A [Commercialisation du cannabidiol (CBD)]*, ECLI:EU:C:2020:938; CJEU, case C-662/21, *Book.fi Oy*, ECLI:EU:C:2023:239; CJEU, case C-558/22, *Fallimento Esperia and GSE*, ECLI:EU:C:2024:209.

78 CJEU, case C-108/09, *Ker-Optika*, ECLI:EU:C:2010:725; CJEU, case C-221/15, *Etablissements Fr. Colruyt NV*, ECLI:EU:C:2016:704.

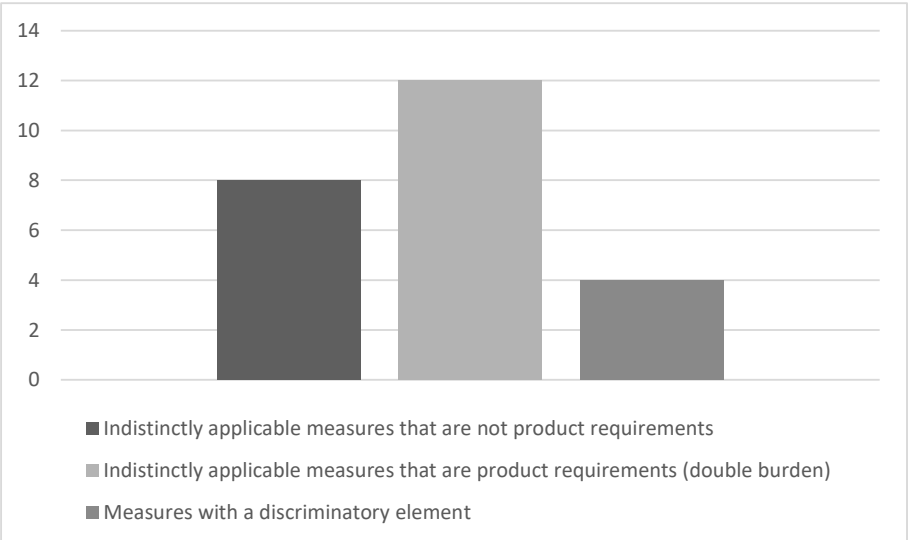

Chart 1[79]

79 Indistinctly appliable measures that are not product requirements: 8 cases (CJEU, case C-142/05, *Mickelsson and Roos*, ECLI:EU:C:2009:336; CJEU, case C-433/05, *Sandström*, ECLI:EU:C:2010:184; CJEU, case C-108/09, *Ker-Optika*, ECLI:EU:C:2010:725; CJEU, case C-28/09, *Commission v. Austria*, ECLI:EU:C:2011:854; CJEU, case C-456/10, *ANETT*, ECLI:EU:C:2012:241; CJEU, case C-333/14, *Scotch Whisky Association*, ECLI:EU:C:2015:845; CJEU, case C-221/15, *Etablissements Fr. Colruyt NV*, ECLI:EU:C:2016:704; CJEU, case C-148/15, *Deutsche Parkinson Vereinigung*, ECLI:EU:C:2016:776); Indistinctly applicable measures that are product requirements (double burden): 12 cases (CJEU, case C-333/08, *Commission v. France*, ECLI:EU:C:2010:44; CJEU, case C-421/09, *Humanplasma*, ECLI:EU:C:2010:760; CJEU, case C-443/10, *Bonnarde*, ECLI:EU:C:2011:641; CJEU, case C-484/10, *Ascafor and Asidac*, ECLI:EU:C:2012:113; CJEU, case C-171/11, *Fra.bo*, ECLI:EU:C:2012:453; CJEU, case C-150/11, *Commission v. Belgium*, ECLI:EU:C:2012:539; CJEU, case C-385/10, *Elenca*, ECLI:EU:C:2012:634; CJEU, case C-481/12, *Juvelta*, ECLI:EU:C:2014:11; CJEU, case C-423/13, *Vilniaus energija*, ECLI:EU:C:2014:2186; CJEU, case C-354/14, *Capoda Import-Export*, ECLI:EU:C:2015:658; CJEU, case C-663/18, *B S and C A [Commercialisation du cannabidiol (CBD)]*, ECLI:EU:C:2020:938; CJEU, case C-662/21, *Book.fi Oy*, ECLI:EU:C:2023:239); Measures with a discriminatory element: 4 cases (CJEU, case C-531/07, *Fachverband der Buch- und Medienwirtschaft v. LIBRO Handelsgesellschaft mbH*, ECLI:EU:C:2009:276; CJEU, case C-573/12, *Ålands Vindkraft*, ECLI:EU:C:2014:2037; CJEU, case C-591/17, *Austria v. Germany*, ECLI:EU:C:2019:504; CJEU, case C-558/22, *Fallimento Esperia and GSE*, ECLI:EU:C:2024:209).

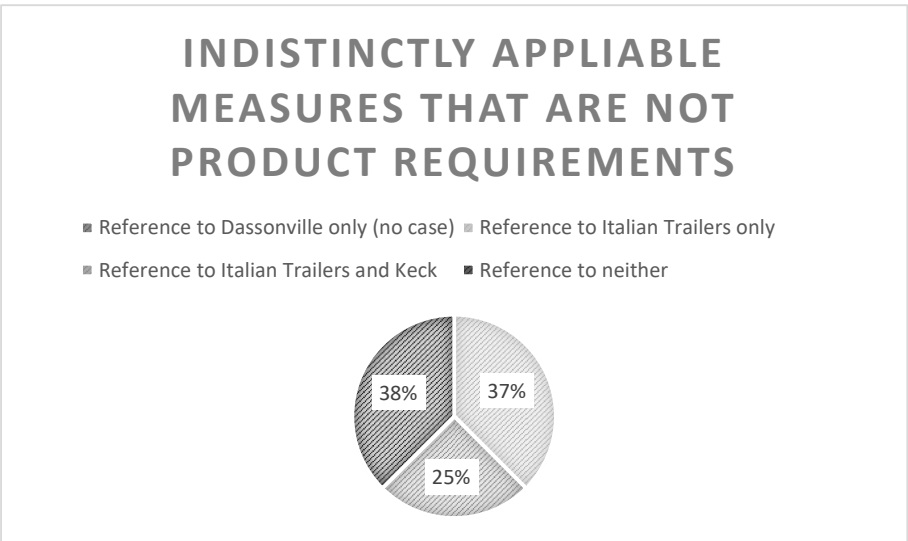

Chart 2[80]

The second set of decisions comprises all decisions that concern indistinctly applicable rules that qualify as product requirements, i.e. basically Category II of the *Dassonville-Keck* approach for certain selling arrangements and Level 2 following *Italian Trailers* (Chart 4). Interestingly, the main decision the Court refers to in 58% of the cases is still *Dassonville*. In none of the decisions did the Court refer only to *Italian Trailers*. However, based on a substantive analysis of the decisions that make no reference to either or refer to both of the judgments, the Court still employs the reasoning of the market access test in 42% of the cases.

80 Reference to *Dassonville* only: 0 cases. Reference to *Italian Trailers* only: 3 cases (CJEU, case C-142/05, *Mickelsson and Roos*, ECLI:EU:C:2009:336; CJEU, case C-456/10, *ANETT*, ECLI:EU:C:2012:241; CJEU, case C-333/14, *Scotch Whisky Association*, ECLI:EU:C:2015:845); Reference to both: 2 cases (CJEU, case C-108/09, *Ker-Optika*, ECLI:EU:C:2010:725; CJEU, case C-221/15, *Etablissements Fr. Colruyt NV*, ECLI:EU:C:2016:704); Reference to neither: 3 cases (CJEU, case C-433/05, *Sandström*, ECLI:EU:C:2010:184; CJEU, case C-28/09, *Commission v. Austria*, ECLI:EU:C:2011:854; CJEU, case C-148/15, *Deutsche Parkinson Vereinigung*, ECLI:EU:C:2016:776).

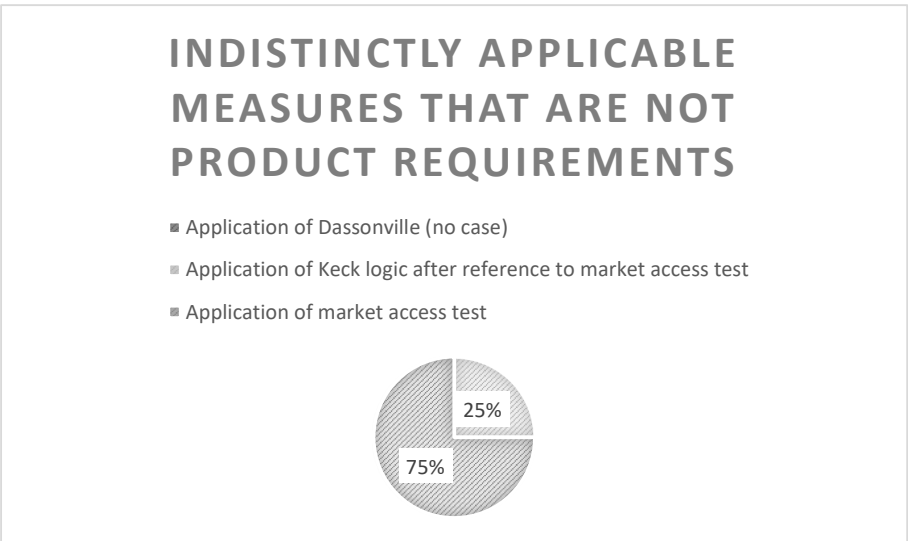

Chart 3[81]

81 Application of *Dassonville*: 0 cases; Application of *Keck* logic after reference to the market access test / *Italian Trailers*: 2 (CJEU, case C-108/09, *Ker-Optika*, ECLI:EU:C:2010:725; CJEU, case C-221/15, *Etablissements Fr. Colruyt NV*, ECLI:EU:C:2016:704); Application of market access test: 6 cases (CJEU, case C-142/05, *Mickelsson and Roos*, ECLI:EU:C:2009:336; CJEU, case C-433/05, *Sandström*, ECLI:EU:C:2010:184; CJEU, case C-28/09, *Commission v. Austria*, ECLI:EU:C:2011:854; CJEU, case C-456/10, *ANETT*, ECLI:EU:C:2012:241; CJEU, case C-333/14, *Scotch Whisky Association*, ECLI:EU:C:2015:845; CJEU, case C-148/15, *Deutsche Parkinson Vereinigung*, ECLI:EU:C:2016:776).

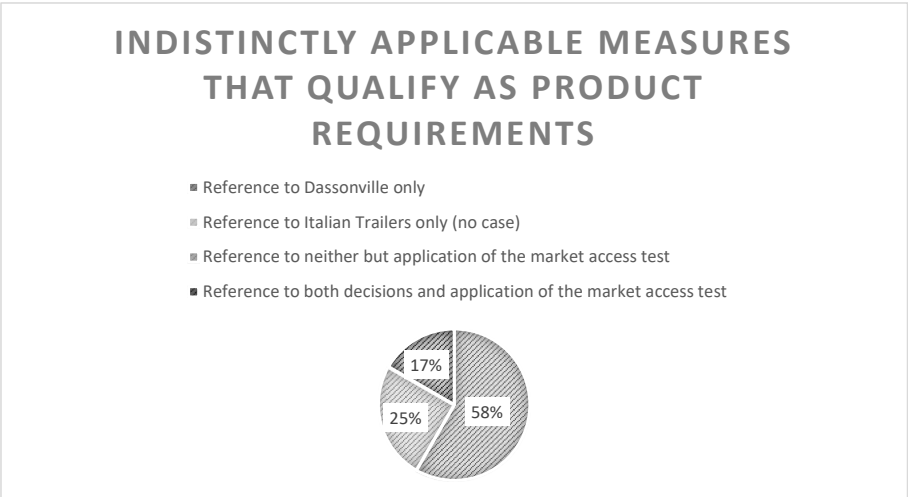

Chart 4[82]

II. Discussion of the findings and the case law

What conclusions can be drawn from these observations? First, the majority of the cases that reach the Court concern indistinctly applicable rules. Hence, unsurprisingly, discriminatory measures are not a big thing anymore (Chart 1). Second, with regard to indistinctly applicable measures and thus national regulation that is facially neutral, there are more cases concerning product requirements (imposing a double burden and breaching the principle of mutual recognition) than other measures, i.e. selling arrangements as well as all other arrangements (restrictions and obstacles on use, advertisement, transportation, etc.) that do not fall within the category of product requirements (Chart 1). However, looking at the impact *Italian Trailers* had on each of the two categories, the following conclusions can be drawn.

In the context of product requirements, the impact of *Italian Trailers* is rather subordinate, as the Court tends to cite its traditional line of case law, i.e. *Dassonville-Cassis de Dijon*, in 56% of the cases. However, in the remaining 42% of

82 Reference to *Dassonville* only: 7 cases (CJEU, case C-333/08, *Commission v. France*, ECLI:EU:C:2010:44; CJEU, case C-421/09, *Humanplasma*, ECLI:EU:C:2010:760; CJEU, case C-443/10, *Bonnarde*, ECLI:EU:C:2011:641; CJEU, case C-171/11, *Fra.bo*, ECLI:EU:C:2012:453; CJEU, case C-150/11, *Commission v. Belgium*, ECLI:EU:C:2012:539; CJEU, case C-481/12, *Juvelta*, ECLI:EU:C:2014:11; CJEU, case C-354/14, *Capoda Import-Export*, ECLI:EU:C:2015:658); Reference to *Italian Trailers* only: 0 cases; Reference to neither but application of the market access test: 3 cases (CJEU, case C-423/13, *Vilniaus energija*, ECLI:EU:C:2014:2186; CJEU, case C-663/18, *B S and C A [Commercialisation du cannabidiol (CBD)]*, ECLI:EU:C:2020:938; CJEU, case C-662/21, *Book.fi Oy*, ECLI:EU:C:2023:239); Reference to both and application of the market access test: 2 cases (CJEU, case C-484/10, *Ascafor and Asidac*, ECLI:EU:C:2012:113; CJEU, case C-385/10, *Elenca*, ECLI:EU:C:2012:634).

cases where there was no reference to either line or both lines of case law, the Court nevertheless uses "market access language" reminiscent of *Italian Trailers* (Chart 4). This finding is not surprising, as in *Italian Trailers*, the Court referred to *Cassis de Dijon* when defining Level 2 of the 3-step test, as abstracted above.[83] Moreover, considering that the two categories (Category II and Level 2) are substantively identical, there is not much to add.

A different picture emerges in the context of all other measures, i.e. selling arrangements and measures of any kind (restrictions and obstacles on use, advertisement, transportation, etc.) that do not fall within the category of product requirements. In other words, what about measures of Category III according to the *Dassonville-Keck* approach and Level 3 following *Italian Trailers*? The evaluation reveals a contrasting picture, as the market access test is referred to in 37% and substantively applied in 75% of the cases (Chart 2 and 3).

Consequently, the third conclusion that can be drawn is that the biggest impact of the ECJ's ruling in *Italian Trailers* concerns Category III or Level 3 measures, while it had a lesser impact on Category II or Level 2 measures (respectively). The explanation for this is, as mentioned, the identity of Category II and Level 2 from a substantive perspective.

Lastly, from a substantive perspective, the case law of the Court is not conclusive when it comes to facts that would, in principle, merit the application of the *Keck* exemption. In only two decisions of the cases at hand did the ECJ indeed employ *Keck*.[84] These cases concerned indistinctly applicable rules, i.e. the ban of online sales of contact lenses (and thus the ban of the internet as a distribution channel) in *Ker-Optika*, as well as a prohibition to sell tobacco products at a retail price which is lower than the indicated price on the stamp affixed to the product in *Etablissements Fr. Colruyt*. Interestingly, there are two other decisions concerning rules on determining product (retail) prices that would, following *Keck* and its logic regarding certain selling arrangements, fall within the ambit of the latter.[85] The case *Deutsche Parkinson Vereinigung* concerned a legally implemented system of fixed prices for the sale of prescription-only medicinal products by pharmacies. The *Scotch Whisky Association* case involved a law imposing a minimum price per unit of alcohol for the retail sale of alcoholic drinks in Scotland. However, in both cases, the Court followed the market access logic, which conflicts with *Keck* as well as with the judgment in *Etablissements Fr. Colruyt*.

83 CJEU, case C-110/05, *Commission v. Italy*, ECLI:EU:C:2009:66, para. 35; see above under B.II.

84 CJEU, case C-108/09, *Ker-Optika*, ECLI:EU:C:2010:725; CJEU, case C-221/15, *Etablissements Fr. Colruyt*, ECLI:EU:C:2016:704.

85 CJEU, case C-333/14, *Scotch Whisky Association*, ECLI:EU:C:2015:845; CJEU, case C-148/15, *Deutsche Parkinson Vereinigung*, ECLI:EU:C:2016:776.

D. The best of two worlds? How *Keck* and *Italian Trailers* can be converged

I. The proposed test …

In light of the above analysis, it seems valid to contend that *Keck* has lost importance over the years. This is supported by the finding that even in cases that would, in principle, fall within the ambit of *Keck*, the case law of the ECJ is not conclusive. Rather, considering the facts of the respective cases analysed, whether or not *Keck* is applied seems somewhat arbitrary. Why is a law regulating the minimum price for units of alcohol (*Scotch Whisky Association*) treated differently than minimum prices for tobacco products (*Etablissements Fr. Colruyt*)? More interestingly, why is the latter exempted according to *Keck* as a selling arrangement, while the system of fixed sale prices for prescription-only medicinal products is not, but instead is qualified as a restriction that needs justification? Even more absurdly, this restriction cannot be justified on grounds of protecting human health and life, as the legislation in question is deemed inappropriate for attaining the objectives pursued (*Deutsche Parkinson Vereinigung*)?[86] Hence, the case law does not only predominantly employ a very broad notion of what constitutes a restriction of the free movement rules, but it is also inconclusive as regards its application of *Keck*, particularly concerning rules determining (minimum) prices. Despite these inconsistencies in the Court's case law, it is my view that the underlying principle in *Keck* should not be forgotten. There is a reason why the Court, in light of the very broad concept of a MEEQR according to *Dassonville* (complemented by *Cassis de Dijon*), adopted the latter decision 30 years ago. This reason can arguably be found in the prevailing sentiments back then and the particular need, in light of the "Sunday trading cases", to curtail the broad notion of a MEEQR. This very reason or need, in my view, is worth recalling as it seems equally valid in the context of the prevailing, dominant application of the market access approach today.

Moreover, the criterion of market access can be found within *Keck* itself. Specifically, at the stage of Category III, when there is an indistinctly applicable measure, there is an assessment of whether the effect of such a measure has the same impact *in fact* on the marketing of foreign goods. How different is this from applying the market access test? Hence, some of the logic of *Keck* can arguably already be found in the *Italian Trailers* market access test or vice versa:[87] *Keck* is already familiar with the market access approach of *Italian Trailers*, as was, as pointed out above, *Leclerc* in the very early days too[88] and *Gourmet International*[89] in times following the judgment in *Keck*. So why do we not continue converging? This could be done with a finetuning of the market access test by integrating the deeper logic *underlying* the decision in *Keck* with the test as established in *Italian Trailers* at its Level 3.

86 CJEU, case C-148/15, *Deutsche Parkinson Vereinigung*, ECLI:EU:C:2016:776, para. 46.
87 Arguing similarly: *Enchelmaier*, in: Craig/De Búrca (eds.), p. 573.
88 CJEU, case 229/83, *Leclerc v. Au blé vert*, ECLI:EU:C:1985:1.
89 CJEU, case C-405/98, *Konsumentombudsmannen (KO) v. Gourmet International Products AB (GIP)*, ECLI:EU:C:2001:135.

This is not about expanding or transferring *Keck* as such, but rather making use of its carved-out, underlying conceptual idea. My claim is thus not to broaden the scope of *Keck* to measures other than certain selling arrangements. Rather, it is about transplanting the logic behind it! In a nutshell: When we abstract what *Keck* is about, it can be converged with the test in *Italian Trailers* providing for the curtailing element necessary to tame the very broad concept of the prevailing market access test.

So what is *Keck* in its essence about? When confronted with a measure that is facially neutral and thus applies without distinction to both, domestic and foreign commodities in the very same manner, it is all about whether its impact on the marketing is the same as regards domestic and foreign products. Hence, one limb is all about market access. The logic lying behind discrimination and the ban of protectionist measures is market access too. When there is a measure discriminating against products originating in a foreign (Member) State, market access is hindered. When there is no discrimination but a measure of protectionist character, market access is hindered. The same logic accompanies the product requirement or double burden category, again, market access is hindered, due to the double burden imposed on a foreign product by means of the product requirement. Following this logic, what unifies all the aforementioned examples, as well as the limb in *Keck* where it is about market access too, is – with the risk of stating the obvious: market access! Therefore, measures hindering market access should be caught by the notion of a MEEQR. So far, so good. This knowledge, however, does not yet help in fine-tuning the broad formula.

But in *Keck* there is more. *Keck* is, broadly speaking, about differentiation. It is about differentiating product requirements, where a de facto greater burden and impact on the marketing of foreign goods can be presumed from other measures which require an in-depth analysis of the de facto impact on market access. Following this logic of differentiation, when confronted with a facially neutral measure, should we not first ask whether the measure is directly hindering market access, or whether difficulties in market access are merely a consequence of market regulation that might affect domestic and foreign products equally?[90] For example, banning distribution channels is directly related to market access, as are rules that determine fixed or capped prices for goods. However, is a prohibition on advertising, a prohibition to drive on a motorway during weekends, or a prohibition to use a trailer with a motorcycle directly related to market access? I would say no. These rules regulate different policy areas within Member States, i.e. health (restricting advertising for tobacco products), the environment (the ban on using the motorway during weekends), and road safety (the ban on using trailers with a motorcycle). While these regulations might have an impact on trade, such impact is indirect, as these rules do not directly relate to market access, although they might certainly influence trade from outside the borders of a Member State. Market liberalisation

90 Making a similar differentiation between market access and market regulation already in 2000: *Weiler*, p. 228.

is meant to secure market access, not to warrant personal economic freedom to the greatest extent possible.[91]

The reason why rules that regulate trade are considered to hinder market access for foreign products is usually that these products would have a harder time establishing themselves in the market because of the existing regulations. But wait, isn't that part of how a market economy based on competition works? In other words, isn't it always hard to hit and enter a new market and compete with (well-)established market-players? Yes, it is (or might be). However, this does not justify the eradication of all rules governing this level-playing field, especially not indistinctly applicable rules and particularly not in light of policy areas that fall within the competences of the Member States. Restrictions on advertising do hamper domestic products too, as does a ban on driving the motorway on weekends and a ban on using trailers with a motorcycle (which was held to be justified by the Court anyway) or a ban to use a personal watercraft in waters other than designated "navigable waterways". Admittedly the given examples might provide for measures that make market-entry a bit more challenging and do have an influence on trade outside the borders of a Member State. However, again, this is how an economic system based on a competitive market works, and it has nothing to do with hindering market access as it should be understood in a multi-level system of market integration and shared competences. In the context of the latter, it is (or should be) about eliminating discrimination, protectionist measures and measures *directly* hindering market access. It is however not about making life easier for potential competitors and thus undermining the very idea of an economic system that is based on a market and competition.[92] As already emphasised, market liberalisation is to secure market access, not, however, to warrant personal economic freedom. In other words, borrowed from *Cruz* (already in 2002), "[t]he line dividing both interpretations of the […] free movement provisions may be thin, but never non-existent. This line is actually quite important, for it distinguishes between warranted interpretations of such provisions (as prohibiting unjustified restrictions of trade: ie an antiprotectionist construction) and unwarranted interpretations thereof (*as prohibiting all hindrance of individual commercial freedom*, i.e. an economic rights construction)" (emphasis added).[93] It seems that the ECJ has blurred the aforementioned lines over the years through its broad application of the market access test, qualifying both anti-protectionist measures and hindrances of individual economic or commercial freedom as restrictions on the free movement rules. Furthermore, in this sense, also the argument of the ECJ, as found in *Italian Trailers* and subsequent case law, that national laws that might have "considerable influence on the behaviour

91 *Cruz*, p. 118.

92 My reasoning here has, in parts, for sure been influenced by my reading of and engaging in the jurisprudence of the US Supreme Court on the *Dormant Commerce Clause*. To name the latest judgment only: *National Pork Producers Council et al.* v. *Ross*, 598 U.S. 356 (2023).

93 *Cruz*, p. 118.

of consumers"[94] and that laws leading to a situation where "[c]onsumers, knowing that the use permitted by [certain] regulations is very limited, have only a limited interest in buying that product"[95] seem inappropriate in the context of determining whether a measure hinders market access. Put even more provocatively, they seem ill-suited in the context of market liberalisation and the establishment of a single market as stipulated in the EU Treaties.

II. … applied to cases concerning indistinctly applicable measures not qualifying as product requirements

So how would the proposed approach affect the outcome of cases concerning indistinctly applicable measures that do not qualify as product requirements? The following section will exemplify the reasoning by applying it to cases concerning indistinctly applicable measures not qualifying as product requirements decided by the ECJ after *Italian Trailers* in 2009.

1. Non-pricing measures

Mickelsson and Roos[96] as well as *Sandström*[97] concerned a ban to use a jet ski or a personal watercraft respectively, in waters other than designated "navigable waterways". In my view, such a regulation is a measure that does not hinder market access. It is about market regulation that has nothing to do with direct market access. The restricted use of personal watercrafts in certain waters applies to all personal watercrafts regardless of their origin. Accordingly, following the proposed test, such a measure would not fall within the scope of a MEEQR and thus not within the ambit of Art. 34 TFEU. This outcome contradicts the reasoning of the ECJ but not the decision itself, considering its ultimate result. The ban was held, while still a matter for the national court to assess, to be justified by the Court anyway.[98]

Ker-Optika[99] was about a ban to sale contact lenses via the internet. Clearly, such a rule has an impact on market access, as it bans a whole distribution channel. Distribution channels are crucial when it comes to accessing a market. They are basically the main route to enter the latter. While the internet is only one among many other distribution channels, it is arguably an important one for foreign products, as foreign distributors usually do not have brick-and-mortar stores in every Member State. Hence, arguing that such a ban would have a greater impact on foreign pro-

94 CJEU, case C-142/05, *Mickelsson and Roos*, ECLI:EU:C:2009:336, para. 26; also in: CJEU, case C-110/05, *Commission v. Italy*, ECLI:EU:C:2009:66, para. 56.
95 CJEU, case C-142/05, *Mickelsson and Roos*, ECLI:EU:C:2009:336, para. 27; also in: CJEU, case C-110/05, *Commission v. Italy*, ECLI:EU:C:2009:66, para. 57.
96 CJEU, case C-142/05, *Mickelsson and Roos*, ECLI:EU:C:2009:336.
97 CJEU, case C-433/05, *Sandström*, ECLI:EU:C:2010:184.
98 CJEU, case C-142/05, *Mickelsson and Roos*, ECLI:EU:C:2009:336, para. 40.
99 CJEU, case C-108/09, *Ker-Optika*, ECLI:EU:C:2010:725.

ducers seems reasonable. Consequently, such a measure falls within the scope of a MEEQR and thus Art. 34 TFEU. This outcome aligns with the decision of the ECJ.

In *ANETT*,[100] tobacco retailers were prohibited from buying their products directly from foreign distributors. They were banned from using a potential distribution channel. Market access was clearly limited as they were restricted to only one channel for obtaining their tobacco commodities. Consequently, such a measure falls within the scope of a MEEQR and thus Art. 34 TFEU. This outcome also aligns with the decision of the ECJ.

Commission v Austria[101] concerned a prohibition for lorries over 7.5 tonnes carrying certain goods of the A12 motorway in Tyrol, Austria, due to environmental concerns and the aim to reduce air pollution. In my view, such a regulation does not hinder market access. It is a market regulation that has nothing to do with direct market access. The transportation of all products concerned is put on hold in this region during weekends when the ban on driving the motorway applies, regardless of where the goods come from. Put differently, all products loaded on trucks arrive one or two days later, regardless of the origin of the goods. Hence, it is a provision of market regulation and not related to market access, despite its impact on commerce in a broader sense. Following the proposed approach, such a measure would not fall within the scope of a MEEQR and thus Art. 34 TFEU. This outcome contradicts the decision of the ECJ.

Moreover, the measure at stake in *Commission v Austria* also serves as an example of why it is welcome and indeed necessary to develop a more nuanced test that curtails the notion of what constitutes a restriction of the free movement rules. There are clear risks in resolving all market jurisprudence cases at the justification and proportionality level, which include the following: The respective sectoral ban on driving on the A12 motorway in Tyrol (applicable on weekends and bank holidays) has already been subject to proceedings before the ECJ twice.[102] In 2011, the Court held that the sectoral traffic prohibition is justified on grounds of, *inter alia*, protection of health and the environment,[103] and qualified it as appropriate for attaining such objectives.[104] Hence, the cases were decided at the proportionality level. Consequently, a wide margin of shaping the respective national laws (in this case, state law, as the regulation falls within the competence of the Federal State

100 CJEU, case C-456/10, *ANETT*, ECLI:EU:C:2012:241.
101 CJEU, case C-28/09, *Commission v. Austria*, ECLI:EU:C:2011:854.
102 Ibid and CJEU, case C-320/03, *Commission v. Austria*, ECLI:EU:C:2005:684.
103 CJEU, case C-28/09, *Commission v. Austria*, ECLI:EU:C:2011:854, para. 118 also mentioning the need to ensure respect for private and family life enshrined in Article 7 of the Charter and Article 8(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
104 Ibid, para. 138. However, the Austrian authorities were under a duty to examine carefully the possibility of using measures less restrictive of the free movement rules (as were proposed by the Commission) and thus the measures adopted were considered going beyond what is necessary to attain the objective declared and thus fell within the ambit of Article 34 TFEU. In the aftermath to the judgment, Austria has caught up on the tasks necessary to meet the requirements as set out by the Court.

Tyrol/Land Tirol) again lies with the ECJ, which means it significantly interferes with national competences.

Moreover, the Court acts as a legislator in this regard. This would not be the case if the rule to ban lorries from a motorway in a specific region on weekends and bank holidays, which indistinctly applies to all lorries regardless of the origin of the commodities they are transporting, were considered not to fall within the ambit of Art. 34 TFEU as it concerns market regulation rather than market access *stricto sensu*. Despite the proceedings in 2005 and 2011, the topic has been subject to constant debate between Austria and Italy. Hence, it seems that we are now about to enter another round of action and court proceedings: Italy announced its intention to bring an action before the ECJ, as the Commission has decided not to initiate infringement proceedings while simultaneously articulating concerns as regards the compliance of the imposed regional measures with the free movement of goods rules.[105]

This situation reveals the issue of assessing the conformity of laws with the Treaty free movement provisions at the level of proportionality. The law adopted by the federal legislator (in this case, the governor, *Landeshauptmann*, of Tyrol) is only considered compliant with the free movement rules as long as the factual circumstances, such as the reduction of nitrogen dioxide emissions per year, remain unchanged. Therefore, as soon as there is circumstantial evidence that the situation has ameliorated or changed in any way, the entire dispute can be restarted, as the assessment of the same measure might turn out to be different due to new underlying circumstances. Moreover, it seems inherent to the nature and exercise of a proportionality assessment that there is always a certain extent of discretion involved. Therefore, in my view, there is a clear advantage to a nuanced test that exempts some measures from the ambit of Art. 34 TFEU altogether.

2. The inconclusive case law regarding pricing measures

In the context of cases concerning laws determining minimum prices for alcohol units (*Scotch Whisky Association*), tobacco products (*Etablissements Fr. Colruyt*) and prescription-only medicinal products (*Deutsche Parkinson Vereinigung*), the analysis and application of the proposed test becomes trickier due to the inconclusiveness of the Court's case law. In principle, one could argue that rules determining or fixing prices prevent companies from undertaking competitive pricing, which is the very basis upon which our competitive system underlying the economic system of a market is built. To this extent, pricing is crucial to market access, and thus, such measures fall within the scope of a MEEQR and Article 34 TFEU. This outcome complies with the Court's rulings and reasoning in *Scotch Whisky Association* and *Deutsche Parkinson Vereinigung*. Moreover, similar reasoning can already be found in *Leclerc* back in 1985. However, this approach of the ECJ clearly conflicts with

105 *ORF Tirol*, EU-Rüge für Tirol, Italien klagt Österreich, available at: https://tirol.orf.at/stories/3256950/ (13/8/2024).

Keck itself as well as the judgment in *Etablissements Fr. Colruyt*. Following the proposed logic here, the differentiation is about whether price regulation directly hinders market access or could rather be qualified as a rule of market regulatory nature. Since in *Keck* a pricing measure was explicitly qualified as a selling arrangement that applied in law and *in fact* indistinctly to all commodities (whether imported or not), it seems valid to stick to exempting pricing measures by means of the application of *Keck*. In other words, the finding that the impact of the measure is *in fact* the same for foreign and domestic products is preceded by an analysis of whether market access is harder for foreign goods; a question that in *Keck* was answered in the negative. Hence, in this light it seems legitimate and sound to stick to the reasoning that laws regulating prices qualify as selling arrangements.

However, according to one reading of the proposed logic here following a more economic based analysis as regards pricing measures as well as considering the decisions in *Scotch Whisky Association* and *Deutsche Parkinson Vereinigung* one could also argue the opposite. The argument would then read as follows: Laws determining prices for commodities affect market access, as pricing is a crucial parameter for market entry. Therefore, it qualifies as a rule that directly affects market access and is not merely a rule of market regulation. Hence, this measure would qualify as a MEEQR unless objectively justified. These two strands of reasonings are juxtaposed in the current case law, making it inconclusive. Moreover, while *Keck* could somehow be reconciled with the later judgments in *Scotch Whisky Association* and *Deutsche Parkinson Vereinigung*, *Etablissements Fr. Colruyt* (which was, from a chronological perspective, decided between the judgments in *Scotch Whisky Association* and *Deutsche Parkinson Vereinigung*) still would not fit (marching to a different drummer). An explanation of *Keck* could be the following: A rule that only bans resales *at a loss* still allows room for undercutting prices to enter a market and thus does not impede market access as such (admittedly though, it is still directly related to it). While the lower cost prices of imported commodities could still be reflected in retail prices for costumers, there is just a ban on undercutting too significantly. Selling below cost, i.e. at a loss, often makes no sense other than aiming to eliminate competition from an economic perspective. This is why, for example, from a competition law perspective, predatory pricing, which basically involves selling below certain costs,[106] is viewed critically (the competition provisions complementing the internal market rules in light of pursuing the goal of establishing and preserving the EU internal market).

Moreover, anti-dumping laws in international trade law follow a similar logic. In this vein, the decision seems reasonable, particularly in light of a system maintaining a competitive process and a market providing for a level playing field. Nevertheless, in light of *Scotch Whisky* and *Deutsche Parkinson*, the fact that *Keck* was also about a pricing measure is delicate. Moreover, as already emphasised, even if *Keck* is found to be compatible with the subsequent case law in *Scotch Whisky Association* and

106 See the respective test established by the ECJ in *AKZO*: CJEU, case C-62/86, *AKZO Chemie BV v. Commission*, ECLI:EU:C:1991:286, paras. 70 et seq.

Deutsche Parkinson Vereinigung, there is still *Etablissements Fr. Colruyt*. However, it seems to me that *Keck* should be famous for its underlying logic and principle of differentiation rather than for the specific measure itself. Furthermore, hope can rest with the ECJ to decide which line in the case law shall prevail in the context of pricing measures.

E. Conclusions

In this article, I argued that more than 30 years after *Keck*, its underlying logic is "old but gold". However, as has been shown, *Keck* has lost importance over the years and even been inconclusive, particularly as regards the core type of measure that initially led to the judgment in *Keck* and the exemption from the free movement rules for certain selling arrangements. In light of a bigger picture, it has been argued that EU market jurisprudence history should repeat itself and curtail the overly broad notion of what qualifies as a MEEQR. The reasons to do so are manifold. One among many is the expansive impact the so-called market access test, as arguably most prominently fleshed out in *Italian Trailers*, has had in the jurisprudence of the ECJ since 2009. However, upon closer examination, the two strands of case law, i.e. the traditional *Dassonville-Keck* approach and the 3-step test following *Italian Trailers*, have more in common than visible at first glance.

Moreover, it has been argued that these approaches can be converged and merged into an overall legal framework with contours and nuances, thereby curtailing the prevailing market access test, which – broadly speaking – catches almost every measure of a Member State one way or another considered "hindering" market access, regardless of the fact that the national law or regulation is facially neutral and thus indistinctly applicable. Following the proposed approach would abandon the prevailing restriction-justification approach in the case law and lead to a legal certainty standard (rather than preserving a sentiment of arbitrariness or intuition as exists with the prevailing market access test) that is necessary in a political system of shared competences. Such an approach would render decisional outcomes more comprehensible and thus arguably increase their acceptance. This article proposed a test that might tackle and solve some of the obscurities and frictions inherent to the two juxtaposed strands of case law by merging the best of both worlds and the aim to unify them.

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Annex
Overview of the main relevant decisions of the ECJ since the landmark ruling in Commission v Italy (C-110/05) dated 10 Feb. 2009

A) Methodology

The analysis covers all cases that were benchmarked against EU primary law (i.e. in particular Art 34 TFEU) and thus does not contain measures whose conformity with EU law was exclusively assessed on the basis of EU secondary law.[107] Moreover, also not included are restrictions in the context of parallel imports and the respective licenses or market authorizations in the pharmaceutical sector,[108] due to the very specifics of the pharmaceutical sector and its highly regulated markets. Moreover, also one decision which has not been translated into the English or German language,[109] was not considered. Therefore, the sample consists of 24 cases which were decided by the Court after its decision in *Italian Trailers* in 2009.

The cases were categorized (or coded) following the categories depicted in section 2 of this paper, i.e. Categories I-III of the *Dassonville-Keck* logic as well as Levels 1-3 following *Italian Trailers* and thus the market access test or logic which are the following:

107 CJEU, case C-478/07, *Budějovický Budvar, národní podnik v. Rudolf Ammersin GmbH*, ECLI:EU:C:2009:521; CJEU, case C-109/08, *Commission of the European Communities v. Hellenic Republic*, ECLI:EU:C:2009:346; CJEU, case C-132/08, *Lidl Magyarország Kereskedelmi bt v. Nemzeti Hírközlési Hatóság Tanácsa*, ECLI:EU:C:2009:281; CJEU, joined cases C-403/08 and C-429/08, *Football Association Premier League Ltd and others v. QC Leisure and others* (C-403/08) *and Karen Murphy v. Media Protection Services Ltd* (C-429/08), ECLI:EU:C:2011:631; CJEU, case C-446/08, *Solgar Vitamin's Franceand and others v. Ministre de l'Économie, des Finances et de l'Emploand and others*, ECLI:EU:C:2010:233; CJEU, case C-142/09, *Lahousse and Lavichy*, ECLI:EU:C:2010:694; CJEU, case C-161/09, *Kakavetsos-Fragkopoulos AE Epexergasias kai Emporias Stafidas v. Nomarchiaki Aftodioikisi Korinthias*, ECLI:EU:C:2011:110; CJEU, case C-216/11, *Commission of the European Communities v. French Republic*, ECLI:EU:C:2013:162; CJEU, case C-98/14, *Berlington Hungary Tanácsadó és Szolgáltató kft and others v. Magyar Állam*, ECLI:EU:C:2015:386; CJEU, case C-472/14, *Canadian Oil Company Sweden AB and Anders Rantén v. Riksåklagaren*, ECLI:EU:C:2016:171; CJEU, case C-114/15, *Association des utilisateurs et distributeurs de l'agrochimie européenne (Audace) and others*, ECLI:EU:C:2016:813; CJEU, case C-137/17, *Van Gennip BVBA and others*, ECLI:EU:C:2018:771; CJEU, case C-326/17, *Directie van de Dienst Wegverkeer (RDW) and others*, ECLI:EU:C:2019:59; CJEU, case C-222/18, *VIPA*, ECLI:EU:C:2019:751; CJEU, case C-648/18, *Hidroelectrica*, ECLI:EU:C:2020:723; CJEU, case C-178/20, *Pharma Expressz*, ECLI:EU:C:2021:551; CJEU, case C-24/21 *PH (Interdiction régionale de mise en culture d'OGM),* ECLI:EU:C:2022:526.

108 CJEU, case C-108/13, *Mac,* ECLI:EU:C:2014:2346; CJEU, case C-387/18, *Delfarma*, ECLI:EU:C:2019:556; CJEU, case C-602/192, *kohlpharma*, ECLI:EU:C:2020:804; CJEU, joined cases C-253/20 and C-254/20, *Impexeco NV v Novartis AG* (C-253/20) and *PI Pharma NV* v. *Novartis AG, Novartis Pharma NV* (C-254/20), ECLI:EU:C:2022:894; CJEU, case C-488/20, *Delfarma*, ECLI:EU:C:2021:956; CJEU, joined cases C-147/20, C-204/20 and C-224/20 *Novartis Pharma*, ECLI:EU:C:2022:89.

109 CJEU, case C-428/12, *Commission v. Spain*, ECLI:EU:C:2014:218.

Discriminatory provisions / provisions with a discriminatory element = category I, level 1 (4 cases)

Indistinctly applicable provisions – selling arrangements and other measures – reference to the *Dassonville-Keck* logic = category III (2 cases)

Indistinctly applicable provisions – product requirement / double burden / principle of mutual recognition – explicit reference to *Dassonville* or citation of the formula = category II (7 cases)

Indistinctly applicable provisions – product requirement / double burden / principle of mutual recognition – reference to Italian Trailers or application of the market access test (without reference) = level 2 (5 cases)

Indistinctly applicable provisions – selling arrangements and other measures – application of the market access test by reference to *Italian Trailers* or without reference (but applying its logic) = level 3 (6 cases)

The analysis of the cases was conducted first with identifying which case law the Court referred to. In a second step, a substantive assessment of the decision and the Courts reasoning was conducted in order to identify which logic or test was actually employed by the ECJ. This evaluation (or encoding) forms the basis for the findings depicted in section 3 of this paper. Hence, the following table provides the basis for the pie charts and graphs in the aforementioned section.

B) Table of cases and analysis

Discriminatory provisions / provisions with a discriminatory element

Indistinctly applicable provisions – selling arrangements and other measures – reference to the *Dassonville-Keck* logic

Indistinctly applicable provisions – product requirement / double burden / principle of mutual recognition – explicit reference to *Dassonville* or citation of the formula

Indistinctly applicable provisions – product requirement / double burden / principle of mutual recognition – reference to *Italian Trailers* or application of the market access test (without reference)

Indistinctly applicable provisions – selling arrangements and other measures – application of the market access test by reference to *Italian Trailers* or without reference (but applying its logic)

Decision	Case no. and date	Measure (Discrimination / Restriction)	Category I, II, III or Level 1, 2, 3	1. Reference to *Keck* and/or *Commission* v *Italy* (*Motoveicoli*) 2. Substantive analysis of the logic or test applied
Fachverband der Buch- und Medien-wirtschaft (LIBRO)	C-531/07, 30 Apr. 2009	Discriminatory rules for foreign and domestic books.	I, 1	Reference to *Keck* and *Commission* v *Italy*, para 17.
Mickelsson and Roos	C-142/05, 4 Jun. 2009	Indistinctly applicable provision / ban to use a jet ski or a personal watercraft, respectively, in waters other than designated 'navigable waterways'	3	Regarding double burden, para 24 refers to *Cassis de Dijon* (C-120/78) and para 67 in *Deutscher Apothekerverband* (C-311/01), the latter of which refers to *Keck*. Subsequent reference to *Commission* v *Italy*, i.e. the market access test, para 24. Application of the market access test paras 25-28.
Commission v. *France*	C-333/08, 28 Jan. 2010	Double burden / directly or at least indirectly discriminatory rules / prior authorization scheme on processing aids and foodstuff where their manufacturing process used processing aids from other Member States (where they were lawfully manufactured and/or marketed)	II	Reference to *Dassonville*, para 74 (and further case law too).
Sandström	C-433/05, 15 Apr. 2010	Indistinctly applicable provision / ban to use a jet ski or a personal watercraft, respectively, in waters other than designated 'navigable waterways'	3	No elaborations / explicit reference to either of the cases, but the reasoning clearly follows the Mickelsson and Roos judgement.
Ker-Optika	C-108/09, 2 Dec. 2010	Indistinctly applicable provision / prohibition to sell contact lenses via the internet	III, 3	Reference to *Dassonville, Keck* and *Commission* v *Italy*, para 51. The ECJ introduces its three-steps-test, however, it then follows the *Keck*-reasoning as the national provisions concerned selling arrangements. The Court concludes that the prohibition to sell contact

				lenses via the internet affects the selling of foreign contact lenses in a different manner and thus significantly impedes market access (paras 52, 54, 55). Therefore, the ECJ applies the limb of the *Keck* test that concerns the question whether the indistinctly applicable rules affect the selling of foreign products in the same manner as it affects the selling of domestic ones.
Humanplasma	C-421/09, 9 Dec. 2010	Double burden / indistinctly applicable provision or indirectly discriminatory / Austrian legislation which provides that the importation of blood or blood components from another Member State is permitted only on the condition, which is also applicable to national products, that the donations of blood on which those products are based were made without any payment being made to the donors, even in terms of the coverage of costs.	II	Reference to *Dassonville*, para 26. Double burden logic can be found in para 29.
Bonnarde	C-443/10, 6 Oct. 2011	Double burden / indistinctly applicable provision or indirectly discriminatory / French legislation which provides that the grant of an advantage may only be awarded for demonstration motor vehicles the registration document of which states that it was a 'demonstration vehicle'.	II	Reference in para 26 to, inter alia, para 16 in *Commission* v. *Belgium*, which refers to *Dassonville/ Keck.* Double burden logic can be found in para 27, with reference to para 67 *Deutscher Apothekerverband* (C-311/01), which refers to *Keck*.
Commission v. *Austria*	C-28/09, 21. Dec. 2011	Indistinctly applicable provision / sectoral traffic prohibition for lorries of over	3	No elaborations / explicit reference to either of the cases.

		7.5 tonnes carrying certain goods at a section of the A 12 motorway in Tyrol during weekends		The Court identified an obstacle to the free movement of goods and made a reference in para 116 to an earlier decision concerning the very same system in C-320/03, *Commission* v. *Austria* (*Sectoral Traffic Prohibition I*). The latter was held to be justifiable due to air pollution reasons, but did not to meet the proportionality requirements necessary to be successfully justified. Application of the market-access logic. In *Sectoral Traffic Prohibition I* the Court referred to the broad formula of *Dassonville*, para 67.
Ascafor and Asidac	C-484/10, 1 Mar. 2012	Double burden / indistinctly applicable provision or indirectly discriminatory / Spanish legislation (indistinctly applicable rule) regarding the quality of reinforcing steel stipulating that it must comply with a certain industrial quality and safety standards, i.e. technical specifications which products must satisfy in order to be used in the construction sector in Spain.	2, II	Reference to *Dassonville* in para 52. Reference to *Commission* v *Italy*, in the context of depicting the double burden logic, para 53. Application of the market access test / logic para 55 et seq.
ANETT	C-456/10, 26 Apr. 2012	Indistinctly applicable provision / prohibition on tobacco retailers to import tobacco products from other Member States	3	Reference to *Commission* v *Italy*, para 33 et seq and *Ker-Optika.* The ECJ applies the market access test, para 33 et seq. No mentioning of *Keck*.
Fra.bo	C-171/11, 12 Jul. 2012	Double burden / indistinctly applicable provision or indirectly discriminatory / presumption of compliance with national law by means of certification	II	Reference to *Dassonville*, para 22 (and further case law too).

		proceedings conducted by a private-law company located in the very Member State.		
Commission v. *Belgium*	C-150/11, 6 Sep. 2012	Double burden / indistinctly applicable provision or indirectly discriminatory / Belgium legislation requiring, in addition to the production of a certificate of registration, the production of a certificate of conformity of a vehicle for the purpose of a roadworthiness test prior to the registration of a vehicle which was previously registered in another Member State. Therefore, vehicles are subject to a roadworthiness test prior to their registration, without taking into account the results of the roadworthiness test carried out in another Member State.	II	Reference in para 50 to, inter alia, para 16 in *Commission* v. *Belgium*, which refers to *Dassonville/ Keck* and para 26 in *Bonnarde* (which again refers to para 16 in *Commission* v. *Belgium*). Double burden logic is found in para 51.
Elenca	C-385/10, 18 Oct. 2012	Double burden / indistinctly applicable provision or indirectly discriminatory / Italian legislation which automatically make the marketing of construction products (inflatable liners for flues and chimney pipes), such as those at issue in the main proceedings, originating from another Member State, subject to the affixing of a CE marking (for products that are not covered by the EU Directive).	2, II	Reference to *Dassonville* in para 22. Reference to *Commission* v *Italy*, in the context of depicting the double burden logic, para 23. Application of the market access test / logic para 25 et seq. (Reasoning similar to *Ascafor and Asidac* C-484/10 above)

Juvelta	C-481/12, 16 Jan. 2014	Double burden / directly or at least indirectly discriminatory rules for goods of precious metals and gemstones imported from another State (where they are permitted to be put on the market) as they may be sold without the mandatory hallmark or the certificate of quality (according to the Lithuanian law) only, where they have been assayed and stamped with the hallmark of an independent assay office authorized by that State, and bear the mandatory responsibility mark, registered in that State and struck thereon when they were made.	II	Reference to *Dassonville* and *Ker-Optika*, para16 (and further case law too).
Ålands Vindkraft	C-573/12, 1 Jul. 2014	Discriminatory provisions / provisions with a discriminatory element / Swedish legislation that made the award of green electricity certificates for electricity production installations (e.g. windfarms) subject to them being located within Sweden.	1	Reference to *Dassonville*, para 66. Application of the market access logic, para 70 et seq.
Vilniaus energija	C-423/13, 10 Sep. 2014	Double burden / Indistinctly applicable provision / national legislation and practice, which subject remote (telemetric) data-transmission devices lawfully manufactured in other Member States to a metrological verification.	II, 2	No reference to either of the decisions is made. ECJ applies the market access test, para 48. The Court refers to the line in the case law concerning national legislation subjecting lawfully manufactured products in another Member State to a prior approval procedure / national approval certificates / national type-approval

				stamp (C-388/00 und C-429/00 *Radiosistemi Srl* v *Prefetto di Genova*, C-14/02 *SA* v *Belgian State*, C-432/03 *Commission* v *Portugal*), para 48.
Capoda Import-Export	C-354/14, 6 Oct. 2015	Double burden / directly or at least indirectly discriminatory rules / Romanian legislation making the marketing of new spare parts for road vehicles (water pumps and fuel filters) subject to the application of an approval or homologation procedure in Romania, unless it is shown, by means of a certificate of approval or homologation, that those products have already been subject to such a procedure in another Member State or that they are original parts or spare parts of matching quality within the meaning of that legislation, a document issued in that respect by the distributor not, however, being considered sufficient.	II	Reference to *Dassonville*, para 39. Double burden logic is found in para 40.
Scotch Whisky Association	C-333/14, 23 Dec. 2015	Indistinctly applicable provision / legislation determining a minimum price of alcoholic drinks calculated according to the alcoholic strength of the product	3	Reference to *Commission* v *Italy*, para 32 and *ANETT*. The ECJ applies the market access test, para 32.
Etablissements Fr. Colruyt	C-221/15, 21 Sep. 2016	Indistinctly applicable provision / Belgian legislation which prohibits retailers from selling tobacco products at a retail price which is lower than the price indicated by the manufacturer or	3, III	Reference to *Dassonville*, para 33 and Scotch Whiskey (C-333/14), which refers to to *Commission* v *Italy*, para 32 and *ANETT*. Reference to *Italian Trailers*, para 35, after having stipulated the *Keck*-logic / formula, as the national

		importer on the revenue stamp affixed to those products.		provisions concerned selling arrangements, without, however, explicitly referring to the latter. Hence, in the context of the 'market access limb' of *Keck*, the Court refers to *Italian Trailers* in para 35 as well as subsequently, in para 37, to *LIBRO* (C-531/07), in which it is referred to *Keck*. The decision contrasts with the outcomes in *Scotch Whisky* (C-221/15) and *Deutsche Parkinson* (C-148/15), as the fixed prices were exempted according to the *Keck*-logic/reasoning.
Deutsche Parkinson Vereinigung	C-148/15, 19 Oct. 2016	Indistinctly applicable provision / setting of fixed prices of prescription-only medicinal products for human use	3	No reference to either of the decisions is made. The ECJ applies the market access test, para 23. Reference to the ECJ decision in *Deutscher Apothekerverband eV* v. *0800 DocMorris NV und Jacques Waterval* (*DOC MORRIS*) dated 11 Dec. 2003 (C-322/01), in which the Court referred to *Keck*, para 68.Also see para 71 et seq, referring, *inter alia*, to its decision in *Société d'Importation Edouard Leclerc-Siplec* v *TF1 Publicité SA and M6 Publicité SA* (C-412/93), i.e. one of the early cases regarding advertisement restrictions which the Court qualified them as selling arrangements and thus applied *Keck*.
Austria v. *Germany*	C-591/17, 18 Jun. 2019	Provision with a discriminatory element / facially neutral provision with an indirectly discriminating element due to the situation in which owners of vehicles registered in Germany qualify for relief from motor vehicle tax in an	I, 1	No reference to either of the decisions is made. The ECJ applies the market access test, para 121. Reference to a decision of the ECJ from 2014 in *Commission* v *Spain* (C-428/12), in which the Court refers, in para 29, to *Commission* v *Italy*.

		amount corresponding to an infrastructure use charge for passenger vehicles (for driving on German motorways)		
B S und C A [Commercialisation du cannabidiol (CBD)]	C-663/18, 19 Nov. 2020	Double burden / indistinctly applicable provision or indirectly discriminatory / French legislation prohibiting the marketing and distribution of hemp oil electronic cigarettes containing CBD when it is extracted from the *Cannabis sativa* plant in its entirety and not solely from its fibre and seeds.	II, 2	No reference to either of the decisions is made. Reference in paras 79-81 to paras 119-121 in *Austria v. Germany* (C-591/17), in which the market access test is applied. The ECJ applies the market access test, para 81.
Book.fi Oy	C-662/21, 23 Mar. 2023	Double burden / indistinctly applicable provision / national legislation requiring age classification and thus not accepting age classification for the online selling of audiovisual recordings made by another Member State	II, 2	No reference to either of the decisions is made. The ECJ applies the market access test, para 34. Reference of the decision in *Republic of Austria* v *Federal Republic of Germany* (C-591/17), para 121, in which the ECJ refers to a decision from 2014 in *Commission* v *Spain* (C-428/12). As regards the latter the Court, in para 29, refers to *Commission* v *Italy*.
Fallimento Esperia and GSE	C-558/22, 7 Mar. 2024	Discriminatory provisions / provisions with a discriminatory element / Italian legislation requiring importers of electricity from another Member State that do not demonstrate that the imported electricity is produced from renewable sources by submitting guarantees of origin, to buy from national producers either green certificates or green electricity in proportion to the amount of electricity	1	Reference in para 105 to para 66 in *Ålands Vindkraft* which refers to *Dassonville*.

		that they import. Second, the law provides for penalties to be imposed in the event that that obligation is not complied with, whereas national producers of green energy are not bound by such a purchase obligation.		