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DE MINIMIS MEETS "MARKET ACCESS": TRANSFORMATIONS IN THE SUBSTANCE – AND THE SYNTAX – OF EU FREE MOVEMENT LAW?

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Abstract

The article examines whether the ECJ has used, or could use, de minimis test(s) in free movement law as a means of limiting the scope of prima facie prohibited non-discriminatory measures. The scrutiny is framed against the Court's recent case law, where the notion of market access has become important. Market access may in fact be interpreted with reference to de minimis tests and its relationship with such tests – systemized here as magnitude, causality and probability thresholds – reveals interesting parallels. Combinations of de minimis tests may influence the content of free movement law and perhaps even lead to changes in the prohibition-justification syntax.

1. Introduction

1.1. *The topic and objectives*

Recent discourse on European free movement law has been dominated by the rulings of the Court of Justice in two cases: *Trailers* and *Mickelsson*.[1] There is a rather widespread consensus among commentators that these cases are a deliberate effort by the Court to follow up on its (in)famous decision in *Keck*.[2] It is far less consensual, however, in what way exactly the Court intended *Trailers* and *Mickelsson* to build on *Keck*: confirming the case law or overturning it; expanding the jurisprudence or narrowing it down. Whichever direction the Court intended to follow, a trait common to many of its

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1. Case C-110/05, *Commission* v. *Italian Republic* (*Trailers*), [2009] ECR I-519; Case C-142/05, *Åklagaren* v. *Percy Mickelsson and Joakim Roos* (*Mickelsson*), [2009] ECR I-4273.

2. Joined Cases C-267 & 268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard (Keck)*, [1993] ECR I-6097.

subsequent rulings has been the focus on *the effects* of national measures, while – seemingly paradoxically – consistently rejecting arguments that *minor, de minimis effects* would fall outside the Court's free movement scrutiny. This recurring theme of the scope of impacts, and in particular the *de minimis* rules, is the topic of this paper.

The objective of this paper is to investigate whether the ECJ has used, and could use, *de minimis* test(s) in its free movement decision-making rationale as a means of limiting the scope of measures that could be considered *prima facie* prohibited restrictions. In pursuance of this objective, the analysis of the case law first of all reveals traces of a multitude of different kinds of *de minimis* tests. This finding appears to challenge the prevailing view that *de minimis* type thresholds have been categorically rejected in the Court's free movement case law. Second, the paper proposes, against the backdrop of the Court's case law, a systematization of the various *de minimis* tests in order to shed light on what kinds of *de minimis* thresholds, if any, the Court could be envisaged to develop further and how the tests could serve the EU's four freedoms. Importantly, and thirdly, the analysis pitches the *de minimis* tests against the notion of market access, which the ECJ's recent judgments in *Trailers* and *Mickelsson* have raised to an important role in defining trade restrictions. The paper concludes by claiming that the multitude of *de minimis* tests may prove useful, partly thanks to their interlinkages with the market access logic. The exploration of *de minimis* thresholds also brings forth the potentially increasing role of non-economic factors in defining prohibited measures. These concluding observations may have implications on, not just substantive free movement law, but on its classic prohibition/justification syntax.

1.2. *Background*

The ECJ's decision in *Keck*[3] aimed at establishing clear and enforceable boundaries to the EU law on measures having an effect equivalent to quantitative restrictions as laid down in Article 34 TFEU. The Court felt that its earlier, extensive definition of trade restrictions in *Dassonville*[4] – as any measures that "directly or indirectly, actually or potentially" affect trade between the Member States – had left virtually unlimited the scope of measures falling under the prohibition. The ECJ's proposed solution in *Keck* was to distinguish "selling arrangements" as a separate category of measures that would escape the definition of prohibited trade restrictions. The exclusion

3. *Keck,* cited *supra* note 2.
4. Case 8/74, *Procureur du Roi* v. *Benoît et Gustave Dassonville,* [1974] ECR 837.

was conditional on such selling arrangements not discriminating between domestic and imported products in either law or in fact.

The Court's formalistic distinction between "selling arrangements" and other, in particular product related measures, can be understood against a philosophical split. Non-discriminatory measures would, according to many authors,[5] constitute a *prima fa*cie prohibited restriction only if they hindered the *market access* of products. Because selling arrangements, and potentially other measures that only affected the market circumstances or the exercise of rights on the market, did not hinder market access, they would be permissible.

The Court's attempt in *Keck* to clarify the scope of prohibited measures left many issues unresolved, however, and even raised a few new ones. *Trailers* and *Mickelsson* presented an opportunity to address such caveats. Both cases concerned a new subset of issues: restrictions on the *use* of goods (as opposed to prohibitions on the goods *per se*). In *Trailers* the controversy revolved around an Italian ban that prohibited mopeds and motorcycles from towing a trailer specifically designed for such purpose. In *Mickelsson*, the ECJ had to deal with Swedish legislation that prohibited the use of jet skis on waters other than designated waterways. The *Keck* doctrine could not apply, as the ban on use could not be classified as a selling arrangement.

It is noteworthy that the distinction between discriminatory and non-discriminatory measures remains explicit in the Court's judgments in *Trailers* and in *Mickelsson*, which concerned the latter group.[6] Furthermore, *Trailers* and *Mickelsson* confirm that for non-discriminatory measures, the prohibition hinges upon the notion of "hinders market access":

> "Consequently, measures adopted by a Member State the object or effect of which is to treat products coming from other Member States *less favourably* are [prohibited], as are [product requirements]. Any other

5. See e.g. Perišin, *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and WTO* (Asser Press, 2008), pp. 39–42; Spaventa, "Leaving Keck behind? The free movement of goods after the rulings in *Commission* v *Italy* and *Mickelsson and Roos"*, 35 EL Rev. (2009), 914–932; Barnard, *The Substantive Law of the EU: The Four Freedoms*, 3rd. ed. (OUP, 2010), pp. 103–108 & 139–144; Moen, "Selling arrangements, keeping Keck", 35 EL Rev. (2010), 387–400.

6. A.G.s have raised the issue of (in)consistency in the ECJ's approach in determining whether a non-discriminatory measure is *prima facie* prohibited. See Opinion of A.G. Tesauro in Case C-292/92, *Ruth Hünermund and others* v *Landesapothekerkammer Baden-Württemberg*, [1993] ECR I-6787, 11 and a decade later similarly, Opinion of A.G. Tizzano in Case C-442/02, *CaixaBank France* v *Ministère d'Economie, des Finances et d'Industrie*, [2004] ECR I-8961, 57. For criticism of the incoherence of the case law, see also Barnard, op. cit. *supra* note 5, p. 148; Spaventa, op. cit. *supra* note 5, 919–920; Snell, *Goods and Services in EC Law: A Study on the Relationship Between the Freedoms*, (OUP, 2002), p. 126; Hatzopoulos and Do, "The case law of the ECJ concerning the free provision of services: 2000–2005", 43 CML Rev. (2006), 961.

> measure which hinders *access* of products originating in other Member States *to the market* of a Member State is also covered by that concept."[7]

Whether the judgments should be interpreted as annulling, altering or reinstating the Court's established *Keck* doctrine may be debated, and is not central to the objectives of this paper. The key point is that the notion of market access is pivotal. Although some scholars[8] question the utility of the term, a number of Advocates General and scholars[9] have used a market access test for determining which non-discriminatory measures[10] constitute *prima facie* prohibited restrictions. This is where the concept of *de minimis* threshold may become relevant. Restrictive effects on market access could potentially be differentiated from restrictive effects on trade at large by defining market access as an expression that reflects a *de minimis* rule. Minimal restrictive effects that only reduce trade do not create an effect on market access, while restrictions on trade that are severe enough to actually hinder a trader from entering a market, or force an established trader to leave a market, would have an effect on market access. The *de minimis* threshold thus would distinguish what is "severe enough". Without a distinction, the notion of "hindering market access" itself could be plagued by the very problem of an indefinite scope, which the *Keck, Trailers* and *Mickelson* cases sought to solve for non-discriminatory measures.[11]

7. *Trailers*, cited *supra* note 1, para 37, emphasis added. For similar reasoning see *Mickelsson*, cited *supra* note 1, para 24.

8. Snell, "The notion of market access: a concept or a slogan?", 47 CML Rev. (2010), 437–472. Snell has argued that the concept collapses into economic freedom or anti-protectionism, and therefore has no added value in free movement law. He rightly criticizes the wide use of the market access concept without a proper definition. See also Spaventa, op. cit. *supra* note 5, at 923. Spaventa also claims that the concept has been used in an "intuitive way".

9. For pre-*Trailers* references see Opinion of A.G. Jacobs in Case C-412/93, *Société d'Importation Edouard Leclerc-Siplec* v. *TF1 Publicité SA and M6 Publicité SA*, [1995] ECR I-179, paras. 38–49; Opinion of A.G. Alber in Case C-176/96, *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL* v. *Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)*, [2000] ECR I-2681, paras. 47–48; Weatherill, "The evolution of European consumer law and policy: From well informed consumer to confident consumer", in Micklitz (Ed.), *Rechtseinheit oder Rechtsvielfalt in Europa?* (Nomos, 1996), pp. 423–471, at 424–440; Barnard, "Fitting the remaining pieces into the goods and persons jigsaw", 26 EL Rev. (2001), 35–59; Kalimo, *E-Cycling: Linking Trade and Environmental Law in the EC and the U.S.* (Transnational Publishers, 2006), pp. 40–87 & 641–658. For post-*Trailers* references see Perišin, op. cit. *supra* note 5, pp. 39–42; Spaventa, op. cit. *supra* note 5, 914–932; Moen, op. cit. *supra* note 5, 387–400; Barnard, op. cit. *supra* note 5, pp. 103–108 & 139–144.

10. In this perspective, dual burden measures can be seen as a part of discriminatory measures, or as a part of market access prohibiting non-discriminatory measures.

11. Spaventa, op. cit. *supra* note 5, at 923. Nonetheless, Spaventa rejects the idea of a *de minimis* rule.

The objective of this paper is therefore to explore whether the Court has used, and could use, a *de minimis* threshold in the context of defining *prima facie* prohibited restrictions, and what such a threshold could entail in practice. The discourse becomes intriguing when the classic views on the various *de minimis* thresholds are connected specifically to the notion of market access. Are *de minimis* and market access, or should they be, effectively reflections of one and the same thing? More detailed views on the existence and workability of *de minimis* threshold(s) in the context of the Court's current free movement jurisprudence thus seem crucial.

1.3. *Varying notions of de minimis thresholds*

The analysis commences by an exploration of what kinds of thresholds of somehow "permissibly unimportant" restrictive effects may already exist in EU free movement law. The applications of the *de minimis* rule could all offer some form of a limitation to non-discriminatory rules that otherwise would fall under the prohibition of EU free movement law.[12]

Various definitions that can be classified as *de minimis* thresholds can be identified in the case law of the ECJ. Underlying the definitional variance, there seem to be three substantive groups of *de minimis* thresholds. They are the classic threshold of the *magnitude* (severity) of the restrictive effect, the *probability* of the restrictive effect, and the *causality* between the measure and the restrictive effect. In essence, these three groups all appear to introduce a test that can be understood as a *de minimis* threshold. The introduction of a *de minimis* test does not necessarily entail a quantifiable threshold; the limits can also be expressed in rather abstract terms.[13]

The fact that the notion of market access may be linked to the *de minimis* thresholds may, at first sight, seem to obscure the overall typology, however. This is so in particular because, unlike the classic types of *de minimis* tests on trade – and indeed the term "minimis" itself – the market access-defining *de minimis* test connotes a considerable, potentially even trade-blocking

12. The variations discussed in this article relate mainly to non-discriminatory measures. The "too uncertain and indirect" test (see sections 3 and 4 *infra*) seems to have been applied even to discriminatory measures. See e.g. Case C-291/09 *Francesco Guarnieri & Cie* v. *Vandevelde Eddy VOF*, [2011] ECR I-2685, para 17. See also Case C-602/10, *Volksbank Romania* v. *Autoritatea Naţională pentru Protecţia Consumatorilor,* judgment of 12 July 2012, nyr, paras. 68–83, where the ECJ appeared to ignore the fact that the measure could have been classified as *de facto* discriminatory. Another variation of a probability test may have been introduced in determining if the case has a cross-border element. See Case C-470/11, *SIA Garkalns* v. *Rīgas dome,* judgment of 19 July 2012, nyr, paras. 20–21.

13. See e.g. Case C-14/09, *Hava Genc* v. *Land Berlin,* [2010] ECR I-931, 29–33, on the application of a *de minimis* type rule without a clear-cut threshold when interpreting EU law on migrant workers.

restriction. In the remaining sections of this article, the classic forms of *de minimis* type rules will be analysed from the perspective of the approach taken by the ECJ, and this analysis is combined with observations on the market access-related *de minimis* threshold (if separate). The implications of the analysis on the scope of EU free movement law will be outlined in the concluding section.

The analysis in this paper expands beyond the free movement of goods, which *Keck*, *Trailers* and *Mickelsson* concern. The view that the principles and tests applicable to the free movement of goods, services, capital and workers in the EU have converged over the past two decades has been put forth by numerous scholars.[14] The convergence may not be complete, however, and the applicability of the above-mentioned three paradigmatic cases to the other fields of free movement still seems unclear.[15] The converging trend seems in any event often justified: the form of economic activity is usually not relevant in terms of creating an internal market, and it is often very difficult in practice to differentiate goods from services.[16] A generic approach to EU trade law would also increase legal certainty.[17] It is presumed in this article that there is a converging trend between the freedoms towards a (more) similar interpretation of prohibited measures, and that an analysis cutting across the freedoms is therefore both possible and interesting. It has nonetheless not been taken for granted that the *de minimis* tests are always identical. A context-specific analysis may reveal different factors that need to be taken into

14. Baquero Cruz, *Between Competition and Free Movement – The Economic Constitutional Law of the European Community* (Hart, 2002), pp. 91–96; Snell and Andenas, "Exporing the outer limits: Restrictions on free movement", in Andenas and Roth (Eds.), *Services and Free Movement in EU Law*, (OUP, 2002), 69–140; Oliver and Roth, "The internal market and the four freedoms", 41 CML Rev. (2004), 407–441, at 439–441; Woods, *Free Movement of Goods and Services within the European Community* (Ashgate, 2004), pp. 293–295; Lenaerts and van Nuffel, *European Union Law* (Sweet & Maxwell, 2011), pp. 202–203. The potential to apply the same principles to imports and exports has also been discussed. See Snell, op. cit. *supra* note 6, pp. 107–114; Barnard, op. cit. *supra* note 5, at 101–103.

15. For views on whether or not Keck applies beyond free movement of goods see Poiares Maduro, "The saga of Article 30 EC Treaty: to be continued", 5 MJ (1998), 298–316; da Cruz Vilaca, "On the application of Keck in the field of free provision of services", in Andenas and Roth, op. cit. *supra* note 14, 25–40, at 35–40; Woods, op. cit. *supra* note 14, pp. 216–218; Oliver and Enchelmaier, "Free movement of goods: Recent developments in the Case Law", 44 CML Rev. (2007), 649–704, at 679; Gormley, *EU Law of Free Movement of Goods and Customs Union* (OUP, 2009), pp. 410–411.

16. For a discussion on the pros and cons of the trend see Barnard, op. cit. *supra* note 9, 35–59; Snell and Andenas, op. cit. *supra* note 14, at 79–80.

17. Reflecting the possibility of a single approach to EU free movement law as a whole, see Craig and de Búrca, *EU Law – Text, Cases, and Materials*, 4th ed. (OUP, 2008), pp. 831–834. Others have been more sceptical as regards the introduction of a simple test. See Arnull, *The European Union and its Court of Justice* (OUP, 2006), pp. 438–441.

account in assessing the tests, or that lead to differences in the tests. Indeed, the differences identified in the *de minimis* tests across the areas of free movement law call for caution in assuming full convergence.

2. Magnitude

2.1. *Magnitude of the restrictive effect*

Perhaps the most common definition of a *de minimis* test is that a measure with a negligible restrictive effect on trade will escape the *prima facie* prohibition. The verb which the ECJ uses to describe the restrictive effect may in itself already indicate different degrees of restrictive effects. The Court has ruled, with a roughly similar variance in different languages,[18] for example, that free movement may *prima facie* not be "prohibited, impeded or rendered less attractive",[19] "dissuaded",[20] "obstructed",[21] "hindered or made less attractive",[22] "hampered",[23] or "restricted" and therefore also not "prevented or deterred".[24] In some cases several of the verbs are used, either cumulatively or as alternatives. The court has also established a *prima facie* prohibited

18. The variance in the use of English verbs "impede", "hinder" and "hamper" seems not to exist in French ("gêner", ("entraver")) or German ("behindern").

19. Case C-500/06, *Corporación Dermoestética SA* v. *To Me Group Advertising Media*, [2008] ECR I-5785, para 32. Similar variance can be observed in e.g. the French and German terms used: "interdisent", "gênent", "rendent moins attrayant" and "verbieten", "behindern" or "weniger attraktiv machen", respectively. See also e.g. Case C-76/90, *Manfred Säger* v. *Dennemeyer & Co. Ltd*, [1991] ECR I-4221, para 12, where the verbs "prohibit" and "impede" are used ("prohiber" and "gêner"; "unterbinden" and "behindern", in French and in German).

20. Case C-212/06, *Government of the French Community and Walloon Government* v. *Flemish Government,* [2008] ECR I-1683, para 48. ("dissuader" and "abhalten" in French and German).

21. Case C-320/03, *Commission* v. *Austria*, [2005] ECR I-9871, para 66–68. The measure obstructed free movement because it *limited trading opportunities* ("entraver" and "behindern" in French and in German).

22. Case C-55/94, *Reinhard Gebhard* v. *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995] ECR I-4165, para 37; Case C-400/08, *Commission* v. *Spain* (*Hypermarkets*), [2011] ECR I-1915, para 63 ("gêner" or "rendre moins attrayant"; "behindern" or "weniger attraktiv machen" in French and German).

23. Case C-19/92, *Dieter Kraus* v. *Land Baden-Württemberg*, [1993] ECR I-1663, para 32 ("gêner", "behindern" in French and in German).

24. 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, para 99 ("restreindre", "empêcher ou dissuader"; "einschränken", "hindern oder abhalten" in French and German). See also para 96, where "preclude" is used instead of "prevent" in the English version, while the terminology corresponds to para 99 in French and in German.

restriction by stating e.g. that investments are "discouraged"[25] or "deterred"[26] or that an "obstacle is constituted" to international transport.[27] The terminology used by the Court appears to vary widely, and in a manner that does not strike one as systematic. A terminological analysis does not promise a useful path for distinguishing between negligible *de minimis* restrictions on trade from the prohibited ones, or it suggests at least an analysis of a different scope and type to the one proposed here.

There is also another, even more perplexing element in the ECJ's case law regarding the thresholds: the Court has namely expressly noted already several decades ago that there is no *de minimis* limit or test on the magnitude of the restriction in the EU law on prohibited measures. These early cases mostly concerned situations where a disadvantage on economic activity of foreign origin could be identified.[28] It seems rather straightforward and consistent with the general principles of EU law to assume that in cases where the Court identifies discrimination, the magnitude of the measure's (negligible) effect is irrelevant. However, the ECJ also rejected a *de minimis* test in a few cases where it did not explicitly find discrimination or a dual burden.[29] A further indication against the relevance of a magnitude *de minimis* threshold could be that the Court has not tended to classify a measure as permissible *solely* by referring to the "too slight" a magnitude of the restrictive effect, but has used alternative or at least complementary arguments. Hence, some might argue that when establishing restrictions in EU free movement law, the ECJ will not give any relevance to the magnitude of the restrictive effect.

25. Joined Cases C-282 & 283/04, *Commission* v. *Netherlands* (*KPN and TPG*), [2006] ECR I-9141, para 28 ("décourager" and "abhalten" in French and in German).

26. *KPN and TPG*, cited *supra* note 25, para 20; Case C-98/01, *Commission* v. *United Kingdom* (*BAA*), [2003] ECR I-4641, para 47 ("dissuader", "abschrecken/abhalten" in French and in German).

27. Case C-350/97, *Wilfried Monsees* v. *Unabhängiger Verwaltungssenat für Kärnten,* [1999] ECR I-2921, para 23 ("constituer un obstacle", "ein Hindernis stellen", in French and in German).

28. Case 24/68, *Commission* v. *Italian Republic* (*Statistical Levy*), [1969] ECR 193, para 9; Case 16/83, *Criminal proceedings against Karl Prantl,* [1984] ECR 1299, para 20; Case 269/83, *Commission* v. *French Republic*, [1985] ECR 837, paras. 9–10; Case 103/84, *Commission v Italian Republic*, [1986] ECR 1759, para 18; Case C-49/89, *Corsica Ferries France* v. *Direction générale des douanes françaises (Corsica Ferries II)*, [1989] ECR 4441, para 8; Case C-463/01, *Commission* v. *Germany*, [2004] ECR I-11705, para 63; Case C-309/02, *Radlberger Getränkegesellschaft mbH & Co. and S. Spitz KG* v. *Land Baden-Württemberg*, [2004] ECR I-11763, para 68; *Flemish Care Insurance*, cited *supra* note 20, para 52; Case C-141/07*, Commission* v. *Federal Republic of Germany*, [2008] ECR I-6935, para 43.

29. Joined Cases 177 & 178/82, *Criminal proceedings against Jan van de Haar and Kaveka de Meern BV ,* [1984] ECR 1797, paras. 13–14; C-166/03, *Commission* v. *French Republic* (*Gold Alloy*), [2004] ECR I-6535, para 15.

This is where the Court's case law on limiting non-discriminatory measures through the notion of market access could become intriguing. In order to distinguish the market access-related, prohibited non-discriminatory measures from other, (market circumstance–related, if one is comfortable with the term) non-discriminatory permissible measures, some test would be required. One way to construe the test has been to define it as a *de minimis* limit on the effect. This proposition has been made perhaps most notably already by Advocate General Jacobs in his Opinion in *Leclerc*.[30] In *Leclerc*, the Advocate General suggested that the Court focus on *substantial* hindrances to accessing the market, thus apparently linking to *de minimis* type reasoning. Others have defined an even higher threshold by suggesting that only an almost complete blocking of market entry creates a prohibited market access measure.[31]

If *Keck*, *Trailers* and *Mickelson* thus define as *prima facie* prohibited non-discriminatory measures only those that hinder market access, and market access hindrances are distinguished from other, permissible non-discriminatory measures by a *de minimis* test, it is difficult to see how one can escape the test. Yet, for the purposes of establishing a market access hindrance, the threshold seems very high, while the classic magnitude threshold may have been anything but. Indeed, the rulings of the Court would seem to imply that a restriction is an obstacle no matter how slight the restrictive effect is, to the extent that the entire relevance of a magnitude *de minimis* test has been the subject of discussion. Perhaps a close look into the heuristics of magnitude *de minimis* tests can further elaborate the seeming paradox.

2.2. *Different measures of magnitude*

The magnitude of a restriction can as a matter of principle be measured in at least three ways: 1) as the (absolute) size of the affected market; 2) as the size of the affected part of the relevant market in relation to the size of the entire relevant market or 3) as the size of the restrictive effect on an individual trader. Unfortunately, the Court or its advocates general do not always make it

30. Opinion of A.G. Jacobs in *Leclerc*, cited *supra* note 9, paras. 38–49. Equally Barnard has adopted the concept of substantial hindrance. She takes the view that the court is introducing a *de minimis* test in relation to the magnitude of the restrictive effect despite its rejecting rhetoric in some judgments. See Barnard, op. cit. *supra* note 9, at 52–59. Moen uses the phrase "prevents or greatly restricts". See Moen, op. cit. *supra* note 5, at 399.

31. Oliver and Roth, op. cit. *supra* note 14, at 415–416; Enchelmaier, *"*Moped Trailers, Mickelson & Roos, and Gysbrechts: The ECJ's case law on goods keeps on moving*"*, 29 YEL (2010), 190–223, at 215–220.

explicit or even implicit which type of a *de minimis* rule is actually being assessed.[32]

First, the magnitude of the restriction can be measured in terms of the *size of the affected market* (market size *de minimis*). The effect could be quantified in terms of the absolute number of the actually – and perhaps even only potentially – affected goods, services, traders or people. Restrictions on small – sometimes local – markets would in this view fall below the *de minimis* threshold, and therefore not be prohibited. However, the Court has stated that also restrictions that affect even a minimal part of the EU market constitute a *prima facie* prohibited restriction.[33] Many commercial innovations start on a very small scale and then diffuse throughout society as more and more individual consumers adopt them. Leaving small markets outside the protection of EU free movement law could gravely jeopardize the creation of a competitive, innovation-driven internal market as envisioned in the Europe 2020[34] strategy and the EU Treaty at large. The Court has often recalled that the limited size of the current market may be exactly a consequence of the existing restrictions clamping down the demand. It is the *potential* market that needs to be assessed.

Second, a *de minimis* threshold could be defined by the *relative* size of the affected part of the relevant market. This test could involve many variations and considerable nuance, as the relative size could be measured in terms of the share of affected trade calculated from, e.g., the number of *traders* or by the volume or value of their *goods/services* (market share *de minimis*). A measure would be *prima facie* prohibited if a substantial part of the relevant market – whatever percentage would be chosen to indicate such a threshold – experienced an access restriction. If one measured the share of the relevant market by the volume or the value of the goods or services, the analysis could make use of tools that exist in the area of competition law.[35] In competition law, if a market player that behaves abusively on the market has a small share of the relevant market, its actions usually need not be restricted. The remaining major part of the market tends to neutralize the effects on the competitors and, even more important, on the consumers. Here a difference between trade and competition should be noticed, however. If the trade-hindering obstacle bars access to even a small part of a relevant market, this may in free movement law

32. An example of where *de minimis* has been discussed without clear indication of what the measure is was Opinion of A.G. Jacobs in *Leclerc*, cited *supra* note 9, paras. 38–49.

33. Case C-67/97, *Criminal proceedings against Ditlev Bluhme*, [1998] ECR I-8033, para 20.

34. COM2010(2020), "Europe2020: A strategy for smart, sustainable and inclusive growth".

35. Commission Notice on the definition of relevant market for the purposes of Community competition law, O.J. 1997, C 372/5-13.

entail a full deprivation of an individual operator's (or a small number of operators') ability to operate, because they may not wish or be able to operate on the other parts of the relevant market. This appears problematic, because a *de minimis* rule reflecting the small affected share of the relevant market would mean that even harsh restrictive effects would not be prohibited. Such a small group could even be forced out of the market. There are already cases where the Court seems to have rejected this type of market share *de minimis*.[36] It would appear that the fundamental nature of the freedoms does not allow for even a limited share of traders being blocked from the market.[37]

Finally, the magnitude of the effect could be measured as the (small) size of the effect on each individual trader, worker, or good (individual effect *de minimis*). This type of a *de minimis* test has a number of important nuances. To start with a definition of the affected party (or affected object), the threshold could in theory be set purely on the basis of the highest proven restrictive effect amongst all the individual traders. If even such an effect were negligible, the measure would, under the *de minimis* rule, not be prohibited. The application of the test would require a case-by-case analysis, where the Court would need to assess the magnitude of the effect on market access on the basis of the evidence presented, usually by the affected importer(s). In the absence of such specific evidence, in particular, the Court's ability and willingness to conduct importer-specific analyses could be limited and lead the Court to focus on the effect that the measure has more generically on a *"*default*"* producer or importer in a similar situation. If the magnitude of the impact is below the *de minimis* threshold, the measure cannot be considered to have a restrictive effect under the TFEU. Such a limit has in EU law usually been seen as a very low one – if even existing – however. The Court heralded in *van de Haar*:

> "… Article 30 of the Treaty does not distinguish between measures . . . according to the degree to which trade between Member States is affected. If a national measure is capable of hindering imports it must be regarded as a . . . restriction, even though the hindrance is slight and even though it is possible for imported products to be marketed in other ways".[38]

Should the Court contemplate a more positive stance towards *de minimis* tests, the above three magnitude *de minimis* thresholds – absolute *size* of the

36. *Flemish Care Insurance*, cited *supra* note 20, para 52; Case C-169/98, *Commission* v. *French Republic* (*Social Security For Migrant Workers*), [2000] ECR I-1049, para 46.

37. Oliver, "Some further reflections on the scope of Articles 28–30 (ex 30–36) EC", 36 CML Rev. (1999), 783–806, at 790–793; *Corsica Ferries II,* cited *supra* note 28, para 8.

38. *Van de Haar*, cited *supra* note 29, para 13.

affected market, relative *share* of the affected market and the effect on an *individual* operator – could in theory be understood in two ways. First, if a measure were considered to fall below any one of the *de minimis* thresholds, it would escape definition as unduly restricting the economic actors' access to the market. For example, a measure that was grave on individual producers (no individual effect *de minimis*), who represent a large share of the market (no market share *de minimis*), would nonetheless not be considered prohibited if the absolute size of the relevant market were negligible (market size *de minimis* is applicable). The measure would hence be considered prohibited under TFEU only if none of the *de minimis* thresholds were fulfilled: the measure has an impact on a market of sufficient size, on a sufficient share of the relevant market and on an individual importer to a sufficient extent. One could, however, perhaps also envisage the opposite interpretation: that a measure is *de minimis* only if it is cumulatively *de minimis* on all three accounts. The non-discriminatory measure would be permissible if it hindered a small share of a small market with only negligible impacts on individual traders.

The combination of the three magnitude *de minimis* rules could also be limited to only two of them, if one form of *de minimis* is deemed irrelevant. Cumulative or not, the different subjects of the magnitude of a restriction are useful to identify and distinguish from one another, because they have different strengths and weaknesses, as the analysis in the next section will reveal.

As noted above, the Court has appeared in many instances reluctant to accept any form of a magnitude *de minimis* in terms of any of the classic three categories. The question is to what extent the market access approach may have altered this.

2.3. *Traces of magnitude de minimis rule in the case law*

Upon a closer look, it may be possible to find indications of the Court referring to the magnitude of a measure's effect. The Court has for example referred to the *high* magnitude of the restrictive effect of the free movement hindrance[39] as well as the market access hindrance.[40] In addition, the Court

39. See expression "having significant effects… or ... giving rise to a genuine restriction on free movement of capital" in Case C-377/07*, Finanzamt Speyer-Germersheim* v. *STEKO Industriemontage GmbH*, [2009] ECR I-299, para 29; and "significant restrictions on the freedom to provide services" in Case C-439/99, *Commission* v. *Italian Republic*, [2002] ECR I-305, para 32.

40. See expression "render commercialization, and consequently access to the market for those goods, appreciably more difficult" in Case C-337/95, *Parfums Christian Dior SA and Parfums Christian Dior BV* v. *Evora BV*, [1997] ECR I-6013, para 51.

has referred to the high magnitude of the effect on transportation[41] and on commercial freedom,[42] as well as to the high magnitude of added costs.[43] Although the Court concluded that measures with a highly restrictive effect were *prima facie* prohibited, it left unsaid what relevance exactly the effect's magnitude had had in its assessment. The uncertainty is also visible in that the ECJ has occasionally referred to the *high* effect on consumer behaviour,[44] but then in other instances not indicated whether the magnitude of the influence had been or would need to have been considerable.[45] In addition, in cases where the Court did refer to a high magnitude, it did not directly reveal if it had found the restrictive effects substantial in terms of the size of the market, the affected market share or the impact on an individual trader. In other words, the Court seems to take the magnitude of measure's effect into account when it is high, yet it is not obvious how the Court measures such highly restrictive effects.

Moreover, the Court may even have made reference to the *low* magnitude of the measure. In *Viacom*, the Court concluded that an advertising tax did not constitute a *prima facie* prohibited restriction since it was "modest".[46] The Court actually considered the magnitude "modest in relation to the value of the services provided", implying that the tax may not even have been that minute in absolute terms. This appears very similar to stating that the added costs are (relatively speaking) too small and that the restrictive effect is therefore also too small. There has also been speculation specifically on whether a measure would be prohibited if the effect were only "hypothetically small".[47]

41. See expression "substantial effect on the transit of goods" in Case C-28/09, *European Commission* v. *Republic of Austria*, judgment of 21 Dec. 2011 , nyr, para 116.

42. See expression "serious obstacle to the pursuit of their activities" in *Dermoestética*, cited *supra* note 19, para 33.

43. See expressions "substantial interference in the freedom to contract", "significant additional costs", "considerably expanding the range of insurance services offered" and "inasmuch as it involves changes and costs on such a scale for those undertakings" in Case C-518/06, *Commission* v. *Italian Republic* (*Motor Vehicle Insurance*), [2009] ECR, I-3491, paras. 66–70.

44. See expression "considerable influence on the behaviour of consumers" in *Trailers*, cited *supra* note 1, para 56; *Mickelsson*, cited *supra* note 1, para 26.

45. Case C-443/10, *Philippe Bonnarde* v. *Agence de Services et de Paiement,* judgment of 6 Oct. 2011, nyr, paras. 30–31.

46. Case C-134/03, *Viacom Outdoor Srl* v. *Giotto Immobilier SARL*, [2005] ECR I-1167, para 38.

47. See Case C-126/91, *Schutzverband gegen Unwesen in der Wirtschaft e.V.* v. *Yves Rocher GmbH,* [1993] ECR I-2361, para 21. In the case, the court appears to imply that measures with only a restriction of hypothetical magnitude would not be prohibited. For comments on this string of case law see Opinion of A.G. Tesauro in *Hünermund,* cited *supra* note 6, para 21 and Opinion of A.G. Tesauro in Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und*

Will all this reasoning, however, come under a new light in view of the doctrinal discussions in *Keck, Trailers* and *Mickelsson*? These three cases essentially sought to establish means to limit the scope of non-discriminatory measures that would be considered prohibited. The Court refers in *Mickelsson* to a "measure, which hinders access of products . . . to the market". The stricter the definition of "hindering access", the more limited the scope of the prohibition, and hence the larger the Member State's ability to enact non-discriminatory policy measures. In its most limited form, "hindering access" would be equated with a full ban from the market. To say this slightly differently: only where the market operators were completely barred from entering or forced to leave a particular market, would the measure be considered to transgress the TFEU rules on free movement. The threshold would in such a case be a very high one – indeed rather deceptively, if one considered the denomination as a "de minimis" limit. Any hindrances to market access would be accepted without the need to justify them with particular societal concerns, as long as the market in question were not completely or almost completely foreclosed.

2.4. *The market access threshold*

Various authors have proposed ways to define the "market access" threshold. Advocate General Kokott in her Opinion in *Mickelsson*, for example, referred to a "complete exclusion, such as a general prohibition on using a certain product" or a "situation where only a marginal possibility for using a product remains". [48] The ECJ concurred by stating that measures preventing or "greatly restricting" use are *prima facie* prohibited.[49] The limit of "prohibiting the last remaining use in the Member State in question in a situation where either such use remains legal in at least one other Member State, or the importing Member State is the last to allow this use" is another proposition.[50]

So how do these market access tests and thresholds connect with the three types of *de minimis* tests explained above? Would the Court's recent focus on market access call for a re-alignment? Will the classic *de minimis* tests on an effect's magnitude be transformed so as to enable the exclusion of non-discriminatory measures from a prohibition scrutiny? If the Court contends that no *de minimis* test is to be applied, it would seem to imply that

vertriebs GmbH v. *Heinrich Bauer Verlag* [1997] ECR I-3689, para 10. The term hypothetical is bound to cause confusion, since it might refer to either the low magnitude of the effect or the low probability of the effect (on the latter, see section 4 of this article).

48. Opinion of A.G. Kokott in *Mickelsson,* cited *supra* note 1, para 67.
49. *Mickelsson*, cited *supra* note 1, para 28.
50. Enchelmaier, op. cit. *supra* note 31, at 215–220.

the harshness of the restrictive effect on individual traders – or on a group of traders representing a sufficient market share – does not matter. This would seem to contrast with its decisions in *Trailers* and *Mickelsson*, where it appeared to assess the measure's effect precisely from the perspective of the market share and the individual effect, and to indeed establish a minimum threshold for both. The effect of use restrictions on moped trailers or watercraft, respectively, was considered to foreclose (*almost) entirely* the *whole* relevant market of the products in question. According to the Court, the measures were declared *prima facie* prohibited since they "affected" and "hindered" market access.[51] The outcome of *Trailers* and *Mickelsson* thus seems to suggest that market access restrictions occur at least when trade is prevented almost entirely for almost everyone. If these, as such extremely high, *de minimis* thresholds on market share and on individual effect are not met, market access may not be hindered, and the non-discriminatory measure is excluded from the scope of prohibition. It is thereby declared permissible.

Case law from the other areas of free movement law appears nevertheless to cast doubts on how exactly to interpret the (*de minimis*) threshold(s) on market access. First of all, the ECJ has mostly in the field of the other freedoms used the concept of "affecting" market access,[52] which might be interpreted as a threshold lower than "hindering". Although ECJ has sometimes used stronger verbs such as "deprive" and "impede",[53] it has in at least one instance declared a measure *prima facie* prohibited because it rendered market access merely "less attractive".[54] These types of formulations would imply that the threshold might not be as high as previously assumed.

51. *Trailers*, cited *supra* note 1, paras. 37 & 56; *Mickelsson*, cited *supra* note 1, paras. 26 & 28 ("affecter" and "entraver"; "auswirken" and "behindern", in French and in German). Already before these cases the Court had used the concept "affects *access to the market*". See Case C-384/93, *Alpine Investments BV* v. *Minister van Financiën*, [1995] ECR I-1141, para 38. The French and German terminology has changed since *Alpine Investments*. In that case the Court used "apte à entaver *le commerce"* and "ist geeignet den *Verkehr* zu behindern", instead of "*l'access au marché"* and "*Zugang zum Markt",* which seem more common now.

52. *BAA*, cited *supra* note 26, para 47 (the market access concept was used here already before *Trailers* and *Mickelsson*); C-465/05, *Commission* v. *Italian Republic* (*Private Security Services*), [2007] ECR I-11091, paras. 100–102; *Hypermarkets*, cited *supra* note 22, para 64 ("conditioner" or "affecter"; "beeinflussen", "beeinträchtigen" in French and in German).

53. Case C-565/08, *Commission* v. *Italian Republic* (*Lawyer Tariffs*), paras. 49–54 ("être privé", "entraver", "gêner"; "behindern", "jemandem die Möglichkeit nehmen"). In this case also "affect", "porter atteinte à", and "beeinträchtigen" in English, French and German were used. See also *BAA*, cited *supra* note 26, paras. 46–47, where alongside these terms "prevent", "empêcher" and "versperren", as well as "affect", "conditioner", and "beeinflussen" in English, French and German were used.

54. *Motor Vehicle Insurance*, cited *supra* note 43, paras. 64–70 ("rendre moins attrayant", "weniger attraktiv machen" in French and in German). The court uses "less attractive" alongside "affect". See also *Volksbank România,* cited *supra* note 12, para 80 ("affecter" and "betreffen" in French and in German).

In some cases only very few persons or traders are entirely prevented from accessing the market as a consequence of the non-discriminatory measure, while other persons or traders are not at all affected. The difference can be due to the parties' specific characteristics or their interests on the market. The ECJ has often found such individually severe measures to affect market access.[55] This case law is not without exceptions,[56] however, and the inconsistency is puzzling. As for the notion of market access, the cases would seem to suggest that an obstacle occurs even when only one trader or person is blocked from accessing the market. Such an interpretation would bring the market access test very close to the third form of magnitude *de minimis* test, which also hinges upon the restrictive effects on an individual trader.[57]

Still considering cases in the free movement law outside the field of goods, there have been measures that have undoubtedly affected all traders on the market but, contrary to the circumstances in *Trailers* and *Mickelsson*, only some traders – or no traders at all – are actually fully prevented from accessing the market. The Court's case law appears again not fully coherent: the ECJ has sometimes found such measures legal,[58] but in other cases declared the measure *prima facie* prohibited.[59] The different outcomes in the cases could

55. On freedom of establishment, see *Hypermarkets*, cited *supra* note 22, para 64; and on freedom of establishment and freedom movement of services see *Private Security Services*, cited *supra* note 52, paras. 100–102. For cases before the market access terminology became established, see case C-60/00, *Mary Carpenter* v. *Secretary of State for the Home Department*, [2002] ECR I-6279, para 39 on free movement of services; *Bosman*, cited *supra* note 24, paras. 96–99 on free movement of workers.

56. On free movement of services, see Joined Cases C-51/96 & C-191/97, *Christelle Dèliege* v. *Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo and Francois Pacquée*, [2000] ECR I-2549, paras. 61–69. As in *BAA* and *Alpine Investments*, the Court actually used the market access concept before *Trailers* and *Mickelsson*. The judgment in *Dèliege* received some criticism. See Van den Bogaert, "The Court of Justice on the Tatami: Ippon, Waza-Ari or Koka?", 25 EL Rev. (2000), 554–563; Snell, op. cit. *supra* note 8, at 461–462.

57. An alternative interpretation would be that the focus should be not on the broad range of traders on the market, but on a clearly identifiable category of traders. Hence, if a measure prevents this whole category of identifiable traders from accessing the market, the measure is *prima facie* prohibited.

58. See e.g. on free movement of services *Lawyer Tariffs*, cited *supra* note 53, 49–54, where the ECJ stated that the measure did not either deprive or impede market access.

59. On free movement of capital see "golden shares" cases C-463/00 *Commission* v. *Spain*, [2003] ECR I-4581, para 61; *BAA*, cited *supra* note 26, paras. 46–47. On free movement of services and freedom of establishment see *Motor Vehicle Insurance*, cited *supra* note 43, paras. 64–70. These cases would seem difficult to explain by the theories developed by e.g. Davies, who has made a detailed attempt to sort out the concept of market access; see Davies, "Understanding market access: Exploring the economic rationality of different conceptions of free movement law", 11 *German Law Journal*, (2010), 671–703. The cases namely neither appear to have favoured incumbents over new market entrants, nor do they completely eliminate the whole market.

perhaps be explained by the differences in the probability that few traders will indeed be fully precluded from the market. The probability *de minimis* rules will be discussed in more detail below (section 4).

There would seem to be three ways to understand, and hence to further systemize, free movement in the cases outside the field of goods.[60] The cases could first of all be interpreted as indicating that a market access restriction occurs already when the access of only one or some traders is fully prevented. A further qualification to this interpretation could be that, for a market access restriction to exist, every (other) trader alongside the few fully precluded traders (also) needs to be affected, even if the effect on such other traders were not substantial at all. Although theoretically possible, this interpretation would seem difficult to reconcile with the current case law. There are cases where the measure was deemed *prima facie* prohibited even when it affected only a limited group of traders. A third interpretation, albeit also not well supported by the case law, could be that (almost) all traders or persons need to be affected, although *none* of them needs to be affected so severely as to be completely precluded from the market. As one may notice, these alternatives reflect different combinations of the market share and the individual effect *de minimis* tests above. Regardless of the interpretation, the cases outside the field of goods clearly indicate that the market access test has been applied to much less severe restrictions of trade than those at hand in *Trailers* and *Mickelsson*. The market access angle thus raises the question whether there actually is convergence between the different areas of free movement. This question is, however, beyond the scope of the present analysis.

Finally, the relationship between market access and *de minimis* tests can also be observed from the direction of the prohibition tests: if the existence of a *prima facie* prohibition may now, in the market access era, be determined on the same scale (effects magnitude) as the three magnitude *de minimis* tests, would that mean that these tests have become redundant for good for non-discriminatory measures? Or have they rather obtained a new role as a part of the market access threshold analysis – it is just that the critical thresholds have shifted toward the opposite end of the magnitude spectrum? The relationship between the market access and magnitude *de minimis* tests may hence simply depend on whether one sees the glass as being half full or half empty.

2.5. *Convergence or divergence?*

Some scholars argue that the Court should continue to reject the *de minimis* tests, even if market access is the prevalent means of defining

60. See the cases referred to in notes 55, 56 and 59 *supra*.

non-discriminatory trade hindrances.[61] The main reasons are that the test would be difficult to apply in practice and hence the rulings could become intuitive. This could threaten legal certainty.

Speaking against such positions, i.e. in favour of the application of *de minimis* tests, would at first sight be the positive experiences in competition law. The analogies appear promising considering that the principles of free movement and competition law have been seen as converging.[62] Although notable differences between these two fields of economic law must be acknowledged,[63] the more detailed conceptualization and categorization of *de minimis* tests in free movement law, conducted above, might nevertheless open interesting paths towards investigating *de minimis* competition law tests. There also are cases where the ECJ has applied both trade and competition law rules.[64] Would it perhaps be possible to envisage a common approach to *de minimis* when tackling cases from the perspectives of both fields of economic law? Again, these intriguing questions extend beyond the scope of the present paper.

All in all, the relevance of the magnitude of the restrictive effect seems to be in a state of flux. The negligible size of the market appears mostly irrelevant. The relative share of the relevant market affected, and in particular the magnitude of the restrictive effect on a single trader, which both have also usually been considered irrelevant, may however through the notion of market access have become delimiting factors for defining prohibited trade restrictions. They do that, however, in the opposite "high" end of an effect's magnitude. This renders the current notion of *de minimis* tests ill-suited. Worthy of note is also that the magnitude of the restrictive effect can still be given relevance in the proportionality test of the justification, even if it is of no relevance in the prohibition.[65]

61. For critical comments on *de minimis* see Snell, op. cit. *supra* note 6, p. 101; Snell, op. cit. *supra* note 8, at 459; and Oliver, *Free Movement of Goods in the European Community*, (Sweet and Maxwell, 2003), p. 101. For a discussion on the problems of a *de minimis* rule see also Weatherill, "Free movement of goods", 61 ICLQ (2012), 541–550, at 542–543.

62. See e.g. Mortelmans, "Towards convergence in the application of the rules on free movement and on competition", 38 CML Rev. (2001), 613–649.

63. Arnull, op. cit. *supra* note 17, p. 441 (at footnote 214). The claim of rejecting it on these grounds would deserve more thorough research.

64. See e.g. Joined Cases C-403 & 429/08, *Football Association Premier League Ltd and Others* v. *QC Leisure and Others* and *Karen Murphy* v. *Media Protection Services Ltd* , [2011] ECR I-9083.

65. Jarass, "A unified approach to the fundamental freedoms", in Andenas and Roth, op. cit. *supra* note 14, 141–162, at 150.

3. Causality

3.1. *Directness (remoteness) as a de minimis test*

Alongside the use of traditional *de minimis* tests, based on the *magnitude* of the restrictive effect, it also seems possible to exclude from the scope of Article 34 TFEU measures that have "too indirect and too uncertain" an effect on trade. These criteria were established by the Court in the *Krantz* and *Peralta* cases[66] – thus well before the doctrinal discussions on the notion of market access started – and can also be seen as *de minimis* limits. These tests have been applied in several cases since then, both in the field of free movement on goods[67] and in relation to the other freedoms.[68] It is unclear how much relevance should be given to each part of the criteria, i.e. to "too indirect" and "too uncertain", or whether they could even be synonyms in the eyes of the ECJ. Here, the focus will be on the criterion of "directness", while the analysis of "(un)certainty" comes in the next section on the notion of probability *de minimis* tests.

Limiting the scope of the prohibited measures by excluding those that have too indirect an effect on trade has been called a "remoteness test".[69] It is a test of *de minimis* causality.[70] According to the *Dassonville* formula, any measure that is capable of hindering trade within the EU "*directly or indirectly*, actually

66. Case C-69/88, *H. Krantz GmbH & Co.* v. *Ontvanger der Directe Belastingen and Netherlands State*, [1990] ECR I-583, para 11; Case C-379/92, *Criminal proceedings against Matteo Peralta*, [1994] ECR I-3453, para 24. Both cases concerned the free movement of goods. For comments on this line of case law see Barnard, op. cit. *supra* note 9, at 48–52; Snell, op. cit. *supra* note 6, pp. 123–125; Oliver, op. cit. *supra* note 61, p. 104; Woods, op. cit. *supra* note 14, pp. 224–225.

67. See e.g. cases C-96/94, *Centro Servizi Spediporto Srl* v. *Spedizioni Marittima del Golfo Srl*, [1995] ECR I-2883, para 41; *Bluhme*, cited *supra* note 33, para 22; C-412/97, *ED Srl* v. *Italo Fenocchio*, [1999] ECR I-3845, para 11.

68. For cases on services see e.g. Case C-211/08, *Commission* v. *Spain*, [2010] ECR I-5267, para 72; and *Volksbank România*, cited *supra* note 12, para 81. The test has also been applied in relation to free movement of workers in Case C-190/98, *Volker Graf* v. *Filzmoser Maschinenbau GmbH*, [2000] ECR I-493, paras. 24–25; and freedom of establishment in 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 & C-332/94, *Semeraro Casa Uno e.a.* v. *Sindaco del Comune di Erbusco e.a.,* [1996] ECR I-2975, para 32. The relevance of the remoteness test still appears to be debatable in the field of free movement of services in the EU. Arnull claims that the test has not yet become a major issue in the field of services, whereas Snell and Andenas claim the test has been important in this field in comparison with the field of goods, where they see the magnitude of the restrictive effect to have been emphasized more. Cf. Snell and Andenas, op. cit. *supra* note 14, at 138; Arnull, op. cit. *supra* note 17, pp. 499–500.

69. Oliver, op. cit. *supra* note 61, pp. 103–104.

70. Opinion of A.G. La Pergola in Case C-44/98, *BASF AG* v. *Präsident des Deutschen Patentamts*, [1999] ECR I-6269, para 18.

or potentially" is *prima facie* prohibited. Therefore, it would actually seem quite clear that it is of no relevance whether the causal relationship between the measure and the restrictive effect is direct or indirect.[71] Although clear, the definition also appears problematic. Most – if not all – commercial regulation seems in reality to have at least some indirectly restrictive effects on trade. The judgment in *Carpenter* illustrates well just how indirect the link can actually be.[72] In that case, a UK national traded services on the internal market. The trader's wife, who was a third country national, faced deportation from the UK where the couple was resident. The deportation decision was, however, found to potentially and indirectly restrict the trader's ability to conduct cross-border trade in the EU, because it could lead also to the trader moving to the non-EU country that his wife returned to, abandoning trade in the EU.

3.2. *Challenges to testing causality*

The question of causality also brings the discussion back to *Keck*. In order to draw limits on the over-broad *Dassonville* formula, the Court in *Keck* stated that certain non-discriminatory selling arrangements would not be considered to even potentially or indirectly hinder trade between the Member States.[73] The *Keck* judgment could thus be read to mean that in the case of rules on selling arrangements, the restrictive effect is already too indirect for the measure to be considered prohibited.

After *Keck*, the Court has, when dealing with measures that did not concern certain selling arrangements, on the one hand occasionally specifically stated that the challenged restriction *directly* affects market access,[74] and on the other hand frequently noted that a measure will not constitute a *prima facie* obstacle if its restrictive effect on cross-border trade is "too indirect and uncertain".[75] Therefore, the Court's current interpretations of directness seem coherent, yet in substance its exclusion of measures which are too indirect seems to contradict the original *Dassonville* formula. This has left the relevance of direct or indirect causality under the EU law of prohibition somewhat open.[76]

71. The notion of "direct or indirect" causality refers to the link between the measure and the *restrictive effect* (on inter-state trade). In other words, it is not understood as referring to the link between the measure and *the inter-state trade in itself.*

72. *Carpenter*, cited *supra* note 55.

73. *Keck*, cited *supra* note 2, para 16.

74. *Alpine Investments*, cited *supra* note 51, para 38.

75. See cases in notes 66–68 *supra*.

76. For a critical analysis see Snell, op. cit. *supra* note 8, at 451–455. See also Weatherill, "After Keck: Some thoughts on how to clarify the clarification", 33 CML Rev. (1996), 885–906, at 896–901. Weatherill accepts the test despite its weaknesses.

As to the content of this threshold, the "indirect" prong of the causality test includes an analysis of degree, as did the test on the magnitude of the effect. There may be one or more intervening factors between a measure and its effect on trade. Although tests of degree are rarely simple to apply in practice, causality is commonly analysed in, for instance, tort law.[77] Another challenge with directness tests is that they are not based on an economic rationale:[78] the economic effect of a restriction is not determined – not solely at least – by how direct the causality between the measure and that effect is. Also the fact that the remoteness test may have been abandoned in US trade law,[79] would speak for not giving relevance to the directness of the causality in EU trade law. Views to the contrary have also been presented,[80] however, and a criterion of directness may be useful in free movement law from a personal rights perspective.[81]

3.3. *Causality and market access*

The criterion of directness may be linked to the Court's recent attempt to draw limits on *prima facie* non-discriminatory measures through the notion of market access. The criterion can probably be seen as parallel to, or even as merging with, the distinction (made, among others, by Weiler[82]) between measures directly affecting market access, as opposed to those only indirectly having such an effect, as they focus on the market circumstances or the exercise of rights on the marketplace. Thus, a finding of direct causality in hindering market access would under this construction be evidence of a *prima facie* restriction.

Would a measure thus escape the label of a prohibited market access restriction, if it only *indirectly* hindered market entry? A prohibition on optimal means of advertising could be an example of a measure that would fall under such causality *de minimis* threshold. The measure could affect business performance, even critically, but only indirectly, gradually over time. Hence, it

77. Barnard, op. cit. *supra* note 9, at 55; Snell, op. cit. *supra* note 6, p. 124.

78. Snell, op. cit. *supra* note 6, p. 105; Snell, op. cit. *supra* note 8, at 452–455.

79. Nowak and Rotunda, *Constitutional Law* (West Pub., 1995), pp. 289–290; Tribe, *American Constitutional Law* (Foundation Press, 1988), p. 408. For early U.S. case law on directness, see e.g. *Smith* v. *Alabama,* 124 U.S. 625 (1888), and for commentary on directness Bittker, *Bittker on the Regulation of Interstate Commerce and Foreign Commerce* (Aspen Law & Business, 1999).

80. Opinion of A.G. Trstenjak in Case C-205/07, *Criminal Proceedings against Lodewijk Gysbrechts, Santurel Inter BVBA*, [2008] ECR I-9947, paras. 54–56.

81. Snell, op. cit. *supra* note 6, pp. 452–453.

82. Weiler, "The constitution of the common market place. Text, and context in the evolution of the free movement of goods", in Craig and de Búrca (Ed.), *The Evolution of EU Law* (OUP, 1999) pp. 349–376, at 372–373.

would remain permissible, even if the effect's magnitude were considerable and its probability high.

Or is the logic in fact reversed: a measure is defined as direct – and hence above the *de minimis* threshold – for the very fact that it will prevent market access, even if over a longer term? Clarifying this type of conceptual ambiguity may prove challenging, and can lead to the directness threshold losing its explanatory power in terms of the market access approach. The scenario bears similarities to what happened in the United States Dormant Commerce Clause case law,[83] and would predict reduced relevance for the test as a *de minimis* threshold in the post-*Mickelsson* era.

4. Probability

This section focuses on the probability of a restrictive effect on trade. The object of evaluation thus is the degree of certainty, and whether high uncertainty has independent value in analysing trade restrictions. There are in fact a number of different aspects of certainty that could constitute a threshold in terms of a restriction on trade. Probability *de minimis* tests also bear similarities to the magnitude and remoteness *de minimis* tests:[84] they all build on the idea of a (quantifiable) scale. Although this may create certain challenges in application to trade restrictions in practice, probability tests with minimum thresholds are routinely applied in the field of criminal and procedural law, for example.

4.1. *The probability of a restrictive effect*

Assessing the probability of a restrictive effect on trade is possible only with a clear understanding of the object of measurement. If "trade" is understood as the volume of cross-border trade,[85] then the probability of a restrictive effect on trade would mean the probability of the cross-border volumes of

83. Note the similarities in some older American jurisprudence, e.g. *Smith* v. *Alabama*, cited *supra* note 79. See also some earlier European scholars' approaches, e.g. Waelbroeck, "Les rapports entre les régles sur la libre circulation des merchandises et les règles de concurrence applicables aux entreprises dans la CEE" in Capotorti, Ehlermann and Pescatore (Eds.), *Du droit international au droit de l'intégration, Liber Amicorum Pierre Pescatore*. (Nomos, 1987), pp. 781–803, in using the "directness" of a measure's effect on inter-state trade as the trigger for creating a trade obstacle. For a more detailed discussion see Kalimo, op. cit. *supra* note 9, p. 54.

84. For a similar view see Arnull, op. cit. *supra* note 17, p. 440. Others argue that a test of probability should not be confused with the traditional *de minimis* test, which is a test of the magnitude or scope of an effect. See Weatherill, op. cit. *supra* note 76, footnote 41 at 900; Oliver, op. cit. *supra* note 37, at 789; Snell, op. cit. *supra* note 6, p. 124.

85. For such an interpretation see Enchelmaier, op. cit. *supra* note 31, at 211.

trade decreasing. To give an example, in *Casa Uno* the Court found the restrictive effect of a ban of trade on Sundays "too indirect and uncertain"[86] to create a *prima facie* prohibited measure. The ECJ did not explain this reasoning further, but it may have considered it uncertain that people would simply not have bought their products on other weekdays if shops were closed on Sundays. In other words, there was uncertainty whether or not the volume of trade would actually decrease as a consequence of the Sunday trading measure. In other cases, the Court has specifically confirmed the relevance of the restrictive effect's probability by stating that effect *was not too uncertain* for a *prima facie* obstacle to occur.[87] The formulation seems to imply a level of probability clearly lower than full certainty. However, the precise level of required probability has fluctuated substantially.

As may be recalled, already in *Dassonville* the Court stated that even a "potential" hindrance could form a *prima facie* prohibited restriction. Later, the Court has concluded that a *prima facie* prohibited restriction is at hand when the measure "is likely to" hinder free movement.[88] The thresholds appear rather high, and in other language versions perhaps even more so.[89] Numerous other notions of probability can be found in the case law: the measure "is liable to",[90] "might"[91] or "may"[92] hinder free movement or is "capable of"[93] hindering it.[94] A further clarification of the threshold for a

86. *Casa Uno*, cited *supra* note 68, para 32.

87. *Bluhme*, cited *supra* note 33, para 22; Case C-577/10, *Commission* v. *Belgium (Limosa)*, judgment of 19 Dec, 2012, nyr, para 42.

88. Case 148/85, *Direction générale des impôts and procureur de la République* v. *Marie-Louise Forest, née Sangoy, and Minoterie Forest SA*, [1986] ECR 3449, para 19; Case C-171/08, *Commission* v. *Portuguese Republic (Portugal Telecom*), [2010] ECR I-6817, para 50; and cited case law. However, see also para 67 in the latter case, where the court uses the expression "is liable to".

89. In *Forest*, cited *supra* note 88; "être de nature à" or "être susceptible de"; "geeignet sein", in French and in German.

90. *Kraus*, cited *supra* note 23, para 32, *Gebhard*, cited *supra* note 22, para 37, *BAA*, cited *supra* note 26, para 47, *Portugal Telecom*, cited *supra* note 88, para 67; *Hypermarkets*, cited *supra* note 22, para 63 (also for this English term (cf. *Forest*, cited *supra* note 88) "être de nature à" or "être susceptible de"; "geeignet sein", "(etwas) können", in French and in German).

91. Case C-168/01, *Bosal Holding BV* v *Staatssecretaris van Financiën*, [2003] ECR I-9409, para 27; *Flemish Care Insurance*, cited *supra* note 20, para 48; *KPN and TPG*, cited *supra* note 25, para 28 ('pourrait être'; 'könnten', in French and in German).

92. *KPN and TPG*, cited *supra* note 25, paras. 26–27 ("peut être/avoir"; "können", in French and in German).

93. *Flemish Care Insurance*, cited *supra* note 20, para 48; *KPN and TPG*, cited *supra* note 25, para 27 ("être susceptible de"; "geeignet sein", "können", in French and in German).

94. In at least one case, the Court has also used the expression "it is not inconceivable" that the measure "may hinder trade". See *Flemish Care Insurance*, cited *supra* note 20, para 5 ("il ne saurait être exclu", "kann nicht ausgeschlossen warden" in French and in German). This resembles a phrase in older case law: "the possibility cannot be ruled out". See Case 382/87,

measure to have an effect that is "too uncertain" would enhance legal certainty.

All in all, the language of the ECJ implies that probability is a relevant *de minimis* threshold, but it is not clear what level of probability is adequate for creating a restrictive effect. A probability *de minimis* threshold thus may exclude non-discriminatory measures from the scope of the *prima facie* prohibition in a somewhat unpredictable fashion.

4.2. *The hypothetical event test*

As explained in the previous section, in a probability-based *de minimis* test the ECJ assesses whether the *restrictive effect* of a measure is too uncertain. Occasionally, however, the Court has had to take into consideration the fact that the measure's restrictive economic effect is subject to an event or circumstance, that in itself is uncertain. This test could be called the "hypothetical event test". Applying this test, the Court has rejected claims that certain measures infringed Treaty provisions on free movement. The hypothetical event test thus seems to create a probability-related *de minimis* threshold.

In *Volker Graf*, for example, the Court evaluated national legislation, under which workers were not entitled to compensation on the termination of employment if it was the worker him/herself that ended the contract at will. The worker was entitled to compensation if the contract was terminated for reasons not attributable to him/her. Mr Graf argued that, since he would not get any compensation if he terminated his current contract, it was less attractive for him, and for other Austrians in the same position, to leave their jobs and seek employment in other Member States. Because the national legislation thereby provided an incentive for Austrian workers to stay in the Member State of their current employer and wait for the contract to be terminated for reasons not attributable to them, the workers' right to free movement had, according to Mr Graf, been restricted. In *Volker Graf, t*he Court applied the hypothetical event test to exclude the national provision on employment contracts from the scope of *prima facie* prohibited measures. It stated that a mere "hypothetical" chance of circumstances in which a contract would be terminated for reasons

R. Buet and Educational Business Services (EBS) v. *Ministère public*, [1989] ECR 1235, para 7 ("on ne saurait exclure la possibilité que"; "ist nicht auszuschließen", in French and in German). However, it may be that these added phrases do not necessarily indicate that the probability threshold should be even lower than suggested by e.g. the expression "may hinder trade". The question could in this kind of preliminary ruling cases also be one of a form of legal linguistic technique.

not attributable to the worker, was not sufficiently probable for the measure to form a *prima facie* obstacle.[95]

The possibility to apply the hypothetical event test had arisen also in *Krantz*. In that case, the ECJ evaluated Dutch legislation establishing a right for the collector of taxes to seize goods from an indebted taxpayer even if the goods had been sold to him/her on instalment terms with a reservation of title. The Court could have concluded that the event – *the seizure* – was too uncertain, hypothetical. However, it instead concluded in a more convoluted fashion that there was no restriction since it was too unlikely *that the sellers would not sell* to Dutch customers due to the hypothetical risk of seizure.[96]

In *KPN and TPG*[97] the Court was also faced with a hypothetical event, but did not apply the hypothetical event test. The case concerned "golden shares", which gave the government special rights as a shareholder to veto decisions, even when the decisions were economically sound. The Court could have concluded that the restrictive effect – third parties facing difficulties in acquiring shares or other deterrence of foreign investments[98] – was dependent on a hypothetical future event, i.e. the decision of the State holding the golden shares to exercise its veto power. The Court did not, however, but instead decided to give relevance to the fact that already the *risk* of a negative event (the veto) discouraged investors. This conclusion could be explained by noting that even the risk may have economic value and such negative value (cost) would amount to a restrictive effect. The probability of the event is therefore monetized in the perceived risk. Such a risk seemed to be considered to exist in *KPN and TPG*, as the measure was declared *prima facie* prohibited.[99] The economic value of a risk could be derived from a probability function, but the Court has not explicitly referred to such analyses. The logic of focusing in more general terms on the economic risk created by a hypothetical event, instead of the probability of the event occurring, would not remove a *de minimis* threshold, but change it in nature. The test would start to resemble the

95. *Volker Graf*, cited *supra* note 68, paras. 24–25. For a reference to the hypothetical event test applied in *Graf* see *Flemish Care Insurance*, cited *supra* note 20, para 51. The ECJ did not consider the restrictive effect in this latter case to be dependent on any hypothetical event.

96. *Krantz*, cited *supra* note 66, para 11.

97. *KPN and TPG*, cited *supra* note 25.

98. It has been argued previously in this article that a restrictive effect occurs when volumes of trade or movement is reduced. This interpretation is complicated to apply in cases on free movement of capital since the number of shares can be constant for a long period of time. A price decrease of the value of the share would not necessarily reduce the trading in the shares. The case law suggests that a restrictive effect in the field of capital occurs simply when the price of the shares would decrease. This does not per se mean investing becomes less attractive, but that it becomes less attractive to make the same size investment in terms of euros for the same number of shares.

99. *KPN and TPG*, cited *supra* note 25, paras. 20–28.

individual effect *de minimis* test, where the magnitude of the effect on a particular trader is assessed. As was discussed in the previous section, the Court's position on introducing a *de minimis* test on the basis of the effect on individual traders nevertheless does not appear evident. The vagueness in the Court's reasoning on the *de minimis* threshold applied– if any – may thus create unnecessary confusion.

As the different reasoning in the cases indicate, the Court's case law on the relevance of this type of probabilities seems inconsistent. The Court seems occasionally to apply a hypothetical event *de minimis* test, even though there might exist an economic rationale for assessing *the effects* of hypothetical events. Measures should not be excluded merely because their restrictive effects are linked to hypothetical events, at least not using the latter as the sole decisive criterion. A measure may have an effect that is quantifiable in economic terms even in cases where its realization is quite uncertain.

4.3. *Factors influencing probability*

4.3.1. *Economic factors*

The Court has not stated expressly how the test of probability of restrictive effects, discussed in section 4.1 above, is to be applied. A closer analysis of the case law could reveal further details. Although economic theory might suggest that volumes of trade decrease if traders' costs increase in one Member State or area, the Court has stated that a mere increase of costs or reduced profitability are not sufficient proxies for a trade restriction.[100] In terms of probability, this means that certainty about increased costs does not lead to a certainty about a restrictive effect. Instead of solely focusing on costs, the Court appears to include other, potentially non-economic factors in its analysis of restrictive effects on trade.

Although added costs may not be the *sole* factor that can contribute to the emergence of a restrictive effect, they would still be expected to factor in the analysis. It seems logical that an increased magnitude of costs would increase the probability of creating a restrictive effect – here assumed to be the probability of a reduction in volumes of trade (or number of persons moving). In that case, the magnitude of added costs would be a factor in the probability analysis. Indeed, the Court has found the restrictive effect "too uncertain and indirect" in cases where the additional costs caused by the measure have been small. There thus appears to be a degree of correlation between the magnitude of the (known[101]) additional costs and the probability of a restrictive effect.

100. See e.g. Joined Cases C-544 & 545/03, *Mobistar SA* v. *Commune de Fléron and Belgacom Mobile* v. *Commune de Schaerbeek*, [2005] ECR I-7723, para 31.

101. It may be specified that in some cases, such as an obligation to contract, the exact magnitude of the additional costs themselves may be uncertain. The Court would then need to

The *Corsica Ferries* case can be used to illustrate the matter. The Court was asked in the case to rule on the restrictive effect of a small charge for obligatory services at a port, and it confirmed that *because* the additional cost of the charge on the goods was only 0.05%, the restrictive effect was too uncertain.[102] In other words, while the tariff applied to the transports in question was both direct and certain, its restrictive effect was considered *uncertain*. In this case, there seems to be a clear correlation between the insignificance of the additional costs (or reduced profits) and the low probability of the restrictive effect.

However, the ECJ's reliance on probability tests seems somewhat haphazard. In a few instances the Court has indeed made use of the tests, yet has refused to do so in other, quite similar cases. For example, the Court ruled in *Esso Española* that the restrictive effect of an obligation on petroleum wholesalers active in an archipelago to service a minimum number of islands was too uncertain and indirect. This was despite the risk that the obligation to contract would reduce the wholesalers' profits, because the minimum service could prove uneconomic.[103] In contrast, the Court ruled in *Motor Vehicle Insurances* that an obligation on an insurance company to provide contracts to all customers on pre-determined terms did constitute a *prima facie* prohibition.[104] Considerations on the potentially "too uncertain and indirect" costs and/or restrictive effects of the obligations to contract measures in *Esso Española* and *Motor Vehicle Insurance* cases could have greatly illuminated the Court's reasoning, in particular considering the different outcomes. It could be, for example, that due to the risk of adverse selection problems in the insurance industry[105] the potential loss in *Motor Vehicle Insurance* was decisively greater than the potential loss in *Esso Española*. The difference could affect the probability calculus for the risk so as to turn the measure into a prohibited barrier.

A similar comparison could be made regarding another category of costs. The Court has frequently ruled that requiring a licence for an economic

assess a combination of two uncertainties: that of the additional cost, and that of the restrictive effect that it may create. In such cases a probability function first describing the different estimated levels of costs would be required. However, the Court has never explicitly carried out such an analysis.

102. Case C-266/96, *Corsica Ferries France SA* v. *Gruppo Antichi Ormeggiatori del porto di Genova Coop. arl, Gruppo Ormeggiatori del Golfo di La Spezia Coop. arl and Ministero dei Trasporti e della Navigazione*, [1998] ECR I-3949, paras. 30–31.

103. Case C-134/94, *Esso Española SA* v. *Comunidad Autónoma de Canarias*, [1995] ECR I-4223, para 24.

104. *Motor Vehicle Insurance*, cited *supra* note 43, paras. 60–71.

105. For further detail on this topic, see e.g. Dionne, Gouriéroux and Vanasse, "Testing for evidence of adverse selection in the automobile insurance market: A comment", 109 *Journal of Political Economy* (2001), 444–453.

activity constitutes a *prima facie* prohibition.[106] It has also explicitly ruled in *Limosa* that even a requirement on a service provider to register the business formed a *prima facie* prohibition, since the restrictive effects of the registration were *not too uncertain* and indirect.[107] In another earlier case the Court had ruled that the restrictive effect of the requirement to apply for a licence before opening a shop *was too uncertain* to constitute a prohibited restriction.[108] Although the outcomes of the cases seem contradictory, in particular as regards the probability of the restrictive effect, they could potentially be explained by differences in the levels of costs that the different licensing and registration requirements entailed. That being said, there are examples of cases where the additional costs of the measure appeared very high, but the court still found the restrictive effect too uncertain. For example, *Peralta* concerned an Italian requirement on ships transporting certain substances to have expensive cleaning equipment. Despite the likely significant business cost, the restrictive effect was considered too uncertain for the measure to constitute a trade restriction.[109]

The correlation between the costs of a measure and the probability of the costs creating a restrictive effect seems to vary in light of the above cases. There may be additional factors in the background that weigh in the overall assessment. In the absence of the Court distinguishing more clearly between these different factors, the low cost burden of the measures does not seem to create a useful *de minimis* threshold through the probability calculus (i.e. the uncertainty factor), either.

4.3.2. *Non-economic factors – altering the classic syntax of trade law?*

The low probability of a restrictive effect can be seen as a *de minimis* threshold that may exclude national measures from the scope of *prima facie* prohibited measures. However, ECJ case law seems to indicate that in practice factors other than increased costs or low profitability may be important in deciding upon the prohibited restrictive effect. The case law is nonetheless not

106. See e.g. *Garkalns*, cited *supra* note 12, para 34. See also Case C-6/01, *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others* v. *Estado português*, [2003] ECR I-8621, paras. 65–66. In the latter case, the operation of games was restricted to casinos – a business that presumably required some form of licence. Even if it is not explicitly mentioned, the ECJ would appear to be willing to regard a licence requirement *prima facie* prohibited also in cases of no dual burden, i.e. where the home country would not require a licence.

107. *Limosa*, cited *supra* note 87, para 42.

108. Joined cases C-140, 141 & 142/94, *DIP SpA* v. *Comune di Bassano del Grappa, LIDL Italia Srl* v. *Comune di Chioggia and Lingral Srl* v. *Comune di Chiogga*, [1995] ECR I-3257, para 29.

109. *Peralta*, cited *supra* note 66, para 24.

particularly helpful in explaining what such other, non-economic factors might be and how they should be assessed.

Alongside costs, behavioural elements may be relevant in analysing whether a measure will constitute a trade restriction. First, behavioural aspects may help explain why a measure does indeed (with sufficient probability) reduce trading volumes. In *Mickelsson*, the Court decided on a Swedish rule, which restricted the use of jet skis to dedicated areas and public waterways. The ECJ looked at the effects the measure might have on consumers' behaviour. [110] There were no waterways dedicated for jet skis at the time of the events, and consumers might in any event have considered such public waterways dangerous for jet skis and less convenient than private waters close to their properties. The measure could thus have caused a drastic change in consumer behaviour: without proper possibilities to use devices, they would not be purchased, either. The traders would in other words be hindered from accessing the Swedish market. The Court did indeed consider the measure *prima facie* prohibited, although it was upheld on environmental justification grounds.

In *Mickelsson* the behaviour of consumers was taken to affect the business opportunities of market operators. Hence, the behaviour of consumers was an indication of reduced volumes of sales and supported the argument that a trade restriction was at issue. We should recall that in other cases the Court has found added costs *not* to constitute trade restrictions, often on the grounds that the restriction – presumably a reduction in volumes of trade[111] or persons moving – was too uncertain. However, if there are no *de minimis* thresholds as regards the reduction in volumes of sales or persons moving, and market operators only consider economic factors in their decision-making, the conclusion should be that the increased costs are certain to cause a trade restriction. Because the Court has reasoned otherwise, it perhaps acknowledges that market operators or workers may decide also on the basis of factors other than costs, and that these non-economic factors outweigh the increased costs, so that no restriction on trade will occur.

The classic problem of tax differences between Member States offers a good example of the potential relevance of behavioural issues. The Court sometimes applies in taxation cases the Treaty articles on free movement rather than, or alongside, those on internal taxation.[112] For example, in *Weigel*, the Court discussed in light of Article 39 TFEU a consumption-based motor

110. *Mickelsson*, cited *supra* note 1, para 26. For similar reasoning see *Trailers*, cited *supra* note 1, para 56.

111. See e.g. *Krantz,* cited *supra* note 66. Discussed in section 4.2 *supra*.

112. See e.g. *Viacom*, cited *supra* note 46, paras. 34–39; Case C-387/01, *Harald Weigel and Ingrid Weigel* v. *Finanzlandesdirektion für Vorarlberg*, [2004] ECR I-4981, paras. 50–56.

vehicle tax, which a worker had to pay when moving (his/her property, including a car) to his new country of employment. The Court confirmed that as long as internal taxes were applied without discrimination, the Treaty does not guarantee tax neutrality[113] for workers that move to another Member State. In applying the provisions on free movement of workers,[114] the ECJ assessed the restriction through a probability test. First, it admitted that a stricter taxation in one Member State was likely have a negative bearing on the workers decision to move across borders. The Court then added, however, that the restrictive effect would be dependent on circumstances case-by-case, and that the differences in the taxation systems as a whole could actually be to the advantage of the moving worker. Hence, according to the Court, the restrictive effect was *uncertain* enough to exclude the measure from a *prima facie* prohibition.[115]

The reasoning of the Court in *Weigel* was perhaps not fully convincing. As the Court admitted, stricter taxation of an activity in the new country of residence would have a negative bearing on the free movement of the persons actually affected by the tax. The measure would have a negative bearing on the *decision of workers* to utilize their right to free movement. Although the Court in this way recognized the link between the restrictive effect and the behaviour of persons, it did not in the end decide the case by studying what other factors than taxation may have affected the decision (behaviour) of the workers and by how much. The Court's decision was, at least as written out, much more rudimentary, simply stating that the differences in taxation could potentially advantage some workers while not others. An alternative solution for the Court would have been to openly develop the idea of behavioural theory further: it was *too uncertain* that any worker would refrain from moving due to small differences in taxation, because there are *other* factors that can affect the workers' choice of country such as the climate, links to other countries, the country of residence of his/her relatives. The tax would in this view have been considered to fall below the probability *de minimis* threshold due to the outweighing behavioyral aspects.

Cases such as *Weigel* show that behavioural theories could make their way into free movement law through a *de minimis* tests.[116] The outcomes of the

113. I.e. that the tax rate of the worker would not change (increase) as a consequence of the move to another tax jurisdiction.

114. The Court explicitly excluded the application of the provisions on the free movement of goods (Arts. 23 and 25 TFEU). See *Weigel*, cited *supra* note 112, paras. 64–65 & 81.

115. *Weigel*, cited *supra* note 112, paras. 50–56.

116. An explicit reference to the relevance of behavioural patterns can be found in *BASF*, cited *supra* note 70, para 20, where the court stated: "The repercussions on intra-Community trade ... will depend above all on the actual, unforeseeable decisions taken by each of the operators concerned."

judgments imply that the Court might in some cases have already taken non-economic behavioural elements into account in identifying pertinent factors. One may wonder whether the behavioural model is more often relevant in the field of free movement of workers, such as *Weigel*, where, the Court saw no restriction despite the added costs. The movement of people tends to involve the rich social context of their entire lives, which may need to be weighed together with the added costs. In cases on free movement of goods and services, the decisions of firms obviously tend to predominantly follow an economic rationale. However, Corporate Social Responsibility expands their range of interests, values and objectives also beyond the mere bottom line: environmental protection and community development are but few examples. Even more important, consumers, who form the demand for such goods and services, also operate on the basis of values much broader than just price. *Mickelsson* and *Trailer* are particularly relevant in this respect: the restrictions on the use of products brings consumer behaviour right to the heart of the market access definition, and hence of the law of prohibition.

It may indeed be the role of behavioural theory in the area of free movement of persons that has influenced similar considerations in the field of goods and services. This would seem to offer quite a straightforward explanation why a hindrance was found to exist in *Carpenter*. The judgment received quite a lot of criticism in academic literature.[117] Focusing purely on a test of probability, it does seem plausible that if the spouse of a trader is forced to leave the country of their residence, there would be a sufficiently high – i.e. not too uncertain – probability that the trader would accompany him/her for non-economic reasons. The obvious examples include emotional ties to family members and questions of tutelage for children, both as a legal matter and a practical matter.[118] Family life enjoys a strong normative protection in the EU legal system. The measure would from this perspective have the effect of forcing the trader to leave his/her trading activities on the internal market. Forcing an economic operator out of the market (if that were the consequence) would mean barring access to the market, which in turn would define it a *prima facie* prohibited restriction on trade, regardless of the potentially discriminatory elements of the measure. As may be seen, behavioural

117. Hatzopoulos and Do, op. cit. *supra* note 6, at 943–944. However, it is difficult to explain this judgment as just an unfortunate misinterpretation in a single case, since the Court has recently even referred to it: see Case C-127/08, *Blaise Baheten Metock and Others* v. *Minister for Justice, Equality and Law Reform*, [2008] ECR I-6241, para 56.

118. One argument in the *Carpenter* case was that the wife of the trader had taken care of the children, which allowed him to put more energy into the business operations. Losing this assistance of his wife would, according to the ECJ, have hindered him from continuing the business operations at the same pace.

considerations could have formed a part of a probability analysis. They may have strengthened the conclusion that *Carpenter* does not fall under the probability *de minims* rule.

Carpenter was perhaps an exceptional case. It may not be obvious to find application for the behavioural model in an equally direct way that often. The Court has referred to behavioural elements in a very limited number of cases, and appears to do so by intuition. If empirical data on behavioural patterns are available, making reference to it would obviously strengthen the argumentation.

From the perspective of the traditional prohibition/justification syntax of free movement law these observations seem intriguing. The expansion of the analysis of prohibition towards behavioural, non-economic values as explanatory factors already in *defining the restrictions* appears novel. Traditionally, such factors have been given relevance only at the later, justification stage of the legal analysis. Here, they are integrated through a probability logic already at the prohibition stage: they may create uncertainty regarding the existence of a negative effect on trade, even when the measure increases costs. Creating a *de minimis* exception on the basis of the relative unimportance of economic factors in comparison to non-economic considerations would seem able to change the classic heuristics of trade law. As said, the relevance of the proposition appears greater for fields other than goods, and would be easier to verify, should the ECJ more openly discuss the relevance of non-economic factors in its prohibition judgments.

5. Conclusions

The objective of this paper was to investigate whether the ECJ has used, and could use, *de minimis* test(s) in its free movement decision-making rationale as a means of limiting the scope of measures that are considered *prima facie* prohibited restrictions.

As the first step in the analysis, traces of three types of *de minimis* tests could be identified in the Court's free movement law: based on magnitude, causality and probability. Within each of these groups, a detailed analysis revealed numerous variations of *de minimis* tests.[119] The probability *de minimis* tests seem different from the magnitude *de minimis* thresholds: State measures have occasionally escaped the prohibition analysis by virtue of being in the former group, i.e. because they fall below the *probability* thresholds. On the contrary, with the notable exception of the market access

119. See *supra* note 12.

context, the Court has *not* tended to classify a measure as permissible solely byreferring to the "too slight" *magnitude* of the restrictive effect. If the magnitude is small, the Court uses alternative or at least complementary arguments. Probability would seem to be just such complementary formula. Indeed, it seems that the ECJ has not always been very detailed in distinguishing between the three groups of *de minimis* tests, let alone the variants within the groups.

The Court has been rather obscure about the *de minimis* test(s) also when it has intended to explicitly reject them. Moreover, the rejections seem inconsistent with the Court's own arguments when it limits the scope of *prima facie* prohibited trade measures. The second step in the paper therefore shed light on how the *de minimis* thresholds, systemized into the three categories of magnitude, causality and probability, could be developed further and how they could be linked to and, perhaps, serve in defining the scope of the EU's four freedoms. Indeed, a number of the variants of the *de minimis* tests seemed to have merit in solving free movement cases in practice. Even a wider view of the variants may nevertheless not be able to explain and/or lead to sensible outcomes in all cases.[120]

The analysis also identified an important, at first sight complicating element regarding the *de minimis* tests. The Court's recent decisions in *Mickelsson* and *Trailers* have confirmed that the notion of *market access* is essential in identifying prohibited non-discriminatory trade restrictions. Restrictive effects on market access could potentially be differentiated from restrictive effects on trade at large by defining market access as a *de minimis* rule. Restrictive effects that only marginally reduce trade do not tend to affect market access, while more severe restrictions on trade may actually hinder market access. The *de minimis* threshold thus would distinguish what is "severe enough". This kind of a "market access *de minimis* rule" could first seem quite different from the three other *de minimis* tests (magnitude, causality and probability). The analysis of this point constituted the third step in the research. Market access *de minimis* has a seemingly much higher threshold of "hindering" or even (almost) completely "barring" market access. In *Trailers* and in *Mickelsson,* for example, it was clear from the circumstances that the effect of the measures was severe in many respects: all trade in the products was (almost fully) blocked. The Court made no direct reference to a *de minimis* test in applying the market access test, however. Yet, on a closer look, distinctions between a market access *de minimis* and other *de minimis* tests may be more complicated to draw, and may not even always

120. Especially *Dèliege*, cited *supra* note 56, paras. 61–69.

exist. Case law[121] on free movement of services, persons and capital, in particular, seemed to suggest that restrictive effects much less severe than those in *Trailer*s and *Mickelsson* could also be considered market access problems. The three "classic" *de minimis* tests on magnitude, causality and probability could thus also be applied for assessing market access – and may sometimes be relevant for the outcome.

On the other hand, the "market access *de minimis*" threshold can be relevant, for it may make redundant the three separate *de minimis* tests: once a non-discriminatory measure falls outside market access measures, it needs no further *de minimis* rule to be considered acceptable. In fact, if the market access test were considered to fully include the three *de minimis* tests, a further analysis of market access on the basis of *de minimis* tests would not even be possible. The logic approaches or even overlaps here another free movement heuristic: through the *de minimis* test, a non-discriminatory measure on market exercise or market circumstances could be distinguished from the scope of prohibited market access hindering measures. This latter heuristics of dividing the market circumstances / exercise measures from those on market access may be debatable. [122]

The market access *de minimis* test and the different variants of the magnitude, probability and causality *de minimis* tests may therefore overlap and be cumulative. In assessing non-discriminatory measures, the finding of a trade restriction might, depending on the interpretation, turn upon e.g. the probability of severe impacts (i.e. preclusion from the market) on only very few traders, potentially even an individual trader. In general, the case law is reasonably well aligned with such "cumulative approach". Focusing on the severity of the effects on individual traders would seem justified both for defining market access (what is too severe, and thus prohibited) and *de minimis* (what is not severe enough, and thus not prohibited), for example, because the purpose of trade law is to guarantee free trade for every market operator. Complementing a test on the probability of a severe effect on individual traders with a market share *de minimis* could also be an alternative to consider, although the Court has so far not moved in that direction. Under such a combination of *de minimis* tests, a non-discriminatory measure could be *prima facie* prohibited also in cases where there is less certainty that the severity of the burden will keep any trader out of the market, but the measure would affect a substantial share of the market. Incorporating either the market size or the remoteness *de minimis* tests would nevertheless seem more problematic, for the various reasons explained earlier.

121. See case law referred to in footnotes 52–59.

122. See e.g. Davies, cited *supra* note 59; Snell, cited *supra* note 6; or Spaventa, cited *supra* note 5.

The obvious critique against more reliance on *de minimis* tests is that they are not conducive to legal certainty. Many of them in fact rely on economic analysis of the markets and effects, rather than on classic legal rationale. Here, the discussion seems to bear similarities to the debate that surrounded the introduction of a more economic approach to competition law. After the initial, natural reticence amongst the competition lawyers, the advantages of a multi-disciplinary approach now appear obvious. As was explained earlier, there are clear differences between trade and competition in, for example, what kinds of market share based thresholds are or are not relevant. Yet the actual definition of such thresholds and the relevant markets that underlie them, seem to bear analogies that could be explored in much more detail. Before such an exploration is complete, it would thus seem premature to discredit the usefulness of certain *de minimis* tests on the basis of their economic orientation and the consequent fear of legal uncertainty.

Whether market access is today considered as the one and only overarching test in free movement law, or (as is assumed in this paper) market access hindrances are rather seen as the limited "third category" of restrictions on trade that remain after discrimination and (dual burden) product requirements,[123] the link between *de minimis* tests and market access would seem relevant and useful. This was the fourth, concluding step in the present analysis. The Court should cease consistently denying the existence of any *de minimis* thresholds, while letting considerations of degree in through the back door. Instead, the Court should focus on clarifying the relationship between the various forms of *de minimis* type rules and market access. The clarification efforts should extend to key definitions such as "too uncertain and indirect" and "hindering market access". In doing so, Court could expressly borrow elements from the *de minimis* type tests and thereby obtain building blocks for clarifying its market access test. These thresholds on the scope of prohibited trade restrictions are just not usually thought of in that way.

The final step in the analysis also led to conclusions on how the analysis of *de minimis* rules relates to the traditional prohibition/justification syntax of trade law. There appeared to be indications, at least when the movement of workers (as in *Weigel*) or services/goods offered by single entrepreneurs (as in *Carpenter*) were at stake, of the Court weighing economic considerations (e.g. increased costs) against non-economic considerations (e.g. behavioural aspects such as maintaining family ties[124]) as a part of the probability *de minimis* tests. In doing so, the Court is in fact introducing a value-balancing exercise in the prohibition part of free movement law. The inclusion of non-economic considerations such as behavioural factors may be useful in

123. As referred to in *Trailers* and in *Micklesson* (see section 1.2, *supra*).
124. See e.g. *Weigel,* cited *supra* note 112; *Carpenter,* cited *supra* note 55.

reaching more just and equitable decisions in applying the law. However, in the traditional view, such a balancing of societal values takes place in the final, justification part of the legal analysis, not in the prohibition phase. The observations on how the *de minimis* case law may thus be tacitly expanding in the EU free movement law may not only imply developments in the substance of free movement the law. They may even denote a change in its syntax.