THE CONCEPTS OF MARKET ACCESS AND DISCRIMINATION AS
ALTERNATIVE GROUNDS OF BREACH OF THE FUNDAMENTAL FREEDOMS
IN THE EC TREATY

This Paper submits the following propositions:-

1. the restriction of market access of by a Host State or Home State is one, distinct, ground of breach of each and every of the fundamental freedoms contained in Articles 28, 29, 39, 43, 49 and 56 of the EC Treaty;

2. the notion of discrimination and the distortion of market participation is a separate, distinct ground of breach;

3. the recent case-law of the ECJ has blurred this distinction which is not only wrong in principle but leads to great difficulty in applying the fundamental freedoms to specific situations in litigation (meaning, in turn, that consistency and predictability of outcome are not achieved).

Market Access

Restriction of market access by a Host State or a Home State is, quite simply, prohibited. The text of Article 39 and Article 43 makes this clear.

1 It is now trite law that all of the freedoms should be construed consistently and subject to the same overall limitations of scope and application: Kraus (Case C-19/92), paragraph 29 of the Judgment of the Court. After all, all of the fundamental freedoms derive their rationale from Article 3.1.C of the EC Treaty which establishes the internal market as a Community objective.
A restriction can be imposed by a Home State which impedes a shift of establishment from the Home State to another State: *R v HM Treasury & Inland Revenue Commissioners ex parte Daily Mail & General Trust Plc* (Case C-81/87), where the ECJ expressly acknowledged that an impediment which restricted the transfer of a UK tax resident company’s seat from the UK to the Netherlands could breach the freedom of establishment on the part of that company to move freely within the Community. However the Court often expresses such market access prohibitions in the language of discrimination: *Asscher* (Case C-107/94); *Biehl v Luxembourg* (Case C-175/88).

As is clear from the text of Article 43, in particular, the notion of discrimination has no part to play in this prohibition against market access.

Examples of the contribution of tax jurisprudence to the development of the market access principle may be found in *Saffir* (Case C-118/96) to *Keller* (Case C-471/04).

So, for example, the Court decided that: restrictions on a tax exemption for savings outside the Home State was held to be unlawful in *Saffir*; the withdrawal of group relief between companies established in a Home State because of the establishment of certain subsidiaries elsewhere in the Community was held to be in breach;\(^2\) similarly the denial of certain intra-group reorganisation provisions between two Swedish resident companies, where the transferee was an indirect subsidiary of the transferor because the intermediate holding companies were located elsewhere in the Community was also a breach;\(^3\) and the restriction

\(^2\) *ICI v Colmer* (Case C-264/96).

\(^3\) *XAB & YAB* (Case C-200/98).
of tax relief to Home State dividends as opposed to Host State dividends is also a breach of the market access principle.\textsuperscript{4}

**Market Participation: Discrimination**

The text of Article 43 (see also Article 39 and Article 58) also, however, sets out an alternative round of breach, namely that of discrimination. However the text of Article 43 makes it quite clear that the notion of discrimination is restricted to the scrutiny of market participation conditions, as opposed to market access conditions. *Daily Mail* (supra) makes it quite clear that the two grounds of breach are distinct and separate. But, as observed above, the Court has often used discrimination language when, in truth, the Court is dealing with market access (for example see *Asscher*: supra).

So far as the notion of “discrimination” is concerned, this means the treatment of persons in the same objective circumstances differently, or conversely, treating persons in objectively different circumstances the same, in either case to the disadvantage of one of the relevant persons: *Sotigu* (Case C-152/73).

Critically, the comparability of circumstances is part of the definition of discrimination as a ground for a breach, rather than a factor which goes to the justification as a cure for breach (so that an absence of comparability and circumstances means that there is no breach at all, rather than being a cure for breach).\textsuperscript{5}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{4}] *Baars* (Case C-251/98); *Verkooijen* (Case C-35/98); *Keller* (Case C-471/04). But see below the criticisms made of the Court’s approach in *Manninen* (Case C-319/02).
\item[\textsuperscript{5}] But see *Saint-Gobain* (Case C-307/97).
\end{itemize}
\end{footnotesize}
Applying the text of Article 43, the notion of discrimination looks at a comparison between a Host State national and the national of another Member State. The text of Article 43\(^{6}\) does not permit a comparison between two Host State nationals, nor between two non-Host State nationals. The so-called “most favoured nation” principle is misconceived, which has been observed by the Court: *D* (Case C-376/03). Indeed, the application of “most favoured nation” merely prohibits positive discrimination. Anti-competition aspects are more properly treated as a matter of State Aid under Articles 87-89.

**ECJ: Approach Blurs the Concepts of Market Access and Discrimination**

Prior to the decision of the ECJ in *Keck* (Case C-267 and 268/91), the Court had blurred the notion of market access as a ground for a breach with discrimination into a single ground for a breach as encompassing any impediment which was liable to dissuade the exercise of the freedoms: *Dassonville* (Case C-8/74). The *Dassonville* formulation was misconceived for the following reasons:-

1. there was no distinction between market access and discrimination which subsequently led to conceptual confusion as to the proper comparison to be made in applying the notion of discrimination and the proper comparisons to be made;

2. the test was subjective rather than objective, which led, in turn, to the notion of taking account of the interaction of Home State and Host State tax systems in ascertaining breach (as in the case of *Manninen* involving the so-called notion of Community-wide coherence).

---

\(^{6}\) The principles of which must be applied to the other freedoms.
The *Dassonville* formulation has survived the application of the market access principle applied by the ECJ from *Saffir* to *Keller* (see above): see, most recently, *Marks & Spencer Plc v Halsey* (Case C-446/03); *Cadbury Schweppes Plc v IRC* (Case C-196/04). *Marks & Spencer* has developed the ECJ’s approach in *Manninen* to take account of the interaction of Home State and Host State provisions in ascertaining breach as a direct result of the application of the *Dassonville* formulation which is also a regrettable consequence of the ECJ’s recent approach. It is correct in principle to scrutinise whether or not a breach of the freedoms has taken place on a country by country basis. The interaction of Home State and Host State provisions should not be taken account of in ascertaining whether or not there has been a breach, since:-

1. that exercise verges on becoming unadjusticiable;

2. it is inconsistent in principle to reject countervailing advantages as justification for a breach in respect of a purported breach of the freedoms by a particular State (Home State or Host State) but take account of effective countervailing advantages in having regard to interaction of Home State and Host State provisions;

3. there will be an inevitable inconsistency of approach between direct actions raised by the European Commission on the one hand and actions raised by specific parties on the other, since in the former case there will be no question of looking at the application of a particular interaction between a Home State and the Host State.

The *Dassonville* formulation has also meant that there is confusion between the grounds of breach on the one hand and justification which cures breach on the other. It is trite law that a justification which cures breach must fulfil a competing Treaty advantage and be
proportionate: *Futura Participations* (Case C-250/95). But justifications which the Court has articulated as curing breach, employing the *Dassonville* formula include “political and economic choices ... to accord with national or regional socio-cultural characteristics”, a balanced allocation of the power to impose taxes, “tax avoidance” which seems, recently, to accord with loss of revenue, and the prospect of double loss relief. None of these justifications are derived from legitimate EC Treaty objectives which trump the fundamental freedoms. They are all grounds for holding that no breach occurred in the first place. Indeed the application of the *Dassonville* formula has led the Court to make not only curious articulations on what can be a justification which cures breach but even more curious articulations of the notion of proportionality. So, in *Marks & Spencer*, a prima facie breach of the fundamental freedoms (restricting group relief to relief amongst Home State resident companies) was justified by reference to the balanced allocation of the power to impose taxes and tax avoidance/loss of revenue but only if the justification was “proportionate” in that the losses which were the subject of a group relief claim could not be claimed in the non-Home State resident company in its own jurisdiction and no other person could use those losses. Hence a Home State will have to look on a day by day basis to each and every country in which companies established in that Home State have established secondary establishments to decide whether they either are (or become) in breach. That is enormously far removed from the conventional notion of proportionality.

---

7 *Torfian Borough Council* (Case 145/88).
8 *Marks & Spencer*.
9 *Marks & Spencer*.
10 *Marks & Spencer*.
11 Which had always been regarded as not being a justification in the absence of abuse, prior to *Cadbury Schweppes* and *Marks & Spencer*. 


Conclusion

The market access/discrimination distinction is correct as a matter of the application of the text of the Treaty and in principle. The confusion in the ECJ’s case-law has led not only to conceptual confusion as a matter of legal academia but confusion as to the application of the Treaty in relation to actual tax systems of Member States. This is to be regretted.