



The Responsibility of Private Actors in the Internal Market

Private Actors taking over?

Jan Trommer

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 30 January 2017

European University Institute
Department of Law

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Examining Board

Prof. Loïc Azoulay, Sciences Po Paris (Supervisor)
Prof. Marco Dani, University of Trento/LSE
Prof. Gareth Davies, Vrije Universiteit Amsterdam
Prof. Hans-Wolfgang Micklitz, EUI

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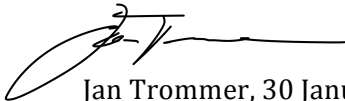
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Abstract

The picture presented and often referred to in EU internal market law and legal scholarship is clear. Within the internal market private actors are the recipients of rights and public authorities are constrained in their (regulatory) powers. The notion of this new individualism is bound up with capacities, powers, and resources that empower private actors to engage in the internal market and cross-border situations; ultimately serving the objectives the internal market seeks to attain. Yet, within this new individualism a conceptually different class of private actors has emerged that is constrained in economic freedoms, i.e. through obligations, rather than being empowered in the context of the internal market. This thesis will enquire the reasons that led to the development of this *counter-culture*. Why did it emerge? To what extent does this phenomenon affect the roles of private actors in the internal market?

I will demonstrate that under the counter-culture private actors are responsabilized and transformed into ‘competent authorities’, i.e. alternative forms of regulatory authority, in the internal market. Private actors are placed into systems of shared responsibilities the relationships of which are coordinated by EU internal market law. In this regard, the concept of responsibility will serve as a tool to bridge the gap between the new positions EU internal market law allocates to private actors and the emerging legal consequences, i.e. allocation of obligations or tasks. The legal contexts of EU free movement law, EU discrimination law, EU food safety law and EU data protection law will serve as case studies against which the construed conceptual framework will be tested. Under the counter-culture the new individualism is no longer only about the exercise of self-interests. Rather, this form of the new individualism comes with a requirement to give account to the interests of other actors within the internal market.

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Introduction

EU Internal Market Law and the Transformation of the Roles of Private Actors

Introductory words

Societies, all societies, are constituted in a certain way that forms their constitution. In EU internal market law the constitution is comprised of treaties that constitute the internal market. In this European context the internal market provides a ‘new social arrangement’ comprising of and affecting different national socio-economic sectors. What is new about the internal market is its ‘common’ character. The ‘common’ relates to the geographical reach of the internal market, which is transnational and intended to unify the national markets of the Member States.¹ The internal market is best described as a space consisting of multiple national markets that are highly regulated at the national level. In the context of the internal market, the notion of construction does not entail the building of something but rather the reduction of diversities between the national markets and laws, in order to enhance the functioning of competition between economic agents located in the different national markets.

1. The internal market as a new social arrangement

EU internal market law and the internal market are constructed in a way that opens up national markets in order to create more economic opportunities for private actors. This transition from organisation at a state level towards a form of

¹ See Paul Craig and Grainne De Búrca, *EU Law* (Fourth edn.: Oxford: OUP, 2008), at Chapter 1; and Pierre Pescatore, *The Law of Integration* (A.W. Sijthoff, 1974); and William Wallace and Royal Institute of International Affairs., *The Dynamics of European integration* (Pinter Publishers for the Royal Institute of International Affairs, 1990).

advanced liberalism at European level “takes place more through stratification than replacement of paradigms.”² In this regard, EU internal market law adds an additional layer of regulation to national law, the intention of which is to ensure the existence of a transnational market economy and maintain stability despite conflicting and divergent national laws. The competition and potential conflicts between the two legal orders were solved by the development of specific doctrines such as the supremacy of EU internal market law and Member State liability that hierarchically place the EU legal order above national laws.³

EU internal market law provides the ‘new legal order’ that guides the construction and the structure of this *new social arrangement*.⁴ The internal market is simply the social context to which EU internal market law relates. Its function as a European project is to

promote throughout the community a harmonious development of economic activities, a continuous balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it.⁵

In relation to this objective of the internal market, EU internal market law is not seen in a Kantian fashion, i.e. as a set of normatively neutral statements, but as reflecting a social ideal. EU internal market law *is* the internal market.⁶ This social ideal reflected in EU internal market law is the constitutional and material

² Marco Dani, 'The subjectification of the citizen in European public law', *EUI Working Paper LAW*, 2015/02 (2015) at 10-11.

³ To this effect see the Court of Justices decisions in Case 6/64 *Flaminio Costa v. ENEL*, [1964] ECR 583; and Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, [1991] ECR I-05357 at 30-36; and Cases C-46/93 and 48/93, *Brasserie du Pecheur SA v. Germany*, and *R v. Secretary of State for Transport, ex parte Factortame Ltd. and Others*, [1996] ECR I-1029 at 20-28. Further see for example Michael Dougan, 'When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy', *Common Market Law Review*, 44/4 (2007), 931-963; and Bruno De Witte, 'Direct Effect, Primacy, and the nature of the Legal Order', in Paul Craig and Grainne De Búrca (eds.), *The Evolution of EU law* (2nd Edition: Oxford University Press, 2011); and Joseph H.H. Weiler, 'Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration', *Journal of Common Market Studies* 31/4 (1993) at 418.

⁴ Case 26/62 *N.V. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse administratie der belastingen* [1963] ECR 1.

⁵ Now Article 3(3) TEU.

⁶ Compare to Philip Bobbitt, 'The shield of Achilles : war, peace and the course of history' (1st edn.: Knopf, 2002), at 205-206.

structure of the internal market.⁷ It concerns the roles, positions, and relationships of legal subjects in the internal market, e.g. how the market ought to be organised? What actors are equipped with power? In this regard EU internal market law transforms roles and positions of actors in the internal market in order to provide a constitutional infrastructure that ensures the unity and functioning of the internal market. This constitutional side of EU internal market law is to be distinguished from the material side that relates to the content of these new defined relationships, e.g. What may actors decide upon? What choices are left to the market actors? In what social, economic and legal environment are they supposed to act?

Lawrence Friedman refers to this as legal culture: the “ideas, attitudes, values and beliefs that people hold about the legal system.”⁸ Although the law appears ‘natural’ and almost self-evident, the “law and legal disciplines always tend, to a greater or narrower extent, to mirror the reality in which they are born and in which they grow.”⁹ EU internal market law and the organisation of the internal market do not emerge in a vacuum. Instead, the EU legal culture and EU internal market law relate to the specific characteristics of the internal market and its objectives while constructing and maintaining the functioning of the internal market.

While EU internal market law aims to ensure the construction and functioning of the internal market, national interests are in stark contrast and instead attempt to ensure the integrity and maintenance of national economies and to prevent foreign competitors from entering their ‘dominion.’ National economies are integrated in a complex web of national policies on economic, political, social, and even cultural matters. The role of EU internal market law is to reduce the national boundaries/distortions emerging from the national policies in order to foster a deeper and wider interweaving of the national economies and markets. ‘Boundaries’ shall not necessarily be understood as geographical frontiers, but as distortions to the construction and functioning of the internal market. *Pierre Pescatore* captures this well: “It is clear that nobody thinks of removing political

⁷ For example see Joseph H.H. Weiler, ‘*Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration*’.

⁸ Lawrence M. Friedman, ‘*Legal Culture and the Welfare State*’, in Gunther Teubner (ed.), *Dilemmas of Law in the Welfare State* (De Gruyter, 1988), at 13.

⁹ Mauro Zamboni, ‘*The "Social" in Social Law*’, *Scandinavian Studies in Law*, 50 (2007), 513 at 514.

frontiers ... In fact, these 'frontiers' seem to concern nothing else than obstacles maintained by divergent national legislation."¹⁰ For this deeper and wider integration, EU internal market law is the instrument and amongst others it was primarily the Court of Justice that developed the legal techniques that promoted the process to unify national markets through legal means. Treaties acting as a general blueprint of the internal market and specialised secondary law instruments are intended to provide the legal basis to boost and ensure the integration of the internal market by constantly removing distortions and restrictions.

The internal market is unique in that it was set up to function as an alternative decision-making process to the purely national decisions made on economic and social aspects. The underlying objective is that some policy choices cannot be, or shall no longer be, made at a national level due to current global challenges to national economies and social structures. Globalisation, mass immigration and the limits to growth to national economies are challenges faced by Member States. The underlying assumption is that the internal market, as a tool to make certain policy choices, is more efficient and provides a better arena for at least parts of the socio-economic choices made formerly within national contexts only. This is reflected in the treaties by the creation of internal markets for goods, services, labour, and capital, within which the free flow of production factors among the Member States supports effective allocation of resources. For example, the creation of a transnational labour market where labour forces within the internal market are free to move to other Member States and compete there in the labour market can lower unemployment rates. Work opportunities are now determined by market forces of demand and supply at a European scale. This in turn will increase the welfare for society as a whole by increasing employment and reducing social costs. Welfare of society as a whole is now generated through the creation of opportunities for individuals to improve their personal situations and welfare, i.e. through the opportunity to engage in gainful employment in a transnational labour market. In theory, this would also increase the overall net level of welfare of society as a whole. The more individuals capable of taking care of themselves and able to earn a living, the higher the welfare

¹⁰ For example see Pierre Pescatore, '*Some Critical Remarks on the "Single European Act"*', *Common Market Law Review*, 24/1 (1987), 9-18.

standard is in society as a whole.¹¹ The difference between the alternative processes is reflected in the different methodologies on how welfare is generated: choices through individualism (i.e. through self-interest) v. choices through collectivism (i.e. general regulation).¹²

2. The idea of an internal market

The market, as a process for making certain policy choices in society, is functionally different from the legislative processes in the Member States. The market as a form of social organisation is not new in modern liberal democracies. The market as a tool for decision-making, i.e. generation of welfare for society, is institutionally and procedurally different from the state where the state decides for the common good. While private actors give up power in the state it is the other way around in the market economy. Here, state control is reduced to benefit individualism. The market as a private law construct was intended to create a space where private actors could engage under market dynamics (i.e. economic factors) and where private actors occupy the centre of organisation in relation to 'political power.' Ever since industrialisation, civilised nations have seen a tremendous emergence of 'private space.' It was a technique to empower private actors to freely engage in economic activities as a means to increase their wellbeing.¹³ Economic choices as a source to increase welfare could be carried out free from state intervention. The power to make choices based on self-interest thus is a core element of the market economy.¹⁴ In this respect, the internal market is understood as an alternative mechanism to make policy choices (e.g. in contrast to top-down regulation). The difference is that it relies on market dynamics at a transnational scale.

¹¹ To this effect see Damian Chalmers, *'The unconfined power of European Union Law'*, *European Papers*, 1/2 (2016), 405 at 406.

¹² N. A. Barr, *'The economics of the welfare state'* (Fifth edn.: Oxford: OUP, 2012), at 31.

¹³ For this see Morton J. Horwitz, *'The History of the Public/Private Distinction'*, *University of Pennsylvania Law Review*, 130 (1981-1982), 1423-1428; and Orly Lobel, *'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought'*, *Minnesota Law Review*, 89 (2004-2005), 342; and N. A. Barr, *'The economics of the welfare state'*; and Bruno De Witte, *'The crumbling public/private divide: horizontality in European anti-discrimination law'*, *Citizenship Studies*, 13/5 (2009), 515-525.

¹⁴ For example see Philip Bobbitt, *'The shield of Achilles : war, peace and the course of history'*, at 229; and N. A. Barr, *'The economics of the welfare state'*.

For the sake of the organisation of the internal market part of the political power consequently shifts from Member States to private actors. It is EU internal market law that legally exercises and structures this shift. It gives and transfers power to private actors that are needed for the market process to function. The internal market is guided by the idea that if individuals act for the individual good (i.e. self-interests) then the sum of all the transactions exercised in the market context will produce social outcomes (i.e. certain policy objectives) in the EU.¹⁵ In this way, policy objectives in the EU are *produced* within the market process. This refers to the 'invisible hand theorem' developed by *Adam Smith*.¹⁶ Liberalism, individualism, and choices driven by self-interest are central to the organisation of the market structure and the market process.¹⁷ As a simplified image, the internal market process,

operates without a central authority. It is atomistic, and the accomplishment of social results is inadvertent. That is the results are produced by innumerable transactions between individuals, none of whom is concerned with aggregate results such as resource allocation efficiency or the general distribution of wealth and opportunity.¹⁸

The competitive advantage of the internal market process over the national political processes in relation to the issues governed by the internal market is its lack of specific (national) focus. The treaties set out broad objectives for which the internal market is set up: i.e. peace, an ever closer union, high level of employment and social progress, sustainable growth, constructing a highly competitive social market economy or the creation of an area of freedom, security and justice.¹⁹ EU internal market law continuously governs, regulates, structures, organises and corrects the internal market through legal means in

¹⁵ Colin Gordon, '*Governmental Rationality*', in Graham Burchell, Colin Gordon, and Peter Miller (eds.), *The Foucault Effect* (University of Chicago Press, Chicago, 1991), at 13-14.

¹⁶ On this point consider Adam Smith, '*The Wealth of Nations*' (Reprint: Bantam Classics, 2003).

¹⁷ For the market dynamics consider François Ewald, '*A Concept of Social Law*', in Gunther Teubner (ed.), *Dilemmas of Law in the Welfare State* (De Gruyter, 1988), at 42. Elmar Altvater, '*The future of the market : an essay on the regulation of money and nature after the collapse of "actually existing socialism"*' (Verso, London, 1991), at 251; and Neil Komesar, '*Imperfect alternatives*' (Chicago: UCP, 1994).

¹⁸ N. A. Barr, '*The economics of the welfare state*', at 45.

¹⁹ Article 3 TEU.

order to keep the process of integration on track.²⁰ This refers to an atomistic market, which understands “competition and diversity not as a temporary strategy before choosing the superior solution in any given scenario, but rather as a means for continuous change and improvement.”²¹ The internal market thus, is better understood as a legally structured process of equal participation of interests where multiple transactions and engagements inadvertently serve the objectives of the EU.

2.1 The transnational dimension of the internal market

What was new under EU internal market law was the transnational dimension and the fact that the internal market was not set up all at once but constructed through the approximation and unification of multiple national markets.

EU internal market law concerns the juxtaposition of national laws and markets, and considers how to reconcile the differences in order to construct and ensure the functioning of the internal market and the transnational space in which private actors can engage under economic conditions.²² Consequently, the internal market is often referred to as an on-going process, the functioning of which is of constant concern to EU internal market law.²³ Thus, another way to view the internal market is as a space of different national markets that open up towards each other: this process is legally structured through the EU Economic Constitution, i.e. the treaties. Hence, EU internal market law continuously shapes the roles and functions of private actors in this transnational space of the internal market. The principles of free movement and non-discrimination form the constitutional kernel of the construction of the internal market.²⁴

²⁰ In particular this is the case where the process of integration or the functioning of the internal market process is distorted by national laws or other activities, public or private, originating in the Member States.

²¹ Neil Komesar, '*Imperfect alternatives*', at 98.

²² Consider the decision of the Court of Justice in Case 178/84, *Commission v. Germany (Beer purity requirement)*, [1987] ECR 1227.

²³ Hans Kutscher, '*Methods of Interpretation as seen by a judge at the Court of Justice*', *Judicial and Academic Conference 27-28 September 1976* (Court of Justice of the European Communities, 1976); and Pierre Pescatore, '*The Doctrine of "Direct Effect": An Infant Disease of Community Law*', *European Law Review*, 8 (1983), 155-177; and Pierre Pescatore, '*The Law of Integration*'.

²⁴ Case 152/73, *Sotgiu v. Deutsche Bundespost*, [1974] ECR 153 at 11; and Case C-237/94, *O'Flynn v. Adjudication Officer*, [1996] ECR I-2617 at 17; and Michael Dougan, '*Minimum Harmonization and the Internal Market*', *Common Market Law Review*, 37 (2000), 853 at 860.

2.2 The function of EU internal market law

Part of the function of EU internal market law is to reorganise political powers within the internal market. Deciding who should hold power to make choices and influence the 'policy-making process' is a challenge the Court of Justice has been confronted with from the beginning.²⁵ Intriguingly, EU internal market law relies on economic dynamics, the market process, and individualism and liberalism as a framework for decision-making.

Geographically economic and political power should shift from a national environment to the European market context. Institutionally, in the internal market economic and political power also shifts from Member States to individuals as economic actors.²⁶ In no way does this mean that Member States powers to regulate are abolished in the internal market, but rather that their powers are confined in the light of the objectives EU internal market law seeks to attain. This is a process of alignment or close coordination of rules, which seeks to ensure that the internal market functions efficiently despite differences in the national laws. Where Member States had previously taken responsibility for the wellbeing of groups in society, this power now shifts to the internal market and is aligned with the new constitutional infrastructure of the internal market.

The position of private actors in a market context in general, but especially in the internal market, changes their function. Private actors are imbedded in a decision-making process that relies on market structures and dynamics. Any actors involved in the market context, be it public and private entities alike, become authorities and actors that compete or decide on aspects in a certain 'policy arena' (i.e. economic context) based on market mechanisms.²⁷ Interests, i.e. self-interest, become the currency in this new policy arena and the participation of interests in the market context, i.e. through the exercise of

²⁵ In particular see Miguel Poiars Maduro, *We the court: the European Court of Justice and the European Economic Constitution* (Hart, 1998), at Chapter 1. Also see: Loic Azoulai, *The European Individual as Part of Collective Entities (Market, Family, Society)*, in Loic Azoulai, Ségolène Barbou Des Places, and Etienne Patout (eds.), *Constructing the Person in EU Law - Rights, Roles and Identities* (Hart Publishing 2016), at 206.

²⁶ Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, at 381.

²⁷ Alexander Somek, *Individualism : an essay on the authority of the European Union* (Oxford: OUP, 2008), at 22-23. Ronen Shamir, *The age of responsabilization: on market-embedded morality*, *Economy and Society*, 37/1 (2008), 1-19 at 14.

choices, the key element to produce change. EU internal market law and the construction of the internal market relies on an organisation,

based on engaging multiple actors and shifting citizens from passive to active roles. The exercise of normative authority is pluralized. Increased participation permeates the many levels and stages of legal process-legislation, promulgation of rules, implementation of policies, and enforcement.²⁸

The “economic becomes the political” and private actors are transformed into legal objects that hold regulatory authority and are integrated into an order of commodities. In the EU the internal market becomes the space for political debate, allowing those having interests to participate, contribute and compete (i.e. ‘debate’) in the internal market.²⁹ It is no longer the public realm that is the only appropriate framework for political debate. EU internal market law transforms and implements this ‘process’ as one of economic interaction at a transnational level. Through choices and decisions, private actors have the power and the ability to produce change: they exercise political power.³⁰ The market process not only provides for participation but also *requires* individuals to participate due to the decentralisation of normative authority in relation to decision-making.³¹ Their choices and their participation in the internal market, both qualitative and quantitative, impact on the functioning of the market process and the generation of optimal policy outcomes. Equal participation of interests determines the efficiency of the internal market as a decision-making process. EU internal market law and the internal market promote this active model of individuals.

²⁸ Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, at 373.

²⁹ On the private space see Morton J. Horwitz, *The History of the Public/Private Distinction*. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, at 380. This private realm emerged over time. Also see Neil Komesar, *Imperfect alternatives*, at 98.

³⁰ Nikolas S. Rose and Peter Miller, *Political Power beyond the State: Problematics of Government*, *The British Journal of Sociology*, 43/2 (Jun. 1992), 173; and James M. Buchanan, *Individual Choice in Voting and the Market*, *Journal of Political Economy*, 62/4 (Aug. 1954), 334; and Robert C. Hockett and Saule T. Omarova, *“Private” Means to “Public” Ends: Governments as Market Actors*, *Theoretical Inquiries in Law*, 15.1 (2014).

³¹ John Hyman, *Action, knowledge, and will*, *Oxford scholarship online*. (First edition. edn.; Oxford: Oxford University Press, 2015), 1 online resource. at 26.

The importance of liberal thought and individualism is evident. Choices based on self-interests are the driving force in the market process. Participation and the capacity to make choices in an environment of state-free interaction is a prerequisite for the internal market process to function efficiently. This means that the possibilities for individuals to choose must increase and this “often means restraining rather than empowering governments.”³² The consequence is the decentralisation of political power towards “the private sector, including private business and non-profit organizations.”³³ Their function and interests in regard to a specific ‘policy arena’ are of importance.

This shift of power is most clearly reflected in the rights culture present in EU internal market law. It was the Court of Justice that interpreted the treaties to constitute a ‘new legal order’ that consequently created directly enforceable rights for individuals in relation to the internal market context.³⁴ Rights conferred under EU internal market law, for example free movement rights or the right to equal pay, realised “an ability to achieve certain consequences” in the internal market vis-à-vis other actors.³⁵ These rights protect and encourage private actors to engage in the transnational market and in cross-border economic transactions.

2.3 Competing visions about individualism

EU internal market law has a profound impact on the life of individuals in the EU. Economic integration towards an ‘ever closer union’ increasingly affects the way EU citizens think.³⁶ EU internal market law and the integration project shackle our thinking about society in a purely national context, where states are

³² Philip Bobbitt, *The shield of Achilles: war, peace and the course of history*, at 229-230.

³³ Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, at 381.

³⁴ Bruno De Witte, *Direct Effect, Primacy, and the nature of the Legal Order*, at; and Michael Dougan, *When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy*; and Case 26/62 *N.V. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse administratie der belastingen* [1963] ECR 1.

³⁵ Joseph Raz, *Legal Rights*, *Oxford Journal of Legal Studies*, 4/1 (1984b), 1-21 at 13.

³⁶ For example see Joseph H. H. Weiler, *Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights*, in Nanette A. Neuwahl and Allan Rosas (eds.), *The European Union and Human Rights* (Martinus Nijhoff Publishers, 1995); and Loic Azoulay, *The European Individual as Part of Collective Entities (Market, Family, Society)*, at 205-206; and Marco Dani, *Assembling the fractured European Consumer*, *European Law Review*, 36/3 (2011), 326; and Marco Dani, *The subjectification of the citizen in European public law*.

the only source of authority. The creation of the internal market not only expanded economic opportunities, but also transformed the roles of private actors in the European context into alternative forms of authority. EU internal market law and the internal market constitute a substantive part of the EU. The outreach of individual opportunities and the power to make choices extends far beyond purely national contexts.

A key difference to the internal market is that economies, economic choices and their social effects are no longer organised in a purely national environment, i.e. private actors as economic actors are no longer engaging in isolation. The economic activities of private actors can have effects beyond their national borders. Formerly, the state as a normative authority determined the legal setting in which private actors should and could engage under market conditions. National markets were organised and framed through national law and had a clear social purpose. This national organisation of markets comes with its own vision about individualism and how private relationships should be organised. National law was the framework in which the individual as an economic actor was constructed. In this context, national laws shape the roles and positions of private actors. An example of this is the creation of a private space for state-free interactions through private law. The private autonomy created reflects a form of delegation of public power to the private sector. At the same time, national law is the context in which private actors are to define themselves vis-à-vis other actors.

The market and the economy were considered as an instrument to provide welfare to the nation as a whole. Public authorities and political actors in the state are in charge of providing—in the ordo-liberal tradition—guidance through legal means to the national market, i.e. to provide a legal framework for private actions in a way that ensures the functioning of the market process.³⁷ In this capacity, national economies were designed to serve the nation as a whole. Political power was organised in a national environment.³⁸ Regulatory choices in relation to the *Wettbewerbsordnung* of the national market were based on national

³⁷ Orly Lobel refers to the 'regulatory state' and Ronen Shamir to the 'old governance principles'. See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*; and Ronen Shamir, *The age of responsabilization: on market-embedded morality*; and Miguel Poiares Maduro, *We the court: the European Court of Justice and the European Economic Constitution*, at 7.

³⁸ Nikolas S. Rose, *Powers of freedom: reframing political thought* (Cambridge: CUP, 1999), at 15; and Case C-334/14, *Belgian State v. Nathalie De Fruyter*, of 2 July 2015 (not yet reported) at 55. The Court of Justice refers to Member States as having set up a monopoly within a national context.

interests and national economic and social structures.³⁹ The expertise on how to structure the national economy is centralised in public authorities.⁴⁰ Territorial boundaries “demarcate the basis on which individuals are included and excluded from participation in decisions affecting their lives” and in the access to economic opportunities.⁴¹

The individualism developed within EU internal market law is distinctive. EU internal market law constructs a specific private actor closely affiliated to the internal market, the *homo economicus*.⁴² In this form individuals constitutionally and procedurally occupy a central position in EU internal market law and the internal market as economic actors. The notion of this new individualism is bound up with capacities, powers, and resources that empower private actors to engage in the internal market and economic cross-border situations. Although individuals are conceived within a similar social construct—a market economy—the regulation of the internal market in terms of shaping roles and positions of private actors seeks to construct private actors as legal subjects in the internal market. In this regard, “the Court of Justice and the EU legislator when interpreting EU internal market law enforces upon private actors positions/roles in relation to their opinion” of how private actors can best contribute to the functioning of the internal market.⁴³ This concerns placing private actors that were formally framed in a national context, in a new transnational context and confers resources and powers that ensure access to and participation in the internal market. In summary, EU internal market law adds a regulatory layer that shapes certain private actors *qua* legal subjects in the internal market in which they are supposed to act, i.e. as workers, as service providers, as producers and also as EU citizens.⁴⁴ This new role is protected by the concept of supremacy of

³⁹ In particular majority decision-making, debating and expertise gathering characterise this process of deliberation, before decision-making is carried out.

⁴⁰ Elmar Altvater, *The future of the market : an essay on the regulation of money and nature after the collapse of "actually existing socialism"*, at 251.

⁴¹ See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*.

⁴² Jens-Uwe Franck and Kai Purnhagen, *Homo economicus, behavioural sciences, and economic regulation : on the concept of man in internal market regulation and its normative basis*, EU working papers LAW 2012/26; and Alexander Somek, *Individualism : an essay on the authority of the European Union*, at 1-2.

⁴³ Marco Dani, *Assembling the fractured European Consumer*, at 363.

⁴⁴ Concerning the construction of the individual within EU internal market law see Loic Azoulai, *The European Individual as Part of Collective Entities (Market, Family, Society)*, at 206-207. Further see: Marco Dani, *Assembling the fractured European Consumer*; and Marco Dani, *The subjectification of the citizen in European public law*.

EU internal market law, which ensures that the EU legal framework that shapes private actors prevails over the national legal framework.⁴⁵

With regard to the determination and allocation of roles and positions to private actors, EU internal market law benefits from its *structural completeness*. This means that EU internal market law constitutes, through the treaties, the legal order creating the internal market (i.e. the constitutional structure and social ideal)⁴⁶ with free movement and competition that is based on an open market policy. However, at the same time EU internal market law provides the legal resources, institutions, and techniques (i.e. fundamental principles, legal powers, openness of principles) to develop and construct the internal market in order to ensure the effective functioning of the market process. This outlines a *closed system* that provides all the resources needed to develop its potential—institutional and material.⁴⁷ EU internal market law is both *reason* and *telos* (i.e. reason and justification) for the establishment and the functioning of the internal market.⁴⁸

Deliberately, EU internal market law and the way it shapes the power of actors in the internal market offers a fine sample of social theory. This is how to organise roles and positions and their interactions at a transnational level as a means to ensure the functioning of the internal market. Roles are transformed and relate to the constitutional structure of the internal market while the shaping, steering and the determination on how those roles are supposed to interact in a specific policy-making environment is attained through legal means and instruments (i.e. rights and obligations).

⁴⁵ To this effect see Case 6/64 *Flaminio Costa v. ENEL*, [1964] ECR 583; and Michael Dougan, 'When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy'; and Sacha Prechal, 'Direct effect, indirect effect, supremacy and the Evolving Constitution of the European Union', in Catherine Barnard (ed.), *The Fundamentals of EU Law Revisited* (Oxford: OUP, 2007).

⁴⁶ For example see Case 26/62 *N.V. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse administratie der belastingen* [1963] ECR I at 12; and Case C-294/83, *Les Verts* [1986] ECR 1339 at 23.

⁴⁷ While 'institutional' refers to the constitutional infrastructure of the internal market, 'material' covers the subject matter that is decided within certain relationships and legal contexts regulated by EU internal market law.

⁴⁸ Loic Azoulai, 'The force and forms of European Legal Integration', *EUI Working Papers*, LAW 2011/06 (2011) at 3.

2.4 A new actor in the game?

The role of private actors in the economic integration process is unique. The perception of individualism and the role of private actors differ significantly between the internal market and national economies. EU internal market law constructs individuals and private actors according to their function in a defined context of the internal market. The doctrine of direct effect of the treaty, which turned treaty provisions into subjective rights for individuals, opened the door for the Court of Justice to manage and assemblage the roles and positions of private actors in the context of the internal market.⁴⁹ Eventually, this allocation of rights had direct practical effects in relation to the construction of the internal market; they constitutionally structured and manifested the internal market. A key element here is that private actors also function as a commodity and tool to ensure the economic and social integration of the internal market. Put differently, the doctrine of direct effect turned the principles of economic integration into direct effective tools (i.e. rights) for economic integration. Private actors, when exercising their rights under EU internal market law became tools for economic integration.

The exercise of rights becomes applied constitutional law and private actors become constitutional agents. Private actors are transformed into a part of the constitutional infrastructure of the internal market. Much has been written about this effect of the rights-culture on EU internal market law that turns private actors into tools for economic integration.

This thesis will not challenge this vision but will place emphasis on a rather undeveloped phenomenon, where EU internal market law constrains the freedoms of private actors in order to attain policy objectives. The difference to the rights-culture is evident. Private actors are not encouraged or empowered to seek opportunities in the internal market. Rather EU internal market law puts a 'legal belt' on the activities and powers of some private actors. Due to the methodological difference to the rights culture, which basically empowers private actors, this phenomenon will be referred to as the *counter-culture*. A good example of this is the expansion of legal obligations under the treaties to private actors. The effect is that private actors are constrained in their economic freedoms within the internal market through EU internal market law. A methodological

⁴⁹ Marco Dani, '*Assembling the fractured European Consumer*', at 363.

and structural analysis of this phenomenon and of the reasons for this development is needed.

3. Research objective

The problem faced with regard to the counter-culture is one of social roles and social functions of private actors in relation to the internal market. How do EU institutions transform the role of private actors in certain contexts to attain particular policy objectives? So far, the counter-culture has not been subject to a coherent or sustainable analytical approach, the consequence being a lack of conceptual and methodological considerations. When EU internal market law is developed and choices are made to allocate legal constraints to private actors this occurs in a pragmatic manner. Whenever this occurs, EU internal market law and EU Institutions do not provide an explanation as to why these specific actors and positions are constrained in their freedoms. Similarly, EU legal scholarships failed to devise a conceptual or methodological approach providing normative convincing arguments supporting the development and emergence of the counter-culture within EU internal market law.

3.1 The gap in the legal doctrine

I am aware that what I refer to as counter-culture has not gone undetected by legal scholarship. Rather, my claim is that the existing conceptual approaches are incomplete or only deal with specific expressions of the counter-culture. First and foremost, the horizontal effect debate of EU internal market law should be mentioned.⁵⁰ Part of the problem with the horizontal effect concept is that it is borrowed from national constitutional law and thus bound to national constitutional doctrine. The horizontal effect concept developed in relation to the expansion of the effects of classically vertical rights (i.e. fundamental rights in public-private relationships) to horizontal situations (i.e. private-private

⁵⁰ On the horizontal effect debate with regard to EU free movement law see Gareth Davies, 'Freedom of Movement, Horizontal Effect, and Freedom of Contract', *European Review of Private Law*, 3 (2012), 805; and Alan Dashwood, 'Viking and Laval: Issues of Horizontal Direct Effect', *Cambridge Yearbook of European Legal Studies*, 10/2007-2008 (2008), 525-540; and Nuno Ferreira, Joanna Krzeminska-Vamvaka, and Teresa Russo, 'The horizontal effect of fundamental rights and freedoms in European Union Law', in Gert Brüggemeier, Aurelia Colombi Ciacchi, and Giovanni Comandè (eds.), *Fundamental Rights and Private Law in the European Union Vol. 1* (Cambridge: CUP, 2010); and Eva Julia Lohse, 'Fundamental Freedoms and Private Actors - towards an 'Indirect Horizontal Effect'', *European Public Law*, 13/1 (2007), 159-190.

relationships). The conceptual similarity to the expansion of treaty articles is obvious. Treaty articles, which emerged as subjective rights against national authorities (i.e. vertical relationship) in the jurisprudence of the Court of Justice first, were soon expanded to include private relationships (i.e. horizontal).⁵¹

The problem with the concept of horizontal effect is its limited scope. Horizontal effect relates to specific legal situations, namely the direct application of constitutional rights to private situations. Thus, in analytical terms the scope of the horizontal effect concept is limited to situations where treaty provisions are directly applied to private relationships. This limited capacity of the concept of horizontal effect already emerges in relation to the free movement of goods. Within the context of the free movement of goods, the Court of Justice refused to apply the treaty provisions in private relationships. Theoretically, this approach comes within the concept of indirect horizontal effect. The application is indirect because the constitutional right is channelled through public authorities, which are required to control the private actors in light of the treaty provisions. The problem is that the horizontal effect concept (i.e. direct or indirect) fails to provide a convincing explanation for the methodological inconsistency between the different free movement rights and their application to private relationships. Why did the Court of Justice develop these different approaches even though it had the chance to expand the treaty provisions in a legally consistent manner with the other freedoms? Similarly, the analysis does not answer why only some private actors are constrained. This relates to the personal scope of the application of EU free movement law, which is only expanded to collective entities and the employer in the labour market. Why should they be treated differently?

Another issue with the concept of horizontal effect is its limited capacity to deal with situations beyond the expansion of treaty provisions to private relationships. It does not explain why there is an emergence of the technique to allocate obligations to private actors in secondary law instruments.⁵² Consequently, a

⁵¹ This emerged first in Case 36/74, *B.N.O. Walrave and L.J.N. Koch v. Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federacion Espanola Ciclismo*, [1974] ECR 1405.

⁵² For example see the legal frameworks created by Regulation (EC) No 178/2002, of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ L 31, 1.2.2002, p. 1-24) ; and Directive 95/46/EC, of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with

more contextual and holistic approach is needed giving account to the emergence of the counter-culture under primary law and secondary law. The phenomenon of constraining private actors in their economic freedoms is found cross-sector. The difference between the allocation of obligations through the Court of Justice under the treaty or through the EU legislator in secondary law instruments is merely a difference in the *source* of the legal obligation (i.e. institutional source and legal framework). However, the technique used to constrain the economic freedoms, through the allocation of legal obligations, of private actors is similar.

3.2. Research objective and research question

My contention is that in relation to the counter-culture those actors addressed by legal obligations occupy specific positions in certain parts of the internal market. The private actors concerned are recognised as legal subjects by EU internal market law, reflecting a form of ‘Europeanisation’.⁵³ This is similar to the rights-culture, where rights are allocated to private actors acting in the capacity of predetermined legal subjects within a certain part of the internal market, e.g. worker in the labour market. Similar to the rights culture, EU internal market law uses legal means to transform and define the role of private actors under the counter-culture. However, the difference to the rights-culture is that these actors are not protected or empowered to act in the internal market but rather that they are constrained in their powers and economic freedoms.

A decisive factor in relation to the emergence of the counter-culture seems to be the ‘power’ private actors hold in a certain sector regulated by EU internal market law. Where under the rights-culture potentially weak actors are strengthened through the allocation of rights, obligations have the opposite function in the counter-culture. Obligations are intended to confine and limit the unbridled power of some private actors in the internal market context. A feature of these positions that are bound up with the counter-culture is that they have

regard to the processing of personal data and on the free movement of such data (OJ L 281 , 23/11/1995 P. 0031).

⁵³ For a similar notion of ‘Europeanisation’ see Olha Cherednychenko, *The Harmonisation of Contract Law in Europe by Means of the Horizontal effect of Fundamental Rights?*, *Erasmus Law Review*, 1/1 (2007), 37-57; and Gareth Davies, *Freedom of Movement, Horizontal Effect, and Freedom of Contract*; and Arthur Hartkamp, *The Effect of the EC Treaty in Private Law: On Direct and Indirect Horizontal Effects of Primary Community Law*, *ibid.*18/3 (2010), 527-548; and Mattias Kumm, *Who is afraid of the total constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, *German Law Journal*, 7/4 (2006), 341-370.

the capacity in a certain part of the internal market which can be described as 'power to affect' others. The actors concerned are in a position to embrace the capacity to potentially *influence* the personal, social or structural conditions under which they may engage in the internal market. It is effectively power to enforce their own will, even against the unwillingness and reluctance of acceptance of the other actors.⁵⁴ In this regard, due to the capacity to affect the policy-making environment in which other private actors are supposed to act and engage, these private actors (and their positions) can be considered as alternative 'forms of governance' competing with EU internal market law about the regulatory competence to regulate the structure parts of the internal market.⁵⁵ The allocation of obligations (and the concurrent subordination to EU internal market law) to these actors is, thus, a form of clarifying the relationship of these 'private forms of governance' with the EU legal order. In this respect, the allocation of legal obligations is a *consequence of the position* that the actors hold in a certain market context governed by EU internal market law.

From this perspective the counter-culture is a technique of governance, having the clear purpose of constructing and ensuring the functioning of the internal market in response to a particular form of distortion. In the case of the counter-culture this distortion results from the 'power to affect' that some private actors have in private relationships governed by EU internal market law. Similar to the rights culture, under the counter-culture private actors are transformed and placed as commodities into the constitutional structure of the internal market. The allocation of obligations has consequences. Firstly, it recognises that some private actors occupy positions in a certain market context, which constitute alternative forms of governance. This is reflected in the capacity these private actors have to affect the opportunities of other private actors in the internal market. Secondly, EU internal market law recognises these positions and alternative forms of governance as integral parts of certain contexts governed by EU internal market law. The private actors may be needed to provide important impetus to the market (i.e. affecting the market dynamics) or to provide alternative, more efficient forms of organisation. The obligation confines this private power and ensures that it does not affect or distort the functioning of the economic process. This is reflected in the material content of the obligation.

⁵⁴ Wallace C. Peterson, 'Market Power', *Journal of Economic Issues*, 23/2 (1989), 379 at 381.

⁵⁵ Damian Chalmers, 'The unconfined power of European Union Law', at 413.

Obligations define a specific activity that should be prevented. The result is that this objective, reflected in the obligation, is internalised into the economic choices and activities of the private actor concerned. Private actors under the counter-culture are transformed into competent authorities because they actively, through compliance with legal requirements, contribute to ('produce') the attainment of policy objectives within the internal market. Competing interests may exist between EU internal market law and the private actors. In this regard, EU internal market law provides the forum within which the dispute is solved, mainly on the basis of the proportionality test (i.e. legitimate aim and proportionality).⁵⁶

Clearly, the situation described above raises many practical and legal issues and this thesis should not be assumed to be a grand theory concerning the role of private actors in the internal market. Rather, the aim of this work is to provide a new way of viewing the role of private actors in the internal market and the techniques EU internal market law uses to shape these roles. The following simple questions will guide my analysis. Why are some private actors constrained in their freedoms and others are not? What are the factors that affect the allocative choices made by EU institutions when determining and defining 'legal subjects' in a certain part of the internal market? What is their relationship to the rights culture? Why did the counter-culture emerge under EU internal market law? To what extent does the counter-culture comply with requirements that are fundamental to the functioning of a market process, i.e. individualism and liberalism? A by-product of this analysis may be that other phenomena, i.e. the liability of private actors under EU internal market law, could be considered from a new perspective.

3.3 Analytical framework

The actors that are subject to legal constraints have a specific function in the context in which they are supposed to act. The question we have to ask relates to

⁵⁶ For the balancing of competing interests between EU internal market law and alternative private 'forms of governance' see the proportionality test applied by the Court of Justice in Case C-415/93, *Bosman* [1995] ECR I-4921; and Case C-438/05, *International Transport Workers Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779; and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767; and Case C-325/08, *Olympique Lyonnais v. Olivier Bernard*, [2010] ECR I-2177; and Case C-176/96, *Lehtonen and Castors Canada Dry namur-Braine ASBL v. FRBSB* [2000] ECR I-0268.

the organisation of roles and functions underlying a specific context governed by EU internal market law. The relationship between the social position an actor has in a specific context and how this manifests in the legal system requires investigation. However, this is problematic because EU Institutions and EU internal market law barely define social positions or roles. This makes it particularly difficult to make a link between the social function of an actor and the legal consequences thereof. While the latter is visible in EU internal market law, the social role and function are not.

In order to bridge this gap I will have recourse to the *concept of responsibility*. The concept of responsibility is not a positive legal concept, but will function as an analytical tool. The usefulness of the concept of responsibility for the analysis of the counter-culture is reflected in its capacity to bridge the gap between the social function an actor has in a specific context and the legal consequence thereof. This distinction is made on the basis of the social function and the normative function, both of which are included in the concept of responsibility. The social function relates to the allocation of positions or the roles of private actors in a specific context. The normative function then acts to justify the allocation of legal requirements to these positions and roles. What needs to be clarified in relation to EU internal market law are the following: What is special about these positions? What is their social role? What is the environment they are acting in or are supposed to act in? How does this relate to the legal expressions that emerge in EU internal market law (i.e. legal obligations)?

The difficulty will be to go beyond the mere black letter analysis and engage with questions concerning social roles, social theory, and those concerning the allocation of roles and the imputability of legal requirements in relation to organising transnational policy-making environments into more 'efficient' systems compared with existing local and regional ones. In relation to questions of allocation for example, the counter-culture is not open to every actor. This implies an allocative choice in terms of the actor concerned has characteristics for which reason he is recognised as occupying a central position in a specific context defined by EU internal market law. For example, this is the food business operator in EU food law, the data controller in EU data protection law or trade unions and business organisations in EU free movement law, all of which reflect specific positions and all come with certain characteristics attached to the actors. These characteristics define the personal scope of those 'positions.' Also in the

rights culture particular criteria define the personal scope of positions that come with rights for individuals, for example, a worker, a job seeker, a part-time worker, or a service provider, as defined in the case-law of the Court of Justice to have certain characteristics.⁵⁷ In relation to the counter-culture, this doctrine that determines the characteristics when private actors come within the scope of certain positions is significantly underdeveloped.

The structure of this thesis will build upon the following core chapter: Chapter 1. In this chapter, the subject matter of the thesis and the analytical angle to be taken will be defined. Following a thorough examination of the differences between the rights culture and the counter-culture, the concept of responsibility will be introduced as the analytical tool to assess the role of actors being subject to the counter-culture. Moreover, the first chapter will frame the reasons and specialties in EU internal market law that led to the development of the concept of counter-culture. The concept of responsibility will serve as a tool to bridge the gap between the new positions EU internal market law allocates to private economic actors and the resulting legal consequences that emerge.

Having established the conceptual framework concerning the counter-culture in EU internal market law in Chapter 1, Chapters 2–5 will examine the counter-culture in four different contexts. EU free movement law, EU discrimination law, EU data protection law, and EU food safety law will serve as study objects against which the construed conceptual framework will be tested.

Finally, recourse will be made to the implications the counter-culture has for EU internal market law, national law, and the transformation of society. It will be shown that under the counter-culture private actors are installed as competent authorities in the context of the internal market and that this technique of governance is increasingly relied on under the ‘Better Regulation’ initiative of the EU Commission.⁵⁸ This entails that under the counter-culture these economic actors are increasingly installed as active agents in attaining specific objectives of EU internal market law in line with the functioning of the internal market. This EU paternalism is considered to be in stark contrast to the idea of individualism

⁵⁷ On this matter see Catherine Barnard, *The substantive law of the EU: the four freedoms* (Fourth edn., 2013).

⁵⁸ For this effect see European Commission Press Release (Ip/15/4988) of 19 May 2015 ‘on Better Regulation Agenda: Enhancing Transparency and scrutiny for better EU law-making’.

and freedom of economic action EU internal market law promotes in its rights culture. Also, some criticism of the counter-culture will be raised in relation to the liability of private actors that are subject to legal requirements under EU internal market law.

Chapter I

Responsibility of Private Actors in EU Internal Market Law

Introduction

The construction of the internal market is permanently triggered by the inherent conflict between the objectives and interests represented by EU internal market law and national law. With regard to the construction and functioning of the internal market, the EU institutions and EU internal market law compete for authority with other national legal orders or other forms of governance, e.g. emerging from plain market forces.⁵⁹ Each of which reflect a form of regulatory authority capable of regulating the internal market within its own spheres of competence. EU institutions are permanently required to offer better solutions than other organisations. Part of the problem is that when providing these ‘better solutions’ EU internal market law must rely on subjects within the Member States to realise them. This leads to an intensive and extensive responsabilization of actors under EU internal market law and a ‘transformation of roles’ of actors involved in the internal market.⁶⁰ In this regard, EU internal market law integrates other actors and sources of authority into the internal market as commodities and turns them into constitutive elements of the internal market. Private actors and public authorities alike occupy positions in the organisation of the internal market bound up with regulatory authority. In other terms, the allocation of rights to private actors and the allocation of obligations to public and private actors reflect forms of responsabilization; this integrates actors into

⁵⁹ Damian Chalmers, *The unconfined power of European Union Law*, at 406. Also see Miguel Poiars Maduro, *Europe and the Constitution: what if this is as good as it gets?*, in Joseph H. H. Weiler and Marlene Wind (eds.), *European constitutionalism beyond the state* (Cambridge: CUP, 2003); and Joseph H. H. Weiler, *The Transformation of Europe*, *The Yale Law Journal*, 100/8 (1991), 2403-2483; and Miguel Poiars Maduro, *We the court: the European Court of Justice and the European Economic Constitution*; and Marco Dani, *Assembling the fractured European Consumer*.

⁶⁰ Damian Chalmers, *The unconfined power of European Union Law*, at 406.

the internal market and ensures that their activities do not distort the objectives of EU internal market law.

1. Constitutionally structuring the internal market

The problem encountered by EU institutions and EU internal market law is how to construct the internal market and ensure its effectiveness by “relying on domestic socio-economic structures.”⁶¹ The construction and functioning of the internal market is attained through a reorganisation of the roles and functions of its legal subjects.⁶² EU internal market law reflects a *wirtschaftspolitische Leitidee* (i.e. economic main idea), i.e. how the internal market should be organised and structured in order to function effectively. The role of private actors is framed in this ‘new social arrangement’ and ascribes private actors a pivotal role in this EU legal culture.⁶³ The transformation of private actors reflects a new form of individualism that subjectifies private actors in a transnational environment. This new individualism created by EU internal market law is without equal. Private actors are placed in a European and transnational context. The allocation of directly enforceable rights was a giant step in creating a constitutional infrastructure of the internal market. It turned the objective principles constituting the internal market into subjective legal rights, which were applied in specific individual cases.⁶⁴ The doctrine of direct effect and the allocation of rights was a major tool developed by the Court of Justice to emancipate “individuals from the legal and territorial boundaries of domestic markets and their regulatory structures” and to integrate them into the transnational market context.⁶⁵ Simultaneously it alienates private actors from national and domestic frameworks and provides a space within which they are to consider themselves in a new collective space: the internal market. EU internal market law constructs legal subjects so as to find their new ‘home’ in the internal market. The identity

⁶¹ Loic Azoulay, *'The European Individual as Part of Collective Entities (Market, Family, Society)'*, at 207.

⁶² See Nikolas S. Rose, *'Powers of freedom: reframing political thought'*.

⁶³ Marco Dani, *'The subjectification of the citizen in European public law'*, at 12.

⁶⁴ Miguel Poiates Maduro, *'We the court: the European Court of Justice and the European Economic Constitution'*, at 8.

⁶⁵ “Under EU law the most obvious form to integrate private actors into the internal market is to grant individuals rights that make them ‘integrable’ into institutions that derive from the pre-structuration of national societies, irrespective of the individuals’ legal categorisation under the law of their country of origin.” For this see Loic Azoulay, *'The European Individual as Part of Collective Entities (Market, Family, Society)'*, at 206.

private actors are bestowed under EU internal market law essentially links them to a European context and to being an integral part of the transnational community.⁶⁶ Private actors are placed in a legal framework and their ‘roles’ are constructed with an “unmediated connection to Europe as a whole.”⁶⁷ However, powers and functions assigned to private actors under EU internal market law only relate to activities in the realm of the internal market and economic integration.

1.1 Rights culture in EU internal market law as a tool for economic integration

As it emerged in the context of the principle of direct effect, the rights-culture relates to the negative integration paradigm that developed under the principle of free movement. The rights culture and the individualism it reflects functions as a tool to unify national markets. Private actors are entrusted with rights protected under EU internal market law so as to bring about change—for themselves and for the economies of the Member States.⁶⁸

The consequence of this rights culture is the empowerment of private actors to make choices. The allocation of rights is a technique to transform “the ways in which individuals come to think of themselves, through inculcating desires for self-development” and to ensure that private actors are legally empowered to exercise these choices.⁶⁹ Rights derived under EU free movement provisions in the treaties empowered private actors to move to another country to seek employment,⁷⁰ to sell goods in another country,⁷¹ or to simply require fair

⁶⁶ Ibid., at 215.

⁶⁷ Ibid., at 205 and 206-207. Further see Marco Dani, *'Assembling the fractured European Consumer'*; and Marco Dani, *'The subjectification of the citizen in European public law'*.

⁶⁸ The internal market as process provides a common approach to [...] promote throughout the community a harmonious development of economic activities, a continuous balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it. See Article 3(3) TEU. Further see Nikolas S. Rose and Peter Miller, *'Political Power beyond the State: Problematics of Government'*.

⁶⁹ Nikolas S. Rose, *'Powers of freedom: reframing political thought'*, at 88.

⁷⁰ For example see Case C-292/89, *Antonissen*, [1991] ECR I-745 at 21; and Case C-281/98 *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*, [2000] ECR I-4139.

⁷¹ See Case 8/74, *Procureur du Roi v. Dassonville*, [1974] ECR 837; and Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649; and Case 127/73, *BRT v. SABAM (I)*, [1974] ECR 52; and Case 178/84, *Commission v. Germany (Beer purity requirement)*, [1987] ECR 1227.

treatment in employment relationships.⁷² Rights have given private actors the power to pursue their self-interests in a transnational context.⁷³ Rights recognised under EU internal market law, for example free movement rights or the right to equal pay acknowledged “an ability to achieve certain consequences.”⁷⁴ For this reason, the treaties provided a basic catalogue of normative expectations for which powers were to be conferred to private actors and which powers were to remain within the Member States sphere of competence.⁷⁵ As soon as a national law or practice interferes with these expectations individuals have an incentive to go to court and challenge the national measure limiting their opportunities. In this context the commonly accepted that the Court of Justice provided rights for private actors and constrained the powers of Member States in order to unify the internal market and to compensate for national protectionist measures. In this view, individuals exercising the right to free movement are allocated a social function at the same time. This function is reflected in the consequence the exercise of the right produces. Where free movement is possible the internal market, in principle, is unified. The consequence of free movement is economic integration in practice and the allocation of factors of production.

The infinite scope of this rights culture as a tool for economic integration becomes evident. The analogy of a metal detector used on the beach can be used to describe the functioning of rights. As soon as the metal detector crosses a metal piece it gives an audible signal. Rights function in the same way. As soon as someone interferes with a right, the rights-holder gives a signal (most likely in front of a court). The special feature of rights is the interest behind it. Someone who holds a right is given a benefit that is legally protected by society: it creates a

⁷² See Case 33/88, *Allué and Coonan*, [1989] ECR 1591; and Case C-350/96, *Clean Car Autoservice GmbH*, [1998] ECR I-2521; and Case 36/74, *B.N.O. Walrave and L.J.N. Koch v. Association Union cyclist internationale, Koninklijke Nederlandsche Wielren Unie et Federacion Espanola Ciclismo*, [1974] ECR 1405; and Case 43/75 *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] ECR 455.

⁷³ Miguel Poiaras Maduro, 'We the court: the European Court of Justice and the European Economic Constitution', at 9.

⁷⁴ Joseph Raz, 'Legal Rights', at 13.

⁷⁵ Guilherme Vasconcelos Vilaça, 'Law as ouroboros', Thesis (PhD) (European University Institute (SPS) 2012, 2012) at 126; and Niklas Luhmann, Klaus A. Ziegert, and Fatima Kastner, 'Law as a social system' (Oxford: OUP, 2004), at 174; and Morton J. Horwitz, 'The History of the Public/Private Distinction', at 1432.

normative expectation.⁷⁶ EU internal market law protects those private actors having an interest “in the obtaining of some benefit.”⁷⁷

This is why private actors became active players in the integration process of the internal market. For example, under current EU internal market law the rights of workers to move freely in the internal market are constantly expanding. The rights of workers have been interpreted broadly and now cover job-seekers, unemployed, and part-time workers.⁷⁸ *Bosman* expanded the right to workers to be protected against any obstacle, public or private, to free movement and to access employment.⁷⁹ This does not negate the power of Member States to hinder access, although the power of Member States is fading. While any direct discrimination is unjustifiable, indirect discrimination may be justified for legitimate reasons and if the measure is proportionate.⁸⁰ The prohibition of differential treatment on grounds of nationality, for example, (which can be understood as a synonym for protectionism) takes away power from Member States and enhances the opportunities for private actors.⁸¹

Along this development the role of Member States and public authorities in the realm of the internal market changed. Under EU internal market law their role is transformed into being a *facilitator*. Their competence to structure national markets and to decide on allocation issues through general laws independently is reduced by legal constraints imposed by EU internal market law. Under the EU legal framework, Member States are responsible for the maintenance of the “infrastructure of law and order” while adapting to the needs and dynamics of the

⁷⁶ On the effect of normative expectations see Niklas Luhmann, Klaus A. Ziegert, and Fatima Kastner, *Law as a social system*, at Chapter 3.

⁷⁷ Joseph Raz, *Legal Rights*, at 13; and Joseph Raz, *Hart on Moral Rights and Legal Duties*, *Oxford Journal of Legal Studies*, 4/1 (1984a), 123-131 at 126.

⁷⁸ Case 53/81, *Levin v. Staatssecretaris van Justitie*, [1982] ECR 1035 at 12-17; and Case C-292/89, *Antonissen*, [1991] ECR I-745 at 9-13.

⁷⁹ Case C-415/93, *Bosman* [1995] ECR I-4921 at 103.

⁸⁰ For example see Case C-297/93, *Schumacker*, [1995] ECR I-225; and Case C-325/08, *Olympique Lyonnais v. Olivier Bernard*, [2010] ECR I-2177 at 39.

⁸¹ In this regard the allocation of obligations and constraints is a more radical form of control as it prohibits specific practices or forms of regulation. In this case it does not matter if legal obligations emerge from the treaties directly or in harmonising measures, the effect remains the same. The difference being that harmonisation as a form of control of national means is more lenient as the drafting process involves representatives of Member States and the instrument of Directives gives discretion to Member States on how to transpose the legal requirements into national law. Harmonisation also does control Member State power.

internal market.⁸² For example, in relation to rights conferred by EU internal market law it is the “Member States responsibility to ensure that those rights are effectively protected.”⁸³ Although EU internal market law does not generally prohibit national laws or new regulations, regulatory activities are required to be in accordance with the principles set by EU internal market law. The realm where public authorities still enjoy discretion to decide matters in national contexts and where conflicts with EU internal market law may emerge is reviewed and balanced in the framework of exceptions and justifications.

This reorganisation of the function of Member States includes not only legislative and executive branches but also the judicial branch. In *Defrenne II*, the Court of Justice clarified that national courts are under a duty to protect directly enforceable rights in national proceedings.⁸⁴ The principle of ‘consistent interpretation’⁸⁵ or the requirement to not apply national law⁸⁶ where there is a conflict with EU internal market law are just other examples that define the function of the judiciary in the context of EU internal market law. The emphasis on individualism and rights results in the judicial branch gaining importance particularly in the realm of EU internal market law. National courts in combination with the subjectivation of EU internal market law and under the preliminary ruling procedure become *European courts* as well. Courts provide the forum for private actors in the case of conflicts between two competing interests or rights.⁸⁷

⁸² Philip Bobbitt, *The shield of Achilles : war, peace and the course of history*; and Nikolas S. Rose, *Powers of freedom: reframing political thought*, at 139; and Colin Gordon, *Governmental Rationality*, at 41.

⁸³ Case C-397/11, *Jörös*, [2013] ECR 340 at 50.

⁸⁴ Case 43/75 *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] ECR 455 at 24. Rights become the forum to determine the scope of protection under EU internal market law and not political deliberation in the Member States. Interesting to see is that with increase of power of individuals the role of courts increased, which is in my opinion a logical consequence as courts provide a forum for private actors to solve problems concerning their rights.

⁸⁵ On consistent interpretation see Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, [1984] ECR 01891.

⁸⁶ For example see Case C-194/94, *CIA Security*, [1996] ECR I-2201.

⁸⁷ Giandomenico Majone, *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, *Journal of Public Policy*, 17/2 (May-Aug.1997), 139 at 155; and Guilherme Vasconcelos Vilaça, *Law as ouroboros*; and Neil Komesar, *A Job for the Judges: The Judiciary and the Constitution in a massive and complex society*, *Michigan Law Review*, 86/4 (1988), 657-721.

This development referred to under the rights culture is well reflected in the *Beer Purity* case. The case concerned a German law fostering consumer habits through beer purity requirements. Only products complying with the product requirements set out in the Beer Purity law could be sold as 'Bier' in Germany. The Beer Purity law had the effect of protecting beer produced in Germany from beers produced in other Member States now being sold in the German market under the same label.⁸⁸ In the Beer purity case the Court of Justice reconstructed the role of the Member State and the consumer in light of the unity of the internal market. The Court of Justice argued that the German law could not "crystallise given consumer habits in a Member State or in a given region." This would assimilate the consumer in this region to a specific group. As a consequence, it would maintain the partitioning of the internal market on the basis of quality standards. The German law would protect national beer producers that had been working under this regulation for years. Instead, the consumer should be given the choice to change its preference based on the establishment of the internal market.⁸⁹ The consumer should decide what is consumed as Bier or an equivalent alternative. Consumers are transformed into a commodity in the internal market. With this status, the consumer is voting through any decision that is made in the market context. At the same time, the consumer becomes a means for the unification of the internal market.

A final point to be raised is that the rights culture is no phenomenon of primary law and the Court of Justice's interpretation of the treaties. On the contrary, the emergence of rights is not, as the direct effect doctrine presumes, limited to primary law and the Court of Justice's jurisprudence. Rights allocated to private actors emerge in other contexts as well. For example, consumer rights protection reflects a detailed legal framework under which consumers are entrusted legal rights vis-à-vis producer or trader.⁹⁰ Rights in relation to product qualities, return policies, or liability for defective products shape the legal position in the relationship with businesses of products. Alternatively, EU data protection law

⁸⁸ Similarly see the cases decided under the free movement of goods and the protection of industrial and commercial property under national law. The Court of Justice held national laws protecting industrial property are in principle liable to maintain a partitioning of the internal market. See Case 78/70, *Deutsche Grammophon v. Metro*, [1971] ECR 489; and Case 62/79, *Coditel v. Ciné Vog Films*, [1980] ECR 881; and Case 40/70, *Sirena v. EDA*, [1971] ECR 69.

⁸⁹ Case 178/84, *Commission v. Germany (Beer purity requirement)*, [1987] ECR 1227.

⁹⁰ See Directive 2011/83/EU, of the European Parliament and of the Council of 25 October 2011 on consumer rights, (OJ L 304, 22.II.2011).

sets out a detailed legal framework that allocates rights to data subject's vis-à-vis the data controller.⁹¹

1.2 The emergence of a counter-culture

The picture presented and often referred to in legal scholarship is clear. Private actors are the recipients of rights and public authorities are constrained in their activities for the sake of protection of the rights. Yet, conceptually different from the rights culture, a class of *private actors that is constrained in freedoms* rather than empowered in the context of the internal market has emerged. Thus, it is a class of actors that is tied to both groups, public and private, and their 'place' under EU internal market law. Under the counter-culture private actors are treated similarly to 'public' actors in the sense that they are constrained in their freedoms through legal means. The key difference to the rights culture is that private actors are legally required to act in a specific way. This is reflected in the allocation of duties, obligations, or other functions or tasks defined by law, which require specific behaviours from the actors concerned. This counter-culture can be seen emerging throughout the various sectors and disciplines of EU internal market law and in the context of primary law and secondary law.

1.3 The counter-culture

Intriguingly, the most contested legal constraints imposed on private actors under EU internal market law emerged in the case-law of the Court of Justice that expanded treaty provisions to directly bind private actors. The difficulty in following the Court of Justice's reasoning emerged from the understanding that the treaties as a form of public law could only bind public actors. However, under *free movement law* the Court of Justice expanded the obligations so not to interfere with the free movement rights of private actors through activities that

⁹¹ For this see Directive 95/46/EC.

were discriminatory on grounds of nationality. *Walrave and Koch*⁹², *Lehtonen*,⁹³ and *Bosman*⁹⁴ are cases where the Court of Justice repeatedly clarified that:

17 Prohibition of such discrimination does not only apply to the action of public authorities but *extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services.*

18 The abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services, which are fundamental objectives of the Community contained in Article 3(c) of the Treaty, would be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law.⁹⁵

Similarly, employers have been recipients of obligations to ensure equality for workers in relation to employment conditions under primary law. The Court of Justice in *Defrenne II* and *Angonese* clarified that the mandatory nature of the prohibition of discrimination on grounds of sex or nationality extends likewise to any private agreement concerning paid labour.⁹⁶

While the decisions of the Court of Justice in the context of free movement and non-discrimination law have been discussed extensively in legal literature, similar developments in EU internal market law have largely not been considered. This refers to cases where some private actors hold a special position in a specific context, the consequence of which is that they are constrained in their freedom of action or required to act in a particular way. This ‘technique’ can be found

⁹² Case 36/74, *B.N.O. Walrave and L.J.N. Koch v. Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federacion Espanola Ciclismo*, [1974] ECR I-1405.

⁹³ Case C-176/96, *Lehtonen and Castors Canada Dry namur-Braine ASBL v. FRBSB* [2000] ECR I-0268.

⁹⁴ Case C-415/93, *Bosman* [1995] ECR I-4921 at 95.

⁹⁵ Case 36/74, *B.N.O. Walrave and L.J.N. Koch v. Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federacion Espanola Ciclismo*, [1974] ECR I-1405 at 17-18. Emphasis added.

⁹⁶ Case 43/75 *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] ECR 455 at 39; and Case C-281/98 *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*, [2000] ECR I-4139 at 35.

throughout different sectors of EU internal market law including secondary law instruments. A similar approach is found in Regulation 1612/68/EEC which addressed specific private activities. Article 7(4) of Regulation 1612/68/EEC requires that:

Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States.⁹⁷

In other words, any collective or individual agreement or any other collective regulation may not impose discriminatory requirements concerning eligibility for employment, employment remuneration and other conditions of work or dismissal. And this requirement has existed since the internal market's infancy.

More recently, different initiatives under EU internal market law follow a similar pattern and have given rise to the notion of the counter-culture in more specific regulatory contexts. In relation to *food safety law*, Regulation (EC) No 178/2002 states that the food business operator:

at all stages of production, processing and distribution within the businesses under their control shall ensure that foods or feeds satisfy the requirements of food law which are relevant to their activities and shall verify that such requirements are met.⁹⁸

In the context of food safety, the food business operator is in charge of something that can be called *due diligence*. They are not only required to ensure that the marketed food is safe for human consumption, but beyond this, they are required to monitor and to inform the public and revoke contaminated food from the food market where necessary.⁹⁹ In contrast to free movement and non-

⁹⁷ Council Regulation 1612/68/EEC on freedom of movement for workers within the Community (OJ 1968/L 257/2) at Article 7(4).

⁹⁸ Regulation (EC) No 178/2002, recital 30 and Article 17 and 18.

⁹⁹ Case C-315/05, *Lidl Italia Srl*, [2006] ECR I-11181; and Case C-636/11, *Karl Berger v. Freistaat Bayern*, [2013] ECR 0000.

discrimination law, the constraint does not stem from a prohibition to act in a particular way but from the imposition of specific protective duties under secondary law. Therefore, the food business operator occupies a special position with regard to ensuring food safety in the internal market, the consequence of which is the additional protective duties imposed.

Directive 95/46/EC sets out the data protection framework within the internal market.¹⁰⁰ *Data protection law* gained prominence in the aftermath of the *Google Spain* case.¹⁰¹ Although the Court of Justice recognised the obligation for search engines to delete out-dated and irrelevant personal information stored on its servers, the data protection regime on which basis the case was decided has existed since 1995. *Google Spain* is interesting concerning the Court of Justices articulation of the task of data controller. The Court of Justice held that the data controller, in respect of processing personal data, must,

ensure, within the framework of its *responsibilities, powers and capabilities*, that that procession meets the requirements of Directive 95/46, in order that the guarantees laid down by the directive may have full effect.¹⁰²

Similar to EU food safety law in EU data protection law some private actor is put in a genuine position, which is bound up with certain legal requirements in a defined context. In the context of data protection it is the data controller to which a special task is entrusted, through the allocation of a specific legal duty to comply with the requirements set out in Directive 95/46/EC. This amounts to a complex framework, which is set up to ensure that personal data are only processed where this is lawful. In this context, the data controller occupies the centre of organisation on how data protection is delivered in practice to data subjects.¹⁰³

¹⁰⁰ Directive 95/46/EC.

¹⁰¹ Case C-131/12, *Google Spain v AEPD*, [2014] ECR 317.

¹⁰² *Ibid.*, at 83.

¹⁰³ In terms of responsibility of private actors it is interesting to see that the upcoming Data Protection Regulation refers to *responsibility* of the data controller directly. See Regulation (EU) No 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), (OJ L 119, 4.5.2016, p. 1-88), Article 5(2).

Environmental law and *consumer law* are further examples that support the argument that the counter-culture is widely present in EU internal market law. In both contexts some private actors are entrusted with special tasks. For example, in consumer protection this may be the producer of goods that places his products on the internal market. The EU Consumer Rights Directive 2011/83/EU and the Unfair Terms Directive 93/13/EC both impose an information duty on the producer. Thus, in order to pursue business in the internal market, under the consumer protection regime, producers bear a special information duty.¹⁰⁴ In environmental law, EU internal market law puts the private sector partly in charge so as to prevent environmental damage from happening. For example, Article 5(1) of Regulation 2004/35/EU requires that:

1. where environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the operator shall, without delay, take the necessary preventive measures.¹⁰⁵

This preventive duty also includes a measure to prevent damage already caused from expanding or increasing. Private actors that act as operators under the environmental law regime are subject to a precautionary duty.

2. Making sense of the counter-culture

The rights culture and the counter-culture both relate to positions and roles of private actors within the internal market. This integration and transformation of individuals into the internal market is of an instrumental nature. Private actors are commodities in this market: they have a certain function in attaining objectives for which the internal market (and the market process) is considered to be the better alternative in terms of decision-making.¹⁰⁶ Rights and obligations

¹⁰⁴ See Council Directive 93/13/EEC, of 5 April 1993 on unfair terms in consumer contracts, (OJ L 95, 21.04.1993, p. 29), Article 3 and 7. Also see Directive 2011/83/EU.

¹⁰⁵ Directive 2004/35/EC, of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, (OJ L 143, 30.4.2004, p. 56-75), Article 5(1).

¹⁰⁶ "Individuals are turned into legal subjects, recognised *qua* worker, employer, producer, consumer, service provider and so on, with a view to create a new institutional order originally labelled the 'Common Market' and now framed as the 'Internal Market'." For this see Loic Azoulay, *The European Individual as Part of Collective Entities (Market, Family, Society)*, at 207.

are legal instruments that are allocated as a consequence of the nature of the actor, and of the position and function EU internal market law ‘considers’ appropriate for them in a defined context.

2.1 Viewing the counter-culture through the concept of responsibility

In order to provide some methodological and structural coherence to my analysis I will have recourse to the socio-political concept of responsibility as an analytical tool. The concept of responsibility in its capacity as an analytical tool comes with a fully equipped toolbox to take into account the specific features of the phenomenon of the counter-culture. First and foremost it functions as a tool to bridge the gap between the roles an actor has in a specific context and the legal consequences thereof.

Responsibility is an ambiguous term that has different meanings depending on the context in which it is used. Responsibility, *responsabilité* or *Verantwortung* may have different meanings in different languages, different legal systems or other contexts such as morals or religion.¹⁰⁷ This ambiguity is paired with the vagueness of the concept of responsibility, which comes with all possible notions. In legal terms, responsibility is assumed to be a synonym for liability.¹⁰⁸ Others argue that responsibility relates to an idea of accountability and answerability. In this sense, responsibility refers to conditions that have to be complied with by those being responsible.¹⁰⁹ *Herbert Hart* developed a taxonomy of responsibility in his book ‘*Punishment and Responsibility*’.¹¹⁰ With regard to the counter-culture, the concept of responsibility is understood in terms of role-responsibility. Role-responsibility assumes that a person is in charge for a specific aspect (which may or may not be legally defined) due to a social role or position occupied in a defined context.¹¹¹

¹⁰⁷ On the concept of responsibility see Roland J. Pennock, ‘*The Problem of Responsibility*’, in Carl J. Friedrich (ed.), *Responsibility* (The Liberal Arts Press New York, 1960); and John Deigh, ‘*On Rights and Responsibilities*’, *Law and Philosophy*, 7/2 (1988), 147-178; and Neil McCormick, ‘*Taking Responsibility Seriously*’, *Edinburgh Law Review*, 9 (2005), 168-175; and Iris Marion Young, ‘*Responsibility for justice*’ (Oxford: OUP, 2011); and Ronen Shamir, ‘*The age of responsabilization: on market-embedded morality*’.

¹⁰⁸ Peter Cane, ‘*Responsibility in law and morality*’ (Hart Publishing, 2002), at 1-2.

¹⁰⁹ J. R. Lucas, ‘*Responsibility*’ (Oxford: OUP, 1993), at 182.

¹¹⁰ See Herbert L. A. Hart, ‘*Punishment and responsibility: essays in the philosophy of law*’ (Rev. edn.: Clarendon Press., 1973).

¹¹¹ *Ibid.*, at 212-215.

In recent years this concept has gained increasing relevance in legal contexts. In environmental law, Corporate Social Responsibility (CSR) deals with the question of the role of companies in relation to externalities. CSR developed as a form of control different from top down regulation. *McKeon* follows this idea of development holding that:

the emergence of responsibility is not simply a curiosity amongst philosophers, but something issuing from the practical problems of government; the expansion of constitutional and responsible forms of government promising self-determination and self-governance, which, by the time he is writing, have been extended to an enormous number of peoples of the world, which had not previously enjoyed such rights.¹¹²

Similarly, *Shamir* argues that responsibility plays an important role in relation to modern forms of governance. Responsibility emerges in response to the liberalism, individualism and economic liberties that are now being legally protected at a transnational level as a tool to govern certain actors in defined contexts.¹¹³

2.1.1 *Social roles and law*

Social roles relate to behaviour in a specific socio-political context, i.e. how we ought to behave in this context –an ideal coordination of behaviour.¹¹⁴ The internal market constitutes such a socio-political context that relies on the coordination of roles and positions in order to ensure the functioning of the internal market, i.e. the functioning of the internal market as an alternative decision-making process. In this regard, the definition of social role relies on four concepts: behaviour, person, context, and characteristics. (1) Roles relate to *behaviour*, in particular, what the role is expected to do or what it *characteristically* does. (2) Roles are *personal* in the sense that who is in charge is defined

¹¹² Christopher M. Kelty, '*Responsibility: McKeon and Ricoeur*', *Anthropology of the Contemporary Research Collaboratory*, May 2008/no.12 (2008) at 9.

¹¹³ On this matter see Ronen Shamir, '*The age of responsabilization: on market-embedded morality*'.

¹¹⁴ This applies to any form of social arrangement: State, Market, Community or Family.

irrespective of whether it is a natural person, a legal entity, or any other institution. (3) Roles are limited by *contextual* specification.¹¹⁵

The concept of role-responsibility may be applied to any organisation with social roles. Almost any societal context relies on roles and individuals may have different roles in different contexts. For example, my role as a lecturer in a university differs from my role as a father in the context of my family. The contextual relation is important for the understanding of social roles (and the legal consequences thereof).¹¹⁶ The concept of role-responsibility relates the position individuals have to the context they act in and combines the social function and legal requirements relating to this position. *Herbert Hart* gives the example of a ship captain who is, because of his status, required to protect the individuals or goods on his vessel. This is the social role of the captain in the context of ships or vessels going to sea.¹¹⁷ The responsibility relates to the assumption on how a certain person ought to behave when acting in the capacity of a certain role. A consequence is that in its normative function the concept of role-responsibility justifies the imposition of legal requirements on private actors to require a specific behaviour and inflict punishment if necessary.¹¹⁸ What some actor is legally in charge for or required to do thus, is part of the responsibility ascribed to actor in a certain context.

In earlier times, morals, nature, and even the church were very influential in determining the function of roles in a specific context and their derived consequences and in ensuring that conduct complied with the expectations of a role. In modern societies *law*, through the allocation of legal requirements, is the key instrument in defining the behaviour of roles in specific social contexts. Legal contexts overlap with social contexts. Law determines the way we shall behave in a specific societal context. In practical terms, law is concerned with the *control and structuring of power and power relationships*. Legal instruments determine what

¹¹⁵ Bruce J. Biddle, *Role Theory: Expectations, Identities, and Behaviors* (Academic Press Inc, New York, 1979), at 58.

¹¹⁶ See Michael Albert and Robin Hahnel, *Unorthodox Marxism* (First edn.: South End Press, Boston, 1978).

¹¹⁷ Herbert L. A. Hart, *Punishment and responsibility: essays in the philosophy of law*, at 212-215.

¹¹⁸ The idea of role responsibility may also work for rights. Because you have a specific position in a social environment you are conferred rights. See Peter Cane, *Responsibility in law and morality*, at 251.

individuals should and can do and what they should not and cannot do.¹¹⁹ This takes place on the basis of an incentive structure that determines what kind of conduct is legal and what is illegal.¹²⁰ *Lon Fuller* describes this as the “subjecting of human conduct to the governance of rules.”¹²¹ Law is the way social contexts are structured.¹²² This function of law is essential for the stability of society. As *Albert and Hahnel* emphasise,

it is evident that if society is to be stable people must generally fit the role slots they are going to fill; actual behaviour must generally conform to the expected patterns of behaviour defined by societies major social institutions.¹²³

This is also found in EU internal market law, which relies on positions or ‘legal subjects’ to structure a certain ‘socio-political context’ or ‘policy-making environments’ (e.g. workers in the labour market, service providers, consumers in the context of consumer protection, or data subjects in EU data protection law etc.).

This responsabilization of private actors as legal subjects in the constitutional structure of the internal market underlies both the rights culture and the counter-culture.¹²⁴ It reflects part of the EU legal culture on how the construction and functioning of the internal market is attained. In EU internal market law the recognition of ‘roles’ within the internal market is reflected in the recognition of ‘legal subjects’. Where an actor is recognised as legal subject within the internal market this reflects a choice these actors, coming with certain characteristics, occupy a position in the constitutional infrastructure of a defined context (i.e. workers, service providers, data controller, food business operators etc.). What is decisive is that the legal subject recognised is actor neutral in

¹¹⁹ For example see Niklas Luhmann, Klaus A. Ziegert, and Fatima Kastner, '*Law as a social system*'.

¹²⁰ Neil Maccormick, '*Institutions of law : an essay in legal theory*' (Oxford: OUP, 2007); and Peter Cane, '*Responsibility in law and morality*'; and Niklas Luhmann, Klaus A. Ziegert, and Fatima Kastner, '*Law as a social system*', at Chapter 3 and 4.

¹²¹ Tom W. Bell, '*The Jurisprudence of Polycentric Law*', *Research Paper, University of Chicago* (1992) at 5-6.

¹²² Philip Bobbitt, '*The shield of Achilles : war, peace and the course of history*', at 205-206.

¹²³ Michael Albert and Robin Hahnel, '*Unorthodox Marxism*', at 107.

¹²⁴ On the idea of responsabilization of private actors in EU internal market law see Damian Chalmers, '*The unconfined power of European Union Law*'; and Marco Dani, '*Assembling the fractured European Consumer*'; and Loic Azoulay, '*The European Individual as Part of Collective Entities (Market, Family, Society)*', at 206.

principle. Yet, some positions are more likely to be occupied by private actors than others simply because these are activities normally carried out by private actors, i.e. private actors when acting in the capacity as workers in contrast to data controller. Ultimately, EU internal market law defines these positions through legal means, i.e. rights, obligations or other privileges or requirements. With the concept of responsibility a link can be made between the position occupied by a private actor as a legal subject in a certain context governed by EU internal market law and the legal consequences that EU internal market law applies to this position. The legal consequences that emerge under EU internal market law are intended to guide the behaviour and activities of the private actors acting in the capacity *qua* legal subjects in a manner that EU internal market law deems to be most suitable for ensuring the functioning of the internal market.

2.1.2 Responsibility and legal instruments

Role and position are not legal but social, and are only defined through legal means. Modern societies use law to structure and control society and the relationships within. While rights empower, the allocation of obligations limits power. This is an effective way to determine and arrange the power relationships between two or more actors (*Machtverhältnisse*). Law as an instrument of government not only manifests the roles, but it determines how we are supposed to act.

This function of law applies to any sector or discipline of the legal system. Only through the legal coordination of behaviour is the stability of the social organisation ensured and social objectives may be attained. Thus, law has some organic features as it aims to ensure the sustainability of a form of social organisation over time.¹²⁵ Importantly, for a “society to persist, peoples personalities must be largely in conformity with the roles they must occupy and the activities they must engage in.”¹²⁶ Law as an instrument allocates roles, empowers or constrains powers so as to organise positions and behaviour in a certain context. These choices for governance reflect a mode of social

¹²⁵ Philip Bobbitt, *The shield of Achilles : war, peace and the course of history*; and Charles E. Clark, *The Function of Law in a Democratic Society*, *University of Chicago Law Review*, 9 (1942), 393. Also see Niklas Luhmann, Klaus A. Ziegert, and Fatima Kastner, *Law as a social system*.

¹²⁶ Michael Albert and Robin Hahnel, *Unorthodox Marxism*, at 138.

coordination “between states as well as public and private actors.”¹²⁷ Governance refers to the processes of governing through law and how the law coordinates the exercise of power to attain specific objectives.¹²⁸ It concerns the

rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence.¹²⁹

Governance is about the control of conduct. The counter-culture as it emerged in EU internal market law reflects a form of governance that lies somewhere “in between the polar extremes of absolute discretion and total control” of private activities.¹³⁰ On the one hand it constrains power which may have negative effects on other actors and moreover on the market. On the other hand, obligations maintain a certain degree of discretion for the addressee, i.e. to exercise economic choices. Responsibility as a technique of governance is a choice in any context it emerges. It is a choice to accept that the power of some actors will affect others and the relevant freedom of those powerful actors that may be needed in this context.

2.1.3 Contextual neutrality

The *contextual neutrality* of the concept of responsibility is an asset. In the internal market there is no such thing as a ‘role’ in the internal market in general. Roles and positions are always determined and legally defined in a defined context. In EU internal market law the legal context concerned is the point of departure and it determines the choices to be made in terms of allocating social roles and how this is manifested in law, i.e. free movement of workers, data protection, consumer protection, environmental protection etc. Private actors are transformed in each of these specific legal contexts, one consequence of which is the allocation of obligations.

¹²⁷ Maria Weimer, *Democratic legitimacy through European conflicts-law?: the case of EU administrative governance of GMOs*, PhD Law (European University Institute (LAW) 2012) at 96.

¹²⁸ Nikolas S. Rose, *Powers of freedom: reframing political thought*, at 16-17.

¹²⁹ COM(2001)428 final European Governance - A White Paper, (OJ 2001/C 287/01); and Mario Monti, 'A New Strategy for the Single Market', *Report to the President of the European Commission* (2010).

¹³⁰ Cary Coglianese and Evan Mendelson, *Meta-Regulation and Self-Regulation*, University of Penn Law School Public Law Research Paper No. 12-11, (2010), 1 at 1.

The context in which the 'role' is defined is decisive. The legal context defines the positions occupied by the different actors and relationships between these actors according to the dynamics in this context. The important point is that the allocation of roles is distinct for every legal context. Every legal context relates to different social objectives and, consequently, each legal context comes with its own ideal organisation of roles and functions in terms of efficiency in attaining the underlying social objectives. The specific feature of EU internal market law is that it consists of multiple legal contexts in which EU internal market law governs the activities of private actors. Who occupies roles in what context, thus depends on the legal context and the objectives to be attained. For example, free movement law relates to the attainment of economic integration, EU discrimination law relates to social integration, while the objectives in EU data protection law and EU food safety law are self-explanatory. The responsibility of private actors always relates to the legal context that defines their role and function.

EU internal market law is about the stabilisation of policy-making environments in the context of the internal market.¹³¹ Part of the power of EU internal market law is derived from ensuring and guaranteeing the normative expectations it creates. Thus, participation and a functioning internal market process are fundamental requirements against which the effectiveness and the legitimacy of power exercised by EU internal market law are measured. As with the rights culture, the counter-culture is committed to this EU legal culture.

In practice, the internal market consists of many markets and submarkets in which behaviour needs to be coordinated. The core of the internal market is constituted by the internal market for goods, labour, services, and capital.¹³² Each of the four core markets comes with its own ideal organisation of roles occupying the centre (i.e. the economic interests involved) and actors at the periphery (i.e. institutions and agencies entrusted with the task to ensure an effective legal framework). The individual organisation of each context reflects the ideal policy-making environment in which market dynamics are supposed to lead to optimal outcomes. In this regard, EU internal market law does not define policies but intends to create a policy-making environment in which market dynamics

¹³¹ Damian Chalmers, *'The unconfined power of European Union Law'*, at 412-413.

¹³² Dennis Swann, *'The economics of the Common Market'* (Seventh edn., 1992), at 11-12.

produce 'optimal' outcomes.¹³³ For example, in the labour market the economic interests of the employer and the employee occupy the centre of organisation. It is the relationship and interaction of the worker and employer that determines the optimal allocation of labour resources throughout the EU. The allocation of rights and obligations intended to define roles and behaviour is the technique to structure this policy-making environment.

Alternatively, where no specific 'market' is regulated, EU internal market law corrects a market failure or instances where the market is distorted. In relation to the specific nature of the internal market this is likely to be the case where the diversity in national laws hinders cross-border economic activities. Harmonisation of national laws is a way to deal with this kind of distortions to the internal market. In this regard, secondary law instruments are intended to complement the structure of a specific market. This would be the case, where market dynamics would not automatically correct the distortion or failure, i.e. a race to the bottom concerning safety standards. In this regard a level playing field is set to which all actors in the internal market must adhere. EU internal market law adds an additional regulatory layer intended to correct the inefficiency of a market based solely on free movement and non-discrimination. EU wide regulation is intended to increase the efficiency of the market process.

2.1.4 Specific legal consequences under EU internal market law

In contrast to the rights culture, the notion of responsibility and the imposition of legal constraints naturally raises the question of how to handle cases of non-compliance with the legal requirements. In contrast to the rights culture, where the exercise of rights is voluntary, the counter-culture makes compliance obligatory. Naturally this constellation of obligation is linked to questions of aversion and retribution. Where an actor did not act according to the legal expectation, two possibilities emerge: justification of the deviation of the legal requirements or punishment as a means to enforce. The concept of responsibility provides the enquiry with analytical tools to deal with side issues emerging from the counter-culture, which are important for the understanding of the concept. In the internal market the possibility of justification and liability are

¹³³ Loic Azoulay, 'The Complex Weave of Harmonisation', in Anthony Arnall and Damian Chalmers (eds.), *The Oxford Handbook of European Union Law* (Oxford: OUP, 2015), at 609.

consequences for actors that are dealt with under the counter-culture. Where under EU internal market law private actors are deemed to occupy positions of 'alternative' regulatory authority they are treated, in general, similarly to public authorities.

a) Justification

To justify a specific behaviour assumes a form of acceptable non-compliant behaviour. Only where there is a conflict between the required behaviour (by law) and the actual behaviour does the issue of justification arise. In this space, private actors may explain—with good reasons—why they deviated from the expected behaviour and why it was necessary in this specific case. It is in this individual context that exceptions to the legal rule are assessed in relation to the wider social benefit that a compliant behaviour would have produced.

In *Bosman* the Court of Justice elaborated on the possibility to justify deviations from the legal requirements under the free movement provisions for sport associations. Sport associations should not impose obstacles to the free movement of workers in terms of transfer fees. In fact the result of such transfer fees would distort the transition from a club in one Member State to another club in another Member State.¹³⁴ The Court of Justice recognised the specific nature of the activities pursued, that sport associations and trade unions for example might restrict the free movement of others for overriding legitimate reasons.¹³⁵ Sustaining a youth player's education¹³⁶ or the protection of workers¹³⁷ was accepted as legitimate reasons in this context. Nevertheless, the possibility to justify is yet to be put under the scrutiny of the Court of Justice and be subject to a proportionality test.

¹³⁴ Case C-415/93, *Bosman* [1995] ECR I-4921.

¹³⁵ Case 36/74, *B.N.O. Walrave and L.J.N. Koch v. Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federacion Espanola Ciclismo*, [1974] ECR 1405; and Case C-176/96, *Lehtonen and Castors Canada Dry namur-Braine ASBL v. FRBSB* [2000] ECR I-0268; and Case C-415/93, *Bosman* [1995] ECR I-4921. Case C-438/05, *International Transport Workers Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779; and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.

¹³⁶ Case C-325/08, *Olympique Lyonnais v. Olivier Bernard*, [2010] ECR I-2177 at 38.

¹³⁷ Case C-438/05, *International Transport Workers Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779; and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.

Similarly, in the data protection framework we find legally defined reasons for non-compliance with the legal requirements. The general principle bestowed on the data controller is to ensure that the processing of personal data must be lawful. Where personal data are processed under lawful conditions, the principle of data protection is ensured. Directive 95/46/EC sets out specific requirements where processing may be lawful. Only Article 7(d)–(f) allow some freedom for the data controller to act on behalf of their own or public interests. Yet, this discretion has been interpreted *restrictively* in *Google Spain*. This case concerned the erasure by Google of out-of-date personal data from the list of results of Google’s search engine. The Court of Justice made it clear that rights concerning personal data override, “as a rule, not only the economic interests of the operator of the search engine, but also the interests of the general public in finding that information” unless “it is justified by the preponderant interest of the public to have access to this information.”¹³⁸ Thus, while interpreting economic and public interests in a narrow fashion, the Court of Justice did not prohibit either of the interests from prevailing over interests relating to personal data under specific circumstances.

b) Liability

Responsibility and liability form an almost natural symbiosis. If someone that is responsible for some activity does not act according to it, liability emerges. Liability is a way of holding someone accountable for his actions. In light of the counter-culture, it is pertinent to ask about the liability of these hybrid actors, i.e. private in nature but exercising regulatory authority, which is normally associated with public entities. Without doubt, liability is an efficient technique to provide a further incentive for compliance with legal requirements.¹³⁹ With regard to EU internal market law and the counter-culture the problem faced is that liability is not conceptualised in a general manner. There is no EU tort law that determines who is liable under what conditions: rather liability emerges contextually.

The question to be dealt with here is one of completeness. How is compliance with legal obligations ensured under EU internal market law? Where

¹³⁸ Case C-131/12, *Google Spain v AEPD*, [2014] ECR 317 at 81 and 97.

¹³⁹ Barend Van Leeuwen, *Private Regulation and Public Responsibility in the Internal Market*, *Yearbook of European Law*, (2014), 1 at 8.

responsibility emerges and where obligations are allocated to the private actors by a legal system, the question of how this legal system ensures compliance needs to be considered. Sanctioning and judicial enforcement emerge from non-compliance with the legal requirements imposed on an individual under EU internal market law in national courts. Inevitably this creates a risk on consistency and coherence of enforcement throughout the EU. Therefore, failure to ensure that the legal obligations imposed under EU internal market law are enforced efficiently would impair and challenge the effectiveness of the concept of responsibility.

2.2 New individualism in EU internal market law

Taking a step back and trying to picture what really happens when EU internal market law allocates rights and obligations to private actors, we see that the private actors that are normally imbedded in national social, economic, political or legal contexts are taken out of their familiar environment and placed at the centre of a new social arrangement on a transnational scale. The allocation of rights and obligations is merely the legal consequence of the positions and powers that actors are ascribed in a certain 'policy-making environment' under EU internal market law. Under this new individualism EU internal market law not only identifies the positions *qua* legal subjects that may be occupied by private actors in a certain policy-making environment, but at the same time, EU internal market law 'governs' their conduct. EU internal market transforms private actors and places them into the constitutional structure of the internal market. The legal framework provided by EU internal market law in a certain context sets out clear rules, processes and requirements that determine how power 'should' be exercised.¹⁴⁰

This transformation is amplified and visualised through the allocation of rights and obligations. EU internal market law is about the creation of a legal environment where private actors are supposed to act. In this context, rights and obligations as they are applied to private actors in different legal contexts are always intended to attain certain policy objectives. Rights and obligations are simply instruments to realise EU policies.¹⁴¹ This understanding of EU internal

¹⁴⁰ COM(2001)428 final ; and Mario Monti, 'A New Strategy for the Single Market'.

¹⁴¹ Damian Chalmers, '*The unconfined power of European Union Law*', at 412-413.

market law goes back to the very nature of the relationship it has with national law and other market forces. It is a relationship based on conflicts and competition about power and regulatory authority. EU internal market law and the institutions applying EU internal market law in specific cases compete with national authorities and other actors within the market about the effective organisation of parts of the internal market, local markets, or other policy objectives that are to be attained within the internal market.

The function of the EU legal culture is to reorganise power at EU level in order to protect the economic and social objectives of EU internal market law. In this regard, the counter-culture and the allocation of obligations is not only a tool of integration of the internal market.¹⁴² The difference to the rights culture is found in the 'personal' characteristics of the private actors that are addressed under the counter-culture. The difference between the rights culture and the counter-culture is determined by the power and relative strength private actors have in a certain economic relationship. Where private actors are potentially weak and disadvantaged in a certain relationship, EU internal market law and the Court of Justice strengthens their positions through the allocation of rights or other resources. Alternatively, where private actors are strong in terms of power to affect other actors in the market (similar to public power held by public authorities), EU internal market law and the Court of Justice allocates obligations as a means to analyse and control unrestrained power. This 'balancing of power' through legal instruments is intended to ensure a level playing field for competition.¹⁴³ While rights have the function to encourage an activity or choice, obligations or the risk of liability provide an incentive to abstain from certain activities. In this pure form, through determining what is legal and what is illegal, EU internal market law steers the market process in a way to produce 'social outcomes.'

The technique reflected in the recognition of private actors *qua* legal subjects and the control of their conduct through the allocation of legal instruments is a technique of governance to control unchecked private power in parts of the

¹⁴² Loic Azoulai, *The Complex Weave of Harmonisation*, at 609; and Damian Chalmers, *The unconfined power of European Union Law*, at 412-413.

¹⁴³ Private actors should enjoy special freedoms. For this see Case 222/82, *Apple and Pear Development Council*, [1982] ECR 4083 at 17.

internal market.¹⁴⁴ It is private power in terms of a competing ‘regulatory authority,’ i.e. where private actors are in a position to affect the environment in which other private actors are supposed to engage, which triggers the allocation of obligations. This concerns EU internal market law competing with other systems of governance and how EU internal market law and EU institutions maintain the status as hegemon within the internal market. Part of the EU legal culture is about the determination of *its relationship with other sources of authority that may exercise regulatory power within the internal market*. It is thus irrelevant if the nature of the alternative source of authority in a certain market context emerges in a national or international context or if it is of a public or private nature.¹⁴⁵ In situations where the counter-culture emerges, private actors occupy positions in a specific market that are loaded with ‘legal’ forms of regulatory authority. These are forms of power that are capable of determining the ‘rules of the internal market’ beyond EU institutions and EU internal market law. Similarly, strong market actors may affect the structure and functioning of the market process irrespective of their public or private nature. Market forces may hold this kind of power in a market context.¹⁴⁶ For example, this would be the case with the employer in the labour market or the data controller in relation to data protection law. A consequence being that EU internal market law not only competes with formal sources of power, such as states or public authorities, but also with functional forms of power that emerge in certain contexts governed by EU internal market law.

3. Counter-culture reassessed—responsibilization of private actors

The concept of responsibility starts with the position that the allocation of obligations is a consequence of the position an actor occupies in a specific context. Put differently, EU internal market law empowers private actors as

¹⁴⁴ Damian Chalmers, *The unconfined power of European Union Law*, at 412-413.

¹⁴⁵ In this view, the Court of Justices decision in *Kadi* fits in as well. In *Kadi* the relationship of the EU legal order to the UN legal order was at stake which was referred to by Advocate General Maduro (21) “This brings us to the question of how the relationship between the International legal order and the Community legal order must be described“. Part of the EU legal culture is about the determination of its relationship with other sources of authority that may exercise regulatory power within the internal market. To this effect see Case C-402 and 415/05, *Kadi v. Commission*, [2008] ECR I-635; and J.H.H. Weiler, *Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration*; and Frederick Van Den Berghe, *The EU and Issues of Human Rights Protection: Same Solution to more Acute Problems?*, *European Law Journal*, 16/2 (2010), 112-157.

¹⁴⁶ Damian Chalmers, *The unconfined power of European Union Law*, at 412-413.

commodities in the constitutional structure of the internal market, i.e. they hold political power in the view that their choices matter and affect the 'policy making'. Drawing on this factor it illustrates how private actors are responsabilized and shaped through EU internal market law *qua* positions. In this respect, the counter-culture and the rights culture alike put private actors in charge of matters relating to a certain sector in the internal market. This *responsibilization* is reflected in the recognition of them as legal subjects in EU internal market law. Private actors are managed and assembled by EU internal market law. The difference to the rights culture is that the economic activity of actors is required to be exercised in a specific manner.

A clear line can be drawn between the counter-culture and the legal responses by EU internal market law and the antitrust framework that is within EU internal market law, normally considered to be the legal framework that imposes constraints on private actors.¹⁴⁷ Although both paradigms relate to situations of power asymmetry between private actors, they are distinct. Competition, as protected under EU competition law, is the 'decision-making force' in the market process¹⁴⁸ and it addresses situations of power where the relative strength is used for benefit through the use of unfair competitive practices. Thus, the abuse of power relates to the competitive process itself vis-à-vis another competitor. The counter-culture is functionally different. The counter-culture relates to misuse of power in relation to the 'constitutional structure' of a certain market context. For example, EU free movement law and EU discrimination law are, within their scope of application, about the construction of the internal market (i.e. designing the framework within which competition takes place). The private power addressed in these contexts is more about power similar to

¹⁴⁷ For example see Sophie Robin-Olivier, *'The evolution of direct effect in the EU: Stocktaking, problems, projections'*, *ICON*, 12/1 (2014), 165-188 at 176.

¹⁴⁸ Article 101 and 102 Treaty on the Functioning of the European Union. In terms of similarity that different strengths and powers are balanced consider Case 127/73, *BRT v. SABAM (I)*, [1974] ECR 52; and Case 155/73, *Guiseppe Sacchi*, [1974] ECR 409; and Julio Baquero Cruz, *'Between competition and free movement : the economic constitutional law of the European Community'* (Hart, Oxford, 2002); and Bruno De Witte, *'Direct Effect, Primacy, and the nature of the Legal Order'*, at 334; and N. A. Barr, *'The economics of the welfare state'*; and Colin Scott, *'Accountability in the Regulatory State'*, *Journal of Law and Society*, 27/1 (March 2000), 38. In this sense, competition functions as an accountability mechanism. This idea of accountability is deeply imbedded in the market as an alternative decision-making process. Once a producer offers a product on the market and enters into competition with other producers consumers decide according to their interests and preference which product to buy. The producer is held accountable on the basis of consumer choices. Consumer choice determines what characteristics a product should have. The demand created by consumer's signals to the producer what to produce or not. The idea is that through arbitrage and innovation product quality increases and adapts the demands of consumer.

regulatory authority and strength. The exercise of power does not affect another competitor.

In a wider context, this power to affect, by whatever means, has an effect on the market as a whole, as it affects the exercise of economic interests in a specific case. The social function the exercise of this economic interest has in terms of its outward effect on society as a whole is restricted. This effect is well captured by the *butterfly-effect*. In Chaos Theory the butterfly-effect refers to the sensitive dependency of conditions in which even the 'slightest, seemingly non-related event can have a huge difference on the outcome of another.' The reference to butterfly-effect was derived from *Edward Lorenz's* metaphorical example of,

the details of a hurricane (exact time of formation, exact path taken) being influenced by minor perturbations such as the flapping of the wings of a distant butterfly several weeks earlier.¹⁴⁹

3.1 All about vested positions

EU internal market law organises the internal market and ensures the functioning of the market process through positions and by governing the relationships that emerge in a certain context. This notion of *vested position* can be identified in each legal sector referred to above within the counter-culture.¹⁵⁰ A decisive factor is that those positions addressed represent part of the core economic interests in a context governed by EU internal market law. Each market context comes with a predetermined set of interests occupying the centre of organisation. This is the economic relationship on which basis supply and demand are determined. The recognition of vested positions is not natural, but a choice made under EU internal market law either through the Court of Justice interpreting the treaty provisions or through the legislator regulating a specific sector or subject matter. The recognition of vested positions under EU internal market law relies on an ideal organisation of a certain market context and the relationship, which should determine the dynamics (supply and demand) in this sector. For example, in the labour market this is the employer and the employee,

¹⁴⁹ E. N. Lorenz, *The essence of chaos*, University of Washington Press (1993).

¹⁵⁰ For the idea of vested positions see Case C-446/03 Marks & Spencer, *Opinion of Advocate General MADURO*, at 37-40.

or in consumer protection it is the producer and the consumer. Only where the 'equal participation' of both interests to the relationship in the relevant context is assured, does the market process function efficiently.

3.2 The structural organisation of responsibility

The nature of the internal market creates a web of actors that are involved in the shaping and construction of policy-making environments in the internal market. In this web of actors different actors have different functions with regard to the attainment of a social objective in a defined context. The responsibility of private actors in relation to the counter-culture is placed in a framework of shared responsibilities, where the holder to correlating rights and economic interests constitutes another important part. This relationship between actors representing economic interests occupies the centre of organisation in a specific legal context and it is imbedded in a wider institutional framework consisting of national legislative authorities, EU institutions, and national courts or specialised agencies. Each of which is entrusted with a responsibility (i.e. function) relating to the attainment of the objective in a specific context. The EU legal framework in relation to a specific context is intended to coordinate the activities of the different actors involved. The objective, which is intended to be attained in a specific legal context, is reached through this coordination of shared responsibilities.

The following illustration of roles is not conclusive or normative. Depending on specific markets more actors may emerge—simply because they are part of an effective policy-making environment. The organisational approach adopted under EU internal market law is special because functions and powers are allocated in terms of specialisation. The responsibility different actors have relates to activities in which the actors have some form of expertise or the actor is best equipped to do. Member States are in charge of legislative activities in terms of transposing EU legal requirements into national law. Courts are in charge of adjudication. Agencies are set up with a clear supportive function in a specific context, which may be to monitor activities or to provide information. Private actors are *only* required to act according to their own economic interests.

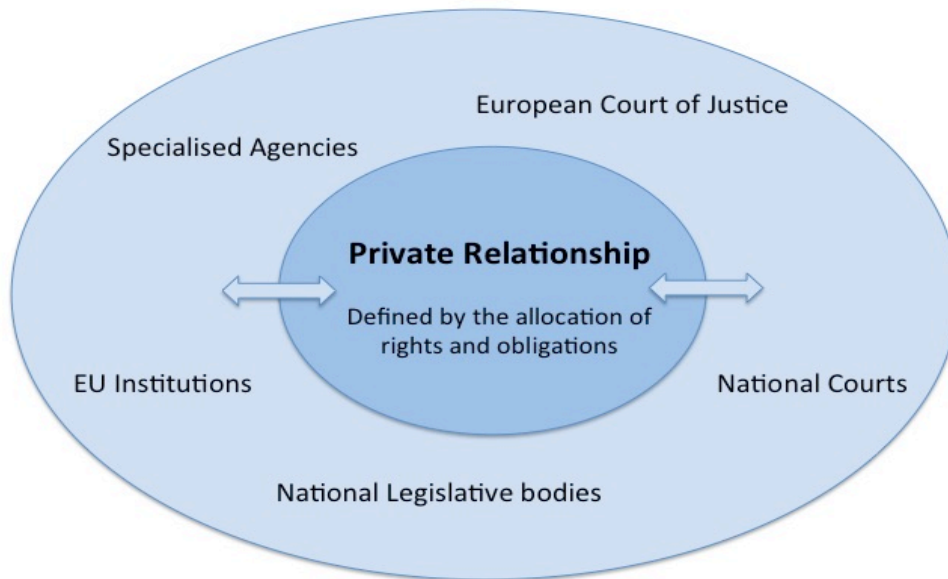


Figure 1 System of shared responsibilities

Figure 1 provides an overview of the different kinds of actors that may occupy roles and positions in a certain policy-making environment.¹⁵¹ Each of which is equipped with different functions in relation to the objective to be attained. The coordination of the roles and relationships is carried out through legal means and is a technique through which EU internal market law intends to attain certain policy objectives.¹⁵² For example, EU data protection law, i.e. the legal context, structures the roles and positions of actors, i.e. the socio-political context, that are supposed to contribute and engage for the attainment of data protection, i.e. the social objective, in the internal market.

3.2.1 *The centre of organisation*

Private actors are responsabilized as legal subjects. EU internal market law instrumentalises private actors by putting them in 'charge' for making choices on their own economic interests. In this regard, every policy objective is driven by at

¹⁵¹ This model is far from being exhaustive or normative. Rather it should be considered as an attempt to provide some clarification to the structure and institutionalisation EU law intends to develop and implement through legal means.

¹⁵² Robert A. Dahl, 'The Concept of Power', *Behavioural Science*, 2/3 (1957:July), 201 at 201.

least two competing economic interests. These are the actors that occupy the positions that determine the supply and demand sides. The fact that this power relationship and the dynamics between the economic actors involved occupy the centre of organisation constitutes the key element through which the market process functions i.e. employer and employee in the labour market. The multiple transactions between competing economic interests ultimately produces optimal outcomes. A certain form of imbalance of power between the actors representing the different economic interests is required to an extent that it stimulates the supply and demand sides of the economic relationship and therefor ensures the functioning of the internal market as decision-making process. The intention to influence other actors in the market is to make our voice heard, or interests represented, and our intentions communicated. This involves some form of hierarchy and to have *actual power* individuals must be in a position that their acts may have actual consequences—positive or negative—for others.¹⁵³ To a certain extent, private actors must be mutually capable of affecting or steering the thinking or action of other actors in a certain relationship.¹⁵⁴ The core characteristic of social power is the potential to *influence* personal, social, or structural conditions of the other actor in the social relationship. Social power is any opportunity to enforce one's own will, even against the unwillingness and reluctance of acceptance by other actors in a social relationship.¹⁵⁵ As *Robert Dahl* says, "A has power over B to the extent that he can get B to do something that B would not otherwise do."¹⁵⁶

Michel Foucault describes this structural relationship of power in a social setting as a "structural expression of a complex strategic situation in a given social setting that requires both constraint and enablement."¹⁵⁷ Yet, economic strength is not necessarily the only decisive criterion, in some situations, the mere position in a specific economic relationship can be sufficient to inaugurate 'power.'

¹⁵³ *Guzzini*, rightly describes that "power, as a dispositional concept, is neither a thing (a resource or a vehicle) nor an event (an exercise of power): it is a capacity". It is a capacity to "effect". To this effect see: Stefano Guzzini, 'The Concept of Power: A constructivist analysis', *Millenium - Journal of International Studies*, 33 (2005), 495-522 at 14; and Case C-270/13 Haralambidis, *Opinion of Advocate General WAHL*, at 55-58.

¹⁵⁴ For example see Dian-Marie Hosking and Ian E. Morley, 'A social psychology of organizing - people, processes and contexts' (Harvester Wheatsheaf, Loughborough, 1991).

¹⁵⁵ Wallace C. Peterson, 'Market Power', at 381.

¹⁵⁶ Robert A. Dahl, 'The Concept of Power'.

¹⁵⁷ To this effect see Michel Foucault and Colin Gordon, 'Power/knowledge : selected interviews and other writings, 1972-1977' (Pantheon Books, New York, 1980).

Functionally speaking, the relationship is not horizontal in terms of competitors but vertical in terms of effect. Therefore the vertical relation is characterised by subordination and dominance in a mutual exchange of input.¹⁵⁸ This might be a way to look at expansion of ‘public obligations’ under the treaty provisions for private actors. If we consider the relationship concerned as a vertical one, then we may look at the concept of ‘public’ not on the basis of formal criteria and factors but in terms of relationship. Public actors are any actors that are capable of affecting the environment for other actors competing in the market. This concerns a simple terminological twist: the perspective on how to perceive and view the public/private divide is changed. EU internal market law does not rely on the same public/private distinction as national constitutional law does. The line is drawn on the basis of function/effect. Thus, private activities would be considered those that take place within the process of competition—while public activities are those that have an effect on the process of competition. The thesis relates to the latter.

3.2.2 *The periphery*

Private actors and their relationship are placed into a framework of shared responsibilities. This refers to an institutional organisation that is intended to organise power in a decentralised manner. EU internal market law coordinates this system of shared responsibilities through specific legal frameworks and the regulation of specific sectors. This form of organisation and coordination of power reflects a “*neo-liberal matrix of authority*.”¹⁵⁹ EU internal market law intends to organise authority in relation to specific objectives in a manner that is less legalistic and centralised. The preference reflected in the approach under EU internal market law is for a reflexive, horizontal, and self-sustaining environment. This environment of shared responsibilities,

is modelled to follow the logic of competitive market relations whereby multiple formally equal actors (acting as or aspiring to act as sources of authority) consult, trade and compete over the

¹⁵⁸ Ralf Michaels and Nils Jansen, ‘*Private Law Beyond the State?*’, *The American Journal of Comparative Law*, 54 (2006), 843 at 849.

¹⁵⁹ Ronen Shamir, ‘*The age of responsabilization: on market-embedded morality*’, at 3-4.

deployment of various instruments of authority (laws, regulations, codes, guidelines, standards, labels, etc.) both intrinsically and in their relations with each other.¹⁶⁰

Specialised Agencies for example may influence the decisions of private actors by providing additional information. The reliance on specialised agencies in regulatory frameworks of EU internal market law is prominent. EU internal market law and regulators seem to prefer specialised actors in situations where specific information, guidance, or monitoring is needed. Impartiality and independence of these agencies from national or European regulatory interests is the asset that these institutions add to the regulatory framework. The European Food Safety Authority, for example, shall provide private actors and consumers with information concerning food safety and healthy nutrition.¹⁶¹ This is a way to influence consumer choices and consumer demands for safer and healthier food. In the case of data protection authorities, although they oversee data protection compliance in national contexts, they are required to act independently from national regulatory interests and authorities.

Courts occupy a key function with regard to the legal framework in which private actors are supposed to engage. The emphasis on individualism and rights results in the judicial branch gaining importance. Courts provide the forum for dispute resolution, in particular where rights of market participants collide.¹⁶² National courts occupy a special position because a large part of the law that 'regulates' the internal market is national law.¹⁶³ Thus, it is national courts that must ensure that EU internal market law is applied effectively in national contexts.¹⁶⁴ The Court of Justice becomes the ultimate arbiter to ensure the effectiveness of EU internal

¹⁶⁰ Ibid.

¹⁶¹ For this see Damian Chalmers, 'Food for Thought': Reconciling European Risks and Traditional Ways of Life', *The Modern Law Review*, 66/4 (Jul. 2003), 532.

¹⁶² Giandomenico Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance', at 155; and Guilherme Vasconcelos Vilaça, 'Law as ouroboros'; and Neil Komisar, 'A Job for the Judges: The Judiciary and the Constitution in a massive and complex society'.

¹⁶³ Loic Azoulai, 'The force and forms of European Legal Integration'.

¹⁶⁴ For example see Case 43/75 *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] ECR 455 at 24; and Case 2/74, *Reyners v. Belgium*, [1974] ECR 631 at 30; and Case 41/74, *Yvonne van Duyn v Home Office*, [1974] ECR 01337 at 12; and Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, [1984] ECR 01891 at 28.

market law and the internal market.¹⁶⁵ In *Defrenne II*, the Court of Justice clarified that national courts are under a duty to protect directly enforceable rights in national proceedings.¹⁶⁶ The principle of consistent interpretation¹⁶⁷ or the requirement to not apply national law¹⁶⁸ where there is a conflict with EU internal market law are just other examples that define the function of the judiciary in the context of EU internal market law.

The role of *Member States* in the internal market is often neglected. The internal market is comprised of national markets that are regulated and shaped by national laws. This does not change in the context of EU internal market law. However, the role of the Member State is reduced to that of a facilitator. The role of Member States relates to the maintenance of the “infrastructure of law and order.”¹⁶⁹ With regard to the internal market and EU internal market law, Member States are entrusted with the task of ensuring that the rights and principles of EU internal market law are effectively protected within the national environment.¹⁷⁰

The role of European legislative institutions also increases. Under EU internal market law, the power to regulate sectors of the market or specific objectives relating to the market is vested in *EU institutions*. EU Institutions are equipped with the power to regulate upon the market in order to enhance the efficiency. This is reflected in a specific legal basis and in the power to approximate national

¹⁶⁵ For example see Case 36/74, *B.N.O. Walrave and L.J.N. Koch v. Association Union cyclist internationale, Koninklijke Nederlandsche Wielren Unie et Federacion Espanola Ciclismo*, [1974] ECR 1405; and Case C-131/12, *Google Spain v AEPD*, [2014] ECR 317; and Miguel Poiars Maduro, 'We the court: the European Court of Justice and the European Economic Constitution'.

¹⁶⁶ Case 43/75 *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] ECR 455 at 24. Rights become the forum to determine substance and not political deliberation in the member states. Interesting to see is that with increase of power of individuals the role of courts increased, which is in my opinion a logical consequence as courts provide a forum for private actors to solve problems concerning their rights.

¹⁶⁷ On consistent interpretation see Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, [1984] ECR 01891.

¹⁶⁸ See Case C-194/94, *CIA Security*, [1996] ECR I-2201.

¹⁶⁹ Philip Bobbitt, 'The shield of Achilles : war, peace and the course of history'; and Nikolas S. Rose, 'Powers of freedom: reframing political thought', at 139; and Colin Gordon, 'Governmental Rationality', at 41.

¹⁷⁰ See Case 43/75 *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] ECR 455 at 24; and Case C-397/11, *Jörös*, [2013] ECR 340 at 50.

laws.¹⁷¹ The power to harmonise national laws is a special power by which EU institutions affect private relationships. Harmonisation in fact transfers the power on substantial matters to EU internal market law. The harmonised approach adopted at EU level reflects some form of reorganisation of roles and legal contexts intended to improve the efficiency in a specific sector.

3.3 The problem space—the emergence of the counter-culture

The inborn conflict in the internal market context emerges between, on the one hand, the creation of individualism and the exercise of individual power and, on the other hand, the objective of EU internal market law to ensure the functioning of the internal market through the protection of equality of opportunity and participation of interests. The open market policy, which is the *Grundnorm* of the internal market, requires that the internal market is accessible for everyone under equal and fair terms of competition.¹⁷² It is to ensure the equal participation of private actors in the market in practice and not only in theory, which determines the effectiveness of the internal market process. This is why the principle of equality of opportunity is central to EU internal market law and the internal market. It is the principle on which the internal market is assessed in terms of functioning:

The idea of liberty is, primarily, a negative one, the removal of restraints upon doing what one wishes. Such restraints may be imposed by the actions of other persons or may be due to natural obstacles. Social liberty refers to the removal of restraints by other persons.¹⁷³

Through openness, EU internal market law ensures diversity and competition in the internal market (or the specific sectors concerned). This idea of structural organisation considers “competition and diversity...as a means for continuous

¹⁷¹ For example see Article 194 TFEU on energy or Article 195 TFEU on tourism. In addition, Article 114 TFEU empowers the EU Institutions to harmonise national laws on whatever subject matter if this is necessary to ensure the functioning of the internal market.

¹⁷² This is a constitutionally protected market economy *based on freedom of movement, non-discrimination and competition*. Case 83/78 *Pigs Marketing Board v Redmond* [1978] ECR 2347 at 57; and COM(2001)428 final 2; and N. A. Barr, 'The economics of the welfare state', at Chapter 3; and François Ewald, 'A Concept of Social Law', at 71.

¹⁷³ D. D. Raphael, 'Justice and liberty' (Athlone Press, 1980), at 52.

change and improvement.”¹⁷⁴ The open market policy functions as a catalyst for the internal market process and is a means to protect the diversity and equal participation of interests in the internal market.

Equality of opportunity does not refer to creating equals.¹⁷⁵ Instead the emphasis is on equality in terms of participation in the internal market. Equality of opportunity relates to equal opportunities between competitors and not among individuals as such. The more diversity there is in the market, the more efficient it functions in terms of ‘producing social outcomes.’ In *GB INNO* the Court of Justice emphasised the necessity of equality of opportunities holding that:

25. A system of undistorted competition, as laid down in the Treaty, can be guaranteed *only* if equality of opportunity is secured as between the various economic operators.¹⁷⁶

Alternatively, in *Boussac* the Court of Justice held that “the equality of opportunity of Community nationals is affected whenever a set of rules leads to nationals of one Member State being placed in a better position than nationals of the other Member States.”¹⁷⁷ In *ERT*, the Court of Justice referred to a “system of equality of opportunity as between broadcasters.”¹⁷⁸ Advocate General Colomer in *i-21 Germany* emphasised the importance of equality of opportunities:

103. During the transition from a stage characterised by a closed market governed by exclusive and special rights for certain companies to another stage characterised by efforts to establish a *competitive market open* to all, any curb on the incorporation of new operators consolidates the status quo and restricts competition, particularly if it involves discrimination.¹⁷⁹

¹⁷⁴ Neil Komesar, '*Imperfect alternatives*', at 98.

¹⁷⁵ Case 147/79, *René Hochstrass*, [1980] ECR 3005 at 7.

¹⁷⁶ Emphasis added. See Case C-18/88, *GB-Inno*, [1991] ECR I-5941 at 25; and Case C-462/09, *Connect Austria*, [2003] ECR I-5197 at 83; and Case C-202/88, *Commission v. France*, [1991] ECR I-1223 at 51.

¹⁷⁷ Case 22/80, *Boussac Saint-Frères SA*, [1980] ECR 3427.

¹⁷⁸ Case C-260/89 *ERT* [1991] ECR I-2925.

¹⁷⁹ Emphasis added. See Joined Cases C-392/04 and C-422/04 *i-21 Germany GmbH*, *Opinion of Advocate General RUIZ-JARABO COLOMER*, at 103.

The concept of equality of opportunity is at the core of EU internal market law.¹⁸⁰ The functioning of the internal market depends on the equality of opportunities that exist in a specific sector.¹⁸¹

The problem with social power is that the market as a form of organisation fosters social inequality. The forces of individualism and liberalism are dynamics that seek to promote solutions of an individual rather than collective nature. EU internal market law and the internal market promote and protect individual freedoms as a precondition for the market process to function.¹⁸² Inevitably, this creates a space where unequal power exists or emerges.¹⁸³ Unequal social power places private actors in a position to affect the market in favour of their own interests. *David Raphael* captures this problem. He notes that:

Men are unequal in their natural powers; freedom to use unequal powers results in unequal achievement, which in turn increases the inequality of power. The goal of equality requires some restriction of the freedom of those who have superior power. In such circumstances equality conflicts with freedom because freedom nourishes natural inequality.¹⁸⁴

The problem with inequality of power is that it is capable of affecting the construction and the functioning of the internal market. Private actors are capable of restricting the effectiveness of economic freedoms that are conferred to other private actors under EU internal market law. *Giuliano Amato* argues that the biggest challenge to a free market economy is to prevent private power from becoming a threat to the freedom of others.¹⁸⁵ The point of departure is an inequality of power in various sectors of the internal market. For example, where one private party is in a position to steer the behaviour of another even though

¹⁸⁰ Christopher McCrudden and Sacha Prechal, 'The Concepts of Equality and Non-Discrimination in Europe', *European Commission DG Employment* (2009) at 17-18.

¹⁸¹ Philip Bobbitt, '*The shield of Achilles: war, peace and the course of history*', at 232.

¹⁸² Nikolas S. Rose, '*Powers of freedom: reframing political thought*', at 93-94.

¹⁸³ Ronald Coase on the nature of the firm and the possibility to organise to increase efficiency. See Ronald Coase, '*The Nature of the Firm*', *Economica*, 16/4 (1937), 386.

¹⁸⁴ David D. Raphael, '*Justice and liberty*', at 57.

¹⁸⁵ Giuliano Amato, '*Antitrust and the bounds of power: the dilemma of liberal democracy in the history of the market*' (Hart, Oxford, 1997), at 3.

he has the freedom to act differently.¹⁸⁶ We can call this market failure, but at least these inequalities of power distort the market because they are capable of steering the market process and affecting others in their rights to participate under equal terms.¹⁸⁷ In terms of the functioning of the market process, positions that can affect other actors (i.e. conditions) are able to affect the market as a process and the outcomes it produces. The capacity to affect the market process and the outcomes it produces is described by *Neil Komesar*:

Some involve parties so large that they can significantly affect or determine market outcomes. These parties operate with an awareness of their impact on aggregate results. They have some appreciable amount of monopolistic or oligopolistic power. ...As with the political process, the extent to which the market process produces efficiency, justness, fairness, or any other goal is largely determined by the pattern of participation.¹⁸⁸

3.3.1 Factors affecting the power relationship

The asymmetry of power between private actors is assessed always in relation to something. Asymmetry of power between actors may emerge in relation to personal, social, or structural factors. For example, in relation to data protection law the factor that triggers the asymmetry of power is structural. Mere access to personal information in a private relationship is considered to give rise to an asymmetry of power between private actors that triggers legal intervention when this is assessed in the context of the objective of data protection. This is because data subjects, in relation to the internal market, are not considered in the position vis-à-vis data controller to have adequate control over their personal data through normal market dynamics. Alternatively, in EU free movement law social and structural factors affect the power relationship between economic actors. Economic actors in a national environment are influenced by social

¹⁸⁶ See for example Erik Claes, Antony Duff, and Serge Gutwirth, '*Privacy and the criminal law*' (Intersentia, Antwerpen, 2006), at 73.

¹⁸⁷ Bronwen Morgan, '*The Economization of Politics*', *Social & Legal Studies*, 12 (2003), 489 at 510. "The welfare states protective obligations of integrity towards vulnerable citizen were translated into the resolution of market failures in respect of information asymmetries that denied consumers the precondition of fully informed and autonomous choices necessary to participate in the market for migration advice."

¹⁸⁸ Neil Komesar, '*Imperfect alternatives*', at 99.

factors such as the attitudes and behaviours that are common in a national environment.

The creation of the internal market adds a structural element, which has a direct impact on the assessment of the social power vis-à-vis migrant workers. The combination of these factors gives rise to an asymmetry of power in the internal market between economic actors occupying vested positions in a national context and those economic actors that want to move and compete in the market of another Member State. The personal factor may give rise to an asymmetry of power in relation to EU discrimination law. Age, gender, racial origin, or disability, are just some examples of personal factors that give rise to an asymmetry of power in a specific context. For example, in the labour market elderly people or disabled people are considered as economically weak workforces, which consequently may have weaker positions in terms of negotiation of labour contracts. The consequence is an asymmetry of power between employer and employee based on personal factors. Power in the constitutional structure of the internal market is seen as the ability to produce change.¹⁸⁹ If there is no equality of opportunity, the market process is distorted. As mentioned before, “the extent to which the market process produces efficiency, justness, fairness, or any other goal is largely determined by the pattern of participation.”¹⁹⁰

Given that power is not innate, to acquire power private actors must be in possession or in control of a form of “power currency” i.e. they must be recognised as legal subjects within the internal market. Power is a contextual concept and accordingly, the meaning of power is determined within a certain legal context of EU internal market law.

For example, in Data Protection law power relates to an idea of control over personal data and the competing interests involved.¹⁹¹ The mere possession of personal data bestows a relative strength data that the controller has over data subjects. Data subjects are dependent on the activities of the data controller that,

¹⁸⁹ John Hyman, 'Action, knowledge, and will', at 26.

¹⁹⁰ Neil Komesar, *Imperfect alternatives*, at 99.

¹⁹¹ Concerning the power over personal data see Directive 95/46/EC, Article 6 and 7. Further see Case C-131/12, *Google Spain v AEPD*, [2014] ECR 317 at 32-33; and Case C-279/12 Fish Legal, *Opinion of Advocate General CRUZ VILLALÓN*, at 110.

they comply with the right to privacy.¹⁹² Alternatively, under the general prohibition of discrimination on grounds of nationality, social power relates to a form of regulatory power capable of restricting free movement.¹⁹³ In the *Ferlini* case, the Court of Justice was concerned with the power of an insurance company to determine the conditions of insurance for employees of international organisations. In relation to the capacity to affect the position of other actors, which was assessed under the general prohibition of discrimination, the Court of Justice argued that the:

50. First paragraph of Article 6 also applies in cases where a group or organization such as the EHL *exercises a certain power* over individuals and is in a position to impose on them conditions, *which adversely affect the exercise of the fundamental freedoms*¹⁹⁴

Wouters is another example concerning the relationship of power and context. In *Wouters* the power to regulate the profession of lawyers and notaries is considered as a power to affect others:

210. The Court is therefore called upon to lay down criteria which will make it possible to strike a balance between, on the one hand, the need to allow the professions a certain power of self-regulation and, on the other, the need to avoid the risks of anti-competitive conduct inherent in the granting of such power¹⁹⁵

4. The specific function of the counter-culture

The purpose of the counter-culture is to mitigate between the different interests and powers in a certain relationship between private actors. The counter-culture only emerges in situations where EU internal market law considers the relationship concerned to be one of competing (i.e. economic) interests. This is

¹⁹² See Case C-131/12, *Google Spain v AEPD*, [2014] ECR 317 at 83. The Court of Justice held that data controller must “ensure, within the framework of its *responsibilities, powers and capabilities*, that that procession meets the requirements of Directive 95/46, in order that the guarantees laid down by the directive may have full effect”. Further see Case C-279/12 *Fish Legal*, *Opinion of Advocate General CRUZ VILLALÓN*, at 110.

¹⁹³ Likewise cases as *Bosman*, *Walrave and Koch* or *Viking and Laval* relate to regulatory power.

¹⁹⁴ Case C-411/98, *Angelo Ferlini v Centre hospitalier de Luxembourg*, [2000] ECR I-08081 at 50.

¹⁹⁵ Case C-309/99 *Wouters*, *Opinion of Advocate General LÉGER*, at 210.

the case where the private actors (as legal subjects) occupy the central positions in a defined legal context. For example, this is the case where the interests of the private actors correlate, i.e. worker and employer in the labour market. In this regard it is the Court of Justice that ultimately determines if an actor 'belongs' to a specific market. The problem encountered with the identification of those vested positions is that EU internal market law does not always articulate these positions.

This is relatively clear in secondary law instruments because EU internal market law defines the key positions in a very specific legal context. Where the concept of responsibility emerges under primary law this is less clear because the treaty provisions do not specify what economic actors are supposed to come within the scope of valid economic interests. For example, the Court of Justice refused to recognise the concept of responsibility under the free movement of goods. This may be explained through a distinction made between the actual social power and the legal social power. The private actors in the cases of *Commission v. France* and *Schmidberger* had actual social power.¹⁹⁶ This was reflected in the position they held, which enabled them to affect the free movement rights of others. The choice not to recognise this strength as a source of regulatory authority in the internal market, implies that those actors have no legal power within the meaning of the internal market. In the view of the Court of Justice, the private actors concerned did not represent an economic interest (i.e. social power) within the ideal organisation of the internal market for goods.

4.1 An alternative form of governance

Where there is a distortion to the functioning of the internal market caused by an asymmetry of power between private actors that are recognised as legal subjects in the context of the internal market EU internal market law intervenes to correct the imbalance. This may take place through the direct allocation of rights or obligations, but likewise through secondary law instruments providing a harmonised legal framework in which private actors may act. Since power operates relationally, the preferred solution is the 'balancing' of power between the parties to a specific relationship through legal means. Rights and obligations

¹⁹⁶ See Case C-265/95, *Commission v. French Republic (Strawberries)*, [1997] ECR I-6959; and Case C-112/00, *Eugen Schmidberger v. Republic of Austria* [2003] ECR I-5956.

are the primary legal instruments (i.e. tools) for restoring an environment of balanced power. This balanced power is intended to ensure a level playing field between the power on which basis economic activities and the engagement in economic transactions can take place under fair conditions.

In this function, EU internal market law intends to provide an 'efficient' legal framework in which market dynamics produce policy objectives. The counter-culture emerges as an "alternative to hierarchical regulation:" as a tool to deal with an asymmetry of power between private actors.¹⁹⁷ The fact that the concept of responsabilization emerges as a tool for governance is found in the nature to control and steer the behaviour and the exercise of powers of private actors in specific contexts.¹⁹⁸ However, the concept of responsibility must be understood as a more reflexive form of governing through law.¹⁹⁹ In this respect, the allocation of obligations is understood as a framework within which private actors remain free to make economic choices. The obligation intervenes in the exercise of economic freedoms only to the extent that is necessary to restore a balance of powers between the private actors concerned. This approach is characterised by a cautious and responsive development of control. The intention is to ensure a minimum level of protection of weaker parties that is needed for the market process to function and to not interfere with economic activities, i.e. to require other behaviour, which is not needed for the functioning of the market process.

The allocation of rights and obligations in the counter-culture is intended to balance the powers in a relationship reflecting economic interests where the relationship is qualified by an asymmetry of power. In this way EU internal market law defines how the 'power' that private actors hold is to be exercised. As *Michael Albert and Robin Hahnel* emphasise:

it is evident that if society is to be stable people must generally fit the role slots they are going to fill; actual behaviour must generally

¹⁹⁷ Maria Weimer, '*Democratic legitimacy through European conflicts-law?: the case of EU administrative governance of GMOs*', at 96.

¹⁹⁸ COM(2001)428 final ; and Mario Monti, 'A New Strategy for the Single Market'.

¹⁹⁹ Nikolas S. Rose, '*Powers of freedom: reframing political thought*', at 16-17.

conform to the expected patterns of behaviour defined by societies major social institutions.²⁰⁰

This function of EU internal market law applies to any sector or discipline covered by EU internal market law. Only through the legal coordination of behaviour in every legal context can EU internal market law create stability in a policy environment in which private actors can engage without distortions caused by asymmetries of power. The allocation of obligations is a tool under EU internal market law to ensure that private actors in a specific legal context act in conformity within the roles they must occupy and the activities they must engage in within this context.²⁰¹ Unwittingly, private actors have an active role in attaining social objectives. This is reflected in the task to internalise obligations. The outward effects of economic activities that comply with the legal requirements under EU internal market law directly contribute to the objective of EU internal market law in this specific sector. In this way, economic activities exercised within legal limits *produce* social outcomes at the same time. This capacity to affect the market creates a form of hybridity.²⁰² Private actors are exercising public functions or tasks. It is private actors that, due to their position in a specific context, hold a position that is bound up with a public function or task. It is public, because exercising the power affects the functioning of the internal market. EU internal market law is the source of this power. More importantly, EU internal market law is the source of this development, thus it is a phenomenon that relates to the construction and functioning of the internal market.

4.2 The counter-culture as an EU legal phenomenon

The counter-culture emerges where an asymmetry of power between private actors that occupy the centre of organisation of a certain context distorts the functioning of the internal market in this sector. This assumes that one side of the relationship is equipped with so much power that it is considered as another source of regulatory authority within the internal market and as such competes

²⁰⁰ Michael Albert and Robin Hahnel, '*Unorthodox Marxism*', at 107.

²⁰¹ *Ibid.*, at 138.

²⁰² On the concept of hybridity see Kaarlo Tuori, '*Transnational Law*', in Miguel Maduro, Kaarlo Tuori, and Suvi Sankari (eds.), *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge: CUP, 2014); and Hans-Wolfgang Micklitz, '*Rethinking the public/private divide*', *ibid.*

with EU internal market law as an institutional alternative providing 'better solutions' in a certain environment. The responsabilization as legal subjects in terms of allocation of obligations relates to an *assessment of power*.²⁰³ Although the conflict is one between private actors, in fact the distortion stems from and relates to national law, either directly or indirectly. In other words, the conflict remains to be one between national and EU internal market law and the place where choices about the construction of the internal market should be made.²⁰⁴

The distortions in the internal market caused by asymmetries of power between private actors relate to national law. Considering national law as a source of distortion one situation from which distortions can emerge are situations of *private autonomy*. National law grants a space for self-organisation. Private autonomy and private law principles guide the activities and set the limits of private power and private relationships. The asymmetry of power in this case emerges from the construction of the internal market. This is especially the case in relation to the objectives of economic and social integration of the internal market. In a purely national context, the asymmetry of power would be within the realm of private law and in principle free from state intervention. EU internal market law and the introduction of the internal market change this set-up. Private actors occupying vested positions in national law are now Europeanised and considered as occupying vested positions in the internal market context. EU internal market law adds a regulatory layer in which the roles and powers of private actors are assessed in light of the objectives of EU internal market law. The problem in terms of asymmetry of power emerges because positions of private power under national law are capable of distorting and restricting the objectives of EU internal market law in terms of economic and social integration. The problem is that national law, per se is deficient in dealing with transnational situations. Thus, even in the case where national law sets the limits on private activities (i.e. private autonomy) this is not so as to ensure compliance with EU internal market law and consequently the attainment of the objectives of EU internal market law in constructing the internal market.

²⁰³ As *Rose* puts it, "freedom has come to define the problem space within which contemporary rationalities of government compete". Nikolas S. Rose, '*Powers of freedom: reframing political thought*', at 94.

²⁰⁴ Damian Chalmers, '*The unconfined power of European Union Law*', at 428.

A second source of distortion emerges where *national law* already controls and deals with asymmetries of power between private actors. This emerges in situations where national authorities protect common interests, fundamental rights, or specific groups in society. Intrinsic to this choice is that national law determined that private actors are subject to the national legal frameworks that guarantees protection. In terms of responsibility, it is important to note the difference in the source of distortion. Although the source of distortion to the construction and functioning of the internal market is national law, what gave rise to the emergence of national law in a specific context is an asymmetry of power between private actors.

4.3 Responsibilization in terms of justice

Besides the very practical purpose of ensuring the functioning of the internal market process, the counter-culture is also crucial for political and social reasons. In social terms, it contributes to the notion of social justice within the internal market. Social justice is understood in terms of fairness of the system and is a “primary virtue of a social system.”²⁰⁵ A legal system, which is unjust, starts to lose legitimacy for its existence and power.²⁰⁶ Fairness in the internal market means that every individual has an inviolable right to welfare and to generate welfare for himself, which even the welfare of society cannot override. In terms of EU internal market law this is the equality of opportunity in terms of participation.

With the inherent social injustice in the market process in terms of natural inequality between private actors, it becomes evident why the shaping and regulating of policy-making environments is so important under EU internal market law. It ensures that equality of opportunities with regard to participation in the market process exists. It relates to the question of how EU internal market law can ensure the functioning of the internal market while at the same time not

²⁰⁵ For example see N. A. Barr, '*The economics of the welfare state*', at Chapter 2; and Richard J. Arneson, '*Rawls, Responsibility, and Distributive Justice*', in Marc Fleurbaey and John A. Weymark (eds.), *Justice, Political Liberalism, and Utilitarianism: Themes from Harsanyi and Rawls* (Cambridge: CUP, 2008); and John Rawls, '*Political Liberalism Expanded Edition*', Columbia Classics in Philosophy. (New York: Columbia University Press, 2011), 1 online resource (588 pages).

²⁰⁶ Nikolas S. Rose, '*Powers of freedom: reframing political thought*', at 27; and Philip Bobbitt, '*The shield of Achilles: war, peace and the course of history*', at 213.

negating “the very freedoms it ought to protect.”²⁰⁷ The quest for EU internal market law is “respecting the autonomy of certain ‘private’ zones, and shaping their conduct in ways conducive to particular conceptions of collective and individual well-being.”²⁰⁸ The constraining of private actors is always assessed with regard to the overall functioning of the internal market in this specific policy-making environment. This is where this new,

more organic individualism combines the ideas of individual value and individual debt, and includes both a concept of freedom that is neither anarchistic nor self-centred and a reference to rationalism that does not demand the impossible, while at the same time it calls for the creative use of the imagination and initiative rather than conformity to a preordained pattern.²⁰⁹

This is the reason why some private actors have to consider their position and their effects in a transnational context and not in the national context in which their power emerged. This is the place where counter-culture emerges. The constraining of some private actors is a trade-off in light of the benefit for the disadvantage actors. In terms of social justice, it improves the overall condition of fairness in the internal market. *John Rawls* refers to this compromise as the *difference principle*, which allows the restriction of freedom of some for the benefit of the least advantaged, stating that:

Social and economic inequalities are to satisfy two conditions: (a) They are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and (b), they are to be to the greatest benefit of the least advantaged members of society.²¹⁰

The assessment of the relative power in the relationship concerned triggers the legal responses under EU internal market law. The emergence of the counter-culture and the allocation of legal constraints takes into account the power structure in the relationship between private economic actors in a defined

²⁰⁷ Giuliano Amato, '*Antitrust and the bounds of power : the dilemma of liberal democracy in the history of the market*', at 3.

²⁰⁸ Nikolas S. Rose, '*Powers of freedom: reframing political thought*', at 48-49.rose p. 48-49

²⁰⁹ Roland J. Pennock, '*The Problem of Responsibility*', at 18.

²¹⁰ John Rawls, '*Political Liberalism Expanded Edition*', at 47.

context. It reflects the idea of constraining some for the benefit of the weaker parties. The intention of EU internal market law is not to attain a level of equal power, but to balance power to a level that the market dynamics in terms of competition are can function efficiently. This is so when the private actors can engage based on the dynamics of supply and demand, which constitute the kernel of economic considerations and choices.

5. Responsibility of private actors

The counter-culture is a specific form of responsabilization of private actors in the EU legal culture. The responsabilization of these actors is a form of Europeanisation where EU internal market law instrumentalises private actors *qua* legal subjects within the internal market to attain its own policy objectives. The positions concerned and addressed under the counter-culture occupy a central position in the organisation of a certain context governed by EU internal market law. This is reflected in the underlying economic interest the actor represents and how EU internal market law considers the need for the interest to be represented in a specific context. For example, this includes the following: associations representing collective interests under free movement law, data controllers under data protection law, and employers in the labour market.

The specific expression of the counter-culture, i.e. who is in charge for what, always relates to a certain legal context: EU free movement law, data protection law, consumer law, and food law. Each of which comes with an objective (i.e. economic integration, data protection, food safety, consumer protection) and its own power relationship at the centre of organisation in which choices shall be made. This is the relationship between the actors representing the correlating and competing interests. For example, in EU data protection law this is the interest to process personal data, i.e. vested in the data controller, which competes with the interest to have personal data protected, i.e. the interest of the data subject.

The underlying problem is an asymmetry of power that emerges between the two correlating economic interests in a specific context. The consequence of this asymmetry of power is that one party of the relationship is in a position to affect the possibility of the other party to engage in economic activities and in the

internal market in general. This is a problem about legal positions in the context of the internal market where private actors hold power (i.e. in a defined context). Each sector of EU internal market law creates a different *context* in which *power* must be assessed and understood. Power is contextual and the characteristics of a specific situation inaugurate 'power.' The meaning of power relates to an organic/structural approach. For example, under free movement law collective organisation is considered to reflect a source of regulatory power within the meaning of free movement. In data protection law and labour law this is different. In these contexts the mere access to a 'good' or 'information' inaugurates power over the other party. This is reflected in a monopoly over personal information by the data controller under data protection law and the monopoly of the employer of access to labour in the labour market. The control over personal data or the access to labour automatically constitutes power that is capable of affecting other economic actors representing the correlating interests. This becomes clearer when considering the relationship between employer and worker in the labour market. While both actors and the positions they represent are vital for the internal market for labour to function they are not competitors. Rather their relationship reflects the *natural relationship of economic (competing) interests* in the labour market. It is their interests that determine supply and demand in the labour market. The asymmetry of power referred to emerges between employer and the worker because the employer has a monopoly on labour. Thus, any choices with regard to eligibility for employment have a regulatory effect on the employer and potentially restrict the opportunities of workers.

The question that emerges in relation to the asymmetry of power is 'how to deal with it?' Due to the fact that an asymmetry of power affects the functioning of the internal market, EU internal market law provides the forum within which this distortion is to be dealt with. The approach adopted under EU internal market law is reflexive. It requires the private actor having relative strength over another actor to comply with legal requirements.

Under the counter-culture the problem is not one of power only, but a problem where the power of private actors goes beyond the powers resulting from the normal rules applicable between individuals and where this may result in

distortions to the market process.²¹¹ The allocation of obligations is not intended to eliminate the asymmetry of power between the economic interests representing the supply and demand sides. On the contrary a certain asymmetry of power is needed to ensure the mutual stimulating effect of the supply and demand sides under market dynamics. Competition and diversity are the factors that ensure constant improvement in the market context. Thus, some diversity in terms of power between certain actors in the market process is required to ensure the functioning of the market process. In EU internal market law and especially in the counter-culture this level of power is confined by the allocation of obligations to private actors. The legal constraints function as a belt for the activities and the behaviour of specific actors in order to ensure that the environment for competition and diversity is maintained.

Moreover, this power, which is held by actors in vested positions, is recognised as a 'legal' form of power in the constitutional structure of a specific market—it is a source of authority that may lawfully affect parts of the internal market. The outcome is that those private actors actively contribute to the attainment of policy objectives—they are transformed into 'competent authorities'. This refers to the capacity to affect certain parts of the internal market. Private actors are recognised as another source of regulatory authority within the internal market. This is reflected in capacities to set up associations or in the power of self-organisation as identified in *Wouters*, *Bosman* or *Viking* and *Laval*.

Under the counter-culture the transformation of private actors into competent authorities is bound up with a change in identity. In this regard EU internal market law changes the attitude and behaviour of private actors when acting within the realm of the internal market. Part of this assemblage is the allocation of obligations, which is intended to control power and steer actors in a defined legal context. The allocation of the obligation must however, be considered in a wider context of organisation of powers and roles. While rights create a space for voluntary action, obligations require compliance and therefore a specific behaviour. This factor of being under a legal obligation to comply with certain

²¹¹ For example in the Unfair Terms Directive Article 3(1) states that contractual terms that have not been individually negotiated are considered as unfair where they cause a significant imbalance between the rights and obligations arising under the contract, to the detriment of the consumer. The notion of 'balance' and fairness is evident here. The counter-culture emerges as a tool to deal with this kind of imbalance. It is intended to restore an environment where the market process can function efficient. Council Directive 93/13/EEC, Article 3(1).

requirements turns private actors into active agents in attaining certain objectives. This is reflected in the outward effect the allocation of obligations creates. This contribution to the attainment of social objectives emerges when the actors engage, in compliance with the applicable legal framework, in economic activities. The internalisation of the legal requirements and the compliance therewith prevents distortions to the internal market to occur. Through the 'steered' economic activities private actors *produce* social objectives in the long-term. Thus, the allocation of constraints goes hand in hand with a form of legal empowerment. The empowerment of these private actors is reflected in the recognition of the capacity to affect others (although subject to legal constraints) and in the capacity to justify the conduct in cases of non-compliance. Private actors under the counter-culture may deviate from the legal requirements imposed by EU internal market law for overriding reasons.²¹² From this perspective, private actors under the counter-culture are treated similar to public authorities. Put differently, under the counter-culture EU internal market law delegates forms of public power to private actors that occupy legal positions in a defined context.

In summary, the rights culture and the counter-culture both relate to positions and roles of private actors within the internal market. Under the counter-culture the new individualism is no longer only about the exercise of self-interests. Rather, this form of the new individualism comes with a requirement to give account to the interests of other actors within the internal market.

5.1 Challenges relating to the responsabilization of private actors

The core challenge for both the Court of Justice and the EU legislator as actors that impose constraints on private actors is to find the right balance to limit powers of certain private actors while at the same time maintaining an appropriate level of autonomy and individualism which is needed for the market process to function. Distortions caused by private autonomy are primarily considered under primary law and the treaty provisions on free movement and

²¹² Case C-325/08, *Olympique Lyonnais v. Olivier Bernard*, [2010] ECR I-2177 at 38; and Case C-415/93, *Bosman* [1995] ECR I-4921 at 85-86; and Case C-438/05, *International Transport Workers Federation and Finnish Seamen's Union v Viking Line ABP and OU Viking Line Eesti*, [2007] ECR I-10779 at 77; and Joined Cases C-369/96 and C-376/96, *Arblade*, [1999] ECR I-8453; and Case C-165/98, *Mazzoleni*, [2001] ECR I-2189.

the prohibition of discrimination. The key actor is the Court of Justice. The simple reason for this is that EU internal market law has no competence to harmonise national laws, the framework of which protects private autonomy and private powers in private relationships.

The biggest challenge under primary law for the Court of Justice is to identify positions of legal power. While this is a relatively easy task when it concerns public authorities, it is difficult when it concerns private actors. While many authors argue that treaty provisions apply to public authorities only, the Court of Justice developed criteria on which basis the distinction is made between private actors that are bound and those that are not. For example, under free movement law the Court of Justice held that collective entities come within the scope of the free movement provisions.²¹³ In this respect, the Court of Justice recognises that the actors have characteristics and power under national law which, when exercised in areas governed by EU internal market law is functionally equivalent to 'public power' that triggers the application of EU free movement law. The functional approach developed by the Court recognises that public authorities are not the only sources of regulatory power in the territories of Member States. There is no such thing as a single internal market. Rather the approach adopted under primary law emphasises the existence of multiple markets being existent in national context each of which comes with its own organisation, positions and relationships. These submarkets are not necessarily dominated or regulated upon by public organisations, but by forms of self-organisation or no organisation at all. The personal scope of EU primary law is assessed in relation to each of these markets and accordingly organises and structures the social powers in these national submarkets if needed.

In this capacity, the concept of responsibility fills a gap between national law and EU internal market law. National law is per se deficient in dealing with transnational situations and situations of exclusion of outsiders. In this context the Court of Justice Europeanises positions and social powers framed in national law and puts the exercise of social power under the control of EU free movement law and discrimination law. The concept of responsibility in EU free movement

²¹³ To this effect see Case 36/74, *B.N.O. Walrave and L.J.N. Koch v. Association Union cyclist internationale, Koninklijke Nederlandsche Wielren Unie et Federacion Espanola Ciclismo*, [1974] ECR 1405; and Case C-415/93, *Bosman* [1995] ECR I-4921; and Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779.

law and discrimination law is used to coordinate positions of social power of private actors between different Member States in order to ensure economic and social integration of the internal market. This is substantially different from the second context in which responsibility emerges.

In the context of harmonisation a key feature is that EU internal market law imposes a new institutional organisation of powers and roles. Harmonisation requires having as its genuine objective the improvement “of the conditions for the establishment and functioning of the internal market”.²¹⁴ Harmonisation is a choice towards an alternative—more effective—regulatory framework that replaces national laws. The new organisation reduces the risk of distortion caused by dispersed forms of organisation and prefers the coordination of shared responsibilities through the EU legal framework. The “multiparty involvement is understood as a way of creating norms” in an allocative efficient manner.²¹⁵ The concept of responsibility of private actors emerges in the context of reorganisation. Thus, the allocative choice in terms of identifying vested positions is made in the drafting process.

The end product is that private actors are placed in a framework of shared responsibilities that eventually leads to attaining specific objectives within the internal market more efficiently. An inherent idea in these systems is that the organisation will ensure durability through the legal framework: it manifests roles and positions and the functions actors have in this specific context. In this regard, the underlying idea is that the ‘new organisation’ is keen to adapt to changes in the environment. Responsibilization under harmonised law implements an objective into a power relationship that did not previously exist. For example, in simple terms data protection is attained through the power relationship of data controller and data subject as defined by EU data protection law. The attainment of data protection through the engagement of the data controller and the data subject is not natural but a choice of the EU legislator considering the attainment of data protection through this form of ‘private organisation’ as more efficient than regulation at Member State level.

²¹⁴ To this effect see Case C-376/98, *Tobacco Advertising*, [2000] ECR I-8419 at 84.

²¹⁵ Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, at 374.

The different functions of the different concepts of responsibility— emerging in case-law and in secondary law originates from the different actors involved, which occupy different positions structurally. The Court of Justice is equipped with powers and in the EU legal and institutional framework it is the key arbitrator in terms of specific conflicts, i.e. where uncertainties emerge about the application and scope of EU internal market law. The preliminary ruling procedure is central to this function where the Court of Justice is confronted with specific conflicts and problems relating to the effectiveness of EU internal market law. The problem with the Court of Justice relates to the fact that it is required to determine the scope of EU internal market law not only in this specific case, but it must also take into account the wider effects of its decisions. Thus, a case has always a narrow and a wide application. It solves the case presented before the judges and at the same time must take into account any eventual and potential structural problems in the regulation of the internal market. This problem to cover up eventual structural deficits in the decision-making is reflected, for example, in the wide scope of the obligations the Court of Justice applied to private actors under primary law, potentially keeping the door open to review similar situations. This is the case where conflicts emerge between rights EU internal market law confers on private actors and forms of distortion, for example. The source of distortion is irrelevant in the first place. What triggers a review under the Court of Justice is a distortion of EU internal market law.

This situation is different with the EU legislator and the function of the concept of responsibility under secondary law instruments. The EU legislator is placed structurally in a position to correct on a larger scale structural deficits or distortions. The EU legislator is empowered to regulate upon and structure the internal market through specific policies in order to improve the efficiency of the market process. Harmonisation is addressed to Member States and public authorities as regulators. Thus, the relationship concerned is fundamentally different than the relationship considered before the Court of Justice. The EU legislator is intended to correct market failures and distortions through regulatory means such as harmonisation. The objective is to provide “market participants and citizens with a legal environment in which production, trade, consumption, and all other sorts of activities are made secure and effective.”²¹⁶ Harmonised law,

²¹⁶ Loic Azoulai, *'The Complex Weave of Harmonisation'*, at 609.

is not supposed to directly involve or target private actors and relations. Market participants and citizens are supposed to enjoy the benefits of the internal market and to trust the effective collaboration of EU and national regulatory authorities.²¹⁷

Being in charge for something assumes that the actor concerned actually has the capacity to act according to his duties, i.e. the capacity to act accordingly, the capacity of understanding, and the power to carry out his duties. It does not, however, require willingness, as this is something relating to voluntariness. Being in charge requires power to fulfil the tasks or awaited requirements. Choices about allocation must take into account the capacities to comply with legal requirements and it must assess the position actors have in a socio-economic context. What are the interests involved? What are the powers an actor holds? What are the factors, in a specific context, that inaugurate power? Are there structural deficits and how can this be dealt with most efficiently?

Another issue developing in relation to the emergence of the counter-culture relates to the legal context and legal certainty. Under harmonisation measures, the responsibility of private actors is clearly defined. Specific provisions address obligations and elaborate on eventual exceptions to the rule. Under the approach developed by the Court of Justice, the responsibility is reflected in the allocation of an obligation only under the treaty. This affects legal certainty especially with regard to exceptions and issues of liability. Are private actors treated like public actors in this context? To what extent does the Court of Justice allow for deviations in terms of justification and liability?

6. Remarks

Within the internal market, the role of some private actors has been significantly shaped by EU internal market law and the on-going process on integration intended to construct and maintain the functioning of the internal market. Choices that were formerly made in national environments by Member States are now transferred to the internal market. Political power is dispersed and shared among multiple actors acting within a specific policy-making environment.

²¹⁷ Ibid.

While private actors occupy a central position in this new environment, they are imbedded in an institutional framework that shapes the environment in which private actors are to engage and compete. It is in this regulatory function of the environment in which private actors are to compete that the counter-culture emerges. Private actors are recognised as competent authorities in the specific context and recognised as actors that may affect the policy-making environment they are acting in. The consequence of which is that private actors are confined by legal requirements.

In the EU legal culture, rights and obligations as legal instruments have a dual function. First they function as a tool to identify private actors qua legal subjects to occupy certain positions in the social organisation that is governed by EU internal market law. The second function relates to the overall objective EU internal market law wants to attain in this particular area of law. Rights and obligations thus function as instruments to 'steer' the behaviour in terms of structuring the power relationship between the actors recognised by EU internal market law. In this way the counter-culture responds to a specific problem in the context of the internal market: how to deal with situations of private power in terms of regulatory authority, which is likely to affect the functioning of the internal market. Rights empower actors and encourage a certain activity being legally protected. Obligations have the opposite result, constraining freedom of action and limiting powers of certain actors. In this regard, rights and obligations that are allocated under EU internal market law to certain private actors always relate to the position and function EU institutions 'intend' for those actors to be in their interpretation of EU internal market law and the attainment of certain policy objectives.

Chapter 2

Responsibility of Private Actors in EU Free Movement Law

Introduction

The principle of free movement holds a central position in the construction of the internal market. Free movement is the means through which the internal market is constructed. With regard to the construction of the internal market, free movement law constitutes the basic principles for the economic integration and unification of national markets.²¹⁸ This implies “that to the free movement of goods within the customs union²¹⁹ is added the free movement of the factors of production, i.e. labour, capital and enterprise.”²²⁰

With the free movement approach, EU internal market law responds to the very structure of the internal market, which is a market based on highly regulated national markets. Free movement law is the meta-script to attain unity and the *fusion* of national markets.²²¹ The abolition and elimination of restrictions and obstacles to the free movement of goods, services, capital, and workers are the key objectives of the activities of the Community and the EU institutions.²²² This is why EU internal market law empowers and protects actors that want to

²¹⁸ Dennis Swann, 'The economics of the Common Market', at 11-12.

²¹⁹ For example see Henri Spaak, 'The Brussels Report on The General Common Market (Spaak Report)', *Intergovernmental Committee on European Integration of June 26 1956* (1956).

²²⁰ Dennis Swann, 'The economics of the Common Market', at 11-12; and Gareth Davies, 'The Process and Side-Effects of Harmonisation of European Welfare States', *Jean Monnet Working Paper*, 02/06 (2006) at 12.

²²¹ Henri Spaak, 'The Brussels Report on The General Common Market (Spaak Report)', at 7 and 14; and Loic Azoulai, 'The European Individual as Part of Collective Entities (Market, Family, Society)', at.

²²² Article 3 TEU and further see Joseph H. H. Weiler, 'The Transformation of Europe'; and Miguel Poiaras Maduro, 'We the court: the European Court of Justice and the European Economic Constitution'.

move to another market and compete there under market conditions—fair competition and non-discrimination.²²³ *Julio Baquero Cruz* emphasises the importance of free movement stating that, “free movement and competition constitute the kernel of economic constitutional law.”²²⁴

The essential purpose of the Treaty is to provide a plan “to unite national markets into a single market.”²²⁵ The internal market can only function if free movement and the opening up of national markets are ensured.²²⁶ As a consequence of free movement, national markets are merged into a internal market. For this reason the principle of free movement is designed to deal with the deficiency that is inherent in these highly regulated national markets. The objective of which is to create a transnational environment where all economic actors having an interest can “operate under equal competitive conditions, and across which goods, persons and services could be exchanged unhindered.”²²⁷ This takes into account the interests of competitors outside the scope of the national market. Free movement is intended to ensure the transition of actors from one national market to another national market. Only under conditions of free movement, fair competition and non-discrimination will the market function as a tool to “promote a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it”.²²⁸

²²³ Case 152/73, *Sotgiu v. Deutsche Bundespost*, [1974] ECR 153 at 11; and Case C-237/94, *O’Flynn v. Adjudication Officer*, [1996] ECR I-2617 at 17; and Michael Dougan, ‘*Minimum Harmonization and the Internal Market*’, at 860.

²²⁴ Julio Baquero Cruz, ‘*Between competition and free movement : the economic constitutional law of the European Community*’, at 86. This is why the Court of Justice commonly refers to the “four freedoms”: the free movement of goods, workers, establishment and the provision of services and capital as “mandatory”, “fundamental freedoms” or “fundamental objectives” Free movement is essential in creating “an area without internal frontiers”. Case 36/74, *B.N.O. Walrave and L.J.N. Koch v. Association Union cyclist internationale, Koninklijke Nederlandsche Wielren Unie et Federacion Espanola Ciclismo*, [1974] ECR 1405 at 16-17. Alexandre Saydé, ‘*One Law, Two Competitions: An enquiry into the contradictions of free movement law*’, *Cambridge Yearbook of European Legal Studies*, 13 (2010-2011), 365 at 369-370. Case C-281/98 *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*, [2000] ECR I-4139 at 33-35.

²²⁵ Case 78/70, *Deutsche Grammophon v. Metro*, [1971] ECR 489 at 12.

²²⁶ For example see Miguel Poiares Maduro, ‘*Europe and the Consitution: what if this is as good as it gets?*’.

²²⁷ Michael Dougan, ‘*Minimum Harmonization and the Internal Market*’, at 860.

²²⁸ Here reference is made to Article 2 EEC which is using a different terminology than Article 3 TEU presently. The objectives set out are not something that is attained at a certain point of time, but it is a constant process striving for more efficiency in attaining its objectives. And the range of Community objectives as widened significantly until today.

The picture presented is a transnational market economy where, “economic decisions should not be distorted by regulatory considerations.”²²⁹ The underlying paradigm of economic integration reflects an idea of regulatory competition. The principle of free movement and free movement law addresses *situations of regulatory power* that affect the transition from one national market to another national market.²³⁰ This may be the transition of goods lawfully produced in another Member State or the transition of workers to the labour market in another Member State. This is regulatory power imbedded in a national context or environment. Economic integration is attained through negative integration, which is the control of regulatory power in national contexts. *Gareth Davies* describes this well, arguing that:

*free movement law only intervenes where a national measure is restricting market access for foreign economic actors. Such an effect inevitably – a few extreme and atypical situations apart – benefits (other) market incumbents who are protected from competition. A measure that reduces market access therefore always has a protectionist effect. The trigger for the application of the Treaty articles is the existence of this inequality or market distortion.*²³¹

There is no such thing as a single national market, but there are different markets within a national context, e.g. markets for goods, labour, and services. Even within these different meta-markets there are submarkets, e.g. for food,

²²⁹ Alexandre Saydé, 'One Law, Two Competitions: An enquiry into the contradictions of free movement law', at 371.

²³⁰ For this see Case 8/74, *Procureur du Roi v. Dassonville*, [1974] ECR 837; and Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649; and Case 178/84, *Commission v. Germany (Beer purity requirement)*, [1987] ECR 1227; and Case 75/63, *Hoekstra*, [1964] ECR 177; and Case 53/81, *Levin v. Staatssecretaris van Justitie*, [1982] ECR 1035. This is something literature refers to as a free movement test: Jukka Snell, 'Private Parties and the Free Movement of Goods and Services', in Mads Andenas and Wulf-Henning Roth (eds.), *Services and Free Movement in EU Law* (Oxford: OUP, 2002); and Miguel Poiars Maduro, 'We the court: the European Court of Justice and the European Economic Constitution'. Moreover, the free movement provisions have been expanded to function as a sword against any obstacle to the free movement “even if it applies without regard to the nationality” of the actor concerned so called distinctively measures or technical barriers to trade. Case C-10/90, *Maria Masgio*, [1991] ECR I-1119 at 18-19; and Case C-415/93, *Bosman* [1995] ECR I-4921 at 96 and 102-104; and Alexandre Saydé, 'One Law, Two Competitions: An enquiry into the contradictions of free movement law', at 381-382.

²³¹ Emphasis added. See Gareth Davies, 'Freedom of Movement, Horizontal Effect, and Freedom of Contract', at 810-811. Also see: Gareth Davies, 'The Process and Side-Effects of Harmonisation of European Welfare States', at 13; and Loic Azoulay, 'The force and forms of European Legal Integration'; and Daniela Caruso, 'The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration', *European Law Journal*, 3/1 (1997), 3; and Pierre Pescatore, 'The Law of Integration'; and William Wallace and Royal Institute of International Affairs., 'The Dynamics of European integration'.

television products, professional football players, lawyers, or posting of construction workers. Each of these come with their own organisations and forms of regulation. Some may be subject to ‘public’ regulation in the sense that the Member State structures the conditions of competition, while other submarkets may be subject to forms of self-organisation or no organisation of competition at all.

This is regulatory power imbedded in some national context or environment. While free movement law seeks to achieve the unity of the internal market, free movement law “only intervenes where a national measure is restricting market access for foreign economic actors.” This is characterised by some situations where the exercise of regulatory power “benefits (other) market incumbents the result of which is that these actors are protected from competition.”²³²

1. EU Free movement law in the internal market

Free movement law emerged from the treaty provisions implementing the principle of free movement for the four core markets of the internal market, i.e. the internal markets for goods, workers, services, and capital. We must draw a line, however, between the objective purpose of the concept of free movement in the process of economic integration, the function as a meta-script and the direct application as subjective rights to practical cases, as a consequence of the direct effect doctrine.

These principles turned into a practical and subjective free movement law—a form of applied constitutional law—through the doctrine of direct effect set out in the Court of Justice’s decision in *van Gend en Loos*.²³³ The facts and the legal reasoning of the Court of Justice are well known and will not be discussed here. What is of relevance is that the decision to turn the principles set out in the treaties into subjective rights turned the objective order of values and principles into practical law that is applicable in virtually any relationship to which the principle of free movement applies. In line with direct effect jurisprudence, free movement law emerged into a doctrine of subjective EU internal market law on

²³² For both quotations in this paragraph see Gareth Davies, *Freedom of Movement, Horizontal Effect, and Freedom of Contract*, at 810-811.

²³³ Case 26/62 *N.V. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse administratie der belastingen* [1963] ECR I at 12.

which private actors can rely before national courts and which have a radiating effect towards any restriction and distortion—a universal character. The creation of subjective (i.e. fundamental) rights, paired with judicial review ensures that all law, including private, becomes subject to judicial scrutiny and to the test of incompatibility with the principles of free movement and undistorted competition within the internal market.²³⁴ The trigger for the application of free movement law under the treaties is this inequality of power that affects competition in the market or leads to a market distortion. Put differently, any law that might be in conflict with the rights created under the Treaty “becomes applied constitutional law and therefore *potentially* public” and subject to review by the Court of Justice.²³⁵

What is decisive for our purpose is that the doctrine of direct effect placed the Court of Justice “in a pivotal position to influence the pace and direction of legal integration on matters of economic and social regulation.”²³⁶ The consequence of which is an unprecedented Court-led economic integration of the internal market. The technique used by the Court of Justice has been,

to bring an ever wider body of rules and regulation under the scope of its review, while at the same time expanding, through its case law the range of potential excuses or justification which member states can put forward in defence of the rules which are under attack.²³⁷

For this review, the Court of Justice developed broad-effects based tests, which were, “used to determine when regulatory laws could be deemed to interfere with the circulation of economic resources within the internal market.”²³⁸

²³⁴ Guilherme Vasconcelos Vilaça, *Law as ouroboros*, at 129; and Simon Deakin, *Regulatory Competition versus Harmonisation in European Company Law*, ESRC Centre for Business Research Working Paper, University of Cambridge No. 163 (2000), 1; and Miguel Pórigues Maduro, *We the court: the European Court of Justice and the European Economic Constitution*, at 7.

²³⁵ Guilherme Vasconcelos Vilaça, *Law as ouroboros*, at 129. “Public because the treaties are considered as public law”

²³⁶ Simon Deakin, *Regulatory Competition versus Harmonisation in European Company Law*, at 14.

²³⁷ *Ibid.*, at 12-13. Broad obligations provide legal uncertainty, because they cover a potential wider scope of cases and characteristics, which may come under judicial review. Within this uncertainty of “EU legal requirements” lies shift of power to initiate a review with the Court of Justice.

²³⁸ *Ibid.*, at 13; and Barend Van Leeuwen, *Private Regulation and Public Responsibility in the Internal Market*.

Nevertheless, it is important to be aware of the fact that the Court of Justice recognised the possibility for regulatory activities in specific sectors to exist. This regulatory power, however, must be exercised in a way compatible with the Treaty. This is possible because the Court of Justice recognised the possibility to justify the incompatibility of regulatory rules with internal market requirements. In this realm, the measure may be upheld if it seeks to “achieve a legitimate aim in this context and the measure is proportionate to the aim being pursued.”²³⁹ This possibility to avail is reflected in the power to justify regulatory measures on the basis of public interests, public policies, or other representative interests.

Although the Court of Justice in the framework of free movement law empowered private actors in the internal market, there is hardly any area of EU internal market law where the role of private actors has been more contested than in the area of free movement law.²⁴⁰ In particular, this is because the Court of Justice, with the decision in *Walrave and Koch*, expanded the legal obligations emerging from the treaties to private actors directly. The consequence being that the treaties provide the basis for legal obligations and constraints applied to the autonomy of private actors in the internal market.²⁴¹ Private actors are deprived of the freedoms guaranteed under national law and the principle of private autonomy through the Court-led development of free movement law.

If one departs from a public law perspective arguing that obligations that emerge from the treaties are only applicable to public entities because the treaties constitute public law this move of the Court of Justice may give rise to criticism. The problem in free movement law is that:

we are faced with a gap in the circle of addressees of the relevant norm. The usual solutions given by the Court have opted for an

²³⁹ Simon Deakin, *Regulatory Competition versus Harmonisation in European Company Law*, at 14-15.

²⁴⁰ For a list of commentaries see Nuno Ferreira, Joanna Krzeminska-Vamvaka, and Teresa Russo, *The horizontal effect of fundamental rights and freedoms in European Union Law*, at; and Mirjam De Mol, *The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination*, *Maastricht Journal of European and Comparative Law*, 18/1-2 (2011), 109-135; and Christoph Krenn, *A Missing Piece in the Horizontal Effect "Jigsaw": Horizontal Direct Effect and the Free Movement of Goods*, *Common Market Law Review*, 49/1 (2012), 177-216; and Eleanor Sharpston, *The Shock Troops Arrive in Force: Horizontal Direct Effect of a Treaty Provision and Temporal Limitation of Judgments Join the Armoury of EC Law*, in Miguel Poiares Maduro and Loic Azoulay (eds.), *The Past and Future of EU Law* (Hart Publishing, 2010); and Bruno De Witte, *The crumbling public/private divide: horizontality in European anti-discrimination law*.

²⁴¹ Joined Cases 177 and 178/82, *Van de Haar and Kaveka de Meern*, [1984] ECR 1797 at 11-12.

objective interpretation of the norms, in which the nature of the activity becomes decisive, irrespective of the actor. While this solution has the advantage of enhancing the effectiveness of Community law and bridging the gap in hand, it also blurs the line between the respective personal scopes of free movement law.²⁴²

Free movement law relates to the cross-border dimension of the internal market. The legal framework constructed by EU free movement law provides legal solutions for distortions or restrictions of cross-border economic activities. In other words, where the transition of one national market to the other is affected, restricted or distorted, EU free movement law is triggered. Free movement law has a clear dimension and sphere of application.

1.1 Expansion of free movement law

The counter-culture is reflected in free movement law by the expansion of the 'public obligations' emerging from the treaties to 'private' actors. In this regard, the distortion to the free movement principle emerges in a private relationship. Clearly, the problem addressed by the counter-culture in the context of EU free movement law is situations where private actors are in a position to affect the transition of other private actors from one Member State market to another Member State market. This power to distort the transition in cross-border situations gave rise to a continual expansion of obligations under primary law to private actors raising many legal and practical issues.

Starting with *Walrave and Koch*, the Court of Justice expanded the prohibition of discrimination on grounds of nationality to organisations that regulate "in a *collective manner* gainful employment and the provision of services."²⁴³ This was justified by the famous reasoning of the Court of Justice that referred to the fundamental objectives of the Community having the aim to abolish obstacles to freedom of movement of persons, services, and capital. The fundamental objectives,

²⁴² Julio Baquero Cruz, 'Between competition and free movement : the economic constitutional law of the European Community', at 85.

²⁴³ Case 36/74, *B.N.O. Walrave and L.J.N. Koch v. Association Union cyclist internationale, Koninklijke Nederlandsche Wielren Unie et Federacion Espanola Ciclismo*, [1974] ECR 1405 at 17.

would be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law.²⁴⁴

In order to create an area without internal frontiers the Court of Justice focused on the neutralisation of obstacles. This functional approach permeates throughout the jurisprudence of the Court of Justice when determining if private actors come within the scope of free movement law or not. For example, in *Bosman*, the Court of Justice clarified that collective actors are obliged to not impair free movement law. The Court of Justice held that the transfer rules for professional football players “constitute an obstacle to freedom of movement for workers prohibited in principle by Article 48 of the Treaty.”²⁴⁵ Put differently, any obstacle that affects the free movement of workers emerging from rules adopted by collective bodies, associations or organisations, is subject to scrutiny under free movement law.

*Viking*²⁴⁶ and *Laval*²⁴⁷ are cases that relate to the activities of trade unions. This is interesting because their activities differ from the entities addressed in *Walrave and Koch* and *Bosman* where the regulatory power was evident. Trade unions represent collective interests, and organisation of workers on the basis of collective interests is understood as a means to enhance their power in the labour market. The objective is to conclude *an agreement, which is meant to regulate the work of employees collectively* with employers or representatives of employers. This regulatory power of trade unions is recognised by the Court of Justice:

64 It must be added that, contrary to the claims, in particular, of

²⁴⁴ Ibid., at 18. We find a similar reasoning and justifications to expand the obligations to private actors for example in Case C-176/96, *Lehtonen and Castors Canada Dry namur-Braine ASBL v. FRBSB* [2000] ECR I-0268; and Case C-415/93, *Bosman* [1995] ECR I-4921; and Case C-325/08, *Olympique Lyonnais v. Olivier Bernard*, [2010] ECR I-2177; and Case C-438/05, *International Transport Workers Federation and Finnish Seamen's Union v Viking Line ABP and OU Viking Line Eesti*, [2007] ECR I-10779; and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.

²⁴⁵ Case C-415/93, *Bosman* [1995] ECR I-4921 at 104.

²⁴⁶ Case C-438/05, *International Transport Workers Federation and Finnish Seamen's Union v Viking Line ABP and OU Viking Line Eesti*, [2007] ECR I-10779.

²⁴⁷ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.

ITF, it does not follow from the case-law of the Court referred to in paragraph 57 of the present judgment that that interpretation applies only to quasi-public organisations or to associations exercising a regulatory task and having quasi-legislative powers.

65 There is no indication in that case law that could validly support the view that it applies only to associations or to organisations exercising a regulatory task or having quasi-legislative powers. Furthermore, it must be pointed out that, in exercising their autonomous power, pursuant to their trade union rights, to negotiate with employers or professional organisations the conditions of employment and pay of workers, trade unions participate in the drawing up of agreements seeking to regulate paid work collectively.²⁴⁸

While the Court of Justice has expanded legal obligations to private regulatory power under the free movement of workers and the free movement of services, this did not occur under the free movement of goods. *Commission v. France*²⁴⁹ and *Schmidberger*²⁵⁰ involved *collective activities* of private groups that distorted the free movement of goods. The Court of Justice did not expand the obligation flowing from the free movement of goods to these actors.

The most contested expansion of legal obligations to private actors is found with regard to employers under the free movement of workers provision. *Angonese* concerned the employment application of Roman Angonese for a position at the Cassa di Risparmio, a bank in the region of Bolzano. His application was refused on the basis that he was not in possession of a specific certificate on bilingualism although he was fluent in the languages (Italian and German) that were the required for the post.²⁵¹ The Court of Justice declared that the requirement to be in possession of the specific certificate on bilingualism was in violation of EU internal market law due to its discriminatory character against those applicants that were not in a position to obtain the certificate, which was only granted in

²⁴⁸ Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779 at 60 and 64-65.

²⁴⁹ Case C-265/95, *Commission v. French Republic (Strawberries)*, [1997] ECR I-6959.

²⁵⁰ Case C-112/00, *Eugen Schmidberger v. Republic of Austria* [2003] ECR I-5956

²⁵¹ Case C-281/98 *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*, [2000] ECR I-4139 at 5.

the region of Bolzano.²⁵² The Court of Justice held that:

40. ... the obligation to obtain the requisite Certificate puts nationals of other Member States at a disadvantage by comparison with residents of the province.²⁵³

Angonese is a striking case because the Court of Justice expanded the obligation to not discriminate on grounds of nationality emerging from the Treaty provision, in the context of the freedom of movement of workers, to the employer.²⁵⁴ As a consequence of this expansion, the notion of regulatory power as addressed under EU free movement law needs some reconsideration.²⁵⁵ This development assumes that regulatory power is not defined in a 'national' context, but in a situational functional context. However, this comes with different problems: What is public? What is private? Why are some actors addressed directly and others not?

1.2 Conceptual uncertainty

The problem with the expansion of the treaty provisions to directly bind private actors is the uncertainty of the personal scope of the treaty provisions on free movement. The issue to which the concept of responsibility of private actors relates in relation to EU free movement law is one of a horizontal effect on the treaty provisions. The problem is one of social roles and positions and, in terms of EU free movement law, the legal requirements that are attached to these positions. The treaty provisions on free movement do not define personal scopes.

²⁵² *Ibid.*, at 35.

²⁵³ See *ibid.*, at 40.

²⁵⁴ Case C-317/14, *Commission v. Belgium*, of 5 February 2015 (not yet reported) at 19 and 27-31.

²⁵⁵ Many scholars aimed at addressing this phenomenon through the concept of horizontal effect. The problem with the concept of horizontal effect is that it only addresses and tries to explain the consequences of the expansion of the obligations emerging from the treaty provisions. This is the direct application of the treaty to private (horizontal) relationships. For example see: Case 36/74, *B.N.O. Walrave and L.J.N. Koch v. Association Union cyclist internationale, Koninklijke Nederlandsche Wielren Unie et Federacion Espanola Ciclismo*, [1974] ECR 1405. Case 13/76, *Gaetano Dona v Mario Mantero*, [1976] ECR 1333 at 6; and Case 2/74, *Reyners v. Belgium*, [1974] ECR 631. Marek Safjan and Przemyslaw Miklaszewicz, 'Horizontal Effect of the General Principles of EU Law in the Sphere of Private Law', *European Review of Private Law*, 18/3 (2010), 475-486 at 477; and Eric Engle, 'Third Party Effect of Fundamental Rights', *Hanse Law Review*, 5/2 (2009), 165-173 at 165; and Robert Alexy, 'A Theory of Constitutional Rights' (Oxford: OUP 2010), at 356; and Nuno Ferreira, Joanna Krzeminska-Vamvaka, and Teresa Russo, 'The horizontal effect of fundamental rights and freedoms in European Union Law', at 8; and Arthur Hartkamp, 'The Effect of the EC Treaty in Private Law: On Direct and Indirect Horizontal Effects of Primary Community Law', at 529 and 546.

Rather, the Court of Justice on a case-to-case basis determines the scope of the treaty provisions for which methodological and dogmatic considerations are missing.

In reviewing the counter-culture as it emerged in the context of EU free movement law this section intends to shed light on the Court of Justice's motivation in expanding the scope of the treaty provisions to private actors. The argument put forward is simple; the expansion of obligations to private actors is not arbitrary but reflects a vision on how a specific internal market for goods, labour, services, or capital is organised in terms of economic interests and powers, i.e. regulatory authority. The consequence of which is that the Court of Justice recognises forms of private regulatory power where these actors occupy vested positions in a specific market (e.g. a submarket to the labour market) that is organised in a national context.

2. The effective attainment of economic integration under EU internal market law

EU free movement was set up with a clear objective: the unification of national markets. In functional terms, free movement law is a legal instrument to ensure economic integration. This relates to the specific nature of the internal market and the problem of national markets that are considered as closed and internally organised systems. The objective of EU internal market law is to economically integrate different national markets being subject to different regulatory forces. Free movement provisions are, in their specific context of application, a means to counter the nationalistic and protectionist regulatory measures that affect the unification of the market and accordingly the equality of opportunities of private actors. This is why free movement law addresses situations of regulatory power (effective power vis-à-vis other actors in the context of free movement activities) that affect the transition of one market to another. The classic form of *regulatory power in a national environment is the state and its organs*.²⁵⁶ There is no debate about the fact that Member States are constrained in their regulatory powers by free

²⁵⁶ Case C-447/09, *Reinhard Prigge*, [2011] ECR I-8003 at 27. Also consider the views expressed in Morton J. Horowitz, *The History of the Public/Private Distinction*; and Alf Ross, *On the Concepts "State" and "State Organs" in Constitutional Law*, *Scandinavian Studies in Law* 113, 5 (1961), 113.

movement law. Ever since the decision in *van Gend en Loos*,²⁵⁷ free movement law has been applied to Member States activities so as to prevent an arbitrary partitioning of the internal market. In this regard free movement law did not replace or amend national law, but required that free movement be ensured.²⁵⁸

The problem with free movement law as it emerged under the treaties is that it does not specify 'positions' or class of actors, which are considered to hold regulatory power in the context of EU free movement law. Put differently, it can be asked, 'when do private actors hold regulatory powers within the meaning of free movement law?'

The expansion of obligations is a legal consequence of actors that are recognised as occupying vested positions within the framework of EU internal market law. In other words, private actors are other sources of authority (i.e. forms of governance) within a certain market context that is governed by EU free movement law. In this regard they relate to and compete with EU internal market law as systems of governance for a specific sector/part of the internal market. The legal constraints imposed on these actors determine the relationship they have with EU internal market law and the position they have in the internal market. They are recognised as legal subjects within a certain context and are legally empowered to affect others, unless this distorts the rights of others. Nevertheless, deviation from the legal requirements imposed by EU free movement law may be justified for overriding reasons. The underlying objective of the allocation of obligations to these actors is to ensure that economic integration is not distorted.

Regulatory power within the meaning of free movement law relates to the power to hinder the transition from one Member State market to another. The test adopted by the Court of Justice is effects-based and of a functional nature. The

²⁵⁷ See Case 26/62 *N.V. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse administratie der belastingen* [1963] ECR I at 12. "The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage."

²⁵⁸ Simon Deakin, '*Regulatory Competition versus Harmonisation in European Company Law*', at 14. "Where the Court rules that a particular body of regulation is contrary to the principle of free movement it limits the autonomy of the member States and thereby restricted the scope for differentiation and experimentation at state level."

focus of the Court of Justice is on the effects that activities by private actors have on the objective of economic integration in relation to a specific market context (i.e. does it have an effect on transition). The public or private nature of actors is irrelevant for the scope of application of the treaty provisions. Thus, the focus is on relative strength between competing economic interests. As a tool to ensure an effective functioning of the internal market in terms of economic integration, the obligation is allocated to positions of power under national law that are capable of hindering the transition of other actors from one market to another. This addresses an asymmetry of power between an economic actor occupying a position of power under national law and an economic actor that wants to have access to a specific national market.

Similarly, the Court of Justice's approach reflects a view or a philosophy about the internal market and the effective integration thereof. National markets are far from being closed systems. Within Member States, different forms of regulatory power have emerged. For example, parts of the economy are regulated through laws and regulations adopted by public authorities. However, other parts are regulated free from public intervention. This emerged as a consequence of the increasing demand for state-free interaction between private actors to engage in economic activities.²⁵⁹ Private law and private autonomy are the key concepts in relation to this form of self-organisation of the economy. The freedom to associate and the freedom of contract are concepts from which regulatory power emerges in a market context, they are not public in nature.²⁶⁰ In the labour market especially, private regulatory activities negotiated between social partners are an important technique to structure the labour markets, wages, and employment-related issues.²⁶¹ The question is 'to what extent do these forms of private regulatory power come within the scope of EU internal market law?'

The Court of Justice acknowledges this diversity and fragmentation in terms of potential private regulatory power that emerged under the umbrella of private autonomy as a source of distortion to the objectives of EU free movement law.

²⁵⁹ In this regard the emergence of space for private interaction can also be construed as a form of delegation of public power to private actors.

²⁶⁰ See Morton J. Horwitz, *'The History of the Public/Private Distinction'*; and Gareth Davies, *'Freedom of Movement, Horizontal Effect, and Freedom of Contract'*.

²⁶¹ For example see Case 43/75 *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] ECR 455; and Case C-281/98 *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*, [2000] ECR I-4139.

The technique developed by the Court of Justice assumes that economic integration and the reconciliation with positions under national law must be determined on a case-by-case basis and for every market context individually.

3. Forms of private regulatory power

The idea that private actors can occupy positions bound up with regulatory power in free movement law is not new and did not emerge with the cases cited above. The Treaty itself recognised private regulatory power in the context of free movement of goods. Although specified in the form of an exception to the free movement of goods, the treaty sets out that:

the provisions of Article 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of ... *the protection of industrial or commercial property*. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.²⁶²

The idea of regulatory power is reflected in the power to restrict the marketing of products that are protected under national industrial and commercial property rights in a specific national market. It is a specific legal position (i.e. defined by the property right) under national law for which EU internal market law recognises the capacity of the right-holder to affect the free movement rights of others. This effect was referred to in *Deutsche Grammophon*. Although the Treaty,

permits prohibitions or restrictions on the free movement of products, which are justified for the purpose of protecting industrial and commercial property, Article 36 only admits derogations from that freedom to the extent to which they are justified for the purpose of safeguarding rights, which constitute the specific subject matter of such property.²⁶³

²⁶² See Article 36 TFEU emphasis added.

²⁶³ Case 78/70, *Deutsche Grammophon v. Metro*, [1971] ECR 489 at 12.

Consequently, the exercise of this right is subject to review under EU internal market law and the Court of Justice determined that a national trademark, *in the absence of EU wide harmonisation*, may be needed in order to protect industrial and commercial property.²⁶⁴ For the time being there is no EU wide harmonisation and EU internal market law accepts the national property rights. The exercise of these rights, however, must be compatible “with the observance of the conditions of competition and unity of the market which are so essential to the Internal market.”²⁶⁵

A similar approach is found in Regulation 1612/68/EEC with regard to the free movement of workers where “collective and individual agreements” have an impact on the effectiveness of EU free movement law. Article 7(4) of Regulation 1612/68/EEC recognises that collective and individual agreements have some regulatory power with regard to employment and occupation. The consequence of which is that all collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment remuneration and other conditions of work or dismissal may not discriminate on grounds of nationality. The situation of free movement law is special. With the exception of Regulation 1612/68/EEC and the industrial and commercial property exception, EU internal market law does not define roles or positions that are bound up with regulatory power and are ‘accepted’ in the context of free movement law. However, the allocation of obligations to private actors assumes that these actors hold regulatory power in the meaning of EU free movement law. For example, in the case of *Walrave and Koch*, the Union Cycliste Internationale (UCI) was constrained in their activities by the legal obligation to not discriminate on grounds of nationality when it regulates the conditions for participating at world cycling competitions.²⁶⁶ Allowing discriminatory treatment in a closed private system of self-regulation would compromise the fundamental objectives of the EU, which is to create an internal market without internal frontiers.²⁶⁷ At the

²⁶⁴ Robert Alexy, 'A Theory of Constitutional Rights', at 355; and Sibó Banda, 'Taking Indirect Horizontality Seriously in Ireland: A Time to Magnify the Nuance', *Dublin University Law Journal*, 16/1 (2009) at 2; and Christoph Herrmann and Chiara Perfumi, 'France', in Gert Brüggemeier, Aurelia Colombi Ciacchi, and Giovanni Comandè (eds.), *Fundamental Rights and Private Law in the European Union Vol.1* (Cambridge: CUP, 2010), at 206.

²⁶⁵ Case 40/70, *Sirena v. EDA*, [1971] ECR 69 at 10; and Case 78/70, *Deutsche Grammophon v. Metro*, [1971] ECR 489 at 12.

²⁶⁶ Case 36/74, *B.N.O. Walrave and L.J.N. Koch v. Association Union cyclist internationale, Koninklijke Nederlandsche Wielren Unie et Federacion Espanola Ciclismo*, [1974] ECR 1405 at 16f.

²⁶⁷ *Ibid.*, at 18.

same time although not explicitly, the obligation recognises the competence of the UCI to regulate collectively *the gainful employment or provision of services* in relation to professional cycling. This is reflected in the fact that the Court of Justice does not prohibit the regulatory function, but confines it. The UCI is free to regulate the conditions of employment and services for professional cyclists, but may not impose discriminatory requirements, which would uphold the partitioning of the internal market. In this case the obligation pursues a dual function: the allocation of legal obligations is a technique to *recognise* and *define* regulatory power at the same time.

3.1 Regulatory power of private actors in free movement law

The majority of cases discussed above address collective forms of power.²⁶⁸ The regulatory power of these entities is evident. By their very nature they are set up to regulate a common interest. The idea of collective power implies a form of organisation and in this regard, private regulatory power is to be distinguished from public regulatory power in terms of expertise. The organisation of private entities always relates to a specific objective or common interest. This is when individuals group together or set up entities that have, in terms of power, more strength in the market due to their organisation than single individual actors. The Court of Justice recognised this type of regulatory power to constitute a legal form of private power within the meaning of EU free movement law. The allocation of a legal obligation under the treaty implies that the recipient of the obligation fulfils specific institutional criteria, for example to represent a collective interest, which qualifies the actor to exercise regulatory power in the context of the internal market. Decisively, it is not that the exercise of this power must actually result in a distortion of the free movement, although this is likely to be the case when it is brought before the Court of Justice, but that a private activity has the potential to distort the transition from one Member State market to another.²⁶⁹

²⁶⁸ For example see Stephan Van De Bogaert, '*Horizontality: The Court Attacks*', in Catherine Barnard and Joanne Scott (eds.), *The Law of the Single European Market, Unpacking the Premises* (Hart, 2002).

²⁶⁹ On this effect see for example Case 251/83, *Haug-Adrion v. Frankfurter Versicherungs-AG*, [1984] ECR 4277.

One type of collective regulatory power relates to the creation of associations or organisations having a mandate to regulate a specific sector. This is the classical example of private regulatory entities. Power flows from the mandate to organise the sector and to affect the members of the association or organisation. Private bodies are set up with clear purposes or functions in a very specific sector.

The second type of collective regulatory power emerges in relation to the organisation of individual power. This is the case when groups of actors organise themselves so as to protect common interests. Power thereby relates to some representative mechanism or, put differently, an institutionalisation of individual power. Individual power is merged, into single or representative entities, in order to have stronger bargaining power in the market process.

3.1.1 Self-organisation

The first case where EU internal market law recognised forms of self-organisation as a valid form to regulate upon parts of the internal market was *Walrave and Koch*. *Walrave and Koch* concerned regulations of the UCI for the organisation of competitions in cycling. The case at hand concerned nationality requirements for teams, pacemaker, and stayer, to be of the same nationality if they want to compete in competitions organised by the UCI.²⁷⁰ The Court of Justice held that:

17. prohibition of such discrimination does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at *regulating in a collective manner gainful employment and the provision of services*.²⁷¹

Allowing discriminatory treatment in a closed private system of self-regulation would compromise the fundamental objectives of the EU, which is to create a internal market without internal frontiers.²⁷² It would lead to inequality between

²⁷⁰ Case 36/74 *Walrave and Koch*, *Opinion of Advocate General WARNER*, at 1422; and Case 36/74, *B.N.O. Walrave and L.J.N. Koch v. Association Union cyclist internationale, Koninklijke Nederlandsche Wielren Unie et Federacion Espanola Ciclismo*, [1974] ECR 1405 at 2-3.

²⁷¹ Case 36/74, *B.N.O. Walrave and L.J.N. Koch v. Association Union cyclist internationale, Koninklijke Nederlandsche Wielren Unie et Federacion Espanola Ciclismo*, [1974] ECR 1405 at 17. Emphasis added.

²⁷² Case 36/74, *B.N.O. Walrave and L.J.N. Koch v. Association Union cyclist internationale, Koninklijke Nederlandsche Wielren Unie et Federacion Espanola Ciclismo*, [1974] ECR 1405 at 18.

those actors subject to UCI rules and those that were not. The possibility to make use of EU internal market law, in terms of economic freedoms, would be severely impaired. Economic opportunities would be solely determined by the rules to form teams “of same nationality” as specified by the UCI.

What is drawn from *Walrave* and *Koch* is that collective regulation in terms of self-organisation for a specific market is ‘accepted’ in the internal market for labour and services. A factor that is relevant here is the notion of collective. It assumes that the regulatory power is somehow legitimated and limited to a specific context (i.e. representing the collective interests). A form of legitimation is institutionalisation or organisation that is set up to decide for the organisation of a specific profession. An authority or an organisation bestowed with regulatory powers is set up to organise the rules and regulations relating to the profession itself through a central organisation. The recognition of regulatory power in the internal market then involves an institutional element. The recognition of regulatory power in terms of self-organisation has very practical effects with regard to the market. This is referred to in *Wouters* where the Court of Justice recognised the *regulatory power* of the national bar association to regulate on the profession of lawyers so as to ensure the functioning of the profession in a specific national context:

210. The Court is therefore called upon to lay down criteria which will make it possible to strike a balance between, on the one hand, *the need to allow the professions a certain power of self-regulation* and, on the other, the need to avoid the risks of anti-competitive conduct inherent in the granting of such power²⁷³

Self-regulation may be a means to organise and structure a specific sector or profession in the market context. This comes with advantages such as the fact that the organisations may set quality standards or ensure codes of conduct. Self-regulation is a means to create an environment where competition may take place, which may also enhance competition on a transnational scale, particularly where competition emerges between different private regulatory bodies in different Member States (i.e. a form of regulatory competition between private entities). Those subject to private regulation may move to other Member States

²⁷³ Case C-309/99 *Wouters*, *Opinion of Advocate General LÉGER*, at 210.

and exercise their profession under the rules in force of the host state. This is not the case, however, when the regulations adopted are discriminatory or hinder other market participants in the transition from one market to another.

3.1.2 Collective bargaining

Another form of collective power emerged in the organisation of groups. This power is different from the power just described because the regulatory authority emerges from the organisation to represent collective interests. Whereas in the form of self-organisation regulatory power emerges from some institution set up, with collective bargaining the regulatory power emerges from the mere number of actors supporting the action. *Viking* and *Laval* are the central cases here.²⁷⁴ Regulatory power relates to what can be described as bargaining power. Individuals having the same interests group together so as to form strong alliances against competing interests.²⁷⁵ Collective power thereby is more of a representative nature.

65. There is no indication in that case law that could validly support the view that it applies only to associations or to organisations exercising a regulatory task or having quasi-legislative powers. Furthermore, it must be pointed out that, in exercising their autonomous power, pursuant to their trade union rights, to negotiate with employers or professional organisations the conditions of employment and pay of workers, *trade unions participate in the drawing up of agreements seeking to regulate paid work collectively*.²⁷⁶

²⁷⁴ Also see Joined Cases C-297/10 and C-298/10, *Sabine Hennigs*, [2011] ECR I-7965 at 67-68. “Where the right of collective bargaining proclaimed in Article 28 of the Charter is covered by provisions of European Union law, it must, within the scope of that law, be exercised in compliance with that law. Consequently, when they adopt measures falling within the scope of Directive 2000/78, which gives specific expression in the field of employment and occupation to the principle of non-discrimination on grounds of age, the social partners must comply with that directive.” Concerning the protection of workers see Case C-127/92, *Enderby*, [1993] ECR I-5535 at 22; and Case C-346/06, *Dirk Ruffert*, [2008] ECR I-1989; and Case C-113/89, *Rush Portuguesa*, [1990] ECR I-1417.

²⁷⁵ Neil McCormick, 'Taking Responsibility Seriously', at 171.

²⁷⁶ Emphasis added. Case C-438/05, *International Transport Workers Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779 at 65; and Alicia Hinarejos, 'Laval and Viking: The Right to Collective Action versus EU Fundamental Freedoms', *Human Rights Law Review*, 8/4 (2008), 714-729.

The power vested in collective entities is thus different than in the cases of *Walrave and Koch*, *Bosman* etc. *Viking* and *Laval* reflect an idea of power that is related to strengthening the economic interests of a specific group in the market context.²⁷⁷ It is a means to attain a stronger position in the market context and in negotiations with other economic actors.²⁷⁸ Regulatory power of trade unions emerges from the power to force other actors to engage in rule-making. For example, the power to require the entering of negotiations concerning conditions of labour is a regulatory power that has a clear regulatory effect on the market concerned.²⁷⁹ The only difference to self-organisation is that rules affecting the market emerge from negotiations between two parties.

Erny concerns the regulatory effects that collective agreements have on the free movement of workers, particularly if collective agreements are the basis for employment contracts.²⁸⁰ *Erny* emerged with regard to such a collective agreement, which formed the basis for his working contract. Mr Erny was a cross-border worker and as a part-time worker he was eligible for a top-up benefit during the period in preparation for retirement. However, the calculation for the top-up benefit did not take into account individual tax liabilities.²⁸¹ Consequently, Mr Erny claimed to be de facto subject to double taxation on the same top-up benefit, which results in discrimination.²⁸² The Court of Justice recognised the regulatory power and autonomy of social partners to conclude collective agreements and continued that the,

right of workers and employers, or their respective organisations,
to negotiate and conclude collective agreements at the appropriate

²⁷⁷ 77. In that regard, it must be observed that the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty and that the protection of workers is one of the overriding reasons of public interest recognised by the Court. Case C-438/05, *International Transport Workers Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779 at 77. Further see Joined Cases C-369/96 and C-376/96, *Arblade*, [1999] ECR I-8453 at 36; and Case C-165/98, *Mazzoleni*, [2001] ECR I-2189 at 27.

²⁷⁸ Wallace C. Peterson, 'Market Power', at 381.

²⁷⁹ Case 78/70, *Deutsche Grammophon v. Metro*, [1971] ECR 489 at 11.

²⁸⁰ Case C-172/11, *Georges Erny*, of 27 February 2014 (not yet published) at 22. Also see Case C-400/02, *Gerard Merida*, [2004] I-8471 at 26.

²⁸¹ Case C-172/11, *Georges Erny*, of 27 February 2014 (not yet published) at 22.

²⁸² *Ibid.*, at 23.

levels must be exercised in accordance with European Union law and, consequently, with the principle of non-discrimination.²⁸³

The acceptance of this collective power—in terms of representative power—is necessary to ensure “improved living and working conditions” and a proper social protection that is ensured through *dialogue between management and labour*.²⁸⁴ It is thus a way to regulate and ensure fair terms of competition on the basis of private initiatives. The right to collective action is a means for workers, through organisation, to balance the power of the employer. This idea of organisation reflects the market mechanism: this is to self-organise in order to improve the efficiency.²⁸⁵ Thus, the asymmetry power in the labour relationship is balanced by purely internal market means and not through external correction or intervention.

3.1.3 Capacity to justify

An important consequence of the recognition of regulatory power in the context of free movement law is that private entities may exercise this regulatory power. Private actors remain in charge for the organisation of a specific sector or for the representation of a specific interest in the internal market. The exercise of this power recognised under free movement law must be in compliance with the treaties. In case of competing interests, balancing of interests is the means to find the regulatory equilibrium between the objectives of self-organisation and the objectives of free movement law. EU internal market law recognises that self-organisation is bound up with the right to act for collective interests, even if this restricts the rights of others. The Court of Justice recognised the possibility for private actors to invoke justifications and exceptions to deviate from the legal requirements set out in the Treaty. In *Bosman*, the Court of Justice held that:

86. ... there is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health.

²⁸³ *Ibid.*, at 50.

²⁸⁴ Case C-438/05, *International Transport Workers Federation and Finnish Seamen's Union v Viking Line ABP and OU Viking Line Eesti*, [2007] ECR I-10779 at 79.

²⁸⁵ Orly Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought', at 369.

Bosman concerned, amongst others, the transfer rules for professional football players. *Olympique Lyonnaise* dealt with rules on compensation for transfers of youth players in relation to their first professional contract. The power to regulate in the name of the collective interest is recognised in both cases.²⁸⁶ Both sets of rules did not involve discriminatory elements. At stake were rules that affected the possibility of footballers to transfer to other clubs. In both cases the conflict was an internal one, between the interests of the individual and the interests represented by the organisation. So there may be the restriction of some interests for the benefit of the common good. In order to balance the competing interests, the Court of Justice analysed the legitimate aim invoked by the collective body and the requirements of proportionality on whether the rules on compensation for the education of youth football players may be justified. The Court of Justice clarified that:

38. [a] measure which constitutes an obstacle to freedom of movement for workers can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons in the public interest. Even if that were so, application of that measure would still have to be such as to ensure achievement of the objective in question and not go beyond what is necessary for that purpose.²⁸⁷

The proportionality test is applied if there is an obstacle to free movement law. This is likely if there is a discriminatory measure; but if there is only an obstacle, this must make movement unlikely.²⁸⁸ As a last step there is the test of whether the measure may be objectively justified, i.e. if it pursues a legitimate aim and if the measure adopted is proportionate to this aim.²⁸⁹ This entails the capacity of the private entity to invoke some common interests as legitimate grounds for the restriction of free movement rights of other individuals. Nevertheless, the material side of justifications, which is the scope of legitimate reasons that may

²⁸⁶ Case C-325/08, *Olympique Lyonnais v. Olivier Bernard*, [2010] ECR I-2177 at 38; and Case C-415/93, *Bosman* [1995] ECR I-4921 at 85-86.

²⁸⁷ Case C-325/08, *Olympique Lyonnais v. Olivier Bernard*, [2010] ECR I-2177 at 38.

²⁸⁸ Case C-176/96, *Lehtonen and Castors Canada Dry namur-Braine ASBL v. FRBSB* [2000] ECR I-0268 at 49; and Case C-415/93, *Bosman* [1995] ECR I-4921.

²⁸⁹ Case C-176/96, *Lehtonen and Castors Canada Dry namur-Braine ASBL v. FRBSB* [2000] ECR I-0268 at 51f.

be invoked, is limited. Collective entities are set up for specific reasons and their regulatory power within EU free movement law is limited to these objectives for practical reasons. If the scope of potential legitimate reasons was not limited, private entities could invoke any kind of justification for regulatory activities. Accordingly, the scope of legitimate interests that may be invoked is assessed against the interests and objectives that the collective entity represents. This is different to public authorities, for example, which enjoy a wider scope of 'legitimate aims' that may be invoked.

In *Viking* the Court of Justice held that collective bargaining might be accepted in the context of free movement of establishment, "only if it pursues a *legitimate aim* compatible with the Treaty and is justified by overriding reasons of public interest".²⁹⁰ The Court of Justice found that:

77. the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty and that the protection of workers is one of the overriding reasons of public interest recognised by the Court.²⁹¹

Similarly in *Wouters*, the Court of Justice recognised that within the power to regulate the law profession is the power to restrict free movement if legitimately justified. The Court of Justice recognised that the restriction to free movement is justified in light of the bar associations function to ensure the proper practice of the legal profession, as organised in the country concerned.²⁹²

Lastly, it should be noted that a different level of scrutiny is applied between private power in terms of self-organisation and private power in terms of collective bargaining. The Court of Justice developed a strict approach in reviewing the exercise of the collective power held by trade unions. Although, in

²⁹⁰ Case C-438/05, *International Transport Workers Federation and Finnish Seamen's Union v Viking Line ABP and OU Viking Line Eesti*, [2007] ECR I-10779 at 75; and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.

²⁹¹ Case C-438/05, *International Transport Workers Federation and Finnish Seamen's Union v Viking Line ABP and OU Viking Line Eesti*, [2007] ECR I-10779 at 77; and Joined Cases C-369/96 and C-376/96, *Arblade*, [1999] ECR I-8453; and Case C-165/98, *Mazzoleni*, [2001] ECR I-2189.

²⁹² Case C-309/99, *Wouters and Others*, [2002] ECR I-1653 at 122-123.

principle the Court of Justice recognises the power of trade unions to protect the interests of its members, in *Viking* this power had been severely restricted. A reason for this stricter review of regulatory power exercised by trade unions may be found in the nature of the power concerned. Both reflect a form of insider systems, which place a strong emphasis on stakeholder representation. Private power in terms of self-organisation may relate to either a strengthening of the inside in the form of self-regulation or of the outside in the form of strengthening one's own position in response to other 'powerful' actors. The difference is found in the interests involved. While self-regulation assumes the giving-up of self-interests for the collective organisation where one's own interests are secondary, collective bargaining aims to strengthen and to bundle self-interests vis-à-vis other economic actors. The openness to interests of outsiders varies accordingly. Therefore, in *Viking* the Court of Justice held that in relation to the use of collective action for the implementation of the flag of convenience policy, that:

88 ... in relation to the collective action seeking to ensure the implementation of the policy in question pursued by ITF, it must be emphasised that, to the extent that that policy results in ship-owners being prevented from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, the restrictions on freedom of establishment resulting from such action cannot be objectively justified.²⁹³

Although the collective action may be for legitimate interests it may not be exercised in a way that denies the holder of a vessel to negotiate terms of employment with social partners in other Member States. A policy like the flag of convenience policy of the International Transport Workers Federation (ITF) would deny the competition between Member States and workforces in these states, which is not accepted in light of free movement law.²⁹⁴

²⁹³ Case C-438/05, *International Transport Workers Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779 at 86-88.

²⁹⁴ See *ibid.*, at 89.

3.2 Actual and legal regulatory power of private actors

The similarity of these forms of collective private power and public regulatory power is evident, which also found its way into the legal literature referring to the collective entities as quasi-public actors in the internal market. The private actors concerned have a representative function and exercise some form of regulatory power, which is functionally similar to what public authorities do when they regulate (i.e. representing the interests of society). The power that is vested in the private entities emerges from the willingness of private actors to organise for collective interests. In economic terms, this is a technique to increase efficiency. For example, *Ronald Coase* refers to forms of organisation as an instrument to bundle resources and increase the internal effectiveness of competition.²⁹⁵ The reason for the recognition of collective entities to hold a form of regulatory power within the meaning of the free movement of workers and services takes into account the ideal organisation in the relevant markets. Private organisation, private autonomy, freedom of contract, bargaining, and collective organisation are natural elements of the labour market and the market for services. The importance of the possibility to organise in the market economy is touched upon in *Bosman*.²⁹⁶

79. As regards the arguments based on the principle of freedom of association, it must be recognized that this principle, ... is one of the fundamental rights which, as the Court has consistently held ... are protected in the Community legal order.²⁹⁷

Similarly, in *Viking* the Court of Justice recognised the importance of organisation of private power in relation to attaining social objectives.²⁹⁸ Collective or representative mechanisms relate to the representation of common interests in order to minimise costs for participation in the market or to ensure a system of fair competition among the members of the organisation or profession being regulated. Collective bargaining does so by uniting forces and associations

²⁹⁵ For example see Ronald Coase, *'The Nature of the Firm'*.

²⁹⁶ Also see Case C-309/99, *Wouters and Others*, [2002] ECR I-1653 at 122-123, where the Court of Justice accepted that self-organization "could reasonably be considered to be necessary for the proper practice of the legal profession, as organised in the country concerned".

²⁹⁷ Case C-415/93, *Bosman* [1995] ECR I-4921 at 79-80.

²⁹⁸ Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779 at 77.

through a harmonisation of standards with which all members must comply. It is a means to reduce costs and to make the functioning of a profession more efficient.²⁹⁹

A final point to be made concerns the existence of *actual regulatory power* and *legal regulatory power*. Actual regulatory power relates to the power capacity to affect others, while legal regulatory power is an 'accepted' kind of regulatory power within the context of EU internal market law, i.e. where private actors holding regulatory power are recognised as legal subjects in the constitutional structure of a certain market. In this respect, the Court of Justice interprets EU free movement law and determines what form of private power is considered an alternative form of governance within the internal market. Legal constraints and the possibility to justify and deviate from the requirements of EU free movement law are the consequence thereof. Ultimately, it is the Court of Justice and EU internal market law that determine what kind of private power is an integral part of the organisation of a certain market context and what kind of power is not. What is decisive is not the relative strengths, equal or unequal, stable or subject to periodic change of private actors, but the recognition of this private regulatory power to be a legal source of regulation in a certain context of the internal market. While the recognition of collective entities as holding a legal regulatory power in terms of EU free movement law is straightforwardly recognised, two exceptions emerged in the context of the free movement of workers and the free movement of goods that emphasise the distinction made between actual and legal power in a certain context governed by EU free movement law.

3.2.1 Exceptions to the collective power paradigm

In light of the Court of Justice's case-law it seems that collective organisation in general triggers the review of the exercise of regulatory power under EU free movement law, however, two exceptions have emerged. Firstly, the employer occupies a special position in the internal market for labour. The special position is, in the line of the argument put forward here, qualified by a regulatory power vested in the employer. This regulatory power has its basis in the contractual freedom and the private autonomy employers hold under national law in

²⁹⁹ For example think about the idea of organisation in a firm as proposed in Ronald Coase, '*The Nature of the Firm*'; and Neil Komesar, '*Imperfect alternatives*', at 98.

constituting the conditions of employment. The question is ‘why are employers treated similar to collective entities?’ Why do they hold legal regulatory power? Secondly, the Court of Justice, thus far, refused to expand the free movement of goods to private actors. A conceptual and methodological explanation for this is lacking. Thus, what is the difference between free movement of goods and the other freedoms? How can this adjudicative approach be reconciled in terms of the consistency of EU free movement law?

3.2.2 *Legal regulatory power of the employer*

The position of the employer within the context of EU free movement law is special. Like collective entities, the employer is addressed by obligations emerging from the treaties. The regulatory power does not emerge from some collective organisation, but it emerges from the position the employer holds in the national labour market. This refers to the fact that the employer has a monopoly on labour within a national context. EU internal market law, by establishing the internal market, creates an asymmetry of power between migrant workers on the one hand and employers on the other. This asymmetry is reflected in the power employers hold under national law—freedom of contract. The regulatory power of the employer emerges from the position of being able to affect the labour market by making choices on what labour and what work forces he desires.³⁰⁰ The monopoly the employer has with regard to labour in a national context provides the basis for *regulatory power*. Choices of the employer with regard to employment and occupation have the power to affect the transition of migrant workers from one Member State to another directly.³⁰¹

Actual regulatory power is turned into legal regulatory power because the employer is a vital component of the internal market for labour. The employer provides labour to the labour market, which is taken up by workforces. The problem in terms of the free movement of workers emerges where the employer

³⁰⁰ Offering a contract for employment has a regulatory effects, because it determines conditions ‘regulating’ the access to employment – the skills a worker must provide to qualify for the job.

³⁰¹ Power to make choices in relation to what skills workers should have. In this sense, any decision or requirement imposed by an employer is understood as a regulatory activity in terms of the market. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*; and Gareth Davies, *Freedom of Movement, Horizontal Effect, and Freedom of Contract*, at 810-811. Also reflected in Case C-281/98 *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*, [2000] ECR I-4139.

imposes conditions or requirements on vacancies that have a detrimental effect on migrant workers. This is why EU internal market law confers special rights on migrant workers in order to ensure equal treatment in relation to access and conditions of employment.³⁰² More importantly, this is the reason why employers are subject to legal obligations under the treaty. The ‘public’ position of the employer, which is reflected in the regulatory power to determine the conditions for competition of workforces, emerged as a consequence of the creation of an internal market for labour. The underlying idea is that workers should at least have the possibility to compete for positions in the internal market for labour. Competition is understood as the accountability mechanism in the context of the internal market for labour, and choices should be made on the basis of skills and suitability for the position rather than aspects relating to origin and nationality. The employer must be as objective as possible when advertising positions.

The *Angonese* case concerned the eligibility requirements that were set for the vacancy advertised by the Cassa di Risparmio di Bolzano. Having recognised the special position the employer has in the context of the common labour market, the Court of Justice held that choices in the labour market should be made on the basis of economic criteria.³⁰³ As the Court of Justice clarified, Article 45 TFEU is designed “to ensure that there is no discrimination on the labour market.”³⁰⁴ This is why obtaining a specific language certificate was considered as discriminatory on grounds of nationality. The Court of Justice did not rule out the possibility of imposing language requirements for specific positions, but the evidence for having an equivalent level of knowledge of bilingualism should be verifiable by objective means. Making the acceptance of bilingualism dependent on a specific certificate that can only be obtained in a specific region is de facto regulating the access to employment on a discriminatory basis.³⁰⁵

The scope of activities that are reviewed by the Court of Justice are limited to discriminatory measures. Although collective actors and employers are recognised as holding valid sources of regulatory power in the internal market for labour, the standard of review is different. The employer is only bound by the

³⁰² Case C-172/11, *Georges Erny*, of 27 February 2014 (not yet published) at 37.

³⁰³ Case C-281/98 *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*, [2000] ECR I-4139 at 35.

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid.*, at 40-41; and Case C-317/14, *Commission v. Belgium*, of 5 February 2015 (not yet reported) at 19.

requirement to not discriminate on grounds of nationality. Collective entities are subject to a standard of review that goes beyond discriminatory requirements since the Court of Justice's decision in *Bosman*. Ever since, any obstacle imposed on private actors to move from one Member State to another triggers the review under the freedom of movement of workers.³⁰⁶ Thus, it seems that the regulatory powers of private actors are assessed with regard to the partitioning effects for the internal market.³⁰⁷ While the reach of the regulatory power of the employer is relatively restricted in terms of partitioning of the internal market for labour, the reach of regulatory power of collective entities is wide. Consequently, the measures adopted and the activities exercised are subject to a wider review

3.2.3 Actual power in the free movement of goods

In contrast to the free movement of workers and the free movement of services, an expansion of legal obligations under the treaty to private actors in the context of the free movement of goods is barely noticeable.³⁰⁸ This is not due to the fact that the Court of Justice had no chance to deal with this issue, but rather that it decided to follow a different path. The most well-known relevant cases are *Commission v. France*, and *Schmidberger*. Both cases concerned private regulatory power in the context of the free movement of goods, because their actions were capable of affecting the transition of goods from one Member State to another.

In *Commission v. France*, the power of a farmers organisation, the '*coordination rurale*,' was at stake. The '*coordination rurale*' organised riots to block the import of Spanish strawberries onto the French market.³⁰⁹ In this sense, they were claiming to act in the interests of groups of farmers to protect their products. The Court of Justice found the '*coordination rurale*' actions came within the scope of the law for the free movement for goods and that their conduct was prohibited thereunder. However, reaching this decision, the Court of Justice followed a

³⁰⁶ Case C-415/93, *Bosman* [1995] ECR I-4921 at 85.

³⁰⁷ Case C-438/05 *Viking Opinion of Advocate General MADURO*, at 49. "The Court of Justice may apply different levels of scrutiny, depending on the source and seriousness of the impediment to the exercise of the right to freedom of movement, and on the force and validity of competing claims of private autonomy."

³⁰⁸ For example see Kamil Mortelmans, 'Towards convergence in the application of the rules on free movement and on competition?', *Common Market Law Review*, 38 (2001), 613; and Christoph Krenn, 'A Missing Piece in the Horizontal Effect "Jigsaw": Horizontal Direct Effect and the Free Movement of Goods', *ibid.* 49/1 (2012), 177-216.

³⁰⁹ Case C-265/95, *Commission v. French Republic (Strawberries)*, [1997] ECR I-6959 at 3.

different route; it created a positive obligation for the French authorities under Article 34 TFEU to prevent these kinds of distortions in the internal market for goods.³¹⁰

Schmidberger confirmed the *Commission v. France* doctrine and clarified that it is the Court of Justice that is the ultimate authority in determining the validity of restrictions to free movement law caused by private actors. *Schmidberger* concerned protests for the protection of the environment in Austria, which involved the blocking of the Brenner Autobahn for a couple of hours.³¹¹ The environmental group in charge of the protests clearly had the power to restrict the free movement of goods and did so with the permission of the national competent authorities.³¹² Following *Commission v. France*, the Court of Justice put the state authorities in charge of ensuring the free movement of goods, or alternatively of allowing restrictions where justified for overriding reasons.³¹³

In the absence of EU-wide regulation, the Court of Justice makes its decisions on the basis of its interpretation of the treaties. The decisions of the Court of Justice are normally understood as an invitation for the EU legislator to act and put the matter dealt with by the Court of Justice beyond doubt.³¹⁴ Although this is problematic as it requires the agreement of Member States this is exactly what happened shortly after the Court's decision in *Commission v. France* when Regulation (EC) 2679/98 was adopted. The Regulation clarifies that the only competent authorities in terms of regulatory power in the context of the free movement of goods are the Member States and the Commission.³¹⁵ With regard to distortion caused by forms of private power it is the Member States that should "take all necessary and proportionate measures with a view to facilitating the free movement of goods in their territory."³¹⁶

³¹⁰ This is commonly referred to as indirect horizontal effect in academic literature. It is indirect, because the obligation is channelled through the public authorities and national regulatory activities intended to comply with EU internal market law.

³¹¹ Case C-112/00, *Eugen Schmidberger v. Republic of Austria* [2003] ECR I-5956

³¹² *Ibid.*, at 2.

³¹³ *Ibid.*, at 38-39.

³¹⁴ Simon Deakin, 'Regulatory Competition versus Harmonisation in European Company Law', at 15.

³¹⁵ Council Regulation (EC) No 2679/98, *on the functioning of the internal market in relation to the free movement of goods among the Member State*, (OJ 1998/L 337/8) at Article 1(2) and Article 5(1).

³¹⁶ *Ibid.*, at recital 3.

In *Commission v. France* and *Schmidberger*, the actual power to affect the internal market for goods is not relevant. This is striking, because in *Viking* and *Laval* the same type of private power was recognised. The actual power held by the organisations in *Commission v. France* and *Schmidberger* is not recognised or accepted as a legal power within the context of the free movement of goods. The recent case of *Fra.Bo* adds some clarity to the legal framework of the free movement of goods and to the role of private actors in this context. The Italian company *Fra.Bo* wanted to import copper fittings into the German market and sought certification from the Deutschen Verein des Gas- und Wasserfaches (DVGW), a private certification body. The power to certify the products and decide on matters affecting the entry of the product onto the German market reflects a form of regulatory power vested in the DVGW.³¹⁷ The remaining problem with this case is the uncertainty as to whether the certification body should be treated as a real private actor or as an emanation of the state by the Court of Justice in the context of the free movement of goods. This uncertainty follows from the Court of Justice's concluding remarks, stating:

32. ... that Article 28 EU must be interpreted as meaning that it applies to standardisation and certification activities of a private-law body, *where the national legislation* considers the products certified by that body to be compliant with national law and that has the effect of restricting the marketing of products which are not certified by that body.³¹⁸

Despite the fact that the DVGW is a private law body,³¹⁹ and as such independent from public authorities in financial and regulatory terms, it seems that the empowerment through national law as a standardisation and certification body is the trigger for a review of its activities under the free movement of goods. *Fra.Bo* might be construed in a way that would support the idea that the Court of Justice would develop an approach à la *Walrave and Koch* in the context of the free movement of goods. Nevertheless, the Court of Justice in *Fra.Bo* recognises that the regulatory power of the DVGW is backed by national legislation. Thus, the real 'private' status of the DVGW is unclear and may give

³¹⁷ Case 171/11, *Fra.Bo Spa v. DVGW*, [2012] ECR 00000 at 31.

³¹⁸ *Ibid.*, at 32.

³¹⁹ *Ibid.*

rise for dispute. Similar to *Fra.Bo* the Court of Justice held in the *Pharmaceutical Society of Great Britain* that:

15 It should be stated that measures adopted by a professional body on which national legislation has conferred powers of that nature may, if they are capable of affecting trade between Member States, constitute 'measures' within the meaning of Article 30 of the Treaty.³²⁰

Again, the link to the national legislation is made. It remains to be seen if this doctrine is further followed and clarified by the Court of Justice. From this perspective it seems that *Fra.Bo* does not reverse the doctrine set in *Commission v. France*, and *Schmidberger*, but upholds and defines it. In terms of the horizontal effect of the free movement of goods the story continues.

Another point to be raised, in favour of no horizontal application on the free movement of goods is found in *Foster*. In *Foster* the Court of Justice had to decide on issues relating to the scope of application of Directives in the case of non-transposition, which excludes the horizontal effect. The Court of Justice considered that some private actors could come directly within the scope of Directives if they can be considered as an emanation of the state. The Court of Justice defined an emanation of the state as:

a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers beyond that which result from the normal rules applicable in relations between individuals.³²¹

In *Fra.Bo* and the *Pharmaceutical Society of Great Britain*, the Court of Justice explicitly referred to the national legislation that confers power on private actors. When reading the cases referred to above in the light of *Foster*, technically these bodies can qualify as emanations of the state because they have “been made responsible, pursuant to a measure adopted by the state.” This would confirm the

³²⁰ Case 266/87, *Pharmaceutical Society of Great Britain*, [1989] ECR 1295 at 14-15.

³²¹ Case C-188/89 *Foster v. British Gas plc* [1990] ECR I-3313 at 20.

picture presented earlier, that the free movement of goods has no horizontal application.

4. On unity, sectors, and EU free movement law

Much has been said about the unity of free movement law and unity in terms of consistency in the expansion of legal obligations to private actors is far from what has been shown in this chapter. While I can see the point in arguing and demanding conceptual and legal consistency and coherence of free movement law, my claim is that there cannot be such a thing as unity between the legal expressions of the principle of free movement simply because free movement law relates to different contexts. Additionally, the legal solutions and techniques to deal with situations of regulatory power emerge in a strictly contextual environment. If unity is of importance then this unity is found in the purpose of free movement law and how this deals with situations of private power and not in conceptual or methodological coherence among the different legal expressions of the different freedoms. In this respect, it must be clarified that free movement law relates to different sectors, each of which comes with its own ideal form of organisation of powers.

The best way to illustrate this contextual diversity is to think of the internal market as a package of four submarkets: the internal market for goods, labour, services, and capital. The combination of these ‘four’ markets constitutes the internal market. The legal context concerned—the free movement of goods, workers, services, or capital—matters for the decision to recognise private actors as holding legal regulatory power or not. The position that is assumed by private actors that hold legal regulatory power under EU free movement law is not natural, but rather a choice of the Court of Justice. The natural habitat of these entities that provides the basis for this power is national law. The choice to recognise private power as a legal power in the context of free movement law does not only relate to the position held in national law, but also to the context of EU free movement in which the position and power of private actors is assessed. The Court of Justice transforms a power held by private actors under national law, into a power in the context of the internal market and EU free movement law. The consequence of this power is that the actors concerned may

legally exercise this regulatory power in the internal market context, subject to the limits set by free movement law.

4.1 Different sectors

Free movement law is the legal expression of the principle of free movement. The four freedoms of free movement of goods, workers, services, and capital turned into a legal framework for the four different markets.³²² Figure 1 illustrates this development and the material difference between the four core markets. Although we commonly refer to the four freedoms as ‘EU free movement law’ this does not mean that the four freedoms follow similar dogmatic and methodological considerations. Each sector of free movement law implements the idea of free movement into a specific market: the internal market for goods, labour, services, or capital. In other words, *free movement law is contextual*. Free movement law responds to the dynamics and needs of each sector individually. It creates an internal market environment, which reflects the optimal organisation of political power in this specific market context.

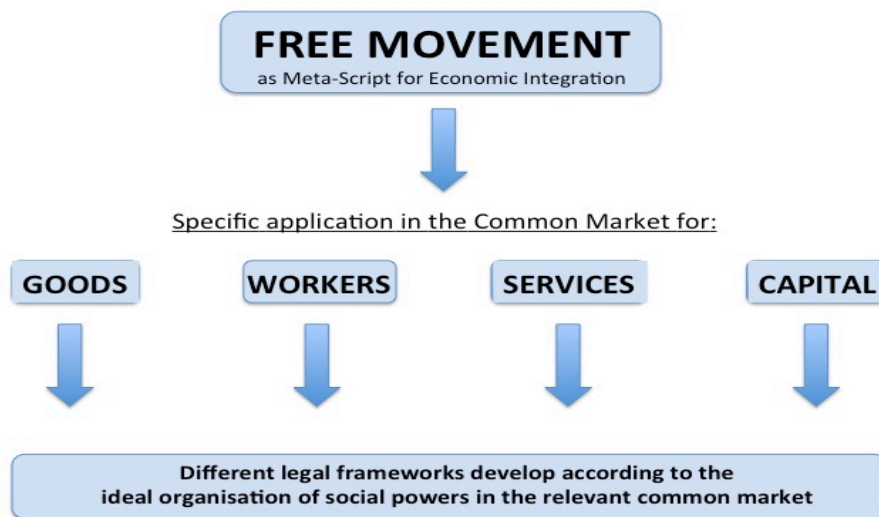


Figure 2 Layout of the different markets to which the principle of free movement applies

³²² Case 26/62 *N.V. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse administratie der belastingen* [1963] ECR 1 at 12; and Loic Azoulay, 'The force and forms of European Legal Integration', at 3.

The principle of free movement permeates each market context. However, the economic interests that the principle of free movement relates to differ between the four markets. Economic interests in relation to labour are different than those in relation to goods. The consequence is that different actors and different regulatory activities are reviewed in each sector.

Each freedom under free movement law provides the legal framework for a different sector or a different internal market. It is important to understand that EU free movement law relates to the organisation of different markets. This is made clear in *Sacchi*, for example, where the Court of Justice was concerned with the possibility of restrictions to different markets concerning goods and services. The *Sacchi* case questioned whether an exclusive right granted by a Member State to a limited company to make all kinds of television transmissions violates the free movement of goods. For our purpose, this case is interesting because the Court of Justice distinguished between the different material scopes of the free movement provisions concerned:

6. In the absence of express provision to the contrary in the Treaty, a television signal must, by reason of its nature be regarded as provision of services.³²³

7. On the other hand, trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals are subject to the rules relating to freedom of movement for goods.³²⁴

If we look at the case law concerning the prohibition of discrimination on grounds of nationality, this difference is elucidated. Free movement is the way through which the prohibition of non-discrimination on grounds of nationality is implemented in EU internal market law.³²⁵ In *Dona v. Mantero*, the Court of Justice held that:

³²³ Case 36/74, *B.N.O. Walrave and L.J.N. Koch v. Association Union cyclist internationale, Koninklijke Nederlandsche Wielren Unie et Federacion Espanola Ciclismo*, [1974] ECR 1405.

³²⁴ Case 155/73, *Guiseppe Sacchi*, [1974] ECR 409 at 6.

³²⁵ According to the Court of Justice the prohibition of discrimination on grounds of nationality is what “Article 7, 48, 59 [have] in common in their respective spheres of application”; see for

6. Article 7 of the Treaty provides that within the scope of application of the Treaty, any discrimination on grounds of nationality shall be prohibited. *As regards employed persons and persons providing services, this rule has been implemented by articles 48 to 51 and 59 to 66 of the treaty* respectively and by measures of the community institutions adopted on the basis of those provisions.³²⁶

Or in *Commission v. Greece*, the Court of Justice held that:

12. ... it should be pointed out first that the general prohibition of discrimination on grounds of nationality laid down in Article 7 of the Treaty has been implemented, *in regard to their several domains*, by Articles 48, 52 and 59 of the Treaty. Consequently, any rules incompatible with those provisions are also incompatible with Article 7.³²⁷

These examples are intended to clearly show that the different free movement provisions apply to different material contexts.³²⁸ These different contexts come with different ‘internal logics’ and different ideal organisations of regulatory power, even where multiple sources of regulatory authority exist in the same market. Each market—goods, workers, services, or capital—comes with its own ideal organisation. In this context, the recognition of legal regulatory power emerges and it reflects a choice that private actors may occupy positions in the internal market that are bound up with the exercise of regulatory power.

The development of the horizontal effect of the treaty provision through the Court of Justice reflects a philosophy underlying the different ideal organisations

example Case 36/74, *B.N.O. Walrave and L.J.N. Koch v. Association Union cyclist internationale, Koninklijke Nederlandsche Wielren Unie et Federacion Espanola Ciclismo*, [1974] ECR 1405 at 16; and Case C-176/96, *Lehtonen and Castors Canada Dry namur-Braine ASBL v. FRBSB* [2000] ECR I-0268 at 37-38; and Case C-281/98 *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*, [2000] ECR I-4139 at 35; and Case C-179/90 *Merci* [1991] ECR I-5889 at 11; and Case C-411/98, *Angelo Ferlini v Centre hospitalier de Luxembourg*, [2000] ECR I-08081 at 39.

³²⁶ Emphasis added. See Case 155/73, *Guisepppe Sacchi*, [1974] ECR 409 at 7; and Case 90/76 *van Ameyde v UCI* [1977] ECR 1091.

³²⁷ Emphasis added. See Case 305/87, *Commission v. Greece*, [1989] ECR 1461 at 12.

³²⁸ One sees a similar distinction made by the Court of Justice with regard to the different scope of different free movement provisions in Case 251/83, *Haug-Adrion v. Frankfurter Versicherungs-AG*, [1984] ECR 4277; and Case 62/79, *Coditel v. Ciné Vog Films*, [1980] ECR 881.

of the internal market for goods, workers, services, and capital. Collective organisations of private power were recognised as forms of legal regulatory power in the internal market. The approach adopted under EU internal market law reflects a preference for self-regulation and self-organisation, instead of regulatory intervention to enhance the efficiency in the context of the free movement of workers and services. This refers to the advantages of self-regulation and self-organisation over regulatory intervention. Whenever a group of private actors organises this originates in a common interest. The benefit of private organisation is that it directly reflects the interests of the individuals. The proximity to individual interests is higher than under statutory regulation. Private collective power is a valid source of influence for market dynamics. The advantage of this approach is the expertise and knowledge that private actors have in regulating a specific aspect of a sector. For example, the advantage of an agreement concluded between *management and labour* is that both parties concluded it.³²⁹ It is an agreement reached between the core actors in the market, the employer and the worker (i.e. through the social partner). Thus, both parties were involved in the negotiations and reached an agreement concluded by both.

Therefore, the direct allocation of obligations to private actors treats them as another source of normative authority within a national context. The problem with labour markets and service markets is the diversity of their organisation in different Member States. Each Member State adopts regulations ensuring compliance with free movement law in relation to the specificities of their national markets. This in turn increases the risk of distortions to economic integration due to the differences between national regulations. On the other hand, the direct binding of private actors holding regulatory power creates a level playing field at the EU level. All private entities fulfilling the criteria of collective entities or employer are bound by the same criteria. It even creates a field for competition between these actors. The technique adopted by the Court is the allocation of broad obligations. The legal uncertainty created gives a constant impetus to judicial review and in particular the assessment of the legitimate aims pursued.

³²⁹ Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779 at 79.

This approach is different for the free movement of goods, where the Court of Justice prefers centralised organisation in terms of statutory regulatory power. The rationale reflected in *Commission v. France*, and *Schmidberger* follows the idea of the internal market that the Court set out in *Cassis de Dijon*. This is an internal market for food based on free movement and mutual recognition.³³⁰ Food is treated as a good and as such is subject to the free movement of goods rationality. Once products are lawfully marketed in one Member State they are free to circulate in the internal market.³³¹ The choices relating to products are made through consumers only. In this regard, the individual interests of consumers matter and the choices of consumers function as the accountability mechanism in the internal market for goods. The acceptance of collective or individual actors to make representative choices in the internal market for goods would deprive the consumers of making their own choices. The consequence of which would be that the market process in relation to goods would not function efficiently. The only alternative regulatory power in the internal market for goods are public authorities or the EU Commission, when engaging in harmonising activities such as the regulation of food safety.

5. Liability

The consequence of the recognition of private regulatory power is that the role of national courts with regard to reviewing the regulatory activities of private actors increases. The regulatory nature of private actors is imbedded in national law. Accordingly, the limits of the rights on which the freedom of association or the rights of trade unions are based are determined in a national context. This is referred to in *Viking* where the Court of Justice clarified that:

85. it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent such collective action meets those requirements.³³²

³³⁰ See Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649.

³³¹ *Ibid.*, at 13-14.

³³² Case C-438/05, *International Transport Workers Federation and Finnish Seamen's Union v Viking Line ABP and OU Viking Line Eesti*, [2007] ECR I-10779 at 85; and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.

Under free movement law and EU discrimination law no general framework for liability is evident. Where private actors exercising public functions under EU internal market law violate the provisions of EU free movement law or EU discrimination law, this makes them subject to scrutiny by the Court of Justice. The Court of Justice does not, however, assess liability or impose specific coercive measures in cases of violation. The assessment of liability is done under national law by national courts. This is evident in *Viking*, for example. Concerning the legality of the collective actions organised by the Finnish Seaman Union (FSU) the Court of Justice held that:

85 ... even if it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent such collective action meets those requirements, the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance, based on the file in the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment.

87 As regards the question of whether or not the collective action at issue in the main proceedings goes beyond what is necessary to achieve the objective pursued, it is for the national court to examine, in particular, on the one hand, whether, under the national rules and collective agreement law applicable to that action, FSU did not have other means at its disposal which were less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into with Viking, and, on the other, whether that trade union had exhausted those means before initiating such action.³³³

With regard to liability, two issues follow: (1) The national court has sole jurisdiction to determine the liability of the entities exercising 'legal regulatory power' within the meaning of EU internal market law and (2) the Court of Justice

³³³ Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779 at 85 and 87.

is to provide an interpretation which should guide the national court in finding its judgment. It must enable the national court to balance an action protected under a national right against a right protected under EU internal market law. EU internal market law may incur liability if the national court in its assessment finds a violation of the EU internal market law. This is clear from *Laval*. *Laval* concerned the possible restriction of the freedom to provide services through collective measures. The Court of Justice found the restrictive effects of blocking premises in order to force the provider of services to enter into negotiations concerning employment conditions to be unjustifiable.³³⁴ The Swedish Labour Court followed this view and awarded damages against the trade unions for a violation of the freedom to provide services.³³⁵

Reasons for this cautious approach of the Court of Justice relate to the nature of both EU free movement law and EU discrimination law. Both disciplines address situations of power that have their basis in national law. In other words, national law is the basis for the power that the private actors have. These are the national rights of trade unions, national rights of association, or with regard to employers the national rights under the freedom of contract. From this perspective it seems reasonable to leave choices on liability to the national courts. It is a more efficient solution simply because national courts are better equipped to decide cases that emerged within their jurisdiction: they have better knowledge of facts, contexts, habits or practices.³³⁶

6. Remarks

The picture we get from this analysis is that private actors are recognised as alternative sources of regulatory authority in the internal market. This assumes that within the internal market and under the control of EU free movement law (and the Court of Justice) private actors occupying specific positions (e.g. the

³³⁴ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767 at 108f.

³³⁵ The Labour Court Judgment, Judgment No. 89/09 2009-12-02, , *Case No. A 268/04*, unofficial English translation: <http://arbetsratt.juridicum.su.se/Filer/PDF/ErikSjoedin/AD%202009%20nr%2089%20Laval%20English.pdf>.

³³⁶ Case 96/80, *J.P. Jenkins v. Kingsgate*, [1981] ECR 911 at 14; and Case C- 45/09, *Rosenbladt*, [2010] ECR I-9391 at 52.

employer, associations or trade unions) in certain markets are recognised as competent authorities holding some regulatory power in the internal market. This is reflected in the power to affect the structure of a certain market. The consequence of this status as legal subjects in the internal market is a review—similar to state actors—under the free movement provisions. However, it seems that different standards of review apply among the different strengths of regulatory power as observed in relation to the employer and collective entities. The position they occupy in a national context is Europeanised and confined by legal obligations. Free movement rights have the same legal force against public and private entities.

The construction of regulatory power within the meaning of EU free movement law as an ‘actor neutral concept’ within the internal market has very practical effects. The counter-culture, which emerged due to the functional application of the effects-test applied to regulatory power, filled a gap in national law. The gap relates to national law and situations where national law created spaces for private organisation or private power in certain contexts that are governed by EU free movement law (i.e. labour market, services market, goods market and capital market). National law always relates to national interests. Even private law and spaces for private economic action are framed in an overall national context and the national interests and objectives. In these spaces, self-organisation and actions based on private autonomy and freedom of contract were the central elements of the organisation of the national markets. From a free movement perspective these forms of private autonomy generated power that qualified these actors to distort the free movement rights of other economic actors in the transition between two markets.

This is seen in the labour markets where Member States delegated large parts of the organisation of labour (e.g. safety, payment, working hours or securities) to the social partners. The consequence is the emergence of a preference for forms of self-organisation in the labour market. The organisations holding powers in the national markets are representative bodies of the national workers, for example. Their understanding about possible effects in relation to transnational situations is relatively low. With the creation of the internal market, economic actors are no longer acting in national contexts only, but their activities also have effects for foreigners. The Court of Justice now also reviews private activities in light of the principles of free movement. The allocation of obligations implies an

educative purpose, which is intended to make those actors that hold regulatory power to take into account the interests of outsiders.

Chapter 3

Responsibility of Private Actors in EU Discrimination Law

Introduction

EU internal market law and the treaties are the key instruments that structure the economic and social integration of the internal market. For economic and social integration, EU internal market law provides different legal and social contexts. Economic integration is driven by the principle of free movement. The intention is to legally protect the access to foreign markets through which an optimal allocation of resources throughout the EU as a whole can be attained.³³⁷ The function and the objective of social integration are different. EU discrimination law, which implements EU social policy, ensures the social integration of individuals in the internal market for labour. It is concerned with the access to the labour market for individuals that are underprivileged for non-economic reasons. The dynamics of the market relationships would always search for the best and fittest competitor to occupy a specific position.³³⁸ Therefore, some actors would be excluded from the benefits of the market economy, or access to the market is particularly difficult for non-economic reasons.³³⁹ In a labour market based on contractual freedom elderly people, women, foreigners, or people having different sexual orientations are likely to be treated less favourably than others in the workforce. The underlying assumption is that their personal characteristics impose additional costs for the employer, therefore they are less attractive as potential employees.

³³⁷ Paul Craig and Grainne De Búrca, *'EU Law'*, at 605.

³³⁸ Consider Walter Eucken, *'Die Grundlagen der Nationalökonomie'* (8 edn.: Springer, Berlin, 1965). "Richtig verstandene Sozialpolitik ist für Eucken in einer Ordnungspolitik aufgehoben, die den Individuen Hilfe zur Selbsthilfe ermöglicht".

³³⁹ Neil Komesar, *'Imperfect alternatives'*, at 102.

The EU social policy accompanies the economic freedoms and complements the “ideal of the internal market.”³⁴⁰ The ideal of the internal market is an open market policy. This assumes that the internal market shall be open to any entity seeking employment or occupation under fair and equal conditions of employment. It is reflected in EU free movement law that ensures the transition from one market to another, and in EU discrimination law that seeks to legally structure access to the labour market for economically disadvantaged individuals. The objective of EU discrimination law is to implement the principle of equal treatment in employment or occupation.³⁴¹

Both economic and social integration are essential for the functioning of the internal market. In the context of EU internal market law social exclusion of specific groups of individuals is considered as a distortion to the functioning of the internal market for labour. The importance of the social objective was emphasised by the Court of Justice stating that:

9. ... in the light of the different stages of the development of social legislation in the various Member States, the aim of Article 119 is to avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers as regards pay.

10 Secondly, this provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and

³⁴⁰ With regard to social integration as a social ideal underlying the internal market see COM(93)551 final on European Social Policy, of 17 November 1993, 23. On the dual objective of social policy see Case 43/75 *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] ECR 455 at 7-9. Mark Bell, 'The Principle of Equal Treatment: Widening and Deepening', in Paul Craig and Grainne De Búrca (eds.), *The Evolution of EU law* (Oxford: OUP, 2011), at 612; and Case 80/70 *Defrenne (I)*, *Opinion of Advocate General DÜTHEILLET DE LAMOTHE*, at 455.

³⁴¹ Directive 2000/78/EC, of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, (OJ L 303, 02/12/2000 P. 0016), Article 1.

working conditions of their peoples, as is emphasized by the Preamble to the Treaty.³⁴²

Similar to the free movement provisions, the principle of non-discrimination has constitutional status. However, the objective relates to the social objectives of the economic constitution. In this respect, the principle of non-discrimination is a means to compensate for the inherent deficits of the market economy with regard to the principle of equality. EU discrimination law provides a harmonised approach to deal with situations of social exclusion.

1. EU social policy

Equality in the labour market does not relate to the idea of formal equality, but to the idea of equality of opportunity.³⁴³ Every individual should have access to the same opportunities. The problem with regard to equality of opportunity is the deficit of the market economy and the economic process to deliver equality in practice. A labour market based on individual choice accommodates individual preferences and as such provides a basis for discriminatory treatment and the exclusion of certain groups of people, particularly economically 'inefficient' actors.

The problem addressed under EU social policy relates to the labour market and its deficiency in providing equal opportunities for all private actors. The central question in terms of social equality and social justice is how to deal with this problem of social exclusion, which is inherent in the market process. The predominant solution in Member States is to compensate the actors being disadvantaged by the market economy through public schemes. Early retirement schemes or social security schemes were intended to compensate, through public funds, those excluded from the economy and market. The role of public authorities in attaining social equality is central and reflects a compensatory approach whereby those disadvantaged by the economy are compensated by the public authorities. One problem with this system is that it produces immense costs for the public sphere and reduces costs for the private sphere, which, for

³⁴² Case 43/75 *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] ECR 455 at 9-10.

³⁴³ Case C-409/95, *Hellmut Marshall*, [1997] ECR I-6363 at 29-30. Mark Bell, 'The Principle of Equal Treatment: Widening and Deepening', at 632-633.

example, does not need to carry the potential costs of hiring elderly or disabled people (i.e. higher costs due to special measures needed to accommodate these workers in the workplace).

The internal market is based on an alternative approach for dealing with social exclusion: the open market policy.³⁴⁴ This assumes that the labour market shall be open to any entity seeking employment or occupation under fair and equal conditions. EU discrimination law legally protects this open market policy. The prohibition of discrimination turns into the primary *Ordnungsprinzip* of the labour market that is governed by EU internal market law. Social integration is attained through a complex legal framework that empowers private actors (that are likely be excluded) to participate in the labour market through the allocation of rights to equal treatment. At the same time, legal constraints are imposed on employers in the form of legal obligations to not discriminate on grounds of age, gender, religion, disability, race, sexual orientation, and belief. Under the new approach, social equality is attained by legally protecting equal opportunities to participate in the labour market for actors that are likely to be disadvantaged.

This ‘new approach’ to attain social justice—from compensation to participation—has had a significant impact on the role of employers in the context of the labour market. First through the Court of Justice and later through a detailed regulatory framework, the role of the employer qua legal subject in the internal market has been legally defined. EU internal market law changes the attitudes of employers, which had previously enjoyed much discretion about choosing employees under the principle of contractual freedom in national laws. Social aspects were within the public domain and statutory solution. EU internal market law changes this and defines a more active role for employers in attaining social integration of individuals into the internal market for labour and as a consequence thereof in relation to the attainment of social justice.

³⁴⁴ The EU Commission refers to the importance of the EU social policy in relation to the internal market for labour. “If the aim of social policy is to assist individuals to take care of themselves and, as far as possible, to perform a useful role in society, only new and innovative combinations of work and welfare are likely to achieve that goal for vulnerable people at risk. There is a consensus in Europe that all citizens should have a guarantee of resources but social policies now have to take on the more ambitious objective of helping people to find a place in society. The main route, but not the only one, is paid work – and this is why employment policies and social policies should be more closely linked.” See COM(93)551 final 21.

The internal market for labour not only provides for the benefit of employees but also simultaneously benefits the economies of the Member States. This is because the internal market for labour creates an environment where workers can move freely and seek employment. This reorganisation relates to an idea of economic efficiency.³⁴⁵ Inclusion of marginalised groups into the labour market increases competition among the workforce and relaxes the social expenses for Member States.

1.1 The idea of a internal market for labour

The labour market, like any other market, functions on the basis of supply and demand.³⁴⁶ The importance of the employment relationship is vested in the fact that employer and employee, through their activities, determine the supply and demand curves of the market. Employer and employee reflect the correlating economic interests underlying the labour market. It is through their choices that supply and demand in the labour market are shaped. For example, let's consider a company owner that intends to expand his company. As an employer he needs to find new employees; he creates a demand for a workforce.³⁴⁷ Workers can supply labour in return for payment. In this equation supply and demand are correlative. If there is little demand for workers and a high supply of workers the salary might decrease because the workers have to compete for the few positions available, i.e. they might offer their services for less payment. Equally, if there are few workers and a high demand for workforces, this might benefit the workers as the value of the workforce increases. Other factors, for example, skills required, experience, and education might also affect this market.

Labour has an important status under EU internal market law. Not only does labour constitute one of the four core markets of EU internal market law, but in more practical terms, in the EU labour and gainful employment is a means through which individuals can improve their economic and social positions in society. Participation in the labour market is seen as a mechanism for individuals

³⁴⁵ Directive 2000/78/EC, recital 8. Further see COM(89) 568 final, 51, Becker, *The Economics of Discrimination* at 19.

³⁴⁶ To this effect see Neil Komesar, *'Imperfect alternatives'*.

³⁴⁷ This could also be the other way around – work in terms of supply and workforce in demand for labour. However, in any way there is an asymmetric and interdependent relationship between employer and employee.

“to improve their position.”³⁴⁸ Gainful employment and the opportunities to find work,

must be one of the means by which workers are guaranteed the possibility of improving their living and working conditions and promoting their social advancement, while helping to satisfy the requirements of the economies of the Member States. The right of all workers in the Member States to pursue the activity of their choice within the Union should be affirmed.³⁴⁹

The problem with social exclusion is evident here. Social inclusion is the means through which individuals can improve their living and working conditions and advance in social life. It recognises that “every individual is of equal worth and should have fair access to the opportunities of life.”³⁵⁰

EU discrimination law deals with the specific problem of the social exclusion of outsiders in the internal market for labour, which in turn distorts the functioning of the labour market in terms of allocative efficiency.³⁵¹ The internal market for labour can only function efficiently, in terms of efficient allocation of resources, where it is characterised by equal access. One side is economic freedoms, which are intended to ensure the optimal allocation of economic resources among different Member States. The other side of the internal market for labour relates to the social objectives and social inclusion. This deals with the inclusion of resources into the internal market for labour that were treated less favourably before.

³⁴⁸ COM(93)551 final 21.

³⁴⁹ Regulation (EU) No 492/2011, of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ L 141, 27.5.2011, p. 1–12), recital 4.

³⁵⁰ COM(2008)420 final, Non-discrimination and equal opportunities: A renewed commitment, of 2 July 2008, 2.

³⁵¹ “Whether the rich get richer or the just are rewarded in the market process depends on the parameters of market participation. The costs of participation include the unwillingness of others to deal with individuals due to racial, ethnic, or gender differences. These costs are also related to education and experience gained from prior exposure to market activity and, therefore, to individual or family wealth. To the extent that per capita stakes and the costs of market participation vary according to such individual characteristics as wealth, income, education, sex, race, and birth, the analysis of participation provides important insight into the role of the market process in determining the whole range of goals.” See Neil Komesar, *‘Imperfect alternatives’*, at 104.

1.2 The problem space in the internal market for labour

The problem of social exclusion goes back to the idea that the employment relationship is vested in national law and the idea of contractual freedom.³⁵² The relevant contracting parties negotiate the conditions of employment.³⁵³ EU discrimination law considers the problem of social exclusion to be caused, partly, by an *asymmetry of power* between the employer and potential employees. It is the freedom to choose workforces held by the employer and personal and structural factors in which employees are considered that affect the power relationship between the employer and employees. Age, gender, racial origin, and disability are just some examples of personal factors on which basis the position of potential employees is weakened in the labour market. In the labour market, for example, elderly people or disabled people are considered as economically weak employees for which reason they may have weaker positions in terms of negotiating labour contracts. The employer on the other hand holds a natural monopoly over labour. Private autonomy and freedom of contract is the place where stereotypes and national habits operate in a manner that disadvantage specific groups of society—for example women, elderly, disabled, and ethnic groups—with regard to the labour market.³⁵⁴ Women are typically paid less or occupy jobs where lower wages are paid on a systemic basis. Younger people are generally preferred over disabled and elderly people, who might need further training or support in the workplace. Also, cultural prejudices might form the basis for not entering an employment contract with ethnic groups, for example.³⁵⁵

³⁵² COM(93)551 final 21. "The causes of exclusion are multiple: persistent unemployment and especially long-term unemployment; the impact of industrial change on poorly skilled workers; the evolution of family structures and the decline of traditional forms of solidarity; the growth of individualism and the decline of traditional representative institutions; and finally new forms of migration, particularly illegal immigration and movements of population. All these phenomena are sometimes coupled with traditional forms of poverty concentrated in declining urban areas or in rural areas lagging behind the general progress in society. Growing resentment at being excluded from sharing in wealth and opportunities heightens the risk of people being driven to desperation and disruptive behaviour such as violence or drugs. Insecurity generates fear of the future, often leading in turn to introversion or susceptibility to racist ideologies, xenophobic behaviour and political and social extremism."

³⁵³ Ulrich K. Preuss, *The Concept of Rights and the Welfare State*, in Gunther Teubner (ed.), *Dilemmas of Law in the Welfare State* (De Gruyter, 1988); and Gareth Davies, *Freedom of Movement, Horizontal Effect, and Freedom of Contract*.

³⁵⁴ Case C-144/04, *Werner Mangold v. Rüdiger Helm* [2005] ECR I - 9981 at 77. Further see: COM(93)551 final 25. "Social and labour market structures continue to operate on the assumption that women are primarily responsible for home and child care while man are responsible for the families economic and financial well-being." Mark Bell, *The Principle of Equal Treatment: Widening and Deepening*, at 633.

³⁵⁵ Horatia Muir Watt, *Gender Equality and Social Policy after Defrenne*, in Miguel Poiars Maduro and Loic Azoulai (eds.), *The Past and Future of EU Law* (Hart Publishing, 2010); and Steve Peers,

In relation to the internal market, this group of potentially disadvantaged people can be expanded. Other personal factors such as nationality or language might affect the conclusion of employment contracts in the context of the internal market. These choices on criteria determining the access to employment are in the market context de facto equivalent to regulatory choices. They regulate the access to the market.

The structural factor of being in a position to control the 'access' to employment gives the employer a certain form of regulatory power. This is reflected in the power to determine the criteria that regulate the access to employment.³⁵⁶ The employer, under EU discrimination law, is considered as another form of governance within the internal market (i.e. by regulating access to employment).

EU discrimination law aims to reconcile the diversities that shape the national labour markets and national labour with the objective of ensuring the functioning of the internal market for labour. The simple capacity to make choices under the freedom of contract about the criteria that regulate the access to employment generates power in a market context. These choices regulate the demand side of the labour market in terms of what kind of workforce is demanded. Excluding parts of the workforce for non-economic reasons distorts the market functioning as competition would only take place between some workers. A skewed allocation of resources is the result. In this context, conditions that go beyond mere economic skills may be required, such as gender or language requirements.³⁵⁷ The 'tastes' of employers may exclude some groups of employees if the preferences of the employer concerning the workforce he wants to employ relate to non-objective economic criteria.³⁵⁸

'Supremacy, equality and human rights: comment on Küçükdeveci (C-555/07)', European Law Review, 35/6 (2010), 849-856; and Anna Van Der Vleuten, *'The Price of Gender Equality'* (Ashgate, 2007).

³⁵⁶ Iris Marion Young and Danielle S. Allen, *'Justice and the politics of difference'* (Paperback edn.: Princeton: PUP, 2011), at 45.

³⁵⁷ Gareth Davies, *'Freedom of Movement, Horizontal Effect, and Freedom of Contract'*. And for example see Case C-427/06 Bartsch, *Opinion of Advocate General SHARPSTON*, at 91.

³⁵⁸ Orly Lobel, *'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought'*, at 378.

1.3 Constructing an inclusive labour market

The objective of EU internal market law is to legally structure a transnational labour market. Employers may employ workers from other Member States. Likewise, workers may seek employment in the labour markets of other Member States. With the internal market for labour, EU internal market law legally creates a transnational labour market. It creates an environment where the demand for workers and the supply of labour may be exchanged beyond the national labour markets. It widens the opportunities for employers and employees.³⁵⁹ Supply and demand are now created at a European scale. However, the advantages the internal market creates come with costs. *Paul Craig and Grainne de Burca* elaborate on this:

Labour is one of the factors of production and may be valued more highly in some areas than in others. This is so if, for example, there is an excess in supply over demand for labour in southern Italy, and an excess of demand over supply in certain parts of Germany. In this situation labour is worth more in Germany than it is in Italy.³⁶⁰

In the context of EU internal market law, free movement of workers and discrimination law in relation to employment and occupation address the problem of discrimination and exclusion in the internal market for labour. The legal structure by which EU internal market law constructs the internal market assumes that the internal market is per se deficient to deal with two issues:— the inclusion of outsiders in terms of nationality (i.e. free movement law counters this deficit) and the inclusion of individuals with regard to other non-economic factors (i.e. EU discrimination law counters this). The social and economic integration of individuals into the labour market is an important element for ensuring the functioning of the internal market.³⁶¹

³⁵⁹ COM(2008)420 final, 2; and Mario Monti, 'A New Strategy for the Single Market', at 56. Bobbitt refers to the market as a tool to provide opportunities. See: Philip Bobbitt, *The shield of Achilles: war, peace and the course of history*.

³⁶⁰ Paul Craig and Grainne De Búrca, *EU Law*, at 605.

³⁶¹ COM(89) 568 final, Communication from the Commission concerning its Action Programme relating to the Implementation of the Community Charter of Basic Social Rights for Workers., of 29 November 1989, 83; and Case 43/75 *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] ECR 455.

Free movement law concerning workers and discrimination law relating to employment and occupation are two sides of the same coin and relate to the creation of a labour market based on the idea of equal treatment, equal opportunity, and fair competition. In this sense, the workplace is seen as a new, non-geographical frontier to the equality of opportunities of individuals in the internal market.³⁶² The objective of EU discrimination law is to open up the labour market for actors that have so far been excluded from the opportunities of the labour market for non-economic reasons. Opening up the labour markets in economic and social terms increases the pool and diversity of skilled workers competing in the labour market.³⁶³ The fostering of equality in the labour market was not just an objective but rather the ideal underlying the organisation of the labour market. Labour should be available to everyone and it should be economic choices that determine the dynamics of the internal market for labour. Underlying this idea is that personal characteristics should not be relevant for the selection processes of employers. However, this is only partly so because depending on the nature of the vacancy, elderly people or disabled people may not be physically capable of carrying out the duties required by the position. These exceptional circumstances are taken into account in EU social law.

2. The effective attainment of social integration under EU internal market law

The emphasis of EU discrimination law is on the *structural problems* of the labour market “which excludes part of the population from economic and social opportunities,”³⁶⁴ and which would give rise to unfair terms of competition between Member States.³⁶⁵ Put differently, this social integration relates to the uniform approach on how to deal with the exclusion of private actors from the benefits of the labour market, for reasons that are not based on grounds of nationality. In order to effectively attain social inclusion EU internal market law favours a harmonised approach, which brings institutional and conceptual

³⁶² COM(93)551 final 23.

³⁶³ Gary S. Becker, *'The economics of discrimination'* (Second edn.: Chicago: UCP, 1971). François Ewald, *'A Concept of Social Law'*, at 46.— the primary objective of a social system is social justice.

³⁶⁴ For example see Directive 2000/78/EC, Article 3(2). COM(93)551 final 20. “The problem is not only one of disparities between the top and bottom of the social scale, but also between those who have a place in society and those who are excluded.”

³⁶⁵ Case 43/75 *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] ECR 455 at 9.

changes alike to the labour market. The approach reflected in EU discrimination law is a process encouraging the inclusion of people into the labour market that were hitherto disadvantaged by the dynamics of the labour market. EU discrimination law implements a new approach that seeks to ensure social equality/social justice in the labour market, through dispersed organisations of actors involved in the implementation of social integration. The result is a form of shared responsibility of functions of which legal coordination is key for delivering social integration in practice.

2.1 The evolution of discrimination law

The idea of an open market policy towards the labour market was shaped by a remarkable evolution of the principle of equality with regard to the internal market for labour.³⁶⁶ Starting with the *Defrenne* line of cases, the Court of Justice in combination with secondary law measures developed a general “corpus of law on equal treatment” seeking to ensure the effective application of the principle of equal treatment in the labour market, national law, and the employment relationship.³⁶⁷ *Mark Bell* refers to this process of evolution as the deepening and widening of the principle of equal treatment.³⁶⁸ Thus, it is to be noted that it was the Court of Justice that first outlined the conceptual and institutional approach on how social integration is best attained in the context of the internal market for labour.

The original treaties only provided for the principle of equal pay for equal work between men and women.³⁶⁹ Mainly inserted due to French pressure, ex Article 119 EEC found its way into the treaties in order to ensure that other Member States or undertakings would not gain competitive advantages by employing cheaper female workers.³⁷⁰ This has been described as the economic rationale or

³⁶⁶ See Article 157 TFEU and Gillian More, *The Principle of Equal Treatment: From market unifier to Fundamental Right*, in P. P. Craig and G. De Búrca (eds.), *The evolution of EU law* (Oxford: OUP, 1999). Case C-427/06 Bartsch, *Opinion of Advocate General SHARPSTON*, at 46, 50-51 and 58-59.

³⁶⁷ Citation from Mark Bell, *The Principle of Equal Treatment: Widening and Deepening*, at 614-615. Further see Joined Cases C-270/97 and C-271/97, *Deutsche Post AG v. Elisabeth Sievers*, [2000] ECR I-929 at 57.

³⁶⁸ Mark Bell, *The Principle of Equal Treatment: Widening and Deepening*, at 612.

³⁶⁹ Article 157 TFEU and Case 43/75 *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] ECR 455.

³⁷⁰ Now Article 157 TFEU.

the regulatory role of the principle of equal pay. Its aim is to prevent situations of unfair competition between the Member States.³⁷¹ In *Defrenne III*, the case concerned an airhostess that was paid less than her male counterparts by the airline for which she brought court proceedings. The Court of Justice already recognised that the “elimination of sex discrimination is a fundamental principle of community law.”³⁷² This status was confirmed through Directive 76/207/EEC, which implemented the principle of equal treatment for men and women as regards access to employment, vocational training, promotion, and working conditions.³⁷³

In the early years of the internal market, the Court of Justice was very influential in the development of EU discrimination law and the reduction of structural deficits through the delivering of equality of opportunity. For example, in *Jenkins*, the Court of Justice had to determine if different hourly wages paid to part-time and full-time workers fell within the scope of the prohibition of discrimination on the grounds of sex.³⁷⁴ The Court of Justice held that different wages do not offend female workers in so far as “the difference in pay between part-time work and full-time work is attributable to factors which are objectively justified and are in no way related to any discrimination based on sex.”³⁷⁵ This would be the case, for example, if different wages were used as a means to encourage full-time work for economic reasons.³⁷⁶ Moreover, the Court of Justice clarified that:

13. ... if it is established that considerably smaller percentage of women than of men perform the minimum number of weekly working hours required in order to be able to claim the full-time hourly rate of pay, the inequality in pay will be contrary to article 119 of the treaty where, regard being had to the difficulties encountered by women in arranging to work that minimum

³⁷¹ Case 43/75 *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] ECR 455 at 9; and Gillian More, *The Principle of Equal Treatment: From market unifier to Fundamental Right*, at 541; and Mark Bell, *The Principle of Equal Treatment: Widening and Deepening*, at 615.

³⁷² Case 149/77 *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena (Defrenne III)* [1978] ECR 1365 at 1378.

³⁷³ See Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ L 039 , 14/02/1976 P. 0040).

³⁷⁴ Case 96/80, *J.P. Jenkins v. Kingsgate*, [1981] ECR 911 at 5-7.

³⁷⁵ *Ibid.*, at 10-11.

³⁷⁶ *Ibid.*, at 12.

number of hours per week, the pay policy of the undertaking in question cannot be explained by factors other than discrimination based on sex.³⁷⁷

In other words, different wages for part-time and full-time workers does not amount to discrimination in the meaning of Article 119 EEC, unless it is “in reality merely an *indirect* way of reducing the level of pay of part-time workers on the grounds that that group of workers is composed exclusively or predominantly of women.”³⁷⁸ This reflects an approach aimed at *substantive equality* in employment and occupation regarding gender.³⁷⁹

Until the Treaty of Amsterdam, discrimination law was limited to the prohibition of discrimination on the grounds of sex.³⁸⁰ The then newly inserted Article 13 EC³⁸¹ paved the way for the next generation of discrimination law. Eventually, this led to the adoption of Directive 2000/43 combating discrimination on the grounds of race and ethnic origin,³⁸² and Directive 2000/78 establishing a general framework for equal treatment in employment and occupation.³⁸³ As part of ensuring social inclusion in the labour market, the Directives set out a general framework putting into effect the principle of equal treatment. Today Article 19 TFEU empowers the EU institutions to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation.³⁸⁴ EU internal market law now has a legal basis to expand and further the social policy and social objectives of the internal market.³⁸⁵ The legal framework of EU discrimination law is an active ingredient in ensuring the inclusion of individuals that would potentially be subject to

³⁷⁷ *Ibid.*, at 13.

³⁷⁸ *Ibid.*, at 15.

³⁷⁹ Case C-158/97, *Georg Badeck*, [2000] ECR I-1875 at 32.

³⁸⁰ Case 149/77 *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena (Defrenne III)* [1978] ECR 1365 at 30-31.

³⁸¹ Now Article 19 TFEU.

³⁸² Council Directive 2000/43/EC, of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 19/07/2000 P. 0022).

³⁸³ Directive 2000/78/EC.

³⁸⁴ Now Article 19(1) TFEU and COM(2008)420 final, 2; and Case C-427/06 *Bartsch*, *Opinion of Advocate General SHARPSTON*, at 50-51.

³⁸⁵ For example see Directive 2000/78/EC, Article 3(2); and COM(93)551 final 20. “The problem is not only one of disparities between the top and bottom of the social scale, but also between those who have a place in society and those who are excluded”.

differential treatment in relation to employment-related issues on the grounds of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation.

2.2 Regulatory power of the employer

In a labour market context, the problem of asymmetry of power relates to the structural position of the employer, which comes with a *regulatory power* in relation to the access to labour.³⁸⁶ In this respect, the internal market for labour comes with an inherent *asymmetry of power* in the relationship at the centre of decision-making, i.e. the relationship between the employer and the employee. This is why, for example, under national law rights for collective action or bargaining through social partners are an integral part of the labour relationship. It is a mechanism recognised through which employees are empowered to balance—on their own initiative—the asymmetry of power in the labour relationship.³⁸⁷ The regulatory power of the employer already recognised in the context of free movement is also evident here. The employer, by merely exercising his choices is in a position to affect the structure of the internal market for labour because the employer determines what kind of labour force is demanded. The consequence is a situation of dependency for workers.

In terms of relative strength, the employer has a power over the employee in relation to the determination of the criteria that regulate the access to employment. The creation of a market for labour automatically creates a monopoly over the supply of labour.³⁸⁸ The “tastes” of employers may exclude some groups of employees if the preferences of the employer, concerning the workers he wants to employ, relate to non-objective economic criteria.³⁸⁹ As a consequence, the relationship between employer and employee is treated as vertical in the context of EU internal market law (i.e. in both free movement law

³⁸⁶ Regulatory power in terms of making choices in relation to what skills workers should have. In this sense, any decision or requirement imposed by an employer for a job vacancy is understood as a regulatory activity in terms of the labour market. On the regulatory effects of freedom of contract see Gareth Davies, *Freedom of Movement, Horizontal Effect, and Freedom of Contract*; and Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*.

³⁸⁷ COM(2008)420 final, 3.

³⁸⁸ Iris Marion Young and Danielle S. Allen, *Justice and the politics of difference*, at 45.

³⁸⁹ Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, at 378.

and discrimination law). The employer has by the very nature of his position in the labour market the regulatory power to affect the market process, i.e. the allocation of resources, through the choices he makes.

2.3 The legal framework ensuring social inclusion

The fight against discrimination and exclusion cannot be won by legislation alone. *First and foremost it depends on changing attitudes and behaviour.* But there can be no doubt that an effective and properly enforced legal framework outlawing discrimination and ensuring that its victims can have effective recourse is an essential precursor for delivering real change. The Commission is committed to ensuring that the existing legal framework is respected, whilst proposing that new legislation is needed to extend the scope of legal protection to all forms of discrimination in all areas of life.³⁹⁰

The approach implemented by EU discrimination law intends to generate social integration at the place where social exclusion emerges in the context of the employment relationship. The problem underlying the employment relationship in the internal market is an asymmetry of power between employer and employee. Contractual freedom, in combination with the automatic monopoly employers have over labour, created an asymmetry of power between the employer and potential employees. The allocation of rights and obligations to the relevant actors does exactly this—it changes attitudes and behaviour. The importance being that the allocation does not respond to the nature of the actors, which is private, but to their position in the labour market that reflects the central economic interests of the labour market. This is why, in relation to the attainment of social integration, a central function is ascribed to the employment relationship; the technique through which social integration is attained is a form of internalisation. The employment relationship has to internalise the objective of social integration.

The consequence of the allocation of rights and obligations is that the economic powers and dynamics leading to social exclusion in the first place are balanced. Firstly, private actors that are likely to be excluded from the labour market are encouraged to participate in the labour market through the allocation of rights.

³⁹⁰ See COM(2008)420 final, 3.

Rights to equal treatment protect potentially vulnerable individuals in seeking employment opportunities under equal conditions. Secondly, the obligation allocated to employers constrains the economic freedoms of employers and requires them not to discriminate on the basis of non-economic factors in the course of posting vacant positions.

The objective is to create a form of regulatory neutrality in terms of factors that give rise to discrimination.³⁹¹ EU discrimination law sets a level playing field on which competition of potential employees takes place on factors other than personal factors. Thus, in principle, EU discrimination law limits the contractual freedom of individuals when acting as ‘employer’ in the context of the internal market.

2.3.1 Allocation of rights

Within the legal framework of EU discrimination law, potential employees are generally protected and covered under the principle of equal treatment. The principle of equal treatment requires that employees or candidates for a post shall have equal opportunities with regard to any other competitor in a specific context. The rights allocated to individuals being discriminated against are “directly applicable and may thus give rise to individual rights which the courts must protect.”³⁹² At the same time, rights are only for the benefit of groups that are discriminated or have suffered structural and systemic disadvantages under national law. Groups that come within this definition are those being discriminated based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation.³⁹³

The function of the allocation of rights is to create a power for employees, which balances the power that the employer has due to his position in the labour market.³⁹⁴ The allocation of rights implies a responsibility to take up

³⁹¹ For this see Alexandre Saydé, *'One Law, Two Competitions: An enquiry into the contradictions of free movement law'*.

³⁹² Case 43/75 *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] ECR 455 at 24.

³⁹³ See Article 19 TFEU and Directive 2000/78/EC; and Council Directive 2000/43/EC.

³⁹⁴ Case C-281/98 *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*, [2000] ECR I-4139.

employment in order to improve one's living conditions.³⁹⁵ In this sense, the position of the employee in the context of the labour market is equally important. Only if employees make use of the opportunities created through EU discrimination law will this increase the welfare overall. Social integration is not only about the creation of equality of opportunities, but also about the actual use of opportunities.

The technique used to activate individuals is similar to the context of free movement law. Rights are allocated as an instrument to empower a potentially weaker economic position. The right functions as an incentive and motivates and supports the individuals engaging in the economic context. This is paired with the allocation of specific obligations, which shall inform and require those actors holding power to take into account potentially weaker actors. This might even require that positive actions are taken to ensure that competition between potential employees can take place on equal footing.

2.3.2 Allocation of obligations

EU discrimination law addresses specific obligations of the employer to abolish any form of discriminatory treatment with regard to employment and occupation. Under EU discrimination law, the employer is entrusted with the task of ensuring that the principle of equal treatment is implemented with regard to the following:

- (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

³⁹⁵ Derrick Wyatt, '*Horizontal Effect of Fundamental Freedoms and the Right to Equality after Viking and Mangold, and the Implications for Community Competence*', *Croatian Yearbook of European Law & Policy*, 4 (2008), 1-48.

(c) employment and working conditions, including dismissals and pay;

(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.³⁹⁶

The approach adopted under EU discrimination law recognises the systemic relevance of the power of employers to make choices relating to the labour market. This is the power of the employer to make economically relevant choices and the power to determine what skills are needed in the labour market. EU internal market law recognises that the employer, in regard to the freedom of contract, must have some powers in determining what kind of labour is needed. However, this power is not recognised unconditionally. In order to ensure an effective functioning of the labour market, employers must ensure that the principle of equal treatment is observed in activities under their control. Thus, individuals shall not be excluded on the basis of arbitrary discrimination. This would “undermine the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.”³⁹⁷ The power of the employer, thus, is assessed in terms of arbitrary discrimination:

56. That is, in essence, because the difference between (acceptable) differential treatment and (unacceptable) discrimination lies not in whether people are treated differently, but in whether society accepts as *justifiable* the criteria whose application results in different treatment, or whether, on the contrary, they are considered as arbitrary.³⁹⁸

Although the *Angonese* case was decided under the free movement of workers, the case also concerns the issue of discrimination. The case of Roman Angonese concerned the requirements that were set in order to be eligible for the vacancy

³⁹⁶ Directive 2000/78/EC, Article 3(d); and Case C-45/09 *Gisela Rosenblatt v Oellerking Gebäudereinigungs GmbH*, *Opinion of Advocate General TRSTENJAK*, at 64.

³⁹⁷ Directive 2000/78/EC, recital 11.

³⁹⁸ Case C-427/06 *Bartsch*, *Opinion of Advocate General SHARPSTON*, at 56.

advertised by the Cassa di Risparmio di Bolzano. Having recognised the special position the employer occupies in the labour market, the Court of justice continued and held that choices in the labour market should be made on the basis of economic criteria.³⁹⁹ As the Court of Justice clarified, Article 45 TFEU is designed “to ensure that there is no arbitrary discrimination [on the grounds of nationality] in the labour market.”⁴⁰⁰

The allocation of the obligation to ensure equal treatment is a means to control the power of employer in the labour market. It fills a gap where national law is deficient: the control of private actors that are by the nature of their position, i.e. employer in the labour market, capable to affect the social integration of the internal market for labour. The objective is to ensure that “activities and choices of the employer with regard to employment and occupation do not distort competition” in the labour market.⁴⁰¹ Consequently, choices made in relation to employment relationships have to be based on economically acceptable criteria. Ultimately the Court of Justice is the ultimate arbiter to decide upon acceptable criteria.

In the labour market, “objective behaviour is based on considerations of productivity alone.”⁴⁰² EU discrimination law incorporates a pecuniary and skills-based approach to the labour market. Choices made on the basis of personal factors are considered as forms of arbitrary discrimination. With regard to objective economic criteria, the employer remains free to determine the demand side. The meaning of objective economic criteria in the context of the labour market refers to conditions which workers, through training, education, and practical experience can attain. For this reason it stands that:

Vocational training is at the forefront of Commission priorities to spearhead a new and indispensable effort to invest in people in their skills, their creativity and their versatility.⁴⁰³

³⁹⁹ Case C-281/98 *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*, [2000] ECR I-4139 at 35.

⁴⁰⁰ *Ibid.*

⁴⁰¹ Gillian More, *The Principle of Equal Treatment: From market unifier to Fundamental Right*, at 549.

⁴⁰² Gary S. Becker, *The economics of discrimination*, at 39.

⁴⁰³ COM(89) 568 final, 39.

The aim is to create an environment that fosters “access to participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.”⁴⁰⁴ Only if choices are made on economic criteria can workers adapt to the demands of employers and move to places where their skills are needed. Criteria or conditions in relation to employment and occupation shall not have a closing-off effect in the sense that participation in the labour market is linked to factors that workers cannot change – such as age, nationality, and sex. In this regard, the organisation of the internal market for labour creates a space in which workers can improve their skills. In other words individuals can invest in their market value and compete in other markets or at other levels of the market. Workers must have the possibility to adapt to the needs of the labour market.⁴⁰⁵ The minimum guarantee the EU social policy seeks to ensure is the possibility to compete under fair and equal conditions in the labour market. Competition is understood as the accountability mechanism in the context of the internal market. Choices should be made on the basis of skills and suitability for the position rather than aspects relating to origin and nationality. The employer must be as objective as possible when advertising positions.

2.3.3 *Economic limits*

The requirement to ensure equal treatment is not unlimited. There are economic limits to the principle of equal treatment.⁴⁰⁶ The principle of equal treatment should not distort the market process in the sense that it requires activities from the employer that would be over burdening and impose too high costs on the employer. Depending on the context concerned it can be seen that different factors affect the balance of what is a disproportionate burden for the employer. Directive 2000/78/EC sheds some light on this issue. In the preamble, Directive 2000/78/EC states that in order,

21. to determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of

⁴⁰⁴ Directive 2000/78/EC, Article 5.

⁴⁰⁵ Ibid., at recital 7. Recital 7 refers to “skilled, trained and *adaptable* workforce.”

⁴⁰⁶ COM(90)228 final Proposal for a Council Directive supplementing the measures to encourage improvements in the safety and health at work of temporary workers, of 29 June 1990, 542.

the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.⁴⁰⁷

Whereas direct discrimination on the grounds of sex seems to be prohibited in general, for example, this is not the case for discrimination on the grounds of age.⁴⁰⁸ Advocate General Sharpston refers to this distinction in her Opinion in *Bartsch*:

63 ... Whilst the directive defines what the principle of equal treatment shall mean in respect of matters falling within its scope and also defines direct and indirect discrimination, it clearly envisages that differentiation on the basis of age in the context of employment and occupation *will not always constitute unlawful discrimination*. Thus, it distinguishes between ‘differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination, which must be prohibited’. Crucially, therefore, it lays down a series of specific rules that establish the parameters of what differential treatment on grounds of (inter alia) age is acceptable (and why).⁴⁰⁹

The possibility to justify discriminatory treatment acknowledges that in some situations discriminatory treatment may be needed or legitimate. For example, this would be the case where the employer has to make additional efforts to make the workplace accessible for elderly or disabled people. The additional costs might be a reason to justify different treatment.⁴¹⁰

⁴⁰⁷ Directive 2000/78/EC, recital 21.

⁴⁰⁸ Case C-427/06 *Bartsch*, *Opinion of Advocate General SHARPSTON*, at 99.

⁴⁰⁹ *Ibid.*, at 63.

⁴¹⁰ Case C-13/05 *Sonia Chacón Navas*, *Opinion of Advocate General GEELHOED*, at 51 and 55; and Case C-45/09 *Gisela Rosenblatt v Oellerking Gebäudereinigungs GmbH*, *Opinion of Advocate General TRSTENJAK*; and Mark Bell, *The Principle of Equal Treatment: Widening and Deepening*, at 636.

3. The employer as a social actor

In the context of EU discrimination law, the role of the employer has been reconfigured and it is placed in the infrastructure of the legal framework that is intended to ensure social integration and social inclusion in the internal market. Moreover, the recognition of employers as legal subjects in the internal market determines their place in the constitutional structure of the internal market for labour and the relationship it has with other EU institutions, i.e. that the activities of employer are subject to requirements imposed by EU internal market law. The allocation of obligations under EU discrimination law to the employer is only the tip of the iceberg. It is the legal consequence of the position EU internal market law envisages for the employer in the labour market (and to a certain extent that what is expected from the employer in relation to the attaining the objectives of social integration).

3.1 The employer as a 'source of authority' in the labour market

In the context of the labour market, the employer occupies a special position. EU discrimination law transforms the employer into a 'competent authority' that is partly in charge of delivering 'social inclusion.' In order to attain social integration of the internal market, EU internal market law creates a legal framework that regulates the activities of private actors that engage in the internal market *qua* 'employer.' The employer as an actor is still vested and closely tied to national law and relies on national contract law to form employment relationships. However, the difference is that when acting in the capacity of the employer, private actors automatically engage in the internal market for labour. Thus, employers must ensure that their activities comply with the requirements set out in EU discrimination law. This has a decisive effect on national contract law with regard to employment relationships. When it comes to contractual freedom in relation to employment issues, EU internal market law confines the private autonomy granted under national law. The effect is that powers granted and protected under national law are redefined in order to ensure social integration and ultimately the construction of the internal market.

The practical consequence of the obligations allocated to the employer is that when engaging in economic activities, the employer automatically *produces* social integration. Thus, through the allocation of obligations EU discrimination law

turns the potentially negative effects of unbridled regulatory power (i.e. social exclusion) into a regulatory power, which is producing social inclusion at the same time economic choices are made. The obligations addressed to the employer have an outward effect as they are imbedded in a legal and institutional framework intended to ensure social integration in the internal market in practice. This steering of conduct leads to the inclusion of disadvantaged actors in the internal market in a general and wider context. The employment relationship becomes the place where social integration is produced and the open market policy of the internal market for labour is delivered in practice.

The employer is an agent in mainstreaming the social objectives of the EU. Under EU discrimination law the employer is required to implement the principle of equal treatment into the workplace and the employment relationship. Consequently, it is the employer that ensures equality of opportunity as a primary agent. Every economic activity is measured against the objectives of EU discrimination law and the requirement imposed on the employer thereunder. When acting in the realm of the internal market, the employer is now also a social actor that actively contributes to the social integration of the internal market when its activities comply with EU discrimination law.

Clearly the approach detailed above is intended to provide a more efficient form of governance to ensure social integration in the internal market for labour.⁴¹¹ The underlying approach to social justice is fundamentally different from that of the welfare state.⁴¹² While the welfare state based social justice on an idea of compensation, i.e. compensating those being disadvantaged by the market, EU discrimination law implements an approach revolving around 'active' actors and their participation in the labour market through equal opportunities. This creates an environment that includes those having 'bad luck' in socio-economic terms, into the market process. This new environment had a profound impact on national labour markets, national laws, and the relationships between employer and employee and the way unemployment was dealt with for example.

⁴¹¹ Neil Komesar, *Imperfect alternatives*, at 30.

⁴¹² COM(93)551 final 19. "We are in the middle of a realignment of the functions of the State, the enterprise and the family."

This approach also involves institutional challenges. Thus, EU internal market law is concerned with the challenge to create a system of institutional actors that ensures the effective implementation of EU discrimination law. Here, the Court of Justice in *Defrenne II* already noted the unwillingness of national public authorities to take care of this.⁴⁴³ Public actors considered employment-related choices to be within the private sphere and only raised issues if the route via Member States was an effective approach to ensure social inclusion. The decision to expand the obligation to employer was not only a decision to give effect to EU discrimination law in private relationships, but it was a decision to not involve Member States in the provision of social justice. Today, EU discrimination law sets out a detailed framework of shared responsibilities through which social integration, i.e. social justice, is delivered in practice. Social justice is produced within the labour market and the relationship of employer and employee whereby the effectiveness of this approach is ensured through the allocation of rights and obligations.

3.2 Wider institutional organisation

Although the employment relationship occupies a central role in the context of attaining social integration, it is far from being the only place where social integration is ensured. The employment relationship and its function in relation to the social integration of individuals in the labour market is surrounded by a multiple web of actors, reflecting a framework of shared responsibility. The coordination of these actors contributes, within the functions entrusted under EU discrimination law, to the attainment of social equality.

3.2.1 *Shared form of responsibility*

Social partners, trade unions, and other collective entities representing interests of labour are likewise bound by the obligation to ensure equal treatment with regard to employment and occupation. The right to use collective bargaining power is well recognised as part of the labour market and workers rights.⁴⁴⁴ It is

⁴⁴³ Case 43/75 *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] ECR 455 at 33.

⁴⁴⁴ See Article 28 EUCFR and Case C-172/11, *Georges Erny*, of 27 February 2014 (not yet published); and Case C-438/05, *International Transport Workers Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779 at 44; and Case C-341/05 *Laval un Partneri*

another remedy for workers to balance the power of the employer. It may be said that this is the ‘natural’ form of balancing the power of employer in labour law. The regulatory power emerging from the organisation of workers in collective entities representing collective interests (e.g. minimum wage), is capable of affecting the labour market.

The asymmetry of power that emerges between the employer and the collective entity is similar to the asymmetry of power faced with regard to the employer and employee. Asymmetry of power emerges from the strength of collective organisations vis-à-vis the employer, i.e. in terms of numbers of employees, and the dependency of the employer on the social partner, which is in an economically stronger position and may dictate conditions for employment that are detrimental to the employer or even discriminatory. The consequence being that these social partners are likewise subject to the requirements of EU discrimination law. Similarly, EU discrimination law recognises the form of self-organisation and collective action as a natural form of balancing the power of the employer.

In *Prigge*, the Court of Justice elaborated on the role of social partners. *Prigge* concerned the alleged age-discrimination that emerged from the retirement age of 60 years as concluded between Lufthansa and its social partners.⁴¹⁵ Having recognised the autonomy of social partners and in particular their legislative power to “lay down provisions limiting the duration of employment contracts” in collective agreements,⁴¹⁶ the Court of Justice continued and held that:

47 The right to collective negotiation set out at Article 28 of the Charter must, within the scope of EU internal market law, be performed in accordance with EU internal market law.

Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet [2007] ECR I-11767 at 91.

⁴¹⁵ Case C-447/09, *Reinhard Prigge*, [2011] ECR I-8003 at 22-36.

⁴¹⁶ *Ibid.*, at 27. “In application of the principle of autonomy of the social partners and the freedom that they have in the carrying out of their legislative power, the social partners may lay down provisions limiting the duration of employment contracts by fixing an age limit. However, as that normative power is shared with the State, the State has specified that the limitation on the duration of employment contracts must be justified by an objective reason. The social partners however have a margin of appreciation in the definition of that objective reason.”

48 Therefore, where they adopt measures, which fall within the scope of the Directive, which gives specific expression, in the domain of employment and occupation, to the principle of non-discrimination on grounds of age, the social partners must respect the Directive.

49 Thus, it is clearly apparent ... that *collective agreements must, the same as legislative, regulatory or administrative provisions, respect the principle implemented by the Directive.*⁴¹⁷

It seems that this type of regulation of employment law is the preferred option under the general framework implemented by Directive 2000/78/EC.⁴¹⁸ In exercising this power, collective entities are bound by the limits set out in Directive 2000/78/EC.⁴¹⁹ The organisation of labour relationships on the basis of agreements negotiated between the social partners is a way to organise the market only on the basis of powers and mechanisms internal to the labour relationship.

a) Member States

In terms of different functions, the employer is not the sole competent authority entrusted with the task of ensuring social equality. Yet, while the employer must ensure that the social policy is implemented in the workplace and in the employment relationship, the Member States must ensure that the legal framework on which the employment relationship is based effectively protects the principle of equal treatment. The consequences being that the Member States are another competent authority acting within the realm of EU social policy.

⁴¹⁷ Ibid., at 47-49. For similar argumentation see Case C-172/11, *Georges Erny*, of 27 February 2014 (not yet published). Erny is decided under free movement, however. Emphasis added.

⁴¹⁸ Directive 2000/78/EC, Article 13. "Member States shall, in accordance with their national traditions and practice, take adequate measures to promote dialogue between the social partners with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conducts and through research or exchange of experiences and good practices."

⁴¹⁹ Case C-447/09, *Reinhard Prigge*, [2011] ECR I-8003 at 48.

National law, for which Member States are responsible, is still the main source for employment relationships. This is because national contract law is still the place that forms the basis for the conclusion of employment contracts. Thus, the responsibility of the Member States has not diminished but changed. With regard to EU discrimination law the role of the Member States is best described as being a facilitator. National contract law, employment law, social law, and even tort law affect the labour market. The Member State's primary responsibility is to ensure an effective legislative framework at national level that is in compliance with the principle of equal treatment.⁴²⁰ For example, in *Defrenne II* the Court of Justice clarified that it is the Member States that must "ensure that the principle of equal pay for male and female workers for equal work of equal value is applied."⁴²¹ Similarly, in *Rosenbladt* the Court of Justice held that the:

79. ... Member States are required to ensure, by means of appropriate laws, regulations or administrative provisions, that all workers are able to enjoy fully the protection granted to them by Directive 2000/78 against discrimination on the grounds of age. Article 16(b) of the directive requires Member States to take the necessary measures to ensure that 'any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements ... are, or may be, declared null and void or are amended.'⁴²²

The Member States enjoy some discretion in terms of compliance.⁴²³ The choice for a directive as the legal instrument leaves "to the national authorities the

⁴²⁰ COM(89) 568 final, 14. "The Commission considers that, in matters of employment and remuneration, *responsibility* and, therefore, initiative lie *mainly* with the Member States *and* the two sides of industry according to national practices, legislation and agreements." Directive 2000/78/EC, Article 16. Further see COM(89) 568 final; and Ronen Shamir, '*The age of responsabilization: on market-embedded morality*', at 51.

⁴²¹ For example see Directive 2000/78/EC, Article 9-11 and 16. Further see Case 43/75 *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] ECR 455 at 33; and Case 43/75 *Defrenne II*, *Opinion of the Advocate General TRABUCCHI*, at 485-486; and Case 80/70 *Defrenne (I)*, *Opinion of Advocate General DUTHEILLET DE LAMOTHE*, at 456.

⁴²² Case C- 45/09, *Rosenbladt*, [2010] ECR I-9391 at 79.

⁴²³ Moreover, the choice for directives as legal instruments setting out the general framework on equal treatment in relation to employment relationships recognizes the position of the Member States in relation to the labour market as being in charge to ensure an effective legal framework in national law. For example see Case C-144/04, *Werner Mangold v. Rüdiger Helm* [2005] ECR I - 9981 at 77; and Case 43/75 *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] ECR 455 at 30; and Case C-427/06 *Bartsch*, *Opinion of Advocate General SHARPSTON*, at 91.

choice of form and method” and a “greater degree of flexibility.”⁴²⁴ This ensures that Member States remain capable of adapting their national systems to the *Ordnungsprinzip* of the internal market for labour.

The omission of an effective transposition into national law, however, does not exempt the employer from its legal requirement to ensure equal treatment with regard to employment and occupation. Although the employment relationship is primarily based on national law, the ‘constitutional status’ of the employer and the employment relationship in the context of the internal market requires that the employer complies with the ‘mandatory’ requirements of EU discrimination law (set out in the treaties or the general principles of EU internal market law).⁴²⁵

b) National courts

As a consequence of the shift of the employment relationship to the centre of the internal market for labour, courts become the forum to deal with disputes arising under EU discrimination law.⁴²⁶ Already in *Defrenne II* the Court of Justice emphasised the role of national courts in the prevention of discriminatory treatment in employment relationships. The Court of Justice held that it is national courts that must protect the individual rights emerging from Article 119 EEC effectively.⁴²⁷

This organisation emerges from the requirement to ensure the functioning of the internal market (which is the ensuring of equal treatment in employment relationships) whilst acknowledging that national courts occupy a special position with regard to the assessment of the employment relationship as they are

⁴²⁴ Case C- 45/09, *Rosenblatt*, [2010] ECR I-9391 at 64.

⁴²⁵ For example see Case 43/75 *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] ECR 455 at 39. And with regard to general principles and their effect for the employer Case C-144/04, *Werner Mangold v. Rüdiger Helm* [2005] ECR I - 9981 at 76-77; and Case C-555/07, *Seda Küçükdeveci v. Swedex GmbH & Co. KG* [2010] at 21-24; and Mirjam De Mol, ‘*Küçükdeveci: Mangold Revisited - Horizontal Direct Effect of a General Principle of EU Law*’, *European Constitutional Law Review*, 6 (2010), 293-308.

⁴²⁶ Alexandre Saydé, ‘*One Law, Two Competitions: An enquiry into the contradictions of free movement law*’, at 366.

⁴²⁷ Case 43/75 *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] ECR 455 at 24.

concluded under national law.⁴²⁸ National courts are best equipped to determine the circumstances and facts that give rise to discriminatory treatment regarding the special characteristics of the national law.⁴²⁹ The Court of Justice elaborated on this in *Mangold*. The Court of Justice held that it is,

77. ... the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law.⁴³⁰

In the context of EU discrimination law, national courts are responsible for ensuring effective protection.⁴³¹ This is a matter of assessing the facts of a case in light of the national legal framework. National courts provide the forum where private actors or parties of an employment relationship can solve their conflict in the case of alleged discriminatory treatment.⁴³² This is made clear in *Jenkins*, where the Court of Justice clarified that national courts must decide “each individual case whether, regard being had to the facts of the case, its history and the employer’s intention, ... the dispute is or is not concerned with discriminatory treatment.”⁴³³

4. Liability

In relation to potential liability of employer, the Court of Justice held that it is “impossible to establish real equality of opportunity without an appropriate

⁴²⁸ See Directive 2000/78/EC, recital 15; and Case 96/80, *J.P. Jenkins v. Kingsgate*, [1981] ECR 911 at 14; and Case C-427/06 Bartsch, *Opinion of Advocate General SHARPSTON*, at 91.

⁴²⁹ Case 96/80, *J.P. Jenkins v. Kingsgate*, [1981] ECR 911 at 14.

⁴³⁰ Case C-144/04, *Werner Mangold v. Rüdiger Helm* [2005] ECR I - 9981 at 77. But also see Case C-427/06 Bartsch, *Opinion of Advocate General SHARPSTON*, at 73.: “It was therefore the responsibility of the national court to apply the fundamental principle to the case before it, and if necessary to set aside a rule of national law in order to guarantee effective protection.”

⁴³¹ Directive 2000/78/EC, 29.

⁴³² Case 96/80, *J.P. Jenkins v. Kingsgate*, [1981] ECR 911 at 14; and Case C- 45/09, *Rosenblatt*, [2010] ECR I-9391.

⁴³³ Case 96/80, *J.P. Jenkins v. Kingsgate*, [1981] ECR 911 at 14.

system of sanctions”.⁴³⁴ This requirement for effective protection of rights in national courts is already emphasised in the Court of Justices decision in *Defrenne II*.⁴³⁵ However, although EU internal market law imposes legal requirements on private actors, EU internal market law does not set up a coherent system of legal liability in this framework. Rather, the responsibility remains within the national laws implementing the Racial Equality Directive and the Employment Equality Directive and within the national courts.⁴³⁶ This requirement is reflected in Article 9 of Directive 2000/78, for example, requiring that:

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

With regard to the effectiveness of measures adopted under national law, the Court of Justice clarified that while “full implementation of the Directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection.”⁴³⁷ The question of enforcement and determination of liability is vested in national law and national institutions (i.e. legislators and courts). The Court of Justice is reluctant to prescribe forms of liability but prefers to set a general obligation to ensure effective judicial protection, understood as access to courts and availability of judicial remedies.

Under German law for example, the General Act on Equal Treatment, transposing Directive 2000/78, established that the employer is obliged to compensate the victim for any damage caused by discriminatory treatment

⁴³⁴ Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, [1984] ECR 01891 at 22.

⁴³⁵ Case 43/75 *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] ECR 455 at 24.

⁴³⁶ See Oliview De Schutter, 'The liability of legal persons in anti-discrimination law', *European Anti-Discrimination Law Review*, 6/7/October 2008 (2008), 33.

⁴³⁷ Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, [1984] ECR 01891 at 23.

(Article 15(i)).⁴³⁸ With regard to compensation, the Court of Justice clarified in *Draehmpaehl* that:

25. ... compensation must be such as to guarantee real and effective judicial protection, have a real deterrent effect on the employer and must in any event be adequate in relation to the damage sustained. Purely nominal compensation would not satisfy the requirements of an effective transposition of the Directive.⁴³⁹

This right to compensation is regularly enforced before national labour courts. The meaning of ‘adequate compensation’ is not defined by national law, but the accompanying commentaries of the General Act on Equal Treatment refer to the Court of Justice’s definition of appropriate as having “a real deterrent effect on the employer and must in any event be adequate in relation to the damage sustained.” Thus, the assessment of an appropriate compensation is made on a case-by-case basis by the competent national courts. The consequence being that the assessment of violation under the Equal Treatment Directive remains within the national domain. Under German law liability is dealt with in the context of civil liability, a dispute between private parties, before ordinary labour courts. This may be a blessing or a curse depending on the perspective adopted. Clearly, a risk inherent in this structure is that national courts do not enforce the requirements of the Equal Treatment Directive effectively, which has a direct impact on the efficiency of attaining social equality. Alternatively, national courts might be best equipped to enforce the legal requirements of EU discrimination law simply because they are familiar with national contract law and can easily move within the applicable national legal frameworks.

In any case, liability under EU discrimination law takes into account to the specific nature of the employment relation, which is still framed under national law. EU internal market law solely occupies parts of the employment relationship, which is reflected in the prohibition to discriminate. The proximity of national courts to national contract law equips national courts with important tools to balance the needs of the integrity of the national system on the one hand

⁴³⁸ See §15(i) AGG, Allgemeines Gleichbehandlungsgesetz (BGBl. I S. 1897, 1920), of 14 August 2006.

⁴³⁹ Case C-180/95, *Nils Draehmpaehl v. Urania Immobilienservice OHG*, [1997] ECR I-02195 at 25.

and the requirement to ensure compliance with EU legal requirements on the other. This advantage in terms of expertise and knowledge is acknowledged by the Court of Justice and EU discrimination law, which leaves adjudication to the national courts.

5. Remarks

The approach developed under EU discrimination law transformed the employment relationship into a place where social integration is effectively produced. The legal requirements imposed on employers (i.e. not to discriminate) and employees (i.e. to make use of powers protected through rights), creates an environment that produces social integration. Social integration emerges as a by-product of the economic activities of employers and employees. While the rights and obligations create direct requirements for specific cases and situations, the outward effect in the long-term implements an open market policy in terms of social inclusion into the internal market.

The approach developed under EU discrimination law to ensure social integration reflects a *Rawlsian improvement*:⁴⁴⁰ the constraint for some (i.e. employer) is to “the greatest benefit of the least advantaged members of society” (i.e. those being discriminated).⁴⁴¹ In this sense, EU discrimination law reflects an approach that is intended to increase social justice with regard to the internal market for labour. The costs for this improvement are allocated to the employer (i.e. through obligations), who is nevertheless in a position to benefit from the market due to the transnational pool of workers available. Through EU discrimination law it is ensured that the benefits and burdens of the internal market for labour are “equitably distributed” between employees and employers in relation to the attainment of social integration.⁴⁴²

⁴⁴⁰ N. A. Barr, '*The economics of the welfare state*', at Chapter 2 and 3.

⁴⁴¹ John Rawls, '*Political Liberalism Expanded Edition*', at 47.

⁴⁴² *Ibid.* – the primary objective of a social system is social justice. François Ewald, '*A Concept of Social Law*', at 46.

Chapter 4

Responsibility of Private Actors in EU Food Safety Law

Introduction

In some countries food is an important part of the culture. Pasta from Italy, sausages from Germany, cheese from France, chocolate from Belgium are just a few examples of food products that are affiliated with a specific nation and culture. It is hardly surprising that in most of these countries laws exist that regulate and protect the requirements of such products. This may include rules on production criteria, permitted ingredients, purity requirements, quality standards, marketing requirements, storing, and labelling, for example. It makes sense that many of the cases that relate to the economic integration of the internal market for goods concern these kind of national laws. In light of the economic integration of the internal market, the real effect of these requirements was that they distorted the cross-border flow of food and therefore the functioning of the internal market for goods.⁴⁴³ Moreover, the Court of Justice even considered national laws dealing with price fixing,⁴⁴⁴ import and export restrictions, and measures promoting domestic goods.⁴⁴⁵

In light of the internal market for goods of which the food market is a sub-category, EU food law emerged. EU Food law did not begin as a self-standing well-developed sector of European regulation. Rather food law, or to be precise

⁴⁴³ For example see Case 8/74, *Procureur du Roi v. Dassonville*, [1974] ECR 837; and Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649; and Case 178/84, *Commission v. Germany (Beer purity requirement)*, [1987] ECR 1227; and Case 170/78, *Commission v. United Kingdom*, [1980] ECR 417; and Case 90/86, *Criminal Proceedings against Giorgio Zoni*, [1988] ECR I-4285.

⁴⁴⁴ Case 82/77, *Openbaar Ministerie v. van Tiggele*, [1978] ECR 25 at 12-14.

⁴⁴⁵ Case 249/81, *Commission v. Ireland*, [1982] ECR 4005.

national food laws and their variations, were one of the key areas of law that led the Court of Justice to develop its approach for economic integration of the internal market for goods. This is simply because the cases and disputes concerning issues of food are decided under the treaty provisions regarding the free movement of goods.⁴⁴⁶ In a remarkable line of cases, the Court of Justice developed a deregulatory approach in relation to food products that opened up national markets for foreign food products. For example *Dassonville* emerged in relation to a conflict concerning the import of whiskey from France to Belgium. Alternatively, the decision in *Cassis de Dijon*, which established the core concept of mutual recognition on which the internal market for goods is based, relates to the import of alcoholic beverages to Germany.

EU food law regulates this internal market for goods, which in practice relates to the development of mechanisms to ensure the free circulation of food in the internal market. The basic structure of the internal market for food is reflected in the Court of Justices decision in *Cassis de Dijon*. This is a market environment that is based upon free movement, mutual recognition, and regulatory competition (i.e. competition on the basis of different national regulations concerning food requirements).⁴⁴⁷ Member States should not obstruct free movement of food and competition because a product does not meet their own national food law standards. Once food is lawfully marketed under the laws of a Member State, producers are free to export to other Member States and compete with similar food products in the markets.⁴⁴⁸ This approach reveals a lot about the role of Member States. Although Member States remain free to regulate issues concerning food, they may not do so in a way that *de facto* interferes with the free movement of goods, unless it is for overriding reasons

⁴⁴⁶ For this see Ronald Coase, '*The Nature of the Firm*', at 387 and 398. Free movement of food is based on the idea of an exchange economy. Exchange takes place in terms of products for money, where the pricing mechanism coordinates demand and supply in the food market.

⁴⁴⁷ Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649 at 14; and Case 178/84, *Commission v. Germany (Beer purity requirement)*, [1987] ECR 1227 at 25; and Alexandre Saydé, '*One Law, Two Competitions: An enquiry into the contradictions of free movement law*'.

⁴⁴⁸ Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649 at 12. For example see the requirement for information on food products that is intended to support consumer choices referred to in Regulation (EU) No 1169/2011, of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, (OJ L 304, 22.11.2011, p. 18–63). Jens-Uwe Franck and Kai Purnhagen, '*Homo economicus, behavioural sciences, and economic regulation: on the concept of man in internal market regulation and its normative basis*', at 2. Saydé refers to this as a model fostering regulatory competition between different national laws. See Alexandre Saydé, '*One Law, Two Competitions: An enquiry into the contradictions of free movement law*'.

such as food safety or public health. It should not be the Member State that determines what the consumer wants but the consumer itself.⁴⁴⁹ The task of food business operators in this context was limited to the lawful marketing of food within the Member State of origin and to provide accurate and understandable information to consumers about food products.⁴⁵⁰ Put differently, the only legal requirements food business operators have to comply with were those set out in national law or EU internal market law intended to harmonise parts of national food law (e.g. labelling).

1. The new approach to food safety in the internal market

Food law is interesting because the system on which the food market was intended to function was a market based on either regulatory competition reflected in the principle of mutual recognition, or, where necessary, through the harmonisation of certain aspects relating to food products that intend to improve the market. For example, labelling is one of these requirements, where EU internal market law harmonised the approach to ensure equal requirements for producers.⁴⁵¹ The system set up was intended to supplement and increase the efficiency of the internal market for food products by prescribing a mandatory set of criteria that must be on the label and therefore available to consumers. The intention was to create a universal set of information for consumers on which basis choices could be made.⁴⁵²

However, the internal market for food does not function on national food law and mutual recognition alone. EU food law adds further requirements that should steer and ensure the effective functioning of the internal market for goods. In addition to mutual recognition of lawfully marketed products, the internal market for food relies on correct information for the consumer as a condition for

⁴⁴⁹ Case 178/84, *Commission v. Germany (Beer purity requirement)*, [1987] ECR 1227 at 32; and Marco Dani, 'Assembling the fractured European Consumer'.

⁴⁵⁰ Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649 at 14; and Case C-33/97, *Colim NV v Bigg's Continent Noord NV*, [1999] ECR I-03175 at 29.

⁴⁵¹ For example see Case C-58/08, *Vodafone Ltd*, [2010] ECR 321 at 38. Harmonisation "aims to contribute to the smooth functioning of the internal market in order to achieve a high level of consumer protection and maintain competition among operators of mobile telephone networks."

⁴⁵² Regulation (EU) No 1169/2011, Recital 3 and Article 9; and Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649 at 13.

the effective functioning for competition.⁴⁵³ Information, in terms of EU food law, is a precondition for the consumer to make correct choices; consequently *labelling* occupies a key position in EU food law. For example, equal information on ingredients, alcohol content, and allergens provides a level playing field for competition between the products concerned. Choices shall be made by the consumer concerning the effects food can have on their health. The internal market for food thus reflects a market already highly harmonised in terms of the 'policy-making environment' created for consumers and producers.

Food safety and food safety regulations were also subject to the same national laws. Food safety requirements were regulated, monitored, and enforced at national level. The underlying assumption was that a sufficient level of consumer protection would be attained through national food safety law, which applied to food businesses in combination with the free movement of food and the principle of mutual recognition.

However, history has proven this approach to be inefficient in terms of guaranteeing a high level of protection of consumer health. The problem encountered relates to the Member States being unable to efficiently provide an *adequate level of protection*. The BSE crisis marks the turning point with regard to the regulation of food safety in the context of the internal market.⁴⁵⁴ During the BSE crisis, British beef contaminated with bovine spongiform encephalopathy (BSE), a neurodegenerative disease, was distributed by British producers throughout the internal market, protected by the principle of mutual recognition. Scientific evidence revealed that BSE could be transmitted to human beings through the consumption of contaminated meat.⁴⁵⁵ The lack of effective safety measures and preventive and protective procedures at national level caused a severe loss of consumer confidence in the benefits and functioning of the internal market for goods. In particular, this refers to the failure of the Member

⁴⁵³ Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649 at 13; and B. M. J. Van Der Meulen and Menno Van Der Velde, *Food Safety Law in the European Union: an Introduction* (Wageningen Academic Publishers, 2004), at 140.

⁴⁵⁴ Speech by Jacques Santer, Debate on the report by the Committee of Inquiry into BSE, SPEECH/97/39; and Ellen Vos, 'EU Food Safety Regulation in the Aftermath of the BSE Crisis', *Journal of Consumer Policy*, 23 (2000) at 231; and Damian Chalmers, "Food for Thought": *Reconciling European Risks and Traditional Ways of Life*', at 534.

⁴⁵⁵ For example see COM(97)176 final, The General Principles of Food Law in the European Union. Commission Green Paper., of 30 April 1997; and Ellen Vos, 'EU Food Safety Regulation in the Aftermath of the BSE Crisis', at 232.

States to intervene timely and efficiently and the failure of the Commission to address the risk emerging from BSE contaminated beef.⁴⁵⁶

In light of these institutional failures—including the failure of the system developed by the Court of Justice to ensure food safety—the EU Commission, in response to pressure from the European Parliament, proposed a new form of ‘management’ to attain food safety and protect consumer health.⁴⁵⁷ The regulation and guarantee of food safety is now harmonised and transferred to EU level. This new approach is reflected in Regulation (EC) No 178/2002.⁴⁵⁸

With Regulation (EC) No 178/2002, the notion of food safety entered the stage of EU food law. Food safety is now attained through a new harmonised and Europeanised approach to *risk*, which fundamentally changed the approach on how food safety is attained; this had a direct impact on the role of food business operators. The counter-culture emerged in this context of reorganisation. This is reflected in the general obligation imposed on food businesses to comply with food safety requirements as defined by EU internal market law or national law. Furthermore, Regulation (EC) No 178/2002 requires that food business operators are able to trace the origins of foods or ingredients they intend to use or sell.⁴⁵⁹ Food business operators are also in charge of a precautionary duty,⁴⁶⁰ i.e. they shall withdraw food that is unsafe from the market as soon as they become aware of it and they shall also inform the public. Thus, it is food businesses that are conferred some form of public responsibility in the context of EU food safety law.

This latest regime requires that “food shall not be placed on the market if it is unsafe.”⁴⁶¹ A precondition for the marketing of food in the internal market is

⁴⁵⁶ In particular this refers to the failure of the EU Commission to address the risk emerging from BSE contaminated beef. The failure of adequate and timely response by the Commission and Member States to the BSE crisis caused a severe loss of consumer confidence in the functioning of the internal market. Speech by Jacques Santer. Speech/97/39 and COM(97)176 final.

⁴⁵⁷ Further see for example see Damian Chalmers, *'Food for Thought': Reconciling European Risks and Traditional Ways of Life*, at 535.

⁴⁵⁸ This reflects a centralised approach in the sense that it harmonises at the minimum level the general principles relating to food law and safety requirements with which all Member States laws must comply.

⁴⁵⁹ Regulation (EC) No 178/2002, Article 18.

⁴⁶⁰ *Ibid.*, at Article 19.

⁴⁶¹ *Ibid.*, at Article 14(1); and Damian Chalmers, *'Food for Thought': Reconciling European Risks and Traditional Ways of Life*, at 545.

that food does not adversely affect health and is safe for human consumption.⁴⁶² With regard to the subject of this thesis, the regulation of food safety is a good case-study because we witness an “*institutional reform and reform of general objectives of food policy*,”⁴⁶³ in particular on how food safety is attained. Prior to Regulation (EC) No 178/2002, food safety was attained through national food law and market dynamics in the internal market for goods; this has now changed profoundly.

Food safety is now an integral part of the internal market that is primarily concerned with consumer health and the attainment of this objective, while also seeking to reconcile this objective with the maintenance of the free movement of goods. This offers a fine sample of EU internal market law relying on specific private actors—here the food business operator—to attain the objective of food safety in the internal market. This latest approach replaces the regime where national law and national institutions were solely in charge of guaranteeing and ensuring food safety.

2. Effective attainment of food safety under EU internal market law

Regulating food safety concerns the organisation and regulation of risk.⁴⁶⁴ This is how to ensure the protection of consumers from unsafe food in accordance with the functioning and free movement of goods in the internal market. In *pre*-Regulation (EC) No 178/2002 systems, food safety was regulated through national food law. Member States and national food authorities were entrusted with the task of ensuring that only safe food was placed on the market. Risk regulation was carried out in a national environment. This level of protection was deemed to be sufficient to ensure that only safe food is placed on the market. With this organisation of food safety in the internal market for goods, it was considered that “consumers may be adequately protected if they are adequately informed.”⁴⁶⁵ Food safety was bound up with the idea that the consumer is

⁴⁶² Regulation (EC) No 178/2002, Article 14(2).

⁴⁶³ Damian Chalmers, “*Food for Thought: Reconciling European Risks and Traditional Ways of Life*”, at 536.

⁴⁶⁴ *Ibid.*, at 535.

⁴⁶⁵ Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649 at 13; and B. M. J. Van Der Meulen and Menno Van Der Velde, “*Food Safety Law in the European Union: an Introduction*”, at 140.

capable of making choices concerning the safety of food to be consumed.⁴⁶⁶ This approach was overhauled and changed entirely.

The standard of food safety is scientific-based and not determined in a 'national environment' only. At the centre of the reorganisation is Regulation (EC) No 178/2002, which sets out the general principles of EU food law and how food safety is attained. This set of principles on how to attain food safety is supplemented and complemented by other specific food regulations relating to labelling, Genetically Modified Organisms (GMOs) and food additives, for example.⁴⁶⁷ Private actors must observe this web of 'food law' when they act in the capacity of food business operators within the meaning of Regulation (EC) No 178/2002.

2.1 The Regulation (EC) No 178/2002 regime

Regulation (EC) No 178/2002 harmonises the general principles and requirements concerning food law. The legal framework set out by Regulation (EC) No 178/2002 establishes a level playing field that applies to all food business operators equally. This harmonised approach is intended to ensure food safety as the basis of the internal market for goods. Food safety is normative in the sense that it prescribes a certain standard of products that are placed on the market.⁴⁶⁸ This does not mean that EU food law is exclusively responsible for all aspects of food safety.⁴⁶⁹ EU internal market law is the only forum where general concerns relating the marketing of safe food can be decided. National laws have to comply with the principles established by Regulation (EC) No 178/2002.

⁴⁶⁶ Regulation (EU) No 1169/2011, Article 8(4); and Ellen Vos, '*EU Food Safety Regulation in the Aftermath of the BSE Crisis*', at 231; and B. M. J. Van Der Meulen and Menno Van Der Velde, '*Food Safety Law in the European Union: an Introduction*', at 140.

⁴⁶⁷ For example see Regulation (EU) No 1169/2011; and Regulation (EC) No 1333/2008 of the European Parliament and of the Council of 16 December 2008 on food additives (OJ L 354, 31.12.2008, pp. 16-33); and Regulation (EC) No 1829/2003, of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed (OJ L 268, 18.10.2003, p. 1-23).

⁴⁶⁸ Case C-636/11, *Karl Berger v. Freistaat Bayern*, [2013] ECR 0000 at 29-31.

⁴⁶⁹ COM(1999)719 final, White Paper on food safety of 12 January 2000, 6. The new approach requires that all aspects of food safety are addressed at EU level.

In this regime, food safety became the primary objective of food law.⁴⁷⁰ A central element in the organisation of food safety is found in Article 14 of Regulation (EC) No 178/2002, which entails that “food shall not be placed on the market if it is unsafe.”⁴⁷¹ In this case, ‘unsafe’ is defined as any food that is ‘injurious to health’ or ‘unfit for human consumption.’⁴⁷² Food safety relates to the protection of health and thus, to the “idea of consumer protection.”⁴⁷³ Food safety becomes a mandatory requirement in attaining consumer protection.⁴⁷⁴

The objective of this latest approach to food safety is to “ensure a high level of protection of public health, safety and the consumer [and] to ensure the free movement of goods within the internal market.”⁴⁷⁵ In this latest approach food safety is ensured through *risk analysis*. Risk analysis shall provide a systemic method for the “determining of effective, proportionate and targeted measures or other actions to protect health.”⁴⁷⁶ This requires that food products at all stages of production be “evaluated for potential risk.”⁴⁷⁷ Article 6(1) of Regulation (EC) No 178/2002 determines that:

in order to achieve the general objective of a high level of protection of human health and life, food law shall be based on risk analysis except where this is not appropriate to the circumstances or the nature of the measure.⁴⁷⁸

Risk analysis forms the basis for food safety policies. It is defined as a systemic “*process* consisting of three interconnected components: risk assessment, risk

⁴⁷⁰ Ibid., at 22.

⁴⁷¹ Regulation (EC) No 178/2002, Article 14(1).

⁴⁷² Ibid., at Article 14(12). Damian Chalmers, *'Food for Thought': Reconciling European Risks and Traditional Ways of Life*, at 545.

⁴⁷³ Regulation (EC) No 178/2002, recital 1-3 and 32; and Ellen Vos, *'EU Food Safety Regulation in the Aftermath of the BSE Crisis'*, at 234.

⁴⁷⁴ Case C-315/05 Lidl Italia Srl, *Opinion of Advocate General STIX-HACKL*, at 32-33; and COM(1999)719 final, 22.

⁴⁷⁵ Regulation (EC) No 178/2002, recital 17; and B. M. J. Van Der Meulen and Menno Van Der Velde, *'Food Safety Law in the European Union : an Introduction'*, at 151; and Ellen Vos, *'EU Food Safety Regulation in the Aftermath of the BSE Crisis'*, at 234-235.

⁴⁷⁶ Regulation (EC) No 178/2002, recital 17. Recital 17 refers to “having recourse to risk assessment, risk management and risk communication.”

⁴⁷⁷ COM(1999)719 final, 9.

⁴⁷⁸ Regulation (EC) No 178/2002, Article 6(1).

management, and risk communication.”⁴⁷⁹ In this regard, food policy applying this risk analysis process shall be based on scientific evidence.⁴⁸⁰ For example, the general requirement to not place food on the market that is unfit for human consumption is not “breached simply because a certain group of people is particularly susceptible to be injured by it,” e.g. allergies.⁴⁸¹ Only food that is unfit for human consumption, based on scientific evidence may not be placed on the market. Where food is not in compliance with the EU food legislation it is presumed that it is either unfit or injurious to health.⁴⁸² Unfit for human consumption according to the Court of Justice’s decision in *Berger* means *unacceptable* for human consumption.⁴⁸³

A consequence of this latest approach on how food safety is attained is that Regulation (EC) No 178/2002 introduces a new institutional organisation.⁴⁸⁴ This new organisation of actors in charge of attaining food safety reflects a form of *shared responsibility*.

2.2 Sharing the responsibility for food safety

Regulation (EC) No 178/2002 coordinates the risk analysis process. This is reflected in the allocation of different duties and tasks concerning aspects of risk analysis to a “disparate number of institutional actors.”⁴⁸⁵ In this new institutional framework, multiple actors are entrusted with different functions under the *risk analysis* system. The responsibility to ensure that only safe food is marketed, is thus shared among multiple actors—it is *decentralised*.⁴⁸⁶

⁴⁷⁹ Ibid., at Article 3(i); and Ellen Vos, 'EU Food Safety Regulation in the Aftermath of the BSE Crisis', at 239.

⁴⁸⁰ Regulation (EC) No 178/2002, Article 6(2) and recital 17; and Ellen Vos, 'EU Food Safety Regulation in the Aftermath of the BSE Crisis', at 234-235.

⁴⁸¹ Regulation (EC) No 178/2002, Article 14(7). This provision assumes that “food that complies with specific Community provisions governing food safety shall be deemed to be safe.”

⁴⁸² Ibid., at Article 14(5); and Case C-636/11, *Karl Berger v. Freistaat Bayern*, [2013] ECR 0000 at 35.

⁴⁸³ Case C-636/11, *Karl Berger v. Freistaat Bayern*, [2013] ECR 0000 at 35.

⁴⁸⁴ Speech by Jacques Santer, para 10; and Damian Chalmers, 'Food for Thought': *Reconciling European Risks and Traditional Ways of Life*, at 536.

⁴⁸⁵ Damian Chalmers, 'Food for Thought': *Reconciling European Risks and Traditional Ways of Life*, at 556. “A feature of such an organisational structure is that it is an adaptive process in which the nature of the 'problem' regulated will vary over space and time.” Different actors are involved in a system of shared responsibilities to ensure food safety is delivered to the consumer in practice.

⁴⁸⁶ COM(1999)719 final, 8; and Damian Chalmers, 'Food for Thought': *Reconciling European Risks and Traditional Ways of Life*, at 542.

In this new institutional framework, food safety is produced through a sharing of functions under the risk analysis system. Private actors, when acting as food business operators, are put in charge for parts of the risk analysis process. Regulation (EC) No 178/2002 refers to this as the primary legal responsibility:

at all stages of production, processing and distribution within the businesses under their control to ensure that foods or feeds satisfy the requirements of food law which are relevant to their activities and shall verify that such requirements are met.⁴⁸⁷

Although the food business operator is entrusted with the *primary* legal responsibility to ensure compliance with food safety requirements, it acts in a framework of institutional actors. In this framework responsibilities are shared. The interplay of all these actors ensures a more efficient organisation to guarantee that only safe food is placed on the market. The advantage under this food safety regime, is that Regulation (EC) No 178/2002 defines the position of the food business operator (where private actors are concerned and constrained) and the legal consequences of being in this position.

a) The European Food Safety Authority

In the institutional framework in which responsibility is shared, the European Food Safety Authority (EFSA) occupies a clear position in the food safety governance regime. This is because it “shall provide scientific advice and scientific and technical support for the Communities legislation and policies in all fields that have direct and indirect impact on food safety.”⁴⁸⁸ In the context of food law, EFSA is the authority that provides technical information on which basis policy choices with regard to food safety law are made.⁴⁸⁹ This scientific advice and technical information is important for both Member States acting in their capacity as legislators regulating national food law, and food business

⁴⁸⁷ Regulation (EC) No 178/2002, recital 30; and B. M. J. Van Der Meulen and Menno Van Der Velde, 'Food Safety Law in the European Union: an Introduction', at 143.

⁴⁸⁸ Regulation (EC) No 178/2002, Article 22(2).

⁴⁸⁹ In this capacity the EFSA “regulates scientific disputes”. For this see Damian Chalmers, 'Food for Thought': *Reconciling European Risks and Traditional Ways of Life*, at 543.

operators making choices about food, ingredients, the production of food, and the marketing thereof.⁴⁹⁰

The power and responsibility of EFSA follows from its status as “a point of reference.”⁴⁹¹ Its relationship to “private operators engaged in the production, processing and distribution” is specific and dependent. Operators require scientific evidence and technical information to make choices about the safety of food or feed in order to place it on the market.⁴⁹² EFSA provides this information and technical support.

Furthermore, EFSA ensures that consumers are well informed and capable of making good choices concerning food safety. In particular information on the risks relating to food, ingredients, or nutrition etc., shall be communicated to the consumer.⁴⁹³ However, this may also cover information about specific ways and means of nutrition. In this way EFSA has a supportive function for the food market. It provides guidance on what choices may be good or what choices may involve more risk. The tendency for more reasonable choices relating to food— allergens or organic —is a shift that emerged as a consequence of different information about food and how we can improve our health through ‘better’ food.

b) Member States

EU food regulation has a significant impact on national food law. Labelling, mutual recognition, and now food safety affect national food policies and reflect

⁴⁹⁰ COM(1999)719 final, 16 and 19; and Damian Chalmers, *Food for Thought: Reconciling European Risks and Traditional Ways of Life*, at 537-538.

⁴⁹¹ Damian Chalmers, *Food for Thought: Reconciling European Risks and Traditional Ways of Life*, at 543. For the necessity of clear scientific evidence see Case T-13/99, *Pfizer Animal Health SA*, [2002] II-3305 at 143-144. “A preventive measure cannot properly be based on a purely hypothetical approach to the risk, founded on mere conjecture which has not been scientifically verified [...] Rather, it follows from the Community Courts' interpretation of the precautionary principle that a preventive measure may be taken only if the risk, although the reality and extent thereof have not been 'fully' demonstrated by conclusive scientific evidence, appears nevertheless to be adequately backed up by the scientific data available at the time when the measure was taken.”

⁴⁹² Regulation (EC) No 178/2002, Article 16-21; and Damian Chalmers, *Food for Thought: Reconciling European Risks and Traditional Ways of Life*, at 542.

⁴⁹³ Regulation (EC) No 178/2002, Article 22(3); and COM(1999)719 final, 16 and 19.

a shift of national dominion to a harmonised EU-wide approach.⁴⁹⁴ To be clear, this does not abolish the competence of Member States to determine which products can be marketed under their national food law, but it restricts their power due to the harmonising nature of EU food law.

With regard to food safety, national food law must implement general principles concerning food safety. Even if national food law may vary between the Member States, for whatever cultural reasons, the standards concerning food safety are harmonised. The consequence of the harmonisation is that now any,

(9) food shall be deemed to be safe when it conforms to the specific provisions of national food law of the Member State in whose territory the food is marketed, such provisions being drawn up and applied without prejudice to the Treaty, in particular Articles 28 and 30 thereof.⁴⁹⁵

Member States still set the legal framework under which food can be marketed. This implies that Member States enjoy discretion “to decide at which level they intend to ensure the protection of the health and life of persons in the absence of harmonisation and in so far as doubts subsist in the current state of scientific research.”⁴⁹⁶ Evidently, there is space for a higher level of protection. In the absence of harmonisation, the Court of Justice held that Member States remain free to protect, legitimately, constitutional interests. Member States may decide on the basis of public health to impose special requirements as long as the EU Commission has not regulated on this.⁴⁹⁷ It requires, however, that activities are proportional and necessary, e.g. a total ban is considered as the most restrictive obstacle available.⁴⁹⁸ Better information for consumers and accurate labelling is

⁴⁹⁴ See Regulation (EU) No 1169/2011; and Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649; and Case 8/74, *Procureur du Roi v. Dassonville*, [1974] ECR 837; and Case 178/84, *Commission v. Germany (Beer purity requirement)*, [1987] ECR 1227; and Damian Chalmers, 'Food for Thought': *Reconciling European Risks and Traditional Ways of Life*, at 553.

⁴⁹⁵ Regulation (EC) No 178/2002, Article 14(9).

⁴⁹⁶ For example consider the public health exceptions under Article 36 TFEU. Further see Case C-333/08, *Commission v. France*, [2010] ECR I-757 at 85; and Joined Cases C-211/03, C-299/03 and C-316/03 to 318/03, *HLH Warenvertriebs GmbH and Orthica*, [2005] I-5141 at 38.

⁴⁹⁷ Case C-446/08, *Solgar Vitamin's France*, [2010] ECR I-3973 at 35 and 54.

⁴⁹⁸ Case C-333/08, *Commission v. France*, [2010] ECR I-757 at 85-86 and 89-90.

the preferred method to allow consumers to make informed choices.⁴⁹⁹

The relationship of national food law and the food business operator is evident. Food business operators have to comply with national food law requirements in order to market a product. After successful marketing, products are protected by the principle of mutual recognition. However, due to its nature Regulation (EC) No 178/2002 enjoys direct applicability in national law and thereby binds food business operators directly.

In the framework of general food law, Member States are responsible for enforcement, and monitoring that the “relevant requirements of food law are fulfilled by food and feed businesses operators at all stages of production.”⁵⁰⁰ In this sense, Member States shall only act as a means of control and protect the public at a final stage. In *Berger*, the Court of Justice clarified that public authorities may inform the public about food being unfit for human consumption if this is deemed necessary to protect the public health. If producers fail to provide safe food, Member States as a means of final power and control, have to act according to their responsibilities to protect individuals.⁵⁰¹

c) European Commission

The responsibility of the *EU Commission* relates to the risk management and risk communication of food law. In relation to risk management, the Commission is responsible for weighing the policy alternatives in order to attain food safety.⁵⁰² Thereby it may opt for measures that concern the (1) content,⁵⁰³ (2) handling,⁵⁰⁴

⁴⁹⁹ For example see Miguel Poiars Maduro, 'We the court: the European Court of Justice and the European Economic Constitution'. Of interest is the discussion about the provision of information to consumers in the internal market for goods through labelling. Further see Case 178/84, *Commission v. Germany (Beer purity requirement)*, [1987] ECR 1227.

⁵⁰⁰ Regulation (EC) No 178/2002, Article 17(2); and Case C-636/11, *Karl Berger v. Freistaat Bayern*, [2013] ECR 0000; and Case C-443/13, *Reindl*, of 13 November 2014 (not yet published).

⁵⁰¹ Case C-636/11, *Karl Berger v. Freistaat Bayern*, [2013] ECR 0000 at 29-31 and 35.

⁵⁰² Regulation (EC) No 178/2002, recital 53 and Article 53(2); and B. M. J. Van Der Meulen and Menno Van Der Velde, 'Food Safety Law in the European Union: an Introduction', at 154.

⁵⁰³ For this see for example Regulation (EC) No 1333/2008; and Regulation (EC) No 1829/2003.

⁵⁰⁴ Regulation (EC) No 178/2002, Article 19; and Case C-636/11, *Karl Berger v. Freistaat Bayern*, [2013] ECR 0000.

or (3) communication⁵⁰⁵ of food. This has direct impact on food business operators and the way they produce, handle, or market food or food ingredients. For example, in *Solgar Vitamins* it was held that the Commission should lay down standards according to Directive 2002/46/EC concerning food supplements.⁵⁰⁶ These standards are binding for food business operators. Alternatively the Commission may regulate on how to ensure food safety. One option is to regulate inspections for example—the when, how and why controls are exercised.⁵⁰⁷

3. Responsibility of food business operators

The food business operator has an indisputable position in the organisational structure of EU food safety law, to which a specific function is attached. In comparison to the responsibilities of EFSA, the Commission, or the Member States, the food business operator is entrusted with a different task. In this respect, the food business operator is transformed into another competent authority for ensuring food safety under the institutional framework created by Regulation (EC) No 178/2002.

The task allocated to the food business operator is not natural, but emerged only in the course of harmonising national laws on food safety. With harmonisation comes the reorganisation of roles and functions in the course of which food business operators were responsabilized and allocated a certain task in the ‘system of shared responsibility’ that is intended to deliver food safety in practice to the consumer.

⁵⁰⁵ Labelling as a form of risk communication see Regulation (EU) No 1169/2011, recital 17. “The prime consideration for requiring mandatory food information should be to enable consumers to identify and make appropriate use of a food and to make choices that suit their individual dietary needs. With this aim, food business operators should facilitate the accessibility of that information to the visually impaired.” Further see Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649 at 13.

⁵⁰⁶ Case C-446/08, *Solgar Vitamin's France*, [2010] ECR I-3973 at 24 and 32. And see Directive 2002/46/EC, of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements (Text with EEA relevance) (OJ L 183, 12.7.2002, p. 51-57).

⁵⁰⁷ Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules (OJ L 165, 30.4.2004, p. 1-141); and B. M. J. Van Der Meulen and Menno Van Der Velde, 'Food Safety Law in the European Union : an Introduction', at 145.

3.1 The task entrusted to the food business operator

The food business operator is entrusted with *primary* legal responsibility. Under Regulation (EC) No 178/2002 the food business operator must ensure “*at all stages of production, processing and distribution within the businesses under their control ... that foods or feeds satisfy the requirements of food law which are relevant to their activities and shall verify that such requirements are met.*”⁵⁰⁸ Thus, the food business operator is legally required to comply with food safety law at all stages in the food chain.

Three elements seem to be important for understanding the role and function of the food business in the attainment of food safety, which will be considered below. (1) The notion of compliance is evident with regard to the task entrusted to the food business operator. Thus, some clarification is needed for the meaning of compliance. In this regard the focus will be on (2) the aspect that food safety must be ensured and *verified at all stages* of the food production process (traceability). This contends that the scope of responsibility of food business operators goes beyond the responsibility for one’s own activities. (3) Finally, I will investigate into the meaning of *under their control*. This assumes some form of power be exercised and implies some organisation and control between actors that are involved in the food chain.

3.1.1 The meaning of compliance

The requirement of compliance is very evident from the text of Regulation (EC) No 178/2002. Food business operators are responsible for ensuring that their food products “satisfy the requirements of food law.”⁵⁰⁹ In this sense, Regulation (EC) No 178/2002 does not regulate or determine what food safety means, but it puts in place a system that ensures that only safe food is delivered to the consumer. Here the interdependence of the institutional framework of EFSA, the EU Commission, and Member States through national law, and food business operators is evident. The meaning of compliance requires that food business operators must take into account the different sources of food safety standards

⁵⁰⁸ Regulation (EC) No 178/2002, recital 30 and Article 17(1).

⁵⁰⁹ Ibid., at Article 14(2) and 17(1); and Case C-636/11, *Karl Berger v. Freistaat Bayern*, [2013] ECR 0000 at 29-30.

and be able to adapt to changes if they occur. This ensures a minimum level of protection for the consumer, which is legally stipulated.

Compliance with food safety law is a precondition for food to be placed on the market and it implies food business operators are aware of the legal requirements to which they are subject. Thus, it is up to the food business operators to decide how to comply with food safety requirements. This compliance may include, for example, complying with the mandatory labelling requirements.⁵¹⁰ Another example is the legal requirement to set up food hygiene standards, such as HACCP (Hazard Analysis and Critical Control Points).⁵¹¹ EU internal market law fulfils this idea of 'food safety requirements' through legislative means, e.g. labelling, GMOs, and food additives.⁵¹² Food business operators in light of their responsibilities under Regulation (EC) No 178/2002 must also comply with these standards.

3.1.2 Verification and control

The wording of Article 17(1) Regulation (EC) No 178/2002 states that the food business operator is not only responsible for *his* activities concerning the verification of food safety but that he shall ensure *at all stages* of production, processing, and distribution within the food chain that food safety is guaranteed.⁵¹³ This reflects an idea of a joint responsibility entrusted to the food chain. In terms of monitoring and supervision, EU internal market law prefers a system of an 'integrated food chain,' where safety is traceable all the way back to the origin.⁵¹⁴ In this sense, "each link in the food chain should take the measures necessary to ensure food safety within the context of its own specific

⁵¹⁰ Regulation (EU) No 1169/2011, Article 8(1) and Chapter IV.

⁵¹¹ Case C-366/04 Georg Schwarz v. Bürgermeister der Landeshauptstadt Salzburg, *Opinion of Advocate General GEELHOED*, at 21.

⁵¹² COM(97)183 final, Communication from the Commission on Consumer Health and Food Safety, of 30 April 1997, 34-36.

⁵¹³ Regulation (EC) No 178/2002. Article 17 reads as follows: "Food and feed business operators at all stages of production, processing and distribution within the businesses *under their control* shall ensure that foods or feeds satisfy the requirements of food law which are relevant to their activities and shall verify that such requirements are met."

⁵¹⁴ Damian Chalmers, "Food for Thought": *Reconciling European Risks and Traditional Ways of Life*, at 536-537.

activities.”⁵¹⁵ This makes food business operators responsible not only for complying with food law requirements with regard to their own activities, but also requires them to actively engage with the food chain. The requirement for the food business operator to verify that food law is complied with requires monitoring and supervision of the food chain and all stages of production in order to ensure compliance with legal requirements.

Lidl Italia concerned the issue of whether traders of food can be held liable with regard to false labelling by producers. Investigations of regional health authorities showed that the actual alcohol content in a spirit was below the content stated on the label. *Lidl Italia* was held liable for false labelling. *Lidl Italia* challenged the national rule on liability, arguing that being only the trader of the product it was not responsible for the accuracy of the label and therefore could not be held liable.⁵¹⁶ Although the assessment was based on the labelling Directive 2000/13,⁵¹⁷ the Court of Justice affirmed the notion of *joint responsibility that is ascribed to actors involved in the food chain*. The denial of responsibility for actors involved in the food chain would “compromise the achievement of the results prescribed by the directive,”⁵¹⁸ i.e. to inform and protect the consumer.⁵¹⁹ The Court concluded that there exists a joint responsibility for the actors involved in the food chain to ensure accurate labelling.⁵²⁰ The compliance of which is the “responsibility [of] all persons involved in the production and distribution process.”⁵²¹

Reindl concerned the issue as to what extent distributors can be held liable in the absence of a clear provision of EU internal market law for liability as a consequence of providing unsafe food. The Court of Justice argued that a system of strict liability is acceptable if it is “to encourage the persons concerned to comply with the provisions of a regulation and where the objective pursued is a matter of public interest.”⁵²² For our purpose, *Reindl* is an important case as the

⁵¹⁵ Regulation (EC) No 178/2002, Article 18(1); and Case C-315/05, *Lidl Italia Srl*, [2006] ECR I-11181 at 41; and Case C-315/05 *Lidl Italia Srl*, *Opinion of Advocate General STIX-HACKL*, at 59.

⁵¹⁶ Case C-315/05, *Lidl Italia Srl*, [2006] ECR I-11181 at 25-28 and 35.

⁵¹⁷ Now Regulation (EU) No 1169/2011.

⁵¹⁸ Case C-315/05, *Lidl Italia Srl*, [2006] ECR I-11181 at 49.

⁵¹⁹ Case C-315/05 *Lidl Italia Srl*, *Opinion of Advocate General STIX-HACKL*, at 44.

⁵²⁰ Case C-315/05, *Lidl Italia Srl*, [2006] ECR I-11181 at 50 and 53.

⁵²¹ Case C-315/05 *Lidl Italia Srl*, *Opinion of Advocate General STIX-HACKL*, at 60.

⁵²² Case C-443/13, *Reindl*, of 13 November 2014 (not yet published) at 42.

Court of Justice reemphasised the integrity of the food chain as being jointly responsible for the safety of food that is placed on the market. In this manner, it is irrelevant if the product became unfit for human consumption at the distribution stage, during processing, or during transport. Under EU food law, it is the final product that is sold to the consumer that is of relevance.⁵²³

Lidl Italia and *Reindl* assume that part of the responsibility of food business operators is to verify compliance with EU food law requirements at all stages of production, processing, and distribution. Here, the function of the food business operator goes beyond mere compliance with the legal requirements. Responsibility requires an active, reasonable, and precautionary approach for ensuring that the food placed on the market is safe for consumption. This is made clear by the requirement of *verification*. Food business operators must be able to *verify* that food safety is ensured at all stages of production, processing, and distribution. This implies a form of actual control or supervision of other actors involved in the food chain.⁵²⁴ This permanent form of mutual control is different to the control Member States were required to exercise under the old regime. While the latter is only exercising control and monitoring on a selective basis, control through the food chain is exercised permanently.⁵²⁵ Food business operators must be able to prove that food products comply with food safety requirements *at any time*. The possible threat of being held accountable for the misconduct of other actors in the food chain functions as an incentive to exercise actual control.⁵²⁶

⁵²³ *Ibid.*, at 44.

⁵²⁴ COM(1999)719 final, 7-8; and B. M. J. Van Der Meulen and Menno Van Der Velde, '*Food Safety Law in the European Union : an Introduction*', at 143. It is interesting to see that Article 8(4) Regulation (EC) 1169/2011 states that: "Food business operators, within the businesses under their control, shall not modify the information accompanying a food if such modification would mislead the final consumer or otherwise reduce the level of consumer protection and the possibilities for the final consumer to make informed choices. Food business operators are responsible for any changes they make to food information accompanying a food.⁴ It shows a tendency to organise the adequacy of labelling through the food chain and internal procedures. However, at the same time it provides for the possibility to modify information, but requires that this information does not lower the standard of protection.

⁵²⁵ For example see Case C-315/05, *Lidl Italia Srl*, [2006] ECR I-11181. Case C-443/13, *Reindl*, of 13 November 2014 (not yet published); and Case C-636/11, *Karl Berger v. Freistaat Bayern*, [2013] ECR 0000.

⁵²⁶ Case C-315/05 *Lidl Italia Srl*, *Opinion of Advocate General STIX-HACKL*, at 61.

3.1.3 *Due-diligence*

The allocation of joint responsibility of the food chain is a technique to minimise risk. The requirement to ensure some form of internal organisation and control by the actors involved in the food chain is a way to reduce the risk that unsafe food is placed on the market and consumed by the consumer. Within this form of internal governance (i.e. self-organisation), the food chain and its individual members have to ensure at all stages that the risk to health that emerges with unsafe food is not transferred to consumers. The legal requirement imposed on food business operators implies a precautionary duty.⁵²⁷ Food businesses are responsible for withdrawing food that is unsafe and for informing consumers about risks in due time.⁵²⁸ The main responsibility of reducing risks and harm is shifted to the food business operator. In particular, the characteristics and the technical complexity of matters relating to food safety make it unreasonable to leave the consumer or Member States solely responsible for dealing with the risk inherent in the safety of food.⁵²⁹

With an integrated food chain, the safety is “*traceable all way back to origin.*”⁵³⁰ Traceability of food and food ingredients is a way to ensure a high level of consumer health by minimising the risk that unsafe food or food ingredients travel all the way through the food chain to the consumer before their risk to health are recognised.⁵³¹ The precautionary duty is evident here when considering the food chain as a whole.

The integrated food chain model differs from one that relies on individual responsibility, where food business operators would be in charge only for their own activities. Thus, responsibility goes beyond mere compliance. It creates a space for food businesses in which they are empowered and required to self-organise a system of mutual control and supervision that ensures a high level of compliance with food safety standards. This kind of mutual control exercised by the food chain is an important element for the effective protection and

⁵²⁷ Ellen Vos, 'EU Food Safety Regulation in the Aftermath of the BSE Crisis', at 245.

⁵²⁸ Case C-636/11, *Karl Berger v. Freistaat Bayern*, [2013] ECR 0000 at 29-31.

⁵²⁹ See for similar idea Case C-316/09 *MSD Sharp & Dohme GmbH*, *Opinion of Advocate General TRSTENJAK*, at 113-114.

⁵³⁰ Ellen Vos, 'EU Food Safety Regulation in the Aftermath of the BSE Crisis', at 244; and Damian Chalmers, 'Food for Thought': *Reconciling European Risks and Traditional Ways of Life*', at 536-537.

⁵³¹ Regulation (EC) No 178/2002, Article 18(1).

organisation of food safety. Accordingly, part of the task entrusted to the food business operator is to organise the food chain so as to ensure effective control and supervision of food safety requirements throughout the food chain. This can be called a *due-diligence* requirement. Meaning that each “link in the food chain should take the measures necessary to ensure food safety within the *context* of its own specific activities.”⁵³²

EU internal market law leaves the organisation of food chain relationships to the actors involved. Clearly, the legal requirements of traceability and joint responsibility prefer integrated food chains, reflecting the “farm to table approach.” This can be arranged through contractual relationships, whereby different actors involved in the food chain have different contractual obligations. Food business operators can “impose on manufacturers rules or quality criteria relating to the manufacture of foodstuffs which could be enforced by means of inspection programmes or regular checks.”⁵³³ In this sense, control may be exercised through the contractual regulation of quality of products or through monitoring for example. How compliance with Regulation (EC) No 178/2002 is attained, is decided by the food business operators.

This form of joint responsibility for food products requires economic operators to resort to “due diligence defence and self-protection,” or private standardisation of safety processes, for example.⁵³⁴ Food business operators are entrusted with the task of ensuring that food safety is actually produced in practice. This creates a space in which economic operators engage and compete with each other so as to find the most efficient solutions for producing and ensuring that food placed on the market is safe for human consumption. Food business operators may acquire knowledge on food safety and consumer needs and contract this expertise out to manufacturers.⁵³⁵ The idea of joint

⁵³² COM(97)176 final, 46.

⁵³³ Case C-315/05 Lidl Italia Srl, *Opinion of Advocate General STIX-HACKL*, at 63.

⁵³⁴ For example see Case C-366/04 Georg Schwarz v. Bürgermeister der Landeshauptstadt Salzburg, *Opinion of Advocate General GEELHOED*, at 21. Sebastian Krapohl, *Risk regulation in the single market : the governance of pharmaceuticals and foodstuffs in the European Union* (Palgrave, 2008).

⁵³⁵ The freedom of organization allows actors involved in the food chain to allocate “costs” in the light of efficiency principles. In this sense it follows a market structure and the allocation of resources through sharing (some form of efficient organisation). Joint liability, then is a tool to “eliminate uncertainties, and therefore assumed only in so far as an alternative, clear and equally effective allocation of obligations and responsibilities has not been established by the parties involved or does not clearly stem from factual circumstances.” For the idea of organisation see Ronald Coase, *The Nature of the Firm*, at 401. Although from Data Protection Law consider the

responsibility recognises a space or freedom for economic operators to interact and organise themselves so as to act according to their responsibilities. However, the complexity and interdependence of the food chain seem to allow for this kind of self-organisation by being compliant with EU food law requirements. It creates a space in which more efficient organisation of control and supervision is negotiated through the actors involved.

4. Delivering food safety in practice

This latest approach assumes that the market process alone—as organised under the *Cassis de Dijon* model—will not provide for a sufficient level of consumer health for several reasons. Prices could be one example: consumers may not make choices on the basis of their health but on the basis of their budgets. Healthy products are likely to be more expensive as they may require special standards of hygiene or production that increases the costs to consumers. This does not mean that consumers are not willing to buy healthy products, but the price argument assumes that some consumers may simply not be able afford to buy healthy products. When leaving health and food safety issues to the market, the risk clearly is on the consumer. This is evident from the BSE crisis in the 1990. A risk closely related to the price argument is a race to the bottom. A higher standard of care or health involves higher costs for food businesses, e.g. certifications of special standards or higher manufacturing costs. The ‘organic’ label is one example here. Thus, food safety may become a factor for competition. The regime adopted by Regulation (EC) No 178/2002 is a response to the difficulties encountered in the internal market concerning delivering safe food in practice to the consumer.⁵³⁶

Analysis of the Regulation (EC) No 178/2002 regime highlights a new approach as to how food safety is delivered to the consumer. The result of the reform is a matrix of competent authorities, which are responsabilized to ensure that only safe food is placed on the market. In this respect, the form of individual and joint responsabilization of the food business operator and the food chain as a whole instrumentalises private actors as alternative forms of regulatory authority. Table

organisation of a complex system through joint responsibility Opinion 1/2010 on the concepts of "controller" and "processor", (00264/10/EN WP169) at 24.

⁵³⁶ For example see the Preamble of Regulation (EC) No 178/2002.

i illustrates the shared responsibilities of actors in delivering food safety to the consumer.

Food business operator	European Food Safety Authority	Commission	Member States and National Food Authorities
Compliance with law and proactive approach to control and verify compliance throughout the food chain; also in charge for aspects relating to risk management and risk communication	Delivering scientific data and technical support for both food business operators and legislative bodies; also in charge for issues relating to risk assessment and risk communication	Delivering harmonised regulation concerning food-related issues (such as GMO's or food additives); also the EU Commission is responsible for risk management	Ensure that national food law is in compliance with EU food safety principles; also in charge for issues relating to risk management

Table i The food safety Regulation (EC) 178/2002 system of shared responsibility

Although the responsibility for ensuring food safety is shared, the system is based on the assumption that only when all actors comply with their functions is a high level of food safety delivered to the consumer. Each actor is put in charge of a specific function relating to the risk analysis scheme: risk assessment, risk management, and risk communication.⁵³⁷ EFSA is responsible for issues relating to risk assessment and risk communication, the EU Commission and Member States are responsible for risk management, and the food business operators are responsible for issues relating to risk management and risk communication. Food safety is generated by the interplay of all these actors. However, the key function in terms of efficiency of the system ensuring food safety is entrusted to the food business operator. This is due to the fact that the food business has to deliver safe food to the consumer in practice.

This form of organisation creates a relative openness, and flexibility with regard to future changes to the meaning of 'food safety.' For example, if alterations in scientific evidence reveal changes concerning ingredients or food additives and their affects on consumer health, this institutional and structural organisation is flexible and can adapt to these changes:

⁵³⁷ Ibid., at Article 3(10)-(13); and Ellen Vos, 'EU Food Safety Regulation in the Aftermath of the BSE Crisis', at 239.

It seeks to achieve this goal through coordinating the actions of a disparate number of institutional actors whose duties are set out in Regulation 178/2002/EC. A feature of such an organisational structure is that it is an adaptive process in which the nature of the 'problem' regulated will vary over space and time.⁵³⁸

For the food business operator this reflects a form of delegation of public power to private actors. Food business operators are now in charge for parts of the organisation of the food market. This capacity is reflected in a form of self-governance granted to food businesses and the food chain as a whole to ensure that only safe food is placed on the internal market. Food business operators are responsible for ensuring that only safe food enters the market. How this is ensured is left at the discretion of the food business and the food chain. In fact, what EU internal market law does is to shift power vested in national institutions to EU level and reorganise it and allocate it to local actors in a decentralised, more effective (i.e. market oriented) way.

4.1 The question of allocation

In relation to food safety, the old regime seemed flawed and showed that a more pro-active framework was required that placed a significant portion of responsibility in attaining food safety on the sector that was likely to affect it, i.e. the food business operators and the food chain. This is not a theoretical issue but importantly about delivering safe food in practice.

In this respect, the task allocated to the food business operator under the Regulation (EC) No 178/2002 regime in relation to the delivery of safe food to consumer was not natural but emerged as a choice of the EU legislator in searching for more 'efficient' solutions for attaining food safety in the internal market. The premise was that actors should be in charge of aspects that they are best equipped to deal with in terms of expertise, skills, and knowledge. This is where the picture of shared responsibilities and the allocation of specific tasks in relation to food safety emerged. This is to set up a system, conceptual and

⁵³⁸ Damian Chalmers, *"Food for Thought": Reconciling European Risks and Traditional Ways of Life*, at 556.

institutional that is, in relative terms, more capable than the old regime of better delivering safe food to the internal market.

The fact that the food business operator occupies a central position in the context of food safety and especially on how food safety is attained reflects part of the choices involved. Here, the system set out in Regulation (EC) No 178/2002 is a consequence of a trade-off about material, conceptual, and institutional alternatives at the end of which the food business is recognised as a ‘competent authority,’ in the web of actors entrusted with the task of *delivering* food safety in the internal market.

4.1.1 Transforming the food business operator

An important factor relating to the allocation of responsibility to the food business operator is its position in the market for food. This position comes with an asymmetry of power over the consumer. This is because food business operators determine the means of production, the ingredients, or other issues relating to the production, processing or selling of food. As *Iris Young* argues, “the agents position in structural processes usually carries with it a specific degree of potential or actual power or influence over processes that produce the outcomes.”⁵³⁹ Consumers are only left with the choice among the foods finally produced.

EU food safety law transforms the power of the food business operator vis-à-vis the consumer into an integral part of the institutional framework for attaining food safety. In light of this asymmetry of power, the allocation of a specific duty to deliver safe food to consumers is a way to increase the efficiency of the sector concerned. It is a legislative choice that food safety can only be attained through regulation and that food businesses ought to be involved in the contribution to health. *As a consequence food safety standards ought to be internalised by food business operators. Consumer health becomes part of their economic activities.*⁵⁴⁰ The economic activities of food businesses under the due diligence obligation have an outward

⁵³⁹ Iris Marion Young, ‘*Responsibility for justice*’, at 144.

⁵⁴⁰ It is legally organised so that there is no need for food business operators to search for “more efficient” or “better” solutions in attaining food safety. This competition for better and more efficient solutions comes with the risk of race to the bottom. For example see Ronald Coase, ‘*The Nature of the Firm*’, at 405.

effect, where an effective internal organisation of the food chain produces food safety for the market as a whole. Ultimately, the activities of food businesses under the Regulation (EC) 178/2002 framework serve the consumer and produce a higher standard of food safety in the long-term. This is the most efficient way in which food safety is delivered in practice. This reflects a form of *Rawlsian improvement*—a fairer and more efficient system. The inequality for some (i.e. the incurred costs for food business operators) is for the benefit of the least advantaged (i.e. the consumers). It reduces the risk for consumers to be exposed to risks to health.

The result of allocating responsibility to the food business operators is that they emerged as another competent authority entrusted with a task formerly vested in public actors. The food business operator occupies a position that is bound up with a protective duty for consumers, reflected in the due-diligence obligation to ensure an effective monitoring and compliance with food safety requirements throughout the food chain. The food business operator has an active role in preventing harm from happening to consumer. It must minimise the risk to which consumers are exposed.

4.1.2 Determining a level playing field

The system set up by Regulation (EC) No 178/2002 creates a level playing field with regard to food safety standards. Food safety under the latest regime is not subject to competition. The food business operator, due to its specific position in the food market, is entrusted with the due-diligence obligation. This due-diligence obligation is a technique to ensure that food safety is actually delivered. The problem here is that private actors that are supposed to act freely based on their self-interests are also required to act in a public function. In the context of food safety law, this is reflected in the control and monitoring of activities in the food chain going beyond one's own activities.

The proximity to products, production, ingredients, and other stages of production where food safety may be affected, places food business operators in the centre of the organisation of ensuring food safety. Food business operators have better expertise and knowledge about risk potentials relating to the production chain of food than public authorities or agencies. Consequently, they

are better equipped to develop a system of effective monitoring and compliance. This distinguishes food business operators from public authorities, which lack this proximity in terms of expertise and knowledge of the relevant risk potentials and processes. This choice for a more effective organisation of the sector to attain food safety is reflected in the allocation of the obligations to food business operators under Regulation (EC) No 178/2002. In practical terms, the new system makes use of the power and the special structure of the food chain, the consequence of which is a protective duty reflected in the monitoring and compliance requirement.

4.1.3 Leaving space for self-organisation—thriving for ‘more efficient solutions’

It appears that the food business operators are in charge of ensuring a certain level of food safety, but they enjoy a certain margin of discretion in order to attain this. This creates a market within the food chain to find efficient solutions to reduce the costs imposed by law. This market may function efficiently, because the floor for competition—the joint responsibility to ensure compliance with food safety requirements—is the same for all actors involved in the food chain. The food businesses, although required to comply with EU internal market law, enjoy discretion to organise the food sector (i.e. food chain) themselves. With this freedom (i.e. within the limits set by food law), food businesses may find or strive for more efficient solutions. This gives room for innovation.

Through innovation, private actors involved in the food chain may reduce their costs further. By organising its relationships with other businesses in the food chain, food business operators may innovate in order to find more efficient solutions (i.e. being adapted to their needs and practices) within the limits set by EU internal market law.⁵⁴¹ This reflexive and flexible approach leads to efficient outcomes. Thus, in terms of self-organisation of the food chain and supervision within, rather than a top-down command and control approach, EU food law favours a bottom-up approach—granting space to the actors involved to find the most suitable solution depending on the characteristics of the case in hand.

⁵⁴¹ See Ronald Coase on the idea of innovation. *Ibid.*, at 397.

4.1.4 Enhancing the efficiency of the internal market

Overall, the latest regime potentially puts the food business operator in a better position than before, despite the fact that it has to comply with food safety requirements and the due-diligence obligation. The system created by Regulation (EC) No 178/2002 aimed to renew consumer faith in the internal market for food through harmonising food safety law and setting up a system that delivers safe food in practice. This in turn then benefits producers simply because consumers return to buy products. At the same time, the abolition of competition on the basis of levels of safety imposes the same costs on all actors involved in the food chain to comply with food safety requirements. In other words, all producers are burdened to the same extent: no producer can gain a competitive advantage on the basis of food safety.

The process of self-organisation with regard to the due-diligence requirement may put the food business in a better position than before. It takes into account the very needs of the food sector. It requires compliance but is flexible on how compliance is reached. This flexibility and freedom is 'controlled' by enforcement through other actors involved in the food chain. In this respect, the integration of the food chain functions as a preventive mechanism. Mutual control ensures the early detection and subsequently prevention of risks to which consumers may be exposed. At the same time this is also advantageous for food business operators as they may adapt to risks at an earlier stage of production or processing.

4.2 The consumer

The role of the consumer in relation to food safety is relatively low. This is because food safety is not subject to competition and as such part of 'consumer choices.' Food safety is an integral part of the internal market and is guaranteed to the consumer by the EU legislator. Rights for the consumer relating to food safety only emerge in situations where the food business operators failed to comply with their obligations. In these cases they are subject to liability under the Directive 85/374/EC on liability for defective products.⁵⁴²

⁵⁴² See Council Directive 85/374/EEC, of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ L 210 , 07/08/1985 P. 0029).

5. Liability

The imputability of legal requirements does not go without liability, which is intended to ensure the effectiveness of the legal requirements. Under Regulation (EC) No 178/2002 liability of food business operators is determined according to Directive 85/374/EC on liability for defective products. Food is treated as a product in the sense of Directive 85/374/EC and the same standards and rules concerning liability apply.⁵⁴³ Directive 85/374/EC sets up a system where the producer is liable for harm caused by a defective product.⁵⁴⁴

Reindl and *Lidl Italia* were cases concerning liability in food law and both cases confirmed that when food unfit for human consumption is placed on the market, any party in the food chain can be held liable.⁵⁴⁵ In this regard, it is irrelevant if the unfitness for human consumption emerged during the processing or distribution stages. It is the final product that is sold to the consumer that is decisive.⁵⁴⁶ For example, *Lidl Italia* refers to this form of joint liability.⁵⁴⁷ *Lidl Italia* concerned the issue of whether traders of food could be held liable with regard to the false labelling of products by a manufacturer. In this case, investigations by regional health authorities revealed that the actual alcohol content of the spirit in question was below the content stated on the label. *Lidl Italia* was held liable for the false labelling. *Lidl Italia* challenged the national rule on liability, arguing that being just a trader of the product it was not responsible for the accuracy of the label and therefore could not be held liable.⁵⁴⁸ Although the assessment was based on labelling Directive 2000/13/EC,⁵⁴⁹ the Court of Justice affirmed the notion of *joint responsibility that is ascribed to actors involved in the food chain*. The denial of joint liability for actors involved in the food chain would “compromise the achievement of the results prescribed by the directive.”⁵⁵⁰

⁵⁴³ Regulation (EC) No 178/2002, Article 21.

⁵⁴⁴ Council Directive 85/374/EEC, Article 1.

⁵⁴⁵ Case C-443/13, *Reindl*, of 13 November 2014 (not yet published) at 42-44; and Damian Chalmers, 'Food for Thought': Reconciling European Risks and Traditional Ways of Life', at 542.

⁵⁴⁶ Case C-443/13, *Reindl*, of 13 November 2014 (not yet published) at 44.

⁵⁴⁷ Council Directive 85/374/EEC, Article 5.

⁵⁴⁸ Case C-315/05, *Lidl Italia Srl*, [2006] ECR I-11181 at 25-28 and 35.

⁵⁴⁹ Now Regulation (EU) No 1169/2011.

⁵⁵⁰ *Ibid.*

Liability of food business operators under EU food law places the decisions of sanctioning and awarding damages within the national environment. At first sight this might sound plausible and responsive to the very nature of EU food law, which is primarily national law. But it is if the sharing between EU internal market law and national law in terms of liability leads to an effective judicial framework that ensures the compliance of food business with the legal requirements on food safety that is the decisive factor here.

Under German law it seems that national courts take their responsibility seriously. For example, in a case before the Oberlandesgericht (OLG) Köln the court was confronted with a case where a woman had bought a sandwich at a gas station, which had a 6mm screw-nut in it. The biting on the screw-nut caused severe damages to the woman for which compensation was sought. The court reaffirmed the precautionary duty imposed on all actors in the food chain under EU internal market law to ensure that only food fit for consumption is placed on the market. The OLG Köln emphasised that the protective duty imposed on producers does not go so far as that all risks for the consumer must be excluded. However, in relation to the case at hand the court clarified that the current monitoring and control mechanisms in terms of visual tests, weight tests, and random sampling that were in place in the food chain were insufficient. In order to ensure adequate testing, the producer is required to comply with modern technical and scientific standards to ensure food safety. Thus, damages are awarded whenever the producer is found not to have acted according to its responsibilities.⁵⁵¹

6. Remarks

Regulation (EC) No 178/2002 significantly transformed the role of food business operators in the course of reorganising the material and institutional approaches for attaining food safety in the internal market. This reorganisation emerged in response to a significant distortion of the internal market for food that had its origin in the old system of ensuring food safety at national level. The old regime relied on national law and national food safety standards through which consumers would be protected in the internal market through the principles of free movement of goods and mutual recognition. Therefore it was assumed that

⁵⁵¹ Oberlandesgericht Köln, 13 U 146/01, OLG Köln 24.07.2002. Case is available in German only.

where food was lawfully marketed in one Member State in compliance with national food safety regulations, this standard would deliver food safety to the internal market as a whole. The BSE crisis revealed that the old system failed in providing an adequate level of protection. The complexity of the food chain and the carelessness of the national and European authorities being responsible for supervision were not able to protect consumers adequately.

The latest regime reorganises the framework through which food safety is attained and integrates it into the internal market for food. Food safety is now an integral part of the food market. The responsibility to attain and ensure a high level of food safety is now shared among the actors addressed by Regulation (EC) No 178/2002. The food business operator emerged as a 'competent authority' in this context, which is reflected in the function allocated under the latest food safety regime.⁵⁵² The food business operator and the food chain as a whole are now considered as an alternative 'source of authority' when it comes to the delivery of safe food to the internal market.

The principles reflected in EU food safety law are now an integral part of the economic activities of food business operators. This is reflected in the *due-diligence* requirement ascribed to food businesses. Under this requirement, food business operators are required to comply with food law requirements, but also are put in a position to set up and organise a system of mutual control covering all stages of the food chain. Thus, the food business and the food chain as a whole occupy a key position in the organisation of the food safety. This idea is reflected in the precautionary approach of Regulation (EC) No 178 /2002. Food should be withdrawn from circulation at any stage of the food chain if it is detected that it is unsafe for human consumption. In this manner, the risk of consumers consuming unsafe food is reduced. It is the task of food businesses to ensure that the risk of consumers being exposed to unsafe food is minimised. The precautionary and preventive system reflected in the internal control mechanisms of food chains is an important aspect of EU food safety law.

The decision to involve private actors and in particular the food chain in the attainment of a high level of consumer health has practical reasons. Due to the position of the food chain in relation to the objective of ensuring food safety in

⁵⁵² COM(97)176 final, 45.

the internal market, food business operators are ascribed the primary responsibility to verify that the food placed on the market is fit for human consumption. As a consequence, food safety becomes a commodity that is produced in and delivered to the market. Thus, the key function in terms of efficiency of the system to ensure food safety is entrusted to the food business operator. The system is only efficient when safe food is placed on the market. In practical terms, this is only attained through a more active role of food business operators in actually producing safe food.

Chapter 5

Responsibility of Private Actors in EU Data Protection Law

Introduction

In an information society, it is said that information is the most valuable asset “that many organisations, commercial or otherwise, possess”—*information is power*.⁵⁵³ The control of information generates power.⁵⁵⁴ This is the case even more so when the information relates to personal data. The power over personal data may be misused to the detriment of data subjects, for example, for specific business interests relating to commercial purposes.

With increases in digital technology and digital information processing mechanisms, the protection of information relating to personal data “has emerged as one of the greatest challenges of our generation.”⁵⁵⁵ Partly, because we increasingly rely on communication through digital means, but even more so in our generation because “most of the actions we undertake leave a digital trace that make a huge amount of personal information potentially available to others.”⁵⁵⁶ This includes means for mass storage, digitalisation, new information technologies and specific algorithms collecting data relating to user behaviour and computing services. Take as a simple example the collection of personal data

⁵⁵³ David I. Bainbridge, '*EC data protection directive*' (Butterworths Law, 1996), at 3.

⁵⁵⁴ This is why for example food labelling in relation to the efficiency of the food market is a mandatory requirement. Information concerning the ingredients and quality of foods is an essential requirement for the internal market for goods to work. See Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649.

⁵⁵⁵ Federico Fabbrini, '*The EU Charter of Fundamental Rights and the Rights to Data Privacy*', *iCourts Working Paper Series*, 19 (2015) at 4.

⁵⁵⁶ Joined Cases C-509/09 and C-161/10 *eDate Advertising GmbH*, *Opinion of Advocate General CRUZ VILLALÓN*, at 45; and Federico Fabbrini, '*The EU Charter of Fundamental Rights and the Rights to Data Privacy*', at 4.

through so called ‘cookie profiling.’⁵⁵⁷ Every expression of preference made in the browser through search requests, online shopping, or other commercial activities for products, is collected: this information may be read by internet browsers and search engines, for example. Some programs do not even work without having access to cookies on a personal computer. The information is collected, stored, bundled, and sold to other commercial entities, or as was the case in *Schrems*, it may be forwarded to intelligence agencies.⁵⁵⁸ Personal data can be used to profile individuals. In relation to economic activities these profiles are a source for personalised offers or advertisements. However, this is not the only type of personal information concerned. Personal data collected may relate to far more sensitive information such as sexual orientation, political beliefs, or religious opinions.

Within EU internal market law, the right to have personal data protected is now recognised as a fundamental right and has constitutional status.⁵⁵⁹ Under EU internal market law the concept of *personal data* covers any information that relates “to an identified or identifiable person.”⁵⁶⁰ Part of the problem faced with protecting personal data relates to the non-absolute character of the right to data protection.⁵⁶¹ Article 8(1) of the EU Charter of Fundamental Rights (EUCFR) provides that “everyone has the right to the protection of personal data concerning him or her.”⁵⁶² Article 8(2) of the EUCFR refers to the exception where the right to personal data may be subject to interference. It states that personal data “must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law.”⁵⁶³ This implies that the processing—the forwarding of personal data—is needed in some specific situations. Different reasons may justify the processing, ranging from public interest concerns to mere compliance with contractual

⁵⁵⁷ For information on cookie-profiling see < <http://www.allaboutcookies.org/cookies/cookie-profiling.html> >

⁵⁵⁸ For this see the latest decision of the Court of Justice on Facebook transferring EU personal data to the United States in Case C-362/14, *Maximilian Schrems v. Data Protection Officer*, of 6 October 2015 (not yet reported).

⁵⁵⁹ See Article 6(1) TEU and Article 16 TFEU and Lee A. Bygrave, ‘Where have all the judges gone? Reflections on judicial involvement in developing data protection law’, *Privacy Law & Policy Reporter*, 7, 11 at 4.

⁵⁶⁰ Directive 95/46/EC, Article 2(a).

⁵⁶¹ Case C-465/00, *Österreichischer Rundfunk*, [2003] ECR I-4989 at 71.

⁵⁶² Also see Article 16 TFEU and in particular Article 16(2) TFEU.

⁵⁶³ See Article 8(2) EUCFR.

agreements, such as the exchange of data for commercial activities. For example in *Schwarz*, the storing of fingerprints with passports was challenged before the Court of Justice. *Schwarz* argued that the taking of fingerprints violated his right to privacy. The Court of Justice rejected this claim. It held that the taking of fingerprints is an adequate means to prevent falsification of passports. There is no real alternative to serve the general interest and it is not overly interfering with the privacy of the data subject.⁵⁶⁴ The right to have one's personal data protected is overridden by the public interest to prevent the falsification of passports. In some situations the processing of personal data may be essential to perform tasks and legal obligations the data controller is effectively subject to.⁵⁶⁵

EU data protection law has had a profound impact on private actors with regard to the protection of personal data in the digital age. This does not only relate to the protection of personal data as such, but in particular refers to the systems through which personal data are attained in the context of the internal market. The central instrument in EU data protection law is Directive 95/46/EC. Directive 95/46/EC introduced a system of data protection that bestows a specific protective duty to the data controller. The consequence of this specific duty is that these data controllers occupy a central position with regard to effectively protecting personal data.⁵⁶⁶ Their responsibility in the context of data protection relates to the function of ensuring that the processing of personal data complies with data protection rules.

1. EU data protection law

Data protection issues relate to the organisation and regulation of risk.⁵⁶⁷ This is how to ensure the protection of personal data from unlawful use and abuse through other actors in light of the need to ensure free movement of personal data within the internal market. The right to have one's personal data protected

⁵⁶⁴ Case C-291/12, *Michael Schwarz v. Stadt Bochum*, [2013] ECR 670 at 27, 51 and 60f.

⁵⁶⁵ See Directive 95/46/EC, Article 7 on lawful processing.

⁵⁶⁶ For example the employer is considered a controller of data in Case C-342/12, *Worten*, of 30 May 2013 (not yet published) at 23.

⁵⁶⁷ Damian Chalmers, '*Food for Thought: Reconciling European Risks and Traditional Ways of Life*', at 535; and Brendan Van Alsenoy, '*Regulating Data Protection: The Allocation of Responsibility and Risk among Actors involved in Personal Data Processing*', Thesis (Doctor of Laws) (KU Leuven (Centre for IT & IP Law), 2016) at 43.

is far from unknown in the EU or the Member States.⁵⁶⁸ Some Member States are signing parties to Convention 108 that concerns the protection of individuals in regard to automatic processing of personal data. Convention 108 entered into force in 1985.⁵⁶⁹ The European Court of Human Rights (ECtHR) similarly found the right to have one's personal data protected to be a human right protected under the European Convention on Human Rights (ECHR). Although the ECHR has no explicit provision for dealing with data protection, the ECtHR held that the right to have one's personal data protected is inherent in Article 8 of the ECHR on the protection of the right to privacy.⁵⁷⁰ Directive 95/46/EC brought the right for data protection to the EU legal landscape.⁵⁷¹

1.1 Regulation (EU) 2016/679

The latest development in EU data protection law is the adoption of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. Regulation (EU) 2016/679 was adopted on 4 May 2016 and will apply from 25 May 2018.

After many years of political deliberation, agreement was reached to update and reaffirm the legal framework set into force by Directive 95/46/EC, through Regulation (EU) 2016/679. Although the approach for data protection and the structural changes it brings about in national laws remains unchanged, a decisive difference is the fact that the EU Data Protection framework will be set out in a Regulation. With this change, the EU legislator intends to set up a stronger framework that is directly applicable in national law and to reduce further the differences between national laws that are still in place due to the existence of differences in the implementation and application of Directive 95/46/EC.⁵⁷² The Regulation affirms the need to permanently ensure a “high level of protection of

⁵⁶⁸ Federico Ferretti, *Data Protection and the Legitimate Interest of Data Controller*, *Common Market Law Review*, 51 (2014), 843 at 847 and 851.

⁵⁶⁹ See Convention 108 of the Council of Europe on Data Protection, Article 1.

⁵⁷⁰ C (84) 57, European Court of Human Rights, *Malone v. The United Kingdom (violation of Article 8 of the Convention)*, of 2 August 1984 at 66-68. And especially the deferring Opinion, which discusses the counter-measures that must be available to data subjects in the case personal data is processed.

⁵⁷¹ Directive 95/46/EC; and Gloria González-Fuster, *The emergence of personal data protection as a fundamental right of the EU* (Springer, 2014), at 136.

⁵⁷² Regulation (EU) No 2016/679 recital 7 and 9.

natural persons and to remove the obstacles to flows of personal data within the Union.”⁵⁷³

The analysis of the data protection regime under this chapter will focus on the system of Directive 95/46/EC for the following reasons. Firstly, the Regulation is not yet applicable and as such it is not binding law. Secondly, the Regulation does not bring about substantial changes against which the Directive 95/46/EC regime should be measured. Rather, this chapter is going to review the Directive that introduced the new, harmonised approach for attaining a high level of data protection within the internal market and which developed the responsibility of the data controller. In light of this thesis, which is concerned with the transformation of roles through EU internal market law, it is more appropriate to look at the original document that first developed the role of the data controller.

2. Emergence of EU data protection law

The concept of data protection relates to the control of power over personal data. In terms of the power relationship, data protection law deals with an *asymmetry of power* between actors that have access to personal data, for whatever reason, and the persons to whom this information belongs. The underlying question is how to deal with this power relationship through legal means to ensure an adequate protection of personal data and the fundamental right to privacy. *Daniel Solove* uses Kafka’s ‘The Trial’ to capture this underlying problem:

Franz Kafka's *The Trial*, which depicts a bureaucracy with inscrutable purposes that uses people's information to make important decisions about them, yet denies the people the ability to participate in how their information is used. The problems captured by the Kafka metaphor (...) are problems of information processing—the storage, use, or analysis of data—rather than information collection. *They affect the power relationships between people and the institutions of the modern state.* They not only frustrate the individual by creating a sense of helplessness and powerlessness, but they also affect social structure by altering the

⁵⁷³ Ibid., at recital 10.

kind of relationships people have with the institutions that make important decisions about their lives.⁵⁷⁴

Prior to Directive 95/46/EC it was the task of Member States and national laws in accordance with the principles set out in Convention 108 to ensure the adequate protection of personal data. The model imposed by Convention 108 is based on the idea that national law and Member States are the key actors in the protection of personal data and the right to privacy. The *responsibility* in the form of a protective duty is bestowed on the public authorities in a national context only. Under this regime, Member States saw the protection of personal data as a central issue in protecting the idea of liberty, liberal society, and the right of self-determination in relation to the new information technologies.

With regard to EU internal market law and the internal market, the potential for conflict is evident. The internal market creates an environment that promotes trans-border interactions between private actors. Irrespective of issues of employment, health, communication or mere consumption, the economic and social freedom the internal market provides to private actors promotes an “increasingly frequent recourse” to the transnational processing of personal data.⁵⁷⁵ Processing of personal data is of “vital interest” for the functioning of the internal market.⁵⁷⁶ The functioning of the internal market is dependent on “cross-border flows of personal data.”⁵⁷⁷ The level of,

economic and social integration resulting from the establishment and functioning of the internal market[...] will necessarily lead to a substantial increase in cross-border flows of personal data between all those involved in a private or public capacity in economic and social activity in the Member States.⁵⁷⁸

⁵⁷⁴ For this see Daniel J. Solove, *'I've got nothing to hide' and other misunderstandings of privacy*, San Diego Law Review, 44 (2007), 745 at 756-757.

⁵⁷⁵ Directive 95/46/EC, recital 4.

⁵⁷⁶ *Ibid.*, at recital 8.

⁵⁷⁷ *Ibid.*, at recital 6.

⁵⁷⁸ *Ibid.*, at recital 5.

This includes the exchange of personal data between private actors located in different Member States, but likewise any national authority in the various Member States that is,

being called upon by virtue of Community law to collaborate and exchange personal data so as to be able to perform their duties or carry out tasks on behalf of an authority in another Member State within the context of the area without internal frontiers as constituted by the internal market.⁵⁷⁹

2.1 Harmonisation of data protection law

The choice to harmonise a specific sector under EU internal market law always involves the decision that a new harmonised approach increases the efficiency and the functioning of the internal market. In relation to data protection, this is not about the fact that Member States were not protecting personal data adequately, but that the diverging provisions of laws, regulations, or administrative measures at the national level were distorting the functioning of the internal market due to the restrictive effects on the trans-border flow of personal data.⁵⁸⁰ Put differently, it is a conflict between national laws on the one hand and EU internal market law for the purpose of the functioning internal market on the other.

With regard to the processing of personal data, the different levels of protection of personal data under national laws is likely to prevent the “transmission of such data from the territory of one Member State to that of another Member State.”⁵⁸¹ The consequence being “an obstacle to the pursuit of a number of economic activities at Community level, [a distortion of] competition and [impeding] authorities in the discharge of their responsibilities under Community law.”⁵⁸² It is the diversity between and the restrictiveness of national laws with regard to the

⁵⁷⁹ Ibid.

⁵⁸⁰ COM(90)314 final, Commission Communication on the protection of Individuals in relation to the processing of personal data in the Community and Information security, of 13 September 1990, 14.

⁵⁸¹ Directive 95/46/EC, recital 7.

⁵⁸² Ibid.

protection of personal data that distorts and impedes the functioning of the internal market.⁵⁸³

Despite the traditional arguments for harmonisation, the Member States and national laws were under pressure due to the rapid technological developments, the increase in collecting and sharing personal data and globalisation that brought new challenges to public authorities to ensure an adequate protection of personal data.⁵⁸⁴ The increasing complexity of ensuring data protection in all sectors, coupled with constant new technical innovations made it difficult for Member States to ensure adequate protection of its citizens. The rapid changes in the business sector paired with the relatively slow nature of law-making procedures (and also a lack in expertise) led to inefficient laws. The emerging diversity between national laws and the different levels of protection awarded, affected both data subjects and the activities of businesses in the internal market. Here lies the core of the problem faced with EU data protection law: how to ensure a high level of protection of personal data while increasing the functioning of the internal market. The approach to reconcile these two objectives is reflected in Directive 95/46/EC.

2.2 The Directive 95/46/EC regime

Although it was adopted as an internal market instrument, Directive 95/46/EC recognised the need to guarantee a high level of personal data protection.⁵⁸⁵ The driving force was not the protection of personal data or the right to privacy, but the functioning of the internal market.⁵⁸⁶ Directive 95/46/EC was adopted with

⁵⁸³ This problem of data protection with regard to the transnational transmission of personal data found its way into Convention 108 already. Article 12 of Convention 108 requires States to not automatically restrict the trans-border flow of personal data for the sole purpose of the protection of privacy. States are required to give account to “the increasing flow across frontiers of personal data undergoing automatic processing“. For this see Convention 108 of the Council of Europe on Data Protection, Article 12. Processing is in particular relevant with regard to the personal data required for (inter)-actions between private parties in the territories of the Member States. See: Federico Fabbrini, *The EU Charter of Fundamental Rights and the Rights to Data Privacy*.

⁵⁸⁴ Regulation (EU) No 2016/679 recital 6.

⁵⁸⁵ Directive 95/46/EC, Article 1. On the dual objective see Case C-101/01, *Lindqvist*, [2003] ECR I-12971 at 96; and Case C-465/00, *Österreichischer Rundfunk*, [2003] ECR I-4989 at 39; and Joined cases C-468/10 and C-469/10, *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF)*, [2011] ECR I-12181 at 29; and Case C-73/07, *Satakunnan*, [2008] ECR I-9831 at 53.

⁵⁸⁶ See Article 114 TFEU and Paul Craig and Grainne De Búrca, *EU Law*, at 616. EU Directive 95/46/EC was adopted as a means ‘to improve the conditions for the establishment and functioning of the internal market’.

the intention of ensuring the functioning of the internal market.⁵⁸⁷ Directive 95/46/EC states that:

(8) ...in order to remove the obstacles to flows of personal data, the level of protection of the rights and freedoms of individuals with regard to the processing of such data must be equivalent in all Member States; ...Community action to approximate those laws is therefore needed;

(9) ...given the equivalent protection resulting from the approximation of national laws, the Member States will no longer be able to inhibit the free movement between them of personal data on grounds relating to protection of the rights and freedoms of individuals, and in particular the right to privacy.⁵⁸⁸

The consequence is that Directive 95/46/EC establishes a regime that serves two objectives: (1) the functioning of the internal market and (2) ensuring a high level of protection of personal data.⁵⁸⁹ This conflict of interests involved is strongly reflected in the organisation of EU data protection law.⁵⁹⁰ In this regard, the Court of Justice clarified that “Member States should, while permitting the free flow of personal data, protect the fundamental rights and freedoms of natural persons and in particular, their right to privacy, with respect to the processing of personal data.”⁵⁹¹

In *Lindqvist*, the Court clarified that the Directive 95/46/EC regime is designed to guarantee the functioning of the internal market while maintaining a high level of protection of personal data throughout the Member States.⁵⁹² *Lindqvist*

⁵⁸⁷ Article 114(1) TFEU.

⁵⁸⁸ Directive 95/46/EC, recital 8-9.

⁵⁸⁹ The dual objective enshrined in the Directive is the reason why we have a system based on individual balancing of cases. *Ibid.*, at Article 1(1) and Article 1(2).

⁵⁹⁰ See Case C-101/01, *Lindqvist*, [2003] ECR I-12971 at 99; and COM(2003)265 final, First report on the implementation of the Data Protection Directive (95/46/EC), of 15 May 2003, 3; and COM(2012)9 final, Safeguarding Privacy in a Connected World: A European Data Protection Framework for the 21st Century, of 25 January 2012, 8.

⁵⁹¹ Case C-73/07, *Satakunnan*, [2008] ECR I-9831 at 53; and Case C-465/00, *Österreichischer Rundfunk*, [2003] ECR I-4989 at 39.

⁵⁹² Alan Dashwood, 'The Harmonisation Process', in Carol Cosgrove Twitchett (ed.), *Harmonisation in the EEC* (St Martins Press, New York, 1981), at 7; and Directive 95/46/EC, recital 7-9; and COM(90)314 final, 14-15. Case C-101/01, *Lindqvist*, [2003] ECR I-12971 at 96; and Joined cases C-

concerned the setting up of a private webpage containing information about a group of catechists. Mrs Lindqvist set up this webpage to enable parishioners preparing for their confirmation to “obtain information they might need.”⁵⁹³ The webpage contained personal information about Mrs Lindqvist and 18 colleagues, such as full names, jobs, hobbies, family names, and telephone numbers. Thus, at hand was the issue between the availability of information on the internet and the protection of personal data. The Court of Justice held that for the functioning of the internal market, the data controller is the competing interest involved under Directive 95/46/EC, as the Court of Justice argued:

80 ... need to have access to personal data to perform their transactions or carry out their tasks within the area without internal frontiers, which the internal market constitutes.

81 On the other hand, those affected by the processing of personal data understandably require those data to be effectively protected.⁵⁹⁴

2.3 Effective data protection in EU internal market law

The challenges the national authorities were confronted with in terms of rapid technological changes and masses of personal data available in the digital world required a new approach. This new approach needed to ensure improved and more efficient protection of personal data at a European scale. In order to respond to the very needs and characteristics of the sector concerned, Directive 95/46/EC set out a new structural organisation and a new approach on how data protection is attained. The underlying assumption is that data protection is ensured if it is made effective in practice:

This goes to the heart of the directive, its first objective being to protect individuals with regard to the processing of personal data. That objective can only be realised and made effective in practice,

468/10 and C-469/10, *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF)*, [2011] ECR I-12181 at 29.

⁵⁹³ Case C-101/01, *Lindqvist*, [2003] ECR I-12971 at 12.

⁵⁹⁴ *Ibid.*, at 80-81.

if those who are responsible for data processing can be sufficiently stimulated by legal and other means to take all the measures that are necessary to ensure that this protection is delivered in practice⁵⁹⁵

Directive 95/46/EC provides this new approach for dealing with the asymmetry of power between data controller and data subject *within* the internal market. The responsabilization of private actors *qua* data controller is a consequence thereof.⁵⁹⁶ When acting in the capacity as data controller, private actors are transformed into ‘competent authorities’ in relation to the attainment of effective data protection in the context of the internal market. The process through which data protection is attained is reorganised. It involves new actors and a new process. Data protection is no longer determined within the scope of specific ‘rights,’⁵⁹⁷ but through a legal framework ensuring lawful processing of personal data. According to Directive 95/46/EC, effective protection of personal data is only attained when exercised at EU level and when imbedded in the internal market. A dispersed organisation of data protection at Member State level is likely to distort the functioning of the internal market as it impedes the free flow of data in cross-border situations.

2.3.1 *New approach to data protection: A legally structured ‘Data protection principle’*

First and foremost, part of the new organisation is reflected in the approach on how personal data are protected. Instead of providing a clear legislative framework of what data protection means, the Directive 95/46/EC adopts a more flexible approach based on the idea of balancing. Data protection is absorbed and ingrained in the internal market context. Political power is taken from Member

⁵⁹⁵ Opinion 1/2010 on the concepts of “controller” and “processor”, (00264/10/EN WP169) at 4.

⁵⁹⁶ “While the concept of controller (of the file) plays a very limited role in Convention 108, this is completely different in the Directive. Article 6(2) explicitly provides that ‘it shall be for the controller to ensure that paragraph 1 is complied with’. This refers to the main principles relating to data quality, including the principle in Article 6(1)(a) that ‘personal data must be processed fairly and lawfully’. The consequence is that all provisions setting conditions for lawful processing are essentially addressed to the controller. For an extensive analysis and overview of EU data protection law see Council Of Europe and Eufra, *Handbook on European Data Protection Law* (Publications Office of the European Union, Brussels, 2014). On the idea of decentralisation see Opinion 1/2010 on the concepts of “controller” and “processor”, (00264/10/EN WP169) at 4.

⁵⁹⁷ This would be the approach adopted by the European Court of Human Rights which sets out what kind of activities are prohibited under Article 8 ECHR and the right to privacy. To this effect see: Council Of Europe and Eufra, *Handbook on European Data Protection Law*.

States and shifted to the European level. The principle of data protection shifts from being a constitutional right towards a commodity produced by actors acting in a market environment and subject to data protection regulations—Directive 95/46/EC in particular.

The approach adopted by Directive 95/46/EC reflects this transformation and shift of power. Under Directive 95/46/EC data protection is no longer “regulated” but “produced.” This is because data protection is attained through lawful processing based on “protection principles.”⁵⁹⁸ The system developed by Directive 95/46 EC is based on the idea that *effective* data protection takes place in the course of processing—lawfulness is the requirement that determines when and if data are processed. Directive 95/46/EC establishes a system that ensures protection of personal data through *lawful processing* of this personal data.⁵⁹⁹ This means that data protection is treated as a commodity in the market. The function of the internal market is ensured and personal data are protected if personal data are processed in accordance and in coordination with the rules and environment developed under Directive 95/46/EC concerning the processing of such data. The meaning of data protection is developed and determined on a case-by-case basis, taking into account to all interests involved in a particular case.⁶⁰⁰

Data protection is “produced” by weighing the interests of the data subject and the data controller on an individual basis, within a detailed legal framework defining lawful processing. Lawful processing is the key to data protection. Directive 95/46/EC determines that lawful processing of personal data is conditional on “principles relating to data quality.”⁶⁰¹ The technique of balancing is used to determine if the interference with the right to data protection is justified or not in the context of the circumstances of the case. It is observed that EU internal market law develops a harmonised approach on which basis the

⁵⁹⁸ Directive 95/46/EC, recital 25.

⁵⁹⁹ *Ibid.*, at Article 7.

⁶⁰⁰ *Ibid.*, at Article 6 and Article 7; and Gloria González-Fuster, 'The emergence of personal data protection as a fundamental right of the EU', at 137.

⁶⁰¹ Directive 95/46/EC, Article 6(i). Further see Mislav Mataija and European University Institute. Law Department., 'Private regulation, competition and free movement : sport, legal services and standard setting in EU economic law', Ph D (European University Institute (LAW), 2013) at 15. The “new approach to harmonization” puts an emphasis only on general principles through legislation and leaves the details to EU standard setting bodies. Data protection going beyond – it gives data controller specific roles in shaping and implementing the EU data protection policy.

interference with free movement is justified for the purpose of the protection of personal data. In fact, the lawful processing test is a mechanism to determine if in a specific case interference with free movement is justified or not.⁶⁰²

The collection and processing of personal data may be justified for legitimate purposes. If personal data are protected it is to the detriment of an entity that has an interest in the processing of these data. Alternatively, if data are processed this may affect the data subject negatively. This implies a trade-off on a case-by-case basis, shifting either to the side of the data subject or to the side of the entity processing personal data. Setting up a system that ensures that the right balance is struck is at the core of Directive 95/46/EC, which ensures data protection in light of the functioning of the internal market.

2.3.2 New structural organisation: Decentralisation of responsibility

For the approach detailed in Directive 95/46/EC and for data protection to work efficiently, roles and functions are reorganised. The new institutional system deviates from the model proposed in Convention 108 where the responsibility to protect personal data was vested in public authorities. The structure outlined in Directive 95/46/EC is best described as a decentralisation of responsibility.

Directive 95/46/EC relies on a constitutional structure that empowers and engages multiple local actors in order to ensure a high level of protection of personal data.⁶⁰³ This decentralised approach is best described as a system of shared responsibilities. Different actors are equipped with different functions relating to the legal framework set out in Directive 95/46/EC. In relation to the effective protection of personal data, data subjects and data controllers occupy the centre of the new organisation. Their role with regard to the protection of personal data is well captured by the preamble of Directive 95/46/EC stating that:

⁶⁰² Case C-362/14, *Maximilian Schrems v. Data Protection Officer*, of 6 October 2015 (not yet reported) at 38. The Court of Justice states in para. 38: “It should be recalled first of all that the provisions of Directive 95/46, inasmuch as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right to respect for private life, must necessarily be interpreted in the light of the fundamental rights guaranteed by the Charter.”

⁶⁰³ Nikolas S. Rose, '*Powers of freedom: reframing political thought*'.

(25) ... the principles of protection must be reflected, on the one hand, in the *obligations* imposed on ... bodies responsible for processing, in particular regarding data quality, technical security, notification to the supervisory authority, and the circumstances under which processing can be carried out, and, on the other hand, in the *right* conferred on individuals, the data on whom are the subject of processing⁶⁰⁴

Directive 95/46/EC creates a type of coordination of multiple actors in charge for implementing, monitoring, and complying with the requirements set out in EU data protection law.⁶⁰⁵ This type of coordination generates a system of self-organisation for those actors involved in the processing of personal data. It is the data subject and the data controller, confined by rights and obligations as set out in the Directive 95/46/EC, that determine when processing is lawful or when this is not the case.⁶⁰⁶ In this system, data subjects shall have the ultimate control over personal data, which is reflected, for example, in the right to access personal data,⁶⁰⁷ the right to be informed,⁶⁰⁸ or the right to obstruct processing.⁶⁰⁹ Limiting the powers of data controllers paired with the allocation of rights transforms the relationship and the power dynamics in between into a tool to implement and to produce “data protection” within the internal market. Thus, data protection is not a definite right, but *produced* (i.e. ensured) within every individual case of ‘processing of personal data’ through a balancing exercise (guided by the legal framework set out in Directive 95/46/EC and the Court of Justice). Directive 95/46/EC depicts the *natural relationship*⁶¹⁰ between data controller and data subject as the centre of the organisation for data protection under EU internal market law and imbeds it in an institutional framework of shared responsibilities.

⁶⁰⁴ Directive 95/46/EC, recital 25. Emphasis added.

⁶⁰⁵ Maria Weimer, '*Democratic legitimacy through European conflicts-law?: the case of EU administrative governance of GMOs*', at 59.

⁶⁰⁶ Directive 95/46/EC, recital 25.

⁶⁰⁷ *Ibid.*, at Article 12. And see Case C-553/07, *Rijkeboer*, [2009] ECR I-3889.

⁶⁰⁸ Directive 95/46/EC, Article 10 and 11.

⁶⁰⁹ *Ibid.*, at Article 14.

⁶¹⁰ This natural relationship is defined on the basis of the conflicting interests at stake: the interests of the owner of personal data and the entity having access to or control over this data.

Member States, national authorities, national courts, businesses and social partners, and data controllers and data subjects are allocated specific tasks with regard to the protection of personal data.⁶¹¹ The protective duty in terms of data protection is shared among multiple local actors. The shift of responsibilities reflects a form of delegation of public powers. The actors put in charge for parts of the organisation of EU data protection law under Directive 95/46/EC are, partly, delegated “powers” that were formerly within the sphere of Member States and public authorities only. In this regard, data controllers are treated as an alternative source of authority in the realm of EU data protection law: they hold the power to affect the ‘level’ of data protection *delivered* to data subjects directly.

3. Effective attainment of data protection in the internal market

Data protection in the internal market organises responsibilities in a horizontal way. Different actors are involved and equipped with different functions concerning the protection of personal data. These actors share the responsibility with regard to the principle of data protection. The function of Directive 95/46/EC is to achieve data protection through the coordination of different actors whose functions are defined by the legal framework it sets out. Directive 95/46/EC sets up a new system of governance that is characterised by decentralisation of competences. The result is the responsabilization of different local actors that through legal coordination seek to ensure a high level of data protection. In this web of actors, the power relationship of the data controller and the data subject is imbedded in a wider institutional framework of *shared responsibilities*. In this framework the *responsibility* of the data controller is limited and confined by the tasks and capacities entrusted to other competent actors.

3.1 National Data Protection Authorities

Directive 95/46/EC requires Member States to set up one or more “public authorities responsible for monitoring, with complete independence, compliance with EU rules on the protection of individuals with regard to the processing of

⁶¹¹ Directive 95/46/EC, recital 9.

such data.”⁶¹² Consequently, National Data Protection Authorities play an important role in the framework created for the protection of personal data. They are entrusted with the task of ensuring the effective enforcement and monitoring of compliance with data protection rules.⁶¹³ National Data Protection Authorities are supposed to control the activities of data controllers. This national scope of competence is important because national law, transposing the Directive 95/46/EC regime, provides the data protection rules that data controllers have to comply with.⁶¹⁴ For this purpose they are entrusted with the task of supervising and monitoring the “application within its territory” of data protection rules.⁶¹⁵ For example, Article 18 of Directive 95/46/EC requires that data controllers notify any processing activity to the National Data Protection Authority. It is to “serve as a basis for selective monitoring of the legitimacy of processing.”⁶¹⁶ National Data Protection Authorities have far reaching powers and competences. They enjoy investigative powers, interventionist powers, and powers to engage in legal proceedings.⁶¹⁷

National Data Protection Authorities are the primary institutions that review possible infringements of data protection rules. They may even be addressed by data subjects before such cases go to court.⁶¹⁸ This became evident in *Schrems*.⁶¹⁹ *Schrems* concerned the transfer of personal data by Facebook’s Irish subsidiary to servers located in the United States. EU data protection law, however, only allows for the transfer of personal data to third parties if an adequate level of data protection is ensured.⁶²⁰ In light of the disclosures made by Edward Snowden

⁶¹² Ibid., at Article 28(1). See for example Case C-362/14, *Maximilian Schrems v. Data Protection Officer*, of 6 October 2015 (not yet reported).

⁶¹³ Directive 95/46/EC, Article 28(1).

⁶¹⁴ Ibid., at Article 4 and Article 5.

⁶¹⁵ Ibid., at Article 28(1).

⁶¹⁶ Ibid., at Article 18(2); and COM(92)422 final, Amended proposal for a Council Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Amended proposal for a Council Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 28-29.

⁶¹⁷ Directive 95/46/EC, Article 28(23).

⁶¹⁸ Ibid. Article 28(3) last paragraph states: “Decisions by the supervisory authority which give rise to complaints may be appealed against through the courts.” Further see: Loic Azoulai and Marijn Van Der Sluis, *Institutionalizing personal data protection in times of global institutional distrust: Schrems*, *Common Market Law Review*, (2016 forthcoming).

⁶¹⁹ See Case C-362/14, *Maximilian Schrems v. Data Protection Officer*, of 6 October 2015 (not yet reported).

⁶²⁰ To this effect see Directive 95/46/EC, Article 25.

concerning mass surveillance by US intelligence agencies, Mr Schrems was doubtful about the requirement of “adequate protection.” For this reason, he filed a complaint to the Irish Data Protection Authority that rejected the complaint on the basis of the Commission’s Safe Harbour agreement, stating that the US ensures adequate protection of personal data.⁶²¹ The Court of Justice strengthened the role of National Data Protection Authorities with regard to the system of data protection as established by Directive 95/46/EC stating that:

40. ... Directive 95/46 requires Member States to set up one or more public authorities responsible for monitoring, with complete independence, compliance with EU rules on the protection of individuals with regard to the processing of such data.

41. The guarantee of the independence of national supervisory authorities is intended to ensure the effectiveness and reliability of the monitoring of compliance with the provisions concerning protection of individuals with regard to the processing of personal data and must be interpreted in the light of that aim. It was established in order to strengthen the protection of individuals and bodies affected by the decisions of those authorities. *The establishment in Member States of independent supervisory authorities is therefore, as stated in recital 62 in the preamble to Directive 95/46, an essential component of the protection of individuals with regard to the processing of personal data.*⁶²²

The independence of the National Data Protection Authorities from other national authorities is important. Even if National Data Protection Authorities act within the territorial limits of Member States they “shall act with complete independence in exercising the functions entrusted to them.”⁶²³ In *Commission v. Germany*⁶²⁴ the importance of this independence was at stake. Germany

⁶²¹ Case C-362/14, *Maximilian Schrems v. Data Protection Officer*, of 6 October 2015 (not yet reported) at 26-36.

⁶²² *Ibid.*, at 40-41.

⁶²³ For example see Case C-614/10, *Commission v. Austria*, [2012] ECR 631 at 36; and Case C-288/12, *Commission v. Hungary*, of 8 April 2014 (not yet published) at 47.

⁶²⁴ Case C-518/07, *Commission v. Germany*, [2010] ECR I-1885. Further see Case C-614/10, *Commission v. Austria*, [2012] ECR 631; and Case C-288/12, *Commission v. Hungary*, of 8 April 2014 (not yet published).

maintained a system whereby supervision of public entities processing data was subject to scrutiny by special public authorities.⁶²⁵ The Court of Justice held, that the very nature of the task entrusted to National Data Protection Authorities requires that they “remain free from any external influence.”⁶²⁶ National Data Protection Authorities must act impartially and objectively and free from any Member State influence. This is essential, because supervisory authorities are “the guardians of those fundamental rights and freedoms, and their existence in the Member States is considered, ... as an essential component of the protection of individuals with regard to the processing of personal data.”⁶²⁷ In this regard, the decision of the Court of Justice in *Schrems* also clarified that National Data Protection Authorities may engage with assessments of adequacy decisions of the Commission—in this case the Safe Harbour Agreement concluded with the United States. Thus assuming a form of independence also from EU institutions.⁶²⁸

In fact, the responsibility ascribed to National Data Protection Authorities is different in kind if compared to the responsibilities of data controllers, for example. Even if National Data Protection Authorities are, in a wider sense, responsible for the protection of personal data, their responsibility in the narrower sense relates to the task of monitoring and supervising the compliance of data controllers’ activities with national data protection rules.

A consequence of the responsibility ascribed to National Data Protection Authorities is that the role of national courts is marginalised. This is because the National Data Protection Authority according to Article 22(1) of Directive 95/46/EC should be the primary authority dealing with supervision and complaints relating to data protection issues.⁶²⁹ It has a quasi-judicial function because it is National Data Protection Authorities that deal with the case in the first instance. Only as a form of appeal, under Article 28(3) is it possible that “decisions by the supervisory authority which give rise to complaints may be

⁶²⁵ Case C-518/07, *Commission v. Germany*, [2010] ECR I-1885 at 7-13.

⁶²⁶ *Ibid.*, at 25.

⁶²⁷ *Ibid.*, at 23.

⁶²⁸ To this effect see Loic Azoulay and Marijn Van Der Sluis, *'Institutionalizing personal data protection in times of global institutional distrust: Schrems'*.

⁶²⁹ Directive 95/46/EC, Article 22(1); and Lee A. Bygrave, *'Where have all the judges gone? Reflections on judicial involvement in developing data protection law'*, at 9.

appealed against through the courts.”⁶³⁰ Courts are clearly reduced in their “ability to function as a corrective to the development of data protection law and policy.”⁶³¹

3.2 Other National Authorities

Although National Data Protection Authorities act within a national environment they are not the only actors in the national environment that is in charge of aspects relating to the protection of personal data under Directive 95/46/EC.

The responsibility of the legislative process in the Member States relates to the transposition of Directive 95/46/EC into national law. Responsibility implies that Member States establish an effective legal framework that data controllers have to comply with.⁶³² In this capacity Member States enjoy discretion. For example, “Member States shall, within the limits of the provisions of this Chapter, determine more precisely the conditions under which the processing of personal data is lawful.”⁶³³ Member States may lay down in law the situations that determine when the processing of personal data is deemed to be lawful⁶³⁴ or when processing is required by law. Article 7(c) of Directive 95/46/EC recognises the competence of the Member States to lay down situations where data controllers are obliged to process personal data, the choice being subject to the principle of proportionality.⁶³⁵ Moreover, when transposing Directive 95/46/EC, Member States may exclude some kinds of data controllers from the scope of Directive 95/46/EC.⁶³⁶

⁶³⁰ Directive 95/46/EC, Article 28 (3).

⁶³¹ See Lee A. Bygrave, *Where have all the judges gone? Reflections on judicial involvement in developing data protection law*, at 7.

⁶³² Directive 95/46/EC, Article 4 and Article 5.

⁶³³ *Ibid.*, at Article 5.

⁶³⁴ *Ibid.*, at Article 4. For example see Directive 95/46/EC Article 4: ‘Member States shall apply’; Article 6 or 7: ‘Member States shall provide’; Article 8: ‘Member States shall prohibit’; Article 13: ‘Member States may adopt’. On the role of the Member States consider Case C-461/10, *Bonnier Audio AB*, [2012] ECR 219; and Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd*, of 8 April 2014 (not yet published); and Case C-70/10, *Scarlet Extended SA*, [2011] ECR I-11959.

⁶³⁵ Case C-275/06, *Promusicae*, [2008] ECR I-271 at 65 and 68.

⁶³⁶ It is interesting to see that Member States enjoy no discretion in relation to exceptions under Article 9 but enjoy discretion (optional) under Article 13. See Directive 95/46/EC, Article 9 and Article 13; and Case C-473/12, *IPI v. Geoffrey Englebert*, [2013] ECR I-715.

In *Promusicae* for example, the Court of Justice had to decide if Directive 95/46/EC and Directive 2002/58/EC oblige a Member State to make the communication of personal data obligatory in order to ensure effective protection of copyright in the context of civil proceedings. This case concerned a copyright infringement of internet users. *Promusicae* asked for the communication of the personal data relating to the internet users from Telefonica, the internet provider. Spain had not provided by law for this kind of processing of personal data. The Court of Justice clarified that the Directive gives Member States a margin of discretion when transposing the Directive into national law.⁶³⁷ It does not require Member States to lay down “an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings.”⁶³⁸

Similarly, in *IPI*, the Court of Justice clarified that Article 13(1) of Directive 95/46/EC does not oblige Member States to lay down exceptions in national law for situations where processing of personal data is deemed to be lawful. In *IPI*, the question was whether private detectives for the very purpose of their activities should be exempted from the obligation to notify data subjects about the collection of personal data relating to them.⁶³⁹ The Court of Justice held that within the limits of Article 13(1) of Directive 95/46/EC, Member States enjoy freedom in deciding what processing of personal data may be exempted from the obligation to inform data subjects about the collection of data.⁶⁴⁰

Although Member States, in principle, may adopt legislation that makes processing lawful, this discretion is not unlimited. If doing so, Member States must strike a fair balance between all the fundamental rights that are involved and protected by the Community legal order. Where national law obliges the data controller to process personal data, this may not violate the principles of proportionality and necessity.⁶⁴¹

⁶³⁷ Case C-275/06, *Promusicae*, [2008] ECR I-271 at 66.

⁶³⁸ *Ibid.*, at 71.

⁶³⁹ Case C-473/12, *IPI v. Geoffrey Englebert*, [2013] ECR I-715 at 42-48 and 50.

⁶⁴⁰ *Ibid.*, at 31-32.

⁶⁴¹ Case C-275/06, *Promusicae*, [2008] ECR I-271 at 65 and 68.

ASNEF dealt with the limits of the discretion afforded to Member States. In *ASNEF*, the question was whether Member States could add additional principles for the lawful processing of personal data. In this case, Spanish law required that personal data could only be processed without consent if the data were already available in public sources.⁶⁴² The Court of Justice reasoned that harmonisation of national laws concerning the lawful processing of personal data is generally complete. This is necessary to ensure an equivalent protection “of rights and freedoms of individuals with regard to the processing of personal data” in all Member States.⁶⁴³ The Court of Justice made clear that:

35. Directive 95/46 includes rules with a degree of flexibility and, in many instances, leaves to the Member States the task of deciding the details or choosing between options. A distinction, consequently, must be made between national measures that provide for additional requirements amending the scope of a principle referred to in Article 7 of Directive 95/46, on the one hand, and national measures which provide for a mere clarification of one of those principles, on the other hand. The first type of national measure is precluded. It is only in the context of the second type of national measure that Member States have, pursuant to Article 5 of Directive 95/46, a margin of discretion.⁶⁴⁴

The structure and organisation of data protection under Directive 95/46/EC reduces the role of Member States to that of facilitators.⁶⁴⁵ Their key function is to deliver protection to individuals through national data protection laws and to provide for effective enforcement in terms of sanctioning.⁶⁴⁶ It is national laws that data controllers have to comply with.⁶⁴⁷ Although Member States may

⁶⁴² Joined cases C-468/10 and C-469/10, *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF)*, [2011] ECR I-12181 at 17.

⁶⁴³ *Ibid.*, at 28 and 29; and Case C-101/01, *Lindqvist*, [2003] ECR I-12971 at 95-96; and Case C-524/06, *Heinz Huber v. Germany*, [2008] ECR I-9705 at 50.

⁶⁴⁴ Joined cases C-468/10 and C-469/10, *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF)*, [2011] ECR I-12181 at 34-35; and Case C-101/01, *Lindqvist*, [2003] ECR I-12971 at 83 and 97.

⁶⁴⁵ If this is so, then the role of Member States is marginalized. Member States can no longer “restrict the free flow of such data in the community on grounds of the protection of the data subject”. To this effect see COM(90)314 final, 7.

⁶⁴⁶ Peter J. Hustinx, *Data Protection in the European Union*, *P & I*, (2005), 62 at 62.

⁶⁴⁷ Directive 95/46/EC, Article 4(1)(a).

determine in their national laws when processing is lawful, this margin of discretion is subject to review under EU internal market law and Directive 95/46/EC in particular.

3.3 Private actors

In the institutional framework imposed by Directive 95/46/EC, the relationship between data subjects and data controllers plays a central role. Data subjects are empowered through the allocation of rights vis-à-vis the data controller. This reflects an approach to have data subjects more actively involved in the context of data protection. On the other side of the relationship is the data controller. In contrast to the data subject, who may exercise its rights, the data controller is obliged to comply with the requirements relating to the lawful processing of personal data set out under the Directive.⁶⁴⁸ It is the relationship of data subjects and data controllers, guided by the legal framework created by Directive 95/46/EC that is intended to provide data protection in practice.

Google Spain reflects this idea of an active data subject vis-à-vis the data controller. *Google Spain* concerned the possibility of a data subject having information relating to him deleted from Google Search listings. In this case, Mr Costeja Gonzales had found himself in financial difficulties in 1998: he was facing a real-estate auction connected with attachment proceedings for the recovery of social security debts. This information was published in the daily newspaper at that time. In 2010, having resolved the proceedings concerning him, he found the newspaper articles from 1998 on the internet via Google Search.⁶⁴⁹ Mr Gonzales claimed that the information concerning him found on the internet was outdated and should cease to exist in line with the EU data protection directive. In fact, he was claiming a right to be forgotten against Google, being the controller of the personal data.

The Court of Justice, finding Google to be a data controller by the very nature of its activities, recognised the requirement for Google in this role to take into

⁶⁴⁸ See Edward Lee, 'Recognizing Rights in Real Time: The Role of Google in the EU Right to be Forgotten', *Chicago-Kent College of Law Research Paper*, 2015-13 (2015), 1.

⁶⁴⁹ Case C-131/12, *Google Spain v AEPD*, [2014] ECR 317 at 14-15.

account the wishes of the data subjects of which it controls personal data.⁶⁵⁰ The Court of Justice held that with respect to the processing of personal data, to “ensure, within the framework of *its responsibilities, powers and capabilities*, that that procession meets the requirements of Directive 95/46/EC, in order that the guarantees laid down by the Directive may have full effect.”⁶⁵¹ In this respect the Court of Justice held in relation to Article 7(f) of the Data Protection Directive that:

97. As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public by its inclusion in such a list of results, it should be held, (...) that those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject’s name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question.⁶⁵²

3.4 The data controller

This thesis is interested in the position of the data controller because instances of the counter-culture emerge where private actors act in the capacity of data controller under the framework created by Directive 95/46/EC.

The concept of data controller is actor neutral. It encompasses any “natural or legal person, public authority, agency or any other body.”⁶⁵³ Only where private actors act in the capacity of a data controller do they come within the context of

⁶⁵⁰ Ibid., at 57-58. Further see Federico Fabbrini, *'The EU Charter of Fundamental Rights and the Rights to Data Privacy'*, at 15.

⁶⁵¹ Case C-131/12, *Google Spain v AEPD*, [2014] ECR 317 at 83.

⁶⁵² Ibid., at 97, but see further 63,71 and 81.

⁶⁵³ Directive 95/46/EC, Article 2(d).

Directive 95/46/EC. In this regard, the capacity to decide on the “purposes and means of the processing of personal data” is decisive.⁶⁵⁴ This involves an element of power in terms of control over personal data.⁶⁵⁵ Control over personal data automatically implies the power to determine the purpose and means of processing. If this is so, then the concept of controller is a functional concept. It ensures that responsibility linked to the role of the data controller in the context of data protection is allocated “where the factual influence is.”⁶⁵⁶ This ensures that the scope of the meaning of data controller is potentially wide.⁶⁵⁷

The Court of Justice has emphasised this potentially wide scope as a necessary precondition to ensure a high level of protection of personal data. Today almost any relationship involves personal data. In *Google Spain*, the Court of Justice had to decide if search engines come within the scope of the data controller. This question emerged in particular as Google argued that it was not the controller of the data as it only hyperlinks the search results to the original content of webpages of third parties. Having decided that the activity of search engines that relates to,

28. ... exploring the internet automatically, constantly and systematically in search of the information which is published there, the operator of a search engine ‘collects’ such data which it subsequently ‘retrieves’, ‘records’ and ‘organises’ within the framework of its indexing programmes, ‘stores’ on its servers and, as the case may be, ‘discloses’ and ‘makes available’ to its users in the form of lists of search results. As those operations are referred to expressly and unconditionally in Article 2(b) of Directive 95/46, they must be classified as ‘processing’ within the meaning of that provision.⁶⁵⁸

Deriving from this approach, the Court of Justice concluded that search engine operators, are data controllers as they de facto “determine the purposes and

⁶⁵⁴ Ibid.

⁶⁵⁵ Opinion 1/2010 on the concepts of “controller” and “processor”, (00264/10/EN WP169) at 8.

⁶⁵⁶ Ibid., at 9.

⁶⁵⁷ Case C-131/12, *Google Spain v AEPD*, [2014] ECR 317 at 28f.

⁶⁵⁸ Ibid., at 27-28.

means of that activity and this of the processing of personal data that it itself carries out within the framework of that activity.”⁶⁵⁹ In this context, it is irrelevant that the content has already been made public by a third party.⁶⁶⁰ Excluding search engines from the scope of data protection would “compromise the directive’s effectiveness and the effective and complete protection of the fundamental rights and freedoms of natural persons, which the directive seeks to ensure.”⁶⁶¹ It is interesting to note that in order to determine the personal scope of the concept of data controller, the Court of Justice had recourse to a reasoning that was similar to the *Walrave and Koch* line of cases. Here, the decisive factor is the activity of the actor concerned and not the status held. The test is whether the actor is likely to distort the efficiency of the policy-making environment in which he is supposed to act. The court refers to this as the ‘compromising effect’ of the system set up by EU internal market law.⁶⁶²

The potentially wide personal scope of the concept of data controller became evident in *Lindqvist* and *Rynes*; both cases related to the processing of personal data in a very private environment. *Lindqvist* concerned the setting up of a private webpage containing information about a group of catechists.⁶⁶³ The data made public provided personal information about Mrs Lindqvist and 18 colleagues, such as full names, jobs, hobbies, family names or telephone numbers. According to the Court of Justice this,

27. ...act of referring on an internet page, to various persons and identifying them by name or by other means, for instance by giving their telephone number or information regarding their working conditions and hobbies, constitutes ‘the processing of personal data wholly or partly by automatic means’ within the meaning of Article 3(1) of Directive 95/46.

The consequence being that Mrs Lindqvist was considered to be a data controller. Even if the activity of Mrs Lindqvist was carried out for non-

⁶⁵⁹ *Ibid.*, at 34.

⁶⁶⁰ Case C-73/07, *Satakunnan*, [2008] ECR I-9831 at 48-49.

⁶⁶¹ Case C-131/12, *Google Spain v AEPD*, [2014] ECR 317 at 58.

⁶⁶² *Ibid.*; and Case 36/74, *B.N.O. Walrave and L.J.N. Koch v. Association Union cyclist internationale, Koninklijke Nederlandsche Wielren Unie et Federacion Espanola Ciclismo*, [1974] ECR 1405 at 16-17.

⁶⁶³ Case C-101/01, *Lindqvist*, [2003] ECR I-12971 at 12.

economic purposes, EU data protection rules were still applicable. A narrow interpretation is needed to ensure a high level of protection of data subjects. *Rynes* is a similar case that concerned a privately installed video surveillance system that partly covered a public square in front of the individual's house. The Court of Justice clarified that in order to ensure a high level of protection of the right to personal data, the Directive must be narrowly interpreted.⁶⁶⁴ The Court of Justice held:

33. To the extent that video surveillance covers even partially, a public space and is accordingly directed towards outwards from the private setting of the person processing the data in that manner, it cannot be regarded as an activity which is a purely personal or household activity for the purposes of Article 3(2) Directive 94/46.⁶⁶⁵

Thus, video surveillance cannot be exempted under the household exception pursuant to Article 3(2) of Directive 95/46/EC. However, the Court of Justice continued that it might be justified for a legitimate reason mentioned in Article 7 and the interests of the data controller in terms of his health and that of his family, and the safety of his property.⁶⁶⁶

Under this definition, almost “every individual is a data subject and entities in every sector of the economy [may qualify as] data controllers.”⁶⁶⁷ This potentially wide interpretation of data controller allows the “allocation of responsibility where the factual influence is” upon issues relating to the lawful processing of personal data.⁶⁶⁸ The trigger is the mere capacity to process personal data. There is no formal distinction between public or private actors. Rather, the difference is drawn on a test of whether the activity is exercised in a purely private context. However, *Lindqvist* and *Rynes* reflect a very narrow and strict interpretation of the concept of “private context.”

⁶⁶⁴ Case C-212/13, *Rynes*, of 11 December 2014 (not yet published) at 25-31.

⁶⁶⁵ *Ibid.*, at 33.

⁶⁶⁶ *Ibid.*, at 34.

⁶⁶⁷ COM(2003)265 final, 4; and Case C-342/12, *Worten*, of 30 May 2013 (not yet published) at 23; and Case C-473/12, *IPI v. Geoffrey Englebert*, [2013] ECR I-715 at 42-48.

⁶⁶⁸ Opinion 1/2010 on the concepts of “controller” and “processor”, (00264/10/EN WP169) at 9.

4. Responsibility of the data controller

The data controller occupies a genuine position in the context of the principle of data protection. In fact, it is EU data protection law that inaugurates private actors as an alternative source of authority in the system of governance for data protection. The task entrusted to data controller—to ensure lawful processing of personal data—only emerges under the Directive 95/46/EC regime. Thus, the power to affect the level of data protection ensured to data subjects, which is vested in the data controller through the allocation of a certain set of obligations set out in Directive 95/46/EC, is delegated by the EU legislator.⁶⁶⁹

4.1 Compliance with data protection principles

The language of the Directive and assumes that the responsibility of the data controller relates to an obligation to comply. Data controllers must ensure *compliance* with data protection rules when processing personal data.⁶⁷⁰ This includes requirements to inform data subjects about the processing of personal data,⁶⁷¹ being responsive to the rights of data subjects particularly in relation to access, obstruction or erasure of personal data⁶⁷² or notification requirements.⁶⁷³ The misleading notion of compliance is problematic. It is misleading because it implies that the responsibility of the data controller is simply to comply with the legal obligations emerging from Directive 95/46/EC.

In fact, Directive 95/46/EC entrusts data controllers with some freedom of action in relation to the lawful processing of personal data. Data controllers are conferred the power to decide *if* the processing of personal data is legitimate, in accordance with Article 7 of Directive 95/46/EC. The power to decide implies a choice vested in the data controller.

The responsibility of data controllers *relates* to the requirement to comply with data protection rules when processing personal data. In particular, the principles

⁶⁶⁹ For example see Brendan Van Alsenoy, 'Regulating Data Protection: The Allocation of Responsibility and Risk among Actors involved in Personal Data Processing', at 96-97.

⁶⁷⁰ Directive 95/46/EC, recital 18 Article 16(2).

⁶⁷¹ Ibid., at Article 10 and 11.

⁶⁷² Ibid., at Article 12 and 14.

⁶⁷³ Ibid., at Article 18-21.

relating to data quality set out in Article 6 and Article 7 of Directive 95/46/EC must be observed. The Court of Justice repeatedly recalled that:

33 ...in accordance with the provisions of Chapter II of Directive 95/46, entitled 'General rules on the lawfulness of the processing of personal data', all processing of personal data must, subject to the exceptions permitted under Article 13, comply, first, with the principles relating to data quality set out in Article 6 of Directive 95/46 and, secondly, with one of the six principles for making data processing legitimate listed in Article 7 of that directive.⁶⁷⁴

Article 6 of the Data Protection Directive provides several obligations for data controllers to comply with. Here, the details are key. Directive 95/46/EC sets up an open system. It accepts that no blank solution exists that is applicable to all situations coming within the scope of EU data protection rules. The consequence being that Directive 95/46/EC establishes an open and flexible system for the protection of personal data. This is reflected in Article 7 of Directive 95/46/EC and the power vested in the data controller to decide/balance on a case-by-case basis if the processing of personal data is lawful or not. The *context, which varies in every individual case*, is decisive.⁶⁷⁵ It is the context that determines the meaning of data protection, i.e. whether data protection is more likely to be demanded or not. Article 7 states that personal data may be processed if:

- (a) the data subject has unambiguously given his consent; or
- (b) processing is necessary for the performance of a contract to which the data subject is party ...
- (c) processing is necessary for compliance with a legal obligation to which the controller is subject; or
- (d) processing is necessary in order to protect the vital interests of the data subject; or
- (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested

⁶⁷⁴ See Case C-342/12, *Worten*, of 30 May 2013 (not yet published) at 33-34; and Case C-465/00, *Österreichischer Rundfunk*, [2003] ECR I-4989 at 65; and Case C-524/06, *Heinz Huber v. Germany*, [2008] ECR I-9705 at 48.

⁶⁷⁵ Opinion 1/2010 *on the concepts of "controller" and "processor"*, (00264/10/EN WP169) at 8.

in the controller or in a third party to whom the data are disclosed;
or

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject, which require protection under Article 1 (1).⁶⁷⁶

Whereas points (a)–(c) presuppose some *external* legitimisation giving approval to and making processing lawful, this is not required for the remaining provisions of Article 7 of Directive 95/46/EC. Even if sections (a)–(c) assume some dependency of the data controller on consent, a contract, or an obligation adopted by law, this is not the case for points (d)–(f). In these cases, the data controller has the power to decide if the processing of personal data is lawful or not. ‘Lawful processing’ is the requirement that combines the competing interests of the data controller and the data subject. Therefore the responsibility of the data controller—and the protection of personal data—relates to the *lawful processing of personal data* in an individual case.⁶⁷⁷ It is the *data controller* that is entrusted with the *task of ensuring that any processing of personal data complies with data protection rules*.⁶⁷⁸ This approach acknowledges that the free flow of personal data may be needed in some circumstances, but places an equal emphasis on the necessity to ensure a high level of protection.⁶⁷⁹ Competing interests with regard to the processing of personal data may exist. It is the responsibility of the data controller to ensure that personal data are processed only when this is lawful. This reflects a task that is classically entrusted to legislators and national courts. The data controller is in charge of a specific function (i.e. ‘to ensure lawful processing’) in an organisational framework that leads to the protection of a constitutional right.

⁶⁷⁶ Directive 95/46/EC, Article 7

⁶⁷⁷ Directive 95/46/EC, Article 3(1); and Opinion 1/2010 *on the concepts of "controller" and "processor"*, (00264/10/EN WP169) at 4.

⁶⁷⁸ It is the duty of the data controller to ensure that personal data is processed fairly and lawfully. See Directive 95/46/EC, Article 6(1)(a) and 6(2); and Case C-342/12, *Worten*, of 30 May 2013 (not yet published) at 23.

⁶⁷⁹ Directive 95/46/EC, Article 6(1)(a) and 7; and Joined cases C-468/10 and C-469/10, *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF)*, [2011] ECR I-12181 at 30; and Case C-131/12, *Google Spain v AEPD*, [2014] ECR 317 at 71; and Case C-342/12, *Worten*, of 30 May 2013 (not yet published) at 33.

4.1.1 Liability

Responsibility entails liability, which is intended to support the legal framework through an accountability mechanism. Directive 95/46/EC imposes direct liability on the data controller in case of illegal processing, unless it can be shown that the controller is not responsible for the damage. Article 23 of Directive 95/46/EC clarifies that it is the data controller that is liable for any damage caused by the unlawful processing of personal data. Moreover, the data subject who has suffered damage “is entitled to receive compensation from the controller.”⁶⁸⁰

However, it is the Member States that shall provide the system for compensation in cases violating EC data protection law. Liability is decided in a national environment.⁶⁸¹ In this environment, the data controller may be subjected to administrative remedies and other sanctions if its activities violate data protection law.⁶⁸² The system of liability is special because it aids the “conflict solution mechanism” that the National Data Protection Authorities are entrusted with. This is clear from Article 22 of Directive 95/46/EC:

Without prejudice to any administrative remedy for which provision may be made, inter alia before the supervisory authority referred to in Article 28, prior to referral to the judicial authority, Member States shall provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national law applicable to the processing in question.

4.2 Producing data protection in the internal market

The new protection system creates an environment where the data controller and the data subject are placed in the centre of the organisation. It creates a policy-making environment where the data controller and the data subject should engage in order to find ‘private’ solutions on matters relating to data protection. This assumes that data protection is primarily ensured within the relationship

⁶⁸⁰ Directive 95/46/EC, Article 23.

⁶⁸¹ For example see Case C-465/00, *Österreichischer Rundfunk*, [2003] ECR I-4989.

⁶⁸² Directive 95/46/EC, Article 22 and 24; and Case C-342/12, *Worten*, of 30 May 2013 (not yet published) at 15.

and activities of these actors. In a wider sense, this new approach reflects a shift on how to address the *asymmetry of power* that exists with regard to data protection. The data controller's access to personal data is the primary factor that generates an asymmetry of power between the data controller and the data subject. An efficient system of data protection in a market environment can only function when the interests of both the data controller and the data subject are reconciled on a permanent basis. Therefore, EU data protection law creates a legal environment in which the asymmetry of power between the data controller and the data subject is balanced and the interplay of the data subject and data controller *produce and ensure* data protection. The legal and institutional framework creates an environment that is intended to sufficiently stimulate the data controller to take all the measures that are necessary to ensure that protection is delivered in practice.⁶⁸³ This is reflected in the extensive allocation of rights and obligations to data subjects and data controllers. Rights and obligations function as instruments to create an environment in which data protection is primarily attained through the engagement of data subjects and data controllers and the interests they have in relation to personal data. Rights empower and protect the data subject to have access to information about the storing, content, or the authenticity of the information concerned. This correlates with the obligations and protective duties allocated to data controllers, which limit the power to process and use personal data according to their own interests. Through this interplay of rights and obligations between data controller and data subject, data protection is "produced."

A good example of this model is the recent *Google Spain* case where data protection was ensured through the engagement of Mr Costeja, the data subject, with *Google Spain*, the data controller. On request of Mr Costeja, and affirmed by the Court of Justice, *Google Spain* was required to assess the validity of the request and delete the personal information if approved, therefore data protection is ensured and "produced." Thus, it is through the exercise of rights granted to data subjects under Directive 95/46/EC in combination with the legal requirements addressed to data controllers that a system of self-governance emerges. Data protection should primarily be attained through engaging data

⁶⁸³ Opinion 1/2010 on the concepts of "controller" and "processor", (00264/10/EN WP169) at 4.

subjects and data controllers in case of disagreement as to whether personal data are adequately protected and lawfully processed.⁶⁸⁴

4.3 Producing data protection through balancing

The idea of data protection as a commodity that is produced becomes clear if we observe the approach adopted under EU data protection law. Effective data protection relates to and takes place in the context of the internal market and is attained *through* lawful processing based on “protection principles.”⁶⁸⁵

Within this space the data controller must balance the competing interests relating to (1) the free flow of personal data for ensuring the functioning of the internal market and (2) ensuring a high level of protection of personal data. The balancing and trade-off between both interests on a case-by-case basis constitutes the central element of the lawful processing test. With this idea, data protection is internalised by the market process. The balancing exercise involved in the ‘lawful processing’ test becomes part of every decision related to processing personal data in the internal market environment. In fact, the power to balance creates a power to make law.⁶⁸⁶

Disputes between data controllers and data subjects are the places where *balancing* is exercised. The Directive does not define the right to have personal data protected. It does not provide minimum standards of protection, but emphasises a mechanism of *balancing* in individual cases; it is the data controller that exercises this task. This is why the data controller, on a case-by-case basis, must strike a balance between the “protection of individuals against unjustified collection, storage, use and dissemination of their personal details” on the one hand and instances “where the delivery of public or private services depends on the processing of personal data and the use of information technology, either nationally or across borders” on the other.⁶⁸⁷

⁶⁸⁴ To this effect see Edward Lee, *Recognizing Rights in Real Time: The Role of Google in the EU Right to be Forgotten*; and Federico Fabbrini, *The EU Charter of Fundamental Rights and the Rights to Data Privacy*.

⁶⁸⁵ Directive 95/46/EC, recital 25.

⁶⁸⁶ To this effect see Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, *Columbia Journal of Transnational Law*, 47 (2008-2009), 72 at 83.

⁶⁸⁷ Peter J. Hustinx, *Data Protection in the European Union*, at 63.

The Court of Justice affirms this individual balancing as a source of data protection. In *ASNEF*, the Court of Justice held that Article 7(f) of Directive 95/46/EC,

45. necessitates a balancing of the opposing rights and interests concerned, which depend, in principle on the individual circumstances of the particular case in question and in the context of which the person or the institution which carries out the balancing must take account of the significance of the data subject's rights arising from Article 7 and 8 of the Charter.⁶⁸⁸

Factors, that might affect balancing can be, for example, whether the information is already publicly available or if the data subject concerned is a legal person or a natural person.⁶⁸⁹ The sensitivity of the information is also an important factor. On the other hand, the status and power of the data controller vis-à-vis the data subject is significant for determining when processing is deemed to be lawful and when it is not. The fact that data controllers offer a service to the public might be of relevance.⁶⁹⁰ The seriousness of the interference with the right to privacy “manifests itself in different ways” and must be weighed on a case-to-case basis.⁶⁹¹ This is why the proportionality and necessity test is applied restrictively, meaning that the processing of personal data shall not go beyond what is strictly necessary for the purpose for which it is processed.⁶⁹² This restrictive approach to processing is affirmed in *Google Spain*. At stake was the right to have personal data deleted from search results if the information is outdated. With regard to Article 7(f) of Directive 95/46/EC the Court of Justice held that:

⁶⁸⁸ Joined cases C-468/10 and C-469/10, *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF)*, [2011] ECR I-12181 at 45; and Case C-131/12, *Google Spain v AEPD*, [2014] ECR 317 at 97.

⁶⁸⁹ Joined Cases C-92/09 and C-93/09, *Schecke and Eifert*, [2010] ECR I-11063 at 87.

⁶⁹⁰ For example see Case C-131/12, *Google Spain v AEPD*, [2014] ECR 317 at 97.

⁶⁹¹ Joined Cases C-92/09 and C-93/09, *Schecke and Eifert*, [2010] ECR I-11063 at 87.

⁶⁹² To this effect see Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd*, of 8 April 2014 (not yet published). In this case the Court of Justice annulled the Data Retention Directive 2006/46/EC because the framework created led to systematic violations of rights to personal data. Further see Case C-524/06, *Heinz Huber v. Germany*, [2008] ECR I-9705 at 49, 52 and 59-60; and Case C-461/10, *Bonnier Audio AB*, [2012] ECR 219; and Case C-70/10, *Scarlet Extended SA*, [2011] ECR I-11959; and Case C-131/12, *Google Spain v AEPD*, [2014] ECR 317.

97 ...the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public by its inclusion in such a list of results, it should be held, ...that those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question.⁶⁹³

One can observe that the responsibility of the data controller goes beyond mere compliance with legal requirements. In fact, it bestows the data controller with a public power, which is reflected in the task to balance the interests involved and to determine if the processing of data is lawful or not.⁶⁹⁴ The consequence being that data controllers are empowered under the Directive 95/46/EC regime to determine what data protection means on a case-by-case basis.

The fact that the data controller is entrusted with a balancing task confers a certain form of authority with regard to ensuring that data protection is delivered to data subjects. Private actors *qua* data controllers are now exercising public functions that formerly under national law were only vested in public authorities. This power to affect turns the data controller into a 'competent authority' in the web of actors that are responsabilized under EU data protection law. Other authorities that are recognised by Directive 95/46/EC *shape* the 'environment' in which the data controller and the data subject should engage: member States through their national laws and regulations, or National Data Protection Authorities through investigations and supervisory tasks exercised over the data controller. National Data Protection Authorities in particular occupy a key position with regard to ensuring the efficiency of the system of self-governance.

⁶⁹³ Case C-131/12, *Google Spain v AEPD*, [2014] ECR 317 at 97, but see further at 63, 71 and 81.

⁶⁹⁴ To this effect see Alec Stone Sweet and Jud Mathews, '*Proportionality Balancing and Global Constitutionalism*', at 83.

As a primary contact point in cases of disagreement between data subject and data controller it is the National Data Protection Authorities that must review if the data controller exercised their powers in accordance with the framework of Directive 95/46/EC.

4.4 A space granted to the data controller

The ‘data protection system’ set up by Directive 95/46/EC is intended to enhance efficiency with regard to the protection of personal data in the internal market. Although Directive 95/46/EC legally defines the procedure on how data protection is attained within the internal market, it leaves open how this is organised by the data controller. For example, data controllers are required to set up access points for data subjects where complaints or requests can be raised in accordance with the Directive. In relation to the right to access information relating to the processing of personal data *Rijkeboer* is a good example for these requirements. *Rijkeboer* concerned the issue as to what extent the access to information concerning the processing of personal data must be ensured. In *Rijkeboer* this information had been stored only for one year by the data controller. Thus the Court of Justice had to decide to what extent this duration was sufficient in terms of the right of access to information for data subjects. Advocate General Sharpston argued that the “holding of personal data is a responsibility with time-limit.”⁶⁹⁵ Even if the deletion of data is a key to the protection, this should not go so far as to eliminate the possibility to access information concerning the processing of personal data for the data subject. In this sense, Article 12 on the right of access to personal data has precedence over Article 6 concerning the deleting of personal data no longer used.⁶⁹⁶ Advocate General Sharpston argued that:

32. the obligation to delete data is secondary to the right of access. The articles concerned confer a right, which is born when the file is created and dies when it is deleted. Accordingly, the erasure of personal data is merely a moment in the life of the right of access, a feature which is determined and justified by Article 12.⁶⁹⁷

⁶⁹⁵ Case C-553/07 *Rijkeboer*, *Opinion of Advocate General SHARPSTON*, at 26.

⁶⁹⁶ *Ibid.*, at 28-29.

⁶⁹⁷ *Ibid.*, at 32.

Similarly, data controllers must have in place effective procedures dealing with the requests made by data subjects. Put differently, data controllers must have in place effective procedures that allow balancing. Data controllers having access to excessive amounts of personal information like Google or Facebook are especially required to develop internal procedures for dealing with complaints raised and for making the information stored on the local servers available to data subjects.⁶⁹⁸ Data controllers must develop internal technical mechanisms that ensure the protection of personal data that are stored digitally. For example, the Apple iCloud was under pressure after a hacker managed to break into the cloud servers and download pictures and personal data.

The system adopted under Directive 95/46/EC responds to the dynamics described above. Processing of personal data becomes complex and the number of transactions so high that personal data cannot be effectively protected through legislative means.⁶⁹⁹ This openness granted to the data controller is a response to the complexity and rapid technological changes involved in processing personal data.⁷⁰⁰ The speed and complexity relating to the development of information technologies with regard to the collection of data makes the organisation of these sectors through legal means overly difficult. Regulation and laws were simply not able to deal with such rapid changes in terms of time, but equally in terms of expertise and knowledge. Regulators in comparison to data controllers lack the knowledge and understanding of specific digital processes, for example, mass storage of personal data, which in turn makes effective regulation even more difficult.

Furthermore, the system takes into account the possible large number of situations where the issue of data protection might emerge. Issues of data protection touch upon virtually all sectors within the internal market. For example, employers when administering data of employees,⁷⁰¹ hosts of private

⁶⁹⁸ For example see Edward Lee, *'Recognizing Rights in Real Time: The Role of Google in the EU Right to be Forgotten'*.

⁶⁹⁹ European Commission Press Release (Ip/12/46) 25 January 2012 *'On a reform of data protection rules'*.

⁷⁰⁰ Opinion 1/2010 *on the concepts of "controller" and "processor"*, (00264/10/EN WP169) at 18; and Opinion 3/2010, *on the principle of accountability*, (00062/10/EN, WP 173), 19.

⁷⁰¹ See Case C-342/12, *Worten*, of 30 May 2013 (not yet published).

webpages containing personal information,⁷⁰² or even video surveillance of one's own house⁷⁰³ may come within the scope of Directive 95/46/EC.

A possible side effect is that the space granted to data controllers in terms of self-organisation creates a market between data controllers for efficient systems of internal organisation. This relates to technical innovations leading to better and more efficient data protection, or the development of internal review procedures that reduce costs and ensure higher standards and more effective means of data protection for data subjects.

4.5 The data controller as a source of regulatory authority

Why is the data controller entrusted with the task of assessing lawful processing? The answer is found in the requirement that for the EU legislator, harmonising instruments must increase the 'efficiency' of the internal market. In other words, harmonisation and reorganisation of a certain policy at EU level must improve the old regime, which is normally the organisation and regulation within the Member States.

The data controller has a natural interest in the processing of personal data for whatever interests. However, the asymmetry of power that the possession of personal data entrusts to the data controller over the data subject is problematic. Under this natural state of affairs, data protection would not take place, as the data controller would process the personal data for his own interests. EU internal market law turns this around and places the data controller in the data protection framework as the primary authority capable of delivering protection of personal data.⁷⁰⁴ The requirement to determine the lawfulness of this processing transforms the data controller into a competent authority that 'produces' data protection and thereby serves a common objective (i.e. a high level of data protection in the internal market).⁷⁰⁵ The allocation of legal requirements under

⁷⁰² See Case C-101/01, *Lindqvist*, [2003] ECR I-12971.

⁷⁰³ See Case C-212/13, *Ryneš*, of 11 December 2014 (not yet published).

⁷⁰⁴ In terms of social justice, this constraining of economic freedom would be considered a *Rawlsian* improvement. The constraining of the data controller is to the advantage of data subjects and ensures a high level of data protection in the internal market.

⁷⁰⁵ See Brendan Van Alsenoy, 'Regulating Data Protection: The Allocation of Responsibility and Risk among Actors involved in Personal Data Processing', at 96-97.

Directive 95/46/EC requires the data controller to internalise their part of the data protection principle into their economic activities. The outward effect is that their activities *produce* data protection.

The question here is to what extent may data controllers define their role as competent authorities entrusted with the task to protect data subjects and their data vis-à-vis other public actors. For example, we see that Article 7(e)–(f) of Directive 95/46/EC, in particular, allows for discretion when determining lawful processing of personal data without consent of the data subject. In light of the Directive and the broad definition of lawful processing for every individual, the task of the data controller may involve a decision to not process personal data due to legislative obligations, i.e. because the reasons are deemed to be unlawful. The data controller may deny complying with national legislation in order to protect data subjects and personal data. In the United States, Apple had this dispute with the Federal Bureau of Investigation (FBI). The case concerned an iPhone of assumed terrorists to which the FBI wanted access, but did not manage to hack the software. Apple was required, by a decision of a national court, to bypass the security log on the iPhone, which deletes its contents. Apple denied the delivery of such software, as it would have potentially posed a security risk for all iPhone users and empower the national agencies to unlimited and uncontrolled access to personal data.⁷⁰⁶

5. Remarks

EU data protection law emerged in response to distortions in the functioning of the internal market. Prior to Directive 95/46/EC, the responsibility to protect personal data was enshrined in national constitutional law. The diversity in national laws, the difficulty to effectively protect personal data through national law, and the ever increasing demand for free movement of personal data in the internal market required the harmonisation of data protection law to increase the efficiency of the internal market.

The regime established by Directive 95/46/EC reorganises the way in which data protection is attained. The organisation introduced by Directive 95/46/EC relies

⁷⁰⁶ For this see ED 15-0451M, *Order Compelling Apple, Inc. to Assist Agents in Search*, United States District Court for the Central District of California of 16 February 2016.

on the natural relationship of the data controller and the data subject. The allocation of rights and obligations to data subjects and data controllers under the new legal framework is the mechanism for coordinating the activities of those actors that are put in charge of ensuring the protection of personal data. The data controller, due to the very nature of its position in the context of data protection, is transformed into a competent authority. The new legal and institutional framework creates a policy-making environment through which data protection is *produced* whereby the power relationship between data subject and data controller is allocated a genuine function.

Finally, even if Directive 95/46/EC was adopted to ensure the free flow of data across Member States, it now coordinates a far-reaching obligation for Member States and data controllers to “protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy in relation to the processing of personal data.”⁷⁰⁷

⁷⁰⁷ Directive 95/46/EC, Article 1(i).

Chapter 6

Transforming the ‘Private’

Introduction

‘Who are you?’ is a question that may be answered in many ways. Most people would answer spontaneously by offering their first or last name. But the question ‘Who are you?’ has many levels. It relates to identity and the way identity is constructed. In modern states, the nationality and citizenship are ways of creating identity. Voting rights and the obligation to pay taxes are part of this identity. Still, there is more to identity than just this. Identity is everything that defines us as a person. It is the way we define ourselves as individuals, through the food we eat, the clothes we wear, the music we listen to, or the job we pursue. Most of us would agree that these are free choices, and thus, we are free in the construction of our identity. But we are not, at least not to the extent we would assume.

The law plays a crucial role in how we organise society and how identity may be shaped.⁷⁰⁸ The law is the way we organise society in a modern state. Although we are free to make choices in principle, this is not so as to be free for absolute purposes. In his book *‘Propaganda’*, Edward Bernays reviews the organisation of societies and the necessity for cooperation of the vast number of individuals “if they are to live together as a smoothly functioning society.”⁷⁰⁹ Strikingly, he continues, “We are governed, our minds are moulded, our tastes formed, our ideas suggested, largely by men we have never heard of.”⁷¹⁰ We act and we

⁷⁰⁸ Philip Bobbitt, *The shield of Achilles : war, peace and the course of history*; and Niklas Luhmann, Klaus A. Ziegert, and Fatima Kastner, *Law as a social system*; and John Rawls, *A theory of justice* (Clarendon Press, Oxford, 1971).

⁷⁰⁹ Edward Bernays, *‘Propaganda’* (First edn.: Routledge, 1928), at 9; and N. A. Barr, *The economics of the welfare state*, at Chapter 2.

⁷¹⁰ Edward Bernays, *‘Propaganda’*, at 9. “The conscious and intelligent manipulation of the organized habits and opinions of the masses is an important element in democratic society. Those

develop our identity and make our choices in a specific social environment. Every social context is constituted in a particular way and we may form and realise our identity in the context of this organisation.⁷¹¹ In the end, we are steered by the law that structures this social context. The granting of rights comes with a notion of empowerment: an incentive to act in a specific way. We are more likely to act in a specific way if we are encouraged to do it. If you have a right or you are legally encouraged to behave in a particular way, you are more likely to do so than for example, in situations where it is unclear or uncertain if we can or we should act in a specific way.⁷¹²

i. The transformation of private actors through EU internal market law

EU internal market law constitutes a 'new legal order' that comes with a new social arrangement: the internal market.⁷¹³ With the change of social environment comes a new rationality and ideal on how private actors are supposed to act. The responsabilization of private actors in the realm of EU internal market law transforms private actors and their 'roles' under national law and in domestic socio-economic contexts. As a means to ensure the construction and functioning of the internal market EU internal market law adds an additional layer to the domestic socio-economic context of regulation. Private actors are imbedded into this new social arrangement, which reflects a fine example of social engineering.⁷¹⁴

Since the development of the doctrine of direct effect through the Court of Justice, the transformation of social roles and functions has been considered as a

who manipulate this unseen mechanism of society constitute an invisible government, which is the true ruling power of our country.”

⁷¹¹ Philip Bobbitt, *'The shield of Achilles : war, peace and the course of history'*, at 205-206; and Case 178/84, *Commission v. Germany (Beer purity requirement)*, [1987] ECR I227.

⁷¹² For example consider *Lubmann* and his idea of the binary code of legal/illegal on which all legal thinking resides. See Niklas Luhmann, Klaus A. Ziegert, and Fatima Kastner, *'Law as a social system'*, at Chapter 3 and 4.

⁷¹³ Case 26/62 *N.V. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse administratie der belastingen* [1963] ECR I at 12.

⁷¹⁴ For example see Michael Albert and Robin Hahnel, *'Unorthodox Marxism'*, at 104-105. “In analysing societies we find it useful to create a dividing line demarcating a human centre and an institutional boundary, which are dynamically interrelated and determine one another. The centre is the collection of people who live within the society including all their needs, powers, personalities, skills and consciousness as discussed above. The boundary is the societies particular institutional framework of interconnected roles that serve to coordinate social activity as well as the material objects that exist within the society.”

technique to attain the objectives of EU internal market law. The fact that the treaties set up an internal market, which unifies highly regulated national markets, part of the technique of EU internal market law to construct the internal market was the development of a *new individualism*. EU internal market law structures and coordinates the relationship and activities between the actors.⁷¹⁵ This new individualism placed private economic actors in the centre of organisation through the allocation of rights. Rights to free movement and rights to equal treatment have a stark outward impact. While in individual cases rights provide access to and equal treatment in foreign national markets, in a wider social context the exercise of these rights leads to economic and social integration simply because allocative efficiency works at a transnational level. The direct allocation of rights under treaty provisions transformed private actors into commodities, which through engaging in economic activities ensures economic and social integration. Private actors are instrumentalised and integrated into a new legal order in which they are conferred an additional 'economic identity' for cross-border situations.⁷¹⁶

2. The counter-culture in EU internal market law

In EU internal market law, the rights culture emerged alongside the counter-culture. Both forms of 'cultures' relate to and are committed to the same EU legal culture, which seeks to construct and ensure the functioning of the internal market in light of conflicts emerging vis-à-vis national laws and interests. Both paradigms seek to transform and steer private behaviour in a way that leads to the attainment of the objectives of EU internal market law. Put differently, EU internal market instrumentalises private actors that are normally situated in national contexts for the sake of the efficiency of the internal market *qua* legal subjects. Yet, the rights culture and the counter-culture are functionally different. In contrast to the rights culture, the counter-culture seeks to steer private actors within the internal market through the allocation of constraints and legal obligations. A central issue with this phenomenon was that it developed in stark contrast to the values of individualism and economic liberties, which constitute the core of market dynamics.

⁷¹⁵ François Ewald, '*A Concept of Social Law*', at 46.

⁷¹⁶ On this instrumentalisation see Loic Azoulay, '*The European Individual as Part of Collective Entities (Market, Family, Society)*', at; and Marco Dani, '*The subjectification of the citizen in European public law*'.

As has been shown in the analyses in this thesis, the counter-culture emerged as a tool to deal with situations of asymmetry of power between economic actors. Legal constraints are allocated where the asymmetry of power is of such a level that it distorts the construction and the functioning of the internal market in relation to specific sectors. Legal requirements are the tools used to minimise the risks of distortions to the market process that emerge from this asymmetry of power. The allocation of legal constraints is intended to restore the efficiency of economic dynamics in specific legal contexts. This makes the emergence of the counter-culture, or the responsabilization of private actors a tool of governance of the internal market.

The analysis outlined that the counter-culture—as a technique of governance—emerges in two situations. This is (1) the control of private autonomy that emerges in a national context to an extent that it is capable of interfering with other ‘private interests’ in the internal market. This kind of distortion is addressed under the free movement provisions and the prohibition of discrimination. Free movement law and discrimination law deal respectively with situations where some actors are in a position to affect the access to either a certain ‘national market,’ or are excluded from the labour market for other non-economic factors (e.g. age, gender, or disability). In these cases EU internal market law directly regulates upon private actors. Alternatively, (2) harmonisation of national laws or community-wide regulation is a technique through which ‘policy-making environments’ are reorganised in a way to enhance the efficiency of the market process in these specific sectors. This refers to private relationships coming with a certain asymmetry in terms of power to the extent that the diversity of national laws regulating this private relationship at national level is likely to distort the functioning of the internal market. In this case, the distortion to the internal market does not emerge in the private relationship itself, but in the national laws dealing with the specific characteristics of a certain relationship. For example, this is seen in the case of EU data protection law and EU food safety law.

All case studies detailed here reveal that private actors under the counter-culture are recognised as ‘competent authorities’ in the context of the internal market. In this course of responsabilization, the difference with the rights culture is that private actors are recognised to have or are charged with certain ‘regulatory’ functions. In the internal market, this regulatory authority is reflected in the

‘power to affect’ other actors. For example, in the context of EU free movement law and EU discrimination law, this authority relates to a capacity of regulatory power. Private actors are recognised as competent authorities because of their regulatory power in the context of the internal market for labour or services. In this way, it is a technique that intends to coordinate the different sources of regulatory authority, i.e. some private actors being one form of authority, so as to ensure the internal market functions efficiently. At the same time, the control of regulatory power recognises the freedom to organise and regulate measures within their national environment. The obligations allocated under EU internal market law include a requirement not to interfere with the integration process of the internal market.⁷¹⁷ The private actors addressed are nevertheless free to regulate and be active in a national environment as long as their activities do not interfere with the objectives of the internal market. Control of the regulatory power *only* relates to the activities and measures that restrict the rights of other actors to have access to the internal market. EU free movement law addresses specific activities affecting transition from one Member State market to another (i.e. economic integration) while EU discrimination law regulates equal access to the internal market for labour (i.e. social integration).

With regard to the emergence of private actors as ‘competent authorities’ in the context of harmonisation measures this is different. Here, the role allocated to private actors emerges from the reorganisation of public power in a definite context. The analysis of the frameworks created by Directive 95/46/EC on data protection and Regulation (EC) 178/2002 on food safety revealed that private actors are placed in a system of shared responsibilities and the status as a competent authority consequently emerges.⁷¹⁸ Both legal instruments introduce a new legal and institutional framework that is intended to increase the efficiency of the internal market by implementing the objectives of data protection and food safety into the economic activities of the ‘stronger’ entities. Through this allocation the inherent asymmetry of power between the data controller and the data subject, and between the food chain and the consumer, is intended to be

⁷¹⁷ At the same time the Court of Justice recognised the capacity of private entities holding positions of regulatory power to justify restrictive measures for the protection of legitimate interests. For example see Case C-415/93, *Bosman* [1995] ECR I-4921; and Case C-438/05, *International Transport Workers Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779; and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.

⁷¹⁸ Directive 95/46/EC; and Regulation (EC) No 178/2002.

balanced. This is why the data controller on the one hand and the food business operator on the other occupy central positions in the respective frameworks that are intended to ensure a high level of protection of personal data and a high level of consumer health respectively. The difference being that the specific power an actor holds in EU internal market law emerged either in (1) national law as a form of self-organisation or (2) is delegated through the reorganisation exercised in the course of harmonisation at EU level. In the first scenario, power is recognised and transformed from a valid power in the national environment into a legal power in the internal market. The power of associations or collective entities to self-regulate under national law is recognised as a regulatory power within the meaning of EU free movement law, for example. In the second scenario, EU internal market law creates the power of a specific actor. This is the consequence of the reorganisation of roles in relation to creating a more efficient environment for attaining social objectives that were formerly regulated at national level. The responsibilities of private actors, for example, the requirement to ensure lawful processing of personal data through the data controller is a responsibility that emerged in the legal framework of Directive 95/46/EC.

2.1 Alternative Choices

The positions and powers that the private actors have under EU internal market law are not natural, but a choice made by the Court of Justice on the one hand and the EU legislator on the other. Due to the fact that the emergence of the counter-culture relates, directly or indirectly, to the distortion private activities produced in the internal market, the recognition of private actors as competent authorities is a choice in terms of efficiency. This is a mode of social coordination and how we structure,

rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence.⁷¹⁹

Governance refers to the processes of governing power, which is about the control of conduct.⁷²⁰ The counter-culture or the *responsibilization* of private

⁷¹⁹ Mario Monti, 'A New Strategy for the Single Market'; and Maria Weimer, 'Democratic legitimacy though European conflicts-law?: the case of EU administrative governance of GMOs', at 96.

actors in the context of the internal market is a technique in the “regulatory toolkit” of EU internal market law to attain the functioning of the internal market.⁷²¹ In specific cases, the allocation of obligations is an instrument for restoring an environment in which economic interests can compete. This does not equate to an equal balance of social powers, but to a level of asymmetry that allows for effective representation of the competing economic interests.⁷²²

The involvement of private actors implies that the attaining of specific social objectives may be more effectively realised through a reflexive form of governance rather than through a classical top-down regulation through centralised authorities. Each situation where the counter-culture emerged could have been solved through the classical top-down command and control structure. EU institutions, under EU internal market law, could have taken the route via Member States and the construction of positive obligations, á la *Commission v. France*, to deal with distortions in the internal market caused by private actors. The route taken in relation to the internal market and in situations where the counter-culture emerged is different. Under the counter-culture some economic actors are subject to legal constraints and obligations. The practical effect of the legal obligations is that the prohibited matter is internalised by these economic actors. For example, where an economic actor is prohibited from discriminating on grounds of nationality, then economic activities that are in compliance with this obligation produce equal treatment. The legal obligations clearly define the requirements with which the actors concerned must comply, i.e. they steer the economic activities of these actors. The allocation of specific duties or obligations is a way to ensure this form of internalisation of social objectives in economic activities. Consequently, the transformation of private actors in this context is a way to attain social objectives through the use of the market dynamics and the power relationship between economic actors.

The choice for this more reflexive and market-imbedded approach to regulation reveals a philosophy of EU institutions to preferably produce social objectives from within and through market activities rather than regulating and correcting the market from the outside through regulatory tools. In this case, a distinction

⁷²⁰ Nikolas S. Rose, '*Powers of freedom: reframing political thought*', at 16-17.

⁷²¹ Cary Coglianese and Evan Mendelson, '*Meta-Regulation and Self-Regulation*', at 1-2.

⁷²² To this effect see François Ewald, '*A Concept of Social Law*', at 46.

is to be made between regulation as a corrective tool and regulation or adjudication from the outside that reorganises the socio-political structure within the internal market in order to ensure the attainment of social objectives.

The counter-culture is a very special form of governance due to the fact that it instrumentalises and delegates 'public power' under EU internal market law to certain private actors. Clearly this raises issues of suitability of socio-economic contexts in which this form of governance can be considered a suitable alternative to other forms of regulation and control of private power in the internal market. In practical terms, the counter-culture may only function as an alternative form of governance in areas where public-regulation may be replaced by private forms of governance. For example, this is the case in highly technical contexts where top-down regulation is likely to fail to provide 'efficient' regulation due to the lack of expertise and knowledge.⁷²³ Thus, it makes no sense to consider the counter-culture as a form of governance within the internal market as 'the alternative' to the classical top-down regulation. The counter-culture works well in areas where private actors are delegated powers such as monitoring, compliance, or supervision, in relation to complex and highly technical contexts (i.e. food safety in the food chain or lawful processing of personal data).⁷²⁴

In terms of alternative regulatory choices, the development of the counter-culture is welcomed as it adds an alternative form of governance to the classical top-down command and control approach at both EU level and national level. This is particularly the case for situations where regulatory intervention in the internal market, due to a distortion caused by an asymmetry of power between private actors, is needed to maintain either the unity or the functioning of the internal market. The advantage of the counter-culture is that it seeks to strike a balance between the protection of individualism, which is needed for the functioning of the internal market process, and the requirement to control a certain form of private power which may give rise to distortions to the market process. This compromise is well reflected in the allocation of legal requirements, which are minimally invasive and only prescribe requirements intended to

⁷²³ On this issue of institutional alternatives see Neil Komesar, *Imperfect alternatives*; and Neil Komesar, *Law's Limits* (Cambridge: CUP, 2001); and Miguel Poiars Maduro, *We the court: the European Court of Justice and the European Economic Constitution*.

⁷²⁴ For example see Loic Azoulay, *The Complex Weave of Harmonisation*, at 609-610.

balance the power between economic actors. Through steered economic activities, private actors *produce* social objectives in the long-term. Thus, the allocation of constraints goes hand in hand with a form of legal empowerment. The result of the counter-culture is that ‘public institutions’ (i.e. EU legislators and Court of Justice) delegate public power in terms of regulatory authority within certain parts of the internal market to private actors. Private actors are transformed into sources of authority actively contributing to the attainment of social objectives within the legal framework created by EU internal market law. Yet, this delegated regulatory authority is framed in a web of shared responsibilities where ‘ultimate’ control and power to correct the system of governance is vested in public institutions (i.e. EU legislators and Court of Justice).

2.2 The risk inherent in the counter-culture

The counter-culture deals with the control of private power for the sake of the construction and the functioning of the internal market; the constraining of private autonomy under EU free movement law is a good example. Originally, national law created a space for private actors to engage in economic activities subject only to the limits set by national law in the framework of private law. The Europeanisation of vested positions of regulatory power changed this situation. The freedom for economic activity (and the social power thereunder) under national law is confined by EU internal market law and assessed against a wider framework of social objectives of EU internal market law. The effect of this European supervision on private actors is that in exercising their economic activities they are required to take into account the interests of other actors and potential outsiders, which would not be considered under the national law framework. The educative function of this technique is to widen the understanding of economic actors about the potential effects of economic choices beyond the national context. The unique feature is that the forces and powers of the legal system back this educative function.

The control that private actors have as ‘competent authorities’ in certain parts of the internal market is a central element of the counter-culture. In both scenarios in which we see the counter-culture emerging, EU internal market law places certain private actors under the control of EU institutions and the EU economic

constitution. From an EU perspective this emergence of a counter-culture as a technique of governance kills two birds with one stone. In simple integrationist terms, it reduces the influence of national law and national institutions, which under EU internal market law are considered to be the key sources of distortions to the construction and functioning of the internal market. Moreover, the counter-culture elaborates a model of governance where policy objectives of EU internal market law are placed alongside economic activities of private actors. In this regard, national 'regulation' is not replaced by EU 'regulation' but it sets up a framework in which 'policy objectives' are produced. Whether this reflexive model of decision-making is more effective remains to be seen.

Nevertheless, under this reflexive approach the risk remains that the space granted for private choices is too wide or too narrow on the basis of legal rights or obligations. To find the middle ground between these two poles of private spaces, i.e. to find the right form of autarky and balance within a power relationship between private actors needed for a policy-making environment to function efficiently, is the major difficulty confronted by EU institutions. This requires effective systems of review, e.g. impact assessments, early warning mechanisms, reviews, and monitoring techniques seeking to ensure the 'effectiveness' of this form of governance. The new Commission Better Regulation Package is an initiative, which seeks to ensure up-to-date efficiency of EU legislative frameworks and systems of governance in force. In relation to the requirement to provide better law-making, *Frans Timmermanns* stated that:

we must rigorously assess the impact of legislation in the making, including substantial amendments introduced during the legislative process, so that political decisions are well informed and evidence-based. And while the natural tendency of politicians is to focus on new initiatives, we must devote at least as much attention to reviewing existing laws and identifying what can be improved or simplified.⁷²⁵

Thus, the task of EU institutions is to review if the counter-culture as a form of governance in a certain sector is still an efficient form of regulation or needs

⁷²⁵ European Commission Press Release (Ip/15/4988) of 19 May 2015 'on Better Regulation Agenda: Enhancing Transparency and scrutiny for better EU law-making'.

revision. For example, the latest data protection reform and the adoption of Regulation (EU) 2016/679 must be seen in this context. The reform was driven by rapid changes in the areas of data protection and processing of personal data:

(6) Rapid technological developments and globalisation have brought new challenges for the protection of personal data. The scale of the collection and sharing of personal data has increased significantly. Technology allows both private companies and public authorities to make use of personal data on an unprecedented scale in order to pursue their activities. Natural persons increasingly make personal information available publicly and globally. Technology has transformed both the economy and social life, and should further facilitate the free flow of personal data within the Union and the transfer to third countries and international organisations, while ensuring a high level of the protection of personal data.

(7) Those developments require a strong and more coherent data protection framework in the Union, backed by strong enforcement, given the importance of creating the trust that will allow the digital economy to develop across the internal market.⁷²⁶

With the adoption of Regulation (EU) 2016/679 the EU legislator not only affirms the system of governance set up by Directive 95/46/EC, which puts private actors acting in their capacities as data controllers in the centre of organisation of the data protection framework, but it strengthens this approach. A decisive difference is the fact that the EU data protection framework will be set out in a Regulation. With this change, the EU legislator intends to set up a stronger framework, which is directly applicable in national law, and to strengthen the position of data controllers, which will be now directly bound by the Regulation.⁷²⁷

⁷²⁶ Regulation (EU) No 2016/679 recital 6 and 7.

⁷²⁷ *Ibid.*, at Article 5. Article 5(2) states that “The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 (‘accountability’).”

2.3 EU paternalism

Another issue to be raised is that the shaping of private actors as a commodity in the internal market under the counter-culture takes place in light of a predetermined pattern. Private actors are shaped in light of the objectives of EU internal market law, which ultimately are to construct and ensure the functioning of the internal market.

This Europeanisation of private actors must be seen in relation to the special character of the internal market, which is transnational and unifies highly regulated national markets. EU internal market law relates to the attainment of the objectives for which the internal market was set up, i.e. ultimately economic and social integration. Private actors are shaped according to the dynamics that affect the construction and functioning of the internal market. Clearly, this shaping of identities reflects a form of EU paternalism. The Court of Justice and EU institutions bestow upon private actors a clear vision about their role in certain sectors of the internal market or in relation to certain policy objectives. EU internal market law by no means gives 'freedom back to private actors' but only replaces a national regulatory framework within which economic identities were formed by a new framework at EU level. For example private actors acting in the capacity as an employer in the internal market are affected by legal requirements imposed on them under EU free movement law, EU discrimination law and under EU data protection law.⁷²⁸ In this respect, EU internal market law comes with a structural completeness. EU internal market law is at the same time the *reason and telos* of the internal market and it provides all the principles and mechanisms that are needed for attaining its objectives. The permanent shaping of powers and requirements of private actors is an indication of this tendency. EU internal market law increasingly relies on private actors to attain social objectives; the data protection and food law frameworks being only two examples here.

The characteristics of *Europeanisation of the private* affect societal structures and societal identities in Europe. The counter-culture reflects this *transformation of the*

⁷²⁸ The employer is subject to the prohibition of discrimination on grounds of nationality and on any other grounds covered by EU discrimination law, but at the same time, the employer acting as a data controller over the data of its employees is subject to EU data protection law. For example the employer is considered a controller of data in Case C-342/12, *Worten*, of 30 May 2013 (not yet published) at 23.

'private.' Roles, at least in economic terms, are disaffiliated from national boundaries and have to find new identities in a transnational economic context.⁷²⁹ Economic actors must increasingly consider their roles and functions in a European rather than purely national contexts. The opportunities the internal market provides to private actors creates transnational possibilities for improving "their living and working conditions and promoting their social advancement."⁷³⁰

The transformation of the 'private' is even more evident in the counter-culture. Where private actors were acting as 'private entities' in a national context, only under the counter-culture are they transformed into alternative sources of regulatory authority and placed in a web of actors being jointly responsible for the organisation of a certain sector that is governed by EU internal market law. Private actors are transformed into 'competent authorities' being partly in charge for the attainment of policy objectives. Under EU internal market law and the counter-culture the new individualism is no longer only about the exercise of self-interests. Rather, the new individualism developed under EU internal market law comes with a requirement to take into account the interests of other actors acting within the internal market. Put differently, some actors are put in charge of collective interests and must actively contribute to policy objectives that are intended to benefit the European society as a whole. This,

more organic individualism combines the ideas of individual value and individual debt, and includes both a concept of freedom that is neither anarchistic nor self-centred and a reference to rationalism that does not demand the impossible, while at the same time it calls for the creative use of the imagination and initiative rather than conformity to a preordained pattern.⁷³¹

⁷²⁹ To this effect see Loic Azoulay, *The European Individual as Part of Collective Entities (Market, Family, Society)*, at; and Marco Dani, *Assembling the fractured European Consumer*; and Marco Dani, *The subjectification of the citizen in European public law*.

⁷³⁰ Regulation (EU) No 492/2011, recital 4.

⁷³¹ Roland J. Pennock, *The Problem of Responsibility*, at 18.

2.4 Private liability and the counter-culture

Where someone is legally put in charge or is delegated a form of power for something bound up with legal requirements, this inevitably raises questions of liability and enforcement in case of non-compliance. In light of EU internal market law this is ever more the case when private actors are put in charge, as competent authorities, of contributing to the attainment of social objectives. In light of the counter-culture the pertinent question to ask appears to concern liability. Are private actors to be held accountable?

With regard to EU internal market law, the problem faced is that liability is not conceptualised in a general manner. EU internal market law does not provide for a concept of liability in case of breach of obligations or requirements imposed by EU internal market law. For example, the Court of Justice developed the doctrine of Member State liability as being “inherent in the system of the Treaty.”⁷³² The Court of Justice found the reasons in the wording of the principle of ‘sincere cooperation’ set out in the treaties, which requires that Member States must fulfil their obligations under EU internal market law. For example, the non-transposition of Directives gives rise to Member State liability.⁷³³ A similar general concept for breaches of EU internal market law through actors coming within the framework of the counter-culture has not yet been established. Rather, the approach developed by the Court of Justice and within secondary law is the construction of context-related forms of liability.

Liability, without doubt, would provide a further incentive for private actors to comply with legal requirements.⁷³⁴ However, there is no EU tort law that determines who is liable under certain conditions. A discipline where we can find some framework of liability is competition law. Regulation (EC) 1/2003 sets out the possibility to impose fines or periodic penalty payments on private actors violating EU internal market law.⁷³⁵ Alternatively, with regard to consumer protection Directive 85/374/EC on product liability establishes a system whereby

⁷³² Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, [1991] ECR I-05357 at 35.

⁷³³ *Ibid.*, at 36; and Paul Craig, ‘*Francovich, Remedies and the Scope of Damages Liability*’, *LQR*, 109 (1993), 595.

⁷³⁴ Barend Van Leeuwen, ‘*Private Regulation and Public Responsibility in the Internal Market*’, at 8.

⁷³⁵ Council Regulation 1/2003/EC, *on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty*, (OJ 2003/L 1/1) at Article 23 and 24.

the producer is made liable for damages caused by a product he placed on the market.⁷³⁶ With regard to liability in relation to the counter-culture the picture presented is skewed and fragmented.

As has been revealed in the case studies, all approaches to liability of private actors under the counter-culture place the decision about sanctioning and awarding damages within the national environment. Under free movement law and EC discrimination law no general framework for liability exists. The assessment of liability is done under national law by national courts; this is evident in *Viking* for example. With regard to the legality of the collective actions organised by FSU the Court of Justice held that:

85 ...even if it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent such collective action meets those requirements.⁷³⁷

The special feature is that the national court must determine the possibility of liability of private actors under the national framework regulating civil liability in light of the requirements imposed on private actors under EU internal market law. Here, the problem with legal certainty is that the national court must balance a right protected under a national law against a right protected under EU internal market law. The Court of Justice may guide the finding but not determine the tone of liability. This is clear from *Laval* that concerned the possible restriction of the freedom to provide services through collective measures. The Court of Justice found the restrictive effects of blocking premises in order to force the provider of services to enter into negotiations concerning employment conditions to be not justifiable.⁷³⁸ The Swedish Labour Court followed this view and awarded damages against the trade unions for a violation of the freedom to provide services.⁷³⁹

⁷³⁶ Council Directive 85/374/EEC, Article 1 and 6.

⁷³⁷ Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OU Viking Line Eesti*, [2007] ECR I-10779 at 85 and 87.

⁷³⁸ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767 at 108f.

⁷³⁹ The Labour Court Judgment, Judgment No. 89/09 2009-12-02, , *Case No. A 268/04*, unofficial English translation:

Reasons for this relatively restrictive approach of the Court of Justice may relate to the nature of EU free movement law and EU discrimination law and the role of private actors awarded the status of holding regulatory power. Both disciplines address situations of power that are vested in national law, e.g. the national rights of trade unions, national rights of association, or with regard to the employer the national rights under the freedom of contract. From this perspective it appears reasonable to leave choices on liability to the national courts, because the power, which is assessed, has a stronger link to national law than to EU internal market law. National courts are better equipped to decide cases that emerge within their jurisdiction. They have better knowledge of facts, contexts, habits, or practices, relating to private actors and private power in a national context.⁷⁴⁰

Directive 95/46/EC and Regulation (EC) No 178/2002 set out when liability may be awarded to the data controller or the food business operator respectively. Article 23 of Directive 95/46/EC makes the data controller liable for the illegitimate processing of data, unless it can be shown that the data controller is not responsible for the damage. However, it is the Member States that shall provide for a system for compensation in case of violation of EC data protection law. Therefore, liability is decided in a national environment.⁷⁴¹ Similarly, under Regulation (EC) No 178/2002 liability is determined according to Directive 85/374/EC on liability for defective products. Food is considered as any other product to which the same standards and rules concerning liability apply.⁷⁴² Directive 85/374/EC sets up a system where the producer is liable for harm caused by a defective product.⁷⁴³

In the context of harmonisation, the frameworks set out by the regulatory instruments determine similar forms of liability for actors that are responsabilized. The food business operator and the data controller are to be held accountable for not acting according to their obligations set out in Directive

<http://arbetsratt.juridicum.su.se/Filer/PDF/ErikSjoedin/AD%202009%20nr%2089%20Laval%20English.pdf>.

⁷⁴⁰ Case 96/80, *J.P. Jenkins v. Kingsgate*, [1981] ECR 911 at 14; and Case C- 45/09, *Rosenblatt*, [2010] ECR I-9391 at 52.

⁷⁴¹ For example see Case C-465/00, *Österreichischer Rundfunk*, [2003] ECR I-4989.

⁷⁴² Regulation (EC) No 178/2002, Article 21.

⁷⁴³ Council Directive 85/374/EEC, Article 1.

95/46/EC and Regulation (EC) No 178/2002 respectively. Yet, liability is not further defined. How liability is imposed and how compensation is awarded is left to national organisation and national law. The consequence is that national courts, again, move to the centre of the organisation for awarding liability for breaches of EU internal market law by private actors. Within their jurisdiction, national courts must determine if liability is imposed and how this is punished. The difference to liability under the treaty provisions is that the national court must assess the position/power of the private actor that is vested in EU internal market law, in the context of national rules on liability. In this regard, private actors are liable under national law for a power EU internal market law has ascribed to them.

The consequence of this context-related approach is that liability is determined on the violation of EU obligations in specific cases framed in national law. This is different from the approach adopted under Member State liability where the framework in which the violation is assessed is EU internal market law. The advantage of the former approach is that it allows a specific discretion for national courts to deal with specificities of national law. At first sight this might sound plausible and responsive to the very nature of EU internal market law and the internal market. This is an internal market comprised of national laws and national markets. Many positions are vested in national law. Thus, it appears reasonable to award damages, for example, in accordance with the roles in which this position is grounded. The risk, however, is that the lack of a consistent principle may give rise to different levels of enforcement and legal protection of EU rights between the Member States. This shall not be about judging if the current approach in EU internal market law is good or bad, but it should provide some food for thought in order to provide a basis for further research.

The strength of a decentralised approach is that it takes into account the national forum in which private actors are mainly framed. EU internal market law only adds a layer to the extent that private actors engage in the internal market. The advantage of the reflexive and less intrusive approach to liability takes into account the national socio-economic and cultural contexts in which private actors exist and perform specific functions. For example, in *Laval* the Court of Justice recognised that the,

national authorities in Sweden have entrusted management and

labour with the task of setting, by way of collective negotiations, the wage rates which national undertakings are to pay their workers and that, as regards undertakings in the construction sector, such a system requires negotiation on a case-by-case basis, at the place of work, having regard to the qualifications and tasks of the employees concerned.⁷⁴⁴

The current approach grants a wide margin of discretion to national courts to assess violations of actors under EU internal market law, in light of their function and position in the organisation of national socio-economic contexts. Ultimately, the test against which a centralised concept of liability must hold is if it increases the efficiency in terms of effectiveness of EU internal market law in practice. The preliminary investigation carried out in the course of this thesis revealed that in cases where liability needed to be determined, national courts were not likely to favour ‘national protectionist’ interpretations of liability.

It could be argued that EU internal market law should supplement the counter-culture with a concept of liability, but the question remains as to ‘what extent does this increase efficiency?’ And would a centralised approach to liability be at all desirable? In any case, the conceptualisation of the counter-culture in terms of responsibility would allow the development of a general concept of liability similar to the concept of Member State liability. The consistency in terms of legal obligations imposed on private actors provides a framework within which a general idea of liability can emerge. Private actors are put in charge of contributing to the attainment of social objectives under EU internal market law. Consequently, one could argue that in case of non-compliance they would fail to fulfil their obligations under EU internal market law, which raises liability. However, this is to be discussed elsewhere.

2.5 The public/private divide

A last point to be raised in the context of this thesis relates to the public/private divide in EU internal market law. The enquiry reinforces the idea, that was once

⁷⁴⁴ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767 at 69.

circulating, that EU internal market law prefers a functional to a formal approach in relation to roles.

The public/private divide has significantly shaped our thinking about law and how we organise matters in society. Public affairs should be governed by public entities and public law, and private actors should be governed by private law.⁷⁴⁵ The public/private distinction was the analytical tool for considering the roles and functions in the Member States. In this regard, it is interesting to read *Ross* who considered the concepts of 'state' and 'state organs' in constitutional law.⁷⁴⁶ *Ross* argued that it is "rules of competence that create public authority."⁷⁴⁷ In other words, legal context determines what is public and what is private. This is also true for EU internal market law. It is within the meanings of the different disciplines of law that emerge in relation to the internal market that the meanings of "public" and "private" are determined. Under EU internal market law, the meaning of public and private are determined on the basis of effects. Within the meaning of the internal market and EU internal market law, the general meaning of "public" in terms of effects refers to the capacity to affect others in the exercise of their economic activities. The threshold for the assessment of power and effect is not merely the existence of simple asymmetry of power between the actors, but it is assessed in terms of relative strength, equality of positions, permanent or temporary positions, and the capacity this produces in terms of influence. In this regard, the capacity to steer and affect the exercise of economic activities of other actors on a permanent basis generates 'public' power within the meaning of the internal market, because the exercise of this power affects the market dynamics. It is evident that private and public actors may occupy public power that is understood in this way. In EU internal market law, this functional approach also works the other way around. Member States are treated as private actors, for example, if they act in the capacity as employer.⁷⁴⁸

⁷⁴⁵ On the idea of the classical distinction for example see Morton J. Horwitz, *The History of the Public/Private Distinction*; and Hans-Wolfgang Micklitz, *Rethinking the public/private divide*, at 275 f.

⁷⁴⁶ Alf Ross, *On the Concepts "State" and "State Organs" in Constitutional Law*.

⁷⁴⁷ *Ibid.*, at 117-118.

⁷⁴⁸ For example see Case 152/73, *Sotgiu v. Deutsche Bundespost*, [1974] ECR 153.

With regard to the counter-culture, this functional approach to the public and private divide is reinforced and further developed. The analysis of the counter-culture in terms of responsibility showed that EU internal market law recognises that some private actors hold 'public' power within the internal market under EU free movement law and EU discrimination law. Moreover, under EU data protection law and EU food safety law, private actors are bestowed with a position that holds a form of "public" power by EU internal market law.

3. The concept of responsibility

The transformation of private actors as actors in the internal market witnessed in the context of EU internal market law emerged some time ago and the aim of this research was to shed some light on this development. The problem with the roles and positions of private actors in EU internal market law is that they are not always defined clearly. Reliance on the concept of responsibility as an analytical tool improved this situation. On the one hand, the concept of responsibility filled the gap between the social role of private actors and the subsequent legal consequences. The advantage of the concept is that the role an actor has in a societal context can be linked to how this is shaped and manifested in the legal system. It fills the gap encountered with regard to EU internal market law as to why some private actors are constrained in their freedoms. On the other hand, the concept of responsibility provided a tool to observe the role of private actors in a wider context, in terms of their function in the internal market.

The concept of responsibility opens the door for a wider analytical framework, which intends to explain the legal consequences imposed on some private actors in a specific legal context. The justification for this is derived from the social and normative functions of the concept of responsibility. While the social functions of the concept of responsibility determine the social role and function an actor has in a specific context, the normative functions justify the imposition of legal consequences due to the position held. The explanation is derived from the analysis of the social role the private actor is supposed to have in the social arrangement underlying the legal context.

The use of the concept of responsibility shall not be understood in normative terms. The concept of responsibility is by far not the only way to analyse the roles and functions of actors under EU internal market law. Yet, the concept of responsibility has proven to be a useful tool for analysing the role of actors within the context of the counter-culture. Thus, we should reasonably consider the inclusion of the concept of responsibility into the ‘analytical tool box’ from which analytical tools are used to understand the development or emergence of new phenomena under EU internal market law—particularly where this relates to EU internal market law shaping roles and positions of actors in the internal market. For example, the concept of responsibility may also be useful for considering the roles of Member States or Authorities within the internal market and under EU internal market law. Alternatively, in relation to the idea of shared responsibilities, the concept of responsibility may be used for a wide-ranging dissection of specific regulatory contexts, such as EU data protection law—and the way EU internal market law structures roles and powers within this framework.

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