15

HARMONY AND DISSONANCE IN FREE MOVEMENT

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I. Introduction

There is a generalised perception that the European Court of Justice has adopted different approaches to the different free movement rules included in the Treaties. In particular, the free movement of goods has 'benefited', until 1993, from a wider scope of application. Contrary to what has for long constituted the standard approach to the free movement of persons, the free movement of goods was constructed as requiring more than national treatment and non-discrimination in regard to goods from other Member States. Even non-discriminatory restrictions on trade in goods could constitute a violation of Community rules if not justified as necessary and proportional to the pursuit of a legitimate public interest. The freedom to provide services has somewhat occupied a middle ground between the interpretation given to the goods and persons provisions.[1] Following the Court's decision in *Keck & Mithouard* in 1993,[2] a reversal of fortune appears to have taken place regarding the Court's approach to the different free movement provisions, with the free movement of persons and the freedom to provide services now benefiting from a more 'aggressive' interpretation in comparison with the free movement of goods. This article reviews, in a comparative and historical perspective, the Court's approach to the different free movement provisions,[3] arriving at some new and

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[1] For the purposes of this essay, the freedom to provide services will generally be considered as distinct from the free movement of persons (which in turn will include free movement of workers and the right of establishment). Although the freedom to provide services may require a movement of persons (which leads some authors to include it in the context of the free movement of persons) that is increasingly not the case.

[2] Joined Cases C–267 and C–268/91 *Keck and Mithouard* [1993] ECR I–6097.

[3] Excluding the free movement of capital.

even paradoxical conclusions and proposals: first, the article reviews the most recent developments of the Court's case law and defends the idea that a uniform approach to the different free movement rules may be emerging in the ECJ jurisprudence; second, it is argued that this uniform approach is based on the application of a two-fold test reviewing the impact of national measures on free movement either through the imposition of a double burden or the prevention of market access; and third, the article ends by defending the notion that, contrary to the common assumption, a totally uniform test may not be a good thing and the Court would do better in continuing to follow its post-*Keck* approach of primarily allocating its judicial resources to the free movement of persons.

The starting point of the article is that judicial resources are limited and that the explanation for the fluctuations in the Court's case law is precisely because that judicial constraint prevents courts from doing all they want to do and requires them to do what they can do best. It is argued throughout the article that the definition of where the Court ought to primarily devote its judicial resources depends on the institutional alternatives to the Court in different areas of the law, and that this requires the Court to assume fully the institutional character of its judicial choices.

I. Harmony and Dissonance I: Presto, Assai Meno Presto

A. *Presto: From* Dassonville *to* Sunday Trading

The broad scope granted to the free movement of goods until 1993 was a result of successive developments in the Court's case law in which its interpretation of Articles 30 and 36 (now 28 and 30) EC interacted with the legal community in such a way as to make possible the review of any national regulation restricting trade under the tests of necessity and proportionality vis-à-vis a Community recognised public interest. The first step in the development of a balance test in the application of the rules on the free movement of goods was taken in *Dassonville*.[4] The fact that it was sufficient for a measure to be 'captured' by Article 28 for it to be 'capable of hindering directly or indirectly, actually or potentially, intra-community trade',[5] in effect subjected all market regulations to a 'balance test' review under Article 28, since they all have by their very nature an impact on trade. In other words, such a test did not require a national measure to be protectionist or to discriminate against foreign products to be subject to review under Article 28. However, in spite of the broad character of the Dassonville *ratio decidendi*, especially after the abandonment of the 'trading rules' words, subsequent decisions kept a close link with a discrimination test.

[4] Case 8/74 *Dassonville* [1974] ECR 837.
[5] Para 5.

It was *Cassis de Dijon* that awoke the 'sleeping beauty' and gave new life to the *Dassonville* doctrine. In itself *Cassis de Dijon* was not particularly revolutionary. It could even be seen as restricting *Dassonville* once it broadened the scope of public exceptions capable of justifying restrictions on trade.[6] Moreover, it could also be constructed as proposing a discrimination test based on the double burden imposed on imports by having to comply with a new set of rules (the legislative disparity between the French and German rules required Cassis de Dijon producers to adapt to the German national requirements, therefore imposing on their products a double cost to which, arguably, the German domestic products would not be subject).[7]

What made *Cassis de Dijon* revolutionary is the change in the expectations of legal and economic actors it promoted and the reversal of the burden of proof on the admissibility of national measures restricting trade. The Court stated;

> Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.[8]

In *Dassonville*, the Court of Justice made no distinction between discriminatory and non-discriminatory measures with an impact on intra-Community trade, but in *Cassis de Dijon* it made it clear that all such measures were only acceptable if necessary to pursue objectives recognised as legitimate by the Community, such as those already set out in Article 36 (now 30) EC. This was enhanced by the introduction of what came to be known as the 'principle of mutual recognition' of national regulations. According to this principle, a State has to accept the marketing in its own territory of products lawfully produced and marketed in other Member States. In the words of the Court:

> There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced to another Member State.[9]

This constituted an 'invitation' to litigate and explore the limits of the *Dassonville* concept of measures having an equivalent effect to a quantitative restriction. In other words, the Court was signalling to the legal and economic communities its willingness to review all national legislative disparities, becoming, in effect, the Community market regulator.[10] The process by which

[6] See Case 120/78 *Cassis de Dijon* [1979] ECR 649, para 8.

[7] On the problems of such understanding, see below.

[8] Case 120/78 *Cassis de Dijon* [1979] ECR 649, para 8.

[9] *Ibid*., para 14.

[10] Further on this point, see Maduro, M. P. *We The Court—The European Court of Justice and the European Economic Constitution* (Oxford, Hart Publishing, 1998) ch. 3.

the scope of action of Article 28 was extended to include virtually any national regulatory measure had its paradigmatic cases in *Oosthoek's* and *Cinéthèque*.

In *Oosthoek's*,[11] which concerned national rules that prohibited a certain method of sales, the Court interpreted the scope of the *Dassonville* doctrine as including indistinctly applicable measures that do not even require any changes to be made to imported products (in the form of different production methods or labelling for example). A simple requirement to comply with different or stricter marketing methods would affect the marketing opportunities of imported products and therefore would be considered as a measure having an equivalent effect to a quantitative restriction. The Court argued that:

> to compel a producer either to adopt advertising or sales promotion schemes which differ from one Member State to another or to discontinue a scheme he considers particularly effective may constitute an obstacle to imports even if the legislation in question applies to domestic and imported products without distinction.[12]

It can be argued that this decision constitutes the most important step in using Article 28 to review practically any national measure regulating the market. It can be seen as going beyond *Cassis de Dijon* by including in the scope of application of Article 28 even national measures, of the type referred to in *Oosthoek's*, that do not appear to impose a double burden on imported goods but simply require the abandoning of particularly effective marketing strategies or sales methods. However, it can also be argued that the reason for including such type of rules under the concept of measures having equivalent effect to a quantitative restriction is identical to that commanding the inclusion of rules requiring changes to be made to imported products (rules on product requirements, such as those at stake in *Cassis de Dijon*): there is a double burden imposed on foreign producers when they are forced to change their strategies and methods of marketing (as when they have to change the characteristics of their products).[13]

That a measure did not need to be discriminatory to come under Article 28 was clearly stated by the Court in *Cinéthèque*[14]. The case concerned French legislation which prohibited the commercial exploitation of cinematographic works in recorded form, mainly video-cassettes, before the end of a set time-limit:

> it must be observed that such a system, if it applies without distinction to both video-cassettes manufactured in the national territory and to imported video-cassettes, does not have the purpose of regulating trade patterns; *its effect is not to favour*

[11] Case 286/81 *Oosthoek's* [1982] ECR 4575.

[12] *Ibid.*, para 15.

[13] See the discussion below on how this notion may be finding its way back to the case law of the Court.

[14] Cases 60 and 61/84 *Cinéthèque* [1985] ECR 2605.

> *national production as against the production of other Member States*, but to encourage cinematographic production as such.
>
> *Nevertheless, the application of such a system may create barriers to intra-Community trade* (. . .). In those circumstances a prohibition of exploitation laid down by such system is not compatible with the principle of free movement of goods provided for in the Treaty unless any obstacle to intra-community trade thereby created does not exceed that which is necessary in order to ensure the attainment of the objective in view and unless that objective is justified with regard to Community law.[15]

The outcome of these developments in the Court's case law was that almost any national regulatory measure became susceptible to review under Article 28 EC. The proportionality test meant that a balance had to be struck between their costs and their benefits. What is normally at stake in these cases is the general restriction imposed on access to the market and competition therein. Under the balance test developed by the Court following *Dassonville* and *Cassis de Dijon*, many measures of this kind have been subjected to the balance test, even where they did not discriminate against foreign products. Examples include: rules on advertising and sales methods;[16] national health-system rules on subsidies on medical products and on pharmaceutical monopolies;[17] price regulations;[18] national recycling systems;[19] prohibition on Sunday trading or on employing workers on Sundays;[20] public law monopolies on the approval of equipment;[21] and the organisation of dock work.[22] This gave the Court a leading role in defining the adequate regulatory level of the common market and transformed Article 28 into a potential 'economic due process' clause. Whether or not the Court intended to include in the scope of Article 28 all national regulatory measures became quite irrelevant once the test adopted was so broad as to allow economic operators to challenge virtually any national regulation of the market. Even a double burden test would lead to the review of any national measure whose content was not consistent with another State's regulatory policy regarding either the characteristics or the marketing of a product.

The way the Court applied its necessity and proportionality tests to the review of national regulatory measures under Article 28 tells us that the final

[15] Paras 21 and 22, emphasis added.

[16] See *Oosthoek's*, above n 11; Case C–362/88 *GB–INNO* [1990] ECR I–667; Case 382/87 *Buet* (Canvassing) [1989] ECR 1235; Joined Cases C–1/90 and C–176/90 *Aragonesa* [1991] ECR I–4151; and Case C–126/91 *Yves Rocher* [1993] ECR I–2361.

[17] Case 238/82 *Duphar* [1984] ECR 523 and Case C–369/88 *Delattre* [1991] ECR I–1487.

[18] For example, Case 29/83 *Leclerc* (Prix du Livre) [1985] ECR 1.

[19] Case 302/86 *Commission* v. *Denmark* [1988] ECR 4607.

[20] Case C–145/88 *Torfaen Borough Council* [1989] ECR 3851, Case C–312/89 *Conforama* [1991] ECR I–991, Case C–332/89 *Marchandise* [1991] ECR I–1027, Case C–169/91 *Stoke-on-Trent* [1992] ECR I–6635.

[21] Case C–18/88 *RTT* (Telephone Equipment) [1991] ECR I–5941.

[22] Case C–179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I–5889.

objective of the Court was to address legislative disparities and not to control the level of public regulation of the market. As I have argued elsewhere the case-law of the Court in this area of the law could be characterised as a form of majoritarian activism:[23] such case-law is more understandable as the product of a '*legislateur de substitution*'[24], which does not intend to impose a constitutional conception of the market and of economic organisation, but which aims to transfer economic decisions affecting the internal market from State level to the Community level, in the pursuance of the judicial harmonisation of State rules the diversity of which is capable of restricting free trade and the optimal gains offered by the common market. I have argued that the criterion guiding the Court in balancing the costs and benefits of national regulations has not been a specific (de)regulatory ideology but an attempt to identify the majoritarian view on that issue, taking the EC as the relevant polity.

For the Court, the common market could not support the costs of non-harmonised national rules. This means that State regulations can no longer diverge on the basis of different national traditions and policy choices. The Court distrusted the national political process to regulate the common market but, at the same time, it also distrusted the ability of the EC political process to bring about the necessary harmonisation between the different national regulatory traditions. The consequence was the Court signalling to the legal and economic community its willingness to review different national regulations and bring about harmonisation through the judicial process. This was done through the broad interpretative scope given to Article 28.

The broad scope given to Article 28 by the European Court of Justice was not intended to promote the review of all market regulation. The aim was not to construct Article 28 judicially as an economic due process clause controlling the degree of public intervention in the market.[25] The broad scope granted to Article 28 is more understandable when viewed in the light of the Court's suspicion that State regulation of the market may either impose a greater burden on products from other Member States or not take into account the Community interest in harmonised rules to prevent restrictions on free trade arising from differing national rules. It was this wariness of intervention by the national political process in a common market coupled with the incapacity for harmonisation of the Community political process that explained the broad scope given by the Court to Article 28 and the degree of control which, as a consequence, was exercised by the Court over national regulatory powers.

The problem was that, once the Court had formulated a criterion which was so broad as to subject to a proportionality test any State regulation of the common market, the other participants in the legal community were also able to use

[23] See Maduro, above n 10, ch. 3.

[24] This expression is taken from Bettati, M. 'Le "Law-Making Power" de la Cour' (1989) 48 *Pouvoirs* 57, at 62.

[25] See Maduro, above n 10, ch. 3.

that criterion to challenge any market regulation which opposed their economic freedom.[26] The broad scope given to Article 28, designed to push for the europeanisation of regulatory law and so to reduce the costs of non-harmonised regulations, caught in its net any national regulatory measures, even those where those concerns were irrelevant or did not exist at all. Since the Court of Justice's distrust of national political processes found expression in a criterion submitting all national regulation to judicial review, economic operators were able to second-guess national regulatory policies through courts even when the original judicial concerns underlying such a criterion were not at stake. What occurred was a shift of the regulatory role from national political processes to courts. The Court of Justice (and, through it, national courts) became the institution responsible for deciding the adequate level of market regulation.

The primary example of this were the *Sunday Trading* cases where the Court of Justice and national courts reviewed the proportionality of a national measure whose impact on free movement was merely a neutral by-product of its general impact on the market. In these cases, the Court was called in to review the validity of national measures prohibiting trade on Sunday upon the pretext that such prohibition restricted the free movement of goods. The Sunday trading cases were also representative of the type of legal challenge that was increasingly over-burdening the workload of the Court.

B. Services and Persons—Assai Meno Presto

While, from *Dassonville* to *Sunday Trading*, the Court extended the scope of application of the free movement of goods, the same did not happen with regard to the other free movement rules. Following upon the literal content of some of these free movement rules the Court elaborated the principle of National Treatment, which requires that a State should treat nationals of other Member States in the same way that it treats its own. The controlling rationale in the application of the other free movement provisions was non-discrimination and not an extended concept of restrictions on trade. However, the principle of National Treatment contains more than an obligation on states to apply the same legislation to its own nationals and to nationals of other Member States. The principle of National Treatment dependence upon the principle of Non-Discrimination determines that nationals of other Member States should be treated the same as home nationals, which does not mean that they should be subject to the same rules. In reality, equal treatment may mean different treatment. It is well known that the principle of equality implies a criterion for ascertaining what are identical situations deserving similar treatment and what are different situations deserving different treatment. The principle of National Treatment also requires such a criterion. In other words the application of the

[26] See Maduro, above n 10, ch. 3.

principle of national treatment had to be developed in accordance with a material notion of non-discrimination.

To determine what equal treatment in the field of the free movement of persons and services should consist of, the Court has elaborated what has been called the 'principle of equivalence'[27]. The first application of this principle was given in *Thieffry*.[28] Here the Court started by saying that the right of establishment is not necessarily dependent upon the adoption of the directives provided for by Article 57 of the EC Treaty (now 47). In certain cases, it can be ensured 'either under the provisions of the laws and regulations in force, or by virtue of the practices of the public service or of professional bodies.'[29] In the case before the Court, Mr. Thieffry's law degree from a Belgian university had already been recognised as equivalent to a French law degree by a French university. The Court went on to state:

> In particular there is an unjustified restriction on that freedom where, in a Member State, admission to a particular profession is refused to a person covered by the Treaty who holds a diploma which has been recognized as an equivalent qualification by the competent authority of the country of establishment and who furthermore has fulfilled the specific conditions regarding professional training in force in that country, solely by reason of the fact that the person concerned does not possess the national diploma corresponding to the diploma which he holds and which has been recognized as an equivalent qualification.[30]

In this way, the Court considered that States are obliged to do more than merely apply the same rules to nationals of other Member States as they apply to their nationals. Non-discrimination requires States to take into account the qualifications obtained by nationals of other Member States in their State of origin to determine if they are substantially equivalent to the qualifications required by home nationals. Moreover, where those qualifications have already been recognised as similar to national qualifications by a competent authority in the State of establishment, this fact must be taken in consideration when deciding on the request of establishment. In *Webb*,[31] a case on the provision of services, the Court made it clear that this previous recognition is not a necessary condition to the application of the principle of equivalence. Instead, the latter imposes on States the obligation to 'take into account the evidence and guarantees already furnished by the provider of the services for the pursuit of his activities in the

[27] See, for example, Watson, P. 'Freedom of Establishment and Freedom to Provide Services: Some Recent Developments' (1983) 20 *CMLRev* 767.

[28] Case 71/76 *Thieffry* v. *Conseil de l'Ordre des Avocats à la Cour de Paris* [1977] ECR 765.

[29] Para 17.

[30] Para 19.

[31] Case 279/80 *Webb* [1981] ECR 3305.

Member State of his establishment'.[32] In this way, the principle of equivalence is the basis for a substantive and material principle of non-discrimination, which imposes on States the obligation to take into account the requirements fulfilled by a national of another Member State in his country of origin. Although the requirements made in both Member States can be formally distinct they may, in substance, be identical.

Such principle of equivalence could, however, easily amount to proportionality. Proportionality becomes an issue in assessing the equivalence of the conditions imposed on and the requirements fulfilled by the different nationals.[33] This was particularly obvious in services cases once the Court considered, for example, that the temporary nature of the provision of services would justify less strict rules than those applicable to those established in the home state. In *Van Weseamel* and *Webb* the cross-over between material non-discrimination and the proportionality of the national measures was already evident. In *Van Wesemael*, the Court held that the requirements imposed by a Member State on the provider of a service must be 'objectively justified by the need to ensure observance of the professional rules of conduct', and in order to protect the interests that such rules intend to safeguard.[34] In *Webb* the Court stated:

> freedom to provide services is one of the fundamental principles of the Treaty and may be restricted only by provisions which are justified by the general good and which are imposed on all persons or undertakings operating in the said State in so far as that interest is not safeguarded by the provisions to which the provider of the service is subject in the Member State of his establishment.[35]

This link between proportionality and non-discrimination was even clearer in a case concerning the insurance sector, where the Court ruled that:

> requirements may be regarded as compatible with Articles 59 and 60 of the EEC Treaty only if it is established that in the field of activity concerned there are imperative reasons relating to the public interest which justify restrictions on the freedom to provide services, that the public interest is not already protected by the rules of the State of establishment and that *the same result cannot be obtained by less restrictive rules*.[36]

[32] Para 20. See also Joined Cases 110 and 111/78 *Van Weseamael* [1979] ECR 35: 'Such a requirement is not objectively justified when the service is provided by an employment agency which comes under the public administration of a Member State or when the person providing the service is established in another Member State and in that State holds a license issued *under conditions comparable to those required by the State in which the service is provided* and his activities are subject in the first State to proper supervision covering all employment agency activity whatever may be the State in which the service is provided', para 30 (emphasis added).

[33] This confirms that the important question on the free movement of goods is not whether the Court should or should not use a balance test but when this test should be used.

[34] Joined Cases 110 and 111/78 *Van Weseamael* [1979] ECR 35, para 29.

[35] Para 17.

[36] Case 205/84 *Commission* v. *Germany* [1986] ECR 3755, para 29.

However, in spite of these developments, the case law of the Court was never characterised, even in the area of services, as requiring more than non-discrimination from national regulations. The reason for the different understandings of the Court's approaches to goods, persons and services lies in the different institutional and litigation dynamics related to these different branches of case-law. As we have seen, the broad understanding of non-discrimination in the area of services and persons could well include an application of proportionality in assessing the legitimacy of national measures restricting those freedoms. But this has never amounted to an 'invitation' to litigate by the Court in these areas. Instead, in goods, the reversal of the burden of proof inherent in the principle of mutual of recognition had a clear institutional message which was supported by the majoritarian approach of the Court: the willingness of the Court to review non-harmonised national rules capable of restricting trade in goods; in this area of the law, the Court was ready to second-guess national political processes and therefore created a new forum where economic actors could attempt to reverse policy choices. This was further enhanced by an understanding of the restrictions to the free movement of goods that went beyond mutual-recognition and no longer required a comparison with the treatment to which those goods where subject in their home state.[37] Due to its limited judicial resources and the higher political sensitivity of free movement of persons, the Court was more restrictive with regard to services and persons (mainly the latter). But this limited application was not so much a consequence of the substantive criteria used in interpreting the different free movement rules (we have seen that proportionality could also be involved in assessing equivalence in services and persons) as it was a consequence of the institutional elements inherent in the different case laws of the Court and its interplay with the litigation dynamics of economic actors.

II. Harmony and Dissonance: Andante, Poco Sostenuto

A. The Sunday Trading *Saga and the* Keck *Outcome*

The Court's approach to free movement of goods was capable of generating a great degree of market integration and, to a considerable extent, the Court of Justice promoted or supplied the legislative harmonisation which the Community political process had difficulties in delivering due to its institutional problems (such as its dependence upon unanimity, until the Single European Act). This role was, however, placing a heavy burden on the resources and legitimacy of the Court. The problems arising from the traditional approach were

[37] The *Sunday Trading* Cases are a perfect example of this. The rules where initially considered as measures having an equivalent effect to quantitative restrictions on imports independently on whether or not those imports where subject to similar rules in their country of origin.

twofold: first, the workload of the Court was becoming increasingly burdened by the growing number of cases challenging any national regulation affecting the economic freedom of economic actors; second, the legitimacy of the Court was being eroded by its degree of involvement in judging the reasonableness of any market regulation, something that always involves a sizeable margin of discretionary powers and complex economic and social policy analyses. These problems were expressly mentioned by the Advocate-General Van Gerven in his Opinion in the first *Sunday Trading* Case. Referring to the traditional approach of the Court, the Advocate-General stated:

> the Court will inevitably have to decide in an increasing number of cases on the reasonableness of policy decisions of Member States taken in the innumerable spheres where there is no question of direct or indirect, factual or legal discrimination against, or detriment to, imported products. The question may arise whether excessive demands would not then be put on the Court, which would be confronted with countless new mandatory requirements and grounds of justification.[38]

The *Sunday Trading* Saga, through which many national economic operators challenged, under Article 28, national regulatory policies whose impact on trade was only marginal,[39] worked as a wake up call to the Court, stressing both the limits of its judicial resources and the problems of legitimacy involved in such policy judgments. At the same time, the Community political process was able, after the Single European Act, to intervene much more effectively in harmonising national measures and promoting the emergence of an internal market.[40]

The decision in *Keck and Mithouard*[41] can be seen as a natural consequence of these developments. In part, it responded to calls from legal commentators to increase certainty and to reduce the overload of cases in the Court. But, as we will see, it can also be presented as part of a broader change in the philosophy behind the Court's case law with regard to the different free movement rules.[42] In *Keck,* the Court renewed its approach to Article 28. Its main concern was to discourage 'the increasing tendency of traders to invoke Article [28] of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States'.[43] To this end the Court starts by reinterpreting *Cassis de Dijon* in a way that restricts its application to product-requirements:

> In '*Cassis de Dijon*' it was held that, in the absence of harmonisation of legislation, measures of equivalent effect prohibited by *Article [28] include obstacles to the free*

[38] Para 25 of AG Opinion.
[39] See above.
[40] Mainly in the area of goods and services. See Article 100A (now Article 95) EC.
[41] Joined Cases C–267 and C–268/91 *Keck and Mithouard* [1993] ECR I–6097.
[42] See below.
[43] Para 14.

> *movement of goods where they are the consequence of applying rules that lay down requirements to be met by such goods* (such as requirements as to designation, form, size, weight, composition, presentation, labelling, packaging) *to goods from other Member States where they are lawfully manufactured and marketed*, even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.[44]

Thus, measures laying down product requirements are submitted to a balance test: the benefits to the public-interest objective must be superior to the costs that flow from the restriction imposed on free movement of goods. However, the same is not the case with regard to 'national provisions restricting or prohibiting certain selling arrangements.'[45] In the case of such measures the Court decided to reverse the interpretation given to *Dassonville* in subsequent decisions concerning national measures governing 'selling arrangements'. It held:

> contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgement, provided that those provisions apply to all affected traders operating within the national territory and *provided that they affect in the same manner, in law and in fact*, the marketing of domestic products and of those from other Member States.[46]

In the case of measures prohibiting or restricting certain selling arrangements it is therefore not sufficient that they may constitute an obstacle to the free movement of goods to fall under Article 28. Such measures must now discriminate 'in law or in fact' against imported products.

Keck has however left us with three open questions:

1) How does the distinction between product characteristics and selling arrangements operate in practice? To borrow an expression from Stephen Weatherill: does the clarification need clarifying?[47] And has the Court performed this clarification in its recent case law?
2) What justifies the different approaches to rules on product requirements and selling arrangements arising from *Keck*? In other words, what is the normative criterion legitimating the different degrees of judicial activism in the free movement of goods and how does that criterion impact on the distribution of market competencies between courts, the Community political process and the national political processes?

[44] Para 15, citation omitted and emphasis added.
[45] Para 16.
[46] Para 16, citation omitted and emphasis added.
[47] Weatherill, S. 'After *Keck*: Some Thoughts on How to Clarify the Clarification' (1996) 33 *CMLRev* 885.

3) Finally, how does the present judicial approach to the free movement of goods relate to the other free movement rules and how should it relate?

B. The Present Criterion I: The Double Burden Test

Keck was bound to raise much criticism since it symbolised a paradigmatic turn in the Court's constitutional approach to free movement.[48] But even among those which welcomed the change in perspective adopted by the Court the decision raised many requests for clarification and fine-tuning in some of its more debatable aspects.[49] The case law subsequent to *Keck* has helped to clarify some of these points while also raising important new questions. A first question regarded the concept of 'selling arrangements'. Was this concept to be understood literally or was the Court ready to include in that concept other rules regulating market circumstances and not product requirements? As I have argued elsewhere, my understanding was that the Court was adopting a broad notion of 'selling arrangements' which corresponded to the distinction between product requirements and market circumstances advanced by Eric White at the time of the *Sunday Trading* Cases.[50] Recently, Joseph Weiler has also argued that there are no reasons to interpret the concept of 'selling arrangements' as excluding other 'market regulation rules—whether selling arrangements or otherwise—that do not bar access'.[51] I will submit that, in effect, the notion of 'selling arrangements' does include other types of market regulation rules which do not regulate the characteristics of a product but simply govern the conditions and methods of sale or other marketing circumstances. The best evidence for this are two cases regarding rules restricting television

[48] See, notably: Gormley, L. 'Two Years After Keck' (1996) 19 *Fordham International Law Journal* 1996, 866; Mattera, A. 'De l'arrêt "Dassonville" à l'arrêt "Keck": l'obscure clarté d'une jurisprudence riche en principes novateurs et en contradictions' (1994) *RMUE* 117.

[49] The literature on Keck is infinite. The following are some of my favourites, representing a wide range of different views: Reich, N. '"The November Revolution" of the European Court of Justice: Keck, Meng and Audi Revisited' (1994) 31 *CMLRev*, 459; Chalmers, D. 'Repackaging the Internal Market—The Ramifications of the *Keck* Judgement' (1994) *ELRev* 385; Bernard, N. 'Discrimination and Free Movement in EC Law' (1996) *ICLQ* 82; Weiler, J. 'The Constitution of the Market Place: Text and Context in the Evolution of the Free Movement of Goods', in Craig, P and de Burca, G. *The Evolution of EU Law* (Oxford, OUP, 1999) at 349, Weatherhill, above n 47; Gormley, above n 48; Mattera, above n 48.

[50] White, E. 'In Search of the Limits to Article 30 of the EEC Treaty' (1989) 26 *CMLRev* 235. The distinction can also be related to a previous proposal by Marenco in 'Pour une interprétation traditionelle de la mesure d'effet equivalent à une restriction quantitative' (1984) *CDE* 291. According to this author indistinctly applicable national measures could be classified as one of two types: measures that require products to be manipulated and those that do not require such manipulation. Briefly restated, the argument was that measures that require changes to products such as labelling, packaging, composition or controls normally impose costs on imported products (in the form of double-controls, re-labelling etc.) which are not imposed on similar national products (see 308–09, 312, 320).

[51] Weiler, above n 49, at 372.

advertising.[52] These rules do not directly relate to 'selling arrangements'. Nevertheless, the Court did include them in the notion of selling arrangements and was satisfied with the fact that they did not discriminate against imports even if they were capable of restricting the importation of goods.[53]

A different and more complex question regards the extent to which non-discriminatory rules governing selling arrangements or market circumstances are in effect totally excluded from the concept of measures having an equivalent effect to quantitative restrictions. Recent cases have stretched the boundary of the distinction between selling arrangements and product requirements. A first line of cases regards selling arrangements which have a side effect on product requirements. These are the easier to make compatible with the *Keck* criteria. The key element in determining whether a measure *prima facie* falls under the scope of application of Article 28 EC is whether it affects the characteristics or contents of the product (product requirements). It has become clear in the case law of the Court that the other face of this definition is that national rules governing 'selling arrangements' or marketing circumstances but which have an impact on the characteristics of the product will also be caught under Article 28. In *Familiapress*[54] the non-discriminatory Austrian rules prohibiting offering consumers free gifts linked to the sale of goods was a regulation of a selling arrangement and not a product requirement. But this did not prevent the Court from considering it a measure having an equivalent effect to a quantitative restriction once it applied to promotions of free gifts advertised in the product itself. For the Court, the 'national legislation in question as applied to the facts of the case is not concerned with a selling arrangement within the meaning of the judgment in *Keck* and Mithouard' because 'even though the relevant national legislation is directed against a method of sales promotion, in this cases it bears on the actual content of the products' (newspapers).[55] This was a confirmation of the previous *Mars* decision[56] where the Court classified as rules on product requirements, national legislation which prohibited an advertising campaign that involved the promotion of the campaign in the labelling of the product. Recently, the Court has confirmed this doctrine with regard to registration rules that may require the products to be adapted to domestic standards.[57]

[52] Case C–412/93 *Leclerc* v. *TF 1 Publicité* [1995] ECR I–179 and Case C–6/98 *PRO Sieben Media* [1999] ECR I–7599

[53] 'legislation which prohibits televised advertising within a certain sector concerns selling arrangements since it prohibits a particular form of promotion of a particular method of marketing products' (*PRO Sieben Media*, para 45 and *Leclerc*, para 22).

[54] Case C–368/95 *Vereinigte Familiapress* v. *Heirich Bauer Verlag* [1997] ECR I–3689.

[55] Para 11.

[56] Case C–470/93 *Mars* [1995] ECR I–1923.

[57] In *Aher-Waggon*, the Court subjected the German prohibition of a first national registration for aircraft exceeding certain noise limits to a test of proportionality: Case C–389/96 *Aher-Waggon* [1998] ECR I–04473 (in particular paras 18–25). See also Case C–390/99 *Canal Satellite Digital* Judgment of the Court of 22 January 2002, nyr (mainly, para 30) and Case C–123/00, *Christina Bellamy*, [2001] ECR I-02795.

There is an important conclusion to be taken from these decisions: rules on selling arrangements or other market circumstances which indirectly require changes to be made to the products also fall within the scope of Article 28 pupm if they do not discriminate de jure or de facto against imported products. In other words, the impact on any characteristic of the product takes precedence over the regulation of selling arrangements. In these cases there is also a double burden imposed on the imported products by having to change their characteristics even if by reason of rules on selling arrangements.

But there is a second line of cases which is more difficult to reconcile with the *Keck* test. In *Franzé*,[58] the Court struck down the Swedish rules which subjected the sale, production and importation of alcoholic drinks to a licensing system (to which both home nationals and nationals of other Member States could apply). The Court considered that such a system restricted the free movement of goods and that it was not proportional to the public health aim pursued.[59] In this case, the Court only referred to the broad *Dassonville* test and ignored the *Keck* distinction. *Schutzverband*[60] regarded a geographic restriction prohibiting bakers, butchers and grocers to make sales on rounds in a given territory (administrative district) unless they have an establishment in that territory where they offer for sale the same products as that which was sold on the rounds. It was also considered as a measure having an equivalent effect to a quantitative restriction.

The easiest way to reconcile these cases with the *Keck* ruling would be by treating them as *de facto* discriminatory rules regulating selling arrangements. This justification was actually advanced by the Court in *Schutzverband* but not in *Franzé*. In this case, the Court only required the measure to have a restrictive effect on trade, appearing to return to the pure *Dassonville* criterion. Even in *Schutzervand*, if it is true that the measure imposes additional costs on traders from other Member States, the same costs are also imposed on Austrian traders established in other administrative districts of Austria and therefore such requirement does not discriminate on the basis of nationality.

However, the notion of 'additional costs' and 'double-burden' appears to play an important role in explaining the Court's inclusion of all these measures regulating 'selling arrangements' in the scope of article 30. Albeit not referring to *Keck* or to a discriminatory impact, the Court stated in *Franzén* that 'the licensing system constitutes an obstacle to the importation of alcoholic beverages from other Member States in that it imposes additional costs (. . .)'.[61] These cases could therefore be related to the other cases, such as *Mars* and *Familiapress*, where the Court has prima facie prohibited measures regulating 'selling arrangements' or 'marketing circumstances' that imposed an additional burden by reason of its indirect requirement to change the products. In *Franzén*

[58] Case C–189/95 *Harry Franzén* [1997] ECR I–0599

[59] See paras 69 to 76.

[60] Case C–254/98 *Schutzverband gegen unlauteren Wettbewerb* [2000] ECR I–09187.

[61] Para 71.

and *Schutzverband*, there is no indirect impact on product requirements but there is an additional cost to imported products arising from either the licensing system or the obligation to have another establishment. These obligations impose on traders from other Member States a double-cost similar to that imposed by product requirements legislation. If a trader has to change its product to enter into another national market it incurs on an additional cost to which home producers usually (but not always) are not subject.[62] It appears that the decisions mentioned extend the rationale of product requirements to measures regulating selling arrangements that also give rise to additional costs. This can constitute a partial return to *Oosthoek's*.[63] In this decision the Court gave two reasons justifying the review of non-discriminatory national measures on marketing methods (selling arrangements). The first reason consisted of the double burden imposed on foreign producers in compelling them to 'adopt advertising or sales promotion schemes which differ from one Member State to another'.[64] The second reason did not require a double burden to be imposed on foreign producers to bring the national measure under review. It would be sufficient that the producer will be forced 'to discontinue a scheme he considers particularly effective'.[65] It would appear from its recent decisions that the Court revives the first argument it provided in *Oosthoek's*. The Court's recognition that the regulation of some selling arrangements may fall within the concept of product requirements may be partly aimed at reviving the concept of measures which, although regulating marketing methods or selling arrangements, also impose a double burden. This double burden argument can even be presented as a form of discrimination (an additional cost imposed on imports but not on domestic products).[66]

C. The Present Criterion II—The Prevention of Market Access Test

The recent decisions of the Court also reflect a concern with measures that bar market access even if non-discriminatory, not regulating product requirements or not imposing a double burden. In *Monsees*[67] the Austrian rules restricting the

[62] According to Advocate-General Tesauro, nothing has changed in the Court's approach to measures affecting product requirements: '[t]hose measures made marketing subject to certain requirements that, if applied to imported products, compelled the producer to incur additional costs in order to gain access to the market of another Member State'; see 'The Community's Internal Market in the light of the Recent Case-law of the Court of Justice' (1995) 15 *YEL* 1, at 4.

[63] Case 286/81 *Oosthoek's* [1982] ECR 4575.

[64] Para 15.

[65] *Ibid*.

[66] Something which was proposed some years ago by Defalque ('Le concept de discrimination en matière de libre circulation des marchandises' (1987) *CDE* 471, mainly at 481). Of course, this means that any sort of legislative disparity is a discrimination and also does not take into account that those domestic products may in turn have to adapt to the standards of the States to which they may also be exported.

[67] Case C–350/97 *Monsees* [1999] ECR I–02921.

transport by road of animals for slaughter by requiring such transport to be carried out only as far as the nearest suitable abattoir and without exceeding a total journey time of six hours and a distance of 130 Kms were considered a violation of Article 28.[68] The Court stated that the effect of the Austrian rules 'is, in fact, to make all international transit by road of animals for slaughter almost impossible in Austria'.[69] The rule was barring access to the market even if not imposing a double burden on imported products.

Another case on the Swedish market rules on alcoholic drinks appears to confirm this trend. In *Gourmet International*,[70] the Court of Justice developed an approach on advertising rules already initiated in *De Agostini*.[71] The Court considered that the Swedish rules prohibiting advertising of alcoholic drinks (notably in specialised magazines) constituted a measure having an equivalent effect to a quantitative restriction. For the Court an almost total ban on advertising would prevent access to the market having a higher impact on imports (since it would reinforce local habits of consumption).[72] Though the Court considers that such a rule amounts to *de facto* discrimination, what is really at stake in this case is a move from a focus on higher impact on imports to prevention of access to the market. *Keck and Mithouard* already included a reference to rules that either prevent access to the market or impede access to imported products any more than they impede the access of domestic products.[73] The Court appears ready to pay greater attention to rules of the first type even if this means rules on selling arrangements.

That the Court may be moving to a test based on market access has been suggested by Weatherill,[74] as well as, with some reservations, by Snell and Andenas.[75] More recently, Weiler has argued for a test of this type to be adopted by the Court. Weiler envisions a reading of Keck restricting the scope of Article 28 but maintaining two types of prima facie prohibitions. The first will be the general rule of free movement prohibiting discrimination, *de iure* or *de facto*, against imported products.[76] The second, which he calls the special rule of free movement, prohibits 'national measures which prevent access to the market of imported goods'.[77] The latter would mean that practically all national measures regarding product-characteristics, to which the Court refers in *Keck*, would have to be justified according to a legitimate and proportional public interest.

[68] See paras 23 to 31.

[69] Para 29.

[70] Case C–405/98 *Gourmet International* [2001] ECR I–01795

[71] Joined Cases 34/95 to C–36/95 *De Agostini and TV-Shop* [1997]ECR I–3843.

[72] Paras. 19–21.

[73] Para. 17.

[74] Weatherill, above n 47.

[75] 'Exploring the Outer Limits—Restrictions on the Free Movement of Goods and Services' (1999) 10 *EBLRev* 252, notably at 272.

[76] Weiler, above n 49 at 372.

[77] *Ibid*., at 373.

In this regard, Weiler's criterion would be quite similar to that of the Court in *Keck*. But Weiler would also prima facie prohibit market regulations or selling arrangements barring access to the national market such as an absolute prohibition on the sale of a certain product.[78] The key to understand Weiler's criterion is the notion of a bar to market access. Hindering market access is not sufficient for a measure to be caught by the prima facie prohibition of Article 28, it is necessary that such measure bars market access for public interest justification to be required.

The cases discussed indicate that the Court is expanding the *Keck* criterion in two ways: first, by including in Article 28 national rules which, although governing selling arrangements or marketing circumstances, also impose an additional cost on products from other Member States in having to comply with a different set of rules from those of their State of origin; second, by considering as measures having equivalent effect to a quantitative restriction, national measures which bar access to the market. Interestingly, such developments in the free movement of goods can lead to a more uniform interpretation of the different free movement rules.

D. The Other Free Movement Rules—From Dissonance to an Emerging Uniform Approach

Soon after *Keck* was decided, the Court appeared to shift its judicial activism to the other free movement rules. In the freedom to provide services the enhanced activism of the Court could be said to pre-date *Keck* since, as we have seen above, there was a progressive tendency towards uniformity with the free movement of goods. The Court has, since *Säger*, adopted a test similar to the wide interpretation of *Cassis de Dijon*. It stated:

> Article 59 of the Treaty 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'. [Moreover . . .] as a fundamental principle of the Treaty, the freedom to provide services may be limited only by rules which are justified by imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the State of destination, in so far as that interest is not protected by the rules to which the person

[78] *Ibid*., at 372–73. Weiler departs from a parallelism with Article XI of the GATT as recently interpreted by a panel and the Appellate Body in the *Beef Hormones* Case. As Weiler describes, the recent developments of the WTO trade law appear to highlight a two-fold strategy regarding trade restrictions: one path, corresponding to the more traditional interpretation of GATT, focusing on discrimination oriented restrictions on trade; another path, derived from a reborn Article XI, focuses on obstacles-oriented prohibition on points of entry and/or market access denial (at 358).

> providing the services is subject in the Member State in which he is established. In particular, those requirements must be objectively necessary in order to ensure compliance with professional rules and to guarantee the protection of the recipient of services and they must not exceed what is necessary to attain those objectives.[79]

More striking than the developments in the freedom to provide services is the shift visible in the case law on the free movement of persons (establishment and workers). Two decisions signalled the shift in approach in areas where the Court had long remained closely attached to the principle of non-discrimination or national treatment. In *Gebhard*, the Court interpreted the right of establishment as a fundamental freedom guaranteed by the Treaty and proceeded to state that:

> national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.[80]

In the famous *Bosman* Case, the Court extended such criteria to the field of the free movement of workers.[81] This could indicate that in return for less activism on the free movement of goods there would be a corresponding increase in activism with regard to the other free movement rules.[82] However, there are also elements of convergence in the case law of the Court. The revival of Article 28 EC, which I have noted before, is one of them. The reference in *Gebhard* and *Bosman* to fundamental freedoms in general is another. The reasoning in these cases can also be read in this light. Both in *Bosman* and *Gebhard* the Court argued that the provisions at stake prevented market access to the individuals in question. They are therefore similar to the decisions barring market access to imported products which, as I have argued, the recent

[79] Case C–76/90 *Säger* [1991] ECR I–4221, paras 12 and 15. See, confirming this decision: Case C–275/92 *Schindler* [1994] ECR I–1039, Case C–3/95 *Reisebüro Broede* [1996] ECR I–6511, and Case C–398/95 *Syndesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion* [1997] ECR I–03091

[80] Case C–55/94 *Gebhard* [1995] ECR I–4165, para 37.

[81] Case C–415/93 *Bosman* [1995] ECR I–4921, paras 102–104. This decision, however, comes in the sequence of a progressive activism of the Court in this area of the law. According to Johnson and O'Keeffe, writing in 1994, also in the area of free movement of workers, the Court has, 'over the past five years, begun to demonstrate a more open hostility towards national measures which although not discriminatory, are capable of hindering the free movement of workers'. Johnson, E. and O'Keeffe, D. 'From Discrimination to Obstacles to Free Movement: Recent Developments Concerning the Free Movement of Workers 1989–1994' 31 (1994) *CMLRev* 1313 at 1314.

[82] Weatherill makes an excellent attempt to make a global and common reading of the recent case-law on the four freedoms. However, even this author appeared to recognise, at that time, that his reading was more a proposal to the Court (offering the possibility to construct a future single approach to the different freedoms) than a faithful interpretation of the decisions of the Court. See Weatherill, above n 47.

case law includes under the scope of measures having equivalent effect to quantitative restrictions. Moreover, the same ban occurs with regard to all those national measures which require nationals of other Member States to comply with specific qualifications or requirements. These rules both prevent market access and impose a double burden on nationals of other Member States. Previously, those type of measures were only subject to a principle of equivalence but now those requirements can no longer be imposed, even in the absence of equivalent requirements in the country of origin, if they are not proportional and necessary to the pursuit of a legitimate public interest.[83]

The same occurs with regard to other restrictions on the free movement of persons which directly affect market access, even if not discriminating against nationals of other Member States.[84] This movement towards harmony would also explain recent decisions regarding the free movement of persons which did not accept a *prima facie* challenge to measures which nevertheless restricted the free movement of persons. In *Futura Participations*,[85] regarding the impact of certain tax benefits on the right of establishment, the measure challenged was neither discriminatory, nor a ban on market access, nor did it impose an additional burden on companies from other Member States. As a consequence the Court did not even apply a proportionality test and dismissed the case.

In the free movement of services the approximation with the free movement of goods was already expected (and to some extent already happening) and should be welcomed. First, the free movement of services has, in economic terms, many similarities to the free movement of goods. Second, as with goods, most Community legislation on services is subject to majority voting in the Community legislative process and therefore it is in the same position as goods in terms of legislative harmonisation. Third, it would frequently be extremely difficult for the Court to distinguish the effects on the free movement of goods from the effects on the freedom to provide services. National rules that are no longer subject to strict review under the *Keck* test applicable in Article 28 may be repropose to the Court as restrictions to the free movement of services: rules on pharmaceutical or liquor retail sales monopolies can be challenged as a restriction on the freedom to provide services (imagine such products are sold through the internet by certain online shops or service providers), for example. The same can be said of restrictions on advertising which may be seen as restrictions on the provision of advertising services by foreign companies.[86] Recent decisions of the Court have stressed once again how difficult it is for the latter

[83] Case C–234/97 *Bobadilla* [1999] ECR I–04773

[84] See Case C–378/97 *Wijsenbeek* [1999] ECR I–06207

[85] Case C–250/95 *Futura Participations* [1997] ECR I–2471.

[86] See Joined Cases C–34, 35 and 36/95 *Konsumentombudsmannen (KO)* v. *De Agostini* [1997] ECR I–1141, and the comment by Cruz Vilaça 'An Exercise on the Application of Keck and Mirhouard in the Field of Free Provision of Services' in *Mélanges en Hommage à Michel Waelbroek* (Bruxelles, Bruylant, 1999), who argues, however, that it would have been possible for the Court to apply *Keck* in this Case and arrive to the same final outcome (see 806–07).

to prevent challenges to national rules under the free movement of services which it will no longer review under article 28.[87] This explains why the Court appears, with some hesitation,[88] to be moving towards a uniform approach in the free movement of goods and the freedom to provide services. The *Alpine Investments* differentiation from *Keck* could be seen as reflected in the more recent decisions on the free movement of goods which focus on the prevention of market access and/or market ban. In *Alpine Investments*, the Court argued that the measure was prima facie prohibited under the freedom to provide services because it directly prevented market access.[89] We have seen that recent free movement of goods cases appear to share that rationale.

In this way it would be possible to reconcile the case law of the different free movement rules relating to non-discriminatory provisions under the following tests:

a) All national measures which impose an additional burden on products, services or nationals of other Member States by reason of having to comply with a different set of rules from that which they have had to comply with in their country of origin are *prima facie* prohibited and need to be justified as necessary and proportional to the pursuit of a legitimate public interest.
b) All measures which, as a matter of law or of fact, bar access to the market to products, services or nationals of other Member States are also to be considered as *prima facie* prohibited and need to be justified as necessary and proportional to the pursuit of a legitimate public interest.

This, with some hesitation, could be presented as an emerging uniform approach to free movement rules. Against this, it must be noted that the Court of Justice has, so far, never applied the *Keck* distinction in the area of the free movement of persons. When asked to do so, it has always found a way to distinguish the case at hand from *Keck*. If a uniform approach is emerging, should we really have it? And are the tests currently suggested for this approach the best normative criteria?

E. Problems with the Emerging Tests

The double burden test arises from a concern with the additional costs imposed on imported products by having to comply with a new set of rules. This is particularly clear in the case of measures affecting product requirements. Those

[87] See Case C–67/98 *Questore di Verona* [1999] ECR I–07289; Case C–124/97 *Markku Juhani* [1999] ECR I–06067. See also, the Commission decision to start an infringement proceeding against Germany over restrictions on the marketing of CDs (for violation of the freedom to provide services).

[88] *Ibid*.

[89] Case C–384/93 *Alpine Investments* [1995] ECR I–1141. Whether that was actually the case is a different question. See Maduro, M. P. 'The Saga of Article 30 EC Treaty' (1998) 5 *MJ* 298, at 315.

measures that require changes to be made to products in the form of requirements on labelling, packaging, shape, composition or controls will normally impose costs on imported products that are not imposed on national products. This is so because imported products will have to conform to two sets of rules: those of the domestic market and those of the importing market. Thus, they will have to comply with two sets of requirements regarding composition, labelling, packaging, etc. As stated before, such requirements could even be said to constitute discrimination against imports as they impose on them an extra cost to which national products are not subject. Therefore, it is common to associate the double-burden test with a broad rationale of non-discrimination and anti-protectionism. Its extension to measures not related to product requirements would simply reflect the fact that frequently there are also additional costs involved in changing aspects of the marketing or sales strategies of a product to conform with a new set of national rules.

There are however strong normative problems involved in the justification of a double burden test which, as stated, can be linked to a broad concept of discrimination. Under the double burden test, discrimination becomes any sort of burden incurred by foreign nationals, including the cost involved in adapting to different national legislation. The difference between discrimination and lack of harmonisation is thus trivial or, even, non-existent. It is certainly possible to argue that whenever there is a double burden imposed on imports from the lack of harmonisation of national regulations there is discrimination against those imports. The relevant questions are: why should the Court be involved in reviewing all non-harmonised national measures? Shouldn't that harmonising role be performed by the Community political process? A double burden test, even if justified to prevent discriminatory effects, allocates to the Court the review of all non-harmonised national rules.

The second element of the emerging harmonised construction of the free movement rules by the Court is the prevention of market access or, as put forward by Joseph Weiler, the notion of a bar to market access. Hindering market access is not sufficient for a measure to be caught by the prima facie prohibition of Article 28; it is necessary that such measure bars market access for it to require a legitimate and proportional public interest justification. By focusing on prevention of market access, Weiler is prima facie prohibiting either absolute bans on the sales of a product or national measures which do not authorise the entry into a national market of a product exactly as it is produced in its market of origin (this second case corresponds to the double burden test). There are also problems with this criterion. If, for example, a product is required to include a label in the language of the importing country that will be considered as barring its entry into that market (because, without the label, it cannot be imported). On the other hand, if a company sells products via catalogue from another State and is required to change the language used in that catalogue, that would not be taken as barring access to the market by those products (they can still be sold, though not

through those catalogues).[90] However, the latter national regulation may constitute a higher burden for imported products than the former. In the first case, the costs of adding a new label will be marginal for the company and it could easily continue to sell its products on the market of the importing State after complying with that minimum requirement. In the second case, though the product is not physically barred, the economic costs involved in changing the entire catalogue or altering a market strategy may strongly restrict the imports of those products. A strong normative criterion based on market access prevention would have to focus on the economic costs involved in changing either product characteristics, selling arrangements or other marketing conditions. Such economic cost could even be considered as amounting to *de facto* discrimination. But such criterion would immediately require complex economic and social judgments by courts, which is what the test of prevention or bar to market access was precisely designed to avoid. All the uncertainty and litigation that such test was supposed to reduce will return to the Court through the test of *de facto* discrimination. Second, the concept of prevention of market access will also include all legislative disparities regarding products characteristics in the *prima facie* prohibition of Article 28 (all those disparities amount to a prevention of market access for the imported products that do not comply with national requirements). In the end, underlying the double burden or market access tests is a suspicion that national measures of that type are discriminatory since they will impose an additional cost on imported products. But such a broad notion of discrimination ends up coinciding with the problem of legislative disparities. As stated before, the question becomes whether the Court of Justice should review all non-harmonised national regulations?

Of course, these tests attempt to make a delicate balance between the use of judicial resources and the normative aims embraced by the authors as inserted in the free movement rules. One of the conclusions out of *Keck* is that what the Court gains in certainty and freeing of resources it loses in normative coherence. But this is not, in itself, a bad choice. As I have repeatedly stated throughout this article, judicial resources (both physical and in legitimacy) are limited and this means that there are important choices regarding the allocation of judicial activity to be made. Constant trade-offs take place between what the Court should do and what it can do. The only valid question regarding the present trends in the jurisprudence of the Court is whether there is a better alternative in addressing the normative questions of free movement while efficiently allocating the resources of the Court.

[90] Of course, it is still possible to complement the first test with a second one designed to capture measures whose economic impact on the products would amount to a prevention of market access. But, if that is done, the legal certainty and judicial restraint brought by the original test will be lost.

III. Harmony and Dissonance: Allegro Assai, Sostenuto

The question regarding the interpretation of the different free movement rules in the post-*Keck* period should not be whether the Court's present criteria are effective in reviewing all national measures restricting trade but whether the Court's choice to review some measures and not others is the right choice, taking into account the other sources of demand for judicial activism. In a world of scarce judicial resources, where should they be primarily allocated? The answer to this question depends on the institutional alternatives to the Court in promoting free trade with regard to the different free movement rules. It depends on the degree of trust we have on national political processes to regulate in those areas of the law. It also depends on the capacity of the EU political process to bring about harmonised legislation in those different areas of the law. Finally, it depends on the market structures in the economic areas corresponding to the different free movement rules and the way those structures may hinder or facilitate economic integration. Only by looking at these different institutional alternatives can one appropriately allocate the available judicial resources and decide on the different degrees of judicial activism that may be required with regard to the different free movement rules.

In the area of the free movement of goods, the Court has chosen to restrict the scope of Article 28 and increase the certainty of its application. The Court's case law will not mean that, as feared by Gormley, we are in 'an open season for all sorts of restrictions'.[91] It may be true that some national measures restricting trade will no longer be reviewed by the Court but that tells us nothing about whether the Court should review those measures. First, there are restrictions on trade arising from legislative disparities that can be better dealt with by the legislative process of the European Union. Second, even where there may be good arguments in favour of the judicial review of national measures restricting free movement, there may be better arguments for the Court not to do it. The Court has to allocate its resources among different functions and areas of the law. As we have seen, the strong activism followed by the Court in the area of free movement of goods was possible because of their being less litigation generated in other areas of Community law and a more restricted scope being given to other Treaty provisions such as the free movement of persons. There may now be good reasons for the Court to shift its activism and resources to promote the free movement of persons and the review of Community legislation.

After *Keck*, it appeared that, whilst it was restricting the scope of the free movement of goods, the Court was expanding the scope of application of the free movement of services and persons.[92] Yet the more recent developments in

[91] Gormley, above n 48 at 885.

[92] As stated above the most emblematic decisions of this expansion were the rulings in *Sager*, *Gebhart* and *Bosman*. See my analysis of this trend in *We, The Court* above n 10, and in 'The Saga of Article 30', above n 86.

the different areas of the Court's case law discussed above indicate that it may be moving towards a uniform approach based on the formal concepts of double burden and prevention of market access. Such a uniform approach may be praised for attempting finally to generate a higher degree of legal certainty and coherence in the interpretation of the different free movement provisions. On the other hand, a uniform approach may ignore the different claims for judicial activism arising from the different institutional contexts of the different free movement provisions.

The institutional contexts of services and goods may justify an identical degree of judicial activism to these free movement rules, since the capacity for intervention of the EU political process tends to be similar in these areas of the law and the market structures of services and goods also tend to be similar. Furthermore, the frequent coincidence between restrictions to services affecting goods, and vice versa, makes it difficult to have different approaches in those areas. But the same is not the case with the free movement of persons. The areas of free movement of persons tend, at this stage of the common market, to remain more strongly dominated by national interest groups since they tend to regulate access to work, professional activities, and services whose conditions are normally set up on the basis of the conditions of the national market, national education and national qualifications. Moreover, these type of requirements associated with the free movement of persons (e.g.: professional qualifications) normally impose a higher burden on out of state nationals, further contributing to the lower mobility of people as compared to goods. Furthermore, this is an area where, unlike goods and services, the European Union decision-making process is still (to some extent) dominated by a unanimity rule[93] and by high transaction and information costs. This makes the EU political process a less viable alternative to promote market integration through legislative harmonisation (contrary to what is now the case in goods and services). The free movement of persons is the area which has deserved less legislative attention[94]. To this, one should also add the higher information and transaction costs associated with many of the litigants who would profit more from the free movement of persons (mainly independent professionals and workers who tend to be one-shot litigants, contrary to companies who are usually repeat litigants). This requires the Court to set higher incentives for litigation in these areas.

The problems highlighted in the institutional alternatives available to the Court in integrating the market in free movement of persons, justify a reversal

[93] See the exceptions imposing unanimity voting in the specific empowering clauses of the free movement of persons (Articles 42 and 47) and, for the other legislative areas affecting the free movement of persons, the exclusion of majority voting for legislation on free movement of persons adopted under the internal market competences (Article 95, n.2).

[94] According to Johnson and O'Keeffe, free movement of workers is 'an area of law which, in recent years at least, has received scant legislative attention from the Council', see above n 78 at 1313.

of fortunes in the Court's case law to the different free movement rules. A higher priority for judicial activity should be given to the previously more 'neglected' area of free movement of persons. This means that the Court should concentrate its judicial resources in those areas where market integration is less developed. In a world of limited judicial resources it makes more sense, in reviewing national measures which restrict free movement, to give judicial priority to those restrictions which are less likely to be overcome by the other institutional alternatives.

Still, it may be argued that there is no basis in the Treaty to adopt a more active approach with regard to the free movement of persons and that it will also be difficult to keep the two strands of case law separate. The problems arising from the lack of a uniform legal criterion presented above in the context of the relation between goods and services may also, albeit to a lesser extent, resurface in the relation between goods and persons. For example, cases which presently are not accepted for review under Article 28 could now be challenged under the free movement of persons: Sunday trading has already been challenged under the right of establishment[95]; even the prohibition of a resale at a loss such as that in *Keck* can be seen as a restriction on the right of establishment of supermarket companies. This would again raise the issue of legal coherence.

The solution to this problem lies in a clear assumption of the institutional aspects involved in the legal options faced by the Court. Only a comparative institutional analysis can provide this by taking seriously the fact that the scope of the different free movement rules must also depend on the different capacity in different instances of the institutions available to promote those freedoms. Such a criterion will recognise the institutional choices made by the Court. It would determine the degree of judicial intervention on the basis of the available institutional alternatives to the Court in promoting market regulation and integration. It will safeguard legal coherence while authorising the Court to exert different degrees of judicial activism on the basis of those different institutional alternatives. I have already designed such a test in the context of Article 28, arguing that the Court of Justice should only second-guess national political processes where these are suspected of under-representing the interests of nationals of other Member States. I have made a distinction between rules affecting cross-national interests (rules that regulate issues where the interests are uniform between home nationals and nationals of other Member States) and national interests (rules that regulate issues where the interests of home nationals and nationals of other Member States are not uniform). The latter type of rules would be prone to suffering from an institutional malfunction in the representation of the interests of nationals of other Member States (national

[95] See Joined Cases C–418/93, C–419/93, C–420/93, C–421/93, C–460/93, C–461/93, C–462/93, C–464/93, C–9/94, C–10/94, C–11/94, C–14/94, C–15/94, C–23/94, C–24/94 and C–332/94 *Semeraro* [1996] ECR I–2975.

bias).[96] I suggest that the application of such criterion to the other free movement rules would maintain legal coherence while authorising the Court to be more activist in the area of the free movement of persons. This is so, because, as argued before, the regulation of the free movement of persons tends to be subject to a higher degree of capture by national interest groups. In many instances of national regulations affecting the free movement of persons the interests embedded in the issues tend to be different for home nationals and nationals of other Member States as a consequence of the differences in qualifications and market structures. In these cases, the national measures are prone to under-represent out-of-state interests and would be subject to strict review (under the tests of proportionality and necessity). The need for judicial intervention in this area is further enhanced by the problems with the institutional alternatives to the Court in promoting market integration in the area of the free movement of persons. A criterion based on institutional alternatives would therefore authorise the Court to have different degrees of judicial activism with regard to the different free movement rules on the basis of their different levels of market integration and on the basis of the different conditions for intervention of the EU and national political processes.

[96] See, for example, Maduro, above n 10 at 166 ff.