UTRECHT JOURNAL OF
INTERNATIONAL AND EUROPEAN LAW

Jotte Mulder, 'Unity and Diversity in the European Union's Internal Market Case Law: Towards Unity in 'Good Governance'?' (2018) 34(1) Utrecht Journal of International and European Law pp. 4-23, DOI: https://doi.org/10.5334/ujiel.454

RESEARCH ARTICLE

Unity and Diversity in the European Union's Internal Market Case Law: Towards Unity in 'Good Governance'?

Jotte Mulder*

This article deals with an enduring challenge for the European Court of Justice: striking a balance between the EU market integration requirements and respecting the 'fundamental structures' that exist in the Member States through the recognition and accommodation of a range of regulatory options that may restrict trade. The challenge is finding unity in social diversity and many commentators consider that the Court has interpreted the constitutional foundation of the European Union as having turned market access rights into fundamental rights and social policy into an obstructive power that has to be limited. This article reflects on the adjudicative methods of the Court and revisits this debate. It argues that the Court has developed a proportionality assessment that is able to accommodate a plethora of Member State policy choices. Member States' systems of protection need to be transparent, systematic and internally coherent. However, if these conditions are taken into account, then the level of protection and the means through which this level of protection is sought remain largely at the discretion of the Member States.

Keywords: European Court of Justice; internal market case law; free movement; social legitimacy; unity in diversity; proportionality; market access

I. Introduction

The challenging balance between unity and diversity manifests clearly in the area of (economic) free movement law on the basis of which economic actors have a right to access markets while Member States' policy choices may often restrict that access to some extent on the basis of their own nationally embedded socio-economic regulations. *In varietate concordia* (united in diversity) is and has been the official motto of the European Union since 2000. Moving away from the persistent idea that Europe is in need of one identity, the motto gives credence to the enduring compromise that underlies European integration. However, maintaining a dual commitment to unity and diversity poses many challenges to the European project. In particular, increasing asymmetric economic burdens, challenges and interests amongst the Member States of the European Union threaten its unity and pose profound challenges to the stability of the integration project. Nevertheless, the European Commission now claims social-economic diversity to be a strength:

> *Europeans are united in working together for peace and prosperity and the many different cultures traditions and languages in Europe are a positive asset for the continent.*

Diversity is an asset and a strength, yet 'united we stand, divided we fall'.

The Treaty on the Functioning of the European Union (TFEU) incorporates an explicit concern for reconciling freedom of (economic) movement with the social structures of Member States. It does so, specifically, by integrating a *dual commitment* within its legal infrastructure: that is, although there is a commitment to intra-European free trade within open markets that accommodate the free movement of goods, capital,

* Assistant Professor at the Europa Institute, Utrecht University School of Law, NL. Contact: j.mulder1@uu.nl.

services and workers, Member States retain control over domestic social interests that are able to override these market integration objectives. Most restrictions on market access, however, must be justified and here the European Court of Justice (hereafter ECJ or the Court) is confronted with an important question: which restrictive Member States policy choices should be allowed and on what basis? Closely connected to this is the question of how, in the face of Member State diversity, the ECJ is able to maintain a form of unity within European law. In maintaining unity in the face of diversity, the Court is constantly performing a balancing act. The challenge is that demanding too much unity may leave Member States too little margin for socio-economic policy choices that are embedded within their own cultural, historical and political backgrounds. Indeed, this is a pertinent issue and one that political opportunists across Europe may prey on when advancing an anti-EU agenda. On the other hand, allowing too many restrictions on trade based on social diversity may allow too much divergence and cause legal fragmentation across the Union. Where exactly the balance should fall and how it should be achieved remains salient, therefore, and represents a continuing challenge that lies at the core of European market integration. The President of the Court of Justice of the European Union, Koen Lenearts, describes this challenge as follows:

> ...beyond a core nucleus of shared values where the ECJ must ensure uniformity, EU law cannot disregard the cultural, historical and social heritage that is part and parcel of national constitutional traditions. Beyond that core nucleus, the ECJ welcomes 'value diversity'.[1]

However, where exactly this dividing line is, remains the subject of much contentious case law and debate. How can the diversity of Member States' 'social-economic systems' be unified within one internal market? This question can be considered from many angles and areas of European law. One could for example consider the use of different types of legal instruments to achieve different levels of harmonisation in market regulation or how the debt crisis has given the European Commission new means to pursue a one size fits all strategy on the basis of the European Semester and other legislative instruments, which challenges the social diversity of the Member States.

In this contribution, however, I revisit the intricate balance between unity and diversity in the case law of the Court and ask whether we can unveil any consistent adjudicative methods with respect to the balancing act that is performed by the Court. To do so, I will revisit some long-standing adjudicative techniques of the Court as a means to achieve unity of European integration. I will analyse strands of case law developed in the area of economic free movement to distill ideal type forms of reason by the Court.[2] First, in section III, I will discuss how the Court developed the principle of market access, essentially, as a tool to maintain unity in the internal market and as a *prima facie* means to initiate a dialogue with the Member States on their policy choices. It is an exceedingly controversial method of the Court because it has essentially subjected all Member State policy that can be qualified as imposing cross-border trade burdens to judicial approval.

Concomitantly, the Court has developed a proportionality assessment that is able to accommodate, in the second stage of the legal assessment, a plethora of Member State policy choices that can justify the restrictions on cross-border trade. It is through this approach, which captures most restrictive rules within the Member States in the 'market access net' but then allows many forms of restrictions as potential justifications that the Court is maintaining unity in diversity within the internal market. The unity is eventually achieved by prescribing *how* Member States pursue objectives that are restrictive of inter-state trade. In particular, by introducing requirements of transparency, coherence and consistency for the local governance contexts in which these restrictive objectives are pursued.

The Court has developed this model in a seemingly incoherent fashion. I will discuss in section IV that the proportionality rationales that the Court employs to adjudicate in the area of economic free movement law can be categorised in three ideal types. Trade restrictive Member State rules are assessed on the basis of the principles of substantive efficiency, a margin of appreciation or procedural good governance standards. The Court has not provided an immediately visible operational rationale as to *when* a certain principle will be adopted to evaluate a restrictive Member State scheme. However, recent case law suggests that in fields

[1] Koen Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' In: Maurice Adams, Henri de Waele, Johan Meeusen, and Gert Straetmans (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 15.

[2] The scope of the article is limited to 'market origin rights' versus regulatory choices of Member States. That excludes individual based rights, such as citizenship and some free movement of persons and workers lines of case law from the scope of this article.

where Member States have been accorded wide discretion,[3] the Court is mostly concerned with the overarching objective of maintaining a dialogue with the Member States. Through this dialogue a perspective of European unity is enforced with respect to the way that Member States develop and embed policy in their wider governance context.

There exists a broadly shared consensus in many of the social critiques on the European project that the Court's concept of unity is essentially reflective of a neoliberal project which subordinates social policy within the Member States to market access. Particularly striking and often referred to examples are the *Scottish minimum alcohol pricing* case,[4] where Scotland was asked to reconsider its policy to restrict alcohol consumption, taking into account the fundamental principle of free price formation which should not be disrupted, and also the infamous *Viking* case,[5] where the right to strike of workers was arguably made conditional on it causing no uneven disruption of cross-border services. In section V, I will challenge this neoliberal consensus (to some extent) and point towards the emerging model in the socially salient *AGET Iraklis* case, which suggests that the Court is willing to accommodate socio-economic diversity that restricts cross-border trade, provided that Member States conform to a set of good governance standards: that is, these States must adopt systematic policy choices that conform to a certain level of transparency, accountability and coherent logic.

Although the introduction of good governance standards could be seen as an elegant method to achieve procedural unity whilst allowing for diversity in socio-economic (substantive) outcomes, I conclude in section VI by addressing the question whether imposing this set of governance standards will not eventually covertly influence the substance of Member States' policy choices. It may very well be that market-centered policy is simply easier to administer and also to defend in Court.

II. One Internal Market in the Face of Normative Plurality: the Challenge for the Court

The supranational market rationale that EU free movement rules purport in its most simplistic form is concerned with an area without internal frontiers, in which the free movement of goods, persons and capital are ensured in accordance with the provisions of the Treaties (Art. 26 TFEU). Free movement rights are granted to ensure market access and can be utilised to challenge obstacles to trade within the Member States. However, the EU Treaties and the Court have always allowed national measures to take precedence over free movement rights when they serve important public interests recognized by the Union, including national identity. In addition, the Court has developed a range of mandatory requirements (*Cassis de Dijon*)[6] as 'public interest requirements' or 'objective justifications'. Free movement law recognizes explicitly that in the absence of EU harmonization and insofar as there are no national measures producing a protectionist effect, Member States enjoy leeway in safeguarding certain objectives, which are deemed fundamental to their identity.[7]

This builds on the idea that the social diversity of preferences and orientations in the EU is the product of specific historical experiences, political contestation, societal learning and continuous political decision-making.[8] As such, despite globalizing trends, Member States vary deeply in terms of institutional preferences and structural policy differences, resulting in a variety of social spheres.[9] As said, beyond the "core nucleus of shared values", the Court "welcomes value diversity".[10] However, controversy arises as to where the line is between these shared values and diversity,[11] and it is up to the Court to establish this dividing line.

---

[3] Due to existing differences between Member States (moral, religious, cultural) or with respect to choosing measures capable of achieving the aims of their social policy.

[4] Case C-333/14 *The Scotch Whisky Association and Others v The Lord Advocate* [2015] EU:C:2015:845.

[5] Case C-438/05 *Viking Line* [2007] ECR I-10779, ECLI:EU:C:2007:772.

[6] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

[7] Maurice Adams, Henri de Waele, Johan Meeusen, and Gert Straetmans (eds), *Judging Europe's Judges : The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013).

[8] As submitted by Christian Joerges, 'Market Integration and Europeanisation of Private Law' (Jean Monnet Project Conference Paper 2015).

[9] These can for example be classified in benefit structures, methods of financing, service intensity, family policy, employment regulation, logic of governance and the regulation of industrial relations in Anton Hemerijck, 'The Self-Transformation of the European Social Model(s)' In: Gøsta Esping Andersen (ed), *Why We Need a Welfare State* (OUP 2002) 178. See also Pablo Beramendi, 'Inequality and the Territorial Fragmentation of Solidarity' (2007) 61(4) International Organization 783.

[10] Koen Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' In: Maurice Adams, Henri de Waele, Johan Meeusen, and Gert Straetmans (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013).

[11] Stephen Weatherhill, 'The Court's Case Law on the Internal Market: 'A Circumloquacious Statement of the Result, Rather Than a Reason for Arriving at It'?' In: Maurice Adams, Henri de Waele, Johan Meeusen, and Gert Straetmans (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 104.

Critiques on the case law of the Court tend to identify a structural bias in favour of market access and deregulation. In most cases before the Court, it is said, where there is found a restriction on free movement pursuant to the pursuit of a regulatory objective, the conflict is decided in favour of EU free movement. Such claims are substantiated on the basis of controversial free movement cases, such as *Centros, Überseering* and *Inspire Art,*[12] that are critiqued for allowing companies to circumvent national codetermination procedures in Germany by establishing themselves in the UK or the *Cadburry Schweppes* type cases[13] that would allow tax-avoidance practices by companies, and perhaps most prominently in the socially salient cases of *Laval, Viking, Ruffert, Luxemburg*, *Occupational pensions, Herron*, and most recently *AGET Iraklis*,[14] which have resulted in a strong belief that fundamental social interests are structurally framed as being subordinate to rights to free movement.[15]

This concern is in essence related to the recently introduced 'mode of reasoning' adopted by the Court when resolving conflicts, particularly so-called diagonal conflicts.[16] Diagonal conflicts are the constitutionally most salient type of conflict constellation in European market integration. Diagonal conflicts involve on the one hand economic freedoms and on the other hand collective goods closely related to national competences, such as social policies. For example, a system of solidarity within a Member State may fundamentally conflict with the market integration objective of full and effective competition. In contrast to vertical conflicts that can be resolved by referring to the supremacy of EU law because they take place within the 'core nucleus' of internal market law, diagonal conflicts are reflective of conflicts which cannot be so easily solved, as they do not only pit levels of government against each other—supranational versus national—but because the norm in conflict pursue radically different ends, far from easy to reduce to one single scale. Thus, diagonal conflicts represent the constitutionally most challenging type of conflict. In such cases, adjudicating on the basis of the supremacy of EU law would be unpersuasive.

Although it can be, and has been argued that such policies should remain 'protected' on the basis of the principle of enumerated competences, the Court has decided that such Member State measures may still conflict—diagonally—with economic freedoms, so the policies need to be justified. Indeed, such conflicts arise abundantly and potentially endlessly, after economic freedoms have been interpreted by the Court as constituting the 'positive standard of constitutionality' because virtually all national social policy objectives can be framed as restrictions of economic freedoms that require justification. It is indeed from this moment onwards that many conflicts have become salient in policy *substantive* terms.[17] The argument is made that, as a result of this asymmetry, there exists a structural preference in favour of deregulation that is targeted

[12] Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-01459; Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH* [2002] ECR I-09919; Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd.* [2003] ECR I-10155.

[13] C-196/04 *Cadbury Schweppes* [2006] ECR I-07995.

[14] Case C-341/05 *Laval un Partneri* [2007] ECR I-11767; Case C-438/05 *Viking Line* [2007] ECR I-10779; Case C-346/06 *Rüffert* [2008] ECR I-01989; Case C-319/06 *Commission/Luxemburg* [2008] ECR I-04323; Case C-271/08 *Occupational pensions* [2010] ECR I-07091; Case C-426/11 *Herron* EU:C:2013:521; Case C-201/15 *AGET Iraklis* EU:C:2016:972.

[15] A selection of critiques: Catherine Barnard, 'Viking and Laval: An Introduction' (2008) 10 Cambridge Yearbook of European Legal Studies 463, 464; Alan Dashwood, 'Viking and Laval: Issues of Horizontal Direct Effect' (2008) 10 Cambridge Yearbook of European Legal Studies 525, 525; Anne Davies, 'One Step Forward, Two Steps Back? Laval and Viking at the ECJ' (2008) 37(2) Industrial Law Journal 126; Simon Deakin, 'Regulatory Competition After Laval' (2008) 10 Cambridge Yearbook of European Legal Studies 581; Colin Kilpatrick, 'Laval's Regulatory Conundrum: Collective Standard-Setting and the Court's New Approach to Postal Workers' (2009) 34 European Law Review 844; Christian Joerges and Florian Rödl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval' (2009) 15 European Law Journal 2; Jonas Malmberg and Tore Sigeman, 'Industrial Action and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice' (2008) 45 Common Market Law Review 1115; Tonia Novitz, 'A Human Rights Analysis of the Viking and Laval Judgments' (2008) 10 Cambridge Yearbook of European Legal Studies 541; Silvana Sciarra, 'Viking and Laval: Collective Labour Rights and Market Freedoms in the Enlarged EU' (2008) 10 Cambridge Yearbook of European Legal Studies 563; Phil Syrpis and Tonia Novitz, 'Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation' (2008) 33 European Law Review 411.

[16] Coined as such by Christian Joerges. See e.g. Christian Joerges, 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective' (1997) 3 European Law Journal 378; also in Christoph Schmid, 'Vertical and Diagonal Conflicts in the Europeanisation Process' In: Christian Joerges and Olivier Gerstenberg (eds), *Private Governance, Democratic Constitutionalism and Supranationalism* (Office for Official Publications of the European Communities 1998) 185–191.

[17] Menéndez, rightly in my view, traces this 'positive standard of constitutionality' back to Cassis de Dijon, Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* ECR 1979-00649. Menéndez provides a compelling argument that this shift explains much of the abrasiveness of post-seventies CJEU case-law and that from this moment internal market conflicts have become relevant, primarily, in policy substantive terms. See Agustin J. Menéndez, 'United They Diverge? From Conflicts to Constitutional Theory? Critical Remarks on Joerges' Theory of Conflicts of Law' (2011) ARENA Working Paper 2, 24. Also, Niamh

against specific, or perhaps better described as claims to, social organizational forms at the Member State level, which challenge the legitimacy of the EU internal market project.[18] There is, therefore, absolute merit in the contention that ECJ case law tends to favour outcomes that are asymmetrically beneficial for economic movement. It has been argued for example, that the Court has 'restyled' EU law and introduced a form of hierarchical balancing, which no longer reflects the constitutive features and division of competences that are inherent to the embedded liberalism compromise.[19] It is interesting, however, to take a closer look at the exact adjudicative techniques employed by the Court in free movement cases, which can be explained on the basis of what appears as the Court's strong wish to maintain an idea of unity which is not necessarily reflective of a neoliberal bias.

III. Market Access as the Adjudicative Technique to Maintain 'Unity'

There is a certain inherent and continuing structure in the free movement case law of the Court that follows partly from the structure of the Treaty and partly from precedent based case law.[20] The adjudicative template of the Court of Justice consists of three separate steps: (i) is there a restriction on a free movement right?; (ii) is there a legitimate justification for the restriction?; (iii) can the restriction be considered proportionate with regard to its legitimate objectives? Importantly, as has been discussed, the starting point of the adjudicative model developed by the Court is to apply a broad and unqualified market access test for all free movement rights,[21] which imposes jurisdiction over most Member State regulatory choices that can be considered restrictive to economic activities, and subsequently, in a second stage, resolve conflicts in the course of a proportionality exercise. As such, within a market access approach, all restrictions are *potentially* in breach of EU free movement law. Some commentators have qualified this as a way for the Court to constrain national self-expression, "so as to mitigate what are regarded as its potential excesses: the exclusion of certain interests from the political process, and its capacity for sovereign violence in limiting permissible behaviour".[22] This is also known as the argument from containment, which conceptualises the intentions of the EU internal market not necessarily as 'pro trade' but as a means to engage in a dialogue with Member States on how their national systems can and need to be adjusted in order to accommodate the out of nation state interests that are to be made part of national processes of governing or governance structures. As such, this view is informed by, seemingly, the most obvious empirical facts that characterise the European Union today: the diversity of socio-economic constellations of the Member States and the increasing asymmetry of interests amongst the Member States.[23] Such diversity results in a need for communication and internalisation of their extraterritorial effects. However, and this point has been made most forcefully by Alexander Somek, it matters on the basis of what terms the dialogue is enacted:

Nic Shuibhne and Marsela Maci, 'Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law' (2013) 50 Common Market Law Review 965.

[18] See Christian Joerges and Florian Rödl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections After the Judgments of the ECJ in Viking and Laval' (2009) 15 European Law Journal 2; Sonja Buckel and Lukas Oberndorfer, 'Die lange Inkubationszeit des Wettbewerbs der Rechtsordnungen – Eine Genealogie der Rechtsfälle Viking/Laval/Rüffert/Luxemburg aus der Perspektive einer materialistischen Europarechtstheorie' In: Andreas Fischer-Lescano, Florian Rödl and Christoph Schmid (eds), *Europäische Gesellschaftsverfassung. Zur Konstitutionalisierung sozialer Demokratie in Europa* (Nomos 2009); see also Alexander Somek, 'The Argument from Transnational Effects I: Representing Outsiders Through Freedom of Movement' (2010) 16 European Law Journal 315; Fritz W. Scharpf, 'Legitimacy in the Multilevel European Polity' (2009) 1 European Political Science Review 173.

[19] Leone Niglia, 'Eclipse of the Constitution' (2016) 22(2) European Law Journal 132; also Brian Bercusson, 'The Trade Union Movement and the European Union: Judgment Day' (2007) 13 European Law Journal 279–308.

[20] As highlighted for example in Loïc Azoulai, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization' (2008) 45 Common Market Law Review 1335.

[21] For a recent analysis, see Ioannis Lianos 'In Memoriam Keck: The Reformation of the EU Law on the Free Movement of Goods' (2015) 40(2) European Law Review 225. More discussion on this adjudicative tool is in Gareth Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law' (2010) 11(8) German Law Journal 671; Jukka Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47(2) Common Market Law Review 437. Whilst originating from the area of free movement of goods, the Dassonville formula (Case 8/74 *Dassonville* [1974] ECR I-00837 para 5), 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intracommunity trade', applies to all other freedoms as well today (For services in case C-79/90 *Manfred Säger v Dennemeyer & Co. Ltd* [1991] ECR I-04221; for workers in case C-415/93 *Bosman* [1995] ECR I-04921; for establishment in case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-04165; for capital in Case C-367/98 Commission v Portugal [2002] ECR I-04731.

[22] Floris de Witte, 'Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law' (2013) 50(6) Common Market Law Review 1545, 1551.

[23] Pablo Beramendi, 'Inequality and the Territorial Fragmentation of Solidarity' (2007) 61(4) International Organization 783, 783.

> In fact, this is clearly revealed in how its focus on transnational effects is mediated by the equal distrust of national regimes burdening, in one way or another, international economic mobility. Anchoring the mitigation of transnational effects in the facilitation of market access modifies the focus of the argument. It is thereby made subservient to an altogether different aim, namely, economic due process.[24]

The potential out of state interest that finds insufficient access within another Member State is identified, solely, on the basis of market access. This has led Somek, in his seminal discussions on the wider importance of the argument of containment for European integration, to pose a fundamental question: *"what might be done to prevent the argument … from slipping into a freewheeling rampage of economic due process?"*.[25] "Economic due process" originates from the United States as the idea that substantive due process protects some rights from deprivation. In simple terms, this means that government may not hamper the exercise of certain 'rights', even where due processes have been adopted. In the famous Supreme Court decision *Lochner v. New York*, New York state law that regulated the hours and working conditions of bakery employees was held to intrude too far into the "fundamental right for an employee and an employer to freely contract". This "fundamental right" to contract freely could not be limited, even by fair legislative processes, and came to be known as having established "economic" substantive due process.[26] Somek's point here is that despite the clear merit in the legitimising idea of EU internal market law as removing traditional, outdated, unrepresentative manifestations of national defected forms of decision making, the grammar and language of this debate may contain inherent limits. It has been persuasively argued that the Court has adopted a model of 'hierarchical proportionality', which structurally subordinates social policy objectives to a market enabling rationale.[27]

To further understand this line of argument, it is useful to take a closer look at the exact reasoning the Court employs. Whilst originating from the area of goods, the *Dassonville* formula, that "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade",[28] applies to all other freedoms as well.[29] The so-called *Keck* exception, which provided for regulatory rules to fall outside of the reach of the free movement rules, in case they qualified as 'certain' non-discriminatory 'selling arrangements' and did not *completely prevent* market access, has largely been left behind by the Court,[30] and all freedoms now appear to be converging towards a rather unqualified market access test.[31] This move has been frequently critiqued[32] and the contributions seem to agree that the Court has now 'refined' its approach in *Keck* in favour of a market access test, although it seems to utilise some of the *Keck* rationale in free movement of goods cases.[33]

---

[24] Alexander Somek, 'The Argument From Transnational Effects I: Representing Outsiders Through Freedom of Movement' (2010) 16 European Law Journal 315, 320.

[25] ibid 332.

[26] See further Matthew J. Lindsay, 'In Search of Laissez-Faire Constitutionalism' (2010) 123 Harvard Law Review Forum 55.

[27] Niglia (n 19) 132.

[28] Case 8/74 *Dassonville* [1974] ECR 00837 para 5.

[29] For services in case C-76/90 *Säger v Dennemeyer* [1991] ECR I-04221; for workers in case C-415/93 *Union royale belge des sociétés de football association and Others v Bosman and Others* [1995] ECR I-04921; for establishments in case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] I-04165; for capital in Case C-367/98 *Commission v Portugal* [2002] ECR I-04731.

[30] Joined cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-06097.

[31] See amongst others Eleanor Spaventa, 'Leaving "Keck" Behind?: The Free Movement of Goods After the Rulings in "Commission v. Italy" and "Mickelsson and Roos"' (2009) 35(6) European Law Review 914.

[32] For example, Catherine Barnard and Simon Deakin, 'Market Access and Regulatory Competition' In: Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market, Unpacking the Premises* (Hart Publishing 2002); Spaventa (n 31) 914; Gareth Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law' (2010) 11(8) German Law Journal 671, 671; Jukka Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47(2) Common Market Law Review 437, 437; Max S. Jansson and Harri Kalimo, 'De Minimis Meets "Market Access": Transformations in the Substance – and the Syntax – of EU Free Movement Law?' (2014) 51(2) Common Market Law Review 523.

[33] See Case C-108/09 *Ker Optika* [2010] ECR I-12213, referring to Keck in paragraph 51: "For that reason, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is such as to hinder directly or indirectly, actually or potentially, trade between Member States for the purposes of the case law flowing from Dassonville, unless those provisions apply to all relevant traders operating within the national territory and affect in the same manner, in law and in fact, the selling of domestic products and of those from other Member States. *The application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is by nature such as to prevent their access to the market or to impede such access more than it impedes the access of domestic products.* (emphasis added)".

It may be argued that the Court provides for some qualifications to market access.[34] Indeed, it is arguable that the Court, to some degree, has focused on *the directness* of market access hindrance, as confirmed, for example, in the field of services and workers.[35] For example, in *Bosman* the Court considered that a football transfer fee system qualified as a restriction by making a reference to the *direct impact* of a player's access to the employment markets of other Member States.[36] In *Apline Investments* the Court of Justice evaluated the legality of a Dutch measure preventing financial service providers from cold calling potential clients.[37] The regulation was defended on the basis of its non-discriminatory nature and that it could consequently be qualified as a selling arrangement. The Court disagreed, describing the measure as *directly* affecting access to the market in services in the other Member States. AG Tizzano agreed with this approach in *Caixa Bank* where he argued that the freedom of establishment is violated only if a measure either discriminates or *directly affects* market access. Therefore, importantly, this reasoning would imply that it is insufficient if a measure's only effect is to reduce profit margins and the attractiveness of the pursuit of an activity.[38] That is because the latter could be seen to mean that the market access test provides for unlimited economic freedom. Similarly, AG Tesauro argued in the *Hünermund* case that "Article 34 does not provide for a general freedom to trade or the right to the unhindered pursuit of commercial activities, but is aimed at restrictions on imports".[39] AG Maduro built on this by arguing in *Alfa Vita* that market access should be restricted in the sense that differences between regulatory regimes as such cannot lead to restrictions that trigger the free movement rules unless they lead to cross border situations being treated less favourably than the national situation.[40] However, recent case law demonstrates that when pressed, the notion is still likely to collapse into a wide economic freedom assertion, much like the original *Dassonville* formula.[41] A recent application in the case *DKV Belgium* explicitly illustrates the workings of the market access test in this respect.[42]

The case concerned a Belgian authorisation requirement for certain insurance premiums. According to Belgian law, insurers could only alter the premium annually on the basis of the consumer price index. If they required higher premium increases, this could only be done after authorisation from the banking, finance and insurance commission. These rules were aimed at protecting consumers, particularly with a view to preventing them from being faced with sharp, unexpected increases in insurance premium rates.[43] DKV Belgium was denied an increase of its premium and challenged the system, alleging that it disproportionately infringed the free movement of services. The Court repeated the mantra that "the term 'restriction' within the meaning of Articles 49 TFEU and 56 TFEU covers all measures which prohibit, impede or render less attractive the freedom of establishment or the freedom to provide services".[44]

However, the Court then considered that:

> ...a measure applicable without distinction, such as the system of premium rate increases at issue in the main proceedings, may come within that concept, it should be borne in mind that rules of a Member State do not constitute a restriction within the meaning of the FEU Treaty solely by virtue of the fact that other Member States apply less strict, or more commercially favourable, rules to providers of similar services established in their territory....

The logical step would have been for the Court, at this point, to qualify the market access test. However, the Court simply considered that "the concept of restriction covers measures taken by a Member State which, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder intra-Community trade".[45]

The Court's current approach to market access seems to have been inspired mostly by the reasoning of AG Jacobs, who argued in his opinion in the case *Leclerc/Siplec,* that the central concern of the treaty provisions

[34] Jansson and Kalimo (n 32) 523.

[35] See Jukka Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47(2) Common Market Law Review 437.

[36] Case C-415/93 *Bosman* [1995] ECR I-04921.

[37] Case C-384/93 *Apline Investments* [1995] ECR I-01141.

[38] Case C-442/02 *Caixa Bank* [2004] ECR I-08961, Opinion of AG Tizzano.

[39] Case C-292/92 (1993) ECR I-06787, Opinion of AG Tesauro.

[40] Joined cases C-158/04 and C-159/04 *Alfa Vita* [2006] ECR I-08135, Opinion of AG Maduro.

[41] Case 8/74 *Dassonville,* [1976] ECR I- 00837 para 5.

[42] Case C-577/11 *DKV Belgium* [2013] EU:C:2013:146.

[43] ibid para 9.

[44] ibid para 31.

[45] Case C-577/11 *DKV Belgium* [2013] EU:C:2013:146 paras 32–33.

on free movement is "to prevent unjustified obstacles to trade between Member States... if an obstacle to interstate trade exists, it cannot cease to exist simply because an identical obstacle affects domestic trade".[46] AG Jacobs held that "restrictions on trade should not be tested against local conditions, which happen to prevail in each Member State, but against the aim of access to the entire Community market".[47] This idea seems to have been the decisive one for the Court when it held that 'insurance undertakings entering the market of a Member State which has introduced a system of premium rate increases such as that at issue in the main proceedings are obliged, if they want to be able to access that market under conditions which comply with the legislation of that Member State, *to re-think their business policy and strategy* [...]'.[48] (emphasis added)

The Court demonstrates here what unqualified market access entails and it is contradictory to the idea that regulatory differences as such do not entail, automatically, restrictions on freedom of movement as meant in the Treaty.[49] Thus, when applied, any rule preventing profit-maximizing behaviour that an undertaking wishes to engage in, is likely to reduce 'profitability', which the Court considers the benchmark of the market access test. The basic fact that an undertaking will have to determine a commercial strategy that is 'specific to a Member State' and takes account of the differing regulatory circumstances in that Member State is sufficient to constitute a restriction on the freedom of establishment and the freedom to provide services. It is, thereby, automatically unfavourable towards the out of state trader. Interpreted in this way, market access is an open concept that will encompass all rules, which have an effect on economic operators' *business policy and strategy*. This is then introduced as the substantial criterion of market access in this case.[50] In other words, the economic operator not only has a right to access the market, "it has a right to access as wide and cheap a market as possible".[51] This reading of market access has been confirmed recently by AG Bot:

> ... a national measure may constitute an obstacle not only when, as a selling arrangement, it is discriminatory, in law or in fact, but also when, *irrespective of its nature, it impedes access to the market of the Member State concerned*. It follows that, where an obstacle to market access is found to exist, there is no need to undertake a comparative examination between the situation of the domestic products and that of the imported products in order to establish the existence of a difference in treatment between them.[52] (emphasis added)

This approach can, of course, be critiqued, and it has been the subject of much commentary.[53] For example, Jukka Snell notes that since the term 'market access' lacks a clear content, "the court may use it freely either to approve or to condemn measures that it happens to like or dislike. Market access may simply provide a sophisticated sounding garb that conceals decisions based on intuition".[54] From the perspective of responsiveness, the potential danger of this method of adjudication is that the instalment of expedient concepts will lead to the quick disapplication of conflicting social objectives.[55] As Catherine Barnard argues, "the moment collective action is found to be a 'restriction' ... The 'social' interests are on the back-foot, having to

[46] Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, Opinion of AG Jacobs.

[47] ibid para 40.

[48] Case C-577/11 *DKV Belgium* [2013] EU:C:2013:146 paras 34–35.

[49] To the same effect: C-543/08 *European Commission Portuguese Republic* [2010] ECR I-11241.

[50] See also Spaventa (n 31) 914–32. See also case Case C-518/06 *Commission v Italy* [2009] ECR I-03491 paras 68–70, concerning an infringement action against Italy in respect of regulatory rules on motor insurance. Insurance companies in Italy were required to provide insurance to any potential customer, under terms and rates the company had to publish in advance, and there were limitations on the freedom of the companies to set their premiums. In the view of the Court this affected market access: "inasmuch as it involves changes and costs on such a scale for those undertakings, the obligation to contract renders access to the Italian market less attractive and, if they obtain access to that market, reduces the ability of the undertaking concerned to compete effectively, from the outset against undertakings traditionally established in Italy".

[51] Spaventa (n 31) 924.

[52] Case C-333/14 *The Scotch Whisky Association and Others v The Lord Advocate* [2015] EU:C:2015:845 Opinion of AG Bot para 58.

[53] Ioannis Lianos 'In Memoriam Keck: The Reformation of the EU Law on the Free Movement of Goods' (2015) 2 European Law Review 225; Jukka Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 Common Market Law Review 437.

[54] ibid 448.

[55] See also Joseph H.H. Weiler, 'Fundamental Rights and Fundamental Boundaries' In: Joseph H.H. Weiler (ed) *The Constitution of Europe: 'Do the New Clothes Have an Emperor' and Other Essays on European Integration* (CUP 1999) 102–129; also Joseph H.H. Weiler, 'The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods' In: Paul Craig and Gráinne De Burca (eds.) *The Evolution of EU Law* (CUP 1999). See also Bruno de Witte, 'Community Law and National Constitutional Values' (1991) 18(2) Legal Issues of European Integration 1, 19.

defend themselves from the economic".[56] It follows from the market access test that the assessment of the proportionality of a restriction to a right of free movement is triggered almost instantly and without any form of qualification, as soon as access to potentially 'embedded' spaces of economic activities is restricted. This also appeared to be a concern of AG Trstenjak, who argued in *Commission v. Germany (occupational pensions)* that:[57]

> Such an analytical approach suggests, in fact, the existence of a hierarchical relationship between fundamental freedoms and fundamental rights in which fundamental rights are subordinated to fundamental freedoms and, consequently, may restrict fundamental freedoms only with the assistance of a written or unwritten ground of justification.

However, as Spaventa notes, whether this approach of the Court is truly problematic all depends on how the internal market is idealised: "The broadening of the scope of the Treaty could be seen as a contribution not so much to deregulation but rather to better regulation, through a process of continuous self-reflection and of continuous dialogue between regulators, traders and the Court".[58] A broadening of the market access test thereby leads to a broadening of the dialogue and furthers the interests of *European unity* from that perspective. In this respect, as aptly pointed out by Nic Schuibhne, "the justification framework has evolved over time to become the prime space within which public interest arguments are aired. It is where the multifaceted construction of the internal market … is explored and contested".[59] Indeed, the Treaty-permitted grounds for derogation from free movement rights[60] have for a long time been extended with a very expansive approach in the case law, which allows the propagation of most policy arguments as 'imperative requirements' or 'overriding reason in the public interest'.[61] Member States are only barred from adopting 'economic' justifications so as to highlight that only public interest objectives can override free movement rights.[62] However, in practice, the 'economic' justifications have been interpreted mostly as 'protectionist' aims, which are, *prima facie*, not accepted as an overriding reason in the public interest.[63] Thus, the simultaneous increase of the reach and the potential justifications with regard to the free movement provisions can indeed be perceived as a tool to be able to impose a view of *European Unity*.[64] It may be argued that in this way, and on the basis of an unqualified market access standard, a constitutional settlement is advanced in which the validity of *all* democratically enacted Member State legislation and regulatory regimes that restrict a free movement right are contingent on judicial approval through a proportionality standard.

This may obviously lead to tensions with the Member States and the Court has over time established a long list of potential justifications. The point seems to be, however, that the Court wants to keep control and maintain an on-going dialogue with Member States. This is why the market access approach of the Court can be considered a means to preserve unity. By not excluding anything from the potential reach of the scrutiny of the Court, internal market law becomes a constant overarching presence that makes all restrictive forms of social-economic regulation subject to the conditionality of judicial approval. The important question that next arises is how the Court has formulated the exceptions. In other words, how does the CJEU manage to accommodate (or not) the socio-economic diversity of the Member States within this imposing adjudicative model?

---

[56] Catherine Barnard, 'Social Dumping or Dumping Socialism' (2008) 67 Current Law Journal 262, 264.

[57] Case C-271/08 [2010] ECR I-07091, Opinion of AG Trstenjak para 184.

[58] Spaventa (n 31) 925.

[59] Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law* (OUP 2013) 26.

[60] 'Public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property' in Article 36 TFEU for quantitative restrictions on the free movement of goods. Public policy, public security or public health in Articles 45(3), 52 and 62 TFEU for free movement of workers, free establishment and free movement of services. For restrictions on free movement of capital specific restrictions are set out in Article 65 TFEU.

[61] See Joanne Scott, 'Mandatory or Imperative Requirements in the EU and the WTO' In: Catherine Barnard and Joanne Scott, *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002) 269.

[62] Case C-141/07 *Commission* v *Germany* [2008] ECR I-6935 para 60; Case C-444/05 *Stamatelaki* [2007] ECR I-03185.

[63] Joined cases C-105/12 to C-107/12 *Essent* EU:C:2013:677, Opinion of AG Jääskinen who provides a compelling argument for interpreting the economic justification in this way in para 89 onwards.

[64] Spaventa (n 31) 925.

IV. Three Ideal Type Models to Regulate Diversity

The three stages of proportionality assessment are standardized and consist of an inquiry into (i) whether a measure was *suitable* to achieve the desired end (in the form of a rational connection between means an end); (ii) whether it was *necessary* to achieve the desired end (in the form of a test if there was a less restrictive measure available); and (iii) whether the measure imposed a burden on the individual that was excessive in relation to the objective sought to be achieved (proportionality *stricto sensu*). The third part of the test is often not applied by the Court and, as Paul Craig has noted, the Court will normally only consider part three when an applicant explicitly addresses an argument concerning this stage of the inquiry.[65] Otherwise, the Court tends to resolve the assessment on the basis of the first two stages of the proportionality assessment.

Recently, increasing reference has been made to two 'separate' versions of proportionality analysis that are applied by the Court.[66] One version is considered to be more substantively oriented, and the other oriented more towards assessing the procedural context in which the measures were taken.[67] The criterion that determines whether the Court emphasises the procedural context or substantive rationality is largely unclear, and accordingly, this determination is mostly arbitrarily applied without explicit consideration. Indeed, the Court will sometimes engage in a comparative review of solutions adopted in other Member States on the basis of the principle of mutual recognition.[68] Then again, it is also considered that "the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate".[69] At times, the Court protects a space for differences between Member States by referring to "the circumstances of law and of fact, which characterize the situation in the Member State concerned"[70] and defers the proportionality assessment completely to the national court.[71] However, when considering these seemingly incoherent techniques of the Court to adjudicate free movement conflicts it is possible to distil three 'ideal type' models.[72]

A. Unity in the Less Restrictive Measure

The first model can be labelled the *substantive efficiency model* and, as an ideal type, comes to the conclusion of a conflict by way of questioning whether a measure is *necessary* to achieve the desired end. If there exists a less restrictive measure, the test is failed. This substantive oriented variant of the proportionality test is prescriptive of the *content* of national choices and the legality of a particular measure, which will depend on the absence of "policy alternatives that are less restrictive of the rights of mobile actors. It allows such actors to demand that Member State policies are re-assessed in light of less restrictive choices made by other Member States".[73] The most standardised version is the one where the Court stipulates that "[i]f a Member State has a choice between various measures to attain the same objective it should choose the means which least restricts [free movement]".[74] In goods cases, the Court has seen labelling as the least restrictive instrument in many instances. A key example is the *Beer Purity* case where the Court decided that informing consumers through linking the name '*Bier'* only to products brewed with malted barley, hops, yeast and water could be achieved equally well 'by means which do not prevent the importation of products which have been lawfully manufactured and marketed in other Member States and, in particular, by the compulsory affixing of suitable labels giving the nature of the products sold'.[75]

Whenever the Court applies the model of substantive efficiency, it pursues the idea that there is a single normative principle at work and that all the interests in the conflict are, therefore, necessarily compatible, by insisting that the diversity of options which have led to a restriction can be subject to one rational judgment,

---

[65] Paul Craig and Gráinne de Burca, *EU Law Text, Cases and Materials* (5th edn, OUP 2011) 551.

[66] Dragana Damjanovic, 'The EU Market Rules as Social Market Rules: Why the EU Can Be a Social Market Economy' (2013) 50(6) Common Market Law Review 1685; de Witte (n 22) 1545.

[67] It would appear that these are not so much separate tests but rather instances where the Court has either put more emphasis on whether a measure is *suitable* to achieve the desired end, or on whether a measure is *necessary* to achieve the desired end. See also Gjermund Mathisen, 'Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement' (2010) 47(4) Common Market Law Review 1021.

[68] E.g. Case C-333/08 *Commission v France* [2010] ECR I-00757 para 105.

[69] E.g. Case C-141/07 *Commission v Germany* [2008] ECR I-06935 para 51; Case C-36/02 *Omega* [2004] ECR I-09609 para 108.

[70] Case C-434/04 *Ahokainen and Leppik*, [2006] ECR I-09171 para 40.

[71] E.g. case C-405/98 *Gourmet International Products*, [2001] ECR I-01795 paras 21–22.

[72] I first developed these models in Jotte Mulder, 'Responsive Adjudication and the 'Social Legitimacy' of the Internal Market' (2016) 22(5) European Law Journal 597.

[73] de Witte (n 22) 1568.

[74] Case 261/81 *Walter Rau* [1982] ECR 03961 para 12.

[75] Case C-178/84 *Commission v. Germany* [1987] ECR 01227 para 36.

according to their weight and rankings.[76] Therewith, the Court adopts a singular idea of substantive unity, where Member States will always adopt the least trade restrictive policy measures. This mode of reasoning is adequately illustrated in a case concerning Austrian restrictions on road transport for environmental reasons, where the Court of Justice stated that:

> Without the need for the Court itself to give a ruling on the existence of alternative means, by rail or road, of transporting the goods covered by the contested regulation under economically acceptable conditions, or to determine whether other measures … could have been adopted in order to attain the objective of reducing emissions of pollutants in the zone concerned, it suffices to say in this respect that, before adopting a measure so radical as a total traffic ban on a section of motorway constituting a vital route of communication between certain Member States, the Austrian authorities were under a duty to examine carefully the possibility of using measures less restrictive of freedom of movement, and discount them only if their inadequacy, in relation to the objective pursued, was clearly established.[77]

The Court eventually held that:

> …it has not been conclusively established in this case that the Austrian authorities … sufficiently studied the question whether the aim of reducing pollutant emissions could be achieved by other means less restrictive of the freedom of movement and whether there actually was a realistic alternative for the transportation of the affected goods by other means of transport or via other road routes.[78]

Although there are obvious hints at procedural evaluation (whether the authorities have studied the availability of less restrictive measures), when the Court opts to apply this substantive efficiency model, it approaches the context that underlies a conflict on the basis of an idea of *managerialism*[79] and internalises the diverse social considerations of Member States within a functional mode of reasoning. A regulatory context is assumed where a rational assessment of a problem involving the gathering and collating of information, listing options, calculating the costs of each option, evaluating consequences and choosing the best course of action is available. This form of reasoning may inhibit and simply ignore legitimate policy choices that flow from the underlying normative infrastructure of the economy within a Member State. By way of illustration, reference can be made to the more recent Scottish minimum alcohol pricing case.[80] The Scottish Parliament passed a law in order to reduce the consumption of alcohol, specifically to create disincentives for lower income groups, which were considered to constitute a majority of 'hazardous drinkers'. The law prohibited the sale of alcohol at a price below a minimum price that was to be calculated on the basis of the content in alcohol. The law was challenged and it was argued, *inter alia,* that the minimum pricing restricted access to the Scottish alcohol market, because it factored out the potentially lower cost structures and the comparative advantages that existed in other Member States. AG Bot considered that the proportionality assessment boiled down to the question whether taxation could not be used as a 'more effective and less trade restrictive measure'.[81] AG Bot considered that on the basis of the principle of 'free formation of prices' an objective such as "*increased taxation that is less restrictive of trade while enabling the objective pursued to be attained must be preferred to a measure fixing a minimum price, which gives rise to a greater obstacle*".[82] AG Bot was of the opinion that this alternative would present a better "*cost-benefit outcome*" than the setting of a minimum price. The consequentialist rationale that is implicit in the utilitarian standard adopted by the AG, in this case, juxtaposes a measure of minimum pricing with general taxation without considering the extent to which the social context allows such a cost-benefit choice for the legislator. Nevertheless, the Court followed this reasoning in its judgment as well. For the Scottish authorities, there was no apparent alternative available to seek a normative choice for the regula-

[76] E.g. Gareth Davies, 'Internal Market Adjudication and the Quality of Life in Europe' (2014) EUI Working Paper Law 2014/07.

[77] Case C-320/03 *Commission v Austria* [2005] ECR I-09871 para 87.

[78] ibid para 89.

[79] A term coined in Willard F. Enteman, *Managerialism: The Emergence of a New Ideology* (University of Wisconsin Press 1993).

[80] Case C-333/14 *The Scotch Whisky Association and Others v The Lord Advocate*, [2015] EU:C:2015:845, Opinion of AG Bot.

[81] ibid para 146.

[82] ibid para 148.

tion of alcohol consumption, since general alcohol taxation is controlled by the UK government. Therefore, underlying the cost-benefit analysis is a fundamental question regarding the balance of constitutional taxation powers between the UK and Scotland and the question to what extent Scotland has the ability to define the normative infrastructure of its own economy. This dimension of the conflict is obscured by the consequentialist analysis, which reduces such social complexities to a question of thinking in terms of the 'less restrictive' measure.

However, in other cases, the Court does find itself granting a definite margin of discretion. It is worth contrasting the above findings with the Court's analysis in the *Trailer's* case on road safety measures, where less restrictive measures had been brought forward by AG Bot, however the Court nevertheless granted a wide margin of discretion to the Member State because:

> ...[i]n the field of road safety a Member State may determine the degree of protection which it wishes to apply in regard to such safety and the way in which that degree of protection is to be achieved. Since that degree of protection may vary from one Member State to the other, Member States must be allowed a *margin of appreciation*. [...] Member States cannot be denied the possibility of attaining an objective such as road safety by the introduction of general and simple rules which will be easily understood and applied by drivers and easily managed and supervised by the competent authorities.[83] (emphasis added)

However, such simplicity was not valued to the same degree in, for example, the invalidation of the Swedish monopoly system for the import of alcohol by persons younger than 20 years of age, on the basis of suggestions made by the Commission for less restrictive measures:

> ...the age check could be carried out by way of a declaration in which the purchaser of the imported beverages certifies, on a form accompanying the goods when they are imported, that he is more than 20 years of age.[84]

As such, there is a degree of variety in the application of the substantive part of the proportionality assessment by the Court, which is not directly clarified or justified in the case law. A strict application of the substantive proportionality assessment invalidates the measure before the Court immediately, as in the Beer purity measures in Germany, the environmental measures of Austria and the import monopoly on alcoholic beverages in Sweden. The deferential version of the substantive review test allows for more discretion for the Member States in the selection of protective measures such as in the *Trailers* case and often involves a referral back to the national court to make the final assessment. This referral will then often be provided with more or less guidance as to the way in which this assessment should take place. It suffices to say for now that the extent and the degree to which the substantive proportionality test is applied by the Court is not consistent and appears to depend to some degree on the 'sensitivity' of the measure that is under review.[85]

B. The Margin of Appreciation Model

The second rationale can be coined as the *margin of appreciation model* and has been heralded as being of the highest significance for EU internal market law because it creates necessary policy space for the Member States.[86] The model is based on granting a margin of discretion to Member States as soon as the restriction at stake is to be considered 'sensitive' and is mostly applied in cases where fundamental rights or values are at stake at the Member State level.[87] The more sensitive the matters advanced in the context of justifications are, the more generous the scope for justification becomes, as does the breadth of the margin of apprecia-

[83] Case C-110/05 *Commission* v. *Italy (Trailers)* [2009] ECR I-519 paras 65–66.

[84] Case C-170/04 *Klas Rosengren and Others v Riksåklagaren* [2007] ECR I-04071 para 56.

[85] Cf. Jan Jans, 'Proportionality Revisited' (2009) 27 Legal Issues of Economic Integration 239; Gráinne de Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 12 Yearbook of European Law 105.

[86] Steve Weatherhill, 'Viking and Laval: the EU Internal Market Perspective' In: Mark Freedland and Jeremias Prassl (eds), *Viking, Laval and Beyond* (Hart Publishing 2014) 32. Also Joseph H.H. Weiler, 'Fundamental Rights and Fundamental Boundaries' In: Joseph H.H. Weiler (ed), *The Constitution of Europe: 'Do the New Clothes Have an Emperor' and Other Essays on European Integration* (CUP 1999) 104.

[87] See Niamh Nic Shuibhne, 'Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law' (2009) 32(2) European Law Review 230.

tion enjoyed by the regulator.[88] The normative principle at work, in this model, is that free movement rules will scrutinise Member State restrictions on free movement rights, in so far as justifications are not sensitive and allow a '*definite margin of discretion'* to Member States in the pursuit of objectives, when the interest at stake is for some reason considered to be sensitive.[89] The obvious shortcoming of the model is that there is no rationale for *when* an interest is to be considered sensitive, other than the vague notion that the further removed from 'trade' the interest is, the more leeway is provided to Member States. This model implies, moreover, that any interest, which is considered sensitive, falls outside of the reach of the internal market, regardless of its transnational effects and potential democratic deficiencies. The Court of Justice, however, does often attach some conditions to the margin of discretion for the Member States. In *Schmidberger,* the Court acknowledged a *wide margin of discretion* to Austria to decide whether or not to ban a demonstration which resulted in the closure of a major transit route and, hence, restricted the free movement of goods. However, the Court then proceeded to investigate how it came to that decision, noting that:

> …various administrative and supporting measures were taken by the competent authorities in order to limit as far as possible the disruption to road traffic. Thus, in particular, those authorities, including the police, the organisers of the demonstration and various motoring organisations cooperated in order to ensure that the demonstration passed off smoothly.[90]

Therefore, the Court, after acknowledging a wide margin of discretion for Austria to determine the best course of action in this situation, proceeded to investigate whether Austria respected basic 'good governance principles' in the wider context of the decision to allow for the protests to take place.[91] As such, the Court granted a margin of discretion, but also introduced another standard of evaluation, which can be seen as the third 'ideal type' model of the Court.

C. Unity in Good Governance as the Emerging Model

The third 'ideal type' type model of the Court can be labelled as the *good governance model*. This concerns a line of case law that focuses nearly exclusively on the suitability of the wider governance context surrounding specific regulatory choices of Member States. Conventionally, suitability in the proportionality test looks at the existence of a 'rational connection' between the measure and its objective. In the *Hartlauer* case,[92] the Court first formulated what can be coined as the 'external suitability' of a measure. Not only must there be a rational connection between the measure and the objective, such as, for example, in *Bosman,*[93] but there must also be a rational connection between the measure *and its broader regulatory context*. In *Bosman,* the Court held that transfer fee rules were not an *adequate means* of maintaining financial and competitive balance in football leagues because they neither precluded the richest clubs from securing the services of the best players, nor did they prevent the availability of financial resources from being a decisive factor in competitive sport. As such, there did not exist a sufficiently deducible *rational connection* between the means and the end. This form of application of the suitability test can be seen as the 'inherent suitability' of a measure. In other words, there should be an inherent rational connection between the measure and the concerned objective. Then, in *Hartlauer*, a measure that made the right to operate a certain category of dental clinics subject to a prior authorisation, while another category of dental clinics was not subject to any such requirement, was considered unsuitable. The Court could not identify any rational basis for the disparate treatment of the two classes of establishment and, accordingly, dismissed the argument that the legislation was justified on public health grounds.[94] In other words, the measure did not make any sense in the wider regulatory context in which it operated. This 'externally oriented' suitability test has been devel-

---

[88] ibid.

[89] For example, Case C-112/00 *Schmidberger* [2003] ECR I-5659 and Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH* v *Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609. See further generally, John Morijn, 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution' (2006) 12 European law Journal 15.

[90] Case C-112/00 *Schmidberger* [2003] ECR I-05659.

[91] See similarly 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* (CUP 2009) 99; also Damian Chalmers, Gareth Davies, and Giorgio Monti, *European Union Law; Cases and Materials* (2nd edn, CUP 2010) 760.

[92] Case C-169/07 *Hartlauer* [2009] ECR I-01721.

[93] Case C-415/93 *Bosman* [1995] ECR I-04921.

[94] Case C-169/07 *Hartlauer* [2009] ECR I-01721 paras 55–63.

oped by the Court in detail in various strands of case law and has crystallized in various requirements that can be placed on how Member States design their regulatory frameworks in a wider sense.[95]

The Court provided somewhat of an underlying rationale for looking at the procedural context instead of on the substantive measure itself in the *Schindler* case, regarding a UK ban on large-scale lotteries:[96]

> Even if the morality of lotteries is at least questionable, it is not for the Court to substitute its assessment for that of the legislatures of the Member States where that activity is practised legally. […], lotteries involve a *high risk of crime or fraud*, given the size of the amounts which can be staked and of the winnings which they can hold out to the players, particularly when they are operated on a large scale. […] they are an *incitement to spend which may have damaging individual and social consequences*. A final ground which is not without relevance, although it cannot in itself be regarded as an objective justification, is that lotteries may make a *significant contribution to the financing of benevolent or public interest activities* such as social works, charitable works, sport or culture. Those particular factors justify national authorities having a *sufficient degree of latitude* to determine what is required to protect the players and […] it is for them to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.[97] (emphasis added)

In *Schindler,* the Court explicitly considers the high risk of crime or fraud, damaging individual and social consequences and the link to public interest activities, as reasons not to substitute the assessment of the Court with that of the legislature. As a result, the Court did not refer at all to the possible existence of equivalent substantive safeguards in the Member State where the service provider was established – safeguards, which AG Gulmann thought were sufficient in this case.[98] On various other occasions, whilst reviewing regulatory contexts surrounding gambling, the Court has stated explicitly that a system of protection that is less restrictive, compared to the one that is adopted by other Member States, *cannot* affect the proportionality of the system of protection that was implemented.[99] Instead, it matters in these cases, whether or not a Member State policy reflects a *genuine concern* to limit gambling opportunities. The criteria to assess this will differ according to *the system* for which a Member State opts and results in what the Court itself has coined a 'global assessment', as in the *Läärä* case, where the Court held that a system of protection must be *assessed as a whole*.[100]

As described before, it is standard case law that, whether some types of games of chance are subject to a public monopoly, whilst others are subject to a system of licenses issued to private operators, is not *in itself* capable of affecting the suitability of a public monopoly for achieving the objective of preventing citizens from being incited to squander money on gambling and of combating addiction.[101] Member States are free to disregard other Member States' systems of protection when choosing *the level of* protection they want to ensure in their territories. The Court made this very explicit in *Stoss and others*:

> […] having regard to the discretion which Member States enjoy in determining the level of protection for consumers and public order which they intend to ensure in the gaming sector, *it is in particular not necessary*, with regard to the criterion of proportionality, *that a restrictive measure decreed by the authorities of one Member State should correspond to a view shared by all the Member States concerning the means of protecting the legitimate interest at issue*.[102] (emphasis added)

Hence, a system of protection must solely be assessed by reference to the objectives pursued by the Member State and, the level of protection the Member State concerned intends to provide. It will then, however, scrutinize the measures as to their genuine nature, systemacy and coherence in a global assessment of

---

[95] See, generally, Stefaan Van den Bogaert and Armin Cuyvers, 'Money for Nothing: The Case Law of the EU Court of Justice on the Regulation of Gambling' (2011) 48(4) Common Market Law Review 1175; also Jotte Mulder, 'A New Chapter in the European Court of Justice Gambling Saga: A Stacked Deck?' (2011) 38 Legal Issues of Economic Integration 243.

[96] Case C-275/92 *Schindler* ECR [1994] I-01039.

[97] ibid paras 60–61.

[98] Case C-275/92 *Schindler* ECR [1994] I-01039, Opinion of AG Gulmann.

[99] For example, Case C-124/97 *Läärä* ECR [1999] I-6067.

[100] ibid paras 35–36.

[101] As in Case C-124/97 *Läärä* ECR [1999] I-6067.

[102] Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Stoss and Others* [2010] ECR I-08069 para 80.

the regulatory context. The normative principle that is inherent in this model is that Member States enjoy the freedom, with respect to legitimate interests, to choose levels of protection, as well as the substantive content of them, as long as the measure fulfils a standard of good governance:[103]

> …moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine, in accordance with *their own scale of values*, what is required in order to ensure consumer protection and the preservation of public order. (emphasis added)

Floris de Witte has commented that this contextually oriented version of proportionality, when correctly applied, could allow for the rationalization of the implementation of national policy and, argues that it is the ideal tool to be used by the Court to ensure the absence of discrimination and protectionism, and to adjudicate conflicts between moral/ethical choices of Member States, and the interests of free movement law.[104] One of the reasons being that this version of the test would respect the substance of national moral and ethical choices and instead focuses on "teasing out discriminatory or protectionist biases" focusing on "the normative coherence of national policies, the consistent application of sanctions, and legislative transparency".[105] It is, however, important to note that the orientation on the governance context can have important and structural effects on the way that policy objectives come into existence on a Member State level. On this basis Mathisen and Davies have for example argued that there exists actually no real difference between the procedural and substantive tests applies by the Court.[106] In the previously discussed gambling cases, the Court, in addition to teasing out discriminatory or protectionist measures, also positively implements procedural due care obligations that are to be followed by the Member States. Indeed, this goes further than teasing out discriminatory or protectionist measures. According to Barnard, it is, in fact, a sign of the excessively rigorous scrutiny that the Court adopts in its evaluation of restrictive measures.[107] Arguably, the procedural due care obligations, as well as the rationalization and transparency requirements that the Court purports, are part of an emerging internal market principle of 'good governance'.[108] It concerns the way in which legislation is adopted or implemented, that is becoming increasingly determinative for the compatibility of national rules with the Treaty. The rise of this interpretation of the principle of proportionality appears to reflect a shift towards a culture of justification, of the giving of reasons in due course within a framework that is transparent and calculable.

However, the "global assessment" approach that the Court purports to adopt in these cases does allow for more social diversity in the internal market since it acknowledges that the normative infrastructure of gambling markets differs amongst Member States and shifts the analysis to procedural coherence and, therefore, away from guiding the normative choices that a Member State makes. In section V I shall further discuss whether this model could indeed accommodate social diversity as I reflect on some of the most socially controversial case law of the Court.

D. Incoherence in the Application of the Different Rationales

To summarise the previous sections, the Court has developed three ideal type models: (i) the substantive efficiency model, which is concerned with the inherent rationality of a measure and its necessity that purports a normative principle of technocratic managerialism, (ii) the margin of appreciation model that balances conflicts through the allocation of a margin of discretion as soon as the interests at stake are to be considered removed from trade and valued as 'sensitive', and (iii) the good governance model that looks at the measure in its procedural and governance context and advances principles of transparency, coherence

[103] ibid para 76. See for the incoherency Case C-243/01 *Gambelli* [2003] ECR I-13031 and Case C-243/01 *Placania* [2007] ECR I-01891, where the Court did apply a light necessity test.

[104] de Witte (n 22) 1551.

[105] ibid 1573.

[106] Gjermund Mathisen, 'Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement' (2010) 47(4) Common Market Law Review 1021; Gareth Davies, 'The Court's Jurisprudence on Free Movement of Goods: Pragmatic Presumptions, Not Philosophical Principles' (2012) 2 European Journal of Consumer Law 25, 27.

[107] Catherine Barnard, 'Derogations, Justifications, and the Four Freedoms: is State Interest Really Protected?' In: Catherine Barnard and Okeoghene Odudu (eds), *The Outer Limits of European Union Law* (Hart Publishing 2009) 273.

[108] Similarly, see Sacha Prechal, 'Free Movement and Procedural Requirements: Proportionality Reconsidered' (2008) 35(3) Legal Issues of Economic Integration 201.

and consistency. In the application of each of these 'ideal type' models, the Court seems to be without a clear rationale as to when a definite margin of discretion is explicitly granted to Member States, when interests are to be considered sensitive,[109] and when a focus on procedural context is more appropriate than an evaluation of the necessity of the substantive measures themselves.[110] In this respect, Gareth Davies has submitted that:

> The rules and principles stated by the Court are far better understood as embodying a series of compromises, perceptions of fact, and pragmatic approximations which aim to deal with the problems of evidence, workload, and legal clarity, rather than as an ongoing monologue about market philosophy. Looking in the case law for a coherent framework addressing these classical judicial concerns is … quite fruitful. Looking in the case law for clear or consistent guidance about the conceptual foundation of economic integration is, as internal market lawyers know, a hopeless cause.[111]

According to Davies, the Court is unable or uninterested in defining a consistent conceptual approach in its case law.[112] However, the foregoing analysis has demonstrated that, if perceived as ideal types, there are certain clear trends in the rationales that the Court adopts in adjudicating free movement conflicts, which allows the formulation of a normative critique that aims to reconstruct this case law into a more coherent model of adjudication, capable to accommodate social diversity between the Member States. I will reflect on this by discussing two important and socially salient cases.

V. The Accommodation of Socio-economic Diversity: Towards a Union of Good Governance?

Many academic commentators propose that the EU internal market instils regulatory competition between Member States with the effect that the overall standard will spiral downwards.[113] This *problématique* is strengthened by the approaches of Member States to social, cultural and ecological objectives that are characterised by variety.[114] Some, most prominently Fritz Scharpf, argue that due to a structural institutional incapacity, the EU will forever be inhibited from dealing with social issues.[115] The view of many commentators, therefore, is that there will be a continuing institutional asymmetry between the Union's trade and social objectives, which has been coined as the 'social deficit'.[116] As Höpner and Schäfer have noted, this continued asymmetry means in practice that proponents of the social have to direct their demands mainly to the national level, while proponents of liberalisation and free trade benefit from the supremacy of free market objectives.[117] These developments have led to a plethora of critical analyses,

[109] Cf., for example, with case C-244/06 *Dynamic Medien* [2008] I-00505, in relation to the level of protection for which the German government opted in relation to minimum age requirements for watching Japanese manga movies that were in free circulation in the UK. Compare also with Case C-137/09 [2010] *Josemans* ECR I-13019, for example, where there was no explicit mention of a margin of discretion despite similar intensity in differences in regulatory contexts between Member States as to the regulation of soft drugs.

[110] See on this also Damjanovic (n 66) 1685.

[111] Davies (n 106) 27.

[112] In contrast see Koen Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' In: Maurice Adams, Henri de Waele, Johan Meeusen, and Gert Straetmans (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 13–60.

[113] In general on the federalist competition structure in the EU, see Liesbet Hooghe and Gary Marks, 'The Making of a Polity: The Struggle Over European Integration' In: Herbert Kitschelt et al (eds), *Continuity and Change in Contemporary Capitalism* (CUP 1999) 70–97.

[114] Pablo Beramendi, 'Inequality and the Territorial Fragmentation of Solidarity' (2007) 4 International Organization 783–820. As Beramendi demonstrates, the more diverse the EU Member States are in terms of wealth, inequality and the organisation of public tasks, the less likely it is that social policies emerge at the European level, despite the fact that EU primary law sources increasingly refer to social progress.

[115] Fritz W. Scharpf, 'Legitimacy in the Multilevel European Polity' (2009) 1 European Political Science Review 173.

[116] See for the coining of the term Christian Joerges and Florian Rödl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections After the Judgments of the ECJ in Viking and Laval' (2009) 15 European Law Journal 2. Similar issues are explored in Gráinne de Burca, 'The Quest for Legitimacy in the European Union' (1994) 59 Modern Law Review 349; Joseph Weiler, 'Fin-De-Siècle: Do the New Clothes Have an Emperor?' In: *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' And other Essays on European Integration* (CUP 1999) 238; Christian Joerges, 'What is Left of the European Economic Constitution?' (2004) EUI Working Paper Law 2004/13. On the general democratic deficit of the Union, see Simon Hix and Andreas Follesdal, 'Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravscik' (2006) 44 Common Market Studies 533–55.

[117] Martin Höpner and Armin Schäfer, 'Embeddedness and Regional Integration: Waiting for Polanyi in a Hayekian Setting' (2012) 66 International Organization 429. The conceptualisation of the supremacy of free trade objectives and the struggle for social objec-

which now constitute a virtual encyclopaedia of social commentary that, across the board, highlight how fundamental social interests, such as the right to strike, and collective negotiating/agreements, appear to have been subordinated to the economic objectives of market integration in the European Union. These critiques narrate a 'new phase' in the case law of the Court that is based on a renewed neoclassical economic theology of free markets, which at times has been considered as pure and unfettered neoliberalism that has sanctified 'the Freedom of Enterprise and Liberty of Contract' as fundamental (natural) European rights. It is considered within this narrative that the constitutional foundation of the European Union has converted economic power into a fundamental right and collective labour rights are today considered mostly as an obstructive power that have to be limited.[118] As such, the spontaneous functioning of the market-order has to be protected from undue interferences like collective action and, more generally, discretionary social policies which are policed by the Court on the basis of a strict scrutiny test. By and large, it is considered by some that this has now culminated into a Hayekian dream of a near complete reversal of the constitutional social pacts underpinning the post-war Keynesian welfare states in Europe,[119] in which constitutionalised market access and the pursuit of economic freedom are the overarching benchmarks of access to justice in the EU market-polity.[120] Critiques within this narrative consider that interests that are promoted on the basis of market integration displace what makes the traditional values of social life in Europe worthwhile.[121] A reflection on two of the Court's decisions provides some nuance with respect to these strong and entrenched narratives.

The *Viking* case is well known as the quintessential case that illustrates the Court's willingness to subordinate fundamental social rights to economic freedoms.[122] The central question to address in *Viking* was how to balance the right of trade unions to initiate strikes with the right to reflag a ship for the purpose of acquiring lower wage employees. The judgment is slightly ambivalent because the Court emphasized, firstly, that the Union not only has an economic but also a social purpose and that the rights under free movement must be balanced against the objectives pursued by social policy.[123] The Court, however, did not reflect deeply on this balance and simply considered that the strike had "the effect of making less attractive, or even pointless, […], Viking's exercise of its right to freedom of establishment",[124] thus necessitating an assessment whether no less restrictive measure was available. This framing of the conflict, therefore, suggested the possibility of a *substantive reconciliation* of market access with the right to strike, looking for the least restrictive policy alternative. Paradoxically, in part of its analysis, the Court was concerned with a question of procedural good governance. In its referral, the Court indicated that the necessity of collective action was significantly hampered on the basis of the fact that the policy rules combating the use of flags were *misconstrued*. The *design* of the policy rules would, if triggered by one of its members, *always* lead to solidarity action against the owner of a vessel, irrespective of whether or not the flag owner's exercise of its right of freedom would actually be liable in a specific circumstance to have a harmful effect on the work or conditions of employment of its employees.[125] In other words, the design of the system of collective action was flawed, which consequently made the broader regulatory context inappropriate as a genuine means

tives originates from the original legal infrastructure of the EU which is designed to promote competitive federalism as proposed by Gary Marks, Liesbet Hooghe and Kermit Blank, 'European Integration Since the 1980s: State-Centric Versus Multi-Level Governance' (1996) 34 Journal of Common Market Studies 343–78.

[118] E.g. Loïc Azoulai, 'The "Retained Powers" Formula in the Case Law of the European Court of Justice: EU Law as Total Law?' (2011) 4(2) European Journal of Legal Studies 192–219; Michelle Everson and Christian Joerges, 'Reconfiguring the Politics–Law Relationship in the Integration Project Through Conflicts–Law Constitutionalism' (2012) 18(5) European Law Journal 644–66; Damian Chalmers, 'The European Redistributive State and a European Law of Struggle' (2012) 18(5) European Law Journal 667–93; Marco Dani, 'Rehabilitating Social Conflicts in European Public Law' (2012) 18(5) European Law Journal 621–43; Floris De Witte, 'Transnational Solidarity and the Mediation of Conflicts of Justice in Europe' (2012) 18(5) European Law Journal 694–710; Gareth Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21 European Law Journal 2–22; Gareth Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 43 Common Market Law Review 63–84.

[119] E.g. Wolfgang Streeck, 'Democratic Capitalism and Its Contradictions' In: Armin Schäfer and Wolfgang Streeck, (eds.), *Politics in the Age of Austerity* (Polity Press 2013).

[120] Hans-Wolfgang Micklitz, 'Social Justice and Access Justice in Private Law' (2011) EUI Working Paper Law 2011/02.

[121] E.g. Gareth Davies, 'Internal Market Adjudication and the Quality of Life in Europe' (2014) EUI Working Paper Law 2014/07.

[122] Leone Niglia has provided a new and quite innovative perspective highlighting the use of 'hierarchical balancing' by the Court. Niglia (n 19) 132. For a selection from other discussions on Viking see (n 12).

[123] Case C-438/05 *Viking Line* [2007] ECR I-10779 para 79.

[124] ibid para 72.

[125] ibid para 89: "[required to] initiate solidarity action against the beneficial owner of a vessel which is registered in a State other than that of which that owner is a national, irrespective of whether or not that owner's exercise of its right of freedom of establishment is liable to have a harmful effect on the work or conditions of employment of its employees".

of worker protection. Therefore, the Court, in part of its assessment applied a broader procedural review of the regulatory framework that led to the restriction. It is interesting in this respect to refer to a passage of the *Laval* judgment, which points in the same direction:

> […] collective action… cannot be justified in the light of the public interest objective […] where the negotiations on pay […] form part of a national context characterised by a lack of provisions […] which *are sufficiently precise and accessible* […] to determine the obligations with which it is required to comply […].[126] (emphasis added)

These considerations of the Court seem to imply that the balance in these cases might have turned out differently *if* the wider regulatory context within which the collective action was exercised would have been 'more transparent', in line with what can be considered as the previously highlighted good governance requirements.

Arguably, this is also the rationale put forward by the Court in the recent and important *AGET Iraklis* case.[127] AGET Iraklis wanted to reorganise its business and shut down one of its three cement plants. It sought ministerial authorisation to carry out collective redundancies as required under Greek law, which provided that the Minister of Labour could refuse to authorise some or all of the projected redundancies on the basis of 'the conditions in the labour market'; 'the situation of the undertaking'; and 'the interests of the national economy'. With reference to the socio-economic crisis in Greece, the Minister of Labour refused to provide the requisite authorisation. In turn, AGET Iraklis argued that the national rule was *inter alia* not compatible with Articles 49 (freedom of establishment) and 63 (free movement of capital) of the TFEU. This case is interesting from many perspectives. The main point for the purpose of illustrating the good governance trend is that the Court (Grand Chamber) held that when pursuing social policy Member States are justified in considering the existence of a mechanism that imposes a framework to ensure enhanced levels of protection of workers provided that criteria are formulated in concrete and precise terms:

> …it is clear that, in the absence of details of the particular circumstances in which the power in question may be exercised, the employers concerned do not know in what specific objective circumstances that power may be applied, as the situations allowing its exercise are potentially numerous, undetermined and indeterminable and leave the authority concerned a broad discretion that is difficult to review. Such criteria which are not precise and are not therefore founded on objective, verifiable conditions go beyond what is necessary in order to attain the objectives stated and cannot therefore satisfy the requirements of the principle of proportionality.[128]

Although I have presented it in a simplified manner, the Court's message is clear: Member States have the option to introduce socio-economic governance mechanisms that ensure high levels of workers protection and significantly restrict the freedom of establishment provided that a standard of good governance is met.

The Court has in different ways found means to value divergent social context by developing different rationales of valuation, going beyond a mere purposeful utilitarian standard. In applying the margins of discretion in areas that are considered sensitive or important, Member States are provided with a certain space they can determine regulatory objectives and ways to achieve this without infringing the internal market rules. This is completed with standards of procedural good governance through which the Court has progressively provided yardsticks that require integration-restrictive interests to be pursued on the basis of transparency, consistency and coherence.

VI. Conclusion

Striking a balance between the EU market integration requirements and respecting the 'fundamental structures' that exist in the Member States through the recognition of the diversity of regulatory options, is one of the structural challenges faced by the European Court of Justice. Indeed, this challenge is fundamental, as the perceived legitimacy of the internal market depends on the pursuit of a dual commitment to the simultaneous achievement of an integrating 'open' market and the recognition of legitimate socio-economic policy within nationally embedded structures of the Member States.

[126] Case C-341/05 *Laval un Partneri* [2007] ECR I-11767 para 110.

[127] Case C-201/15 *AGET Iraklis* EU:C:2016:972.

[128] ibid para 100.

The wide market access test that is applied by the Court in free movement cases allows for a discussion of, theoretically, an unlimited range of Member State rules and regulatory schemes. I demonstrated that this approach of the Court can be seen as primarily functional. The conflict is structured by the Court so that legitimate rights and policies can be established from that moment. The *prima facie* structuring of EU free movement conflicts is indeed a crucial part of the adjudicative model of the Court. However, this model can only endure politically if eventually, the conflicts between rights and general public interest are resolved on the basis of an explicit responsiveness that accommodates a variety of social-economic policies.

I have discussed that there is a significant body of case law of the Court that imposes a limited market primacy ruled balancing framework on restrictive regulatory schemes within Member States. Based on certain lines of case law, one may credibly argue that the adjudicative model of the Court in free movement law is functional and under-socialised, threatening the social cohesions, solidarity and identity that a state pursues. It was confirmed by discussing a line of case law in which the valuation of social context was indeed mainly 'purpose' driven and regulatory choices were assessed within a model that can be termed consequentialist, based on utilitarian principles. As such, it was discussed that the substantive efficiency model of proportionality, implements a utilitarian approach. However, a liberal society, such as the EU itself claims to be, contains a diversity of social spheres. European adjudicators should, therefore, make space for different kinds of valuation and, although the adjudicative model of the Court in free movement cases carries the inherent risk of "slipping into a freewheeling rampage of economic due process", the foregoing analysis also found that the Court has created different means to evaluate restrictive social contexts. As such, regulatory choices for a monopoly system in the gambling market, restricting the free movement of services and completely foreclosing access to the market, are allowed, provided that the wider public law infrastructure is transparent and coherently tuned towards a high level of consumer protection. The focus of good governance is on procedure and the coherence of the broader regulatory context, rather than on the rationality, efficiency or profitability of the outcome.

If we indeed accept the argument that social diversity is a value to which the EU internal market is committed, then market derived utilitarian standards, despite the overarching value of unity and 'administrability', are not appropriate means to adjudicate internal market conflicts, because they simply fail to capture and weigh the true social significance of some restrictive rules. However, it often is the case that many restrictive Member State regulations perish within the evaluative frameworks of the Court because Member States themselves do not understand the functions of their own laws. Such regulatory *indeterminacy* tends not to fulfil the evaluative standards of the Court.

I discussed the Court's tendency to adopt good governance principles that focus on transparency and coherence of a governance process, instead of solely on the rationality and efficiency of its outcome. This implies that the idea of unity, which is pursued by the Court in this area of EU law, is mostly one where Member States pursue their policies systematically and opt for policies that are verifiable, coherent and transparent. With respect to the *Viking* and *AGET Iraklis* cases, the outcomes could have been fundamentally different if the concerned governance mechanisms were set up in part so as to conform to these principles. An interesting question for further contemplation is whether initiating a dialogue with the Member States on the basis of these standards still unveils a certain bias against different types of socio-economic policies or whether it is fully reflective of the fact that governance is increasingly decentralised and compartmentalised. One could argue that the conditions of good governance, as purported by the Court, are most conducive to neoliberal outcomes; however, this should be assessed on a case-by-case basis. What is clear is an emerging model to accommodate diversity in a context of transparent and coherent governance frameworks in the Member States. The Court has thereby adopted a strategy that is also long-practiced by the WTO appellate body,[129] developing a regulation-centered internal market regime that looks to the expectations of market actors and indicates the development of overarching European administrative law principles. At the same time, this trend is reflective of a compromise. It is the best the Court can achieve in the face of legitimate social economic diversity within and between the Member States: to offer a platform for constructive conflict resolution.

The Court's trend to move away from substantive prescriptions of policy requires a coherent approach to avoid that social diversity turns into a *carte blanche* for communities that prefer their own values at the expense of other Member States. Indeed, one of the key points of the 'good governance' based case law of the Court is that a system of protection that a Member States installs has to *be embedded by ex ante*

[129] See e.g. Padideh Ala'i, 'From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance' (2008) 11(4) Journal of International Economic Law 779.

conditions justifying the Member State choices. If systems of protection are coherently and systematically part of an existing normative infrastructure that is tailored towards the level of protection that it seeks to protect, these systems of protection are provided with a definite margin of discretion and are unlikely to be struck down by EU law. In other words, the systems of protection adopted by Member States need to be transparent, systematic and internally coherent. However, if these conditions are taken into account, then the level of protection and the means through which this level of protection is sought, remains largely at the discretion of the Member States.

In a very real sense, the Court calls for better regulation by the Member States. However, better regulation is not necessarily regulation that represents the market perspective. The Court has demonstrated that it will respond to genuine regulatory choices and rationales in the pursuit of objectives that are legitimate and serve an important social commitment or normative orientation of a local economy. Accordingly, the normative ideal that the Court pursues for the internal market may be characterised as one of unity in diversity.

Competing Interests

The author has no competing interests to declare.

How to cite this article: Jotte Mulder, 'Unity and Diversity in the European Union's Internal Market Case Law: Towards Unity in 'Good Governance'?' (2018) 34(1) Utrecht Journal of International and European Law pp. 4-23, DOI: https://doi.org/10.5334/ujiel.454

Submitted: 10 February 2018 **Accepted:** 26 May 2018 **Published:** 07 June 2018

]u[*Utrecht Journal of International and European Law* is a peer-reviewed open access journal published by Ubiquity Press.

OPEN ACCESS