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Need We Kill To Dissect?

Attempt at a Contextual Approach to the EU Economic Freedoms

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ABSTRACT

A different type of polity requires a different type of constitution; more importantly, it also requires a different way of thinking, a new constitutionalism able to address the relevant descriptive and normative questions facing this new political entity. This thesis tries to contribute to the development of EU constitutionalism by focusing on the interplay between the different normative concerns behind the EU's market freedoms identified in traditional legal discourse – as results mainly from court decisions and academic discussions –, and the institutional environment which mediates the freedoms' application. It is hypothesised that such interplay can be better understood by reference to the findings of some disciplines 'external' to internal legal discourses such as economics, philosophy, or political science. Normatively, it is hoped that debates concerning the market freedoms that take into account 'external elements' will be more attractive to the legal community than those that do not include such considerations. Descriptively, it is submitted that the incorporation of insights arising from these 'external' disciplines into the traditional modes of discourse and analysis on the EU market freedoms – in effect, the internalisation of these 'external' elements – can provide better descriptive fits of the law and its development than theories that do not take them into account. An incidental result of this approach is that by the end of this thesis a theory of the market freedoms will have been sketched: by combining 'internal' and 'external' elements, an analytical framework can be developed that is able to make descriptive sense, formally and substantively, of free movement law at both its most general – where formal common structures seem to be undeniable, and a minimum common substantive content can be found –, and at its most detailed levels – where substantive variations and greater normative specification seem to exist.

Our meddling intellect / Mis-shapes the beauteous forms of things: / We murder to dissect.

William Woodsworth, *The Tables Turned*

"La grammaire, avec son mélange de règle logique et d'usage arbitraire, propose au jeune esprit un avant-goût de ce que lui offriront plus tard les sciences de la conduite humaine, le droit ou la morale, tous les systèmes où l'homme a codifié son expérience instinctive."

Marguerite Yourcenar, *Memoires d'Hadrian*

"The growth of knowledge, particularly specialized knowledge, is a very slow process. Far from being merely additive or cumulative, the growth of knowledge is a process of selective accumulation, displacement, rearrangement, and insistence within what has been called a research consensus. [...] My principal operating principles were – and continue to be – that fields of learning, as much as the works of even the most eccentric artists, are constrained and acted upon by societies, by cultural traditions, by worldly circumstance, and by stabilising influences like schools, libraries and governments; moreover, that both learned and imaginative writing are never free, but are limited in their imagery, assumptions and intentions; and finally, that advances in a "science" [...] are less objectively true than we often like to think."

Edward W. Said, *Orientalism*

"Every philosopher, in addition to the formal system he offers to the world, has another, much simpler, of which he may be quite unaware. If he is aware of it, he probably realizes it won't quite do; he therefore conceals it, and sets forth something more sophisticated, which he believes because it is like his crude system, but which he asks others to accept because he thinks he has made it such as cannot be disproved."

Bertrand Russell, *History of Western Philosophy*

"In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary ways of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when all of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given; for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it."

David Hume, *A Treatise of Human Nature* (1739), book III, part I, section I

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Table of Abbreviations

American Economic Review.....	Am.Econ.Rev.
American Journal of Comparative Law.....	Am.J.Comp.L.
American Journal of International Law.....	AJIL
American Political Science Review.....	Am.Polit.Sci.Rev.
American Journal of Sociology.....	Am.J.Soc.
American Sociological Review.....	AmSociolRev
Arizona Journal of International and Comparative Law.....	Ariz.J.Int'l&Comp.L.
Arizona State Law Journal.....	Ariz.St.L.J.
Auckland University Law Review.....	Auckland U L Rev
Boston University Law Review.....	B.U.L.Rev.
British Tax Review.....	B.T.R.
Boston University Law Review.....	B.U.L.Rev.
Cahiers de Droit Européen.....	CDE
California Law Review.....	CLR
Chicago Journal of International Law.....	Chi.J.Int'lL.
Columbia Law Review.....	Colum.L.Rev.
Columbia Journal of European Law.....	Colum.J.Eur.L.
Columbia Journal of Transnational Law.....	Colum.J.Transnat'lL.
Cambridge Law Journal.....	C.L.J.
Cambridge Yearbook of European Legal Studies.....	C.Y.E.L.S.
Commission of the European Communities.....	Commission
Common Market Law Review.....	CML Rev.
Cornell Law Review.....	Cornell L.Rev.
Court of Justice of the European Communities.....	Court or CJEU
Creighton Law Review.....	Creighton L.Rev.
Croatian Yearbook of European Law and Policy.....	CYELP
Deutsches Verwaltungsblatt.....	DVBl.
Dublin University Law Journal.....	D.U.L.J.
Duke Law Journal.....	Duke L.J.
Emory Law Journal.....	Emory L.J.
Europäisches Wirtschafts- & Steuerrecht.....	EWS
EuropaRecht.....	EuR
Europäische Zeitschrift für Wirtschaftsrecht.....	EuZW
European Business Law Review.....	EBLRev
European Company Law.....	Eur.Co.L.
European Constitutional Law Review.....	EuConst
European Economic Area.....	EEA
European Journal of International Law.....	EJIL
European Journal of Legal Studies.....	EJLS
European Journal of Law and Economics.....	EurJLawEcon
European Law Journal.....	ELJ
European Law Review.....	E.L.Rev.
European Public Law.....	EPL
Fordham International Law Journal.....	Fordham Int'l L.J.
George Washington Law Review.....	Geo.Wash.L.Rev.
Georgetown Law Journal.....	Geo.L.J.
German Law Journal.....	GLJ
Hanse Law Review.....	HanseLR

Harvard Law Review.....	Harv.L.Rev.
Hastings Law Journal.....	Hastings L.J.
Human Rights Law Review.....	H.R.L.Rev.
Indiana Law Journal.....	Ind.L.J.
Industrial Law Journal.....	ILJ
International Comparative Law Quarterly.....	ICLQ
International Journal of Constitutional Law.....	I•CON
Iowa Law Review.....	IowaL.Rev.
Irish Journal of European Law.....	Ir.J.Eur.L.
Law and Philosophy.....	Law&Phil
Law & Social Inquiry.....	L.& Soc.Inquiry
Legal Issues of European Economic Integration.....	LIEI
Legal Studies.....	LS
Loyola Law Review.....	Loy.L.Rev.
Journal of International Economic Law.....	JIEL
Journal of Common Market Studies.....	JCMS
Journal of European Public Policy.....	J.E.P.P.
Journal of International Law and Politics.....	JILP
Journal of Law and Religion.....	J.L.&Relig.
Journal of Legal Studies.....	JLS
Journal of Public Economics.....	JPE
Journal of Social Security Law.....	JSSL
Maastricht Journal of European and Comparative Law.....	MJ
Maryland Law Review.....	Md.L.Rev.
Michigan Law Review.....	Mich.L.Rev.
Minnesota Law Review.....	Minn.L.Rev.
Modern Law Review.....	MLR
New York University Law Review.....	N.Y.U.L.Rev.
Notre Dame Law Review.....	Notre Dame L.Rev.
Penn State International Law Review.....	Penn St. Int'l L. Rev
Political Science Quarterly.....	Pol.Sci.Q.
Political Theory.....	Pol.Theo
Revue internationale de droit comparé.....	RIDC
Revue trimestrielle de droit européen.....	RTDeur.
Rivista di Diritto Europeo.....	Riv.Dir.Eur.
San Diego Law Review.....	San Diego L.Rev
Scientia Juridica.....	Scientia Jur.
Social Forces.....	SocForces
Stanford Law Review.....	Stan.L.Rev.
Stanford Law and Policy Review.....	Stan. L. & Pol'y Rev.
The Western Political Quarterly.....	West.Pol.Q.
Texas Law Review.....	Tex.L.Rev.
Theoretical Inquiries in Law.....	TheoInqL
University of Chicago Law Review.....	U.Chi.L.Rev.
University of Hawai'i Law Review.....	U.Haw.L.Rev.
Virginia Journal of International Law.....	Va.J.Int'l L.
Virginia Law Review.....	Va.L.Rev.
William Mitchell Law Review.....	Wm.Mitchell L.Rev.
World Trade Review.....	WTR
Yale Law Journal.....	Yale L.J.

Yearbook of European Law.....YEL
Zeitschrift für ausländisches öffentliches Recht und Völkerrecht.....ZaöRV

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Introduction

Constitutionalism is a ‘fuzzy’ concept with a variety of meanings. From a historical perspective constitutionalism can be seen as an increasingly sophisticated method to limit political power; from a procedural perspective as the set of tools used to limit absolute power; and from a substantive perspective it can be said to comprise a number of values shared by all liberal Western democracies, not to say all civilized countries.¹

In a minimal sense, a modern ‘constitution’ consists of a set of rules or norms creating, structuring and defining the limits of government power and thereby creating an area of individual liberty.² The idea of a higher law resulting from mythology, religion, or tradition that simultaneously empowers and limits the exercise of public powers was already present in Ancient Greece and was the subject of serious theorisation during the Middle-Ages.³ With the secularisation of society, the legitimation of the exercise of public power was secularised as well⁴; from religious theories of legitimation and personal rights, typical of the Middle-Ages, the intellectual debate departs during the Enlightenment from objective-religious foundations of the

¹ It is this substantive meaning that a number of authors adopt in the EU context, focusing on liberal democracy and political representation – see Miguel Poiars Maduro, ‘Europe and the constitution: what if this is as good as it gets?’ in J.H.H. Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (Cambridge University Press 2003) – or on human rights – see Ernst-Ulrich Petersmann, ‘Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism’ in Ernst-Ulrich Petersmann and Christian Joerges (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart Publishing 2006), *inter alia*.

² *Stanford Encyclopedia of Philosophy – Constitutionalism* (2004).

³ Christine E. J. Schwöbel, *Global Constitutionalism in International Legal Perspectives* (Martinus Nijhoff Publishers 2011), 54-65.

⁴ Starting, famously, with Jean Bodin, *Six books of the commonwealth* (Blackwell 1955). On the role of the Protestant Reformation and the demise of the Catholic Church as the main source of political legitimacy, and concurrent need to find other sources of legitimacy, see J. B. Schneewind, *The invention of autonomy: a history of modern moral philosophy* (Cambridge University Press 1998).

ideal political order⁵ to focus on how individuals constitute polities via a social contract.⁶ Underlying this new secular perspective was the idea originating from religious thought that natural individual rights merit protection and should prevail over States' power.⁷ This liberty of the moderns⁸ was first expressed in the British Bill of Rights of 1689, the Virginia Bill of Rights of 1776⁹, and in the *Déclaration des Droits de l'Homme et du Citoyen* of 1789¹⁰. Developing alongside the liberal nation-State, constitutionalism also came to incorporate the notion of a constitution as a normative guarantee of the legitimacy of public power, and perhaps even potentially as the very foundation of the identity of a liberal political community^{11, 12}.

These are the basic traditional underpinnings of constitutionalism, which run parallel to the development of the modern State itself. However, as the Court of Justice of the European Union (the 'Court' or 'CJEU') has stated, and the Member States have explicitly or implicitly admitted, the EU is a new legal order. Instead of a unitary State or a Federal entity, it is a new political form consisting of a supranational structure superimposed on a number of historically settled and widely varied nation-States. With

⁵ See, most famously, St. Augustine, *The City of God* (translated by Marcus Dods) (Hendrickson 2009) and Saint Thomas Aquinas, *Summa theologiae: a concise translation* (by Timothy McDermott) (Eyre and Spottiswoode 1989).

⁶ Most famous of which are the contributions by Thomas Hobbes, *Leviathan* (Dalloz 2004), John Locke, *Two treatises on government* (Industrial Systems Research 2009) and Jean-Jacques Rousseau, *Du contrat social, ou, Principes du droit politique* (Bordas 1985).

⁷ With a preponderance of the Spanish school of Salamanca, and particularly Francisco Suárez, *Tratado de las leyes y de Dios legislador* (University of Michigan Library 1918).

⁸ Benjamin Constant, *De la liberté des Anciens comparée à celle des Modernes* (1819).

⁹ Followed at the Federal level in 1791 by the Bill of Rights.

¹⁰ Which famously stated in its Art 16: '*Toute société dans laquelle la garantie des droits n'est pas assurée ni la séparation des pouvoirs déterminée, n'a point de Constitution*'.

¹¹ Of which the main early example may well be the US Constitution, following in the steps of the Mayflower Compact.

¹² Sergio Dellavalle, 'Constitutionalism beyond the Constitution: The Treaty of Lisbon in Light of Post-National Public Law' [2009] Jean Monnet Working Paper 03/09, 5-14.

the failure of the European Constitution it is not now foreseeable that a (written) constitution will found a European political structure. The EU nonetheless possesses a constitution within the context of the philosophical theories, legal documents and political praxis of constitutionalism – it allocates public powers between different bodies, protects the rights of its citizens through the judiciary, and promotes a number of values traditionally associated with the constitutionalist tradition such as the rule-of-law, the separation of powers and democracy.¹³

The *sui generis* character of this constitution does not dispense with constitutionalism *per se*, which will be present whenever a regulation of public powers exists, but neither is it fully compatible with the traditional theories of constitutionalism developed for modern nation-States.¹⁴ A different type of polity requires a different type of constitution; more importantly, it also requires a different way of thinking, a new constitutionalism able to address the relevant descriptive and normative questions facing this *sui generis* constitution.¹⁵ This new constitutionalism may borrow the language of traditional constitutionalism, but it must be careful that such language is translated carefully, and that it develops a new vocabulary as necessary.¹⁶ The main obstacle to the development of an EU constitutionalism to the same level of sophistication as that of a nation-State is not that the EU falls outside the traditional forms of polity, but that the EU is effectively still determining what kind of polity it

¹³ Joseph Weiler, *The Constitution of Europe* (Cambridge University Press 1999); Dellavalle, 31.

¹⁴ Joseph Weiler, 'In Defence of the Status Quo: Europe's Constitutional Sonderweg' in J.H.H. Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (Cambridge University Press 2003), 18-19. In effect, it may pressure national States to change their own constitutional practices – see Petersmann, 11.

¹⁵ Critically, Martin Loughlin, 'What is Constitutionalisation?' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (OUP 2010), 65-66.

¹⁶ Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 MLR 317, 322.

wants to be.¹⁷ A good example of this can be found in the fundamental freedoms¹⁸, the ‘original’ constitutional rights of the EU. In these provisions, and in debates about them, questions about which model of integration the EU should follow and about what kind of *polis* the EU should become bubble underneath a veneer of technical legal discourse. The fundamental freedoms are accordingly a good topic through which to analyse how this new constitutionalism is developing and to understand the role that the EU’s ‘constitutional’ court plays in such development, as is apparent from the voluminous literature and heated debates they generate.

While the Court’s development of these freedoms has been strikingly innovative, its approach has tended to be understood in terms of traditional international and constitutional law theories, ignoring the constraints resulting from the very specific setting where they are applied. This conflicts with the idea, dominant in theories of European constitutionalism, that the EU is a Union of different *demoi*; in particular, EU law is accepted in the Member States not as a result of a hierarchical imposition, as is typical of national legal orders, but as a result of a continuous mutual (constitutional) tolerance of distinct legal orders.¹⁹ European constitutionalism has specific normative underpinnings resulting from the specific political nature and institutional structure of the EU, even if those underpinnings are to a large extent borrowed from and shared by the constitutional traditions of the Member States,

¹⁷ On the contested purpose of EU integration, see Jan Komárek, ‘Judicial Law Making and Precedent in Supreme Courts’ LSE Law, Society and Economy Working Papers 4/2011, 29.

¹⁸ These include the market freedoms – the free movement of goods, right of establishment, the free provision of services, the free movement of workers and the free movement of capital – and European Citizenship.

¹⁹ Weiler, ‘In Defence of the Status Quo: Europe’s Constitutional Sonderweg’, 21. But see the discussion on pluralism in Chapter I, Section II below.

The fundamental freedoms, as open constitutional provisions, are ‘arenas’ where different models of integration fight for preponderance. The outcome of specific decisions in this field push the law in directions which trigger a number of (political) reactions from a variety of different entities – political, social, economic – and thereby condition the development of European integration and the interpretation of the fundamental freedoms alike. They raise serious normative issues as to the model of the EU integration, but they also pose questions of institutional choice and of separation of powers in the EU. For heuristic purposes one can identify a focus in the academic literature on either substantive or institutional matters. Literature focusing on ‘substantive matters’ can be said to pursue specific normative theories about the nature of the fundamental freedoms – are the market freedoms anti-protectionist devices or economic due-process clauses? Should fundamental freedoms only bind public authorities? Do the market freedoms have the same *telos* between themselves, and should they be subject to the same interpretation? What does European Citizenship entail? Literature on ‘institutional matters’ focuses instead on matters of capability of the adjudicative process and institutional comparative choice – will an extension in the scope of the fundamental freedoms lead to the EU exceeding its competences, and should such competences be left to the States? Will such an extension increase the power of the Court *vis-à-vis* other EU institutions? Would this be desirable, or do we prefer to limit the power of the Court and protect that of other institutions? What is the effect of a decision on the Court’s docket control and its ability to correctly manage and decide cases?

In reality, it is rare that analyses focusing on substantive theories do not touch on institutional issues, and vice-versa; however, these issues are usually not addressed explicitly, but are treated instead as implicit or as merely incidental. This thesis tries to

bridge this gap by focusing expressly on the interplay between the different normative concerns behind the EU's market freedoms identified in traditional legal discourse – as results mainly from court decisions and academic discussions –, and the institutional environment which mediates their application. It is hypothesised that such interplay can be better understood by reference to the findings of some disciplines 'external' to legal discourse such as economics, philosophy or political science. The existence of elements external to the 'internal' discourse of the EU legal community is, to a certain extent, uncontroversial, constituting a 'tacit dimension' of its legal practice – a set of propositions and opinions shared by a group deemed to be so obvious that they are never fully articulated or systematised.²⁰ In attempting to identify and analyse elements of this tacit dimension to see whether their implications are as obvious as they would seem *prima facie*, the thesis takes as its subject the scope of the EU's fundamental freedoms²¹, and in particular the market freedoms, and asks whether this subject can be informed by 'external' elements. Its main hypothesis is that the incorporation of insights arising from these 'external' disciplines into the traditional modes of discourse and analysis on the EU fundamental freedoms – in effect, the internalisation of these 'external' elements – can provide both a more accurate descriptive framework of EU free movement law, and more attractive normative theories concerning it.

On the other hand, this thesis in no way intends to provide a definite analysis or theory of these phenomena, being acknowledged that its results are very much perfectible and that the selection of 'external' facts is not comprehensive. The main claim is more restrained: it is merely that the insertion of some external elements, such

²⁰ Michael Polanyi and Amartya Sen, *The tacit dimension* (University of Chicago Press 2009).

²¹ By which is meant the identification of the situations where the Court will be empowered under the market freedoms to pursue a balancing exercise between free movement and the legitimate interests of the Member States. On the nature of this balancing, see Chapter I.

as the ones selected herein, can enrich the existing purely ‘internal’ descriptive and normative analyses of the fundamental freedoms. A further claim, which will be tested throughout, is that the inclusion of these institutional considerations may also help to explain the evolution and change in normative underpinnings of the law, and that this change in the intellectual environment can in turn lead to modifications in the institutional context.

The thesis is divided into eight chapters, which can be roughly assigned to two different sections. The first three chapters set the stage for an analysis of how institutional elements identified in external disciplines can help to explain normative concerns and debates in jurisdictional practice. The first chapter introduces the findings of the ‘external’ disciplines selected. In light of the fact that it focuses on market freedoms, which are an area of mainly court-made law, and that the development of EU law is uncommonly reliant on the workings of courts, the ‘external’ elements used in this thesis are findings in jurisprudence, economics, sociology and political science concerning the nature of legal adjudication, judicial law-making and other institutional constraints facing courts, particularly in what concerns the Court of Justice of the European Union. The second and third chapters proceed with an analysis of the classic normative theories accepted in EU legal discourse as underpinning the market freedoms – elements understood to be ‘internal’ to the law, and usually subject of discussion in legal literature. Since these theories usually either focus on all the freedoms together or adopt particular views on specific freedoms, the second chapter will review the normative foundations which are generally held to apply jointly to all market freedoms, while the third chapter will review those normative positions said to apply to some freedoms but not to others.

This allows for a review of the full gamut of the main normative positions found in the literature. In areas where the freedoms are treated identically, one can reasonably assume that the normative inputs and institutional constraints operate similarly for all of them.²² On the other hand, in areas where it is arguable that such a similar treatment does not take place it is a reasonable hypothesis that specific normative concerns and/or institutional constraints are at play. If so, a related hypothesis is that it is the existence of these specific inputs that explains the differences between the market freedoms. Assuming that one can identify these inputs – the topic of Chapters I to III – this makes the discussion of areas concerning the scope of free movement law where freedoms are treated differently ideal grounds for trying to map out the interaction between normative concerns and institutional constraints in the development of the law, while allowing us to test the hypotheses presented above. An added benefit of this approach is that one can also assess how attractive the proposition is that the market freedoms are, or should be, subject to a single integrated and multi-disciplinary analytical framework.

Thus, the chapters in this second section will focus on areas where it is commonly accepted that there is no common approach throughout the freedoms, particularly in what concerns their scope. Chapter IV looks at the cumulative requirements of a cross-border nature and an economic aim as pre-requisites for a national measure applying to certain facts to be found restrictive of the market freedoms. Chapters V to VII focus on the concept of restriction *per se*: Chapter V will review traditional debates on the concept of restriction; Chapter VI will attempt to unpack the normative foundations underlying these debates and the judicial formulae that they propose; and Chapter VII will exemplify how adding institutional elements to

²² This is not to deny the possibility that different normative inputs and institutional constraints may eventually lead to a similar outcome in different situations, but this is unlikely and, more importantly, much harder to test.

the analysis makes both descriptive and normative sense. Finally, Chapter VIII will apply this analytical framework to the extension of the scope of the market freedoms to private activity – the question of so-called ‘horizontal direct effect’ of the fundamental freedoms.

In short, it is foreseen that the addition of ‘external’ elements will provide better descriptive fits for the law and its development than theories that do not take them into account. Normatively, it is hoped that debates concerning the market freedoms which take into account ‘external elements’ will be more attractive to the legal community than those that not include such considerations. An incidental result of this is that, by the end of this thesis, a theory of the market freedoms operating within the confines of ‘internal’ legal discourse will have been sketched, adding to the extremely rich debates already existing in this field to which this effort hopes modestly to contribute.

Chapter I

Between Rules, Organizations and Agents

Abstract:

This chapter presents ‘external’ elements relevant for a better understanding of EU market freedoms. In light of the fact that this thesis focuses on an area of mainly court-made law, and that the development of EU law is uncommonly reliant on the workings of courts, the ‘external’ elements to be used are findings in the areas of jurisprudence, economics, sociology and political science concerning the nature of legal adjudication and judicial law-making, particularly in what concerns the Court of Justice of the European Union.

I. Introduction

This chapter intends to identify the external elements, or institutional constraints, selected as relevant for the understanding of the legal phenomena to be analysed, and attempts to justify their selection. Since this thesis focuses on the market freedoms, which were developed mainly through case law, the ‘external’ elements selected concern the activity of courts – and in particular the CJEU –, and focus in particular on the institutional logic of adopting certain modes of legal reasoning, on the incentives behind the adoption of incompletely theorised judicial decisions, on the causes and implications of legal precedent and on the implications of concerns about legitimacy on courts’ decision-making. These elements will be firstly addressed by reference to jurisdictional bodies in general, which will be followed by an analysis of their importance in understanding the Court’s decision-making practice in particular.²³ This chapter then concludes with an argument as to why the descriptive relevance of these ‘external’ elements means that normative (legal) approaches which take them into account may be more attractive than those that do not.

²³ The more detailed analysis of the relevance of these elements in addressing specific legal questions concerning the fundamental freedoms is pursued in later chapters.

II. The Odd Life of a Partially Supreme Court

The role of the CJEU in the creation of the EU is so atypical that it has been described as a fairy tale:

‘Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal type structure in Europe.’²⁴

In effect, political science and legal studies have so extolled its importance in the development of EU law that the Court has become arguably the most important subject of both legal and political science literature on EU integration.²⁵ This focus should, however, be understood in the context of perceptions about the contemporary role of the judiciary, which have changed from regarding courts as merely applying of the letter of the law to recognising that courts pursue law-making to a certain extent.²⁶ It is also generally agreed that the scope of judicial power has been progressively increasing, be that due to the growth of administrative and constitutional law, to an increase in social and economic regulation, or to the adoption of constitutions that have given judges the power to control the contents of laws.²⁷ The latter development lies at the origin of judicial review and the ‘judicialisation’ of politics through the transfer of decision-making powers from legislatures or executives to courts.²⁸ An overview of

²⁴ Eric Stein, ‘Lawyers, Judges and the Making of a Transnational Constitution’ (1981) 75 AJIL 1, 1.

²⁵ See id, Joseph Weiler, ‘The Transformation of Europe’ (1991) 1000 Yale LJ 2403; Alec Stone Sweet, *The Judicial Construction of Europe* (OUP 2004).

²⁶ Joseph Raz, *The Authority of Law – Essays on Law and Morality* (Oxford University Press 1979), 176; H. L. A. Hart, Penelope A. Bulloch and Joseph Raz, *The concept of law* (2nd edn, Clarendon Press 1994), 124 ff.

²⁷ C. Neal Tate and Torbjörn Vallinder, *The Global Expansion of Judicial Power* (New York University Press 1995); Tom Ginsburg, ‘The Global Spread of Judicial Review’ in Gregory A. Caldeira, R. Daniel Kelemen and Keith E Whittington (eds), *The Oxford Handbook of Law and Politics* (OUP 2008); A.E. Dick Howard, ‘A Traveler from an Antique Land: The Modern Renaissance of Comparative Constitutionalism’ (2009) 50 VaJInt'l L 3, 21-25.

²⁸ Torbjörn Vallinder, ‘When the Courts Go Marching In’ in C. Neal Tate and Torbjörn Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press 1995), 13-15.

constitutional traditions in Europe indicates that two main modes of constitutional review have been adopted: abstract review, whereby a specialised judicial body is asked to review the constitutionality of a measure in the absence of litigation; and concrete review, whereby a constitutional court answers questions posed by a non-specialised judicial court on constitutional matters.²⁹ These modes of judicial review are analogous to some of the actions which can be brought before the Court: abstract review is comparable to the action for failure of a Member State to fulfil its obligations and the action for annulment prescribed in Articles 258 and 263 TFEU, while concrete review is similar to the preliminary reference mechanism provided for by Article 267 TFEU. In effect, the Court has a number of characteristics usually associated with constitutional courts, such as having the power to review the constitutionality of legislation, adjudicate on the powers of EU organs, and rule on the vertical division of competences between EU and Member States.³⁰

The ‘constitutionalisation’ of Europe, and the development of its brand of constitutionalism, was famously developed mainly by, and through, the EU’s ‘constitutional’ Court, which endowed EU law with constitutional effects and led to the discourse that dominates the EU’s legal order becoming a constitutional one.³¹ This is clear, for example, from the limits EU law imposes on the exercise of national powers,

²⁹ Alec Stone Sweet, ‘Why Europe Rejected American Judicial Review and Why It May Not Matter’ (2003) 101 *MichLRev* 2744, 2771. On the existent variants in Europe, see Mauro Cappelletti and others, *Methods, tools and institutions. Book 1. A political, legal and economic overview* (Walter de Gruyter 1986), 273-278.

³⁰ Takis Tridimas, ‘The Court of Justice and Judicial Activism’ (2006) 21 *ELRev* 199, 206.

³¹ See Weiler, ‘The Transformation of Europe’, Weiler, *The Constitution of Europe*, Sweet, *The Judicial Construction of Europe*; Robert Schütze, *From Dual to Cooperative Federalism* (OUP 2009), 49-50; and Case 294/83 *Les Verts v Parliament* [1986] E.C.R. 1339. This is not to dispute the existence of a debate as to the nature of the EU as an international organization or an autonomous, constitutional legal order. It merely reflects the fact that this thesis places itself within the internal perspective and background narratives of EU law practice and literature, which adopts the latter position – see Katja Ziegler, ‘International Law and EU Law: Between Asymmetric Constitutionalisation and Fragmentation’ in Alexander Orakhelashvili (ed), *Research Handbook on the Theory of International Law* (Elgar 2011), 269, 315-318.

from the ‘subjectivation’ of the Treaty, and from the development of a number of constitutional doctrines such as supremacy, direct effect and implied powers.³² However, it is also clear that not all classical ‘constitutional’ concepts and discourses are useful. Even though the analytical categories that have shaped much of the scholarly and political debate over the history of the EU have originated from the traditional approaches to constitutional polities and to international organizations³³, the EU is not a typical State-based constitutional polity, and it raises questions that are absent, or are not so pronounced, in nation-States.³⁴

The role of the Court in developing the enforcement mechanisms of EU law fits with general functional theories of federalism, according to which judicial review operates as a mechanism for dealing with collective action issues when a free trade system is being created and there are multiple legislatures that may set up protectionist barriers.³⁵ The peculiarity of EU law in this respect lies mainly in that the effectiveness of EU law depends primarily on its acceptance by national courts and administrations, which may find that their loyalties lie with the national legislature that set up those

³² José Luis da Cruz Vilaça and Nuno Piçarra, ‘Y a-t-il des Limites Matérielles à la Revision des Traités Instituant les Communautés Européennes?’ [1993] CDE 3, 10-13; Norbert Reich, ‘A European Constitution for Citizens’ (1997) 3 ELJ 131, p. 132; Miguel Poiares Maduro, *We, the Court – The European Court of Justice and the European Economic Constitution – A Critical Reading of Article 30 of the EC Treaty* (Hart Publishing 1998), 8-9; Weiler, *The Constitution of Europe*, 19-25; Alec Stone Sweet and James Caporaso, ‘From Free Trade to Supranational Polity: European Court and Integration’ in Wayne Sandholtz and Alec Stone Sweet (eds), *European Integration and Supranational Governance* (OUP 1998), 102; Paul Craig, ‘Constitutions, Constitutionalism, and the European Union’ (2001) 7 ELJ 125, 128-139; Julio Baquero Cruz, *Between Competition and Free Movement* (Hart Publishing 2002), 2.

³³ Schütze, *From Dual to Cooperative Federalism*, 3-4, 51. A third option is to see the EU through an administrative law prism. See Peter L. Lindseth, ‘Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community’ (1994) 99 ColumLRev 628, 654.

³⁴ Pavlos Eleftheriadis, ‘Aspects of European Constitutionalism’ (1996) 21 ELRev 32, 42.

³⁵ For the USA, see Martin Shapiro, ‘Federalism, the race to the bottom and the regulation-averse entrepreneur’ in H. Scheiber (ed), *North-American and Comparative Federalism* (Institute of Governmental Studies Press 1992).

protectionist barriers to begin with.³⁶ This creates both opportunities and risks for the Court: if national courts have an incentive to apply EU law, being empowered by the supremacy and direct effect doctrines to act as the teeth or 'sword' that foster integration and force policy change on reluctant governments³⁷, EU law can be denied its full practical effect by those same national courts should they decide that national sovereignty should be protected. This is the case particularly with national supreme or constitutional courts, which tend to see themselves as defenders of the integrity of national systems and refuse the supremacy doctrine as postulated by the CJEU.

To negotiate this the Court seems to have entered into an indirect dialogue with national courts, with each party agreeing to disagree: while the Court states that the European legal order is superior to every legal act enacted by national legal orders, national supreme and constitutional courts refuse a straightforward surrender of national legal sovereignty and insist on their own role as guardians of fundamental rights while resisting further transfers of the main core of Member State's sovereignty from the national to the European level.³⁸ This dichotomy has led to the emergence and

³⁶ Imelda Maher, 'National Courts as European Community Courts' (1994) 14 LS 226; Wayne Sandholtz and Alec Stone Sweet, 'Integration, Supranational Governance, and the Institutionalization of the European Polity' in Wayne Sandholtz and Alec Stone Sweet (eds), *European Integration and Supranational Governance* (1998), 18.

³⁷ Andreas J. Obermaier, 'The National Judiciary as Sword of European Court of Justice Rulings: The Example of the *Kohll/Decker* Jurisprudence' (2008) 6 ELJ 735; Weiler, *The Constitution of Europe*, 194.

³⁸ The main role in this saga was taken by the German Federal Constitutional Court, which in its Solange decisions – Judgment of 29 May 1974 *Solange I* BVerfGE 271; Judgment of 22 October 1986 *Solange II* BVerfGE 339; Judgement of 12 October 1993 *Maastricht* BVerfGE 155; Judgement of 30 June 2009 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, 0.06.2009 *Lisbon Treaty* – developed a doctrine which was adopted by most of the other Member States' supreme courts. On this, see Neil MacCormick, 'The Maastricht-Urteil: Sovereignty now' (1995) 1 ELJ 259, 259-260, 609; Ernst-Ulrich Petersmann, 'Judging Judges: From "Principal-Agent" Theory to "Constitutional Justice" in Multilevel "Judicial Governance" of Economic Cooperation Among Citizens' (2008) 11 JIEL 827, 857; Ernst-Ulrich Petersmann, 'Do Judges Meet their Constitutional Obligation to Settle Disputes in Conformity with 'Principles of Justice and International Law'?' (2007) 1 EJLS, 23 ff; Giacinto della Cananea, 'The Italian Constitutional Court and the European Court of Justice: From Separation to Interaction' (2008) 14 EPL 523; Xavier Groussot, 'European Rights' and Dialogues in the context of Constitutional Pluralism' in Avbelj and Komárek (eds), *Constitutional Pluralism in the EU and Beyond* (Hart Publishing, 2012), 19; Florence Giorgi and Nicolas Triart, 'National Judges, Community Judges:

increasing popularity of pluralism, a descriptive endeavour with several variants that attempts to conceptualize the conflicting pretensions of supremacy (which are deemed equally valid from the internal point of view of each of the opposing systems) as leading to interactive rather than hierarchical relations between legal orders.³⁹ It should be noted that pluralism is not unanimously accepted, at least from a normative perspective⁴⁰; nonetheless, resistance is much frailer concerning its descriptive force in explaining how different legal systems making contradictory claims of authority on issues of constitutional relevance such as fundamental rights, institutional autonomy and allocation of competences, can operate hand-in-hand.⁴¹ In practice, national courts act as if belonging to the EU legal system when applying EU law, with the small area of potential conflict between national and European courts being managed through the behaviour and interdependence of the relevant courts and institutions.⁴² The principle of

Invitation to a Journey through the Looking-glass – On the Need for Jurisdictions to Rethink the Inter-systemic Relations beyond the Hierarchical Principle’ (2008) 14 ELJ 693.

³⁹ The roots of this theory in the EU context can be traced back to the *Maastricht-Urteil* and to Neil McCormick, in particular both Neil MacCormick, ‘Beyond the sovereign state’ (1993) 56 MLR 1, MacCormick, ‘The Maastricht-Urteil: Sovereignty now’ and Neil MacCormick, *Questioning sovereignty: law, state, and nation in the European commonwealth* (Oxford University Press 1999). A number of different pluralist theories have been put forth, not only for the EU but for other supranational organizations as well: see, for example, Miguel Poiars Maduro, ‘Contrapunctual Law: Europe's Constitutional Pluralism in Action’ in Neil Walker (ed), *Sovereignty in transition – Essays in European law* (Hart 2006); Miguel Poiars Maduro, ‘Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the context of Legal and Constitutional Pluralism’ (Constitutional Pluralism in the EU and Beyond); Mattias Kumm, ‘Who is the Arbiter of Constitutionality in Europe?’ (1999) 36 CML Rev 351; Petersmann, ‘Judging Judges: From "Principal-Agent" Theory to "Constitutional Justice" in Multilevel "Judicial Governance" of Economic Cooperation Among Citizens’, particularly at pages 866-867 and 877-878; Nikolais Lavranos, ‘Regulating Competing Jurisdictions Among International Courts and Tribunals’ (2008) 68 ZaöRV 575, 612-621; Groussot, 9, 15; Neil Walker, ‘The EU and the WTO: Constitutionalism in a New Key’ in Gráinne de Burca and Joanne Scott (eds), *The EU and the WTO – Legal and Constitutional Issues* (Hart Publishing 2001), 34-41.

⁴⁰ Julio Baquero Cruz, ‘The Legacy of the Maastricht-Urteil and the Pluralist Movement’ 14 ELJ 389; Julie Dickson, *How Many Legal Systems? Some Puzzles Regarding the Identity Conditions of, and Relations between, Legal Systems in the European Union* (SSRN 2008), 12.

⁴¹ Daniel Sarmiento, ‘The Silent Lamb and the Deaf Wolves – Constitutional pluralism, preliminary references and the role of silent judgments in EU Law’ (Constitutional Pluralism in the EU and Beyond), 4.

⁴² Miguel Poiars Maduro, *A Crise Existencial da Constituição Europeia* (FDUNL 1999), 16.

supremacy is recognised and applied in practice, even if its normative-legal grounds are not set in stone and not as securely embedded in the national constitutional theories applied by national courts as the CJEU might demand.⁴³

The issue of pluralism falls outside the scope of the present work, but is brought up because it brings to the forefront the fact that the Court exists in an environment of institutional bargaining where not every legal problem can be solved legally. It illustrates how an approach based exclusively on an ‘internal’ perspective of the law that views judicial decisions as resulting from a strictly deductive approach to the law and the Treaties will not do. To understand the case law one must take into account not only the text of the law, or even the expressions effectively used in the Court’s decisions, but also other elements latent in (but external to) traditional legal analysis, including those elements which constrain the actions of courts in general, and the Court in particular. These external elements will be referred to as ‘institutional constraints’.⁴⁴ Concerning the concept of institution itself – as the source of the relevant constraints – I will follow the vocabulary used by Stone Sweet, Sandholtz and Fliegstein.⁴⁵ They distinguish between:

- rule-systems, or institutions *per se*, which include formal rules, such as constitutions, statutes, common law, regulations and even contracts. Also included are informal rules, such as: *(1) extensions, elaborations and modifications of formal rules, (2) socially sanctioned norms of behaviour, and*

⁴³ Ziegler, 278-9.

⁴⁴ This choice derives not from the potential truth of the concept but from its usefulness in relating data to each other and in orienting the research to profitable modes of gathering and organizing the data. See Howard B. Kaplan, ‘The Concept of Institution: A Review, Evaluation, and Suggested Research Procedure’ (1960) 29 SocForces 176.

⁴⁵ Alec Stone Sweet, Wayne Sandholtz and Neil Fliegstein, *The Institutionalization of Europe* (OUP 2001), 6-8.

(3) *internally enforced standards of conduct*.⁴⁶ Informal rules tend to be disregarded in legal discussions, but they are arguably as important, if not more, than formal rules. Local cultures contain cognitive elements that allow for the definition of social relationships, and for interpretative frameworks that allow actors to render meaningful the actions of others and interpret their own position in social relationships.⁴⁷ Informal rules are instrumental to the existence of these shared cognitive frameworks that are constitutive of specific legal cultures and/or communities, providing the structure in which social interaction occurs and making purposive action possible by providing individuals with a framework of shared expectations.⁴⁸

- organizations, meaning groups of individuals, more or less formally constituted in specific times and places, who pursue a set of collective purposes. Organizations coordinate between individual actors and the rule-setting in which they operate.

- actors, meaning individuals acting purposefully within a specific institutional framework.

The section below will be devoted to identifying some institutional constraints that are relevant for courts in general; the following section will then focus on how

⁴⁶ Douglass C North, *Institutions, institutional change and economic performance* (Cambridge University Press 1990), 40. Similarly, Neil Fligstein, 'Markets as Politics' (1996) 61 *AmSociolRev* 656, 658.

⁴⁷ Neil Fligstein, *The architecture of markets: an economic sociology of twenty-first-century capitalist societies* (Princeton University Press 2001), 15.

⁴⁸ Edward L. Rubin, 'The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions' (1996) 109 *HarvLR* 1393, 1414. On the concept of cognitive frameworks as interpretive systems through which individuals process information and make sense of their experiences, see Karl E. Weick, *Making sense of the organization* (Blackwell Business 2001). For a review of current research on this topic, see Judith A. Howard and Daniel G. Renfrow, 'Social Cognition' in John Delamater (ed), *Handbook of Social Psychology* (Springer 2006), 262-269.

these elements are relevant for better descriptions of the CJEU's decision-making practices.

III. Institutional Constraints of Courts

a. Cognitive Frameworks and the Institutional Logic of Legal Reasoning

*'Skilled social actors are crucial to institutional change because of their ability to generate or manipulate frames that make sense of institutional or policy problems and offer persuasive solutions. Frames can help mobilize cooperation among diverse actors by linking their interests and identities to a set of ideas—symbols, theories, models—that allow for further institutional development. We see skilled action, and sometimes new frames, in many situations, such as [for example when] the Court finds principles of mutual recognition in the Rome Treaty.'*⁴⁹

This description of the Court challenges the traditional legal perspective distinguishing between the political and judicial domains, according to which courts are supposed merely to apply the law.⁵⁰ Nonetheless, and even within the narrow confines of legal literature, the perception of the role of judges has moved on from this traditional separation of powers' approach.

Judicial review, inasmuch as it requires the protection of rights by courts on constitutional grounds, conflicts with traditional concepts of parliamentary democracy and strict separation of powers, but it is nonetheless a common feature of contemporary public law systems.⁵¹ Also, while the task of judges still consists primarily in the independent and impartial interpretation, clarification and protection of the rule of law, it is now generally acknowledged that every judgement of a new situation adds to the

⁴⁹ Stone Sweet, Sandholtz and Fligstein, 12.

⁵⁰ According to which the judge '*est la bouche qui prononce les paroles de la loi*' – Charles de Secondat Montesquieu, David Wallace Carrithers and Thomas Nugent, *The spirit of law: a compendium of the first English edition* (University of California Press 1977), Livre XI, chapitre VI. See also Sweet, 'Why Europe Rejected American Judicial Review and Why It May Not Matter', 2746.

⁵¹ A M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962), 16-17; Alec Stone Sweet, 'Constitutional Courts and Parliamentary Democracy' (2002) 25 *West European Politics* 77, 78-79.

meaning of a rule or to the resolution of lacunae: the existence of lacunae in the legal system, when combined with the *non liquet* prohibition, leads to judges having to solve issues not foreseen by previous rules. Similarly, it is now commonly accepted that there are limits to the guidance that general language can provide due to its open texture: ‘canons’ of interpretation can diminish, but not eliminate, interpretative uncertainties. These uncertainties can be syntactical, arising from the way words are organised in a sentence; or lexical, arising from: (a) the polysemy of words, (b) vagueness in what regards their extension, and (c) the open texture which allows the precise extension of a given meaning to change over time.⁵²

All legal systems compromise between the need for certain, simple rules which can be applied by private individuals, and the existence of issues which may only be appreciated and settled by an expert choice when they arise in a concrete case.⁵³ Judges must sometimes face situations where there are different legitimate answers. In these situations judges are still expected to invoke only those reasons which are recognised by law⁵⁴, but courts have nonetheless to determine what the correct answer is based on criteria other than those used in a pure adjudicatory setting.⁵⁵ Even though legal reasoning with law-making consequences is usually similar to and continuous with decisions interpreting and applying law⁵⁶, at least in the former case non-legal

⁵² Carlos Santiago Nino, *Introducción al análisis del derecho* (2da. edn, Editorial Astrea 1988), 260-268; Elina Paunio and Susanna Lindroos-Hovinheimo, ‘Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law’ (2010) 16 ELJ 395, 397-399.

⁵³ Hart, Bulloch and Raz, *The concept of law*, p.126-130; Raz, *The Authority of Law*, 78.

⁵⁴ Raz, *The Authority of Law*, 200 and 208; Jeremy Waldron, ‘Representative Lawmaking’ (2009) 89 BULRev 335, 336.

⁵⁵ Raz, *The Authority of Law*, 182, notes that law itself may rule out several options as inappropriate and give some guidance as to how to choose between the remaining possible answers. Against this, arguing that only one right solution exists for each legal system, see Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977), 68-71 and 81-130.

⁵⁶ Karl Larenz, *Methodenlehre der Rechtswissenschaft* (José Lamego tr, Springer-Verlag 1991), 519.

considerations may act in the shadow – including ideological preferences, strategic interaction with other judges on a collegial court, pressures by judges on the judicial hierarchy's lower rungs, inter-branch struggles over legal outcomes with significant policy implications, and popular opinion regarding judicial outcomes and the practice of judicial review.⁵⁷ This post-modern approach to adjudication, recognising the pervasiveness of extra-legal considerations, should not however lead us to conclude that adjudication is a purely arbitrary operation. It is a common understanding of a shared 'story' about the contents and existence of a legal order which makes such order authoritative within a community;⁵⁸ similarly, it is the obeisance to social practices and shared understandings by a legal community, which are in turn in accordance with a more general common understanding of what is legitimate law, that determines what

⁵⁷ Barry Friedman, 'The Politics of Judicial Review' (2005) 84 *TexLRev* 257. A thorough debate of this question, which is common in the US context would depart from legal realism – Brian Tamanaha, 'Understanding Legal Realism' (2009) 87 *TexLRev* 731; Victoria Nourse and Gregory Shaffer, 'Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?' (2009) 95 *Cornell LRev* 62 –, look into the attitudinal model – Jeffrey Allan Segal and Harold J. Spaeth, *The supreme court and the attitudinal model revisited* (Cambridge University Press 2002), 44-114 – and eventually compare it with New Institutional approaches which condense the contributions of law and economics and critical legal studies – Rogers M. Smith, 'Political Jurisprudence, The "New Institutionalism," and the Future of Public Law' (1988) 82 *AmPolitSciRev* 89; Mark C. Suchman and Lauren B. Edelman, 'Review: Legal Rational Myths: The New Institutionalism and the Law and Society Tradition' (1996) 21 *L& SocInquiry* 903; Rubin, B. Guy Peters, *Institutional theory in political science: the 'new institutionalism'* (2nd edn, Continuum 2005) – or legal process theory. For a good overview of these currents, see Arthur Dyevre, 'Making Sense of Judicial Lawmaking: A Theory of Theories of Adjudication' (*EUI*, 2008/09) <http://cadmus.eui.eu/dspace/bitstream/1814/8510/1/MWP_2008_09.pdf> accessed 10-4-2010, 8–22.

⁵⁸ It should be noted that this insight is coherent with one of the main theoretical accounts of why people obey rules. From an evolutionary psychological perspective, rule abeyance is the result of cognitive, intuitive and emotional abilities that allow for the organization of behaviour around genetically grounded, yet culturally transmitted rules – see Richard Alexander, 'The Evolution of Social Behavior' (1974) 5 *Annual Review of Ecology and Systematics* 325; Michael Owren and Jo-Anne Bachorowski, 'The Evolution of Emotional Expression: A "Selfish-Gene" Account of Smiling and Laughter in Early Hominids and Humans' in Tracy Mayne and George A. Bonanno (eds), *Emotions: current issues and future directions* (Guilford Press 2001); Robert Trivers, 'The evolution of reciprocal altruism' (1971) 46 *Quarterly Review of Biology* 35; and Robert Trivers, *Social Evolution* (Benjamin/Cummings 1985). For such findings in what concerns other primates, see F. B. M. de Waal, *Chimpanzee politics: power and sex among apes* (Johns Hopkins University Press 1989); Dorothy L. Cheney and Robert M. Seyfarth, *Baboon metaphysics: the evolution of a social mind* (University of Chicago Press 2007). More generally, see Paul Seabright, *The company of strangers: a natural history of economic life* (Princeton University Press 2010), 65-90 and Francis Fukuyama, *The origins of political order* (Profile 2011).

judges can legitimately decide.⁵⁹ If courts, and particularly high courts, can generate and manipulate the institutional frames in which they operate, the way they do so is effectively constrained by that same institutional framework. Judicial decisions are not valid because they are issued by a judge, but because they are issued by a judge within a specific setting in a duly reasoned manner.⁶⁰

The point to be taken from all of this is that judicial activism has to mask itself as the discovery of law, even when it verges into politics; and, importantly, that this masking has serious consequences as to how courts decide. Legal reasoning is in effect constrained by rules, even if some are merely informal. For courts to operate at all, every agent and organization participating in judicial processes must, in order for such participation to make sense, share in a common legal culture that frames and constrains the different cognitive frameworks available to them. This cognitive framework usually goes unremarked because it is unremarkable; it is part of what has been called the ‘tacit dimension’, meaning that it includes propositions and opinions shared by a group and deemed so obvious that they are never fully articulated or systematised.⁶¹ For example, the cognitive framework shared by most, if not all, European legal orders requires that when interpreting law it is the language of the accepted law sources that is to be taken into account. Even if the meaning of the relevant provisions or authorities is uncertain, the limits of uncertainty of language are the boundaries of certainty of language as well: interpretation cannot go beyond what language itself allows. Another of these common assumptions is the imperative of treating similar situations similarly; this imposes

⁵⁹Robert Cover, ‘Foreword: Nomos and Narrative’ (1982) 97 HarvLRev 1; Gerald Postema, ‘Implicit Law’ (1994) 13 Law&Phil 361, 369-371.

⁶⁰ Adjudication is thus a device giving formal and institutional expression to reasoned argument – Lon L. Fuller, ‘The Forms and Limits of Adjudication’ (1978) 92 HarvLRev 353, 366.

⁶¹ Polanyi and Sen, *The tacit dimension*.

coherence and consistency requirements into legal systems, underpinning imperatives to remove contradictions between different parts of the system and to generalise rules developed in individual cases. This, in turn, is related to the pursuit of legal certainty, the creation of a rule of law and the removal of purely arbitrary decisions.⁶² Even within the scope of possible interpretations, extra-legal considerations are, like background principles and values, mediated through the existent institutional setting and by a common ‘culture’ of legal reasoning. Such a culture imposes standards – for example, of consistency and coherence with the contents of the relevant statutes and legal precedents – by which the correctness of legal interpretation is to be judged.

In this cognitive setting, decisions are arrived at through deliberation and analogical reasoning, and presented as relatively redundant, self-evident, incremental extensions of available legal materials. Control of whether the relevant parameters of legal reasoning have been complied with in a legal decision is ensured by the interactive nature of law practice: *ex-ante* because cases are brought and argued before courts by lawyers trained and imbued in the spirit and grammar of a specific legal community; and *ex post* through systems of appeal and the criticism from an interpretive community recognizing as authoritative a number of commonly accepted parameters as to the correctness of interpretation.⁶³

A good example of this practice is balancing, a technique for solving conflicts between individual rights, between individual rights and public interests, and between conflicting public interests, which in the European context is traditionally associated

⁶² Claus-Wilhelm Canaris, *Systemdenken und Systembegriff in der Jurisprudenz* (A. Menezes Cordeiro tr, 2nd edn, Duncker und Humblot 1983), §1 (2).

⁶³ Gerald Postema, ‘“Protestant” Interpretation and Social Practices’ (1987) 72 *Law&Phil* 283, 310-312. On the EU, see Ham Schepel and Rein Wesseling, ‘The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe’ (1997) 3 *ELJ* 165. On the constitutive nature of such a grammar, if focusing on public law generally, Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010), 178-180.

with the principle of proportionality.⁶⁴ Balancing plays an important role in the case law of many constitutional courts under different guises, including the CJEU.⁶⁵ Its most complete treatment in the European setting is probably by Alexy, who draws and builds on Dworkin's conceptual distinction between rules and principles.⁶⁶ According to Dworkin, while rules are applicable in all-or-nothing fashion, principles can conflict, having a weight that provides non-conclusive reasons for deciding a case one way or another. Both principles and rules are norms, with principles being more general, abstract, indeterminate, and foundational than rules. The distinction, however, is not merely quantitative but also qualitative: a norm is either a principle or a rule depending on whether it provides a definitive reason for action or not.⁶⁷ While a collision of rules can only be resolved by either the invalidation of one of the rules or the stipulation of an exception, a conflict of principles – being a conflict of non-conclusive norms – must be solved by balancing the relative weight of each.⁶⁸ Alexy goes beyond this and considers that principles are not only standards of relatively high generality providing non-

⁶⁴ On its origins, see J. J. Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (3rd edn, Almedina 1998), 262 ff.

⁶⁵ Donald H. Regan, 'The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause' (1985-1986) 84 MichLRev 1091, 1101-1108, describes a number of different balancing tests in the American context. Maduro, *We, the Court*, 54-58, does the same in the European context. Analysing the potential differences between balancing and proportionality, see Moshe Cohen-Eliya and Iddo Porat, 'American balancing and German proportionality: The historical origins' (2010) 8 I•CON 263, 268-270. Mapping the adoption of proportionality throughout the world, see Alec Stone Sweet and Jud Mathews, 'Proportionality, Balancing and Global Constitutionalism' (2008) 47 ColumJTransnat'IL 72.

⁶⁶ But the theories are distinct on a number of points: Alexy allows for the existence of multiple possible solutions, while Dworkin famously does not; constitutional rights for Dworkin are rules, while for Alexy they are, at least in some cases, principles; Dworkin expressly considers that balancing is not acceptable when individual rights are at stake, while Alexy builds his whole theory around the idea that the balancing of individual constitutional rights is unavoidable; and to Dworkin principles are not optimization requirements for policies and rights alike, as they are to Alexy, but mere standards providing reasons for individual rights.

⁶⁷ Dworkin, *Taking Rights Seriously*, 23-26. This distinction is similar to that between rules and standards: see Kathleen Sullivan, 'Foreword: The Justices of Rules and Standards' (1992) 106 HarvLRev 22, 57 ff.

⁶⁸ Dworkin, *Taking Rights Seriously*, 27.

conclusive reasons for deontic decisions which may be displaced by other principles, but also optimization requirements demanding that something be realised to the greatest extent possible given the factual and legal possibilities. In other words, to Alexy principles are value-claims with mere *prima facie* force, and balancing is inherent to them: when principles collide, contrary to rules, the situation cannot be solved by declaring that one of the principles is invalid or by building exceptions into it.⁶⁹ The solution is to create a conditional relation of precedence for the balancing of principles in light of the specific facts of the case.⁷⁰ To achieve this, Alexy proposes a 'Law of Balancing', which can be divided into three stages: first, establishing the degree of non-satisfaction of a first principle; second, establishing the importance of the competing principle; and third, establishing the relationship between the first two elements.⁷¹

This technique is supposed to create the appearance that law yields purely objective results and that law is not so much made as found. For this appearance to be true an axiological unity of values in the legal system, allowing for the discovery of a single rational right answer, would be required.⁷² This requires all legal solutions to be compatible and fit into a single whole, meaning that an objective order of values has both to exist and be epistemologically accessible.⁷³ Since truths cannot be logically incompatible, and since reason is common to all men, a right solution would then be

⁶⁹ Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, Oxford University Press 2001), 66; Raz, *The Authority of Law*, 228. Raz's position is distinct from that of Alexy in that he considers that principles and rules are reasons for actions while Alexy's view is more restricted and strictly jurisprudential, considering that they are reasons for norms.

⁷⁰ Alexy, *A Theory of Constitutional Rights*, 50-54, Sullivan, 59.

⁷¹ Groussot, 4.

⁷² See Canaris, *Systemdenken und Systembegriff in der Jurisprudenz*, translated into Portuguese by Menezes Cordeiro, in particular 204-208; Larenz, *Methodenlehre der Rechtswissenschaft*, 675-686.

⁷³ Isaiah Berlin, *Four essays on liberty* (Oxford University Press 1969), 145-147; Alexy, *A Theory of Constitutional Rights*, 94.

acceptable to all rational persons.⁷⁴ However, without an *a priori* demonstration that a total harmony of values is somewhere to be found, either through the reduction of the concept of good to a common measure or by creating a comprehensive hierarchy among goods, we have no reason to suppose that all ends and values can be harmonised.⁷⁵ Some values may be incommensurable, which will occur when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgements about how these goods are best characterized.⁷⁶

If one does not accept theories that claim universal validity for the highest values or goods, then balancing's function is to find a *modus vivendi* among forms of life that are irreconcilable, or mediating claims which can never be solved.⁷⁷ On the other hand, if theories about universal validity were accepted, they would imply that a hierarchical solution would be available, in which case there would seem to be no need for balancing in the first place. The consequence of this is that balancing does not seem apt to reach a single, definitive solution: when goods are not instrumental but intrinsic, no metric is available, no balancing is possible, and choices must be made. Reasons run

⁷⁴ Berlin, *Four essays on liberty*, lv.

⁷⁵ William A. Galston, *Liberal pluralism: the implications of value pluralism for political theory and practice* (Cambridge University Press 2002), 6.

⁷⁶ Raz, *The Morality of Freedom*, 325, concerning essentially failures of transitivity; Galston, *Liberal pluralism* 29 ff; Sunstein, 796; Neil MacCormick, *Practical Reason in Law and Morality* (OUP 2008), 37. On the (legal) debate on incommensurability, see the overview provided in Brian Bix, *Law, Language and Legal Determinacy* (Clarendon Press 1993), 96-104.

⁷⁷ Berlin, *Four essays on liberty*, 167-171; John Gray, *Enlightenment's wake: politics and culture at the close of the modern age* (Routledge 2007), 13; Galston, *Liberal pluralism*, p.32-33. A discussion on modes of conciliating values in a pluralist environment can be found in Frank Michelman, 'The Supreme Court 1985 Term – Foreword: Traces of Self-Government' (1986) 100 HarvLRev 4, 31-33. He identifies 3 tendencies on modes of conciliation: procedural conditions of normative conversation (Habermas), pragmatic concerns with contingent and temporarily accepted premises which suffice for the purposes of conciliating values at a given time and space (Rorty, Gadamer), and conditions based on the intersubjective and social formation of the self (Minow, the feminist movement). See also Cass Sunstein, 'Incommensurability and Valuation in Law' (1994) 92 MichLRev 779.

out⁷⁸, which is why balancing can potentially be co-extensive with discretion.⁷⁹ Moral pluralism, the existence of a multitude of incompatible but morally valuable forms of life, and value pluralism, the existence of incompatible virtues which are not completely ranked by some impersonal criteria of moral worth, seem to be the rule.⁸⁰

As much is acknowledged by Alexy himself, who refuses the existence of an order of values or principles determining the content of adjudication and expressly admits that balancing does not lead to a single solution in each case. Nonetheless, Alexy still contends that, while substantive answers to all morality questions are not possible, procedural moral theories formulating rules or conditions for rational practical argument are.⁸¹ This may lead to the argument that balancing operates at a purely formal level, with its correctness merely a matter of discourse and of relative coherence rather than of any external, substantive standards.⁸² Nonetheless, this ‘procedural’ test requires the injection of significant elements of value in at least two moments: in determining the relative ‘weight’ of the principles involved; and in carrying out the final balancing

⁷⁸ Raz, *The Morality of Freedom*, 353; Habermas, *Between Facts and Norms*, 160.

⁷⁹ Julian Rivers, ‘Proportionality and Discretion in International and European Law’ in Nicholas Tsagourias (ed), *Transnational Constitutionalism* (Cambridge University Press 2007); Sunstein, 804; Jeremy Waldron, ‘Fake Incommensurability: A Response to Professor Schauer’ (1994) 45 *Hastings LJ* 813, 816.

⁸⁰ Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986), 133, 396-397. This line of thought equates values – and the current philosophical discussion on their incommensurability – with legal principles. Even though different in that values have an axiological character while principles are deontic value-claims, both principles and values have essentially the same conceptual structure inasmuch as both have to do with the logic of applying norms and both require balancing for solving conflicts between them – see Alexy, *A Theory of Constitutional Rights*, 93; J Habermas, *Between Facts and Norms* (Polity Press 1996), 233.

⁸¹ Alexy, *A Theory of Constitutional Rights*, 99, 365-370. See also Rivers, 119; Gustavo Zagrebelsky, *Il diritto mite* (Einaudi 1992), 170. A similar process-based theory has been advanced by Jurgen Habermas, ‘Law and Morality’ in S. M. McMurrin (ed), *The Tanner Lectures on Human Values*, vol 8 (University of Utah 1988) <<http://www.tannerlectures.utah.edu/lectures/documents/habermas88.pdf>>.

⁸² Gerard Conway, ‘Levels of Generality in the Legal Reasoning of the European Court of Justice’ 14 *ELJ* 787. On how Habermas and other theorists fail to answer this question, see Thomas McCarthy, ‘Practical Discourse: On the Relation of Morality to Politics’ in Craig Calhoun (ed), *Habermas and the Public Sphere* (MIT 1992).

exercise, as the outcome which is considered to be best may depend on the concept of efficiency used or even on the specific balancing test that is adopted. Thus, balancing always contains substantive elements, requiring value-judgements which are not controllable due to the absence of a sensible standard for balancing and comparing values, and is therefore inherently subjective.⁸³

It should be noted that these concerns do not apply to judicial balancing alone: they also apply to political decisions by other bodies.⁸⁴ In effect, different orderings of value cannot always co-exist, in which case the political system must tilt one way or the other.⁸⁵ As Post has noted:

‘Politics and law are [...] two distinct ways of managing the inevitable social facts of agreement and disagreement. As social practices, politics and law are both independent and interdependent. They are independent in the sense that they are incompatible. To submit a political controversy to legal resolution is to remove it from the political domain; to submit a legal controversy to political resolution is to undermine the law. Yet they are interdependent in the sense that law requires politics to produce the shared norms that law enforces, whereas politics requires law to stabilize and entrench the shared values that politics strives to achieve.’⁸⁶

What this all means is that we must take into account that the objective quality of legal interpretation is bounded, limited, and relative, in the sense that its results cannot be found to be ‘true’ or ‘false’.⁸⁷ Nonetheless the achievement of those same

⁸³ Ben Schueler, ‘Methods of Application of the Proportionality Principle in Environmental Law’ (2008) 35 *LIEI* 231, 231; Groussot, 8; Friedrich Müller, *Die Einheit der Verfassung – Kritik des juristischen Holismus* (Dunken & Humblot 1979), particularly 199. Alexy considers this problem to be inherent to any practical reason discourse: see Robert Alexy, *A Theory of Legal Argumentation: the theory of rational discourse as theory of legal justification* (translated by Ruth Adler and Neil MacCormick) (Clarendon Press 1989), 206-208, 288.

⁸⁴ Waldron, ‘Fake Incommensurability: A Response to Professor Schauer’, 822.

⁸⁵ Galston, *Liberal pluralism*, 59.

⁸⁶ Robert Post, ‘Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics’ (2010) 98 *CLR* 1319, 1343.

⁸⁷ Bounded rationality is a term first proposed by Herbert Simon and used in economics to identify situations where people may not look for fully rational choices because of their inability to be sufficiently focused, or adequately steadfast or alert enough in seeking the information necessary to make a fully rational decision – see Herbert Simon, “A Behavioral Model of Rational Choice” *Quarterly Journal of Economics* 69 (1955), and “Models of Thought” (New Haven, Yale University Press, 1979).

results is constrained by a series of rules and interpretative practices arising from a shared cognitive framework that reduce their potential number, while allowing those results to be seen as accountable and legitimate due to the way in which they are reached. Legal adjudication need not be either a purely formalistic or a purely arbitrary operation, and in some cases it contains elements of both. Legal reasoning is best understood as a discursive practice restricted by a series of conditions undertaken by, and within the context of, a specific (legal) community with the purpose of putting forward rules which are of such limited normative content that individuals with different normative backgrounds may agree to them, but also strong enough for any discussion abiding by them to be acknowledged as rational and therefore legitimate by the ideal (legal) audience.⁸⁸ As Hart said, even though in some cases it cannot be demonstrated that a decision is uniquely correct, it may be made acceptable as a reasoned product of informed impartial choice.⁸⁹

b. Judicial Limitations and Decisional Minimalism

Not even the most powerful national courts have the power of the ‘sword’ or ‘purse’; even if courts have legitimacy of their own that limits what kind of action other political entities can take and the extent to which judicial pronouncements can be ignored, it is a staple of political science literature that courts’ limited institutional resources means that they are also somewhat dependent on the goodwill of other branches of government and citizens for both support and compliance.⁹⁰ One way to

⁸⁸ Owen Fiss, ‘Objectivity and Interpretation’ (1982) 34 *StanLRev* 739, 743-745; Alexy, *A theory of legal argumentation*, 19 and 288; Lisa Connant, *Justice Contained – Law and Politics in the European Union* (Cornell University 2002), 218; Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 *Yale LJ* 1346, 1381.

⁸⁹ Hart, Bulloch and Raz, *The concept of law*, 200.

⁹⁰ James L. Gibson, Gregory A. Caldeira and Vanessa A. Baird, ‘On the Legitimacy of National High Courts’ (1998) 92 *AmPolitSciRev* 343, 343. On the limited impact of judicial decisions on policy settings

protect this legitimacy and goodwill is by focusing on the outcome of particular cases. In particular, courts may seek to find solutions that are acceptable on results and on low-level principles without taking sides in large-scale controversies, producing ‘incompletely theorised agreements on particular outcomes’.⁹¹ This will allow courts to solve disputes by the application of general and abstract standards in a way sufficiently detached from the political process to ensure the acceptance of their decisions as the authority of the law.⁹²

Simultaneously, for purposes of access to and rationalisation of the case law, participants in a legal community will tend to develop propositions that will serve as classification devices framed in such a way that they could serve as a means of understanding the underlying logic of previous case law and of predicting the outcome of hypothetical future cases.⁹³ These classificatory frameworks can be framed within a continuum from bright-line rules to high-generality standards.⁹⁴ In complex situations judges may want to adopt standards, ensuring greater flexibility to deal with specific cases they cannot easily foresee and to pursue the normative goals resulting from the law. Standards act as a reserve, implicitly granting competence to courts, as ultimate

and on the dependence of such impact on external context, see Connant, *Justice Contained*, particularly 15-39.

⁹¹ Cass R. Sunstein, *Legal Reasoning and Political Conflict* (OUP 1996), p 4-5; Connant, *Justice Contained*, 51-52.

⁹² Andreas Paulus, ‘International Adjudication’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010), 219.

⁹³ George Christie, *Philosopher Kings?* (OUP 2011), 133-134.

⁹⁴ Frederick Schauer, ‘Rules and the Rule of Law’ (1991) 14 Harv JL & Pub Pol’y 645, 648-651; Louis Kaplow, ‘Rules versus Standards: An Economic Analysis’ (1992) 42 Duke LJ 557, 608-611. It should be noted, as these authors do, that the difference between standards and rules is merely one of degree. Rules and standards are not qualitatively distinct, but are short-hand for the different levels of discretion granted to adjudicatory bodies and are therefore mainly useful analytical tools – Sullivan, 57-62. For heuristic purposes, rules and standards will be referred to as if one was comparing pure types, a practice common in legal theory, even though legal commands mix the two in varying degrees – see Frederick Schauer, ‘The Convergence of Rules and Standards’ [2003] NZLRev 303, p306-309.

arbiter, to decide instead of other institutions. The problem is that the amount and complexity of litigation this can generate can lead to a standard's overextension, which may in turn lead to an increase in strategic litigation by market players, and the surfacing of concerns about courts' physical capacity and docket control. Furthermore, a court may face specific problems concerning its legitimacy under a standard-based approach, as it will face highly politicised value-choices where no best solution is available, and risk ceding the impartial adjudicatory role that traditionally ensures the acceptance of a court's decisions by those to whom they are addressed.⁹⁵ This will create incentives for courts to limit standards through the development of rules. Rules may be defended on grounds of fairness – since they treat *prima facie* similar cases similarly –, legal certainty, saving time and costs in adjudications and of restraining the discretion of courts.⁹⁶ They reduce uncertainty, facilitate settlement and allow courts to allocate decision-making elsewhere. Rules tend, however, to be both over- and under-inclusive in relation to their normative underpinning; judges may well want greater flexibility to deal with specific situations and thereby decrease errors of under- and over-inclusiveness.⁹⁷ This may, in turn, push courts back towards standards. As the complexity and number of cases increase, all alternative solutions become imperfect, which may lead to cycling between rules and standards as a least-bad situation is attained, leading to a tension between the flexibility courts might obtain through the

⁹⁵ Waldron, 'Representative Lawmaking', 336.

⁹⁶ Sullivan, 62-65.

⁹⁷ This includes considerations of fairness – taking into account similarities and differences which are suppressed by rules –, preventing the exploitation of rules when knowledge or access to information is distributed unequally, and expressing the balancing exercise which is merely implicit in rules. *Id.*, 66-69.

adoption of standards and the reduction in litigation and allocation of cases to other organizations that simple rules allow.⁹⁸

c. The Need for Precedent

Precedent can be seen as a reaction to the tension between the judges' law-making role and the need for certainty and law-obedience: precedent arises as an inherently legal constraint on discretion and law-making, while also allowing judges to portray their decisions as self-evident, redundant deductive extensions of pre-existing law.⁹⁹ Simultaneously, precedent effectively entrenches the powers or jurisdiction a court may have claimed in previous decisions by both providing a reason for such powers and restricting the reasons which can be used by its opponents.¹⁰⁰ When a process of case-by-case adjudication is adopted within an institutional and cognitive framework such as the one described above, something akin to precedent must of necessity develop in order to comply with the imperative of treating factually similar situations alike.¹⁰¹ The existence of law-making elements in legal interpretation means that even in civil systems judicial decisions are relevant to the development of the law;¹⁰² this is expressly so in common law systems that embrace *stare decisis*.

Precedent flows from the requirements of legal reasoning and is simultaneously instrumental to, and the goal of, efforts of categorising and rationalising prior case law. It is thus relevant for both the stabilization and the development of law. Informal rules of precedent and legal reasoning, operating in the context of a specific common legal

⁹⁸ Neil K. Komesar, *Law's limits: the rule of law and the supply and demand of rights* (Cambridge University Press 2001), 159-160.

⁹⁹ Sweet, *The Judicial Construction of Europe*, 10.

¹⁰⁰ In the US context, see Barry Friedman and Erin F. Delaney, 'Becoming Supreme: The Federal Foundation of Judicial Supremacy' (2011) 111 *ColumLRev* 1137, 1188-1192.

¹⁰¹ Christie, *Philosopher Kings?*, 132.

¹⁰² See, in particular and with great detail, Larenz, *Methodenlehre der Rechtswissenschaft*.

culture, effectively constrain the development of the law. North has provided a general theory on institutional change and development which is also a good heuristic device to understand how, due to such informal rules and culture, legal change occurs incrementally with even discontinuous changes being constrained by the embeddedness of established customs, traditions and codes and conducts.¹⁰³

Cultural constraints are crucial to understand the path of historical change, and how organizations and rules-settings interact and mutually constrain one another. In particular, organizations have to operate under the existing rule-setting and thus have to navigate the options that such a setting provides. Simultaneously they are major agents of institutional change: as organizations evolve and adapt, they alter rules as well. In other words, the path of institutional change is shaped by both the lock-in and path-dependency that comes from the symbiotic relationship between institutions and organizations, and the feedback process by which human beings perceive and react to the existing choice-set. In particular, incremental change comes from the perceptions of entrepreneurs in political and economic organizations that they could do better by altering the existent institutional framework at the margin. On the other hand, this perception is usually framed by incomplete information processed through mental constructs, which leads to institutional developments not being strictly those envisaged by those advancing them. This is particularly the case with legal systems, namely those that are precedent-based:

'past decisions become embedded in the structure of the law, which changes marginally as new cases arise involving new, or at least in terms of past cases unforeseen issues; when decided these become in turn, a part of the legal framework. The judicial decisions reflect the subjective processing of information in the context of the historical construction of the legal framework. (...) However we account for the judicial process,

¹⁰³ North, *Institutions, institutional change and economic performance*. It should be noted that the author's argument is very much focused on showing that institutional change need not be economically efficient, which in no way undermines the use of this theory here.

*the institutional framework is continuously but incrementally modified by the purposive activities of organizations bringing cases before the courts.*¹⁰⁴

In other words, History matters: the selection of a prior path determines current behaviour. Precedents are part of the cognitive framework in which courts operate, generating adaptive expectations that constrain litigants to argue within the bounds of existing precedent and law even when attempting to push the law further.¹⁰⁵ This may seem to stabilise law, but it has also been observed that, through path-dependence, precedent can be said to lead to three distinct, if interconnected, phenomena.¹⁰⁶ The first phenomenon is non-ergodicity, meaning that the development of the case law is not necessarily incremental, and that not all developments are equally likely, but that instead small early events can have a disproportionate impact on the eventual direction the case law takes. In short, apparently irrelevant decisions may have large, unexpected consequences. The second effect is lock-in, or inflexibility: once a court has taken a decision on a legal question, precedent and other informal rules lock-in the legal rule. It should also be pointed out that there are legitimate ways for judges to eschew precedent within the cognitive framework in which they operate, such as relying on different precedents, on linguistic imprecisions or on factual distinctions.¹⁰⁷ This can however be costly or impossible to the extent that courts and the actors with whom they interact have invested resources, and adapted their routines, expectations, and relationships with

¹⁰⁴ Id, 97. On the suitability of this framework for the CJEU, see Adrienne Héritier, ‘Overt and Covert Institutionalization in Europe’ in Alec Stone Sweet, Wayne Sandholtz and Neil Fligstein (eds), *The Institutionalization of Europe* (OUP 2001), 59.

¹⁰⁵ Oona A. Hathaway, ‘Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System’ 86 *IowaLRev* 601, 627-630. On the role of litigants in shaping the development of EU law, see Mitchel Lasser, *Judicial deliberations: a comparative analysis of judicial transparency and legitimacy* (Oxford University Press 2004), 109-110; more specifically for their role in developing the European economic freedoms, see Maduro, *We, the Court*, 25 ff.

¹⁰⁶ I here follow Hathaway, 630-634.

¹⁰⁷ Clayton P. Gillette, ‘Lock-In Effects in Law and Norms’ (1998) 78 *BULRev* 813, particularly 824-5; Hathaway, 624-625.

one another, in step with how the law has evolved.¹⁰⁸ The third consequence is indeterminacy of outcome, as a decision choosing between different solutions that were possible at an initial stage will have been adopted on the basis of imperfect information as to its consequences and can end up affecting the subsequent development of the case law in unexpected, and even surprising ways.

This last element also seems to be relevant in understanding the evolution and role of normative considerations and pressures in the case law. In particular, it may occur that through their efforts to explain and rationalise the case law, legal operators may divine normative reasons which were previously absent or conclude that normative concerns which were present ceased to be relevant, even though that was not foreseen or intended by the relevant decision-makers when the case law started developing. Judicial decisions are human expressions containing ideas; unintended consequences flow from human thought no less than from human action.¹⁰⁹

d. Legitimate Judicial Decision-Making

A particular concern for courts is to ensure obedience; in light of the specific institutional framework of the EU, the question of the legitimacy of EU law is one of the most extensively debated in the literature, and one we must address. However, some preliminary points must be made, as legitimacy is an elusive concept. It is normally given three different meanings: the first takes legitimacy as addressing the conformity of certain behaviours to the existing legal rules (legal legitimacy, or procedural legitimacy); the second concerns whether what the law prescribes is normatively justified according to rationally defensible principles (moral or substantive

¹⁰⁸ Stone Sweet, Sandholtz and Fligstein, 20.

¹⁰⁹ Albert O. Hirschman, *The passions and the interests: political arguments for capitalism before its triumph* (Princeton University Press 1997), 41.

legitimacy);¹¹⁰ lastly, legitimacy can be seen as the existence of non-coerced consent by subjects to obey a given authority. In light of problems with measuring subjective adherence to a given system, some social scientists prefer to talk of consensus, as a measure of empirically demonstrable acceptance by subjects, rather than of subjective consent. Regardless, both consent and consensus vary along a continuum from active participation to passive acceptance to sullen obedience, and with them varies also the level of sociological legitimacy.¹¹¹

Some literature drifts uncertainly between legitimacy as normative input and as behavioural output¹¹², but these are different beasts: there is a distinction between the existence of empirically verifiable sociological legitimacy and the normative grounds upon which the belief of the existence of a legitimate authority rests. Normative approaches to legitimacy search for a truth that is logically independent from the strictly empirical question of whether law's subjects share a belief in the legitimacy of a political system. Normative theories are usually unitary and exclusionary, while it is quite possible for multiple theories of normative legitimacy to coexist as foundations of sociological legitimacy. It is true that normative arguments may change the beliefs of the relevant people and thus undermine the sociological legitimacy of political systems,

¹¹⁰ David Beetham, *The Legitimation of Power* (Peter Jones and Albert Weale eds, MacMillan 1991), 3-6.

¹¹¹ Dolf Sternberger, 'Legitimacy' in David L. Sills (ed), *International Encyclopedia of the Social Sciences*, vol 9 (Macmillan 1968); P. H. Partridge, *Consent and Consensus* (Leonard Schapiro ed, Pall Mall 1971), 71; Joseph Rothschild, 'Observations on Political Legitimacy in Contemporary Europe' (1977) 92 *PolSciQ* 487, 498; Beetham, *The Legitimation of Power*, 3-20; David Beetham and Christopher Lord, *Legitimacy and the EU* (Kenneth Dyson and Kevin Featherstone eds, Longman 1998), 12; R. Stryber, 'Legitimacy' in Neil J. Smelser and Paul B. Bates (eds), *International Encyclopedia of the Social & Behavioural Sciences*, vol 13 (Elsevier 2001), 8700-8701; Mattei Dogan, 'Conceptions of Legitimacy' in Mary Hawkesworth and Maurice Kogan (eds), *Encyclopedia of government and politics* vol I (2nd edn, Routledge 2003).

¹¹² Ian Clark, *International Legitimacy and World Society* (Oxford University Press 2007), 17.

but to mix these dimensions of legitimacy would constitute a normative fallacy.¹¹³ Weber himself famously tried to map this relationship: he identified a number of normative grounds for legitimacy – the rational-legal, traditional and charismatic principles of authority –, and then proceeded to conclude that in the modern State the relevant normative ground was the rational-legal, meaning that procedural legitimacy would lead to sociological legitimacy.¹¹⁴ This approach is at least still partially shared by some authors who consider that the internal constraints inherent to juridical discourse imposed by the logic of argumentation allow for a procedural rationality that legitimises both legal procedures and democratic legislation.¹¹⁵ The dominant contemporary view, however, considers that the normative grounds of legitimacy in modern States are mixed and fluid. In face of the relationship between people's belief in legitimacy and the normative justification for such beliefs, on the one hand, and of the evolution and variance of such normative justifications, on the other, legitimacy can be seen as arising in the political space where a tolerable consensus is achieved between different normative foundations, the weight of each remaining largely indeterminate.¹¹⁶

In what concerns the EU and Western liberal democracies, the normative grounds for sociological legitimacy are usually deemed to comprise a mix of substantive and formal sources, but the most commonly identified source of legitimacy is the perception that a government is operating under democratic principles and is subject to the will of the people who regularly express their consent, usually through

¹¹³ I owe this term to Arie Rosen.

¹¹⁴ See Max Weber, *Economy and society: an outline of interpretive sociology* (Bedminster Press 1968). See also Habermas, 'Law and Morality', 220-228; Stryber, 8700.

¹¹⁵ Habermas, 'Law and Morality', 229-280.

¹¹⁶ Dogan, 118; Beetham, *The Legitimation of Power*, 24-25; Ian Clark, *Legitimacy in International Society* (Oxford University Press 2007), 20, 226; Clark, *International Legitimacy and World Society*, 13.

organized elections.¹¹⁷ Democracy is a concept whose meaning can be lost amidst a cacophony of competing interpretations, but in the Western World it can be understood as referring to a number of different principles such as the need for elected officials, universal, equal, secret and regular suffrage, freedom of expression, the right to engage in political activities and the concomitant need to create a space for continuous debate between opposing social forces, interests and ideas, *inter alia*.¹¹⁸ Other sources of sociological legitimacy, however, can and usually do act in an anti-democratic direction: constitutionalism fits this bill, as it implies the adoption of a value-order protected by fundamental rights beyond the reach of democratic decisions. Another non-democratic source of sociological legitimacy is technocratic, namely the existence of scientific grounds which provide a normative justification for the adoption of certain rules.¹¹⁹ Yet another source of sociological legitimacy is efficiency. In a noted essay, Lipset distinguished between economic efficiency, which was instrumental to the sustainability of a democratic system, and legitimacy, understood as the normative underpinnings that had to be commonly accepted for democracy to emerge.¹²⁰ It is

¹¹⁷ For the EU, see Articles 6 and 7 TEU.

¹¹⁸ Giovanni Sartori, 'Democracy' in David L. Sills (ed), *International Encyclopaedia of the Social Sciences*, vol 4 (Macmillan 1968), 112; Nanette Neuwahl and Steven Wheatley, 'The EU and Democracy – Lawful and Legitimate Intervention in the Domestic Affairs of States?' in Anthony Arnall and Daniel Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford University Press 2002); T.D. Christiano, 'Democracy: Normative Theory' in Neil J. Smelser and Paul B. Bates (eds), *International encyclopedia of the Social & Behavioral Sciences*, vol 5 (Elsevier 2001); Beetham and Lord, *Legitimacy and the EU*, 6, 9; R. A. Dahl, 'Democracy' in Neil J. Smelser and Paul B. Baltes (eds), *International encyclopedia of the Social & Behavioral Sciences*, vol 5 (Elsevier 2001), 3406-8; Robert Dahl, *On Democracy* (Yale University Press 1998) 84-86; Jeremy Waldron, 'Can There Be a Democratic Jurisprudence?' (2009) 58 *Emory LJ* 675, 680. On the importance of the Charter of Paris to a New Europe of 1990 in summing up the essence of Western democratic practice, see Clark, *International Legitimacy and World Society*, 159.

¹¹⁹ Beetham, *The Legitimation of Power*, 71-75; Clark, *Legitimacy in International Society*, 135-138. Paradoxically, the increased reliance on scientific-technical expertise by political and legal authorities can have the effect of increasing politicisation and delegitimizing legal processes and institutions: see Stryber, 8703.

¹²⁰ Seymour Martin Lipset, 'Some Social Requisites of Democracy: Economic Development and Political Legitimacy' (1959) 53 *AmPolitSciRev* 69, 86.

generally accepted that the performance of a system forms a necessary component of its legitimacy, and that political legitimacy is usually held to require both a morally authoritative source for government and an ability to satisfy the ends that justify holding power. Accordingly, in addition to formal and substantive sources, we can also identify input (normative) and output (performance) sources of sociological legitimacy.¹²¹

The sophisticated machinery of modern democratic States reflects the concern that the legitimacy of courts depends on their ability to meet the public's conception of the proper role of courts; and this conception can, in turn, be said to rely on a number of common, basic, assumptions. One assumption is that the judicial process is pursued by fair-minded and intelligent people, and will ultimately lead to fair and impartial decisions through a number of procedural requirements concerning the right to counsel, right to a fair hearing, rules on evidence, *inter alia*. Another assumption is that the law is previously known or at least knowable by the people staffing the adjudicatory process, and dictates the appropriate resolution of the relevant disputes brought before courts. This in turn requires the assumption that law is, at least for the most part, out there to be discovered by a trained judiciary in a quasi-mechanical way.¹²² In other words, the legitimacy of courts, and in particular of politically engaged courts, is to a great degree dependant on them being seen as acting within a certain conception of judicial activity, which brings us back to the institutional logic of legal reasoning and action described above in the first place.

IV. Institutional Constraints of the Court of Justice of the European Union

a. Legitimacy Deficits and Surpluses in the EU

¹²¹ Beetham, *The Legitimation of Power*, 137; Fritz Wilhelm Scharpf, *Governing in Europe: effective and democratic?* (OUP 1999), 6 ff.

¹²² Christie, *Philosopher Kings?*, 77, 124.

Assessing the sociological legitimacy or illegitimacy of a system requires us to identify the various relevant normative sources of sociological legitimacy and how they interact. A legitimacy deficit can be said to arise when constitutional structures, the substantive content of rules, or their adequacy to resolve problems of government performance do not conform sufficiently to accepted beliefs about the proper source of authority.¹²³ In the case of the EU, the balance between democracy, constitutionalism, technocratic options and efficiency tends to boil down to the *vexata quaestio* of the Union's democratic deficit.

On this topic, it has been argued that EU law needs output legitimacy alone. In particular, Scharpf has argued that input legitimacy must be borrowed from the national level; output legitimacy, on the other hand, can be achieved at European level by the EU's institutions sticking to the limited competences attributed to them in the Treaties and pursuing consensual technocratic solutions with low political visibility that increase economic efficiency.¹²⁴ Somewhat similarly, Majone submits that the EU is a regulatory State which can be legitimised without recourse to input legitimacy as long as it pursues only efficiency-enhancing policies that lead to Pareto-efficiencies and it avoids redistribution and politically charged choices.¹²⁵ As Moravcsik has noted, a common element to these approaches is the view that the EU's activities should be restricted to

¹²³ Beetham, *The Legitimation of Power*, 75, 149, 208. 'Democratic deficit' is a concept which knows multiple formulations beyond this one: see Giandomenico Majone, *Dilemmas of European integration: the ambiguities and pitfalls of integration by stealth* (OUP 2005), 37; Andreas Follesdal and Simon Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 *JCMS* 533, 534-537.

¹²⁴ Scharpf, *Governing in Europe: effective and democratic?* Negative integration in advancing market competition and avoiding protectionism is identified as an area where output legitimacy will suffice.

¹²⁵ Giandomenico Majone and Pio Baake, *Regulating Europe* (Routledge 1996), 287-296; Giandomenico Majone, 'Europe's "Democratic Deficit": The question of Standards' (1998) 4 *ELJ* 5, 28.

its limited competences in technical areas of low political relevance.¹²⁶ The gist of the argument is that the EU is not a State, and as such the traditional balance between input and output legitimacy for nation-States does not apply. EU law is seen as something akin to administrative law: not susceptible of being legitimised by democratic means in light of the absence of a European polity and *demos*, but legitimate as long as it pursues its limited goals within the framework of competences attributed to it by democratically elected national bodies. Whatever legitimacy the EU is able to derive on its own arises from generating greater economic efficiency and from its ability to deal with transnational issues which national States and their majoritarian institutions are unable to address on their own. Thus, the democratic deficit is non-existent or limited to a few specific areas where the EU's actions go beyond its technocratic and efficiency-enhancing role.¹²⁷

Another proposed non-democratic normative source of legitimacy at EU level relates to constitutionalism and to the protection of individual rights, including in some formulations the protection of individual economic freedoms against interferences from public powers. This approach draws from both ordo-liberal and Kantian legal theories¹²⁸, with the market freedoms legitimising market integration and non-discriminatory competition by increasing individual autonomy, controlling abuses of government, and maximising economic welfare.¹²⁹ An offshoot of this approach goes

¹²⁶ A. Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing the Legitimacy of the European Union' (2002) 40 *JCMS* 603, 613-619.

¹²⁷ This is a view usually associated with inter-governmentalism.

¹²⁸ E-J. von Mestmäcker, 'On the Legitimacy of European Law' (1994) 58 *RechtsZ* 617, 619, 626 ff; Ernst-Ulrich Petersmann, 'European and International Constitutional Law: Time for Promoting "Cosmopolitan Democracy" in the WTO' in Gráinne de Burca and Joanne Scott (eds), *The EU and the WTO – Legal and Constitutional Issues* (Hart Publishing 2001), 81-82.

¹²⁹ Miguel Poiares Maduro, 'Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights' (1997) 3 *ELJ* 55, 55-56; Petersmann, 'European and International Constitutional Law: Time for Promoting "Cosmopolitan Democracy" in the WTO', 82.

further and argues that individual freedoms are crucial to democratic consensus by ensuring the rule of law in pluralistic societies, understood as a minimal ‘overlapping consensus’ of reasonably diverse moral, religious, and political conceptions that is likely to endure over time in democratic societies.¹³⁰ A closely related approach is the ‘transnationalist’ one¹³¹, which sees EU law, and particularly the fundamental freedoms, as improving the democratic practices of the Member States. It argues that institutional malfunctions can arise from ‘national failures’, in particular the parochial and selfish nature of national democratic systems. The concept of ideal democracy implicit in this approach focuses on the existence of a public domain of free discussion where all interests are taken into account before decisions are made, instead of on the existence of majority rule applied to political decisions. Supranational institutions, and in particular free movement rights, are seen as improving democracy by giving representation status to non-nationals in the political process of Member States, thereby forcing them to take into account out-of-State interests.¹³² Some authors have linked this idea with that of

On ordo-liberalism, see David J. Gerber, ‘Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe’ (1994) 42 AmJCompL 25.

¹³⁰ Petersmann, ‘Do Judges Meet their Constitutional Obligation to Settle Disputes in Conformity with ‘Principles of Justice and International Law’?’, 37; Petersmann, ‘Judging Judges: From "Principal-Agent" Theory to "Constitutional Justice" in Multilevel "Judicial Governance" of Economic Cooperation Among Citizens’, 850.

¹³¹ Anupam Chander, ‘Globalization and Distrust’ (2005) 114 Yale LJ 1197, 2000. On the origins of this approach in John Hart Ely, *Democracy and distrust: a theory of judicial review* (Harvard University Press 1980), see Alexander Somek, ‘The Argument from Transnational Effects I: Representing Outsiders through Freedom of Movement’ (2010) 16 ELJ 315, 317-321.

¹³² Maduro, *We, the Court*; Maduro, ‘Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights’, 73-76; Christian Joerges and Jurgen Neyer, ‘From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology’ (1997) 3 ELJ 273, 294-295.

output legitimacy, and argue that the EU benefits from both input and output legitimacy, even if differently from States.¹³³

All the above-mentioned approaches provide *prima facie* valid normative sources of legitimacy for the EU, but seem to ignore that normative reasons do not ensure sociological legitimacy. All these theses assume that their normative sources of legitimacy can actually contribute to sociological legitimacy rather than test them empirically. But the richness of normative sources of legitimacy identified, coupled with the existence of formal legitimacy arising from the Treaties, indicates that if there is a European legitimacy deficit it is not so much a normative as a sociological one.

Traditionally, three types of consideration are put forth to justify decision-making by democratically unelected bodies: first, the mechanisms of electoral accountability are thought to be unsuited for the pursuit of certain goals and for addressing certain questions; secondly, achieving these goals and addressing these questions tend to require highly technical solutions, and the best way to pursue, critique and control these solutions is thought to be by a professional community; lastly, if decisions adopted go against broad majorities, elected bodies should be able to override the experts' options.¹³⁴ The main problem with the EU seems to be that it appears to be insufficiently democratic in relation to expected standards.¹³⁵ Since EU institutions are not subject to direct democratic control, this requirement of technocratic legitimacy is absent, leading to potentially serious de-legitimation consequences. Democratic processes are still mainly restricted to national units, while an ever increasing number of

¹³³ Anand Menon and Stephen Weatherill, 'Legitimacy, Accountability and Delegation in the European Union' in Anthony Arnall and Daniel Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford University Press 2002), 120-131.

¹³⁴ Scharpf, *Governing in Europe: effective and democratic?*, 16, 22.

¹³⁵ Weiler, *The Constitution of Europe*, 84.

decisions are adopted at EU level, with citizens having no effective means of debating European decisions and influencing decision-making.¹³⁶ The democratic deficit in Europe therefore relates to the absence of a common polity where the majority principle can apply: there is not a European *demos*, no European-wide policy discourse and no European-wide institutional arrangements assuring the political accountability of European office holders.¹³⁷ The problem appears to be that people only accept the majoritarian principle of democracy within a polity to which they see themselves as belonging to; democracy requires a previous polity in which a minority can accept to be compelled by a majority.¹³⁸ Even though some authors have debated the ideal conditions for the creation of a European polity¹³⁹, the fact remains that the creation of a polity, and even of a mere ‘thin identity’¹⁴⁰ with elements common to all Europeans, depends on very long-term factors, such as social, cultural, linguistic, and historic affinity. It may well be that it is only through a shared history that the normative, civilizing, and liberal values that are to be common to the EU can be given a durable social existence.¹⁴¹

The democratic deficit becomes particularly acute in light of the combination of the supremacy principle, the extension of EU political competences, and the possibility

¹³⁶ Jürgen Habermas, ‘Citizenship and National Identity: Some Reflections on the Future of Europe’ in Ronald Beiner (ed), *Theorising Citizenship* (State University of New York 1995), 265-267; Brigid Laffan, ‘The Politics of Identity and Political Order in Europe’ (1996) 34 *JCMS* 81, 93-4. This also appears to be the position of the German Federal Constitutional Court: see *Lisbon Treaty*, para. 262-4.

¹³⁷ Scharpf, *Governing in Europe: effective and democratic?*, 187; Angus Johnston, ‘Democracy in the European System: Towards a Critical Approach’ (1998) 9 *European Law Students Association Selected Papers in European Law* 77.

¹³⁸ Weiler, *The Constitution of Europe*, 83, 337; Beetham and Lord, *Legitimacy and the EU*, 29, 33.

¹³⁹ See Habermas, ‘Citizenship and National Identity: Some Reflections on the Future of Europe’ and the idea of ‘constitutional patriotism’.

¹⁴⁰ Beetham and Lord, *Legitimacy and the EU*, 45-47, 58.

¹⁴¹ Lindseth, 681.

of virtually all national rules being subject to European constitutional review. In face of the present impossibility of grounding the EU's legitimacy in a manner similar to that of Member States, particularly in what concerns its democratic credentials, it is not surprising that authors have scrambled to ground its legitimacy on the sources identified above, or on a combination of them.¹⁴² However, as long as political identity clings to the nation-State there will be democratic-legitimacy problems in supranational bodies. This is an empirical, sociological reality that cannot be theorized away¹⁴³, and which poses particular obstacles to the Court in making sure that its decisions are followed and accepted as legitimate. This concern may in turn be reflected in the way the Court acts and how it tries to present such actions.

b. The Court in its labyrinth

Like other judicial bodies, the Court is simultaneously empowered and constrained by both formal rules (the Treaties, the specific procedural rules by which it must abide) and informal rules (the parameters of correct judicial discourse identified above). The rules and procedures of the EU constitute the framework of constraints and opportunities for actors who want to enhance their social, economic, or political positions.¹⁴⁴ Those actors may thus prefer to refer to courts instead of other organizations to further their ends, with the result that domestic courts can be routinely prompted by savvy litigants to take account of and interpret European law in otherwise mundane litigation.¹⁴⁵ The ease with which these litigants can refer to European law in

¹⁴² Agustín José Menéndez, 'The European Democratic Challenge: The Forging of a Supranational *Volonté Générale*' (2009) 15 ELJ 277, 282-284.

¹⁴³ Lindseth, 736.

¹⁴⁴ Stone Sweet, Sandholtz and Fligstein, 10.

¹⁴⁵ An empirical analysis of this phenomenon can be found, among others, in Alec Stone Sweet and Neil Fligstein, 'Institutionalizing the Treaty of Rome' in Alec Stone Sweet, Wayne Sandholtz and Neil Fligstein (eds), *The Institutionalization of Europe* (OUP 2001).

situations where a potential gain might be obtained depends, however, on the Court's own case law. No less importantly, the Court is constrained by the institutional and organizational framework in which it operates. To begin with, like other courts, the Court consists:

*'of highly diverse people, who have a weak democratic pedigree and limited fact-finding capacity, and who must render many decisions, live together, avoid error to the extent possible, and show respect to each other, to the people who come before them, and to those affected by their decisions.'*¹⁴⁶

The Court was set as the authoritative interpreter of EU law in the Treaty of Rome, in which many of the original provisions were very loosely worded in order to enable political agreement. The Court was thus empowered judicially to clarify the rules *ex post*.¹⁴⁷ Furthermore, for a long time the Court operated in an environment where EU rules had to be adopted by unanimity. Even today the reversal by political means of the Court's interpretation of Treaty articles is primarily to be achieved by Treaty amendment, allowing the Court to develop Treaty provisions, and particularly the fundamental freedoms, in such a way that their study is now for the most part the study of the relevant case law.¹⁴⁸ This rule governing the reversal of the Court's interpretations of the Treaty is a weak form of control favouring the Court's dominance over the constitutional development of the EU, particularly in light of the limited threat from other court-curbing mechanisms.¹⁴⁹

¹⁴⁶ Sunstein, *Legal Reasoning and Political Conflict*, 6.

¹⁴⁷ Tridimas, 204; Petersmann, 'Do Judges Meet their Constitutional Obligation to Settle Disputes in Conformity with 'Principles of Justice and International Law'?', 4; Petersmann, 'Judging Judges: From "Principal-Agent" Theory to "Constitutional Justice" in Multilevel "Judicial Governance" of Economic Cooperation Among Citizens', 840.

¹⁴⁸ Fritz Scharpf, 'Legitimacy in the Multi-Level European Polity' in Martin Loughlin and Petra Dobner (eds), *The Twilight of of Constitutionalism?* (OUP 2010), 93.

¹⁴⁹ Such as withdrawing resources, jurisdiction stripping, court packing, and judicial selection and reappointment, which all face the same difficulties as those inherent to overriding Court decisions – see

Counter-balancing this, and adding to the concerns about the legitimacy of EU law identified above, is the fact that the Court's decisions have to be applied by national courts and administrations. It was submitted above that it is a common understanding of a shared 'story' about the contents and existence of a legal order that makes such order authoritative within a community; and it is the conformity with social practices and shared understandings about what is legitimate law that determines what judges can legitimately decide.¹⁵⁰ In the Western legal tradition, courts' legitimacy derives to a large extent from the social acceptance of having them perform the technical role of legal adjudicators in an impartial manner. While there is a degree of consensus among scholars that diffuse support for courts is an attitude that evolves over time through the slow accretion of positive messages about courts and the law¹⁵¹, courts are nonetheless expected to rely on much more than their ancient existence to be seen as legitimate. The CJEU, in particular, has an explicit political role when balancing interests and choosing between different interpretative possibilities that may become very visible when addressing politically controversial issues, and which can thereby seriously impact its legitimacy.¹⁵² Legitimacy concerns are thereby implicit in decisions with serious constitutional and political implications that may be fiercely resisted by their addressees, but can nonetheless only be overturned by Treaty revision. Since it is the Court's legitimacy, and that of EU law, that generally ensures the cooperation of national courts and administrations – alongside the empowering effect EU law has on

R. Daniel Kelemen, 'The Political Foundations of Judicial Independence in the European Union' (2012) 19 JEPP 43.

¹⁵⁰ Postema, 'Implicit Law', 369-371.

¹⁵¹ Gibson, Caldeira and Baird. 345.

¹⁵² See Michael O'Neill, 'Democracy and the EU: legal perspectives on the political debate' (1995) 4 IrJEurL 48, 63-64; Jukka Snell, *Goods and services in EC law: a study of the relationship between the freedoms* (Oxford University Press 2002), 71-72; Lindseth, 699.

lower courts that are granted a *prima facie* legitimate tool with which to contradict higher courts and national legislatures – these concerns feed into the institutional incentives for the Court strictly to abide by the commonly accepted precepts of legal reasoning,¹⁵³

The above elements represent the institutional constraints usually identified in the literature – i.e., the Court’s need to operate within the accepted frameworks of legal reasoning, the empowering of national courts against national administrations, and the institutional barriers to the overturning of its decisions – as interacting to determine the institutional ability of the Court’s adjudicative process.¹⁵⁴ The fact that to a large extent the Court creates EU law, is able to regulate litigants’ access to it, and that its decisions are subject to only a weak form of political control creates a ‘zone of discretion’ where it can operate.¹⁵⁵ But even in this zone the Court must operate within a specific strategic environment that limits the Court’s discretion through formal and informal constraints, such as the fact that the Court must operate under the ‘mask of law’.¹⁵⁶ This accounts for the Court’s incentive to develop its case law through a number of very incompletely theorised decisions focusing on the specific facts of the case instead of proposing fully-fledged normative theories. This is an apt strategy for producing stability and agreement in the midst of social disagreement and pluralism, and may even be virtuous from a democratic perspective, as it leaves fundamental principles to be discussed in

¹⁵³ Karen Alter, *Establishing the Supremacy of European Law* (OUP 2003). This is not to say that all that motivates lower courts is legitimate legal reasoning and concern for the law: there are a number of empirical studies pointing to lower courts referring questions when they wish to reverse national rules and refusing to do so when they wish to shield national systems: see Connant, *Justice Contained*, 86-87.

¹⁵⁴ Connant, *Justice Contained*, 38-45.

¹⁵⁵ Sweet, *The Judicial Construction of Europe*, 23-26.

¹⁵⁶ Walter Mattli and Anne-Marie Slaughter, ‘Constructing the European Community Legal System from the ground up: the role of individual litigants and national courts’ [1996] Jean Monnet Working Paper 6/96, Alec Stone Sweet, ‘The Politics of Constitutional Review in France and Europe’ (2007) 5 I•CON 69, 79.

democratic arenas, and recognises the institutional limitations of ability and capacity which plague courts. It also recognises that silence may help the present to learn from the future.¹⁵⁷ Such incomplete theorisation of decisions leads to a case-by-case adjudicative strategy that has the advantage of assuaging misgivings about giving too much discretion to courts, hiding and minimising the impact of the exercise of that discretion. On the other hand, this is also seemingly inherent in the Court's peculiar system of collegial decision-making. This system does not allow for majority and dissenting opinions, and can thus be expected to lead to a clipped form of reasoning that hides personal inclinations and skims over disagreements and underlying tensions while reflecting the possible consensus within particular groups of judges.¹⁵⁸

The case law's incomplete theorisation can, on the other hand, lead to divergent lines of case law within the Court itself, particularly in light of the system of chambers currently in place at the Court.¹⁵⁹ Legal discourse – both by litigants, courts and in the literature – traces the decisions back to the Court even when cases are decided in different chambers. This is a useful fiction in constructing the law and the cognitive framework of legal agents. But this same cognitive framework means that courts, litigants and legal commentators will try to rationalise and extract useful categories from the case law *ex post*; because different chambers may have different inclinations and may be able to sustain one line of case law that is not prevalent in the Court as a

¹⁵⁷ Sunstein, *Legal Reasoning and Political Conflict*, 39.

¹⁵⁸ Lasser, *Judicial deliberations: a comparative analysis of judicial transparency and legitimacy*, 105-106; Vlad Perju, 'Reason and Authority in the European Court of Justice' (2009) 42 *VaJInt'l L* 307, 310-311, 331-332. That the existence of judges with different preferences leads to different judicial outcomes in cases decided by the CJEU has been first studied, and established, by Michael Malecki, 'Do ECJ Judges All Speak With The Same Voice? Evidence of divergent preferences from the judgments of chambers' (2012) 19 *JEPP* 59, particularly at 67.

¹⁵⁹ To understand the impact of this one must only realise that by the mid-nineties less than 20 per cent of all decisions were made by the full Court. See Malecki, 63, who also found evidence of systemic variation of outcomes attributable to chamber composition, and thus to individual judges – at 61.

whole, or even contradicts decisions by other chambers, this *ex post* exercise will try to explain these particular decision-patterns, which were developed within a normatively indeterminate background, as being either normatively coherent with a particular approach or as being ‘wrong’ decisions. The results of such an exercise may vary; but more often than not a fiction that the normative foundations of the case law are, and always have been, something that can explain the whole of the case law will be adopted, without any acknowledgment of how the law and its normative underpinnings have effectively changed.

This illustrates how, when coupled with the lack of a European democratic space, the strictures of legal reasoning, and the specific context in which the Court operates, incompletely theorised approaches may lead down an unexpected path which is then hard to reverse. As with other judicial bodies, for the Court’s role to be effective requires legal actors to be able to identify the applicable legal rules and the consequences of their application. The Court’s case law creates a cognitive framework that allows for this, while simultaneously empowering a number of societal actors who pick up on the Court’s case law.¹⁶⁰ Even in the absence of a formal *stare decisis* rule,¹⁶¹ legal principles laid down by the Court seem to be given full effect only in decisions following those in which they were first identified, thereby grounding them in something akin to settled precedent¹⁶². The existence of precedent, when coupled with this cognitive framework – which is shared by the European legal community, and influences the way litigants and referring courts frame their pleadings and questions –

¹⁶⁰ Sweet, *The Judicial Construction of Europe*, 35.

¹⁶¹ On how the Court, even though not *de iure* bound by precedent, still acts as if it was so bound in practice, Anthony Arnall, *The European Union and its Court of Justice* (2nd edn, OUP 2006), 627; Lasser, *Judicial deliberations: a comparative analysis of judicial transparency and legitimacy*, 107-111.

¹⁶² Maduro, *We, the Court*, 10, 20.

creates path-dependence. This may, in turn, lead to the above-mentioned phenomena of non-ergodicity, lock-in and indeterminacy of outcome.¹⁶³ Even if a certain line of case law has been kick-started by accident, as a result of work pressure, lack of communication between different chambers, or of genuine disagreements within the Court, path dependence and lock-in are still bound to kick in. The path adopted, moreover, will depend on the type of questions reaching the Court, and this will in turn depend on who the litigants are and on what questions the referring courts decide to send the Court. Such litigants will usually be those who can prospectively benefit from the case law while possessing sufficient resources to spend in litigation. It is to be expected that the existence of different rates of participation and representation of interests in litigation will push the case law in a direction which benefits repeat players who have both the means and the incentives to participate in it. In this regard, it has been noted that the Court serves as a battleground for States, corporate actors – particularly the wealthier industry players –, and societal interest organizations: a result of their resources and organizational capacity to pursue litigation and obtain information on EU law when compared with other groups pursuing diffuse and widely distributed interests.¹⁶⁴

This mode of decision-making must be understood in the context of an environment where the Court is required to follow the prevailing canon for legal reasoning, judicial methodology and logics of presentation,¹⁶⁵ and is also reflected in other elements of the mode of reasoning adopted by the Court. For example, when

¹⁶³ Susanne K. Schmidt, 'Who Cares About Nationality? The path-dependent case law of the ECJ from goods to citizens' (2012) 19 JEPP 8, 10. Whether this is indeed the case will be tested in Chapters IV to VIII.

¹⁶⁴ Connant, *Justice Contained*, 21, 28-29.

¹⁶⁵ Hart, Bulloch and Raz, *The concept of law*, 123.

lacunae are found the Court has recourse to teleological interpretation in line with Article 31 of the Vienna Convention on the Law of Treaties¹⁶⁶, namely through the use of broad systemic values such as the effectiveness and unity of EU law.¹⁶⁷ This results in policy issues being dealt with as merely technical questions.¹⁶⁸ In addition to the Treaties, the Court draws on the ECHR and other international treaties to which the Member States are parties, on EU secondary legislation, and on general principles built from the foundations of national laws.¹⁶⁹ The Court can be said to search for common standards accepted by the Member States; this precludes the impression that the Court is second-guessing national legislatures, seeks to confer EU law a level of acceptability by national legal orders, and helps generate the requisite impression that the Court is finding law instead of merely creating it. While the existing requirements of judicial accountability and control for the CJEU require judges to provide reasons for choosing one interpretative path over another, traditional ideas about legal reasoning, concerns about the legitimacy of the Court, and the requirement that judges come to collegial decisions all point towards a mode of reasoning which ignores the existence of serious interpretive and normative conflicts. On the other hand, the publication of the Advocates General's Opinions ensures not only that the Court has engaged in an

¹⁶⁶ This is somewhat contentious, since that Article also provides as elements of interpretation the usual meaning of the words and the context, and there is no consensus as to whether there is a hierarchy between them.

¹⁶⁷ Pierre Pescatore, 'Le recours, dans la jurisprudence de la Cour de justice des Communautés européennes, à des normes déduites de la comparaison des droits des États membres' (1980) 32 RIDC 337; Thijmen Koopmans, 'The Birth of European Law at the Crossroads of Legal Traditions' (1991) 39 AmJCompL 493, 496-505; Koen Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) 52 ICLQ 873; Mitchel Lasser, 'Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de cassation and the United States Supreme Court' [2003] Jean Monnet Working Paper 1/03, 44-47.

¹⁶⁸ Lasser, 'Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de cassation and the United States Supreme Court', 52

¹⁶⁹ On the role of this legislation in determining the majority opinion at European level, see Maduro, *We, the Court*, 74-76.

informed judicial debate between high-ranking judicial professionals, but also allows critiques by the Advocates General and legal commentators to play an influential dialogical role in the Court's decisions, thereby ensuring the legitimacy of the decision-making procedure in the eyes of a potentially critical legal community.¹⁷⁰

A good example of a mode legal reasoning along these lines, which hides important political decisions behind a patina of legal reasoning, is proportionality, a general principle of German administrative and constitutional law that has been imported by the Court.¹⁷¹ In German Constitutional practice, proportionality addresses the question of: (i) whether a measure is adequate to the pursuit of the relevant public interest (*Geeignetheit*); (ii) whether a measure is necessary, in the sense of there being the possibility of a less restrictive measure having been adopted (*Erforderlichkeit*); and finally, (iii) whether a measure is strictly proportional, in the sense of whether the costs imposed by the measure are not excessive in relation to its envisaged benefits (*Verhältnismässigkeit*).¹⁷² Proportionality thus described is similar to the three different 'reasonableness' tests identified in international economic law literature, particularly at WTO level¹⁷³: (a) means/ends or suitability test, (b) cost effectiveness or necessity test, and (c) cost/benefit or proportionality test. These three tests constitute an ascending series in terms of the intensity and intrusiveness of the review of national regulation. While strict proportionality calls for value assessments which may not be empirically testable, the necessity test is seen as merely delving into the factual efficiency of a given measure, without implying any balancing of values or imposing any limits to the level of State intervention. In international economic law, the necessity test acts as an anti-protectionist device, indicating whether there was a 'regulatory capture' of local

¹⁷⁰ Lasser, *Judicial deliberations: a comparative analysis of judicial transparency and legitimacy*, 316-317. More directly on the impact of the academic literature on the Court, and particularly the AG's Opinions, id, 122-133.

political processes by the beneficiaries of protectionism, and forcing States to internalise the costs of its actions and to take into account out-of-State interests.¹⁷⁴

The CJEU can be seen to follow two different formulations of proportionality. One resembles the necessity test, as it only ascertains whether the means employed are causally suitable to achieve the envisaged purpose and whether such means do not go beyond what is necessary to achieve that objective. The other version adds to these requirements the possibility of applying proportionality *stricto sensu*, but sensibly the Court only rarely applies it¹⁷⁵, as this requirement is the one that most seriously impinges on the separation of powers and the question of value-choices.¹⁷⁶

¹⁷¹ Gráinne de Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 YEL 105, 114. See also Maduro, *We, the Court*, 57; Giuseppe Federico Mancini, 'Crosscurrents and the tide at the European Court of Justice' (1995) 4 IrJeurL 120, 123; Rivers, 112.

¹⁷² Canotilho, *Direito Constitucional e Teoria da Constituição*, 264-265; Alexy, *A Theory of Constitutional Rights*, 66. In the EU context, see for example, Case C-331/88 *Ex Parte Fedesa* [1990] E.C.R. I-4023. This is akin to the proportionality test as used in most constitutional jurisdictions around the world. It should also be noted that this test can be preceded by an assessment of whether the goal pursued by a measure is legitimate to begin with: see Sweet and Mathews, 'Proportionality, Balancing and Global Constitutionalism', 76.

¹⁷³ Where a necessity test is usually applied to Articles XX GATT and XIV GATS, even though a fuller version of proportionality appear to be making inroads: see Kenneth A. Bamberger and Andrew T. Guzman, 'Keeping Imports Safe: A Proposal for Discriminatory Regulation of International Trade' (2008) 98 CLR 1405, 1440-1441; Petersmann, 'Judging Judges: From "Principal-Agent" Theory to "Constitutional Justice" in Multilevel "Judicial Governance" of Economic Cooperation Among Citizens', 838; Peter Van den Bossche, 'Looking for Proportionality in WTO Law' (2008) 35 LIEI 283, 292; Ben McGrady, 'Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures' (2009) 12 JIEL 153, 160; Donald H. Regan, 'The meaning of "necessary" in GATT Article XX and GATS Article XIV: the myth of cost-benefit balancing' (2007) 6 WTR 347.

¹⁷⁴ Alexy, *A Theory of Constitutional Rights*, 67, Rivers, 115-117; Federico Ortino, 'From 'non-discrimination' to 'reasonableness': a paradigm shift in international economic law?' Jean Monnet Working Paper 01/05, 33-34, McGrady, 154; Alan O. Sykes, 'Regulatory Protectionism and the Law of International Trade' (1999) 66 UChiLRev 1, 21; Regan, 'The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause', 1105-1107; Mark P. Gergen, 'The Selfish State and the Market' (1988) 66 TexLRev 1097, 1111.

¹⁷⁵ See Case 44/79 *Hauer* [1979] E.C.R. 3727, para. 23; Case C-265/88 *Messner* [1989] E.C.R. 4209, para. 9-12; Case C-169/91 *Stoke and Norwich v B&Q* [1992] E.C.R. I-6635, para. 12-15; Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] E.C.R. I-0929, para. 36; Case C-29/95 *Pastoor* [1997] E.C.R. I-285, para. 26; Case C-378/97 *Wijzenbeek* [1999] E.C.R. I-6207, para. 44.

¹⁷⁶ de Búrca, 113; Francis Jacobs, 'Recent Developments in the Principle of Proportionality in EC Law' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999), 1; Walter van Gerven, 'The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe' in Evelyn Ellis (ed), *The Principle of*

Proportionality gives the appearance of being a merely formalistic exercise, but at least in the EU context even recourse to the necessity test does not wholly avoid the concerns raised by strict proportionality: the construction of the regulatory goal is relevant, as the more narrowly it is construed the less likely it is that a less restrictive approach can be found. For example, under mutual recognition it has been argued that goods can be lawfully marketed in a Member State when the rules in the producing State meet the overall objectives, if not the precise detail, of national law. But much depends on this choice between overall objective and precise detail; for example, substituting labelling requirements for rules on the composition of foodstuffs may be acceptable under an overall objective approach, but it will hardly meet the requirements of 'precise detail' in the host-State rule.¹⁷⁷ Besides, in the EU context even the necessity test is not value-neutral when applied to the fundamental freedoms: for example, when determining whether derogations from the market freedoms not provided for in the Treaty are legitimate, the Court is second-guessing the *prima facie* legitimacy of Member States' value-choices.¹⁷⁸

This illustrates how the Court adopts value-charged political decisions under a veneer of legal reasoning. The creation of constitutional rights by the Treaty, to be enforced and protected by the judiciary, does not remove them from political strife, but

Proportionality in the Laws of Europe (Hart Publishing 1999), 37-42; Takis Tridimas, 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999), 68; Jan Jans, 'Proportionality Revisited' (2000) 27 LIEI 239, 240-248; Sacha Prechal, 'Free Movement and Procedural Requirements: Proportionality Reconsidered' (2008) 35 LIEI 201, 201.

¹⁷⁷ See, for example, Case 178/84 *Commission v Germany* [1987] E.C.R. 1227. Also Stephen Weatherill, 'Consumer Safety Legislation in the United Kingdom and Article 30 EEC' (1988) 12 ELRev 87, 91; Maduro, *We, the Court*, 56.

¹⁷⁸ Roel de Lange, 'Paradoxes of European Citizenship' in Peter Fitzpatrick (ed), *Nationalism, Racism and the Rule of Law* (Dartmouth 1995), 103; McGrady, 157-162; Regan, 'The meaning of "necessary" in GATT Article XX and GATS Article XIV: the myth of cost-benefit balancing'; Weiler, *The Constitution of Europe*, 90.

merely leads to a greater role for the courts¹⁷⁹. Recourse to proportionality has the effect of both assigning to the Court the power to determine what institution – including itself – is best suited to decide certain questions, and to control the extent to which such institutions may exercise their discretion. This means that the intensity of review under proportionality or any other balancing test can vary depending on a number of institutional factors, and we may expect to find a relationship between the intensity of review under the proportionality test and the amount of discretion available to a given institution depending on the nature of the original decision-making authority, the nature of the acts to be assessed, the importance and variety of the interests involved, the technicality of the measure, or even the urgency of the situation.¹⁸⁰ This seems to be borne out by the fact that the nature of the CJEU's scrutiny can be influenced by the type of act subject to challenge¹⁸¹: the Court adopts a test of variable intensity when reviewing Member States' measures depending on the nature of the subject matter, the expertise of the first instance decision-maker, and the specificity of the jurisdictional condition.¹⁸² For example, in exceptions to the fundamental freedoms concerning public morality, public policy, or national security the Court tends to defer to the Member States' assessment¹⁸³; when fundamental rights are at issue, or the case falls in harmonized areas where the Member States' discretion is curtailed, a more rigorous

¹⁷⁹ Raz, *The Morality of Freedom*, 257-260.

¹⁸⁰ de Búrca, 111; Gerven, 61; Tridimas, 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny'.

¹⁸¹ Petersmann, 'Judging Judges: From "Principal-Agent" Theory to "Constitutional Justice" in Multilevel "Judicial Governance" of Economic Cooperation Among Citizens', 869, fn. 125.

¹⁸² Alexander Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law' (2010) 47 CML Rev 361, 367-381.

¹⁸³ de Búrca, 132.

proportionality test is applied.¹⁸⁴ Concerning EU measures, the Court applies a ‘manifestly inappropriate’ test when reviewing EU acts which are adopted within the context of wide policy discretion, while applying a stricter standard when there is no such discretion.¹⁸⁵

V. Normative Implications

What an organization should do is effectively limited by what it can do. A descriptive assessment can describe not only what is being done but also what can be done within a specific institutional setting, which in turn sets the limits of any question as to what ought to be done – assuming one would keep normative assessments pursued under practical reason within the realm of what is possible. In other words, evaluative and prescriptive research on courts and judges can only be fruitful if they are informed by a correct descriptive understanding of what courts and judges do.¹⁸⁶ There are thus normative implications from concluding that the Court is one among a variety of other political institutions with decision-making power.

This chapter described a world where a plurality of institutions with law-making powers co-exist with the impossibility of determining correct outcomes *a priori*, even within strict formal requirements for decision-making such as those imposed by proportionality and balancing assessments – in other words, a world of divided powers, imperfect decision-makers and value pluralism. In this context different, but *prima facie* equally valid normative frameworks may lead to different answers; thus the question is

¹⁸⁴ Schueler, 325-236; de Búrca, 126 and 138; Xavier Groussot, ‘Rock the KaZaA: Another Clash of Fundamental Rights’ (2008) 45 CML Rev 1745, 1762.

¹⁸⁵ de Búrca, 116-123; Aland Dashwood and Derrick Wyatt, Wyatt and Dashwood’s European Union law (6th edn, Sweet & Maxwell 2011), 123-124; Jacobs, 3; Tridimas, ‘Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny’, 66. See also cases Case 265/87 *Schröder* [1989] E.C.R. 2237, *Ex Parte Fedesa*, Case C-375/96 *Zaninotto* [1998] E.C.R. I-6629, Case C-84/94 *UK v Council* [1996] E.C.R. I-5755, Case C-491/01 *British American Tobacco* [2002] ECR I-11543.

¹⁸⁶ Dyevre, 46,

not merely whether a decision was wrong or right in accordance with a certain ‘evaluative’ normative framework, but also which entity should decide in certain circumstances and how that decision should be taken. In other words, preliminary to the substantive evaluation of individual decisions there is the issue of determining which entity is best placed to decide a given issue. This issue is a comparative institutional question, dependent on the context and specific institutional environment in which the relevant entities operate, and for which the institutional elements analysed above are of the utmost importance.¹⁸⁷

To evaluate whether a certain entity is the best decision-maker for a given situation, one must take into account its organizational qualities, those of alternative decision-makers, and the institutional environment where they operate. Preliminary to this question of comparative choice there is a similar question of which entity is best placed to make that choice as well – and we can pursue this logical exercise *ad infinitum*. This is avoided in the real world by constitutional instruments allocating competences, usually to representative bodies on the basis of their perceived legitimacy. Even if these instruments are rarely complete and unambiguous, they tend to grant some organizations the power to either decide a certain issue themselves or to delegate the decision to other organizations – requiring an (implicit) comparative institutional analysis by the entity which was granted original competence. When this is not so, questions may arise concerning which entity should exercise a certain competence; in what concerns the Court, its selection as the relevant decision-maker is usually mediated through the scope of its jurisdiction.

When the Treaties grant decision-making powers to the Court, implied in this is a comparative institutional choice in favour of the Court as opposed to other possible

¹⁸⁷ Similarly, but in the US context, Rubin, 1403.

decision-makers. Recently, there has been a tendency for legislative bodies of the EU to increasingly choose the Court as the relevant decision-maker, the reason for which appears to be that regulation at EU level occurs:

‘in the context of a highly fragmented regulatory state with a powerful judicial system and a weak administrative apparatus. The vertical fragmentation between the EU and the member states and the horizontal fragmentation of power between institutions at the EU level (i.e., the Council, the Parliament, and the Commission) generate principal-agent problems that encourage the adoption of laws with strict, judicially enforceable goals, deadlines, and transparent procedural requirements. Also, given the EU’s extremely limited implementation and enforcement capacities, EU lawmakers have an incentive to create justiciable rights and to empower private parties to serve as the enforcers of EU law.’¹⁸⁸

In the above situations, the Member States and the EU political process are the entities empowered to decide which organization is best suited to decide certain issues, and have implicitly assumed that the Court is the best comparative option. The Court, however, also has powers of its own to determine what organizations are the best decision-makers, a good example of which can be found in its interpretation of the Treaties, and in particular of the fundamental freedoms. If, on the one hand, the Treaties chose the Court as the relevant decision-maker in what concerns negative integration, the Court can nonetheless, through its control of the scope of the fundamental freedoms – which act as gatekeepers to the relevant balancing exercises and to the Court’s jurisdiction –, still exercise a certain amount of discretion in allocating decision-making powers between itself and other organizations.

In light of this, it is submitted that the institutional constraints identified above should be relevant for normative discussions on what the scope of the market freedoms should be, and to the corresponding comparative institutional choice of the Court as the relevant decision-maker. Naturally, questions of comparative institutional choice do not

¹⁸⁸ R. Daniel Kelemen, *Eurolegalism: the transformation of law and regulation in the European Union* (Harvard University Press 2011), 8.

preclude the subsequent question of how the Court is supposed to adjudicate the questions coming before it. It is submitted that the answer to this question should also incorporate these institutional elements, as they are demonstrably relevant in determining the outcome of the decision-making process. In other words, not only scholars, but also the Court itself should incorporate institutional considerations into its interpretative practices.¹⁸⁹ For example, discussions about the legitimacy of proportionality tests by the Court would benefit from the insight that the pursuit of such a test fits into the operative and cognitive framework of legitimate judicial intervention, and will only take place following a comparative institutional choice having been made. It is true that courts' face specific structural limitations which can make them unsuitable to pursue the role implicit in proportionality assessments: they often lack expertise and have high administrative costs, are subject to information biases in favour of those sufficiently organised to participate in the judicial process, may decide issues without hearing some of the affected interests, and do not have the advantage of determining when to adopt politically charged decisions. But concluding from this that courts should not pursue proportionality because it is subjective, as some do, is objecting not to the decision-making practice but to the institutional choice of having courts decide the issue. But we cannot *a priori* assume that a court is superior or inferior to Parliaments or Governments in reaching good solutions, as both are institutional options with advantages and costs. The typical trade-off will be between political processes with more information but subject to both majoritarian and minoritarian biases, and an adjudicatory process with less information but that

¹⁸⁹ See similarly, for constitutional adjudication in the US, Cass R. Sunstein and Adrian Vermeule, 'Interpretation and Institutions' (2003) 101 Mich L Rev 885, 938.

suppresses some of those biases, particularly through the independence of judges.¹⁹⁰ Accordingly, referring to a court's institutional limitations is not *per se* sufficient to demonstrate that it is not the best-suited body to take a given decision – that might be the case or not, depending on the situation. And once an institutional choice has been made, the reason why proportionality may be preferred to other legal decision-making practices is that even if proportionality leaves a wide margin for subjectivity, it also acknowledges the existence of clashes of rights and recognises that there is no ready-made answer to them.¹⁹¹ What is more, proportionality provides discursive structures allowing for litigants to plead their interests and engage with their opponents' arguments, while allowing for a measure of predictability in how courts frame their decisions. Proportionality can be seen as a regulated argumentative framework within which the Court may accommodate conflicting values in a particular case in a way that is acceptable to all participants. This may lead to uncertainty, but it has the advantage of preventing or at least allowing for the control of arbitrary and purely subjective decisions and of improving the (bounded) rationality of judgements.¹⁹² It also allows interested parties to participate in the legal theatre, reconstructing or accepting controversial, politically charged decisions as natural, unproblematic developments of previous legal practice. As has been noted:

*'Under conditions of supremacy (given a steady case load), fidelity on the part of the court to a particular framework will entrench that mode of argumentation as constitutional doctrine. To the extent that arguing outside of the framework is ineffective, skilled legal actors will use the framework, thereby reproducing and legitimizing it.'*¹⁹³

¹⁹⁰ Maduro, 'Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the context of Legal and Constitutional Pluralism', 20; Neil Komesar, *Imperfect Alternatives – Choosing Institutions in Law, Economics, and Public Policy* (The University of Chicago Press 1994); Komesar, *Law's limits*, 38.

¹⁹¹ Groussot, 'Rock the KaZaA: Another Clash of Fundamental Rights', 1762.

¹⁹² Alexy, *A Theory of Constitutional Rights*, 107, 387.

¹⁹³ Sweet and Mathews, 'Proportionality, Balancing and Global Constitutionalism', 89.

This may well be deemed a comparative institutional advantage of courts over other institutions – democratic or representative or not – as decision-making *loci*. From a practical perspective, it might be preferable that subjectivity occurs under conditions that are subject to rational control and criticism: juridical reasoning aspires to objectivity¹⁹⁴, submitting subjective decisions to a discursive practice restricted by a series of conditions, such as respect for the law, and consideration of precedents and of rules established in process codes¹⁹⁵. What is more, courts will usually be able to decide on the basis of the particular facts of the case without needing to engage with the large-scale societal questions underlying it: they may enlist silence as a device for producing convergence despite disagreement and uncertainty by adopting an incompletely theorised outcome that may more accurately reflect the amount of societal consensus behind the adoption of a given rule. This mechanism is an important source of social stability since it allows the participants to be clear on a result without agreeing on a more general theory or value that accounts for it, and is well suited to a pluralist society.¹⁹⁶ It is a judicial equivalent to the legislative technique of using purposefully vague provisions to accommodate different normative theories and values. Practical reason, for all its limitations, may be the best we can envision.¹⁹⁷

In short, in the absence of a ‘right’ decision to be found, the first question to be asked is which body is best placed to make it, a question to which the elements

¹⁹⁴ MacCormick, *Practical Reason in Law and Morality*, 192.

¹⁹⁵ Alexy, *A Theory of Constitutional Rights*, 370-387.

¹⁹⁶ Sunstein, *Legal Reasoning and Political Conflict*, 5, 44.

¹⁹⁷ Zagrebelsky, *Il diritto mite*, 168 ff; Waldron, ‘Fake Incommensurability: A Response to Professor Schauer’, 823. On the relevance of practical reason for legal reasoning, see also Sunstein, ‘Incommensurability and Valuation in Law’, 859.

identified in this chapter are relevant. Furthermore, when assessing individual decisions *post*-institutional choice, those elements are also relevant to frame the possible ‘good’ outcomes within the specific institutional setting in which the relevant organization operates. This is not to conclude that institutions have normative value in themselves – even though that may very well be the case on occasion, such as, for example, in what concerns the mere existence of stable rules and the resulting legal certainty and security –, but merely to argue that institutional elements are relevant for normative (or evaluative or prescriptive) debates by allowing us to understand and map the boundaries for ‘good’ decision-making within the realms of the physical and legally possible.

Chapter II

The Market Freedoms' Common Normative Foundations

Abstract:

The purpose of this and the next chapter is to describe the different normative positions and reasons accepted in EU legal discourse as underpinning the market freedoms – elements understood to be ‘internal’ to the law, and the subject of discussion in legal literature. The ultimate goal is to set the stage for the subsequent analysis of how institutional constraints influence normative concerns and debates in legal practice. This chapter will review the normative foundations that are generally accepted to apply jointly to all the market freedoms.

I. Introduction

The previous chapter identified a number of elements ‘external’ to traditional EU legal discourse that, it was argued, should be taken into account when analysing the economic free movement provisions. Also essential to the analysis of those freedoms, and to understand the relevance of institutional elements in the development of the law, is to identify their normative underpinnings. This will be the focus of the next two chapters, which will describe the main normative theories on the EU economic freedoms as usually found in the literature. The present chapter will look into those normative foundations said to be common to all the fundamental economic freedoms – which shall henceforth be referred to as ‘market freedoms’.

II. Market Freedoms and Constitutional Rights

Any analysis of the market freedoms *in totum* must start by explaining why they should be subject to joint treatment. German legal circles were, and arguably still are, the site where this question is most debated.¹⁹⁸ At the very minimum, there seems to be

¹⁹⁸ Thorsten Kingreen, ‘Fundamental Freedoms’ in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing 2006), 550-552. See in particular Peter Behrens, ‘Die Konvergenz der wirtschaftlichen Freiheiten im europäischen Gemeinschaftsrecht’ (1992) 27 EuR 145.

a consensus that the market freedoms are ‘subjective public rights’¹⁹⁹ – rights originating from public law that pursue both general and individual interests and impose on public authorities a conduct duty which can be procedurally enforced by individuals.²⁰⁰ Subjective public rights include (but are not limited to) fundamental rights, as they indicate objective values to be protected against State interference and a corresponding subjective element entitling individuals to judicial protection.²⁰¹ In other words, market freedoms are seen as one of a set of protection rights that can be invoked in court by private persons against acts or omissions by the State when there is a public law goal imposing on that State an administrative duty for the protection of individual rights.

Some have gone as far as to argue that the market freedoms are fundamental rights themselves.²⁰² This position can find some support in the case law: since 1983 the Court has occasionally referred to the free movement of workers as a fundamental right²⁰³, even if that honour has only rarely been bestowed on the free movement of

¹⁹⁹ Thorsten Kingreen and Reiner Störmer, ‘Die subjektiv-öffentlichen Rechte des primären Gemeinschaftsrechts’ [1998] EuR 263, 266; Norbert Reich, *Bürgerrechte in der Europäischen Union* (Nomos 1999), 450-451. Some authors argue that the fundamental freedoms are also subjective private rights, since they can be invoked against both State and private persons: see Josef Drexler, ‘Competition Law as Part of the European Constitutions’ in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing 2006). This relates to the question of horizontal direct effect of the fundamental freedoms, which is analysed in Chapter VIII.

²⁰⁰ Sven Hölscheidt, ‘Abschied vom subjektiv-öffentlichen Recht?’ [2001] EuR 376, 379.

²⁰¹ Canotilho, *Direito Constitucional e Teoria da Constituição*, 273, 376; Dirk André Stoppel, ‘Grundfreiheitsliche Schutzpflichten der Mitgliedstaaten im Europäischen Gemeinschaftsrecht’ (Heinrich-Heine-Universität Düsseldorf 2003), 41-42; Dirck Ehlers, ‘General Principles’ in Dick Ehlers (ed), *European Fundamental Rights and Freedoms* (de Gruyter 2007), 193.

²⁰² Mainly from an ordo-liberal perspective (as economic fundamental rights) – see Albert Bleckman, ‘Die Freiheiten des Gemeinsamen als Grundrechte’ in Roland Bieber and Dietmar Nickel (eds), *Das Europa der zweiten Generation – Gedächtnisschrift für Christoph Sasse*, vol II (N. P. Engel Verlag 1981), 665 ff., but also from a trans-nationalist perspective as political fundamental rights – see Maduro, ‘Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights’, 73.

²⁰³ Case 152/82 *Forcheri* [1983] E.C.R. 2323, para 11.

goods²⁰⁴. The prevailing view, however, is that the market freedoms are different from fundamental rights. The main argument for differentiation is that while the market freedoms are instrumental to the realization of a market without internal frontiers²⁰⁵, the fundamental rights' *telos* is to protect essential areas of freedom resulting intrinsically from human dignity.²⁰⁶ The discussion is relevant to debates on how to balance market freedoms against fundamental rights, and underlying it there is a debate concerning the relative importance of market freedoms and of other fundamental rights within the scheme of the Treaty.²⁰⁷ Regardless of one's particular position on this debate, there seems to be a consensus that: both market freedoms and fundamental rights operate as constitutional rights of a fundamental nature, granting direct rights to individuals against Member States and the EU²⁰⁸; both use the same analytical framework and proportionality test;²⁰⁹ and both are multi-level norms, regulating the interaction between Member States and the EU by determining the vertical allocation of

²⁰⁴ Peter Oliver and Wulf-Henning Roth, 'The Internal Market and the Four Freedoms' (2004) 41 CMLR 407, 407. See Case C-228/98 *Dounias* [2000] E.C.R. I-00577, para. 64-65; Case C-421/09 *Humanplasma* [2010] E.C.R. I-12869, para. 25. On the free movement of goods as an element of the right to trade, see Case 240/83 *ADBHU* [1985] E.C.R. 531, para. 9.

²⁰⁵ Case C-265/95 *Commission v France* [1997] E.C.R. I-6959, para. 30.

²⁰⁶ This argument is differently expressed by different authors, but can be found in virtually all of them. See Walter Frenz, 'Grundfreiheiten und Grundrechte' [2002] EuR 603 and Kingreen, 'Fundamental Freedoms', 567-571.

²⁰⁷ Peter Oliver, 'Competition and Free Movement: Their Place in the Treaty' in Takis Tridimas and Paolisa Nebbia (eds), *European Law for the Twenty-First Century*, vol II (Hart Publishing 2004), 166.

²⁰⁸ Situations where the Court referenced the fundamental nature of Treaty freedoms are various: see Case C-266/96 *Corsica Ferries France* [1998] E.C.R. I-3949, para. 8; Case C-34/98 *Commission v France* [2000] E.C.R. I-995, para 49 (all four freedoms); Case C-19/92 *Kraus* [1993] E.C.R. I-1663, para. 28 (workers and establishment); Case C-385/99 *Müller-Fauré* [2003] E.C.R. I-4509, para 72 (services); Case C-112/00 *Schmidberger* [2003] E.C.R. I-5659, para. 50, 51 and 74 (goods); and Case C-483/99 *Commission v France* [2002] E.C.R. I-4871, para. 45 and 48 (capital).

²⁰⁹ Frenz, 610-612.

competences between them while simultaneously limiting the substantive scope of their powers.²¹⁰

In this formalistic sense, at least, the market freedoms seem to share the same underpinnings as other fundamental constitutional rights. These underpinnings are thin, however – they may require courts to protect certain interests against the desires of elected majorities, but they do not tell us what these interests might be. Accordingly, it is important to understand exactly what the relevant normative foundations of the market freedoms *qua* market freedoms are, as opposed to other constitutional rights.

III. The Normative Foundations of the EU Market Freedoms

Market freedoms are usually distinguished from other constitutional rights by reference to their instrumentality to the internal market. This might suggest that the market freedoms should be subject to a uniform approach, but it is clear from a superficial reading of the Treaties that such an approach is not expressly adopted there. Different provisions create different freedoms, with different wordings pointing to both different issues being addressed and different solutions being used to tackle them.²¹¹ The freedoms' scope *ratione materiae* and *personae* differ; even the scope *ratione locus* is not identical, since the free movement of capital extends to third countries while the other freedoms' effects are restricted to the internal market.²¹²

Arguments for a common approach can nonetheless be gleaned from the Treaty. From an historical perspective, the reason for the existence of different freedoms

²¹⁰ Kingreen, 'Fundamental Freedoms', 562-565; Michael Schillig, 'The Interpretation of European Private Law in the Light of Market Freedoms and EU Fundamental Rights' (2008) 15 MJ 285, 287. On the conception of human rights as rights with the particularity of setting limits to sovereignty, Joseph Raz, *Human Rights Without Foundations* (SSRN 2007), 14.

²¹¹ Snell, *Goods and services in EC law: a study of the relationship between the freedoms*, 22.

²¹² Peter Oliver and Stefan Enchelmaier, 'Free movement of goods: recent developments in the case law' (2007) 44 CML Rev 649.

appears to be that it was easier to write four sets of provisions instead of one, particularly because the Member States originally wanted to be able to have a stricter control on the free movement of capital than on the other freedoms.²¹³ Furthermore, all freedoms were based on the same provisions of the Treaty, in particular Article 3(1) (c) EC, which established as a goal of the EC the creation of ‘*an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital*’. Post-Lisbon, Art. 26 TFEU still holds that the ‘*Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market*’ where ‘*an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured*’. Such commonality of purpose was from the early stages reflected in the case law of the Court, which stated that the goal of the free movement provisions, prior to Maastricht, was to assist in the ‘*abolition of all obstacles to the establishment of a common market in which the nationals of the Member States may move freely within the territory of those States in order to pursue their economic activities*’.²¹⁴ The systemic argument for the unity of the market freedoms was reinforced by the Treaty giving regulatory competence to the Union concerning all the fundamental freedoms in a single provision, Article 114 TFEU, even if this is somewhat refuted by the need for different majorities depending on the freedoms.

Economic and common market theories that would appear to underpin the concept of internal market classify labour, entrepreneurship and capital as production factors, while identifying goods and services as material and non-material products.²¹⁵

²¹³ Snell, *Goods and services in EC law: a study of the relationship between the freedoms*, 22-23.

²¹⁴ Joined Cases 35 and 36/82 *Morson and Jhanjan* [1982] E.C.R. 3723.

²¹⁵ Already in 1933, in Bertil Gotthard Ohlin, *Interregional and international trade* (Harvard University Press 1933), 68 and 163, a distinction between goods – commodities and services – and factors of

While the free movement of products can be theorised under free trade and custom's union theories, the benefits of the creation of a common market can only be fully attained if both products and productive factors are allowed to circulate freely.²¹⁶ If the goal of the fundamental freedoms is to create a common market, then all fundamental freedoms form part of the same economic unit and their basic function is to remove (unjustified) barriers to cross-border economic transactions.²¹⁷ There is thus no *prima facie* reason to allow different degrees of protectionism with regard to the various economic factors. Nor is it normatively justified to distinguish between inbound and outbound movements, since from an economic perspective it is irrelevant which State erects the barrier.²¹⁸

Other arguments for a common approach focus on systemic coherence and the need for legal certainty. They start from the descriptive reality that different market freedoms may be applicable to the same situation, and that in these cases there is great confusion concerning the rules determining which freedom, if any, should prevail.²¹⁹ This can be more clearly understood by analysing how the material scope of the market freedoms overlaps in the case law. These overlaps can be mapped in accordance with the table below:

production – labour, capital, land, to which the author adds risk taking – was considered to be classical. It was also noted how certain goods can be factors of production: see 148.

²¹⁶ These benefits include increases in the variety of goods available, gains in the allocation of goods through price equalization, productive efficiency, economies of scale and other gains via competition: see Jacques Pelkmans and others, *Europe's domestic market* (Routledge 1988), 16-25.

²¹⁷ Maureen Mackintosh, Vivienne Brown and Neil Costello, *Economics and changing economies* (Open University Press 1996), 458-460, 471; Theodore Hitiris, *European Community economics: a modern introduction* (Harvester Wheatsheaf 1988), 2-5, 36-37; Alasdair I. MacBean and P. N. Snowden, *International institutions in trade and finance* (Allen & Unwin 1981), 145-147; Jean-François Deniau, *The common market* (4th revised edn, Barrie & Rockliff 1967), 60-65, 74.

²¹⁸ Axel Cordewener, 'The prohibitions of discrimination and restriction within the framework of the fully integrated internal market' in Frans Vanistendael (ed), *EU Freedoms and Taxation* (IBDF 2006), 4-10.

²¹⁹ Vassilis Hatzopoulos, 'Recent Developments of the Case Law of the ECJ in the Field of Services' (2000) 37 CML Rev 43, 54-55.

	Goods	Workers	Establishment	Services	Capital
Goods	X	(a)	(b)	(c)	(d)
Workers	X	X	(e)	(e)	(f)
Establishment	X	X	X	(g)	(h)
Services	X	X	X	X	(i)
Capital	X	X	X	X	X

a. Free movement of goods v free movement of workers

The different material scopes of these freedoms are obvious – goods are material objects that can be valued in money and form the subject, or move across frontiers for the purposes, of commercial transactions²²⁰, while workers are individuals in a subordination relationship pursuing economic activities for remuneration.²²¹ Nonetheless, a natural person who moves his residence to another Member State usually takes his movable property with him and may potentially intend to trade it, with the result that provisions that restrict the free movement of persons may also indirectly restrict the movement of such items of property, and vice-versa. Even though the Court has tended to decide these cases under the free movement of workers instead of goods²²², if the restriction on the free movement of goods had the effect of preventing people from moving (for example, by prohibiting the admission into a State of certain goods that have a fundamental religious value to some individuals on grounds of public health or public order) this might no longer be the case.²²³

When dealing with situations which may be subject to both the free movement of goods and workers the Court might choose one of the freedoms over the other²²⁴, but

²²⁰ Case 7/68 *Commission v Italy* [1968] E.C.R. 423 and Case C-2/90 *Walloon Waste* [1992] ECR I-4431.

²²¹ Case C-3/90 *Bernini* [1992] E.C.R. I-1071, para. 14.

²²² See AG Kokott's Opinion in Case C-470/04 *N* [2006] E.C.R. I-7409, para. 37.

²²³ Peter Oliver, *Free Movement of Goods in the European Union* (5th edn., Sweet and Maxwell 2010), 39.

²²⁴ AG Kokott's Opinion in *N*, para. 37, by reference to Case C-387/01 *Weigel* [2004] E.C.R. I-4981. For European Citizenship, see Case C-365/02 *Lindfors* [2004] E.C.R. I-7183. It is arguable, however, that

it has also subjected the situation to an autonomous assessment under each of the freedoms.²²⁵

b. Free movement of goods v right of establishment

The difference between these freedoms looks pretty straightforward – goods concern tangible products while establishment concerns the free movement of both individual and legal persons on a lasting basis for the purposes of undertaking all types of self-employed activity, creating undertakings and/or setting-up agencies, branches or subsidiaries in the territory of any other Member State²²⁶ – but this does not mean that measures affecting one freedom cannot affect the other. A good example of this was a case concerning a requirement of prior authorization for the operation of commercial premises exceeding a certain area. While the Court assessed such requirement under the right of establishment – preventing the establishment of certain commercial premises –, the AG had considered that, by restricting the amount and type of goods which could be sold, this requirement infringed the free movement of goods.²²⁷

The Court has dealt with situations concerning both freedoms in a variety of ways. One such way is to apply only one of the freedoms, at times holding that the restriction of the freedom which was not assessed was an indirect or unavoidable consequence of the restriction of the other freedom²²⁸, other times not addressing why it chose one freedom over the other.²²⁹ Another way is to apply both freedoms side-by-

these cases applied both the free movement of workers and the free movement of goods (under Art. 110 TFEU) autonomously.

²²⁵ Case 251/83 *Haug-Adrion* [1984] E.C.R. 4277, Case C-379/92 *Peralta* [1994] E.C.R. I-3453.

²²⁶ Case C-70/95 *Sodemare* [1997] E.C.R. I-3395, para. 26.

²²⁷ Case 20/87 *Gauchard* [1987] E.C.R. 4879.

²²⁸ Case C-255/97 *Pfeiffer Großhandel* [1999] E.C.R. I-2835, particularly para. 26; Case C-108/96 *Mac Quen* [2001] E.C.R. I-837, particularly para. 21.

²²⁹ Case C-438/02 *Hanner* [2005] E.C.R. I-04551.

side: for example, the Court held that a rule prohibiting the installation and use of all electric, electromechanical and electronic games, including all computer games, on all public or private premises apart from casinos, infringed both the free movement of goods (on what concerns installation) and the right of establishment (on what concerns their use).²³⁰

c. Free movement of goods v freedom to provide services

The distinction between these freedoms is simple in theory: from an economic perspective, which seems to be the essence of the distinction in EU law as well, goods are material products while services are non-material products.²³¹ In practice the distinction between material and immaterial products is not so clear-cut as economic theory might suggest, occasionally giving rise to doubts.

The Court has dealt with situations which could potentially fall under both freedoms in different ways. In certain cases the Court autonomously submitted elements of a given product to the provisions on goods and others to the provisions on services: for example, while telecommunication signals are considered to be services, the trade in material used for their diffusion is subject to the free movement of goods.²³² In others, it submits a situation to just one of the freedoms, without any justification: waste, electricity, and apparently even gas and oil, were classified as goods by the Court

²³⁰ Case C-65/05 *Commission v Greece* [2006] E.C.R. I-10341. However, it is not clear how this distinction is supposed to hold: a restriction on use would also restrict the free movement of goods – as became clear after Case C-110/05 *Commission v Italy* [2009] ECR I-00519 – while the prohibition of installation would effectively prevent establishment.

²³¹ Snell, *Goods and services in EC law: a study of the relationship between the freedoms*, 9, 15, and 23; and AG Jacobs Opinion in Case C-76/90 *Säger* [1991] E.C.R. I-4221.

²³² Case 155/73 *Sacchi* [1974] E.C.R. 409, Case 52/79 *Debauve* [1980] E.C.R. 833, Joined Cases 60/84 and 61/84 *Cinéthèque* [1985] E.C.R. 2605, Case C-260/89 *ERT* [1991] E.C.R. I-2925. See for similar solutions to questions concerning lotteries and slot machines, Case C-275/92 *Schindler* [1994] E.C.R. I-1039, Case C-124/97 *Läärä* [1999] E.C.R. I-6067, Case C-6/01 *Anomar* [2003] E.C.R. I-8261, Case C-36/02 *Omega* [2004] E.C.R. I-9609; concerning restrictions on advertising, Case C-405/98 *Gourmet International* [2001] E.C.R. I-1795.

without much ado.²³³ A variant of this option, which appears to be gaining ground, is for the Court to assess a situation under just one freedom and hold that the other one is entirely secondary in the case.²³⁴ Finally, at times a situation may be jointly assessed under both freedoms.²³⁵

d. Free movement of goods v free movement of capital

While goods are tradable material objects, capital includes all monetary transfers necessary to economic activities, including both current payments and financial transactions not caused directly by exchanges in goods or services as such.²³⁶ A peculiarity of capital is that, unlike the other freedoms, it did not have direct effect until 1 July 1990, when the deadline for transposing Directive 88/361 expired.²³⁷ Another of the peculiarities of this freedom is the reliance the Court places on secondary legislation to determine its scope. It is now settled case law that the content of Article 1 of Directive 88/361 and the nomenclature of capital movements annexed thereto retains indicative value for the purposes of defining the term ‘movement of capital’, subject to the qualification that the list set out therein is not exhaustive.²³⁸ This freedom can be

²³³ Case 6/64 *Costa v ENEL* [1964] E.C.R. 585, Case C-393/92 *Almelo* [1994] ECR I-1477, *Walloon Waste* and Case C-97/98 *Jägerskiöld v Gustafsson* [1999] ECR I-7319.

²³⁴ *Schindler*, para. 22; *Omega*, para 26; Case C-390/99 *Canal Satélite Digital* [2002] E.C.R. I-00607, para. 31; Case C-71/02 *Karner* [2004] E.C.R. I-3025, para. 46; Case C-20/03 *Burmanjer* [2005] E.C.R. I-4133.

²³⁵ *Canal Satélite Digital*, para. 32-33.

²³⁶ Case 7/78 *Regina v Thompson* [1978] E.C.R. 2247, para. 21; *Schindler*, para. 30. Also John Usher, ‘Monetary movements and the internal market’ in Niamh Nic Shuibhne (ed), *Regulating the Internal Market* (Edward Elgar 2006), 186; Ivo E. Schwartz, ‘Rechtsangleichung und Rechtswettbewerb im Binnenmarkt – Zum europäischen Modell’ [2007] EuR 194, 20.

²³⁷ Council Directive 88/361/EEC [1988] OJ L 178 for the implementation of Article 67 of the Treaty. See Joined Cases C-286/82 and 26/83 *Luisi and Carbone* [1984] E.C.R. 377, and Case 308/86 *Lambert* [1988] E.C.R. 43693. The exception was Art. 106 EEC, which had direct effect and applied to current payments related to other freedoms.

²³⁸ Case C-513/03 *van Hilten-van der Heijden* [2006] E.C.R. I-10653, para. 39. Arguing that the Directive has been broadly construed, Usher, p.193-198.

said to consist of all financial transactions that are not caused directly by goods or services, even if it includes operations that are clearly current payments alongside capital movements as such.²³⁹

Inter-State trade in goods will usually entail an inverse inter-State movement of means of payment.²⁴⁰ As the Court noted, the free movement of capital is effectively a pre-condition for the fulfilment of the other freedoms²⁴¹, and thus the free movement of goods would be nugatory if a purchaser could not pay a supplier in another Member State. It is may be the fact that direct effect was not granted to capital until later than to the other freedoms that explains why the Court held that a restriction on the payment of goods imported from other Member States could amount to a restriction on the free movement of those goods instead of capital.²⁴² Nonetheless, the Court has held that means of payment are not goods; hence, the physical supports of means of payment falling within the scope of the free movement of capital do not fall within the scope of the free movement of goods.²⁴³ For example, coins which constitute legal tender in Member States, or are treated in money markets of Member States as being equivalent to currency fall within the scope of the free movement of capital, while coins which are

²³⁹ This includes direct investments, investments in real estate, credits related to commercial transactions or the provision of services in which a resident is participating, financial loans and credits, sureties, transfers in performance of insurance contracts, personal capital movements, physical import and export of financial movement, transfer of moneys required for the provision of services and operations in (i) securities in the capital markets; (ii) units of collective investment undertakings, (iii) securities and other instruments usually dealt in money markets; (iv) current and deposit accounts with financial institutions. See Usher, 186; Schwartz, 20.

²⁴⁰ Bleckman, 671.

²⁴¹ Case 203/80 *Casati* [1981] E.C.R. 2595, para. 8.

²⁴² Usher, 187-189. See Case 95/81 *Commission v Italy* [1982] E.C.R. 2187.

²⁴³ *Regina v Thompson*, para. 25.

no longer legal tender are held to constitute goods.²⁴⁴ Documents proving financial transactions can also lead to an overlap between these freedoms, and it has been argued that the free movement of goods should, in this case, be treated as ancillary to capital movement.²⁴⁵ Nonetheless, other than these specifications of the respective scope of each freedom, no case law on overlaps between goods and capital was found.

e. Free movement of workers v free movement of self-employed persons

The heart of the distinction between the provisions on workers and those on services and establishment lies in the concept of subordination, which is required for workers and must be absent for self-employed persons.²⁴⁶ It should also be noted that, since legal persons cannot be employed, the free movement of workers does not apply to them.²⁴⁷ Nonetheless, even within these purportedly opposing scopes there are areas of potential overlap, such as the situation of posted-workers: individuals employed in their home-State by an entity providing services in a host-State. To deal with these situations the Court looks into the relationship between the relevant persons and the host-State's labour market: if a physical person moves from one Member State looking for access to employed work in its labour market, such a situation falls under the free movement of workers; if the same person moves in order to provide or receive a service, or to be self-employed, i.e. to start up a business, that situation is encompassed by the free provision

²⁴⁴ Id, para. 31. See Snell, *Goods and services in EC law: a study of the relationship between the freedoms*, 5; Oliver and Enchelmaier, 'Free movement of goods: recent developments in the case law', 671.

²⁴⁵ Oliver, *Free Movement of Goods in the European Union*, 41-42.

²⁴⁶ Case 66/85 *Lawrie-Blum* [1986] E.C.R. 2121, Case C-107/94 *Asscher* [1996] E.C.R. I-3089, Case C-268/99 *Jany* [2001] E.C.R. I-8615, Joined cases C-151/04 and C-152/04 *Nadin* [2005] E.C.R. I-11203.

²⁴⁷ Koen Laenerts and Ludovic Bernardeau, 'L'encadrement communautaire de la fiscalité directe' [2007] 19 CDE, 52.

of services or the right of establishment.²⁴⁸ In other cases, however, the Court has applied all the relevant freedoms simultaneously, not bothering to determine what situation was predominant.²⁴⁹

f. Free Movement of workers v free movement of capital

Similarly to what occurs with the relationship between workers and goods, when people move across borders they might bring capital and means of payment with them. The Court has held that mere change of residence does not as such constitute a capital movement²⁵⁰, which can be argued to mean that any transfer of capital takes second place to the exercise of free movement of persons.²⁵¹ However, if the free movement of persons was pursued in order to effect a payment or a financial transaction, the situation could arguably fall under the scope of the free movement of capital. Yet again, there seems to be no case law on this.

g. Freedom to provide services v right of establishment

These freedoms have in common that while they both apply to physical and legal persons alike, they do not apply to employed individuals. The distinction between them, as set forth in *Gebhard*²⁵², is that while the right of establishment implies a stable and continuous participation – one could also say a permanent presence²⁵³ – in the economic life of a Member State other than the home-State, the freedom to provide services implies that that same activity is pursued on a temporary basis. Therefore, it is the

²⁴⁸ Snell, *Goods and services in EC law: a study of the relationship between the freedoms*, 9-11; Hatzopoulos, 50. See Case C-43/93 *Elst* [1994] E.C.R. I-3803 para. 21.

²⁴⁹ Case C-330/03 *Colegio de Ingenieros* [2006] E.C.R. I-801, Case C-150/04 *Commission v Denmark* [2007] E.C.R. I-1163.

²⁵⁰ *van Hilten-van der Heijden*, para. 49.

²⁵¹ AG Kokott's Opinion in *N*, para. 38.

²⁵² Case C-55/94 *Gebhard* [1995] E.C.R. I-4165, para. 25-27.

²⁵³ As in Case 205/84 *Commission v Germany* [1986] E.C.R. 3755, para. 21.

temporary or permanent nature of the activities which distinguishes between services and establishment, with the distinction not hanging on the specific activity pursued but on the way in which it is pursued. As was noted by the Court, a general requirement of establishment for the provision of cross-border services would deprive of all effectiveness the Treaty provisions concerning the free provision of services.²⁵⁴ It can even be argued that both freedoms constitute a right of pursuit of ‘self-employed activities’, with the only difference being that it is proportional for Member States to impose stricter rules on establishment than on services.²⁵⁵

To distinguish between permanent and temporary activity, the Court has held that the activity has to be assessed not only on the basis of duration of the activity, but also on its regularity, periodicity and continuity²⁵⁶, while holding that an activity might be temporary even if provided through an extended period of time – which may go on for years²⁵⁷ – as long as it is not pursued without a foreseeable limit to its duration²⁵⁸. Simultaneously, the Court requires an infrastructure or a place of business as essential for an activity to be considered permanent, and hence to fall within the scope of the right of establishment²⁵⁹, while also holding that an activity can be temporary even if the provider of services equips himself with some form of infrastructure in the host-State in so far as such infrastructure is necessary for the purposes of performing the

²⁵⁴ As has been clear since Case 33/74 *van Binsbergen* [1974] E.C.R. 1299, para. 11. See also, *Commission v Germany*, para. 52.

²⁵⁵ Snell, *Goods and services in EC law: a study of the relationship between the freedoms*, 9, 24-25.

²⁵⁶ Case C-3/95 *Reisebüro Broede* [1996] E.C.R. I-6511, para. 22.

²⁵⁷ Case C-215/01 *Bruno Schnitzer* [2001] E.C.R. I-14847, Case C-171/02 *Commission v Portugal* [2004] E.C.R. I-5645, para. 28.

²⁵⁸ Case 196/87 *Steydmann* [1988] E.C.R. 6159, para. 16.

²⁵⁹ *Schnitzer*, para. 32; *Commission v Portugal*, para. 25: ‘(...) In this context, the concept of establishment means that the operator offers its services on a stable and continuous basis from an established professional base in the Member State of destination (...)’ [my emphasis].

services in question.²⁶⁰ This case law leads to a blurring of services and establishment, there appearing to be no definite criteria to determine whether an activity is temporary or permanent. Unless the existing criteria are construed as being cumulative, they are even potentially contradictory: for example, if someone from State A pursues permanent activities in State B without a professional base in the latter, the situation should (because it is permanent) and should not (because there is no professional basis) fall under the right of establishment.²⁶¹ Only if these requirements are deemed cumulative can it be ascertained that the situation falls within the scope of the free provision of services instead of the right of establishment.

Apart from these efforts to determine the precise scope of each freedom, the Court has also admitted that a measure can fall under the scope of both freedoms. In those cases the Court has sometimes chosen one freedom over the other by stating that when a freedom is affected merely as a result of a measure which primarily affects another freedom only the latter will be taken into account.²⁶² On other occasions, however, it has forsaken any attempt at a distinction and applied both freedoms simultaneously.²⁶³

h. Right of establishment v free movement of capital

Even though the scope of the right of establishment may seem to be very different from that of capital, the reality is that establishing a permanent presence in another Member State usually requires an investment and/or a transfer of capital between States, and can also involve investment in an existing undertaking in the host-

²⁶⁰ *Gebhard*, para. 27

²⁶¹ Arnall, Wyatt and Dashwood, *Wyatt and Dashwood's European Union Law*, 555-557.

²⁶² Case C-196/04 *Cadbury Schweppes* [2006] E.C.R. I-7995.

²⁶³ Case C-294/00 *Deutsche Paracelsus* [2002] E.C.R. I-6515, *Commission v Greece*, Case C-314/08 *Filipiak* [2009] E.C.R. I-11049.

State. To address this latter overlap, a distinction between ‘direct investment’ and ‘portfolio investment’ has been adopted. Direct investment, according to Directive 88/361, is characterised by the possibility of participating effectively in the management or control of a company, while portfolio investment includes the acquisition of equity or debt on pure financial investment grounds, that is, without the aim of exerting any influence on management. While the latter is exclusively covered by the free movement of capital, the former concerns capital movements which might also fall within the scope of the right of establishment, since the Court held that freedom of establishment includes the right to set up and manage – and thereby acquire control in – undertakings in a Member State by a national of another Member State. Accordingly, a national of a Member State who has a holding in the capital of a company established in another Member State that gives him definite influence over the company's decisions and allows him to determine its activities is exercising his right of establishment²⁶⁴; anything less than this triggers the free movement of capital. Another area of distinction between these freedoms concerns the acquisition of real estate property. While the right to acquire, use, or dispose of immovable property on the territory of another Member State is a corollary of the right of establishment, investments in real estate on the territory of a Member State by non-residents are deemed capital movements in Annex I to Directive 88/361.²⁶⁵

A peculiarity of the free movement of capital is that it has wider scope *ratione loci* than the other freedoms, applying also to third-States. The consequence of this is

²⁶⁴ Case C-251/98 *Baars* [2000] E.C.R. I-2787, para. 22; Case C-208/00 *Überseering* [2002] E.C.R. I-9919, para. 77; *N*, para. 27; Case C-347/04 *Rewe Zentralfinanz* [2007] E.C.R. I-2647, para 22; *Filipiak*, para. 32.

²⁶⁵ It is in effect unclear what the criteria are for distinguishing between the freedoms in these cases: see Case C-302/97 *Konle* [1999] E.C.R. I-3099, Case C-423/98 *Albore* [2000] E.C.R. I-5965, Case C-370/05 *Festersen* [2007] E.C.R. I-1129.

that when litigating States usually try to rely on the right of establishment, while claimants have added incentives to have recourse to the free movement of capital. This may explain why the Court sometimes appears to take the differing scopes of each freedom very seriously.²⁶⁶ In other situations, however, the Court acts similarly to its custom with other freedoms²⁶⁷: sometimes it chooses one freedom as the exclusively applicable one without much justification;²⁶⁸ other times it chooses to apply only one of the freedoms by looking into the intention of the legislation;²⁶⁹ on occasion it holds that one of the freedoms is only affected as an indirect consequence of the main infringement²⁷⁰; and occasionally it assesses a number of situations under both the right of establishment and the free movement of capital simultaneously.²⁷¹

i. Freedom to provide services v free movement of capital

Similarly to what occurs in the relationship between goods and capital, these freedoms overlap as the provision of services across borders would be nugatory without

²⁶⁶ Suzanne Kingston, 'A Light in the Darkness: Recent Developments in the ECJ's Recent Tax Jurisprudence' (2007) 44 CML Rev 1321, 1328. See Case C-524/04 *Test Claimants III* [2007] E.C.R. I-2107, para. 93-102.

²⁶⁷ Thomas Papadopoulos, 'Case Note on *Idrima Tipou*' (2012) 49 CML Rev 401.

²⁶⁸ Case C-200/98 *X AB* [1999] E.C.R. I-8261, concerning intra-group transfers of capital; Joined Cases C-397/98 and C-410/98 *Metallgesellschaft* [2001] E.C.R. I-1727, *Baars, Konle*.

²⁶⁹ Case C-157/05 *Holböck* [2007] E.C.R. I-4051, Case C-182/08 *Glaxo Wellcome* [2009] E.C.R. I-08591.

²⁷⁰ Case C-98/01 *Commission v UK* [2003] E.C.R. I-4601, *Glaxo Wellcome, Cadbury Schweppes*, Case C-231/05 *Oy AA* [2007] E.C.R. I-6373. A conspicuous example of this concerns golden shares, which are special shares granting special control powers over a company to their holders independently of the size of their shareholding. These are held to fall under capital and only incidentally under establishment, unlike what could have been expected under the distinction between management and portfolio investments identified above – see AG Jarabo Colomer's Opinion in Case C-326/07 *Commission v Italy* [2009] E.C.R. I-02291, para 44-49; Case C-212/09 *Commission v Portugal* of 10 November 2011 (not yet published), para. 98 and the case law referred therein; 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 ELJ 177, 195.

²⁷¹ Kingston, 1326. See *Commission v Italy*, Case C-81/09 *Idrima Tipou* [2010] E.C.R. I-10161, *Commission v Portugal*.

the corresponding movement of capital or means of payment as remuneration.²⁷² Another major area of overlap is that of financial services: to point out just the most obvious case, the granting of credit on a commercial basis implies both the provision of services and the movement of capital.²⁷³ This was acknowledged in the Treaty itself, which provided in Art. 58 (2) TFEU that: "*the liberalization of banking and insurance services connected with movements of capital shall be effected in step with the progressive liberalization of movement of capital*".²⁷⁴

When dealing with these overlaps, the Court, as with establishment, sometimes appears to take the distinction between the different scopes of the freedoms very seriously, with the free provision of services seeming to prevail in most cases over the free movement of capital, perhaps in light of capital's applicability to situations involving third-countries.²⁷⁵ Another possible reason for this is that the free movement of capital has been extensively organised in secondary legislation and that opting for the other market freedoms allows the Court to neutralise loopholes found in that legislation (such as the possibility of discriminating, taxation-wise, on grounds of residency when it comes to capital).²⁷⁶ In any event, and as with the other freedoms, if the Court tends to justify its choice of one freedom over the other on the grounds of the former being directly and primarily affected by the relevant measure, sometimes that choice is not justified at all.²⁷⁷ Furthermore, on some occasions the Court applies each freedom

²⁷² *Luisi and Carbone*.

²⁷³ Case C-452/04 *Fidium Finanz* [2006] E.C.R. I-8135, Case C-222/95 *Parodi* [1997] E.C.R. I-3899 and Joined Cases C-155/08 and C-157/08 *Schoot* [2009] E.C.R. I-05093.

²⁷⁴ Case C-484/93 *Svensson and Gustavsson* [1995] E.C.R. I-3955, para. 10-12.

²⁷⁵ Martha O'Brien, 'Fidium Finanz Case Note' (2007) 44 CML Rev 1483, 1495.

²⁷⁶ Hatzopoulos, 48-49.

autonomously²⁷⁸, while in others it applies them jointly as if they were a single freedom.²⁷⁹

j. A General Approach to Overlaps?

It should be clear by now that, even taking into account their different scopes, there are potential overlaps between all the freedoms. This potential is more pronounced in some freedoms than in others, but it is nonetheless possible in what regards every freedom in relation to every other freedom. What is more, the broader the concept of restriction used, the higher the odds that an overlap will occur.²⁸⁰

If there were serious concerns at the drafting of the Treaty concerning their different normative foundations, it was to be expected that there would be some rules to determine when to apply one freedom instead of another – but none are to be found in the Treaties, other than the now revoked rule that the free provision of services should apply subsidiarily to the other freedoms. Even though this rule seemed to assume the possibility of overlaps between different freedoms – at least with services – and establish a hierarchy whereby the free provision of services would be subordinate, the Court did not seem to follow this. Instead, the Court read the Treaty as using the notion

²⁷⁷ *Fidium Finanz*, Case C-42/07 *Bwin* [2009] E.C.R. I-07633. See also Martha O'Brien, 'Taxation and the Third Country Dimension of Free Movement of Capital in EU Law: the ECJ's Rulings and Unresolved Issues' [2008] BTR 628, 657; Laenerts and Bernardeau, 52-53. This distinction appears to be pursued arbitrarily sometimes: see Case C-410/96 *Ambry* [1998] E.C.R. I-7875, where the Court held that a requirement for compulsory financial security to be provided to a travel agent had to be guaranteed by a credit institution or insurance company fell within the freedom to provide financial services; or Case C-222/97 *Trummer and Mayer* [1999] E.C.R. I-1661, where it was decided that providing a mortgage falls within the scope of the free movement of capital.

²⁷⁸ *Svensson and Gustavsson*.

²⁷⁹ Case C-148/91 *Vereniging Veronica Omroep* [1993] E.C.R. I-487, Case C-496/01 *Commission v France* [2004] E.C.R. I-2351.

²⁸⁰ See, for example, Case 145/88 *Torfaen* [1989] E.C.R. 765 and Joined Cases C-418/93 to C-420/93, C-421/93, C-460/93, C-461/93, C-462/93, C-464/93, C-9/94, C-10/94, C-11/94, C-14/94, C-15/94, C-23/94, C-24/94 and C-332/94 *Semeraro and Others* [1996] E.C.R. I-2975, where the same case was submitted under the right of establishment and the free provision of services after the scope of the free movement of goods was restricted and those on the free movement of persons were being expanded.

of ‘services’ to cover situations not governed by other freedoms in order to ensure that all economic activity fell within the scope of the market freedoms.²⁸¹ Thus, different market freedoms may apply to the same situations, and this is not problematic; it is more important that all restrictions on economic activity ‘fall within the scope of the fundamental freedoms’, regardless of the freedom being engaged. This implies the existence of a common ‘residual’ category and appears to indicate a common rationale justifying a common approach to all market freedoms.²⁸²

This apparent absence of concern with which specific freedom is engaged in particular situations may be further demonstrated by the Court itself never having developed a coherent approach on how to address these overlaps between different freedoms. The Court’s approach can perhaps be described, in broad strokes, as including the following steps²⁸³: (i) Determine the Scope – if it is able, the Court will try to distinguish between the parts of a situation which are affected by each freedom and apply the relevant provisions autonomously; (ii) Pursue Subsidiary Distinctions – if the Court is unable or unwilling to determine whether a specific situation falls within the scope of one freedom and not another, the Court may choose the freedom it considers to be predominantly affected, try to identify what is the purpose of the legislation at issue, or try to determine whether the transaction in question primarily relates to goods, persons, services, or capital, as the case may be.²⁸⁴ This last element is not present in infringement procedures, however, since whenever the Commission files an action

²⁸¹ *Fidium Finanz*, para. 32-33. Eventually this rule was removed from the Treaties, so that now services has equal standing to the other freedoms.

²⁸² Snell, *Goods and services in EC law: a study of the relationship between the freedoms*, 22-23; Behrens, 146-147.

²⁸³ It is very possible that this step-by-step analysis is too kind on the Court’s practice, which may very well be intuitive, maybe even arbitrary in some cases.

²⁸⁴ Oliver and Enchelmaier, ‘Free movement of goods: recent developments in the case law’, 668; Hatzopoulos, 54-55; *Holböck*, para. 22.

against a State under Art 258 TFEU the Court has to perform an abstract assessment which is detached from the potential facts of a case; (iii) Acceptance of Identity of Freedoms – lastly, the Court may argue that no distinction is possible and no individual freedom is prevalent, in which case it may apply all the relevant freedoms jointly.²⁸⁵ This may be the case in infringement proceedings where no facts exist that could engage a specific freedom to the detriment of others. Furthermore, particularly in what concerns persons, the Court has started deciding a variety of cases without determining which specific freedom is applicable, applying them in parallel under the banner of the free movement of persons.²⁸⁶ This may be the result of difficulties in determining which the predominant activity is: a person's status is sometimes a hybrid, since people can be employed and self-employed at the same time²⁸⁷, which may lead to a decision being justified by recourse to different freedoms simultaneously. For example, in cases concerning direct taxation the same rule can be assessed under different freedoms depending on the status of the taxpayer.²⁸⁸ Nevertheless, it cannot be denied that a unitary approach to the free movement of persons appears to have been adopted in the Court's language.²⁸⁹

The systemic and legal certainty argument for a common approach to the market freedoms is thus that, since different freedoms may equally apply to the same situations,

²⁸⁵ For services and goods, see *Canal Satélite Digital*; for services, establishment and workers, as they are held to concern the free movement of persons, see Case C-106/91 *Ramrath* [1992] E.C.R. I-3351 and *Kraus*; for cases concerning these freedoms and European citizenship, see Case C-274/96 *Bickel and Franz* [1998] E.C.R. I-7637 and Case C-135/99 *Ursula Elsen* [2000] E.C.R. I-10409.

²⁸⁶ See for example, Case C-363/89 *Roux* [1991] E.C.R. I-00273. Other examples include *Kraus*, where this occurred between establishment and workers; Case 36/74 *Walrave* [1974] E.C.R. 1405 and Case 118/75 *Watson and Belmann* [1976] E.C.R. 1185 for workers and services; *Commission v Italy* for services and establishment.

²⁸⁷ Para. 27-28 of AG Geelhoed's Opinion in Case C-456/02 *Trojani* [2004] E.C.R. I-7573.

²⁸⁸ O'Brien, 'Fidium Finanz Case Note', 1497.

²⁸⁹ Hatzopoulos, 70.

it would be arbitrary to treat situations differently based on very technical and obscure decisions on which freedom is to be applied or is prevalently affected in a given situation, particularly when no good reason is presented to justify such differentiation. To this can be added that coherence and doctrinal clarity are beneficial to both justice, which requires us to treat similar things alike, and to the legitimacy of the law-enforcing bodies. In short, the factual differences between cases falling under the market freedoms should be accommodated at the level of justification and proportionality, while the scope of application of the market freedoms should have a uniform structure.²⁹⁰

²⁹⁰ Snell, *Goods and services in EC law: a study of the relationship between the freedoms*, 23; Cordewener, 4-10 and 39-41; Cruz, *Between Competition and Free Movement*, 94-6, arguing however that the free movement of workers justifies a different approach.

Chapter III

Specific Normative Foundations of Individual Market Freedoms

Abstract:

This chapter will continue the description of the main normative foundations of the market freedoms by reviewing a set of normative positions said to apply to individual freedoms alone, which thus argue against a common approach being adopted. The most relevant of these concern the free movement of persons, and as such the analysis of these will take up most of this chapter.

I. Introduction

Arguments for a common approach to the market freedoms seem to require a normative unity between the freedoms. Arguments against such an approach, on the other hand, tend to be freedom-specific: if it can be shown that specific normative concerns apply only to specific freedoms then it follows that a common approach to all the freedoms is not desirable even if a thinner common normative substratum exists.²⁹¹ This requires a review of the main arguments for treating the market freedoms differently, to which this chapter is devoted.²⁹² This chapter will begin by reviewing the grounds for and against a distinction between different kinds of products, between products and production factors, between capital and the other freedoms, and between the free movement of persons and the other freedoms. This last aspect is a particularly relevant topic since Maastricht, in light of the creation of EU Citizenship and the

²⁹¹ It has also been held that a common approach has not been followed by the Court and that such a discrepancy did not hinder the creation of a common market – Hatzopoulos, 66-70; Jukka Snell, ‘And Then There Were Two: Products and Citizens in Community Law’ in Takis Tridimas (ed), *European Law for the Twenty-First Century*, vol II (Hart Publishing 2004), 50-67. Regardless of the descriptive accuracy of such analysis, this does not seem to constitute a normative argument for or against a common approach.

²⁹² These arguments seem to map out perceived differences in the treatment of the market freedoms, particularly in what concerns the lack of direct effect for capital and the different treatment of goods and services in the *post-Dassonville* and then *post-Keck* worlds. This is also arguably the case in what concerns the free movement of persons, even if here the legal doctrine seemed to be more pro-active in trying to bring about a desired change. In any event, the analysis of the normative conceptions in this chapter is conceptually unrelated to, and completely independent of whether they are descriptively accurate.

development of the European project from a mainly economic to a more politically integrated endeavour, as reflected also in the recent amendments to the TEU emphasising the protection of human rights and of the equality of European Citizens before the Union and the Member States.

II. Should we treat material and non-material products differently?

A number of objections have been levelled at the common treatment of goods and services. One line of argument is based on the different modes of supply of tangible and intangible products. The immateriality of services means that they are not susceptible to changing hands in a series of different transactions and may need to be produced at the place where they are provided, which might in turn require the movement of production factors in ways that goods do not require.²⁹³ This argument has been disputed on the grounds that differences in modes of production do not change the underlying economic calculus, and that, in the absence of restrictions to the free movement of production factors in the EU, different modes of supply do not constitute grounds to approach products differently based on their corporeality or lack of it.²⁹⁴ Another line of argument invokes the differences on the level and kind of regulation to which goods and services are subject. It is also argued that services not only tend to be much more heavily regulated than goods, but that regulation concerning them usually targets the service provider, while regulation of goods usually targets the product itself.²⁹⁵ Against this, it has been held that this is a distinction of degree, not of kind: the prevalence of regulation concerning the producer in services does not mean that such a

²⁹³ Apostolos Gkoutzinis, 'Free Provision of Services in the EC Treaty and the Law of Contractual Obligations relating to Banking and Financial Services' (2004) 41 CML Rev 119, 129-130

²⁹⁴ See Piet Eeckhout, 'Constitutional Concepts for Free Trade in Services' in Gráinne de Burca and Joanne Scott (eds), *The EU and the WTO – Legal and Constitutional Issues* (Hart Publishing 2001), 215, 220; Snell, *Goods and services in EC law: a study of the relationship between the freedoms*, 16-17.

²⁹⁵ Eeckhout, 221.

technique cannot be adopted for goods any more than the prevalence of the regulation of products for goods would prevent such a technique being used for services. A similar argument holds for the existence of more extensive regulation of services than goods.²⁹⁶ The prevailing view, accordingly, is that services and goods share the same normative background and should be treated similarly. The Court itself has recognised the similarity of these freedoms and ruled that the principles governing justification of restrictions falling under these freedoms are essentially the same²⁹⁷, while it is common in Federal systems for the same provision to be used to regulate both goods and services.²⁹⁸

III. Should we distinguish between Products and Production Factors?

Once we accept that products should be treated similarly regardless of being tangible or intangible, the question left from an economic perspective is whether production factors should be treated differently from products. This would make sense if the EU were a free trade area or a customs union, since in that case production factors would face limited mobility when compared to products. As the EU is a common market, there appears to be no good economic reason to distinguish on these grounds. In economic terms, common markets depend on the free movement of both products and production factors; furthermore where goods and services cannot be traded, the free movement of capital, labour²⁹⁹, and technology can act as substitutes, and vice-versa.³⁰⁰

²⁹⁶ Snell, *Goods and services in EC law: a study of the relationship between the freedoms*, 17-19. These differences relate not so much to the creation of the internal market, but to the existence of different legitimate interests whose protection is accepted in that market.

²⁹⁷ Oliver and Enchelmaier, 'Free movement of goods: recent developments in the case law', 670. See also *Canal Satélite Digital*, para 32.

²⁹⁸ See, for example, the US' Commerce Clause and Article 92 of the Australian Constitution.

²⁹⁹ Sometimes 'labour' is substituted by 'persons'; see Hitiris, *European Community economics: a modern introduction*, 36, MacBean and Snowden, *International institutions in trade and finance*, 145.

³⁰⁰ Ohlin, *Interregional and international trade*, 167-170.

Thus, there seems to be no good normative justification for such a distinction, and the Treaty itself does not pursue it.

IV. Should capital be treated differently?

Another relevant question is whether there are good normative reasons to treat capital differently from the other freedoms. While the Spaak Report addressed the free movement of capital in terms similar to those of the other freedoms, it admitted that the creation of a common market depended on the maintenance of the equilibrium on the balance of payments, which was at the time ensured within the Bretton Woods system.³⁰¹ While means of payment had to be liberalised at the same rate as the free movement of other products or productive factors – and the fact that means of payment fall within the definition of capital means that its free movement was a pre-condition for the fulfilment of the other freedoms³⁰² – the situation of purely financial movement of capital was distinct. The Spaak Report emphasised the impact that the liberalisation of purely financial capital movements could have on monetary policies, particularly as a result of speculative fits or of capital flight to laxer regulatory regimes. The nature of capital itself pointed to a different, more flexible, integration strategy than for the other freedoms. Greater discretion and technical knowledge would have to be applied, at each stage, in the creation of conditions for a common market for capital movements. Safeguard clauses would probably remain necessary even after the transition period in the absence of a common budget and monetary policy.³⁰³

³⁰¹ Whereby some world currencies were pegged to the dollar, and the US promised to anchor its value by offering to redeem dollars held by foreign governments and central banks for gold at the rate of \$35 per ounce. See Richard Syllar, 'Political Economy of Supplying Money to a Growing Economy: Monetary Regimes and the Search for an Anchor to Stabilize the Value of Money' (2010) 11 *TheoInqL* 1, 24.

³⁰² *Casati*, para. 8.

³⁰³ *Spaak Report* [1956], 93-96.

The main example of this different integration strategy is how long it took for the free movement of capital to acquire direct effect and how dependent this was on secondary legislation – direct effect was only granted at the end of the deadline for transposing Directive 88/361 on 1 July 1990, and the Directive’s Annex I is still the main instrument in determining which situations fall within the scope of the free movement of capital.³⁰⁴ Underlying this may well be the well-known fact that a Member State can control at most two out of three political economy objectives: a fixed-exchanged rate, free movement of capital, and an independent monetary policy.³⁰⁵ Thus, if Member States were to retain their independent monetary policies within a system of stable exchange rates – which was the dominant system under the gold standard and then the Bretton Woods system, reappeared after the demise of the latter under the European Exchange Mechanism, as was finally fulfilled through the Euro – capital movement would have to be kept in check. Accordingly, even after free movement of capital was granted direct effect, Directive 88/361 still includes a safeguard for national unilateral action.³⁰⁶

Another example of the specificities of capital can be found in the vicissitudes of creating a market in financial services, as foreseen in Art. 61(2) TEC. The creation of such a market required capital liberalisation, the removal of regulatory obstacles to cross-border financial transactions, and the concomitant deregulation of capital markets. In the 80s the idea that short-term gains and stability could lead to long-term distortions, and to a corresponding impact on long-term economic growth, gained credence. It was

³⁰⁴ Council Directive 88/361/EEC. The exception was Art. 106 EEC, which had direct effect and applied to current payments related to other freedoms.

³⁰⁵ Maurice Obstfeld, *Models of currency crises with self-fulfilling features* (Centre for Economic Policy Research 1996); Niall Ferguson, *The Cash Nexus* (Penguin Books, London 2001), p. 332-340.

³⁰⁶ Behrens, 155.

only then, as this long-term view became mainstream and was adopted as national policy by the Member States, that indirect instruments that tried to control credit expansion through price mechanisms such as interest rates replaced direct intervention in capital markets. Only after this intellectual environment favourable to deregulation came about was the internal market in financial services created; even in this case, however, this was done through a number of Directives, and not through the granting of direct effect to Treaty provisions by judicial *fiat*.³⁰⁷

A last, but important, example of this different strategy concerns the extension of the scope *ratione loci* of free movement of capital to States not part of the EU. If capital is unique among production factors, in that it raises for Member States concerns about controlling exchange rates and international movement of capital, particularly speculative ones,³⁰⁸ these concerns are aggravated by Article 63 TFEU promoting capital movement not only intra-Union but also between Member States and third countries, thereby extending certain benefits and rights to residents and citizens of countries not Members of the EU without requiring reciprocity.³⁰⁹ This third-country dimension was introduced in the Maastricht Treaty, with the apparent purpose of supporting the Euro as an international reserve currency and reassuring money markets with regard to its external movement and availability. Nonetheless, this third-country dimension must be understood within a context where movement of capital had already been substantially liberalised and regulated between Member States and third countries

³⁰⁷ Mads Andenas, 'The interplay of the Commission and the Court of Justice in giving effect to the right to provide financial services' in Paul Craig and Carol Harlow (eds), *Lawmaking in the European Union* (Kluwer 1998), 333-335.

³⁰⁸ Deniau, *The common market*, 77.

³⁰⁹ O'Brien, 'Taxation and the Third Country Dimension of Free Movement of Capital in EU Law: the ECJ's Rulings and Unresolved Issues'. See AG Kokott's Opinion in Case C-282/07 *Truck Center* [2008] E.C.R. I-10767.

by the OECD Code of Liberalisation of Capital Movements.³¹⁰ What is more, this peculiarity justifies provisions such as Article 64 TFEU allowing for restrictions on the movement of capital from third countries as long as such a restriction formed part of the country's legal order continuously from 31 December, 1993. Furthermore, it explains why, when applying the proportionality test to capital, the Court accepts that justifications not valid for intra-Union movement of capital may be acceptable regarding third countries.³¹¹

In light of all of this it has been held sometimes that capital deserves a different treatment from the other freedoms, particularly because Member States' control of capital was an essential element of national economic and monetary policy pre-Euro. Substantial differences between capital and the other freedoms can arguably be found even in the Treaty. On the other hand, the free circulation of capital is still an essential element to any common market, and in that sense can be said to share the same basic normative foundations of the other market freedoms, particularly in countries that now pertain to the same currency union.

V. **Should we distinguish between the free movement of persons and other freedoms?**

The different Treaty provisions on the economic free movement of people can arguably be seen as complementary to a more general freedom for the movement of natural and legal persons.³¹² This is reflected in the Court's case law, which holds that

³¹⁰ Usher, 193.

³¹¹ O'Brien, 'Taxation and the Third Country Dimension of Free Movement of Capital in EU Law: the ECJ's Rulings and Unresolved Issues', 663.

³¹² Dieter H. Scheuing, 'Freizügigkeit als Unionsbürgerrecht' [2003] EuR 744, 753; Stephen Weatherill, 'Discrimination on grounds of nationality in sport' (1989) 9 YEL 55, 59; Snell, *Goods and services in EC law: a study of the relationship between the freedoms*, 9; Patrick Dollat, *Libre circulation des personnes et citoyenneté: enjeux et perspectives* (Bruylant 1998), 26. Arguing that services should be treated differently from establishment and workers, as the former can be regulated by the home-State and

the different Treaty provisions on the free movement of persons are based on the same principles in what regards entry into, residence, and pursuit of an economic activity in the territory of the Member States by persons covered by EU law, and prohibits all discrimination against them on grounds of nationality.³¹³ They provide the same level of legal protection³¹⁴ and are intended to facilitate the pursuit of occupational activities of all kinds throughout the Union, precluding national legislation that might place persons at a disadvantage when they wish to extend their activities beyond the territory of a single Member State.³¹⁵ It is hard to deny that a unitary approach to the free movement of persons appears to have been adopted in the Court's language.³¹⁶ Determining whether the provisions on the free movement of persons should be treated similarly is naturally distinct from assessing whether they should in turn be treated differently from freedoms not involving such movement. And this is the main point addressed in the literature, and which is almost subliminally reflected by the case law: whether the right of persons to move freely from State to State in the Union occupies a more protected position than does the movement of cattle, fruit, steel, capital and coal across State lines.³¹⁷

Underlying this position lurks the insight that the EU is more than an internal market; it is a politically and socially integrated polity. The most serious arguments for

requires a lesser degree of integration in the host-State, see Luigi Daniele, 'Non-discriminatory restrictions to the free movement of persons' (1997) 22 ELRev 191, 195-198.

³¹³ *Ramrath*, para. 17; *Asscher*, para. 29.

³¹⁴ *Roux, Nadin*.

³¹⁵ Case 143/87 *Stanton* [1988] E.C.R. 3877, para. 13; Joined Cases 154 and 155/87 *Wolf and Dorchain* [1988] E.C.R. 3897, para. 13; Case C-370/90 *Singh* [1992] E.C.R. I-4265, para. 16.

³¹⁶ Hatzopoulos, 70.

³¹⁷ As the question was put in the US by Justice Douglas in *Edwards v. California* [1941] 314 U.S. 160, at 177.

a distinctive approach to the free movement of persons relate to its nature as a fundamental (human) right and to European Citizenship. Proponents of the former view argue that persons, and particularly workers, are not viewed merely as a source of labour by the EU, but as human beings. They have also argued that the free movement of workers has a social element that distinguishes it from the other market freedoms, and that the Treaty itself views the free movement of persons as more than a merely economic freedom.³¹⁸ It is further held that the free movement of persons, as opposed to the other freedoms which merely grant market or economic rights, reflects fundamental rights, goes beyond the aim of creating and maintaining a common market and deserves a higher level of protection.³¹⁹ Against this position, it has been argued that while it is clear that the right of establishment and the free movement of workers require effective cross-border movement by persons to occur, under the free provision of services increasingly the service travels but not its provider or recipient.³²⁰ Similarly, while the free movement of goods and capital has traditionally been read as not prohibiting obstacles to the free movement of traders or financiers, but merely to the free movement of goods and capital themselves³²¹, it is also apparent that even market freedoms that are not held by the Treaty to concern the free movement of persons may imply exactly such a movement: the free movement of goods may require persons to cross borders as suppliers or as consumers, and the free movement of capital might overlap with the free

³¹⁸ Arnall, Wyatt and Dashwood, *Wyatt and Dashwood's European Union law*, 498-500; Snell, 'And Then There Were Two: Products and Citizens in Community Law', 69-70.

³¹⁹ Chris Hilson, 'Discrimination in Community free movement law' (1999) 24 *ELRev* 445, 453; Oliver and Enchelmaier, 'Free movement of goods: recent developments in the case law', 666.

³²⁰ Catherine Barnard, 'Fitting the remaining pieces into the goods and persons jigsaw?' (2001) 26 *ELRev* 35, 40.

³²¹ Alina Tryfonidou, 'Further steps on the road to convergence among the market freedoms' (2010) 35 *ELRev* 36, 38-39.

movement of persons.³²² Additionally, even though it is in effect easier to consider that the free movement of persons is a fundamental right than it is to consider the free movement of goods or the free movement of capital³²³, these latter freedoms can also be seen as a reflection of the fundamental right to conduct a business and the right to property (as recognised in the case law³²⁴ and Articles 16 and 17 of the Charter of Fundamental Rights).³²⁵ Some authors even consider that all the fundamental freedoms are fundamental rights.³²⁶ It is also argued that market freedoms are constitutional rights on a par with fundamental rights, and that more important than whether they are fundamental or not is their importance in the scheme of the Treaty.³²⁷ This is a position that appears to be adopted in the case law, inasmuch as when balancing between market freedoms and fundamental rights takes place it does not seem that the free movement of goods suffers from being considered less fundamental than the free movement of persons.³²⁸

The argument that market freedoms on the free movement of individuals are ‘fundamental rights’ has at times been merged with European Citizenship. It is, however, of crucial importance to distinguish these arguments. Fundamental rights and European Citizenship provide independent, if related, normative inputs. The argument

³²² See Snell, *Goods and services in EC law: a study of the relationship between the freedoms*, 25, on the possibility of the people crossing a border to promote goods. See also Case C-362/88 *GB-INNO-BM* [1990] E.C.R. I-667, para. 8.

³²³ Oliver, ‘Competition and Free Movement: Their Place in the Treaty’.

³²⁴ Case C-280/93 *Germany v Council* [1994] E.C.R. I-4973, para 78 and Case C-200/96 *Metronome* [1998] E.C.R. I-01953, para. 21.

³²⁵ Frenz, 606-7; Oliver and Roth, ‘The Internal Market and the Four Freedoms’; Oliver, ‘Competition and Free Movement: Their Place in the Treaty’, 164.

³²⁶ Bleckman, 665 ff; Maduro, ‘Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights’, 73.

³²⁷ Oliver, ‘Competition and Free Movement: Their Place in the Treaty’, 166.

³²⁸ See, for example, *Schmidberger* and *Omega*.

that the free movement of persons is fundamental while the other market freedoms are not faces the problem of being wholly dependent on controversial *a priori* assumptions as to what rights are fundamental. European Citizenship, on the other hand, apart from being able to extend the scope of EU law, and thereby increasing the number of situations where EU fundamental rights protection can intervene, is able to provide normative justifications for arguments in favour of the precedence of free movement of persons, unsupported by and unrelated to any fundamental rights discourse. European Citizenship may have deep normative implications, and deserves a more detailed review.

For clarity purposes, this analysis will be subdivided into three subsections: first an introduction to European Citizenship, then an attempt to understand its normative underpinnings, and lastly a description of the impact that European Citizenship can have on free movement. The latter description will focus on two possible types of impact: European Citizenship either (a) provides a basis for a wider interpretation of the economic and non-economic free movement of persons than for the other economic free movement provisions, or (b) it constitutes a broader basis for individual free movement which is nonetheless autonomous and separate from classic economic free movement rights.³²⁹

a. An Introduction to European Citizenship

European Citizenship consists of a number of different rights accruing to those resulting from a person being a citizen of a Member State. Introduced in the Maastricht Treaty, European Citizenship was originally seen as merely reiterating the rights of free movement and residence already accorded to various categories of individuals provided

³²⁹ Since this chapter is descriptive, my own position will not be made evident here. For an expression of my normative preferences, and the arguments for it, please see Chapter IV, section V(b) below.

for in primary and secondary legislation – in particular to economically active nationals and, through the three residence Directives adopted in 1990, to non-economically active students, retired people and those who had never been economically active but had comprehensive medical insurance and sufficient resources not to become a burden on the host-welfare system.³³⁰ In doing so, European Citizenship welded them together in a single provision of primary law that left the limitations to which those rights were subject untouched.³³¹

A contrary perspective that developed later on argued that EU Citizenship was an autonomous Treaty provision that expanded free movement rights beyond these categories to include all EU citizens.³³² Non-discrimination of foreign European citizens was held to be the cornerstone of the emerging European society, which would acknowledge equal rights to nationals and foreigners across national borders. The basic idea would be one of additionality: EU Citizenship would only operate in addition to national citizenship and where no more specific rights, such as those arising from the market freedoms, applied.³³³ This position was progressively adopted by a number of Advocates-General³³⁴, and in *Baumbast* the Court settled this specific debate by holding

³³⁰ Council Directive 90/364/EEC [1990] OJ L 180 on the right of residence, 26; Council Directive 90/365/EEC [1990] OJ L 180 on the right of residence for employees and self-employed persons who have ceased their occupational activity, 28; and Council Directive 93/96/EEC [1993] OJ L 317 on the right of residence for students.

³³¹ Robert Kovar and Denys Simon, 'La Citoyenneté Européenne' [1993] CDE 285, 298; Hans d'Oliveira, 'European Citizenship: Its Meaning, Its Potential' in Renaud Dehousse (ed), *Europe After Maastricht: An Ever Closer Union?* (LBE 1994), 135-141; Siofra O'Leary, 'The Relationship between Community Citizenship and the Protection of Fundamental Rights in Community Law' (1995) 32 CMLR 519, 519; Sionaidh Douglas-Scott, 'In Search of European Citizenship' (1998) 18 YEL 29, 37; Dollat, *Libre circulation des personnes et citoyenneté: enjeux et perspectives*, 133.

³³² See for a defence of this position para. 19 of AG La Pergola's Opinion in Case C-85/96 *Martínez Sala* [1998] E.C.R. I-2691.

³³³ Carlos Closa, 'The Concept of Citizenship in the Treaty on the European Union' (1992) 29 CMLRev 1137, 1160

³³⁴ AG Geelhoed's Opinion in Case C-413/99 *Baumbast* [2002] E.C.R. I-7091, AG Kokott's Opinion in Case C-192/05 *Tas-Hagen* [2006] E.C.R. I-10451. See also Yuri Borgmann-Prebil, 'The Rule of Reason

that the right to move to and reside within the territory of the Member States under Article 21 (1) TFEU was not dependent on the existence of prior Treaty provisions or secondary legislation, but was instead conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty.³³⁵ Also in accordance with this perspective, EU Citizenship's personal scope was extended to include all citizens of a Member State.³³⁶ It seemed indeed that:

*'Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.'*³³⁷

b. The Normative Underpinnings of EU Citizenship

The above debate was a mere preliminary to the question of what EU Citizenship entails. 'Citizenship' is such a wide concept that it can be used to propose virtually any normative approach – from the minimalist approach according to which European Citizenship was merely a symbolic ornament, which was explicitly refuted by the Court, to a maximalist one stating that it completely changed the nature of the

in European Citizenship' 14 ELJ 328, 338; Stefano Giubboni, 'Free Movement of Persons and European Solidarity' (2007) 13 ELJ 360, 370.

³³⁵ *Baumbast*, para. 78, 81-84. Sharing this interpretation, see Michael Dougan and Eleanor Spaventa, 'Educating Rudy and the non-English patient: A double-bill on residency rights under Article 18 EC' (2003) 28 ELRev 699; Chris Hilson, 'What's in a right? The relationship between Community, fundamental and citizenship rights in EU law' (2004) 29 ELRev 636, 640; Alexander Somek, 'Solidarity decomposed: being and time in European citizenship' (2007) 32 ELRev 787, 794; Stephan Wernicke, 'Au nom de qui? The European Court of Justice between Member States, Civil Society and Union Citizens' (2007) 13 ELJ 380, 396; Francis Jacobs, 'Citizenship of the European Union – A Legal Analysis' (2007) 13 ELJ 591 596. Against it, James Mather, 'The Court of Justice and the Union Citizen' (2005) 11 ELJ 722, 727-8.

³³⁶ *Martínez Sala*. This scope was further defined by secondary law in Directive 2004/38/EC [2004] OJ L 158 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. See also Somek, 'Solidarity decomposed: being and time in European citizenship', 790-791; Jean-Yves Carlier, 'Le devenir de la libre circulation des personnes dans l'Union Européenne: regard sur la directive 2004/38' [2006] CDE 13, 23-27.

³³⁷ Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193, para. 31.

EU.³³⁸ A uniform legal analysis of Union Citizenship is not possible unless one is prepared, from the outset, to measure it against a pre-defined vision of the role of citizens in Europe.³³⁹

At its lowest level of definition – and hence, its most consensual – citizenship can be said to relate to a certain bundle of rights and duties which are attributed in terms of equality³⁴⁰ to an individual as a result of belonging to a certain community.³⁴¹ Such a community is nowadays generally understood to be the State, but except for a short period of time following the French Revolution citizenship was not functionally tied to national identity.³⁴² The concept of citizenship predates the State by a few millennia, and with the advent of the EU it can be said to post-date it too.³⁴³ Although in its original formulation citizenship related essentially to rights of political participation, with the increase in the size of political organizations citizenship became more a legal status of passive recipients of rights.³⁴⁴ This can be said to be the dominant element in

³³⁸ Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' 68 MLJ 233, 234-5.

³³⁹ Stephan Kadelbach, 'Union Citizenship' in Armin von Bogdandy (ed), *Principles of European Constitutional Law* (Hart Publishing 2006), 484.

³⁴⁰ That this was the ideal is already apparent in Aristotle, *Politics* (Dover 2000), which however excluded most of humanity from this condition: see J.G.A. Pocock, 'The Ideal of Citizenship since Classical Times' in Ronald Beiner (ed), *Theorising Citizenship* (State University of New York 1995), 31.

³⁴¹ Michael Walzer, 'Citizenship' in Terence Ball, James Farr and Russell L. Hanson (eds), *Political Innovation and Conceptual Change* (Cambridge University Press 1989), 211; David Held, 'Between State and Civil Society: Citizenship' in Geoff Andrews (ed), *Citizenship* (Lawrence & Wishart 1991); Josephine Shaw, 'Citizenship of the Union: Towards Post-National Membership?' [1997] Jean Monnet Working Paper 06/97; Closa, 1138.

³⁴² Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe', 259.

³⁴³ Walker, 'The EU and the WTO: Constitutionalism in a New Key', 47; Carlos Closa, 'Citizenship of the Union and Nationality of Member States' (1995) 32 CMLR 487, 491-494; Ulrich K. Preuss, 'Problems of a Concept of European Citizenship' (1995) 1 ELJ 267, 280; Dollat, *Libre circulation des personnes et citoyenneté: enjeux et perspectives*, 405; Derek Heater, *What is citizenship?* (Polity Press 1999), 149.

³⁴⁴ This is visible in Aristotle, *Politics*, for example, but also in Benjamin Constant's distinction between the liberty of the ancients and of the moderns in Livre XVI of Benjamin Constant, *Principes de politique: Applicables à tous les gouvernements* (Hachette Littératures 2006).

citizenship nowadays, even if liberal democracies still entitle citizens to participate in political life in an attempt to conciliate the instrumental elements of citizenship adopted in the liberal perspective springing from the Stoics and Locke, and the communitarian and ethical elements of citizenship arising from Aristotle and Rousseau.³⁴⁵

In its complexity, citizenship can be said to combine the public and social dimensions of political life with its individual aspects.³⁴⁶ Being a very malleable concept, its specific content is not set *a priori*, but seems to depend on specific socio-historical conditions. For example, European Citizenship is dependent on an individual being a citizen of a Member State, a *status* which is at the discretion of Member States themselves.³⁴⁷ It is much more limited, and therefore hardly comparable, to domestic (generic) conceptions of citizenship.³⁴⁸ Rather, it is a historically, geographically, and culturally contingent institution that can only be fully understood by reference to both broader theories of citizenship and situation-specific ideas about European integration that stress the dynamic, open-ended nature of that process. This under-determination of the normative contents of European Citizenship comes across very clearly in AG Sharpston's Opinion in *Zambrano*, when it is asked:

*'Is Union citizenship merely the non-economic version of the same generic kind of free movement rights as have long existed for the economically active and for persons of independent means? Or does it mean something more radical: true citizenship, carrying with it a uniform set of rights and obligations, in a Union under the rule of law in which respect for fundamental rights must necessarily play an integral part?'*³⁴⁹

³⁴⁵ Walzer, 215-216; Pocock, 43; Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe', 261; Heater, *What is citizenship?*, 44-51.

³⁴⁶ Held, 21; Preuss, 270.

³⁴⁷ Even if cumulated with a double nationality of a non-Member State. See Case C-369/90 *Micheletti* [1992] E.C.R. I-4239.

³⁴⁸ Shaw.

³⁴⁹ Opinion in Case C-34/09 *Zambrano* [2011] of 8 March 2011 (not yet published), para. 3.

Here are identified relevant questions posed by the development of EU Citizenship at the current stage of its development: does European Citizenship grant a combined right to move to another Member State and then reside there? Or a sequential right to move to another Member State and, having moved there at some stage in the past, then to reside there? Or two independent rights, the right to move to another Member State and the right to reside in any Member State, even the nationality-State?³⁵⁰ And if so, are there any ‘purely internal situations’ in what concerns European Citizenship and concomitant protection of fundamental rights at EU level?

On this last issue a number of developments have been observed recently. In *Zambrano*, the Court decided that European Citizenship: ‘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’.³⁵¹ In light of this, the Court held that dependent Belgian children who had never left Belgium would see the genuine enjoyment of the substance of their rights infringed by the deportation of their Colombian parents back to Colombia. This could have been read as implying that European Citizenship extended to ‘purely internal’ situations. However, shortly afterwards, in *McCarthy*, the Court held that an United Kingdom/Irish national who had never left the UK was not able to rely on EU law when her Jamaican husband faced deportation because the situation was purely internal.³⁵² This apparent contradiction was finally clarified in *Dereci*, a case concerning a refusal by the Austrian authorities to grant permission to third-country nationals to live with family members who were EU citizens residing in, and nationals of, Austria who had never exercised

³⁵⁰ Id, para. 80 of the Opinion.

³⁵¹ Id, para. 42.

³⁵² Case C-434/09 *McCarthy* [2011] of 5 May 2011 (not yet published).

their right to free movement. Reiterating the formula developed in *Zambrano*, the Court went on to hold that there is a denial of the genuine enjoyment of the substance of EU Citizenship rights when the Union citizen in fact has to leave the territory of the Union as a result of the refusal to grant a right of residence to the family member, but that simply wanting to have third-country national family members live with you ‘*for economic reasons or in order to keep his family together in the territory of the Union*’ is not enough for the Court to find that this would force an EU citizen to leave the territory of the Union.³⁵³ Even if this somewhat clarifies the scope of the intrusion of European Citizenship into purely internal situations, it still leaves serious questions to be addressed, particularly concerning what factual situations qualify as forcing an EU citizen to leave the territory of the Union, what the ‘*substance of the rights conferred by virtue of their status as citizens of the Union*’ may be in other contexts, and what the normative justifications for the creation of this specially protected status are.³⁵⁴ What this also demonstrates very clearly is how ‘fuzzy’ and undetermined the concept of EU Citizenship still is 20 years after it was first adopted.³⁵⁵

c. *The Normative Implications for the Market Freedoms of European Citizenship*

The idea that European Citizenship may affect the market freedoms starts from the existence of some descriptive similarities between them. Like the market freedoms, a directly effective European Citizenship is a subjective public right. From a

³⁵³ Case C-256/11 *Dereci* of 15 November 2011 (not yet published), para. 64-69.

³⁵⁴ Kay Hailbronner and Daniel Thym, ‘*Zambrano* Case Opinion’ (2011) 48 CML Rev 1253; Peter Van Elsuwege, ‘Shifting the Boundaries? European Citizenship and the Scope of Application of EU Law’ (2011) 38 LIEI 263; and Alicia Hinarejos, ‘Extending citizenship and the scope of EU law’ (2011) 70 CLJ 309.

³⁵⁵ See Niamh Nic Shuibhne, ‘(Some Of) The Kids Are All Right: Comment on *McCarthy* and *Dereci*’ (2012) 49 CML Rev 349, 379, arguing that current developments on the ‘the substance of rights granted by European Citizenship’ make this an area of law which is virtually impossible to explain, teach or advise on.

methodological perspective, the Court has applied European Citizenship and the market freedoms in an analogous way since its decision in *D’Hoop*.³⁵⁶ It first tries to determine whether a measure restricts the relevant freedom, and secondly it assesses whether the measure is justifiable.³⁵⁷ The existence of some areas of substantive overlap, which has led to the Court sometimes conflating the economic free movement of persons and European Citizenship, further reinforces the idea that European Citizenship may impact the market freedoms. In *Bickel and Franz* the Court considered that the prohibition of discrimination on the grounds of nationality set in Article 18 TFEU applied equally to the free provision of services and to European Citizenship, while in *Ursula Elsen* the Court decided a case without determining whether a situation fell within the scope of the free movement of workers or European Citizenship.³⁵⁸ These similarities in themselves do not imply that European Citizenship must fundamentally affect the market freedoms; but to these have been added normative arguments that the instrumental nature of the economic freedoms in the creation of the common market has been replaced by a more general *rationale* centred on the idea of European Citizenship and of a political Union going well beyond market integration. The ideal of the economically-active citizen of a Member State – the market citizen – apparent in the market freedoms is to be replaced by a broader ‘citizen-focused’ character which could turn the free movement provisions into something akin to civil rights for citizenship purposes.³⁵⁹ This approach found favour with a number of Advocates General³⁶⁰, and

³⁵⁶ Case C-224/98 *D’Hoop* [2002] E.C.R. I-6191. See Scheuing, 778-780.

³⁵⁷ This is in effect typical of constitutional rights’ adjudication – see Somek, ‘Solidarity decomposed: being and time in European citizenship’, 794.

³⁵⁸ *Bickel and Franz*, para 15; *Ursula Elsen*, para. 35-36.

³⁵⁹ Shaw; Wolfgang Streeck, ‘From Market Making to State Building? Reflections on the Political Economy of European Social Policy’ in Stephan Leibfried and Paul Pierson (eds), *European Social Policy – Between Fragmentation and Integration* (The Brookings Institution 1995), 399.

eventually found its way into Court decisions.³⁶¹ Even if the case law still gives priority to citizens pursuing an economic activity in relation to non-economically active migrants³⁶², with Article 21 TFEU operating as a safety net when the traditional categories cannot apply³⁶³, European Citizenship is now held to be *lex generalis*, defining the core to which other freedoms give more specific expression as *lex specialis*.³⁶⁴

This approach naturally leads to European Citizenship being relevant in construing the other fundamental freedoms, in particular by expanding their scope.³⁶⁵ This extension of scope is in certain cases easily justified independently of particular normative considerations. For example, in *Bidar*³⁶⁶, a case on European Citizenship, the Court extended the scope *ratione materiae* of the Treaty on what concerned maintenance grants attributed to students beyond that which had been previously accepted for the free movement of workers or provided for in secondary legislation.³⁶⁷ From a systematic perspective, if the autonomous function of European Citizenship is to

³⁶⁰ AG Cosmas in *Wijsenbeek*, AG Jarabo-Colomer in Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] E.C.R. I-9161, and AG Maduro in Joined Cases C-158/04 and C-159/04 *Alfa Vita Vassilopoulos* [2006] E.C.R. I-8135.

³⁶¹ See, for example, Case C-345/05 *Commission v Portugal* [2006] E.C.R. I-10633 para. 13-14. For expressions of this case law on the economic fundamental freedoms, see on right of establishment, *Skanavi and Chryssanthakopoulos*, para. 22; on freedom of movement for workers, see Case C-100/01 *Oteiza Olazabal* [2002] E.C.R. I-10981, para. 26; and on freedom to provide services, see Case C-92/01 *Stylianakis* [2003] E.C.R. I-1291, para. 18; on both free movement of workers and free provision of services, Case C-208/05 *ITC* [2007] E.C.R. I-181, para. 64-65.

³⁶² Charlotte O'Brien, 'Social Blind Spots and Monocular Policy Making: The ECJ's Migrant Worker Model' (2009) 46 CMLR 1107, 1112.

³⁶³ *Id.*, 1109.

³⁶⁴ Scheuing, 764.

³⁶⁵ Jacobs, 'Citizenship of the European Union – A Legal Analysis', 595; Siofra O'Leary, 'Developing an Ever Closer Union between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship' (2008) 27 YEL 167, 182-183.

³⁶⁶ Case C-209/03 *Bidar* [2005] E.C.R. I-2119, paras. 32-36.

³⁶⁷ See Case 39/86 *Sylvie Lair* [1988] E.C.R. 3161, and Case 197/86 *Malcolm Brown* [1988] E.C.R. 3205.

protect those which are not encompassed by the economic fundamental freedoms, it would not make sense to protect non-workers more than workers, which is what would have happened had the material scope of the relevant fundamental provisions not been extended.

Other developments, however, seem to require a change in the normative foundations of the market freedoms. Even though the origins of this case law can be found prior to European Citizenship's adoption³⁶⁸, it is arguable that certain cases interpreted the *telos* of the economic free movement provisions not as allowing the nationals of the Member States to '*move freely within the territory of those States in order to pursue their economic activities*'³⁶⁹ but as protecting the rights of all economically active persons whose personal situation has a cross-border dimension.³⁷⁰ The *rationale* for these cases seems to revolve around the creation of a meaningful status for EU citizens, centred around the idea of fundamental rights, in particular the fundamental right to a family life, rather than being connected to the internal market. Arguably, the Court is protecting certain human rights of all moving Union citizens, without the kind of movement involved, or the relationship between the human rights' protection and the person's cross-border movement, being significant.³⁷¹

It is clear that the Court has chosen to look at European Citizenship as being relevant for the way in which the market freedoms are construed.³⁷² European

³⁶⁸ Case 186/87 *Cowan* [1989] E.C.R. 195.

³⁶⁹ *Morson and Jhanjan*.

³⁷⁰ Alina Tryfonidou, 'In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?' (2009) 46 CML Rev 1591.

³⁷¹ Christophe Schiltz, '*Akrich*: A clear delimitation without limits' (2005) 12 MJ 241, 252; Alina Tryfonidou, 'Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach' (2009) 15 ELJ 634. See, in more detail, Chapter IV, section IV below.

³⁷² See, for a somewhat similar analysis, Niamh Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 CML Rev 1597.

Citizenship is being used to expand the scope of the free movement provisions while imposing an even stricter interpretation of any derogation.³⁷³ While up until European Citizenship free movement was instrumental to the more general goal of allowing for the cross-border pursuit of economic activities³⁷⁴, with European Citizenship the internal market recedes as a normative foundation and the individual right to free movement itself becomes the matter. Thus, the argument from European Citizenship is usually used to argue for a more important status of the free movement of persons within the economic freedoms.³⁷⁵ This has given rise to some authors arguing that European Citizenship may normatively justify extending the scope of the free movement of person provisions beyond discrimination into a rule of reason³⁷⁶, or extending the scope of European law to purely internal situations, thereby ensuring true equality between individuals through EU law.³⁷⁷ It has also been argued that European Citizenship requires the Court to protect the human rights of any free moving EU citizen,³⁷⁸ and some go as far as to argue for a transposition of solidarity from the

³⁷³ Eleanor Spaventa, *Free Movement of Persons in the European Union* (Kluwer Law International 2007), 137-8.

³⁷⁴ Scheuing, 746. This is only the main, consensually accepted normative goal. As we have seen above, there are arguably other normative concerns for particular freedoms.

³⁷⁵ Shaw; Streeck, 399; Snell, 'And Then There Were Two: Products and Citizens in Community Law', 68-69; Spaventa, *Free Movement of Persons in the European Union*; Ferdinand Wollenschläger, 'A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration' (2011) 17 ELJ 1, 5-7; Jacobs, 'Citizenship of the European Union – A Legal Analysis', 595; O'Leary, 'Developing an Ever Closer Union between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship', 182-183. A notable exception is AG Maduro's Opinion in *Alfa Vita Vassilopoulos*, para. 50.

³⁷⁶ Spaventa, *Free Movement of Persons in the European Union*, 143-148.

³⁷⁷ Eleanor Spaventa, 'Seeing the wood despite the trees? On the scope of Union Citizenship and its constitutional effects' (2008) 45 CML Rev 13, 36-39, for purely internal situation; 41 for indirect review.

³⁷⁸ *Id.*, 39-44; Peter Neussl, 'European Citizenship and Human Rights: An Interactive European Concept' (1997) 24 LIEI 47.

national to the European level.³⁷⁹ In the end, these readings propose or justify the reinforcement of the powers of the EU and national courts, as well as an overlap between the competences of the CJEU and the ECHR.³⁸⁰ A trend which runs through this literature is the argument that European Citizenship should perhaps be used to interpret the free movement provisions in line with a fundamental rights discourse detached from market integration, and a concomitant replacement of national by EU fundamental rights protection.

These normative approaches, which seem predominant, have nonetheless been contested in some quarters. It has been noted that the insertion of European Citizenship has not turned the EU into a State, transferred the citizens' allegiances from their national State to the European level, or created solidarity bonds between EU citizens equivalent to that of citizens of national States. Even admitting that European Citizenship was originally intended to have the political function of easing the identification with the Union of its citizens, and that it performs a number of the roles usually attributed to modern citizenship, such as granting civil rights, political rights and even, in certain circumstances, rights to social benefits, it is argued that European Citizenship corresponds to a thin citizenship, detached from any ethic of participation and corresponding to a mere legal status. Its impact in construing the market freedoms must thereby of necessity be limited. Furthermore, from a drafting perspective there is no indication in the Treaties that European Citizenship altered the goals of the market freedoms, and thus it is arguable that their goal is still to enable Member State nationals

³⁷⁹ Somek, 'Solidarity decomposed: being and time in European citizenship', 789

³⁸⁰ Michael Dougan, 'The constitutional dimension to the case law on Union citizenship' (2006) 31 *ELRev* 613, 625-626; Spaventa, 'Seeing the wood despite the trees? On the scope of Union Citizenship and its constitutional effects', 39-44.

to move between Member States for economic purposes, instrumentally to the creation of a common market.

It is true that whenever a situation concerns individual movement across borders, and the taking up of residence in another Member State, a situation will fall under the scope of European Citizenship, and that in some cases this movement will overlap with one of the market freedoms without this overlap leading to any difference in the particular outcome of the case. This should not lead to the conclusion that the market freedoms should be extended to encompass more situations than what their *telos* requires; what it means is that when the market freedoms do not apply, European Citizenship, with its broader scope, will.³⁸¹ This can be further reinforced by reference to the recent development of a test according to which EU Citizenship is infringed by national measures that 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.³⁸² Even though structurally similar to the existence of threshold tests for the market freedoms – reflecting their common status as judicially enforceable constitutional rights –, and seemingly constituting a more difficult threshold to fulfil, it should be remembered that this formulation effectively builds on, and is accordingly more expansive, than the thresholds applicable to economic free movement rights, reflecting heightened normative concerns with ensuring that EU citizens cannot be removed from the EU space specific to European Citizenship.

The argument that European Citizenship requires a more exalted status for the free movement of persons within the economic freedoms may also be contested by noting that all market freedoms entail, to a greater or lesser degree, the possibility of

³⁸¹ Kadelbach, 465; Tryfonidou, ‘In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?’, 1612.

³⁸² See fn. 351 to 353 above.

people crossing borders, with the result that it is arbitrary to distinguish between the market freedoms on this basis. From this perspective, European Citizenship, unlike what is commonly argued, actually poses problems to the idea that the provisions on the economic free movement of persons should be treated differently from the other market freedoms. If European Citizenship requires that the Court give priority to the economic movement of natural persons over legal ones this means, since only physical persons may rely on Article 21 TFEU³⁸³, that a different approach common to the economic free movement of persons would not be common at all, but would instead require different approaches to be adopted within specific freedoms depending on whether the movement of EU citizens was at stake or not.³⁸⁴ This would, particularly in what concerns the free provision of services and the right of establishment, lead to the creation of two sets of rules within each freedom.

A last argument against an extensive effect of EU Citizenship on the market freedoms focuses on the former's normative under-conceptualisation, and the resulting under-theorisation of what its impact on the market freedoms should be.³⁸⁵ To regulate situations that should fall within the scope of European Citizenship alone under the banner of market freedoms merely leads to confusion as to what the relevant normative underpinnings of EU Citizenship and the market freedoms are, and where their dividing lines lie. The consequences of such normative confusion may be pernicious. If the goal of the market freedoms is to protect the human rights of all economically active persons whose personal situation has a cross-border dimension, this will require an extension of

³⁸³ Alongside Art. 45 TFEU: see Leanarts and Bernardeau, 52.

³⁸⁴ As also noted by Snell, 'And Then There Were Two: Products and Citizens in Community Law', 70, fn. 111.

³⁸⁵ It must be acknowledged that I developed this argument. The presumption of inserting it here may be justified by the fact that it is to be published soon, and that it makes more systematic sense to present it here as neutrally as possible instead of just using it, without notice, in the next chapters.

the scope of the market freedoms, and of the Court's duty to balance them with fundamental rights. This extension can, *in extremis*, potentially go as far as encompassing all situations where someone had any kind of economic relationship with any foreign good or service at any past time, even as a customer, in effect turning the Court into a last-resort appeal instance for virtually any dispute involving an EU citizen. The question would then become how the protection of human rights by the CJEU relates to that same protection by the European Court of Human Rights and the Member States. As noted by AG Sharpston, such an extension in the protection of fundamental rights by the CJEU to situations beyond the traditional remit of EU law, under the banner of European Citizenship, would be akin to stating that certain fundamental rights are so significant that they are among the fundamental rights that must be protected by the EU from impairment by the States:

*'A change of that kind would alter, in legal and political terms, the very nature of fundamental rights under EU law. It therefore requires both an evolution in the case law and an unequivocal political statement from the constituent powers of the EU (its Member States), pointing at a new role for fundamental rights in the EU.'*³⁸⁶

Thus, this position holds that even though there may be normative reasons for extending the scope of European Citizenship, depending on the evolution of European integration, such extension should be distinguished from the scope of the market freedoms: the latter refer to economic rights and should be restricted to situations of intra-State movement with an economic purpose, while the former refers to a fundamental right of a more political nature. Naturally, European Citizenship does have effects in construing the market freedoms. For example, systemic considerations point to economically active citizens being granted social benefits at least equivalent to non-

³⁸⁶ Opinion in *Zambrano*, para. 173. This would also raise serious issues of judicial architecture that would need to be addressed. For an example of previous discussions on Treaty amendments concerning the EU's judicial architecture, see Angus Johnston, 'Judicial Reform and the Treaty of Nice' (2001) 38 CML Rev 499.

economically active citizens; as such, should the Court or the legislature increase the level of benefits available for inactive citizens, *ceteris paribus* the level of protection of (previously) active citizens should be at least similar. But this does not imply any alteration of the normative foundations of the market freedoms themselves, or any privileged status for the economic free movement of persons over other economic freedoms without detriment to any such privileged status which may accrue to individuals under their newly exalted status as European Citizens.

Chapter IV
**The Scope of the Market Freedoms:
Economic Aim and Cross-Border Nature**

Abstract:

This chapter will start to apply the institutional and normative insights collected in the previous chapters by addressing some issues concerning the scope of the market freedoms. These issues focus on requirements of cross-border elements, the economic aim of free movement, and their cumulateness in specific fact-situations. The case law on these topics will be reviewed, as will their normative foundations. It will be argued that the addition of institutional considerations to traditional analyses focusing on normative elements can help develop a better descriptive model of the law and its evolution. From the insights arising from this improved descriptive model, a number of normative proposals will be suggested.

I. Introduction

The previous chapters set the stage for the analysis to be pursued in the next chapters of how institutional constraints interact with normative ideas concerning the market freedoms. These chapters will test the hypothesis that adding institutional considerations to traditional ‘normative’ discussions allows for the development of better descriptive models of the law and its evolution, and more contextualised normative debates. In Chapter I it was shown that, in a world of divided powers, imperfect decision-makers, and value pluralism, one should look beyond whether a decision is wrong or right in accordance with a certain ‘evaluative’ normative framework; one should look also into which entity is to decide and in what context. It was also demonstrated that the Court can appoint itself as the best available decision-maker through its judgments on the scope of the market freedoms, which act as gatekeepers to the Court’s balancing exercises.

The analysis in the following chapters will thus focus on the scope of the market freedoms. It is assumed that, in areas where the freedoms are treated identically, one can reasonably presume that normative inputs and institutional constraints are similar for all

freedoms.³⁸⁷ In areas where it is arguable that the market freedoms are subject to differentiated treatment, on the other hand, it is a reasonable hypothesis that specific normative concerns and/or institutional constraints are at play. If so, a related hypothesis is that it is the existence of these specific inputs that explains the differences between the market freedoms. Assuming one can identify these inputs, this makes the discussion of areas concerning the scope of free movement law where freedoms are treated differently ideal grounds for trying to map out the interaction between normative concerns and institutional constraints in the development of the law.

As seen in Chapter II, the market freedoms are traditionally considered to have an identity of aim: to contribute to the completion and functioning of the internal market through the elimination of obstacles to economic free movement, and the creation of an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured.³⁸⁸ Chapter III made clear, however, that it is arguable that the normative goals underpinning the internal market may have evolved since the Union's inception in 1957, in particular under the influence of European Citizenship, and that some market freedoms may be subject to specific normative foundations. The following chapters will try to understand how tensions between these differing normative underpinnings may have led to developments in the case law concerning the scope of the market freedoms, and how institutional considerations are relevant to these and future developments inasmuch as they mediate and constrain such normative inputs. For these purposes, the Court's case law will be analytically divided into a set of specific

³⁸⁷ See fn. 22 above.

³⁸⁸ See Art. 26 TFEU. See also Case 355/85 *Driancourt v Cognet* [1986] E.C.R. 3231, and Case 98/86 *Mathot* [1987] E.C.R. 809.

requirements that must be cumulatively fulfilled for a situation to fall within the scope of the market freedoms:³⁸⁹

I. the existence of a cross-border element;

II. the economic aim of the exercise of the free movement right;

III. the existence of a specific hindrance to the pursuit of cross-border movement with an economic aim. This latter element can, in turn, be sub-divided into two different elements:

(a) whether the specific fact situation deals with cross-border movement with an economic aim;

(b) whether a measure has a *prima facie* restrictive effect on cross-border free movement with an economic aim.

In all these areas it is arguable that different freedoms are subject to specific treatment. Requirements I. through III. (a) will be analysed in the present chapter. Chapters V to VII will be devoted to Requirement III. (b), which is concerned with the concept of ‘restriction on free movement’, as it is arguably the most disputed topic in the whole of EU law literature. A specific question concerning Requirement III. (b) is whether the relevant measure has to be adopted by a State authority or if actions by private individuals can also infringe on free movement rights; this will be subject to autonomous treatment in Chapter VIII, reflecting the specific debates concerning it.

The method adopted in this and the next chapters will be to review the case law on each of these topics, alongside the academic literature concerning them. Following this, an attempt will be made to demonstrate how the institutional context matters to the development of the law by courts, and how taking it into account can add to traditional

³⁸⁹ A similar structure can be found in Alina Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer Law International 2009), 10.

‘normative’ debates. These sections will be merely descriptive, and concerned with whether the addition of institutional elements can provide a better descriptive fit with the law. These descriptive sections will be then be followed by a section where normative approaches will be sketched. Even if not found attractive or persuasive by all, they will provide an illustration of how more contextualised normative approaches might look

II. Cross-Border Elements – The Purely Internal Situations Doctrine

a. Describing the Case law

From a purely normative perspective, it can be argued that obstacles to movement within Member States are obstacles to the creation of an internal market and that the Court could have legitimately decided that situations without a cross-border element fell within the scope of the market freedoms. Against this, the letter of the Treaty, with the exception of the provisions on free movement of workers, points towards cross-border situations alone being subject to EU law, while the pluralistic element of EU integration may be construed as leaving regulatory autonomy to the Member States in situations not falling within the scope and purposes of EU law.³⁹⁰ In this reading, purely internal situations would fall outside the scope of the market freedoms.³⁹¹ These different options were explicitly reflected in the different solutions proposed by the AG and the Court in *Saunders*³⁹², the first case purposefully to reflect on this issue. AG Warner held that: ‘*The true question is not whether the case has any*

³⁹⁰ See, for goods, Art. 28, 30, 34 and 35 TFEU, which all include prohibitions *between Member States* on custom duties on imports and exports and all charges having equivalent effect; on establishment and services, which prohibit restrictions on such freedoms on nationals *of a Member State in the territory of another Member State*, see Art. 49 and 56 TFEU; finally, Art. 63 TFEU prohibits all restrictions on the free movement of capital *between Member States* (and also third-countries).

³⁹¹ Tryfonidou, *Reverse Discrimination in EC Law*, 9.

³⁹² Case 175/78 *Saunders* [1979] E.C.R. 1129.

connection with another Member State, but whether and, if so, to what extent Community law confers rights on a person'. From this perspective, what matters is not whether the factual situation is circumscribed to a single Member State but whether the national measure infringes the substance of rights conferred by the free movement provisions. The Court, however, decided otherwise, holding that the free movement of workers did not have the goal of restricting the power of Member States to lay down rules in purely internal situations.

The different approaches in this case are reminiscent of, and seem to have been influenced by, two criteria used in private international law to distinguish between international and internal situations: the AG's approach is reminiscent of the 'juridical' criterion, which looks into whether more than one legal system is connected to a case, while the Court's is similar to a 'geographical' test, focusing on where the facts of the case take place.³⁹³ AG Geelhoed neatly encapsulated the procedural implications of this:

*'The main question is this: is it the facts in the main proceedings that determine whether the Court must answer the questions referred to it for a preliminary ruling, or is it the nature and substance of the national measure? If it is the facts in the main proceedings that are decisive, the Court clearly will not answer the question where the main proceedings have no cross-border elements. [...] If it is the substance of the national measure that is decisive, the Court should consider how far the national legislation may have an external effect. Only if there is no – potential – external effect should the Court refrain from answering the question referred to it.'*³⁹⁴

³⁹³ Hans Ulrich Jessurun d'Oliveira, 'Is Reverse Discrimination Still Permissible under the Single European Act?' in *Forty Years on: The Evolution of Postwar Private International Law in Europe* (Kluwer 1990), 73-74.

³⁹⁴ Opinion in Joined Cases C-515/99, C-519/99 to C-524/99, and C-526/99 to C-540/99 *Reisch* [2002] E.C.R. I-2157, para. 79-82.

Following *Saunders*, the Court seemed to have adopted a unitary approach to all the freedoms favouring the geographical approach. The canonical formulations of this were that the free movement provisions did not apply to activities which had no factor linking them with any of the situations governed by EU law and/or that were confined in all aspects within a single Member State.³⁹⁵ Some recent cases have nonetheless arguably moved away from this unitary approach, particularly in what concerns the free movement of products (goods and services). In *Lancry*³⁹⁶ the Court held that the prohibition of custom duties set forth in Article 28 TFEU does not apply only to duties imposed on goods that have moved from one State to another, but also to customs duties imposed on goods crossing the internal frontiers of a Member State, at least inasmuch as they could also apply to imported goods – which distinction from national goods, in light of the prohibition of border controls and the conclusion of the internal market, was seen to be practically impossible.³⁹⁷ This was further developed in *Jersey Produce*, where the Court held that even though an internal customs duty applied only to the export of potatoes from Jersey to the United Kingdom:

*‘that does not rule out the possibility that such potatoes, once within the United Kingdom, might then be re-exported to other Member States, with the result that the contribution in question may be levied on goods which, after having passed through the United Kingdom in transit, are in fact exported to other Member States.’*³⁹⁸

³⁹⁵ d'Oliveira, 'Is Reverse Discrimination Still Permissible under the Single European Act?', 73-74; Tryfonidou, *Reverse Discrimination in EC Law*, 30-31. See for goods *Mathot*, Case C-60/91 *Morais* [1992] E.C.R. I-2085; for establishment, Case C-198/89 *Tourist Guides Greece* [1991] E.C.R. I-00727, Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] E.C.R. I-3171; for services, *Gauchard*, Joined Cases C-54/88, C-91/88 and C-14/89 *Nino* [1990] E.C.R. I-3537, and Case C-152/94 *Buynder* [1995] E.C.R. I-3981; for capital, *van Hilten-van der Heijden*.

³⁹⁶ Joined Cases C-363/93, C-407/93, C-408/93, C-409/93, C-410/93 and C-411/93 *Lancry* [1994] E.C.R. I-3957, confirmed in Case C-72/03 *Carbonati Apuani* [2004] E.C.R. I-8027.

³⁹⁷ Oliver and Roth, 'The Internal Market and the Four Freedoms', 431; Cyril Ritter, 'Purely Internal Situations, Reverse Discrimination, *Guimont*, *Dzodzi* and Article 234' (2006) 31 ELRev 690, 706.

³⁹⁸ Case C-293/02 *Jersey Produce* [2005] E.C.R. I-9543, para. 65.

Hence, the principle appears to be that whenever it is impossible to identify whether potential imports or exports will be affected by a custom duty, such a duty will infringe EU law even where it applies to products that are in a purely internal situation.³⁹⁹ This approach appears to have been transposed into Art. 34 TFEU in *Pistre*, concerning an appeal brought by French nationals for selling goods produced in France under the description ‘*montagne*’, the use of which was allowed only in relation to products prepared in French territory after the producer had obtained an authorisation from the French authorities. In the case at hand, all the relevant legislation was complied with but no authorisation had been obtained. Choosing not to look into the specific facts of the case, the Court held that:

‘Article [34 TFEU] cannot be considered inapplicable simply because all the facts of the specific case before the national court are confined to a single Member State. In such a situation, the application of the national measure may also have effects on the free movement of goods between Member States, in particular when the measure in question facilitates the marketing of goods of domestic origin to the detriment of imported goods. In such circumstances, the application of the measure, even if restricted to domestic producers, in itself creates and maintains a difference of treatment between those two categories of goods, hindering, at least potentially, intra-Community trade.’⁴⁰⁰

This statement can be read as implying that the Court will look not into the facts of the case, but into the substance of the national measure and its potential external effects – in effect adopting the juridical approach.⁴⁰¹ On the other hand, the Court went on to note that since it was ‘*accepted that the domestic legislation in question could be applied to products imported from other Member States, it follows, first, that it constitutes an obstacle to intra-Community trade*’, seemingly implying that the free movement of goods merely protected imported goods, and that the geographic criterion

³⁹⁹ Tryfonidou, *Reverse Discrimination in EC Law*, 75.

⁴⁰⁰ Joined Cases C-321/94 to C-324/94 *Pistre* [1997] E.C.R I-2343, para. 44-45.

⁴⁰¹ See, in this sense, Tryfonidou, *Reverse Discrimination in EC Law*, 71.

still stood. This was clarified in *Guimont*, where the Court distinguished *Pistre* as applying the juridical approach only to discriminatory rules, and stated that on what concerns indistinctly applicable rules: ‘*it is clear from the Court's case law that such a rule falls under Article [34] of the Treaty only in so far as it applies to situations that are linked to the importation of goods in intra-Community trade*’.⁴⁰²

The Court went on to state, however, that a preliminary reference request from a national court would only be refused if it was quite obvious that the interpretation of EU law sought bore no relation to the actual nature of the case or to the subject-matter of the main action; since it was possible that a reply might be useful if national law were to require that the rights which a foreign producer would derive from EU law must also be enjoyed by national producers, the Court decided to take the case.⁴⁰³ Similarly, in *PreussenElektra* the Court essentially dismissed out-of-hand any argument that a situation had no cross-border element by stating that it was for the referring court to determine whether the question was relevant and stating that: ‘*it is not obvious that the interpretation sought bears no relation to the actual facts of the main action or its purpose*’.⁴⁰⁴ This so-called *Guimont* case law has been progressively adopted under capital⁴⁰⁵, services,⁴⁰⁶ establishment⁴⁰⁷, and might also be applicable for workers⁴⁰⁸. Thus, the Court appears to be moving away from its traditional geographical approach,

⁴⁰² Case C-448/98 *Guimont* [2000] E.C.R. I-10663, para. 21.

⁴⁰³ *Id.*, para. 20-23.

⁴⁰⁴ Case C-379/98 *PreussenElektra* [2001] E.C.R. I-2099, para. 52.

⁴⁰⁵ *Reisch*.

⁴⁰⁶ *Anomar*. See Stefan Enchelmaier, ‘Always at your service (within limits)’ (2011) 36 *ELRev* 615, 617.

⁴⁰⁷ Case C-250/03 *Mauri* [2005] E.C.R. I-1267.

⁴⁰⁸ See AG Léger’s Opinion in Case C-152/03 *Ritter-Coulais* [2006] E.C.R. I-1711, footnote 47.

and to be now willing to review measures applying to purely internal situations as long as the national referring courts consider the question to be relevant.

A parallel development away from the canonical understanding of the purely internal situations doctrine can also be seen taking place through the extension of the geographical criterion itself. It is settled law that a situation will have a link with free movement law if it involves a potential, but not a merely hypothetical, exercise of a market freedom.⁴⁰⁹ The distinction between hypothetical and potential exercises of a market freedom is not exactly clear, however, and the Court has taken advantage of this to expand the scope of the free movement of persons by increasing the number of situations deemed to have potential links with EU law.⁴¹⁰ Even as it reiterated that the free provision of services does not apply to purely hypothetical situations, the Court recently set forth that there is no need to prove the existence of a previously determined recipient as long as the recipient is determinable⁴¹¹: the existence of either virtual or merely possible future recipients suffices.⁴¹² In effect, the case law no longer insists on a specific exercise of inter-State movement, as long as a potential effect on the intra-State provision of services can be found.⁴¹³ Like in *Pistre*, even though all the facts of the case may be located within a Member State, a situation might still fall within the

⁴⁰⁹ See for the free movement of workers Case 180/83 *Moser* [1984] E.C.R. 2539, para. 18; Case C-41/90 *Höfner and Elser* [1991] E.C.R. I-1979, para. 39. On the application of this principle to all free movement of persons provisions, see Case C-299/95 *Kremzow* [1997] E.C.R. I-2629.

⁴¹⁰ Niamh Nic Shuibhne, 'Free movement of persons and the wholly internal rule: time to move on?' (2002) 39 CML Rev 731, 736.

⁴¹¹ Hatzopoulos, 58. See Case C-384/93 *Alpine Investments* [1995] E.C.R. I-1141, Joined Cases C-51/96 and C-191/97 *Deliège* [2000] E.C.R. I-2549, *Gourmet International*, Case C-355/00 *Freskot* [2003] E.C.R. I-5263.

⁴¹² *Alpine, Omega*, Case C-215/03 *Oulane* [2005] E.C.R. I-01215. See Vassilis Hatzopoulos and Thien Uyen Do, 'The Case Law of the ECJ concerning the Free Provision of Services: 2000-2005' (2006) 43 CML Rev 923, 926.

⁴¹³ Tryfonidou, *Reverse Discrimination in EC Law*, 85; Enchelmaier, 618.

scope of the market freedoms, thereby further undermining the geographical approach.⁴¹⁴

b. Understanding the Case law

(i) Normative Considerations

Taken together, all these developments point towards the Court extending the kind and type of cases it is willing to review. What justifies this erosion of the purely internal doctrine? It should be noted that, for all the references to geographical and juridical criteria in the literature, the Court never did provide a coherent normative theory for this doctrine to begin with, which heuristic value always hinged on the Court tacitly endorsing it. Without proper normative underpinnings this analytical distinction can easily cease to make sense, with questions about the *degree* of (geographical) cross-border elements required being susceptible, through the manipulation of whether a situation is potentially or hypothetically concerned with cross-border movement, of becoming questions of whether a situation has a sufficient connection with the free movement provision; and similarly, questions about whether the situation falls within the scope of a freedom can easily be framed in geographical terms. At the same time, the *Guimont* doctrine allows the Court to review national measures even when it accepts that a situation is purely internal, thereby apparently sidestepping the geographical/juridical distinction completely under the guise of taking into account equality requirements (that may or may not exist in national law).

To understand the geographical/juridical distinction, one must recognise it as an analytical tool for the identification of situations falling outside the scope of the market freedoms. The distinction's normative foundations are those of the purely internal

⁴¹⁴ Compare Case C-108/98 *RI.SAN*. [1999] E.C.R. I-5219 and Case C-410/04 *ANAV* [2006] E.C.R. I-3303.

situation doctrine itself, which originally seemed to be based on the idea that an area of Member State autonomy should be protected through the creation of areas of State regulation outside the reach of EU law. The choice of purely internal situations as being immune from control by EU law derived, in turn, from a view of the internal market as being concerned with the abolition of obstacles to free movement across State borders but not intra-State ones. This may have been replaced by new normative concerns, particularly in what regards reverse discrimination – which arises when those not encompassed by the free movement provisions, and particularly those involved in purely internal situations, are left worse-off than those who do fall within their scope. Arguments against reverse discrimination hold that, on the basis of the adoption and development of European Citizenship, of the protection of fundamental rights, and of the principle of equality enshrined in the prohibition of discrimination on grounds of nationality, EU law should protect nationals against their own State in the same way as it protects non-nationals.⁴¹⁵ The Court’s justification of its *Guimont* case law is slightly different but is nonetheless related to concerns about reverse discrimination as well, holding that cases without cross-border elements may nonetheless be addressed because it may be useful if:

*‘national law were to require, in proceedings such as those in this case, that a national producer must be allowed to enjoy the same rights as those which a producer of another Member State would derive from Community law in the same situation.’*⁴¹⁶

However, the Court appears to have avoided a careful consideration of what the relevant balance between protecting State autonomy and preventing reverse discrimination might be. This balancing touches on how the limitations of EU law

⁴¹⁵ Shuibhne, ‘Free movement of persons and the wholly internal rule: time to move on?’; Alina Tryfonidou, ‘Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizen's Europe’ (2008) 35 LIEI 43.

⁴¹⁶ *Guimont*, para. 23.

deriving from subsidiarity, the EU's limited competences and the maintenance of an area of State autonomy is to relate to the expansionary pull of European citizenship⁴¹⁷, and is nowhere addressed in the case law⁴¹⁸. Some literature infers from the diluting of the 'purely internal situations' doctrine justifications for a more extensive protection of fundamental rights, European Citizenship and the free movement of persons;⁴¹⁹ but this is usually done without reference to similar developments in what concerns goods, and concomitantly without reflection on what the normative justifications for this development might be outside the field of persons, and on how to explain the parallel erosion of the 'purely internal situations' doctrine across the full spectrum of the market freedoms.⁴²⁰

(ii) Institutional Insights

To fully understand these developments one must realise that the purely internal doctrine comports both procedural and substantive implications. Substantively, the impact of the purely internal doctrine is still that the free movement rules have no effect on situations the facts and effects of which are confined within a single Member State, even if such a measure falls within their scope in what concerns situations with a cross-border element.⁴²¹ The same national measure may be sometimes legal, sometimes

⁴¹⁷ See in particular how the purely internal doctrine was reformulated in the *Zambrano, McCarthy* and *Dereci* cases – see above around fn. 351 to 355.

⁴¹⁸ With the exception of the Opinion of AG Sharpston in *Zambrano*.

⁴¹⁹ Spaventa, 'Seeing the wood despite the trees? On the scope of Union Citizenship and its constitutional effects', 36-39; Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizen's Europe', 58; Herwig Verschueren, 'Reverse Discrimination: An Unsolvable Problem?' in Paul Minderhoud and Nicos Trimikliniotis (eds), *Rethinking the free movement of workers: The European challenges ahead* (Wolf Legal Publishers 2009).

⁴²⁰ The main exception is Tryfonidou, *Reverse Discrimination in EC Law*. See also Alina Tryfonidou, 'Resolving the Reverse Discrimination Paradox in the Area of Custom Duties' (2011) 22 EBLRev 311, arguing that the focus with preventing reverse discrimination in what concerns goods is to maintain a properly functioning market where competition is undistorted.

⁴²¹ See on goods, Joined Cases 314/81 to 316/81 and 83/82 *Waterkeyn* [1982] E.C.R. 4337, Case 286/81 *Oosthoek's* [1982] E.C.R. 4575; on services, see *Debaue, Höfner and Elser*; on workers, see Case C-

illegal, depending on the underlying factual situation in which it is applied. A Member State is merely required not to apply the relevant measure in cross-border situations, while it is allowed to apply it in purely internal situations.⁴²² The Court, however, has been extending the substantive scope of the market freedoms explicitly in what concerns custom duties and discriminatory infringements upon the free movement of goods, and implicitly through an increase in the number of situations with a potential link with EU law throughout the freedoms.⁴²³

From a procedural standpoint, the purely internal rule is a gatekeeper to the preliminary reference mechanism: if a case under consideration by the national court concerns a purely internal situation, the Court would not traditionally pursue any assessment of the relevant measures. Nonetheless, this refusal on the part of the Court to pursue assessments under the preliminary reference mechanism has no implication on the substantive status of a measure under EU law: that measure could still be subject to review under an infringement procedure brought by the Commission against a Member State, or by a litigant whose situation has a cross-border element. Under *Guimont*, however, the Court seems to be reversing its case law by allowing cases on the basis of national prohibitions of reverse discrimination while foregoing control of whether national law prevents reverse discrimination or not. Hence the risk of delivering purely theoretical rulings becomes real.⁴²⁴ Adequately, the implications and reasoning justifying this are similar to the Court's case law on the extent of its jurisdiction in

332/90 *Steen* [1992] E.C.R. I-341, *Peralta*, Case C-212/06 *Government of Communauté française and Gouvernement wallon* [2008] E.C.R. I-1683; on establishment, see *Nino*. There is no case law on capital of which I am aware.

⁴²² This is particularly clear in Case 407/85 *Drei Glocken* [1988] E.C.R. 4233. See also Ritter, 691. It should be noted that it is this substantive effect that leads to reverse discrimination.

⁴²³ On all of the above, see P. P. Craig and G. De Búrca, *EU law: text, cases, and materials* (5th. edn, Oxford University Press 2011), 462-474.

⁴²⁴ See AG Tizzano's Opinion in *Anomar*, para. 23. Critical of this, Ritter, 700.

preliminary reference cases. The Court was initially very liberal in this area, holding that facts were a matter for national courts, and that the Court was not empowered to investigate them or question the grounds or purpose of the request for interpretation.⁴²⁵ Nonetheless, the Court eventually asserted control over its docket in the *Foglia* decisions, becoming the ultimate decider of its own jurisdiction.⁴²⁶ In particular, the Court held that a genuine dispute was required, and that the Court had no jurisdiction to deliver ‘advisory opinions on general or hypothetical questions’.⁴²⁷ Ever since, the Court has refused to answer hypothetical questions, but the *Guimont* approach to the ‘purely internal situations’ doctrine is a limited return to the original, pre-*Foglia*, case law on the Court’s jurisdiction in preliminary reference cases: it effectively opens the door to test-cases in situations without any direct link with EU law without leading to a substantive extension of the scope of the freedoms.

The identification of non-substantive consequences of the developments reviewed above indicates that there is more at play than merely substantive issues. Can institutional considerations help us make further sense of the case law? It is submitted that they can, starting with helping us to understand the seeming absence of fully-fledged justifications for the current developments in the case law other than a diffuse concern with reverse discrimination. As remarked in Chapter I, courts will usually decide cases on the particular facts of the case without needing to engage with the large-scale societal questions underlying them: courts may enlist silence as a device for

⁴²⁵ See, for example, *Costa v ENEL*, Case 35/76 *Simmenthal* [1976] E.C.R. 1871.

⁴²⁶ Case 104/79 *Foglia I* [1980] E.C.R. 745, Case 244/80 *Foglia II* [1981] E.C.R. 3045.

⁴²⁷ This is not the only reason for the Court to refuse to pass judgement: it may also do so when the questions have no relation to the facts or subject-matter of the main action – Case C-18/93 *Corsica Ferries Italia* [1994] E.C.R. I-1783 –, when the questions are not articulated clearly enough for the Court to give any meaningful response – Case C-318/00 *Bacardi-Martini* [2003] E.C.R. I-905 – and when the facts are insufficiently clear for the Court to be able to apply the relevant legal rules – Case C-157/92 *Banchero* [1993] E.C.R. I-1085.

producing consensus despite disagreement and uncertainty by adopting incompletely theorised outcomes. The existence of potential disagreements that judges must paper over or negotiate in order to achieve a single collegial decision concerning whether reverse discrimination should be addressed – and if so how –, may also be relevant to explain why the developments in the case law seem not to have been properly justified and give an impression of lack of theorisation. On the other hand, the potential consequences of under-theorised decisions are impacted by the particular institutional dynamics of the EU adjudicative process, in particular those resulting from the lock-in and path-dependency inherent in the case law. The presentation of justifications centred on the free movement of persons – fundamental rights, EU Citizenship, etc. – did not prevent the extension of the *Guimont* case law, and its apparent concerns with reverse discrimination, to the free movement of goods and capital. The acknowledgement by the Court of such a concern would, in turn, be tantamount to a change of the normative substratum of the market freedoms, and of the very concept of internal market adopted by the Court when addressing these freedoms.⁴²⁸ The absence of justifications being presented also leads to there being no reason why the tweaking of the geographical criterion resulting from manipulating ‘hypothetical’ and ‘potential’ cases cannot be extended from the free movement of services to the other freedoms – companies might potentially want to expand to another country, workers seek jobs abroad, and goods may potentially compete in another market. Similarly, once the ‘juridical’ criterion is adapted in what concerns goods there appears to be no impediment to its extension to the free movement of persons. More than specific normative concerns, the specific dynamics of path-dependency and legal reasoning – particularly the requirements of

⁴²⁸ It can be argued, I think successfully, that such a change has not occurred because the *Guimont* case law merely provides guidance to States should they wish to prevent reverse discrimination, and did not extend the scope of the market freedoms to intra-State situations. This is not to say, however, that it will not happen, particularly in light of the under-theorisation of this case law.

systemic coherence in legal reasoning resulting from the common normative background of the market freedoms, and the tradition of the doctrine of ‘purely internal situations’ being analysed in general terms – seem to be what is pushing through the erosion of the ‘purely internal situations’ doctrine across all the market freedoms.

Looking at the interaction of ‘substantive’ and ‘institutional’ concerns has descriptive power in explaining the evolution of the case law. But it can also be useful in understanding its implications and normative foundations. For example, even accepting that a normative concern with reverse discrimination might be behind the developments in the case law, such concern is under-theorised. This is particularly obvious once we see how concerns about reverse discrimination interact with the traditional focus on State autonomy in practice. Taking into account the institutional context in which the Court operates allows us to note that, while the extension of the material scope of the market freedoms leads to the Court dealing with reverse discrimination itself, the *Guimont* case law leaves this question for Member States’ courts and governments. The Court effectively uses the purely internal situation strategically as a tool for institutional choice, deciding which cases it wants to deal with and those it delegates to national courts or legislatures. Both approaches can be seen as means of dealing with reverse discrimination, but the existence of these different institutional options reveals different normative choices on how to balance reverse discrimination with the protection of State autonomy. Concerns with reverse discrimination in what concerns the free movement of persons allow for greater interference with State autonomy – perhaps due to the normative impact of EU Citizenship – than what might be allowed under purely economic concerns. Meta-normative considerations thereby seem to lurk behind notions of reverse discrimination which may only become evident *ex-post* in practice.

‘Substantive’ and ‘institutional’ normative considerations are, in this context, autonomous but inseparable because closely intertwined and mutually symbiotic. Even though the Court and the academic literature seem to ignore institutional considerations, normative claims concerning the scope of the market freedoms contain implicit assumptions as to which entity is best placed to further them. The *Guimont* case law effectively opens the door to test-cases in situations without any direct link with EU law which, if successful, will put the Member States in the ‘shadow of the law’ and under pressure to amend national rules; it increases the pool of litigants and, potentially, the workload of the Court, thereby risking increasing the level of control the Court exercises on national regulatory autonomy as well. On the substantive front, the blurring between ‘hypothetical’ and ‘potential’ situations leads to an increase in the scope of the freedoms because in an internal market the existence of a ‘potential’ intra-Union element is inherent.⁴²⁹ Taken together, the result of both procedural and substantive approaches is to relax the requirements for submitting national measures to review by the Court, thereby making an implicit institutional choice: claims that the purely internal situations doctrine should be reduced or eliminated call for an expansion of EU powers and, incidentally, those of the Court itself.

III. The Economic Aim of Cross-Border Movement

In light of the limited case law and academic discussion on this topic, this section will move directly to the identification of the relevant normative and institutional considerations without describing the case law in detail.

a. Normative Considerations

The market freedoms are instrumental to the completion and functioning of the internal market through the elimination of obstacles to economic free movement. As

⁴²⁹ Spaventa, *Free Movement of Persons in the European Union*, 153

such, they have an economic aim that is reflected in their scope.⁴³⁰ This characterisation is under-theorised, though, as there are different concepts of economic activity. While some conceptualizations focus strictly on the production of goods and services, others add to this their distribution and consumption. Welfare definitions of economic activity, on the other hand, focus on the production and distribution of goods and services which are provided against measurable amounts of money or other material requirements of well-being.⁴³¹

These differing conceptualizations are reflected in EU law, where both the Court and the Commission seem to admit the existence of different concepts of economic activity depending on the relevant areas of law.⁴³² EU competition law can only be applied to undertakings, which, according to the case law, include every entity engaged in economic activity regardless of their legal status.⁴³³ An activity is deemed to be economic when there is the potential for the provision of goods or services and to make a profit under market conditions, unless that activity is deemed to be in the public interest or pursued in the exercise of official authority. In other words, the question is whether a for-profit entity could respond to market demand.⁴³⁴ However, only the

⁴³⁰ It should be noted that for freedoms implying the free movement of persons the situation must also fall within the scope of the freedoms *ratione personae*, i.e. the persons moving must be nationals – or be related to nationals – of a Member State.

⁴³¹ Alfred Marshall, *Principles of economics: an introductory volume* (8th edn, Macmillan 1949), A. C. Pigou, *The economics of welfare* (4th ed edn, Macmillan 1962).

⁴³² See Case C-519/04 P *Meca-Medina* [2006] E.C.R. I-6991, para. 33. See also AG Maduro's Opinion in Case C-205/03 P *FENIN* [2006] E.C.R. I-6295, para. 51; and AG Kokott's Opinion in Case C-284/04 *T-Mobile Austria* [2007] E.C.R. I-05189, para. 61. Similarly, see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Accompanying the Communication on 'A single market for 21st century Europe' Services of general interest, including social services of general interest: a new European commitment [2007] COM 2007 725 Final 5.

⁴³³ *Höfner and Elser*, para. 21.

⁴³⁴ See Joined Cases C-180/98 to C-184/98 *Pavlov* [2000] E.C.R. I-6451, para. 75; Case C-364/92 *Eurocontrol* [1994] E.C.R. I-0043, *Meca-Medina*, para. 41; and AG Maduro Opinion in *FENIN*, para. 13-

offering of products is relevant; demand is not deemed to be an economic activity, at least in what concerns the purchase of goods on the market for use in the provision of State services.⁴³⁵

The concept of economic activity for the purpose of the market freedoms is somewhat different: it focuses on both the provision *and* demand of goods or services against some kind of remuneration.⁴³⁶ Goods are generally accepted to be material objects that can be valued in money and either form the subject of, or move across frontiers for the purposes of, commercial transactions.⁴³⁷ Establishment applies to both physical and legal persons who are engaged in self-employed activities, meaning the actual pursuit of an economic activity with the purpose of obtaining a profit;⁴³⁸ accordingly, the right of establishment seems not to apply to non-profits.⁴³⁹ Free movement of capital follows the content of Article 1 of Directive 88/361 and the nomenclature of capital movements annexed thereto, which tend to be deemed to concern economic activities.⁴⁴⁰ The situation for workers is slightly more nuanced, if very much settled law: as it stands, this freedom encompasses anyone who, for a certain period of time, performs services for and under the direction of another person in return

14. See also Niamh Dunne, 'Knowing When To See It: State Activities, Economic Activities, and the Concept of Undertaking' (2010) 16 ColumJEurL 427, 436.

⁴³⁵ Mark Furse, *Competition Law* (OUP 2008), 22. See *FENIN*.

⁴³⁶ Okeoghene Odudu, 'Economic Activity as a Limit to Community Law' in Catherine Barnard and Okeoghene Odudu (ed), *The Outer Limits of European Union Law* (Hart Publishing 2009), 230-231. It should be noticed that remuneration is not a necessary element in competition law: see Case T-155/04 *Selex* [2006] E.C.R. II-4797, para. 77.

⁴³⁷ Snell, *Goods and services in EC law: a study of the relationship between the freedoms*, 4-5. See *Commission v Italy* and *Walloon Waste*.

⁴³⁸ *Gebhard*, para. 25, Directive 2006/123/EC on services in the internal market [2006] OJ L 376, Art. 4 (5).

⁴³⁹ AG Fenelly's Opinion in *Sodemare*, para. 21

⁴⁴⁰ Council Directive 88/361/EEC

for which he receives remuneration⁴⁴¹, regardless of the level of productivity or the origin of the funds from which the remuneration is paid⁴⁴².

This means that activities that are not remunerated but have profit-making potential fall within the scope of competition law but not free movement law, and vice-versa. For example, activities which are deemed to be in the public interest – such as the maintenance of air navigation safety and the protection of the environment⁴⁴³ –, or which operate under the principle of solidarity – such as the payment of benefits out of social security schemes⁴⁴⁴ – do not fall within the scope of competition law, as they are deemed not to be profit-making activities, even though they might fall within the scope of the free movement provisions inasmuch as there is remuneration. From an opposite perspective, an activity might be economic independently of the way in which it is financed, meaning that activities which are financed by the State without any remuneration – such as employment procurement by State agencies – might fall within the scope of competition law but not the free movement provisions.⁴⁴⁵

Determining whether an activity is economic does not pose significant problems on most occasions, but when it is not clear whether an activity is economic or not the lack of a proper normative underpinning of the case law comes to the fore. For example, the concept of remuneration for services was traditionally held to be consideration for a service to be normally agreed upon between providers and recipients of services.⁴⁴⁶

⁴⁴¹ *Lawrie-Blum*, para. 16-17; Case 344/87 *Bettray* [1989] E.C.R. I-1621, para. 12; Case C-337/97 *Meeusen* [1999] E.C.R. I-3289.

⁴⁴² *Bettray*, para. 15.

⁴⁴³ AG Maduro's Opinion in *FENIN*, para. 15.

⁴⁴⁴ Case C-159/91 and C-160/91 *Poucet and Pistre* [1993] E.C.R. I-637.

⁴⁴⁵ *Höfner and Elser*, para. 21-22.

⁴⁴⁶ Case 263/86 *Humbel* [1988] E.C.R. 5365, para. 17; *Freskot*, para. 55.

Even though it was from an early stage accepted that remuneration need not be paid by the service recipients themselves,⁴⁴⁷ the concept of remuneration has been recently extended beyond its former limits to cover payments that are only indirectly related to the service provided – in the sense that the remuneration does not need to be agreed between the parties, it needs not be provided by the service recipient and it can even be subject to subsequent reimbursement by a third party.⁴⁴⁸ In applying this new concept of remuneration, the Court sometimes acts incoherently. For example, the provision of services in the area of public education is held not to be economic for the purposes of the Treaty because it is considered that the State is not seeking to engage in gainful activity and the system in question is, as a general rule, funded from the public purse and not by pupils or their parents.⁴⁴⁹ However, this reasoning is not applicable to the public provision of hospital health services in the scheme of insurance services providing benefits in-kind, even though similar arguments would seem to hold.⁴⁵⁰ These inconsistencies cannot be explained away on the basis of normative arguments about what constitutes economic activity – even though they are evidence of an absence of due consideration of the relevant normative foundations.

A similar phenomenon can be observed for goods and capital, if in a different form that actually seems to defy the need for an economic element for these market freedoms at all. In what concerns goods, there is case law indicating that goods need not be part of an economic transaction, but only capable of being part to an economic

⁴⁴⁷ Case 352/85 *Bond van Adverteerders* [1988] E.C.R. 2085.

⁴⁴⁸ Pedro Cabral, ‘The internal market and the right to cross border medical care’ (2004) 19 ELRev 673, 677; Hatzopoulos and Do, ‘The Case Law of the ECJ concerning the Free Provision of Services: 2000-2005’, 946-947; Lorna Woods, *Free Movement of Goods and Services within the European Community* (Ashgate 2004), 168-174.

⁴⁴⁹ *Humbel* and Case C-109/92 *Wirth* [1993] E.C.R. I-6447.

⁴⁵⁰ Case C-157/99 *Smits & Peerbooms* [2001] E.C.R. I-5473 and Case C-368/98 *Vanbraekel* [2001] E.C.R. I-5363. In both cases the AG argued the situation did not fall within the freedom’s scope.

transaction, to fall within the scope of the free movement of goods. In effect, it has been remarked that Article 34 TFEU: “*which does not itself use the word “trade”, cannot be interpreted as limited to transactions by or between traders*”.⁴⁵¹ Similarly, AG Jacobs’ has held that:

*“objects can benefit from the Treaty provisions concerning the free movement of goods, whether or not they are being transported across national frontiers for the purposes of sale or resale. (...) [The free movement of goods can be extended], for instance, to the importation of goods by a private individual for the purposes of personal consumption.”*⁴⁵²

In what concerns capital, Annex I to Directive 88/361 includes a Section XI on “Personal Capital Movement”, allowing for the free movement of capital of, *inter alia*, gifts and endowments, dowries, inheritances and legacies, the transfer of assets constituted by residents in the event of emigration, at the time of their installation or during their period of stay abroad, and transfers, during their period of stay, of immigrants’ savings to their previous country of residence.⁴⁵³ None of these movements seems to have an economic nature, but are instead examples of situations where individuals would like to transfer money without wanting to engage in any economic transactions.⁴⁵⁴

Again, these (judicial and legislative) developments clearly cannot be justified on the basis of different considerations of what an economic activity might be; they

⁴⁵¹ AG Warner’s Opinion in Case 34/79 *Henn and Darby* [1979] E.C.R. 3795.

⁴⁵² *Walloon Waste*, AG’s second Opinion, para. 15

⁴⁵³ Council Directive 88/361/EEC

⁴⁵⁴ See, as a good example, Case C-25/10 *Missionswerk* [2011] ECR I-00497, where a restriction on the free movement of capital was found concerning rules that made a legacy to a non-for-profit organization abroad less valuable than if the legacy had been made to a non-for-profit in the State where the deceased had previously resided or worked. The main rule concerning inheritances seems to be that rules that have the effect of reducing the value of the inheritance of a resident of a State other than the Member State in which the assets concerned are situated and which taxes the inheritance of those assets are restrictive – see *van Hilten-van der Heijden*, para. 44 and the case-law cited therein. Similarly, considering that rules restricting gifts to charities can infringe upon the free movement of capital, see Case C-318/07 *Hein Persche* [2009] ECR I-00359.

seem to be instead completely alien to such a normative justification, even if this does not mean that they were the subject of a detailed analysis as to what their foundations might be.⁴⁵⁵

b. Institutional Insights

A fuller picture of the case law emerges once, in addition to again taking into account the normative indeterminacy resulting from the tendency of courts to adopt incompletely theorised decisions, one considers the institutional consequences of an activity being deemed economic or not. The concept of ‘economic activity’ serves as a limit to EU law, preserving for Member States an area of autonomy over non-economic areas.⁴⁵⁶ But economic activity does not work merely as a device for the allocation of competences between the EU and the Member States: it also operates as a device to determine whether the Court should be able to overrule Member State choices or whether such overruling should only occur if the EU political process so decides. In the absence of a careful consideration of the relevant normative and institutional underpinnings, decisions by the Court on whether an activity is economic or not – or whether a certain type of movement needs to be economic to fall within the scope of the market freedoms at all–, seem to constitute unprincipled, or at least unjustified, comparative institutional choices. Thus institutional considerations seem to be relevant in this context, being implicit in claims that the flexible use of the concept of remuneration reflects a pragmatic streak of the Court, which is seen as using the concept malleably to get rid of cases it does not want to decide or to decide cases it would not

⁴⁵⁵Arguing that this indicates that non-economic free movement of goods is covered by Art. 34 TFEU, see Odudu, ‘Economic Activity as a Limit to Community Law’, 238-239.

⁴⁵⁶ Odudu, ‘Economic Activity as a Limit to Community Law’ 226; with the obvious exception of when EU competences over non-economic areas exist.

have competence to do so beforehand.⁴⁵⁷

IV. Hindrances to cross-border movement with an economic aim

a. Describing the Case law

‘The simple exercise of the right of free movement within the Community is not in itself sufficient to bring a particular set of circumstances within the scope of Community Law; there must be some connecting factor between the exercise of the right of free movement and the right relied on by the individual.’⁴⁵⁸

This succinct formulation of orthodox case law expresses the requirement that economic rights granted by the Treaty must be exercised in a cross-border situation for an economic purpose. Nonetheless, the Court appears to be doing its utmost to get as far away as possible from this principle without expressly reneging on it, at least in what concerns the free movement of individuals.

Arguably the origins of this case law can be found in *Cowan*, a case concerning a national measure making the award of State compensation for harm caused in France to the victim of an assault resulting in physical injury, subject to the condition that the victim either held a residence permit or was a national of a country which had entered into a reciprocal agreement on the matter with France.⁴⁵⁹ As the French State argued, this requirement posed no obstacle to economic free movement, but the Court nonetheless considered this rule to be contrary to the free provision of services, holding that there was a sufficient cross-border element because the situation concerned tourists, i.e., service recipients, who had travelled across State borders. One way to make sense

⁴⁵⁷ See also the criticism in Spaventa, *Free Movement of Persons in the European Union*, 54-58; Vassilis Hatzopoulos, ‘Killing National Health and Insurance Systems but Healing Patients? The European Market for Healthcare Services after the Judgements of the ECJ in *Vanbraekel* and *Peerbooms*’ (2002) 39 CML Rev 683, 693-4. For a famous example of an ingenious, if normatively incoherent, use of the concept of economic activity by the Court, one need only see how the Court avoided having to decide on the prohibition of abortion in Ireland in Case C-159/90 *Grogan* [1991] E.C.R. I-4685.

⁴⁵⁸ Para. 5 of AG Tesauero’s Opinion in *Singh*.

⁴⁵⁹ *Cowan*.

of this case would be to consider that it did not concern market freedoms at all, but instead granted an autonomous status to the prohibition of discrimination on grounds of nationality. This view could be reinforced by reference to *Bickel and Franz*, a case concerning a refusal to grant to German-speaking foreigners in Italy a right to use their own language in interactions with the judicial and administrative authorities based in the Bolzano province when such a right was granted to German-speaking Italians.⁴⁶⁰ The Court decided that such a refusal was prohibited by the general prohibition of discrimination arising from Art. 18 TFEU.⁴⁶¹

A number of other cases where the link between economic aim and cross-border elements was dubious cannot, however, be explained by reference to the autonomy and blanket application of a general prohibition of discrimination on grounds of nationality.⁴⁶² The paradigmatic example of this is *Carpenter*.⁴⁶³ Mr Carpenter was a British national who married in the UK a Philippines' national who had overstayed her allowed leave. The British authorities ordered her deportation, but the Court, on the grounds that Mr Carpenter conducted a business which provided services to advertisers established in other Member States, and occasionally travelled there for business purposes, found a link with EU law and went on to hold that the deportation of Ms Carpenter from the UK, where they resided, would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercised a market freedom.

⁴⁶⁰ *Bickel and Franz*.

⁴⁶¹ The question here is whether there was a link to EU law to start with. While the Court ignored the issue, AG Jacobs in his Opinion tried to establish such a link by reference to European Citizenship.

⁴⁶² See *Singh* and Case C-291/05 *Eind* [2007] E.C.R. I-10719. See also Miguel Poiars Maduro, 'The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination' in Claire Kilpatrick, Tonia Novitz and Paul Skidmore (eds), *The Future of Remedies in Europe* (Hart Publishing 2000), 124. See also, for goods and capital, fn. 451 to 455 above.

⁴⁶³ Case C-60/00 *Carpenter* [2002] E.C.R. I-6279.

The main issue here is that, even though in this case a cross-border element could be found, it was in no way related to the economic purpose of the freedom: after all, the choice was never between Mr Carpenter not exercising his freedom to provide services and maintaining the right to reside with his wife, as opposed to exercising that freedom and, as a result of that, losing that right.⁴⁶⁴

This lack of relationship between economic aim and cross-border movement is also present in the Court's case law on family reunification. In these cases the question was whether third-country nationals who were relatives of EU citizens who had moved into another State should be allowed to join them there directly from outside the Union without previously having been allowed to reside in the EU citizen's State of origin.⁴⁶⁵ The argument against this was that the aim of the granting of family reunification rights was to enable Member State nationals to move freely between Member States. An impediment to that movement would only arise if the relatives of an EU citizen who previously resided lawfully with them in the territory of a Member State would, as a result of the EU citizen's movement to another Member State, lose the right to reside with him; and this would only occur if the family members were already lawfully residing with the EU national before he moved to another Member State.⁴⁶⁶ Accordingly:

'it is the family situation as it exists at the time the Community national decides to go to another Member State which should be taken into account. [National immigration rules should not restrict the right of] a national who has already exercised his rights to free

⁴⁶⁴ Woods, *Free Movement of Goods and Services within the European Community*, 222-224; Tryfonidou, 'Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach', 638.

⁴⁶⁵ This situation was not addressed by either Council Directive 73/148/EEC [1973] OJ 1973 L 172 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, or by Directive 2004/38/EC.

⁴⁶⁶ Tryfonidou, 'Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach', 637-638.

*movement and apparently has not been dissuaded from using that right for reasons related to the non-admission of third-country-national family members.*⁴⁶⁷

This was the *rationale* behind old cases such as *Morson*⁴⁶⁸ and more recent ones such as *Akrich*⁴⁶⁹. However, in *Jia*⁴⁷⁰ and particularly in *Metock*⁴⁷¹, the Court chose to disregard this argument, holding instead that the relevant point was that the third-country national was a family member of an EU citizen. Whether the refusal of the extension of the claimed family reunification rights would have impeded the exercise of the free movement right or not was deemed to be irrelevant.⁴⁷²

A last line of cases where there appears to be no link between the cross-border element and the economic *telos* of the Treaty provisions concerns changes in the State of residence by persons who continue to pursue their economic activities in their States of origin. This line of cases includes workers or self-employed persons who have moved their residence to another Member State but continue to pursue their economic activities in their home-State⁴⁷³, and situations where a person controlling a number of undertakings in his home-State moves into another State without any economic intent.⁴⁷⁴ In these cases, even though the movement cannot be said to relate to access to

⁴⁶⁷ AG Geelhoed's Opinion in Case C-1/05 *Jia* [2007] E.C.R. I-001, para. 70.

⁴⁶⁸ *Morson and Jhanjan*.

⁴⁶⁹ Case C-109/01 *Akrich* [2003] E.C.R. I-9607.

⁴⁷⁰ *Jia*.

⁴⁷¹ Case C-127/08 *Metock* [2008] ECR I-6241.

⁴⁷² Alina Tryfonidou, 'Jia or "Carpenter II": the edge of reason' (2007) 32 ELRev 908, 913-915

⁴⁷³ *Ritter-Coulais, Government of Communauté française and Gouvernement wallon*, Case C-152/05 *Commission v Germany* [2008] E.C.R. I-00039, Case C-527/06 *Renneberg* [2008] E.C.R. I-7735. Examples of traditional case law can be found in Case C-112/91 *Werner* [1993] E.C.R. I-00429, Case C-293/03 *Gregorio My* [2004] E.C.R. I-12013.

⁴⁷⁴ *N*, Case C-464/05 *Geurts* [2007] E.C.R. I-9325.

the relevant markets in another Member State, the Court still held that their situation fell within the scope of the market freedoms.⁴⁷⁵

b. Understanding the Case law

i. Normative Considerations

In all these cases, there is cross-border movement and the EU national is economically active, but there is no link between these two elements. It appears that the *type* of movement involved is not significant and even those who move *back* to their State of nationality, and those who exercise merely temporary short-term movements to other Member States without any economic purpose can rely on EU law for requiring Member States (including their own Member State) to respect their rights.⁴⁷⁶

All these cases concern the free movement of persons, in particular of individuals.⁴⁷⁷ It is plausible, therefore, that normative considerations on the special status of individuals in the EU underlie this case law. The *rationale* behind this can perhaps be traced to the influence that European Citizenship has had on the market freedoms. This is apparent in a growing body of literature that, starting from the observation that a unitary approach to the free movement of persons appears to have been adopted in the Court's language⁴⁷⁸, holds that the different Treaty provisions on the economic free movement of people are complementary to a more general freedom for the movement of natural and legal persons.⁴⁷⁹ It is submitted in this literature that

⁴⁷⁵ Tryfonidou, 'In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?', 1596-1604.

⁴⁷⁶ Schiltz, 252.

⁴⁷⁷ Again, with the exception of the situations identified between fn. 451 and 455 above.

⁴⁷⁸ Hatzopoulos, 'Recent Developments of the Case Law of the ECJ in the Field of Services', 70.

⁴⁷⁹ Scheuing, 753; Weatherill, 'Discrimination on grounds of nationality in sport', 59; Snell, *Goods and services in EC law: a study of the relationship between the freedoms*, 9; Dollat, *Libre circulation des personnes et citoyenneté: enjeux et perspectives*, 26; Snell, 'And Then There Were Two: Products and

European Citizenship has had an impact on the case law with the Court reading the free movement provisions as protecting the human rights of any free moving EU citizen,⁴⁸⁰ and some go as far as to argue for a transposition of solidarity from the national to the European level.⁴⁸¹ These are akin to the normative arguments reviewed in Chapter III and above in what concerns the erosion of the purely internal situation doctrine, pointing towards the free movement of persons having a more exalted normative status than the other freedoms. If this is indeed the reason behind the developments in the case law, it implies that the normative underpinning of the market freedoms ceased to be merely to protect the right to move for the purpose of taking up an economic activity, and that these freedoms now protect the rights of all economically active persons whose situation has a cross-border dimension. If so, the scope of the market freedoms may have moved on to cover the situations of all economically active Union citizens, provided that the situation involves a cross-border element and regardless of whether the restriction is related to the economic activity pursued.

ii. Institutional Insights

It is again submitted that taking into account institutional considerations allows us better to understand the evolution and implications of this case law than purely normative approaches would. To begin with, it should be made clear how the existence of case law that deviates from the norm can: (a) , through *ex-post* rationalisation and categorisation, (b) *via* the effects of lock-in and path-dependency, and (c) under

Citizens in Community Law’, 69-70; Hilson, ‘Discrimination in Community free movement law ’, 453; Oliver and Enchelmaier, ‘Free movement of goods: recent developments in the case law’, 666.

⁴⁸⁰ Spaventa, ‘Seeing the wood despite the trees? On the scope of Union Citizenship and its constitutional effects’, 39-44. This can reflect the idea that the basic common values of European States lie in respect for human rights, which hence should be protected by the Court: see AG Jacob’s Opinion in Case C-168/91 *Konstantinidis* [1993] E.C.R. I-1191; Neussl.

⁴⁸¹ Somek, ‘Solidarity decomposed: being and time in European citizenship’, 789.

influence of a legal culture that prizes systemic coherence and regularity, change the normative foundations of the law without any explicit decision to that effect being made. *Prima facie*, family reunification rights becoming subject to a specific protection regime detached from the internal market rationale would seem to be the result of developments too recent and limited for us to conclude that such a change in normative underpinnings of the market freedoms will, or should, extend to any other areas of EU law. Nonetheless, it became a prevalent view in the literature that the overall normative underpinning of the market freedoms had changed from merely protecting the right to move for the purpose of taking up an economic activity into protecting the rights of all economically active persons whose situation has a cross-border dimension. It seems that *ex-post* rationalisation, combined with the logic of legal reasoning, and perhaps a certain normative bent prevalent in the scholarship, are what underlie this potential change in the normative foundations of the case law in the first place.

Similarly, only by taking into account institutional considerations can we understand the implications that the seemingly unrelated normative developments in what concerns the concept of cross-border movement and of economic activity jointly have. As we have seen above, both the economic aim and the cross-border element are susceptible to being stretched: what an economic activity is can be contentious; what the relevant cross-border element is can be somewhat arbitrary. But the relaxation of the requirement of their cumulativeness has effectively lifted one of the major restrictions on the scope of the market freedoms. This can be seen in *Carpenter*, which exemplifies how decoupling the economic aim of the freedoms from their cross-border element leads to stretching the market freedoms to breaking point. This expansionary effect on the market freedoms allows litigants to use the Court to challenge Member States' national measures that result from *prima facie* legitimate democratic processes. It means

that the Court has decided to second-guess Member States' decisions in areas outside the traditional scope of EU law, without any prior consideration as to why it would be better suited to pursue such an assessment. Normative claims defending this case law on the basis of the development of European Citizenship and fundamental rights protection are, implicitly, calls for a greater role of courts and, eventually, the EU political process to the detriment of the Member States' political processes. What is more, they also require the CJEU to take on a load for which an international court is already responsible – the European Court of Human Rights. That the CJEU must mediate between the Member States and the ECHR in areas falling within the scope of EU law results clearly enough from the case law, and appears to be justified by the fact that EU law is ultimately responsible for outcomes in these fields; whether it should do so in areas not traditionally falling within the scope of EU law is a question with which these normative claims usually fail to engage. As above, institutional questions are dressed up in 'substantive' normative clothes, while the normative claims themselves – that European Citizenship allows for the expansion of the market freedoms, and that the protection of fundamental rights at EU level should prevail over the mechanisms of protection at national level – only make sense in the current institutional setting of the EU and as a result of *ex-post* rationalisation. Like Siamese twins, 'substantive' normative claims contain institutional elements and institutional arguments reflect 'substantive' normative goals.

V. **Beyond the Descriptive, Towards the Normative**

a. *Suggestions for Normative Debates*

All of the methodological steps identified above – the cross-border element, the economic aim, and their required cumulateness – have been subject to pressures due to mutations in their normative underpinnings. These mutations seem to have gone

hand-in-hand with evolutions in the European project – particularly non-economic developments, such as the appearance of concerns with reverse discrimination, the adoption and development of European Citizenship⁴⁸², and the increasing importance of protecting fundamental rights. Legitimate concerns with the undesirable and unjust results of reverse discrimination, together with concerns about the justice of specific decisions and the protection of fundamental rights, provide normative grounds which, when taken together with the influence European Citizenship might have in construing the market freedoms, appear to lay behind much of the case law analysed above. This might be further justified in light of the recent amendments to the TEU, which further extends the scope of the Union beyond the economic realm and emphasises the protection of human rights (Art. 2 TEU), grants the Charter of Fundamental Rights the same legal value as the Treaties (Art. 6 TEU), and protects the equality of European citizens before the Union (Art. 9 TEU). On the other hand, these developments in the case law also seem to have resulted from how lightly theorised the normative assumptions underlying it were at the outset. This under-theorisation increases the odds of the Court developing its case law in a manner which goes beyond its initial underlying normative scope, thereby allowing for the continuous expansion of the scope of the market freedoms under pressure from self-interested litigants. Light theorisation enables new normative pressures to produce major effects, but also, and more importantly, to do so without any previous consideration of how old and new normative concerns should interact, or of the consequences of adopting of a given course. Of particular concern, in this regard, is the Court's obliviousness to the institutional questions and consequences hidden beneath its case law. One of the consequences of a

⁴⁸² Of which the recent decisions in *Zambrano*, *McCarthy* and *Dereci* arguably make the purely internal situation doctrine irrelevant for at least some areas of European Citizenship – see above around fn. 351 to 355. This may lead in the future to potentially similar developments for the market freedoms, as a result of systemic arguments pleaded by litigants before courts.

measure falling within the scope of the market freedoms or European Citizenship is that such a measure is now subject to review under EU law standards, including as to its adequacy under EU's fundamental rights' standards. As AG Sharpston put it:

*'According to the Court's settled case law, EU fundamental rights may be invoked when (but only when) the contested measure comes within the scope of application of EU law. All measures enacted by the institutions are therefore subject to scrutiny as to their compliance with EU fundamental rights. The same applies to acts of the Member States taken in the implementation of obligations under EU law or, more generally, that fall within the field of application of EU law. This aspect is obviously delicate, as it takes EU fundamental rights protection into the sphere of each Member State, where it coexists with the standards of fundamental rights protection enshrined in domestic law or in the ECHR.'*⁴⁸³

To grasp the importance of appropriately delimiting the scope of the market freedoms, one need only think of the consequences of taking *Carpenter* and *Bickel and Franz* to their logical conclusions. Could a person buying a book from another State via Amazon, or having enjoyed a holiday in another Member State 15 years ago, or even watching a foreign television channel in his home-State, claim fundamental rights protection from the EU on the grounds that the person was once party to an economic relationship with a cross-border element?⁴⁸⁴ There being evidence of both cross-border activity and of free movement with an economic aim, what is to prevent any of these situations from falling within the scope of the market freedoms? At present, we are all potential recipients of services within the meaning of Article 56 TFEU; does it effectively suffice that someone has once benefited from a market freedom to forever benefit of all the rights which might arise from EU law, regardless of the existence of a relationship between the *telos* of that law and the situation at hand? *In extremis*, if no limits were established, the EU's protection of fundamental rights would no longer be incidental and subsidiary.

⁴⁸³ AG Sharpston's Opinion in *Zambrano*, para. 156.

⁴⁸⁴ A point already raised by Robert Lane and Niamh Nic Shuibhne, 'Angonese Case Note' (2000) 37 CML Rev 1237, 1242.

Simultaneously, the Court may find itself facing litigants trying to maximise the opening that the Court has granted them in *Carpenter* and related cases. As remarked above, even if these developments had been merely kick-started by accident, as a result of work pressure or lack of communication between different chambers, path dependence and lock-in are still bound to kick in, particularly as litigants, academic commentators and, finally, courts themselves try to rationalise, contextualise and finally institutionalise their understanding of these legal developments. The lack of proper reasoning in the case law, and the under-theorisation of its normative underpinnings, will make life easier for litigants trying to maximise the benefits they already accrue from this case law, and risks making the law ever more incoherent and normatively at drift. The Court may end up facing a question it probably did not envision, and that in all likelihood it actively hopes to avoid: does it have the conditions and the will to become the fundamental rights court of last resort for all measures adopted by any public body within the EU? Questions of capability, ability and legitimacy of the Court – all of them ultimately institutional questions – would finally have to come to the forefront of the discussion.⁴⁸⁵

In short, it should be recognised that the Court's case law is the result of interactions between different, and sometimes conflicting, normative goals – European integration, the removal of obstacles to free movement, the protection of areas of Member State autonomy, the defence of fundamental rights – mediated through the existing institutional setting. Decisions about the scope of the free movement provisions of necessity imply assessments of comparative institutional choice, since, through direct effect, free movement rules re-allocate Member State competences to the EU, and place

⁴⁸⁵ As the *Guimont* case law points out, the Court is aware of its limitations, actively delegating to national courts the task to deal with reverse discrimination. On the other hand, as the recent Lisbon decision by the German Constitutional Court indicates, national courts themselves may react against this case law by the Court, leading to a situation of serious institutional conflict.

areas that were under the exclusive remit of the EU's political process under judicial control. It is thereby crucial not only that greater attention be paid to the 'pure' normative goals underlying the case law, but also to the institutional questions of choice and ability which are always also present. Better reasoning and theorization of the relevant substantive normative underpinnings is undoubtedly in order; but this also requires that institutional considerations be recognised as normative concerns of equal importance for the Court's decision-making process. In the end, the absence of consideration of institutional realities and implications does not eliminate them; it merely prevents a properly reasoned consideration of all the relevant normative and institutional choices which the Court has to make in its case law.

b. *A Normative Proposal*

What would a contextualised approach look like? It might begin by a deeper look into the normative underpinnings of the case law. In this respect, I find the argument that the normative goals of the market freedoms should not be affected by European Citizenship most attractive. As described in Chapter III when describing this position, the goals of the market freedoms were not expressly altered by European Citizenship or any of the Treaty amendments, and thus their purpose is still *prima facie* to enable Member State nationals to move between Member States for an economic purpose, thereby assisting in the creation a common market.⁴⁸⁶ Also, to extend situations which should fall within the scope of European Citizenship alone under the banner of market freedoms merely leads to confusion as to what the relevant underpinnings of the market freedoms are and where the dividing lines lay. Furthermore, all market freedoms entail, to a greater or lesser degree, the possibility of

⁴⁸⁶ Kadelbach, 465; Tryfonidou, 'In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?', 1612.

people crossing borders, with the result that it is arbitrary to distinguish between the provisions on workers, services and establishment, and the provisions on capital and goods. Since only physical persons may rely on Article 21 TFEU, European Citizenship requires that the Court should give priority to the movement of natural persons over legal ones, implying that a different approach common to the economic free movement of persons would not be common at all, but would instead require different approaches to be adopted within individual freedoms depending on whether individual free movement occurred or not.

According to this perspective, the case law reviewed above is normatively unjustified, inasmuch as it was decided under the market freedoms; this would not be the case had it been decided under the banner of European Citizenship. Where Article 21 TFEU and the market freedoms overlap, the Court should not take cover behind the market freedoms. This is deleterious to legal certainty and clarity, and to both the Court's and the market freedoms' legitimacy. By leading to the extension of the scope of the market freedoms to breaking point, this case law risks turning the Court into a potential court of last instance on human rights issues whenever there is a potential cross-border element. Naturally, this risk also exists if a very broad notion of what constitutes a restriction upon European Citizenship is adopted, regardless of any confusion with or over-extension of the market freedoms; but this is exactly why the issue needs to be addressed and debated, and a clear delimitation framed. The same can be said concerning the clarification of the relationship between the spheres of competence of European and national legal orders.

Debates about the nature of European Citizenship are effectively debates about the nature and direction of European integration. What the future holds is unknown and different visions compete for supremacy. The Court and the legal and political

communities should address the nature and impact of European Citizenship on its own, or at the very least try explicitly to deal with the impact of European Citizenship in construing a more complex normative framework for the market freedoms. It is thus submitted that even though there may be normative reasons for extending the scope of European Citizenship, depending on the evolution of European integration, such extension should be distinguished from the scope of the market freedoms: the latter refer to economic rights and should be restricted to situations of intra-State movement with an economic purpose, while the former refers to a fundamental right of a more political nature which covers situations that may overlap with, but are more extensive than, those falling under the market freedoms. Distinguishing between situations covered by European Citizenship and those covered by the market freedoms should lead to greater clarity in the reasoning of the Court, increased doctrinal consistency in its decisions, and a clear distinction between those rights which are merely economic and those which are something more – and, hopefully, to a renewed and more rigorous analysis of the characteristics of each, and to a clearer and more exalted status for European Citizenship as a cornerstone of the European project.

Even if this position is not found attractive, enhanced normative precision – or at least foisting the existing normative uncertainty out of the market freedoms on to European Citizenship – permits greater analytical clarity by allowing for a clearer focus on the institutional consequences of adopting certain normative views. The ultimate question hidden by the conflation of market freedoms and European Citizenship by the Court is, again, a comparative institutional choice: when should the Court's balancing prevail? This is so because the scope of European Citizenship triggers, similarly to the market freedoms, the Court's proportionality assessment. If, for example, European Citizenship is found to be incompatible with reverse discrimination, this would imply

the end of the ‘purely internal situation doctrine’ in what concerns the free movement of individuals, since EU law would protect situations with and without cross-border movement alike – and thus, even though the market freedoms would allow for reverse discrimination, European Citizenship would then act subsidiarily to prevent this from occurring. In such a situation, this would create a link to EU law for cross-border and purely internal situations alike, with the result that the EU fundamental rights regime would prevail over national regimes even in purely internal situations.

As we have already seen, one implication of this would be that the Union’s protection of fundamental rights would cease to be incidental and subsidiary to protecting economic free movement, with national exercises in balancing fundamental rights being replaced by value-choices at EU level whenever a situation fell within the scope of EU law. Any such replacement implies a comparative institutional choice in favour of the Court second-guessing the decisions and value-choices of both national and international bodies devoted to the protection of human rights. An enhanced role in the protection of fundamental rights, resulting from an expansive reading of either the market freedoms or European Citizenship, unnecessarily increases the potential conflicts arising from the Court’s substitution of national value-choices expressed in the particular balancing of fundamental rights by national courts and legislatures⁴⁸⁷ – and this when a specialised international court reviewing Member State’s actions, and to whose decisions the Court itself is to be bound, already exists. It must be remembered that not only do all EU Member States effectively protect fundamental rights, even if they might disagree as to the particular balancing to be achieved between them; they are also already under the jurisdiction of the European Court of Human Rights. This approach further risks creating the conditions for the Court to be swamped with

⁴⁸⁷ See, as an example of this reaction, the German Constitutional Court’s *Lisbon* decision.

litigation unrelated to the goals of the market freedoms and even European Citizenship, thereby raising serious issues concerning the Court's scale and ability to deal with these issues, even as it proposes to impose its decisions on institutions which might be better placed to deal with the issues at hand in the first place.⁴⁸⁸ This may well justify the granting of large margins of appreciation to Member States in this balancing⁴⁸⁹, and it may well be that the Court demonstrates sensitivity to institutional realities when it merely seeks to determine whether Member States protect minimum standards, thereby minimising the possibility of conflicts and allowing for the co-ordination of both national and international legal orders.⁴⁹⁰

In light of the existing regime for the protection of fundamental rights and the existence of European Citizenship, it is submitted that the best normative and institutional balance for the market freedoms would result from, first, maintaining the 'purely internal situations' doctrine in some form. The juridical criterion might be preserved, and preferred to the geographical criterion in light of the practical limitations of the latter evidenced in *Lancry* and *Pistre*, and the fact that it directly relates to the question of the scope of the market freedoms. The juridical criterion seems, in particular, to be amenable to unified analytical treatment with the concept of restriction without implying a complete reversal of precedent, in a way that the geographical criterion is not. Secondly, a more normatively consistent approach to the concept of economic activity should be pursued. And lastly, the traditional requirement that a link

⁴⁸⁸ It should be noted that a similar issue of institutional comparative analysis was crucial in the Court's decision not to apply a UN resolution in *Joined Cases C-402/05 P and C-415/05 P Kadi* [2008] E.C.R. I-06351 – see in particular AG Maduro's Opinion, particularly para. 54.

⁴⁸⁹ See, for example, *Schmidberger* and *Omega*.

⁴⁹⁰ Charles F. Sabel and Oliver Gerstenberg, 'Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order' (2010) 16 *ELJ* 511, who also argue that this is a reverse version of the *Solange* doctrine.

must be found in fact-situations between the economic aim of movement and its cross-border element must be re-affirmed, with those situations deviating from it – and thus from the *telos* of the market freedoms – being addressed, if at all, under European Citizenship.

Normative readings of European Citizenship may, like the market freedoms, also benefit from taking into account institutional considerations, since the same perils of unduly expanding the scope of the market freedoms are also inherent to expansive readings of the scope of European Citizenship. The Court should be aware of these perils when it develops its case law in the future, and they should be the subject of an extensive debate. But this is not strictly a question for the Court: in the end, these questions relate to the overall impact of European Citizenship in the process of European integration. As noted by AG Sharpston, the extension in the protection of fundamental rights by the Court to situations beyond the traditional remit of EU law, under the banner of European Citizenship, would be akin to stating that certain fundamental rights are so significant that they are among the fundamental rights that must be protected by the EU from impairment by the States:

‘A change of that kind would alter, in legal and political terms, the very nature of fundamental rights under EU law. It therefore requires both an evolution in the case law and an unequivocal political statement from the constituent powers of the EU (its Member States), pointing at a new role for fundamental rights in the EU.’⁴⁹¹

Those constituent powers, it might be added, might also consider sparing a thought or two for the institutional machinery and environment required by such a role.

⁴⁹¹ Opinion in *Zambrano*, para. 173

Chapter V

The Concept of Restriction on Free Movement – An Introduction

Abstract: *The concept of restriction on free movement is one of the most extensively debated questions in the 60-years of EU law. This chapter will review the main tests presented in the case law and literature to identify restrictions on the market freedoms – the economic due-process test; the discrimination test; typological tests; and the access-to-market test. This will be a prelude to the next chapters, which will try to make normative sense of these tests and of how institutional constraints may add to the understanding of this topic.*

I. Introduction

If the groundwork for the Court's leading role in creating the EU legal order was laid during the 1960s by the doctrines of direct effect and supremacy, this role was assumed in the 1970s by the market freedoms – in particular the free movement of goods, and, since the 1990s, the free movement of persons. The removal of national measures posing unjustified obstacles to intra-Union trade was one of the main tools used in building the internal market. And the concept of restriction to free movement adopted was instrumental to this by providing the threshold for identifying the measures that *prima facie* pose such obstacles – in other words, the broader the concept of 'restriction' used, the more national rules would fall within the scope of the free movement provisions. This chapter will review the traditional tests developed by the Court concerning the concept of restriction on the market freedoms, which tend to fit with tests proposed in the literature. These tests will be divided into four main groups which will be analysed in turn: discrimination tests, economic due-process tests, typological tests, and access-to-market tests.

II. A Bit of Legal History

Originally, all market freedoms to which direct effect had been granted were supposed to apply a test prohibiting discrimination on grounds of nationality.

According to orthodox history this first changed with the free movement of goods, which prohibits both quantitative restrictions – a well-known concept in International Economic Law referring to measures amounting to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit⁴⁹² – and measures having equivalent effect to quantitative restrictions. The traditional tale is that, in the 1970s, the concept of a measure having equivalent effect to a quantitative restriction was extended from referring merely to discriminatory measures into encompassing national measures whose mere existence was liable *per se* to have a restrictive effect on intra-State trade.⁴⁹³ During the 1980s this was further extended until the free movement of goods was held to prohibit any measure that might diminish the total volume of trade, as with economic due-process clauses.⁴⁹⁴ Following academic criticism of this case law,⁴⁹⁵ in 1993 the Court expressly corrected its case law in *Keck and Mithouard* by adopting a typological approach.⁴⁹⁶ According to this narrative, while the free movement of goods expanded, the other freedoms lingered until the 1990s – with the provisions on capital not being granted direct effect, and those on persons still applying discriminatory tests –, when the Court expressly adopted more expansive tests for persons and capital almost contemporaneously with its attempt to

⁴⁹² Case 2/73 *Geddo v Ente* [1973] E.C.R. 865.

⁴⁹³ Case 8/74 *Dassonville* [1974] E.C.R. 837, Case 120/78 *Rewe-Zentral AG* [1979] E.C.R. 649 (*Cassis de Dijon*).

⁴⁹⁴ In the so-called *Sunday Trading* cases: see *Torfaen*, Case C-312/89 *Conforama* [1991] E.C.R. I-00997, Case C-332/89 *Marchandise* [1991] E.C.R. I-1027 and *Stoke and Norwich v B&Q*.

⁴⁹⁵ Particularly important was Eric L. White, 'In search of the limits to Article 30 of the EEC Treaty' (1989) 26 CML Rev 235, who as a member of the Commission legal service pressed this view on the Court in more than one hearing.

⁴⁹⁶ Joined Cases C-267/91 and 268/91 *Keck and Mithouard* [1993] E.C.R. I-6097.

restrain the free movement of goods.⁴⁹⁷ These tests coalesced around the concept of access-to-market, application of which to goods has recently been attempted by the Court.⁴⁹⁸ In this summary description we find four main tests: discrimination, economic due-process, typological, and access-to-market. They shall now be addressed in turn.

III. Discriminatory Approaches

Prohibitions of discrimination on grounds of nationality were first adopted by anti-protectionist theories on the grounds that measures that discriminate against foreigners are normally intended to protect nationals at their expense. Discrimination tests always include formal discrimination, but they can also look into related criteria, such as the intent of regulation – since a purportedly legitimate regulatory purpose can disguise protectionist intent –, or the existence of material discrimination. In this latter case, the subject of examination is the effect of State measures, in particular whether they place a heavier burden on foreign goods than on national ones.⁴⁹⁹ The Treaties set out in Article 18 TFEU a general prohibition of discrimination on grounds of nationality, but it is the market freedoms, as *lex specialis*, that apply this principle in the context of the internal market.⁵⁰⁰ That discrimination is prohibited under the market freedoms is unanimously accepted, but it should be noted that goods, services

⁴⁹⁷ See for establishment, Case C-340/89 *Vlassopoulou* [1991] E.C.R. I-2357; for services, *Säger*; for workers, *Kraus*.

⁴⁹⁸ For services, *Alpine*; for workers Case C-415/03 *Bosman* [1995] E.C.R. I-4921; for capital, *Commission v UK*; for establishment, Case C-442/02 *CaixaBank* [2004] E.C.R. I-8961; and for goods, *Commission v Italy*.

⁴⁹⁹ Sykes, 16-23; Gráinne de Búrca, ‘Unpacking the Concept of Discrimination in EC and International Trade Law’ in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market* (Hart Publishing 2001), 187-188.

⁵⁰⁰ On workers, see Case C-40/05 *Lyyski* [2007] E.C.R. I-99, para. 34; on services, see Case C-341/05 *Laval* [2007] E.C.R. I-11767, para. 55; on establishment and capital, see Case C-311/08 *SGI* [2010] E.C.R. I-487, para. 32.

and capital do not have nationality as such; it is discrimination on the grounds of their origins which is contrary to free movement law, even if sometimes nationality is used as shorthand.⁵⁰¹ Similarly, discrimination on the grounds of the company's seat – its registered office, administration or principal place of business – serves as the equivalent to discrimination on grounds of nationality for legal persons.

Discrimination on grounds of nationality was the main test applied to the market freedoms until the early 1990s. The exception to this was goods, and it was in reaction to this freedom that structured defences of discrimination were first elaborated. In particular, attempts were made to rationalise the case law on goods as focusing on discrimination, the main technique for which was to consider that mandatory requirements, more than being justifications, limited the concept of restriction itself.⁵⁰² Since only discriminatory measures and product requirements had originally been deemed restrictive, and product requirements⁵⁰³ could be seen as indirectly discriminating against foreign goods by imposing an unjustified 'double-regulatory burden' on imports, it was argued that the dominant test was still discrimination.⁵⁰⁴ Following the *Sunday Trading* cases this position became descriptively untenable,⁵⁰⁵ but *Keck's* classification of product requirements and

⁵⁰¹ Gareth Davies, *Nationality discrimination in the European internal market* (Kluwer Academic Publishers 2003), 60.

⁵⁰² Kingreen, 'Fundamental Freedoms', 573; Karen Banks and Giuliano Marengo, 'Intellectual Property and the Community Rules on Free Movement: discrimination unearthed' 15 ELRev 224, 238-241. See for a criticism of this position, Joseph Weiler, 'The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods' in Paul Craig and Grainne de Búrca (eds), *The Evolution of EU law* (OUP 1999).

⁵⁰³ Meaning: legal requirements concerning the physical characteristics of products. See the more elaborate discussion on typological approaches below.

⁵⁰⁴ Gustavo Marengo, 'Pour une Interprétation Traditionnelle de la Notion de Mesure d'Effet Equivalent à une Restriction Quantitative' (1984) 20 CDE 291, in particular 304-313 and 349; Louis Defalque, 'Le concept de discrimination en matière de libre circulation des marchandises' (1987) 23 CDE 471.

⁵⁰⁵ See fn. 494 above.

discriminatory selling arrangements as the only measures restricting the free movement of goods resuscitated the plausibility of this approach.⁵⁰⁶

What are we to make of this approach? One should recall that prohibitions of discrimination are prescriptive impositions of equality standards consisting of a tripartite relation between two (or several) objects or persons who share one (or several) qualities alongside an inadmissible distinction criterion. Since discrimination refers to the unjustified differentiated treatment of similar situations the first step is to determine whether the relevant situations are similar; and this, in turn, requires a *tertium comparationis* – the quality that the things being compared have in common that makes them similar – to have been determined. Secondly, one must then select what criteria used to distinguish/discriminate between two subjects sharing this *tertium comparationis* are prohibited. This selection requires the pre-existence of normative reasons making such distinction criteria unacceptable. A discrimination test not following these steps can easily lead to the kind of arbitrary decisions that it purports to prevent.

In light of this, the discrimination approaches adopted in the case law and in the literature are problematic. First, they seem to assume that domestic and foreign goods are similarly situated; but:

‘The problem is that one cannot presuppose any such thing. One must have criteria for determining which goods (or services or workers) are equivalent and hence worthy of equal treatment. No credible discrimination model can exist without definitions of what we mean by equivalent or similar situations. A failure to treat equivalent situations the same is a hall-mark of arbitrary behaviour.’⁵⁰⁷

⁵⁰⁶ *Keck and Mithouard*. See Bernard, 95; Snell, *Goods and services in EC law: a study of the relationship between the freedoms*, 27-28, 45-46.

⁵⁰⁷ Daniel Wilsher, ‘Does *Keck* discrimination make any sense? An assessment of the non-discrimination principle within the European Single Market’ (2008) 33 *ELRev* 3, 5.

Under WTO law, discrimination tests are preceded by a market equivalence analysis of the relevant products, requiring an economic and empirical analysis of the market prior to even starting to determine whether the products are subject to differentiated treatment. This is understood to be a difficult exercise, and as such a variety of different criteria such as objective (physical characteristics, tariff classification, end-uses, or even the act of exportation) and economic (market definition) standards have been used.⁵⁰⁸ In EU law, however, the Court usually deems products to be comparable without going into the business of determining whether they effectively are so. A descriptively apt discriminatory approach thereby requires a variety of *tertia comparationis* to accommodate this: product requirements are unlawful because they discriminate on the basis of regulatory equivalence, with the host-State imposing an additional burden on products which have already been subject to rules pursuing the same regulatory purpose in the home-State; while selling arrangements would only be unlawful when they discriminate between products whose comparability was established on the basis of market equivalence.⁵⁰⁹ The existence of multiple *tertia comparationis*, however, leads to completely different comparisons: even if measures that discriminate on the basis of regulatory equivalence may also indirectly discriminate on the basis of market equivalence, concerns with indirect discrimination of products as they are placed in the market are incidental at best, and unproven at worst, because no market equivalence exercise is pursued or demonstrated at the outset.⁵¹⁰

⁵⁰⁸ Nicolas F. Diebold, *Non-Discrimination and the Pillars of International Economic Law – Comparative Analysis and Building Coherency* (Society of International Economic Law 2010), 4-7.

⁵⁰⁹ Wilsher, 5-9.

⁵¹⁰ Findings of market equivalence are actually impossible in the case of product bans – id, 13 -, which is why they have to be accommodated as situations of regulatory equivalence – see Snell, *Goods and services in EC law: a study of the relationship between the freedoms*, 87. This does not only apply to bans

Just as importantly, the discrimination approaches proposed in the literature and adopted by the Court completely elude the question of exactly what normative values are protected by the discrimination prohibition. The Treaties set forth that ‘nationality’ and ‘the State of origin of a given product’ are the relevant prohibited discrimination criteria. This is straightforward for cases of direct discrimination, but findings of indirect discrimination require an economic assessment of the practical effects of a measure; the Court has however never seemed inclined to pursue the extensive empirical analysis its own test requires, relying instead on a series of intuitive rules that point towards discrimination but bear little relation to empirical evidence.⁵¹¹ A good example of this in what concerns goods is the case law on measures preventing both national and foreign economic agents from effectively entering and competing in consolidated national markets: even though discriminatory effects are found on the grounds that measures protecting the existent players in a market – such as general bans on advertising⁵¹² or requirements of presence in local markets⁵¹³ – affect foreign importers more adversely than domestic suppliers, such measures do not seem to distinguish on grounds of nationality.⁵¹⁴ The distinction is not between foreign and national goods or suppliers, but rather between established and

on selling goods – *Henn and Darby* – but also to services, for example in situations where, by requiring an establishment, their provision is prevented – Case 39/75 *Coenen* [1975] E.C.R. 1547, Joined Cases C-110/78 and C-111/78 *Van Wesemael* [1979] E.C.R. 35.

⁵¹¹ Wilsher, 18-20.

⁵¹² Case C-412/93 *Leclerc-Siplec* [1995] E.C.R. I-0179, and Joined Cases C-34/95 to 36/95 *De Agostini* [1997] E.C.R. I-3843.

⁵¹³ See Case C-254/98 *TK-Heimdienst* [2000] E.C.R. I-151, Case C-322/01 *DocMorris* [2003] E.C.R. I-14887, Case C-141/07 *Commission v Germany* [2008] E.C.R. I-06935.

⁵¹⁴ As is made clear by AG La Pergola’s Opinion that there was no discrimination in *TK-Heimdienst*.

incoming economic agents or between local and non-local operators.⁵¹⁵ In one of these cases the Court went so far as to state that:

*'For a national measure to be characterised as discriminatory or protective within the meaning of the rules on the free movement of goods, it is not necessary for it to have the effect of favouring national products as a whole or of placing only imported products at a disadvantage and not national products.'*⁵¹⁶

This is *prima facie* correct, since a measure that is detrimental to imports may also affect some national products, but it does not provide any criteria to distinguish between those measures which may potentially affect any imported product and those which are indirectly discriminatory. The question is whether these two groups should actually correspond. After all, there are other options: is a measure to be prohibited if it applies to domestic and foreign products alike, as long as at least a single foreign product more is affected? Or should it be prohibited only if it applies mainly to foreign products? Or should a measure instead be deemed discriminatory only when it does not apply to foreign products the best treatment available for national products?

Without a thorough understanding of the values being protected by the prohibition of discrimination, these questions cannot be answered. And by avoiding these questions, and making it possible to equate measures which may potentially affect any imported product with indirect discrimination, the Court allows for the finding of materially discriminatory effects in almost any situation. Since regulatory regimes are likely to push consumer behaviour in a way which will put the marketing of certain products, including imports among their number, at a disadvantage⁵¹⁷, and

⁵¹⁵ Against this, see Tamara Perisin, *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and WTO* (TMC Asser Press 2008), 36.

⁵¹⁶ *Commission v Germany*, para. 39.

⁵¹⁷ Damian Chalmers, 'Repackaging the Internal Market – The ramifications of the *Keck* Judgement' (1994) 19 *ELRev* 385, 399.

specific costs may arise from both the legal splintering of a company's activity in intra-State and inter-State activities and the need to gain familiarity with foreign regulations⁵¹⁸, the mere fact that imports have to comply with different sets of rules may prevent imported products from enjoying a competitive advantage, or grant competitive advantages to domestic products.⁵¹⁹ Any factual difference in the impact of national rules on imported and domestic products can be considered discriminatory or protectionist, with the result that virtually any rule can be said to be discriminatory; but this is not the result of comparative exercises within firmly set parameters, but of an absence of relevant parameters in the first place.

The use of discrimination tests in the free movement of persons suffers from similar problems. It is generally accepted that the Court has interpreted indirect discrimination broadly, using proxy criteria which might allow for the identification of measures with the same effect as nationality-dependent rules.⁵²⁰ Further to this, the Court found that measures applying regardless of nationality, but which were empirically shown to apply mainly to nationals of other Member States, or that defined the conditions for the acquisition or retention of the right to benefits in such a way that they could only, or more easily, be satisfied by home-State nationals⁵²¹, were also indirectly discriminatory.⁵²² In *O'Flynn*, a case on the free movement of workers, the

⁵¹⁸ Holger Spamann, 'Choice of Law in a Federal System and an Internal Market' [2001] Jean Monnet Working Paper 8/01, 33-34.

⁵¹⁹ Maduro, 'Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights', 68; Snell, *Goods and services in EC law: a study of the relationship between the freedoms*, 85.

⁵²⁰ Some went as far as asserting that any rule which had a territorial element was likely to be indirectly discriminatory – Spaventa, *Free Movement of Persons in the European Union*, 24-25.

⁵²¹ Case C-349/87 *Paraschi* [1991] E.C.R. I-4501, para. 23.

⁵²² Case 33/88 *Allué and Coonan* [1989] E.C.R. 1591, Joined cases C-259/91, C-331/91 and C-332/91 *Allué and Coonan and others* [1993] E.C.R. I-4309, Case C-272/92 *Spotti* [1993] E.C.R. I-5185.

Court tried to consolidate its case law on indirect discrimination by developing a formula:

*'[...] conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers [...] or the great majority of those affected are migrant workers [...], where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers [...] or where there is a risk that they may operate to the particular detriment of migrant workers.'*⁵²³

However, the Court also stated that *'It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect'*.⁵²⁴ This formulation leads us into the same kind of problems identified in what concerns material discrimination on the free movement of goods, since situations where there is a mere risk of foreigners being left in a worse situation can be deemed restrictive without the Court pursuing any empirical assessment.⁵²⁵ This includes, like in goods, situations where the restriction is local and thereby risks discriminating against non-local nationals as much as it does against foreigners.⁵²⁶ Virtually all cases concerning restrictions which have a purely local dimension are good examples of how material discrimination can be incidental to virtually any rule. The free movement of people leads to people having the right to choose the community where they live throughout the Union; but the mere existence of a community implies disadvantages to outsiders, which are not allowed to enjoy public goods or other local services in the same way as members of that community. Local obstacles will always exist, but if they are applied at an exclusively local level they are surely not being applied on grounds of nationality.⁵²⁷ Findings of material discrimination seem again to result not from empirically grounded exercises, but from lack of thought concerning the identification

⁵²³ Case C-237/94 *John O'Flynn* [1996] E.C.R. I-2617, para. 18.

of the protected values, and from lack of consideration of the necessary parameters required for the successful pursuit of discrimination analyses.

Furthermore, it can be said that the Court has expressly abandoned nationality as the only criterion for discrimination in what concerns the free movement of persons. The very first case where a national measure was struck down as an unjustified restriction on the free provision of services concerned the situation of a Dutch lawyer who had moved to Belgium and was prevented from practicing in the Netherlands by a residency requirement for lawyers practicing there.⁵²⁸ It was also held from an early stage that prohibiting establishment on the grounds that the relevant person already had a different place of establishment was restrictive, with the result that discrimination was prohibited both against foreigners or companies trying to establish themselves in a host-State (on the basis of nationality), and against a State's own nationals or companies State trying to establish themselves in another Member State.⁵²⁹ For workers, the Court eventually also held that, alongside measures distinguishing on grounds of nationality, national legislation which might place nationals at a disadvantage when they wish to extend their activities beyond the territory of a single

⁵²⁴ Id, para. 21. See also Case C-278/94 *Commission v Belgium* [1996] E.C.R. I-4307, para. 20; and Case C-332/05 *Cellozi* [2007] E.C.R. I-563, para. 26-27.

⁵²⁵ See Gareth Davies, “‘Any Place I hang my hat?’ or: Residence is the New Nationality” (2005) 11 ELJ 43, 46-47.

⁵²⁶ Case C-281/98 *Angonese* [2000] E.C.R. I-4139 – concerning the requirement of language certificates issued by the Bolzano province in Italy – and Case C-162/99 *Commission v Italy* [2001] E.C.R. I-541 – concerning a requirement that, in order to be registered, dentists must have their residence or practise their profession in the district of the professional body or association where they are registered, thereby precluding the opening of secondary establishments – provide good examples.

⁵²⁷ Davies, “‘Any Place I hang my hat?’ or: Residence is the New Nationality”, 55-56,

⁵²⁸ *van Binsbergen*.

⁵²⁹ Case 107/83 *Klopp* [1984] E.C.R. 2971. This applies also to a person who is employed in one Member State and wishes, in addition, to work in another Member State in a self-employed capacity, or vice-versa: see *Stanton, Wolf and Dorchain*, Case C-351/90 *Commission v Luxembourg* [1992] E.C.R. I-3945.

Member State by placing those nationals which migrate in a worse position than those who have not was prohibited unless justified.⁵³⁰

National measures are thereby unlawful not only when they distinguish on grounds of nationality, but also when found to discriminate against cross-border movement.⁵³¹ This can be said to have found expression in the case law on the free movement of persons, which provisions:

*'are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the European Community, and preclude measures which might place them at a disadvantage when they wish to pursue an economic activity in the territory of another Member State.'*⁵³²

This, however, gives rise to problems as to how to conceptualise the case law in light of the Treaties. Some have tried to interpret the case law as applying traditional discrimination tests⁵³³, while others have favoured a discrimination test while admitting that nationality was no longer the sole relevant criterion.⁵³⁴ Another option was to conceptualise the case law as prohibiting the two sides of discrimination against cross-border situations, according to which a restriction on free movement is found if a situation is worse than a hypothetical exclusively domestic situation would be.⁵³⁵ The

⁵³⁰ *Stanton*. This includes not only rules by a home-State applying to nationals moving abroad, but also to those returning home: Case C-392/05 *Alevizos* [2007] E.C.R. I-3505. See also D Martin, 'Discriminations, Entraves et Raison Impérieuses' [1998] CDE 561.

⁵³¹ It might very well be that the only reason this was never developed in what concerns goods is that this is the only freedom which has different provisions for entry (imports) and exit (exports) situations – see Marek Szydło, 'Export Restrictions within the Structure of Free Movement of Goods. Reconsideration of an Old Paradigm' (2010) 47 CML Rev 753, 753-754.

⁵³² *Renneberg*, para. 43; *Filipiak*, para. 58.

⁵³³ Denis Martin, 'Réflexions sur le champ d'application de l'Article 48 du Traité CE' [1993] CDE 555, 596.

⁵³⁴ Esther Johnson and David O'Keefe, 'From discrimination to obstacles to free movement: Recent developments concerning the free movement of workers' (1994) 31 CML Rev 1313, 1332; Spaventa, *Free Movement of Persons in the European Union*, 23.

⁵³⁵ Cordewener.

Court itself never seemed sure of how to justify this doctrine in light of the Treaties: it considered in some cases that rules which discriminate against free movement indirectly discriminate on grounds of nationality, while in others it held that mobility is a prohibited criterion of differentiation under the Treaty; finally, in yet others it held that discrimination against free movement constitutes an obstacle to free movement outside the scope of traditional discrimination analyses.⁵³⁶ Part of the reason for this confusion is that cases of indirect discrimination on grounds of nationality – which are identified by criteria like residence or employment in a foreign country – will collapse into discrimination against free movement when the complainant is a national residing abroad but working in the home-State, or has resided or worked abroad and decided to return. In these cases, the only relevant difference between applying these different discrimination tests is the nationality of the complainant.⁵³⁷ But another reason for this confusion is that since material discrimination as used by the Court can be extended to encompass virtually any rule, measures discriminating against free movement can be reconceptualised as discrimination on grounds of nationality by looking at the facts differently.⁵³⁸

The problems with discriminatory approaches are the same throughout the freedoms: they lack a proper determination of a *tertium comparationis*, have recourse to different prohibited discrimination criteria and use an indirect/material discrimination test which can be extended to encompass virtually any rule. These

⁵³⁶ Anastasia Iliopoulou and Helen Toner, ‘A new approach to discrimination against free movement? *D’Hoop v Office National de l’Emploi*’ (2003) 28 ELRev, 392. See, for services, *Tourist Guides Greece*, para. 16, Case C-154/89 *Tourist Guides France* [1991] E.C.R. I-00659, para. 12.

⁵³⁷ See Case C-436/00 *X and Y* [2002] E.C.R. I-10829, Case C-269/07 *Commission v Germany* [2009] E.C.R. I-07811.

⁵³⁸ Say, from the perspective of an employer instead of the employee – see Case C-232/01 *van Lent* [2003] E.C.R. I-11525, particularly para. 19-21.

issues are pervasive both in academic approaches and in the Court's case law, demonstrating a deficient understanding of the necessary normative underpinnings of non-discrimination.

The relevant question for any discrimination test is not merely how to distinguish between selective and non-selective rules, since economic regulation will always 'select' some situations to regulate. The question is whether that specific 'selection' and the level of differentiation it entails are acceptable. The existing approaches reflect a lack of normative sustentation that makes the discrimination test too malleable and unclear to have any explanatory value.⁵³⁹ The discrimination test is the most traditional and widely used tool in international economic law and constitutional law to identify protectionism; however, not only has a structured theory of anti-protectionism never been articulated in what concerns the market freedoms, these provisions have been used to remove national measures posing obstacles to trade other than traditional protectionist ones.⁵⁴⁰ A more sophisticated approach is required to determine why certain measures are acceptable and others not, or a discrimination-based approach will risk prohibiting all national measures and eventually overlapping with economic due-process tests, to which we now turn our attention.⁵⁴¹

⁵³⁹ Maduro, *We, the Court*, 43; Martin, 'Discriminations, Entraves et Raison Impérieuses', 632; Gareth Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law' (2010) 11 GLJ 671, 680.

⁵⁴⁰ Perisin, *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and WTO*, 39; Imelda Higgins, 'The free and not so free movement of goods since *Keck*' (1997) 6 IrJeurL 166, 176; Maduro, *We, the Court*, 68-70.

⁵⁴¹ Maduro, *We, the Court*, 84 and 162; Piet Eeckhout, 'After *Keck* and *Mithouard*: Free Movement of Goods in the EC, Market Access and Non-Discrimination' in Thomas Cottier and Petros C. Mavroidis (eds), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (The University of Michigan Press 2000), 203. This is also recognised by proponents of discriminatory approaches: see Snell, *Goods and services in EC law: a study of the relationship between the freedoms*, 85; Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law', 676, apparently proposing *de minimis* limits to the amount of material discrimination necessary. At WTO level this was dealt with by using protectionist intent instead of material discrimination. Defending this approach, see the seminal Donald H. Regan, 'Judicial Review of Member-

IV. Economic Due-Process

The original evolution from a discriminatory approach is usually presented as the result of two cases on the free movement of goods. The most important one is arguably the latter, *Cassis de Dijon*, which adopted a notably elliptical formula:

*'Obstacles to movement within the Community resulting from disparities between national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements [...].'*⁵⁴²

In the absence of such mandatory requirements, there was *'no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced in any other Member State'*.⁵⁴³

This was susceptible of being construed as meaning that a product could be subject to non-discriminatory marketing rules in its country-of-origin, but not in the country where it was sold, unless this latter set of rules was justified because the former country did not provide for an equivalent level of regulatory protection as the latter one. In other words, *Cassis* could be read as establishing a mutual recognition system mixing a country-of-origin principle coupled with recognition of regulatory equivalence between States.⁵⁴⁴ On the other hand, *Cassis* also opened the door for the free movement of

State Regulation of Trade within a Federal or Quasi-Federal System: Protectionism and Balancing, "Da Capo" 99 MichLRev 1853.

⁵⁴² *Cassis de Dijon*, para. 8.

⁵⁴³ *Id.*, para. 14.

⁵⁴⁴ On this, or advocating this view of mutual recognition, Joseph Weiler, 'Mutual Recognition, Functional Equivalence and Harmonization in the Evolution of the European Common Market and the WTO' in Fiorella Kostoris Padoa Schioppa (ed), *The Principle of Mutual Recognition in the European Integration Process* (Palmgrave Macmillan 2005); Kalypso Nicolaïdis, 'Globalization with Human Faces: Managed Mutual Recognition and the Free Movement of Professionals' in Fiorella Kostoris Padoa Schioppa (ed), *The Principle of Mutual Recognition in the European Integration Process* (Palmgrave Macmillan 2005); Markus Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 CML Rev 405, Vassilis Hatzopoulos, 'Le principe de reconnaissance mutuelle dans la prestation des services' [2010] CDE 47.

goods to remove even more national rules as obstacles to free movement. The concept of obstacles had been previously developed in *Dassonville*, which had held that:

'All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered measures having an equivalent effect to quantitative restrictions'.⁵⁴⁵

When articulated with *Dassonville*, *Cassis* could be read in at least two additional ways to a mutual recognition approach: as applying a pure country-of-origin principle, labelling as restrictive any double-regulation regardless of the level of regulation in the home and host-States; or, by focusing exclusively on the *Dassonville* formula, as prohibiting all individual national rules which could have an effect on intra-Union trade, even if non-discriminatory or protectionist, unless they were justified.

While *Cassis* extended the concept of restriction to encompass perfectly reasonable disparities in national laws concerning the marketing of products, together with *Dassonville* it also opened the door to a market economy with no political regulation beyond the political devices of guaranteeing equal opportunity in the market and protecting free competition. This possibility was bound eventually to emerge in the case law, and arguably it raised its head in *Cinéthèque*, a case concerning whether a legal regime establishing a non-commercialisation period between the exploration of a film in movie theatres and in video could create barriers to intra-Union trade in video-cassettes when these were already marketed in other Member States.⁵⁴⁶ AG Slynn argued that the purpose of the free movement of goods was merely to prevent measures protecting domestic products, and that a measure could not be restrictive because it merely reduced the volume of trade, but only if was directed at,

⁵⁴⁵ *Dassonville*, para. 5.

⁵⁴⁶ *Cinéthèque*.

discriminated against, or gave protection to domestic producers against imports – none of which could be said to apply to the measure *sub judice*. The Court ignored the AG, and held that a legal regime establishing a non-commercialisation period between the exploration of a film in movie theatres and in video could create barriers to intra-Union trade in video-cassettes when these were already marketed in other Member States. This case was soon followed by *Commission v France*, where the Court held that a total prohibition on the marketing of both national and foreign products intended to replace milk powder or concentrated milk, and composed of products other than milk, was contrary to the free movement of goods on the sole basis that it applied to imported products, even though it applied to national products alike.⁵⁴⁷ Both these cases took *Cassis* and ran with it, applying a pure version of the country-of-origin principle to the concept of restriction: as long as a product was lawfully marketed in a Member State, preventing it from circulating in another Member State was a restriction to be justified, regardless of there being regulatory equivalence or not.

The decisions in these cases were soon followed by the so-called ‘*Sunday Trading*’ cases, concerning national measures prohibiting the opening of commercial premises on Sundays.⁵⁴⁸ The first of these cases read *Cinétique* as having stated that a marketing prohibition:

*‘applicable to domestic and imported products alike [was] not compatible with the principle of the free movement of goods provided for in the Treaty unless any obstacle to Community trade thereby created did not exceed what was necessary in order to ensure the attainment of the objective in view and unless that objective was justified with regard to Community law.’*⁵⁴⁹

⁵⁴⁷ Case 216/84 *Commission v France* [1988] E.C.R. 793.

⁵⁴⁸ See fn. 494 above.

⁵⁴⁹ *Torfaen*, para. 12.

The Court went on to hold that a prohibition of marketing goods on Sundays was restrictive merely because it might restrict the total volume of sales.⁵⁵⁰ No longer was the main justification for finding non-discriminatory measures to be restrictive based on a country-of-origin principle, but merely on the impact, however slight, that a measure could have on imports, regardless of whether it had the same effect on national products. Since virtually any rule can have an impact on the total volume of trade⁵⁵¹, this equates with an economic due-process clause, meaning a test according to which any rule which can impact on trade, and thus on economic freedom, is subject to judicial review as to whether it is justified.⁵⁵²

This test was not only identified from a descriptive standpoint in the literature⁵⁵³, it was also actively defended by some from a normative standpoint. It was argued that a clear application of the *Dassonville* formula, coupled with proper argumentation and the judicious use of balancing exercises, was an appropriate approach that could provide clear guidance on the precise practical application of the free movement of goods to Member States and national courts alike.⁵⁵⁴ On the other hand, normative arguments

⁵⁵⁰ *Conforama*, para. 8; *Marchandise*, para. 9.

⁵⁵¹ White, 246.

⁵⁵² Since the Court can also apply this test to persons in situations where no economic interest exists – namely in what concerns European citizenship – the concept of economic due-process is restricted to the market freedoms. In a theory encompassing all free movement provisions – economic and non-economic – this would probably be more appropriately called a rule-of-reason, since it would require a general balancing of costs and benefits between differing public values. See Borgmann-Prebil.

⁵⁵³ Even though a number of cases militated against it, inasmuch as they held that national rules fell outside the scope of the free movement of goods in a manner inconsistent with the *Sunday Trading* cases: see *ERT*, Case 155/80 *Oebel* [1981] E.C.R. 1993, Case 75/81 *Blesgen* [1982] E.C.R. 1211, Case 148/85 *Forest* [1986] E.C.R. 3449, *Oosthoek's*, Case C-23/89 *Quietlynn* [1990] E.C.R. I-3059, Case C-69/88 *Krantz* [1990] E.C.R. I-00583.

⁵⁵⁴ See Laurence W. Gormley, "Actually or Potentially, Directly or Indirectly?" Obstacles to the Free Movement of Goods' (1989) 9 YEL 197 and Laurence Gormley, 'Recent case law on the free movement of goods: some hot potatoes' (1990) 27 CML Rev 825, 857; Anthony Arnall, 'What shall we do on a Sunday?' (1991) 16 ELRev 112. See also, slightly differently, Wouter P. J. Wils, 'The search for a rule in Article 30 EEC: much ado about nothing?' (1993) 18 ELRev 475.

against this approach could also be found in the literature. The first such argument was that whereas an economic due-process clause inherently espoused an ordo-liberal perspective, promoting the removal of any unjustified restriction on unfettered competition and free movement, this was not the underlying normative underpinning of the market freedoms.⁵⁵⁵ The question was, as AG Tesauro put it:

Is Article [34] of the Treaty a provision intended to liberalize intra-Community trade or is it intended more generally to encourage the unhindered pursuit of commerce in individual Member States? [...] [The latter option] means that any measure which might potentially reduce the volume of trade, however minimally, would be prima facie, a restriction on the free movement of goods. [...] [In the former option, on the other hand] the purpose of Article [34] [would be] to ensure the free movement of goods in order to establish a single integrated market, eliminating therefore those national measures which in any way create an obstacle to or even mere difficulties for the movement of goods; its purpose is not to strike down the most widely differing measures in order, essentially, to ensure the greatest possible expansion of trade.’⁵⁵⁶

Secondly, findings of restriction require the Court to pursue balancing exercises; and the more situations in which the Court (and national courts) are required to pursue such a balancing, the more they become responsible for defining the appropriate regulatory policy – should there be regulation? If so, who should regulate? What are the substantive limits which any regulation may prescribe? This requires value judgements on broad policy questions, with the implication that economic due-process clauses pose serious questions of judicial legitimacy.⁵⁵⁷ This is compounded by the fact that the proportionality test is unable to produce a single coherent result for each situation, as became clear as different national courts in the same Member State

⁵⁵⁵ On the influence of ordo-liberals at the inception of the European project, Maduro, ‘Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights’, 55-56, Gerber.

⁵⁵⁶ AG Tesauro’s Opinion in Case C-292/92 *Hünernmund* [1993] E.C.R. I-6787, para. 1, 10 and 28. See also AG van Gerven’s Opinion in *Torfaen*.

⁵⁵⁷ Maduro, ‘Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights’, 55- 57; and Maduro, *We, the Court*, 35.

reached contradictory decisions on whether rules prohibiting the opening of stores on Sundays were justified or not, thereby contradicting the arguments that economic due-process clauses could provide clear guidance and legal certainty.⁵⁵⁸ Thirdly, under Article 114 TFEU the concept of obstacles to trade is crucial to the attribution of competence to the Union to legislate in what concerns the internal market; this, plus the concentration of balancing exercises at the Court, gives rise to a centralisation which might be held contrary to the division of powers between different Union bodies and the Member States envisioned by the Treaties.

V. Typological Approaches

The criticisms of the economic due-process test were usually associated with proposals for discrimination-based tests such as the ones reviewed above or, more originally, with related typological tests.⁵⁵⁹ One of these tests, proposed by White and then seemingly followed by some AG⁵⁶⁰, was eventually picked up by the Court in *Keck and Mithouard*. This test built on a distinction implicit in some interpretations of *Cassis* between rules requiring changes to be made to products before they could be marketed in a host-State and discriminatory rules,⁵⁶¹ with the Court distinguishing between rules concerning product requirements – meaning ‘*rules that lay down requirements to be met by [goods coming from other Member States where they are lawfully manufactured and marketed] (such as those relating to designation, form, size, weight, composition,*

⁵⁵⁸ J. Steiner, ‘Drawing the line: uses and abuses of Article 30 EEC’ (1992) 29 CML Rev 749, 755-762.

⁵⁵⁹ Kamiel Mortelmans, ‘Article 30 of the EEC Treaty and legislation relating to market circumstances: time to consider a new definition?’ (1991) 28 CML Rev 115; Steiner, 769-772; Norbert Reich, ‘The “November Revolution” of the European Court of Justice: *Keck*, *Meng* and *Audi* revisited’ (1994) 31 CML Rev 459, 467.

⁵⁶⁰ White, AG van Gerven’s Opinion in *Torfaen*, AG Tesouro’s Opinion in *Hünernmund*.

⁵⁶¹ This reading is typical of discriminatory approaches – see fn. 504. The similarity of tests may have to do with the fact that both Marenco and White were Commission’s Agents with the Court, which might also have something to do with the Court having chosen this particular typological test.

presentation, labelling, packaging)’ which were deemed restrictive regardless being indistinctly applicable to national and foreign products alike –, and rules concerning certain selling arrangements, which did not infringe the rules on free movement of goods unless they discriminated, in law or in fact, between the marketing of domestic and foreign products. In the Court’s view, measures that respect these principles ‘*do not prevent access to the market, nor impede access any more than it impedes the access of domestic products*’.⁵⁶²

Keck was more reform than revolution: the *Dassonville* and *Cassis* tests were perfected in order to increase legal certainty and reduce the Court’s case-load.⁵⁶³ Following AG Tesouro’s lead, the typology adopted was a means of distinguishing between measures which merely reduce the economic attractiveness of pursuing a given activity, and those measures which effectively restricted the free movement rights within the framework of the Treaty. Rather than solving the academic debate, however, *Keck* merely changed its focus. If, on the one hand, *Keck* was said to increase legal certainty, and as having clarified the case law by expressly repudiating ordo-liberal readings of the free movement of goods,⁵⁶⁴ on the other hand it was argued that the *Keck* typology still did not accurately reflect the normative underpinning of the

⁵⁶² *Keck and Mithouard*, para. 15-17.

⁵⁶³ Maduro, ‘Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights’, 58. The Court justified its decision thus, in para. 14:

‘*In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter.*’

⁵⁶⁴ Reich, ‘The "November Revolution" of the European Court of Justice: *Keck*, *Meng* and *Audi* revisited’, 480; Stephen Weatherill, ‘After *Keck*: Some thoughts on how to clarify the clarification’ (1996) 33 CML Rev 885, 886; Barnard, 42; Maduro, *We, the Court*, 83; Snell, *Goods and services in EC law: a study of the relationship between the freedoms*, 78, 98; Bernard, 101.

free movement of goods.⁵⁶⁵ The argument was that a typological test will only be normatively apt if it is able perfectly to marry the nature of national measures to their effect; since the effect of a measure may depend on the particular situation and structure of a specific market while the nature of a measure has to be determined in the abstract, the nature of a measure and its effects may not always correspond. In the case of obstacles to the free movement of goods, an almost infinite range of domestic policies can have an effect on both trade flows and market access; non-tariff barriers have such variety and complexity that they present serious definitional problems.⁵⁶⁶ The nature of a measure, even if it may constitute a good indication as to its effect, does not seem to be able to identify every situation where a given type of measure will have a certain effect. This was apparent in a certain descriptive inability of the *Keck* typology, which was not able to encompass measures which undoubtedly had an effect equivalent to a quantitative restriction but were not easily surmised to be either product requirement or selling arrangements, such as frontier inspections on imported goods⁵⁶⁷ or rules on the exercise of intellectual property rights.⁵⁶⁸

It seemed that any attempt to maintain *Keck*'s formalistic distinction, while ensuring that it fit a normative framework requiring that no genuine obstacle to free movement be left standing, would lead to either an extension of the concept of product

⁵⁶⁵ AG Jacobs' Opinion in *Leclerc-Siplec*; Weatherill, 'After *Keck*: Some thoughts on how to clarify the clarification'; Barnard; Niamh Nic Shuibhne, 'The free movement of goods and Article 28 EC: an evolving framework' (2002) 27 *ELRev* 408; Eeckhout, 'Constitutional Concepts for Free Trade in Services', 216, 225; Schillig, 290; Snell, *Goods and services in EC law: a study of the relationship between the freedoms*, 98-99 and 117.

⁵⁶⁶ Stanley D. Metzger, *Lowering nontariff barriers: U.S. law, practice, and negotiating objectives* (Brookings Institution 1973), 7-8; Robert Howse and Donal Regan, 'The product/process distinction: an illusory basis for disciplining "unilateralism" in trading' 11 *EJIL* 249, 253.

⁵⁶⁷ *Simmenthal*, Case 190/87 *Moormann* [1988] E.C.R. 4689.

⁵⁶⁸ Case 78/70 *Deutsche Grammophon* [1971] E.C.R. 487, Case 15/74 *Centrafarm v Sterling* [1974] E.C.R. 1147, Case 187/80 *Merck v Stephar* [1981] E.C.R. 2063, Joined Cases 55/80 and 57/80 *Musik-Vertrieb* [1981] E.C.R. 147.

requirements to measures which restrict free movement even though they are not product requirements *per se*, to a number of ‘selling arrangements’ being held discriminatory even though that was not really the case, or even to the Court ignoring its own test when it became inconvenient and it could do so without too much ado. It may even lead to all of these combined; and arguably this is exactly what happened. The concept of product requirements was extended beyond its original boundaries, to the point where it includes certain measures that regulate the marketing of a product but have an impact on its actual content or packaging.⁵⁶⁹ Discrimination in what concerns selling arrangements was found in a number of cases where it is extremely controversial that this was actually the case, such as general restrictions on advertising⁵⁷⁰ or requirements of presence in local markets^{571, 572}. And the *Keck* typology was also avoided in a variety of cases where it arguably did not fit the measures under review⁵⁷³, such as rules on inspections of imported products⁵⁷⁴, restrictions on transport,⁵⁷⁵ obligations to collect data for statistics⁵⁷⁶ and State omissions⁵⁷⁷. Finally, in a number of

⁵⁶⁹ Case C-315/92 *Estée Lauder* [1994] E.C.R. I-00317, Case C-470/93 *Mars* [1996] E.C.R. I-1923, Case C-368/95 *Familiapress* [1997] E.C.R. I-3689, and arguably *Alfa Vita Vassilopoulos*.

⁵⁷⁰ *De Agostini, Gourmet International, Case C-239/02 Douwe Egberts* [2004] E.C.R. I-7007.

⁵⁷¹ See *TK-Heimdienst, DocMorris, Commission v Germany*.

⁵⁷² See D Wilsher, 'Does *Keck* Discrimination Make Any Sense?' (2008) 3; this relates to the probabilities for manipulation of discrimination tests mentioned above – see in particular the text between ft. 513 and 525 above.

⁵⁷³ Or where it did fit but nevertheless the Court ignored the typology – Case C-337/95 *Evora* [1997] E.C.R. I-6013; Case C-358/95 *Morellato* [1997] E.C.R. I-1431.

⁵⁷⁴ Case C-105/94 *Ditta A. Celestini* [1997] E.C.R. I-2971.

⁵⁷⁵ Case C-350/97 *Wilfried Monsees* [1999] E.C.R. I-2921.

⁵⁷⁶ Case C-114/96 *Kieffer and Thill* [1997] E.C.R. I-3629.

⁵⁷⁷ *Commission v France*.

cases the focus was on the effects of a measure instead of in trying to apply the *Keck* typology.⁵⁷⁸

VI. Access to market

In their attempts to criticise *Keck* while sustaining its goal of avoiding an economic due-process clause, AG Jacobs and some commentators tried to advance the argument that, instead of adopting a typological approach for its own sake, *Keck* merely used it as a means to distinguish measures restricting market access from those that did not.⁵⁷⁹ But while debates on the *Keck* typology focused on the free movement of goods, market access was first applied autonomously to the free movement of persons. To understand why this was so, it is important to describe the evolution of the latter field, where the Court had originally framed its approach under the banner of discrimination. Nonetheless, such an approach was descriptively inept, at least if one took this to mean a rigorous prohibition of discrimination on grounds of nationality. For example, from very early on, any obligation on a service provider to fulfil all requirements applicable to established persons in the host-State was held effectively to deny the freedom to provide cross-border services. Any such requirement was only justified if the home-State did not have a similar level of control or supervision over the service provider as the host-State required for service providers based therein.⁵⁸⁰ This was similar to the *Cassis* approach, whereby a country-of-origin principle was complemented by mutual recognition, which was recognised in goods not to amount to discrimination but to an

⁵⁷⁸ Case C-189/95 *Franzén* [1997] E.C.R. I-5909, and Case C-323/93 *Crespelle* [1994] E.C.R. I-5077.

⁵⁷⁹ AG Jacobs' Opinion *Leclerc-Siplec*. See, in particular, Weatherill, 'After *Keck*: Some thoughts on how to clarify the clarification'.

⁵⁸⁰ *van Binsbergen, Van Wesemael*, Case 279/80 *Webb* [1981] E.C.R. 3305, *Commission v Germany*, Case C-355/98 *Commission v Belgium* [2000] E.C.R. I-1221.

obstacle-based approach.⁵⁸¹ The Court eventually acknowledged that the free provision of services:

*'require(s) not only the abolition of any discrimination against a person providing services on account of his nationality but also the abolition of any restriction on the freedom to provide services imposed on the ground that the person providing a service is established in a Member State other than the one in which the service is provided. In particular, the Member State cannot make the performance of the services in its territory subject to observance of all the conditions required for establishment; were it to do so the provisions securing freedom to provide services would be deprived of all practical effect.'*⁵⁸²

In *Säger* this was extended into a pure obstacle-based approach similar to that arising out of *Dassonville*, with the Court stating that the free provision of services:

*'requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.'*⁵⁸³

This replacement of discrimination by an obstacle-based approach was mimicked in the fields of workers and establishment. The starting point for this was, again, mutual recognition, this time of professional qualifications. This area was originally regulated by secondary legislation, particularly a number of Directives focusing on: (i) transitional measures, whereby pending mutual recognition of diplomas recognition was granted in certain areas to professionals who had pursued a professional activity for a certain period; (ii) co-ordination of training requirements and professional qualifications, in particular concerning health-related activities; (iii) co-ordination of national requirements, which merely applied to architects; and (iv) the

⁵⁸¹ Hatzopoulos, 'Le principe de reconnaissance mutuelle dans la prestation des services', 73-74.

⁵⁸² *Tourist Guides Greece*, para. 16. See also *Tourist Guides France*, Case C-180/89 *Tourist Guides Italy* [1991] E.C.R. I-00709, Case C-375/92 *Commission v Spain* [1994] E.C.R. I-0923.

⁵⁸³ *Säger*, para. 12.

possibility of pursuing legal activities under a national title in another country.⁵⁸⁴

Finally, in 1985 the Commission submitted a new draft directive ‘on a *general* system of recognition of higher education diplomas’ which added to, but did not replace, the existing sectorial directives on mutual recognition.⁵⁸⁵

Initially, the Court merely applied this secondary legislation without finding that any right to mutual recognition arose directly from Treaty provisions, meaning that to refuse mutual recognition in the absence of secondary legislation was the State’s prerogative.⁵⁸⁶ But eventually the Court reversed its case law and started holding that national requirements concerning professional qualifications might have the effect of restricting the right of establishment or the free movement of workers, even if applied without any discrimination on grounds of nationality.⁵⁸⁷ This was taken to its logical conclusion in *Kraus*, where the Court held that any national measure governing the conditions under which an academic title obtained in another Member State may be used were restrictive:

‘where that measure, even though it is applicable without discrimination on grounds of nationality, is liable to hamper or to render less attractive the exercise by Community nationals, including those of the Member State which enacted the measure, of fundamental freedoms guaranteed by the Treaty.’⁵⁸⁸

⁵⁸⁴ See Rolf Wägenbauer, ‘Free movement in the professions: The new EEC proposal on professional qualifications’ (1986) 23 CML Rev 91, 94-97.

⁵⁸⁵ Council Directive 89/48/EEC [1988] OJ L 19, 16-23 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years’ duration, replaced by Council Directive 92/51/EEC [1992] OJ L 209, 25-45 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC. See also Directive 2005/36/EC [2005] OJ L255/22 on the recognition of professional qualifications.

⁵⁸⁶ Case 136/78 *Auer* [1979] E.C.R. 437, Case 271/82 *Auer II* [1983] E.C.R. 2727, Case C-61/89 *Bouchoucha* [1990] E.C.R. I-3551.

⁵⁸⁷ Case 222/86 *Unectef v Heylens* [1987] E.C.R. 4097, *Vlassopoulou*.

⁵⁸⁸ *Kraus*, para. 32.

At this stage a number of different obstacle-based approaches co-existed: *Dassonville* focused on trade rules capable of hindering inter-State trade; *Säger* on whether a restriction was capable of prohibiting or otherwise impeding the cross-border provision of services; *Kraus* and *Gebhard* on whether a measure could hamper or render less attractive the exercise of the market freedoms. Nonetheless, these formulae were interchangeable in the way they focused on situations or measures that might be liable to hinder or impede the cross-border exercise of the market freedoms. Furthermore, these formulae faced the same problems as material discrimination and economic due-process clauses: like material discrimination, any disparity between national rules can be seen as an impediment to free movement inasmuch as persons or products might face stricter requirements in the host-State than in the home-State, or by requiring the product or person moving to adapt to a new set of legal rules. Like economic due-process clauses, these formulae may also be used to imply that reductions on the volume of economic activities or limitations in the manner whereby such activities can be pursued somehow impede or make less attractive the exercise of the market freedoms to someone, particularly when they are subject to a less onerous regime in their home-State. The question that remains is, once again, how to distinguish between those measures which create obstacles to cross-border economic activity directly and those obstacles that are merely incidental to the normal regulation of economic activity.

This question had been already addressed in what concerns goods by *Keck*'s typological approach. Hidden in this case's reasoning, however, was a justification for why only discriminatory selling arrangements would be restrictive: because they would not '*prevent access to the market or impede access any more than it impedes*

*the access of domestic product.*⁵⁸⁹ Since *Keck* was a development of an obstacle-based approach which occurred precisely as the tests on the free movement of persons were catching up with the original obstacle-based approach for goods, it is not surprising that it was thought by some that the *Keck* typology should apply beyond goods to the other market freedoms. In *Alpine*, a case concerning services decided shortly after *Keck*, it was argued that, unlike what the *Säger* formula implied, rules of the State of establishment prohibiting the practice of ‘cold-calling’ by financial service providers to potential clients in other States, even when such States allowed for ‘cold-calling’, concerned selling arrangements. The Court dismissed this argument by holding that:

*‘A prohibition such as that at issue is imposed by the Member State in which the provider of services is established and affects not only offers made by him to addressees who are established in that State or move there in order to receive services but also offers made to potential recipients in another Member State. It therefore directly affects access to the market in services in the other Member States and is thus capable of hindering intra-Community trade in services.’*⁵⁹⁰

Keck and *Alpine* are the first cases where the expression ‘access to the market’ is used.⁵⁹¹ While it is debatable whether *Alpine* embraced *Keck* or whether it expressly refused to do so, what is undeniable is that, while the Court stuck with the *Keck* typology in goods, it started having recourse to market access in other freedoms. Having first expressly used the test in services, it was soon after applied to workers in *Bosman*.⁵⁹² The relevant point concerned transfer indemnities rules, according to which professional footballers could not transfer to a new club unless they had paid their former club a transfer fee agreed upon between the two clubs or determined in

⁵⁸⁹ *Keck and Mithouard*, para. 17.

⁵⁹⁰ *Alpine*, para. 37-38. This reasoning has also been used to explain why *Keck*’s typological distinction is not applicable to certain analogous measure under the free movement of capital: see Case C-543/08 *Commission v Portugal* [2010] E.C.R. I-11241, para. 67-68.

⁵⁹¹ AG Tesouro’s Opinion in *Hünernund*, particularly para. 25; *Keck and Mithouard*, para. 17.

⁵⁹² *Bosman*.

accordance with the regulations of the relevant sporting associations. AG Lenz admitted that pure obstacle-based approaches could entail a very broad concept of restriction, and observed that the Court had in *Keck* reined in the obstacle test for goods.⁵⁹³ He further noted that:

*'[In Alpine, the Court] considered that the ground for the decision reached in Keck and Mithouard lay in the fact that the provision at issue in that case was not such as to 'prevent' access of foreign products to the market or 'impede such access more than it impedes access by domestic products'. The prohibition at issue in Alpine Investments, by contrast, 'directly affects access to the market in services in the other Member States and is thus capable of hindering intra-Community trade in services'. That reasoning can be applied to the field of [workers]. It must be noted in particular that the transfer rules at issue in the present case directly affect access to the employment market in other Member States.'*⁵⁹⁴

The Court, even though following a different line of reasoning, went on to hold that the relevant rules directly affected players' access to the employment market in other Member States.⁵⁹⁵ In 2003, the Court extended the market access test to the free movement of capital⁵⁹⁶, and in the following year to establishment⁵⁹⁷. Finally, recent decisions in the field of goods point to the express adoption of an access to market test, bringing the case law full circle and establishing market access as the key criterion on its free movement jurisprudence.⁵⁹⁸

What is the meaning of "market access", however? Even though a new arrival to the internal market scene, this concept is an old acquaintance in competition law and

⁵⁹³ See para. 204-205 of the AG's Opinion.

⁵⁹⁴ AG's Opinion, para. 206. See also AG Tizzano's Opinion in *CaixaBank*, para. 73-74.

⁵⁹⁵ *Id.*, para. 103.

⁵⁹⁶ *Commission v UK*, para. 45-47.

⁵⁹⁷ *CaixaBank*.

⁵⁹⁸ *Commission v Italy*, Case C-142/05 *Mickelsson and Roos* [2009] E.C.R. I-04273. See also Shuibhne, 'The free movement of goods and Article 28 EC: an evolving framework', 411; Jukka Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 CML Rev 437, 460.

industrial economic studies on barriers to entry.⁵⁹⁹ The concept corresponds broadly to two different economic views: the first one, associated with Harvard's structure-performance-conduct paradigm, sees as barriers to access any kind of advantage enjoyed by established sellers allowing them to sell above a competitive price without new competitors entering the market. Barriers to entry exist each time the entrant cannot achieve the profit-levels post-entry that the incumbent enjoyed prior to its arrival.⁶⁰⁰ This is a very broad approach, in that unless the market is perfectly competitive virtually any cost or obstacle in accessing a market – such as economies of scale, advertising or capital requirements – constitutes a barrier to entry.⁶⁰¹ If this conception is adopted, any State regulation which can have a negative effect on a credible opportunity for trade is susceptible of being deemed a barrier to entry. The second approach, developed by members of the Chicago School, considers that barriers to entry are only those obstacles of regulatory or other origin that make it costlier for some firms to enter a market than for others. A barrier is merely a cost of producing which must be borne by firms seeking to enter an industry but was not borne by firms already in that industry. If the incumbent faces a number of market constraints in entering the market, the existence of such constraints for newcomers is not deemed a barrier; only if the constraints are higher for the newcomer will a barrier be detected.⁶⁰² Apart from these two main approaches there are a variety of other

⁵⁹⁹ Ioannis Lianos, 'Shifting Narratives in the European Internal Market' (2010) 21 EBLRev 705, 728; Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law', 681-2.

⁶⁰⁰ Joe S. Bain, *Industrial organization* (2nd edn, Wiley 1968), 252; James Milton Ferguson, *Advertising and competition; theory, measurement, fact* (Ballinger Pub. Co 1974), 10.

⁶⁰¹ Harold Demsetz, 'Barriers to Entry' (1982) 72 AmEconRev 47, 47-48.

⁶⁰² George J. Stigler, *The organization of industry* (R.D. Irwin 1968), 67-70.

proposals as to what should constitute a barrier to entry.⁶⁰³ In particular, new institutionalist approaches distinguish between economic barriers and anti-trust barriers. The difference lies in the relevant time dimension: some barriers relevant for antitrust purposes – because they reduce the welfare of consumers relative to a situation where entry would otherwise be possible in the shorter term – are not so from an economic, long-term perspective, where the dominant position will eventually be replaced by a more competitive market. Relevant barriers from an antitrust perspective are not exclusively economic barriers, but also those deemed socially undesirable in the shorter term; as such, the relevance of economic perspectives is of limited use here.⁶⁰⁴

The relevance of competition law conceptions is, however, bound to be limited in identifying obstacles to the market freedoms.⁶⁰⁵ More importantly, there is no indication that the Court had any such approach in mind when it adopted market access as a test. The goal of adopting market access seemed, similarly to *Keck*, to be to limit the scope of the concept of restriction by distinguishing between measures that merely reduce the economic attractiveness of pursuing a given activity, and measures which effectively restrict the free movement rights within the framework of the Treaty.⁶⁰⁶ Even if this implies a rejection of a test based on the Harvard school conception of barrier to entry, it does not in way imply an acceptance of other conceptions.

⁶⁰³ R. Preston McAfee, Hugo M. Mialon and Michael A. Williams, ‘What is a Barrier to Entry?’ (2004) 94 *AmEconRev* 461, 461-463.

⁶⁰⁴ *Id.*, 463-465.

⁶⁰⁵ A different option would be to use market access as it is usually applied by the WTO, but market access here applies only to measures concerning actions on imports which take place at the border, while the test at EU level is an effects-based one. See Snell, ‘The Notion of Market Access: A Concept or a Slogan?’, 439-443.

⁶⁰⁶ Eeckhout, ‘After *Keck and Mithouard*: Free Movement of Goods in the EC, Market Access and Non-Discrimination’, 204.

In light of the lack of normative anchoring other than trying to develop a non-discriminatory alternative to economic due-process, market access has been criticized as being an intuitive approach or a mere slogan.⁶⁰⁷ Like material discrimination, a more sophisticated approach is necessary; until some flesh has been added to its bones, access to market is merely a shell. The risks of this are apparent in market access's drift towards an economic due-process clause, going against its own original normative foundations. This can be seen in a number of cases where it was found that the mere fact that general regulatory restrictions on the pursuit of economic activities existed, that one of various possible ways of competing in the market was prohibited, that local portioning of markets occurred, or even that less onerous regulatory requirements existed elsewhere, all constituted restrictions on market access.⁶⁰⁸ This risk is also particularly evident in the case law on capital concerning the prohibition of golden shares, where restrictions were found on access to the market for corporate control even though the market was defined extremely narrowly – the relevant company –, and where the Court's reasoning was that national provisions creating golden shares are restrictive:

'to the extent to which they create instruments liable to limit the ability of investors to participate in the share capital [in a company] with a view to establishing or maintaining lasting and direct economic links with it which would make possible effective participation in the management or control of that company, reduce the interest in acquiring a stake in that capital [and are thereby restriction inasmuch as] direct investors from other Member States, whether actual or potential, may have been deterred from acquiring a stake in the capital of that company.'⁶⁰⁹

⁶⁰⁷ Spaventa, *Free Movement of Persons in the European Union*, 95-99; Snell, 'The Notion of Market Access: A Concept or a Slogan?'.

⁶⁰⁸ See for workers, Case C-176/96 *Lethonen* [2000] E.C.R. I-2681 and Case C-325/08 *Olympique Lyonnais* [2010] E.C.R. I-02177; for establishment, *CaixaBank*, particularly para. 12-15 and Case C-134/05 *Commission v Italy* [2007] E.C.R. I-6251, Case C-389/05 *Commission v France* [2008] E.C.R. I-5337, Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes* [2009] E.C.R. I-04171 Case C-384/08 *Attanasio* [2010] E.C.R. I-02055; for services, Joined Cases C-94/04 and C-202/04 *Cipolla* [2006] E.C.R. I-2107; for goods, see Case C-108/09 *Ker-Optika* [2010] E.C.R. I-12213. See for a cogent analysis Eleanor Spaventa, 'Caixa-Bank Case Note' (2005) 42 CML Rev 1151, 1156-1161

⁶⁰⁹ *Commission v Portugal*, para. 67 (the emphasis is my own).

The underlying *rationale* for this is, for all purposes, undistinguishable from an economic due-process clause.⁶¹⁰

The main problem with differentiating between a purely deregulatory exercise and the removal of obstacles to the internal market is that measures reducing the economic attractiveness of pursuing a given activity will have a detrimental effect on the pursuit of cross-border activities in that field. This distinction of itself is not sufficient; a more sophisticated approach is still required. AG Jacobs, when first proposing market access, proposed a *de minimis* approach except in what concerns direct discrimination, with any measure which substantially restricts market access being deemed an obstacle to free movement. The idea of substantially affecting market access, in any event, was not adopted as the Court has always refused to apply a *de minimis* test; instead, the Court resorted to the concept of ‘directly’ affecting access to the market⁶¹¹, perhaps as a counterpoint to the ‘too uncertain and indirect’ doctrine.⁶¹² But in the absence of a properly structured normative underpinning, the consequences of this approach to market access are similar to material discrimination: it leads to all those measures constraining market behaviour and limiting free competition, regardless of whether they pose obstacles to the cross-border exercise of the market freedoms,

⁶¹⁰ Similarly, Snell, ‘The Notion of Market Access: A Concept or a Slogan?’, 463. See also *Commission v Portugal*, para. 71. On cases concerning general rules on shareholding limits in certain sectors, see *Idrma Tipou*, particularly para. 59, according to which a restriction exists concerning an indistinctly applicable measure setting shareholding limits for companies holding licences to found, establish and operate a television station because foreign companies ‘*know less about the realities of media life in Greece and are not necessarily acquainted with the various groups or alliances represented amongst the shareholders of [such] a company.*’

⁶¹¹ Opinion in *Leclerc-Siplec*, para. 39-40. See *Alpine*, para. 38; *Bosman*, para. 103; and AG Tizzano’s Opinion in *CaixaBank*, para. 62-66.

⁶¹² Which was first applied as a limit to market access in Case C-190/98 *Graf* [2000] E.C.R. I-493.

being deemed *prima facie* restrictive. It leads, in other words, back into an economic due-process clause.

Chapter VI

Unpacking the Normative Foundations of Judicial Concepts of Restriction

Abstract: *This chapter argues that the reason why the main judicial formulae used to identify restrictions to the market freedoms are so unsatisfactory is because they incompletely reflect normative debates concerning the ideal levels of centralization, harmonisation and regulation in the EU's internal market. It will be further argued that one reason for this is that judicial tests do not precisely correspond to normative theories, but are instead able carry a variety of possibly conflicting normative concerns. In particular, it will be submitted that tests concerning the concept of restriction reflect visions of negative integration that are only incompletely related to more complete models of European integration.*

I. Introduction

The previous chapter identified a variety of different tests that have been both adopted by the Court and proposed and defended in the literature. There is seemingly a consensus that the concept of restriction reflects concerns with the creation of the internal market, and is to be contained within two boundaries: first, it is not disputed that the market freedoms are supposed to prevent protectionist measures (*minimum content*); and, secondly, it is accepted that the market freedoms do not reflect a deregulatory agenda according to which any national measure can be subject to review as to its rationality (*maximum content*). What the normative underpinnings of the concept of restriction are in between these extremes is not clear; and this vagueness of the concept of restriction seems to correspond to a lack of specification of the normative underpinnings of the market freedoms themselves. Being instrumental to the creation of a European internal market, the market freedoms nonetheless do not specify how market integration is to proceed or what kind of integrated European market is envisioned.

The main argument of what follows is that the options for a specific test relate to normative debates about the ideal levels of centralization, harmonisation and regulation in the internal market, but that these debates tend to be both insular in relation to each other and overlook the relative roles that negative and positive integration should play

in European integration.⁶¹³ These debates fail to note that judicial tests do not precisely correspond to normative theories but are instead able carry a variety of normative concerns which may not always be compatible. This chapter will begin by reviewing the implications of adopting certain tests before moving into the analysis of the normative ideas which can be said to underlie each test. This analysis will reveal that each test can be underpinned by a variety of autonomous normative positions. It will be further argued that most discussions about the concept of restriction not only ignore this normative polysemy of judicial tests, but also tend to also to overlook the existence of different normative debates and to focus on negative integration to the detriment of more integrated models of European integration.

II. What Do the Market Freedoms Do?

What is the impact of adopting a specific test to determine whether a national measure restricts a market freedom? As we have already seen, such tests identify the national measures that will be subjected to a proportionality assessment by courts to establish whether they are justified. But behind this apparently simple consequence one can discern a variety other implications for State autonomy, for the EU's competence to legislate and for the level and kind of regulation left in the marketplace. It is to these implications, and to their usual understanding in the literature, that this section is devoted. A framework will be developed that incorporates both these implications and the relevant literature, starting with a description of what the consequences are usually understood to be from a static perspective, and then reviewing the implications of adopting a more complex dynamic model.

⁶¹³A question which any trade system must face – see Weiler, 'Mutual Recognition, Functional Equivalence and Harmonization in the Evolution of the European Common Market and the WTO', 25; Perisin, *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and WTO*, 9.

a. Static Perspectives

Through the market freedoms, a large number of State actions become subject to review by the Court. This review can occur regardless of whether those national measures fall within the scope of Union legislative competences. When the Court decides that a national rule falls within the scope of the market freedoms it makes an institutional choice: it takes ultimate control away from the ordinary national legislative process and subjects these rules to the jurisdiction of the courts.⁶¹⁴ Even if a *prima facie* restrictive measure is deemed justified, the Court will have the ultimate say about its validity, thereby centralising the ultimate decision-making power at the EU level regardless of whether those measures fall within the scope of Union legislative competences.⁶¹⁵ This has consequences at what will be called the horizontal level, concerning the level of regulatory options left to Member States in non-harmonized areas and to the Union in harmonized ones, and the vertical level, concerning the division of regulatory competences between the Union and its Member States.

Horizontally, the market freedoms set substantive limits to the exercise of legislative powers at both the national and EU levels.⁶¹⁶ At the national level, when a measure is caught within the scope of the market freedoms the ultimate decision as to its legitimacy falls to the Court which may, by means of a proportionality test, determine whether the manner in which a State protects its public interests is acceptable. Further to this, in certain cases – namely concerning justifications not provided for by the Treaties – the Court may even determine what public interests a State can legitimately pursue. The

⁶¹⁴ Gregory Shaffer, 'A Structural Theory of WTO Dispute Settlement: Why Institutional Choice Lies at the Centre of the GMO Case' (2008) 41 JILP 1, 4.

⁶¹⁵ See, just as an example, Case C-438/05 *Viking* [2007] E.C.R. I-10779, para. 40 and the case law referred to therein.

⁶¹⁶ Schillig, 296-297.

result is that a Member State loses part of its autonomy to legislate; and Member States other than the State subject to the Court's decision but with similar measures in place will find themselves under the 'shadow of the law', and under pressure to amend out-of-step rules in accordance with the Court's case law.⁶¹⁷ Similarly, EU legislation can be assessed as to its conformity with the substantive orientation of the market freedoms, even if this has only seldom occurred.⁶¹⁸

At the vertical level, the market freedoms not only centralise ultimate decision-making powers in the Court but are also instrumental in granting competences to the Union: the broader the concept of restriction used, the larger the number of rules susceptible of being deemed contrary to EU law, or of being harmonized under Articles 114 to 118 TFEU.⁶¹⁹ Nonetheless, it should be noted that deciding that a national rule falls within the scope of the market freedoms does not *per se* lead to the replacement of national measures for EU measures, nor does the adoption of Union measures depend only on the finding that national measures present forbidden obstacles to economic free movement.⁶²⁰ Article 114 TFEU is obviously not the only positive competence rule in the Treaty – since the Union has a variety of legislative competences which are not related to the market freedoms, or even to the internal market –, but it is very relevant in

⁶¹⁷ Sweet and Caporaso, 'From Free Trade to Supranational Polity: European Court and Integration', 128

⁶¹⁸ And even more seldom invalidated: see Joined Cases 80 and 81/77 *Commissionnaires Réunis v Receveur des douanes* [1978] E.C.R. 927, para. 35; Case 41/84 *Pinna* [1986] E.C.R. 1; Case 20/85 *Roviello* [1988] E.C.R. 2805; Piet Eeckhout, 'The European Court of Law and the Legislature' (1998) 18 YEL 1, 12-14. Nonetheless, Union legislation can be indirectly reviewed by the Court assessing whether a national measure compliant with Union legislation still infringes the fundamental Treaty provisions: see Case C-208/07 *Chamier-Glisczinski* [2009] E.C.R. I-06095, para. 66 and other cases quoted there.

⁶¹⁹ Matej Avbelj, 'European Court of Justice and the Question of Value Choices' [2004] Jean Monnet Working Paper 06/04, 19. Evidence that litigation and negative integration led to an increase in EU legislation – presumably to replace regulatory holes left in the Member States by the negative integration that preceded it – has been empirically observed. See Sweet and Fligstein, 'Institutionalizing the Treaty of Rome', 45-46, 51-53.

⁶²⁰ Loïc Azoulai, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization' (2008) 45 CML Rev 1335, 1341.

that it has within its scope not only to re-regulate at the European level what the market freedoms deregulated but also to remove obstacles to trade that cannot be said to fall under the remit of the market freedoms at all, such as those arising from non-restrictive discrepancies between national laws.⁶²¹ And even if there were a perfect correspondence between the provisions on negative and positive integration, this would not automatically lead to legislative harmonization. The Commission would still be required to muster the political will to prepare the necessary proposals, accompanied by the assembly of adequate political support among the Member States and in the European Parliament. Moreover, compliance with the constitutional constraints set by Art. 5 TEU further requires that a harmonizing measure must respect both proportionality and subsidiarity. The impact of the scope of the market freedoms on Union competences and any recourse to Article 114 TFEU must be distinguished, even if the Union's legislative competence is triggered each time a measure is deemed restrictive.⁶²² This means that the scope of the market freedoms is instrumental to the vertical allocation of competences in that a finding of a national measure being restrictive is a sufficient, but not necessary, trigger for harmonization. Whatever the similarities between the scope of the market freedoms (i.e., centralization) and the extension of Union competences under Article 114 TFEU (i.e., harmonization) – to a degree, similarities between centralisation and harmonisation in the internal market – seem to be the result of both the absence of *ex ante* restraint by Member States and EU institutions in adopting harmonised rules,

⁶²¹ Gareth Davies, 'Can selling arrangements be harmonised?' (2005) 30 ELRev 370, 375-378. This is also apparent from Case C-380/03 *Tobacco Advertising II* [2006] E.C.R. I-11573, para. 80.

⁶²² Which is a further reason for there being no equivalence between a test where a market freedom would have a vast scope and be subject to light review at the justification stage, and a test imposing a stricter scope for the market freedoms but applying a stricter review at justification stage, even when the final decision of the cases would be the same.

and of the Court's timid approach *ex post* to reviewing Union legislation under the principles of proportionality and subsidiarity.⁶²³

In short, when determining the scope of the market freedoms and what the legitimate justifications to their restriction are, the Court's decisions have implications of two types. From a vertical perspective, the market freedoms act as positive competence rules, with the Court being instrumental to the allocation of competences between the Union and the Member States. From a horizontal perspective, the market freedoms operate as negative competence rules: what matters is not the allocation of competences within the EU and the States but the scope of EU law itself, and here the Court's role looms even larger as it becomes the ultimate decider of what regulatory options are available within the Union. From this interplay of vertical and horizontal outcomes arises the functional consequence that the market freedoms have inherently deregulatory effects, since the Court can only strike down legislative measures but cannot legislate itself – in other words, the greater the degree of centralization in the Court (via the free movement rules), the greater the prospect of deregulation of national markets becomes. On the other hand, the market freedoms also open the possibility of the EU political process stepping in, so that the prospect of re-regulation at EU level also increases, subject to the assembly of the required support among the EU's law-making institutions. This re-regulation, however, will be different from national regulation, inasmuch as the participants in the regulatory process are more numerous

⁶²³ Stephen Weatherill, 'Better competence monitoring' (2005) 30 *ELRev* 23, 25-28; Perisin, *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and WTO*, 91-108. See Case C-376/98 *Tobacco Advertising I* [2000] ECR I-8419, *British American Tobacco*, Case C-210/03 *Swedish Match* [2004] E.C.R. I-11893, *Tobacco Advertising II*.

and diverse by including previous market outsiders, leading to a potential change in both regulatory goals and methods.⁶²⁴

b. A Dynamic Perspective

A recent contribution to our understanding of the impact of the market freedoms has arisen from the teachings of US federalism on ‘regulatory competition’.⁶²⁵ What this adds to a static analysis is the insight that the impact of the market freedoms can be understood from a dynamic perspective by taking into account the existence of the internal market itself, and the possibility of free movement of economic agents between jurisdictions. Regulatory competition depends on federal or quasi-federal entities creating and enforcing exit and entry rights for products and production factors without interfering with the regulatory autonomy of States, so that local regulators are able to react to competition in the market for legal rules. In the EU, the market freedoms create the conditions for the existence of regulatory competition, namely by making available comparative information, and by creating the ability for economic agents to both exert voice and exit within different jurisdictions. This allows consumers to show their preferences in products and services (*voting with their purses*), businesses to relocate to more favourable environments (*voting with their feet*), and for private agents to vote or lobby their public authorities for different rules (*voice*). In turn, this forces different rule-making entities to compete in the market for legal rules, which may theoretically

⁶²⁴ National deregulation might paradoxically lead to greater levels of formal regulation, since laws and regulatory processes tend to become more formal, transparent, and legalistic, replacing more informal mechanisms as the social distance and distrust between regulators and regulated actors in liberalized markets increases. See on this Kelemen, *Eurolegalism: the transformation of law and regulation in the European Union*, 23.

⁶²⁵ A theory originating in the US from C. Tiebout, ‘A Pure Theory of Local Expenditures’ (1956) 64 *Journal of Political Economy* 416.

lead to a convergence of standards.⁶²⁶ Some argue that this convergence results in a race-to-the-bottom in regulation—effectively, deregulation—while others contend that it leads to optimal levels of regulation.⁶²⁷

The dynamic perspective adds to the static perspective in a variety of ways. It points to the fact that the market freedoms change the incentives of market and political agents within Member States, and thus affect State autonomy in ways unforeseen from a static perspective. It demonstrates that a dynamic process of regulatory competition may lead to the creation of common rules throughout the internal market which do not come top-down from European institutions, but arise instead bottom-up as a result of competitive pressures in the market for legal rules that lead to (a different kind of) harmonization of national rules. Additionally, it focuses on the fact that, even if the adopted tests seek, to protect existing levels of regulation put in place by States, deregulation may still emerge as a consequence of economic agents searching for the less onerous regulatory regime.

⁶²⁶ Jeanne-Mey Sun and Jacques Pelkmans, 'Regulatory Competition in the Single Market' (1995) 33 *JCMS* 67, 69-77; Catherine Barnard and Simon Deakin, 'Market Access and Regulatory Competition' (New York) Jean Monnet Working Paper 9/01, 2-4. On the origin of these concepts, see Albert O. Hirschman, *Exit, voice, and loyalty: responses to decline in firms, organizations, and states* (Harvard University Press 1970).

⁶²⁷ This is an empirically debatable question, particularly in the EU context. See, for example, Scharpf, *Governing in Europe: effective and democratic?*, 86-101; Catherine Barnard, 'Social dumping and the race to the bottom: some lessons for the European Union from Delaware?' (2000) 25 *ELRev* 57.

III. What Ought the Market Freedoms To Be Doing?

The above review of the practical implications of the market freedoms allows us to map out three different ways to approach them from a normative perspective—concerning, respectively, the desirability of centralization, deregulation and harmonization.

First, one can focus on the impact of the market freedoms on centralization of powers at EU level and on State autonomy. From this perspective, normative positions vary in a continuum between defending extreme centralization of powers in EU bodies, and particularly the Court – proponents of which will usually favour a broad approach – , and arguing for decentralization and the maximization of State autonomy – which will usually lean towards a narrow test.⁶²⁸ Secondly, one can look into the deregulatory effects of the market freedoms, with the normative positions varying from defending the market freedoms as neo-liberal tools protecting the unencumbered pursuit of economic activity by eliminating unjustified rules at the national level, which would point towards a very broad test, or seeing them merely as a means to remove obstacles to inter-State trade and protectionist measures that are otherwise economically agnostic, a position traditionally associated with a narrower test.⁶²⁹ In light of *Keck*, the deregulation v. economic agnosticism debate appears to have been replaced in the literature by discussions concerning the balancing of the virtues of regulatory competition when compared to harmonisation. One side of the argument is that regulatory pluralism is more desirable because centralised rules are more distant from the regulated entities,

⁶²⁸ It should be noted that this perspective also overlaps with debates on the value of judicial review as opposed to legislative autonomy. I thank Damian Chalmers for his comments on this point.

⁶²⁹ On broad tests leading to deregulation, see critically Spaventa, *Free Movement of Persons in the European Union*. On the debate, see Wolf Sauter and Harm Schepel, *State and market in European Union law: the public and private spheres of the internal market before the EU courts* (Cambridge University Press 2009), 4-15.

tend to reduce opportunities for meaningful political participation, are more subject to capture by particular groups, imply severe procedural costs inherent to implementing common rules in large, heterogeneous spaces, and pre-empt regulatory competition in the areas in which they are adopted.⁶³⁰ Regulatory pluralism is said not only to allow the content of rules to be matched more effectively to the preferences of citizens by taking into account local specificities, but also to promote diversity and innovation in legal solutions, the flow of information on effective law-making, and competition between legal orders.⁶³¹ Against this, and in favour of harmonization, it is argued that regulatory competition can be sub-optimal, not only because of the risks of a race-to-the-bottom and deregulation, but also because it can lead to market failures being left unattended.⁶³² Furthermore, since governments regulate a number of economic activities not handled satisfactorily by competitive markets in the first place, it has been argued that regulatory competition may lead to the re-emergence of market failures which were previously solved by corrective national regulation.⁶³³ It is also argued that harmonization is useful as a means of reducing transaction costs, and better placed to deal with natural monopolies, systemic risks, and regulatory drift.⁶³⁴

⁶³⁰ Majone, *Dilemmas of European integration*, 145; Snell, *Goods and services in EC law: a study of the relationship between the freedoms*, 38-40.

⁶³¹ Although some authors have pointed to discrepancies between economic models and empirical results: see Sun and Pelkmans, 83-85.

⁶³² These can traditionally be distinguished between externalities, market power and asymmetric information. See John Kay and John Vickers, 'Regulatory Reform: An appraisal' in Giandomenico Majone (ed), *Deregulation or Re-regulation* (Pinter 1990), 225-230; Cass R. Sunstein, *After the rights revolution: reconceiving the regulatory state* (Harvard University Press 1990), 47-73; A. I. Ogas, *Regulation: legal form and economic theory* (Hart 2004), 30-46; Andrew Johnston and Phil Syrpis, 'Regulatory competition in European company law after *Cartesio*' (2009) 34 *ELRev* 378, 392; Kalypso Nicolaïdis, 'Mutual Recognition of Regulatory Regimes' Jean Monnet Working Papers, 11-12.

⁶³³ Hans-Werner Sinn, 'The selection principle and market failure in systems competition' (1997) 66 *JPE* 247.

⁶³⁴ Simon Deakin, 'Legal Diversity and Regulatory Competition: Which Model for Europe?' (2006) 12 *ELJ* 440, 441-443; Neil Fligstein and Alec Stone Sweet, 'Constructing Politics and Markets: An Institutional Account of European Integration' (2002) 107 *AmJSoc* 1206, 1312.

One can thereby, for heuristic purposes, develop a taxonomy of the mainstream debates on the scope of the market freedoms as concerning themselves with the balancing of centralization v. decentralisation, deregulation v. economic agnosticism and harmonization v. regulatory pluralism.

IV. Towards a Contextualised Perspective

This section will begin with a critical review of the static and dynamic models presented above, following which it will attempt to deconstruct how the different normative models of European integration interact with the judicial formulae developed to identify national measures that restrict free movement.

a. Refining Our Understanding of the Impact of the Market Freedoms

The above analysis of the impact of the market freedoms offers important insights. In particular, the static perspective allows us to understand that choices concerning the concept of restriction will be relevant in determining the level of centralization of powers at EU level, and the deregulatory impact of the market freedoms in national markets. The dynamic perspective, in turn, points to the impact of the market freedoms in the development of common European standards, and illustrates the choice parameters between harmonization and regulatory competition.

Nonetheless, these perspectives seem to be somewhat lacking. From a static perspective, we have seen above that the market freedoms may be seen as deregulatory because the Court can strike down but not create regulations *ex-novo*; on the other hand the market freedoms may also be looked at as favouring harmonized regulation, whereby they effectively become re-regulatory instruments. If there are good reasons behind arguments for the market freedoms being both deregulatory and re-regulatory devices, the prevailing element seems to be the result of specific institutional realities.

When the Court replaces the parameters of acceptability of a certain regulatory scheme, this will have a deregulatory effect if the different options for re-regulation – at both national and EU level – are blocked, as commonly occurred prior to the adoption of the Single European Act. If this is not the case, and the re-regulatory channels are open, a *prima facie* deregulatory decision may well have preponderantly re-regulatory effects.

What is more, a closer look at the ways in which the market freedoms operate demonstrates that the market freedoms need not be deregulatory at all, even if the channels for re-regulation are closed. It was in a context where the mechanisms of re-regulation were foreclosed that the Court first developed a tool for changing the criteria for acceptability of regulation in Member States without deregulating national markets – mutual recognition. This concept, as seen in the previous Chapter, was first adopted in *Cassis de Dijon*, a case concerning a prohibition on importing liqueur from France into Germany on the grounds that it had an alcoholic content inferior to the minimum allowed for the marketing of alcoholic beverages in Germany.⁶³⁵ The Court held that disparities between national laws concerning the marketing of products were contrary to the free movement of goods because they could hinder trade between Member States, and that the host-State should recognise different marketing rules set by the home-State unless its own rules were justified. This was later seen as extending the concept of restriction to encompass disparities in national laws concerning product requirements, a vast expansion on the scope of that concept as understood until then. As we have also seen, this eventually led to an economic due-process clause. Mutual recognition, however, does not lead so much to deregulation as to the transfer of regulatory authority from one jurisdiction to another. In doing this, *Cassis* picked up a lead from the EU legislature, which, in adopting Commission Directive 70/50/EEC of 22 December 1969,

⁶³⁵ *Cassis de Dijon*.

imposed on Member States an obligation to take all necessary steps to abolish not only distinctly applicable measures hindering imports, but also: *'measures governing the marketing of products which deal, in particular, with shape, size, weight, composition, presentation, identification or putting up and which are equally applicable to domestic and imported products'*.⁶³⁶ *Cassis de Dijon*'s reference to disparities between national laws on the marketing of products can be related to the types of rules listed in Directive 70/50/EEC. Even if the Court did not refer to it expressly in its decision, the Commission's interpretation of this case was that:

*'a Member State may not in principle prohibit the sale in its territory of a product lawfully produced and marketed in another Member State even if the product is produced according to technical or quality requirements which differ from those imposed on its domestic products. [...] [This refers in particular to] rules covering the composition, designation, presentation and packaging of products as well as rules requiring compliance with certain technical standards.'*⁶³⁷

It was in light of this that *Cassis* was interpreted as having adopted mutual recognition, focusing on home-country rule while recognising the legitimacy of different, but equivalent, rules on technical standards in different Member States. Mutual recognition thus meant that an economic agent was only subject to the rules on technical standards of its home-State in any host-State, and was thereby freed from the onus of complying with two or more sets of rules; and can be thought of as a contract between governments mandating the transfer of regulatory authority from one jurisdiction to another. As stated by Nicolaïdis:

⁶³⁶ Commission Directive 70/50/EEC [1969] OJ L 13 on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty, Art. 3.

⁶³⁷ Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 (*Cassis de Dijon*) [1980]. It has been remarked that the Commission fished around for a case of this sort and worked closely with the plaintiffs to bring it forward: see Kalipso Nicolaïdis, 'Kir Forever? The Journey of a Political Scientist in the Landscape of Mutual Recognition' in Miguel Poiaras Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing), 449.

*‘If a professional can operate, a product be sold or a service provided lawfully in one jurisdiction, they can operate, be sold or provided in any other participating jurisdiction, without having to comply with the regulations of those other jurisdictions. The “recognition” involved here is the “equivalence”, “compatibility” or at least “acceptability” of the counterpart’s regulatory system; the “mutual” part indicates that the reallocation of authority is reciprocal and simultaneous.’*⁶³⁸

Underlying this is the idea that if the standards of different Member States are functionally equivalent, there is no good reason to exclude products coming from another State. By mandating that standards of a home-State be accepted as functionally equivalent to those of a host-State, the Court replaced the deregulatory effects of the freedoms with the imposition of a different regulatory standard.⁶³⁹ Since different Member States can have different degrees of protection of public interests, the determination of the level at which equivalence occurs is a pre-requisite for mutual recognition to occur, with this determination requiring the Court to balance how much the regulatory autonomy of the Member State must be sacrificed for the sake of the functioning of the internal market.⁶⁴⁰ This effectively substitutes a European value assessment for the national one, and imposes the Court’s evaluation of what level of protection is sufficient. In some situations the Court will follow secondary legislation in establishing the equivalence level, such as in *Cassis*, or as in the case law on alternative labelling policy.⁶⁴¹ In other situations, however, there may be no such support, but since

⁶³⁸ Nicolaïdis, ‘Globalization with Human Faces: Managed Mutual Recognition and the Free Movement of Professionals’, 133.

⁶³⁹ Nicolaïdis, ‘Mutual Recognition of Regulatory Regimes’, 2-14. This may, occasionally, lead to harmonization through regulatory competition – see Miguel Poiars Maduro, ‘So close and yet so far: the paradoxes of mutual recognition’ (2007) 14 JEPP 814.

⁶⁴⁰ Nicolaïdis, ‘Globalization with Human Faces: Managed Mutual Recognition and the Free Movement of Professionals’, 144-146; Möstl, 411.

⁶⁴¹ Where the Court had recourse to secondary legislation when striking down national law imposing certain product requirements by considering that labelling information on product characteristics would provide an equivalent level of protection – see Council Directive 79/112/EEC [1978] OJ L33/01 relating to the labelling, presentation and advertisement for foodstuffs for sale to the ultimate consumer, and Case 130/80 *Kelderman* [1981] E.C.R. 527, *Commission v France*, and Case 76/86 *Commission v Germany* [1989] E.C.R. 121. See other examples in Maduro, *We, the Court*, 72-74.

mutual recognition does not allow Member States to maintain different levels of protection, the Court must nonetheless adopt a minimum level at which equivalence is ascertained, which will usually become the maximum European standard. It is in light of this assessment that the Court determines whether the regulatory objectives in the origin and destination countries are 'equivalent': when a State's requirements go beyond the 'European' maximum standard, no derogation can be successfully invoked.⁶⁴² From this perspective, the whole 'imperative requirements' doctrines should be read as ensuring that mutual recognition is politically and sociably acceptable by maintaining the assessment of the equivalence of different regulatory regimes within reasonable limits.⁶⁴³ Mutual recognition still implies a loss of regulatory autonomy for the Member State, by delinking the exercise of sovereign power from its territorial anchor through a reciprocal allocation of jurisdictional authority to prescribe and enforce laws.⁶⁴⁴ But it is a middle way, less intrusive than outright deregulation or harmonization, which gives the lie to models arguing that the market freedoms lead to either Court-mandated deregulation of national markets or to increased legislative harmonization.

The dynamic model is more sophisticated in that it takes into account the existence of a federal or quasi-federal system as a relevant consideration in attempting to identify the effects unleashed by the market freedoms. Still, it is arguably insufficiently contextualised, taking as it does as a given the existence of an ideal

⁶⁴² Jacques Pelkmans, 'Mutual recognition in goods. On promises and disillusion' (2007) 14 JEPP, 702.

⁶⁴³ Nicolas Bernard, 'La Libre Circulation sous l'angle de la compétence' [1998] CDE 11.

⁶⁴⁴ Kenneth Armstrong, 'Mutual Recognition' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market* (Hart Publishing 2001), 332; Möstl, 407; Kalypso Nicolaidis, 'Trusting the Poles? Constructing Europe through mutual recognition' (2007) 14 JEPP 682, 691.

federal system without looking into the specific characteristics of the EU.⁶⁴⁵ After all, any complex market system – including markets for laws – effectively requires the establishment of a system of rules that ensures at least a minimum degree of order and security allowing for the enforcement of market arrangements. Rules promote and facilitate certain kinds of exchange, but may also raise costs or prevent other kinds of exchange.⁶⁴⁶ As Deakin has stated:

*‘All markets rest on institutional foundations. These ‘rules of the game’ are not solely concerned with protecting existing markets, by enforcing contracts and penalising collusion. At a more basic level, they constitute markets by defining the elements of exchange, and in so doing inevitably frame the process of competition. The market for laws is no different.’*⁶⁴⁷

In particular, ‘pure’ regulatory competition requires that all relevant products and production factors be equally mobile and able to move – or at least be able credibly to threaten to move – to a State which better meets their preferences, and that market failures be dealt with aptly.⁶⁴⁸ This ideal framework does not actually occur in practice: since the ideal parameters are almost never met, they cannot be assumed but must be assessed in each particular case.⁶⁴⁹ An abstract model of regulatory competition is a heuristically useful device, but it will necessarily fail to identify some relevant

⁶⁴⁵ Arguing that this theory in its purest version is too abstract even for the US reality, see Simon Deakin, ‘Reflexive Governance and European Company Law’ (2009) 15 ELJ 224, 231.

⁶⁴⁶ North, *Institutions, institutional change and economic performance*, 47. In effect, most systems require much more than this: see Ogus, *Regulation*, 3, 16-28. On the other hand, in an ideal neoclassical world without information costs rules would be largely irrelevant, as *per* the Coase Theorem.

⁶⁴⁷ Deakin, ‘Legal Diversity and Regulatory Competition: Which Model for Europe?’, 440. See also Fligstein, ‘Markets as Politics’, 658. A more expressive illustration was provided by Bertrand Russell, *History of Western Philosophy* (Routledge 2004), 704, when stating: “‘Free competition’, in orthodox economics, is a very artificial conception, hedged in by legal restraints. You may undersell a competitor, but not kill him.’

⁶⁴⁸ Deakin, ‘Legal Diversity and Regulatory Competition: Which Model for Europe?’, 442, points out that Tiebout’s work was an application of theories of general equilibrium typical at the time, where ideal conditions were assumed and institutional considerations ignored.

⁶⁴⁹ Joel Trachtman, ‘Regulatory competition and regulatory jurisdiction’ (2000) 3 JIEL 331,332. On particular rules defining and limiting regulatory competition in the EU, see, for example, Maduro, *We, the Court*, 133-135.

characteristics of the applicable institutional framework. For example, it is generally accepted that labour is far less mobile than capital in the EU, which would seem to indicate that centralised action might be required in this field as the ideal requirements for the proper functioning of the market for rules on the free movement of workers are not met.⁶⁵⁰ Also, traditional regulatory competition debates focus on whether decentralisation, which ensures regulatory heterogeneity and protects local peculiarities, is preferable to centralization through judicial or legislative balancing. But in the EU, should a market failure (re-)emerge as a result of regulatory competition, it could be dealt with not only through harmonization but also by ensuring that national standards of protection are equivalent through mutual recognition – which not only created the conditions for wider regulatory competition in the EU⁶⁵¹, but also set forth mechanisms to prevent the re-emergence of most of the market failures that the national measures were dealing with in the first place.⁶⁵²

b. Contextualising Normative Debates

In addition to the limitations identified above, it is also worth noting that debates about the ideal form of negative integration are part of wider debates about the general goals and ideal models of European integration that contain elements of both negative and positive integration. Thus, to understand debates on negative integration one must also understand those general models of European integration to which they are related. For simplification and exposition purposes, we can adopt a taxonomy of different models of integration found in the literature identifying a centralised constitutional

⁶⁵⁰ Johnston and Syrpis, 392.

⁶⁵¹ Deakin, 'Legal Diversity and Regulatory Competition: Which Model for Europe?', 452.

⁶⁵² Jacques Pelkmans, 'Mutual Recognition in Goods and Services: An Economic Perspective' in Fiorella Kostoris Padoa Schioppa (ed), *The Principle of Mutual Recognition in the European Integration Process* (Palmgrave Macmillan 2005), 92, 115.

model, a competitive constitutional model, and a decentralised constitutional model.⁶⁵³

These overarching heuristic models deal with modes of both positive and negative integration. When dealing with the latter, they tend to be connected to a specific understanding of what the concept of restriction should be and what it should achieve.

The centralised constitutional model advocates the creation of mechanisms for the peaceful resolution of disputes, and the adoption of harmonised rules, as a way to foment political and economic stability, and to defuse horizontal friction between Member States. Proponents of this model will tend to side with broad tests leading to the ultimate decision as to the legitimacy of an increased number of national laws resting with the EU, and particularly with the Court, and to an expansion of the areas where harmonisation is possible. The decentralised constitutional model favours the maintenance of Member States' autonomy, arguing that this would be the best approach to co-ordinate national regulatory systems by allowing for regulatory pluralism, for the Court to be economically agnostic, and for a focus on ensuring that products from other Member States are able to compete on truly equal terms with domestic products. This model points towards a decentralised system where Member State competence is preserved and the quest for regulatory uniformity through the European courts and institutions is abandoned, thus siding with a narrow test on the grounds that it would prevent the Court from overriding decisions best left for national legislatures, while reducing the attribution of legislative competences to the Union. The competitive constitutional model is subject to a sub-distinction as to whether it favours competition

⁶⁵³ Maduro, *We, the Court*, 108-149. Similar models have been developed by Alan O. Sykes, 'The (Limited) Role of Regulatory Harmonization in International Goods and Services' (1999) 2 JIEL 49, for international economic law, who distinguishes between models supporting regulatory harmonization, mutual recognition, and policed de-centralisation; and by Armin von Bogdandy, 'Legitimacy of International Economic Governance' in Stefan Griller (ed), *International economic governance and non-economic concerns* (Springer-Verlag 2003), who identifies a federal model, a coordinated interdependence model and a liberal model.

at the national or at the European level.⁶⁵⁴ The former model relates to deregulation in national markets, and it will tend to be associated with broad tests through which the basic tenets of ordo-liberalism – increasing individual autonomy, controlling abuses of government, and maximising economic welfare – can be enforced by courts. The latter model merely favours regulatory competition, and will tend to favour a narrow test – thereby protecting regulatory pluralism – as long as free movement and the conditions for the creation of regulatory competition are possible and harmonization at EU level is limited.⁶⁵⁵

This taxonomy of ‘ideal’ models of European integration, though providing a useful heuristic device to identify different visions present in EU integration, fails to include in these visions some of the realities of EU integration – in particular those present in the other models.⁶⁵⁶ The centralised constitutional model overlooks how the Treaties merely provide the Union with a limited set of competences. The competitive constitutional model in its ordo-liberal version ignores the fact that the Union does not have a strictly deregulatory bent, as is made clear by the existence of derogations to the Treaty freedoms and of a variety of harmonization competences attributed to the Union⁶⁵⁷; and in its regulatory competition guise it fails to recognise both the relevance of the political goals of the Union going beyond efficiency or market integration, and the role of centralised rules in both creating the possibility of regulatory competition and remedying its defects. Finally, the de-centralised constitutional model sees the Treaties and the EU as little more than free-trade agreements, to which the lie is given

⁶⁵⁴ This version of the model was not developed by Maduro, but I add it here because it helps fill what I perceive to be a gap in his taxonomy – which appears to result from an assumption that regulatory competition will lead to a race-to-the-bottom and thereby should be equated with deregulation.

⁶⁵⁵ Bernard, ‘Discrimination and Free Movement in EC Law’, 102-108; Spaventa, *Free Movement of Persons in the European Union*, 85-86. Against, arguing that it tends towards a broad test, Maduro, *We, the Court*, 109.

not only by the extent of Union's competences but also by political developments, particularly those that took place since the Single European Act and the Maastricht Treaty.

Naturally, the descriptive limitations of these 'ideal' models are at least partially the result of their purity, and each normative 'ideal' may still be valid and attractive on its own. But what we must question is how helpful they may be in assisting us in finding the normative underpinnings of the market freedoms as developed and applied in practice. To begin with, while these models partially overlap – inasmuch as they agree on the desirability of some sort of European integration –, they answer different questions concerning the nature of European positive and negative integration. This can be exemplified by bringing together these models with the different normative debates identified above concerning the scope of the market freedoms. The centralised constitutional model takes a position on the harmonization v. regulatory pluralism debate in favour of harmonization, and on the centralization v. decentralization debate in favour of centralization, but none on the deregulation v. economic agnosticism debate. The competitive constitutional model in its ordo-liberal mode takes a position on the deregulation v. economic agnosticism debate in favour of deregulation, and on the centralization v. decentralization debate in favour of centralization, but none on the question of harmonization v. regulatory pluralism. In its 'regulatory competition' variant, this model takes a position on the harmonization v. regulatory pluralism debate with a presumption in favour of pluralism, and on the centralization v. decentralization debate with a presumption in favour of decentralisation, but does not take any express position on the deregulation v. economic agnosticism debate. Lastly, the de-centralised

⁶⁵⁶ Maduro, id, 109.

⁶⁵⁷ Wolf Sauter, 'The Economic Constitution of the European Union' (1998) 4 ColumJEurL 27, 57-63; Schwartz, 198-202.

constitutional model takes a position on the deregulation v. economic agnosticism debate in favour of economic agnosticism, and on the centralisation v. decentralisation debate in favour of decentralisation, but on the harmonisation v. regulatory pluralism (while it is arguable that it would favour regulatory pluralism⁶⁵⁸) it is completely oblivious to the question of how regulatory competition may impact the relevant choice.

This partially overlapping pattern reflects the fact that, like the ‘ideal’ models of European integration, the normative debates about the scope of the market freedoms – centralization v. decentralization, deregulation v. economic agnosticism and harmonization v. regulatory pluralism – themselves overlap partially, but are effectively autonomous. They are heuristic simplifications of a much more complex reality, developed to try to make sense of specific questions raised during particular moments of the process of European Integration, and reflect the different cognitive frameworks available of those looking into those questions at the time.⁶⁵⁹ This illustrates that the main problem of trying to find a single normative underpinning for the various tests proposed by the Court is that these tests are effectively no more than crude types of shorthand allowing courts and lawyers to pursue their activity, while simultaneously carrying with them a multiplicity of (possibly conflicting) meanings and normative concerns.⁶⁶⁰

To illustrate this, remember that broad tests are usually related to centralisation, harmonisation and deregulation; while narrow tests, on the other hand, are associated

⁶⁵⁸ This seems to result from this model expressly defending the maintenance of the maximum State autonomy possible while the different normative debates focus precisely on the impact of negative integration on State autonomy.

⁶⁵⁹ On the concept of cognitive frameworks, see fn. 48.

⁶⁶⁰ This is related to the indeterminacy of any concept. As remarked by Joseph Raz, ‘The Problem of Authority: Revisiting the Service Conception’ (2006) 90 *MinnLRev* 1003, 1011, explanations such as normative theories may strive to replicate the indeterminacies of the concepts they explain, but it is almost impossible to replicate that explanation perfectly.

with State autonomy, regulatory pluralism, and economical agnosticism. Concerning the ideal models of European Integration, we have also pointed out that the centralised constitutional model is usually connected with broad tests; the de-centralised constitutional model tends to be associated with narrow tests; and the competitive constitutional model does not necessarily favour either, even if its ordo-liberal version was traditionally associated with broad tests, and its regulatory pluralistic version with narrow, economically agnostic tests. In short, this means that tests are adopted as reflections of specific positions in each of the centralization v. decentralization, harmonization v. regulatory pluralism, and deregulation v. economic agnosticism debates; and they are usually also used as projections of a certain ‘ideal’ model of European integration. However, as we have seen, these debates are autonomous, and they only partially match the ‘ideal’ models of European integration. The result is that all tests carry with them different, sometimes conflicting, normative concerns. For example, broad limits to national regulation can be argued in favour of either a deregulated or a European re-regulated market.⁶⁶¹ This means that some supporters of deregulation could support broad tests because they saw it as leading to the advancement of liberalisation, while that same test could be defended by someone who could favour broad tests as a means to centralization (say, a proponent of a unified European State) but did not particularly care about the level of regulation in the internal market.

This mix of normative foundations is further complicated by the facts that the institutional context matters for the normative connotations of each test, and that an exclusive focus on the concept of restriction ignores the role of the Treaty and judge-made derogations as safety-valves that mediate and soften the implications of this

⁶⁶¹ Maduro, *We, the Court*, 103.

normative mix in practice. Should the context change, someone's position concerning the relevant test would change as well, even if the underlying normative position being defended did not. For example, ordo-liberals and proponents of a centralised European State could find common ground when most or all regulation was produced at State level and the EU's political process was blocked. But when Treaty amendments resuscitated the EU's political process and started propounding a European social model, leading to an increase in EU legislation, ordo-liberals might have found that deregulatory approaches could be more successfully pursued at the national level, and started supporting a restrictive reading of the market freedoms. Centralisers would then find themselves in the company of supporters of a well-regulated market – who had previously supported a narrow test, as they opposed deregulation – in supporting a broad test. This can be seen, for example, in the change from a deregulation-based to a 'regulatory competition'-based debate. With the Single European Act and the Maastricht Treaty, the channels for re-regulation at EU level were facilitated, and a multiplicity of EU legislation started being produced. Accordingly, proponents of deregulation had to admit that the broad test they defended was susceptible of creating EU-wide rules, and their emphasis changed into the question of whether such rules should be adopted or not. Thus, the original debate transferred into a dispute concerning the related virtues of regulatory competition and EU-wide harmonization. But what is more, the possible conflicts between an ordo-liberal and a centralised view of the European project, and afterwards between supporters of a centralized European State and of well-regulated markets, were mediated and neutralised by the effect the derogations to the freedoms, and in particular the development of mutual recognition,

had in limiting the full impact of adopting a certain concept of restriction and in leading to particular outcomes acceptable for all.⁶⁶²

What sustains a specific approach appears to be a coalition of persons and agents with different normative agendas coalescing around a test in a specific context. Underlying each normative concern is a theory – on protecting international trade, on the constitutional division of competences in the EU, on the appropriate level of regulation in the market – which is a heuristic simplification of reality that needs to be transformed into legal criteria through the judicial interpretation and application of rules. Different normative goals will tend to be compatible in certain settings, and give rise to coalitions of proponents of a common approach even though those proponents have disparate normative concerns; but the world may change, and it might be found that apparently compatible goals are contradictory after all. In other words, the same test can be used to defend completely different, usually unrelated, and sometimes contradictory normative concerns. Defending a specific normative position in terms of the test to be adopted by the Court ignores the limitations of a specific formula in encapsulating a whole normative theory. More importantly, it also prevents a reflection on how multiple normative concerns interact in practice, leading to a misunderstanding of the case law, inasmuch as it ignores other relevant historical and institutional settings under which a decision was adopted by focusing on the supposed economic or ideological factors found in the case law.

⁶⁶² A good example of this ambivalence can be found in Manfred Streit and Werner Mussler, 'The Economic Constitution of the European Community' (1995) 1 ELJ 5.

Chapter VII

Re-framing the Concept of Restriction

Abstract: *This chapter will add institutional elements to the environment of normative indeterminacy identified in the previous chapters. It will be exemplified how taking into account these elements not only can improve descriptive models by helping make sense of the classic debates on the concept of restriction, but can also increase those descriptive models' comprehensiveness by explaining the existence of individual tests developed for specific areas of free movement law that are usually ignored in those debates. Finally an attempt will be made to develop a more context- and institutional-sensitive normative approach to the concept of restriction.*

I. Introduction

The previous chapter found that the traditional normative underpinnings of the various concepts of restriction are under-determined, insular in relation to each other, and usually fail to take into account the non-judicial dimensions of European integration. This chapter will review how adding institutional elements to the analysis of the previous chapters adds to our understanding of the law. It will begin by explaining how such institutional elements help to make sense not only of the case law on general concepts of restriction, but also of the traditional debates surrounding them, and will then demonstrate how such elements allow for the incorporation of sector-specific concepts of restriction which are usually not dealt with, or even acknowledged, by such traditional debates. Finally, suggestions will be made on how more fruitfully to pursue normative debates concerning the market freedoms and the concept of restriction.

II. Institutional Considerations and the Evolution of the Case law: the Basics

We have seen that the judicial tests adopted by the Court and described in the literature for identifying restrictions on the market freedoms tend to be both descriptively inept and normatively vague. It is submitted that, to understand the case law, one must look beyond purely normative considerations and take the relevant institutional context into account as well. It is worth restating that the Court must abide

by the prevailing canons for legal reasoning, judicial methodology, and logics of presentation in order to ensure its own legitimacy and ensure that national courts obey it. In effect, it does not matter what the Court may say if its decisions are not followed.⁶⁶³ As Weiler once stated:

*'Constitutional actors in the Member States accept the European constitutional discipline not because, as a matter of legal doctrine, as is the case in the federal state, they are subordinate to a higher sovereignty and authority attaching to norms validated by the federal people, the constitutional demos. They accept it as an autonomous voluntary act, endlessly renewed on each occasion, [...] The French or the Italians or the Germans are told: in the name of the peoples of Europe, you are invited to obey [...] This process also operates at the Community level. Think of the European judge [...] who must understand that, in the peculiar constitutional compact of Europe, his decision will take effect only if obeyed by national courts [...]. This, too, will instil a measure of caution and tolerance.'*⁶⁶⁴

If adopting certain normative positions implies taking sides on potentially controversial issues of constitutional importance, one should not be surprised to find the Court eschewing fully theorised decisions while leaning heavily on anchors to its legitimacy – such as abiding by recognised forms of legal reasoning, and devotion to precedent – in order to ensure that its decisions are found persuasive and obeyed by the relevant agents.

Mutual recognition provides perhaps the best example of this in the market freedoms. Surprisingly, mutual recognition is usually ignored as such in debates about the concept of restriction. The literature tends to associate it with obstacle-based tests, particularly economic due-process⁶⁶⁵, or with discrimination approaches⁶⁶⁶, usually depending on the position being advocated by the relevant author. This reflects the

⁶⁶³ Karen Alter, *The European Court's Political Power* (OUP 2009), 92-109.

⁶⁶⁴ Weiler, 'In Defence of the Status Quo: Europe's Constitutional Sonderweg', 21-22.

⁶⁶⁵ Understandable, since both mutual recognition and the economic due-process clause originated in the same two cases, *Dassonville* and *Cassis de Dijon*. See Laurence Gormley, 'Reasoning Renounced? The Remarkable Judgement in *Keck and Mithouard*' (1994) [5] EBLRev 63.

⁶⁶⁶ Marenco, Snell.

normative indeterminacy that underpins both these approaches and allows for the incorporation of mutual recognition into both of them. To begin with, for mutual recognition to be identified as a form of discrimination requires a modification extending the latter's traditional use. The 'dual-burden' thesis is wholly alien to classic trade law: it requires the assumption, unnecessary under traditional discrimination law, that a set of regulations in a State provides adequate protection for consumers in a second State – meaning, innovatively, that obstacles resulting from the existence of disparate rules restrict free movement and can be challenged in court. Mutual recognition thus eliminates obstacles to trade that go well beyond the traditional conception of a liberal trade regime requires, such as those created by the existence of different legal regimes applicable to the same object. On the other hand, if mutual recognition effectively increases the scope of measures deemed to have a detrimental effect on intra-Union trade beyond the traditional normative scope of discrimination tests, this did not in any way imply the adoption of an ordo-liberal perspective or of an economic due-process clause. It is a fact, however, that one can observe a development from mutual recognition in *Cassis* to an economic due-process clause in the *Sunday Trading* cases. How then are we to explain this?

The answer starts from the observation that mutual recognition is an under-theorised judicial tool that refuses to decide between opposing normative concerns while attempting to produce a pragmatic solution acceptable to all parties on the facts. The price that the Court paid for such pragmatism was to eschew normative foundations strong enough to prevent the case law from departing from them. The story of these departures has already been described in Chapter V, for it is the story of the path-dependent evolution of judicial tests as well. It is a story which begins with the notably elusive language of *Cassis*, which stated that:

*'Obstacles to movement within the Community resulting from disparities between national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements [...].'*⁶⁶⁷

As previously described, this not only opened the door to mutual recognition, but could also accommodate a pure country-of-origin principle. Furthermore, when coupled with *Dassonville*, it was not clear that the case law provided any tools to distinguish between restrictive and non-restrictive national measures. When an attempt at such a distinction was pursued in *Cinéthèque* by AG Slynn, the Court held instead that, as long as a product was lawfully marketed in a Member State, preventing it from circulating in another Member State was a restriction requiring justification regardless of there being regulatory equivalence or not. Since regulatory equivalence is an element that, if absent, leads to mutual recognition becoming a pure country-of-origin principle, *Cinéthèque* formally extended the case law beyond mutual recognition. On the other hand, *Cinéthèque* left unaddressed whether the case law was applying merely a country-of-origin principle, or, as implicitly made possible by the *Dassonville* formula, other types of obstacles could also be caught under the free movement of goods. When the first *Sunday Trading* case read *Cinéthèque* as focusing on the concept of obstacle to trade instead of on the country-of-origin principle (which clearly did not apply to measures prohibiting stores from opening on Sundays), the move towards an economic due-process clause, and to a concept of restriction able to catch any measure reducing the volume of imports, was complete.⁶⁶⁸

⁶⁶⁷ *Cassis de Dijon*, para. 8.

⁶⁶⁸ See fn. 545 to 550 above.

Strikingly, a similar development can be observed for persons, if at a later date than for goods.⁶⁶⁹ The Court developed its concept of restriction on the free provision of services by focusing on discrimination against free movement, considering that any obligation on a service provider to fulfil all requirements applicable to established persons in the host-State effectively denied the freedom to provide cross-border services.⁶⁷⁰ The Court developed a *rationale* similar to goods to justify this, arguing that specific requirements imposed on a person who does not reside in the State where the services were to be provided would not be contrary to the Treaty if justified. Those requirements, however, were not justified when the service provider was already subject to similar requirements on its State of establishment.⁶⁷¹ This was a *Cassis*-like line of reasoning, akin to applying a mutual recognition principle under the banner of discrimination.

For workers and establishment, the adoption of the obstacle-based approach followed a longer path that nonetheless ran through mutual recognition as well. Mutual recognition in what concerns persons was for a long time restricted to the Court applying a number of Directives – the earliest of which concerned very specific and carefully delineated professions – reflecting both the sensitivity of the topic and the related difficulty in coming up with generally acceptable equivalence criteria.⁶⁷² This concern can be seen in the Court’s case law: in *Auer* the Court held that an Austrian veterinarian who could practise in Italy could not practise in France, where he was established, until the relevant Directive on mutual recognition of diplomas was brought

⁶⁶⁹ This precedence of goods may relate to the existence of higher levels of litigation concerning it than what existed for the other market freedoms – see Schmidt, 11.

⁶⁷⁰ See fn. 580 to 581 above.

⁶⁷¹ *Van Wesemael*, paras. 27-28.

⁶⁷² See fn. 584 to 586 above.

into force.⁶⁷³ On the same day that this case was decided, the Court acknowledged that a Member State had to recognize a foreign qualification obtained by one of its nationals because a Directive was in place which set forth parameters for the protection of the States' legitimate interests.⁶⁷⁴ To reinforce the point, when the *Auer* case came before the Court again after the relevant Directive's implementation date, with the French State still not having implemented it, mutual recognition was acknowledged to result from the Directive's direct effect.⁶⁷⁵ This case law was restated in subsequent cases, under the umbrella of the Directives harmonising specific profession qualifications⁶⁷⁶; as a corollary, the Court repeatedly upheld the Member States' right to refuse mutual recognition in the absence of EU legislation, since the regulation of the exercise of professional activities in their territory, as long as pursued in a non-discriminatory fashion, was their prerogative.⁶⁷⁷ Eventually, proposals to create a general system of mutual recognition of professional qualifications introduced the concept of a 'regulated profession' – those professions where the conditions for taking up or pursuing a professional activity are directly or indirectly governed by laws, regulations, or administrative provisions requiring possession of evidence of education and training, or an attestation of competence – and the idea that, when controlling access to such a profession, host-States had to take into account qualifications obtained in another Member State.⁶⁷⁸ In a case decided after the adoption of the first general recognition Directive, but applying to a situation which had occurred before such adoption, the

⁶⁷³ *Auer*.

⁶⁷⁴ Case 115/78 *Knoors* [1979] E.C.R. 399.

⁶⁷⁵ *Auer II*. See similarly Case 5/83 *Rienks* [1983] E.C.R. 4233.

⁶⁷⁶ Case 246/80 *Broekmeulen* [1981] E.C.R. 2311.

⁶⁷⁷ Case 292/86 *Gullung* [1988] E.C.R. 111.

⁶⁷⁸ See fn. 585 and 586 above.

Court finally decided that, even in the absence of secondary legislation, national requirements concerning qualifications could restrict the right of establishment, particularly when they took no account of the knowledge and qualifications already acquired in another Member State.⁶⁷⁹ This was a distillation of the general recognition system developed in the Directives, imposing an obligation to examine whether, and to what extent, diplomas and professional qualifications awarded by other Member States were equivalent to the diplomas and qualifications required in the host-State. A similar obligation applied to considerations of professional experience.⁶⁸⁰ Since judicial mutual recognition was only required for situations falling outside the scope of secondary legislation, this case law applied only to situations not covered by it.⁶⁸¹ It may even be said that this case law was used to extend or plug gaps in the mutual recognition Directives, particularly as the general system did not apply to professions that were subject to specific directives.⁶⁸²

Under pressure from mutual recognition, the test for persons eventually changed from a discrimination- to an obstacle-based approach. It was first acknowledged that the free provision of services:

'require(s) not only the abolition of any discrimination against a person providing services on account of his nationality but also the abolition of any restriction on the freedom to provide services imposed on the ground that the person providing a service is established in a Member State other than the one in which the service is provided. In

⁶⁷⁹ *Unectef v Heylens*.

⁶⁸⁰ See Case C-313/01 *Morgenbesser* [2003] E.C.R. I-13467, Case C-238/98 *Hocsman* [2000] E.C.R. I-6623, Case C-345/08 *Pešla* [2009] E.C.R. I-11677. Arguing that this corresponds to the Directive's system, Catherine Barnard, *The Substantive Law of the EU* (3 edn, Oxford University Press 2010), 317-319.

⁶⁸¹ Essentially, these cases were those that either fell outside the scope of the relevant Directives – see *Commission v Spain* –, or that addressed situations occurring before such Directives had been implemented – see *Vlassopoulou*. See also AG Jacobs' Opinion in Case C-104/91 *Borrell* [1992] E.C.R. I-3003, para. 11 and 16.

⁶⁸² See Article 2 of both of the above mentioned Directives. See also Case C-319/92 *Haim* [1994] E.C.R. I-00425, for dental practitioners, see *Gebhard*, and *Morgenbesser* concerning lawyers.

*particular, the Member State cannot make the performance of the services in its territory subject to observance of all the conditions required for establishment; were it to do so the provisions securing freedom to provide services would be deprived of all practical effect.*⁶⁸³

Similarly, and almost simultaneously, the Court started holding that rules concerning professional qualification were susceptible of hindering nationals of other Member States in the exercise of their right of establishment or of free movement of workers, even if applied without any discrimination on grounds of nationality.⁶⁸⁴ Finally, in *Säger* – a case concerning a requirement making the provision of patent renewal services in Germany by an undertaking established in the UK subject to the issue of an administrative license for which the possession of certain professional qualifications was required – the Court adopted a pure obstacle-based element similar to that arising out of *Dassonville*, by stating that the free provision of services:

*‘requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.’*⁶⁸⁵

In *Kraus*, the Court adopted a similar approach for workers and establishment, holding that any national measure governing the conditions under which an academic title obtained in another Member State may be used were restrictive:

*‘where that measure, even though it is applicable without discrimination on grounds of nationality, is liable to hamper or to render less attractive the exercise by Community nationals, including those of the Member State which enacted the measure, of fundamental freedoms guaranteed by the Treaty.’*⁶⁸⁶

⁶⁸³ *Tourist Guides Greece*, para. 16. See also *Tourist Guides France*, *Commission v Italy*, *Commission v Spain*.

⁶⁸⁴ *Unectef v Heylens; Vlassopoulou*, para. 15-17.

⁶⁸⁵ *Säger*, para. 12.

⁶⁸⁶ *Kraus*, para. 32.

More than as an outcome required by a specific normative underpinning, these developments can be understood as a result of litigants arguing within the bounds of existing law, with the potential beneficiaries of new precedent generating further positive feedback by following through on incentives to push the law within a context of normative under-determination. A similar observation can be made for the development of the market access test in *Alpine* and its subsequent drift into something akin an economic due-process clause, and in the case law on goods post-*Keck*.⁶⁸⁷ It is perhaps arguable that the reason why the case law seems to evolve towards broader tests is that the entities more likely to plead on the basis of the market freedoms are those benefitting from increased inter-State movement rights and economic freedom, which also have the means to pursue their preferences in the adjudicative arena. Not all possible paths are, after all, as likely to be followed: litigants only follow those paths that are more likely to be of benefit to them. Those persons who enjoy direct benefits from free movement are more likely to plead and try to extend them. Simultaneously, it is arguable that the costs of increased free movement are likely to be diffuse, with those suffering from them not having sufficient incentives to start judicial actions.

This system of judicial incentives – which is consistent with findings that corporations, public interest groups and enforcement agencies tend to be repeat players in starting legal procedures under the market freedoms – can create a stream of cases arguing for the market freedoms’ extension without any equivalent counter-balancing pressure at the judicial level other than those arising from the institutional environment in which the Court operates.⁶⁸⁸ From this perspective, a retrenchment such as the one in

⁶⁸⁷ See fn. 590 to 598 above.

⁶⁸⁸ Such as the role of Member States as interveners in the judicial process. This, however, only amounts to a defensive role, and even Member States must argue in accordance with existing precedent, which seems to indicate that the role of the Member States as interveners can, like dikes, slow the rising tide of

Keck is an outlier, which may be explained by arguing that the Court was concerned about its ability to control its docket, or was reacting to expressions of displeasure about the increased scope of its jurisdiction by organizations operating in the relevant institutional environment, or even that the Court was reacting to academic criticism and concerns about normative coherence.⁶⁸⁹ On the other hand, a case such as *Keck* is not likely to create a positive feedback in what concerns litigation, with the result that the case law will remain static or, as arguably happened in practice, renewed pressure for its extension will again surface under a new guise as litigants continue to try to extend their free movement rights.⁶⁹⁰

This focus on path dependence need not blind us to the role of the law and legal communities in creating a cognitive framework that is relevant for the way the law developed. As is apparent from *Keck*, normative considerations can buck institutionally-based trends. Furthermore, normative theories developed to rationalise this evolution influenced these developments, by providing greater levels of theorisation in the form of normative and explanatory theories to the concept of restriction to free movement which could then be adopted, alongside theories of the normative unity or disunity of the freedoms and related requirements of systemic interpretation, by courts and litigants

the market freedom's extension, but may not be able to stop it altogether, thereby creating a need for Member States to retreat to different, 'higher and drier' positions from time to time.

⁶⁸⁹ Arguably, the best (anecdotal) evidence that all of these elements had a role to play is that the Court reacted to increased academic and judicial criticism about its case law, particularly in light of being flooded with identical cases during the *Sunday Trading* saga, by adopting a theory which was advanced by one of the Commission's agents while justifying its actions as needed to check 'the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States,' in para. 14 of *Keck and Mithouard*. To verify this empirically would be, assuming it is possible, outside of the scope of this study.

⁶⁹⁰ See fn. 164 above, including Connant, *Justice Contained*, 19, 21-38. See also Schmidt, 11.

when deciding and pleading cases.⁶⁹¹ The outcome of *Cassis* was an incompletely theorized mix of traditional normative ideas about anti-protectionism with novel ideas about European integration. In effect, the *Cassis* reasoning attracted virtually no attention until the issuing by the Commission of an interpretative Communication rationalising it *ex post* in accordance with certain classificatory frameworks which were then picked up by a community of EU legal academics and practitioners in developing judicial tests.⁶⁹² On the other hand, and as we have seen, normative approaches are of limited use in what concerns the effective specification of the meaning of judicial tests, with the result that locked-in, constrained by path-dependency, and pressured by claimants who perceived and reacted to existent choice-set by attempting to alter the existent institutional framework at some margin⁶⁹³, the Court gave prevalence to the formulae it created over their potential normative foundations, thereby detaching the judicial tests from their original normative *rationale*, and even from most of their *ex post* rationalisations.

A consequence of all of this is that institutionally-driven developments can affect what the relevant normative *substratum* of legal provisions is understood to be. Since negative integration, of necessity, leads to some overlap between the removal of obstacles to intra-State trade and deregulation, in the absence of a careful application of normative criteria the pressures exercised by economic agents eventually led, through

⁶⁹¹ Examples of these theories can be found for discrimination – Marengo –, economic due-process – Gormley, ‘“Actually or Potentially, Directly or Indirectly? Obstacles to the Free Movement of Goods’ –, typology – White –, and market access – Weatherill, ‘After *Keck*: Some thoughts on how to clarify the clarification’ –, to name only the most relevant.

⁶⁹² See, famously, Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 (*Cassis de Dijon*) already referred in fn. 637. Another example of this can be found in the Commission's White Paper on 'Completing the Internal Market' [1985]. See also Connant, *Justice Contained*, 12.

⁶⁹³ And by reactions of other players in the relevant institutional context: see Connant, *Justice Contained*, 12-13.

incremental change, to the finding that any rule which might potentially restrict economic freedom could be restrictive – for example, it was the judicial tests for goods’ normative under-theorisation that allowed litigants to argue, and the Court to conclude, that: (i) a decision prohibiting national measures preventing the sale of products coming from one State into another, on the basis of non-compliance with the latter’s product requirements, implied that all national measures prohibiting the marketing of certain products, regardless of them being imported or not, needed to be justified, as in *Cinéthèque*; and (ii) subsequently to move on to the conclusion that any measure that can potentially restrict the volume of sales of imported and domestic products alike is a restriction unless justified – and thereby to transform the free movement of goods into an economic due-process clause, as in the *Sunday Trading* cases. A similar development, to which should perhaps be added systemic pressures arising from a body of case law on goods dealing with similar issues, can be said to have occurred in the field of persons, and eventually to have led to the apparent adoption of market access as a test across all the freedoms.⁶⁹⁴ These developments do not reflect an improved divination of the original meaning of the market freedoms’ provisions, but are instead the result of a discursive process which brought about an evolution in the accepted meaning of those provisions through sophisticated reflection on their possible normative underpinnings by a professional legal class operating in particular institutional contexts, and through pressure by litigants who took advantage of this reflection to argue for increased rights to free movement on the basis of normative coherence and systemic interpretation.

⁶⁹⁴ Schmidt, 11.

III. A More Comprehensive Description

Apart from the literature focusing on free movement generally, there is a different branch of scholarship that focuses instead on free movement law concerning specific sectors. The existence of this literature constitutes a blind-spot in more general discussions of the concept of restriction, while pointing to the existence of specific concepts of restriction in some sectors – an issue that needs to be addressed by anyone attempting to develop an analytical framework fully able to explain the concept of restriction. This section will now analyse some of the areas dealt with in this literature, and try to understand whether their specificities fit into the analytical framework sketched above.

A. Direct Taxation

Direct taxation raises a number of particular issues for free movement law. Tax provisions are inherently territorial, applying criteria such as residence and place of work, as acknowledged in the *Avoir Fiscal* case.⁶⁹⁵ For example, international tax law tends to distinguish between taxation at source (meaning at the place where the taxable income or activity occurred) and taxation of the worldwide income of residents. This gives rise to the possibility of double taxation, which is usually dealt with in double taxation agreements ('DTA') by giving precedence to taxation at source and granting a corresponding credit at the place of residence. The main problem which this poses to the market freedoms is that, with the exception of capital – which allows Member States to

⁶⁹⁵ Case 270/83 *Commission v France* [1986] E.C.R. 273. See also Case C-175/88 *Biehl* [1990] E.C.R. I-1779, Jan Wouters, 'Fiscal Barriers to Companies' Cross Border Establishment' (1994) 14 YEL 73, 103. This is also so for non-physical entities: Lenaerts and Bernardeau, 42.

discriminate for tax purposes on the basis of residence⁶⁹⁶ –, there is a general presumption that distinguishing on the basis of territorial criteria is prohibited as indirect discrimination. It would thus appear that most tax-related measures could be deemed indirectly discriminatory on grounds of nationality⁶⁹⁷, or as discriminating against free movement⁶⁹⁸, thereby subjecting direct national taxation to EU oversight.

The Court has, however, decided otherwise. In *Schumacker*, it held that where direct taxes are concerned the situations of residents and non-residents are not comparable because income received in the territory of a State by a non-resident is in most cases only part of his total income. A non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, was held to be easier to assess at the place where his personal and financial interests are centred, which in general is the place where he has his usual abode. This meant that residency requirements were not indirectly discriminatory, except when a non-resident received no significant income in the State of residence and obtained a significant part of his taxable income in another State.⁶⁹⁹ This case law has since become entrenched for workers⁷⁰⁰, and been extended to establishment⁷⁰¹,

⁶⁹⁶ But following *Manninen*, this, when articulated with the prohibition of Art. 58 (3) on arbitrary restriction, is to be read in accordance with the case law on tax discrimination under the other market freedoms. See Usher, 200-207.

⁶⁹⁷ See Case C-42/02 *Lindman* [2003] E.C.R. I-13519.

⁶⁹⁸ Case C-234/01 *Gerritse* [2003] E.C.R. I-5933, Case C-39/04 *Fournier* [2005] E.C.R. I-2057, Case C-17/00 *De Coster* [2001] E.C.R. I-9445, Case C-136/00 *Danner* [2002] E.C.R. I-8147, Case C-330/07 *Vermögensverwaltungs-Gesellschaft* [2008] E.C.R. I-9099, *Filipiak*. As seen above, indirect discrimination on grounds of nationality sometimes overlaps with discrimination against free movement: see Case C-294/97 *Eurowings* [1999] E.C.R. I-7447, para. 37.

⁶⁹⁹ Case C-279/93 *Schumaker* [1995] E.C.R. I-0225.

⁷⁰⁰ Case C-336/96 *Gilly* [1998] E.C.R. I-2793, *Renneberg*.

⁷⁰¹ Case C-80/94 *Wielockx* [1995] E.C.R. I-2493, *Asscher*, Case C-329/05 *Meindl* [2007] E.C.R. I-1107.

services⁷⁰², to European Citizenship⁷⁰³, and arguably to capital as well.⁷⁰⁴ It has also been further specified that the situation of residents and non-residents is comparable when the amount earned by a non-resident in a Member State is 90% or more of his total income⁷⁰⁵; and extended to include: *'all the tax advantages connected with the non-resident's ability to pay tax which are not taken into account either in the State of residence or in the State of employment'*.⁷⁰⁶

The peculiarity here is in the way discrimination is applied, in particular in the attention paid to the *tertium comparationis* – an attention which is effectively absent in the more general use of discrimination by the Court. What was established, correctly, is that if the situation of residents and non-residents is not objectively comparable so far as concerns direct taxation, no discrimination can be said to exist even if a criterion that is *prima facie* prohibited is being used by national legislation. Residence requirements are thereby *prima facie* lawful in direct taxation⁷⁰⁷, with the relevant question being how to determine in what situations residents and non-residents can be found to be in an objectively non-comparable position. The Court held that this occurs when a person earns the majority of its income in a State other than the one where the person resides, making it impossible for the State of residency to take into account its resident's situation. The underlying idea seems to be that such a person becomes a 'virtual'

⁷⁰² *Gerritse*.

⁷⁰³ Case C-520/04 *Turpeinen* [2006] E.C.R. I-10685.

⁷⁰⁴ Case C-376/03 *D.* [2005] E.C.R. I-2421, Case C-510/08 *Mattner* [2010] E.C.R. I-3553. See also Laenerts and Bernardeau, 76.

⁷⁰⁵ Case C-391/97 *Gschwind* [1999] E.C.R. I-5451. A. Castro Oliveira, 'Workers and other persons: step-by-step from movement to citizenship – Case-Law 1995-2001' (2002) 39 CML Rev 77, 121, criticises this by arguing that residents and non-residents were, in this case, in a comparable situation.

⁷⁰⁶ Case C-182/06 *Lakebrink* [2007] E.C.R. I-6705, para. 34.

⁷⁰⁷ Paul Farmer, 'Article 48 EC and the taxation of frontier workers' (1995) 20 ELRev 310, 316.

resident of the State where the majority of income is earned, which justifies requiring the host-State to take into account the non-resident's personal and family circumstances in the same way it does for its residents.⁷⁰⁸ This approach requires a State other than the one of residence to take into account facts which are usually known only to the latter. In creating the pre-conditions for the comparability of the situation of residents and non-residents, the existence of secondary legislation providing ways for States to obtain information from other tax authorities appears to have been essential to the development of this case law.⁷⁰⁹

Apart from this particular take on the *tertium comparationis*, direct taxation is also conspicuous for the concept of restriction used.⁷¹⁰ The Court started using the language of obstacle-based tests for cases of direct taxation soon after such a test was adopted for the free movement of persons, even if in virtually every case it then went on to pursue a discrimination-based analysis concerning whether there had been a tax advantage, and whether the situation of the claimant and of the persons receiving such an advantage were comparable.⁷¹¹ Even though theoretically the free movement provisions apply in the same way to tax and non-tax rules, an obstacle-based approach

⁷⁰⁸ Peter Wattel, 'The EC Court's Attempts to Reconcile the Treaty Freedoms with International Tax Law' (1996) 33 CML Rev 233, 227; Melchior Wathelet, 'The influence of Free movement of persons, services and capital on National Direct Taxation: Trends in the Case law of the Court of Justice' (2000) 20 YEL 1, 10.

⁷⁰⁹ *Schumaker*, para. 45; *Wielockx*, para. 26. See Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation [1977] OJ 1977 L 336 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation.

⁷¹⁰ This is arguably also the case for indirect taxation: see Jukka Snell 'Non-Discriminatory Tax Obstacles' (2008) 56 ICLQ 339, 340-350.

⁷¹¹ AG Maduro's Opinion in Case C-446/03 *Marks & Spencer* [2005] E.C.R. I-10837, paras. 27-28. See, for example: for workers, Case C-385/00 *de Groot* [2002] E.C.R. I-11819; for services, *De Coster, Lindman*; for establishment, Case C-307/97 *Saint-Gobain* [1999] E.C.R. I-6161, Case C-250/95 *Futura* [1997] E.C.R. I-2417 *X and Y*, Case C-324/00 *Lankhorst-Hohorst* [2002] E.C.R. I-11779, and Case C-168/01 *Bosal* [2003] E.C.R. I-9409. Also, Kingston, 1334; Snell 'Non-Discriminatory Tax Obstacles', 350-354.

sits uneasily with the concept of national sovereignty in tax law. Direct taxation is an area in which mere discrepancies between the laws of Member States can be seen to pose clear obstacles to free movement. The combination of source-based and residence-based taxation criteria can lead to double taxation, the very definition of an obstacle created by different national rules; and a number of differences in national tax law, for example the tax rate, could be construed as obstacles under the mutual recognition or ‘additional cost’ criterion.⁷¹²

As such, an obstacle-based approach could easily lead into an economic due-process clause, an opportunity not lost on private litigants. In what has been identified as a reaction by the Court to the barrage of cases it was receiving testing the limits of this case law, the Court subsequently seemed to revert explicitly to a discrimination-based analysis.⁷¹³ In *Marks and Spencer*, a case on UK rules creating limits on the amounts parent-companies could deduct on losses incurred by non-resident subsidiaries, AG Maduro explicitly argued for an extension of the test applicable to direct taxation beyond non-discrimination, in an attempt to bring it in line with the rest of the case law on the market freedoms.⁷¹⁴ The Court, without explicitly disagreeing with the AG, instead argued that the measure discriminated both on grounds of nationality and against free movement. A restriction was found because the rules applied ‘*different treatment for tax purposes to losses incurred by a resident subsidiary and losses incurred by a non-resident subsidiary*’.⁷¹⁵ An explicit defence of this purely discriminatory approach was subsequently pursued by AG Geelhoed, who held that

⁷¹² Kingston, 1330-1331.

⁷¹³ See *D.*, Case C-403/03 *Schempp* [2005] E.C.R. I-6421, Kingston, 1335.

⁷¹⁴ AG Maduro’s Opinion in *Marks & Spencer*, paras. 31-40.

⁷¹⁵ *Id.*, paras. 31-34.

cumulative burdens resulting from the parallel exercise of Member State's fiscal sovereignty 'restrict' cross-border activity, but that on closer analysis two types of 'restriction' can arise in such circumstances. The first (which were termed 'quasi-restrictions') are restrictions resulting inevitably from the co-existence of national tax systems, which give rise to '*distortions of economic activity resulting from the fact that different legal systems must exist side-by-side*' with results that may be advantageous or disadvantageous to economic actors. The second (which he termed 'true restrictions') are '*restrictions that go beyond those flowing inevitably from the co-existence of national tax systems*'. The AG then went on to suggest that '*all "truly" restrictive national direct tax measures will also, in practice, [be] directly or indirectly discriminatory measures*', distinguishing between obstacles '*resulting from disparities or differences between the tax systems of two or more Member States*', which did not restrict the market freedoms, and '*obstacles resulting from discrimination, which occurs as a result of the rules of just one tax jurisdiction*', which did.⁷¹⁶ This reasoning appears to have been adopted by the Court, which has for all purposes abandoned even the trappings of an obstacle-based approach in favour of a discrimination-oriented test.⁷¹⁷

This is not to say that the Court has not developed other strategies to remove non-discriminatory obstacles in this field, particularly those arising from the possibility of double-taxation.⁷¹⁸ It has considered that the Treaty does not prohibit national instruments that minimise such obstacles, such as the application of a tax credit

⁷¹⁶ See AG Geelhoed's Opinion in Case C-374/04 *Test Claimants* [2006] E.C.R. I-11673, paras. 32-41. See, similarly, AG Sharpston's Opinion in Case C-96/08 *CIBA* [2010] E.C.R. I-2911, paras. 26-29.

⁷¹⁷ Kingston, 1336-1341; Michael J. Graetz and Alvin C. Warren, 'Dividend Taxation in Europe: When the ECJ Makes Tax Policy' (2007) 44 CML Rev 1577. But path-dependency still plays its role; the Court sometimes refers to the relevant obstacle test before applying a discrimination test: see, for example, *CIBA*, para. 19; Case C-284/09 *Commission v Germany* [2010] of 20 October 2011 (not yet published), para. 72.

⁷¹⁸ International double taxation is not an obstacle restrictive of the market freedoms: see Case C-513/04 *Kerckhaert and Morris* [2006] ECR I-10967.

mechanism with a view to preclude double-taxation.⁷¹⁹ It has also extended the scope of the free movement provisions so that they are able to assess whether double-taxation agreements (DTAs) entered into by Member States – which are international treaties *prima facie* excluded from the freedoms’ scope – are in accordance with the Treaty.⁷²⁰ But in all these cases the Court went to extremes to stress that what it was assessing was whether the national rules of Member States were discriminatory; that mere differences between national direct taxation laws do not fall within the scope of the freedoms; and that whenever a DTA is deemed discriminatory, it is because the laws in question are coordinated, and hence there can be said to be no restrictions arising from pure differences between national laws.⁷²¹

B. Social Security

The integrity of the various national social security schemes, each requiring a minimum contribution on an annual basis and a minimum number of years of such contributions, meant that a worker whose contribution record would entitle him to benefit at a full rate in case of unemployment could have to sacrifice such coverage by migrating into another State. National authorities refusing to pay benefits to claimants residing outside their jurisdiction could further compound this obstacle.⁷²² To address this issue, the Treaties provided not for harmonization but merely of co-ordination, requiring the amendment of national laws in what was necessary to abolish the territorial limitations resulting from the application of different national social security

⁷¹⁹ *Gilly*, Lenaerts and Bernardeau, 70-71.

⁷²⁰ *Saint-Gobain*, paras. 57-60; *de Groot*, *Gerritse*, *Turpeinen*.

⁷²¹ *Alevizos*.

⁷²² Derrick Wyatt, ‘The Social Security Rights of Migrant Workers and their Families’ (1977) 14 CML Rev 411, 411-2; A. C. Page, ‘The Scope of Community and National Rules against the Overlapping of Social Security Benefits’ (1989) 17 CML Rev 211, 211.

schemes.⁷²³ The secondary legislation adopted for this purpose was based on a number of basic principles⁷²⁴: persons covered by EU legislation were assimilated to nationals, requiring the removal of national laws which put migrants at a disadvantage; and a person should, if it decided to move, see the social protection to which it was entitled replaced by an equivalent protection in the host-State through the aggregation of the social benefits that the person accrued in different Member States, and by the guarantee that such aggregated benefits would be paid in whatever Member State the person lawfully resided.⁷²⁵ Furthermore, in the case of payment of cash-benefits Member States were precluded from withdrawing or reducing benefits on the ground that the recipient was a resident in a Member State other than that whose institution was responsible for payment.⁷²⁶

The case law of the Court on social security mainly applied this secondary legislation, with the market freedoms being applied only to the few situations falling outside that legislation's scope; this may explain why the concept of restriction used seemed to follow the principles resulting from that legislation, focusing on precluding national legislation that might place EU citizens at a disadvantage when they wished to extend their activities beyond the territory of a single Member State.⁷²⁷ Situations that

⁷²³ Art. 51 EEC. See J. Seché, 'The Revision of Regulations nos. 3 and 4 (Social Security and Migrant Workers) in light of their interpretation by the Court of Justice' (1968) 6 CML Rev 170, 171.

⁷²⁴ Particularly Regulation no. 1408/71 [1971] OJ L 149 OF – replaced by Regulation No 883/2004 [2004] OJ L 166 on the coordination of social security systems. See A. Pieter van der Mei, *Free Movement of Persons within the European Community* (Hart Publishing 2003), 63-4; Vicki Paskalia, 'Co-ordination of Social Security in the European Union: An Overview of Recent Case Law' (2009) 46 CML Rev 1177, 1180.

⁷²⁵ Walter Munch and Jean-Claude Séché, 'Les Droits de l'Étranger dans les Communautés Européennes' [1975] CDE 251, 261-262.

⁷²⁶ Wyatt, 413.

⁷²⁷ See *Stanton*.

could lead a worker to lose, as a consequence of the exercise of his right to free movement, the advantages in the field of social security guaranteed to him by the laws of a single Member State, especially where those advantages represented the counterpart of contributions already paid, would be contrary to the free movement of persons as they placed him in a worse situation than that of a worker who had never migrated.⁷²⁸ Similarly, legislation by a Member State requiring contributions to be made to a social security scheme by persons already affiliated to a social security scheme without providing any additional benefits was prohibited since such legislation disadvantages the pursuit of occupational activity in a second Member State by imposing costs without any corresponding benefit.⁷²⁹

Other than these situations of discrimination against free movement, the Court has consistently held that the Treaty offers no guarantee to a person that extending her/his activities into more than one Member State, or transferring them to another Member State, will be neutral as regards social security. Given the disparities in the social security legislation of the Member States, such an extension or transfer may be to the person's advantage in terms of social security or not, according to circumstance. It follows that any variations in treatment by Member States that arise from differences between national laws are in accordance with EU law, so long as these variations affect in the same way those to whom the laws apply, according to objective criteria, and without regard to their nationality.⁷³⁰ This may perhaps be anchored in the idea that, since the Treaty provides not for the harmonisation but for the coordination of social

⁷²⁸ Case C-228/07 *Petersen* [2008] E.C.R. I-6989, para. 43 and case law cited therein.

⁷²⁹ Case C-53/95 *Kemmler* [1996] E.C.R. I-0703; Joined cases C-393/99 and C-394/99 *INASTI* [2002] E.C.R. I-2829.

⁷³⁰ Case C-92/02 *Kristiansen* [2003] E.C.R. I-14597; Case C-493/04 *Piatkowski* [2006] E.C.R. I-2369, para. 34.

security rules, the competences of the Member States are to be protected. This prevents the finding of obstacles in the mere disparity of regulations and the full use of obstacle tests such as market access.

There is one exception to this, however, which concerns receiving health services abroad. Article 22 of Regulation 1407/71 required a prior authorisation from the home-State for the reception of certain health-benefits by a national in another Member State. The generality of this requirement was challenged in two groundbreaking cases: *Decker*⁷³¹, concerning a refusal to reimburse, by the Luxembourg social security authorities, of a pair of spectacles bought in Belgium on the basis of a Luxembourg prescription; and *Kohll*⁷³², concerning a refusal by those same authorities to allow dental treatment in Germany for one of its citizens. Both of these refusals were valid under the Regulation, but the Court held that the situations fell outside its scope. The Regulation, it was held, was:

*‘not intended to regulate, and hence did not in any way prevent the reimbursement by Member States at the tariffs in force in the competent State, of costs incurred in connection with treatment provided in another Member State, even without prior authorisation’.*⁷³³

In both these cases the traditional obstacle-based approach was adopted and the authorisation requirements were deemed restrictive.⁷³⁴ These decisions depart from other case law on social security in that they apply an obstacle-based approach which had not yet been applied in this area, creating an alternative procedure under which reimbursement of the cost of cross-border care is not a privilege but a judicially

⁷³¹ Case C-120/95 *Nicolas Decker* [1998] E.C.R. I-1831.

⁷³² Case C-158/96 *Kohll* [1998] E.C.R. I-1931.

⁷³³ *Id.*, para. 27.

⁷³⁴ *Decker*, paras. 31-36; *Kohll*, paras. 31-36. See also Matthew Moore, ‘Freedom of Movement and Migrant Workers’ Social Security: An Overview of the Case Law’ (2002) 39 CML Rev 808, 816.

enforceable right which can only be limited in exceptional circumstances.⁷³⁵ The striking thing about these cases and the case law arising from it, however, is that even though apparently alien to both the principles enshrined in the Regulation and more generally in the Court's case law on social security, this case law has the only decisions in this field that follow the more general concept of restriction used in the case law on the free movement of persons.⁷³⁶

C. *Transfer of Seat*

Yet another area where the Court seems to apply a specific test, different from its more general approaches, concerns the transfer of the primary seat of legal persons. Two main theories can be said to exist in this regard. The '*Sitztheorie*', or company-seat principle, postulates that a company's legal capacity is determined by reference to the law applicable in the place where its actual centre of administration is established. In accordance with this theory, the removal of central administration from that jurisdiction may presuppose the winding-up of the company with all the consequences that this entails in company and tax law, while the establishment of such a centre of administration by a foreign company might require it to be newly incorporated there. Some jurisdictions do not impose such strict requirements and allow a company to

⁷³⁵ Barnard, *The Substantive Law of the EU*, 395-403; Mei, *Free Movement of Persons within the European Community*, 288; Hatzopoulos, 'Killing National Health and Insurance Systems but Healing Patients? The European Market for Healthcare Services after the Judgements of the ECJ in *Vanbraekel* and *Peerbooms*', 696.

⁷³⁶ *Vanbraekel*, para. 44; *Geraets-Smits*, paras. 61-69; *Commission v France*, para. 91; *Müller-Fauré*, para. 44; Case C-8/02 *Leichtle* [2004] E.C.R. I-2641, para. 30; Case C-444/05 *Stamatelaki* [2007] E.C.R. I-3185, paras. 25-29; Case C-211/08 *Commission v Spain* [2010] E.C.R. I-5267, paras. 56-72; Case C-512/08 *Commission v France* [2010] E.C.R. I-08833, para. 32; Case C-173/09 *Elchinov* [2010] E.C.R. I-08889, paras. 41-45; Case 255/09 *Commission v Portugal* of 27 October 2011 (not yet published), paras. 74-75. The present case law can be summarily described as holding that prior authorisation for reimbursement of costs constitutes, for both patients and service providers, an obstacle to free movement. This is likely to be justified for systems of intra-mural (hospital) care or extra-mural care requiring the use of major and costly equipment exhaustively listed in the national legislation, but not for general extra-mural (out-of-hospital) care or for systems based on reimbursement. See Barnard, *The Substantive Law of the EU*, 401.

move without being dissolved. But, in its pure form, real seat jurisdictions refuse to recognise companies originating from other legal orders – even if this is in accordance with the company’s home-State legal order – by either disqualifying them or by submitting those companies to their own (real-seat) legal order when their centre of management is in their territory.⁷³⁷ The second theory, known as ‘*Gründungstheorie*’, or incorporation theory, holds instead that legal capacity is determined in accordance with the law of the State in which the company was incorporated regardless of where its centre of administration is located.

Articulating these models in a single economic space where free movement is protected is a difficult exercise, with the following combination of movements being possible:

	Incorporation	Real-seat
Incorporation	I	II
Real-seat	III	IV

Whereas in moves such as I. – the rules of the original State of incorporation apply – and IV. – the rules of the host-State apply – do not seem to pose issues concerning which jurisdiction regulates a company, movement II. can lead to two legal orders claiming jurisdiction over a company while movement III. may result in a company being left unregulated. Furthermore, even in situations where movement is possible and it is clear which jurisdiction will apply after that movement, there may be national rules setting forth conditions for that movement being allowed in the first place. The complexity of this issue was reflected in the Treaties. Article 54 TFEU

⁷³⁷ Eddy Wymeersch, ‘The Transfer of the Company’s Seat in European Community Law’ (2003) 40 CML Rev 661, 662, 668-671.

provides for a number of different connection factors – registered office, central administration, or principal place of business – as being relevant to determine the nationality of a company. Concerning the transfer of seat, Article 220 of the EC Treaty (meanwhile revoked) provided for the conclusion, so far as necessary, of agreements between the Member States to address the issue; no convention in this area, however, ever came into force.

A question, concerning a type I. situation, eventually reached the Court in *Daily Mail*, a case concerning the validity of conditions – namely, prior authorisation from the Treasury – for the outbound movement from the UK of a company wanting to establish its central management in the Netherlands without losing legal personality, or ceasing to be a United Kingdom company.⁷³⁸ The Court, while holding that the right of establishment prohibits the home-State from hindering the establishment in another Member State of a company incorporated under its legislation by means of both secondary establishment and/or taking part in the incorporation of a company in another Member State, decided that the transfer of primary seat fell outside the scope of the market freedoms. Holding that companies are creatures of national law, and that their existence, functioning, and extinction is to be regulated by that law alone, it decided that the conditions under which a company may transfer its central management and control from one Member State to another was still governed by the national laws of the State in which it was incorporated and of the State to which it wished to move. In the absence of harmonization, the Court held that differences in national legislation concerning the required connecting factor, and on the admission of transfer of seats, must be dealt with by future legislation or conventions.

⁷³⁸ Case 81/87 *Daily Mail* [1988] E.C.R. 5483. The reason for this condition was that the company would cease to be resident in the UK for corporate tax purposes.

Daily Mail did not pose problems of determining which jurisdiction applied; but in *Überseering* a type II. situation reached the Court when a company incorporated in the Netherlands moved its actual seat to Germany and became subject to two jurisdictions simultaneously.⁷³⁹ The case focused on the real-seat jurisdiction, Germany, which refused to recognise a company incorporated under the law of the Netherlands by denying it all legal capacity unless it had been reincorporated in Germany, even though the company's actions were lawful under Dutch law.⁷⁴⁰ The Court held that the situation fell within the scope of the market freedoms, distinguishing *Daily Mail* by holding that it applied only to relations between a company and the Member State under whose laws it had been incorporated when that company wished to transfer its actual centre of administration to another Member State whilst retaining its legal personality in the State of incorporation. In this sense, *Daily Mail* was an 'emigration' case. *Überseering*, was, instead, an immigration case, and the refusal to recognise a company validly incorporated in another Member State which had no problem with the company moving its centre of administration elsewhere was held to be a restriction on the right of establishment. Thus, and unlike what could have been derived from *Daily Mail*, it was decided that not all differences between legal systems on the subject of change of primary seat fell outside the scope of the right of establishment.⁷⁴¹ In *Inspire Art*⁷⁴², concerning a Dutch law imposing a number of obligations upon the exercise of a UK

⁷³⁹ *Überseering*.

⁷⁴⁰ Wymeersch, 671, 682 – these are so-called 'bipatride' companies. The opposite situation would be a type III. situation, which can leave a company unregulated. This is usually prevented by the home-State requiring the winding-up of the company to move into another Member State. See the discussion on *Cartesio* below.

⁷⁴¹ *Überseering*, para. 82. See also António Frada de Sousa, 'Company's Cross-border Transfer of Seat in the EU after *Cartesio*' (New York) Jean Monnet Working Paper 07/09, 18.

⁷⁴² Case C-167/01 *Inspire Art* [2003] E.C.R. I-10155.

company's business activities in the Netherlands, this reasoning was further elaborated and extended to inbound type I. situations.

The law, accordingly, seemed to be that, while inbound situations fell within the scope of the right of establishment, outbound situations did not. This was at odds with the main corpus of free movement law where inbound and outbound situations were subject to the same standards⁷⁴³, but while the Court was refusing to eradicate obstacles to the outbound movement of a company's primary seat it was also creating, together with the EU's political process, the conditions for the circumvention of these same obstacles. The most conspicuous means by which it did so was by allowing companies to set a primary establishment in one Member State even if they then went on to pursue all activities through a secondary establishment in another Member State. In *Centros* the Court expressly accepted that a company could be formed in a Member State solely for the purpose of establishing itself in another State where its main, or indeed entire, business was to be conducted through a secondary branch.⁷⁴⁴ From a practical standpoint, this made the distinction between primary and secondary establishment virtually meaningless.⁷⁴⁵ Another way whereby obstacles to the transfer of primary seat were addressed was through the transformation of companies. *Daily Mail* removed from the scope of the market freedoms the transfer of primary seat of companies to another Member State '*while retaining their status as companies incorporated under the legislation of the first Member State.*'⁷⁴⁶ In *Sevic*, a case concerning a decision by German authorities to refuse the registration of a merger of a German company with a

⁷⁴³ Wymeersch, 675-676. But see section D below.

⁷⁴⁴ Case C-212/97 *Centros* [1999] E.C.R. I-1459.

⁷⁴⁵ Wymeersch, 680-1.

⁷⁴⁶ *Daily Mail*, para. 24.

Luxembourg company on the grounds that German law only provided for mergers between companies established in Germany, the Court held that restrictions on mergers fell within the scope of the free movement provisions, further restricting the scope of *Daily Mail* to those outbound situations where there is a retention of legal personality in the State of incorporation.⁷⁴⁷ The EU legislator also started devising ways to facilitate the transfer of a company's main seat. The first instrument for this was the *Societas Europaea* ('SE') Regulation, allowing public limited liability companies the possibility of transferring their registered office from one Member State to another. The public limited company intending to transfer its seat abroad would, however, first have to convert itself into an SE in its home-State; the SE would subsequently transfer its registered office to the host-State and, finally, convert itself back there into a public limited company subject to the *lex societatis* of that host-State.⁷⁴⁸ Secondly, the cross-border merger Directive provided to limited liability companies the possibility of transferring their registered office to another Member State with a change of *lex societatis* through a cross-border merger – in particular, by setting up a subsidiary in the Member State where it wanted to move its registered office and then merging into that subsidiary.⁷⁴⁹ *Prima facie*, the case law seemed to have created a body of law according to which rules governing the inbound movement of a company's seat fell within the scope of the market freedoms, while outbound movement did not. But, in effect, a number of ways were devised to circumvent obstacles to outbound movement through

⁷⁴⁷ Case C-411/03 *SEVIC* [2005] E.C.R. I-10805. See Gert-Jan Vossestein, 'Companies' Freedom of Establishment after *Sevic*' (2006) 4 EBLRev 177, 179.

⁷⁴⁸ Council Regulation No 2157/2001 [2001] OJ L 294 on the Statute for a European Company.

⁷⁴⁹ Directive 2005/56/EC [2005] OJ L 310 on cross-border mergers of limited liability companies. This is similar to the system prevailing in the US, which espouses the incorporation doctrine – see Jan Wouters, 'European Company Law: *Quo Vadis?*' (2000) 37 CML Rev 257, Mathias M. Siems, 'The impact of the European company (SE) on legal culture' (2005) 28 ELRev 431, Deakin, 'Legal Diversity and Regulatory Competition: Which Model for Europe?'.

case law and legislation on secondary establishment, cross-border mergers, and *ad hoc* company structures.⁷⁵⁰

This state of affairs gave rise to a particular tension, since the decision in *Centros* seemed to imply that the validity of incorporation of a company in one Member State could not be called into question in a second Member State on the grounds that central administration was not located in the State of incorporation. In other words, *Centros* seemed to establish that the real seat theory itself was an obstacle to free movement prohibited by the Treaty.⁷⁵¹ This started an academic debate about whether the real-seat doctrine ran contrary to the free movement provisions or not.⁷⁵² The question reached the Court in *Cartesio*, a case concerning a company wishing to transfer its operational headquarters from Hungary, a real-seat jurisdiction, to Italy while remaining registered in Hungary and having its legal status governed by Hungarian law.⁷⁵³ The Hungarian authorities required the company to liquidate itself and reconstitute in Italy. AG Maduro argued quite forcefully that the requirement to liquidate a company when it moved its centre of administration to another Member State, as required by the real seat theory, was contrary to the right of establishment by treating cross-border situations less favourably than purely national situations. He argued for the reversal of *Daily Mail* on the grounds that the Court had consistently held that rules on the transfer of seat fell within the scope of the right of establishment; that

⁷⁵⁰ de Sousa, 55, 60-61; Johnston and Syrpis, 385-6.

⁷⁵¹ Sousa, 7; Wulf-Henning Roth, 'From *Centros* to *Überseering*: Free Movement of Companies, Private International, Law and Community Law' (2003) 52 ICLQ 177, 187.

⁷⁵² For its abolition see Peter Dyrberg, 'Full free movement of companies in the European Community at last?' (2003) 18 ELRev 528, 531; with qualifications, Wymeersch, 680-687; Erik Werlauff, 'Cross-border Transfers of SE Companies' (2004) 1 EurCoL. In favour of the doctrine, Roth, 190-3.

⁷⁵³ Case C-210/06 *Cartesio* [2008] E.C.R. I-9641. This case was a mirror image of *Überseering* – see fn. 740 above.

the distinction between ‘exit’ and ‘access’ situations ran against the general analytical framework of right of establishment; and that even though the right of establishment did not preclude the adoption of either the real seat or incorporation theories, it prevented them from being applied to their fullest logical extension.⁷⁵⁴ The Court did not follow the AG and upheld *Daily Mail*, deciding that differences in national legislation should be dealt legislatively, and that Member States were allowed to prevent a company governed by its law to retain that status if the company intended to reorganise itself in another Member State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the State of incorporation.⁷⁵⁵ On the other hand, the Court further narrowed the scope of application of *Daily Mail*, holding that it did not apply to situations where a company moves to another Member State with an attendant change as regards the national law applicable, in particular by converting itself into a form of company which is governed by the law of the Member State to which it has moved. In addition to the possibilities offered by cross-border mergers or the European Company, the Court further argued that a liquidation or winding-up requirement prevented a company from converting itself into a company governed by the law of the other Member State, to the extent permitted under that law.⁷⁵⁶

In so far as primary establishment is concerned at least, the disparate treatment between outbound and inbound situations subsists, creating an exception to the normal

⁷⁵⁴ Opinion, paras. 25-31.

⁷⁵⁵ How much this position by the Court was influenced by the year-long failure to adopt the 14th Company Law Directive on the cross-border transfer of the registered office of limited companies is impossible to say – see on this http://ec.europa.eu/internal_market/company/seat-transfer/2004-consult_en.htm.

⁷⁵⁶ It should be noted that, at the time of the decision, no Member State had such rules in place – Johnston and Syrpis, 387.

market access test applied more generally throughout the freedoms.⁷⁵⁷ This is reminiscent of another area where this distinction was first elaborated: exports of goods, to which the next section is devoted.

D. Exports of Goods

The free movement of goods is the only freedom that has different provisions for entry (imports) and exit (exports) situations, and is also the only freedom where the Court explicitly adopted different approaches for inbound and outbound situations.⁷⁵⁸ In *Groenveld*, decided shortly after the Court expanded its test in *Cassis de Dijon*, the Court held that the concept of measures having equivalent effects for exports was different from the one for imports, merely preventing national measures the aim or effect of which was: (i) to restrict the flow of exports, and (ii) to thus establish a difference in treatment between the domestic trade of a Member State and its export trade, (iii) in such a way as to confer a particular advantage on domestic production or on the domestic market of the Member State in question.⁷⁵⁹ The dominant reading of this was that it related exclusively to discriminatory measures.⁷⁶⁰ However, the fact that the ‘too uncertain and indirect effect’ doctrine was found to also apply to exports⁷⁶¹, and that in some cases the Court appeared to indicate that measures such as bans on exports

⁷⁵⁷ Sousa, 38-39.

⁷⁵⁸ Szydło, 753-754.

⁷⁵⁹ Case 15/79 *Groenveld* [1979] E.C.R. 3409, para. 7. See also *Oebel*, para. 17; *Oosthoek's*, para. 13; Case 172/82 *Inter-Huiles* [1983] E.C.R. 555, para. 12; Case 237/82 *Kaas* [1984] E.C.R. 4025, paras. 22-23; Case C-339/89 *Alsthom Atlantique* [1991] E.C.R. I-00107, paras. 13-14; Case C-412/97 *ED v Fenocchio* [1999] E.C.R. I-3845, para. 10; Case C-205/07 *Gysbrechts and Santurel Inter* [2008] E.C.R. I-09947, para. 40.

⁷⁶⁰ Weatherill, ‘After *Keck*: Some thoughts on how to clarify the clarification’, 902.

⁷⁶¹ *ED v Fenocchio*, para. 11.

and other non-discriminatory obstacles would also be found restrictive⁷⁶², could be seen as indicating that this prohibition applied an effects-based test with a broader scope than a mere prohibition of discriminatory measures.⁷⁶³

Regardless of which reading was to prevail, and even though the normative grounds for the distinction were not clear⁷⁶⁴, it was consensual that the test on exports was different, and less broad, than the test for imported goods, and for outbound movement in other freedoms.⁷⁶⁵ More recently, however, the Court could be seen to have moved towards a convergence between exports and imports. In *Gysbrechts* the Court decided that a Belgian rule prohibiting a supplier in a distance-sale from requiring an advance or payment before expiry of the period for withdrawal was a restriction on exports. The measure itself was indistinctly applicable, but the Court held that it affected cross-border sales more than intra-State trade, arguing that the actual effect of a prohibition applicable to all traders active in a national territory was greater on goods leaving the market of the exporting Member State than on the marketing of goods in the domestic market. This was because of obstacles to bringing legal proceedings against consumers who default in a Member State other than the one where the plaintiff resides, especially when the sales involve relatively small sums.⁷⁶⁶ It is clear that the measure

⁷⁶² Case 118/86 *Nertsvoederfabriek Nederland* [1987] E.C.R. 3883, para. 11; *Monsees*, para. 22; Case C-47/90 *Delhaize frères* [1992] E.C.R. I-3669, paras. 13-14.

⁷⁶³ In the sense that an effects-based test, when applied to rules that apply indistinctly of nationality, has to have some protective effect to constitute an impediment to trade, see AG Fenelly's Opinion in *Corsica Ferries*, para. 29.

⁷⁶⁴ See, as attempts to provide such grounds, Alexandre Defossez, 'L'Histoire d'une Divergence et d'une Possible Réconciliation: l'article 29 CE' (2009) XLV CDE 409, 420-421. Critical of this distinction, see AG Trstenjak's Opinion in *Gysbrechts and Santurel Inter*, paras. 42-48.

⁷⁶⁵ For example, it is not clear why the marketing of goods and services should be treated differently, but that's what *Groenveld* and *Alpine* do: see Oliver and Roth, 'The Internal Market and the Four Freedoms', 420.

⁷⁶⁶ *Gysbrechts and Santurel Inter*.

did not provide a particular advantage for Belgian production or its domestic market at the expense of foreign production or trade: Belgian exporters would in effect be in a worse situation than local producers by virtue of a rule imposed by Belgium.⁷⁶⁷ It is therefore not surprising that Belgium, the Commission and the AG considered that there was no restriction of exports unless the case law was modified.

That this case cannot be explained on the basis of the *Groenveld* criteria alone is obvious. Even if it reduces the flow of exports, the Belgian law did not differentiate between domestic and export trade, and did not confer any particular advantage upon domestic trade. This case is perhaps part of a trend whereby the Court has started to rely on the test used for imports with the aim of developing an overarching formula for goods.⁷⁶⁸ However, this trend did not reverse *Groenveld*, nor did it provide a new test in its stead; exports are *prima facie* still subject to a different test as to the concept of restriction than the one applying generally to the market freedoms at large.⁷⁶⁹

E. Discrepancies and Context

Each of the sectors reviewed above applies a test which differs from the more general approach said to apply to the market freedoms *in totum*. What is more, these specific tests are not found in respect of different freedoms, where different concepts of restriction are usually identified and for which the justifications found in Chapter III were developed; instead, the same test applies to all the freedoms in a certain sector of

⁷⁶⁷ As observed by AG Trstenjak in para. 34-40 of her Opinion, before defending the adoption of an exit from the market test, and proposing a substantially similar solution to that adopted by the Court in this case.

⁷⁶⁸ See *Jersey Produce*, Case C-161/09 *Kakavetsos-Fragkopoulos* of 3 March 2011 (not yet published), particularly AG Mengozzi's Opinion, paras. 46-48. See also Anthony Dawes, 'A freedom reborn? The new yet unclear scope of Article 29 EC' (2009) 34 *ELRev* 639, 642.

⁷⁶⁹ Stéphanie Rodrigues, 'Cronique de Jurisprudence Communautaire – Marché intérieur' [2009] *CDE* 217, 230; Tryfonidou, 'Further steps on the road to convergence among the market freedoms', 53.

the law. Lastly, if in some cases – namely exports and the transfer of seat – legal commentators and AG have generally criticised the case law for departing from the general approach, in others – such as social security, but particularly direct taxation – such a departure is not so much criticised as acknowledged, described and rationalised. The Court and its constitutive chambers appear to react to criticisms by bringing the tests more closely into line with its general approaches, even if without explicitly reversing itself. Simultaneously, the Court’s judges appear to embrace and expand the special approaches that are not subject to particular criticism.

It has been noted by political scientists that as the EU generated an increasing volume of rules and expanded its authority into new areas, there was often little coordination between these areas. Separate policy domains emerged as responses to separate sets of societal demands, with self-interested actors exploiting EU rules and arenas – for example, by taking their concerns to the Commission, the Court, or the Parliament, and urging them to act.⁷⁷⁰ These separate policy domains seem to have shaped the institutional environment in which the Court operates. Repeatedly throughout this study it has been observed how the existence of secondary legislation was relevant to the development of the Court’s primary law. The reasons for this can be said to relate both to canonical understandings of systemic interpretation, and to attempts by the Court to advance the law in a consensual way that respects, or seems to respect, the options of other relevant institutional actors.

On the other hand, if the political mechanisms for positive integration are blocked, this not only channels the actions of interested agents into fomenting negative integration; it also creates an institutional setting whereby the risks of the Court’s decisions being overruled by the political process are very small. The Court’s role in

⁷⁷⁰ Stone Sweet, Sandholtz and Fligstein.

bringing about the internal market by granting individuals with a stake in EU integration directly enforceable rights, and in adopting a broad interpretation of the market freedoms, initially co-existed with limited positive integration and requirements of unanimity for its adoption. The existence of secondary legislation and the unblocking of EU political channels increase the institutional constraints on the Court, thereby limiting its role even if the normative goals pursued remain the same;⁷⁷¹ simultaneously, an opposite pull can arise from the law's path-dependency, keeping the Court locked-in and subject to the pressures of self-interest maximizing litigants, even when faced with increased institutional constraints. The co-existence of both general and specific concepts of restriction reflects this tension between the specific institutional context of certain sectors – for example, the political sensitivity and absence of harmonization in direct taxation; or the system of co-ordination and secondary legislation for social security – with the more general values and context governing general tests, leading to different institutional calculi concerning the acceptable scope of the market freedoms in specific sectors. The evolution of the case law may similarly reflect a tension between different path-dependent lines of case law, on the one hand, and convergence pressures arising from systematic concerns and the use of related arguments by litigants and AG, as is particularly clear from the discussions above on exports and on transfer of seat. While traditional debates about the concept of restriction do not deal with this variety of tests, they are relevant to understanding them, since it is only by looking at the discursive process between all of the relevant institutional agents and the normative theories they might defend from time to time that we can try to make sense of all of these phenomena within a single analytical framework.

⁷⁷¹ This unblocking is relative, obviously: the move from unanimity to qualified majority voting facilitates the adoption of secondary legislation, but the hurdles for its adoption are still quite high, as noted above – see the comments around fn. 622.

It will not be attempted here to identify, specifically, the role that institutional constraints and normative constraints play in each situation; even if taking into account insights from political science helps us better to understand the case law, what those insights might be are still controversial within political science itself;⁷⁷² and if each situation is deeply contextual, as has been argued, going beyond a somewhat superficial identification of normative structures and institutional surfaces requires a detailed analysis which is too extensive and detailed to fit in this study.⁷⁷³ The claim here is merely that by acknowledging the relevance of institutional constraints, and that the finding of restriction corresponds to an allocation of power to the Court instead of other institutional alternatives – in the cases identified above, the Member States and their political processes – helps to make sense of the law, and allows us to incorporate situations which are ignored or unexplained by discussions focusing exclusively on purely normative questions and/or on general concepts of restriction. Taking into account institutional context improves the descriptive models available, increasing their explanatory power and the amount of situations they are able to encompass, which should lead towards more sophisticated and comprehensive legal analyses in the future.

⁷⁷² See, on the impact of the possibility of State override and non-compliance on Court decision-making, the (very recent) debate found in: Clifford Carruba, Mathew Gabel and Charles Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' (2008) 102 *AmPolitSciRev* 435; Alec Stone Sweet and Thomas L. Brunell, 'The European Court of Justice, State Noncompliance, and the Politics of Override' (2012) 106 *AmPolitSciRev* 204, and Clifford Carruba, Mathew Gabel and Charles Hankla, 'Understanding the Role of the European Court of Justice in European Integration' (2012) 106 *AmPolitSciRev* 214.

⁷⁷³ Such detailed studies are effectively pursued in the literature mentioned at the beginning of section III, which is specifically devoted to each of these fields; the goal here is to bring these fields back to, and put them in the context of, more general discussions of the concept of restriction.

IV. Normative Implications

A. A Suggestion For Normative Debates

The concept of restriction – alongside other elements concerning the scope of the market freedoms such as the ones reviewed in Chapter IV – is a tool whereby the Court determines when it has the power to balance a variety of interests and values concerning European economic integration, instead of leaving such balancing to other decision-making entities such as the EU and national political processes. The sensitivity of some issues, the pre-existence of different modes of regulation, and the institutional consequences of finding a restriction in what concerns the allocation of legislative competences within the EU can change the incentives for negative integration and the Court's institutional calculus, even if all other substantive normative considerations remain the same. It is within a discursive framework that includes both normative and institutional considerations that the Court determines its scope of action; and it is by trying to take into account this framework that we can understand why the Court is better able to take decisions *in certain situations but not in others*.

What is at stake in the Court's decisions on the scope of the market freedoms is a choice between various models of European integration and between the normative concerns which these models carry with them. The Treaties' statement that one of EU's goals is to create an internal market does not really help in determining what such a model should be. There is nothing fixed about an internal market – most sovereign States have one, but the models vary with the patterns of deregulation and re-regulation which underpin them being different. Art. 3 (3) TEU sets about the creation of an internal market that is supposed to contribute, simultaneously, to, *inter alia*, balanced economic growth and price stability, a highly competitive social market economy, and a high level of protection and improvement of the quality of the environment and social

justice. It should be clear that, apart from the different meanings that can be attributed to expressions such as a ‘competitive social market economy’, the exclusive pursuit of one goal, such as economic growth, might undermine the achievement of goals of social justice or protection of the environment.⁷⁷⁴ The balancing of these different goals, a task of the utmost political significance, is thereby required, but neither this provision nor the Treaties provide a complete picture as to what the division of competences between the Member States and the EU, or between the Court and the EU legislature should be.⁷⁷⁵

In other words, the Court is left with the duty to choose between multiple and contentious normative views on what the EU and its internal market should be. A preliminary question in this situation must be why the Court should decide these matters in the first place. A number of answers are possible. First, even if the Court is institutionally incapable of taking into account all relevant interests when compared with more representative political bodies, as observed in Chapter I, it may provide a forum for voices otherwise unable to be adequately represented in national and European political processes, and thereby serve an important corrective role.⁷⁷⁶ Also, the Court has formal legitimacy granted by the Treaties, but it cannot effectively impose its views on the rest of the European Union. Its institutional limitations may point towards it being the better comparative option to allocate competences between the relevant decision-makers – including itself –, since those same limitations prevent it from exercising excessive power as a result of abusing this role when compared with other institutional alternatives. In other words, the Court is the least dangerous branch,

⁷⁷⁴ K. Mortelmans, ‘The common market, the internal market and the single market, what’s in a market?’ (1998) 35 CML Rev 101, 118.

⁷⁷⁵ I thank Stephen Weatherill for having pointed this out to me.

⁷⁷⁶ This is the thesis in Maduro, *We, the Court* as I understand it.

which is why the ultimate power should be granted to it. Furthermore, the Court's concern with making sure that its decisions are accepted and seen as legitimate leads to the adoption of incompletely theorised agreements that have the advantage of requiring prior reasoned argument, and of usually presenting a possible compromise solution acceptable by most if not all parties. This means that the Court is not the last word in the development of European integration, but merely a voice, and a moderating one at that, in a more complex discursive process. These insights do not point to any specific concept of restriction *per se*, but they allow normative approaches that purport to find such a concept to think contextually about how better to fit their proposals as to what the law should be with specific normative agendas.

The observations above provide insights into two different facts. The first is that the role of the market freedoms in reconciling divergent social traditions in a competitive 'single' marketplace requires determining what role the Court should play in determining such matters.⁷⁷⁷ The second insight is that such determination is highly contextual. The main consequence of a measure being found restrictive is that the Court determines that it – or the national court – is the best-placed institution to pursue a balancing exercise between the need for European integration and the Member State's regulatory autonomy. However, this balancing – and this ability to determine what institution should pursue it – does not take place in a vacuum allowing the Court to pursue its own normative agenda as it sees fit. The question is thereby one of comparative institutional choice, and requires us to identify when the Court is better placed than other institutional alternatives to determine the balance between European integration and the State's regulatory autonomy, between centralization and

⁷⁷⁷ Niahm Nic Shuibhne, 'Settling Dust? Reflection on the Judgments in *Viking* and *Laval*' (2010) 21 EBLRev 681, 701-703.

decentralization, and between different regulatory options. This is not a question that can be answered in the abstract: the specific context in which the Court operates is relevant. What is more, that context not only changes, it does so by the Court's own actions, by reactions to such actions, and by autonomous initiatives of other relevant actors. The Court operates in an institutional environment which might dispute the Court's assessment and react to it: it is the historical interaction between the Member States, the Court, and other EU institutions that determines the on-going and ever-(slightly)-changing balance of powers in the EU and the content of the Union's economic constitution.⁷⁷⁸ That constitution is open, in the sense that its contents concerning the level of regulation and the attribution of competences will be the result of a discursive process between all the relevant institutional agents and the normative theories they might from time to time defend.

This leads us to the second insight, that the Court has good reasons to avoid definitively answering normative questions concerning the nature of the internal market. The choice of the Court as the relevant decision-maker is an imperfect one: being the best institutional alternative does not mean that the Court is a perfect institutional alternative, able to identify normatively ideal outcomes. There is no good reason why the Court should determine on its own what kind of single market is to be created – that is a contentious issue requiring the continuous balancing of different normative considerations. The existence of discrepancies in the concept of restriction can thus even be applauded as demonstrating sensitivity to context. Since positive integration is more developed in some sectors than in others, the incentives for negative integration

⁷⁷⁸ More broadly, on the inherent role of conflicting tensions and their constant management by pluralist market societies, see Albert O. Hirschman, 'Social Conflicts as Pillars of Democratic Market Society' (1994) 22 *PolTheo* 203.

may vary, and specific normative considerations may provide reasons why the Court's institutional calculus should be different in different areas.⁷⁷⁹

B. A Proposal Concerning Judicial Tests

Courts are constrained by both formal and informal rules as to how they are to pursue their role, but they are also constrained by their own limitations as to what they can effectively do. This relates both to their resources, and to their ability to investigate, understand, and make the substantive social decisions that may be required of them. These constraints interact with the determinants of litigation to determine the institutional ability of the adjudicative process.⁷⁸⁰ It is common to find in the literature concerning the way courts deal with such limitations references to rules and standards. As was described in Chapter I, this is also a traditional classification device used by legal agents attempting to rationalise case law.⁷⁸¹ To summarise what was said there, standards implicitly grant competence to courts, ensuring greater flexibility in dealing with cases that cannot be easily foreseen or made to fit with the normative underpinnings of the law. Rules reduce uncertainty, facilitate settlement and allow courts to allocate decision-making elsewhere, but tend to be both over- and under-inclusive in relation to their normative underpinning.

The finding of a restriction on free movement carries with it different, possibly conflicting, normative considerations concerning both the identification of obstacles to free movement, the nature of that internal market, and the allocation of competences in the Union, covering an immense variety of situations. This makes it a seemingly ideal

⁷⁷⁹ It should be noted that this calculus includes a consideration of the Court's own legitimacy – after all, what the Court may preserve of its legitimacy in avoiding certain controversies and adopting incompletely theorised approaches, it may loose in criticisms from the legal community for vagueness, in creating difficulties for national courts, in confusing market participants, etc.

⁷⁸⁰ Komesar, *Law's Limits*, 38.

⁷⁸¹ See fn. 94 to 98 above.

candidate for the adoption of a standard-based test; and in effect, this appears to be the case with both the economic due-process clause, with market access, and with the use to which discrimination tests have generally been put to by the Court. The problem with this, as was also observed in Chapter I, is that, as the amount and complexity of litigation increases, the lack of clear normative underpinnings can lead to a standard's overextension, while concerns about physical capacity, scale, and even about the legitimacy of being seen to adjudicate highly politicised value-choices where no best solution is available might drive courts towards rules. This is what appears to have occurred with the free movement of goods in *Keck*, and to a certain extent with the developments concerning tax and social security. The main issue with this is the natural normative under- and over-inclusiveness of rules, which may lead courts progressively to extend their scope until they resemble standards, or to develop means of evading them.⁷⁸²

In truly complex issues where the heterogeneity of the cases submitted before the Court might mean that a rule does not encompass a situation that should be subject to Court scrutiny, the Court will have to balance the relevant normative considerations with the weight of institutional constraints such as consistency, coherence, and consequent path-dependency in determining which is the best solution. As complexity and numbers increase, all alternative solutions become imperfect. The tension between the flexibility courts might obtain through the adoption of standards, and the reduction in litigation and the sharing of competence with other institutions that simple rules allow, may lead to cycling between rules and standards as a least-bad situation is attained.⁷⁸³

⁷⁸² The best example of which is arguably the slide from a typological test to market access in goods.

⁷⁸³ Komesar, *Law's limits*, 159-160.

This insight can be formulated in a slightly different fashion: due to the way in which they operate, the market freedoms function as a tool for policing the borderline between legitimate and illegitimate national regulation. As European integration evolves, an increase in the heterogeneity of cases submitted will follow, leading to the adoption of complex, standard-based tests.⁷⁸⁴ These standard tests, in turn, can become more manageable and predictable by the development of specific rules applicable to homogeneous situations subject to the same solutions.⁷⁸⁵ This can be said to be the case of the situations described in Section III. above: since they were subject to specific normative and institutional considerations, and as such to different comparative institutional choice assessments, they led to the development of specific (more rule-like) case law in opposition to the standard-like tests applied more generally to the market freedoms. It is true that pressure by litigants and the pull of legitimate normative concerns can limit the usefulness of such rules and lead to the renewed adoption of standards; nonetheless, in light of the incentives for litigation being skewed towards increasing the scope of the market freedoms, rules can serve an important role in anchoring the case law and preventing normative drifts.

The starting point for developing a concept of restriction should be to acknowledge that even if the market freedoms share a normative unity concerning the goal of creating an internal market, such normative unity is under-determined and hides debates between diverse visions of the European common market; and, secondly that, as was seen above, there is no good reason for the Court to decide such debates on its own. The Court is rather better suited, institutionally, to participate in the discursive process

⁷⁸⁴ Empirical demonstration that to increases in inter-State trade corresponds to an increase in the amount of litigation reaching the Court (and also to an increase in the number of positive integration instruments being adopted) is found in Stone Sweet, Sandholtz and Fligstein, 49-51. It is also demonstrated that increases in inter-State trade correspond to increases in the levels of positive integration – see, *id.*, 52.

⁷⁸⁵ Similarly, see Wils.

whereby such debates take place by being a forum for pragmatic compromises where possible, not ideal, equilibriums are found. The adoption of specific types of tests entails that what the Court may gain in certainty and freeing resources by setting rules it may lose in normative coherence and vice-versa.⁷⁸⁶ But this is not a bad thing; quite the opposite, it is a reflection of the institutional roles that courts are better suited to pursue, and may reflect both the institutional realities of enforcement and the political/sociological facts of greater or lesser degrees of agreement existing concerning those normative goals. On the other hand, these tests are imperfect tools, with their usefulness being constantly tested, and with a concomitant tendency for them to cycle back between standards and rules.

A standard like market access – reflecting the normative minimum of the market freedoms promoting market integration, while not leading to an economic due-process clause – seems to be, *prima facie*, the best current available fit for dealing with such a complex, normatively under-determined topic as the ideal scope of the market freedoms. In any event, more care about the normative underpinnings of the case law, and an acknowledgement that the stream of cases reaching the Court will pressure it towards a continuous expansion of the scope of the market freedoms, seem to be in order. On the other hand, normative concerns and institutional constraints specific to certain areas of the law, particularly when coupled with the disadvantages of standards identified above, might counsel the adoption of rules which might complement, simplify, or, in some rare cases, even go against the chosen standard. A rule can easily encompass most situations arising before a court, while a standard can play a residual role and deal with issues of over- or under-inclusiveness. From this perspective, the

⁷⁸⁶ Miguel Poiars Maduro, 'Harmony and Dissonance in Free Movement' in Mads Andenas and Wulf-Henning Roth (eds), *Services and Free Movement in EU Law* (OUP 2002), 65.

proposal of rule-like tests by AG in order to mitigate the institutional issues that the adoption of a standard entails, the existence of exceptions to the main ‘market access’ standard in certain sectors, the co-existence of a *Keck* typology and market access concerning goods, and the existence of settled derogations from even *prima facie* restrictions may be both the expression of institutional memory and of the tentative equilibriums between normative coherence and legal certainty.⁷⁸⁷

Underlying such different tests, however, the question being asked is the same: when is the Court the best institutional choice to decide a certain issue in light of the relevant normative goals? Within the scheme of the Treaties, the scope of the market freedoms is a legal tool to address such an issue; more importantly still, it ascribes to the Court, within limits, the power to answer that very question. It is only by taking into account all of the relevant normative and institutional concerns that such a question can be dealt with fruitfully. Existing standards and rules are judicial tools reflecting the variety of situations reaching the Court, while also providing a modicum of legal certainty and coherence. They reflect prior comparative institutional choices, provide classificatory frameworks, and allow for argumentative frameworks within which legal and judicial debates take place. Nonetheless, they do not preclude the recurrence of a question whose answer changes, ever so slightly, with every case, law, political initiative, and change in the legal and political contexts: is the Court *prima facie* the best institution to address this issue, or to determine what such an institution might be?

Adopting such a perspective is to embrace an open-ended, not pre-determined, judicial formula that reflects the lack of an identifiable definitive model for the internal market, and acknowledges the limitations of the Court’s capacity to solve that issue on

⁷⁸⁷ On the first point, see AG Lenz’ Opinion in *Bosman*; AG Fennely’s Opinion in *Graf*; and AG Kokott in *Mickelsson and Roos*; on the second point, see section III above; and on the last point, see my contribution: Pedro Caro de Sousa, ‘Through Contact Lenses, Darkly: is identifying restrictions to free movement harder than meets the eye? Comment on *Ker-Optika*’ (2012) 37 ELRev 79.

its own. The question is both normative and institutional, and an open one at that – but, arguably, such is the nature of standards and European integration alike.

Chapter VIII

Private Persons and the Scope of the Market Freedoms

Abstract: *This chapter will look into whether private actions can fall within the scope of the market freedoms – the question of so-called “horizontal direct effect”. It will be argued that: the differentiated treatment of the market freedoms apparent in the case law does not seem to be justified by any of the normative grounds for distinction between them identified in previous chapters; the origins for this differentiated treatment can be explained on the basis of specific institutional constraints; and the evolution of the case law is characterized by opposing pulls from the relevant institutional and normative inputs. Finally, a normative suggestion of how to deal with horizontal effect is proposed that builds on these descriptive insights.*

I. Introduction

This chapter will focus on the last outstanding area concerning the scope of the market freedoms in which there appears to be differentiated treatment depending on the freedom at stake. This is a question usually referred to as that of ‘horizontal direct effect’ of the market freedoms: whether they apply to private relationships and, if so, in what way. The chapter will begin by describing the Court’s case law, following which a review of the literature on the topic will be pursued; in both it is generally accepted that different freedoms have different types of horizontal effects. This review will identify the main reasons said to be behind this differential treatment, and subject them to a critical assessment, after which a mapping of the interaction between normative concerns and institutional constraints will be attempted.

II. Some Preliminaries

A number of preliminary points are in order. First, the expression ‘horizontal effect’ does not exclusively refer to relationships between private parties, in the same way that vertical effect does not relate exclusively to relationships between the Union and Member States. Horizontal effect can also be said to refer to the effect of Union law between Member States, while vertical effect also affects the relationship between the

Union and individuals. Regardless, the expression ‘horizontal effect’ is commonly, and imprecisely, used in the academic literature to refer to the effect of the market freedoms in purely private relationships – a usage which will be adopted in this chapter –, even if it has never been used by the Court itself.⁷⁸⁸ It should also be noted that the absence of horizontal direct effect does not mean that market freedoms do not affect private relationships – as demonstrated by the fact that under the preliminary reference mechanism purely private disputes are decided under EU law. In this sense, it is not doubted that Treaty provisions can have horizontal impact, with private parties being empowered to claim rights deriving from the market freedoms even in private litigation. The relevant question is not whether private relationships can be directly affected by the market freedoms, but whether individual conduct may itself infringe the rules on free movement; in other words, whether, in addition to Member States’ activities, actions by a private party are susceptible of falling within the scope of the market freedoms.⁷⁸⁹ Inasmuch as the overwhelming majority of private actions will be regulated by some kind of State measure, it is only in the exceptional cases where this does not occur that the question of horizontal direct effect arise – which is reflected in the limited amount of cases on this topic when compared to the full body of free movement case law.

III. The State of the Law on Horizontal Effect

It is common when analysing the Court’s case law on horizontal effect of the market freedoms to distinguish between the free movement of persons and the free

⁷⁸⁸ Joanna Krzeminska-Vamkava, ‘Horizontal Effect of Fundamental Rights and Freedoms – Much Ado About Nothing? German, Polish and EU Theories Compared after *Viking Line*’ [2009] Jean Monnet Working Paper 11/09, 7.

⁷⁸⁹ Julio Baquero Cruz, ‘Free Movement and Private Autonomy’ (1999) 24 ELRev 603, 605; Damian Chalmers, G. T. Davies and Giorgio Monti, *European Union law* (2nd edn, Cambridge University Press 2010), 274.

movement of goods, a distinction which will also be followed here for clarity of exposition.⁷⁹⁰

a. Free Movement of Persons

The question of whether private persons were bound by the free movement provisions was first addressed in *Walrave*, where it was held that the rules of an international sporting federation fell within the scope of the Treaty because the non-discrimination imperative applied not only to the action of public authorities but also to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services.⁷⁹¹ This formulation was reiterated in subsequent cases, which elaborated on the reasons justifying the extension of the scope of the provisions on free movement of persons to actions by private entities, boiling them down to three different propositions: the *effect utile* proposition; the uniform application proposition; and the general wording proposition.⁷⁹² The *effect utile* proposition points out that market freedoms create rights which courts must protect, and that the removal as between Member States of obstacles to the freedom of movement for persons would be compromised if the abolition of State barriers could be neutralized by other obstacles created by associations or organizations not governed by public law. The uniform application proposition points out that, since working conditions in different Member States are governed sometimes by provisions laid down by law or regulation, and sometimes by agreements and other acts concluded or adopted by private persons, to

⁷⁹⁰ Capital is usually ignored in these discussions.

⁷⁹¹ *Walrave*.

⁷⁹² Detlef Schaefer, *Die unmittelbare Wirkung des Verbot der nichttarifären Handelshemmnisse (Art. 30 EWGV) in den Rechtsbeziehungen zwischen Privaten* (Lang 1987), 147-154; Torsten Körber, 'Innerstaatliche Anwendung und Drittwirkung der Grundfreiheiten' (2000) 35 EuR 932, 941; Stefaan van den Bogaert, 'Horizontality: the Court Attacks?' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market* (Hart Publishing 2001), 125.

limit the scope of the fundamental freedoms to public acts would prevent them from being uniformly applied throughout the EU. Lastly, the general wording proposition points to there being nothing in the relevant provisions restricting the direct effect of the free movement of persons to public action.⁷⁹³

These reasons for finding that private actions can fall within the scope of the fundamental freedoms leave some questions unanswered. The most obvious one is whether private persons found to have infringed the free movement rights of others would be able to have recourse to the exceptions provided for in the Treaty, particularly since such justifications do not appear to be suited to private entities. The Court eventually held that there is nothing to preclude individuals from relying on justifications on grounds of public policy, public security, or public health, as neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question.⁷⁹⁴ Other unaddressed issues are what exactly a measure ‘aimed at regulating in a collective manner gainful employment and the provision of services’ is, and whether private actions not falling under this *aegis* can also restrict the free movement of persons. The Court never answered the former question⁷⁹⁵, but the latter question was addressed in *Angonese*.⁷⁹⁶ This case concerned a competition for a post with a private banking undertaking in Bolzano that required, as one of the conditions for entry into the competition, the possession of a certain certificate of bilingualism (in Italian and German) which could only be obtained in that

⁷⁹³ Case 13/76 *Donà v Mantero* [1976] E.C.R. 1333, *Bosman*, *Deliège*, Case C-309/99 *Wouters* [2002] E.C.R. I-1577.

⁷⁹⁴ *Bosman*, para. 86.

⁷⁹⁵ In the doctrine it has been argued that it corresponds to what is known as *Rechtsetzung durch Private* or private legislation in German doctrine. See Julio Baquero Cruz, ‘Free Movement and Private Autonomy’ 24 *ELRev* 603, 616-619.

⁷⁹⁶ *Angonese*, para. 34.

Italian province. The Court held that this condition discriminated on grounds of nationality, and that the prohibition of discrimination applied equally to agreements intended to regulate paid labour collectively and to contracts between individuals, thus seemingly extending the prohibition of discrimination on grounds of nationality to private persons, at least so far as the free movement of workers is concerned.⁷⁹⁷

In light of this case law it is almost unanimously recognized (and rarely criticised from a normative standpoint⁷⁹⁸) that the free movement of persons has horizontal direct effect.⁷⁹⁹

b. Free Movement of Goods

The unanimous acceptance of horizontal direct effect for the free movement of persons was mirrored up until recently by a near unanimous rejection of such an effect for the free movement of goods. An apparent consensus that Article 34 TFEU concerned only public measures emerged following a number of cases on intellectual property in the 1970s.⁸⁰⁰ In these cases the Court would seek to identify the IP right's 'specific object': for example, for patents the 'specific object' would be the right for the holder to be the first to place a patented product in a given market and enjoy the economic benefit arising from it. The exercise of the right to this 'specific object'

⁷⁹⁷ This leaves open the question of whether the prohibition of measures which do not regulate in a collective manner employment but are non-discriminatory can also apply to private persons, a question still unaddressed by the Court.

⁷⁹⁸ Even if such criticisms do exist: see Weatherill, 'Discrimination on grounds of nationality in sport', 65-66; Rudolf Streinz, *Europarecht* (5, neubearb. Aufl. edn, C.F. Müller 2001), 285.

⁷⁹⁹ Weatherill, 'Discrimination on grounds of nationality in sport', 90; Jean-Claude S  ch  , '*Quand les juges tirent au but: l'arr  t Bosman*' [1996] CDE 355, 361.

⁸⁰⁰ See, *inter alia*, *Deutsche Grammophon, Centrafarm v Sterling*, Case 16/74 *Centrafarm v Winthrop* [1974] E.C.R. 1183, Case 3/78 *Centrafarm v American Home Products* [1978] E.C.R. 1823. See on this consensus Snell, *Goods and services in EC law: a study of the relationship between the freedoms*, 129-131; and on this controversy, Christoph Krenn, 'A Missing Piece in the Horizontal Effect "Jigsaw": Horizontal Direct Effect and the Free Movement of Goods' (2012) 49 CML Rev 177, 180-181.

would ‘exhaust’ the IP right, with the result that whenever the exercise of a right by a private party exceeded the ‘specific object’ – for example, if the patentee tried to prevent the importation of the product into his own Member State when such product had already been lawfully marketed in another Member State –, such exercise would be considered to infringe Article 34 TFEU.⁸⁰¹ This doctrine seemingly implied that it was the private party’s action that restricted free movement, leading to a lively academic debate on whether this was (and should) be the case or not.⁸⁰² The issue was apparently solved when the Court seemed to hold that the scope of Article 34 TFEU was restricted to the laws which granted IP rights to private parties.⁸⁰³

It thus became settled law that the actions of private persons did not *per se* restrict the free movement of goods.⁸⁰⁴ But in two landmark decisions concerning State omissions at the turn of the millennium, the Court seemed to embrace a different approach. The first case, *Commission v France*, concerned a failure by the French State to prevent actions by private parties obstructing the free movement of fruit and

⁸⁰¹ *Merck v Stephar*, paras. 9-10; Joined Cases C-267/95 and C-268/95 *Beecham Group v Europharm* [1996] E.C.R. I-6285, para. 33.

⁸⁰² Arguing for horizontal effect of the free movement of goods, Walter Van Gerven, ‘The Recent Case Law of the Court of Justice Concerning Articles 30 and 36 of the EEC Treaty’ (1977) 14 CML Rev 5, Pierre Pescatore, ‘Public and Private Aspects of European Community Competition Law’ (1986-1987) 10 Fordham Int’l LJ 373, Michel Waelbroeck, ‘Les rapports entre les règles sur la libre circulation des marchandises et les règles de concurrence applicables aux entreprises dans la CEE’ in F. Capotorti and others (eds), *Liber Amicorum Pierre Pescatore* (Nomos 1987), 782-786. Arguing against it, Giuliano Marengo, ‘Competition between National Economies and Competition between Businesses – A Response to Judge Pescatore’ (1986-1987) 10 Fordham Int’l LJ 420, Nicholas MacGowan and Mary Quinn, ‘Could Article 30 impose obligations on individuals?’ (1987) 12 ELRev 163, White, Karen Banks and Giuliano Marengo, ‘Intellectual Property and the Community Rules on Free Movement: discrimination unearthed’ (1990) 15 ELRev 224.

⁸⁰³ See Case 19/84 *Pharmon v Hoechst* [1985] E.C.R. 2281, para. 22; Case 434/85 *Allen and Hanburys* [1988] E.C.R. 1245, paras. 8-10, Case C-316/95 *Generics* [1997] E.C.R. I-3929, para. 17.

⁸⁰⁴ Joined Cases 177 and 178/82 *van de Haar* [1984] E.C.R. 1797, Case 311/85 *Vlaamse Reisbureaus* [1987] E.C.R. 3801, Case C-159/00 *Sapod Audic* [2002] E.C.R. I-5031. For a possible exception to this, see Case 58/80 *Dansk Supermarked* [1981] E.C.R. 181. For the controversy around it, see Cruz, ‘Free Movement and Private Autonomy’, 608-9.

vegetables originating from other countries.⁸⁰⁵ The second one, *Schmidberger*, dealt with the absence of actions by the Austrian State to prevent a demonstration that resulted in the complete closure of a major transit route between northern Europe and northern Italy.⁸⁰⁶ In both cases the Court was asked to consider whether omissions by a Member State to suppress individuals' activities impeding cross-border trade restricted the free movement of goods, and considered that it did do so. This approach was new in that, even though in both cases an assessment of the lawfulness of collective actions undertaken by private individuals was implied, the decisions did not identify obstacles erected through the conduct of purely private persons *per se* but focused instead on the absence of State action preventing such conduct.⁸⁰⁷

On this basis one could arguably distinguish between a principle of direct horizontal effect for persons – meaning that it was possible for private action to restrict those free movement rights – and indirect State liability for goods – meaning that even though private action would not be able to restrict this free movement right *per se*, States could still be held liable for their failure to regulate such private activity. This distinction, however, was apparently not followed by the Court in *dicta* in *Viking*, a case on right of establishment, which read these cases as making it ‘*apparent that restrictions [on the free movement of goods] may be the result of actions by individuals or groups of such individuals rather than caused by the State*’⁸⁰⁸, thereby seemingly

⁸⁰⁵ *Commission v France*, para. 31.

⁸⁰⁶ *Schmidberger*, para. 64.

⁸⁰⁷ Giovanni Orlandini, ‘Right to Strike, Transnational Collective Action and European Law: Time to Move On?’ (2007) *Right to Strike, Transnational Collective Action and European Law*, 23.

⁸⁰⁸ *Viking*, paras. 62-63.

opening the scope of Article 34 TFEU to private actions that restrict the free movement of goods.⁸⁰⁹

IV. The Traditional Debate on Horizontal Effect

What reasons were presented to justify the different treatment between goods and persons with regard to horizontal direct effect? The traditional academic debate on the horizontal effect of the fundamental freedoms originated with the IP rights' cases reviewed above and focused on the structure of the Treaties. In particular, this debate tried to identify the relative roles of competition law and of the fundamental freedoms – the latter being mainly addressed to public entities, the former regulating private conduct. A consequence of this, as we shall see, was a focus on horizontal direct effect to the detriment of other types of horizontal effect.

A first current of this literature argued that while the market freedoms cover State action, private action should be covered exclusively by the provisions on competition law of Articles 101 and 102 TFEU. If either competition law or the market freedoms did not regulate some situations, these were not gaps, but situations that were explicitly excluded from the scope of the Treaty in order to protect a sphere of regulatory autonomy for the Member States.⁸¹⁰ An opposite current disputed these assertions on both descriptive and normative grounds. Descriptively, it argued that the Court had already applied both competition law and market freedoms to the same

⁸⁰⁹ Derrick Wyatt, 'Horizontal Effect of Fundamental Freedoms and the Right to Equality after *Viking* and *Mangold*, and the Implications for Community Competence' (4) [2008] CYELP 1, 8.

⁸¹⁰ This was stated in the *Spaak Report*, 16, and has been restated ever since: see Claus Dieter Ehlermann, 'The Contribution of EC Competition Policy to the Single Market' (1992) 29 CML Rev 257; Drexler, 642. Supporting this position see Marengo, 'Competition between National Economies and Competition between Businesses – A Response to Judge Pescatore', 424-432; MacGowan and Quinn, 167-8; White, 264; Orlandini, 8; Jukka Snell, 'Private Parties and the Free Movement of Goods and Services' in Mads Andenas and Wulf-Henning Roth (eds), *Services and Free Movement in EU Law* (OUP 2002), 211-212.

situations, reflecting the existence of situations with both public and private elements.⁸¹¹ It pointed out that while competition law only applies to undertakings, this concept encompasses any entity engaged in an economic activity regardless of its legal status.⁸¹² This meant that actions by public bodies such as public authorities, State-owned corporations, bodies entrusted by the State with particular tasks, and quasi-governmental bodies could be subject to competition law whenever they pursued an economic activity, and could thus fall within the scope of both free movement provisions and competition rules.⁸¹³ Simultaneously, actions by private persons did not fall within the scope of competition law when they were not undertakings, but could still fall within the scope of the market freedoms, at least concerning the free movement of persons.⁸¹⁴ From a normative perspective, it was argued that since both sets of provisions have as their goal the creation of the common market, free movement and competition law were complementary – but that this in no way entailed they were mutually exclusive, or that a distinction on the basis of the public or private nature of a specific organization was suitable.⁸¹⁵

⁸¹¹ *Vlaamse Reisbureaus*. See K. Mortelmans, ‘Towards convergence in the application of the rules on free movement and on competition?’ (2001) 38 CML Rev 613, 625.

⁸¹² *Höfner and Elser*, paras. 21-22 and 74-75 and cases mentioned therein. See, for a detailed analysis, Okeoghene Odudu, *The Boundaries of EC Competition Law* (OUP 2006), 23-45.

⁸¹³ Richard Whish, *Competition Law* (6th Edition edn, OUP 2009), 85-6; Mortelmans, ‘Towards convergence in the application of the rules on free movement and on competition?’ , 634-5.

⁸¹⁴ Examples of private parties not being deemed undertakings can be seen in Case C-96/94 *Spedizioni Marittima del Golfo* [1995] E.C.R. I-2883, paras. 23-25; Case C-343/95 *Cali & Figli* [1997] E.C.R. I-1547, para. 23; Case C-35/96 *Commission v Italy* [1998] E.C.R. I-3851, paras. 41-44; *Eurocontrol*, para. 30; *Wouters*, para. 57; Case C-67/96 *Albany* [1999] E.C.R. I-5751, para. 60; Joined Cases C-115/97 to C-117/97 *Brentjens* [1999] E.C.R. I-6025, para 57.

⁸¹⁵ Waelbroeck, 781, 793; Pescatore, ‘Public and Private Aspects of European Community Competition Law’, 383-386; Cruz, *Between Competition and Free Movement*, 87; Krenn, 205-206.

V. **Why Different Solutions for Different Freedoms? A Contextualised Descriptive Overview**

a. Normative Inputs

Against what would seem to be required by even a merely superficial analysis of the case law, the traditional debate failed to engage with the possibility of types of horizontal effect other than horizontal direct effect while simultaneously seeming to ignore the existence of different types of horizontal effect granted to different freedoms. In light of this, some arguments were developed which focused not so much on the logic of horizontal effect but rather on the special status of people under EU law. These arguments take two different forms: a first version holds that the free movement of workers, due to its specific social significance and the fact that it does not fall within the scope of competition rules, is subject to special treatment, while the second approach takes the doctrine of horizontal direct effect outside the realm of market integration into a general prohibition of non-discrimination based on human rights and/or European Citizenship.⁸¹⁶

A special status for workers is arguably reflected in the general prohibition of discriminatory treatment on the grounds of nationality by private employers resulting from *Angonese*⁸¹⁷, and also in the secondary legislation that has extended the prohibition on discrimination to collective agreements and individual contracts alike.⁸¹⁸ This argument also seems to be consistent with the Court's uniform application

⁸¹⁶ Cruz, *Between Competition and Free Movement*, 92; Chalmers, Davies and Monti, *European Union law*, 802; Schepel, 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law', 180; Krenn, 184- 185.

⁸¹⁷ See also Case C-94/07 *Raccanelli* [2008] E.C.R. I-5939.

⁸¹⁸ Cruz, *Between Competition and Free Movement*, 235; Cruz, 'Free Movement and Private Autonomy', 619; Schepel, 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law', 180.

proposition reviewed above, which focuses on the existence of different modes of regulating employment in different Member States. But even if one accepts a special normative underpinning for the free movement of workers, this seems nonetheless to be unable to explain the Court's zigzags concerning the types of obligations which the free movement of goods imposes on private persons (or on States with regard to the behaviour of their citizens); or to explain why the Court has up until now only protected the free movement of goods through indirect State liability, while granting horizontal direct effect to all provisions on the free movement of persons. The second line of argument, holding that the direct horizontal effect of the free movement of persons equates with the privileged status of persons within the EU legal system, tends to be justified by the normative reasons described in Chapter III.⁸¹⁹ Against this, it can be held that the attribution of horizontal direct effect to the free movement of persons occurred in a period when the case law's focus was on developing the free movement of goods, and seemed actually to attribute a secondary status to the other freedoms, so that it is unlikely that these normative justifications were at play. It can further be argued that the three propositions presented by the Court for the introduction of horizontal direct effect for the free movement of persons – which were reviewed above – in no way seemed to indicate that the normative underpinning for such an introduction was the privileged status of that freedom. Lastly, it can be argued that the introduction and development of European Citizenship as an alternative normative foundation took place simultaneously with the apparent extension of the horizontal scope of the free movement of goods towards indirect State liability, and not to any particular development in what concerns the horizontal effect of the free movement of persons,

⁸¹⁹ See, specifically along these lines, Krenn, 186-191.

with the exception of the extension of the prohibition of discrimination on grounds of nationality to private employers.

The remaining suggested normative underpinning for the privileged status of the free movement of persons in Chapter II – that these are fundamental rights unlike the other market freedoms – refers us back to the discussion concerning the status of the market freedoms as fundamental rights. As was noted there, regardless of their potential fundamental status, all market freedoms are EU constitutional rights hierarchically superior to national law, both regulating the interaction between Member States and the EU, and protecting the rights of individuals and economic agents by limiting the Union and the Member State’s substantive legislative and regulatory leeway.⁸²⁰ Adopting a constitutional rights perspective allows the problem of horizontal direct effect of the market freedoms to be compared with similar issues affecting constitutional rights throughout the world.

As has been noted, the problem of horizontal direct effect is not restricted to EU law: it is a pervasive question wherever constitutional rights exist.⁸²¹ The most cogent discussions on this topic can be found mainly in German doctrine, where it is generally accepted that, where the relevant provision expressly states that fundamental rights apply only against the State, or that they also apply against private parties, the question of whether constitutional rights should bind private parties is solved. The problem only exists in situations where no such specification exists. As to what the solution should be in this case, three main theories can be found. The *unmittelbare, direkte Drittwirkung* approach argues that fundamental rights should be directly effective in private relations without any need for the intervention of public powers. The *mittelbare, indirekte*

⁸²⁰ See fn. 208 to 210 above.

⁸²¹ Marc Tushnet, ‘The Issue of State Action/Horizontal Effect in Comparative Constitutional Law’ I (2003) I•CON 79.

Drittwirkung theory holds that fundamental rights should be indirectly effective, and that therefore it is incumbent upon the legislator to regulate private relationships in such a way as to ensure respect for fundamental rights, and upon the courts to interpret private law in accordance with constitutional rights.⁸²² A third theory, that of *Schutzpflicht*, which is sometimes seen as complementary to the other two, argues that fundamental rights impose protection duties on public powers, in particular the duty of the State to take positive actions in order to protect private parties from acts by third parties that may infringe on their fundamental rights. Inasmuch as any such infraction takes place, the State is responsible for it.⁸²³

The prevailing theory in German practice is the *mittelbare Drittwirkung*, which I shall translate as indirect horizontal effect. The origins of this can be traced back to the *Lüth* case, where the German Constitutional Court stated that: ‘Basic rights are primarily to protect the citizen against the State, but as enacted in the Constitution they also incorporate an objective scale of values which applies, as a matter of constitutional law, throughout the entire legal system’.⁸²⁴ Constitutional rights ‘radiate’ into all areas of the legal system, requiring fundamental rights to be taken into account when interpreting private law. Alongside this prevalence of indirect horizontal effect, practice seems also to have embraced the existence of the State’s protection duties⁸²⁵,

⁸²² Alexy, *A Theory of Constitutional Rights*, 355; Claus-Wilhelm Canaris, ‘Drittwirkung der gemeinschaftsrechtlichen Grundfreiheiten’ in Hartmut Bauer and others (eds), *Umwelt, Wirtschaft und Recht* (Mohr Siebeck 2002), 34; Krzeminska-Vamkava, 11; Canotilho, *Direito Constitucional e Teoria da Constituição*, 422.

⁸²³ Alexy, *A Theory of Constitutional Rights*, 302 ff; Matthias Kumm, ‘Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law’ (2006) 7 GLJ 341, 350-1; Canotilho, *Direito Constitucional e Teoria da Constituição*, 374, 384-385. This doctrine can also be found in the case law of the European Court of Human Rights since the *Belgian Linguistic case (No 2)* [1968] 1 EHRR 252.

⁸²⁴ *Lüth* BVerfGE 7 198 (205).

⁸²⁵ Mathias Ruffert, *Vorrang der Verfassung und Eigenständigkeit des Privatrechts* (Mohr Siebeck 2001), 12-28, 144-152; Kumm, ‘Who is Afraid of the Total Constitution? Constitutional Rights as Principles and

according to which courts have a duty, as State bodies, to hand down decisions that respect the constitutional rights of the parties by either interpreting private law in accordance with fundamental rights or, when such law is explicitly contrary to fundamental rights, by considering it unlawful.⁸²⁶

Despite the existence of these debates, which focus on the best way to regulate private conduct, it is generally accepted both in Germany and elsewhere that no substantive difference arises from adopting horizontal direct or indirect effect, or from adopting a doctrine requiring State action for the protection of constitutional rights: these approaches are outcome-neutral, and depend merely on how one decides to look at legal issues, even if the institutional mechanisms and their supporting narratives vary from place to place.⁸²⁷ The only practical differences concern the way in which procedural questions are framed: under horizontal direct effect, private parties would be the addressees of the decision instead of the public authority, and the actions of those parties would be reviewed instead of the relevant law or absence thereof. The substantive outcome, however, would be the same: since courts are under an obligation to uphold constitutional law, the fact that parties may not invoke a direct constitutional infringement by the other party merely means that the question is replaced by the similar requirement that existing private law be interpreted in accordance with the

the Constitutionalization of Private Law’, 352. Similarly for Austria, see Theo Öhlinger, *Verfassungsrecht* (8 edn, Facultas 2009).

⁸²⁶ Considering that this should merely be considered an element of a wider *Schutzpflicht* incumbent on both Courts and the legislature, see Hermes, ‘Grundrechtsschutz durch Privatrecht auf neuer Grundlage?’ [1990] NJW 1764; arguing that *mittelbare Drittwirkung* and *Schutzpflicht* are very similar, if dogmatically distinct, Ingo von Münch, Josep Ferrer i Riba and Pablo Salvador Coderch, *Zur Drittwirkung der Grundrechte* (Lang 1998), 24-28

⁸²⁷ Stephen Gardbaum, ‘Where the (State) Action is ’ (2006) 4 I•CON 760. On a plausible explanation of the historical-institutional background for the apparently restrictive “State-action” doctrine in the USA, see Kumm and Comella, ‘What Is So Special about Constitutional Rights in Private Litigation?’, 272-283.

constitution or be declared unconstitutional, with exactly the same balancing exercise being imposed on courts from a substantive perspective.⁸²⁸ Only exceptionally, in situations which are left untouched by the relatively thick regime of regulation nowadays applicable to private actors in their interactions – in other words, when situations fall outside the control of the State’s judicial apparatus (such as purely social arrangements) – will the only way for fundamental rights to apply in the private sphere be through direct horizontal application of fundamental rights which would extend the reach of judicial control⁸²⁹; and even this can in turn be framed as a situation where a State omission occurred and thus be conceptualised under *Schutzpflicht*.

In a sense, what this demonstrates is that the issue of horizontal effect of fundamental rights is a typical doctrine of constitutional law, inherent to the creation of a system of judicial adjudication of constitutional rights.⁸³⁰ This might sound counter-intuitive, since it requires constitutional rights to be understood not as providing an area of liberty protected against government intervention, but as imposing on governments a duty to create and protect areas of individual liberty against both public and private action. This is a result of the position that:

‘In modern constitutional settlements the basis of rights theories [having] dramatically shifted. Rights are no longer conceived as defining a zone of individual autonomy freed from governmental interest. Rights are now conceived to be part of the objective organizational principles of the constitutional order that has been instituted. Rather than being treated as pre-political rights that specify the limits of government,

⁸²⁸ Krzeminska-Vamkava, 13-18; Kumm, ‘Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law’, 352-359.

⁸²⁹ Mark Tushnet, ‘The Relationship between Judicial Review of Legislation and the Interpretation of Non-Constitutional Law, with Reference to Third Party Effect’ in András Sajó and Renáta Uitz (eds), *The Constitution in Private Relationships* (Eleven International Publishing 2005), 170; Stephen Gardbaum, ‘Where the (State) Action is ’ (2006) 4 I•CON 760, 767. A good example of this is Canada, where certain rules – such as common law – are largely exempt from judicial constitutional review. See Cheryl Saunders, ‘Constitutional Rights and the Common Law’ in András Sajó and Renáta Uitz (eds), *The Constitution in Private Relationships* (Eleven International Publishing 2005), 195-199.

⁸³⁰ Tushnet, ‘The Relationship between Judicial Review of Legislation and the Interpretation of Non-Constitutional Law, with Reference to Third Party Effect’, 169.

*constitutional rights emerge from and obtain their realization only through the constitutional order that authorizes the office of government. [...] Whereas liberty previously was conceived as imposing limitations on law, liberty now becomes a state that is realized only through the operations of law. Instead of being treated as a natural condition—the product of pre-political social processes—liberty becomes a political condition that is itself institutionally shaped and normatively ordered.*⁸³¹

Under this framework, even a constitutional right that merely protects against the public abuse of power is no longer satisfied by State abstention, requiring instead that such abstention be protected through a public apparatus that deters and punishes misconduct. The same can be said, *a fortiori*, of the infraction of constitutional rights by private parties: if private individuals infringing on rights are acting in accordance with laws creating and regulating private behaviour, this means that government action is present. Most of the so-called negative rights thus come to be understood as requiring governmental assistance, not governmental abstention; those rights cannot exist without public assistance to begin with, and no substantive difference arises from controlling private action directly or through the regulatory apparatus allowing for those actions.⁸³²

Like other constitutional rights, the market freedoms impose substantive constraints on the resolution of political questions by subjecting them to courts that, under the guise of adjudicating constitutional rights provisions, will assess whether an act is supported by good reasons. They not only establish a comprehensive system of defences for individuals against potential excesses of Member States, but also provide the basis for claims against public authorities – be that the legislature, the executive, or the judiciary – to intervene on behalf of rights-claimants in response to threats from

⁸³¹ Loughlin, *Foundations of Public Law*, 369.

⁸³² Tushnet, 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law', 79; Cass R. Sunstein, 'State Action is Always Present' 3 *ChiJInt'IL* 465, 466-9.

third parties.⁸³³ Through the market freedoms, individuals are granted rights that have to be protected by the State, not only by ensuring that public authorities do not act in such a way as to infringe them, but also by effectively implementing the conditions whereby those rights can be enjoyed. If a market freedom were limited to protecting against public abuses of power, it could be satisfied by State abstention; but in practice that abstention must be guaranteed by a public apparatus that will deter and punish misconduct. If private individuals infringing on market freedoms are acting in accordance with laws creating and regulating market behaviour, this means that State action is present. Market freedoms, like most of the so-called negative constitutional rights, require governmental assistance, not governmental abstention; they cannot exist without public assistance in the first place.⁸³⁴

Like with other constitutional rights, choosing between different approaches to horizontal direct effect does not affect the substance of the relevant rights, but merely what the relevant legal actions to enforce those rights are. A good example of this is the IP rights saga described above. The discussion as to whether what infringed the free movement of goods was the exercise by the private party of the IP right, or the fact that national law allowed for such a right in the first place, did not alter the substantive outcome: in the end, the situation would have been considered contrary to the free movement of goods regardless of the Court deciding that it was private action or the public conduct that was relevant. Hence, upholding the effect of market freedoms in purely private relationships can be done by either granting them direct or indirect horizontal effect, or by imposing on the State a duty to protect them, without any

⁸³³ Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law', 343-4, relying on his concept of 'constitutional juristocracy' to describe such a system.

⁸³⁴ Tushnet, 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law', 79; Cass R. Sunstein, 'State Action is Always Present' 3 *ChiJInt'lL* 465, 466-9.

relevant substantive distinction arising from this. In the end, the outcome will be the same.⁸³⁵

This in turn seems to explain why there seem to be no ‘classic’ normative justifications for a different treatment of the market freedoms concerning horizontal direct effect. Such normative foundations are concerned with the substance and purpose of the market freedoms, and these seem unaffected by what type of horizontal effect is adopted.

b. Institutional Constraints

Substantively, the impact of market freedoms is the same regardless of the type of horizontal effect which a market freedoms is said to have, and this seems to be reflected in the absence of normative reasons to distinguish between the freedoms. The question this raises is: how can we explain the existence of different types of horizontal effect for different freedoms? One may only speculate as to the motivations of the judges involved, but one of the Court’s justifications in extending horizontal direct effect to the free movement of persons was that there was nothing in the relevant provisions restricting their direct effect to public action. This is different from the provisions concerning the free movement of goods or the free movement of capital.⁸³⁶ Even if this does not present a final argument against the extension of direct horizontal effect to these freedoms, it is one of the most basic canons of interpretation that the letter of the law is the first step in any interpretative process. Since the Treaties do not explicitly address the question of horizontal direct effect, it is not surprising that the

⁸³⁵ AG Maduro’s Opinion in *Viking*, paras. 38-40.

⁸³⁶ Article 34 TFEU prohibits quantitative restrictions on imports and all measures having equivalent effect *between Member States*; and Art. 63 (1) TFEU prohibits all restrictions on the movement of capital *between Member States* and *between Member States and third countries*. It should be noted that it has not yet been established whether the free movement of capital has horizontal effect, and if so what type it should assume – see Schepel, ‘Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law’, 192-196.

Court followed the express language of the relevant provisions, particularly in the absence of substantive normative reasons to decide otherwise. If nothing relevant hangs in the balance, why not address the freedoms differently if such is the *prima facie* indication provided for by the Treaty? A second reason could also relate to pure systemic issues such as those reflected in the traditional debates concerning horizontal direct effect reviewed above. With collective labour agreements and workers not falling within the scope of competition law, this meant that there was no control mechanism of private action similar to that in place for other freedoms. From this standpoint, principles of interpretation of EU law such as the principle of effectiveness and of uniform application – which were invoked by the Court – may indeed point towards these types of private actions falling within the scope of the free movement provisions in order to ensure that all relevant public and private activity was regulated by the Treaty.

The different treatment to which individual market freedoms are subject is also demonstrative of courts' tendency to find solutions that are acceptable on results and on low-level principles without taking sides in large-scale controversies, and possibly also of the judicial drift which can result from such a practice. In its decisions, the Court never directly engaged with the academic discussions, or expressly reneged on its previous case law, but merely focused on the facts at issue. Its decisions reflected 'incompletely theorised agreements on particular outcomes'⁸³⁷: they were not fully theorised, nor did they attempt to be. Instead, the Court's decisions duly followed the prevailing canon for legal reasoning, judicial methodology, and logics of presentation to reach solutions that, even though duly justified, were limited to the questions that had been addressed to it.

⁸³⁷ Sunstein, *Legal Reasoning and Political Conflict*, 4-5.

A good example of this is yet again the IP saga, where the Court's assertion that the exercise of an intellectual property right could restrict the free movement of goods was in no way a sweeping proposition that the free movement of goods had horizontal direct effect, but merely a step in a piece of legal reasoning holding that the existence of rights in national law could restrict the free movement of goods if exercised.⁸³⁸ Nor did the subsequent focus of the Court on national rules granting rights to individuals include an outright rejection of horizontal direct effect. Both sets of decisions merely included statements to the effect that the exercise of the IP right or, subsequently, the application of national provisions restricted free movement, but this fell short of endorsing one type of horizontal effect over another, a task left for, and embraced by, legal commentators.

A similar lack of theorisation can be found in the development of direct horizontal effect for the free movement of persons. By invoking *effet utile*, uniform application, and general wording to justify its adoption of the horizontal direct effect, the Court made reference to underlying principles of EU law that could support its conclusion that certain types of 'collective regulation' may fall within the scope of the free movement provisions. On the other hand, the concept of 'collective regulation' pops up as unannounced as Venus from the waves of Cyprus, and has never been subject to any detailed analysis as to its meaning and content. This has allowed the Court to elude the debates on whether the free movement provisions should have horizontal direct effect, and if so to what extent, and to focus instead on the problem at

⁸³⁸ A step borrowed from competition law – see Joined Cases 56 and 58/64 *Consten and Grundig* [1966] E.C.R. 299 – and which can relate to the intermix between competition and free movement law in IP cases – see for example *Deutsche Grammophon*, para. 11. For a detailed analysis, see D. G. Goyder, Joanna Goyder and Albertina Albors-Llorens, *Goyder's EC Competition Law* (5th edn, Oxford University Press 2009), e-source – Additional chapter on Intellectual Property Rights.

hand – in the relevant cases, the problems arising from the regulation of certain types of professional activities by international bodies outside the control of the State.⁸³⁹

From these humble and under-theorised beginnings, however, small differences escalated and congealed into bigger ones. This is again a reflection of the fact that legal change will usually occur incrementally, being constrained by the embeddedness of customs, legal traditions, codes, and conduct that lead both to lock-in and path-dependency. The feedback process of legal decisions and reactions by self-interested legal and economic actors that are characteristic of precedent based-systems means that small early events can have a large, and surprising, impact on the eventual outcome of the case law, particularly in under-theorised areas. By treating the free movement of persons as having direct horizontal effect, and the free movement of goods as not having such an effect, a (legal) cognitive pattern was created that pushed would-be litigants to try to argue along these lines, thereby creating a normatively unjustified outcome. For example, the IP rights cases reviewed above ended up looking into the national laws creating IP rights, but the solution to the cases was the same as if the Court had looked into the individual actions exercising these rights. This situation was different from that where the activity of a vast number of individuals effectively prevented the free movement of agricultural products from Spain to France. The cases were similar in that in both of them restrictions on the free movement of goods took place. But since there was no national law to which to make reference in the latter case, and since within the cognitive framework created by the Court's case law no action was possible against private persons, the Commission had to bring an action not against

⁸³⁹ See, particularly, *Walrave*, paras. 17-22; see also how the arguments remain exactly the same, and similarly focused, in *Bosman*, paras. 82-86.

those individuals but against the French State for not controlling them.⁸⁴⁰ In light of this new datum, when a later protest blocked a road linking Austria to Italy, the question could now be framed by the national court, and the litigants, as being focused on the failure of the relevant public agent to ban the demonstration instead of on the acts of the demonstrators.⁸⁴¹

So far as the free movement of persons is concerned, the thin theorisation in place to justify horizontal direct effect was never explicitly restrained to ‘collective regulations’; it also seemingly implied that the prohibition of discrimination on grounds of nationality was not restricted to the State, and that private parties should not be allowed to raise obstacles to free movement. This meant that some types of private behaviour akin to State behaviour were prohibited, but it could also mean that either such behaviour included discrimination on grounds of nationality by private entities when the effect would be similar to State action, or merely that private parties were not allowed to discriminate on grounds of nationality *tout court*. When the question of whether private parties were allowed to discriminate on grounds of nationality reached the Court, the latter perspective was accepted without the former having even been considered by either the referring or the deciding courts.⁸⁴² This development seemed finally to have taken the free movement of persons – or at least workers – beyond the other freedoms by extending the kind of restrictions that it encompassed, requiring a

⁸⁴⁰ *Commission v France*.

⁸⁴¹ *Schmidberger*.

⁸⁴² *Angonese*, para. 36.

somewhat different normative foundation for it. This different normative foundation, however, was never articulated.⁸⁴³

Normativity does have its pull, however, and as such the question remains: apart from the institutional context and the constraints it imposes, why should the freedoms be treated differently? The recognition of this may be the reason behind the startling *obiter dicta* in *Viking* that from the case law on the free movement of goods it is apparent that restrictions may be the result of actions by individuals rather than caused by the State.⁸⁴⁴ If this picture of the evolution of the case law is correct, it must be remarked that the introduction of institutional elements helps to make descriptive sense of the law in a way that looking merely at normative inputs does not; furthermore, institutional elements may also help to explain perceived changes in the normative *substratum* of the market freedoms, such as the one resulting from *Angonese*. On the other hand, the relevance of normative considerations is not denied, and is effectively demonstrated by its gravitational effect on what institutional developments were slowly separating, helping to maintain a modicum of coherence in the case law.

⁸⁴³ Except by Baquero Cruz – see fn. 818 above. This line of case law has had a very limited impact. The exception is *Raccanelli*, which effectively applied this principle to a private entity operating in the public interest.

⁸⁴⁴ *Viking*, para. 62. See also AG Maduro’s Opinion, paras. 36-40.

VI. Normative Suggestions

The focus up until here has been on the development of a better description of the law and its development. What follows will be yet another attempt to develop normative proposals building on the descriptive insights obtained, and on the view sustained in the first chapter that institutional considerations should be included in the internal perspective of the law.

a. What type of horizontal effect should be adopted?

Throughout this thesis it has been sustained that normative and institutional considerations are intertwined. The descriptive picture above is an example of this by pointing to the fact that, even though the form of horizontal effect one adopts is normatively neutral, the end-result of choosing between them need not be substantively the same, even from a purely normative perspective. In other words, arising from developments spurred by purely institutional constraints, we may end up seeing developments in the normative *substratum* of the law. *Angonese* is a good example of this, inasmuch as it effectively requires a refinement, if not a change, of the normative foundations of the free movement of workers and the type of obstacles it is supposed to remove. Even if one could dismiss it as a wrong decision from a normative standpoint, this does not prevent it being picked up as a precedent, as has indeed happened.⁸⁴⁵ Normative ideas seem to be able to influence the institutional environment, but also seem to be (indirectly) influenced by it. Thus, institutional considerations are not only valuable by themselves, but are necessary to develop more attractive, complete, and realistic normative proposals.

Even in a static scenario where the market freedoms share the same immovable normative *substratum*, the adoption of specific types of horizontal effect has serious

⁸⁴⁵ If only once: *Raccanelli*.

consequences which merit analysis. The infringement of market freedoms may give rise to civil liability, and thus to the payment of damages to the injured party. From the perspective of who should be made to pay for infringements of the market freedoms, some authors argue for the generalised adoption of indirect horizontal effect in the EU context. The first reason for this is that indirect horizontal liability by the State – including both a duty of interpreting national law in accordance with the market freedoms, and State liability in cases where sufficiently serious omissions on the State's part leads to market freedoms being infringed – covers all possible situations. Hence, this approach has the advantage of providing a single uniform solution to all cases by making the attribution of liability independent of the degree of regulatory intervention of particular States in private relationships, thereby prevent private parties from being deemed liable or not depending not on their actions but on the State in which those actions took place in. Adopting a general indirect horizontal approach would also allow for liability actions against the Member State for infractions committed by its public bodies and for those resulting from the State having allowed certain private activities, while simultaneously making sure that private parties are liable under national law when the Member State has fulfilled its duty and made such activities illegal. Another advantage to this approach is that, even though private parties might have recourse to the justifications provided in the Treaty, these are directed at States and not at individuals: it is hard to see how individuals might have recourse to them in practice. A final reason advanced for adopting this approach is that it leaves to the relevant Member State the main duty of regulating private relationships, in accordance with the principle of subsidiarity.⁸⁴⁶

⁸⁴⁶ Stoppel, 247-250 and 260-1; Alison McDonnell (ed), *A review of forty years of Community law: legal developments in the European Communities and European Union* (Kluwer 2005), 149; Kingreen, 'Fundamental Freedoms', 578-583; Schillig, 293. Against this, arguing for direct effect, see Schaefer, *Die*

It is submitted that it would indeed be simpler, and more in accordance with the structure of the Treaty, to restrict the horizontal effect of the market freedoms to a duty of '*interprétation conforme*' by national courts, coupled with some form of liability for breach of a State's positive duties. Concerning damages, this approach would lead to an acceptable allocation of liability between State and private persons. Whenever a private party infringed both the market freedoms and a national rule, that party would be liable for damages under national law. Whenever the relevant structure to protect a market freedom had not been put in place, by either Member State omission or by the adoption of a law infringing those freedoms, the Member State would then be liable for its legislative failures in this regard.⁸⁴⁷ This solution would also allow for the same treatment for all the freedoms, reflecting the fact that there seems to be no good reason to distinguish between them, and thereby preventing unreasoned and unjustified normative drifts such as the one verified in the free movement of workers under *Angonese*.⁸⁴⁸

Simultaneously, pure institutional considerations point towards courts, inasmuch as possible, allowing Member State discretion on how to address private actions that might restrict free movement, without foregoing their powers to make sure that the exercise of such discretion duly protects the market freedoms.⁸⁴⁹ It must be remarked

unmittelbare Wirkung des Verbot der nichttarifären Handelshemmnisse (Art. 30 EWGV) in den Rechtsbeziehungen zwischen Privaten; Krenn, 208-209; seeing for direct and indirect effect as complementary, see Krzeminska-Vamkava, 40.

⁸⁴⁷ This is nevertheless currently not the position adopted by the CJEU in cases other than those on the free movement of goods – see Peter Szczekalla, 'Grundfreiheitliche Schutzpflichten – eine "neue" Funktion der Grundfreiheiten des Gemeinschaftsrechts' (1998) 113 DVBl 219.

⁸⁴⁸ What is being taken issue with here is not the change in normative foundations *per se*, as much as the lack of debate and reasoning in that change. Rationalizing and explaining such changes *ex post* may be a substitute for this, but they not seem adequate replacements for previous reasoned analysis.

⁸⁴⁹ Koen Muylle, 'Angry farmers and passive policemen: private conduct and the free movement of goods' (1998) 23 ELRev 467, 473-4.

that the choice between direct horizontal effect and indirect horizontal effect is a choice concerning which entity should *prima facie* regulate private action that may infringe on the market freedoms. Considerations of the ability and scope of courts clearly indicate that they cannot be expected to review every single action which might pose these problems. Courts should, inasmuch as possible, defer to legislatures and private law the creation of rules arbitrating between private parties; they cannot legislate in general terms, and as such are much more suited to control State regulation in particular cases than to devise regulation themselves. The submission of private action to review under the market freedoms – instead of having such actions be subject to indirect review by giving the courts the power to directly review national rules – could result in excessive legal uncertainty due to a completely open and unstructured process of balancing rights, risking the destruction of well-established private law concepts.⁸⁵⁰

b. What types of private action should be subject to horizontal direct effect?

A second question, related to but independent from the above one, looks into what kind of private behaviour must be subject to control by the market freedoms. From the fact that the market freedoms have an effect on private relations, it does not follow that any private action may fall within their scope, and the relevant question is thereby what effects an action will need to have for this to happen.

A first building block in defining which private actions infringe free movement rights is to recognize that, when private actions infringe both national law and EU free movement rights, the relevance of the latter will be residual. These situations will be, first and foremost, regulated by national law, with that law being subject to assessment under the market freedoms. This limits the question to identifying that class of private actions that are contrary to EU law and are not expressly permitted or prohibited by

⁸⁵⁰ Schillig.

national law as construed under the principle of '*interprétation conforme*'.⁸⁵¹ A second building block is recognising that the fundamental freedoms are provisions that were drafted with the goal of creating an internal market. Since Member States tend to be able to intervene in the functioning of the common market by restricting the activities of market participants in ways that private entities do not, they are the main addressees of the free movement provision. The situation with private parties is different because in many circumstances private actors simply do not wield enough influence successfully to prevent others from enjoying their rights to free movement. Hence, it is arguable that what matters is that the restrictive effects on the market produced by private subjects be similar to those produced by a State norm or a public act.⁸⁵² This would be coherent with the normative underpinnings of the market freedoms in creating an internal market. Free movement provisions must only act where private action may endanger market unity, and if so then private action may be caught by the Treaty rules on free movement only when it is not unlike State action: i.e. when it amounts to some sort of private legislation which restricts the free movement of economic factors.⁸⁵³

It could be argued, in light of this, that only measures or actions that are 'collective' in nature, or that regulate in a collective manner (by virtue of State delegation or having the character of private legislation or self-regulation allowed by the State), would have such an effect because they imply a 'power over individuals'.⁸⁵⁴ This view, however, does not seem to be entirely correct. Not all State acts falling under the market freedoms are general in nature; co-respectively, even though most actions

⁸⁵¹ Case 14/83 *von Colson* [1984] E.C.R. 1891, Case C-106/89 *Marleasing* [1990] E.C.R. I-04135, Case C-91/92 *Faccini Dori* [1994] E.C.R. I-03325.

⁸⁵² Orlandini, 10; similarly, for goods, Krenn, 211.

⁸⁵³ Cruz, *Between Competition and Free Movement*, 105.

⁸⁵⁴ *Id.*, 121-125.

having a restrictive effect will probably be of a collective nature, there seems to be no good normative reason to limit the type of private actions that may fall within the scope of the market freedoms to collective private actions. If what matters is the effect of an action, what is relevant is not whether the private action is similar in form to State action, but whether its effect is similar to that of State action. Thus, not only collective measures but also non-collective measures may fall within the scope of the market freedoms. Although this is unlikely to occur, there is no good *a priori* reason to exclude this possibility: what matters is whether the private action in question may have the effect of unlawfully restricting the individual right to free movement, regardless of the nature of the action. This normative position seems to have been adopted by the Court, which does not restrict the private persons who can restrict the market freedoms ‘to quasi-public organisations, or to associations exercising a regulatory task and having quasi-legislative powers’, but has instead extended it to trade unions⁸⁵⁵; to private actions such as demonstrations or protests not checked by the State⁸⁵⁶; and also to ‘private regulations’ with effects akin to State action.⁸⁵⁷

However, inasmuch as the case law arising from *Angonese* seems to require a change to the basic normative foundations of the case law by considering that any discrimination on grounds of nationality by private parties is prohibited, the law differs from the suggested normative position. This is to be criticised, both from a normative and from an institutional perspective. From a purely normative perspective, it seems that *Angonese* is at odds with the goals of the free movement provisions, which is to remove obstacles to the functioning of the common market, without previous reasoning

⁸⁵⁵ *Viking*, paras. 64-65.

⁸⁵⁶ *Commission v France, Schmidberger*.

⁸⁵⁷ *Walrave, Donà v Mantero, Bosman*.

or justification. Also, *Angonese* raises problems concerning the types of justifications that can be used by private parties to justify discriminatory conduct, particularly for actions without effects akin to State action, even though it may be argued that – unlike Member States, who may only have recourse to the exceptions provided for in the Treaty concerning discriminatory measures⁸⁵⁸ – Articles 15 to 17 of the Charter of Fundamental Rights provide general justifications which can be used by individuals when requiring that the core of private autonomy not to be affected by the market freedoms.⁸⁵⁹ From an institutional standpoint, the *Angonese* case law may require courts to pursue balancing exercises whenever any individuals discriminate on grounds of nationality, an exercise which may well exceed the courts' scope or ability. The scope of the market freedoms reflects comparative institutional choices: by defining which private actions fall within the scope of the market freedoms, what is being determined is which actions should be regulated by public entities – directly by the Court in cases of horizontal direct effect, or by the States, subject to review by the Court, in cases of indirect horizontal effect – and which ones should be left to the marketplace. The *Angonese* case law leads to a choice in favour of courts and States' regulatory apparatuses without taking into account the characteristics of the main institutional alternatives. As noted by AG Maduro:

The case of an individual shopkeeper who refuses to purchase goods from other Member States would not be liable to obstruct the functioning of the common market. The reason is that suppliers from other Member States would still have the opportunity to market their goods through alternative channels. Moreover, the shopkeeper would in

⁸⁵⁸ At least *prima facie*. It is arguable that in a number of cases concerning discriminatory national rules, the Court nonetheless applied court-made derogations, even if without admitting it was doing so – see, for example, *Walloon Waste* and *PreussenElektra*, among others. See also Maduro, *We the Court*, 52; Snell, *Goods and services in EC law: a study of the relationship between the freedoms*, 185; Cruz, *Between Competition and Free Movement*, 95; P Gilliaux, 'Les entraves à la liberté de circulation des personnes' (2009) XLIV CDE 407, 426.

⁸⁵⁹ Anne Röthel, 'Grundfreiheiten und Private Normgebung' [2001] EuR 908, 916; Schepel, 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law', 197-198; Krenn, 213-214.

*all likelihood suffer from competition from retailers who had fewer qualms about buying foreign goods and who, as a result, might be able to offer lower prices and a larger choice to consumers. That prospect alone would probably be adequate to deter behaviour of this kind. Thus, the market will 'take care of it'. In those circumstances, there is no ground for Union law to intervene. The implication is that the rules on freedom of movement apply directly to any private action that is capable of effectively restricting others from exercising their right to freedom of movement.*⁸⁶⁰

It is thus submitted that, as a rule, private parties are unlikely to have enough influence successfully to prevent others from enjoying their rights to freedom of movement and, as such, decisions applying horizontal direct effect should be exceptional. It is true that for States any discrimination on grounds of nationality is prohibited under the market freedoms; but this relates to concerns as to their specific powers, both in the normative, socio-economic and cultural spheres *qua* States. Any State measure that discriminates on grounds of nationality becomes immediately suspect of creating obstacles to trade, being subject to review and deemed to be *prima facie* unlawful. There is no reason for this to be the case concerning private action; it should be specifically demonstrated that a private action discriminating on grounds of nationality restricts someone's right to free movement, thereby ensuring that the same concept of restriction is used for both States and private persons.⁸⁶¹

From the above it results that, once the relevant normative and institutional concerns are taken into account, the question of what types of private action should fall within the market freedoms relates to the scope of the market freedoms in general, and that this again relates to comparative institutional choices concerning the role of courts

⁸⁶⁰ Opinion in *Viking*, paras. 42-43.

⁸⁶¹ Similarly, for goods, see Krenn, 211. This is obviously without prejudice to a different normative underpinning for the autonomous application of the non-discrimination provisions coming along. Even in this case, however, from an institutional standpoint it would seem that the best way to go about this would be to leave it to the legislature to deal with the issue, not unlike what occurred with the adoption of Council Directive 2004/113/EC [2004] OJ L 373 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, and of Council Directive 2000/43/EC [2000] OJ L 180 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

when compared with other relevant bodies. These questions are in turn related to the question of whether there is a restriction on free movement, which is the trigger for court intervention and the corresponding balancing exercise. There seems to be no reason to assume that determining whether there is a restriction on free movement will be simpler concerning individual actions than those of States. Hence, it is submitted that all types of private action – collective, non-collective, discriminatory and non-discriminatory – should fall within the scope of the market freedoms as long as they have the requisite effect.

Conclusion

De-contextualised ideas about law are not wrong as such; in effect, they can reflect the phenomenology of the law and refine our intuitions about it. It is submitted that they nonetheless have a number of disadvantages over more contextualised approaches: first, they are descriptively inferior to theories that are contextualised because they ignore something relevant about the law. Second, they present prescriptive suggestions that may well ignore the fact that legal decisions are adopted in an institutional environment that constrains what can effectively be done.⁸⁶²

In the interplay of legal reasoning and institutional setting, of substantive and procedural issues, one can thus hope to find better descriptive and prescriptive frameworks for the development of the Court's role and of Europe's particular brand of constitutionalism. While courts are likely, for institutional reasons, to dwell on incompletely theorised propositions, it is the role of legal commentators to flesh out those underlying theories. Again, a contextualised approach will be superior to de-contextualised ones, since under debates about 'pure' normative concerns one can find hidden institutional questions – for example, debates about the nature of European integration or rights are also debates about the scope of State autonomy and about the discretionary power of courts over legislatures. On the other hand, since different bodies may be perceived as favouring different normative agendas – for example, the Court tends to be seen as pursuing a more supranationalist model of integration when compared with the Council of the EU –, sometimes under the guise of institutional arguments what is being advanced are specific normative orientations. This is a

⁸⁶² This perspective can be framed as Realist, as opposed to Moralist, to use a distinction recently elaborated in American jurisprudence: see Brian Leiter, 'In Praise of Realism (and Against "Nonsense" Jurisprudence)' (2012) 100 *GeoLJ* 865.

reflection of the fact that, as a political actor, the CJEU's decisions carry both substantive and institutional implications. Thus, literature on such substantive normative topics as the 'correct' concept of restriction on the market freedoms, the 'nature' of EU Citizenship, or even, and most flagrantly, the protection at EU level of human rights by the Court does not make complete sense without taking into account the specific constitutional architecture of the EU and the logic of constitutional tolerance underpinning it.

The main claim of this thesis is that a theory explaining the interplay between normative and institutional issues, and how they should be addressed and incorporated into the scheme of European constitutionalism, would be a more complete, and arguably better, descriptive and normative theory than de-contextualised approaches. This does not require merely the incorporation of institutional questions into normative theories, or vice-versa. It calls first for those de-contextualised normative theories to be properly fleshed out, since only then can their institutional consequences properly be appreciated. At the same time, it is submitted that understanding such institutional consequences is required properly to theorise and understand the normative theories being advanced in this field in the first place. Facts and norms are mediated through modes of legal reasoning; but such mediation can only be understood if the relevant facts and norms are previously known themselves. Acknowledging this feed-back loop between theoretical idealism and institutional realities is a first step for understanding the role of legal reasoning has in EU integration, and for developing better descriptive and/or prescriptive approaches to EU law.

This study has attempted to sketch such a theory, and tried to incorporate insights of disciplines concerned with law, and EU law in particular, into the existing modes of legal discourse. In particular, it has tried to demonstrate how such an approach

might work, by reference to the market freedoms, to their development, and to the analysis of the debates concerning them. It did so by explicitly starting from a value-pluralist perspective: when balancing free movement with State interests, the Court had to arbitrate between incommensurate values and/or between values the measurement of which the Court is unable to verify empirically. In such a situation, reasons run out, and the Court's decision-making is co-extensive with discretion. Under a veneer of legal reasoning, the Court faces value-charged political questions, and free movement rights do not remove such questions from political strife so much as lead to a greater role for the courts in addressing them. Recourse to proportionality when applying free movement rights has the effect of both assigning to the Court the power to determine what institution – including, among others, itself – is best suited to decide certain questions, and to control the extent to which such institutions may exercise their discretion. If this is so, it was argued, the first relevant question has to be why the Court should decide such issues to begin with: a comparative institutional question. And this was particularly important because the ultimate arbiter of this question is the Court itself.

This institutional choice by the Court concerning the market freedoms takes place primarily through the determination of their scope. After such a determination, the Court can decide to balance the relevant values itself, delegate such a task to different entities – particularly national legal processes and national courts – or even create the conditions and incentives for the European political process to take over. From a descriptive perspective, it was demonstrated how taking into account both normative and institutional elements helps to make better sense of the case law than analyses that do not expressly acknowledge the nature of this institutional choice. In particular, it was demonstrated that: different normative theories tend to co-exist in judicial formulae and

in the law in general; adopting specific normative perspectives as descriptive principles provides only partial explanations; acknowledging the plurality of normative interests and the normative indeterminacy of the law provides, by itself, a better explanation of free movement law and its development; and adding institutional elements to this not only further improves these descriptions of the law and its evolution, but also helps to explain how the normative interests and concerns identified by the legal community appeared and changed over time, particularly as a result of attempts to categorise and rationalise the law itself *ex post*.

It is in effect arguable that a general theory of free movement rights can be framed around the concept of scope of the market freedoms, coupled with the idea of moral pluralism at the balancing stage. True, this is a high-level, abstract analytical framework, but combining normative multiplicity and indeterminacy with institutional insights allows for the common treatment of all free movement provisions, while also explaining, and taking into account, the various peculiarities found in specific fields of free movement law – such as distinctions based on the existence of different legal provisions and different market freedoms, differences anchored in sectorial specificities regardless of the freedom being applied, and even questions concerning the extension of the scope of the freedoms to private individuals. It is submitted that such an analytical framework is able to make descriptive sense, both formally and substantively, of free movement law, simultaneously at both its most general – where formal common structures seem to be undeniable, and a minimum common substantive content can be found – and at its most detailed levels – where substantive variations and greater normative specification exist.

This analytical framework can also be adopted for normative debates. It is submitted that there are normative consequences to the descriptive analysis pursued:

assuming that normative assessments of legal questions pursued under practical reason should be kept within the realm of what is possible, the descriptive assessments set limits and provide context to questions concerning what the law should be. If, as results from the descriptive analysis, the Court is merely one among a variety of other political institutions with decision-making powers operating in a world of divided powers, imperfect decision-makers, and value pluralism, then the relevant normative questions are not only whether decisions should be taken in accordance with a certain ‘evaluative’ normative framework, but, preliminarily to this, whether decisions should be adopted by a judicial entity or by another organization. This preliminary assessment must not focus exclusively on pure substantive normative considerations, but on the relative advantages and disadvantages of particular decision-making bodies, requiring a comparative institutional assessment that takes into account both normative and institutional considerations. Since this choice is pursued by the Court through the determination of the scope of the market freedoms, normative debates concerning such scope will be more fruitful if they take both normative and institutional concerns into account, and focus first on whether a measure should fall within the scope of the market freedoms – in other words, whether the Court should decide a certain question –, and only subsequently on whether that decision was correctly adopted on the merits.

Throughout this thesis a number of normative positions were advanced, both concerning the adequacy of the Court being the best institutional option, and concerning the merits of some lines of case law. This required not only the addition of institutional elements to existing normative positions, but also previous assessments of these normative arguments on their own terms. It is submitted that normative debates following the orientation proposed here will have to embrace complexity and deal simultaneously with purely normative debates, purely institutional questions, and the

interaction between them. The normative positions advanced here are examples of how one can embrace such complexity, and it is also naturally submitted that they are more attractive than the other normative suggestions available. But an important point is that one can legitimately disagree with such normative suggestions and still agree that normative debates should explicitly encompass both ‘substantive’ normative issues and institutional realities. Similarly, one may find purely theoretical or moral normative positions more attractive than contextualised ones, and still conclude that the descriptive model provided here is a better fit than other models available, and vice-versa.

Lastly, this study poses a challenge to political science, and in particular to schools of thought which do not take the law seriously, in particular the attitudinal and the structural approaches. By insisting that judges either follow their own personal policy preferences or those of the Member States, each school can undoubtedly provide – and has provided, – particular insights into the role that judges and Member States’ policy preferences play in deciding cases and developing the law. But by demonstrating the importance of the law, and requiring that it be taken into account as a serious constraint on agents’ behaviour and as a relevant ideational influence, this study points to a serious limitation in those schools of thought. Without purporting to have been able to operationalize how the law constrains and frames the actions of the relevant agents, it is submitted that it was demonstrated that the law is relevant in generating cognitive frameworks and, thus, in both creating and restricting possible future development paths. This study hopefully opens possibilities of research into how the law affects the conduct of relevant institutional agents, and into how they in turn influence the development of the law.⁸⁶³

⁸⁶³ Similarly, and proposing exactly such a type of research concerning path dependency, see Schmidt, 14 and 21.

In the end, the underlying intuition of this thesis is that if the EU is a work in progress, that must of necessity be the nature of its constitutional law as well; and that if the direction and implications of the EU project are unclear, its basic provisions will share this under-determination and malleability, and reflect the institutional realities in which they are developed. As stated in another context:

*'The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties. 'Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent whole.'*⁸⁶⁴

A new constitutional order needs a new constitutionalism; and a new constitutionalism requires a different vocabulary and a new set of tools refined over time and in parallel with the development of this new polity. It is the role of EU legal theory to help to develop such vocabulary and tools. Hopefully, this study will contribute to what is already a very impressive set, by acknowledging that the life of European law has not been merely logic, but also experience.⁸⁶⁵ The Court is merely one of the participants in that experience, and the fact that the law it created was not perfectly logical should not detract from attempts to understand it, and, particularly, trying to improve it. Virtue is not necessarily rational, and for all else that may transpire from this study it should be perfectly clear that underlying it is a view of the European project as an endeavour to create a community of disparate and at times warring peoples that is a most noble experience at heart.

⁸⁶⁴ Alexander Hamilton, John Jay and James Madison, *The Federalist papers* (IndyPublish.com 2002), No. 82 (A. Hamilton).

⁸⁶⁵ Oliver Wendell Holmes, *The common law* (Dover edn, Dover 1991), 1; Weiler, *The Constitution of Europe*, 94.

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