Case Notes

What about Sunday Trading ...? – The Rise of Market Access as an Independent Criterion under Article 34 TFEU

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Case C-456/10, Asociación Nacional de Expendedores de Tabaco y Timbre (ANETT) v Administracion del Estado.[1]

I. Introduction

In the case under review the Spanish *Asociación Nacional de Expendedores de Tabaco y Timbre* [hereafter ANETT] claimed that a national rule prohibiting tobacco retailers in Spain from importing tobacco products from other Member States while exclusively granting these powers to a national wholesaler with a commercial monopoly violated Article 34 TFEU. In its judgment the Court of Justice of the European Union [hereafter CJEU] quickly dismissed that said national rule would be covered by Article 37 TFEU relating to State monopolies of a commercial character. It was equally quick to establish that the case at hand was not about 'certain selling arrangements' in the line of *Keck* which would have put the dispute outside of the scope of Article 34 altogether. Instead, the CJEU investigated whether the national rules would have amounted to a restriction on market access of foreign products to the Spanish domestic market. The Court eventually found that the Spanish rules indeed restricted market access and that they could not be justified. The emphasis on 'market access' confirms the development starting with cases such as *Italian Trailers* and *Mickelson & Roos,* wherein 'market access' was introduced as an independent category for establishing whether Article 34 TFEU has been violated.[2] This annotation will argue that this development will have consequences on the litigation in the field of free movement of goods. After the degradation of *Keck*, it will be easier to establish a restriction on trade and demonstrate a *prima facie* violation of Article 34 TFEU, and potential justifications will become more important. *En passant*, the CJEU has further approximated its approach to all four freedoms as *Keck* always set the free movement of goods apart. Arguably, now every potential obstacle to the free movement of goods that potentially restricts market access of foreign products will have to be justified.[3]

This case note will introduce the facts, decision and reasoning of the CJEU in *ANETT* before commenting on some of the developments that are likely to result from the promotion of the market access test.

II. The ANETT-Case

1. Facts

In the case under review, the Spanish Tribunal Supremo referred a question about the validity of a Spanish Royal Decree which prevents retailers from

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1 Judgment of 26 April 2012, Third Chamber, n.y.r.

2 Case C-110/05, *Commission v. Italy [Trailers]*, Judgment of 10 February 2009; Case C-142/05, *Aklgaren v. Percy Mickelson and Joakim Roos,* Judgment of 4 June 2009. These cases have been extensively annotated, see, for example, Thomas Horsley, "Anyone for Keck?" annotation of Case C-110/05 and Case C-142/05, and Case C-256/06, *Commission v. Portugal*, Judgment of 10 April 2008, 46 *Common Market Law Review* (2009), pp. 2001–2019; Eleanor Spaventa, "Leaving *Keck* behind? The free moment of goods after the rulings in *Commission v Italy* and *Mickelsson and Roos*", 34 *European Law Review* (2009), pp. 914–932; Claus Dieter Classen, "Vorfahrt für den Marktzugang? Anmerkungen zum Urteil des EuGH vom 10. Februar 2009, Rs C-110/05 (Kommission/Italien)", *EuR,* Heft 4, (2009), pp. 555–562.

3 For another case note on ANETT, see Kai Purnhagen, "Anmerkung zu EuGH – C-456/10, ANNETT, Urteil vom 26.4.2012", 67 *Juristenzeitung* (2012), pp. 742–745.

importing tobacco individually. In Spain, the distribution of tobacco products lies in the hands of a State run company which has the monopoly on the distribution and importation of tobacco products. The Spanish Asociación Nacional de Expendedores de Tabaco y Timbre (ANETT) claimed that such rules would be in conflict with Article 34 of the TFEU because they would amount to a quantitative restriction or a measure having equivalent effect to a quantitative restriction [hereafter MEQR].[4] Accordingly the question asked by the Tribunal Supremo was whether Spanish national law prohibiting tobacco retailers from importing manufactured tobacco products from other Member States constituted an infringement of Article 34 TFEU.[5]

2. The CJEU's Judgment

The CJEU first had to dismiss an eligibility complaint by the Spanish government. The government invoked that the judgment of the Court could not have any influence in the underlying national proceedings because the Royal Decree at issue, i.e. Royal Decree 1/2007, would not govern the import of Tobacco products at all. This would be governed in Royal Decree 1199/1999 which would not be at issue in the current national proceedings and, in addition, would have been already dealt with in another case before the Tribunal Supremo, which had been rejected.[6] In light of the principles of legal certainty and *res judicata* the case would have to be dismissed. The CJEU in reaction admitted that its case law allows the dismissal of cases when it is clear that the interpretation of Union law would have 'no relation to the actual facts of the main action or its purpose, where the problem is hypothetical', or when the 'factual or legal material' before the Court to render a judgment is insufficient.[7] However, in the instant proceedings it 'cannot be completely excluded' that the CJEU's answer 'may serve a purpose in relation to the outcome of the main proceedings' and hence the Court does render a judgment on the merits.[8]

Regarding the merits of the Case, the Court reformulated the question referred in so far as it would mean that the national court would ask whether Article 34 TFEU would preclude national rules imposing a prohibition on tobacco retailers from importing tobacco products from other Member States.[9] Because the European Commission and the Spanish Government both claimed that the said national legislation would have to be assessed under Article 37 TFEU governing monopolies of a commercial character, the court had to address this first. The Court reflected on its own case law stating that only rules in relation to the existence and operation of the domestic commercial monopoly are covered by Article 37 and that the effect of other rules of national law, 'which are separable from the operation of the monopoly although they have a bearing upon it', are captured by Article 34 TFEU.[10] The Court reiterated that the specific purpose of the monopoly in question was to 'reserve the exclusive right of sale of tobacco products at retail level to authorized retailers', which, however, 'does not imply that they should be prohibited from importing such products'. Hence, to the Court, import restriction of tobacco affected the free movements of goods in the EU and did not govern the existence of the monopoly in question[11] – the exclusive right to sell tobacco products and not to import it. Accordingly the Court concluded that the national rule in question did not concern the existence or functioning of the monopoly.[12]

In a similar logic, the Court assessed the question whether the rules at hand would be 'selling arrangements'. Here, the Court quickly stated that the operation of the monopoly in question 'does not affect private individuals but rather the licensees under the monopoly in question', i.e. tobacco retailers. The rule thus concerns the upstream market and does not affect the selling arrangements for retail of tobacco.[13] Consequently, the Court concluded that the import

4 Case C-456/10, paras. 10–12.

5 Case C-456/10, para. 20.

6 Case C-456/10, para. 12.

7 Case C-456/10, paras. 13–15.

8 Case C-456/10, para. 16.

9 Case C-456/10, para.18.

10 Case C-456/10, paras. 22–23, reference made to Case C-189/95 *Franzen* [1997] ECR I-5909, para 35; and Case C-170/04 *Rosengren and Others* [2007] ECR I-4071, paras. 17–18.

11 Case C-456/10, paras. 25–56.

12 Case C-456/10, para. 27, reference to Case C-170/04 *Rosengren and Others* [2007] ECR I-4071, para. 22.

13 The Court here distinguishes C-170/04 *Rosengren and Others* [2007] ECR I-4071, para. 24; where individuals were affected by the ban to import alcohol into Sweden; likewise, different from *Rosengren*, the monopoly in instant case would not touch upon the 'monopoly's system of product selection', the sale network or the marketing or advertising of the products distributed by the monopoly.

ban for tobacco retailers must be assessed in light of Article 34 TFEU.[14] The Court did not spend many words to rule out that the case does not fall under Article 34 TFEU at all and it appears that the decision to assess the Case from the point of view of market access was made easily by the Court.[15]

In the following assessment of the national measure's compatibility with Article 34 TFEU, the Court repeated its *Dassonville*-formula stating that 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, trade within the European Union are to be considered as measures having an effect equivalent to quantitative restrictions within the meaning of Article 34 TFEU'.[16] The Court further explained that Article 34 also reflects the principles of non-discrimination as well as the principle of mutual recognition of products lawfully produced in other Member States. What is more, the Court emphasized the 'principle of ensuring free access of EU products to national markets'.[17] The Court repeated its wide interpretation of Article 34 mentioning that discriminatory as well as non-discriminatory rules as well as *'any other measure which hinders access of products originating in other Member States'* are also covered by Article 34 TFEU.[18] The latter – as introduced above – is a reflection of the Court's promotion of market access as an independent category in the assessment of legality of national measures under Article 34 TFEU.

In this light, the CJEU continued that nothing indicates that said Spanish legislation had the objective or effect of treating foreign products less favorably.[19] However, it would still be necessary to examine whether the Spanish legislation would hinder market access of products coming from other Member States.[20] The Court invoked a few reasons why this was the case and why the Spanish system has disadvantages for the retailer which amounted to a violation of Article 34 as interpreted in *Dassonville*, *Trailers*, and *Ker-Optika*. *First,* the retailer can only sell the product if the wholesaler has imported it and if it is actually in stock. If this is not the case, there would be no legal way of meeting the demands of customers demanding the product. *Secondly*, the importers might not import certain products if they consider the demand to be too low. Retailers themselves could react to customer demands 'more flexibly and quickly'. *Thirdly,* the system bans retailers from procuring supplies in other Member States.[21] This prevents them from benefitting from the advantages of the internal market. Accordingly, the Court held that the import monopoly and prohibition for tobacco retailers to individually import tobacco products duly manufactured in other Member States is 'capable of having a negative effect on the choice of products that the tobacco retailers include in their range of products and, ultimately, on the access of various products (...) to the Spanish market'.[22] Thus, the measure hindered market access and constituted a measure having the equivalent effect to a quantitative restriction under Article 34 TFEU.[23] The Court, *nota bene,* clearly spelled out that it was the restriction of market access alone that triggered Article 34 TFEU.

National measures infringing Article 34 TFEU may be justified under Article 36 TFEU or when they seek to protect imperative requirements in the public interest. However, the national measures must be indistinctively applicable and proportionate to the (legitimate) aim pursued by them. The potential justifications brought forward by the Spanish and Italian Governments, such as fiscal and custom controls, ensuring public health, and consumer protection, are all dismissed by the Court.[24] According to the CJEU, the governments have failed to substantiate their arguments or have not explored less infringing interventions to obtain the same objectives.[25] Thus, the Spanish measures at stake violated Article 34 TFEU and could not be justified. The Court in *ANETT* addressed all potential justifications brought forward by the Member States, but was quick to dismiss them as unpersuasive.

14 Case C-456/10, paras. 30–31.

15 This could be seen as a hint that selling arrangements indeed lost influence in the assessment of Article 34 TFEU cases and that the Court moved on to assess the impact of a rule on market access foremost, see on these thoughts Purnhagen, "Anmerkung zu EuGH – C-456/10", *supra* note 3.

16 Case C-456/10, para. 32; reference to Case 8/74 *Dassonville* [1974] ECR 837, para. 5, and Case C-110/05 *Trailers*, para. 33.

17 Case C-456/10, para. 33; reference to Case C-110/05, *Trailers*, para. 34, and Case C-108/09 *Ker-Optica* [2010], para. 48.

18 Case C-456/10, para. 35.

19 Case C-456/10, para. 36.

20 Case C-456/10, para. 37.

21 Case C-456/10, paras. 38–41.

22 Case C-456/10, para. 42.

23 Case C-456/10, paras. 43–45.

24 Case C-456/10, paras. 45–49.

25 Case C-456/10, paras. 50–55.

III. Comments

1. Confirmation: Market Access as Independent Criterion under Article 34 TFEU

Why is it necessary to comment on the *ANETT* case? Not much springs to mind in the case itself on first sight. The *Keck* line of cases is distinguished through the quick ruling that the case is not about selling arrangements.[26] What is more, market access as a criterion to assess the legality of national measures that potentially inflict Article 34 TFEU and amount to measures having equivalent effect to a quantitative restriction is nothing new in the case law of the CJEU. It was indeed part of the infamous *Keck*-test to ensure that 'certain selling arrangements' Member States were allowed to introduce without infringing Article 34 TFEU would not discriminate against foreign products and would not hinder the access of these products to the domestic market.[27] Also, in the relatively recent *Ker-Optika* case the Court referred to *Dassonville, Keck* and market access at the same time, emphasizing that rules restricting market access could not be considered legal.[28] It is, however, noticeable that already in *Ker-Optika, Keck* only appeared in the reasoning of the Court after *Dassonville* and after market access were addressed.[29]

When compared to *Ker-Optika*, the Court in the case at hand could be straight forward in avoiding the issue of selling arrangements altogether. The fact that the CJEU mentions *Keck* in its reasoning, if only to dismiss it, however, proves that selling arrangements still *are* important in the assessment of legality of national measures under Article 34 TFEU.[30] However, next to the existing avenues of assessing the legality of national measures under Article 34 TFEU, the Court picks up the ball it started to roll itself earlier. By stating that under the *Dassonville*-formula[31] '*any other measure which hinders access of products originating in other Member States*' would be tantamount to MEQRs, the CJEU confirms a series of case law that started with cases such as *Italian Trailers* and *Mickelson & Roos*.[32] Market access is elevated to an independent and decisive criterion to determine whether a national measure has breached Article 34 TFEU and amounts to a measure having equivalent effect to a quantitative restriction. As such, 'hampering market access' became a rather encompassing criterion when applied under the *Dassonville* formula to determine whether Article 34 TFEU is triggered.[33]

After *Trailers* and *Mickelson*, as confirmed by *ANETT,* the following measures put forward by Snell violate Article 34 TFEU and are held to be MEQRs: (1) rules that discriminate against products from other Member States, (2) product requirements on imported goods (which are not selling arrangements), and (3) any other rule hindering market access.[34] It appears that market access is only one amongst three types of criteria; however, it will arguably be the most decisive.[35] This will have profound consequences on how Member States have to argue when facing complaints that national measures infringe Article 34 TFEU.

2. The Downgrading of *Keck* and Its Effects

Keck and the decisiveness of labeling national measures as 'selling arrangements' outside the scope of Article 34 TFEU has decreased. After all, national measures will be independently scrutinized with regard to their effect on market access of products from other Member States.[36] *Keck* was not overruled

26 Joined Cases C-267/91 and C-268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard,* ECR 1993 p. I-06097, paras. 12–16. There is hardly any case which arguably 'suffered' from more attention in legal literature than the *Keck*-case, see, for example, Catherine Barnard, *The Substantive Law of the EU – The Four Freedoms* (Oxford: Oxford Universtiy Press 2010), p. 123 *et sqq*.

27 Joined Cases C-267/91 and C-268/91 *Keck*, para. 16.

28 Case C-108/09 *Ker-Optica* [2010], paras. 46–56.

29 See on this point and the confusion this move by the Court created back then, Pedro Caro de Sousa, "Through Contact Lenses, Darkly: Is Identifying Restrictions to Free Movement Harder than Meets the Eye? Comment on *Ker-Optika*", 37 *European Law Review* (2012), pp. 79–89, at p. 81.

30 Barnard, *The Substantive Law of the* EU, *supra* note 26, at p. 142.

31 *Dassonville* formula: "*All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be regarded as measures having an effect equivalent to quantitative restrictions*", Case 8/74, Procureur du Roi *vs.* Benoît and Gustave Dassonville, ECR 1974 p. 00837, para. 5. For a good overview on how the Article 34 TFEU test developed and was applied over time, see Caro de Sousa, "Through Contact Lenses, Darkly", *supra* note 29.

32 Case C-110/05 *[Trailers]*; Case C-142/05, *Mickelson and Roos;* see for annotations *supra*.

33 As Purnhagen shows, since 2006 the *Keck* formula was under attack from AGs such as Maduro (in Case C-158/04), Kokott (Case C-142/04), Trstenjak (Case C-265/06), and Bot (Case C-110/05); Purnhagen, "Anmerkung zu EuGH – C-456/10", *supra* note 3.

34 Jukka Snell, "The Notion of Market Access: A Concept or a Slogan", 47 *Common Market Law Review* (2010), pp. 437–473, at p. 455.

35 It has already been the most decisive factor in *Trailers* and *Mickelson & Roos*. See *ibid.*, p. 456. See also, Barnard, *The Substantive Law of the EU*, *supra* note 26, pp. 103–108.

36 Compare for the situation after *Trailers* and *Mickelsson and Roos,* Barnard, p. 71.

as such; however, its potential application was seriously reduced.[37] This is slightly ironic because it was the *Keck* case itself which introduced market access provided a sub-test to establish whether Article 34 TFEU had been breached.[38]

Member States could rely upon *Keck* to argue that national rules regarding questions such as *where, when, and how* products were allowed to be sold[39] did not fall within the scope of application altogether if they were indistinctively applicable and do not hamper the market access of foreign products more than that of domestic products.[40] Instead of functioning independently, the market access test put forward in *Keck* was embedded in the investigation of whether a selling arrangement would nevertheless trigger Article 34 TFEU because it would hamper foreign products more than domestic products.[41] Thus, there was an element of discrimination in the *Keck* way of applying a market access test. Only afterwards would States have to think about justifying such selling arrangements.[42]

Eventually, even though *Keck* is still mentioned as influential by the CJEU, the new test developed to assess whether Article 34 TFEU is breached will lead to a drastic limitation of the practical use of the concept 'certain selling arrangements' introduced in the *Keck*-case. As soon as applicants can show that national rules could be defined as '*any other measure which hinders access of products originating in other Member States*', something that can be established rather easily one can assume, Article 34 TFEU is breached regardless of its nature as a non-discriminatory selling arrangement under *Keck*.[43]

The independent market access test turns back time and allows market operators to apply the *Dassonville*-formula to the fullest extent, again, to show that almost all national rules / measures influencing trade at large amount to a MEQR.[44] The question will be what the difference is with the unfortunate *Sunday Trading* cases,[45] which allegedly gave rise to the Court's reaction in *Keck*, and how the Court will contain the assumption that Article 34 TFEU can (again) be triggered by almost every indistinctively applicable national measure, for as long as it directly or indirectly, actually or potentially restricts market access of products from other Member States.

3. Justification of Potential Breaches of Article 34 Has Become More Important

In effect, the decision of the CJEU to bring measures formally designated 'selling arrangements' back under the scope of Article 34 TFEU if they potentially influence market access *will* have a vast impact on litigation in the area of free movement of goods. A MEQR will be established much quicker increasing the need for justifying such *prima facie* violation of Article 34 TFEU. Avenues for justification as provided for in Article 36 TFEU or under the Court's case law allowing for mandatory requirements to protect public interests through national 'rules of reason' will become more important and potentially the only way for Member States to save national measures restricting market access.[46] It will be interesting to see how the Court reacts to this and whether it is willing to grant more leeway during justification attempts and, for example, accept more national measures as 'rules of reasons'. Especially interesting will be whether the Court will be more lenient assessing the proportionality of national measures in order to compensate for the ground taken away from the Member States by downgrading *Keck*.

There are indications that this is already happening and that the Court allows Member States more

37 Barnard, *The Substantive Law of the EU*, *supra* note 26, at p. 140.

38 Market access has been described as the offspring of KECK. See Caro de Sousa, "Through Contact Lenses, Darkly", *supra* note 29, at pp. 83–84.

39 See definition in Case C-71/02 *Herbert Karner* [2004] ECR I-3025, para. 38.

40 Joined Cases C-267/91 and C-268/91, *Keck*, para. 16.

41 Barnard, *The Substantive Law of the EU*, *supra* note 26, at p. 125.

42 Snell, "The Notion of Market Access", *supra* note 34, pp. 446–449.

43 Spaventa, "Leaving *Keck* behind?", *supra* note 2, at p. 929.

44 This would mean, to a certain extent, turning back the clock to the pre-Keck 'Sunday-trading'cases, which were difficult for the CJEU to contain and eventually led to the restriction of the scope of Article 34 TFEU in *Keck*; see Stefan Enchelmaier, "Moped Trailers, Mickelson & Rooos, Gysbrechts: The ECJ's Case Law on Goods Keeps on Moving", 29(1) *Yearbook of European Law* (2010), pp. 190–223, at p. 193; Horsley, "Anyone for Keck", *supra* note 2, at p. 2006.

45 'Sunday trading' refers to the line of cases where the Court established that rules prohibiting shops from opening on Sunday would trigger Article 34 TFEU under the *Dassonville* approach, amounting in turn to an extremely wide interpretation of the scope of that Treaty article. The Court, applying *Cassis de Dijon*, held that these rules would only be allowed if they are justified by social objectives and proportionate to the said social objectives. These cases were widely regarded as excessive because, as potentially with the marked access developments described in this note, virtually no rule would be outside of the scope of Article 34 TFEU following this interpretation. See, *inter alia,* Case C-169/91 *Stoke on Trent and Nowwhich City Counsil v B&O plc* [1992] ECR i-6635, paras. 16–17; Barnard, *The substantive Law of the EU*, *supra* note 26, at pp. 120–121. Sunday trading cases and explanation; Spaventa, "Leaving *Keck* behind?", *supra* note 2, at p. 929.

46 Enchelmaier, "Moped Trailers, Mickelson & Rooos, Gysbrechts", *supra* note 44, at p. 206.

space to breathe for justifying indistinctively applicable measures amounting to *prima facie* restrictions of trade on the internal market. For example, in *Mickelson & Roos*, the Court, after relying on the wide market access test to establish a *prima facie* breach of Article 34 TFEU,[47] engaged in a lengthy and detailed analysis of Swedish law during the discussion of potential justifications and their proportionality to assist the national authorities.[48] Some have argued that this lengthy discussion would only be necessary because of the widening of the Article 34 TFEU test and the resulting peril is that the Court has (1) opened the door for more cases to be brought, and (2) will find it necessary to give more and more detailed answers to handle the 'open' system created.[49] Similarly, the Court in *Ker-Optika* also provided a detailed and nuanced approach to justification attempts brought forward by Hungary explaining that Member States have a margin of discretion to protect public health while measures must also be proportionate to the aim pursued.[50]

One should also not forget that in another case held to have brought about the promotion of market access as an independent criterion under Article 34 TFEU, i.e. *Italian Trailers*, the Court established that the measure in question is appropriate and necessary to ensure the legitimate objective of road safety.[51] Thus, Italy was successful in justifying an arguably restrictive measure.[52] Another recent example where a justification attempt was successful after a market access test can be found in the *Doc Morris* case. There the CJEU held that the restriction on internet trade of medicine that needs to be prescribed in Germany and which restricted the importation of such medicine from other Member States, would be justified and proportionate, while the restriction of trade of medicine that does not need to be described would not be justifiable.[53] Again, it appears that the Court made an active attempt to give some room for Member States to safeguard their national rules. One should also remember that the Court accepts every national 'rule of reason' protecting mandatory requirements in the public interest for as long as it is proportionate to the aim pursued and not installed for purely economic purposes.[54] There is room for the Court to grant more leeway in allowing Member States to justify *prima facie* restrictions without changing its approach and way of reasoning greatly.

This tendency is witnessed by Barnard, who states that market access as a criterion would be far more intrusive to national regulatory autonomy in the absence of harmonization than a model establishing restrictions only in terms of discrimination.[55] Moving towards market access is tantamount to a subtle movement of regulatory competence away from the Member States and to the EU / CJEU in particular.[56] Barnard comments that the court had reacted in the past by granting more leeway in justification attempts.[57] There are more cases in this regard; however, they go beyond the scope of this annotation. [58] Yet, one should be aware that if the Court would decide against leaving more room for justification after narrowing down the room for maneuver for Member States through the degradation of *Keck*, it would effectively reduce the Member States' regulatory autonomy.[59]

4. Need to Introduce a *De Minimis* Norm for Free Movement of Goods?

Keck was introduced by the Court to decrease the number of cases falling under the scope of Article 34 TFEU and to reduce the scenarios that could be considered to establish a MEQR. The Court was reason-

47 Case C-142/05, *Mickelson and Roos*, paras. 24–28; Spaventa, "Leaving *Keck* behind?", *supra* note 2, pp. 923–925.

48 This takes about one third of the whole judgment, Case C-142/05, *Mickelson and Roos*, paras. 29–43.

49 Enchelmaier, "Moped Trailers, Mickelson & Rooos, Gysbrechts", *supra* note 44, pp. 212–214.

50 Case C-108/09 *Ker-Optica* [2010], paras. 57–78.

51 Case C-110/05, *Trailers*, paras. 64 & 69. See on this, Horsley, "Anyone for Keck", *supra* note 2, at pp. 2006–2007.

52 Some have argued that Italy got away relatively easy and take this a clear indication that the CJEU is balancing a stricter market access approach with more leeway in the justification of such measures, see Sybe A. de Vries, "Goods Revisited – Nieuwe inzichten in de rechtspraak over het vrij verkeer van goederen", 4 *Nederlandse Tijdschrift voor Europees Recht* (2009), p. 128.

53 Case C-322/01 *Doc Morris* [2003] ECR I-14887.

54 Barnard, *The Substantive Law of the EU*, *supra* note 26, at p. 168.

55 *Ibid*, at p. 21.

56 *Ibid*, at p. 25.

57 *Ibid*, at pp. 86–88. Barnard refers to a host of cases where a rather easy approach to justifications was taken after choosing a quick establishment of a restriction to trade, such as the *Walloon Waste Case*, Case C-2/90, *Commission v Belgium* [1992] ECR I-4431, wherein the court allowed environmental protection as a reason to apply discriminatory measures; or Case C-524/07 *Commission v. Austria* [2008] ECR I-187 wherein a clear distinction in place for *imported* cars was simply called an MEQR, which could be justified.

58 On the issue of justification, see Barnard, *The Substantive Law of the EU*, *supra* note 26, pp. 148–192.

59 *Ibid.*, pp. 18–19.

ably successful in doing so while there was a trend to increasingly rely on the discriminatory nature of a selling arrangement and to hold that Article 34 TFEU was triggered nevertheless over the last few years.[60] With the degradation of *Keck* the question whether another tool would be needed to limit the scope of application of Article 34 TFEU inevitably arises. One instrument that is being discussed and which is used in the area of EU Competition Law[61] would be the introduction of some form of *de minimis* rule that sets a threshold below which no national measure could be caught by Article 34 TFEU.[62] As in *Keck*, such a rule would introduce a technical criterion allowing the Court to quickly state that a certain national measure would fall outside of the scope of Article 34 TFEU altogether.

Leaving aside the question of why the CJEU should opt for such a rule after narrowing the technical ways of dismissing a case through *Keck*, a *de minimis* rule would fundamentally oppose the *Dassonville* approach to the free movement of goods. The formulation that 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially' inter-community trade would be prohibited unless they can be justified leaves no room for any minimum thresholds. Needless to say, the recent case law of the Court discussed in this very case note states that *any* measure that is capable of hindering market access would be caught by Article 34 TFEU also sits very badly with potential *de minimis* rules. Indeed, neither in the case under review, nor in *Trailers* or *Mickelson & Roos* does the CJEU make any effort to hint at a *de minimis* rule in the area of market access.[63] There is traditionally no *de minimis* in cases involving the four freedoms and even the smallest restriction is caught and needs justification.[64] Member States have a special responsibility to guarantee the functioning of the internal market and no rule should be allowed to diminish this functioning.[65]

On the other hand, the CJEU has recognized that national rules whose effect on inter-community trade would be 'too uncertain and too indirect' would be excluded from scrutiny.[66] This indicates that there might be a certain threshold under which national rules do not trigger Article 34 TFEU. Although, as Snell shows, there is no consistency in the case law on this point,[67] the CJEU could possibly rely on these cases to introduce some form of *de minimis* in the area of free movement of goods to contain the effects of a too loose market access test. Eventually it is unlikely the Court will limit its recent case law immediately through the introduction of a new *de minimis* regime in the area of the four freedoms beyond the inconsistently applied findings that the effects of national measures would be too uncertain and indirect.

IV. Conclusion

With the *ANETT* case, the Court confirmed market access as an independent criterion for the evaluation of whether a national measure amounts to a MEQR under Article 34 TFEU. As such, *Keck* was downgraded, and its application was reduced. Selling arrangements, which formerly would have fallen outside of the scope of Article 34 TFEU, altogether can now be covered if they have any effect on the market access of products. In effect, this has diminished Member States' room for maneuver and decreased the regulatory autonomy of Member States if the Court does not grant more leeway in attempts to justify potential restrictions. Indications that the Court is willing to do so are present.

Some observers have questioned whether the new approach by the Court's new approach will be a step forward while others have asserted that the concept

60 See the excellent table on cases regarding selling arrangements after *Keck*, Spaventa, "Leaving *Keck* behind?", *supra* note 2, pp. 929–932.

61 Enchelmaier, "Moped Trailers, Mickelson & Rooos, Gysbrechts", *supra* note 44, at p. 215.

62 As argued in the past by those having problems with *Keck* as such, see Spaventa, "Leaving *Keck* behind?", *supra* note 2, at p. 923–924.

63 Spaventa, "Leaving *Keck* behind?", *supra* note 2, at p. 924.

64 The Court was clear about the absence of *de minimis* in the area of the four freedoms; Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government*, [2008] ECR I-1683, para. 53, as referred to by Yearbook p. 193. See in addition Snell, "The Notion of Market Access", *supra* note 34, at p. 458.

65 This distinguishes the internal market from companies and, in turn, the application of EU competition law with its *de minimis* rules. Companies are under no such general obligation as private parties, Enchelmaier, "Moped Trailers, Mickelson & Rooos, Gysbrechts", *supra* note 44, at p. 215.

66 Case C-20/03 *Criminal proceedings against Burmanjer* [2005] ECR I-4133, para. 31.See Horsley, "Anyone for Keck", *supra* note 2, at p. 2016–2017, referring to Case C-69/88, *Krantz* [1990] ECR I-583, para. 11; Case C-379/92 *Peralta* [1994] ECR I-3453, para. 24. Snell also refers to cases in the area of free movment of workers and services where the same formulation was used in the assessment of national meausures but also refers to other articles undermining the assumed coherence of case-law in this regard, Article CMLRev. 460–465; referring to for workers, Case C-190/98 *Graf* [2000] ECR I-493, paras. 23–25 and for services, Case C-384/93 *Alpine Investments* [1995] ECR I-1141.

67 *Ibid.*

would "obscure rather than illuminate" and that the market access test boils down to a somewhat sophisticated expression for decisions taken on grounds of intuition.[68] Indeed, the question is whether this new approach factually changes something and whether the outcome of cases would be different under the previous regime.[69] Despite the outcome of certain cases, the CJEU has substantially altered the rules of the game in the area of free movement of goods. No longer does it accept that a whole group of potential restrictions falls outside of the scope of Article 34 TFEU altogether. If market access is (potentially) restricted, these rules now need to be justified even if they hit domestic and foreign products alike. Spaventa has written in this regard, that the Court moved from the guarantee of free movement of goods on the internal market to protecting the internal market as a whole by guarding a general 'freedom to trade'.[70]

The Court has increased the area of scrutiny and can, by means of a stricter or easier proportionality test when assessing justification attempts by Member States, very easily adjust the room granted to national measures without changing anything in its approach. As an immediate effect, justification attempts of Member States will become more important. This development brings the free movement of goods in line with the other freedoms on the internal market. *Keck* distinguished the free movement of goods from the other freedoms where a free standing market access criterion is well established.[71] As Barnard puts it, market access on the internal market has become a 'catch-all' criterion which forces Member States to assess all national rules bearing in mind the objectives of the internal market.[72] The Sunday-trading problem,[73] however, is still present and the Court will find it difficult to tame the effects of its all-inclusive interpretation of Article 34 TFEU.

68 Snell, "The Notion of Market Access", *supra* note 34, at p. 469–470.

69 Compare list of cases decided after *Keck*, Spaventa, "Leaving *Keck* behind?", *supra* note 2, pp. 929–932.

70 *Ibid*, p. 929.

71 Goods merge in approach with persons: every infringement has to be justified, see Barnard, *The Substantive Law of the EU*, *supra* note 26, at p. 108; see also, Alina Tryfonidou, "Further steps on the road to convergence among the market freedoms", 35 *European Law Review* (2010), at p. 36; Yearbook, p. 191; Spaventa, "Leaving *Keck* behind?", *supra* note 2, at p. 924–925, see also line of examples from other market freedoms Snell, "The Notion of Market Access", *supra* note 34, at p. 451–452.

72 Barnard, *The Substantive Law of the EU*, *supra* note 26, at p. 105.

73 Spaventa, "Leaving *Keck* behind?", *supra* note 2, at p. 929; Horsley, "Anyone for Keck", *supra* note 2, at p. 2008–2009.