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Title: Catch Me If You Can? The Market Freedoms' Ever-expanding Outer Limits

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### **Abstract:**

*This Article submits that questions of institutional ability and legitimacy should play a more important role in the Court of Justice's decision-making process. In effect, both the legal literature and the Court's reasoning process tend to disregard such questions, thereby ignoring relevant comparative institutional choices which take place whether they are acknowledged or not. The deficiencies arising from the current approach will be exemplified by an analysis of developments in EU's free movement law on the requirements of cross-border elements, economic aim of free movement, and on the complementarity of these two requirements. In particular, it will be argued that the absence of properly reasoned institutional comparative analysis, when coupled with under-theorised normative foundations and the introduction of European Citizenship, has potentially explosive consequences for the scope of the EU's market freedoms.*

# ESSAY

## CATCH ME IF YOU CAN? THE MARKET FREEDOMS' EVER-EXPANDING OUTER LIMITS

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## 1. Introduction

Recent developments in the case-law of the Court of Justice of the European Union's (the "Court" or the "CJEU") seem to have extended the substantive scope of the market freedoms<sup>1</sup>; this has occurred through a diminution of the number of situations deemed to be purely internal, an extension of the scope of activities deemed to have an economic nature and the use of the market freedoms to deal with situations beyond their traditional "*telos*". It will be submitted that this results partially from an absence of dully theorised normative underpinnings for the case-law, but also from an absence of consideration of the institutional implications of adopting particular decisions.

The main argument of this Article is not only that better theorisation by the Court of the normative underpinnings of the case-law is in order, but also that the Court and legal commentators should start taking into account institutional considerations alongside purely substantive ones. The insight underlying this is a very simple one: what a court should do is effectively limited by what it can do. In other words, evaluative and prescriptive assessments of courts and judges can only be fruitful if they are informed by a correct descriptive understanding of what they do, and what hidden comparative institutional choices are at play.<sup>2</sup> The recent expansion in the scope of the market freedoms will be used to demonstrate how the institutional context matters to the development of law by courts; and to evidence the issues arising from the Court ignoring institutional consequences of its decision-making, particularly when the relevant normative foundations of the case-law are under-theorised to begin with. It will be submitted that a proper consideration of the different substantive and institutional normative foundations of the case-law, and of the ways in which they interact, leads to better descriptive frameworks and prescriptive approaches to the case-law.

## 2. Contextualising Courts

Courts are institutional bodies operating within specific institutional frameworks that constrain and shape their actions. Institutions, for our

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<sup>1</sup> For the avoidance of doubt, these are the economic freedoms – free movement of goods, services, establishment, capital and workers.

<sup>2</sup> Arthur Dyevre, '*Making Sense of Judicial Lawmaking: A Theory of Theories of Adjudication*' (EUI 2008/09) <[http://cadmus.eui.eu/dspace/bitstream/1814/8510/1/MWP\\_2008\\_09.pdf](http://cadmus.eui.eu/dspace/bitstream/1814/8510/1/MWP_2008_09.pdf)> accessed 10-4-2010, 46.

purposes, include formal rules, such as constitutions, statutes, common law, regulations and even contracts; but they also include informal rules, which:

Arising to coordinate repeated human interaction, [...] are (1) extensions, elaborations and modifications of formal rules, (2) socially sanctioned norms of behaviour, and (3) internally enforced standards of conduct.<sup>3</sup>

Institutional bodies – organizations - and institutional frameworks continuously interact and mutually constrain each other. In particular, all organizations have to operate under the existent institutional framework and thus have to navigate the options that such a framework provides. But they are also the major agents of institutional change: as organizations evolve and adapt, they alter institutional frameworks – the rules applying to them - as well. The path of institutional change is thus shaped by both the lock-in and path-dependency that comes from the symbiotic relationship between rules and organizations – with organizations being the result of an institutional framework which changes as a result of organizations adapting and trying to modify it - and the feedback process by which human beings perceive and react to the existent choice-set. In particular, incremental change comes from the perceptions of agents in political and economic organizations that they could do better by altering the existent institutional framework at the margin. On the other hand, this perception usually results from incomplete information processed through mental constructs, which leads to the institutional developments not being strictly those envisaged by those advancing them.

This is particular the case with legal systems, namely those which are precedent-based. In these systems:

past decisions become embedded in the structure of the law, which changes marginally as new cases arise involving new, or at least in terms of past cases unforeseen, issues; when decided these become, in turn, a part of the legal framework. The judicial decisions reflect the subjective processing of information in the context of the historical construction of the legal framework. (...) However we account for the judicial process, the institutional framework is continuously but incrementally modified by the purposive activities of organizations bringing cases before the courts.<sup>4</sup>

In other words, history matters: the selection of a prior path determines current behaviour. Particularly in systems which follow precedent, but also in systems

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<sup>3</sup>Douglass C North, *Institutions, institutional change and economic performance* (Cambridge University Press, Cambridge 1990) 40.

<sup>4</sup>Ibid., 97.

which are not formally bound by *stare decisis*, legal rules gradually build upon one another over time, with the consequence that an earlier decision influences the later decisions of courts. This is related to the insight that organizations can maximise their situation by altering the institutional framework at the margin.<sup>5</sup> Litigants argue within the bounds of existent precedent and law; potential beneficiaries of new precedent have the incentive to push the law further, creating path-dependencies for both courts and subsequent litigants.<sup>6</sup> Path dependence can be said to lead to three autonomous, if interconnected, phenomena<sup>7</sup>: the first is non-ergodicity, meaning that small early events have a large impact on the eventual outcome of the case law. The second effect is lock-in, or inflexibility: once a court has taken a decision on a legal question, precedent and other informal rules lock in the legal rule. Nonetheless, it should also be pointed out that there are ways for judges to eschew precedent within the accepted scope of judicial reasoning, such as relying on different precedents, linguistic imprecisions and factual distinctions.<sup>8</sup> In this particular, considerations of scope and ability might be serious determinants in a court's decision to eschew past precedent.<sup>9</sup> The third consequence is indeterminacy of outcome: a decision choosing between different solutions which were possible at an initial stage is adopted on the basis of imperfect information as to its consequences and ends up affecting the subsequent development of the case-law.

The CJEU is simultaneously empowered and constrained by rules both formal – the Treaties, specific procedural rules – and informal – the parameters of correct judicial discourse – which lead to it being path-dependent. On top of this, the Court is also constrained by its own limitations as to what it can effectively do: this relates both to their physical resources and their ability to

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<sup>5</sup> North (n 3) 8.

<sup>6</sup> Oona A. Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' 86 Iowa L.Rev. 601, 627-630. On the role of litigants in shaping the development of the European economic freedoms, see Miguel Poiars Maduro, *We, the Court - The European Court of Justice and the European Economic Constitution - A Critical Reading of Article 30 of the EC Treaty* (Hart Publishing, Oxford 1998) 25ff.

<sup>7</sup> I here follow Hathaway (n 6) 630-634.

<sup>8</sup> Clayton P. Gillette, 'Lock-In Effects in Law and Norms' (1998) 78 B.U.L.Rev. 813, particularly 824-5; Hathaway (n 6) 624-625.

<sup>9</sup> This is even sometimes made clear by the Court itself. In para. 12 of Joined Cases C-267/91 and 268/91 *Keck and Mithouard* [1993] E.C.R. I-6097, it justified its changing of *Dassonville* by stating that: 'In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter'.

investigate, understand and make the substantive social decisions that may come to them. It is the interaction of these limitations with the determinants of litigation that determines the institutional ability of the CJEU.<sup>10</sup> For example, domestic courts are routinely prompted by savvy litigants to take account of and interpret free movement European law in otherwise mundane litigation. This occurs naturally, as these litigants attempt to use European law to their benefit. Considering the institutional ability of the adjudicative process is of the utmost importance when deciding those cases, because decisions about the scope of directly effective EU law provisions are comparative institutional assessments, in the sense that they allocate the competence to decide on the desirability of national legislation to national courts – and in last resort to the CJEU – instead of to national legislatures. What is more, the ease by means of which these litigants can refer to European law in situations where a potential gain might be obtained depends on the Court's own case-law.

Accordingly, the Court should not only be concerned with substantive questions, but also with the amount and complexity of litigation which reaches it, taking into account the limitations deriving from its physical capacity and its ability to correctly decide large amounts of cases; and these institutional constraints should in turn be compared with the other institutional options available. Avoiding these questions does not make them go away, but merely hides them, preventing the issues arising from them from being properly addressed and allowing them to effectively build up. This will now be demonstrated by reference to developments concerning the substantive scope of the market freedoms.

### 3. The Scope of the Market Freedoms

The market freedoms are traditionally considered to have an identity of aim: to contribute to the completion and functioning of the internal market through the elimination of obstacles to economic free movement between Member-States and the creation of an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.<sup>11</sup> This is the primary normative underpinning of the Court's case-law, but it still leaves a number of questions to be addressed. When Art. 3 (3) Treaty of the European

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<sup>10</sup> Neil K. Komisar, *Law's limits: the rule of law and the supply and demand of rights* (Cambridge University Press, Cambridge 2001) 38; Mitchel Lasser, *Judicial transformations: the rights revolution in the courts of Europe* (Oxford University Press, Oxford 2009) 204-205.

<sup>11</sup> See Art. 26 TFEU. See also Case 355/85 *Driancourt v Cognet* [1986] E.C.R. 3231, and Case 98/86 *Mathot* [1987] E.C.R. 809.

Union (“TEU”) sets about the creation of an internal market which is supposed to contribute, simultaneously, to balanced economic growth and price stability, a highly competitive social market economy, a high level of protection and improvement of the quality of the environment, social justice, *inter alia*, it should be clear that, apart from the different meanings which can be attributed to expressions such as a “competitive social market economy”, the exclusive pursuit of a goal, such as economic growth, would to be to the detriment of other listed goals such as social justice or protection of the environment.<sup>12</sup> What is more, the different normative goals which fit into the internal market have evolved since the Union’s inception in 1957; of particular importance in this respect is the introduction and development of European Citizenship, which impact on the normative understanding of the market freedoms is still unclear but has been reflected in concerns about reverse discrimination and fundamental rights’ protection expressed in the legal literature and in Advocates General’s Opinions.<sup>13</sup>

The following sections will show how tensions between these differing normative underpinnings have led to developments in the case-law concerning the scope of the market freedoms, and how institutional considerations are relevant to these and future developments. For these purposes, the Court’s case-law will be analytically divided into specific requirements which must be fulfilled in turn for a situation to fall within the scope of the market freedoms:<sup>14</sup>

- the existence of a cross-border element;
- the economic aim of the exercise of the free movement right;
- the existence of a specific hindrance to the pursuit of cross-border movement with an economic aim.

### 3.1 Cross-Border Elements

This section will begin by describing the origins of the “purely internal situations” doctrine, which started from a debate in the field of private international law on whether the better way to distinguish between internal and

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<sup>12</sup> K. Mortelmans, 'The common market, the internal market and the single market, what's in a market?' (1998) 35 CML Rev. 101, 118. This tension can be seen in the process and discussions started by the Commission’s Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, on “A Single Market for 21st Century Europe”, COM(2007) 724.

<sup>13</sup> See in particular Advocate General Sharpston’s Opinion in Case C-34/09 *Zambrano* of 30 September 2010, still unpublished.

<sup>14</sup> A similar structure can be found in Alina Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer Law International, Alphen aan den Rijn 2009) 10.

international situations was through a geographical or a juridical criterion. It will then be described how, having initially chosen the geographical criterion, the Court has recently relaxed its application and thereby eroded the application of this doctrine. Finally, an attempt will be made to understand this erosion.

### 3.1.1 Origins of the Purely Internal Situations Doctrine

From a purely normative perspective, it could be argued that obstacles to movement within Member-States could also be obstacles to the creation of an internal market. The Court could have legitimately decided that situations without a cross-border element fell within the scope of the market freedoms, depending on the conception of “internal market” adopted. Against this, the letter of the Treaty on the Functioning of the European Union (“TFEU”), with the exception of the provisions on free movement of workers, points towards only cross-border situations being subject to EU law<sup>15</sup>, and the pluralistic element of EU integration may be construed as leaving regulatory autonomy to the Member-States in situations not falling within the scope and purposes of EU law<sup>16</sup>, and as such requiring purely internal situations to fall outside the scope of the market freedoms.

These different options were reflected in *Saunders*<sup>17</sup> in the different solutions proposed by the Advocate General and the Court. Advocate General Warner held that: “*The true question is not whether the case has any connection with another Member State, but whether and, if so, to what extent Community law confers rights on a person.*” From this perspective, what would matter was not whether the factual situation was circumscribed to a single Member-State but whether the national measure infringed the substance of rights conferred by the free movement provisions. The Court, however, decided otherwise, holding that the free movement of workers did not have the goal of restricting the power of Member-States to lay down rules in purely internal situations. The different

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<sup>15</sup> See, for goods, Art. 28, 30, 34 and 35 TFEU, which all include prohibitions *between Member-States* on custom duties on imports and exports and all charges having equivalent effect; on establishment and services, which prohibit restrictions on such freedoms on nationals *of a Member-State in the territory of another Member-State*, see Art. 49 and 56 TFEU; and on capital, Art. 63 TFEU prohibits all restrictions on its free movement *between Member-States* (and also third-countries). Naturally, at the time the relevant provisions were part of the Treaty establishing the European Economic Community (EEC Treaty).

<sup>16</sup> Tryfonidou (n 14) 9.

<sup>17</sup> Case 175/78 *Saunders* [1979] E.C.R. 1129, following a lead from Case 115/78 *Knoors* [1979] E.C.R. 399.



approaches identified above are reminiscent of two criteria used in private international law to distinguish between international and internal situations: a “geographical” criterion, focusing on where the facts of the case take place, and a “juridical” one, which looks into whether more than one legal system is connected to the case.<sup>18</sup> The procedural implications of this were neatly encapsulated by Advocate General Geelhoed:

[...] the Treaty provisions concerning free movement (of persons and goods) do not apply to activities all of the relevant aspects of which are confined to one Member-State. [...] The main question is this: is it the facts in the main proceedings that determine whether the Court must answer the questions referred to it for a preliminary ruling, or is it the nature and substance of the national measure? If it is the facts in the main proceedings that are decisive, the Court clearly will not answer the question where the main proceedings have no cross-border elements. [...] If it is the substance of the national measure that is decisive, the Court should consider how far the national legislation may have an external effect. Only if there is no - potential - external effect should the Court refrain from answering the question referred to it.<sup>19</sup>

Following *Saunders*, the Court adopted a unitary approach to all the freedoms, favouring the geographical approach. The canonical formulations for this were that the free movement provisions do not apply to activities which have no factor linking them with any of the situations governed by EU law and/or that are confined in all aspects within a single Member-State.<sup>20</sup>

### 3.1.2 Relaxing the Geographical Requirement

Some recent cases have arguably moved away from this unitary approach, particularly in what concerns the free movement of products (goods and

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<sup>18</sup> Hans Ulrich Jessurun d'Oliveira, 'Is Reverse Discrimination Still Permissible under the Single European Act?' in *Forty Years on: The Evolution of Postwar Private International Law in Europe* (Kluwer, Dewenter 1990) 73-74.

<sup>19</sup> Opinion in Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch* [2002] E.C.R. I-2157, para. 79-82.

<sup>20</sup> d'Oliveira, 73-74, Tryfonidou, 30-31. See for goods *Mathot*, Case C-60/91 *Morais* [1992] E.C.R. I-2085; for establishment, Case C-198/89 *Tourist Guides Greece* [1991] E.C.R. I-00727, para. 9, Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] E.C.R. I-3171; for services, Case 20/87 *Gauchard* [1987] E.C.R. 4879, Joined Cases C-54/88, C-91/88 and C-14/89 *Nino* [1990] E.C.R. I-3537, Case C-152/94 *Buynder* [1995] E.C.R. I-3981; for capital, Case C-513/03 *van Hilten-van der Heijden* [2006] E.C.R. I-10653.

services). In *Lancry*<sup>21</sup> the Court held that the prohibition of custom duties set forth in Article 28 TFEU (ex-Art 23 of the Treaty establishing the European Community (“TEC”)) does not apply only to duties imposed on goods that have moved from one State to another, but also to customs duties imposed on goods crossing the internal frontiers of a Member-State, at least inasmuch as they could also apply to imported goods – which distinction from national goods, in light of the prohibition of border controls and the conclusion of the internal market, was seen to be practically impossible.<sup>22</sup> This was further developed in *Jersey Produce*<sup>23</sup>, where the Court held that even though an internal customs duty applied only to the export of potatoes from Jersey to the United Kingdom:

that does not rule out the possibility that such potatoes, once within the United Kingdom, might then be re-exported to other Member-States, with the result that the contribution in question may be levied on goods which, after having passed through the United Kingdom in transit, are in fact exported to other Member-States.<sup>24</sup>

Hence, the principle appears to be that whenever it is impossible to identify whether potential imports or exports are to be affected by a custom duty, such a duty will infringe Union law, even where it applies to products which are in a purely internal situation.<sup>25</sup> This approach appears to have been transposed into Art. 34 TFEU (ex-Art 28 TEC) by *Pistre*.<sup>26</sup> The facts of the case concerned an appeal brought by French nationals for selling goods produced in France under the description “montagne”. The use of this description was allowed only in relation to products prepared in French territory after the producer had obtained an authorisation from the French authorities. In the case at hand, all the relevant legislation was complied with, but no authorisation had been obtained. Choosing not to look into the specific facts of the case, the Court held that:

Article 30 cannot be considered inapplicable simply because all the facts of the specific case before the national court are confined to a single Member-

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<sup>21</sup> Joined Cases C-363/93, C-407/93, C-408/93, C-409/93, C-410/93 and C-411/93 *Lancry* [1994] E.C.R. I-3957. Confirmed in Case C-72/03 *Carbonati Apuani* [2004] E.C.R. I-8027.

<sup>22</sup> Peter Oliver and Wulf-Henning Roth, 'The Internal Market and the Four Freedoms' (2004) 41 CMLR 407, 431, Cyril Ritter, 'Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234' (2006) 31 E.L.Rev. 690, 706.

<sup>23</sup> Case C-293/02 *Jersey Produce* [2005] E.C.R. I-9543

<sup>24</sup> *Ibid.*, para. 65.

<sup>25</sup> Tryfonidou (n 14) 75.

<sup>26</sup> Joined Cases C-321/94 to C-324/94 *Pistre* [1997] E.C.R. I-2343.

State. In such a situation, the application of the national measure may *also have effects on the free movement of goods between Member-States*, in particular when the measure in question facilitates the marketing of goods of domestic origin to the detriment of imported goods. In such circumstances, the application of the measure, even if restricted to domestic producers, in itself creates and maintains a difference of treatment between those two categories of goods, hindering, at least potentially, intra-Community trade.<sup>27</sup> [*emphasis added*]

In itself, this statement could be read as applying the juridical approach, looking not into the facts of the case but into the substance of the national measure and its potential external effects.<sup>28</sup> On the other hand, the Court went on to note that since it was “*accepted that the domestic legislation in question could be applied to products imported from other Member-States, it follows, first, that it constitutes an obstacle to intra-Community trade*”, which seems to imply that the free movement of goods merely protects imported goods and that the geographic criterion still stood.

This was clarified in *Guimont*<sup>29</sup>, where the Court distinguished *Pistre* as applying the juridical approach only to discriminatory rules, and stated that on what concerns indistinctly applicable rules: “*it is clear from the Court’s case-law that such a rule falls under Article 30 of the Treaty only in so far as it applies to situations that are linked to the importation of goods in intra-Community trade*”. However, the Court went on to state that a preliminary reference request from a national court will only be refused if it is quite obvious that the interpretation of Union law sought bears no relation to the actual nature of the case or to the subject-matter of the main action, and since it was possible that a reply might be useful if national law were to require that the rights which a foreign producer would derive from Community law must also be enjoyed by national producers thereby preventing reverse discrimination - , the Court would still look at the rule.<sup>30</sup> Similarly, in *PreussenElektra* the Court essentially dismissed out-of-hand any argument that a situation had no cross-border element by stating that it was for the referring court to determine whether the question was relevant and stating that “*it is not obvious that the interpretation sought bears no relation to the actual facts of the main action or its purpose.*”<sup>31</sup> This so-called *Guimont* case-law has

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<sup>27</sup> *Ibid.*, paras 44-45.

<sup>28</sup> See, in this sense, Tryfonidou (n 14) 71.

<sup>29</sup> Case C-448/98 *Guimont* [2000] E.C.R. I-10663.

<sup>30</sup> *Ibid.*, paras 20-23.

<sup>31</sup> Case C-379/98 *PreussenElektra* [2001] E.C.R. I-2099, para. 52.

been progressively adopted under capital<sup>32</sup>, services,<sup>33</sup> establishment<sup>34</sup>, and it appears that it might also be applicable for workers<sup>35</sup>. Thus, the Court seems to be moving away from its traditional geographical requirements of cross-border elements, and to be now willing to review measures applying to purely internal situations as long as the national referring courts consider the question to be relevant.

A parallel development away from the canonical understanding of the purely internal situations doctrine is also taking place through the extension of the geographical criterion itself, particularly in the field of free movement of persons. It is settled law that a situation will have a link with free movement law if it involves a potential, but not a merely hypothetical, exercise of a market freedom.<sup>36</sup> The distinction between what is a hypothetical or potential exercise of a market freedom is not exactly clear, however, and the Court has taken advantage of this to expand the scope of the free movement of persons by increasing the number of situations deemed to have potential links with EU law.<sup>37</sup> Even as the Court has reiterated that the free provision of services does not apply to purely hypothetical situations, the Court recently set forth that there is no need to prove the existence of a previously determined recipient as long as the recipient is determinable<sup>38</sup>: the existence of either virtual or merely possible future recipients suffices.<sup>39</sup> In effect, the case-law no longer insists on a specific exercise of inter-State movement, as long as a potential effect on the

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<sup>32</sup> *Reisch* (n 19).

<sup>33</sup> Case C-6/01 *Anomar* [2003] E.C.R. I-8261. See Stefan Enchelmaier, 'Always at your service (within limits)' (2011) 36 E.L.Rev. 615, 617.

<sup>34</sup> Case C-250/03 *Mauri* [2005] E.C.R. I-1267.

<sup>35</sup> See Advocate General Léger's Opinion in Case C-152/03 *Ritter-Coulais* [2006] E.C.R. I-1711, footnote 47.

<sup>36</sup> See for the free movement of workers Case 180/83 *Moser* [1984] E.C.R. 2539, para. 18; Case C-41/90 *Höfner and Elser* [1991] E.C.R. I-1979, para. 39. On the application of this principle to all free movement of persons provisions, see Case C-299/95 *Kremzow* [1997] E.C.R. I-2629.

<sup>37</sup> Niamh Nic Shuibhne, 'Free Movement of persons and the wholly internal rule: time to move on?' (2002) 39 CML Rev. 731, 736.

<sup>38</sup> Vassilis Hatzopoulos, 'Recent Developments of the Case Law of the ECJ in the Field of Services' (2000) 37 CML Rev. 43, 58. See Case C-384/93 *Alpine Investments* [1995] E.C.R. I-1141, Joined Cases C-51/96 and C-191/97 *Delière* [2000] E.C.R. I-2549, Case C-405/98 *Gourmet International* E.C.R. I-1795, Case C-355/00 *Freskot* [2003] E.C.R. I-5263.

<sup>39</sup> *Alpine*, Case C-36/02 *Omega* [2004] E.C.R. I-9609, Case C-215/03 *Oulane* [2005] E.C.R. I-01215. See Vassilis Hatzopoulos and Thien Uyen Do, 'The Case Law of the ECJ concerning the Free Provision of Services: 2000-2005' (2006) 43 CML Rev. 923, 926.

intra-State provision of services can be found.<sup>40</sup> Like in *Pistre*, even though all the facts of the case may be located within a Member-State, a situation might still fall within the scope of the market freedoms.<sup>41</sup>

### 3.1.3 Understanding the Erosion of the Purely Internal Doctrine

Taken together, all these developments point towards the Court extending the kind and type of cases it is willing to review. The distinction between juridical and geographical approaches, which heuristic value had always hinged on the Court tacitly endorsing it, lost much of its explanatory power in this scenario. A question about the *degree* of (geographical) cross-border elements required may, through the manipulation of whether a situation is potentially or hypothetically concerned with cross-border movement, become a question on whether a situation has a sufficient connection with the free movement provision; and similarly, a question about whether the situation falls within the scope of a freedom can easily be framed in geographical terms. At the same time, the *Guimont* doctrine allows the Court to review national measures even when it accepts that a situation is purely internal.

What justifies this erosion of the purely internal doctrine? It should be noted that, for all the references to geographical and juridical criteria in the literature, the Court never did provide a coherent normative theory for this doctrine to begin with. The original concern seemed to be with the maintenance of an area of Member-State autonomy, but this might have been overrun by new normative concerns: prior to the developments described above, legal commentators started to submit arguments against reverse discrimination<sup>42</sup> on the basis of the adoption and development of European Citizenship, and the protection of fundamental rights.<sup>43</sup> A similar argument can be seen in the Court's justification of its *Guimont* case-law, which is that a decision may still be useful if:

national law were to require, in proceedings such as those in this case, that a national producer must be allowed to enjoy the same rights as those

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<sup>40</sup> Tryfonidou (n 14) 85; Enchelmaier (n 33) 618.

<sup>41</sup> Compare Case C-108/98 *RI.SAN*. [1999] E.C.R. I-5219 and Case C-410/04 *ANAV* [2006] E.C.R. I-3303.

<sup>42</sup> These are situations where those not encompassed by the free movement provisions – namely those involved in purely internal situations – are left worse-off than those who do fall within their scope.

<sup>43</sup> Nic Shuibhne, 731, Alina Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizen's Europe' (2008) 35 *LIEI* 43.

which a producer of another Member-State would derive from Community law in the same situation.<sup>44</sup>

Nonetheless, the Court never properly discussed how to balance the relevant normative concerns at stake. Academic contributions to the subject made their own normative contributions, but tend to not consider the institutional realities of judicial decision-making by the CJEU, focusing instead on the undesirable and unjust results of reverse discrimination. But taking into account these institutional considerations allows us to bring to the forefront an important distinction: the purely internal doctrine comports both procedural and substantial implications.

From a procedural standpoint, the purely internal rule is a gatekeeper to the preliminary reference mechanism: if the case under consideration by the national court concerned a purely internal situation, the Court would not pursue any assessment of the relevant measures. Nonetheless, this refusal on the part of the Court to pursue assessments under the preliminary reference mechanism had no implication on the substantive status of a measure under EU law: in effect, that measure could still be subject to review under, say, an infringement procedure brought by the Commission against a Member-State or by a litigant whose situation had a cross-border element. From a substantive perspective, the implications of this doctrine are that the free movement rules have no effect on situations the facts and effects of which are confined within a single Member-State, even if such a measure would fall within their scope on what concerns situations with a cross-border element.<sup>45</sup> What this means, in turn, is that the same national measure is sometimes legal, sometimes illegal, depending on the underlying factual situation in which it is applied. The Member-State is merely required not to apply the relevant measure in cross-border situations, while it is allowed to apply it in purely internal situations.<sup>46</sup>

This distinction is important to understand the developments in the case-law. Under the *Guimont* case-law the Court does not seem to control whether national law prevents reverse discrimination or not before assessing national

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<sup>44</sup> *Guimont* (n 29) para. 23.

<sup>45</sup> See on goods, Joined Cases 314/81 to 316/81 and 83/82 *Waterkeyn* [1982] E.C.R. 4337; Case 286/81 *Oosthoek's* [1982] E.C.R. 4575; on services, see Case 52/79 *Debauve* [1980] E.C.R. 833, *Höfner and Elser* (n 36); on workers, see Case C-332/90 *Steen* [1992] E.C.R. I-341, Case C-379/92 *Peralta* [1994] E.C.R. I-3453, Case C-212/06 *Government of Communauté française and Gouvernement wallon* [2008] E.C.R. I-1683; on establishment, see *Nino* (n 20). There is still no case-law on capital that I'm aware of.

<sup>46</sup> This is particularly clear in Case 407/85 *Drei Glocken* [1988] E.C.R. 4233. See also *Ritter* (n 22) 691. It should be noted that it is this substantial effect which leads to reverse discrimination.

measures; it doesn't even require the national court to actually show that its national law prohibits reverse discrimination. Hence the risk of delivering purely theoretical rulings is real.<sup>47</sup> The implications and reasoning of the *Guimont* case-law are, from a procedural perspective, akin to the Court's case-law on the extent of its jurisdiction in preliminary reference cases. The Court was initially very liberal in this area, holding that the facts were a matter for national courts, and that the Court was not empowered to investigate the facts of the case or question the grounds or purpose of the request for interpretation.<sup>48</sup> Nonetheless, the Court eventually asserted control over its docket in the *Foglia*<sup>49</sup> decisions, becoming the ultimate decider of its own jurisdiction. In particular, the Court held that a genuine dispute was required and that the Court had no jurisdiction to deliver "advisory opinions on general or hypothetical questions". Ever since, the Court has refused to answer hypothetical questions, which might be justified as preventing a waste of judicial resources.<sup>50</sup> The *Guimont* approach to the purely internal doctrine is a limited return to the original, pre-*Foglia*, case-law on the Court's jurisdiction in preliminary reference cases: it effectively opens the door to test-cases in situations without any direct link with EU law which, if successful, will put the Member-States in the "shadow of the law" and under pressure to amend national rules; it increases the pool of litigants and, potentially, the workload of the Court, and thereby risks increasing the level of control the Court exercises on national regulatory autonomy as well. Nonetheless, it does not *per se* lead to a substantive extension of the scope of the freedoms.

Substantively, the Court has extended the scope of the market freedoms not only explicitly in what concerns custom duties and discriminatory infringements to the free movement of goods, but implicitly through an increase in the number of situations which are held to have a potential link with EU law. The main issue is that there is a very thin line between merely potential situations and test cases, as a measure applicable to an internal

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<sup>47</sup> See Advocate General Tizzano's Opinion in *Anomar* (n 33) para. 23. Critical of this, Ritter (n 22) 700.

<sup>48</sup> See, for example, Case 6/64 *Costa v ENEL* [1964] E.C.R. 585, Case 35/76 *Simmenthal* [1976] E.C.R. 1871.

<sup>49</sup> Case 104/79. *Foglia I* [1980] E.C.R. 745, Case 244/80 *Foglia II* [1981] E.C.R. 3045.

<sup>50</sup> Please note that this is not the only reason for the Court to refuse to pass judgement: this may also occur when the questions have no relation to the facts or subject-matter of the main action - Case C-18/93 *Corsica Ferries Italia* [1994] E.C.R. I-1783 - when the questions are not articulated clearly enough for the Court to give any meaningful response - Case C-318/00 *Bacardi-Martini* [2003] E.C.R. I-905 - and when the facts are insufficiently clear for the Court to be able to apply the relevant legal rules - Case C-157/92 *Banchero* [1993] E.C.R. I-1085.

situation can hypothetically also apply to future cross-border situations.<sup>51</sup> This is valid not only for services, where this line of cases had its genesis, but also for other freedoms: companies might potentially want to expand to another country, workers seek jobs abroad, and goods may potentially compete in another market. After all, the *Dassonville* formula for goods relates to “*actual and potential*” effects. The problem this raises is that, as has been said, in an internal market the existence of a “potential” intra-Community element is inherent.<sup>52</sup> Particularly in what concerns services this is worrying, as due to the breadth of subjects falling under it, and the application to both active and passive actors, few (temporary) migrants are excluded from its protection.<sup>53</sup>

This could be controlled, or at least justified, if there was a clear normative basis for these developments, but this seems to be absent. The Court has avoided a careful consideration of what the relevant balance between protecting State autonomy and preventing reverse discrimination might be. Reverse discrimination touches on how the limitations on EU law deriving from subsidiarity, the EU’s limited competences and the maintenance of an area of State autonomy is to relate to the expansionary pull of European citizenship, but this is not addressed in the case-law. It is true that courts will usually decide cases on the basis of the particular facts of the case without needing to engage with the large-scale societal questions underlying it: they may enlist silence as a device for producing convergence despite disagreement and uncertainty by adopting an incompletely theorised outcome. This mechanism is an important source of social stability by allowing the participants to be clear on a result without agreeing on a more general theory or value that accounts for it, and is well-suited to a pluralist society.<sup>54</sup> But even without having the Court engage in large-scale theorising, better low-level theorisation seems to be in order. The absence of debate or theorisation on these normative issues leads to a lack of coherence in the development of the case-law on purely internal situations and to the potential extension of the case-law on services and custom duties to include virtually any situation. Simultaneously, the Court also seems to ignore the institutional implications of its decisions, with the result that both procedural and substantive approaches relax the requirements for submitting national measures to review by the Court, without any consideration for the

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<sup>51</sup> On all of the above, see P. P. Craig and G. De Búrca, *EU Law: Text, Cases, and Materials* (4th edn, Oxford University Press, Oxford 2008) 482-493.

<sup>52</sup> Eleanor Spaventa, *Free Movement of Persons in the European Union* (Kluwer Law International, 2007) 153.

<sup>53</sup> Catherine Barnard, *The Substantive Law of the EU* (Second edn, Oxford University Press, Oxford 2007) 335.

<sup>54</sup> Cass R. Sunstein, *Legal Reasoning and Political Conflict* (OUP, Oxford 1996) 5, 44.



risks in opening the floodgates of litigation or the institutional allocation of competences between the EU and the Member-States. Even when there is theorisation, as in the legal literature, it ignores the institutional considerations that permeate the normative debate. Normative claims contain implicit assumptions as to which entity is best placed to further them – for example, normative claims that the purely internal doctrine should be eliminated implicitly call for an expansion of EU powers, and consider that the interests of nationals of a Member-State are, in the case of reverse discrimination, better protected by the CJEU than by the Member-States themselves.

Taking into account the interaction of “substantive” and “institutional” concerns has both normative and descriptive power. This can be demonstrated by reference to the different strands in the case-law – one procedural, the other substantive. Each strand has different institutional consequences relevant to the debate on more “substantive” normative questions: while the extension of the material scope of the market freedoms leads to the Court dealing with reverse discrimination itself, the *Guimont* case-law leaves this question for Member-States’ courts and governments. The Court effectively uses the purely internal situation strategically as a tool for institutional choice, deciding which cases it wants to deal with and those it delegates to national courts or legislatures. Both can be seen as means of dealing with reverse discrimination, but the existence of these different institutional options changes the configuration of the relevant “substantive” normative debate itself, for example on questions of how to better protect and balance State autonomy against other normative concerns. “Substantive” and “institutional” normative considerations are, in this context, autonomous but inseparable because closely intertwined.

### 3.2 The Economic Aim of Cross-Border Movement

The market freedoms are instrumental to the completion and functioning of the internal market through the elimination of obstacles to economic free movement. As such, they have an economic aim which is reflected in their scope.<sup>55</sup> This characterisation is under-theorised, though, as there are different concepts of economic activity. While some conceptualizations focus strictly on the production of goods and services, others add to this their distribution and consumption. Welfare definitions of economic activity, on the other hand, focus on the production and distribution of goods and services which are

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<sup>55</sup> It should be noted that for freedoms implying the free movement of persons the situation must also fall within the scope of the freedoms *ratione personae*, i.e. the persons moving must be nationals – or be related to nationals – of a Member-State.

provided against measurable amounts of money or other material requirements of well-being.<sup>56</sup>

These differing conceptualizations are reflected in EU law, where both the Court and the Commission seem to admit the existence of different concepts of economic activity depending on the relevant areas of law.<sup>57</sup> EU competition law can only be applied to undertakings, which, according to the case-law, include every entity engaged in economic activity, regardless of its legal status.<sup>58</sup> An activity is deemed to be economic when there is the potential for the provision of goods or services and to make a profit under market conditions, unless that activity is deemed to be in the public interest or pursued in the exercise of official authority. In other words, the question seems to be whether a for-profit entity could respond to market demand.<sup>59</sup> However, only the offering of products seems to be relevant; demand is not deemed to be an economic activity, at least in what concerns the purchase of goods on the market for use in the provision of State services.<sup>60</sup>

The concept of economic activity for the purpose of the market freedoms is somewhat different: it focuses on both the provision *and demand* of goods or services against some kind of remuneration.<sup>61</sup> Goods are generally accepted to be material objects which can be valued in money and either form the subject

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<sup>56</sup> Alfred Marshall, *Principles of Economics: An Introductory Volume* (8th edn, Macmillan, London 1949); A. C. Pigou, *The Economics of Welfare* (4th edn, Macmillan, London 1962).

<sup>57</sup> See Case C-519/04 P *Meca-Medina* [2006] E.C.R. I-6991, para. 33. See also Advocate General Maduro's Opinion in Case C-205/03 P *FENIN* [2006] E.C.R. I-6295, para. 51; and Advocate General Kokott's Opinion in Case C-284/04 *T-Mobile Austria* E.C.R. I-05189, para. 61. Similarly, see *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Accompanying the Communication on 'A single market for 21st century Europe' Services of general interest, including social services of general interest: a new European commitment* (COM 2007 725 Final p 5).

<sup>58</sup> *Höfnér and Elser* (n 36) para. 21.

<sup>59</sup> See Joined Cases C-180/98 to C-184/98 *Pavlov* [2000] E.C.R. I-6451, para. 75, Case C-364/92 *Eurocontrol* [1994] E.C.R. I-0043, *Meca-Medina* (n 57) para. 41 and Advocate General Maduro Opinion in *FENIN* (n 57) para. 13-14. See also N Dunne, 'Knowing When To See It: State Activities, Economic Activities, and the Concept of Undertaking' (2010) 16 *Columbia Journal of European Law* 427, 436.

<sup>60</sup> Marck Furse, *Competition Law* (OUP, Oxford 2008), 22. See *FENIN* (n 57).

<sup>61</sup> Okeoghene Odudu, 'Economic Activity as a Limit to Community Law' in O. Odudu (ed) *The Outer Limits of European Union Law* (Hart Publishing, Oxford 2009) 230-231. It should be noticed that remuneration is not a necessary element in competition law: see Case T-155/04 *Selex* [2006] E.C.R. II-4797, para. 77.

of, or move across frontiers for the purposes of, commercial transactions.<sup>62</sup> Establishment applies to both physical and legal persons who are engaged in self-employed activities, meaning the actual pursuit of an economic activity with the purpose of obtaining a profit<sup>63</sup>; accordingly, the right of establishment seems not to apply to non-profits.<sup>64</sup> Free movement of capital follows the content of Article 1 of Directive 88/361 and the nomenclature of capital movements annexed thereto, which are all deemed to concern economic activities.<sup>65</sup> The situation for workers is slightly more nuanced, if very much settled law. As it stands, this freedom encompasses anyone who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration<sup>66</sup>, regardless of the level of productivity or the origin of the funds from which the remuneration is paid.<sup>67</sup>

This means that activities which are not remunerated but have profit-making potential fall within the scope of competition law but not free movement law, and vice-versa. For example, activities which are deemed to be in the public interest - such as the maintenance of air navigation safety and the protection of the environment<sup>68</sup> -, or which operate under the principle of solidarity - such as the payment of benefits out of social security schemes<sup>69</sup> - do not fall within the scope of competition law, as they are deemed not to be profit-making activities, even though they might fall within the scope of the free movement provisions inasmuch as there is remuneration. From an opposite perspective, an activity might be economic independently of the way in which it is financed, meaning that activities which are financed by the State without any remuneration - such

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<sup>62</sup> Jukka Snell, *Goods and services in EC law: a study of the relationship between the freedoms* (Oxford University Press, Oxford 2002) 4-5. See Case 7/68 *Commission v Italy* [1968] E.C.R. 423 and Case C-2/90 *Walloon Waste* [1992] ECR I-4431.

<sup>63</sup> Case C-55/94 *Gebhard* [1995] E.C.R. I-4165, para. 25, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, Art. 4 (5).

<sup>64</sup> Advocate General Fenelly's Opinion in Case C-70/95 *Sodemare* [1997] E.C.R. I-3395, para. 21.

<sup>65</sup> Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty.

<sup>66</sup> Case 66/85 *Lawrie-Blum* [1986] E.C.R. 2121, para. 16-17; Case 344/87 *Bettray* [1989] E.C.R. I-1621, para. 12; Case C-337/97 *Meeusen* [1999] E.C.R. I-3289.

<sup>67</sup> *Bettray* (n 66) para. 15.

<sup>68</sup> Advocate General Maduro's Opinion in *FENIN* (n 57) para. 15.

<sup>69</sup> See *Pistre* (n 26).

as employment procurement by State agencies - might fall within the scope of competition law but not the free movement provisions.<sup>70</sup>

Determining whether an activity is economic does not pose significant problems on most occasions, but when it is not clear whether an activity is economic or not, the lack of a proper normative underpinning of the case-law comes to the fore. For example, the concept of remuneration for services was traditionally held to be consideration for a service to be normally agreed upon between providers and recipients of services.<sup>71</sup> Even though it was from early on accepted that remuneration need not be paid by the service recipients themselves,<sup>72</sup> the concept of remuneration has been recently extended beyond its former limits to cover payments that are only indirectly related to the service provided - in the sense that the remuneration does not need to be agreed between the parties, it needs not be provided by the service recipient and it can even be subject to subsequent reimbursement by a third party.<sup>73</sup> In applying this new concept of remuneration, the Court sometimes acts incoherently. For example, the provision of services in the area of public education is held not to be economic for the purposes of the Treaty because it is considered that the State is not seeking to engage in gainful activity and the system in question is, as a general rule, funded from the public purse and not by pupils or their parents.<sup>74</sup> However, this reasoning is not applicable to the public provision of hospital health services in the scheme of insurance services providing benefits in-kind, even though similar arguments would seem to hold.<sup>75</sup> These inconsistencies cannot be explained away in the basis of normative arguments about what constitutes economic activity - even though they are evidence of an absence of due consideration of the relevant normative foundations.

A fuller picture of the case-law emerges once, in addition to taking into account normative indeterminacy, one considers the institutional consequences of an

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<sup>70</sup> *Höfner and Elser* (n 36) paras 21-22.

<sup>71</sup> Case 263/86 *Humbel* [1988] E.C.R. 5365, para. 17; *Freskot* (n 38) para. 55.

<sup>72</sup> Case 352/85 *Bond van Adverteerders* [1988] E.C.R. 2085

<sup>73</sup> Pedro Cabral, 'The internal market and the right to cross border medical care' (2004) 19 E.L.Rev. 673, 677; Hatzopoulos and Do (n 39) 946-947; Lorna Woods, *Free Movement of Goods and Services within the European Community* (Ashgate, Aldershot 2004) 168-174.

<sup>74</sup> *Humbel* and Case C-109/92 *Wirth* [1993] E.C.R. I-6447.

<sup>75</sup> Case C-157/99 *Smits & Peerbooms* [2001] E.C.R. I-5473 and Case C-368/98 *Vanbraekel* [2001] E.C.R. I-5363. In both cases the Advocate Generals argued the situation did not fall within the freedom's scope. Interestingly, situations similar to *Smits & Peerbooms*, in that it concerns health services provided free of charge by hospitals, were held not to be economic for competition law purposes: see *FENIN* (n 57).

activity being deemed economic or not. The concept of “economic activity” serves as a limit to EU law, preserving for Member States an area of autonomy over non-economic areas.<sup>76</sup> But economic activity does not work merely as a device for the allocation of competences between the EU and the Member-States: it also operates as a device to determine whether the Court should be able to overrule Member-State choices or whether such overruling should only occur if the EU political process so decides. Nonetheless, institutional concerns are not explicitly considered in the case-law, and tend to be ignored by legal commentators. But they are very relevant in this context, and are implicit in claims that the flexible use of the concept of remuneration has led to arguments that the Court uses it pragmatically to get rid of cases it does not want to decide or to decide cases it would not have competence to do so beforehand.<sup>77</sup>

In the absence of a careful consideration of the relevant normative and institutional underpinnings, decisions by the Court on whether an activity is economic or not constitute unprincipled - or at least unjustified - comparative institutional choices. This exemplifies how institutional considerations are necessary, because implicit, in any serious debate about what constitutes, or should constitute, an economic activity for the purposes of EU free movement law.

### 3.3 Hindrances to cross-border movement with an economic aim

The simple exercise of the right of free movement within the Community is not in itself sufficient to bring a particular set of circumstances within the scope of Community Law; there must be some connecting factor between the exercise of the right of free movement and the right relied on by the individual.<sup>78</sup>

This succinct formulation of the orthodox case-law requires that for a restriction to a free movement right to be found there must be a link between the economic aim and the cross-border element.<sup>79</sup> The scope of the market

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<sup>76</sup> Odudu (n 61) 226. Subject, naturally, to EU competences over specific non-economic areas.

<sup>77</sup> See also the criticism in Spaventa (n 52) 54-58, Vassilis Hatzopoulos, 'Killing National Health and Insurance Systems but *Healing* Patients? The European Market for Healthcare Services after the Judgements of the ECJ in *Vanbraekel* and *Peerbooms*' (2002) 39 CML Rev. 683, 693-4.

<sup>78</sup> Case C-370/90 *Singh* [1992] E.C.R. I-4265, para. 5 of Advocate General Tesauro's Opinion.

<sup>79</sup> This link was an ingrained and generally accepted element of the concept of restriction to the free movement provisions, applying independently of the much more contentious issue of whether restrictions should concern only discriminatory or also indistinctly applicable measures, an issue which will not be addressed here.

freedoms requires that the rights granted by the Treaty be exercised in a cross-border situation for an economic purpose. Nonetheless, the Court seems to be doing its utmost to get as far away as possible from this principle without expressly reneging it, at least in what concerns the free movement of individuals.

Arguably the origins of this case-law can be found in *Cowan*,<sup>80</sup> a case concerning a national measure making the award of State compensation for harm caused in France to the victim of an assault resulting in physical injury subject to the condition that the victim holds a residence permit or is a national of a country which has entered into a reciprocal agreement with France. As the French State argued, this requirement posed no obstacle to economic free movement. Nonetheless, the Court considered this rule to be contrary to the free provision of services. It held that there was a sufficient cross-border element because the situation concerned tourists, i.e., service recipients, who had travelled across State borders. One way to make sense of this case would be to consider that it did not concern market freedoms at all, but instead granted an autonomous status to the prohibition of discrimination on grounds of nationality. This view could be reinforced by reference to *Bickel and Franz*<sup>81</sup>, a case concerning a refusal to grant to German-speaking foreigners in Italy a right to use their own language in interactions with the judicial and administrative authorities based in the Bolzano province when such a right was granted to German-speaking Italians. The Court decided that such a refusal was prohibited by the general prohibition of discrimination arising from Art. 18 TFEU (ex-Art 12 TEC).<sup>82</sup> However, a number of other cases where the link between economic aim and cross-border elements was dubious cannot be explained by reference to the autonomy and blanket application of a general prohibition of discrimination on grounds of nationality.<sup>83</sup> The paradigmatic example of this is *Carpenter*<sup>84</sup>. Mr Carpenter was a British national who married in the UK a Philippines' national who had overstayed her allowed leave. The

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<sup>80</sup> Case 186/87 *Cowan* [1989] E.C.R. 195

<sup>81</sup> Case C-274/96 *Bickel and Franz* [1998] E.C.R. I-7637.

<sup>82</sup> The question here is whether there was a link with EU law to start with. While the Court ignored the issue, Advocate General Jacobs in his Opinion tried to establish such a link by reference to European Citizenship.

<sup>83</sup> See *Singh* and Case C-291/05 *Eind* [2007] E.C.R. I-10719. See also Miguel Poiarés Maduro, 'The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination' in C Kilpatrick, T Novitz and P Skidmore (eds), *The Future of Remedies in Europe* (Hart Publishing, Oxford 2000), 124; Anthony Arnull, Derrick Wyatt and Alan Dashwood, *Wyatt and Dashwood's European Union law* (5th edn Sweet & Maxwell, London 2006) 761.

<sup>84</sup> Case C-60/00 *Carpenter* [2002] E.C.R. I-6279.

British authorities ordered her deportation, but the Court, on the grounds that Mr Carpenter conducted a business which provided services to advertisers established in other Member-States and occasionally travelled there for business purposes, found a link with Community law and went on to hold that the deportation of Ms Carpenter from Mr Carpenter's country of origin, where they resided, would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercised a market freedom. This conclusion is problematic: after all, the choice was never between Mr Carpenter not exercising his freedom to provide services and maintaining the right to reside with his wife as opposed to exercising that freedom and, as a result of that, losing that right.<sup>85</sup> The main problem with the concept of restriction used is that even though in this case a cross-border element could be found, such restriction was in no way related to the economic purpose of the freedom.

This lack of relationship between economic aim and free movement is also present in the Court's case-law on family reunification. In these cases the question was whether third-country nationals who were relatives of EU nationals who had exercised their free movement right to move into a host-State should be allowed to join them directly from outside the Community in that Member-State, without previously having been lawfully resident in that or another Member-State.<sup>86</sup> The argument against this was that the aim of the granting of family reunification rights was to enable Member-State nationals to move freely between Member-States. An impediment to that movement would only arise if the relatives of a EU national who previously resided lawfully with them in the territory of a Member-State would, as a result of the EU national's movement to another Member-State, lose the right to reside with him; and this would only occur if the family members were already lawfully residing with the EU national before he moved to another Member-State.<sup>87</sup> Accordingly:

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

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<sup>85</sup> Woods (n 73) 222-224; Alina Tryfonidou, 'Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach' (2009) 15 ELJ 634, 638.

<sup>86</sup>This situation was effectively not addressed by either Council Directive 73/148/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services or Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

<sup>87</sup> This is what Tryfonidou calls the "moderate" approach. See (n 82) 637-638.

apparently has not been dissuaded from using that right for reasons related to the non-admission of third-country-national family members.<sup>88</sup>

This was the *rationale* behind old cases such as *Morson*<sup>89</sup> and more recent ones such as *Akrich*<sup>90</sup>. However, in *Jia*<sup>91</sup> and particularly in *Metock*<sup>92</sup> the Court chose to disregard this argument, holding that the relevant point was whether the third-country national was a family member of the EU national. Whether the refusal of the extension of the claimed family reunification rights would have impeded the exercise of the free movement right or not was deemed to be irrelevant.<sup>93</sup>

Another line of cases where there appears to be no link between the cross-border element and the economic *telos* of the Treaty provisions concerns changes in the State of residence by persons who continue to pursue their economic activities in their States of origin. This line of cases includes workers or self-employed persons who have moved their residence to another Member-State but continue to pursue their economic activities in their home State<sup>94</sup> or situations where a person controlling a number of undertakings in his home-State moves into another State without any economic intent<sup>95</sup>. In these cases, even though the movement cannot be said to relate to access to the relevant markets in another Member-State, the Court still held that their situation fell within the scope of the market freedoms.<sup>96</sup>

In all these cases, there is cross-border movement and the EU national is economically active, but there is no link between these two elements. It appears that the *type* of movement involved is not significant and even those who move

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<sup>88</sup> Advocate General Geelhoed's Opinion in Case C-1/05 *Jia* [2007] E.C.R. I-001, para. 70.

<sup>89</sup> Joined Cases 35 and 36/82 *Morson and Jhanjan* [1982] E.C.R. 3723.

<sup>90</sup> Case C-109/01 *Akrich* [2003] E.C.R. I-9607.

<sup>91</sup> *Jia* (n 88).

<sup>92</sup> Case C-127/08 *Metock* ECR I-6241.

<sup>93</sup> Alina Tryfonidou, 'Jia or "Carpenter II": The Edge of Reason' (2007) 32 E.L.Rev. 908, 913-915.

<sup>94</sup> *Ritter-Coulais, Government of Communauté française and Gouvernement wallon, Case C-152/05 Commission v Germany* [2008] E.C.R. I-00039, Case C-527/06 *Renneberg* [2008] E.C.R. I-7735. Examples of traditional case-law can be found in Case C-112/91 *Werner* [1993] E.C.R. I-00429, Case C-293/03 *Gregorio My* [2004] E.C.R. I-12013.

<sup>95</sup> Case C-470/04 *N* [2006] E.C.R. I-7409, Case C-464/05 *Geurts* [2007] E.C.R. I-9325.

<sup>96</sup> Alina Tryfonidou, 'In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?' (2009) 46 CML Rev. 1591, 1596-1604.



*back* to their State of nationality and those who exercise merely temporary short-term movements to other Member-States without any economic purpose can rely on EU law for requiring Member-States (including their own Member-State) to respect their rights.<sup>97</sup> All these cases concern the free movement of persons, in particular of individuals. It is plausible, therefore, that normative considerations on the special status of individuals in the EU underlie this case-law. The *rationale* behind this can perhaps be traced to the influence European Citizenship has had on the market freedoms: much of the case-law can be rationalised by reference to a preoccupation with creating a meaningful status for EU citizens, centred around the idea of fundamental rights, and in particular the fundamental right to a family life, rather than being connected to the internal market. This rationalisation is effectively anchored in a growing body of literature, which starting from the observation that a unitary approach to the free movement of persons appears to have been adopted in the Court's language<sup>98</sup>, holds that the different Treaty provisions on the economic free movement of people are complementary to a more general freedom for the movement of natural and legal persons.<sup>99</sup> This view argues that persons are not viewed merely as a source of labour by the EU, but as human beings; that the free movement of individuals has a social element which distinguishes it from the other market freedoms; and that the Treaty itself views the free movement of persons as more than a merely economic freedom.<sup>100</sup> In effect, while the free movement of persons concerns economic actors, the free movement of goods has traditionally been read as not prohibiting obstacles to the free movement of traders but merely to the free movement of goods themselves. A similar argument can be made for capital.<sup>101</sup> Hence, it is argued that the free movement of persons reflects fundamental rights and goes beyond the aim of creating and maintaining a common market, as opposed to the other freedoms which merely

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<sup>97</sup> Christophe Schiltz, 'Akrich: A clear delimitation without limits' (2005) 12 MJ 241, 252.

<sup>98</sup> Hatzopoulos (n 38) 70.

<sup>99</sup> Dieter H. Scheuing, 'Freizügigkeit als Unionsbürgerrecht' [2003] EuR 744, 753; Stephen Weatherill, 'Discrimination on grounds of nationality in sport' (1989) 9 YEL 55, 59; Snell (n 62) 9; Patrick Dollat, *Libre circulation des personnes et citoyenneté : enjeux et perspectives* (Bruylant, Bruxelles, Belgique 1998) 26. Arguing that services should be treated differently from establishment and workers, as the former can be regulated by the home-State and requires a lesser degree of integration in the host-State, see Luigi Daniele, 'Non-discriminatory restrictions to the free movement of persons' (1997) 22 E.L.Rev. 191, 195-198.

<sup>100</sup> Arnall, Wyatt and Dashwood, 705-707; Jukka Snell, 'And Then There Were Two: Products and Citizens in Community Law' in T Tridimas (ed) *European Law for the Twenty-First Century* (Hart Publishing, Oxford 2004) 69-70.

<sup>101</sup> Alina Tryfonidou, 'Further steps on the road to convergence among the market freedoms' (2010) 35 E.L.Rev. 36, 38-39.

grant market or economic rights not deserving the same level of protection.<sup>102</sup> This has given rise to some Authors arguing that European Citizenship may normatively justify extending the scope of the free movement of persons beyond discrimination into a rule of reason<sup>103</sup>, or extending the scope of European law to purely internal situations, thereby eliminating reverse discrimination altogether and ensuring true equality between individuals through Union law<sup>104</sup>. It has also been argued that European Citizenship has had an impact on the case law on family reunification rights and even personal identity in what concerns names, with the Court reading the free movement provisions as protecting the human rights of any free moving EU citizen,<sup>105</sup> and some go as far as to argue for a transposition of solidarity from the national to the European level<sup>106</sup>.

If this is indeed the reason behind the developments in the case-law, it implies that the normative underpinning of the market freedoms ceases to be merely to protect the right to move for the purpose of taking up an economic activity, and that these freedoms now protect the rights of all economically active persons whose situation has a cross-border dimension. If so, the scope of the market freedoms may have moved on to cover the situations of all economically active Union citizens, provided that the situation involves a cross-border element and regardless of whether the restriction is related to the economic activity pursued.

This would be a major development in EU law; but apart from the absence of a properly theorised analysis of the balancing of the relevant normative concerns at play, there is also no consideration of the very serious institutional implications of such a turn, a characteristic shared by most of the academic literature, which is much more concerned with analysing these cases from a purely “substantive” perspective. But alongside the development of minimally

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<sup>102</sup> Chris Hilson, 'Discrimination in Community free movement law' (1999) 24 *European Law Review* 445, 453; Peter Oliver and Stefan Enchelmaier, 'Free movement of goods: recent developments in the case law' (2007) 44 *CML Rev.* 649, 666.

<sup>103</sup> Spaventa (n 52) 143-148.

<sup>104</sup> Eleanor Spaventa, 'Seeing the wood despite the trees? On the scope of Union Citizenship and its constitutional effects' (2008) 45 *CML Rev.* 13, 36-39 for purely internal situation; 41 for indirect review.

<sup>105</sup> *Ibid.*, 39-44. This can reflect the idea that the basic common values of European States lie in respect for human rights, which hence should be protected by the Court: see Advocate General Jacob's Opinion in Case C-168/91 *Konstantinidis* [1993] E.C.R. I-1191; Peter Neussl, 'European Citizenship and Human Rights: An Interactive European Concept' (1997) 24 *LIEI* 47.

<sup>106</sup> Alexander Somek, 'Solidarity decomposed: being and time in European citizenship' (2007) 32 *E.L.Rev.* 787, 789.

coherent normative underpinnings for the case-law, taking into account institutional considerations should be paramount. *Carpenter* exemplifies how decoupling the economic aim of the freedoms from their cross-border element leads to stretching the market freedoms to breaking point. As we have seen above, both the economic aim and the cross-border element are susceptible to being stretched: what an economic activity is can be contentious; what the relevant cross-border element is can be somewhat arbitrary. But the relaxation of the link between them has effectively lifted one of the major restrictions on the scope of the market freedoms. This expansionary effect on the market freedoms allows litigants to use the Court to challenge Member-States' national measures which result from *prima facie* legitimate democratic processes. It means that the Court has decided to double-guess Member-States' decisions in areas outside the traditional scope of EU law without any consideration as to why it would be better suited to pursue such an assessment to begin with.

Normative claims defending this case-law on the basis of the development of European Citizenship and fundamental rights protection are, implicitly, calls for a greater role of courts and, eventually, the EU political process to the detriment of the Member-States' political processes. As above, institutional questions are dressed up in "substantive" normative clothes. But the normative claims themselves – that European Citizenship allows for the expansion of the market freedoms and the protection of fundamental rights at EU level should prevail over the mechanisms of protection at national level – only make sense in the current institutional setting of the EU. Again, like Siamese twins, "substantive" normative claims contain institutional elements and institutional arguments reflect "substantive" normative goals.

#### 4. Between Normative Fluidity and Institutional Considerations

All the methodological steps identified above – the cross-border element, the economic aim, and the relationship between them – have been subject to pressures due to mutations in their normative underpinnings. These mutations have gone hand-in-hand with evolutions in the European project, and particularly with non-economic developments, such as the appearance of concerns with reverse discrimination, the adoption and development of European Citizenship<sup>107</sup> and the increasing importance of protecting

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<sup>107</sup> Of which the recent decision in *Zambrano* (n 13) arguably makes the purely internal situation doctrine irrelevant for at least some areas of European Citizenship – see Kay Hailbronner and Daniel Thym, 'Zambrano Case Opinion' (2011) 48 CML Rev. 1253, Peter Van Elsuwege, 'Shifting the Boundaries? European Citizenship and the Scope of Application of EU Law' (2011) 38 LIEI 263, and Alicia Hinarejos, 'Extending citizenship and the scope of EU law' (2011)

fundamental rights. This might be further justified in light of the recent amendments to the TEU, which further extends the scope of the Union beyond the economic realm and emphasises the protection of human rights (Art. 2 TEU), grants the Charter of Fundamental Rights the same legal value as the Treaties (Art. 6 TEU) and protects the equality of European citizens before the Union (Art. 9 TEU). But the developments in the case-law are also a result of how lightly theorised the normative assumptions underlying it were to begin with, thereby increasing the odds of the Court developing its case-law in a manner which goes beyond its initial underlying normative scope and continuously expanding the scope of the market freedoms as a result of pressures by self-interested litigants. This light theorisation enables new normative pressures to produce major effects, but also, and more importantly, to do so without any previous consideration of how old and new normative concerns should interact or to the consequences of the adoption of a given course.

Of particular concern, in this regard, is the Court's obliviousness to the institutional questions and consequences hidden beneath its case-law. In effect, one of the consequences of a measure falling within the scope of the market freedoms or European citizenship is that such a measure is now subject to review under EU law standards, including as to its adequacy under EU's fundamental rights' standards. As Advocate General Sharpston put it:

According to the Court's settled case-law, EU fundamental rights may be invoked when (but only when) the contested measure comes within the scope of application of EU law. All measures enacted by the institutions are therefore subject to scrutiny as to their compliance with EU fundamental rights. The same applies to acts of the Member States taken in the implementation of obligations under EU law or, more generally, that fall within the field of application of EU law. This aspect is obviously delicate, as it takes EU fundamental rights protection into the sphere of each Member State, where it coexists with the standards of fundamental rights protection enshrined in domestic law or in the ECHR.<sup>108</sup>

To grasp the importance of appropriately delimiting the scope of the market freedoms, one need only think of the consequences of a person buying a book from another State via Amazon, or having enjoyed a holiday in another Member-State 15 years ago, or even watching a foreign television channel in his home State: could she/he claim a Union protection of her/his fundamental

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70 C.L.J. 309. This may lead to potentially similar developments for the market freedoms, as a result of systemic arguments put forth by litigants before the courts.

<sup>108</sup> Opinion in *Zambrano* (n 13) para. 156.

rights in a case similar to that of Mr Carpenter on the grounds that she/he was once part to an economic relationship with a cross-border element?<sup>109</sup> At present, we are all potential recipients of services within the meaning of Article 56 TFEU (ex-Art. 49 TEC); does it effectively suffice that someone had once benefited from a market freedom to forever benefit of all the rights which might arise from EU law, regardless of the existence of a relationship between that law and the situation at hand? If no limits were established, the EU's protection of fundamental rights would no longer be incidental and subsidiary. National balancing of fundamental rights would be replaced by EU value-choices whenever a situation fell within the EU's limited scope of competences as a result of the primacy of EU law: the EU could end up monopolising the protection of fundamental rights in Europe.

The consequences of this are mainly institutional, as the protection of human rights is a characteristic of all Member-States and there is already a European Court on Human Rights. Even from a substantive perspective, the results of this case-law are mainly the replacement of one fundamental rights' balancing that of the Member-State for another the CJEU's. It is, in effect, a question of comparative institutional choice. Simultaneously, the Court may well expect to find itself before cases brought by agents trying to maximise the opening that the Court has granted them in *Carpenter* and related cases. Even if these developments had been merely kick-started by accident, as a result of work pressure or lack of communication between different chambers, path dependence and lock-in are still bound to kick in. And the lack of proper reasoning in the case-law and continuous under-theorisation of its normative underpinnings will make life easier for such agents, making the law ever more incoherent and normatively at drift. The Court would eventually likely be faced with a question it probably did not envision, and in all likelihood actively hopes to avoid<sup>110</sup>: does it have the conditions and the will to become the court of last resort for all measures adopted by any public body within the EU potentially affecting fundamental rights? Questions of capability, ability and legitimacy of the Court all of them ultimately institutional questions would finally have to come to the forefront of the discussion.

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<sup>109</sup> A point already raised by R Lane and N Nic Shuibhne, 'Angonese Case Note' (2000) 37 CML Rev. 1237, 1242.

<sup>110</sup> As the *Guimont* (n 29) case law points out, the Court is aware of its limitations, actively delegating on national courts the task to deal with reverse discrimination. On the other hand, as the recent Lisbon decision by the German Constitutional Court indicates, national courts themselves may react against this case-law by the Court, leading to a situation of serious institutional conflict.

In short, it should be recognised that the Court's case-law is a result of the interaction between different, and sometimes conflicting, normative goals: European integration, the removal of obstacles to free movement, the protection of areas of Member-State autonomy, the defence of fundamental rights - mediated through the existent institutional setting. Decisions about the scope of the free movement provisions of necessity imply assessments of comparative institutional choice - through direct effect, free movement rules re-allocate Member-State competences to the EU, and place areas which were under the exclusive remit of the EU's political process under control by the courts. It is thereby crucial not only that greater attention be paid to the "pure" normative goals underlying the case-law, but also to the institutional questions of choice and ability which are always also present.

## 5. Conclusion

Legitimate concerns with the undesirable and unjust results of reverse discrimination, together with the justice of specific decision and the protection of fundamental rights provide normative grounds which, when taken together with considerations of strategic behaviour by the Court, and the influence of European Citizenship in construing the market freedoms, appear to lie behind much of the case-law analysed above. Nonetheless, institutional realities mean that this expansionary trend might gain traction independently of the original normative reasons which gave rise to its original development; if not checked, this may eventually lead to the Court being seen as a fundamental rights' last body of appeal for all measures adopted within the EU-area, creating problems for the Court in its ability to deal with the concomitant workload and conflicts with other decision-making bodies.

To address this, it must be recognized that the Court's case-law is a result of the interaction between different, and sometimes conflicting, normative goals mediated through the existent institutional setting. Better reasoning and theorization of the relevant substantive normative underpinnings is undoubtedly in order; but this also requires that institutional considerations be recognised as normative concerns of equal importance for the Court of Justice's decision-making process. In the end, the absence of consideration of institutional realities and implications does not eliminate them, as they are present in "pure" normative claims but also inform and are informed by them in a feedback loop reminiscent of a Mobius strip. It merely prevents a properly reasoned consideration of the relevant normative and institutional choices which the CJEU has to make in its case-law.