The several internal markets

Stephen Weatherill
Faculty of Law and Somerville College, University of Oxford

I Introduction

> '[F]ree movement of people is one of the four essential freedoms. These four freedoms are indivisible. This is how our Single Market works. And let me be clear: the integrity of the Single Market will never be compromised in these negotiations' (Michel Barnier). 1

> 'In a colourful interview with the Czech daily Hospodářské noviny Mr Johnson [was quoted] as using the word "bollocks" in reference to the idea of the free movement of people being a founding principle of the EU. To many EU officials the union's four freedoms – goods, services, capital and the free movement of people – are essential to membership. But in the interview, Mr Johnson, added: "It's a total myth - nonsense. It is stupid to say that freedom of movement is a fundamental right. It's something that has been acquired by a series of decisions by the courts. And everyone now has in his head that every human being has a fundamental, God-given right to go and move wherever he wants. But it is not. It was never a founding principle of the European Union. It's a complete myth. Total myth' (Boris Johnson). 2

Michel Barnier wants to defend the four freedoms as indivisible, while Boris Johnson wants to shatter their unity. Michel Barnier adopts an elegantly thoughtful tone while Boris Johnson prefers oafish truculence. But in the background both are working on a common understanding: that the EU's internal market is a political construct, and that its nature is open to contestation. They are right. It is not *only* a political construct – internal market lawyers are not out of a job. But there is a remarkably range of ambiguities in the legal definition of the EU's internal market (and related phenomena such as the EEA) and within those vacant spaces political choices are required to determine its shape and direction.

The internal market is a legal concept that is both ambiguous and marked by heterogeneity. The purpose of this paper is to traverse the ambiguous and heterogenous character of the EU's internal market (and related phenomena such as the EEA) and to explain that there are in fact several 'internal markets' to be found in and beyond the EU. [3] This paper is not about Brexit: it is about the definition of the internal market. But Brexit has brought into focus that troublingly imprecise definition, and some of the confusion about hard and soft versions of Brexit stems from the absence of a secure anchor for the debate (though some too stems from calculated misrepresentation of the options, not least by the egregious Mr Johnson).

---

1 'Protecting Citizens' Rights in the Negotiations with the UK', speech delivered at the EUI in Florence, 5 May 2017.

2 'Free movement of people as a founding principle of EU is a 'total myth' says foreign Seretary Boris Johnson', The Independent, 15 November 2016, http://www.independent.co.uk/news/uk/politics/brexit-boris-johnson-freedom-of-movement-myth-immigration-eu-uk-a7419026.html.

3 In Stephen Weatherill, *The Internal Market as a Legal Concept* (Oxford: OUP, 2016) I explore the ambiguities: this paper is more concerned to focus on the points of heterogeneity, and to explore the export of internal market norms to the EEA and beyond.

II Defining the internal market

Michel Barnier's comments confirm a steely resolution to treat the internal market as a single indivisible package based on the four freedoms. It is a stance that was equally plain in the implacable resistance to offering Mr Cameron anything more than confected solutions in the UK's messy and ill-fated process of 're-negotiation' which concluded in February 2016. 4 Moreover the aversion to cherry-picking on the EU's side was matched by Mrs May in the 'Article 50 letter' of 29 March 2017, which declares that the United Kingdom 'does not seek membership of the single market: we understand and respect your position that the four freedoms of the single market and indivisible and that there can be no cherry picking'. 5 But this clarity hides a more complex reality. Within the EU the internal market as a project has provided immense mobilising force, and its progressive deepening is a major reason why the EU is situated towards the more ambitious end of the available models of economic integration that exist: far more than a free trade area, though less than a full political union. But nonetheless the character of the internal market is neither unambiguous nor homogenous – legally, economically or politically.

That the establishment of an internal market is an aim of the EU is stipulated by Article 3(3) TEU. A definition is provided by Article 26(2) TFEU. The internal market 'shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties'. But that is the sum total of the definition supplied by the Treaties, and even though Title 1 of Part Three of the TFEU bears the title *The Internal Market* it is short, containing only two Articles, and is of no practical significance beyond its provision of the basic definitional guidance supplied by Article 26. The issue addressed in this paper is, in short, that the internal market is an area within which the free movement of goods, persons, services and capital is ensured, but they are not ensured in exactly the same way, and nor is their relationship with other EU policies fixed or clear.

In truth the EU has several internal markets. Its market for goods is different from its market for services and different again from its market for people. This is true of primary law, both on the face of the Treaty and in the interpretative approach of the Court. This is examined in Section III. It is true too of secondary law, both in the scope of legislative competence and, more strikingly, in the detailed elaboration of the exercise of that competence, which reveals a kaleidoscope of different patterns sector by sector within the internal market. This is examined in Section IV. A further dimension asks how much more falls within the scope of the internal market beyond the well-recognised focus on the four freedoms, competition law and legislative harmonisation. This is examined in Section V, and covers both legal bases in the Treaty which make an explicit connection with the internal market and, more awkward, those that do not. A further set of questions focus on Treaty provisions that prohibit particular choices where they would conflict with the internal market. This is examined in Section VI, and it focuses on the most illuminating example, the procedures that permit enhanced co-operation among a group of Member States. A further element in the mix is provided by the ready export of familiar provisions of EU internal market law to a wider terrain. Section VII looks at the EEA and Section VIII at other agreements with third countries. Here what is built is an internal market of sorts, but one that is not identical to that within the EU, even if much of the applicable terminology is identical. Section IX concludes.

---

4 OJ 2016 C69I/1.

5 https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50.

III When and how are practices subjected to the disciplines of internal market law?

Article 26 TFEU defines the internal market as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties', but that formula leaves open a range of crucial questions. Most prominent are those of a vertical and horizontal nature. The vertical issue asks how far, and on what basis, shall regulatory choices made at State level be subject to review pursuant to EU law, and the horizontal issue focuses on the division of labour at EU level – specifically, how much shall be achieved by judicial review and prohibition of national practices that impede cross-border trade and how much shall be taken forward by the legislative process on the basis of the negotiation and adoption of common rules at EU level in partial or total replacement for diverse national rules. Article 26 TFEU tells us nothing about these matters. The individual Treaty provisions on free movement are a little more helpful, but they are typically written with economy, and leave space for important decisions about the vertical distribution of competences and the horizontal distribution of powers to be taken by the Court of Justice in an environment which is structured by the Treaty but not mapped in precise detail. It would exaggerate to describe the internal market as consequently a judge-made enterprise, but it would not exaggerate at all to insist that the Court has been delegated a power and responsibility to make key choices about the shape of the internal market. It has not always made those choices with perfect clarity, and it has sometimes changed its mind.

A. The internal market - Economic effects

Article 38 TFEU tells us that the internal market 'shall extend to agriculture, fisheries and trade in agricultural products' but this is an oddity, for it is rare across the Treaty texts to find such an attempt to spell out the reach of the internal market. The illuminating point is not what is covered – the illuminating point is what is not. And that is very little.

All sectors of the economy are in principle covered by the TFEU. It is plain that products, workers and services normally easily and uncontroversially fall within the scope of internal market law and so national measures adopted by public authorities or private practices that address them in such a way as to impede cross-border trade require justification by the regulator.

Just occasionally the Court finds itself able to refrain from investigation on the basis that the matter in question does not fall within the scope of EU law because of an absence of the required economic nexus. The exceptional nature of these cases makes the point: EU law is rarely inapplicable for want of economic context.

SPUC v Grogan was triggered by action taken pursuant to Irish law to stop students' unions in Dublin from providing information about abortion services available in London. 6 The background was the relatively rigid regime controlling abortion which at the time prevailed in Ireland. The Court noted that the students' unions involved in the litigation had no commercial motivation in providing the information: they were merely a conduit for information. So the unions were not engaged in an economic activity and could not rely on EU free movement law, which permitted the Court to avoid balancing the interest in free movement (of pregnant

6 Case C-159/90, *Society for the Protection of Unborn Children Ireland* v. *Grogan*, EU:C:1991:378.

women) and the interest in morality as perceived by Irish law applicable at the time. *Marc Michel Josemans v. Burgemeester van Maastricht* is similar, both in its pattern of potentially sensitive adjudicative choices and in the Court's deftness in avoiding having to make them. 7 The case concerned restrictions imposed in the licensing of 'coffee shops' in Maastricht. Only local residents could use them. The purpose of this restriction was to dissuade 'drug tourism'; its effect was to impede inter-state trade (in drugs and in drug tourists). The Court noted that the harmfulness of narcotic drugs is generally recognised and that accordingly 'there is a prohibition in all the Member States on marketing them, with the exception of strictly controlled trade for use for medical and scientific purposes'. 8 So, the Court concluded, outside those cited strictly controlled channels, narcotic drugs are 'prohibited from being released into the economic and commercial channels of the European Union'. 9 This meant that a coffee-shop proprietor could not reach for the protection offered by EU internal market law. A further and final example of the non-application of free movement law is provided by *Elisabeta Dano*. Ms Dano was a Romanian national resident in Germany who had been refused social benefits for her and her son. 10 She was, in short, economically inactive 11; she had not worked in Germany or in Romania, no was there any evidence that she had looked for a job. The Court ruled that that it was permitted under EU law for the German authorities to refuse 'to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence'.12

For competition law too, which is explicitly tied to the service of the internal market by both Articles 101 and 102 TFEU, rare occasions arise where the economic context is lacking and so EU law does not apply. The offer of goods and services on a given market is an economic activity, and the offeror is an undertaking for the purposes of EU competition law. 13 But activities which count as the exercise of public powers are not for these purposes treated as bearing an economic nature. An example is provided by the Court's agreement that the management of a public social security system is an activity which, though plainly of an economic nature in a general sense, is beyond the realm of economic activity for the purpose of defining the scope of EU competition law. 14

These cases are exceptional, but, more than that, they are also based on reasoning that is fragile or unconvincing or both. In *Grogan* the collision between Irish law and EU law would have been inescapable if the provider of information had been in any way motivated by profit – a supplier of services in London, for example. It was only the identity of the party trying to rely on EU law that saved Court from having to address the collision of values at stake. In *Josemans* the reasoning is weak. The problem to which the authorities in Maastricht were reacting existed precisely because soft drugs were tolerated in the Netherlands and people were crossing borders in order to buy them. And it will be rare to find migrants as economically inactive as Ms Dano was – not least because their lawyers are now able to draw on the ruling to make sure their clients structure their life in such a way as to fall within the protection afforded by EU law. In

7 Case C-137/09, *Marc Michel Josemans* v. *Burgemeester van Maastricht*, EU:C:2010:774.
8 Ibid, para 36.
9 Ibid, para 42.
10 Case C-333/13, *Elisabeta Dano*, EU:C:2014:2358.
11 Ibid, para 73. See also paras 39, 40 and 66.
12 Ibid, para 78.
13 Eg, Case C-41/90, *Höfner and Elser* EU:C:1991:161; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK-Bundesverband and Others*, EU:C:2004:150; Case C-205/03P, *FENIN* v. *Commission*, EU:C:2006:453.
14 Eg Joined Cases C-159/91, C-160/91, *Poucet and Pistre*, EU:C:1993:63.

particular the Court has long interpreted (what is now) Article 45 TFEU in a generous manner which extends its protection to the person looking for work in another Member State.15 And it is more common to find cases where the Court refuses to place bodies with some degree of social function, such as provider of health care, beyond the grip of competition law than it is to find it impressed by the claims for autonomy made before it. 16

So even the handful of cases in which the Court places matters beyond the reach of EU law because they lack the necessary 'marketising' element reveal only unusual factual twists rather than any area that is in principle immune from the law of the internal market. And in countless decisions of the Court arguments about the existence of a necessary economic nexus are unaddressed, so obvious is it, from turkeys 17 to ureaformaldehyde 18, bees 19 to waste. 20 Even in *Grogan* the Court, pressed to accept that the provision of abortion 'cannot be regarded as being a service, on the grounds that it is grossly immoral and involves the destruction of the life of a human being, namely the unborn child' 21, decided instead that abortion, lawful in several though not all Member States, is a medical activity which is normally provided for remuneration, and so it is a 'service' within the meaning of the law of the internal market. In similarly broad vein the Court takes the view that an activity must not be provided for nothing, but that a person need not be seeking to make a profit in order for EU law to apply. 22 It is very easy to put a price on something, and even if one wants to object that markets degrade 23, in EU law that is without relevance to the key jurisdictional point that an economic context is readily found with the consequence that the law of the internal market is applicable.

The broad approach to the 'market' applies to all the four freedoms and to competition law and it guarantees a wide application of EU internal market law. On this point the law of the internal market is in its essence homogenous.

B. The nature of a restriction – the internal market

In *Tecnoedi Costruzioni Srl v Comune di Fossano* the Court was asked to consider a challenge to Italian rules which automatically excluded abnormally low tenders from consideration as part of the process for award of public works contracts, public service contracts and public supply contracts which had a value of less than 1 million euros. 24 The value threshold for application of Directive 2004/18 to public contracts is 5 million euros, so it did not apply, but it is clear that primary EU law, specifically the rules on free movement and equal treatment, may apply to practices associated with the award of contracts by public authorities which fall outwith the material scope of Directives on public procurement. 25 But not in this case. The Court demanded that a finding that such practices affected cross-border trade 'must be the positive outcome of a specific assessment of the circumstances of the contract at issue'. 26

15 Case C-292/89, *Antonissen*, EU:C:1991:80.
16 Cf eg Case C-437/09, *AG2R Prévoyance*, EU:C:2011:112.
17 Case 40/82, *Commission v UK*, EU:C:1984:33.
18 Case 26/62, *Van Gend en Loos*,EU:C:1963:1.
19 Case C-67/97, *Ditlev Bluhme*, EU:C:1998:584.
20 Eg Case C-2/90, *Commission* v. *Belgium*, EU:C:1992:310.
21 Case C-159/90 (n 00 above), at para 19.
22 Case C-281/06, *Jundt*, EU:C:2007:816.
23 Neil Duxbury, 'Do Markets Degrade?' (1996) 59 *Modern Law Review* 331. See more recently Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets* (London: Penguin Books, 2012).
24 Case C-318/15 EU:C:2016:747.
25 Eg Joined Cases C-147/06 and C-148/06, *SECAP and Santorso*,EU:C:2008:277.
26 Para 22.

There was no evidence at all to hand. The Court noted that the value of the contract did not even reach a quarter of the threshold laid down by the Directive and that the place of performance was located 200 km away from the border with another Member State. It treated the reference as inadmissible.

But this is exceptional. Much more characteristic of the Court's approach to identifying the necessary cross-border element to a case before it is its observation in *Berlington Hungary*, which concerned legislative restrictions placed by the Hungarian authorities on Hungarian operators of slot machines, that some of the players were holidaying tourists from other Member States and that it was 'far from inconceivable' that operators established in Member States other than Hungary might be interested in opening amusement arcades in Hungary. 27 It advanced no empirical evidence for this claim, but treated it as adequate to establish that inter-state trade was sufficiently affected by the rules and that therefore the EU's internal market laws were triggered. This approach, used generously by the Court across the several freedoms 28, ensures that it is very easy to rely on EU law even in circumstances which seem to be largely confined to a single Member State. And probably it is justified. In an internal market the very point is that one should expect economic operators to be attentive to opportunities to penetrate new markets, so the fact they are not currently doing so is not decisive – it may even be taken as hint that obstacles prevent them from doing so. In similar vein the Court long ago decided that a cartel operating on the territory of a single Member State and comprising only traders based in that Member State exerts the required effect on inter-State trade to trigger the application of what is today Article 101 on the basis that such arrangements harm opportunities for other parties to trade into that market: such rules tend 'to reinforce the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about'. 29 Again, this is to assert a wide scope of application for EU internal market law, but it seems perfectly justified, and it is an approach to which the Court adheres today. [30]

The Court has famously asserted that the free movement provisions control not only national measures that act as physical barriers to inter-State trade and measures that discriminate on the basis of origin but also national technical regulations that apply without distinction based on origin, but which impede inter-State trade simply because they are different State by State. In *Dassonville* the Court brought 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade' within the scope of what is today Article 34 TFEU. 31 This offered a promise of a very broad effects-based approach to internal market law, not hemmed in by the rather stilted language of the Treaty, which in Article 34 refers to 'quantitative restrictions'. In fact, just as the Court in *Van Gend en Loos* [32] and *Costa v ENEL* [33] moved EU law away from the orthodoxy of public international law by making specific demands about how national legal orders should treat EU law as a new legal order, so too in *Dassonville* the Court wrenched its interpretative approach away from the 'quantitative restriction', the discourse of international economic law, and instead pushed EU internal market law in a new direction which promotes a higher degree of

27 Case C-98/14, *Berlington Hungary and others*, EU:C:2015:386, at para 27.
28 The same phrase, 'far from inconceivable', appears in eg Case C-470/11, *Garkalns*, EU:C:2012:505, at para 21; Case C-367/12, *Susanne Sokoll-Seebacher*, EU:C:2014:68, at para 10; Case C-327/12, *Ministero dello Sviluppo economic* v. *SOA*, EU:C:2013:827, at para 48.
29 Case 61/80, *Cooperative Stremsel- en Kleurselfabriek* v. *Commission*, EU:C:1981:75, para 15.
30 Eg Case C-172/14, *ING Pensii*, EU:C:2015:484, para 48.
31 Case 8/74, *Dassonville*, EU:C:1974:82.
32 Case 26/62 EU:C:1963:1.
33 Case 6/64 EU:C:1964:66.

supervision of national regulatory practices. And the empowering insistence that a potential effect on inter-State is sufficient to trigger the application of Article 34 is aligned with a similar approach in competition law, where the same formula requiring an 'actual or potential' effect on inter-State trade is sometimes visible. 34

But *Dassonville* was a case involving discrimination based on origin, even if the Court's formula was capable of application beyond cases of discrimination. It was not long before the Court would decisively break with any argument that free movement law should catch only discriminatory practices. First in *Van Binsbergen*, a case concerning services 35, and then more famously and more fully in the landmark case on goods, *Cassis de Dijon* 36, the Court chose to shape free movement law in a way that curtails national regulatory autonomy even where it is exercised without reference to the origin of goods, services or traders. In the furtherance of this adventure the Court concocted its own formula which is inspired by the purpose and structure of the Treaty rules on free movement and which fully complies with the model found there, based on prohibition qualified by the possibility of derogation, but which is significantly more supple and sophisticated. National measures that restrict inter-State trade survive only if shown to be justified according to the standards recognised by EU law. They are put to the test. This is a principle of conditional or non-absolute mutual recognition. Neither the host country nor the home country enjoys unconditional competence to decide the standards that govern access to the market: an intermediate model applies instead, according to which the host country (the state of destination) may apply its standards on condition that it has a good reason to insist on them where they serve to exclude imports from home countries (the State of production or initial marketing) which prefer to apply different standards.

It is important to appreciate that the reason why the sickly-sweet taste of Cassis de Dijon is smeared across the pages of every textbook ever written about EU law is not that the Court found that there was a barrier to inter-state trade. It was undeniable that there was a barrier to inter-state trade. A product that met the standards applied in France did not meet the stricter standards applied in Germany and so the product was excluded from the German market. The landmark status of *Cassis* is guaranteed by the way the Court chose to treat that barrier to inter-state trade. The Opinion of Advocate General Capotorti in the case deserves inspection to ensure appreciation that the law of the internal market could have been so different had the Court yielded to the arguments presented before it by the German authority, the Bundesmonopolverwaltung. It argued that the free movement rules should be confined in their application to physical barriers to trade and overtly discriminatory practices, and that divergences between technical standards of the type at issue in *Cassis* should be addressed not by judicially-enforced prohibition but rather by legislative harmonization. This is the argument which the Court resisted in *Cassis*, and this is why the case is so enduringly important, and why it is central to understanding the vertical distribution of competences and the horizontal distribution of powers within the EU. The Court's approach allowed judicial inspection of national rules that impede cross-border trade, and thereby diminished the role played by the political institutions of the EU. And the consequence of this approach is that where national rules are found to lack justification, they are to be disapplied as far as imports are concerned, thereby opening up the internal market to free trade in diverse products, whereas, had the Bundesmonopolverwaltung prevailed, progress could have been made only by the adoption of common EU rules, to the detriment of diversity and the enhancement of centralisation. So

34 Eg Case 61/80 (n 00), para 14; Case C-250/92, *Gottrup-Klim*, EU:C:1994:413, para 54; Case C-295/04 *Manfredi*, EU:C:2006:461, para 42; Case C-172/14 (n 00 above) para 48.
35 Case 33/74, *Van Binsbergen*, EU:C:1974:131.
36 Case 120/78, *Rewe-Zentrale AG* v. *Bundesmonopolverwaltung für Branntwein*, EU:C:1979:42.

Cassis de Dijon insists on a more deregulatory vision than would have applied had the Court been less bold. It means more work for judges, less for the legislative process. This was quickly noted by the Commission at the time of the ruling 37 and the reduced intensity required of the programme of legislative harmonization consequent on the Court's willingness in *Cassis* to place a heavier load on judge-driven free movement law is also a key theme of the White Paper on completion of the internal market, published by the Commission in June 1985. 38

This applies across all the freedoms. There is a basic homogeneity in this aspect of the law of the internal market. *Säger v Dennemeyer* was one of the first cases in which the Court applied its *Cassis* formula to the free movement of services 39 and *Gebhard* was one of the most high-profile early examples of the Court's elucidation of a formula capable of general application across the freedoms 40, but this parallel application has over time become absolutely routine. And so on occasion the Court simply adopts a fused analysis, not troubling to clarify whether the matter concerns goods or services. 41 Moreover, the Court's thematic insistence in *Cassis* that free movement law bites where national measures diverge and that it does not wait for the legislative process to catch up stands with similarly high-profile rulings dealing with other freedoms, such as *Centros* 42 and *Reyners* 43. This approach empowers private litigants, the motors of the internal market and of EU law more generally; moreover, it means that the scope allowed by judges dealing with such challenges for justification of obstructive practices becomes crucial to setting the boundary between deregulation and market protection. This is considered below.

But there must be limits to the reach of EU law into national regulatory choices. And in exploring the location of these limits the homogeneity of internal market law becomes murkier.

It is approaching fifty years since the Court in *Deutsche Grammophon* interpreted the Treaty provisions on free movement of goods and competition law in order to avoid an approach 'which would legitimize the isolation of national markets', and instead it focused on the aim 'to unite national markets into a single market'. 44 So – simply put - national measures that do not threaten this aim are immune from review. This is the concrete application of Article 5(1) TEU, the principle of conferral, to the law of the internal market. But the conversion of the principle asserted by Article 5 into a practically useful means to place limits on the impact of EU law is notoriously troublesome. Koen Lenaerts' aphorism that 'there simply is no nucleus of sovereignty that the Member States can invoke, as such, against the' Union 45 is famous for its focused elegance but also because it captures a fundamental structural truth about EU law. And it is vividly illustrated by internal market law. The Court has struggled to articulate the location of the constitutionally necessary jurisdictional demarcation between national regulatory autonomy and the demands of the law of the internal market and, of particular pertinence to this paper, it has avoided an approach which is explicitly homogenous across the several freedoms guaranteed by the Treaty.

---

37 Commission Notice, OJ 1980 C256/2.
38 COM (85) 310, especially paras 57 *et seq*.
39 Case C-76/90, EU:C:1991:331.
40 Case C-55/94, [1995] ECR I-4165.
41 Eg Case C-390/99, *Canal Satelite Digital v Spain*, EU:C:2002:34.
42 Case C-212/97, *Centros*, EU:C:1999:126.
43 Case 2/74, *Reyners*, EU:C:1974:68).
44 Case 78/70, *Deutsche Grammophon* v *Metro* EU:C:1971:59, at para 12.
45 Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205.

It is worth noting in the first place that there are textual differences in the Treaty. Article 30 prohibits customs duties and charges having an equivalent effect. Article 34 prohibits quantitative restrictions on imports and all measures having equivalent effect. Article 45 directs that freedom of movement for workers shall be secured, and that this shall entail the abolition of any discrimination based on nationality. Article 49 prohibits restrictions on the freedom of establishment, and Article 56 also uses the language of restrictions to address the free movement of services. Capital has become the largely forgotten freedom, not least as a result of the emergence of the Eurozone, and this paper will do little to remedy that forgetfulness, but it too is based on a targeting of restrictions on the free movement of capital in Article 63 TFEU. The provisions on Citizenship of the Union have been part of the pattern of free movement law since they were inserted into the Treaties with effect from 1993, even if their ambition and scope is broader than free movement alone. Articles 20 and 21 TFEU both assert a right to move and reside freely within the territory of the Member States.

The Court has shown little appetite to tie itself to textual specifics. On occasion it tries to follow the wording of the Treaty provisions it is asked to interpret 46 but normally it shows no inclination to be so cramped, and prefers instead much looser teleologically-driven terminology. So it is typical of its methodology that although Article 56 TFEU refers only to the freedom to provide services in another Member State, the Court treats it as covering also the freedom to receive services in another Member State. This interpretation, it explained, is necessary to fulfil 'the objective of liberalizing all gainful activity not covered by the free movement of goods, persons and capital'.47 And one can readily understand the logic of this claim, which is driven by the need to make real the internal market, even while also appreciating how it is insensitive to residual claims to national regulatory autonomy.

But the Court has not always been so aggressively intolerant of the legitimate scope of national regulatory autonomy. Just occasionally an anxiety to take seriously the limits of free movement law surfaces in the Court's case law. A matter that is purely internal to a single Member State is untouched by EU free movement law or competition law, as the Court on relatively rare occasion has had cause to underline. 48 Nor may free movement law be deployed to attack a measure which has a purely hypothetical impact on cross-border activity. 49 But some cases at the margin are trickier and do not disclose a clearly internal context.

The experienced internal market lawyer is now groaning: *Keck and Mithouard*, here we go again. 50 It is admittedly a painfully familiar tale. Allow only one paragraph to capture the essence of the narrative in its application to the free movement of goods. The Court, most of all in its Sunday trading rulings, fell prey to the temptation to apply EU internal market law to instances where, as it itself admitted, 'the marketing of products imported from other Member States is not therefore made more difficult than the marketing of domestic products'. 51 The ruling in *Keck* was the antidote to the Court's own over-extension of EU internal market law. Openly admitting it was time to 're-examine' its case law the Court examined a national

46 See eg the rather laborious examination of whether a measure amounts to a 'restriction' on the free movement of services in Case C-255/04, *Commission v France*, EU:C:2006:401, para 38.
47 Joined Cases 282/82 and 26/83, *Luisi and Carbone* v. *Ministero del Tesoro*, EU:C:1984:35), at para 10.
48 Eg Joined Cases 314 – 316/82, *Waterkeyn*, EU:C:1982:430 (goods); Case C-448/98 *Guimont* EU:C:2000:663 (goods); Case C-64/96 and C-65/96, *Land Nordrhein Westfalen* v. *Uecker, Jacquet*, EU:C:1997:285 (workers); Case 175/78, *Saunders*, EU:C:1979:88 (workers).
49 Eg Case C-299/95, *Kremzow*, EU:C:1997:254; Case C-40/11, *Yoshikazu Iida v Stadt Ulm*, EU:C:2012:691.
50 Cases C-267 and C-268/91, *Keck and Mithouard*, EU:C:1993:905.
51 Case 145/88, *Torfaen BC* v. *B&Q plc*, EU:C:1989:593, para 11; Case C-169/91, *Stoke on Trent and Norwich City Councils* v. *B&Q plc*, EU:C:1992:519, para 10.

measure that restricted a method of sales promotion – in casu, resale at a loss – and placed it beyond the reach of EU internal market law where the provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. 52 But this formula has needed, and continues to need, refinement, first to make clear that there is no intention to shield national practices that have a factually distinct application to the detriment of imports from review 53, and more recently to fashion a new test apt to deal with the impact of national restrictions on use. 54 Such tweaking has attracted anxiety lest the Court undo the retreat sounded in *Keck* altogether 55, but the Court's concern is to negotiate the tightrope the Treaty places it on, based on the building of an internal market which, as Article 5 TEU makes clear, does not wholly subvert national regulatory autonomy.

Keck concerned goods, but exactly the same type of problem arises in areas covered by the other Treaty freedoms. The scope and desirability of 'convergence' of the freedoms has been debated at length in the academic literature. 56 But the Court has never explicitly accepted in principle that *Keck* provides a model suitable for wider application – although it has never denied it either. It has, however, used tests that appear functionally similar, and perhaps identical, to *Keck* in order to place limits on the intrusive effect of the other freedoms on national regulatory autonomy. So in *Simona Kornhaas* the Court was asked to address the compatibility with Article 49 TFEU of a procedure under German law designed to prevent the assets of an insolvent estate being reduced before the opening of insolvency proceedings which had been applied in the context of a German branch of a company established in the UK. 57 The Court agreed that differences between corporate and insolvency law might in some circumstances constitute a restriction of freedom of establishment within the meaning of EU law, but here the relevant German rule did not concern the formation of a company in a given Member State or its subsequent establishment in another Member State, but rather applied only after that company had been duly formed. The Court did not mention *Keck* at all, but the idea seems to run along the same lines – namely that rules which affect the conduct of business on a regulated market, but do not cause friction for those wishing to gain access to that market, escape the scope of EU free movement law. A comparably evasive approach informs the Court's interpretation of Article 56 TFEU on the free movement of services. In *Mobistar and Belgacom Mobile* it accepted that national measures which do no more than create additional costs in respect of the service in question and which affect in the same way the provision of services between Member States and that within one Member State do not fall within its scope. 58 This is probably the same idea as animates *Keck*, but the Court did not mention *Keck*. In

52 Cases C-267 and C-268/91 (n 00) para 16.
53 See eg Case C-470/93, *Verein gegen Unwesen in Handel und Gewerbe Köln* v *Mars GmbH*, EU:C:1995:224; Case C-405/98, *Konsumentombudsmannen* v. *Gourmet International Products*, EU:C:2001:135; Case C-148/15, *Deutsche Parkinson Vereinigung eV*, EU:C:2016:776.
54 Case C-142/05, *Åklagaren* v *Mickelsson, Roos*, EU:C:2009:336; Case C-110/05, *Commission* v *Italy*, EU:C:2009:66.
55 See eg Peter Oliver and Stefan Enchelmaier, 'Free Movement of Goods: Recent Developments in the case law' (2007) 44 *Common Market Law Review* 649, esp at 679-683 and 704; see also Laurence Gormley, 'Inconsistencies and Misconceptions in the Free Movement of Goods' (2015) 40 *European Law Review* 925; Ioannis Lianos, 'In Memoriam Keck: The Reformation of the EU Law on the Free Movement of Goods' (2015) 40 *European Law Review* 225.
56 See eg Peter Behrens, 'Die Konvergenz der wirtschaftlichen Freiheiten im europäischen Gemeinschaftsrecht' (1992) 27 *Europarecht* 145; Peter Oliver and Wulf-Henning Roth, 'The Internal Market and the Four Freedoms' (2004) 41 *Common Market Law Review* 407; Edouard Dubout and Alexandre Maitrot de la Motte (eds), *L'unité des libertés de circulation: In Varietate Concordia* (Brussels: Bruylant, 2012).
57 Case C-594/14 EU:C:2015:806.
58 Joined Cases C-544/03 and C-545/03, *Mobistar* and *Belgacom Mobile*, EU:C:2005:518, para 31; see also

similar vein, in *DKV Belgium*, a case concerning services, the Court explained that free movement law is triggered when undertakings entering the market of a Member State 'are obliged, if they want to be able to access that market under conditions which comply with the legislation of that Member State, to re-think their business policy and strategy'. 59 This too is probably a good way of explaining why and when free movement law places national measures within its grip – but again *Keck* goes unmentioned in the Court's judgment. The Court refrains from joining up the dots to produce a homogenous formula addressing the limits of free movement law's curtailment of national regulatory autonomy.

So the Court has attempted to restrain the sense, most of all evident in its ill-judged Sunday trading rulings 60, that internal market law is a basis for review of any measure of market regulation introduced at State level and has instead tried to narrow down the law by focussing on the concern to prevent fragmentation of the internal market along national lines, but it has mud on its boots and, fed further questions by puzzled national courts, it probably has some way to walk in those boots yet. But the Court's twenty-five year campaign to tilt the law on to a more conservative basis than that visible in the Sunday trading cases, thereby to preserve some viable degree of national regulatory autonomy in matters that are truly local in their impact, has a dramatic point of contrast in the law governing the free movement of persons, most of all that pertaining to third country nationals (TCNs). This is the line of case law begun in *Ruiz Zambrano*.

Ruiz Zambrano concerned a Colombian national with dependent children who held Belgian nationality and who had never left Belgium. 61 The question was whether the Colombian acquired a right of residence in Belgium via her children, who were EU nationals. This might have seemed to be a situation that was purely internal to Belgium, and in fact the Court noted in its ruling this very objection to the applicability of the free movement provisions. 62 But it then ignored the point and set off in an entirely different direction. It declared that Article 20 TFEU 'precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'. 63 This deprivation would occur if the national measure were to force the EU national to leave the territory of the EU. So through this route the TCN could secure protection derived from the EU law rights of the dependent children: if the action planned will cause the children to be forced to leave the EU, then EU law is applicable. They can stay, so can he or she, and national immigration law must accommodate this EU law requirement even where no cross-border aspect is present in the case.

Subsequent case law has helpfully teased out exactly what kind of situations fall within this notion of a deprivation of rights which triggers the application of EU law. 64 But nowhere has the Court offered any convincing articulation of just where this new test owes its origins. In *Ruiz Zambrano* it claimed to draw the new test from its own previous ruling in *Rottmann*. 65 But *Rottmann* was a case where there was a clear cross-border dimension. Perhaps the Court's

---

Case C-98/14 (n 00 above).
59 Case C-577/11, *DKV Belgium*, EU:C:2013:146, para 36.
60 Note 00 above.
61 Case C-34/09, *Ruiz Zambrano*, EU:C:2011:124.
62 Ibid, at para 37.
63 Ibid, at para 42.
64 Especially Case C-256/11, *Dereci*, EU:C:2011:734; Case C-40/11 (n 00 above); Case C-87/12, *Ymeraga*, EU:C:2013:291; Case C-86/12, *Alokpa*, EU:C:2013:645.
65 Para 42 of Case C-34/09 *Ruiz Zambrano* (n 00 above) cites para 42 of Case C-135/08, *Rottmann*, EU:C:2010:104.

approach is in some way associated with the importance of EU citizenship, combined with the widened aims of the EU and deepened commitments to fundamental rights asserted by the amending Lisbon Treaty. So one might choose to treat the right to move mentioned in Article 20 and 21 TFEU as something qualitatively different from, and more generous in scope than, the free movement provisions found in Part Three of the TFEU: people matter more than goods, Citizens matter more than free movers. 66 There are reflections of this nature to be found in the Opinion of Advocate General Sharpston in the case, but this is not how the Court's decision is reasoned. In fact the decision is hardly reasoned at all – its core is simply a short series of assertions. 67 There is a flavour of the Court's heroic judgments of the past, typically brief and impervious to any sense of doubt or nuance. This might lend authority to the judgment. It might indicate a split court. It might do both. We know today that *Van Gend en Loos* was not supported unanimously 68 and it seems improbable that *Ruiz Zambrano* is a decision on which all the judges see eye to eye. *Ruiz Zambrano* is an example given for Michal Bobek's observation that 'collegiality might even lead to almost no reasons at all', though he correctly takes pains to insist this is not normal practice in Luxembourg. 69 And Bobek has also cautioned that academics might have a thirst for an explosion of explanation and dissent, while those who actually have to apply the law on a daily basis might have a very different view, and a healthy preference for judgments that keep things simple. 70 *Ruiz Zambrano*, after all, does give a concrete ruling on how EU law applies to a particular case (a TCN threatened with deportation who has dependent children who are nationals of an EU Member State) – even if it is singularly light on just why this is so. The problem with *Ruiz Zambrano*, however, is that what the Court has done with minimal explanation is not merely technical adjudication, but something constitutionally troubling. Prior to *Ruiz Zambrano* the case which attracted most attention for the Court's remarkably quick willingness to apply free movement law to help an individual threatened by deportation by a Member State was *Mary Carpenter*. 71 Mrs Carpenter, a national of the Philippines, was married to Peter Carpenter, a British national. They lived in the UK, but she was threatened with deportation. She, as a third country national, had no EU law rights. Her husband did, provided he was engaged in cross-border economic activity, which would in turn confer a derivative right on her. His business was selling advertising space in journals and providing publishing services, and some of his dealings were with persons established in other Member States and he also occasionally travelled outside the UK on business. This was enough to bring the matter within the scope of EU free movement law. The Court spends very little time in the judgment explaining the connection between the threatened deportation and the obstacle to inter-state trade, but it does not ignore the need for that cross-border dimension. 72 *Carpenter* is a stretched application of internal market orthodoxy. *Ruiz Zambrano* is quite different. The Court does not even pretend to find a cross-border element to the case. There is not one to be found. This is not at all orthodox. In 1997, in

66 For discussion see Niamh NicShuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford: OUP, 2013), Chapter 4.4; Pedro Caro de Sousa, *The European Fundamental Freedoms: A Contextual Approach* (Oxford, OUP 2015), Chapters 2, 6.2; Alina Tryfonidou, *Impact of Union Citizenship on the EU's market freedoms* (Oxford: Hart, 2016), Chapter 5.
67 Case C-34/09 (n 00 above) paras 40-42.
68 Case 26/62 EU:C:1963:1. See eg (with references) Editorial, 'For History's Sake' (2014) 10 *European Constitutional Law Review* 191.
69 Michal Bobek, 'The Court of Justice of the European Union', Ch 7 in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law*, (Oxford: OUP, 2015) page 171.
70 Michal Bobek, 'Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts' in Maurice Adams, Henri De Waele, Johan Meeusen and Gert Straetmans, *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Oxford: Hart, 2013).
71 Case C-60/00, *Mary Carpenter*, EU:C:2002:434.
72 See especially paras 29-30, 37.

Uecker, Jacquet, the Court explicitly refused to accept that the status of citizenship of the Union is intended to extend the material scope of the Treaty to internal situations which have no link with EU law. [73] In *Ruiz Zambrano*, over a decade later, it has not formally overturned this logic because the ruling insists that the particular matter of the TCN threatened with deportation with consequent effects felt by children as EU nationals *does* have a link with EU law, but in reality *Ruiz Zambrano* has moved the boundary between EU and state competence in matters of migration policy in favour of the former by adapting and expanding the reach of one particular provision of the Treaty which grants (inter alia) a free movement right. To be more institutionally specific, that shift in favour of the EU is such as to empower the *Court* to review State policy choices which are unconnected to inter-State mobility.

It would be kind to describe this as a picture of nuance; more acerbically it reveals opportunism. The Court reaches beyond a concern to control practices that discriminate on the basis of origin. It is concerned with using EU law to address practices that impede access to the market of a regulating State; it is engaged in defining what constitutes a restriction for the purposes of EU internal market law. Sometimes, as in *Ruiz Zambrano*, it is even more demanding. But, as has been powerfully pointed out, such brief summary is to describe the problem rather than to solve it, and much deeper articulation of the issues is required to provide satisfying answers to questions about the proper scope and limits of free movement law. 74 The Court's case law resists distillation to a single test or explanation. It is, frankly, very hard work. And, of particular pertinence to this paper, there is here no homogenous law of the internal market.

C. Personal scope

The line of case law initiated by *Ruiz Zambrano* establishes that the protection afforded by EU law to persons reaches more deeply into situations that appear to be the preserve of a single Member State than applies in the context of goods. But there is a further separation between the freedoms which raises the profile of those affecting persons relative to those affecting goods. This concerns their personal scope. The Treaty provisions governing persons and services bind not only public authorities but also private parties. Those governing goods bind only public authorities. The Treaty does not stipulate this separation. It stems from the Court's interpretative choices. The basis for these choices, however, remains mystifyingly obscure.

In the case law in which the Court declared that the binding effect of Treaty rules on the free movement of persons and services stretch beyond public authorities in the Member States two explanations in particular are visible. First, that the aims of the Treaty are better achieved by reaching beyond the public sector, and second that a restriction to the public sector would breed inequality in application because Member States take different approaches to the scope of the public realm. In this vein the Court has therefore subjected bodies such as sports federations

73 Joined Cases C-64/96 and C-65/96 (n 00 above), para 23.

74 See eg Gareth Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law' (2010) 11 *German Law Journal* 671; Jukka Snell. 'The Notion of Market Access: a Concept or a Slogan?' (2010) 47 *Common Market Law Review* 437; Alina Tryfonidou, 'The Notions of "Restriction" and "Discrimination" in the Context of the Free Movement of Persons Provisions: From a Relationship of Interdependence to One of (Almost Complete) Independence' (2014) 33 *Yearbook of European Law* 385; Ioannis Lianos, 'Shifting Narratives in the European Internal Market: Efficient Restrictions of Trade and the Nature of "Economic" Integration', [2010] *European Business Law Review* 705; Robert Schűtze, 'Of Types and Tests: Towards a Unitary Doctrinal Framework for Article 34 TFEU?' (2016) 41 *European Law Review* 826.

75 and trade unions 76 to the obligations contained in what are today Articles 45, 49 and 56 TFEU. It has even suggested that unilateral action by private parties may be caught 77 but the Court has not consistently adopted this approach and it is probably safer to conclude that only collective action by private parties is subject to review where it obstructs the free movement of persons and services.

The awkward twist is that the Court does not treat the rules on the free movement of goods as capable of binding private parties. Both rationales – that the system works better and more evenly when extended to bind private parties acting collectively – are as readily applicable to goods as to persons and services, but the Court has always set its face against any such approach. Article 34 TFEU controls only the actions of public authorities. 78 True, the Court does not insist on a formalist approach and Article 34 applies to private bodies which have been granted special powers by the State. 79 But the true private party is beyond the reach of the Treaty rules on the free movement of goods and is subject only to the controls exercised by EU competition law, whereas by contrast that true private party must reckon with the application of the rules governing the free movement of persons and services in addition to the competition rules.

The Court's case law is troublingly inconsistent. Plenty of good, albeit divergent, ideas for its renovation have been advanced 80, but for the time being this remains a point on which the heterogeneity of internal market law, and the divisibility of the freedoms, is very clear. If there is a good reason for the Court's differentiated treatment, it may plausibly lie in the higher significance of the rules governing people rather than goods, but no such articulation appears on the face of the Court's record.

D. Justification

The previous sub-sections have shown that not much escapes the reach of the law of the EU's internal market. Or, approaching the matter from the opposite direction, not much can be treated as reliably located within the sphere of national regulatory autonomy. The internal market is a competence shared between the EU and its Member States according to Article 4 TFEU, save only that establishing the competition rules necessary for the functioning of the internal market is an exclusive EU competence, as listed in Article 3(1)(b) TFEU, but the terms on which competences are shared are hugely complicated and they are not homogenous across the freedoms either.

---

75 Case 36/74, *Walrave and Koch*, EU:C:1974:140.
76 Case C-438/05, *International Transport Workers' Federation* v. *Viking Line ABP*, EU:C:2007:772; Case C-341/05, *Laval un Partneri*, EU:C:2007:809.
77 Case C-281/98, *Angonese*, EU:C:2000:296; Case C-94/07, *Andrea Raccanelli*, EU:C:2008:425.
78 Eg Case C-112/00, *Schmidberger* v *Austria*, EU:C:2003:333; Case C-159/00, *Sapod Audic*, EU:C:2002:343; Case C-573/12, *Alands Vinkraft AB*, EU:C:2014:2037.
79 Eg Case 249/81, *Commission* v. *Ireland*, EU:C:1982:402; Case C-171/11, *Fra.bo SpA*, EU:C:2012:453.
80 Cf eg Sacha Prechal and Sybe De Vries, 'Seamless Web of Judicial Protection in the Internal Market' (2009) 34 *European Law Review* 5; Peter Műller-Graff, 'Die horizontale Direktwirkung der Grundfreiheiten' (2014) 49 *Europarecht* 3; Harm Schepel, 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law' (2012) 18 *European Law Journal* 177; Barend Van Leeuwen, 'Private Regulation and Public Responsibility in the Internal Market' (2014) 33 *Yearbook of European Law* 277.

However, once the examination of a national measure that restricts inter-State trade moves to the stage of assessing whether or not it is justified, the Court has promoted a convergent vision. Here the law of the internal market is broadly homogenous. Its approach to justification is common across all the freedoms. *Cassis de Dijon* was the landmark case in which the Court stepped beyond the relatively confined space for justification granted by the several Treaty provisions that list available derogations 81, and embraced a much broader public interest test. This looks for, as the Court put in its judgment, 'a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods'. 82 Justification is the device that prevents free movement law from operating as an exclusively deregulatory exercise. Moreover, justification according to this broad test is available across all the freedoms, not just that relating to goods. So, to pick from hundreds of examples, the Court has weighed the interest in free movement in balance against the protection of vulnerable consumers 83, the protection of the environment 84, the conservation of biodiversity 85, the defence and promotion of culture and artistic property 86, the protection of the special features of sport 87, and the survival of small and medium-sized businesses 88. Among the most spectacular rulings of the Court in recent years have been those which have asked the Court to adjudicate on the collision of free movement rights and rights and freedoms of a social and political nature which are defended by national laws and practices. Rulings such as *Schmidberger*, where protests about environmental damage caused disruption to trade through the Brenner Pass 89, and *Omega Spielhallen*, where cross-border supply of a game involving simulated killing was blocked because of German sensitivities about harm to human dignity 90, provide vivid illustration of the need to adopt a contextually sensitive approach to the shaping of free movement law. Cases in which free movement rights have been restricted because of claims to defend national identity provide further examples of how very rich free movement law has become: richer than the early years of pigmeat and alcoholic drinks would have led one to expect. 91

Moreover, the Court has injected into EU competition law a functionally equivalent readiness to embrace the positive virtue of arrangements that restrict competition in its analysis of the application of the basic Treaty prohibitions, thereby to soften their force in order to take account of the importance of interests reflected elsewhere in the structure of the EU legal order. *Wouters* is the most prominent landmark.92 The Court found that a Dutch rule forbidding the creation of multi-disciplinary partnerships involving barristers and accountants restricted competition, because it suppressed the possibility to offer a wider range of services, which would be apt to

81 Arts 36, 45(3) and (4), 52(1) and 62 TFEU.
82 Case 120/78 (n 00 above) para 14.
83 Eg Case 382/87, *Buet*, EU:C:1989:198; Case C-441/04, *A-Punkt Schmuckhandels GmbH* v *Claudia Schmidt*, EU:C:2006:141; Case C-265/12, *Citroën Belux*, EU:C:2013:498.
84 Eg Case C-2/90, *Commission* v. *Belgium*, EU:C:1992:310; Case C-379/98, *PreussenElektra AG* v. *Schleswag AG*, EU:C:2001:160; Case C-573/12, *Ålands Vindkraft*, EU:C:2014:2037; Joined Cases C-204/12 to C-208/12, *Essent Belgium*, EU:C:2014:2192.
85 Case C-67/97, *Ditlev Bluhme*, EU:C:1998:584.
86 Eg Case C-250/06, *United Pan-Europe Communications Belgium SA*, EU:C:2007:783; Case C-531/07, *Fachverband/ LIBRO*, EU:C:2009:276.
87 Case C-415/93, *Bosman*, EU:C:1995:463.
88 Case C-464/05, *Maria Geurts*, EU:C:2007:631).
89 Case C-112/00 (n 00 above).
90 Case C-36/02, *Omega Spielhallen*, EU:C:2004:614.
91 Case C-208/09, *Ilonka Sayn-Wittgenstein* v. *Landeshauptmann von Wien*, EU:C:2010:806; Case C-391/09, *Runevic-Vardyn*, EU:C:2011:291.
92 Case C-309/99, *J.C.J. Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV* v. *Algemene Raad van de Nederlandse Orde van Advocaten*, EU:C:2002:98.

generate economies of scale, and was liable to limit production and technical development in the field. But the motivation for the prohibition was to guarantee the independence and loyalty to clients of members of the Bar as part of a broader concern to secure the sound administration of justice. The Court decided that this was a valid concern in the public interest and that the rule did not go beyond what was necessary in order to ensure the proper functioning of the legal profession in the Netherlands. So a practice that restricted competition did not fall within the scope of the prohibition contained in Article 101(1) TFEU. Similarly the Court in *Meca-Medina and Majcen* found that a doping ban imposed on swimmers by a sports governing body would not constitute a forbidden restriction of competition within the meaning of (what is now) Article 101 TFEU where it was justified by the legitimate objective of ensuring a 'clean' sport. 93

The Court has ample structural support for its readiness to treat the law of the internal market as porous to such non-economic interests. The Charter and the transversally applicable Treaty provisions such as Articles 11 and 12 TFEU mandate the integration of concerns such as consumer protection, the protection of human dignity and environmental protection into the elaboration of all the EU's policies and activities, and this certainly includes the law of the internal market. But it should be appreciated that the Court was the pioneer, not a mere follower. It was engaged in the elaboration of this sophisticated approach long ago.

This, of course, is not to suggest that all is clear, simple and uncontroversial. There is ample room for debate about whether the Court is sufficiently sensitive to the value of interests advanced by regulating authorities as justification for trade-restrictive practices. 94 It suffices to mention the ferocity of the debate unleashed by the notorious rulings in *Viking Line* and *Laval* 95, in which the Court paid disturbingly little respect to the value of collective action in defence of the interest of workers where that came into collision with corporate mobility. 96 Moreover, the amendments made by the Treaty of Lisbon with effect from 2009 – in particular the grant of binding force to the Charter, embrace of a 'social market economy' in Article 3(3) TEU, and the relegation of the direction that competition shall not be distorted in the internal market from Treaty to Protocol – have enlivened the debate about the constitutional balance between socially motivated public regulation and market competition which is at the heart of the Court's adjudicative task. 97 It should also be appreciated that there is a high degree of

93 Case C-519/04 P, *Meca-Medina and Majcen v Commission*, EU:C:2006:492.

94 See eg Dragana Damjanovic, 'The EU Market Rules as Social Market Rules: Why the EU Can Be a Social Market Economy' (2013) 50 *Common Market Law Review* 1685; Jurgen Schwarze, 'Die Abwägung von Zielen der europäischen Integration und mitgliedstaatlichen Interessen in der Rechtsprechung des EuGH' (2013) 48 *Europarecht* 253: Oliver Gerstenberg, 'The Justiciability of Socio-Economic Rights, European Solidarity and the Role of the Court of Justice of the EU' (2014) 33 *Yearbook of European Law* 245; Gareth Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21 *European Law Journal* 2; Jotte Mulder, 'Responsive Adjudication and the "Social Legitimacy" of the Internal Market' (2016) 22 *European Law Journal* 597; Sacha Garben, 'The constitutional (im)balance between the market and the social in the European Union' (2017) 13 *European Constitutional Law Review* 23; Stephen Weatherill, 'Economic Rights and Fundamental Rights', in Sybe De Vries, Ulf Bernitz and Stephen Weatherill (eds.), *The Protection of Fundamental Rights in the EU after Lisbon* (Oxford: Hart, 2013).

95 Case C-438/05 and Case C-341/05 (n 00 above).

96 See eg Loic Azoulai, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for Its Realisation' (2008) 45 *Common Market Law Review* 1335; Anne Davies, 'One Step Forward, Two Steps back? The *Viking* and *Laval* Cases in the ECJ' (2008) 37 *Industrial Law Journal* 126; Diamond Ashiagbor, 'Unravelling the Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration' (2013)19 *European Law Journal* 303.

97 See eg Niamh Nic Shuibhne, 'Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law', (2009) 34 *European Law Review* 230; Constanze Semmelmann, 'The European Union's Economic Constitution under the Lisbon Treaty: Soul-searching Shifts the Focus to Procedure' (2010) 35

diversity in the way in which the Court structures its judgments which deal with justification in free movement law. Sometimes it leaves ample space to national authorities, preserving a margin of appreciation, sometimes it leaves matters of detailed judgment firmly in the hands of the referring national judge. On other occasions it is much more ready to assert a more heavily centrally directed control. The case law demands a detailed and nuanced assessment. 98 Overall, however, the law governing justification of trade-restrictive national measures in the internal market is homogenous in character.

IV. Legislative competence - harmonisation

A. Harmonisation is plainly connected to the internal market

The orthodox assumption is that where free movement law's potential in achieving the internal market is exhausted, then legislative harmonisation shall take the strain. More concretely, where national measures that restrict inter-State trade are shown to be justified, legitimate diversity in national practice lives on, and harmonisation, the adoption of common rules at EU level in replacement for national diversity, is the way to deepen the internal market.

Article 114 TFEU provides the foundation of the EU's extensive programme of legislative harmonisation. It is explicitly tied to the 'achievement of the objectives set out in Article 26', namely the establishment of an internal market, and it envisages the adoption of measures in accordance with the ordinary legislative procedure 'for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.' Approximation and harmonization are properly treated as synonyms, and it is the latter word that has come to dominate the discourse.

The internal market is here an empowering concept. Article 114 does not equip the EU with competence to harmonize diverse national rules *per se*. Instead it requires that that diversity shall exert a damaging effect on the internal market: that is the constitutionally proper target of harmonisation. It is quite common to find measures of harmonisation adopted on the combined basis of Articles 114, 53(2) and 62 TFEU where the scope of the regime covers not only goods, but also the right of establishment and the services sector.

This trilogy of legal bases was used to support Directive 98/43 on the advertising of tobacco products: in fact, to be precise, the predecessors to Articles 114, 53(2) and 62 TFEU, Articles 100a, 57(2), and 66 EC, were used. And this is the Directive that was annulled by the Court in the first Tobacco Advertising case: *Germany v Parliament and Council*. 99 This ruling famously confirmed that legislative harmonisation has limits, and they are set by the requirement that a measure shall make a sufficient contribution to the establishment and functioning of the internal market. The Court's judgment held, in short, that the Directive simply did not make that required contribution: the Court held, sub silentio, that the EU legislature was in truth pursuing a programme of public health protection camouflaged as

---

European Law Review 516; Dagmar Schiek, 'The EU Constitution of Social Governance in an Economic Crisis: In Defence of a Transnational Dimension to Social Europe', (2013) 20 *Maastricht Journal of European and Comparative Law* 185.

98 It gets it in Jan Zglinski, 'Europe's Passive Virtues: The Margin of Appreciation in EU Free Movement Law' thesis submitted at the EUI, November 2016, http://cadmus.eui.eu//handle/1814/43946.

99 Case C-376/98, *Germany* v. *Parliament and Council*, EU:C:2000:544.

market-making harmonisation. The EU's competence to act in the field of public health granted by Article 168 TFEU is not so wide as to permit harmonisation. But there is no objection to public health serving as the decisive factor in choosing the quality of a harmonised regime adopted on the basis of Article 114 provided only that that regime shall make an adequate contribution to the internal market project. 100 That was what was missing in the case of Directive 98/43. The ruling in the first Tobacco Advertising case is a concrete application of Article 5 TEU to the particular competence provided by Articles 114, 53(2) and 62 TFEU.

The EU legislature learned its lesson. It has larded the Preambles to subsequently adopted measures of legislative harmonisation, including the Directive on tobacco advertising which replaced the annulled measure 101, with insistence that pursuit of the internal market dictates a need to harmonise national rules across a wide range of areas. And it has survived such challenges as have reached the Court to the validity of such legislative choices. 102 Articles 114, 53(2) and 62 TFEU provide a competence to the EU which is limited, as all legislative competences conferred by the Treaty are limited, in accordance with the demands of Article 5 TEU. But those limits, drawn by reference to the internal market project, are in fact generously broad. I have in this vein argued that the EU's legislature has been able to exploit the broad and ambiguous limits of the legislative competences to convert compliance with the principle of conferral into little more than a drafting exercise. 103 The first Tobacco Advertising case is exceptional, and best explained by legislative laziness. The original Directive, 98/34, was just four pages long and supported by just 12 Recitals: inspection of more modern legislative texts will reveal a lot more paperwork being consumed as the constitutionally necessary commitment to fidelity to market-making is asserted, typically using both belt and braces.

In fact the trend in the Court's case law is very strongly in favour of a wide reading of Articles 114, 53(2) and 62 TFEU. So for example the Court has authorised preventive harmonisation. Where it is likely that obstacles to inter-State trade will emerge in the future, because the Member States are about to take divergent measures, then legislative intervention pursuant to Article 114 is valid. 104 Moreover, reliance on Article 114 does not 'presuppose the existence of an actual link with free movement between Member States in every situation referred to by the measure founded on that basis'.105 In order to achieve completeness and clarity of application a measure of harmonisation may properly exert an impact in some instances on situations internal to a Member State. And, a final example of this empowering trend, Article 114 TFEU may be used to provide for the establishment of a body responsible for contributing to the implementation of a process of harmonisation. 106 The only limiting factor is that the tasks conferred on such a body must be closely linked to the subject-matter of the measure of harmonisation.107

---

100 Case C-376/98 (n 00 above) para 88; also Case C-210/03, *Swedish Match*, EU:C:2004:802; Case C-380/03, *Germany* v *Parliament and Council*, EU:C:2006:772.
101 Directive 2003/33 OJ 2003 L152/16, challenged unsuccessfully in Case C-380/03 (n 00 above).
102 Eg recently Case C-547/14, *Philip Morris* v. *Secretary of State for Health*, EU:C:2016:325.
103 Cf Stephen Weatherill, 'The Limits of Legislative Harmonisation Ten Years after *Tobacco Advertising*: How the Court's Case Law Has Become a "Drafting Guide"' (2011) 12 *German Law Journal* 827.
104 Eg Case C-376/98 (n 00 above) para 86; Case C-380/03 (n 00 above) para 41; Case C-58/08, *Vodafone, O2 et al* v *Secretary of State*, EU:C:2010:321, para 45.
105 Joined Cases C-465/00, C-138/01 and C-139/01, *Rechnungshof* v. *Österreichischer Rundfunk*, EU:C:2003:294), at para 41.
106 Case C-270/12, *United Kingdom v Council and Parliament*, EU:C:2014:18.
107 Case C-217/04 (n 00 above) paras 45, 47.

B. Legislative practice

So far, so homogenous. However, once one inspects the content of the legislative acquis which provides a foundation for the internal market, the narrative of homogeneity breaks down.

Harmonisation operates in a wide range of fields, in all circumstances under a logic that asserts that diversity in regulatory approaches among the Member States impedes the smooth functioning of the internal market and that therefore a common EU-wide standard should be introduced. Compliance with the EU's standard is mandatory, and the prize is improved access to the entire internal market. That basic structural narrative is homogenous.

So the internal market for cosmetics and pharmaceuticals and unfair commercial practices is structured in the same way as the internal market for banking services and gambling and hairdressers and recognition of driving licences in the sense that in all cases a mix of primary and secondary legislation provides the foundation for the relevant sector-specific internal market. But at a more detailed level there are significant differences in the nature and scope of the legislative regimes that has been hammered out at EU level. It is conventionally understood that the EU has been more successful in promoting the integration of goods markets rather than markets for services, but that too is a broad generalisation that would require a detailed evidence-based explanation (covering not only law but also culture, language and other obstacles to a seamless internal market across the whole territory of the EU).

To provide an exhaustive account of the legislative *acquis* would demand a huge number of words, and most of them would be remorselessly dull. But it is not difficult at all to find measures which, within their material scope, are marked by heterogeneity in application. This may be geographical – so, for example, successive Directives on the manufacture, presentation and sale of tobacco products have excluded Sweden from the obligation to ban the marketing of tobacco for oral use.108 It may be personal – the Citizens Rights Directive, 2004/38, provides a well-known example of carefully structured differential treatment of the conditions governing the exercise of the right of free movement and residence which are enjoyed by Union citizens and their family members. 109 The rules set out in the Directive are complex and beset by provisos and derogations, and but, stripped down to its essence, the core scheme separates out the migrant's presence in the host Member State into three distinct categories: presence for up to three months, presence for between three months and five years, and presence for more than five years. This is of course not even to mention 'Schengen' which ensures that there are very concrete barriers to the movement of persons between some Member States in the EU. It is not open to the EU's legislative institutions to carve out exceptions which conflict with the core values of EU law. A reminder comes from the ruling in *Association belge des Consommateurs Test-Achats*, in which the Court relied on the Charter to find a provision of Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services to be invalid because it authorised differences relating to sex in the calculation of insurance premiums and benefits. 110 But there is nevertheless plenty of room for permissible differentiation and opt-outs in the legislative acquis in areas which are not controlled by the values enshrined in the Charter. So, for example, Directive 69/493, an orthodox measure of legislative harmonisation laying down common rules

108 The current version is found in Directive 2014/40 OJ 2014 L127/1, see Recitals 20 and 32 and Article 17.
109 OJ 2004 L158/77.
110 Case C-236/09, EU:C:2011:100.

governing crystal glass products as a means to promote an integrated market for such products, included a proviso that a Member State in which the goods are marketed may require that description of the product be in the local language or languages. This option, where used, would cause persisting barriers to inter-State trade. But the Court, asked in a preliminary reference to rule on the compatibility of the scheme with what is now Article 34 TFEU, concluded that this would serve to protect consumers and that the legislature had 'not exceeded the limits of its discretion in the framework of its powers of harmonization'. [111] The EU legislature, like the Member States, is in principle bound by the obligations imposed by the Treaty provisions on free movement, but this does not mean that there is not room for diversity in application where it is shown to be justified. It has become commonplace to note that the geographical and functional expansion of the EU over recent years has generated a differentiated, even fragmented, pattern of application at the level of the Treaty 112 but less attention has been paid to similar phenomena at the level of secondary legislation. However, the internal market is built on more heterogenous legislative foundations than is commonly assumed, and this remains relatively lightly explored. 113 To geographical and personal differentiation one could add temporal differentiation, applicable in particular but not exclusively to acceding States, opt outs and optional derogations – the list of devices of differentiation is long. That list should also include appreciation of the diverse patterns of implementation at national level. The very nature of the Directive depicted in Article 288 TFEU assumes that a choice of form and methods apt to achieve the result intended by the Directive is reserved to the Member States. Their choices are inevitably heterogenous, reflecting local constitutional norms and administrative practices. Account too should be taken of the rise of softer forms of EU governance such as the open method of co-ordination, where the very purpose is to preserve space for doing things differently as a means to learn from experience. Every sector-specific specialist knows how complicated and differentiated the intricate detail of the EU's legislative acquis on paper and in practice really is and could hungrily shovel more examples on to the pile.

Such detail matters in explaining the heterogenous legal and economic shape of the internal market, but at the broader level there are two big structural points to grasp in understanding the relationship between primary and secondary law governing the internal market. The first concerns the material scope of a regime of legislative harmonisation – the wider it reaches, the less practical relevance attaches to the continued application of the primary rules. The second concerns pre-emptive effect – a model of maximum harmonisation transfers regulatory responsibility from primary to secondary law, whereas by contrast minimum rules preserve scope for stricter national measures that continue to be disciplined by primary law.

C. Material scope

111 Case C-51/93 *Meyhui NV v Schott Zwiesel Glaswerke AG* EU:C:1994:312.

112 See eg Bruno De Witte, Andrea Ott and Ellen Vos (eds), *Between Flexibility and Disintegration: the Trajectory of Differentiation in EU Law* (Cheltenham: Elgar, 2017); Jean-Claude Piris, *The Future of Europe: Towards a Two-Speed EU?* (Cambridge: CUP, 2012); Stephen Weatherill, *Law and Values in the European Union* (Oxford: OUP Clarendon Law Series, 2016) Ch 5.

113 But not unexplored: see Grainne de Búrca, 'Differentiation Within the Core? The Case of the Common Market', Ch. 7 in Grainne de Búrca and Joanne Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Oxford, Hart, 2000); and more recently Thomas Duttle, Katharina Holzinger, Thomas Malang, Thomas Schäuble, Frank Schimmelfennig and Thomas Winzen, 'Opting out from EU legislation: the differentiation of secondary law' (2017) 24 *Journal of European Public Policy* 406.

Some measures of legislative harmonisation are precise in their definition of their scope, others are more ambiguous and typically therefore call for the attention of the Court in clarifying just when the EU rule is engaged. So, for example, regular preliminary references have caused Directive 2005/29 on unfair business-to-consumer commercial practices to attract the Court's frequent attention. It has adopted a wide interpretation of the material scope of the measure, treating it as apt to cover any commercial practice directly connected with the promotion, sale or supply of a product to consumers. 114 The Court takes this view because of its concern to ensure that a high level of consumer protection is secured. 115

Across the wide sweep of EU legislative activity there are plenty of cases of this type dotted throughout the *European Court Reports*. Few are of interest to anyone other than specialists in the particular area subject to harmonisation, though all are doubtless of detailed practical significance to such people. One might be forgiven for failing to get excited about whether plasma prepared by means of an industrial process falls within the material scope of Directive 2001/83 on the code relating to medicinal products for human use, but it mattered in determining whether France could prevent a private party from supplying the product. 116

But sometimes questions of material scope have real political saliency. The Services Directive, Directive 2006/123, is a wonderful example of the internal market's capacity to provoke political contestation. 117 The so-called 'Bolkestein Draft', initially proposed by the Commission in 2004 118, would have swept most of the services sector into the liberalising net of a measure of (maximum) harmonization. But opposition was stern.119 Compromises and concessions had to be made. In Article 2 of the finally adopted version of the Directive several highly significant services sectors are excluded from the regime, such as financial services, services in the field of transport, healthcare services, gambling activities, and some social services. This does not immunise these sectors from review where national practices impede the construction of an internal market, but it does ensure that only primary law applies to them, thereby securing space for Member States to advance the normal public interest justifications that apply under free movement law where their practices are attacked.

Although the identification of a measure of harmonisation's material scope is sometimes difficult and often immensely significant to the resolution of a particular dispute and although, in addition, patterns of differentiation mark the acquis, the basic structural point is straightforward enough. The inquiry into material scope serves to determine whether the dispute falls to be resolved in the light of national law conditioned by primary EU law (where it falls outwith the material scope of the EU measure) or instead whether the EU legislative measure itself, which has (wholly or partially) occupied the field, must be taken into account. However, the immense diversity to be found in the ambition attached to the material scope of measures of harmonisation, with consequential vast divergence in the pattern of application of

114 Eg Case C-540/08, *Mediaprint*, EU:C:2010:660.
115 Eg Case C-122/10, *Ving Sverige AB*, EU:C:2011:299; Case C-388/13, *Nemzeti*, EU:C:2015:225.
116 Case C-512/12, *Octapharma France SAS*, EU:C:2014:149. For a structurally similar example arising in the field of environmental protection see Case C-129/16 *Országos Környezetvédelmi és Természetvédelmi Főfelügyelőség*, EU:C:2017:547.
117 OJ 2006 L376/36.
118 COM (2004) 2.
119 See eg Kalypso Nicolaïdis and Susanne Schmidt, 'Mutual recognition on trial: the long road to services liberalisation' (2007) 14 *Journal of European Public Policy* 717; Jeff Loder, 'The Lisbon Strategy and the Politicization of EU Policy-Making: The Case of the Services Directive' (2011) 18 *Journal of European Public Policy* 566.

primary and secondary law, guarantees that at this level of detail the internal market is fragmented and wildly heterogenous.

D. Pre-emption

If it is determined that the matter at hand falls within the material scope of the EU's regime of legislative harmonisation, the logical next question asks whether the EU's intervention precludes any divergent national practice or whether instead it merely confines such autonomy. This is a familiar federalist issue, and descriptors such as pre-emption or field occupation are commonly used, albeit not always with pellucid precision. 120 There are, however, two principal models that are available to the EU legislator – maximum rules or minimum rules. Under a maximum model the EU rules wholly displace national competence: the EU standards act as both floor and ceiling. Under a minimum model the EU rules must be faitthfully implemented at national level, but it is open to national authorities to add stricter requirements on top – the EU standards act as floor only. Minimum rule-making is, in a sense, a much more broadly applicable version of the type of differentiated integration mentioned above: it preserves the flexibility of Member States to prefer different standards from the EU base generally, not simply in particular circumstances defined by the legislative measure.

In some areas the Treaty stipulates that minimum rule-making is the norm. This is true of, for example, consumer protection pursuant to Article 169(4) TFEU and environmental protection under Article 193 TFEU. Where the EU legislates on these bases, the Member States must adopt the standards mandated by the EU. But they may add stricter protection. By contrast Article 114 is silent on this point. It contains merely the much more limited concessions to Member State ability set stricter norms which are contained in its fourth paragraph and those following, which offer a tightly defined scope for stricter measures than the harmonised norm which moreover demands management by the Commission. Legislative practice pursuant to Article 114 TFEU, however, discloses a far more varied pattern. In some areas the internal market is built on measures of maximum harmonisation. In others minimum harmonisation is preferred, with consequent recognition of the value of diversity and local autonomy, at a price paid by the fragmented platform for the internal market.

A typical example of a comprehensive harmonised regime based on maximum rules is provided by Directive 2003/33 on the advertising and sponsorship of tobacco products, the Directive that replaced the measure held invalid in the first Tobacco Advertising case. 121 Its Article 8 is entitled *Free movement of products and services* and stipulates simply that 'Member States shall not prohibit or restrict the free movement of products or services which comply with this Directive'. So once a product or service complies with the requirements of the EU measure it may not be excluded from the markets of any of the Member States. The exceptions contained in the Treaty are no longer available to a Member State: so protection of matters covered by Article 36 TFEU in the case of goods is taken to be wrapped up in and covered by the harmonised regime.

120 Robert Schűtze has campaigned with vigour for improved precision: see eg in *European Union Law* (Cambridge: CUP, 2015), pages 134-146; see also Amedeo Arena, 'Exercise of EU Competences and Pre-Emption of Member States' Powers in the Internal and the External Sphere: Towards 'Grand Unification'?' (2016) 35 *Yearbook of European Law* 28.
121 OJ 2003 L152/16.

As with defining material scope, so with the choice of pre-emptive model: if there is any ambiguity in the text it falls to the Court to resolve the matter. Plenty of decisions of the Court have emphasized this structure, typically in circumstances where the Court interprets such measures as excluding any scope for Member States to have recourse to derogations recognised by the Treaty to justify stricter measures. 122 It is a model that one sometimes finds in areas less technical than those concerning goods or services. Directive 2005/29 concerning unfair business-to-consumer practices in the internal market is a measure which harmonises administrative supervision of the market. 123 The Directive requires the suppression of such unfair practices. It replaces diverse national regimes and it does so under a maximum model. Its Article 4, entitled *Internal market*, declares that 'Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive', which is designed to ensure that practices are treated in the same way wherever they are pursued within the internal market. There is no scope for Member States to choose to establish stricter standards within the field occupied by the Directive. This stern rule has been applied and enforced by the Court in several decisions on the point.124 In fact, the use of a maximum, rather than a minimum, model of harmonisation is the reason why questions about material scope assume such high significance. Where a Member State applies a stricter rule than is mandated by a minimum measure it is of no sharp practical significance whether that national rule falls within the material scope of the EU measure or not – if it does, it is permitted because of the minimum formula, if it does not, it is untouched by EU secondary rules in the first place. But if the measure is of a maximum nature, it is decisive to the survival of the stricter national rule whether the matter falls within the material scope of the EU measure or not. If it does, a Member State should eliminate it; a national court should not apply it pending its elimination. So, as a general observation, maximum rules place greater demands on those lawmakers, administrators and judges engaged in implementation and application of EU measures at national level than do minimum rules.

But minimum harmonisation is far from uncommon in the internal market. The EU's harmonisation of national measures designed to protect the economic interest of consumers has typically been pursued under a minimum model, thereby to permit Member States to add extra protection above that mandated by the EU. Directive 93/13 on unfair terms in consumer contracts provides a well-known example. 125 Its Article 8 declares that 'Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive'. The same pattern is found in Directive 99/44 on consumer sales and guarantees. 126 Article 114 TFEU lacks any comprehensive safety valve of the type found in Articles 169(4) and 191 TFEU, but such individual measures of legislative harmonisation import a proviso that ensures that EU action does not displace room for stricter national action. The political salience of the minimum model as a means to ensure that EU's rules are not the last word in protecting consumers from perceived market imperfections is well illustrated by the Commission's fruitless quest to convert these two Directives into maximum models. A tough political struggle ended in failure. The Commission's argument that a maximum model would guarantee a more smoothly functioning internal market did not persuade those alarmed about

122 Eg Case 35/76, *Simmenthal*, EU:C:1976:180; Case 190/87, *Oberkreisdirektor* v *Moormann*, EU:C:1988:424; Case 60/86, *Commission* v *UK*, EU:C:1988:382; Case C-374/05, *Gintec International*, EU:C:2007:654); Case 246/80 *Broekmeulen* v *Huisarts Registratie Commissie*, EU:C:1981:218.
123 OJ 2005 L149/22.
124 Eg Case C-261/07, *VTB-VAB NV*, EU:C:2009:244; Case C-122/10 (n 00 above). See Jules Stuyck, 'The Court of Justice and the Unfair Commercial Practices Directive' (2015) 52 *Common Market Law Review* 721.
125 OJ 1993 L95/29
126 OJ 1999 L171/12

the necessary implication that only the standard of protection mandated by the EU measure would govern the regulation of the market to the exclusion of diverse national choices. 127

The Services Directive, Directive 2006/123, offers another good example. As mentioned above, the initial draft met fierce opposition and the finally adopted text excludes a number of sensitive sectors from the Directive's material scope. But there was more to the trimming. The original preference of the Commission for a maximum model, which would have located the regulation of services exclusively within the reach of the Directive in replacement for primary law, was too brutal for political taste. It triggered a ferocious backlash against perceived over-liberalisation of the internal market. Directive 2006/123 is based on a model that instead leaves room for stricter national rules in some fields. So in some circumstances compliance with the common standards set at EU level governing the quality of services does not automatically entail that a service provider shall enjoy access to target markets in other Member States. Member States are permitted to choose to set stricter rules where this is justified within the parameters envisaged by the Directive. 128 There is some imprecision in the precise nature of the compromise finally struck 129 and so yet again the Court has been called upon to dot the is and cross the ts. In *Rina Services* it explicitly contrasted the provisions of the Directive which do not allow Member States to justify stricter rules from those that do.130 In fact the Services Directive is neither pure maximum harmonisation – because it does not completely oust national competence to prefer stricter rules – nor pure minimum harmonisation – because the stricter rules that may be preferred at national level are conditioned by the terms of the Directive, which are inspired by primary law, but not co-terminous with it.

Neither the maximum nor the minimum model is right or wrong. The maximum model creates a more even regulatory environment by suppressing national diversity above the EU norm; the minimum model ensures room for expression of values pursued in different ways at national level which the Treaties and the Charter command the EU to respect, such as consumer protection, environmental protection and respect for national identities. The choice between the models depends on one's priorities, and both maximum and minimum rule-making contribute to building an internal market, just not the same type of internal market. 131 The overall result is, once again, an internal market which is marked by startling heterogeneity across the many sectors that have been regulated at EU level.

V. Beyond legislative harmonisation

This paper has so far considered free movement law, competition law and legislative harmonisation. These are building blocks of the internal market. But what more is included within the internal market – what does the EU do which falls outside the concept of the internal market? Where exactly ends the internal market? The Treaty is the obvious place to go. But Article 26 TFEU fails to offer any useful direction on the regulatory framework of the internal

127 Cf Stephen Weatherill, 'The Consumer Rights Directive: How and Why a Quest for "Coherence" Has (Largely) Failed' (2012) 49 *Common Market Law Review* 1279.
128 In particular its Arts. 15(2), 16(3).
129 Cf eg Catherine Barnard, 'Unravelling the Services Directive' (2008) 45 *Common Market Law Review* 323 ; Johan van de Gronden and Henri de Waele, 'All's Well That Bends Well ? The Constitutional Dimension to the Services Directive' (2010) 6 *European Constitutional Law Review* 397.
130 Case C-593/13, *Rina Services*, EU:C:2015:399.
131 See eg Nina Boeger, 'Minimum Harmonization, Free Movement and Proportionality' in Phil Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge: CUP, 2012); Stephen Weatherill, *Contract law of the Internal Market* (Cambridge: Intersentia, 2016), Ch 6.

market. And so it is necessary to look hard at the relevant legal bases scattered throughout the Treaty.

A. Legislating for the internal market

It is easy, if numbingly unexciting, to assemble a list of bases in the Treaty for legislative action which make an explicit connection with the internal market. The linking theme is that each deals with a particular sector, in contrast to the much broader and functionally-driven Article 114 TFEU.

Article 81 TFEU directs that the Union shall develop judicial cooperation in civil matters having cross-border implications, and envisages adoption of measures in accordance with the ordinary legislative procedure 'particularly when necessary for the proper functioning of the internal market'. Article 113 TFEU permits the Council, acting unanimously, to adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation 'to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition'. Article 116 TFEU provides for the possibility of legislative action in cases of legislative differences between the Member States which distorting the conditions of competition in the internal market. None of these has been much used.

Article 118 TFEU provides that 'In the context of the establishment and functioning of the internal market' legislative action taken according to the ordinary legislative procedure may 'establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements'. It is intuitively appealing that an internal market requires a common platform on which intellectual property is protected, and in this sense Article 118 is no more than a sector-specific application of the orthodox logic which underpins legislative harmonisation generally. And the legislative record underlines this alignment. Directive 2008/95 harmonises the laws of the Member States relating to trade marks. 132 It pre-dates the arrival of Article 118 in the Treaty, which occurred only with effect from 2009 when the Treaty of Lisbon entered into force, and accordingly its legal base is Article 95 EC, predecessor of Article 114 TFEU, and its Preamble ties it tightly to addressing disparities between national trade mark laws 'which may have impeded the free movement of goods and freedom to provide services and may have distorted competition' within the internal market. 133 Amending Directive 2015/2436 on trade marks similarly takes the orthodox legal base for harmonisation, Article 114. 134

More recently, Regulation 1257/2012 on the creation of unitary patent protection 135, which was adopted pursuant to a Council Decision authorising enhanced cooperation in the area 136, relies on Article 118. Its Preamble holds that it 'will foster scientific and technological advances and the functioning of the internal market by making access to the patent system easier, less costly and legally secure.' 137

132 OJ 2008 L299/25
133 Recital 2.
134 OJ 2015 L336/1.
135 Regulation 1257/2012 OJ 2012 L361/1.
136 Council Decision 2011/167 OJ 2011 L76/53.
137 Recital 4.

Article 194 TFEU concerns energy. It provides that 'In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment', Union policy on energy shall be developed. As with intellectual property, so with energy: the promotion of a true internal market in the energy sector requires the harmonisation of laws in order to displace diverse national approaches which fragment the market. So for example Directive 2009/72 on the electricity internal market 138 and Directive 2009/73 on the natural gas internal market 139 pre-date the arrival of Article 194 in the Treaty and take Articles 47(2), 55 and 95 EC as their legal bases. Both are underpinned by a thematic concern to complete the internal market in the relevant sectors. This is an area where the extension of harmonization also to mandate the creation of agencies, mentioned in Section IV.A above, is visible. Regulation 713/2009 on the creation of an Agency for the Cooperation of Energy Regulators (ACER)140, is based on Article 95 EC.

One final provision which is tied explicitly to the internal market is odd, but illuminatingly so. It is Article 115 TFEU. It provides that 'Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market'. To which the casual reader of the Treaty would respond with puzzlement – why does this provision even exist, given that Article 114, the immediately preceding provision, allows harmonisation according to a more supple legislative procedure, the ordinary procedure which requires only the support of a qualified majority in Council? A technical answer would be that Article 115 could be relevant in areas of harmonisation that are excluded from Article 114 by its second paragraph, namely fiscal provisions, those relating to free movement of persons, and those relating to the rights and interests of employed persons. But in fact Article 115 is hardly ever used and has no real value. It is there because of ancient history. Article 115 is the successor to the provision equipping the EU with a competence to harmonise which was in the original Treaty of Rome, Article 100 EEC. It was tied to the making of the common market, not the internal market, but has always demanded unanimity in Council. It fell into disuse once what is today Article 114 TFEU was added to the Treaty, which occurred with effect from 1987, the entry into force of the SEA. The key was that Article 114 allows, and has always allowed, QMV in Council. The two provisions co-existed, one referring to the common market and rarely used, the other referring to the internal market and frequently used, until 2009, when the Treaty of Lisbon eliminated all references to the common market in favour of the internal market. It did this without in any way addressing what the change might or should mean. It did it on a plain assumption that the concepts are identical. But they are also identically lacking any precise definition in the Treaties that have existed since 1950s. A better solution would have been to delete Article 115 entirely, but even this more radical adjustment would not have altered the bigger picture, which reveals that terms such as common market and internal market are used in a carefree and legally imprecise manner.

B. Beyond an explicit connection with the internal market

What of Treaty provisions that equip the EU with rule-making competence and which therefore serve to generate common rules but are not explicitly tied to the internal market? The intuitive

138 OJ 2009 L211/55.
139 OJ 2009 L211/94.
140 OJ 2009 L211/1.

divide here is typically between rules that are necessary to create the internal market and rules which regulate that market once in place – which, otherwise put, deal with the consequences of having created an internal market. The former type of rule is self-evidently part of any coherent understanding of the internal market. The latter can generate more debate, but, thematically and crucially, the Treaty does not pin down what is precisely at stake.

A vivid example of the problem is supplied by the White Paper on the Future of Europe published by the Commission in March 2017, which sets out five different scenarios for the EU come 2025. 141 It would be a mistake to take this flabby document too seriously, and its want of legal precision is immediately plain from its use of the term 'single market' rather than 'internal market'. Nevertheless the aficionado is enticed by the second scenario offered, which is 'Nothing but the Single Market'. This landscape would, one would suppose, require some explanation in order to show what falls within the notion of a single market and what is something wider or deeper. But in fact the document makes no attempt to draw the necessary line between the single market and other EU activities which are of a different character. The only hint that there may be a definitional problem in the arrangement of this menu appears tantalisingly at page 22, which, in its elaboration of the fourth scenario 'Doing Less More Efficiently', suggests that the EU might choose to withdraw in whole or in part from 'areas such as regional development, public health, or parts of employment and social policy not directly related to the functioning of the single market'. This is troublingly evasive, but perhaps understandably so, because there is no clarity to be found in primary EU law when one looks for such a crisp margin between the internal market and activities that lie beyond it.

C. Social Policy

Social policy provides a helpful case study. Article 151 TFEU mentions the internal market. It declares that the Union and the Member States 'shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion'. It then adds that they envisage that development in these directions 'will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action'. This is vague: it clearly does not make any coherent or careful connection between social policy and the internal market, but rather it nods loosely and optimistically to two routes to development in this area, that caused by the internal market process itself and that provided by legislative initiative. It is tellingly evasive that Title X on Social Policy, which comprises Articles 151 – 161 TFEU, makes no further mention of the phrase 'internal market' at all.

The political background, however, is well-known. The original Treaty of Rome contained in Article 119 EEC the direction that men and women shall receive equal pay for equal work: the current iteration is today located in Article 157 TFEU. The principal motivation for inclusion of this rule lay in the concern of States that had already regulated in this manner - most of all France – that they would find their socially progressive legislation undermine by States that preferred to leave the market for wages uncorrected – most of all Germany. 142 So the EU rule

141 https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf.
142 For a fuller historical account see Jeff Kenner, *EU Employment Law: From Rome to Amsterdam and Beyond* (Oxford: Hart, 2003), esp Ch 1; Catherine Barnard, *EU Employment Law* (Oxford: OUP, 4th ed, 2012),

replaced national diversity. In 1976 the Court decided *Defrenne v SABENA*. 143 It found that the equality rule was directly effective and, moreover, that it this was true even in 'horizontal' cases, that is, where private parties, an employer and an employee, were involved. The Court emphasised the socially progressive purpose of the equality rule and of the EU more generally, while its approach also sharply improved the potential for effective enforcement of the rule by private individuals acting before national courts. The Court also confirmed that the political background informed the legal interpretation of the rule: it aims to prevent a situation arising in which undertakings established in States which have implemented the principle of equal pay suffer a competitive disadvantage as compared with undertakings established in states which have not so legislated. The EU pursues 'a double aim, which is at once economic and social'. 144 This immediately puts one in mind of the rationales for legislative harmonisation generally. Measures adopted pursuant to Article 114 TFEU have both an economic aim, in the sense that they put in place common rules apt to strengthen the internal market, but also a regulatory aim, in that, whatever rules are adopted at EU level in partial or total replacement for diverse national rules become the EU's choice about where and how to exercise control over unrestrained market freedom.

From this perspective one could argue that just as the internal market requires common binding standards on, say, the composition of cosmetics and pharmaceuticals and on the conduct of unfair commercial practices so too it needs common binding standards on the protection of workers and on social welfare more generally. And in fact the earliest legislative activity in the field was based on Article 100 EEC, the original though now dormant Treaty basis for legislative harmonisation. For example Directive 77/187 on safeguarding of employees' rights in the event of transfers of undertakings was adopted pursuant to Article 100 EEC. 145 It was replaced by Directive 2001/23, which takes the same – albeit amended – legal base, Article 94 EC (which is now, after further amendment, Article 115 TFEU). 146 Directive 80/987 on the protection of employees in the event of the insolvency of their employer was based on Article 100 EEC 147 though its successor and the current version is Directive 2008/94, which takes Article 137(2) EC (now Article 153 TFEU), as its base, and its Preamble emphasises more strongly the protective element rather than simply the need to address regulatory divergence among the Member States. 148

These measures count as a demonstration that there has been at times in the development of the EU a political readiness to treat the harmonisation of standards of social protection as a required element within the building of the internal market. But this is not spelled out clearly in the social policy Chapter of the Treaty. In fact the equal pay rule today found in Article 157 is in any event atypical. Most of the relevant provisions equip the EU with a competence to adopt legislation, rather than setting clear and directly enforceable norms. This locates primary responsibility for action in these areas at national level, and under patterns that will doubtless vary, pending the assembly of political will to act at EU level. And even if the formal scope of EU social policy has been eased outwards on paper over time as the relevant competences have been modestly expanded at times of periodic Treaty revision, that political will has fluctuated. The legislative record is far from insignificant but it is patchy and fragmented, its elaboration

Ch 1.
143 Case C-43/75, *Defrenne* v. *SABENA,* EU:C:1976:56.
144 Ibid, para 12.
145 OJ 1977 L61/26.
146 OJ 2001 L82/16.
147 OJ 1980 L283/23.
148 OJ 2008 L283/36.

is dictated by sluggish and variable political will and latterly the picture has become still murkier in consequence on the rise of the social dialogue now found in Articles 154 – 155 TFEU and the contested virtues of the open method of co-ordination and associated 'softer' forms of governance which seek to escape top-down EU lawmaking orthodoxy. 149 Moreover the application of the EU's procedures designed to avoid excessive deficit and to strengthen budgetary discipline have led to significant disruption in established patterns of social protection at national level, which has included the downgrade of employment protection. Appeal to defence of the 'internal market' is simply not constitutionally strong enough to halt or even effectively challenge such trends. 150

In the abstract one could envisage an internal market of the type defined in Article 26 TFEU as devoid of any common commitment to social policy. In the EU the structure of the Treaty, its aspirations and its history militate against such an aggressive decentralised and deregulated model. Moreover, the Lisbon Treaty made adjustments that are capable being read as having enhanced the social objectives of the EU, in particular in Articles 2 and 3 TEU and the grant of binding force to the Charter. 151 However, that still leaves plenty of room for contestation about just how intense shall be the regulation of the internal market. It has been perceptively counselled that that labour lawyers 'should be alert to the potential provided by the new treaty structure…. [b]ut should not allow themselves to be too easily seduced by the changes'. 152 No specific detailed model for social policy in the internal market can be extracted from the Treaty. There is an enduring ambiguity about how much common policymaking in this field the EU's internal market entails, and the answers are driven largely by political rather than constitutional framing.

D. Cohesion

Title XVIII of Part Three of the TFEU is entitled Economic, Social and Territorial Cohesion, and comprises Articles 174 – 178 TFEU. According to Article 174, the Union shall seek 'to promote its overall harmonious development' by developing and pursuing 'its actions leading to the strengthening of its economic, social and territorial cohesion'. There is no mention of the internal market in Title XVIII, save only for the passing reference to it in Article 175, which provides that the 'formulation and implementation of the Union's policies and actions and the implementation of the internal market shall take into account the objectives set out in Article 174 and shall contribute to their achievement'.

But these provisions in fact have an intimate political connection to the internal market programme. They were added to the Treaty system in 1987 by the Single European Act as part of an understanding that although the basic economics assumed that the internal market project would create growth across all of the Member States, the gains would not be evenly spread. It was politically necessary for the deal to include a readiness to authorise some distribution in

149 In the employment context, see Barnard (n 00 above) Ch 3.
150 Cf eg Catherine Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future' (2014) 67 *Current Legal Problems* 199; Aristea Koukiadaki, 'The legacy of the economic crisis for labour law in Europe', Ch 4 in Alan Bogg, Cathryn Costello and Anne Davies (eds), *Research Handbook on EU Labour Law*, (Cheltenham: Elgar, 2016).
151 See Dagmar Schiek, 'The EU Constitution of Social Governance in an Economic Crisis: In Defence of a Transnational Dimension to Social Europe' (2013) 20 *Maastricht Journal* 185.
152 Phil Syrpis, 'The EU's role in Labour Law: An Overview of the rationales for EU involvement in the field' Ch 2 in Bogg, Costello and Davies (n 00 above), page 23.

favour of less advantaged regions, not only in the long-standing Member States but also under the influence of the Iberian and Greek enlargements during the 1980s. 153

So the Single European Act was of transformative significance in the development of the internal market because it released the brake of unanimity in Council by adding what is now Article 114 TFEU to the legislative armoury while also upgrading the involvement of the Parliament, but that constitutional adjustment was part of a wider package. There is no specifically legal basis for insisting that the internal market is tied to such policies. But politically it plainly is. As with social policy, so with cohesion: the provisions are limited in scope and peculiarly fragmented, although they have been embroidered at times of periodic Treaty revision [154], but they owe their admission to the Treaty structure to the mobilising energy of the project of market integration.

E. The internal market bargain

There is plenty of interesting literature that seeks to develop a principled explanation of how and why competences should be distributed between the EU and its Member States. 155 It is a debate that has been framed by the slogan of subsidiarity, although not necessarily to any helpful effect since, at least in its strict meaning as set out in Article 5 TEU, subsidiarity comes into play only once it has been decided to pursue a particular objective in respect of which the EU possesses a conferred competence, whereas a more critical edge requires that the very decision to act in the first place should be scrutinised. 156 But the current state of the internal market is built on the accumulation of rules and policies over time, and its shape is rough-edged.

The UK government's *Balance of Competences* review, launched in 2012 and concluded in 2014, got this (and many other things) right: in the report dealing with the 'Single Market' it explains how the internal market is more than the four freedoms and is a 'package' or a 'bargain' among the Member States 'in which every Member State has to accept some decisions they find unpalatable in order to gain in other areas'. 157 This is correct. There are many matters that have been carried along on the wind created by the internal market project even if they are not explicitly tied to it in any constitutionally unambiguous sense. They are 'derivatives' of the internal market. 158

Sadly the report on the 'Single Market', like all the other 31 that made up the *Balance of Competences* review, slipped quickly from the brief prominence it enjoyed at the time of publication, presumably because Mr Cameron's alleged re-negotiation of the terms of UK

153 See Simon Bulmer and Kenneth Armstrong, *The Governance of the Single European Market* (Manchester: MUP, 1998), pages 27 – 29; also (on cohesion policy as a 'completive' measure) Clemens Kaupa, *The Pluralist Character of the European Economic Constitution* (Oxford: Hart, 2015), pages 134 - 136.
154 See Ian Bache, 'Cohesion Policy: a new direction for new times?', Ch 10 in Helen Wallace, Mark Pollack and Alasdair Young (eds), *Policy-Making in the European Union* (Oxford: OUP, 7th ed, 2015).
155 See eg recently Richard Levy, 'The law and economics of supranationalism: the European Union and the subsidiarity principle in collective action perspective' (2017) 43 *European Journal of Law and Economics* 441; Roger Van Den Bergh, 'Why the European Union should take the Economics of Federalism Seriously' (2016) 23 *Maastricht Journal* 937.
156 Cf eg Gareth Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 43 *Common Market Law Review* 63; Emanuela Carbonara, Barbara Luppi, and Francesco Parisi, 'Self-Defeating Subsidiarity' (2009) 5 *Review of Law and Economics* 742.
157 https://www.gov.uk/guidance/review-of-the-balance-of-competences, para 1.14.
158 Jacques Pelkmans, 'Why the single market remains the EU's core business' (2016) 39 *West European Politics* 1095, 1096.

membership which was concluded in early 2016 159 and which was designed to pave the way towards a vote in favour of Remain in the referendum of June 2016 did not sit comfortably alongside a documented finding that in the current distribution of competences between the EU and its Member States there is nothing significant that requires any renegotiation.

But appreciation of the complex character of the internal market as a project is also visible in the tormented wake of the British referendum. The European Union Committee of the House of Lords published a thoughtful report entitled 'Brexit – the options for trade' in December 2016. 160 It drew on a quote from a paper published earlier in 2016 by Consultancy Europe Economics to the effect that 'carried to its logical limit there is almost no policy area that could not be seen as in some way connected to the single market', and so it notes that 'the quid pro quo for membership of the Single market is that Member States have to comply with legislation regarding competition and mergers, state aid, environmental protection, employee protection, consumer protection, data protection, procurement, and sector specific regulatory frameworks'. 161 One could readily question whether these are in truth correctly described as quid pro quo – they are arguably simply part of the single market.

The cited paper published by Consultancy Europe Economics captures the ambiguities nicely with the following example:

> ' …. if labour is allowed to move freely, that might be conceived as implying no border guards checking people entering or leaving countries, no showing of identity cards or passports, etc.. But that also may mean no guards preventing criminals skipping outside the reach of the legal authorities where they committed their crimes. If countries are to be happy not to restrict movement across borders, they may also want to achieve a high level of agreement about the pursuit and return of criminals that enter other Member States. In this way, the criminal law, extradition, and policing principles could all in principle be seen as affected by the Single Market'. 162

Again, the animating insight is that the internal market is not a fixed target. The paper adds too that there are 'compromises and trade offs' associated with being involved in the development of a market of this type where there is no agreement on what is included and what is not, and where there is a long-term rhythm which treats economic integration as a means to secure political stability. 163

The sober and thoughtful tone of these contributions is entirely missing from the White Paper 'The United Kingdom's exit from and new partnership with the European Union' published by the UK government in February 2017. 164 This, an exercise in astonishing arrogance and presumably intended merely to reassure a domestic audience that Brexit will be sunnily splendid rather designed as a serious basis for negotiation, is free of any appreciation of the aspirations of the EU-27 or of the historical development of the internal market. Its Chapter 8, ignorantly entitled 'Ensuring free trade with European markets' shows no serious understanding of the complex and ambiguous regulatory structure of the markets which the UK

159 Note 00 above.
160 HL Paper 72, 5th report of Session 2016-17.
161 Para 18.
162 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/224579/bis-13-1058-europe-economics-optimal-integration-in-the-single-market-a-synoptic-review.pdf, at page 14.
163 Page 20.
164 Cm 9417.

wishes to treat as 'free' and begins with the pitifully banal note that 'The Government will prioritise securing the freest and most frictionless trade possible in goods and services between the UK and the EU'. More sophistication is to be found in letters written to Santa Claus by five year-old children.

It is perfectly possible to envisage a system of trade integration that does not include social policy, cohesion payments or any kind of supporting regulatory instruments at all. However, the existence of such possible models does not prove that the EU internal market can be or should be understood in a stripped-down sense. A perfectly plausible retort is that such decentralised and deregulated patterns are not 'internal markets' of the type envisaged by the EU at all. There are several internal markets.

VI. Defending the internal market

There are a handful of instances scattered across the TFEU where defence of the internal market conditions the availability of concessions or derogations sought by Member States. The insertion of reference to the internal market is normally illuminatingly inconsequential and little more than bland window-dressing. So, to take an example that is as trivial as it is typical, Article 349 TFEU takes account of the structural social and economic situation of Guadeloupe, French Guiana, Martinique, Mayotte, Réunion, Saint-Martin, the Azores, Madeira and the Canary Islands. Specific measures may be aimed at laying down the conditions of application of the Treaties to those outermost regions, including common policies. But this shall not undermine 'the integrity and the coherence of the Union legal order, including the internal market and common policies'. 165 Nothing more need be said about this, beyond simply emphasising that referring to the internal market is merely a comforting reflex action.

The best known, and potentially most significant, of these defensive provisions is Article 326 TFEU. This provides that enhanced cooperation shall comply with the Treaties and Union law, and, of particular current relevance, it provides that such cooperation shall not undermine the internal market or economic, social and territorial cohesion. Moreover it shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them.

The scheme of enhanced co-operation was first introduced into the Treaty with effect from 1999 by the Treaty of Amsterdam, though its shape has been adjusted by reforms made subsequently. It is in a sense an attempt to provide a structured understanding of how and when action in common by some but not all states should be permitted which is superior to and more principled than the ad hoc patterns of fragmentation squeezed out at times of tortured Treaty revision relating to areas including the Eurozone, Schengen and, from 1993 to 1999, social policy. 166 Eager commentators noted how high the hurdles seem to be.167 After all, pursuit of enhanced co-operation seems to involve an inevitable rupture within the internal market. It

165 See also Art 65(4), 143(1), 144(1), 346, 347 TFEU.
166 See eg Giandomenico Majone, 'Unity in Diversity: European Integration and the Enlargement Process' (2008) 33 *European Law Review* 457; Daniel Thym, 'The Political Character of Supranational Differentiation' (2006) 31 *European Law Review* 781.
167 Eg Stephen Weatherill, '"If I'd wanted you to understand I would have explained it better": What is the Purpose of the Provisions on Closer Co-operation introduced by the Treaty of Amsterdam?' in David O'Keeffe and Pat Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Oxford: Hart, 1999).

leads to regulatory divergence between the participating states and the non-participants, with consequent distortion in conditions of competition as undertakings are free to exploit the uneven pattern of regulation as they so choose. One may consider that a good thing or a bad thing, but that is beside the point: the very nature of enhanced co-operation is to disrupt the internal market as a single regulated space.

In practice there is no evidence that these pre-conditions have been taken seriously in the few instances in which these provisions have been used.

A Council Decision of July 2010 authorised enhanced co-operation in the area of law applicable to divorce and legal separation 168 and this was then implemented by a Council Regulation adopted later in the same year. 169 One might have supposed that the promotion of enhanced co-operation, which by definition covers some but not all Member States, would imperil the unity of the internal market, but neither measure makes any attempt to explain how the pre-condition of not undermining the internal market is satisfied. The Decision simply asserts that 'Enhanced cooperation in the area of the law applicable to divorce and legal separation complies with the Treaties and Union law, and it does not undermine the internal market or economic, social and territorial cohesion' and that it 'does not constitute a barrier to or discrimination in trade between Member States and does not distort competition between them'. 170

Precisely the same model of assertion rather than demonstration is found in the case of the second resort to the Treaty scheme for enhanced co-operation, which occurred in 2011. Regulation 1257/2012 on the creation of unitary patent protection 171 was adopted pursuant to a Council Decision authorising enhanced cooperation in the area 172, and relies on Article 118 TFEU. Recital 13 to the Decision declares that 'Enhanced cooperation in the area of the creation of unitary patent protection complies with the Treaties and Union law, and does not undermine the internal market or economic, social or territorial cohesion'; and that 'It does not constitute a barrier to, or discrimination in, trade between Member States and does not distort competition between them'. The Preamble to Regulation 1257/2012 at least nods to fragmentation. It asserts the value of a legal regime establishing uniform patent protection 'within the internal market, or at least a significant part thereof'. 173 But it makes no further attempt to explain how the division between participating and non-participating member States which is the inevitable consequence of enhanced co-operation can be squared with the Treaty direction not to undermine the internal market. The internal market, it seems, can be marked by heterogenous regulation adopted in common by some but not all states using the EU legislative process.

The Council Decision of January 2013 authorising enhanced cooperation in the area of financial transaction tax, of which use has not been made to adopt a measure, is similarly barren of explanation. 174

168 Dec 2010/405 OJ 2010 L189/12.
169 Reg 1259/2010 OJ 2010 L343/10.
170 Recital 11.
171 Reg 1257/2012 OJ 2012 L361/1.
172 Council Decision 2011/167 OJ 2011 L76/53
173 Recital 1.
174 Council Decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax OJ 2013 L22/11.

The Court had its chance to address these issues in *Spain and Italy v Council*, an application for annulment of Decision 2011/167 which authorised enhanced co-operation in the creation of unitary patent protection. 175 It is a ruling of the Grand Chamber. The application was not successful, and the Court's treatment of it is instructively reticent. There were several grounds of challenge, but of direct relevance to the current concern with the role played by the 'internal market' in EU law is the complaint that the conditions set out in Article 20 TEU and in Articles 326 and 327 TFEU were not satisfied by the authorising Decision, most of all the requirement that the internal market shall not be undermined. However, the Court was unimpressed. It treated the divide created by participating and non-participating States as inherent in the very nature of enhanced co-operation, which is based on an assumption that Union-wide application is excluded. So the divide of which Spain and Italy complained was in fact a necessary consequence of the Treaty scheme. 176 There was, the Court concluded, no damage to the internal market of the type forbidden by Article 326 TFEU.

One might wish to construct an argument that the meagre use made of the provisions on enhanced co-operation shows that the protection of the internal market is operationally significant, but the comfort with which the provisions have been triggered would defy such a case. It seems plain that a political will to act is enough: compliance with the pre-conditions becomes a matter of ticking the boxes. In truth the Court had two principal options: to take seriously the protection of the internal market promised by the preconditions and to find that enhanced co-operation is in practice unfeasible or instead to treat that protection as in practice devoid of concrete legal meaning and force and thereby to loosen the political discretion pertaining to pursuit of enhanced co-operation. It chose the latter. The effect of the judgment is to push dissentients to make use of political routes to protect their concerns, not legal. The Court would certainly have been fully aware of this. So the politics of enhanced co-operation are interesting 177; the law less so. The judgment shows that the stipulated defence of the internal market is a strikingly less constitutionally durable control than might have been anticipated.

VII. The EEA

The term 'internal market' does not appear in the Agreement on the European Economic Area at all. The EEA, which comprises the 28 Member States of the EU and three Member States of EFTA (Iceland, Norway and Liechtenstein [178]) and which dates from 1994, is sometimes described as having created a 'single market', but this can only be shorthand, because the term 'single market' has no legal significance for it too is missing from the text of the EEA. Although reserving the label 'single market' to the EEA would be a convenient means to distinguish it from the internal market which is owned only by the EU, it would not be backed by any legal force. And in fact the attraction of treating the EU as founded on an 'internal market' and the

175 Joined Cases C-274/11 and C-295/11, *Spain and Italy v Council*, EU:C:2013:240.
176 Especially paras 68, 75 of the ruling.
177 See eg Daniela Kroll and Dirk Leuffen, 'Enhanced co-operation in practice. An analysis of differentiated integration in EU secondary law' (2015) 22 *Journal of European Public Policy* 353; and, more broadly, Thomas Winzen and Frank Schimmelfennig, 'Explaining differentiation in European Union Treaties' (2016) 17 *European Union Politics* 616.
178 Switzerland is another story again: see eg Sandra Lavenex and René Schwok, 'The Swiss Way: The nature of Switzerland's relationship with the EU', Ch 3 in Erik Eriksen and John Erik Fossum, *The European Union's Non-Members: Independence under Hegemony?* (Abingdon: Routledge, 2015); Christa Tobler, 'A Look at the EEA from Switzerland', Ch 40 in EFTA Court (ed), *The EEA and the EFTA Court: Decentred Integration* (Oxford: Hart, 2014).

EEA as a wider 'single market' is undermined by the readiness of the EU to treat the 'internal market' and the 'single market' as synonyms. This is readily visible in speeches [179], websites [180]and official documentation. [181] EFTA's own site also commits this solecism: it declares that the Agreement brings together the participating States 'in a single market, referred to as the "Internal Market"'. 182

In substance the EEA is a close relative of the EU's internal market, but it is not identical.

The EEA excludes common policies on agriculture and fisheries and there is, of course, no provision on economic and monetary union. The differences are starker still on the external plane. It is beyond the EU's customs union, and so does not entail a common external trade policy of the type which is one of the EU's most important activities, albeit one with its own legal ambiguities. 183 This means that border controls of a type are inevitably present.

But large amounts of the EEA follow the model of the EU, and this is particularly plain in the core areas of market integration. Part II of the EEA Agreement is entitled the Free Movement of Goods; Part III contains rules on the free movement of persons, services and capital; Part IV covers competition rules, including rules on state aid. The EU specialist will feel comfortably at home. So, for example, Article 11 prohibits 'quantitative restrictions on imports and all measures having equivalent effect', and Article 13 contains the list of derogations familiar from Article 36 TFEU; Article 28 directs that 'freedom of movement for workers shall be secured', which shall 'entail the abolition of any discrimination based on nationality'. Articles 53 and 54 mirror Articles 101 and 102 TFEU.

Part V is entitled 'Horizontal provisions relevant to the four freedoms' and comprises five separate Chapters, on social policy, consumer protection, environment, statistics and company law. Part VI addresses cooperation outside the four freedoms. Therein a commitment is made to strengthen and broaden cooperation in several fields in which the EU is active, such as research and technological development, information services, tourism and civil protection.

The institutional arrangements, set out in Part VII of the Agreement, are less close to the EU model than the rules of substantive law, but they are still recognisably similar. An EEA Joint Committee has the job of deciding on the incorporation of EEA-relevant EU legislation into the EEA scheme, a process dealt with in intricate detail by Articles 97 – 104 of the Agreement. [184]This, in short, does not automatically cause EEA law to change simply because of changes within the EU, but the institutional arrangements are designed to ensure a dynamic process within which blockages are designed to be, and are, uncommon. The asymmetry of power between the EU and the EFTA-3 is plain, and so the form, whereby the Joint Committee could refuse the application of EU rules within the EEA, is not matched by the practice, to the point where it has been said in summary that the EFTA states 'have little access to real decision-making', because laws agreed within the EU are normally simply exported without fuss through the Joint Committee and into EEA law. 185 It is 'Independence under hegemony', as

179 Eg Barnier (n 1).
180 Eg 'The European Single Market', https://ec.europa.eu/growth/single-market_en.
181 Eg Commission Communication, *A single market for 21st century Europe* (COM (2007) 724); Commission Communication, *The Single Market Act II, Together for New Growth* (COM 2012 573).
182 http://www.efta.int/eea/eea-agreement.
183 See Opinion 2/15 on the Free Trade Agreement with Singapore, 16 May 2017.
184 For explanation of the detail see Georges Baur 'Decision-making Procedure and Implementation of New Law' in Carl Baudenbacher (ed.), *The Handbook of EEA Law* (Cham: Springer, 2016).
185 Dora Sif Tynes and Elisabeth Lian Haugsdal, 'In, Out or In-between? The UK as a Contracting Party to the

a recent collection of essays has suggested. [186] There is also an EEA Council and an EEA Joint Parliamentary Committee. 'Joint' indicates a pattern of co-operation between the 28 and the 3. The EFTA surveillance authority supervises compliance with the rules by the three EFTA states, in a manner comparable to the role played by the Commission within the EU, and the EFTA court possesses two principal jurisdictions – to rule on actions brought by the EFTA Surveillance Authority against an EFTA country, in a manner that resembles that found in the EU system under Article 258, and also the advisory opinion procedure, which is related to Article 267 but marked by a less ambitious character. National courts never fall under an obligation to ask for an advisory opinion; the EFTA Court does not claim exclusive authority to provide an authoritative interpretation.

So, in the rules and procedures governing the integration of markets, the EEA is not identical to the EU, nor is it simply a tail that is wagged by the big EU dog, but there are many common features combined with close institutional co-ordination, and it is not wrong as a matter of generalisation to treat the EEA as a geographically extended version of the EU's internal market, even if at the level of detail that is to skate over the points of departure between the two systems. There is nothing remotely surprising about this congruence. The aim is to produce a 'homogenous European Economic Area', according to Article 1(1) of the Agreement; as the EFTA Court has insisted, 'homogeneity is one of the fundamental principles of the EEA Agreement', albeit that, as the Court noted, 'it follows from the structure of the Agreement and the legislative procedure provided for therein that this might not always be fully achieved in terms of simultaneous application of legislative measures'. 187 But given this eager if not absolute commitment to homogeneity it makes perfect sense that large parts of the deal involve the extended application of EU orthodoxy. This is given further steel by the – rather complicated – set of arrangements which do not go so far as to export the Court of Justice's interpretation of EU law directly into the practice of the EFTA Court but instead set up processes which are designed to secure alignment and a frictionless system. 188 The EFTA Court is fully alive to this concern. It has repeatedly preferred not to confine itself to the detailed directions in the Agreement to strive for alignment with practice within EU law, but has instead adopted a general assumption that it will interpret and apply rules of the EEA which are textually identical to those of the EU in the same way. This tone was set from the beginning. In its first judgment, *Restamark*, it began its analysis of the substance of the case by noting that 'in interpreting the EEA Agreement it must be borne in mind that the objective of the Contracting Parties was to create a dynamic and homogeneous European Economic Area'. 189 So it is normal to find classics of EU free movement law such as *Cassis de Dijon* [190] and *Keck* [191] woven tightly into judgments of the EFTA Court dealing with Article 11 EEA. [192] In *L'Oreal* the EFTA Court went so far as to adapt its approach to trade mark exhaustion in the light of subsequent rulings of the Court of Justice. 193 It was quite open that differently motivated arguments had prevailed before it in the past in contrast to those which had subsequently convinced the Court of Justice and it offered no hint that it thought its approach was inferior to, rather than simply different from, that of the Court of Justice. But, relying on

---

Agreement on the European Economic Area' (2016) 41 *European Law Review* 753, 765.

186 Erik Eriksen and John Erik Fossum, *The European Union's Non-Members: Independence under Hegemony?* (n 00 above).

187 Case E-3/97, *Opel Norge SA*, para 30.

188 See especially Arts 6, 105-107, 111 of the EEA Agreement.

189 Case E-1/94, para 32.

190 Case 120/78 (n 00 above).

191 Joined CasesC-267/91 and C-268/91 (n 00 above).

192 Eg Case C-16/10, *Philip Morris Norway AS*.

193 Joined Cases E-9/07 and E-10/07, *L'Oreal*.

the principle of homogeneity and finding no compelling grounds for divergent interpretations in EEA law and EC law, it chose not to stand its ground, but instead to adapt its stance in order to align its case law with that developed in Luxembourg. There are points of departure between the Court of Justice's approach and that of the EFTA Court – for example, its President, Carl Baudenbacher, recently spoke proudly of the more intensive standard of review conducted by the EFTA court in cases on competition law and state aid 194– but there is a conscious concern on the part of the EFTA court to pursue conformity with EU law as the normal reflex. It has been shrewdly noted that this 'loyal deference to the CJEU has diminished the demand' for the EFTA Court's services: national courts relatively rarely bother to ask its advice. [195]

This thematic preference for alignment is not limited to substantive law. The effect of Article 7 of the EEA Agreement and its Protocol 35 is that primacy and direct effect do not operate in the EFTA system in the same way that they do in the EU. [196] But other constitutional devices which cement connection between the transnational and the national planes do. The EFTA Court embraced the principle of State liability in *Sveinbjörnsdóttir*. 197 Accepting that the depth of integration of the EEA Agreement is less far-reaching than under the EC Treaty (as it then was), but the Court nonetheless relied heavily on the virtue of pursuit of a homogenous EEA to find that the EFTA States must be obliged to provide for compensation for loss and damage caused to an individual by incorrect implementation of a directive. It cheerfully helping itself to the reasoning of the Court of Justice in *Francovich*. 198 Subsequently it repeated precisely this pattern of reasoning in order to embrace the principle of consistent interpretation on terms plainly drawn directly from the practice of the Court of Justice. 199 The EFTA Court is not simply a mimic of the Court of Justice, but its clear and open understanding is that the normal, though not inevitable, expectation is that EEA law shall operate along the same track as that taken by EU law.

But the freedoms are divisible in a way that they are not under EU law. Chapter IV of Part VII is entitled 'Safeguard Measures'. It contains Articles 112 – 114, which are intriguingly more generous to the possibility of placing restrictions on cross-border trade than anything to be found in the EU's internal market.

Article 112 provides room for safeguard measures where 'serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising'. Such safeguard measures 'shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation' and they shall apply to all contracting parties. Article 112(1) stipulates that such action may be taken 'unilaterally', but the conditions and procedures laid down in Article 113, which entail in short mandatory dialogue coupled to time restrictions, must be followed.

---

194 Case E-15/10, *Posten Norge*; Carl Baudenbacher, 'After Brexit: Is the EEA an option for the United Kingdom?', lecture delivered at King's College, London, October 2016, https://www.kcl.ac.uk/law/tli/about/Baudenbacher-Kings-College-13-10-16.pdf. See also Eric Barbier de la Serre, 'Standard of review in competition law cases: *Posten Norge* and Beyond', Ch 31 in EFTA Court (n 00 above).

195 Halvard Haukeland Fredriksen, 'The EEA and the Case Law of the CJEU: Incorporation without participation?', Ch 6 in Erik Eriksen and John Erik Fossum, *The European Union's Non-Members: Independence under Hegemony?* (n 00 above), at page 108.

196 For explanation see Henrik Bull, '"Shall be made part of the internal legal order": The legislative approaches', Ch 18 in EFTA Court (n 00 above).

197 Case E-9/97, *Erla Maria Sveinbjörnsdóttir v Iceland*.

198 Cases C-6/90 and C-9/90, *Francovich and Others* v *Italian State*, EU:C:1991:428.

199 Case E-1/07, *Criminal Proceedings against A*; Joined Cases E-9/07 and E-10/07 (n 00 above).

There is no doubt that Article 112 is unorthodox when compared with the EU system. A search of the 55 Articles of the TEU and the 358 Articles of the TFEU will throw up no mention of 'unilateral' action at all, yet in Article 112 EEA unilateralism is embraced. However, Article 112 has been invoked only infrequently. It is plainly written in such a way as to stress its exceptional character. [200] The most notable instance concerns the case of Liechtenstein and concerns the free movement of persons. Articles 112 – 114 are not confined to this freedom, but the special significance of the free movement of persons in this context was confirmed by the adoption of Protocol 15 on transitional periods on the free movement of persons, which put in place a special time-limited regime applicable to Liechtenstein concerning quantitative restrictions on new residents, seasonal workers and frontier workers. This has been extended in time and special arrangements govern Liechtenstein's treatment of people even today.201 It seems improbable that a large Member State of the EU which chooses to leave the EU on a tide of invented and statistically baseless claims about the economic harm done by migration from other Member States, join EFTA instead and seek to rely on Article 112 to curb inward migration could expect to be treated as generously as Liechtenstein. At the very least the nature and existence of the pre-conditions applicable to invocation of Article 112 – that 'serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising' – would doubtless be tested as part of the dispute settlement process envisaged by Article 111; and/ or the party taking action pursuant to Article 112 might expect to be confronted by rebalancing measures of the type envisaged by Article 114. This is the full context in which Article 112's assertion of 'unilateral' action needs to be understood. But the current concern is not the future, it is the present. Article 112 shows that the pattern of integration preferred by the EU need not be that applicable in the wider EEA. A higher level of respect is granted to the autonomy of participating States.

At one level there is nothing surprising in this. These are different Treaties, and so why shouldn't the rules be different? The value in inspection of Article 112 lies in the light it shines on the choices made within the EU. It is, as the (admittedly limited) practice in the EEA demonstrates, perfectly possible to treat the free movement of persons in a more guarded way than the free movement of goods. EU law chooses not to do so openly, and in fact rulings such as *Ruiz Zambrano* push in the other direction. Politically it is plain that the EU has chosen implacable opposition to any rupture of the type found in the practical (if rare) application of Article 112 EEA. This is to return to the forceful comments of M Barnier about the indivisibility of the freedoms in the EU 202, while also grasping that the EEA, though built on rules that are not identical to those of the EU, lies within the EU's gravitational pull and is tied closely to its model through both constitutional design and institutional choice.

VIII. Association Agreements

Words mean different things in different contexts. Some of the rules of the EU's internal market are replicated word-for-word in other legal texts, but without the same impact.

---

200 See eg Georges Baur 'Suspension of Parts of the EEA Agreement: Disputes about Incorporation, Consequences of Failure to Reach Agreement and Safeguard Measures' in Baudenbacher (n 00 above), stressing at page 75 the 'very strict conditions'.

201 For the Commission's most recent review, see COM (2015) 411, 28 August 2015.

202 Note 00 above.

In *Polydor v Harlequin Records Shops*, a decision of February 1982, the Court was asked by the English Court of Appeal, which was dealing with an action for copyright infringement, to interpret provisions of the agreement between the EEC and Portugal which mirrored what are now Articles 34 and 36 TFEU, and which, if applicable, would have been sufficient to defeat the action which had been brought before the English court against goods imported into the UK. 203But the Court refused to adopt its approach to the interpretation of the EEC Treaty in the context of the EEC/ Portugal Agreement. The Court noted the undoubted textual congruence, but it looked beyond the text. The EEC's objectives, it noted, include a quest to 'to unite national markets into a single market having the characteristics of a domestic market 204, whereas the EEC- Portugal Agreement pursued the less ambitious aim of consolidation of economic relations. So textual congruence generated different outcomes: what would not have been allowed as barrier to inter-State within the EU was permitted in the context of suppressing imports from Portugal that infringed copyright. The Court was quite open about this cleavage. 205

Since *Polydor* the Court has had a number of different opportunities to underline that its view that words and phrases which are entirely familiar to the orthodox EU internal market lawyer may be interpreted to mean something different when they appear in the distinct context of an agreement with a non-Member State.

To hark back to the previous section this principle played a part in the elaboration of the EEA Agreement. The Court was asked to give its Opinion on a draft Agreement pursuant to the procedure now found in Article 218 TFEU whereby the compatibility of an envisaged international agreement with EU law may be sought. It found that the plans were not compatible with EU law, and so a further round of renegotiation was required before the EEA deal could be concluded.206 The draft included identically worded treatment of free movement law but this did not reassure the Court that there would inevitably be identical interpretation. The objectives of the EEA on the one hand and the EU on the other were different. The planned EEA agreement was concerned with the application of rules on free trade and competition in economic and commercial relations between the contracting states, whereas the EU rules on free movement and competition were not an end in themselves, but rather they count as means for attaining wider objectives, ultimately to contribute together to making concrete progress towards European unity. 207 This brought the Court to the conclusion that the system of judicial supervision which the agreement proposed to establish was incompatible with EU law because it threatened its autonomy, and so it had to be re-thought, and, to the ultimate satisfaction of the Court, it was. 208 The plan for an EEA Court, comprised of judges from both the EU and EFTA, to which the Court objected was scrapped in favour of an EFTA Court comprising only judges from the EFTA states.

Economic integration in the EU has a deeper purpose than its pursuit in other Treaty-based systems and this means that texts may be interpreted to mean different things even where they are written in precisely the same way. What matters is examination of the agreement's aims and objectives in context. So, for example, in *Gloszcuk* the Court refused to interpret provisions on the right of establishment contained in the Association Agreement with Poland as

203 Case 270/80 EU:C:1982:43.
204 Paras 16, 18.
205 Para 19.
206 Opinion 1/91, EU:C:1991:490.
207 At para 17, citing Article 1 of the Single European Act.
208 Opinion 1/92, EU:C:1992:189.

generously as it conventionally interprets parallel provisions in EU law. 209 Citing (inter alia) *Polydor*, it contrasted the Association Agreement's more limited ambition simply to create an appropriate framework for Poland's gradual movement towards accession to the Union with the EU's deeper concern to treat the right of establishment as part of the means to fulfil the Treaty mandate to create an internal market based on the abolition of obstacles to the free movement of goods, persons, services and capital.

The Agreement with Turkey has been a regular source of illustrative case law of this type. In *Demirkan* the Court noted that the EU's agreement with Turkey explicitly recognizes the freedom to provide services, but, in the absence of any explicit direction to that effect, the Court refused to interpret to cover a right to receive services. 210 It has, of course, made precisely this extension in its interpretation of 'internal' EU law. 211 The Court insisted on the need for a 'comparison between the objectives and context of the agreement and those of the Treaty'.212 The agreement with Turkey, the Court concluded, pursues an economic purpose, whereas EU law is deeper and wider in its ambition. This is standard fare. In its subsequent ruling in *Agro Foreign Trade* the Court cited *Demirkan* in support of the proposition that 'The development of economic freedoms for the purpose of bringing about freedom of movement for persons of a general nature which may be compared to that afforded to European Union citizens under Article 21 TFEU is not the object of the Association Agreement' with Turkey. 213 This led it to an interpretation of Directive 86/653 on the coordination of the laws of the Member States relating to self-employed commercial agents in the light of the Agreement which precluded its system of protection being held to extend to commercial agents established in Turkey.

But the Court is not always so implacable. In *Maros Kolpak* the Court interpreted relevant provisions of the Association Agreement with Slovakia in a manner that was in line with the approach taken 'inside' EU law. In consequence the applicant, a Slovak handball player who was already working in Germany, was able to rely on EU law to challenge treatment that discriminated against him on the basis of his nationality. [214]

There is no ambition here to provide an exhaustive discussion. [215] The point is simple: the point is that the rules of the internal market might mean different things in different contexts even when they say precisely the same thing. There are evidently several internal markets. The Association Agreements do not envisage release of the free movement of persons in the same ambitious manner as is found in the EU and the EEA and so the differences are plain, but even where the Agreements adopt the same terminology as EU and EEA law, that does not mean they have the same legal effect. One consequence of this heterogenous and context-specific approach to the rules of the internal market is that a post-Brexit deal between the EU and the UK which absorbed the orthodox language of the Treaty rules on free movement of goods and services would not necessarily deliver the frictionless path to market access which those in the UK pursuing this model might hope for and expect. 216 But pursuit of a more ambitious model,

209 Case C-63/99, EU:C:2001:488.
210 Case C-221/11, *Demirkan*, EU:C:2013:583.
211 Joined Cases 282/82 and 26/83 (n 00).
212 Case C-221/11 (n 00 above), para 47.
213 Case C-507/15 EU:C:2017:129, para 43.
214 Case C-438/00 EU:C:2003:255.
215 See further Daniel Thym and Margarite Zoeteweij-Turhan (eds), *Rights of Third Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship* (Leiden: Brill Nijhoff, 2015).
216 Cf Marja-Liisa Oberg, 'From EU Citizens to Third Country Nationals: The Legacy of Polydor' (2016) 22 *European Public Law* 97.

more openly wedded to the patterns of homogeneity that are promoted through the institutional, constitutional and substantive rules of the EEA as a means to protect trade flows, would amount to a merciless exposure of the poisonous deception of the claim to 'take back control'.

IX. Conclusion

The four freedoms are locked together by Article 26 TFEU. The internal market 'shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties'. But those freedoms are divisible. More than that: they are divided.

Section III of this paper ranged over the wide sweep of activities which are subject to review in the light of their impact on the construction of the EU's internal market. A consistent theme holds that EU internal market law is relatively easily engaged, since practices devoid of economic effect are rare and matters that concern a situation that is purely internal to a single Member State are scarcely more common. This is an observation that applies equally across the four freedoms and competition law too. However, the law of the internal market is not homogenous. The Court of Justice has refused to adopt an overtly common approach to the determination of when a measure that applies equally in law and in fact is properly placed beyond the reach of the free movement provisions – the *Keck* conundrum – and it has adopted an inflated reading of the incursion of EU law into practices that do not arise in the context of an obstruction of cross-border mobility in the particular case of dependent children of third country nationals. Moreover the personal scope of the free movement provisions is not aligned: those concerning goods do not bind private parties, those concerning persons and services do. Section IV explored the pattern of legislative harmonisation. The basic structural issues are common across the freedoms, both with regard to the scope of legislative competence, which is tied (loosely, according to the Court's tests) to the building of the internal market, and in the appreciation that harmonisation, once put in place, determines the regulation of the internal market within its material scope, and ousts national competence to select divergent standards unless this is permitted by the relevant EU measure. Here the heterogeneity of the internal market stems from the fact that across the many sectors that have been the subject of harmonisation the precise patterns according to which primary and secondary law combine reveal myriad different models. Moreover the *acquis* is marked by a great many instances of sanctioned variation of many different types – geographical, material, personal, temporal and so on. Section V lifts the gaze to legislative activity beyond the programme of harmonisation. It reveals a number of legal bases which are explicitly tied to the internal market, most of which are simply sector-specific iterations of the basic assumptions associated with market-making harmonisation. However, when one looks instead to legal bases elsewhere in the TFEU which are not declared to operate in the service of the internal market then the rough edges of the internal market as a legal concept become plain. As the chosen examples of social policy and cohesion demonstrate, there are policies that are part of the EU's activities as a result of the bargains struck in the dynamic development of the project of market integration even though no legal norm makes any such explicit inter-connection. The EU's internal market, as a bargain or a package deal, is surprisingly lacking in precise legal definition or boundary. And sometimes it plays a role that is trivial or even worthless. Section VI examines provisions which place off limits activities that are apt to harm the internal market but finds that this may have little relevance in practice. The treatment of enhanced co-operation by the legislative institutions and by the Court shows a ready acceptance that there can be a sectorally-focused

internal market populated by some but not all the Member States within the wider 'true' internal market. The internal market also has a presence beyond the EU's external frontiers. The EEA, examined in Section VII, takes on most, though not all, of the baggage of the internal market and the political and judicial institutions of EFTA seek normally to bring EEA law into conformity with EU law. A big part of the internal market is in this way exported, but the mutability of the rules of the internal market is confirmed by the points of departure which make the EEA less deep in scope or ambition than the EU. Section VIII considers the EU's Association Agreements. These are still less ambitious than the EEA and their scope typically excludes matters such as the free movement of persons, but even where their provisions replicate those familiar within the EU legal order, they are not always interpreted to mean the same thing. The rules of the internal market come diluted.

So what does this tell us?

There are internal markets to be found in Canada, the United States of America, Australia, the United Kingdom, Germany, and so on: there is a single economic space, but with some degree of legislative diversity across the constituent units of the whole. A great many internal markets exist around the world and the EU is just one of them, albeit it is certainly the one that is most developed beyond a purely State setting. These internal markets do not all look alike. They differ according to the extent to which the constituent units are permitted to pursue different regulatory policies. They vary according to the scope of lawmaking competence and powers allocated to the central authority. They vary too according to the governing institutional (judicial and political) arrangements. The quality and intensity of the regulated environment varies according to the choices made. In truth there is a broad band of possible internal markets, ranging from one which is radically decentralized as a result of a choice in favour of unrestricted inter-jurisdictional competition to, at the other extreme, one which is radically centralized in the sense that lawmaking competence has been completely stripped away from the constituent units in favour of the central authority. From one extreme to another there exists a huge range of options, and the many internal markets found across the globe are far from homogenous.

But even the EU contains several internal markets. There is a heterogenous pattern both within and beyond the EU. The law of the free movement of goods does not follow precisely the same model as the free movement of persons, legislative activity varies sector by sector, and the EEA and the Association Agreements reveal patterns inspired by, but less ambitious than, the EU's internal market. There are several internal markets.

This paper is not about Brexit, but Brexit brings into focus its findings. There is in law no obstacle to dividing the freedoms in the way that some in the UK would wish, most obviously by privileging the free movement of goods and services over that of people. The indivisibility of the freedoms is a political construct: the legal reality is already more messy and more heterogenous. But the political commitment to the indivisibility of the freedoms within the internal market is profound, and it is existential. The EU is and always has been about more than market-making. In October 2016 Martin Schulz, at the time the President of the European Parliament, captured the mood: 'I refuse to imagine a Europe where lorries and hedge funds are free to cross borders but citizens are not'. 217 This does not mean identical treatment sector-by-sector, but it does entail a political commitment not to accept priorities or hierarchies that

217 http://www.europarl.europa.eu/former_ep_presidents/president-schulz-2014-2016/en/press-room/speech_of_the_president_of_the_european_parliament__martin_schulz__at_the_european_council_of_20_-2.

entrench divisions between the freedoms. Reforms introduced by the Treaty of Lisbon such as the grant of binding force to the Charter and the embedding of the social market economy in Article 3(3) TEU are inapt to generate concrete changes in the existing law of the internal market [218], but they constitute recognition of the EU's vocation beyond trade liberalisation. There is much that is toxic about the Brexiteers' brew, but the refusal to take seriously the true scope of the EU's mission, clearly illustrated by the ghastly words of Boris Johnson contained in this paper's Introduction, is the most damaging to prospects of a settlement within which a new version of the internal market is created for the UK in particular.

218 See references at note 00 above.