The prohibitions of discrimination and restriction have both been intended to achieve a fully integrated internal market in the European Union

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A. Is there in your view a difference in the way in which the principle of non-discrimination operates and the way in which the principle of non-restriction operates?

To answer this question properly, it seems necessary to proceed in two main steps: First, it must be clearly identified what the principles of "non-discrimination" on the one hand and of "non-restriction" on the other stand for in a conceptual sense, i.e. what their aims and functions are (*infra* I.). Once these basic issues are clarified, it will be possible to outline in a second step the differences in their application from a legal point of view (*infra* II.). It must be pointed out right from the start that the approach chosen here deviates to a certain extent from the approach that can be derived from the ECJ´s case-law, although this is more a matter of semantics rather than of substance. Still, some introductory remarks may be helpful.

I. "Discrimination" and "restriction" – a matter of concepts and definition

Looking at the innumerable cases dealt with by the ECJ until today, some broad distinctions concerning the development of the fundamental freedoms can be made. Not everybody will necessarily agree, but I would suggest a subdivision into three major stages with more or less smooth transitions: (1) From the early 1970s until the mid 1980s, there was a strong dominance of cases on the free movement of goods and an extensive interpretation of that freedom by the Court. The scope of application of Art. 28 (ex Art. 30) EC Treaty had even been extended so far in the "Dassonville" formula[1] that the Court had to come up with a counterweight on the level of justification in "Cassis de Dijon"[2] a few years later, so that at least pro forma a balance between Community and national interests was preserved. (2) From the mid 1980s until the mid 1990s, not only the freedom to provide services guaranteed by Art. 49 (ex Art. 59) EC Treaty but also the rules on the free movement of persons laid down in Art. 39 (ex Art. 48) and Art. 43 (ex Art. 52) EC Treaty tried to keep pace with the speed that, until then, had marked the developments in the field of free movement of goods. (3) And finally, sometime around the mid 1990s, a tendency emerged to gear down and replace a rampant extension of all freedoms by a more subtle and sophisticated approach. Once again, the decisive cornerstone to this development has been set in the area of goods by the much-disputed "Keck" decision[3]. Since then there is an ongoing discussion about how to adjust the interpretation of the other fundamental freedoms to that signal[4], a debate in which also the free movement of capital regulated by Art. 56(1) (ex Art. 73b(1)) EC Treaty has been included.

Quite often this whole development, and in particular the second stage, is described as an evolution of the fundamental freedoms from a prohibition of "discrimination" to one of "restriction". This seems to imply that the fundamental freedoms have undergone a change of character, in the sense that a narrow concept of "non-discrimination" has been replaced by a broader concept of "non-restriction". However, this is only true to a certain extent. What has taken place must rather be qualified as a supplementation or enlargement of the first concept than a mere replacement by the second. To be more precise, what we see today is a cooperation of both concepts, depending on the type of national measure that is to be tested for its compatibility with EC law[5]. But the situation is not really clear yet, since the diction employed by the ECJ appears unsteady and vague. Quite often national rules are simply labelled "restrictive" although they clearly cause unequal treatment in a certain respect, and sometimes national rules are regarded as causing "covert" (or "hidden") discrimination even though they do not provide for any formal distinction and could therefore also be qualified as being "restrictive". On certain occasions the ECJ even changed its approach from one case to another although similar national rules were at stake[6].

This situation may seem unsatisfactory, but there could be some reasons why the ECJ is not always clear in its approach: In the first place, the wording of the EC Treaty itself causes a certain unclarity as regards the *scope of*

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[1] ECJ, 8/74, *Dassonville*, [1974] ECR 837 at 5: "All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions" (on imports) and are therefore, in principle, prohibited.

[2] According to ECJ, 120/78, *Rewe-Zentral-AG*, [1979] ECR 649 at 8, certain "obstacles to free movement within the Community … must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements".

[3] ECJ, C-267/91 & C-268/91, *Keck and Mithouard*, [1993] ECR I-6097.

[4] For examples from the abundant literature see Cordewener, Europäische Grundfreiheiten und nationales Steuerrecht, Cologne 2002, p. 268 et seq. As a recent example the discussion about the influence of EC law on domestic company and civil law after ECJ, C-208/00, *Überseering BV*, [2002] ECR I-9919 and C-167/01, *Inspire Arts BV*, n.y.r. can be mentioned; see Eidenmüller/Rehm, ZGR 2004, 159 at 167 et seq. Cf. *infra* B.I.

[5] Cf. *infra* A.II.1, A.II.2 and B.

[6] In ECJ, 62/81& 63/81, *Seco*, [1982] ECR 223 at 8 et seq., a double levy of social security contributions was regarded as "covert discrimination" of service providers established in another Member State. However, in ECJ, C-43/93, *Vander Elst*, [1994] ECR I-3803 at 15, a similar double levy constituted a "restriction on the freedom to provide services". On subsequent decisions see *infra* B.I.2.

application of the different freedoms. It cannot be denied that all freedoms are phrased differently which may prima facie be regarded as a hindrance for a mutual transfer of concepts and ideas by way of analogies. Closely related to this may also be a certain apprehension on the part of the Court that going too far beyond the actual wording prescribed by the EC Treaty could lead to an accusation of "judicial activism". But secondly there is also a source of confusion still remaining on the *level of justification*. In fact, it appears that the ECJ is somewhat stuck in its apodictic approach[7] that (in particular: "overtly") "discriminatory" provisions can only be justified on the basis of grounds explicitly mentioned in the EC Treaty[8], whereas "restrictive" national measures can also be justified under the unwritten "rule of reason". The dilemma is clearly visible in cases of "covert" discrimination[9], and the number of Advocates-General calling for clarification in the name of legal certainty is growing steadily[10]. Yet, under the current state of affairs, any explicit qualification of a national measure as "discriminatory" instead of "restrictive" will necessarily have immediate consequences for the availability of defences to the Member States, and this could explain why the ECJ prefers to maintain a rather flexible approach when testing individual national measures.

1) The key role of the internal market aim

In sum, such more or less formalistic problems should, however, not obstruct the view to the fact that the ECJ is continuously pursuing one major aim in substance, and that is the integration of several domestic markets into one EU-wide single market. The ECJ is basically in no other position than the U.S. Supreme Court, which for about one and a half centuries has been eager to establish a Common Market and to remove unjustifiable hindrances to trade among the federal states[11]. While the U.S. Supreme Court from the outset had based its approach of "negative integration" on the broad blanket wording of the so-called "dormant" Commerce Clause of the U.S. Constitution[12], the ECJ proceeded on a step-by-step basis, gradually involving one particular freedom after the other into the overall process of building a European Economic Constitution. If one wants to understand the rationale behind the myriad of ECJ judgments on the interpretation and application of the fundamental freedoms until now, it must be recognised that the key is the overall functional context to which all the individual freedoms must be adapted: This is the general aim of an EU-wide internal market, which is defined as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured" (Art. 14(2) EC Treaty), and which is "characterized by the abolition, as between Member States, of obstacles to freedom of movement of goods, persons, services and capital" (Art. 3(1) lit. c EC Treaty).

It is true that these general clauses are not directly applicable in the sense that a market participant could immediately rely on them against national measures before his domestic courts[13]. But it is also true that the ECJ has qualified the afore-mentioned general clauses as important guidelines for the interpretation of the individual specific norms laid down in the Treaty. Therefore, just as Art. 3(1) lit. f EC Treaty influences the interpretation of the specific rules dealing with free competition in the EC[14], Art. 3(1) lit. c EC Treaty comes into play when guidance and orientation is needed on the application of individual free movement rules. It is noteworthy that, as early as 1976, the ECJ has pointed out that Art. 39, 43 and 49 (ex Art. 48, 52 and 59) EC Treaty and the secondary Community law rules accompanying these freedoms "implement a fundamental principle contained in Article 3 lit. c of the Treaty, which states that, for the

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[7] See, e.g., ECJ, 113/80, *Commission v. Ireland*, [1981] ECR 1625 at 10 and 229/83, *Leclerc*, [1985] ECR 1 at 29 et seq. (both concerning Art. 28 EC Treaty); 352/85, *Bond van Adverteerders*, [1988] ECR 2085 at 32 et seq. and C-353/89, *Commission v. Netherlands*, [1991] ECR I-4069 at 15 (both concerning Art. 49 EC Treaty).

[8] See the public policy exceptions contained in Art. 30, 39(3) and 46 (ex Art. 36, 48(3) and 56) EC Treaty. The exception in Art. 58(1) lit. b (ex Art. 73d(1) lit. b) EC Treaty, which was inserted during the Maastricht reform process, is phrased similarly. The other written exception concerning the free movement of capital, Art. 58(1) lit. a (ex Art. 73d(1) lit. a) EC Treaty, is a special case: It has a much broader scope and is supposed to be regarded as a codification of the ECJ´s jurisprudence in the field of the other freedoms, where the Court has accepted unwritten justifications also with regard to tax provisions; see A-G Kokott, C-242/03, *Weidert and Paulus*, n.y.r. at 26 et seq.

[9] A good example is ECJ, C-484/93, *Svensson and Gustavsson*, [1995] ECR I-3955 at 12 et seq.: After stating that the national rule in question "constitutes discrimination against credit institutions established in other Member States", the Court pointed out that "such discrimination can only be justified on the general interest grounds referred to in Article 56(1) of the Treaty, to which Article 66 refers" (now Art. 46(1) and 55 EC Treaty), before it finally went on to consider the (unwritten) "coherence" defence.

[10] See A-G Tesauro, C-120/95, *Decker*, [1998] ECR I-1831 at 49 et seq., C-118/96, *Safir*, [1998] ECR I-1897 at 30 et seq., and C-264/96, *ICI*, [1998] ECR I-4695 at 20 et seq.; A-G Saggio, C-55/98, *Vestergaard*, [1999] ECR I-7641 at 29 et seq.; A-G Jacobs, C-136/00, *Danner*, [2002] ECR I-8147 at 32 et seq. The whole issue of justifications will be dealt with comprehensively by L. Hinnekens in report no. 3.

[11] There are numerous publications concerning legal comparison between the EC and the U.S. in this respect. See Roth, Freier Warenverkehr und Staatliche Regelungsgewalt in einem Gemeinsamen Markt – Europäische Probleme und amerikanische Erfahrungen, Munich 1977; Stein, 75 Am. J. Int. L. (1981), 1; Stein, L.I.E.I. 1983/1, 27; Hartley, 34 Am. J. Comp. L. (1986), 229; Sunstein, in: Bieber et al. (eds.), 1992: One European Market?, Baden-Baden 1988, p. 127; Lackhoff, 2 Col. J. Eur. L. (1996), 313. Compare also the various contributions to Sandalow/Stein (eds.), Courts and Free Markets – Perspectives from the United States and Europe, Oxford 1982, and to Cappelletti et al. (eds.), Integration Through Law – Europe and the American Federal Experience, Berlin/New York 1986.

[12] Art. I Sec. 8 Clause 3 U.S. Constitution is actually drafted as a legal basis for "positive integration" by the federal legislature and reads (as far as of relevance here): "The Congress shall have Power … To regulate Commerce … among the several States". On the "negative" or "dormant" dimension of this provision see, e.g., Lenaerts, 30 Jahrbuch des Öffentlichen Rechts der Gegenwart (1981), 569; Collins, 63 N.Y.U. L. Rev. (1988), 43.

[13] See A-G Cosmas, C-378/97, *Wijsenbeek*, [1999] ECR I-6207 at 36 et seq., concerning Art. 14(2) (ex Art. 7a(2)) EC Treaty.

[14] See ECJ, C-339/89, *Alsthom Atlantique*, [1991] ECR I-107 at 10.

purposes set out in Article 2, the activities of the Community shall include the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital"[15]. Moreover, it is definitely no coincidence that the Court reverts to Art. 3(1) lit. c EC Treaty particularly in situations where the outer boundaries of the scope of a fundamental freedom seem to have been reached but free movement is not yet achieved. Probably the most striking example of this phenomenon are cases where EU citizens sought to rely on the guarantees of free movement of persons against their own Member State[16]: A literal and narrow reading of Art. 39 and 43 EC Treaty would have led to the conclusion that a prohibition of discrimination on grounds of foreign nationality could not help any further. If that had been the end of it, and if the Court had not pushed the development to some extent by falling back to the basic aims pursued by Art. 3(1) lit. c EC Treaty, several substantial hindrances to the free movement of persons (which in fact have nothing to do with nationality at all) would have escaped EC law scrutiny altogether and persisted until today.

Against this background, Art. 3(1) lit. c EC Treaty (read in conjunction with Art. 14(2) EC Treaty) must be regarded as a fundamental norm containing the *leitmotif* and basic standards for the achievement of the EU internal market, while the individual Treaty freedoms serve as selective extensions of these basic standards into the different realms of goods, persons, services and capital. The overarching notion of an "internal market" must be regarded as a legal term with economic contents, and since the individual freedoms are inherently tied to Art. 3(1) lit. c EC Treaty, this general clause is able to send signals to every specific freedom concerning its shape and interpretation. Yet, the function of Art. 3(1) lit. c EC Treaty goes beyond this unilateral "vertical" input from the general clause down to the specific freedoms, since it is at the same time the connecting link in a "horizontal" perspective between the individual freedoms As their common denominator, Art. 3(1) lit. c EC Treaty is capable of receiving signals from one individual freedom and passing them on to the others, so that in the end a uniform concept as to their structure and interpretation can and must be established[17].

2) Some basic patterns common to all fundamental freedoms

Accepting that the basic underlying idea of Art. 3(1) lit. c and Art. 14(2) EC Treaty is to achieve "free movement" of products and of factors of production "as between Member States" (or, to transfer the approach of the U.S. Supreme Court under the Commerce Clause to the internal market in the EC, a "free flow of interstate commerce"[18]) necessarily leads to a broad approach regarding the interpretation of the different fundamental freedoms. In particular, the conclusion must be drawn that what is at stake is the removal of (unjustified) barriers to *cross-border economic transactions*. Keeping this conceptual background in mind, some major characteristics that are common to all fundamental freedoms can be derived from the ECJ´s jurisprudence:

(1) A *cross-border element* (or "EU dimension"), i.e. a link between the particular economic transaction and two different EU Member States, is always necessary to trigger the protection of the market freedoms. This requirement already follows from Art. 3(1) lit. c EC Treaty itself which seeks to achieve free movement "between Member States". Therefore, purely internal transactions exclusively related to one and the same Member State lie outside of the scope of application of the various freedoms, and the market participant is referred to legal positions eventually granted by domestic constitutional law[19].

(2) It is indispensable to recognise that the establishment of an internal market can be impaired by different kinds of "obstacles" ("barriers", "hindrances") to cross-border free movement: (a) By way of national measures providing for certain legal distinctions, cross-border transactions can be put at a disadvantage as compared to transactions of a similar nature with a purely domestic dimension within the respective Member State[20]. These disadvantages may deter economic actors from becoming market participants on an EU wide level, which may impede the free allocation of factors of production (labour and capital) and of products (goods, but also services). (b) But there may also be situations where national measures are non-discriminatory (in the sense that they treat cross-border and domestic situations alike) but

[15] ECJ, 118/75, *Watson and Belmann*, [1976] ECR 1185 at 16.
[16] See, e.g., ECJ, 71/76, *Thieffry*, [1977] ECR 765 at 7; 115/78, *Knoors*, [1979] ECR 399 at 19; 246/80, *Broekmeulen*, [1981] 2311 at 20; C-370/90, *Singh*, [1992] ECR I-4265 at 15; C-19/92, *Kraus*, [1993] ECR I-1663 at 29; C-18/95, *Terhoeve*, [1999] ECR I-345 at 36.
[17] On this function as Art. 3(1) lit. c (read together with Art. 14(2)) EC Treaty as "transmitter" and "multiplier" of legal concepts between the different fundamental freedoms see Cordewener, footnote 4, p. 200 et seq., p. 252 et seq., p. 288 et seq., p. 322 et seq. with further references. A similar view is also taken by Snell, Goods and Services in EC Law, Oxford 2002, p. 22 et seq.
[18] Occasionally, the ECJ in fact uses similar expressions. See ECJ, C-265/95, *Commission v. France*, [1997] ECR I-6959 at 25 et seq., where the Court puts Art. 28 EC Treaty into the context of Art. 3(1) lit. c and Art. 14 EC Treaty and states that "that provision, taken in its context, must be understood as being intended to eliminate all barriers, whether direct or indirect, actual or potential, to flows of imports in intra-Community trade".
[19] ECJ, C-332/90, *Steen I*, [1992] ECR 341 at 9 et seq. and C-132/93, *Steen II*, [1994] ECR I-2715 at 8 et seq.; C-134/94, *Esso Española*, [1995] ECR I-4223 at 16; C-134/95, *USSL/INAIL*, [1997] ECR I-195 at 19; C-18/95, *Terhoeve*, [1999] I-345 at 26. Like always, however, there are borderline cases which shed some doubt on this general principle as they even seem to cover situations where a cross-border element appears to be missing; see for example ECJ, C-321/94 et al., *Pistre*, [1997] ECR I-2343.
[20] I will omit situations in which the national legislation as such is non-discriminatory, but its factual application to cross-border and purely domestic transactions by the national administration unilaterally favours the latter situations. See on this issue ECJ, C-185/96, *Commission v. Greece*, [1998] ECR I-6601 at 22 et seq.

nevertheless constitute an "obstacle" ("barrier", "hindrance") to cross-border transactions, since they make it particularly burdensome or even impossible for products or factors of production to leave one national market and/or enter another.

If it is true that the fundamental freedoms are the decisive legal tools for opening national systems to the demands of the internal market, then their legal structure must be able to tackle both of the afore-mentioned types of "obstacles" to free movement. And in fact, their wording leaves enough space for such an interpretation: In most of the relevant provisions the EC Treaty speaks of a prohibition of "restrictions" to cross-border movement (Art. 28, 29, 43(1), 49(1), 56(1)), and Art. 39(1) even simply guarantees "freedom of movement" (which in turn implies that there shall be no "restrictions" to this freedom). Moreover, it is precisely because of this open wording that the ECJ was able to extend the different freedoms beyond mere prohibitions of "discrimination" and develop them into prohibitions of "restrictions" at all[21]. However, for the purposes of the present analysis, and in order to be able to work with clear concepts and definitions without being prejudiced, it is suggested to move away for a moment from the terminology as employed by the ECJ in specific cases. Instead, the term "restrictions" should either be conceived in a neutral sense or, even better, be replaced (at least notionally) by "obstacles" as the neutral general term that is used in Art. 3(1) lit. c EC Treaty.

If this step is made and the term "restriction" conceived as nothing else than a synonym for "obstacle", it is much easier to comprehend that each individual freedom, being a specific expression of the general internal market principle, is phrased broad enough to encompass both (a) a non-discrimination component for tackling unfavourable treatment of cross-border economic transactions, and (b) a non-restriction component for tackling non-discriminatory hindrances to market access or exit. For those who - like the ECJ - prefer to adhere to the term "restriction", an equivalent distinction can be made by speaking of (a) "discriminatory restrictions" on the one hand and of (b) "restrictions in a closer sense" (or "real restrictions") on the other[22]. In any case it should be clear that the fundamental freedoms are characterised by a *dual legal structure*: They do not contain either a prohibition of discrimination or of (non-discriminatory) restrictions, but they comprise a non-discrimination component *and* a non-restriction component[23]. Both components should be regarded as complementary legal tools pursuing the aims of ensuring market access to domestic markets of other Member States (against barriers to entry or exit) and market equality within those markets (against distortions in favour of competitors acting purely domestically).

(3) Finally, it must be emphasised that all fundamental freedoms are also characterised by a *dual territorial perspective*: They do not only focus on one single direction, but are phrased broad enough cover both inbound *and* outbound situations. Since the fundamental freedoms strive to open domestic markets for cross-border movements and thereby try to merge the domestic markets involved in a particular transaction as if there was only one single EU-wide internal market, the "discriminations" and (non-discriminatory) "restrictions" to cross-border economic transactions mentioned above must be prohibited no matter which of the Member States involved in a particular transaction actually causes them. From a single market point of view it is of no use if Member State A as the "state of destination" (or "host state") complies with fundamental freedoms standards and allows foreign commerce to enter freely (inbound situation), while Member State B as the "state of origin" (or "home state") still prevents its own economic actors from participating in the very same cross-border transaction (outbound situation).

The clearest example of the attitude taken by the EC Treaty itself towards this problem can once again be found in the field of free movement of goods: While Art. 28 EC Treaty deals with "restrictions on imports" only, there exists an explicit provision in Art. 29 (ex Art. 34) EC Treaty prohibiting also "restrictions on exports". But at a closer glance the same idea can implicitly also be discovered in the rules governing the free movement of capital: Firstly, the current version of Art. 56(1) EC Treaty prohibits "all restrictions on the movement of capital between Member States" and is clearly not only addressed to the host state. And secondly, an *e contrario* reading of Art. 58(1) lit. a EC Treaty (as a ground of justification) leads to the conclusion that the scope of application of Art. 56(1) EC Treaty must also cover potential discriminations of "tax-payers who are not in the same situation with regard to their place of residence or with regard to *the place where their capital is invested*". As the fundamental freedoms only apply to cross-border situations, it is obvious that this last passage only makes sense for constellations where the *home state* provides for a difference in treatment between domestic and foreign investment. Moreover, it may also be noted that the former Art. 67(1) EEC Treaty (which was repealed after Maastricht, but can still serve as a guideline for the interpretation of the current rules on free movement of capital[24]) had been striving for, inter alia, the abolition of "any discrimination based on the nationality or on the place of residence of the parties or on *the place where such capital is invested*", which also implies that obstacles to cross-border movements from both states involved are covered.

It is true that the text of the EC Treaty is less clear as regards hindrances to an "outbound" free movement of persons and services. But it cannot be denied that the ECJ has gradually recognised that these fundamental freedoms as well have an "outbound perspective", prohibiting the home state ("state of origin") to set up obstacles to cross-border movements not only of its own nationals, but of all EU citizens and of corporations located within its territory and engaged in economic activities with market participants located in other Member States. This concerns the free

[21] See *infra* B.I.
[22] Under the use of this terminology one must necessarily come to the conclusion that every "discrimination" is at the same time a "restriction", but not every "restriction" is also a "discrimination".
[23] See Cordewener, footnote 4, p. 322 et seq. with further references.
[24] See A-G Alber, C-251/98, *Baars*, [2000] ECR I-2787 at 51 et seq.

movement of workers (Art. 39 EC Treaty)[25] in the same way as it basically covers the freedom of establishment (Art. 43 EC Treaty)[26], and it also includes the freedom to provide services (Art. 49 EC Treaty)[27].

II. Structural differences between non-discrimination and non-restriction

Until here several common features of the fundamental freedoms have been presented: They all protect cross-border free movement between EC Member States[28], they operate against "obstacles" to this free movement that may not only be caused by national measures discriminating against interstate economic transactions but also by non-discriminatory measures, and last but not least it is irrelevant whether these discriminatory or non-discriminatory "obstacles" are created by the host state or the home state[29]. This broad conceptual framework can now be completed with further details which can be derived from the ECJ´s jurisprudence and will serve to demonstrate important differences between the non-discrimination and the non-restriction component.

1) Non-discrimination: a relative concept

To start with, it is essential to point out that the non-discrimination component is structured as an "equality right" (*Gleichheitsrecht*): It is a *relative* concept which cannot exist in a vacuum but always requires a *tertium comparationis* as point of reference. Since the legal protection of cross-border economic transactions and the abolition of discrimination as compared to transactions taking place merely within the Member State concerned are at issue, the relevant tertium comparationis is the *hypothetical* purely domestic transaction which is equivalent to the cross-border transaction except for the fact that it lacks the cross-border element. In other words, the treatment of a specific cross-border transaction by a particular national measure must be compared to that of a transaction in which, ceteris paribus, the cross-border element (that triggers EC law protection) is replaced by a purely domestic element.

Tax law is probably one of the areas where this approach can be most plausibly demonstrated, and as direct taxation has become one of the major fields of application of the fundamental freedoms, it may be regarded as representing other areas of domestic law here as well: If, for instance, the tax treatment of a service rendered by a non-resident service provider to a resident recipient in the host state (or in tax terms: the "source country") is at stake (*inbound situation*), then the relevant tertium comparationis must be formed by replacing the non-resident by a hypothetical resident providing the same service to the same recipient, before finally the tax treatment of that hypothetical intra-state transaction will have to be opposed to that of the actual interstate transaction. If on the other hand, for example, the tax treatment on the part of the home state (or "residence country") of person holding a participation in a foreign corporation is at issue (*outbound situation*), this cross-border participation will have to be replaced by a hypothetical equivalent investment in a domestic corporation, before the results in tax treatment are to be confronted with each other.

As a basic rule it can be concluded that the ECJ will assume the existence of a potential discrimination[30] once it is established that a Member State treats a specific cross-border transaction worse than the corresponding hypothetical situation with a purely domestic dimension. In this context it must be emphasised that the Court requires a rather strict correspondence and is not willing to compare apples with pears[31]. Furthermore, it should be clear that the ECJ refuses to acknowledge any *de minimis* rule in this respect so that even minor discriminations are prohibited[32].

a) The gradual enlargement of the non-discrimination component

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[25] See, e.g., ECJ, 143/87, *Stanton*, [1988] ECR 3877 at 7 et seq. and 154/87 & 155/87, *Wolf*, [1988] ECR 3897 at 7 et seq.; C-175/88, *Biehl*, [1990] ECR I-1779 at 13 et seq.; C-415/93, *Bosman*, [1995] ECR I-4921 at 99 et seq.; C-336/96, *Gilly*, [1998] ECR I-2793 at 19 et seq.; C-18/95, *Terhoeve*, [1999] ECR I-345 at 27 et seq.; C-190/98, *Graf*, [2000] ECR I-493 at 21 et seq.

[26] See also in this respect the afore-mentioned decisions in *Stanton* and *Wolf*, and furthermore, e.g., ECJ, C-264/96, *ICI*, [1998] ECR I-4695 at 21; C-200/98, *X AB, Y AB*, [1999] ECR I-8261 at 27 et seq.; C-251/98, *Baars*, [2000] ECR I-2787 at 26 et seq., and recently C-9/02, *de Lasteyrie du Saillant*, n.y.r. at 42. Yet, it is interesting to see that in the decision that probably gave the strongest impetus to this "outbound perspective" of the freedom of establishment, the corporation concerned was denied protection under Art. 43 EC Treaty as regards the transfer of its seat (place of management) to another Member State; see ECJ, 81/87, *Daily Mail*, [1988] ECR 5483 at 16 et seq.

[27] See ECJ, C-49/89, *Corsica Ferries France*, [1989] ECR 4441 at 7; C-384/93, *Alpine Investments*, [1995] ECR I-1141 at 35 et seq.; C-70/99, *Commission v. Portugal*, [2001] ECR I-4845 at 27 et seq.

[28] I will not discuss the fact that Art. 56(1) EC Treaty does not only prohibit restrictions on free movement (of capital) "between Member States", but also "between Member States and third countries". This potential *erga omnes* effect will have to be analysed by the ECJ in the pending case C-513/03, *van Hilten*.

[29] See *supra* A.I.2 at (3).

[30] Until here, it is only a "potential" discrimination since the question of whether an acceptable justification exists will still have to be answered in a separate step. Only if there is no such justification, a violation of a fundamental freedom and thus a breach of EC law is at hand.

[31] A good example for this is ECJ, C-324/00, *Lankhorst-Hohorst*, [2002] ECR 11779 at 28.

[32] See ECJ, 270/83, *Commission v. France*, [1986] ECR 273 at 21; C-49/89, *Corsica Ferries France*, [1989] ECR I-4441 at 8; C-34/98, *Commission v. France*, [2000] ECR I-995 at 49.

The afore-mentioned general scheme for applying the fundamental freedoms as prohibitions of discrimination of cross-border transactions has been developed in different steps in the ECJ´s jurisprudence.

(1) A first important step has been the silent broadening of the narrow concept of "national treatment" for *inbound* situations: The ECJ has repeatedly held[33] that all freedoms are to be regarded as special expression of the general provision laid down in Art. 12(1) (ex Art. 6(1)) EC Treaty, which prohibits "any discrimination on grounds of nationality" and is commonly understood to relate to *foreign* nationality[34]. In particular the Treaty provisions on the free movement of persons and services either comprise an explicit prohibition of discrimination on grounds of nationality or a guarantee of "national treatment" of foreign nationals with host state nationals (Art. 39(2) and (3) lit. c, Art. 43(2) and Art. 50(3) EC Treaty). When the EEC Treaty was concluded, these provisions were drafted according to the models of similar clauses contained in traditional instruments of public international law, such as bilateral treaties on commerce and friendship[35], and it must even be assumed that the founding Member States intended to achieve nothing else than equal treatment of foreign nationals who moved to another Member State to exercise an economic activity there[36].

Yet, this traditional concept of "national treatment" is a very narrow one in a double sense, as by its nature it is only addressed to the "host state", thus only covering inbound situations, and that it only prohibits discriminations based on the foreign *nationality* of a certain person as the criterion for distinction. Quite soon, however, the ECJ found this concept of "overt" discriminations insufficient in order to deal adequately with obstacles to cross-border economic activities in inbound situations. Therefore, in early cases such as "Sotgiu"[37] the concept of "covert" (or "hidden"[38]) discrimination was developed, which subsequently was transferred also to direct tax cases in "Biehl"[39] (concerning physical persons) and "Commerzbank"[40] (concerning corporations). In substance, this has enlarged the non-discrimination component of the free movement rules for persons and services[41] and has turned it from a prohibition of discriminating against foreign nationals to a prohibition of discriminating against foreign *residents*, which demonstrates much clearer that what is really at stake is the issue of opening the host state´s domestic market to *commercial activities* coming in from abroad. It is evident, therefore, that higher tax rates for non-residents are a potential discrimination under Art. 39 and 43 EC Treaty[42], since they can deter these persons from taking up employment or starting self-employed activities in the host state ("state of destination" or, to speak in tax terminology, the "source state"). And it should be equally clear, for example, that the same goes for the denial of cost deduction related to the performance of non-resident artists[43], since once again residents are put at a competitive advantage.

Even nowadays discrimination by the host state simply on the basis of a person´s foreign nationality may still be the most striking obstacle to cross-border free movement. But this is no reason for limiting the scope of application of the fundamental freedoms to these situations. In fact, it is noteworthy that already the old Art. 67(1) EEC Treaty[44] had explicitly prohibited not only "any discrimination based on the nationality" but also "on the place of *residence* of the parties", which clearly shows that both "suspect" criteria are placed on equal footing within the framework of a broader concept with the aim of clearing the way from obstacles to free movement. And it should also be taken into account that the Member States themselves have pushed the development by inserting the "internal market" concept into the Treaty with the Single European Act[45]: It is widely believed that this concept stands for a higher level of market integration than the previous concept of a "common market"[46], and this intensification must also be reflected by the interpretation of the different fundamental freedoms. Once it is understood that the ultimate aim of all freedoms is really free movement of products and factors of production (Art. 3(1) lit. c EC Treaty), it is evident that any limitation of their *scope of application* is the wrong solution as regards the abolition of discriminatory obstacles. Rather, the severity of obstacles caused by "open" discrimination should be adequately dealt with on the *level of justification*, and this is in fact done by the ECJ

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[33] See, e.g., ECJ, 90/76, *Van Ameyde*, [1977] ECR 1091 at 27; C-22/98, *Becu*, [1999] ECR I-5665 at 32; C-251/98, *Baars*, [2000] ECR I-2787 at 30 et seq.

[34] Although from the wording of Art. 12(1) EC Treaty this is not so clear; see Weatherill/Beaumont, EU Law, 3d ed., London 1999, p. 713.

[35] Cf. Mössner, in: Haarmann (ed.), Die beschränkte Steuerpflicht, Cologne 1993, p. 110 at 111 et seq.; Pfeil, Historische Vorbilder und Entwicklung des Rechtsbegriffs der „Vier Grundfreiheiten" im Europäischen Gemeinschaftsrecht, Frankfurt am Main etc. 1998, p. 45 et seq., p. 118 et seq., p. 228 et seq.; Cordewener, footnote 4, p. 106 et seq.

[36] This has been admitted by Everling, in: Mestmäcker et al. (eds.), Festschrift für von der Groeben, Baden-Baden 1987, p. 111 at 113 et seq. and 120 et seq.

[37] ECJ, 152/73, *Sotgiu*, [1974] ECR 153 at 11.

[38] Sometimes this concept is also referred to as "indirect" discrimination, although at least for the purposes of the present analysis a distinction may be preferable: The term "hidden" discrimination should be reserved for the use of criteria of distinction other than nationality, while the term "indirect" discrimination should be used in the context of national measures that are not immediately concerned with regulating the cross-border transaction itself but more with its concomitant circumstances; see *infra* A.II.1 at (3).

[39] ECJ, C-175/88, *Biehl*, [1990] ECR I-1779 at 13 et seq. This case in fact concerned an outbound situation (a German resident in Luxembourg moving back to Germany to take up a new employment there) and is a good example of a national rule that discriminates inbound just as well as outbound situations. See also *infra* B.II.

[40] ECJ, C-330/91, *Commerzbank*, [1993] ECR I-4017 at 13 et seq.

[41] In the area of free movement of goods, discrimination on grounds of nationality has never played any significant role, as it was always the territorial origin that gave rise to discriminatory treatment.

[42] ECJ, C-107/94, *Asscher*, [1996] ECR I-3089 at 37 et seq.; C-311/97, *Royal Bank of Scotland*, [1999] ECR I-2651 at 24 et seq.

[43] ECJ, C-234/01, *Gerritse*, [2003] I-5933 at 27 et seq.

[44] See *supra* A.I.2 at (2).

[45] Of 17./28. February 1986, in force since 1 July 1987, OJ 1987 L 169/1.

[46] For references see Cordewener, footnote 4, p. 50 et seq.

when it pursues the approach that these "open" discriminations cannot be justified by the "rule of reason" but only on the basis of written exceptions (in particular Art. 39(3) and Art. 46 EC)[47].

(2) A second step in the ECJ´s jurisprudence concerns a differentiation between the different cases of "restrictions" (or, more neutral, "obstacles", "barriers", "hindrances") to *outbound* transactions: It becomes more and more obvious that, not only in the sphere of Art. 29 EC Treaty[48] but also in the fields of free movement of persons, services and capital, in the vast majority of decisions in which the Court considers a national measure of the home state ("state of origin", or in tax terms, the "state of residence") to be a "restriction" of cross-border activities, in substance a non-discrimination test is applied. This was not really clear yet in early cases such as "Daily Mail" or "Biehl", but in subsequent judgments like "ICI"[49] and "X AB, Y AB"[50] (concerning corporations) and then "Baars"[51] and "Verkooijen"[52] (concerning physical persons) it is eye-catching that the Court is always looking for the purely domestic situation as a tertium comparationis. In some recent decisions the ECJ has even become a bit more explicit: In "Mertens"[53] the Court characterised the national rule concerned as disfavouring EU citizens from extending their economic activity beyond the territory of a single Member State, and as creating unequal treatment of persons exercising their economic activity across the border as compared to those acting purely within the respective Member State. In "Bosal Holding"[54] the Court explained that a reservation of cost deduction to costs related only to domestic participations might dissuade a parent company from carrying on its activities through foreign subsidiaries. And finally, in the "de Lasteyrie"[55] case, the Court diagnosed a "dissuasive effect on taxpayers wishing to establish themselves in another Member State", since a taxpayer who transferred his residence abroad was "subjected to disadvantageous treatment in comparison with a person who maintains his residence in France".

Thus, what is at stake from an economic perspective is that the ECJ is trying to suppress distortions of choices for economic actors who want to become "market participants", i.e. who desire to make use of an EU-wide internal market and benefit from it. In order to achieve the free allocation of products and factors of production which is supposed to characterise this internal market, the Court requires neutrality of treatment of cross-border and purely domestic transactions. In other words, the home state is obliged not to make cross-border employed and self-employed activities more burdensome than purely domestic ones, just as it is prohibited, e.g., to make investment in foreign corporations less attractive than in domestic corporations, as all these measures would induce potential market participants (workers, self-employed persons, service providers, investors etc.) to "stay at home". This, in turn, would preserve the existence of several isolated domestic markets and be detrimental to the development of one single EU-wide internal market.

From a legal point of view, however, it must be pointed out that under the formal heading of a "non-restriction" approach in substance a "non-discrimination" approach is hiding, and what the ECJ is doing is to compare the treatment of economic actors engaged in cross-border transactions with that of economic actors pursuing equivalent activities within the Member State concerned[56]. In this respect, the application of this non-discrimination component to outbound situations does not deviate in any significant way from the Court´s (broadened) approach towards "non-discrimination" in inbound situations as described above. Once again the reason for the lack of clarity appears to be the vague wording of the Treaty, which does not provide for a prohibition of discrimination for outbound situations. Since the guarantee of "national treatment" as described above only makes sense for inbound situations, the only textual link that could be considered to cover outbound constellations is in fact the prohibition of "restrictions" or the guarantee of "free movement"[57], and this is probably why the ECJ still formally speaks of "restrictions" (or sometimes also of "hindrances") caused by the home state. Yet if it is accepted that discrimination of cross-border commerce is only a specific case of a "restriction" (or, more neutral, of an "obstacle")[58], there is no contradiction between the substantial test employed by the ECJ and the wording of the Treaty.

(3) Apart from the afore-mentioned developments concerning the application of the non-discrimination component to inbound and outbound situations, a third step of development may be mentioned is that it is the *cross-border transaction* (or, in other words, the "free flow of interstate commerce") in its entirety which is protected by the fundamental freedoms. This aspect, which is not always clearly discernible and not exclusively reserved for the non-discrimination component

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[47] See *supra* A.I.
[48] See *infra* C.
[49] ECJ, C-264/96, *ICI*, [1998] ECR I-4695 at 23 et seq.
[50] ECJ, C-200/98, *X AB, Y AB*, [1999] ECR I-8261 at 28.
[51] ECJ, C-251/98, *Baars*, [2000] ECR I-2787 at 30 et seq.
[52] ECJ, C-35/98, *Verkooijen*, [2000] ECR I-4071 at 34 et seq.
[53] ECJ, C-431/01, *Mertens*, [2002] ECR I-7073 at 26 et seq.
[54] ECJ, C-168/01, *Bosal Holding*, n.y.r. at 27.
[55] ECJ, C-9/02, *de Lasteyrie du Saillant*, n.y.r. at 45 et seq.
[56] It is my understanding of the cases that have been decided up to now that the ECJ does not compare the treatment of cross-border actors with persons *not acting at all*. This is much clearer in decisions on inbound situations, however; see, e.g., ECJ, C-80/94, *Wielockx*, [1995] ECR I-2493 at 20, where the Court analyses the comparability of a non-resident exercising a self-employed activity in the host state with "a resident of that state who does the same work there".
[57] See *supra* A.I.2 at (2).
[58] See *supra* A.I.2 at (2).

(but probably of more relevance here than for the non-restriction component[59]), could be described as a "creeping" extension of the scope of application of the different fundamental freedoms both in a subjective and an objective way:

(a) The *subjective extension* concerns the application of the fundamental freedoms not only to national measures affecting the "active" market participant (i.e. the importer, worker, self-employed person, service provider, investor etc.), but also to the *"passive"* market participant. In numerous decisions the ECJ has made clear that both sides of a cross-border economic relationship are protected by EC law, which in fact is only logical since a market is inherently determined by two interacting factors: supply and demand[60]. And once again, from an economic perspective the abolition of distortions of choices has played a dominant role in the Court´s case-law.

As regards the free movement of goods, for example, the Court assessed the reservation of tax advantages to French press enterprises which had their newspapers produced by domestic printers as a violation of Art. 28 EC Treaty, "since it encourages newspaper publishers to have publications printed in France rather than other Member States"[61]. Concerning the free movement of services, the ECJ saw an infringement of Art. 49 EC Treaty in the obligation for Dutch broadcasting enterprises only to make use of technical resources offered by domestic undertakings, as it "prevents those bodies from using the services of undertakings established in other Member States or, in any event, limits their opportunities of doing so"; it is evident that this diverting influence on the demand side also has a corresponding negative effect on the supply side, and the Court therefore rightly concluded that the national rule in question had "a protective effect for the benefit of a service undertaking established in the national territory and, to that extent, disadvantages undertakings of the same kind established in other Member States"[62]. And in a later judgment concerning a specific reimbursement procedure applicable only to medical treatment received abroad, the ECJ first made clear that Art. 49 EC Treaty "precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State", before it stated that national rules as the one in question "deter insured persons from approaching providers of medical services established in another Member State and constitute, *for them and their patients*, a barrier to freedom to provide services"[63].

It should be clear that the same principles apply, mutatis mutandis, also in the sphere of the other fundamental freedoms. With respect to the interpretation of the old Art. 67 EEC Treaty and of Art. 1(1) of Directive 88/361/EEC[64], the ECJ pointed out that "provisions implying that a bank must be established in a Member State in order for recipients of loans residing in its territory to obtain an interest rate subsidy from the State out of public funds are liable to dissuade those concerned from approaching banks established in another Member State and therefore constitute an obstacle to movements of capital such as bank loans"[65]. In a subsequent judgment the Court made clear that the limitation of a tax exemption under Dutch law to purely domestic investment not only "has the effect of dissuading nationals of a Member State residing in the Netherlands from investing their capital in companies which have their seat in another Member State", but that it "also has a restrictive effect as regards companies established in other Member States: it constitutes an obstacle to the raising of capital in the Netherlands since the dividends which such companies pay to Netherlands residents receive less favourable tax treatment than dividends distributed by a company established in the Netherlands, so that their shares are less attractive to investors residing in the Netherlands than shares in companies which have their seat in that Member State"[66].

And in a case concerning Art. 39 EC Treaty the Court explained that, "in order to be truly effective, the right of workers to be engaged and employed without discrimination necessarily entails as a corollary the employer's entitlement to engage them in accordance with the rules governing freedom of movement for workers. Those rules could easily be rendered nugatory if Member States could circumvent the prohibitions which they contain merely by imposing on employers requirements to be met by any worker whom they wish to employ which, if imposed directly on the worker, would constitute restrictions on the exercise of the right to freedom of movement to which that worker is entitled"[67]. Thus, not only with regard to the products, but also with regard to factors of production the fundamental freedoms must be perceived as protecting Community-wide mobility on which all the persons involved either "actively" or "passively" can rely.

At first sight, Art. 43 EC Treaty appears to be a difficult case in this context, as a "passive" dimension of a cross-border establishment cannot easily be imagined. Yet, even though this may be true as far as primary establishment is

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[59] This is particularly due to the fact that after "Keck", the non-restriction component has received a narrower reading than before. See also infra B.I. and report no. 2 by M. Lehner.

[60] Compare in this respect Kapteyn/VerLoren van Themaat, Introduction to the Law of the European Communities – After the coming into force of the Single European Act, 2d ed., Deventer/Boston 1989, p. 78: "A market can be described as the meeting place of supply and demand; the Common Market as the meeting place of supply and demand from all the Member States". On the inclusion of "passive" market participants into the scope of the fundamental freedoms see also Cordewener, footnote 4, p. 234 et seq.

[61] ECJ, 18/84, *Commission v. France*, [1985] ECR 1339 at 16. See also ECJ, C-120/95, *Decker*, [1998] ECR I-1831 at 36, concerning Art. 28 EC Treaty and social insurance rules.

[62] ECJ, C-353/91, *Commission v. Netherlands* , [1991] ECR I-4069 at 23.

[63] ECJ, C-158/96, *Kohll*, [1998] ECR I-1931 at 33 et seq. See also the different tax cases concerning the recipients of cross-border services, e.g., ECJ, C-204/90, *Bachmann*, [1992] ECR I-249 at 31 and C-300/90, *Commission v. Belgium*, [1992] ECR I-305 at 22; C-118/96, *Safir*, [1998] ECR I-1897 at 23.

[64] Of 24 June 1988, OJ 1988 L 178/5.

[65] ECJ, C-484/93, *Svensson and Gustavsson*, [1995] ECR I-3955 at 10.

[66] ECJ, C-35/98, *Verkooijen*, [2000] ECR I-4071 at 34 et seq.

[67] ECJ, C-350/96, *Clean Car Autoservice*, [1998] ECR I-2521 at 20 et seq.

concerned, the situation is somewhat different when it comes to secondary establishment. Especially if one takes a look at how group relationships between parent and subsidiary companies are treated by the ECJ, certain parallels to the Court´s approach under the other fundamental freedoms can be discovered. In "Metallgesellschaft"[68], for example, the UK subsidiaries complained against a domestic rule which excluded them and their foreign parent companies from a favourable system of group taxation, and the ECJ in fact criticised that the legislation in question created an unjustified "difference in treatment between subsidiaries resident in the United Kingdom depending on whether or not their parent company has its seat in the United Kingdom". Thus, as it was the *UK subsidiary* that could invoke Art. 43 EC Treaty, it can be said that the freedom of establishment not only grants equal treatment between foreign and domestic parent corporations but also between cross-border and purely domestic group structures as a whole. This has become even clearer in "Lankhorst-Hohorst"[69], where the German subsidiary of a Dutch parent corporation complained against a tax burden that was triggered under the German rules on shareholder-financing because it had received a loan from its Dutch grandparent corporation: The ECJ not only found that "a difference in treatment between resident subsidiary companies according to the seat of their parent company constitutes an obstacle to the freedom of establishment", but it also stated that the national measure in question made it "less attractive for companies established in other Member States to exercise freedom of establishment and they may, in consequence, refrain from acquiring, creating or maintaining a subsidiary in the State which adopts that measure". Once again, therefore, there is a strong indication that it is the whole cross-border group structure (with all related transactions) that is protected[70].

(b) The *objective extension* of the fundamental freedoms concerns a somewhat different development, which could be described as a tendency on the part of the ECJ to cover also those obstacles that do not bar the cross-border movement as such (factually or legally) but still deter the economic actor from acting outside of his home state. Many of these "indirect" obstacles to cross-border economic activities are in fact closely related to the area of direct taxation. A first group of examples that can be identified are national rules that affect the result (or "fruit") of an economic activity: In "Biehl"[71] the ECJ pointed out that the free movement of workers guaranteed by Art. 39 EC Treaty includes the abolition of discrimination also with regard to remuneration, and that this principle of equal treatment "would be rendered ineffective if it could be undermined by discriminatory national provisions on income tax". Quite similarly, in "Verkooijen"[72] the Court explained that the receipt of dividends is protected by the free movement of capital since it "necessarily presupposes participation in new or existing undertakings" or may also be "linked to Acquisition by residents of foreign securities dealt in on a stock exchange", which is "indissociable from a capital movement". In both afore-mentioned cases it is not immediately the cross-border activity as such that meets a hindrance. But quite obviously there is a strong causal link between that activity and its financial outcome, and if the latter is subject to an unfavourable tax treatment as compared to that of a purely domestic activity, a distortion of choices of economic actors in favour of staying "at home" is imminent.

A second group of examples is of particular importance in the areas of free movement of persons and of services. To be able to offer their activities to recipients (employers, clients, consumers etc.) in another Member State, the persons concerned must not only be allowed to enter the territory of that Member State but also to stay or even reside there while looking for or pursuing an occupation as employed or self-employed persons. On several occasions the ECJ has pointed out that these "auxiliary" free movement rights flow directly from EC primary law if they are connected to an economic activity within the meaning of Art. 39, 43 and 49 EC Treaty[73]. It is true that national measures affecting entry to and physical presence in another Member State do not regulate the specific conditions of a particular economic activity, but it is also evident that there is a strong link between the two elements and that any obstacle to the personal mobility of an economic actor will also cause an "indirect" barrier to the cross-border movement of the economic activity as such.. Thus, it is not surprising that the Court recently considered a national exit tax rule, that is triggered by the cross-border transfer of a taxpayer´s residence to another Member State, as a (discriminatory) obstacle to the freedom of establishment if it is necessary or at least helpful for the proper exercise of a self-employed activity that the person concerned also moves its private residence to that other Member State[74].

b) Some remaining obscurities concerning the non-discrimination component

[68] ECJ, C-397/98 & C-410/98, *Metallgesellschaft et al*., [2001] ECR I-1727 at 43.
[69] ECJ, C-324/00, *Lankhorst-Hohorst*, [2002] ECR I-11779 at 32.
[70] To a certain degree this has recently been underlined by a parallel drawn by the Court between Art. 43 EC Treaty and the aim of the Parent Subsidiary Directive 90/435/EEC of 23 July 1990, OJ 1990 L 225/6, in the sense that both sets or rules seek to "eliminate the disadvantage due to the application of tax provisions governing relations between parent companies and subsidiaries of different Member States which are less advantageous than those applicable to parent companies and subsidiaries of the same Member State"; see ECJ, C-168/01, *Bosal Holding*, n.y.r. at 28.
[71] ECJ, C-175/88, *Biehl*, [1990] ECR I-1779 at 11 et seq.
[72] ECJ, C-35/98, *Verkooijen*, [2000] ECR I-4071 at 28 et seq. Compare also A-G Kokott, C-319/02, *Manninen*, n.y.r. at 29.
[73] See, e.g., ECJ, 48/75, *Royer*, [1976] ECR 497 at 31; C-363/89, *Roux*, [1991] ECR I-273 at 9; C-292/89, *Antonissen*, [1991] ECR I-745 at 9 et seq.; C-171/91, *Tsiotras*, [1993] ECR I-2925 at 8. On inherent limitations of these auxiliary rights for cross-border service providers (no indefinite right of residence) see ECJ, 196/87, *Steymann*, [1988] ECR 6159 at 15 et seq.
[74] See ECJ, C-9/02, *de Lasteyrie du Saillant*, n.y.r. at 45 et seq.

Nevertheless, some aspects of the application of the non-discrimination component have remained obscure in the ECJ´s jurisprudence, and to a certain extent they are related to the Court´s definition of "discrimination" as "the application of different rules to comparable situations or the application of the same rule to different situations"[75]. To start with, it is not really clear yet in how far the second half of the definition ("the application of the same rule to different situations") has a function of its own. In this respect it may be mentioned that an almost identical formula is used under the equality principle of German constitutional law, where legal doctrine is of the opinion that this second half does not fulfil any specific function of its own. It is argued that questions of equality could always be looked at as questions of inequality, too, an that in order to handle the non-discrimination test properly there should be a strong emphasis on the first half of the definition, and in particular on the identification of the correct tertium comparationis[76]. Keeping this in mind, it may not be unreasonable to deal with certain obstacles to cross-border movement *caused by equal treatment* from the perspective of the "non-restriction" component[77].

Apart from that it should basically be clear that the concept of non-discrimination as it is applied by the Court is a very narrow one: It focuses on the treatment of a specific issue in a specific Member State, which at the same time means that a particular unfavourable treatment of cross-border economic transactions can neither be "neutralised" (or "compensated") by advantages granted in other respects by the same Member State[78] nor, a fortiori, by advantages granted by other Member States[79]. Within this narrow focus, the treatment of one and the same cross-border transaction in another Member State is in principle irrelevant for the outcome of the question of whether interstate and purely intrastate economic activities are in "comparable situations". Yet, a different approach has been developed by the Court in the area of direct taxation, and here more specifically with regard to access of non-resident physical persons to tax advantages related to personal and family circumstances: For these situations[80] the ECJ has established the principle that "the situations of residents and of non-residents are not, as a rule, comparable"[81]. However, simultaneously the Court has accepted an exception to this principle if the non-resident person "receives no significant income in the State of his residence and obtains the major part of his taxable income from an activity performed in the State of employment, with the result that the State of his residence is not in a position to grant him the benefits resulting from the taking into account of his personal and family circumstances"[82].

Thus, what happens in the latter case is that the focus is broadened and the obligation of the source state not to discriminate made dependent on how a particular cross-border activity is treated in that state *and* in the state of residence. This particular approach can be explained by the Court´s intention to achieve equitable results and provide taxpayers with a guarantee that their "personal and family circumstances" will be taken into account in one of the Member States concerned, which is a reaction to the danger that, due to a "negative conflict of competences", these circumstances would not be considered in any Member State[83]. From a strictly legal point of view, however, this enlarged perspective is subject to criticism[84], because it is not only based on presumptions and vague concepts as far as the mechanics of international tax law are concerned, but it is also inconsistent with the ECJ´s normal approach under EC law of applying the non-discrimination component to measures of one single Member State "in isolation"[85]. Yet, there are other issues in the pipeline which may be more fundamental for taxation in the EC and which equally raise the question of whether discrimination of cross-border economic transactions exists if a certain item is not taken into account in any Member State, such as for instance losses[86] or participation costs[87]. Although the ECJ seems to be reluctant until now, it cannot be excluded that it will pursue its broader approach à la "Schumacker" also beyond the limited field of person-related tax advantages in the future, which unavoidably will lead to a stronger cross-linking between domestic tax systems and enforce the level of integration in the EU internal market.

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[75] See, e.g., ECJ, C-279/93, *Schumacker*, [1995] ECR I-225 at 30.
[76] See Cordewener, footnote 4, p. 177 et seq. with further references.
[77] See *infra* A.II.2.
[78] ECJ, 270/83, *Commission v. France*, [1986] ECR 273 at 21; C-307/97, *Compagnie de Saint-Gobain*, [1999] ECR I-6161 at 51 et seq.
[79] ECJ, C-294/97, *Eurowings*, [1999] ECR I-7447 at 44 et seq.
[80] Beyond the sphere of tax rules concerning "personal and family circumstances", the ECJ has never applied its "Schumacker" approach. See Cordewener, footnote 4, p. 890 et seq.
[81] ECJ, C-279/93, *Schumacker*, [1995] ECR I-225 at 31 et seq. Cf. ECJ, C-80/94, *Wielockx*, [1995] ECR I-2493 at 18 et seq.; C-107/94, *Asscher*, [1996] ECR I-3089 at 41; C-391/97, *Gschwind*, [1999] ECR I-5451 at 22 et seq.; C-87/99, *Zurstrassen*, [2000] ECR I-3337 at 21; C-234/01, *Gerritse*, [2003] ECR I-5933 at 43. See also A-G Léger, C-169/03, *Wallentin*, n.y.r. at 22 et seq.
[82] ECJ, C-279/93, *Schumacker*, [1995] ECR I-225 at 36. See also ECJ, C-385/00, *de Groot*, [2002] ECR I-11819 at 88 et seq.
[83] See A-G Léger, C-279/93, *Schumacker*, [1995] ECR I-225 at 66 et seq. Compare also Knobbe-Keuk, intertax 1995, 234 at 236.
[84] On this issue see Eden, EC Tax Journal, Vol. 4 (1999), 11 at 32 et seq.; Reimer, in: Lehner (ed.), Grundfreiheiten im Steuerrecht der EU-Staaten, Munich 2000, p. 39 at 46 et seq.; Cordewener, footnote 4, p. 493 et seq., p. 841 et seq., p. 900 et seq. with further references.
[85] This traditional approach has also been described as achieving "equality in a box" ("Kästchengleichheit") within the legal order of always one particular Member State. See Birk, in: Lehner (ed.), Steuerrecht im Europäischen Binnenmarkt, DStJG Vol. 19, Cologne 1996, p. 63 at 73 et seq. and 76 et seq.; Reimer, in: Lehner (ed.), footnote 84, p. 39 at 50; Cordewener, footnote 4, p. 828 et seq. with further references.
[86] Compare the question referred by the Hof van Beroep te Gent in ECJ, C-141/99, *AMID*, [2000] ECR I-11619 at 16, which hints at the problem that a loss suffered from a cross-border activity "cannot be offset, in either of the Member States concerned, against the taxable income" of the respective economic actor.
[87] In the proceedings of ECJ, C-168/01, *Bosal Holding*, n.y.r. before the Dutch Hoge Raad, the question was raised of whether it would infringe the fundamental freedoms that in certain situations the costs of financing a subsidiary could neither be deducted on the level of the parent nor of the subsidiary; see Advocaat-Generaal Wattel, case no. 35729, B.N.B. 2001/257, 2494 at 10.1.

Last but not least, it must be pointed out that there seem to be additional "hidden reserves" which could be activated by the ECJ if need be to boost the internal market concept. While the non-discrimination component as described above relies on a "vertical" comparison between cross-border (interstate) and purely domestic (intrastate) economic transactions, legal doctrine in recent years has identified two other constellations that are possibly protected by the fundamental freedoms but characterised by a "horizontal" comparison between two cross-border activities. In the first place, there are indications in the Court´s previous case-law that the choice between different types of cross-border secondary establishment must not be distorted. This may result in a legal obligation under Art. 43 EC Treaty not to discriminate against agencies, branches and subsidiaries[88], and the ECJ may in fact have the opportunity to rule on this issue soon[89]. Secondly, various authors have taken the view that the fundamental freedoms oblige the Member States to grant each other "most favoured nation treatment", so that Member State A may not treat cross-border transactions with Member State B worse than equivalent transactions with Member State C[90]. On this issue the ECJ will have to decide in the near future, too[91].

2) Non-restriction: an absolute concept

In contrast to the remarks made above regarding the structure of the non-discrimination component[92], the fundamental freedoms´ non-restriction component must be understood as a "freedom right" (*Freiheitsrecht*): It is an *absolute* concept that operates autonomously, which means that it is independent from the treatment of other situations. Therefore, it does not require any tertium comparationis and can be applied to cross-border economic transactions without taking the (hypothetical) treatment of equivalent purely domestic transactions into account. In fact, it has been argued quite convincingly that in order to achieve an internal market, an extension of the scope of the fundamental freedoms beyond a mere guarantee of equal treatment is necessary, as it is often simply equal treatment that is intrinsically responsible for hindrances to cross-border commerce[93] which then cannot be overcome by a prohibition of discrimination[94]. The "obstacle" to "free movement of goods, persons, services and capital" (to speak with Art. 3(1) lit. c EC Treaty[95]) in these cases lies in the mere fact that the respective cross-border activity as such is "restricted" by a Member State, i.e. made subject to a burden caused by a national measure.

For a better understanding of the ECJ´s approach towards truly non-discriminatory "obstacles" to cross-border free movement of products and factors of production, it must first of all be pointed out that the amount of cases dealing with these "restrictions" (in a narrow sense) is not as big as it may seem. As already mentioned[96], a vast number of decisions using the term "restrictions" in substance actually dealt with discriminatory national measures, above all where outbound situations were concerned or a particular measure did not immediately affect the "active" but the "passive" market participant. What is left are basically those measures which, in the language of the Court, form a hindrance to "market access", and in this respect two main categories of cases can be identified: First of all, there are overlapping national regulations which impose a double burden on cross-border transactions, and secondly one can identify national measures which legally or in their factual consequences make the exercise of an activity protected under the different Treaty freedoms extremely difficult, if not impossible[97].

Examples for the application of the non-restriction component to tax cases have been very rare up to now, and the transfer of the Court´s "Keck" approach not only to the other fundamental freedoms but in particular to the whole field of taxation is very problematic[98]. A relatively clear, though not totally undisputed example of a non-discriminatory restriction to the freedom of establishment is the part of the "Futura Participations" decision that deals with the obligation of non-resident taxpayers to have, at least for the purposes of a loss carry-forward, separate accounts for a permanent establishment in the host state complying with that state´s tax rules and being held in that state: The ECJ found that this

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[88] See ECJ, 270/83, *Commission v. France*, [1986] ECR 273 at 22; C-307/97, *Compagnie de Saint-Gobain*, [1999] ECR I-6161 at 42 et seq. See on this issue of free choice and legal neutrality in particular Schön, 2 EBOR (2001), 339. For further references see Cordewener, footnote 4, p. 831 et seq.

[89] Case C-253/03, *CLT-UFA*, concerns the application of different tax rates to permanent establishments (branches) and subsidiaries of non-resident corporations (inbound situation). In case C-446/03, *Marks & Spencer*, the issue of unequal treatment of losses suffered by foreign subsidiaries and foreign permanent establishments of resident corporations (outbound situation) could gain relevance; see Wattel, EC Tax Review 2003, 194 at 197 et seq.

[90] See, e.g., Rädler, EC Tax Review 1995, 66 et seq.; Schuch, EC Tax Review 1998, 29 at 30 et seq. For further references see Cordewener, footnote 4, p. 501 et seq., p. 836 et seq. Closely related to this issue is that of "Community preference" and the discussion of whether a Member State may treat cross-border transactions with a third country better than equivalent transactions with a Member State. See Kokott, in: Lehner (ed.), Grundfreiheiten im Steuerrecht der EU-Staaten, Munich 2000, p. 1 at 8 et seq., and the discussion after ECJ, C-466/98 et al., *Commission v. UK et al.*, [2002] ECR I-9427, as for example Craig, BIFD 2003, 63.

[91] See pending cases C-376/03, *D* (with annotation Weber/Spierts, European Taxation 2004, 65) and C-8/04, *Bujara*.

[92] *Supra* A.II.1.

[93] Compare Steindorff, Der Gleichheitssatz im Wirtschaftsrecht des Gemeinsamen Marktes, Munich 1965, p. 36 et seq.; Roth, footnote 11, p. 56 et seq.; Steindorff, ZHR 154 (1994), 149 at 160 et seq.; Epiney, Umgekehrte Diskriminierungen, Cologne etc. 1995, p. 45; Steindorff, EG-Vertrag und Privatrecht, Baden-Baden 1996, p. 64 et seq.

[94] See Behrens, Europarecht 1992, 145 at 148; Boutard Labarde, Journal du droit international, 1992, 446 at 447 ; Cordewener, footnote 4, p. 116 et seq. and p. 250 et seq. with further references.

[95] *Supra* A.I.1.

[96] See *supra* A.II.1.a.

[97] See in more detail *infra* B.I.

[98] See on this issue report no. 2 by M. Lehner.

was a "restriction" under Art. 43 EC Treaty, since this host state condition came on top of the taxpayer´s obligation to keep accounts under his home state´s tax rules, and that therefore "such a condition, which specifically affects companies or firms having their seat in another Member State, is in principle prohibited"[99]. However, it must be pointed out that the issue here was not the effect of a substantive tax rule but merely a double burden under procedural law.

As far as substantive tax provisions are concerned, the cases decided by the ECJ are rather obscure. In "Sandoz" the question was raised whether the levy of a stamp duty on loans taken up abroad by a domestic borrower constituted a violation of Art. 56(1) EC Treaty, and the Court confirmed this even though the Austrian legislation concerned applied "irrespective of the nationality of the contracting parties or of the place where the loan is contracted, … to all natural and legal persons resident in Austria who enter into a contract for a loan". The Court´s argument for accepting an obstacle to the free movement of capital was simply that the Austrian provision "deprives residents of a Member State of the possibility of benefiting from the absence of taxation which may be associated with loans obtained outside the national territory"[100], but it is questionable whether this is not a case of mere disparity between Member States´ legal systems.

In the more recent "De Coster" case the ECJ had to deal with a tax on satellite dishes that was introduced by a Belgian municipality with the aim of reducing the amount of such dishes within the area. The Court concluded that a restriction prohibited under Art. 49 EC Treaty was at hand, since this charge only affected the reception of television programmes transmitted by satellite and not by cable. For foreign broadcasters, however, satellite transmission was generally the only way of reaching recipients in Belgium, and therefore the tax at issue dissuaded potential recipients of broadcasting services in that municipality from "seeking access to television programmes broadcast from other Member States". Yet, it seems that this case is decided less on the basis of the non-restriction component than under a broadly stretched non-discrimination principle, which can also be derived from the ECJ´s statement that the tax concerned "is liable to impede more the activities of operators in the field of broadcasting or television transmission established in Member States other than the Kingdom of Belgium, while giving an advantage to the internal Belgian market and to radio and television distribution within that Member State"[101].

[99] ECJ, C-250/95, *Futura Participations*, [1997] ECR I-2471 at 25 et seq. Cf. Cordewener, footnote 4, p. 632 et seq.
[100] ECJ, C-439/97, *Sandoz*, [1999] ECR I-7041 at 17 et seq.
[101] ECJ, C-17/00, *De Coster*, [2001] ECR I-9445 at 29 et seq. The test applied by the ECJ in substance comes very close to that applied to indirect taxes on the import of "exotic" fruits under Art. 90(2) (ex Art. 95(2)) EC Treaty. On this borderline between non-discrimination and non-restriction cf. Weatherill/Beaumont, supra footnote 34, p. 488 et seq. and Schön, Europarecht 2001, 341 at 354 et seq. It can be added that also A-G Ruiz-Jarabo Colomer, C-17/00, *De Coster*, [2001] ECR I-9445 at 120 et seq. seemed to have some difficulty with characterising the rule under dispute as either a discrimination or restriction.

B. Is there in your view a difference in the way in which the basic economic freedoms should be tested: (i) some freedoms are tested on the basis of the non-discrimination principle and other freedoms on the basis of the non-restriction principle, or (ii) all freedoms are tested in the same way on the basis of both principles? If both principles apply, is there any order of priority in their application?

I. The (r)evolution in the ECJ´s jurisprudence: From non-discrimination to non-restriction (and partly back again)

It has already been pointed out that the structure of the EC fundamental freedoms has undergone certain developments over the years and that the free movement of goods has always taken a leading role. Whereas Art. 28 EC Treaty had received a very broad expansion already at an early stage, it took the ECJ more than two decades to extend the scope of the other freedoms gradually beyond the boundary of mere non-discrimination[102]. Nevertheless, it can be stated that today it is generally accepted that all freedoms basically also apply as a prohibition of (non-discriminatory) restrictions, and the decision in "Gebhard" is widely regarded as the culmination point of this whole development since it requires that all "national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty" must be justified[103]. Therefore, the emphasis of the discussion about the non-restriction principle no longer lies on the "if" of its existence but on the "how" of its design. But once it is acknowledged that protection under the fundamental freedoms can be triggered by measures that simply put a burden on cross-border transactions, the decisive question is of course whether that burden or "restriction" (to speak with Art. 28, 29, 43(1), 49(1), 56(1) and, in principle, also Art. 39(1) EC Treaty[104]) can be characterised any closer, above all whether any particular *threshold* must be surpassed.

It must be clear that the lower that threshold for an infringement of the fundamental freedoms´ scope of application is set, the further EC law will expand over the various sectors of national law. Unavoidably this will lead to a considerable increase in conflicts between the fundamental freedoms and domestic provisions of the Member States, and due to the primacy of EC law and the relatively strict standards maintained by the ECJ with regard to justification and proportionality, the pressure on national legal systems could rise enormously. In fact, a thoughtless application of the old "Dassonville" formula or even a literal reading of the above-mentioned "Gebhard" formula could lead to the conclusion that almost any national provision due to its mere divergence from rules in other Member State, or even any foreign legal order in its entirety, could be characterised as a "restriction" of economic free movement. In particular as regards taxation, the mere existence of charging provisions would suffice to subject them to EC law scrutiny[105]. Seen from that angle, the issue of interpreting the fundamental freedoms as prohibitions of (non-discriminatory) restrictions has a very basic constitutional dimension as it involves a decision on the range of Member States´ competences that remain unaffected by EC law. It is submitted that this *vertical* "distribution of powers" is the actual core issue of the whole discussion about non-restriction and of the Court´s case-law from "Dassonville" over "Cassis de Dijon" to "Keck", to take the free movement of goods as the most striking example[106].

1) Non-discriminatory measures: "market access" v. "rule of remoteness"

Against this background, it should be easier to perceive the "Keck" judgment as a trade-off between, on the one hand, the need for full market integration within the EU and, on the other hand, the respect for Member States´ competences which shall not fall victim to an all-embracing deregulation. In the Court´s view, mere "selling arrangements" that apply in a non-discriminatory way to imported and domestic goods are not capable of hindering "directly or indirectly, actually or potentially, trade between Member States" and for this reason "fall outside the scope of Article 30" (now Art. 28) EC Treaty, whereas "product requirements" are capable of preventing or impeding "access to the market" of a Member State even when they do not distinguish between foreign and domestic products[107]. Thus, what the ECJ does with its somewhat blurry distinction between "selling arrangements" and "product requirements" is nothing else than a fine-tuning of the range of the "Dassonville" formula: For the former category it is reduced to a prohibition of discrimination, while to the latter category the non-restriction principle shall still apply. This explicit shift in direction can be regarded as a (partial) "restriction of the non-restriction principle", and it has been explained as the Court´s commitment to a narrower concept

[102] See *supra* A.I.1.
[103] ECJ, C-55/94, *Gebhard*, [1995] ECR I-4165 at 37. Cf. Schön, ZHR 160 (1996), 220 at 246 et seq.; Wouters, Het Europese vestigingsrecht voor ondernemingen herbekeken, Leuven 1996/97, p. 348 et seq.; Ysewyn, Sociaal-Economische Wetgeving 1997, 24 at 27; Tison, L.I.E.I. 2/1997, 1 at 3; Cordewener, footnote 4, p. 108 with further references.
[104] *Supra* A.I.2 at (2).
[105] See Cordewener, footnote 4, p. 288 et seq. with further references.
[106] There may also be a *horizontal* dimension of "distribution of powers" on the Community level between the ECJ on the one hand and the Community legislator on the other, since the more obstacles to free movement are already cleared by EC primary law, the less significance can be attached to EC secondary law measures. Cf. Cordewener, footnote 4, p. 47 et seq., p. 250 et seq.
[107] ECJ, C-267/91 & C-268/91, *Keck and Mithouard*, [1993] ECR I-6097 at 14 et seq. This approach has been repeated several times afterwards; see for instance recently ECJ, C-322/01, *Deutscher Apothekerverband e.V.*, n.y.r. at 66 et seq. Compare also report no. 2 by M. Lehner.

of an internal market that is still characterised by certain differences between national legal systems[108]. Nevertheless, the judgment also demonstrates that non-discrimination alone, although it is the basic pillar for the functioning of the internal market, is not sufficient for the liberalisation of trade as it still leaves Member States room to maintain rules that effectively prevent cross-border economic movements[109].

The main principle to be derived from the "Keck" decision concerning the scope of application of Art. 28 EC Treaty is definitely that its non-restriction component is triggered only where the access of goods to the market of the state of destination is impeded. In legal doctrine there is far-reaching agreement that this "market access" test should also apply in the sphere of the other fundamental freedoms[110], and indeed it can be said that the Court has used this test on several occasions now. To start with some *positive examples* of national rules that passed this test: In "Alpine Investments" the ECJ held that a prohibition of approaching clients through unsolicited telephone calls ("cold-calling"), although applying in a "general and non-discriminatory" way to both purely domestic and cross-border situations, was a "restriction" of the rights guaranteed under Art. 49 EC Treaty simply because it "directly affects access to the market in services in the other Member States and is thus capable of hindering intra-Community trade in services"[111]. Quite similarly, in "Bosman" the Court found that transfer fee rules which applied equally to cross-border transfer of football players and to transfers between clubs within the same Member State nevertheless "hindered" the free movement of workers (Art. 39 EC Treaty), since they "still directly affect players' access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers"[112]. And in two recent decisions concerning actions brought by the Commission against Spain and the UK, the Court held that national rules on so-called "golden shares" were applied "without distinction to both residents and non-residents" but still formed a "restriction" of the free movement of capital (Art. 56(1) EC Treaty), as they "affect the position of a person acquiring a shareholding as such and are thus liable to deter investors from other Member States from making such investments and, consequently, affect access to the market"[113].

There are of course also *negative examples* of (non-discriminatory) national measures that could not trigger the non-restriction component: In "Semeraro Casa Uno", e.g., the ECJ had to deal with opening hours for retail shops on Sundays and public holidays that applied to all traders exercising their activity in Italy. The ECJ not only came to the conclusion that the national rules concerned fell under the "selling arrangements" category (and therefore out of the scope of Art. 28 EC Treaty) since there was no specific problem of "access to the market" for imported products, but the Court furthermore also held that that there was no restriction under Art. 43 EC Treaty either, since the disputed legislation´s "purpose is not to regulate the conditions concerning the establishment of the undertakings concerned; and that any restrictive effects which it might have on freedom of establishment are too uncertain and indirect for the obligation laid down to be regarded as being capable of hindering that freedom"[114]. The issue in the "Graf" case was whether Art. 39 EC Treaty could be infringed by a national provision which, without distinction between cross-border and purely domestic situations, denied entitlement to compensation on termination of employment in the case of a worker who terminates his contract of employment himself in order to take up employment with a new employer. Here the ECJ explicitly stated that non-discriminatory measures by the state of origin may "constitute an obstacle" to an employee´s freedom of leaving that state, but that "in order to be capable of constituting such an obstacle, they must affect access of workers to the labour market". In respect of the national rule in question, the Court was of the opinion that its effects were too uncertain and indirect … to be capable of being regarded as liable to hinder freedom of movement for workers"[115].

It is important to notice that in the former of the two last-mentioned judgments implicitly and in the latter even explicitly reference is made to a line of ECJ decisions which, before and after "Keck", sorted a number of non-discriminatory national measures out of the scope of Art. 28 EC Treaty because they did not have the specific purpose of regulating trade in goods and their effects were "too uncertain and indirect … to hinder trade between Member States"[116]. This approach, which has been described as a "rule of remoteness" in legal writing[117], can also be discovered in the area of free movement of services[118]. Thus, just as the "market access" test has come to the fore in "Keck" and subsequently entered the fields of the other fundamental freedoms, this "rule of remoteness" has now become a common feature of all Treaty freedoms. In fact, it is submitted that both aspects are nothing else than the two sides of one and the same coin since they are both concerned with defining the outer boundary of the fundamental freedoms´ non-restriction component.

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[108] See Chalmers, 19 E.L.Rev. (1994), 385 at 402; Steindorff, ZHR 158 (1994), 149 at 160; Cordewener, footnote ???, p. 289 et seq. with further references.
[109] Chalmers, 19 E.L.Rev. (1994), 385 at 401; Cordewener, footnote 4, p. 280 et seq.
[110] Compare Cordewener, footnote 4, p. 280 et seq., p. 293 et seq. with several references.
[111] ECJ, C-384/93, *Alpine Investments*, [1995] ECR I-1141 at 33 et seq. Cf. Cordewener, footnote 4, p. 278 et seq.
[112] ECJ, C-415/93, *Bosman*, [1995] ECR I-4921 at 98 et seq. Cf. Cordewener, footnote 4, p. 278 et seq.
[113] ECJ, C-463/00, *Commission v. Spain*, [2003] ECR I-4581 at 58 et seq.; C-98/01, *Commission v. UK*, [2003] ECR I-4641 at 45 et seq.
[114] ECJ, C418/93 et al., *Semeraro Casa Uno Srl et al*., [1996] ECR I-2971 at 13 et seq. and at 32.
[115] ECJ, C-190/98, *Graf*, [2000] ECR I-493 at 22 et seq.
[116] See ECJ, C-69/88, *Krantz*, [1990] ECR I-583 at 11; C-93/92, *CMC Motorradcenter*, [1993] ECR I-5009 at 12; C-379/92, *Peralta*, [1994] ECR I-3453 at 24.
[117] See, e.g., Schilling, Europarecht 1994, 50 at 60 et seq.; Oliver, 36 CML Rev. (1999), 783 at 788 et seq. Compare also A-G Jacobs, C-412/93, *Leclerc-Siplec*, [1995] ECR I-179 at 45.
[118] See ECJ, C-159/90, *Grogan*, [1991] ECR I-4685 at 24, where the Court stated that the "link" between a national measure and the provision of medical services was "too tenuous … to be capable of being regarded as a restriction" within the meaning of Art. 49 EC Treaty.

In this context it may well be difficult to transfer the ECJ´s "Keck" approach to the other free movement guarantees, and in particular to those protecting persons and capital, as a distinction between "product requirements" and "selling arrangements" may be inadequate in the realms of factors of production. However, the application of the "market access" test should not be based on formalistic but rather on substantive considerations, and the whole test must be placed in the wider context of the Treaty aim of an internal market. It has convincingly been argued that, in "Keck", the ECJ has rearranged the interpretation of the fundamental freedoms and redirected their focus from unlimited economic free movement within the territorial reach of the EC Treaty to the abolition of obstacles to free trade "as between Member States" (Art. 3(1) lit. c EC Treaty). The fundamental freedoms have received a functional application which has to "concentrate on whether and when non-discriminatory state regulations *specifically* place a burden on the Community-wide distribution of goods"[119] or other products in the form of services or, as the case may be, on the Community-wide allocation of labour and capital[120]. The basic question is that of whether a particular national measure has the effect of *splitting up* the internal market into several domestic markets, and the factors determining the answer must primarily be economic ones. It must be asked whether that national measure *seals off* a domestic market by constituting a "barrier to entry" (or to "exit"), which brings the obligations of Member States under the fundamental freedoms in a close parallel to the obligations of private enterprises under the general competition law norm of Art. 81 (ex Art. 85) EC Treaty[121].

2) Classification of non-discriminatory restrictions

Against the background of the above analysis, there are two main groups of national measures that can be positively identified as falling under the fundamental freedoms´ non-restriction component. First of all there are provisions which, due to their mere existence and close causal link to a particular economic activity, cause an absolute burden to cross-border transactions. These rules can be relevant for inbound or outbound situations, and they largely consist of prohibitions on the exercise of a particular activity. A clear example is the ban on "cold-calling" that restricted the freedom to provide cross-border services in the "Alpine Investments" case[122]. Another example is a so-called "single practice rule" which prevents certain entrepreneurs, and in particular members of a free profession, from having more than one place of professional establishment. With regard to lawyers the ECJ decided in "Klopp" that this was a "restriction" prohibited by Art. 43 EC Treaty[123]. Even though the Court did not explicitly go beyond non-discrimination, in substance the non-restriction component was applied, for mere equal treatment would not have solved the problem as the rule in question not merely contained "an impediment to the exercise of the right of free movement, but a pure and simple denial of the right of secondary establishment"[124]. In fact, in an earlier case concerning a similar rule for medical doctors the ECJ had already indicated that Art. 39, 43 and 49 EC Treaty prohibit any "restrictions" caused by national rules which either "discriminate against practitioners established in other Member States or raise obstacles to access to the profession which go beyond what is necessary in order to achieve the intended goal"[125]. Finally, the "Bosman" case can be mentioned where the transfer fee rule did not completely prohibit the transfer to a new employer but nevertheless formed a serious hindrance to leaving the labour market of one Member State and entering that of another Member State[126].

A second category of non-discriminatory restrictions are those caused by national measures imposing dual regulations (or "double burdens") on a specific cross-border activity. This is in particular the case when diverging national provisions applying to one and the same transaction prevent economic actors from expanding their activities beyond their home state and from entering the domestic markets of foreign host states, so that an EU-wide distribution of goods and services or allocation of labour and capital is made impossible or at least extremely difficult. In the sphere of free movement of goods, the classical example is the situation in "Cassis de Dijon" where French fruit liqueurs with an alcohol content of 20 % or less could not be marketed in Germany because under German law a minimum alcohol content of 25 % was required[127]. A similar restriction to imports under Art. 28 EC Treaty was caused by the German "Reinheitsgebot", which provided that beverages could only be marketed as "Bier" in Germany if certain raw materials without any additives

[119] Roth, 31 CML Rev. (1994), 845 at 853. Compare also Eilmansberger, Juristische Blätter 1999, 434 at 438 and 452; Cordewener, footnote 4, p. 264 et seq. On the specific case of export of goods see *infra* C.I.
[120] See Cordewener, footnote 4 p. 280 et seq., p. 285 et seq., p. 293 et seq.
[121] This is not really astonishing if on takes into consideration that the "Dassonville" formula itself had been transferred almost literally from the field of Art. 81 to that of Art. 28 EC Treaty. See Cordewener, footnote 4, p. 294 et seq. with further references. The idea that a particular national provision is capable of "partitioning" the common or internal market into several domestic markets has been emphasised explicitly in cases dealing with intellectual property rights under Art. 28. EC Treaty. See, e.g., ECJ, 192/73, *HAG I*, [1974] ECR 731 at 11; 187/80, *Merck v. Stephar*, [1981] ECR 2063 at 13; C-267/95 & C-268/95, *Merck v. Primecrown*, [1996] ECR I-6285 at 36.
[122] *Supra* B.I.1.
[123] ECJ, 107/83, *Klopp*, [1984] ECR 2971 at 19.
[124] Bernard, 45 I.C.L.Q. (1996), 82 at 90. Compare also Cordewener, footnote 4, p. 276 et seq. with further references.
[125] ECJ, 96/85, *Commission v. France*, [1986] 1475 at 11. See also ECJ, C-351/90, *Commission v. Luxembourg*, [1992] ECR I-3945 at 14.
[126] *Supra* B.I.1.
[127] See ECJ, 120/78, *Rewe-Zentral-AG*, [1979] ECR 649 at 8, where the Court speaks of "obstacles to free movement within the Community resulting from disparities between the national laws".

were used[128]. As far as the freedom to provide services is concerned, it seems that the ECJ has even developed a rather strict attitude towards non-discriminatory restrictions under Art. 49 EC Treaty, especially when it comes to national rules requiring a service provider established and engaged in a lawful activity in one Member State to obtain a specific licence, to undergo an authorisation procedure and possibly even be entered on specific registers, or to make use of intermediaries such as lawyers in order to be allowed to provide his services to recipients in another Member State[129].

Further examples can also be found in the area of free movement of persons: In "Vlassopoulou", for instance, the issue was whether a Member State could make admission to the national bar subject to the condition that a complete legal education under the host state´s system had been obtained. The ECJ decided that "national requirements concerning qualifications may have the effect of hindering nationals of the other Member States in the exercise of their right of establishment" guaranteed by Art. 43 EC Treaty, in particular "if the national rules in question took no account of the knowledge and qualifications already acquired by the person concerned in another Member State"[130]. In addition, it may even be argued that a host state´s refusal under the "real seat" doctrine to recognise the legal existence of a foreign company that is validly incorporated abroad after it has transferred its actual centre of administration to that Member State[131] must be regarded as a non-discriminatory restriction under Art. 43, 48 EC Treaty, since it would require the shareholders to set up a new corporation on the basis of the domestic legal system of the host state.

Many of the afore-mentioned cases, where the obstacle to cross-border economic movements was particularly due to the divergent requirements to be met in different Member States, have also been discussed under the headings of "covert", "hidden" or "factual" discrimination by several authors. However, in order not to overload the non-discrimination component with demands not only for legal but at the same time also for factual equality, it seems more appropriate to deal with these situations from the perspective of a non-restriction principle[132]. This is in fact also the solution that seems to be favoured by the ECJ, and this is even more apparent in a line of cases where the dual burden to cross-border activities was not caused by divergent standards but by the mere coaction of national provisions of different Member States. The clearest example for this are the decisions on the double levy of social security contributions, in which the ECJ has pointed out that the simultaneous imposition of such levies on one and the same cross-border activity by two different Member States constitutes a restriction of, as the case may be, the free movement rights guaranteed by Art. 39, 43 or 49 EC Treaty[133]. Thus, it seems that if there are double burdens of any kind, the ECJ is easily tempted to assume the existence of a non-discriminatory hindrance to market access that is covered by the fundamental freedom´s non-restriction component.

Still, the ECJ has also made clear that there is an outer boundary for the application of the non-restriction principle. In its "Peralta" judgment the Court first emphasised that, "in the absence of Community harmonization, a Member State may certainly impose, directly or indirectly, technical rules which are specific to it and which are not necessarily to be found in the other Member States". Quite generally, the Court then added that "the difficulties which might arise" for certain undertakings confronted with these national rules "do not affect freedom of establishment within the meaning of Article 52 of the Treaty. Fundamentally, those difficulties are no different in nature from those which may originate in disparities between national laws governing, for example, labour costs, social security costs or the tax system"[134]. Thus, at least as long as there is no coaction between the domestic systems of several Member States that may cause a specific obstacle to an individual act of cross-border free movement, the mere co-existence of disparate national rules in different Member States will generally not trigger EC law protection but will have to be accepted as the normal situation in a European Community with a federal-type structure and now 25 national (and a multitude of additional regional) legislators. Therefore it is correct when the German Federal Tax Court in a recent judgment states that the (non-discriminatory) imposition of business trade tax on all commercial activities exercises in Germany does not in itself infringe the fundamental freedoms, even if no other EC Member State had a similar tax[135]. Quite similarly, there is no restriction of fundamental freedoms if an economic actor falls under the rules on wealth tax in the host state while his home state did not maintain such tax[136].

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[128] ECJ, 178/84, *Commission v. Germany*, [1987] ECR 1227 at 28.

[129] See, e.g., ECJ, C-76/90, *Säger*, [1991] ECR I-4221 at 12 et seq.; C-3/95, *Reisebüro Broede*, [1996] ECR I-6511 at 26 et seq.; C-222/95, *SCI Parodi*, [1997] ECR I-3899 at 18 et seq.; C-55/98, *Corsten*, [2000] ECR I-7919 at 33 et seq.; C-215/01, *Schnitzer*, n.y.r. at 34. Compare also Cordewener, footnote 4, p. 269 et seq. with further references.

[130] ECJ, C-340/89, *Vlassopoulou*, [1991] ECR I-2357 at 15.

[131] ECJ, C-208/00, *Überseering BV*, [2002] ECR I-9919 at 78 et seq.

[132] Cf. Cordewener, footnote 4, p. 178, p. 256 et seq., p. 267 et seq.

[133] See ECJ, C-43/93, *Vander Elst*, [1994] ECR I-3803 at 15; C-53/93, *Kemmler*, [1996] ECR I-703 at 12; C-272/94, *Guiot*, [1996] ECR I-1905 at 15 et seq.; C-369/96 & C-376/96, *Arblade*, [1999] ECR I-8453 at 50 et seq.; C-302/98, *Sehrer*, [2000] ECR I-4585 at 34 et seq. Cf. Cordewener, footnote 4, p. 273 et seq., p. 867 et seq.

[134] ECJ, C-379/92, *Peralta*, [1994] ECR I-3453 at 34.

[135] Bundesfinanzhof, judgment of 18 September 2003 – X R 2/00, Finanz-Rundschau 2004, 82, 85 at II.3.b.bb (1).

[136] See Weber, fiscal weekblad FED 1997/176, 722 at 727, referring to the example of a Belgian worker moving to the Netherlands.

II. Why the basic structure of all fundamental freedoms should be identical

As the foregoing analysis demonstrates, the same leading principles can be found throughout all the different fundamental freedoms, and this goes for their non-discrimination just as for their non-restriction component. It must be emphasised that there are indeed a number of good reasons for this so-called general "convergence" in the interpretation of the Treaty freedoms towards a symmetric structure[137]. The main reason is to be seen in the fact that the freedoms´ common denominator, the definition of the "internal market" in Art. 3(1) lit. c and Art. 14(2) EC Treaty, does not make any distinction at all between the scope and structure of the different free movement guarantees. On the contrary, these general provisions require a uniform interpretation of the individual freedoms and often actually serve the ECJ as the decisive legal basis for analogies[138].

Yet, there are also other reasons, in particular aspects of legal certainty and clarity, why interpretation should not differ from one freedom to another. In particular, only a uniform interpretation can serve to prevent illogical and contradictory gaps in the legal protection of market participants against measures taken by the Member States. This is especially true with regard to cases on the borderline between different freedoms. The distinction between the free movement of goods and the freedom to provide services, for example, is based on the criterion of whether a particular transaction concerns a moveable item, which leads to difficulties when it comes to lottery tickets or energy supply[139]. Freedom of establishment and free movement of workers, on the other hand, are distinguished on the basis of whether a self-employed activity is exercised, which has caused confusion as far as managing shareholders are concerned[140]. Based on the same criterion, the line between free movement of workers and freedom to provide services is drawn, and already in a very early judgment the Court clearly emphasised that this must not lead to any significant difference in the application of the two freedoms[141]. Furthermore, freedom to provide services is very closely connected to freedom of establishment, as the latter comes into play once the self-employed person concerned participates, "on a stable and continuous basis, in the economic life of a Member State other than his State of origin"[142]. Thus, once again there is a "grey area"[143], and the same can be said with regard to financial services on the borderline between free movement of services and capital[144], or to shareholdings in enterprises on the edge between freedom of establishment and free movement of capital[145].

In fact, it can even be observed that the application of one freedom or another may be rather coincidental. In quite a number of preliminary ruling procedures under Art. 234 (ex Art. 177) EC Treaty it was not quite clear which freedom actually applied to the specific facts of the individual case, and it is obvious that in such a situation the ECJ tries to protect market participants in the best possible way by applying different freedoms either alternatively[146] or even cumulatively[147]. Moreover, in the procedural framework of an action for infringement under Art. 226 (ex Art. 169) EC Treaty an abstract evaluation of a particular national measure from an EC law point of view will have to be made, and its influence on the free movement guarantees will have to be tested detached from the specific facts of an individual case. This may lead to the conclusion that one and the same national measure may violate different Treaty freedoms, depending on the individual factual constellations one could imagine to be affected by that measure[148].

Finally, a peculiarity that may be added in this context lies in the circumstance that sometimes the same facts under the same national provision can constitute an inbound situation under one freedom and an outbound situation under another[149]. In all the afore-mentioned constellations it would be quite unfortunate if the extent of legal protection granted to cross-border activities of market participants should depend on coincidence and arbitrary differences in the interpretation of the scope of the fundamental freedoms. Therefore, it is submitted that a solution for all these borderline-

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[137] On this development see Cordewener, footnote 4, p. 105 with further references.
[138] See *supra* A.I.1 and A.I.2. For further examples in the ECJ´s jurisprudence see Cordewener, footnote 4, p. 104 et seq.
[139] See ECJ, C-275/92, *Schindler*, [1994] ECR I-1039 at 16 et seq.; C-393/92, *Gemeente Almelo*, [1994] ECR I-1477 at 27 et seq. Compare also Cordewener, footnote 4, p. 326 with further references.
[140] ECJ, C-107/94, *Asscher*, [1996] ECR I-3089 at 26 et seq.
[141] See ECJ, 36/74, *Walrave and Koch*, [1974] ECR 1405 at 23 et seq.: "The activities referred to in Article 59 are not to be distinguished by their nature from those in Article 48, but only by the fact that they are performed outside the ties of a contract of employment. This single distinction cannot justify a more restrictive interpretation of the scope of the freedom to be ensured".
[142] ECJ, C-55/94, *Gebhard*, [1995] ECR I-4165 at 25 et seq.
[143] This has even been admitted by the Commission in its Communication on the interpretation of the rules concerning freedom to provide services in the Second Banking Directive, OJ 1997 C 209/6, part 1 at B.3.
[144] See, e.g., ECJ, C-204/90, *Bachmann*, [1992] ECR I-249 at 31 et seq.; C-484/93, *Svensson and Gustavsson*, [1995] ECR I-3955 at 6 et seq.
[145] See, e.g., A-G Alber, C-251/98, *Baars*, [2000] ECR I-2787 at 33 et seq. Compare on this issue also Cordewener, footnote 4, p. 123, p. 327, p. 721 with further references.
[146] See as a recent example ECJ, C-436/00, *X and Y*, [2002] ECR I-10829 at 33 et seq. and at 66 et seq., concerning Art. 43 and 56(1) EC Treaty.
[147] This is particularly true with regard to cases concerning the free movement of persons and services. Compare for instance ECJ, 48/75, *Royer*, [1976] ECR 497 at 19 et seq.; 16/78, *Choquet*, [1978] ECR 2293 at 8 et seq.; C-348/96, *Calfa*, [1999] ECR I-11 at 18 et seq.
[148] With regard to free movement of persons and services see, e.g., ECJ, 96/85, *Commission v. France*, [1986] ECR 1475 at 11 et seq.; C-375/92, *Commission v. Spain*, [1994] ECR I-923 at 9.
[149] See on combinations of Art. 49 EC Treaty (inbound) and Art. 56(1) EC Treaty (outbound) in the field of financial services ECJ, C-484/93, *Svensson and Gustavsson*, [1995] ECR I-3955 at 6 et seq. and 11 et seq.; C-334/02, *Commission v. France*, n.y.r. at 23 et seq.

cases and for each individual situation should be found on the level of justification and proportionality, while the scope of application of all freedoms should have a uniform structure[150].

III. Why non-discrimination should have priority over non-restriction

If one accepts that the different Treaty freedoms comprise both a non-discrimination component and a non-restriction component, the question as to the relationship of these components arises. In this respect a few introductory remarks must be made with regard to the common features, but also as regards the differences between the non-discrimination and the non-restriction principle. To start with, it is important to notice that the non-discrimination component has a very broad function, as it not only aims at guaranteeing equal treatment with other market participants within a particular market but also ensures market access where a market is sealed off by means of discriminatory regulations. Keeping the broadening of the non-discrimination concept for inbound situations and the refinement of the non-restriction concept in its outbound perspective in mind[151], there is actually not too much space left for the non-restriction component to apply and surpass non-discriminatory obstacles to market access ("real restrictions"). Apart from that, there are areas where the absolute concept of non-restriction simply does not work, and that is where cross-border transactions are not burdened in any specific way but still choices of economic actors are distorted because certain advantages are reserved in favour of purely domestic activities. A typical example for this is the reservation of exemptions from social security contributions, of social benefits, of tax exemptions or of deductions from the tax base to domestic economic actors[152]: In such a situation it is only the non-discrimination component, with its relative structure and the fixation of a tertium comparationis, that can open the door towards these advantages also for cross-border economic actors and allows them to take a "piggy-back" ride on an already existing national legal system[153].

Another aspect that must be mentioned is that the effects of the non-restriction component on the domestic legal systems of the Member States are quite severe, for the non-discriminatory obstacle is simply pushed aside by the overriding force of EC law. This may not be too obvious as far as double burdens à la "Cassis de Dijon" are concerned, since the gap in the host state´s system can to a certain extent be closed by falling back to the home state´s rules under the principle of mutual recognition. Yet, things may be different when it comes to other non-discriminatory obstacles à la "Bosman". Against this background it must be concluded that, from a federal point of view and regarding the horizontal distribution of powers between the Community and the Member States, the non-discrimination component is definitely the less restrictive concept of the two, and therefore it makes perfectly sense that the "Keck" judgment is largely regarded as an expression of the principle of subsidiarity laid down in Art. 5(2) (ex Art. 3b(2)) EC Treaty[154]. Altogether it can be said that there should be a priority in the application of the two components in favour of the non-discrimination principle, with the non-restriction principle only applying if the non-discriminatory character of a particular national measure has been established. This does not unreasonably deprive market participants of legal protection since the ECJ has ruled that, on the basis of the non-discrimination component, the group put at a disadvantage can directly claim to have the more favourable regime applying to others applied to itself, too[155], so that cross-border economic actors always have a valuable weapon at their disposal against the Member States.

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[150] Compare Cordewener, footnote 4, p. 325 et seq. with further references.
[151] See *supra* A.II.1.a at (1) and (2).
[152] See, e.g., ECJ, 143/87, *Stanton*, [1988] ECR 3877 and 154/87 & 155/87, *Wolf*, [1988] ECR 3897; C-279/93, *Schumacker*, [1995] ECR I-225; C-237/94, *O´Flynn*, [1996] ECR I-2617; C-307/97, *Compagnie de Saint-Gobain*, [1999] ECR I-6161.
[153] On this derivative participation in favourable national regimes compare Cordewener, footnote 4, p. 233, p. 248, p. 325 with further references.
[154] See Lenaerts/van Ypersele, 30 Cahiers de droit européen (1994), 3 at 18 et seq.; Bermann, 94 Col. L. Rev. (1994), 331 at 400 et seq.; Kapteyn/VerLoren van Themaat, Introduction to the Law of the European Communities – From Maastricht to Amsterdam, 3rd ed., London etc. 1998, p. 587 et seq.; Cordewener, footnote 4, p. 312 et seq. with further references.
[155] See ECJ, C-15/96, *Schöning-Kougebetopoulou*, [1998] ECR I-47 at 33; C-15/95, *Terhoeve*, [1999] ECR I-345 at 57. Compare also Wouters, EC Tax Review 1999, 98 at 106; Cordewener, footnote 4, p. 325.

C. Should there be a distinction in the application of the non-discrimination and the non-restriction principles between inbound and outbound transactions? If so, is this distinction compatible with the concept of a fully integrated market?

It has already been pointed out that the "abolition, as between Member States, of obstacles to freedom of movement of goods, persons, services and capital" (Art. 3(1) lit. c EC Treaty) is the guiding legal concept for an EU-wide internal market, and that the interpretation of the individual fundamental freedoms must be adapted to this concept. This does not only require the Treaty freedoms to apply to both discriminatory and non-discriminatory "obstacles" to cross-border free movement, but it also demands that such "obstacles" must be abolished irrespective of whether they are caused by measures of the home state ("state of origin") or the host state ("state of destination")[156]. This parallel interpretation and application of the non-discrimination and the non-restriction component is a dominant feature of the ECJ´s jurisprudence throughout all the fundamental freedoms[157], and one should in fact assume that the Treaty rules on the free movement of goods, with their identical wordings concerning the prohibition of "quantitative restrictions … and all measures having equivalent effect" on imports (Art. 28 EC Treaty) and on exports (Art. 29 EC Treaty), are the clearest example for the necessity of this uniform approach.

However, if any of the fundamental freedoms does not fit into the general scheme, then this is Art. 29 EC Treaty: From its early case-law on, the ECJ modified the broad "Dassonville" formula in the context of this provision in the sense that it only applies to "national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the state in question"[158]. Since Art. 29 EC Treaty is the only freedom that had no impact on Member States´ direct tax provisions until now, and since it can be assumed that no significant impact is to be expected in the future, it is not the purpose of the present analysis to indulge in the realms of exports of goods. Suffice it to say that it seems that the Court has some trouble with the interpretation of this Treaty rule. This can be exemplified by the fact that this modified formula, in it original version, comprised the additional requirement that the "particular advantage" for the Member State concerned must arise "at the expense of the production or of the trade of other Member States". Even though that annex had disappeared in subsequent decisions[159], the ECJ recently re-activated it and even emphasised that, "unlike Article 28 EC, which concerns quantitative restrictions on imports and measures having equivalent effect to such restrictions, Article 29 EC prohibits only national measures which provide for a difference in treatment between products destined for exports and those sold within the Member State concerned"[160].

Thus, it seems that the Court has not found a clear line yet in this area. This is even underlined by the fact that in the sphere of common market organisations the full "Dassonville" formula is applied to exports[161], and that in the "Monsees" case the Court had decided that a non-discriminatory national rule could violate both Art. 28 and 29 EC Treaty at the same time[162]. It may be added that already several Advocates-General have asked the ECJ to review its approach[163], and that also a growing number of authors in legal doctrine have advocated an extension of Art. 29 EC Treaty beyond a mere prohibition of non-discrimination[164]. On the whole it cannot be denied that such a limited reading of this norm constitutes an anachronism within the whole sphere of interpretation of the fundamental freedoms, and it is hardly surprising that a former judge at the ECJ has based his plea in favour of an extended reading simply on the fact that in Art. 3(1) lit. c EC Treaty all freedoms are mentioned on exactly the same level[165]. It may therefore be concluded that the realisation of an internal market requires a uniform interpretation of all fundamental freedoms, including Art. 29 EC Treaty, as prohibitions of discrimination and non-discriminatory restrictions in inbound and outbound situations.

[156] See *supra* A.I.1, A.I.2 at (2) and (3), B.II.
[157] See *supra* A.II.1.a at (1) and (2) concerning the non-discrimination component, A.II., B.I.1 and B.I.2 concerning the non-restriction component.
[158] ECJ, 15/79, *Groenveld*, [1979] ECR 3409 at 7.
[159] See ECJ, 155/80, *Oebel*, [1981] ECR 1993 at 15; 238/82, *Duphar*, [1984] ECR 523 at 25. See Oliver, 22 CML Rev. (1985), 301 at 303 et seq; Cordewener, footnote 4, p. 221.
[160] ECJ, C-12/02, *Grilli*, n.y.r. at 41 et seq.
[161] Compare Cordewener, footnote 4, p. 283 et seq. with further references.
[162] ECJ, C-350/97, *Monsees*, [1999] ECR I-2921 at 23.
[163] See A-G Capotorti, 155/80, *Oebel*, [1981] ECR 1993 at 6; A-G Lenz, C-415/93, *Bosman*, [1995] ECR I-4921 at 207; Tesauro, The Internal Market of the EC in the Light of the Recent Case-Law of the Court of Justice, Bonn 1996, p. 41.
[164] Compare Cordewener, footnote 4, p. 284 et seq. with further references.
[165] Zuleeg, Betriebs-Berater 1994, 581 at 586.