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A Retreat from *Säger*?

Servicing or Fine-Tuning the Application of Article 49 EC

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1. Introduction

Tumultuous developments have stalked the Court of Justice's case-law on the free movement of services over the course of the past decade. Ever since the seminal *Säger*[1] case of 1991, there has been a steady increase in the number of times the Court has been asked to express itself on the scope and limits of Article 49 EC.[2] Yet, though delivering clarity must have served as the underlying objective, the harvest reaped amounts rather much to the opposite. The treatment of abuse of law in the free movement of services,[3] and the trend of the progressive marginalization of the transnational element and corollary situations of reverse discrimination[4] have already put past commentators at pains, and seem to have marred legal consistency in the field.[5] Any attempt to delineate exactly how far the prohibition of Article 49 EC actually extends nowadays has become overall one of the most complicated ventures. The present contribution is nonetheless devoted to this issue. As will be set forth, there are reasons to believe that the scope of application of Article 49 is shifting, not least because of possible new directions in case-law. If these were to set a trend, it will be argued, a retreat from *Säger*, if not initiated yet, may be impending.

For some time, *Säger* served as a trusty beacon. As known, the case made

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1. Case C-76/90, *M. Säger* v. *Dennemayer & Co. Ltd.*, [1991] ECR I-4221.
2. Thus contrasting with the period of relative inactivity up to 1991, when the ECJ would render on average judgment in roughly three services cases a year.
3. *See* Case C-148/91, *Vereniging Veronica Omroep Organisatie* v. *Commissariaat voor de Media*, [1993] ECR I-487; C-23/93, *TV10 SA* v. *Commissariaat voor de Media*, [1994] ECR I-4795; Case C-56/96, *VT4 Ltd.* v. *Vlaamse Gemeenschap*, [1997] ECR I-3143.
4. *See inter alia* Case C-484/93, *Svensson and Gustavsson* v. *Ministre du Logement et d'Urbanisme*, [1995] ECR I-3955; Case C-398/95, *SETTG* v. *Ypourgos Ergasias* [1997] ECR I-3113.
5. *See* e.g. N. Bernard, 'Discrimination and Free Movement in E.C. Law' (1996) 45 ICLQ 82; A. Kjellgren, 'On the Border of Abuse: The Jurisprudence of the ECJ on Circumvention, Fraud and Abuses of Community Law', in M. Andenas & W.-H. Roth (eds.), *Services and Free Movement in EU Law,* (Oxford: Oxford University Press, 2002); V. Hatzopoulos, 'Recent Developments of the Case-Law of the ECJ in the Field of Services', (2000) 37 C.M.L.Rev., p. 43; C. Barnard, 'Fitting the Remaining Pieces into the Goods and Persons Jigsaw?' (2001) 26 E.L.Rev., p. 35.

leeway in regard of the free movement of goods by introducing a *Cassis*[6]-like approach, and further extended the provision's material grasp by demanding abolition of any restrictions, even when entirely non-discriminatory.[7] The judgments in *Alpine*[8] and in *Schindler*[9] underlined this approach, and though the *Säger* formula was not adhered to verbatim there, it has figured in most case-law of late.[10] So far, the scope of Article 49 was seemingly delimited clearly. Yet, the absence of a *Keck*[11]-type of rule in the free movement of services, which could function to exclude *a priori* certain domestic rules from the grasp of the 'no obstacles' doctrine, exposes the troublesome ramifications of the latter, looming large in recent judgments. For, in the absence of harmonization, Member States continue to uphold a plethora of rules relating to market circumstances which, in light of the EC provisions on services, may or may not be considered outlawed by now. In principle, these could be justified, as long as actions by the host and the home Member States in the protection of particular interests are taken into account alike. Yet, this does not prevent a rise in the amount of complaints lodged and a subsequent high tide of litigation, as long as it remains unclear from the outset what obstacles *are* capable of preventing or substantially impeding market access for service providers and recipients. From an efficiency point of view, this proliferation of the Court's workload is already far from ideal, and in this respect *Säger*'s mandatory requirements concession has done (too) little to stem the flow. Arguably, *Alpine* compounded matters by denying the existence of a 'selling arrangements' strategy as undertaken in the free movement of goods. By contrast, it has been argued that, focusing on the particular nature of services, the *Keck* distinction would not fit anyway; as the 'selling arrangements' of a service form part of the service itself, it would be unwise or unpractical to treat these separately.[12] The

6. Case 120/78, *Rewe Zentral AG* v. *Bundesmonopolverwaltung für Branntwein,* (Cassis de Dijon) [1979] ECR 649.
7. Case C-76/90, *Säger* v. *Dennemayer & Co. Ltd.*, [1991] ECR I-4221, para. 12: "[…] Article [49] requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services."
8. Case C-384/93, *Alpine Investments BV* v. *Minister van Financiën*, [1995] ECR I-1141.
9. Case C-275/92, *Her Majesty's Customs and Excise* v. *Schindler,* [1994] ECR I-1039.
10. E.g. Case C-43/93, *Raymond Vander Elst* v. *Office des Migrations Internationales,* [1994], ECR I-3803, para. 14; Case C-272/94, *Guiot/Climatec,* [1996] ECR I-1905 para. 10; Case C-222/95, *Société civile immobilière Parodi* v. *Banque H. Albert de Bary et Cie.*, [1997] ECR I-3899, para. 19; Joined Cases C-369 & 376/96, *Criminal Proceedings against Arblade and Leloup* [1999] ECR I-8453, para. 33; Case C-58/98, *Josef Corsten,* [2000] ECR I-7919, para. 33.
11. Joined Cases C-267 & 268/91, *Criminal Proceedings against Keck and Mithouard,* [1993] ECR I-6097.
12. *See* V. Hatzopoulos, *Le principe communautaire d'équivalence et de reconnaissance mutuelle dans la libre prestation de services* (Bruxelles: Bruylant, 1999), p. 254.

consequence, in line then with *Bosman*,[13] would be that 'pure *Keck*', the distinction between selling arrangements on the one hand, and other measures on the other, operates in the field of goods only.[14] Indeed, the Court repeated this declinatory stance on the facts of *De Agostini*,[15] though, as shall be argued, this does not rule out that the right factual circumstances might still trigger its effective application eventually.

Shunning the particularities of *Keck* and the specific realm in which it matured for a moment, one cannot fail to notice the strikingly broad range and purport of *Säger*'s abolition-behest. Taking the view that the Court thus aligned its services case-law with the *Dassonville*[16] stance, even if, admittedly, the wide reach of the latter case never truly corresponded with the reality of the goods case-law,[17] a similar need, albeit twenty years on, to make the bite of Article 49 less powerful than its bark, may prove to be equally as indispensable. Moreover, as shall be expounded, a doctrine consisting in a conceptual but not a typological kinsman of *Keck*, i.e. displaying its main similarity not in obviating the broadness of the earlier prohibition, but in mollifying the latter's grasp by enabling its preventive non-application,[18] whether for some time already dormant or not, truly seems on the verge of being nascent.[19] There still might not be a single grand theory – whether based on the concept of non-discrimi-

13. Case C-415/93, *Union royale belge des sociétés de football association ASBL* v. *Jean-Marc Bosman*, *Royal club liégeois SA* v. *Jean-Marc Bosman and others* and *Union des associations européennes de football (UEFA)* v. *Jean-Marc Bosman,* [1995] ECR I-4921
14. *See* Hatzopoulos, cited *supra* note 5, p. 68.
15. Joined Cases C-34/95, C-35/95, C-36/95, *Konsumentenombudsmannen* v. *De Agostini (Svenska) Förlag AB* and *Konsumentenombudsmannen* v. *TV-Shop,* [1997] ECR I-3843.
16. Case 8/74, *Procureur du Roi* v. *Dassonville*, [1974] ECR 837.
17. *See* J.H.H. Weiler, 'The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods', in P. Craig & G. de Búrca (eds.), *The Evolution of EU Law*, Oxford: Oxford University Press 1999, and S. Weatherill & P. Beaumont, *EU Law,* London: Penguin 1999, p. 608.
18. For the sake of completeness, it should be noted that a general consensus in European legal doctrine still does not exist on the question whether *Keck* truly disqualifies selling arrangements as being equivalent to quantitative restrictions, thus bringing these *outside* the scope of Article 28 EC; or whether on the other hand, these should be regarded as measures equivalent to quantitative restrictions, which are granted, though they are *within* the reach of Article 28 EC, through *Keck*, an 'internal exemption' similar to the mandatory requirements doctrine. *Cf.* e.g. G. Davies, 'Can Selling Arrangements Be Harmonised?', (2005) 30 E.L.Rev., p. 376, and C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford, Oxford University Press, 2004), p. 41.
19. To some, this will come as no surprise, as the ideas inspiring the Court on the free provision of services have always seemed to resonate those behind the rules on the free movement of goods. This can be gleaned especially from the trend of demanding the abolition of restricting, not just discriminating, domestic measures. Also in the requirement that host States take heed of measures imposed by home States in protecting any relevant legitimate interests, the services case-law closely follows that on goods. Compare e.g. Case 120/78, *Rewe Zentral AG* v. *Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649, para. 14, and Case 272/80, *Criminal Proceedings against Biologische Producten BV*, [1981] ECR 3277, para. 14.

nation or in the principle of market access – generally accepted and capable of explaining convincingly all the Court's case-law on free movement, but many writers do share the view that the Court's case-law on the four freedoms is steering a course for convergence.[20] Thus, along with the continual spillover from the 'persons' case law to that of goods, the multitude of intertwined issues in goods and services, as exemplified by cases like *De Agostini*, would make a fresh installment in their parallel evolution readily understandable.

Allegedly, *Keck* itself did little for legal certainty in the goods case-law; so little that every possible new approach, as e.g. heralded in *Gourmet*,[21] is greeted with much enthusiasm. All the same, if *Keck* despite all criticisms[22] is *in se* never to be repealed, the emergence of a similar, rather than identical, doctrine in the services case-law could still be forthcoming. As it is difficult to fit the approach in the recent *Viacom II* and *Mobistar* cases, discussed below, in with earlier jurisprudence, the main submission of this article is that the ECJ, however unclear yet the direction, at least is backtracking on *Säger*, and may well be steering for a new course. Therewith, as shall be illustrated, it potentially has become possible to ascertain the theoretical framework underlying the free movement provisions with greater accuracy than before.

2. Theories on Barriers: Taking Stock

What general test should apply to non-discriminatory barriers to services provision is a classic matter, and far from easily resolved. Although it is clear that the Court in *Säger* parted with the traditional 'discriminatory barriers-only' approach, for now it is left to scholarship to deduce what type of test actually replaced the discrimination framework. It is argued widely that it in fact was substituted for a market access test, under which any rule that substantially hinders the access of services to national markets would be caught by Article 49 EC and would, hence, have to be justified.[23] The problem of correct

20. *See* e.g. Barnard (cited *supra* notes 5 and 18); R. Greaves, 'Advertising Restrictions and the Free Movement of Goods and Services', (1998) 23 E.L.Rev., p. 305; W. Devroe & J. Wouters, 'Liberté d'établissement et libre prestation des services' (1996) *J.T.D.E.*, p. 56; S. Weatherill, 'After Keck: Some Thoughts on How to Clarify the Clarification', (1996) 33 C.M.L.Rev., p. 885.
21. Case C-405/98, *Konsumentombudsmannen* v. *Gourmet International Products*, [2001] ECR I-1795.
22. For all the enthusiasm with which the doctrine has initially been applied, uncertainties still haunts the question of how a selling arrangement is to be defined. Also, it is at least regrettable that the Court did not express itself on which cases *Keck* had exactly overturned. Finally, as regards the actual flaws of the test and terms, *see* e.g. Weatherill, (cited *supra* note 20), *passim*, and the opinion of AG Jacobs in Case C-412/93 *Société d'Importation Leclerc-Siplec* v. *TF1 Publicité and M6 Publicité*, [1995] ECR I-179.
23. E.g. Weiler cited *supra* note 17; Barnard cited *supra* note 5; P. Oliver & W.-H. Roth, 'The

qualification of non-discriminatory barriers was, however, not settled definitively by seeking recourse to this market access-doctrine. It remains ambiguous why a national measure that would benefit from a *Keck*-type exemption applied under Article 49 EC, forecloses national markets to such an extent that the matter would demand address under either Articles 46/55 EC, or the mandatory requirements doctrine. Indeed, as emphasized by Da Cruz Vilaça, conceptually it is incomprehensible why a rule prohibiting the sale of goods at a loss would benefit from a specific exception, whereas a similar rule outlawing sales of services at a loss would need to be subjected to a proportionality test.[24] If the intention behind the provisions establishing the Internal Market actually is to integrate national markets, rather than to liberalize trade by removing all inhibitions to commerce (i.e. even those which do not obstruct imports and exports), then one must conclude that national measures that affect equally, both in law and in fact, the import of services, do not jeopardize the attainment of that Market. What is then required in this respect is a case in which the ECJ ascertains that this vision underlies the service regime as well.

Starting from the premise that goods and services share a common denominator, we will investigate below the possibility of a single theory underlying both sets of rules, such as the idea that discrimination is not (or should not be) the only issue in need of address, but market foreclosure too. Of course, comparison with the free movement of goods case-law is apt, and occasionally, neighbouring fields of law like the free movement of persons also will enter into our analysis. All existing theories will be grouped into three main categories, the discrimination theory, the restrictions theory and the market access theory respectively. A fourth category identified below consists of a combination of the first and the third. It will be argued that this fourth theory catches all trade impairing measures that 'ought' to be caught under Article 49 EC. The four theories are best seen as prisms: looking through them separately sheds light on different aspects of trade barriers and the reason they are injurious to the Internal Market, but none of them provides a comprehensive solution individually.

2.1. The Discrimination Theory

It would appear contradictory to state that non-discriminatory barriers to trade could be caught by an approach towards Article 49 EC that relies on a dis-

Internal Market and the Four Freedoms', (2004) 41 C.M.L.Rev., p. 415–416; E. Spaventa, 'From Gebhard to Carpenter: Towards a (Non-)economic European constitution', (2004) 41 C.M.L.Rev., p. 756.

24. J.L. da Cruz Vilaça, 'On the Application of Keck in the Field of Free Provision of Services', in M.T. Andenas & W.-H. Roth (eds.), *Services and Free Movement in EU Law* (Oxford: Oxford University Press, 2002), p. 39.

crimination test. Nevertheless, the ECJ has in the past actually addressed such barriers under such a test.[25] Moreover, there are those who argue that many more discriminatory scenarios could be caught under Article 49 EC by varying the discrimination test, i.e. letting go of the nationality yardstick and looking for other distinguishing criteria that should be disallowed.[26] A ban on certain (particularly effective) methods of marketing, for instance, would discriminate to the detriment of foreign service providers who are trying to penetrate the market of the regulating Member State. This theory may especially be of help in the context of advertising restrictions, which were featured in a considerable number of free movement of goods cases.[27]

A problem that may arise under a pure discrimination test under Article 49 EC is that straightforward bans on selling certain products normally affect nationally produced services as severely as imported ones; it would nevertheless appear to be peculiar to turn a blind eye to them.[28] If subjected to a *Keck*-like rule, such bans might escape the prohibition of Article 49 EC, while this sort of measure obviously interferes with the establishment of the Internal Market; they undoubtedly form a barrier to enter a national market.[29] The ECJ made no mistake when it held this type of rule to fall inside the scope of Article 49 EC; its wording is indeed broad enough to catch total prohibitions.[30] The reason that their inclusion appears to be correct is that it is difficult to appre-

25. Respectively Case 33/73, *J.H.M. van Binsbergen* v. *Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, [1974] ECR 1299; Case 71/7, *Jean Thieffry* v. *Conseil de l'ordre des avocats à la cour de Paris*, [1977] ECR 765.
26. W.-H. Roth, 'The European Court of Justice's Case Law on Freedom to Provide Services: Is *Keck* Relevant?' in M.T. Andenas & W.-H. Roth (eds.), *Services and Free Movement in EU Law* (Oxford, Oxford University Press, 2002), p. 13.
27. E.g. Case C-320/93, *Lucien Ortscheit GmbH* v. *Eurim-Pharm Arzneimittel GmbH*, [1994] ECR I-5243; Case C-412/93 *Société d'Importation Leclerc-Siplec* v. *TF1 Publicité and M6 Publicité*, [1995] ECR I-179; Case C-6/98 *Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD)* v. *Pro Sieben Media AG, supported by SAT 1 Satellitenfernsehen GmbH, Kabel 1, K 1 Fernsehen GmbH*, [1999] ECR I-7599.
28. Nevertheless, in its early case law, the ECJ left this type of measure untouched: Case 52/79, *Procureur du Roi* v. *Marc J.V.C. Debauve and others*, [1980] ECR 833. *Cf.* P. Oliver, W.-H. Roth, cited *supra* note 23, p. 415.
29. Under Article 28 EC an outright ban qualifies as a quantitative restriction (Case 34/79, *R.* v. *Maurice Donald Henn and John Frederick Ernest Darby*, [1979] ECR 3795). Article 49 EC does not mention this specific type of barrier but employs the broader notion of 'restrictions'. *See* also Spaventa, cited *supra* note 23, p. 761.
30. Case C-384/93, *Alpine Investments BV* v. *Minister van Financiën*, [1995] ECR I-1141; Case C-275/92, *Her Majesty's Customs and Excise* v. *Schindler,* [1994] ECR I-1039; Case C-67/98 *Questore di Verona* v. *Diego Zenatti*, [1999] ECR I-7289. The exact grounds for disallowing outright bans to service provision are unclear; however Spaventa, cited *supra* note 23, p. 761: 'A total barrier to imports runs against the very prohibition on quantitative restrictions contained in the Treaty. […] But also, and more importantly, both a ban on imports and a ban on the provision of services run against the mutual recognition principle.'

ciate why a product (be it a service or a good) that is lawfully marketed in one state should be banned in another, even though the principle of mutual recognition does not apply to goods to exactly the same extent as it applies to services.

A closely related complication arises out of another dissimilarity between the regimes of the provisions on goods on one hand and services on the other; it is caused by the quadripartite approach of the goods regime, which consists of four separate provisions, Articles 25, 28, 29 and 90 EC, covering a wide variety of intra-Community trade barriers. These are not individually specified in Article 49 EC, which will therefore have to address all types of restrictions if it intends to have the same scope as the entire regime applicable to goods. It is clear from *Alpine* that Article 49 EC also covers export restrictions.[31] Nevertheless, there is a marked difference between Articles 28 and 29 EC: whereas the scope of Article 28 EC embraces both directly and indirectly discriminatory measures, the realm of Article 29 EC only stretches to cover directly discriminatory rules.[32] Should the same distinction be read into Article 49 EC, despite its broader formulation?[33] It is submitted here that it should.

One interesting aspect of the discrimination theory is the way in which certain national measures that are *prima facie* candidates for the *Keck*-rule, mainly those rules that prohibit certain types of advertising or other marketing methods, would be dealt with. One could argue that restrictions on the use of certain ways of advertising or other types of product promotion discriminate between, on the one hand, products already on the market of the Member State that called the restriction into being, and, on the other, products from other Member States which still have to find their way to the Member State where the restrictive marketing regime is in force. On this point we agree with Roth, however, that even restrictions on advertising that stem from national rules, which are actually in harmony with one another, may hinder intra-Community trade.[34] Such is to say that, even if two Member States happened to have enacted advertising restrictions of a similar nature, their respective national traders may find it difficult to penetrate the other Member State's national market if they are not allowed to use certain particularly effective

31. If Article 49 EC also applies to export restrictions by reason of its broader formulation, one could argue by analogy that it would also apply to financial barriers like the ones encompassed by Articles 25 and 90 EC. Such financial burdens without doubt would qualify as 'restrictions'.
32. Case 15/79, *P.B. Groenveld BV* v. *Produktschap voor vee en vlees*, [1979] ECR 3409; Case 155/80, *Criminal proceedings against Sergius Oebel*, [1981] ECR 1993; Case C-80/92, *Commission* v. *Belgium*, [1994] ECR I-1019.
33. Case C-384/93, *Alpine Investments BV* v. *Minister van Financiën*, [1995] ECR I-1141, paras 40–48: in essence, the Dutch prohibition on 'cold calling' formed a restraint on exports more than on national sales.
34. W.-H. Roth, 'Combined case-note on *Keck and Mithouard* and *Hünermund*', (1994) 31 C.M.L.Rev., p. 854.

means of marketing. Under a pure discrimination test, it appears impossible to solve this problem.

This example is a species of another obstacle that is difficult to capture under a pure discrimination test, a double regulatory barrier. Although one might argue that services subjected to regulation from their home state (the state of origin) are discriminated against because, once exported, they also have to satisfy the requirements set by the host state (the state of destination), it is far from clear how this would qualify as discriminatory. Here, the premise could be that services meant for export would suffer discriminatory treatment as they have to pass two tests, whereas nationally traded products only have to be in conformity with one set of rules.[35] It is, however, extremely difficult to perceive how Member States would be able to avoid this type of discrimination.[36] The only option here is to take foreign law into account when regulating trade in services, which is not a particularly attractive option in a Union of twenty-five (and beyond) Member States.

2.2. The Restrictions Theory

A second way of analyzing what type of trade barrier, by some standard, ought to fall foul of Article 49 EC is assessing whether the national rule contains a restriction to trade. There are judgments regarding the free movement of persons[37] that employ this theory, but overall it has not been hailed with great enthusiasm.[38] Small wonder, since the restrictions theory knows many pitfalls, caused by its very general nature. Under such a theory, Member States should remove all 'obstacles' to trade. First of all, the notion of 'obstacles' is rather vague, as has rightly been pointed out by Barnard in a comment on *Carpenter*:[39]

> 'Take *Carpenter* as an example: what was the obstacle which 'deterred' Mr Carpenter from exercising his freedom to provide cross-border services – the separation of husband and wife which would be 'detrimental to their family life', the potential loss of child care, or the emotional distress involved?'[40]

35. Roth, cited *supra* note 27, p. 13 (footnote 59).
36. *Ibid.*, footnote 60.
37. Case C-415/93, *Union royale belge des sociétés de football association ASBL* v. *Jean-Marc Bosman*, *Royal club liégeois SA* v. *Jean-Marc Bosman and others* and *Union des associations européennes de football (UEFA)* v. *Jean-Marc Bosman,* [1995] ECR I-4921; Case C-19/92, *Dieter Kraus* v. *Land Baden-Württemberg*, [1993] ECR I-1663; Case C-60/00, *Mary Carpenter* v. *Secretary of State for the Home Department*, [2002] ECR I-6279.
38. Barnard, cited *supra* note 18, p. 260.
39. Case C-60/00, *Mary Carpenter* v. *Secretary of State for the Home Department*, [2002] ECR I-6279.
40. Barnard, cited *supra* note 18, p. 260 (footnotes omitted).

Indeed, it appears that 'obstacles' contains a subjective element, which could be formulated as the question: 'Does the service provider *feel* that a national measure curtails his freedom to provide services in any significant way?' Admittedly, in the context of service provision, the notion could be objectified to a greater extent, as it may have to be addressed in relation to the service itself and not in relation to the service provider. Nevertheless, the subjective element comes into play again when the service provider himself is hindered in his freedom to move to another Member State in order to perform his services there.

A related aspect is the almost embedded need for a *de minimis* demarcation line. If, indeed, all measures that have some restrictive impact on the free movement of services should be drawn into the scope of Article 49 EC, one might argue that, in mitigation, these barriers will have to produce a noticeable impact on economic life. In the context of Article 28 EC, this discussion has already taken place. Advocate General Van Gerven proposed to introduce a type of *de minimis* test in *Torfaen*,[41] but the ECJ rejected his submission. Later on, Advocate General Lenz refocused the debate by arguing that the emphasis should be on market access instead of on the substantiality of the restraint.[42] Nevertheless, the substantiality criterion re-entered through the backdoor, when Advocate General Jacobs argued in turn that if unlimited access to national markets was the proper criterion by which national measures should be judged, any non-discriminatory measure that exerts a *substantial* restriction to access to another Member State should be caught by Article 28 EC.[43] The word 'substantial' appears to suggest that negligible barriers may also exist, and that the borderline between these categories would logically be formed by a *de minimis* test of some kind.[44] In this respect, the restrictions theory and the market access theory, discussed below, appear to overlap. A potential impediment that does not appear to restrict trade in any noticeable way would probably not bar access to a national market either.

Lastly, pleading against this theory as the sole dominating paradigm, it cannot be held that the EC Treaty intends to prohibit every barrier to trade. It aims at eliminating barriers to *interstate* trade only. This becomes apparent from the fact that purely internal situations still do not come under the scope of the free movement provisions, even though the transnational elements are

41. *See* the opinion of AG Van Gerven in Case 145/88, *Torfaen Borough Council* v. *B & Q Plc*., [1989] ECR 3851.
42. *See* the opinion of AG Lenz in Case C-391/92, *Commission* v. *Greece*, [1995] ECR I-1621.
43. *See* the opinion of AG Jacobs in Case C-412/93 *Société d'Importation Leclerc-Siplec* v. *TF1 Publicité and M6 Publicité*, [1995] ECR I-179. *See* also: G. Straetmans, 'Case-note on *Gourmet*', (2002) 39 C.M.L.Rev., p. 1412–1413. *See* also the opinion of AG Tesauro in Case C-292/92 *Ruth Hünermund and others* v. *Landesapothekerkammer Baden-Württemberg*, [1993] ECR I-6787.
44. K. Mortelmans, 'Towards convergence in the application of the rules on free movement and on competition?' (2001) 38 C.M.L.Rev., p. 633–634.

increasingly marginalized by the ECJ in recent cases.[45] Judgments predominantly based on the restriction theory are often controversial because of the rather vague notion of 'restrictions', which give a catch-all character to the Treaty provisions safeguarding free movement. This is unavoidable, as laws are an exponent of government involvement in private life and, surely, any government interference in civil liberties in some way will curtail private (economic) freedom and thereby produce obstacles to trade.[46] Nonetheless, Judge Joliet rightly argued that it is was not the intention of those who designed the Treaty to liberalize trade in general, by attacking any type of public involvement in economic life. It rather was to integrate segregated national markets.[47] A theory exclusively based on the question of whether a national trading rule impairs economic freedom thus would be over-inclusive, and would shift the emphasis towards justification of such measures under express derogation clauses or the rule of reason. For these reasons, it is submitted that the restrictions theory never should be applied in isolation, but may fulfil a useful ancillary role when applied in combination with the traditional discrimination model. For instance, it can be of use in determining whether the effects of a national measure have the same repercussions on national and foreign traders.

2.3. The Market Access Theory

It has been argued that the third theory which may underlie the free movement rules, the market access theory, is in reality an extension of the 'factual equality test' introduced in *Keck*.[48] One may recall that the ECJ held that national rules that '[…] affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States […]' fall outside the realm of Article 28 EC. *De Agostini* showed that foreign products are placed at a disadvantage in case a non-discriminatory rule factually

45. *See* Hatzopoulos, cited *supra* note 5, p. 58–62, and e.g. in the free movement of goods Case C-72/03, *Carbonati Apuani Srl* v. *Comune di Carrara*, [2004] ECR I-8027; Case C-293/02, *Jersey Produce Marketing Organisation Ltd* v. *States of Jersey and Jersey Potato Export Marketing Board*, n.y.r.
46. *Cf.* R. Barents, 'Measures of Equivalent Effect. Some Recent Developments', (1981) 18 C.M.L.Rev., p. 287: 'State interventions on the market may be said to have an appreciable effect by their very nature.'
47. R. Joliet, 'La libre circulation des marchandises: l'arrêt Keck et Mithouard et les nouvelles orientations de la jurisprudence', *Exposé présenté lors de la visite des Cours suprêmes à la Cour de justice le 6 juin 1994*. *See* also the opening sentence from the opinion of AG Tesauro in Case C-292/92, *Ruth Hünermund and others* v. *Landesapothekerkammer Baden-Württemberg*, [1993] ECR I-6787: 'Is Article 30 of the Treaty a provision intended to liberalise intra-Community trade or is it intended more generally to encourage the unhindered pursuit of commerce in individual Member States?'
48. Straetmans, cited *supra* note 43, p. 1414.

hampers their access to a national market. Especially when the national measure outlaws a specific type of advertising, it has the inherent effect of blocking access, thereby making life harder for the foreign trader than for the nationally oriented businessman. After all, the effect of such a ban would be that manufacturers in other Member States '[…] would find it virtually impossible to penetrate the market in which the ban was imposed'.[49] The national producers, already present in their home market, naturally would not suffer the same distress.

The *Gourmet* judgment helped to carve details into the rule laid down in *Keck*, by specifying which national legal instruments would be classified as selling arrangements. Apparently, national rules that form some impediment to the use of effective marketing means (such as certain types of advertising) do not factually affect national and foreign traders equally, and will therefore not escape the scrutiny of Article 28 EC. In fact, one could even see this as an abandonment of the dichotomy introduced by *Keck*, i.e. that a national measure must either qualify as a selling arrangement or as a product requirement.[50] It seems a better question to ask instead whether the national measure obstructs access to the market; product requirements usually do, but selling arrangements, especially advertising restrictions, may produce similar effects.

In this context, the close link between the goods and services case-law is provided by *Alpine Investments*.[51] It appears from this case that the ECJ does not wish to introduce a hard and fast *Keck*-like rule under Article 49 EC, only to find that it will subsequently need to refine it, just as it had to (and has) refined *Keck* in many subsequent cases.[52] The ECJ seems to have been treading on this path, disregarding a *Keck* dichotomy under Article 49 EC, when it ruled that the Dutch ban on cold-calling '[…] directly affects access to the markets in services in the other Member States and is thus capable of hindering intra-Community trade in services'.[53] Ever since, the waiting has been for

49. Opinion of AG Jacobs in Joined Cases C-34/95, C-35/95, C-36/95, *Konsumentenombudsmannen* v. *De Agostini (Svenska) Förlag AB* and *Konsumentenombudsmannen* v. *TV-Shop,* [1997] ECR I-3843, para. 99.
50. Straetmans, cited *supra* note 43, p. 1414.
51. Noteworthy is that in the free movement of goods case *Heimdienst*, the ECJ addressed the notion of trade impediment with explicit reference to *Alpine Investments*, a free movement of services case; Case C-254/98, *Schutzverband gegen unlauteren Wettbewerb* v. *TK-Heimdienst Sass GmbH*, [2000] ECR I-151, para. 29.
52. For a recent overview of the post-*Keck* case-law, *see* K.J.M. Mortelmans, 'De Keck-check', (2005), 11/12 *Nederlands Tijdschrift voor Europees Recht*, p. 247.
53. Case C-384/93, *Alpine Investments BV* v. *Minister van Financiën*, [1995] ECR I-1141, para. 38. *See* also: M. Poiares Maduro, 'Hamony and Dissonance in Free Movement', in M.T. Andenas & W.-H. Roth (eds.), *Services and Free Movement in EU Law* (Oxford: Oxford University Press, 2002), 41, p. 62. On different types of market access theories, *see* C. Barnard & S. Deakin, 'Market access and regulatory competition,' in C. Barnard and J. Scott (eds.), *The Law of the Single European Market. Unpacking the Premises*, (Oxford: Hart, 2002), p. 204–213. Some

a case to come up in which the effects of the national rule were not so as to preclude access to a national market, i.e. a services case in which *Keck*, or, rather, the more fundamental theory *Keck* appears to be a symptom of, is applied under Article 49 EC.

2.4. The Combination Theory: Discrimination and Market Access

It is possible to combine the discrimination and market access theories into one paradigm, in which the traditional discrimination theory forms the initial framework for case analysis, and the market access theory fulfils an ancillary role.[54] The ECJ expressly mentioned this possibility in a case concerning the freedom of establishment, *Commission* v. *Belgium*. The Court there held that '[t]he conditions laid down for the registration of aircraft must therefore not discriminate on grounds of nationality *or* form an obstacle to the exercise of that freedom'.[55] This phrasing seems to suggest that a two-tiered approach will be taken by the ECJ: if a discriminatory intent or effect of the national measure can be discerned, the Court may condemn the national law on that basis alone. If, however, no sign of direct or indirect discrimination emanates from the first assessment, the ECJ will proceed to look whether an obstacle to the exercise of the relevant fundamental freedom can be found.[56] The combination theory thus may tie the discrimination and market access theories together. It finds it origin in *Keck*, notably in paragraph 16 of the judgment, where the ECJ held that as long as national provisions apply equally to domestic and foreign traders and as long as they affect both parties equally both *in law and in fact*, they do not qualify as barriers in the sense of *Dassonville*.[57]

The best examples of measures with trade-impairing factual effects are the Swedish advertising prohibitions *De Agostini* and *Gourmet* revolved around, respectively a ban on television advertising directed at children under the age of twelve, and a ban on certain methods of advertising for alcoholic beverages.

authors believe, however, that the application of the *Keck*-doctrine to services was explicitly rejected in *Alpine*: L. Idot, *Europe* (1995), Juillet Comm. No. 264, p. 11.

54. *See* Roth, cited *supra* note 27, p. 16; Barnard, cited *supra* note 18, p. 261.
55. Case C-203/98, *Commission* v. *Belgium*, [1999] ECR I-4899, para. 12 (emphasis added).
56. Due care should be taken in drawing too much inference from the passage above: it must be stressed that in the original French version of the judgment, the word 'ni' is used instead of 'or', while in the German and Dutch the words 'und' respectively 'en' are used, both meaning 'and'. Consequently, in the English version, the test appears to consist of two stages; if the national measure does not pass the scrutiny of the first stage, there appears to be no room for assessment under the second stage, whereas in the French, Dutch and German versions, the stages seem to be plainly cumulative rather than arranged in any specific order.
57. Joined Cases C-267 & 268/91, *Criminal Proceedings against Keck and Mithouard,* [1993] ECR I-6097, para. 16 (emphasis added).

Under the traditional discrimination theory, these outright prohibitions would have affected in the same manner, in law and in fact, national and imported goods as the prohibition impairs their marketing in exactly the same fashion. Nevertheless, the ECJ stretched the meaning of the notion 'affecting in fact' in *Gourmet* by stating:

> '[…] the Court is able to conclude that, in the case of products like alcoholic beverages, the consumption of which is linked to traditional social practices and to local habits and customs, a prohibition of all advertising directed at consumers […] is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are instantly more familiar.'[58]

On the basis of this paragraph, the factual setting in which the detrimental consequences for imports caused by a national measure should be broadened beyond a mere analysis of the effects the trade barrier is likely to propel itself; i.e. it should be judged against the relevant factual background, not in the abstract. It seems that under the traditional discrimination approach, the context in which assessment of the obstruction took place was confined to such an assessment *in abstracto*. When, however, the surrounding and more remotely related facts are also taken into account, one may reach a different conclusion. That appears to be exactly what the ECJ did in *Gourmet*. The relevant facts that ought to be taken into account apparently include that Sweden had only recently joined the EU when the judgment was passed; its market for alcoholic drinks had been foreclosed to a very high degree by its system of compulsory sales through a government-controlled distribution chain,[59] and a genuine risk was present that the market would not open up if foreign traders remained unable to promote their products. It could well be that if not Sweden but a different Member State, which had already been part of the EC for a much longer period, had called into life a similar prohibition, market access would not have been obstructed as significantly as was the case in *Gourmet*.[60] This is why national measures curbing companies' freedom to advertise are tricky examples of 'selling arrangements'. It is likewise the reason why the intent to impair trade on part of the legislator should not play a role when its laws are

58. Case C-405/98, *Konsumentombudsmannen* v. *Gourmet International Products*, [2001] ECR I-1795, para. 21.
59. *See* Case C-189/95, *Criminal proceedings against Harry Franzén*, [1997] ECR I-5909.
60. Besides, there is a more general risk for foreign traders that national operators do not run: it is difficult for exporters to ship their goods 'à la bonne foi' to another Member State and only hope and pray they will subsequently be sold. An advertising campaign can be seen as a first step towards entering a national market.

scrutinized; it is the *factual effect* assessed in the *factual context in which the rule is applied* that counts.[61]

3. *Keck* in the Land of Services – Opportunities So Far

In view of this last remark, it makes sense to explore if there is room for the application of the *Keck* rule under article 49 EC, or, rather, it would appear sensible to look whether the proper factual setting in which this rule would apply has ever presented itself. We submit that it has not. In our view, the ECJ has had two opportunities to introduce the *Keck* exception in the field of service provision, in *Alpine Investments* and in *De Agostini*. On closer inspection, conducted below, it appears neither case lends itself for this purpose.[62] Unsurprising, one could say, as both cases deal with restrictions to the use of certain marketing methods.

3.1. Alpine Investments

In *Alpine Investments*, as mentioned above, the ECJ addressed the Dutch ban on unsolicited phone calls to consumers in order to market financial products. As the prohibition applied to phone calls to potential customers established in the Netherlands as well as in other Members States, the measure could be qualified as non-discriminatory. The Dutch and UK governments subsequently contended that this was the reason it should benefit from the *Keck* exemption, applied analogously under Article 49 EC. The Court, however, distinguished that case on the facts by holding that '[s]uch a prohibition is not analogous to the legislation concerning selling arrangements held in *Keck and Mithouard* to fall outside the scope of Article 30 of the Treaty'.[63] This statement can be seen as a silent acceptance of the *Keck* exemption and its transplantation into Article 49 EC.[64] However, it is equally plausible that the ECJ just ignored the applicability of an exception for selling arrangements from the scope of that provision.[65] The fact that it went to the trouble of rebutting the Dutch and UK's contention, however, seems to indicate that it had accepted, be it *in obiter,* the potential applicability of *Keck* under Art. 49 EC. However, the Court hastily responded to the submissions of the Netherlands and the UK by holding that the prohibition at stake '[…] directly affects access to the

61. Roth, cited *supra* note 27, p. 11; Oliver & Roth, cited *supra* note 23, p. 416.
62. Da Cruz Vilaça, cited *supra* note 24, p. 28–30.
63. Case C-384/93, *Alpine Investments BV* v. *Minister van Financiën*, [1995] ECR I-1141, para. 36.
64. M. Poiares Maduro, 'The Saga of Article 30 EC: To Be Continued', (1998) 5 *Maastricht Journal*, p. 315.
65. V. Hatzopoulos, 'Case-note on *Alpine Investments*,' (1995) 32 C.M.L.Rev., p. 1427.

market in services in the other Member States and is thus capable of hindering intra-Community trade in services'.[66]

This leap from considerations relating to the applicability of *Keck* to the classification of the Dutch rule as a barrier to service provision spurred some authors to conclude that the ECJ actually rejected the applicability of the *Keck*-rule under Article 49 EC.[67] That observation may be true, but considering the rather neutral wording employed by the Court, it is no less likely that it was trying to kill several birds with one stone. One could contend that the Court restated *Keck* by laying more stress on the second condition,[68] i.e. by emphasizing that an indistinctly applicable national measure can form an obstacle to trade when the effects it produces impose heavier on foreign traders than on national ones.[69] A third way of looking at *Alpine Investments* is that *Keck* is actually ignored by the Court in its assessment of the case. This view is supported by the sharp contrast in approach with *Leclerc-Siplec*, a free movement of goods case in which *Keck* was successfully invoked.[70] In that case, a French law precluded companies active in the distribution sector from making use of television advertising. The ECJ appeared very keen to qualify the French law as a selling arrangement by referring to the fact that distributors have alternative means of advertising at their disposal. The Court's implicit refusal to take that same argument into account in *Alpine Investments* (it did not assess whether any effective marketing methods besides cold calling were available) could be regarded as an expression of its unwillingness to apply *Keck* to service cases.[71] This could also be explained by the fact that *Alpine Investments* more closely resembles what would be an Article 29 EC case, had it concerned goods. To the present authors, this seems the most plausible reason why *Keck* was not successfully applied in *Alpine*.[72]

66. Case C-384/93, *Alpine Investments BV* v. *Minister van Financiën*, [1995] ECR I-1141, para. 38.
67. E.g. J.-G. Huglo, 'Liberté d'établissement et libre prestation des services', (1995) *R.T.D.E.,* p. 827, in whose opinion the Court excluded in *Alpine* "[…] toute pollution de la matière de la libre prestation des services par la jurisprudence *Keck et Mithouard* […]"; *see* also Idot, cited *supra* note 53; Hatzopoulos, cited *supra* note 65.
68. The first condition being that the national measure should only regulate selling arrangements rather than be aimed at regulating the flux of goods between Member States. It is submitted that the ECJ no longer pays much attention to the first criterion: *see* Poiares Maduro, cited *supra* note 64, p. 54–55.
69. Similarly Hatzopoulos, cited *supra* note 65, p. 1438.
70. *Ibid*., p. 1439.
71. J. Stuyck, 'Case-note on *De Agostini*', (1997) 34 C.M.L.Rev., p. 1466. Of further relevance is also the order in which the ECJ deals with qualifying the restriction at hand: it first performs a classic, pre-*Keck* examination of the case, only to address *Keck* after the conclusion that the Dutch measure can be seen as a barrier has already been drawn.
72. For the same reasons it appears not to have been applicable in *Pro Sieben* either: Case C-6/98, *Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD)* v. *PRO Sieben Media AG, supported by SAT1 Satellitenfernsehen GmbH, Kabel 1, K1 Fernsehen GmbH,* [1999] ECR I-7599, paras. 49–52.

3.2. De Agostini

A second opportunity to transplant the *Keck*-doctrine to Article 49 EC presented itself when *De Agostini* was referred to the ECJ. The Swedish legislation which was impugned in this case forbade, amongst many other things, the marketing of products through television commercials specifically aimed at children under the age of twelve. Although this case too was resolved largely under Article 28 EC as De Agostini tried to market magazines, it also touched upon the free movement of services. Although the magazines which were at stake qualified as goods and therefore fell under the scope of Article 28 EC, the re-transmission of television commercials obviously was a service to be placed within the ambit of Article 49 EC. In so far as the Swedish legislation inhibited the sale of magazines, it could, according to the Court, be qualified as a selling arrangement, but not if it were proven before the national court that '[…] the ban does not affect in the same way, in fact and in law, the marketing of national products and of products from other Member States'. When turning to the second question referred by the Swedish Court, the ECJ takes a different perspective:

> 'Provisions such as those in question in the main proceedings, where they restrict the possibility for television broadcasters established in the broadcasting State to broadcast, for advertisers established in the receiving State, television advertising specifically directed at the public in the receiving State, involve a restriction on freedom to provide services.'[73]

At first glance, these differing approaches towards the same trade barrier appear contradictory. If they are examined in light of a remark of Advocate General Jacobs in his opinion in *Leclerc-Siplec*, however, they need not be. He felt that the restrictiveness of a national measure depends, amongst other factors, upon the availability of alternatives for the party facing the trade barrier.[74] Indeed, the advertiser, De Agostini, had other, maybe less effective, means of advertising than television commercials at its disposal, such as advertisements in magazines, billboards, or perhaps door-to-door folders. The ECJ addressed the same matter under Article 49 EC not from the advertiser's stance, but from the perspective of the broadcaster.[75] Whereas the advertiser can change its marketing policy, the broadcaster cannot change the contents of

73. Joined Cases C-34/95, C-35/95, C-36/95, *Konsumentenombudsmannen* v. *De Agostini (Svenska) Förlag AB* and *Konsumentenombudsmannen* v. *TV-Shop,* [1997] ECR I-3843, para. 50.
74. Opinion of AG Jacobs in Case C-412/93 *Société d'Importation Leclerc-Siplec* v. *TF1 Publicité and M6 Publicité*, [1995] ECR I-179, para. 45.
75. Stuyck, cited *supra* note 71, p. 1467. This is subscribed to by Da Cruz Vilaça, cited *supra* note 24, p. 32–33.

the television commercial offered to him in order to be de-transmitted, and is therefore faced with what to him is an outright ban,[76] while this may be a restraint of relatively minor importance to a different party within the chain of product distribution or presentation.[77] But perhaps the time is near when the ECJ can no longer distinguish cases on the facts, and will have to examine whether the *Keck*-doctrine may in some form find harbour under Article 49 EC too.

4. Barriers, *Keck* and the Land of Services – A Novel Approach?

Two recent cases give rise to the suspicion that the above cases truly are, in a sense, merely missed opportunities, and not principled denials, though the wait for an overt application of *Keck* itself is at present still not over. A greater synthesis of approaches seems nigh however, with which, as said, it could very well prove possible to outline the conceptual framework that underlies the free movement provisions with greater accuracy than ever before.

4.1. Viacom II

This case,[78] decided in February 2005, arose out of a dispute between the undertakings Viacom Outdoor, established in Italy, and Giotto Immobilier, established in France.[79] Viacom demanded payment from Giotto for bill-posting advertising services provided in 2000 in the municipality of Genoa, Italy. Contested between the parties was only the part of the sum which served as reimbursement for the expenditure on the municipal advertising tax, which was payable to the municipality of Genoa. Giotto refused to reimburse Viacom for this expenditure, claiming the municipal tax contravened Community law. The called-on national court subsequently referred questions to the ECJ on the possible infringement of Articles 86, 82, 87 and 88 EC. After terse investigation, the Court deemed these questions to be inadmissible, as the order for reference did not provide the information necessary to give a meaningful reply to the questions referred. However, the question also referred, of whether the municipal advertising tax constituted an impediment to the freedom to provide services, contrary to Article 49 EC, could be answered. The Court first

76. Which qualifies as a restriction; Opinion of AG Jacobs in Case C-412/93 *Société d'Importation Leclerc-Siplec* v. *TF1 Publicité and M6 Publicité*, [1995] ECR I-179, para. 44.
77. Da Cruz Vilaça, cited *supra* note 24, p. 33.
78. Case C-134/03, *Viacom Outdoor SrL* v. *Giotto Immobilier SARL*, [2005] n.y.r.
79. In the first Viacom case (C-190/02, [2002] ECR I-8287), the ECJ found the reference for a preliminary ruling to be manifestly inadmissible, as the latter did not provide sufficient explanation of the factual and legislative context.

reiterated the stance familiar ever since the *Säger* case, and emphasized that Article 49 EC 'requires the elimination of *any* restriction to the freedom to provide services, even if it applies to national providers of services and to those of other Member States alike, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services'.[80] As the Court has asserted before that national tax measures restricting the free provision of services may indeed be considered contrary to Article 49 EC,[81] what remained was to scrutinize the Italian advertising tax in particular. The Court noted that it is levied without distinction, regardless of the place of establishment of the provider or recipient of the bill-posting services, or the place of origin of the advertised goods or services:

> 'Next, such a tax is applied only to outdoor activities involving the use of public space administered by the municipal authorities, and its amount is fixed at a level which may be considered modest in relation to the value of the services provided which are subject to it. In those circumstances, the levying of such a tax is *not on any view liable to prohibit, impede or otherwise make less attractive* the provision of advertising services to be carried out in the territory of the municipalities concerned, including the case in which the provision of services is of a cross-border nature on account of the place of establishment of either the provider or the recipient of the services.'[82]

The advertising tax was therefore judged to be compatible with Article 49 EC. This outcome is striking, as on a strict reading of *Säger*, which the Court formally still adheres to, the Italian rules would have been outlawed by Community law. The municipal tax was imposed on *inter alia* bill-posting services of a cross-border nature on the basis of the place of establishment of either the provider or the recipient of the services, and in this respect constituted a restriction, though *any* restrictions are to be abolished. The fact that it concerned an indistinctly applicable measure, moreover that it concerned only a marginal sum, was, apparently, *de facto* sufficient to take the case outside the scope of the prohibition. Evidently, this amounts to backtracking on the *Säger* imperative. It also puts dents in any attempts to infer a pure restrictions theory

80. Para. 35 (emphasis added), with reference to Case C-262/02, *Commission* v. *France*, [2004] ECR I-6569, para. 22, and Case C-429/02, *Bacardi France SAS, formerly Bacardi-Martini SAS* v. *Télévision française 1 SA (TF1), Groupe Jean-Claude Darmon SA and Girosport SARL*, [2004] ECR I-6613, para. 31. Both paragraphs cited explicitly refer back to *Säger*, para. 12.

81. *See* Case C-17/00, *François De Coster* v. *Collège des bourgmestre et échevins de Watermael-Boitsfort* [2001] ECR I-9445, esp. para. 29.

82. Para. 38 (emphasis added).

underlying (at least this section of) the free movement case-law. Finally, a proportionality or rather a *de minimis* of sorts as regards cross-border market access seems to be in order, whose exact standards test have yet to be developed on a case-by-case basis. Still, *Viacom* leaves a sizeable question mark as regards its wider significance and possible structural ramifications.

4.2. Mobistar

In search for further clarification, a link may potentially be established with *Mobistar*.[83] In these joined cases, decided in September 2005, two companies, Mobistar and Belgacom Mobile, contested the legality of the adoption of two separate Belgian municipal regulations that concerned the taxation of their mobile telecommunications infrastructure. One of the questions referred to the ECJ sought to ascertain whether Article 49 EC precluded the introduction, whether by legislation of national or local authorities, of such taxation.[84] The Court reiterated its position from *De Coster* that the measures of the kind in dispute could in principle constitute a prohibited measure. Next, it emphasized again that vested case-law demands the abolition of any restriction, even if it were to apply without distinction, liable to prohibit or further impede the activities of a service provider established in another Member State where he provides similar services.[85] National rules that have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State have also been expressly prohibited before.[86] However:

> '[…] measures, the only effect of which is to create additional costs in respect of the service in question and which affect in the same way the provision of services between Member States and that within one Member State, do not fall within the scope of Article [49] of the Treaty. As regards the question whether the levy […] in question in the main proceedings amounts to a restriction incompatible with Article [49] EC, it is necessary to point out that such taxes apply without distinction to all

83. Joined Cases C-544/03 and C-545/03, *Mobistar NV* v. *Commune de Fléron* and *Belgacom Mobile NV* v. *Gemeente Schaarbeek*, [2005] n.y.r.
84. The second question, discussion of which would go beyond the scope of our inquiry, pertained to the correct interpretation and exact ambit of Article 3c of Commission Directive 90/388/EEC on competition in the markets for telecommunication services.
85. Para. 29, with reference to Case C-43/93, *Raymond Vander Elst* v. *Office des Migrations Internationales,* [1994], ECR I-3803, para. 14, and Case C-17/00, *François De Coster* v. *Collège des bourgmestre et échevins de Watermael-Boitsfort* [2001] ECR I-9445, para. 29. Again, these both paragraphs explicitly refer back to *Säger*'s para. 12.
86. *See* e.g. Case C-118/96, *Jessica Safir* v. *Skattemyndigheten i Dalarnas Län, formerly Skattemyndigheten i Kopparbergs Län*, [1998] ECR I-1897, para. 23.

> owners of mobile telephone installations within the commune in question, and that foreign operators are not, *either in law or in fact*, more adversely affected by those measures than national operators.'[87]

The levies in question applied without distinction. Foreign operators were neither in law or in fact affected any more by the measures than national operators, nor was the provision of cross-border services rendered more difficult than national service provision.[88] Article 49 EC was therefore to be considered as not precluding the disputed measures, provided they met the conditions of first, applying without distinction to both national service providers and those established in other Member States, and second, affecting both of these in the same way, in law and in fact. Thus, in *Mobistar*, the factual equality test launched in *Keck* is also brought to the fore in the free movement of services. The market access theory, and therewith also in particular the combination theory expounded above, resonates clearly in this case. Again, the purport of *Säger* appears to have diminished to a considerable extent. Moreover, the two conditions submitted by the Court render it quite likely that a more general inference can be drawn here. Clearly, the *Keck* doctrine in itself is not being transplanted. Yet, a conceptually, though not typologically, identical test to the one launched in *Keck* may perhaps be surmised, handing courts and litigants a 'check-list' to determine the possible non-application of Article 49 EC in advance. Essentially, this test would seem to pronounce that any restrictions to the provision of services, provided, first, that they apply without distinction (*Viacom II/Mobistar*), second, that they either consist of minor obstacles to market access (*Viacom II*) or failing that, affect in the same manner in law and in fact both bilateral and unilateral service transactions (*Mobistar*), do not fall foul of Article 49 EC. Thus, one is tempted to postulate cautiously, the combination theory, which includes the discrimination and the market access paradigms, truly appears to be the one underlying (at least this section of) the free movement case-law. Far from conclusive proof admittedly, but all the same, substantially more than conjecture.

5. Conclusion

It will be clear from the preceding, and this should definitely not be negated, that though both *Viacom II* and *Mobistar* share a common core, in significant

87. Paras. 31–32 (emphasis added).
88. The Court did qualify this statement: 'Admittedly, introducing a tax on pylons, masts and antennae can make tariffs for mobile telephone communications to Belgium from abroad and vice versa more expensive. However, national telephone service provision is, to the same extent, subject to the risk that the tax will have an impact on tariffs.' (para. 33).

respects the similarities in both cases are overshadowed by the differences. The way in which the national measures are tackled by the Court coincides in the fact that, at heart, in both cases the classic *Säger* formula would no longer serve. In *Viacom II*, it would have been possible to qualify the municipal tax as a restriction in principle, only to save it through the trusted escape route of the mandatory requirements doctrine. Apparently, there was a need for refinement, for application of a yet unfamiliar novel standard. To the critical observer, alas, the solution chosen much resembles an obscuring ruse. Judged by its wording, the decisive paragraph has the distinct ring of a *de minimis* test. The standard employed however is far from clear-cut. The fact that prior to the crucial paragraph the measure's non-distinctive application is asserted, conveys the impression of a *Debauve*[89] approach resurfacing after all this time: discriminating measures, whatever their manifestation, are outlawed, but all others, whatever their factual impact, will stand the test. The marginality of the Italian measure then *in casu* amounted to a superfluous datum.[90] Such a relapse is however less credible than that the reasoning and its outcome should be regarded a characteristic emanation of the market access theorem.

Mobistar is much less murky. First of all, the Court manifestly chooses to *exclude* the Belgian measures from the scope of Article 49 EC. This provides a most suitable lead for launching a principled rule similar to *Keck*. The fact that the disputed taxes affected Belgian and foreign providers of telecommunication services equally is a second factor adding momentum. The phrasing of the decisive paragraphs in words strongly reminiscent of the crucial passage in *Keck*, allude to a more fundamental issue being addressed. Not only do the words 'in law and in fact' run parallel, the post-*Keck* case-law shows that the concept of selling arrangements is increasingly being subordinated to a substantive assessment of the disputed measure's impact on market access. It has lead Weiler to present as the first proposition, the 'general rule of free movement' of his 'universal field theory': 'National provisions which do not affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States, must be justified by a public interest over the free movement of goods.'[91] In this respect, it could well be that in

89. Case 52/79, *Procureur du Roi* v. *Marc J.V.C. Debauve and others*, [1980] ECR 833.

90. In fact, it remains to be seen what the status of the *de minimis* rule in *Viacom II* implies. It could match the type of unsubstantial barrier distinguished by AG Jacobs in *Leclerc-Siplec*. Equally plausible is the possibility that the municipal tax, had it been applied to goods instead of advertising services, would have escaped the prohibition laid down in Article 90 EC. In this paradigm, it could be that the ECJ reads an equivalent of Article 90 EC into Article 49 EC. Less likely is the possibility that a general *de minimis* rule is articulated, which would, for instance, also apply to discriminatory barriers.

91. Weiler, cited *supra* note 17, p. 372. Barnard presents a similar 'global test' for both goods and services, in which the central question in all cases would be '[…] whether the national measure prevents or imposes a direct and substantial impediment of access to the market in another Member State' (Barnard, cited *supra* note 5, p. 53).

Mobistar, the exact labelling of the disputed measures with the insufficiently articulating, even materially obsolete, term of 'selling arrangements' proved unnecessary.

A final *caveat* is in order. Both *Viacom II* and *Mobistar* concerned fiscal measures. This may suffice to place both cases in a wholly different light. As known, Article 90 EC spells out Community requirements to the Member States' tax regimes, but its scope is narrowed down to goods. Non-discriminatory taxation of goods meets the conditions of that provision; an identical rule applicable to services is nowhere to be found in the Treaty, but the general wording of Article 49 EC could make up for this omission. The potential impediment that national tax measures cause to service provision was already affirmed in *De Coster*, but this case did not answer the question of why a non-discriminatory tax would not at least run contrary to the spirit of the Internal Market. Set against this background then, *Viacom II* was to stress that negligible levies are permissible *ipso facto*, with *Mobistar* introducing a genuine dim of Article 90 EC into the services framework. The two stages of analysis of fiscal barriers would thus consist in the appraisal of their indistinct applicability, in law and in fact, followed by a determination of any remaining factual impact on trade, judged by the magnitude of the levy.

One swallow does not make a summer. Nonetheless, if the signalled cases were to set a trend, would the complete redundancy of the *Säger* formula ensue? For several reasons, we think it more plausible that it received a thorough servicing, in which the span of Article 49 EC has been neatly fine-tuned. *Säger* still is a point of reference in the aforementioned case-law, albeit increasingly indirectly.[92] If the dilution persists, this may change, but for the moment this is where it is. Next, compared to *Keck*'s '[…] contrary to what has previously been decided […]', the ECJ is much less outspoken. That judgment's explosiveness left legal scholarship shell-shocked, but subsequent case-law alleviated their suffering. If anything, *Viacom II* and *Mobistar* form an evolution rather than a revolution, as post-*Keck* refinements in the goods case-law appear to have been transplanted into Article 49 EC, if one accepts at all that the cases represent such a transplant. The Court's – above all – *nuanced* approach represents, or so we contend, a direct emanation of cross-fertilization between, if not of the convergence of, the goods and services regimes. As advanced here, the combined discrimination/market access theory fits as the single true prism through which to observe hindrances to trade in both domains.

92. *Cf. supra*, note 80 and 85.