



Creation, evolution etc.... theoretical and interdisciplinary perspectives on the interpretation of the Court of Justice of the European Union

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Thesis submitted for assessment with a view to obtaining the degree of Master in Comparative, European and International Laws (LL.M.) of the European University Institute

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Introduction

Is [Article 34 TFEU] ..., *to be interpreted* as meaning... ?

(Case C-171/11 *Fra.bo* [2012] ECR I-0000)

This preliminary reference question of the Oberlandesgericht Düsseldorf in *Fra.bo* is as typical as it is revealing. Typical, as an imprecise empirical glance at the development of the jurisprudence of the Court reveals that the form of the question – is such and such a provision of EU law to be interpreted as meaning so and so – has become standardized. Revealing, as it shows interpretation to be at the very heart of the Court’s activities – indeed it is its institutional task – and that this is recognized and acknowledged by other actors such as national courts.

The central nature of interpretation and how crucial it is to understanding EU law, or any law for that matter, is not something that has passed by the judges or Advocates General of the Court. Indeed many, if not most, of the rich literature on the interpretation of the Court has been written by those charged with its performance. My purpose is not to rehash what has preceded, although it is of undoubted importance in describing the Court’s interpretation, not least because it reveals the phenomenology of the interpreter.

Instead, my purpose is to infuse the description of the methods of interpretation of the Court – textual, contextual, and teleological – with theoretical and interdisciplinary perspectives and in doing so add depth to it. Interpretive theory is naturally of primary importance. I draw on the philosopher and great Oxford positivist Raz to describe the creativity involved in the interpretive process. I make use of the hermeneutic theory of Gadamer as adapted for legal interpretation by Esser. Along with systems theory as developed by Luhmann and economic approaches, hermeneutics is deployed to describe the evolutionary nature of the Court’s interpretation. As

already stated, a critical – and perhaps unavoidable perspective – is that of describing how interpreters experience the legal issues they face. In this regard, I draw on the Critical Legal Studies tradition. Legal and integrationist theories are (again naturally) of prime importance, as is moral and political philosophy.

As is evident, there is no one guiding theoretical approach. Instead, I have chosen the perspectives that seem apt or which shed light on a particular phenomenon in the interpretation of the Court. However, I hope that analytical linkages between the various perspectives become apparent, as well as with interpretation of the Court. Moreover, I hope the theoretical perspectives aid in clarifying, at least at a conceptual level, the relationship between the interpretive methods deployed by the Court.

The thesis culminates in section IV where, based on these perspective, I argue that the meta-teleology of the Court – the cornerstone that guides and justifies all other interpretive methods – is today best recast in terms of providing individuals with an autonomy-supporting pan-European environment aimed at cross-border action, interaction and thus ultimately integration. There is of course a danger here of flirting with idealism, which would be inappropriate in a descriptive account. However, even if I am partial to the ideal, my argument is that it is an ideal that is shared by the Court.

If the approach to the topic is unorthodox, the structure of the description is not. I begin outlining interpretation as the institutional task of the Court. I then move on to examine textual, contextual and teleological interpretation in turn.

I. Interpreting EU law as the institutional task of the Court of Justice of the European Union

According to Article 19(1) of the Treaty on European Union (TEU), the Court of Justice of the European Union (the Court) ‘shall ensure that in the interpretation and application of the Treaties the law is observed’. ‘The Court’s primary task, its chief *raison d’être*,’ wrote Chevallier in the early and revolutionary period of the Court’s life, ‘is thus the direct or indirect interpretation of the texts of [Union] law’¹.

However, unlike with the Charter of Fundamental Rights (the Charter)², neither the TEU nor the Treaty on the Functioning of the European Union (TFEU) contain a provision on their interpretation. The starting point the Court took in *Van Gend en Loos* to fill in this foundational lacuna (and indeed provide for the method for determining what are underdetermined Treaties) was unremarkable in the sense that it relied on methods of interpretation common to the legal orders of the Member States – particularly the French and German legal traditions – and international law³: the Court must consider ‘the spirit, the general scheme, and the wording of... provisions’⁴ – what may be termed as literal, contextual and teleological interpretation (each will be elaborated upon in sections II-IV below). The Court restated its interpretive technique in *CILFIT*, bringing it line with Article 31 of the 1969 Vienna Convention on the law of Treaties: ‘every provision of [EU] law must be placed in its context and interpreted in the light of EU law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied’⁵. The Court did so in *Van Gend en Loos* with regard to the EEC Treaty and the result of this *was* remarkable, particularly in terms of objectives⁶:

¹ R.-M. Chevallier, ‘Methods and Reasoning of the European Court in Its Interpretation of Community Law’ (1965) 2 *Common Market Law Review* 21, 21

² See Article 52 of the Charter

³ Article 31 of the 1969 Vienna Convention on the law of Treaties states that ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to terms of the treaty in their context and in light of its object and purpose’.

⁴ Case 26/62 *van Gend end Loos* [1963] ECR 1 (English special edition), 12

⁵ Case 283/81 *CILFIT e. a.* [1982] ECR 3415, paragraph 18

⁶ *van Gen end Loos*, above n 4, 12

The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens.

Furthermore, it must be noted that the nationals of the States brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.

In addition the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals.

The conclusion to be drawn from this is that 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. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

This provides the starting point for the Court's interpretation in the following senses. First, it settles a direct⁷ or important indirect objective of the provisions of the Treaties⁸ – the establishment of what is today termed the internal market, through it an increased individual (economic⁹) space for action, and consequent inter-Member State interaction and integration (see

⁷ Such as the with regard to the fundamental freedoms, and to an extent, Citizenship (Articles 21, 34, 45, 49, 56 and 63 TFEU)

⁸ Such as the preliminary reference mechanism as is posited in Article 267 TFEU.

⁹ Today, Citizenship can be said to be an extent severed from this original economic rationale, although it is often not far from the surface. For example in case C-127/08 *Metock* [2008] ECR I-6241, at paragraph 68, a case which

section I.B and IV below). Establishing an internal market cannot be said today to be the sole sub-objective the EU Treaties. However, it remains a very important, if not core, sub-objective in the grand project of European integration¹⁰.

Second, it establishes the autonomy of the EU legal order necessary for it to achieve its objectives¹¹. This was confirmed by the Court in *Costa v ENEL* where it formulated its primacy doctrine: ‘the EEC Treaty has created its own legal system which, on entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply’¹².

Third, it establishes the importance of the preliminary ruling procedure (see section I.A below).

Fourth, it provides for a vision of the legal system required to achieve the Treaty objectives – a system of protected rights (see section I.C below).

It is in these ways that the Court in *Van Gend en Loos* crossed the Rubicon¹³ and why it is ‘difficult to exaggerate the importance’¹⁴ of the judgement, a point repeatedly underlined at a conference to mark the 50th anniversary of the judgement at the Court of Justice in 2013¹⁵.

concerned the derivative right of residence of a third country national family member whose entry to the Member State of origin was unlawful, the Court reasoned that not allowing that third country national a right of residence ‘would not be compatible with the objective set out in Article 3(1)(c) EC of an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of persons. Establishing an internal market implies that the conditions of entry and residence of a Union citizen in a Member State whose nationality he does not possess are the same in all the Member States. Freedom of movement for Union citizens must therefore be interpreted as the right to leave any Member State, in particular the Member State whose nationality the Union citizen possesses, in order to become established under the same conditions in any Member State other than the Member State whose nationality the Union citizen possesses.’

¹⁰ See section I.B and III

¹¹ Confirmed in the more recent high-profile Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, at paragraph 285, where the constitutional autonomy of EU law was under threat from norms of international law, where the Court declared that ‘the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.’

¹² Case 6/64 *Costa v ENEL* [1964] ECR 585, 593

¹³ N. Fennelly, ‘Legal Interpretation at the European Court of Justice’ (1996) 20 *Fordham International Law Journal* 656, 679

¹⁴ *Ibid.*

¹⁵ < http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-02/programme_vgl_en.pdf>, accessed 22 August 2014

Taking into account these features specific to the EU context, the Court is required to develop the law because of the underdetermined nature of the Treaties and is given the institutional capacity – bestowed upon it by the preliminary ruling procedure – to do so (A). The Court uses this capacity to creatively make more precise and evolve EU law within the context of the project and purpose of integration (B). The result of this precision and evolution of EU law is a system of rights, and protection of those rights, which protect the individual and allows for the achievement of the aim of integration (C).

A. The normative system that requires the Court to develop the law and the institutional system which gives the Court the capacity to do so

The Treaties for the most part¹⁶ lay down objectives rather than formulate substantive rules. Lord Denning MR, writing from the perspective of an English judge shortly after the United Kingdom acceded to the EU, observed that ‘[t]he Treaty is quite unlike any of the enactments to which we have become accustomed [in the United Kingdom]. The draftsmen of our statutes have striven to express themselves with the utmost exactness. They have tried to foresee all possible circumstances that may arise and to provide for them... How different is this Treaty! It lays down general principles. It expresses its aims and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but he would look in vain. There is none. All the way through the Treaty there are gaps and lacunae. These have to be filled in by the judges, or by Regulations or directives. It is the European way.’¹⁷

This underdetermined nature is in a large part what gives rise to the need to interpret the Treaties. Instead of being a fully worked out set of substantive rules, the Treaties instead amount to, in the word of Pescatore, former judge of the Court, ‘acts of mutual confidence’¹⁸. Put another way, and thinking schematically, the Treaties, as a ‘*traité cadre*’¹⁹, ‘provide no more than a framework’²⁰.

¹⁶ With the notable exception of the competition provisions.

¹⁷ *Bulmer Ltd v Bollinger SA* [1974] Ch 401, 425

¹⁸ P. Pescatore, *The Law of Integration* (1st edition, Kluwer Law International, 1975) 19

¹⁹ J. Mertens de Wilmars, ‘Réflexions sur les méthodes d’interprétation de la Cour de justice des Communautés européennes’ (1986) *Cahiers de droit européen* 5, 13

They posit – what were at least originally for the mainly – wide economic concepts which are filled out and made more concrete by the Court. For example, the Court added definition to the concept of a concerted practice²¹ in *Suiker Unie* by stating that it was ‘a form of coordination between undertakings, which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition, practical cooperation between them which leads to conditions of competition which do not correspond to the normal conditions of the market’²². Likewise, a measure of equivalent effect²³ was said by the Court in *Dassonville* to include ‘all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade’²⁴. As such, the Court is engaged in a process of defining the scope and application of wide concepts and rules.

Given this objective-based and undetermined nature of the Treaties, if they were to be at all functional, they required a mechanism by which substantive rules could be generated from the Treaty objectives. The preliminary ruling procedure is the key mechanism that gives the Court the capacity to do so. In this regard, Article 267 of the Treaty on the Functioning of the European Union (TFEU) states that the Court ‘shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union...’. Likewise, Article 19(3)(b) TEU states that the Court ‘shall, in accordance with the Treaties:... give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law’.

Three important features may be noted about this mechanism.

The first, and most important for the present purpose, is that the Article 267 TFEU mechanism ensures the uniform interpretation and application of Union law throughout the Union. As will be further developed in sections II-IV below with regard to the interpretive methods of the Court, a uniform interpretation of EU law across the Member States is crucial to the project and purpose of the Union, integration; particularly with regard to its core sub-project, the internal market.

²⁰ T. Tridimas, *The General Principles of EU Law* (2nd ed., Oxford University Press, 2006) 18

²¹ Contained in Article 101 TFEU

²² Case C-40/73 *Suiker Unie* [1975] ECR 1663, paragraph 26

²³ Contained in Article 34 TFEU

²⁴ Case C-8/74 *Dassonville* [1974] ECR 837, paragraph 5

This means that the prominent role the Court plays through the interpretation of EU law – in providing uniform interpretations, to create what has been described by Advocate General Fennelly writing extra-judicially as ‘a monopoly on final interpretation’²⁵ – is itself the result of its use of its interpretive methods – particularly its recourse to context and objectives. In other words, in order to realise the substantive goals, a procedural architecture – an institutional system – was put in place.

This uniformity in interpretation also aids the Court in fulfilling its Article 19 TEU mission of ensuring ‘that in the interpretation and application of the Treaties *the law* [emphasis added] is observed’. The requirement of the Court to ensure observance of the law places an obligation on the Court to uphold the rule of law, since, in the words of Raz, ‘conformity to the rule of law is an inherent value of laws, indeed it is their most important inherent value. It is of the essence of law to guide behaviour through rules and courts in charge of their application. Therefore, the rule of law is the specific excellence of the law’²⁶. Uniformity in interpretation is aimed at like cases being treated alike across the Member States, which maintains both branches – equality before the law and legal certainty – of a traditional conception of the rule of law and thus being capable of guiding individuals, as well as Member States and EU institutions. As will be explained in section I.C below, EU law has created a space and regime of action for individuals through a system of rights. If EU law was not capable of guiding individuals through this space and regime of action, it would be ineffective in achieving its objectives (please see I.B and IV below on how the objectives of EU law have a decisive effect on its interpretation). Law is after all a means of ‘facilitating coordination through the organization and reduction of complexity’²⁷. Just as ‘a knife is not a knife unless it has some ability to cut’²⁸, EU law must provide a clear space and regime of action for individuals if it is to contribute to integration. It must clearly draw attention to the increased variety of cross-border options available to individuals.

The second feature, in order to achieve uniformity, is that the Court is required to interpret a provision in a general and abstract manner, rather than judging the facts of the case at hand.

²⁵ Fennelly, above n 13, 673

²⁶ J. Raz, *The authority of law: Essays on law and morality* (1st ed., Clarendon Press, 1979) 225

²⁷ S. Deakin, ‘Legal Evolution: Integrating Economic and Systemic Approaches’ (2010) *Review of Law & Economics* 659, 660; I am of course aware of the large debate in analytical jurisprudence about the nature of the law and that such a short remark cannot even begin to do justice to answering the question ‘what is law?’

²⁸ Raz, above n 26, 225

‘This procedure thus compels the Court to give a ruling on the content and scope of a rule, which, due to its general nature, may itself assume the nature of a general rule’²⁹. Such a procedure contributes to the building up of a scheme of rules and a legal system. Indeed, the rulings in the form of a general rule, which interpret a provision of EU law, may themselves be interpreted and organised schematically, evolving and adding further substance to the content of EU law.

The third feature, owing to the fact that preliminary rulings answer questions of interpretation in the context of real proceedings before national courts³⁰, is that even if the Court must interpret a provision of EU law in a general and abstract way, it must nevertheless provide an interpretation that would permit the referring court to decide the case without any further difficulty concerning the EU law point. However, as has been acknowledged by many judges and scholars³¹, being able to balance the requirements of these two aspects can prove to be difficult.

Such difficulty also exists with regard to the related issue (in that they both concern the generality or specificity of the ruling) of respecting the division of labour between the Court which is to interpret provisions of EU law and national courts which apply those provisions³². However, as explained by Dumon, ‘since interpretation and application are linked, the former being required for the latter, the question submitted and the replies given are frequently and necessarily ‘bound up’ with the facts of the case’³³.

Moreover, as will now be explained, the facts of cases and the context in which those facts find themselves are crucial to filling in the *traité cadre* in a way that is relevant and therefore useful to individuals, including filling any potential gaps in judicial protection. Could the Treaty authors really for example be expected to foresee the bizarre discriminatory practices of sporting

²⁹ H. Kutscher, ‘Methods of Interpretation as Seen by a Judge at the Court of Justice’ in *Reports of a Judicial and Academic Conference held in Luxemburg on 27-28 September 1976*, 13

³⁰ Indeed, the Court does not answer hypothetical preliminary reference questions.

³¹ For example, Kutscher, above n 29, 14; F. Dumon, ‘The case-law of the Community. A critical examination of the methods of interpretation’ in *Reports of a Judicial and Academic Conference held in Luxemburg on 27-28 September 1976*, 23 et seq.

³² For example, Case 77/72, *Capolongo* [1973] ECR 622, where the Court considered that ‘in the exercise of the powers conferred by Article [267]..., the Court, having to limit itself to giving an interpretation of the provisions of [Union] law in question, cannot consider legal acts and provisions of national law, the risk being that the reply will correspond only imperfectly to the circumstances of the case’. And even more clearly in Case 32/75, *Cristini* [1975] ECR 108, where the Court stated that it ‘has no jurisdiction to apply the Community rule to a specific case’.

³³ Dumon, above n 31, 25

associations such as the ICU requiring those involved in ‘stayering’³⁴ to be of the same nationality in *Walrave*³⁵? It is an incidence of each such unexpected turn that the Treaty is made more relevant and useful to individuals.

B. Creatively developing and making more precise provisions of EU law for the project and purpose of integration

Montesquieu and Robespierre asserted that ‘it is the nature of the constitution that judges follow the letter of the law... The judges are the mouth piece which utter the words of the law; inanimate being which cannot temper its severity’³⁶. In the words of Advocate General Dumon, ‘all judges, academic lawyers and legal practitioners realize the simplistic and unrealistic nature of the assertions’³⁷. This is most certainly the case with regard to EU law.

i. Precision

The imprecise nature of the Treaties and preliminary ruling procedure imply that a large part of the role of the Court is to make the imprecise provisions more precise. And indeed, moreover, as Kutscher, a former President of Chamber at the Court, commented, ‘the vagueness of many of the concepts of the Treaty is intended to ensure that the institutions of the Community have a certain freedom of action’³⁸. As will be explained below, it is also this undetermined and objective-orientated nature of the Treaties which give rise to the objectives-based and contextual methods of interpretation of the Court.

The process of making general and abstract formulae more precise involves bringing them closer to the concrete and less high-ordered ways individuals relate to events that these legal formulae

³⁴ The practice in competitive cycling where the motorbike rider and the pacemaker form a team to manage a race.

³⁵ Case 36/74 *Walrave and Koch* [1974] ECR 1406

³⁶ Montesquieu, *De l’esprit des lois* (VI-3, GF Flammarion, 1980) 557

³⁷ Dumon, above n 31, 10

³⁸ Kutscher, above n 29, 9

regulate³⁹. This could be in the context of the family defining a spouse as someone to whom somebody is married⁴⁰. In the realm inter-State trade, the Court made more precise the vague formula of ‘measures of equivalent effect’ contained in Article 34 TFEU with reference to how a business person would think of the matter. Article 34 TFEU prohibits ‘[q]uantitative restrictions on imports and all measures having equivalent effect’. What measures having an effect equivalent to quantitative restrictions? Adding further precision to the *Dassonville* formula⁴¹, the Court stated in *Keck and Mithouard*⁴² that ‘the application to products from other Member States of national provisions restricting or prohibiting *certain selling arrangements* is not such as to hinder directly or indirectly, actually or potentially, trade between Member States... so long as those provisions apply to all relevant *traders* operating within the national territory and so long as they affect in the same manner, in law and in fact, *the marketing* of domestic products and of those from other Member States’⁴³ (emphasis added). Businesspeople – traders – engaged in inter-State trade think of their operations as how they sell their product in foreign markets and how the law allows them to sell their product in foreign markets. The Court thus made more precise the term ‘measures of equivalent effect’ in a manner that brought it closer to the way those businesspeople think about their business operation which is being regulated.

That is to say that the legal rules resultant upon the interpretive process are to a degree dependent on and provide for the real world concrete interactions in the exercise of individuals of their autonomy. These pieces of information provided by the real world concrete interactions are ‘coded’⁴⁴ by the legal system in the act of union between the abstract and the concrete performed by the interpreter.

³⁹ This paragraph is based on the theoretical observations made by game theorists that: ‘At the core of correlated equilibrium is the idea that the correlating device gives an instruction of some kind to the actors... there are many such devices expressed in conceptual or abstract form, without any obvious physical manifestation. Norms, for example, can take the form of linguistic expression or formulae which function as shorthand for physical behavioral manifestations or common knowledge... Legal formulae, which frequently express complex, high-order concepts, are at one end of the spectrum running from concrete to the abstract’ (S. Deakin, ‘Legal Evolution: Integrating Economic and Systemic Approaches’ (2010) *Review of Law & Economics* 659, 670)

⁴⁰ Case 59/85 *Reed* [1986] ECR 1296

⁴¹ *Dassonville*, above n 24, paragraph 5

⁴² Case C-267 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097

⁴³ *Ibid.*, paragraph 16

⁴⁴ Deakin, above n 27, 673 drawing on system theorists such Morowitz makes the observation that ‘[s]ocial systems [such as legal systems] are cognitive orders which store and retain information drawn from their environment and transmit it back in such a way as to shape the environment’s structure’.

This however is not a once and for all mechanism of precision. As I repeatedly emphasize throughout, indeed it being a core theme of this work – particularly section iv on developing the law and section III on contextual interpretation –, EU law evolves and as such the real world information coded by the legal system may change in response to the real world. This is particular done through the feedback mechanism that is preliminary reference (Article 267 TFEU) as described in section IV.C.ii below. Note also the creativity involved in the interpretation of the Court incorporating business concepts which will be elaborated on in section I.B.ii below.

Making precise the rule in more concrete and ‘real world’ terms also has the benefit of making it easier to understand and providing the individual actors better guidance for what variety of valuable options is being opened up to them by the Court. It thus provides them with greater legal certainty. As will be explained in section iii and IV.B below, this goes hand in hand with, in that it provides for the successful achievement of, a project with a purpose such as that of European integration.

The current great challenge the Court faces with regard to providing precision through interpretation is with regard to Article 47 of the Charter, the right to an effective remedy. The Charter is binding after Lisbon and staggeringly, 50% of preliminary references now refer to Article 47 of the Charter⁴⁵, usually concerning whether EU law rights are effectively protected by Member States. As the Court explained in *Alassini*, the ‘requirements of equivalence and effectiveness embody the general obligation on the Member States to ensure judicial protection of an individual’s rights under EU law’⁴⁶. However, the right to an effective remedy contained in Article 47 is, like many Treaty provisions, vague and under-determined. Article 47(1) states that ‘[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy...’. Moreover, this applies to each and every area of national law in which there are EU law rights – from consumer law to capital markets law to immigration law. What does an effective remedy entail in each area? The Court will have to repeatedly consider simultaneously Article 47, the facts of the case and the concerns specific to each area⁴⁷.

⁴⁵ H-W. Micklitz, ‘The ‘invention’ of new remedies by creative interpretation’ (L’interprétation en droit conference, Florence, 4 September 2014)

⁴⁶ Joined Cases C-317/08, C-318/08, C-319-08 and C-320/08 *Alassini* [2010] ECR I-0000

⁴⁷ Please see below on this process analysis on this process from systems theory and Critical Legal Studies, among others – as well from the hermeneutic interpretive theory here used.

Indeed the Court makes more precise provisions of EU law in the context of specific cases. As such, despite the Court's best attempts to provide general and abstract interpretations, these interpretations will almost inevitably be to a degree a function of the set of facts that gave rise to the issue – and indeed must bear relevance to those facts in order for the interpretation to be a useful one allowing the referring court to apply the provision of EU law to the case. Esser – based on the hermeneutic theory of communication of Gadamer – constructed a 'hermeneutical circle' methodology of interpretation which posits that 'judge's eye has to go from the facts to the text and the meaning of the norm, over and again, like in a circle... understanding and interpreting the content of the norm better because of the very facts and analysing the facts more deeply because of the content of the norm – always narrowing the gap between the two, also potentially a gap in time'⁴⁸.

This raises the possibility of what I shall term 'stubbornness' of either the facts or the law. It may be the case that the facts are very strong, with the law being drawn closer and molded around the facts or *vice versa*. This was the case in *Viking*⁴⁹ which concerned industrial action and raised the issue of whether the freedom of establishment conferred rights which may be relied on against a trade union or association of trade unions. In holding that the freedom of establishment did in fact confer such rights, the Court was swayed by the effectiveness of the industrial action which incorporated an international association of trade unions and in effect prevented any relocation of the company. This could also be said to be true of *Ruiz Zambrano*⁵⁰ which concerned the deportation of Colombian parents and necessarily also their Belgian national children from Belgium, this being a case that arouses great sympathy for the applicants. Or indeed *Mohammed Aziz*⁵¹ that concerned an individual who could not pay his mortgage in economic crisis-hit Spain.

In contrast, the late great Lord Bingham, former Chief Law Lord in the United Kingdom, emphasized regularly the importance of the supreme interpretive court in a legal system dining *à la carte*. As Baroness Hale, Vice-President of the UK Supreme Court, explained in a recent

⁴⁸ S. Grundmann in S. Grundmann, H.-W. Micklitz and M. Renner, *Grand Theories of Private Law* (Mohr Siebeck forthcoming) 000

⁴⁹ Case C-438/05 *Viking Line* [2007] ECR I-10806

⁵⁰ Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1232

⁵¹ Case C-415/11 *Mohamed Aziz* [2013] ECR I-0000

lecture⁵², what Lord Bingham meant by this was that House of Lords then, or UK Supreme Court now, will not take a case solely because there is an issue of interpretation to be resolved, but also requiring a case where the facts do not strongly point to one result or another and thus skew the interpretive analysis. It must be borne in mind that the Court does not have this luxury as Article 19 TFEU binds the Court to throw an interpretive glance of its collective eye where the interpretation of a provision of EU law is unclear. However, what remains and is important for present purposes is those charged with interpretation recognize the potential for the law to bent around the facts where those facts are strong.

Esser also raises the possibility of other hermeneutic circles layered upon the primary circle. In these terms, the eye of the Court must not only oscillate between the facts and the law, but also between the route between the two and the ‘overarching, socially accepted value system’⁵³ – which for the Court is primarily the system and objectives of the Treaties, as well as other various contexts such as the societal conceptions and economic thinking of the day (see below). Esser concludes, and this appears to ring particularly true for the Court, that the role of the judge is to ‘carefully coordinating these “elements”, carefully reshaping the basis of the already existing decisions’⁵⁴.

As Grundmann points out⁵⁵, this reflection must not only be open to the value system internal to law, but also insights from other disciplines. The use of economic concepts is of particular importance in the interpretation of the Treaties. The economic thought relied upon might come from what is posited in the Treaties such as the competition provisions. But it may also come from external to the Treaties to complete them, to make them more precise. These contextual interpretive techniques will be discussed in section III below. Also, as will be repeatedly highlighted from this point onwards, there is an openness to other social systems, such as national political orders.

Further, on this logic, a further self-building meta-circle can be said to exist: protection of individuals and integration by the Court changes both the factual context (more individuals

⁵² Baroness Hale of Richmond (Lecture to the Cambridge Union Society, Cambridge, 19 October 2013) <http://www.youtube.com/watch?v=i7HJCw8Y8i0>, accessed 20 August 2014

⁵³ S. Grundmann, above n 48, 000

⁵⁴ Grundmann, above n 48, 000

⁵⁵ Grundmann, above n 48, 000

exercising their rights and integrating) and the legal context to the effect that further protection of the rights of individuals and further integration is a more fitting and justifiable interpretation the next time around⁵⁶. One could describe this as being the legal manifestation, and legal-constitutive manifestation as the protection of the rights have an effect of allowing private persons a further space and range of action, of an ‘ever closer union among the peoples of Europe’ envisaged in the preamble of the TFEU, depth breeding depth. Prophesizing this, and in fact the whole process of creatively developing and making more precise provisions of EU law to achieve integration, the Schuman Declaration announced that ‘Europe will not be made all at once, or according to a single plan.’⁵⁷

ii. Creation

Making provisions of EU law more precise requires creativity from the Court. This goes to the very heart of the nature of interpretation. Traditional definitions of (legal) interpretation, such as interpretation consisting of giving a clear meaning to something which is obscure⁵⁸, do not describe fully what the act of interpretation involves. There is often an innovative aspect to interpretation, whether that is interpretation of law or of art or literature. In this regard, Raz distinguishes two types of innovation that could be present in the act of interpretation. One could reveal ‘a meaning which was so far hidden’⁵⁹ such as is demonstrated by the psychoanalytic interpretation of *Hamlet*. One could describe the uniformity, effectiveness and primacy of EU law requiring the Court to defensively write fundamental rights into EU law in *Internationale Handelsgesellschaft*⁶⁰ as general principles as a meaning that was obscure before national constitutional orders made clear the importance they placed on fundamental rights protection and

⁵⁶ Fit and justification are the two dimensions of interpretation developed by Dworkin (notably in R. Dworkin, *Law's Empire* (Hart Publishing, 1986) 228)

⁵⁷ Schuman Declaration, 9 May 1950

⁵⁸ Robert, *Dictionnaire de la Langue Française* – vide ‘Interprétation’; such conceptions of interpretation are often relied on implicitly or explicitly by those describing interpretation in EU law, such as Dumon, above n 31, 9 using definition here-cited and A. Albors Llorens, ‘The European Court of Justice, More than a Teleological Court’ (1999) 2 *Cambridge Yearbook of European Legal Studies* 375, 375 who asserts that ‘[t]o interpret means to bring out the meaning of law’.

⁵⁹ Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (1st edition, Oxford University Press, 2009) 224

⁶⁰ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1126

their willingness to not apply EU law where it conflicted with fundamental rights. The fundamental rights meaning of the primacy of EU law was thus revealed.

Alternatively, '[s]ometimes new interpretations are not prompted by new discoveries of general truths, but by a novel realization of how some truths bear on the events of as a story or the features of some other works'⁶¹. A good example of this would be the free movement of services case *Carpenter*⁶². Mr Carpenter, an English national, had a business selling advertising space, which meant he had to travel to Germany regularly to see clients. He was also the father of minor children, and Mrs Carpenter, his Filipino wife, took care of them while he was away for business. The British government wished to deport Mrs Carpenter to the Philippines. The Court held that 'it is clear that the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom'⁶³. The fundamental freedom in this context is thus the pre-existing work and core focus of attention of the Court: the interpretive problem that it faced is whether on facts such as those at issue in the case, a breach of a service provider's fundamental freedom has occurred. New light is shed on the fundamental freedoms by a realization of how some other (legal) truth – the existence of fundamental rights protection in the EU legal order, specifically in this case the right to family life – bears on them. The novel realization may be stated as the fundamental freedoms requiring the protection of the conditions for the exercise of the rights contained therein which includes the right to family life.

Indeed, two key families of interpretation that the Court employs – contextual and teleological interpretation – may be regarded as instances of innovation through interpretation. Both are analysed in this regard among others in sections III and IV below. However, suffice it to say for present purposes that in the context of systematic interpretation the Court uses the truth of surrounding provisions and the ratio of the scheme for a novel realization of the meaning of a specific provision of EU law. Moreover, as is demonstrated in *Carpenter*, there is the possibility for great creativity in the arrangement of the norms generated by previous interpretation as is described in section III.A.i below. At a more meta-level, the interpretive techniques like the norms that are subjected to them are abstract representations of complex ideas – this again gives

⁶¹ Raz, above n 59, 225

⁶² Case C-60/00 *Carpenter* [2002] ECR I-6305

⁶³ *Ibid.*, paragraph 39

the Court much scope as to how to relate them together. This will be evident in what follows⁶⁴. Likewise, types of objectives-based reasoning sees the Court interpret ambiguous provisions of EU law in light of the objectives it pursues. It is this process of novel realization which turns the general objectives and concepts set out in the Treaties into substantive rules of law.

iii. The project and purpose of integration

This process of creative interpretation that the Court undertakes is ultimately aimed at, and in the context of, achieving the project and purpose of integration. At a conceptual level, in the words of Pescatore, ‘the rule of law being by its nature a provision with a certain objective, the teleological method is, in the last analysis, the decisive criteria of every legal interpretation’⁶⁵. ‘This is doubly true in the context of the treaties which proceed by laying down objectives rather than substantive rules’⁶⁶. Viewed through this lens, the Preamble of the TFEU is instructive as it provides the core aim of ‘ever closer union among the peoples of Europe’ through what is revealed in the rest of that Treaty to be initially only economic integration. Other forms of integration were later added through Treaty revisions, prominently Citizenship of the Union added by the 1992 Maastricht revision. In this regard, the literal, contextual and teleological interpretation that the Court undertakes can all be viewed as attempting to realise the objectives of the Treaties.

However, it must be said that it is at least possible now to conceptualise the EU project as one that no longer so much is defined by the realisation of objectives, rather now being now a community of principles⁶⁷, as has been argued by Von Bogdandy. Itzcovich has likewise noticed a shift in the discourse of the Court towards fundamental rights as a mode of regulating the relationship between the EU and Member States⁶⁸. That said, principles and fundamental rights

⁶⁴ There is depth analysis in this regard in section II.C below.

⁶⁵ Pescatore, above n 18, 88

⁶⁶ *Ibid.*

⁶⁷ A. von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing, Verlag C.H. Beck, Oxford, München 2010)

⁶⁸ G. Itzcovich, ‘Fundamental Rights, Legal Disorder and Legitimacy: The *Federfarma* Case’ Jean Monnet Working Paper 12/08, <http://www.jeanmonnetprogram.org/papers/08/081201.pdf> accessed 27 September 2014

being norms, they also conceptually have to a more or less extent have objectives. Moreover, they exist with the grand purpose and project of European integration. The system of objectives that is created by the system of rights and principles is explained fully in section IV below.

Moreover, as stated above in section I.A, Article 19(1) TEU places the duty and constraint on the Court of ensuing observance of the law, and therefore the rule of law, when interpreting the Treaties. From this duty has sprung the Court's own conception of a 'Community of law' which it proclaimed in *Partie Ecologiste "Les Verts"*⁶⁹. In *Partie Ecologiste "Les Verts"*, the Court demonstrates a concern for effective judicial protection *per se*, rather than effective judicial protection for the sake of economic integration⁷⁰. The Court held it had jurisdiction to hear a challenge to the decision of the European Parliament brought by the French Green Party even though at that time the Parliament was not named by the Treaties as an institution whose acts the legality of which could be challenged. Advocate General Mancini stated that 'whenever required in the interest of judicial protection, the Court is prepared to correct or complete the rules which limit its powers in the name of the principle [observance of the law] which defines its mission'. Following the Advocate General, the Court based its jurisdiction to hear the challenge on the fact that the Community was now viewed as one 'based on the rule of law'⁷¹.

At this juncture it is convenient to note that observance of the rule of law and making sure that there are no gaps in judicial protection often goes hand in hand with the project and purpose of integration and therefore also important sub-objectives such as creation of an internal market. The former provides for the effective realisation of the latter as it enables individuals to enforce the system of rights that has established integration and the internal market. Private persons may as a result be certain of protection in the exercise of the new cross-border options available to them. Any gaps, explained the Court, would 'lead to a result contrary both to the spirit of the Treaty... and to its system'⁷². Again, it would have been difficult to anticipate in the Treaties the situation, for example, where sporting associations exercised monopoly power but fell outside the scope of the competition provisions due to not being undertakings.

⁶⁹ Case C-294/83 *Partie Ecologiste "Les Verts"* [1986] ECR 1339, paragraph 23

⁷⁰ Even if it is possible to argue that the democratic institutional system that the Court was seeking to protect only exists for the purpose of integration, in line with Pecatore's thesis that final common denominator are the objectives of the Union.

⁷¹ *Partie Ecologiste "Les Verts"*, above n 69, paragraph 23

⁷² *Partie Ecologiste "Les Verts"*, above n 69, paragraph 25

The right to effective judicial protection is now enshrined in Article 47 of the Charter on Fundamental Rights of the European Union (the ‘Charter’), as well as it constituting a part of the legal foundation of the EU as has been here described. As will be further explored in sections III and IV below, the right to effective judicial protection has provided a schematic and teleological basis for the creative interpretation of EU law.

The existence of such ultimate objectives contributes to EU lawyers, and most importantly the Court, starting to an extent from a set of shared premises when interpreting EU law. Such an analysis makes use of Critical Legal Studies’ starting point – such as is exemplified by Duncan Kennedy’s strategy to search for what he calls ‘legal consciousness’ – ‘that it is possible to isolate and describe the significant dimensions or aspects of the body of ideas through which lawyers experience legal issues’⁷³. The teleological reasoning of the Court is a particularly clear and important example of this. Advocate General Dumon stated that ‘it is the duty of the Court to scrutinize, weigh up and ponder divorced from any preference or preferences, in order to arrive at the cogent judgement as it sees it’⁷⁴. However, as well as this statement being doubtful for any legal interpretive process, the objectives of the EU play a crucial role in shaping how the Court interprets EU law, as will be demonstrated in section IV. In the words of Advocate General Fennelly, ‘the judicial role is distinct from that of a neutral arbiter played by the normal court in Member State whose task is to hold the scales of justice evenly between parties or between citizen and the state’⁷⁵. As, according to A19(1) TEU, the Court’s role is the application and interpretation of the Treaties, and as the Treaties contain objectives – ‘an ambitious agenda for change’⁷⁶ – the Court is programmed to experience EU law issues in an *integration-biased* way, among other (sub-)objectives, notably the upholding of the rule of law. While like other courts the Court cannot meaningfully said to be a neutral arbiter – its decisions being shaped by its economic and political commitments – it can be differentiated from many other courts in that its basic premise of (economic) integration, and the broad structure of how to achieve this, is evident. This means that unlike many other courts, it makes no claim to neutrality. This is done both by the Court in its rulings by way of justification for those rulings and by judges of the

⁷³ D. Kennedy, *The Rise & Fall of Classical Legal Thought* (Washington DC, BeardBooks, 2006) 3

⁷⁴ Dumon, above n 31, 57

⁷⁵ Fennelly, above no 13, 672

⁷⁶ *Ibid.*

Court and Advocates General writing extra-judicially. This extra-judicial writing in particular shows a particular consciousness of those within the EU legal order of EU legal consciousness. No more is this so than with Pescatore, former judge of the Court and most beautiful describer of EU law as the law of integration, who analysed ‘[a]insi, que surgisse un problème juridique, le niveau de technicité est rapidement dépassé et la Cour se trouve seule avec les quelques indications très sommaires qui résultant des traités et, *pour le surplus, sa conscience juridique. C’est dans ces conditions qu’entre en jeu la considération des objectifs de la Communauté*’⁷⁷. Moreover, this lack of neutrality is legitimate⁷⁸ to the extent that it is derived from what has been posited in the Treaties which were agreed upon by the Member States.

It had been said in the early days of the Treaties that the Court’s aim in such an objectives-based approach combined with the wording of the Treaties was to discover the thinking of the authors of those texts of EU law that it was called upon to interpret. However, the absence of *travaux préparatoires* and evolutive nature of interpretation in EU law pours cold water in this idea, of course to the extent that the Treaty authors foresaw and intended evolution in EU law⁷⁹. Pertinent remarks have been made in the US Constitution context. Tribe stated with regard to the US Constitution, equally applicable today to the Treaty of Rome, that such an attempt to reconstruct what the authors of the text had in mind provides little more than ‘a faded snapshot of a bygone age’⁸⁰.

However, it must be noted, as was done by Lenaerts and Gutierrez-Fons⁸¹, that the use of *travaux préparatoires* is becoming increasingly important. In *Pringle*⁸² the Court in interpreting the ‘no bail-out clause’ contained in Article 125 TFEU relied on the Treaty of Maastricht’s *travaux préparatoires*. The *travaux préparatoires* from the European Convention, which drafted the Treaty establishing a Constitution for Europe (‘TCE’), the predecessor to the Lisbon Treaty,

⁷⁷ P. Pescatore 1972, *The Law of Integration. Emergence of new phenomenon in international relations, based on the experience of the European Communities* (Leiden, Sijthoof, 1974) 26

⁷⁸ This is a word with many different senses; here the legitimizing factor is the consent of the Member States

⁷⁹ Which may certainly have been the case given the visions enunciated in the Schumann Declaration of 9 May 1950: ‘Europe will not be made all at once, or according to a single plan.’

⁸⁰ L. Tribe in A. Scalia (ed), *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press) 81

⁸¹ Lenaerts and Gutierrez-Fons, ‘To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice’ (2013) EUI Working Paper AEL 2013/9, 19 <

http://cadmus.eui.eu/bitstream/handle/1814/28339/AEL_2013_09_DL.pdf?sequence=1 > accessed 29 September 2014

⁸² Case C-370/12 *Pringle*, judgement of 27 November 2012, not yet reported

were also key in the General Court's interpretation in *Inuit Tapiriit*⁸³ of the Lisbon Treaty amendment to Article 263(4) TFEU that was also present in the TCE. In that case, Advocate General Kokott stated '[d]rafting history in particular has not played a role thus far in the interpretation of primary law, because the '*travaux préparatoires*' for the founding Treaties were largely not available. However, the practice of using conventions to prepare Treaty amendments, like the practice of publishing the mandates of intergovernmental conferences, has led to a fundamental change in this area. The greater transparency in the preparations for Treaty amendments opens up new possibilities for interpreting the Treaties which should be utilised as supplementary means of interpretation if, as in the present case, the meaning of a provision is still unclear having regard to its wording, the regulatory context and the objectives pursued.'⁸⁴ As concluded by Lenaerts and Gutierrez-Fons, '[i]t follows that the more access to *travaux préparatoires* is granted, the more the [Court] will take them into account'⁸⁵.

iv. Developing EU law

The Court develops EU law in an ever-continuing process. Two ways in which the Court develops EU law may be distinguished. Both are almost certainly present at the same time and describe different aspects of the same interpretation. The first way the Court develops EU law is by making it more precise as has been described above. This adding of precision interacts with present-day conditions as what the words, context and objectives of EU law means will vary with time.

The second way the Court develops EU law is by evolving it in line with present-day social conditions, social, economic and philosophical concepts, technical developments etc.⁸⁶ This is not to say that does not interpret positive EU law literally, contextually and teleologically, rather that the result of these interpretive techniques, and the meaning of provisions, will be different as times change. Through this process of interpretation, the EU legal system, in the terms of

⁸³ T-18/10 *Inuit Tapiriit Kanatami and Others v Parliament and Council*, order of 6 September 2011, not yet reported

⁸⁴ Opinion of AG Kokott, delivered on 17 January 2013, in Case C-581/11 P *Inuit Tapiriit*, paragraph 47

⁸⁵ Lenaerts and Gutierrez-Fons, above n 81, 21

⁸⁶ Something often implicitly or explicitly recognized by courts; for example see the European Court of Human Rights in *Marckx v. Belgium* (ECHR 13 June 1979, Series A vo. 31)

systems theory, stores and retains information drawn from its environment and transmits it back⁸⁷. The importance this has for shaping the environment's structure – for example shaping the environment towards it being an environment that is autonomy and interaction enabling – will be fully explored in section IV.B below.

The Court's evolution of what it considers to be discrimination is of particular importance given that the principle of non-discrimination is core to the Treaty system and thus liable to have a pervasive effect on the interpretation of EU law. In terms of the objectives of the Treaties, this is most notably the case with regard to the principle of non-discrimination on grounds of nationality, a key, if not the key manner in which the Treaties seek to achieve its aims⁸⁸.

Given the long-established nature of the principle of non-discrimination – at least as far back as Aristotle's formal equality principle of 'treat like cases alike'⁸⁹ – as well as how central the principle is to the aims of the EU law and achieving those aims, what constitutes discrimination is a particularly important example of how interpreting courts, in Esser's terms, must oscillate their eye – as well as between the facts and the law – between 'values which seem "eternal"' – that like cases should be treated alike – and 'values of a particular time'⁹⁰ – which gives the substance to this formal principle of what constitute like cases. In the words of Advocate General Sharpston in *Bartsch*, 'the answers to the questions 'who is covered by the principle of equal treatment?' and 'what aspects of economic, social, political, civic and personal life are encompassed by that principle?' are not immutable. They evolve with society. As they do so, the law reflects that change by starting to state explicitly that certain forms of discriminatory treatment, previously unnoticed or (if noticed) tolerated, will be tolerated no longer. Such legal changes are an extension – a new and further expression – of the general principle of equality'⁹¹.

Two well-known examples from other jurisdictions show the particular susceptibility of what constitutes discrimination to the period and the need to evolve the law according to changes in

⁸⁷ Deakin, above n 27, 673

⁸⁸ Albeit that the Court has more recently moved to restrictions-based approach to what constitutes an obstacle to free movement across the fundamental freedoms and that other types of prohibitions of non-discrimination present in EU law, such as the Article 157 TFEU principle of equal pay for male and female workers, can be seen as at least in part having as their aim the harmonisation of the labour market across the Member States thus contribution to completion of the internal market and economic integration.

⁸⁹ Aristotle, *Nicomachean Ethics*, V.3. 1131a10-b15; *Politics*, III.9.1280 a8-15, III. 12. 1282b18-23

⁹⁰ S. Grundmann, H-W. Micklitz and M. Renner, *Grand Theories of Private Law* (forthcoming)

⁹¹ Case C-427/06, Opinion of Advocate General Sharpston, [2008] ECR I-7245, paragraph 46

what are acceptable distinctions for the law to make. In *Brown v. Board of Education of Topeka*⁹², the US Supreme Court held that separate education facilities for black and white children deprived the children of the black minority group of equal educational opportunities. In doing so, it placed particular emphasis on the ever-increasing importance of a child receiving a good education, particularly with regard to getting on in life, and the increasing provision of that education by states. This societal change made it even more unacceptable that black and white children were educated separately. *Marckx v. Belgium*⁹³ concerned the need in Belgium family law at the time for a mother to go through a court procedure at her own expense to adopt her own illegitimate child. The European Court of Human Rights noted that although it was previously regarded as permissible and normal in many European countries to draw a distinction between the illegitimate and the legitimate family⁹⁴, recalling the need to interpret the Convention ‘in light of the present day conditions’⁹⁵, it could not ‘but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe ha[d] evolved and [was] continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim "mater semper certa est"⁹⁶. This may be distinguished from *Brown v. Board of Education* as the court responded to a changing legal context that was resultant upon changing societal conceptions of the family and attitudes towards single-parent families, rather than directly relying upon societal changes. This second type of legal evolution can therefore be also seen as an instance of comparative law.

A particularly current issue that the Court will no doubt will have to grapple with, and has indeed indicated that it will rule on taking account of societal changes, particularly through their reflection in the laws of Member States, is the issue of whether the term ‘spouse’ in EU law, particularly for the purposes of Directive 2004/38, should be interpreted as included those in same-sex unions. As was stated by Advocate General Jarabo Colomer in *Maruko*⁹⁷, Europe is currently undergoing a ‘long process of accepting homosexuality, which is a vital step towards achieving equality and respect for all human beings’⁹⁸. In *Reed*⁹⁹, which concerned whether

⁹² 347 US 483 (1954)

⁹³ ECHR 13 June 1979, Series A vol. 31

⁹⁴ *Ibid.* paragraph 42

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ Case C-267/06 *Maruko* [2008] ECR I-1757

⁹⁸ Case C-276/06 Opinion of Advocate General Jarabo Colomer [2008] ECR I-1760, paragraph 2

unmarried partners should be treated as spouses for the purposes Regulation 1612/68, the Court took as the starting point for the crux of its reasoning that ‘since Regulation No 1612/68 applied in all of the Member States... any interpretation of a legal term must take into account the situation in the whole Community, not merely in one Member State’¹⁰⁰. Given that there was no real consensus in favour of this at the time of the judgement, the Court felt itself bound to hold that ‘[i]n the absence of a general social development which would justify a broad construction, and in the absence of any indication to the contrary in the regulation, it must be held that the term “spouse” in Article 10 of the Regulation refers to a marital relationship only’¹⁰¹. Drawing upon this, the Court in *D and Sweden* held that the term ‘married official’ did not apply to those in same-sex partnerships, even if such partnerships were celebrated and recognised by some Member States, as it was ‘not in question that, according to the definitions accepted by the Member States, the term “marriage” means a union between two persons of the opposite sex’¹⁰².

However, just as time saw a change in the laws of the Council of Europe states with regard to illegitimate children, ‘the legal and social context has evolved at both national and EU level’¹⁰³ with regard to same-sex unions. In 2006 in *Maruko*¹⁰⁴, the Court addressed the potentially discriminatory effect of a national German law on old-age pensions that provided for a financial benefit for the surviving spouse of a worker but refused such benefit to the registered partner. Sitting as a Grand Chamber, the Court ruled that ‘if the referring court decides that surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor’s benefit, legislation such as that at issue in the main proceedings must, as a consequence, be considered to constitute direct discrimination on grounds of sexual orientation’¹⁰⁵ as given expression in Directive 2000/78. Although marking the now firm EU stance against discrimination based on sexual orientation¹⁰⁶, the Court was also reserved the extent that it left assessment of the comparability of the situation to the referring court. By 2011

⁹⁹Case C-59/85 *Reed* [1986] ECR 1283

¹⁰⁰ *Ibid.*, paragraph 13

¹⁰¹ *Ibid.*, paragraph 15

¹⁰² Joined Cases C-122/99 P and C-125/99 P *D and Sweden* [2001] ECR I-4319, paragraph 34

¹⁰³ K. Lenaerts and J. A. Gutierrez-Fons, above n 81, 38

¹⁰⁴ *Maruko*, above n 97

¹⁰⁵ *Maruko*, above no 97, paragraph 72

¹⁰⁶ In 1999, the Treaty of Amsterdam placed the prohibition of discrimination on grounds of sexual orientation, age, race or origin and disability firmly within the scope of Union competence. This was quickly followed by the Directive 2000/78 which gave expression to these prohibitions.

in *Römer*¹⁰⁷, after a period that saw great progress in the attitudes towards LGBT individuals in Europe, with more and more Member States providing for same-sex unions, the Court evolved its stance in line with social and legal evolution, with particular reference to Germany, the country from which the reference originated. On facts similar to *Maruko*, repeating that such legislation could amount to direct discrimination on ground of sexual orientation, it went deeper into the assessment of the comparability of the situations of married couples and registered partners – developing the law by adding precision to the norm as well as by evolving it to match the changed social and normative context – , ruling that the referring court should focus ‘on the rights and obligations of the spouses and registered life partners as they result from the applicable domestic provisions, which are relevant taking account of the purpose and the conditions for granting the benefit at issue in the main proceedings, and must not consist in examining whether national law generally and comprehensively treats registered life partnership as legally equivalent to marriage’¹⁰⁸. Finally, in *Hay*¹⁰⁹ the Court went so far as to assess the compatibility of opposite-sex married couple and same-sex couples in a registered partnership. Addressing this time provisions of a collective agreement that provided for days of special leave and a salary bonus granted to employees on the occasion of their marriage, but not of their registration as partners, the Court established in a firm tone that the PACS, the French form of registered partnership, ‘constitutes, like marriage, a form of civil union under French law which places the couple within a specific legal framework entailing rights and obligations in respect of each other and vis-à-vis third parties’¹¹⁰. ‘Thus, as regards benefits in terms of pay or working conditions, such as days of special leave and a bonus like those at issue in the main proceedings, granted at the time of an employee’s marriage – which is a form of civil union – persons of the same sex who cannot enter into marriage and therefore conclude a PACS are in a situation which is comparable to that of couples who marry’¹¹¹.

In light of these developments changing the social and legal context external to the EU legal order, and in light of the change that this has affected elsewhere in the legal order thus changing the normative context internal to the EU legal order, the term ‘spouse’, for the purposes of EU

¹⁰⁷Case C-147/08 *Römer* [2011] ECR I-3591

¹⁰⁸*Ibid.* paragraph 43

¹⁰⁹Case C-267/12 *Hay* [2013] ECR I-0000

¹¹⁰*Ibid.* paragraph 36

¹¹¹*Ibid.* paragraph 37

law, particularly with regards to Directive 2004/38, could be interpreted by the Court to include those in same-sex unions. Such an interpretation is made all the more plausible if the teleological consideration of effectiveness – here interaction with social and legal developments – of a person in a same-sex union’s free movement right was taken into account. Such a right would be facilitated for those in same-sex unions if their partners were to be considered spouses and were to be given the legal protection flowing from that status.

C. The result: a system of rights which protect the individual and allows for the achievement of the aim of integration

As well as providing the interpretive methods for EU law – the spirit, general scheme and wording of provisions – the Court in *Van Gend en Loos*¹¹² gave birth to its result: a system of rights that protects the individual and allows for the achievement of the aim of integration. In that most seminal of judgments, the Court identified two subjects of EU law: ‘not only Member States but also their nationals’¹¹³. The latter were now empowered in EU law as it conferred rights upon them directly which could be invoked by them before national courts. As will be described in depth in section IV.C below, the system of rights aims to protect the conditions for individual autonomy and thus achieve integration by the interaction of individuals. The following is of importance for our present purposes.

The purpose of granting those rights was to ensure for individuals a wider (economic) space and range of action and thus greater cross-border interaction. As stated by a former President of the Court, ‘[e]ither the Community is for individuals (physical or legal persons) an attractive but distant abstraction which is only of interest to the governments who apply its rules to them at their whim, or it is for them a concrete reality and consequently the originator of rights’¹¹⁴. Individuals were being granted rights for the purpose and project of integration, so that they could exercise their autonomy, and create an internal market. In this regard, it must be noted that the Treaties at that time had not been interpreted as to contain anything more than obligations for Member States. The system of rights created is thus instrumental as it insures compliance of

¹¹² *Van Gend en Loos*, above n 4, 12-13

¹¹³ *Van Gend en Loos*, above n 4, 12

¹¹⁴ Fennelly, above n 13, 679

Member States with their EU law obligations. In the words of Robert Lecourt, a Judge of the Court in *Van Gend en Loos*, ‘when an individual appears before the judge [of a national court] to defend rights he derived from the Treaties, that individual does not only act in his own interest, he immediately becomes an auxiliary agent of the [Union]’¹¹⁵. The ‘Union’ here should not be thought of as mainly the EU institutions (although they have an important part to play), but rather the ensemble of individuals who interact and bring about European integration through their concrete achievements. Giving individuals access to national courts and allowing EU law to be invocable by individuals (this procedural aspect being a piece of ingenuity to bridge the gap between Member State obligations and individual rights) gave these individuals a wider space and range of action, beyond their Member State of origin, which has had the ultimate purpose of integration through the construction of an internal market (see section IV.B.iii below).

The primary value that EU law thus seeks to protect is individual autonomy. The principle of non-discrimination, although it may be said to be valuable in its own right and in promoting dignity of individuals, has a particular autonomy-increasing function in the EU context. It increases individuals’ space of action and options across the Member States (see section IV.B.ii below).

The language of individual rights has been pervasive in EU law. Although framing the discourse in terms of rights is not something peculiar to EU law, it is striking how in EU law the culture of rights now provides a structural seam as a legitimating and integrating force. A recent example of this is *VALE*¹¹⁶ that concerned a cross-border conversion of a company governed by Italian law into a company governed by Hungarian law. Despite reiterating that ‘companies are creatures of national law and exist only by virtue of the national legislation which determines their incorporation and functioning’¹¹⁷, the Court went on to overlook the fact that VALE had been dissolved in Italy and had not yet been incorporated in Hungary, meaning that the company that the Court refers to did not exist legally in any national law, to hold that the ‘refusal to record [VALE] in the Hungarian commercial register as ‘the predecessor in law’ is not compatible with principle of equivalence’¹¹⁸ and that ‘a practice on the part of the authorities of the host Member

¹¹⁵ R. Lecourt, *L’Europe des juges* (Brussels, Bruyant, 1976) 307

¹¹⁶ C-378/10 *VALE* [2012] ECR I-0000

¹¹⁷ *Ibid.* paragraph 51

¹¹⁸ *Ibid.* paragraph 56

State to refuse, in a general manner, to take account of documents obtained from the authorities of the Member State of origin during the registration procedure is liable to make impossible for the company requesting to be converted to show that it actually complied with the requirements of the Member State of origin, thereby jeopardising the implementation of the cross-border conversion to which it had committed itself¹¹⁹, protecting the Article 49 TFEU establishment right. Given at the time of the action that right was the sole legal presence of VALE, the right had a constitutive effect giving VALE a legal identity.

The system of rights created by the EU legal order is a manifestation of an underpinning system of objectives posited in the system of norms that constitute EU law. If we take as a starting point the firm belief of Pescatore that every legal rule has an objective¹²⁰, these three systems are directly correlating. Reference to one particular system or another is dependent upon the analytical standpoint. Conceptualization of the EU legal order as a system of rights places an emphasis on the individual. The viewpoint is of his entitlement to take action and partake in cross-border interaction (that cross-border action and interaction being an objective of the individual's rights). And just as certain derivative rights serve primary rights, certain sub-objectives serve higher order objectives¹²¹. For example, the right of the family member in EU law is derived from the primary right of the EU citizen, worker etc. – and its objective, providing the EU individual his family members, serves the objective of the conditions of autonomy, providing the EU individual with realistic cross-border options. Casting the system in terms rights also provides for its functionality in a judicial setting. Rights are instruments that are the bread and butter for legal practitioners. They are a language understood and used by lawyers. Objectives are not.

¹¹⁹ *Ibid.* paragraph 60

¹²⁰ Pescatore, above n 18, 88

¹²¹ Please section IV below for a full theoretical explanation of EU law as a system of objectives

I. Literal interpretation

A. The operation of literal interpretation

Literal interpretation is the ascribing to words in a legal provision their ordinary meaning; that is to say, deriving ‘legal arguments from the semantic and syntactic features of the language in which the legal provisions are expressed’¹²² or rather, as may necessarily be the case, ‘the meaning which a jurist understands’¹²³. Not only that, we must specify a jurist of a particular legal system: as the Court stated in *CILFIT*, ‘legal concepts do not necessarily have the same meaning in [EU] law and in the law of the various Member States’¹²⁴.

As is implicit in this last specification, the ordinary meaning to a person knowledgeable of a particular legal system may well already be imbued by other methods of interpretation. It may for an EU lawyer be difficult not to see anything other than an interpretation of a provision taking into account contextual and teleological considerations. In the language of the Critical Legal Studies school, jurists in a particular legal system approach this mental operation with a set of ‘shared premises’. If, as will be argued in section IV below, the fundamental freedoms and Citizenship provisions are consistently thought of as aiming at an ideal of autonomy as a means of integration, it would be difficult for EU lawyers not to see these provisions in those terms.

Likewise, EU lawyers will have in mind private and institutional conceptions of family life when interpreting provisions of EU law on the family (see section III.A.iv below in particular on societal context). The interpretation of the term ‘spouse’ examined in section I.B.iv above is a particular example of this. There exists therefore – for the EU lawyer and all others – a degree of

¹²² G. Itzcovich, ‘The Interpretation of Community Law by the European Court of Justice’ (2009) 10 *German Law Journal* 537, 549; building upon the classificatory structure of J. Bengoetxea, N. MacCormick and L. Moral Soriano, ‘Integration and Integrity in the Legal Reasoning of the European Court of Justice’ in G. de Búrca and J.H.H. Weiler (eds), *The European Court of Justice*, Collected Courses of the Academy of European Law (Oxford,

Oxford University Press, 2001) 43, 58

¹²³ Itzcovich, above n 122, 550

¹²⁴ *CILFIT*, above n 5, paragraph 19

unconscious or semi-conscious contextual and teleological interpretation undertaken in any interpretive process before such modes of interpretation are employed consciously.

In the way here described literal interpretation acts as a gateway to the operation of all other interpretive techniques. It establishes the range of possible meanings of a provision that other methods of interpretation determine. In the words of Kutcher who was at the time President of the Court, ‘... every interpretation of a rule has to start with its wording and the ‘ordinary meaning’ of a word’¹²⁵.

Given that literal interpretation functions to narrow down the range of possible meanings of a provision, the more precise a provision already is, the greater and more determinative role literal interpretation will play. Let us remember the comparison Lord Denning MR made (see section I.A above) between common law statutes which aim to precisely cover all situations and EU provisions which provide general principles expressing aims. At one end of the scale of determinacy therefore lie statutes in common law jurisdictions. As a result, great emphasis is placed on literal interpretation, an inevitable consequence of much of the legwork being done by it without resort being had to other methods of interpretation. Thus, the so-called ‘golden rule’ of statutory interpretation for judges in English courts is if a legal text has clear meaning, then the judge has to abide by it¹²⁶. The only exception to that rule is where adherence to the ordinary meaning would lead to absurdity¹²⁷. Such is the emphasis of the English judge on the ordinary words of the text, ‘schematic and teleological’ – the EU law methods of interpretation required to be applied by English judges after the UK’s accession – appeared to the Master of the Rolls to be ‘strange words’¹²⁸. At the other end of the scale lie provisions of EU law that posit general principles expressing aims. As a result, literal interpretation in EU law is often non-determinative. Therefore, it is not surprising that it is a less pivotal method of interpretation in this context,

¹²⁵ Kutcher, above n 29, 17

¹²⁶ Lord Diplock in *Duport Steels Ltd. v. Sirs* [1980] 1 WLR, at 157 and Lord Lester, ‘English Judges as Law Makers’ (1993) PL 269, 272-275

¹²⁷ Interestingly assessing whether an interpretation would be absurd requires the use of other interpretive techniques. Absurdity perhaps presumes more than anything an original purpose of a rule. For example, the Court of Appeal in *Rochefoucauld v Boustead* [1897] 1 Ch 197 held that section 7 of the Statute of Frauds 1677, which was designed to prevent fraud by requiring declarations of trusts of land to be proved and signed by some writing (a rule of evidence), could not be itself used to commit a fraud where there was clear evidence to the contrary.

¹²⁸ *James Buchanan and Co. v. Babco Forward and Shipping Ltd.*, [1977] Q.B. 208, 213 (Q.B. Civ. Div.)

providing a range of possible interpretations to be chosen from on contextual and teleological grounds.

This relationship between determinacy of legal provision and the emphasis on literal interpretation can be seen in the US context in the writing of Justice Scalia of the US Supreme Court. Scalia, a firm believer in the democratic value of the predominance of a literal interpretation (thus trying to stick as closely as possible to the intentions of the legislature), makes clear that ‘Congress can enact foolish statutes as well as wise ones, and it is not for the court to decide which is which and rewrite the former’¹²⁹. However, even such a firm believer in the virtues of sticking as close as possible to the text recognises the more open-textured nature of the US Constitution; interpretation of that Constitution is a distinctive problem ‘not because special principles of interpretation apply, but because unusual principles are being applied to an unusual text’¹³⁰. Such comments may be applied in comparing English statutes with the European Treaties.

B. The challenge specific to the EU of linguistic equality

Article 55(1) TEU states that the texts of the TEU in each of the 24 official languages of the EU are ‘equally authentic’¹³¹. Article 342 TFEU provides that ‘the rules governing the languages of the institutions of the Union shall... be determined by the Council, acting unanimously by means of regulations’. Pursuant to Articles 4 and 5 of Regulation No 1/58, ‘documents of general application [are drafted in all] official languages’ and are ‘published in [all] official languages’. As a result, all acts of general application are published in all 24 official languages of the Union and as such there is the potential for variations between the texts in the different language versions.

¹²⁹ Scalia, above n 80, 23

¹³⁰ *Ibid.* paragraphs 20 and 23

¹³¹ Article 55(1) in fact lists the official languages as Bulgarian, Croatian, Czech, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, and Swedish.

If there is a variation between different language versions of a text, and if those language versions of a text are equally authentic¹³², how is the difference to be resolved? At this point a purely textual interpretation reaches the limits of its capacity. Other interpretive criteria must be used to move beyond this impasse.

The starting point is that among the texts that have different meanings in different languages, one meaning must be decided upon¹³³. This is required by one of the key interpretive principles of the Court – uniform interpretation – that was arrived at contextually and teleologically. Contextually, the Court saw the objective of the preliminary reference system in *Van Gend end Loos*¹³⁴ to be securing the uniform application of EU law which is teleologically required for the creation of an internal market¹³⁵. A non-uniform interpretation would be inconsistent¹³⁶ with the system of purposes that is set up in the European project¹³⁷.

If the Court can no longer refer itself to textual considerations, and if the two other core methods of interpretation of the Court are contextual and teleological, then logically it must determine the meaning of a provision with these methods. Indeed, the Court held in *Boucheraau* that ‘the different language versions of an [EU] text must be given uniform interpretation and hence in the case of divergence between the versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part’¹³⁸. In *Stauder*¹³⁹, a Commission decision authorized Member States to make butter available at a reduced price to consumers who were beneficiaries under a social welfare scheme and whose income does not enable them to buy butter at a normal price. The decisions stipulated in two of its versions, one

¹³² Confirmed by the Court in Case C-296/95 *EMU Tabac and Others* [1998] ECR I-1605, paragraph 36: ‘[A]ll language versions must, [as a matter of] principle, be recognised as having the same weight and thus cannot vary according to the size of the population of the Member States using the language in question’

¹³³ See for example *ibid.*, where the Court stated that ‘the need for a uniform interpretation of [EU] regulations makes it impossible for the text of a provision to be considered in isolation but requires, on the contrary, that it should be interpreted and applied in the light of the versions existing in the other official languages [...]’. See also Case C-257/00 *Givane and Others* [2003] ECR I-345, paragraph 36 and C-152/01 *Kyocera* [2003] ECR I – 13833, paragraph 32.

¹³⁴ *Van Gen end Loos*, above n 4, 12

¹³⁵ A teleological move that is so entrenched in the Court’s psyche that it finds itself being used in Citizenship cases that have no direct impact on economic integration. See *Metock*, above n 9.

¹³⁶ See section III below as to the importance of consistency in interpretation.

¹³⁷ See section IV below as to the EU project consisting of a system of purposes.

¹³⁸ Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 14. See also Case C-449/93 *Rockfon* [1995] ECR I-4291, paragraph 28; Case C-236/97 *Codan* [1998] ECR I-8679, paragraph 28, and Case C-34/01 *Plato Plastik Robert Frank* [2004] ECR I-4883, paragraph 64

¹³⁹ Case 29/69 *Stauder* [1969] ECR 419

being the German version, that the purchaser was required to produce a ‘coupon indicating their names’, whilst in the other versions, however, it was only stated that a ‘coupon referring to the person concerned’ must be shown, thus making other methods of checking in addition to naming the beneficiary. The Court began by noting the need for uniform application of provisions of EU law and thus uniform interpretation¹⁴⁰. It then held that ‘the most liberal interpretation must prevail, provided that is sufficient to achieve the objectives pursued by the decision in question’¹⁴¹. As well as this objective based interpretation, the Court also interpreted the provision contextually by looking at its *travaux préparatoires*¹⁴².

This method for providing a uniform interpretation does however find its limit where the a provision refers to a concept that inherently varies from Member State to Member State or is defined by reference to the differing orders – legal or otherwise – of the different Member States. This is the case with the notion of ‘public policy’ which was interpreted in the context of Directive 64/221 in *Boucherau*¹⁴³. The Court reasoned that ‘the concept of public policy may vary from one country to another and from one period to another and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty and the provisions adopted for its implementation’¹⁴⁴. That said, the importance objectives of the Directive and the need for uniformity were not far from the Court’s thought and it added the caveat that ‘in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society’¹⁴⁵.

C. The relationship of literal interpretation with other methods of interpretation

As can already be seen, it is difficult – or impossible – for an interpretation to be purely literal; whether that be for example due to preconceptions of the interpreter or the fact literal

¹⁴⁰ *Ibid.* paragraph 3

¹⁴¹ *Ibid.* paragraph 4

¹⁴² *Ibid.* paragraphs 5-6

¹⁴³ *Boucherau*, above n 138,

¹⁴⁴ *Boucherau*, above n 138, paragraph 27

¹⁴⁵ *Boucherau*, above n 138, paragraph 35

interpretation will only take you so far. This is particularly the case with regards to provisions that are to a large extent under-determined such as Treaty provisions in EU law. In the words of CK Allen, ‘the plain and unambiguous meaning of words by which courts often believe themselves to be governed is really a delusion, since no words are so plain and unambiguous that they do not need interpretation in relation to a context of language and circumstances’¹⁴⁶. The context and objectives of a provision – in the broad terms explained in sections III and IV below – always have a role to play.

Literal interpretations can be rejected when they run contrary to objectives and context. For example, Article 267 TFEU would seem to read as giving national courts jurisdiction to declare acts of Union institutions invalid¹⁴⁷. However, in *Foto-Frost*¹⁴⁸ the Court held that ‘the coherence of the system [of remedies] requires that where the validity of a [Union] act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice’¹⁴⁹. A systematic interpretation revealed a power to declare an act invalid reserved only to the Court. Moreover, allowing national courts to declare acts of Union law invalid would run a coach and horses through the uniformity of application of EU law.

*Defrenne II*¹⁵⁰ concerned the interpretation of Article 157 TFEU which states ‘[e]ach Member State shall ensure the principle of equal pay for male and female workers for equal work or work of equal value is applied’. On a literal interpretation therefore, Article 157 TFEU only has Member States as its addressees. The core of the Court’s reasoning shows a balancing of the value of literal interpretation against teleological demands. In finding that Article 157 TFEU also had individuals as its addressees, the Court focused on the importance of not denying individuals their EU law rights¹⁵¹, that is to say their claim to the conditions of autonomy. It then noted that there was an objective to be achieved within a set period (that period having expired)¹⁵² –

¹⁴⁶ C.K. Allen, *Law in the Making* (7th edition, Oxford University Press, 1964) 506

¹⁴⁷ Article 267(1) TFEU states that the Court ‘shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it consider that a decision on the question is necessary to enable it to give judgment request the Court to give a ruling thereon’.

¹⁴⁸ Case C-314/85 *Foto-Frost* [1987] ECR I-4199

¹⁴⁹ *Ibid.*, paragraph 17

¹⁵⁰ Case 43/75 *Defrenne II* [1976] ECR 456

¹⁵¹ *Ibid.* paragraph 31

¹⁵² *Ibid.* paragraph 32

equality of pay between men and women – and ‘that the effectiveness of this provision cannot be affected by the fact that the duty imposed by the Treaty has not been discharged by certain Member States and that the joint institutions have not reacted sufficiently energetically against this failure to act’¹⁵³. In this sequence of reasoning, it finished by holding ‘[t]o accept the contrary view would be to risk raising the violation of the right to the status of a principle of interpretation, a position the adoption of which would not be consistent with the task assigned to the Court by Article [267 TFEU]’¹⁵⁴. Not only was the immediate objective being threatened but also the entire system of objectives that constitutes EU law and ultimately the project and purpose of integration. The immediate threat was also metaphysical.

Finally, the Court like English courts (as mentioned above) does not interpret a provision in a certain way if it leads to absurd result, this being a special application teleological interpretation¹⁵⁵. As explained by Advocate General Mayras in *Fellinger*, ‘[i]f such a construction were to lead to a nonsensical result in regard to a situation which the Court believed the provisions were intended to cover, certain doubts may be properly entertained in regard to it’¹⁵⁶.

A notable recent example of the Court interpreting a provision of EU law according to its objective rather than sticking strictly to the text is *Sturgeon*¹⁵⁷ that concerned the interpretation of Regulation No 261/2004¹⁵⁸ establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delays on flights. Regulation 261/2004 sets up two categories of passengers: those whose flights are delayed who are entitled to assistance only and those whose flights are cancelled who are entitled to assistance and compensation. The *Sturgeon* family’s flight was ‘delayed’ by 25 hours. In reality, the airline had renamed the next day’s flight as the flight the *Sturgeons* were due to be on the day before. Within the strict text of the directive, the *Sturgeons* were only entitled to compensation. The

¹⁵³ *Ibid.* paragraph 33

¹⁵⁴ *Ibid.* paragraph 34

¹⁵⁵ See note 127 above

¹⁵⁶ Case 67/79 Opinion of Advocate General Mayras [1980] ECR I-535, 550

¹⁵⁷ Joined Cases C-402/07 and C-432/07 *Sturgeon and Others and Böck v Air France* [2009] ECR I-10923

¹⁵⁸ Regulation No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, [2004] OJ L46/1

Court noted ‘a [Union] act must be interpreted in such a way as not to affect its validity’¹⁵⁹. Given the superior EU law objective and principle of equal treatment, the Court reasoned that ‘given that the damage sustained by air passengers in cases of cancellation or long delay is comparable, passengers whose flights are delayed and passengers whose flights are cancelled cannot be treated differently without the principle of equal treatment being infringed’¹⁶⁰. Otherwise, airlines would be completely able to avoid compensating passengers for cancelled flights by referring to them as (very long) delays. That would be state of absurdity and render the rule toothless.

However, literal interpretation can place limits on more teleological considerations, particularly when it is combined with systematic considerations. The full *effet utile* of directives would require that they had horizontal direct effect from the time their implementation period was up. However, the Court in *Marshall*¹⁶¹ stuck closely to the text of Article 288 TFEU which states *inter alia* that a ‘directive shall be *binding*, as to the result to be achieved, *upon each Member State* to which it is addressed, but shall leave to the national authorities the choice of form and method [emphasis added]’ to hold that it ‘follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person’¹⁶². In addition, the Court has made reference to the system of legislative measure open to the Union legislature. In *Faccini Dori*, the Court held that to allow an individual to rely on the provisions of a directive against another individual ‘would be to recognize a power in the [EU] to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations’¹⁶³.

This latter point is perhaps therefore the crucial difference with *Defrenne II*. While in *Defrenne II* there were strong teleological and contextual considerations militating in favour of departing from a literal interpretation while with regard to horizontal direct effect of directives, there were contextual reasons militating against.

¹⁵⁹ *Sturgeon*, above n 157, paragraph 47

¹⁶⁰ *Ibid.* paragraph 60

¹⁶¹ Case 152/84 *Marshall* [1986] ECR 737

¹⁶² *Ibid.* paragraph 48

¹⁶³ Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 24

D. The values protected by literal interpretation

As has been touched on in section I.B.iii above and will so again in section IV.A below, the rule of law has a particular role to play in the bodies of law of grand projects with purposes.

Predictable law – through sticking to the ‘ordinary meaning’ of words as above elaborated –, which provides for legal certainty, marks out for the individual his cross-border range of options. The rule of law is of course a value and an objective in itself – it is after all, as explained by Raz, the value intrinsic to law. However, EU law would not be in existence without the project and purpose of integration. Therefore, the rule of law is an objective subjugated to this higher objective in the EU context.

II. Contextual interpretation

A. Some types of context

Context is a broad term, or at least – *by definition* – broader than the object of contextualisation. For our present purposes interpreting provisions of EU law by reference to their context, five types of contexts may be distinguished: (i) the normative context internal to a particular legal system which may be subdivided into (a) the substantive context (b) the procedural context and (c) the institutional context, guiding substantive norms, and the procedural and institutional context amounting to an architectural context; (ii) the pre-normative context that is the legislative process that led to the adoption of a norm; (iii) the normative context external to a legal system, i.e. norms from other legal systems; (iv) the societal context, particularly at the time of interpretation; and (v) knowledge and understanding from disciplines other than law, particularly where legal concepts originate from other disciplines. It must, however, be acknowledged from the outset that when the Court refers to context, it only mean the normative context internal to EU law. That said, it does openly refer to the pre-normative context – the *travaux préparatoires* – and norms from other legal systems. Moreover, it does refer itself, consciously or unconsciously, to the societal context and knowledge and understanding from other disciplines even, even if it does not always acknowledge that this is so.

i. Normative context internal to a particular legal system

The Court refers itself to the EU law normative context. In *Van Gend en Loos* the Court placed upon itself a requirement to consult ‘the general scheme’¹⁶⁴. This schematic interpretation requirement was later described in *CILFIT* in the following manner: ‘every provision of

¹⁶⁴*Van Gend en Loos*, above n 4, 12

Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole¹⁶⁵. As analysed by Itzcovich, this may occur at three different levels of zoom: ‘the same normative text, or belonging to the same area of the legal system, or belonging to different areas of the same legal system’¹⁶⁶.

The most common normative context internal to the EU legal order on which the Court bases its interpretation is the substantive context of a provision. This is not to say that it cannot be of great importance and involve dealing with issues fundamental for the EU legal order and the project and purpose of integration. For example, there has been a degree of convergence in interpretation between the fundamental freedoms¹⁶⁷. As has been analysed with regard to creation of a system of rights in section I.C above and will be analysed with regard to teleological interpretation in section IV below, norms in the EU legal system represent the positing of objectives. These shared objectives represent the deeper conceptual similarities that link provisions of law together and call for their coherent interpretation.

However, it has often been the examination of the procedural and institutional context, in conjunction with the substantive context of the Treaty scheme as a whole, which has led to the most foundational, creative and spectacular results. No more is this so than the Court drawing in *Van Gend en Loos*¹⁶⁸ on the existence of Article 267 TFEU in the Treaty – a procedure which presupposes the invocation of provisions of EU law before national courts - to adduce that in principle provisions of EU law are invocable before national courts, that is to say the doctrine of direct effect. The systemic context, in the words of Pescatore, therefore ‘is a complete architecture, [presumed to be] coherent and well thought out... : a general scheme of legislation, structure of the institutions, arrangement of powers (in conjunction, where appropriate with the objectives), general concepts and guiding ideas of the Treaties’¹⁶⁹. The architecture posited in the

¹⁶⁵ *CILFIT e. a.*, above n 5, paragraph 20

¹⁶⁶ Itzcovich, above n 122, 549

¹⁶⁷ Such as with regard to a broad conception of restriction in *Dassonville* (above, n 24) and *Cassis de Dijon* (above, n xx) in the context of the free movement of goods being reflected by broader conceptions in the context of the free movement of services (Case C-76/90 *Säger* [1991] ECR I-4421), the freedom of establishment (Case C-55/94 *Gebhard* [1995] ECR I-4165) and the free movement of workers (Case C-415/93 *Bosman* [1995] ECR I-4921)

¹⁶⁸ *Van Gend en Loos*, above n 4, 12

¹⁶⁹ Pescatore, above n 18, 87

Treaty scheme in combination with the substance of that scheme as a whole thus led to the creation of constitutional doctrines.

Norms are also importantly generated by previous interpretations; in the context of EU law these being previous judgements of the Court. Given that there is now over fifty years since the seminal judgement in *Van Gend end Loos* of 1963, and even more since the Treaty of Rome signed in 1957, the EU legal order now possesses a large number of previous judgements, and thus new and still rather abstract norms. On the one hand, these new interpretations also become themselves objects of interpretation. They are after all formulated in a general and abstract way so as to be applicable to more cases than the specific case at hand (see section I.A above). On the other hand, the norms from these interpretations generated fit into, and from that point form part of, a logic puzzle – or mosaic¹⁷⁰ or collage¹⁷¹ – into which norms generated by future interpretations must also fit. Indeed, these previous judgements are referred to by the Court and cited as authority for its new interpretations. This is the case even though the Court is not strictly bound by its previous judgements, this not being out of the ordinary for an interpretive body which is at the apex of a legal system. If the Court was strictly bound by its previous judgement, it would be left with a narrower scope for it to develop the law and evolve its interpretation. This would neither be appropriate for a court whose work finds creation and evolution so close to its core nor for one whose ultimate imperative is the system of objectives established by the Treaties (as described in section IV below).

It is of interesting that both Mancini, a former judge of the Court, and Azoulai, a former référendaire, both use artistic images to describe the process of interpretation a provision of EU law in the context of norms internal to the EU legal order.

This first discloses a creative attitude towards – and indeed a need for creativity in the use of – even this most dry of interpretive techniques. It is after all the mode of interpretation closest to pure logic. In this regard, the Court does often even in fact use quasi-logic criteria such as

¹⁷⁰Mancini cited by T. Koopmans, ‘The Theory of Interpretation and the Court of Justice’, in D. O’Keeffe and A. Bavasso (eds), *Judicial review in European Union Law – Liber Amicorum in Honour of Lord Slynn of Hadley* (The Hague-London-Boston, Kluwer Law International, 2000) 45, 49

¹⁷¹L. Azoulai, ‘The Court of Justice and the social market economy: The emergence of an ideal and the conditions for its realization’ (2008) 45 CMLR 1335, 1339; Perhaps the best analogy that can be made is with arrangement of Lego bricks; while Lego bricks offer a great variety of combinations and thus scope for creativity, they nevertheless have limits on the way they may be arranged. I am grateful to Professor Michal Bobek for this analogy.

analogy¹⁷² and *a fortiori* reasoning¹⁷³. Interpretation in the normative context of a legal system where there is already a large system of norms thus bears a closer resemblance to completing a jigsaw puzzle or assembling flat-pack furniture than to say painting a picture or writing a novel.

However, on the one hand, while there is only one possible solution to a jigsaw puzzle or flat-pack furniture, there are many possible arrangements of the abstract formulae contained in the provisions and judgments which provide interpretation of those provisions within the EU legal order. Given that legal norms often express compressed and complex ideas, it is unsurprising that many different analytical linkages can be drawn between them. This arrangement of abstract norms – mosaic or collage making – is a process that gives scope for, and indeed requires of the Court, a certain creative zeal. In *Viking*¹⁷⁴ and *Laval*¹⁷⁵, which concerned industrial action and raised the issue of whether the freedom of establishment and the free movement of services conferred rights which may be relied on against a trade union or association of trade unions, brought together and attempted to arrange coherently (not always successfully as will be analysed in section C below) a diverse range of formulae in dealing with the issue at hand.

On the other hand, there are certain larger more important pieces of the mosaic that must be included in the form of seminal and principle-setting judgments of the Court that are to be included (or consciously replaced) and structure the arrangement. There is again similarity to pieces of a jigsaw in that these pieces fit together in a certain way already decided upon by the Court, albeit open to the Court in principle to depart from this arrangement if compelling reasons required it. In this regard, the interpretations that make more precise and add flesh to the substantive bones of the *traité cadre* form themselves an *arrêts cadre*, or more specifically *formulae/principes cadre*¹⁷⁶.

ii. The pre-normative context

¹⁷² Famously in Case C-281/98 *Angonese* [2000] I-4161

¹⁷³ On many occasions, for example recently in Case C-297/13 *Data I/O* [2014] ECR I-0000

¹⁷⁴ See *Viking*, n 49 above, for a full description of the fact

¹⁷⁵ Case C-341/05 *Laval* [2007] I-11845

¹⁷⁶ See Azoulai, above n 171, 1339 for a list of formulae and framework decisions of the Court

The Court refers itself to the pre-normative context that is the legislative process that led to the adoption of a norm. As described in section I.B above, the use of *travaux préparatoires* is becoming increasingly important. *Travaux préparatoires* have been used by the Court in two recent high-profile cases: in *Pringle*¹⁷⁷ in interpreting the ‘no bail-out clause’ contained in Article 125 TFEU and in *Inuit Tapiriit*¹⁷⁸ interpreting the Lisbon Treaty amendment to Article 263(4) TFEU.

iii. The normative context external to the legal system

The Court refers itself to the normative context external to the EU legal scheme, in particular to the laws of its Member States. This is often referred to as the Court taking a comparative law approach. In *Brasserie du Pecheur and Factortame*¹⁷⁹, the Court stated that it was for it ‘in pursuance of the task conferred on it by Article [19 TEU] of ensuring that in the interpretation and application of the Treaty the law is observed, to rule on such a question in accordance with general accepted methods of interpretation, in particular by reference to the fundamental principles of the [EU] legal system, and, where necessary, general principles common to the legal systems of the Member States’¹⁸⁰. Moreover, Article 6(3) TEU states that the EU must respect ‘[f]undamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, [which] shall constitute general principles of the Union’s law’.

As was demonstrated regard to the issue of whether the EU term ‘spouse’ is to be interpreted as including same-sex partners in section I.B above, reliance on Member State norms can act as a conduit for taking into account the societal context of the Member States reflected in those norms. Two particular types of societal context for which norms act as a conduit may be distinguished. On the one hand, it may be that the context of the norms of all the Member States which are taken into account on a particular issue. As was the case when the Court was searching

¹⁷⁷ Case C-370/12 *Pringle*, judgement of 27 November 2012, not yet reported

¹⁷⁸ T-18/10 *Inuit Tapiriit Kanatami and Others v Parliament and Council*, order of 6 Septmeber 2011, not yet reported

¹⁷⁹ Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur and Factortame* [1996] ECR I-1029

¹⁸⁰ *Ibid.* paragraph 27

for a definition of marriage in *D and Sweden*, recognising (at that time) it was ‘not in question that, according to the definitions accepted by the Member States, the term “marriage” means a union between two persons of the opposite sex’¹⁸¹. On the other hand, a particular social context of a Member State, reflected in its norms may be taken into account. This has particularly been so in cases involving fundamental rights and identities which are a function of basic values and structures of societies. In this regard, Article 4(2) TEU gives textual authority for the EU to respect the ‘national identities, inherent in their fundamental structures, political and constitutional’ of Member States. As the Court held in *Omega Spielhallen*¹⁸² and *Sayn-Wittgenstein*¹⁸³, ‘it is not indispensable for the restrictive measures issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected and that, on the contrary, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State’¹⁸⁴. In *Omega* it was Germany’s particularly strong protection of the right to dignity and in *Sayn-Wittgenstein* it was Austria’s abolition of the use of ‘von’ in line with their abolition of aristocracy. Such a societal context sensitive approach allows for varying fundamental rights protection between the Member States. However, as Lenaerts and Gutierrez-Fons have pointed out, this finds its limit where ‘national measures that derogate from fundamental freedoms... adversely affect the essential interests of the EU’¹⁸⁵. Such a bottom line is evident also with regard to the level of protection the Charter offers. In *Melloni*, the Court held that ‘Member States are free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the [Court], and the primacy, unity and effectiveness of EU law are not thereby comprised’¹⁸⁶.

¹⁸¹ Joined Cases C-122/99 P and C-125/99 P *D and Sweden* [2001] ECR I-4319, paragraph 34

¹⁸² Case C-36/02 *Omega* [2004] ECR I-9609 (pre-introduction of Article 4(2) TEU)

¹⁸³ Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693 (post-introduction of Article 4(2) TEU; thus ostensibly indicating the introduction of Article 4(2) TEU has not made a substantive difference in practice)

¹⁸⁴ *Omega*, above n 182, paragraphs 37 and 38 and *Sayn-Wittgenstein*, above n 183, paragraph 91

¹⁸⁵ K. Lenaerts and J.A. Gutiérrez-Fons, ‘The Constitutional Allocation of Powers and General Principles of EU law’ (2010) 47 CMLR 1629, 1632

¹⁸⁶ Case C-399/11 *Melloni*, judgment of 26 February 2013, not yet reported, paragraphs 60 and 61

iv. Societal context

The Court refers itself to the societal context – or at least to its own societal conceptions – directly at the time of judgement, even if this is done implicitly. The Court for example may be said to have a traditional image of the nuclear family. This is no more so the case than in *Carpenter* where the Court was keen to emphasise ‘Mrs Carpenter continues to lead a true family life there, in particular by looking after her husband's children from a previous marriage’¹⁸⁷. As such, Mrs Carpenter was conceived of a good wife worthy of a derivative permanent resident right. She fulfilled her function of looking after her husband’s children while he, the breadwinner, could take full advantage of the cross-border economic options available to him.

Some of the most important changes in societal context in recent years have been due to the financial crisis. *Mohamed Aziz*¹⁸⁸ concerned the repossession of a home after the mortgagor lost his job in financial crisis-hit Spain. The substantive issue of transferring title to the bank had already been decided when Mr. Aziz attempted to challenge this in the enforcement proceedings. This was barred under Spanish law. However, the Court required the creation of interim relief¹⁸⁹ so that it could go back and ensure the substantive fairness of the initial contract. Unfortunately, a change in social conditions such as a financial crisis may be autonomy reducing. However, there was already regulation present – the unfair consumer terms directive¹⁹⁰ – that had as its objective the conditions for autonomy in that it protects consumers from the dominance of businesses. Swayed by the autonomy-reducing conditions of financial crisis, the Court felt pressure to give Mr. Aziz at least a fair crack at autonomy through granting him interim relief so that he could challenge the substantive fairness of the mortgage contract.

v. Political context

A refusal of a Member State, usually of a national court, to apply EU law now appears to be out of the question. However, the Court remains sensitive to the concerns of political (and legal)

¹⁸⁷ *Carpenter*, above n 62, paragraph 44

¹⁸⁸ *Mohamed Aziz*, above n 51

¹⁸⁹ *Ibid.* paragraph 52

¹⁹⁰ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29)

systems in Member States. On a few high profile occasions such as with regard to what constitutes a trade barrier in a series of cases from *Dassonville*¹⁹¹ to *Keck*¹⁹² and the need for a cross-border element and the protection of Citizenship rights in *Zambrano*¹⁹³, *Dereci*¹⁹⁴, *McCarthy*¹⁹⁵, *Iida*¹⁹⁶ and *O & S*¹⁹⁷ the Court rows back on its previous particularly innovative interpretations under pressure from Member State political systems. Such pressure from Member State political systems will be described as an environmental factor in the evolution of EU law in section IV.B.iii below.

iv. Knowledge and understanding from other disciplines

The Court may, although not finding their way into the posited grounds of a judgement, refer itself to knowledge and understanding from disciplines other than law, particularly where legal concepts originate from other disciplines. These concepts once introduced in one area, such as competition law, feed through the rest of the Treaties, such as through to the free movement provisions, due to the Court looking at the systemic context of provisions it interprets¹⁹⁸.

It is uncontroversial to point out that the Court – like all courts – use conceptions from moral and political philosophy. After all, at the heart of the rule of law and the principle of non-discrimination is the Aristotelean formal concept of justice and equality – that like cases should be treated alike, and that different cases should be treated differently. Likewise, I will go onto argue in section IV below is that the guiding principle of the Court in the project and purpose of integration is providing the individual with the conditions for autonomy. Moreover, like many economic concepts such as economic efficiency (and party autonomy) requiring the control of cartels and monopolies as is posited in the competition provisions, grand philosophical concepts

¹⁹¹*Dassonville*, above n 24

¹⁹²*Keck and Mithouard*, above n 42

¹⁹³*Ruiz Zambrano*, above n 50

¹⁹⁴Case C-256/11 *Dereci and ors* [2011] ECR I-0000

¹⁹⁵Case C-434/09 *McCarthy* [2011] ECR I-3393

¹⁹⁶Case C-40/11 *Iida* [2012] ECR I-0000

¹⁹⁷Joined Cases C-356/11 and C-357/11 *O and S* [2012] ECR I-0000

as human dignity, freedom, democracy and equality are provided for in the EU legal system through Article 2 TEU.

Insight from economics cross-fertilises through systemic interpretation through the Treaty system. *Walrave*¹⁹⁹ and *Bosman*²⁰⁰ concerned rules in sport where the sports associations had monopoly power but were not subject to the control of the competition provisions as they were not undertakings. These horizontal application of free movement provision cases are in general very interesting for examining the interpretation of the Court, as is reflected in referring to them throughout the present analysis. They have offered creative combination of interpretive techniques. Literal interpretation began the interpretive argument by making play of the fact that addressees of Article 45 TFEU were not explicitly Member States²⁰¹. This left the door open for the cross-fertilisation through the Treaty of the ordo-liberal, and indeed morally autonomy supporting, idea of protecting individuals from monopoly power. That this was not far from the surface is confirmed by the attention Advocate General Lenz pays to the competition provisions in *Bosman*²⁰².

These last three contexts external and not directly relating to the EU legal system provide a context from which the Court may develop EU law, as has been explored in section I.B above, particularly by its evolution in line with these contexts. Combine this with a more tradition understanding of context – the surrounding norms internal to the EU legal system – and what emerges is multi-point oscillation of the judge’s eye (again, in Esser’s terminology), from fact to law to multiple contexts. This hermeneutic conception of interpretation bears similarities to insights from sociological conceptions of law. For example Scholten, relying on Geny, describes a legal system as an ‘open system’ where the ‘legal system is never finished, as the reality for which it has been made is in a process of continuous flux’²⁰³. In this vein, Mancini compared the EU legal system to an ‘unfinished mosaic [as] every new stone... must fit in the existing pattern’²⁰⁴. As has been described by Deakin drawing on the behavioural science perspective of Luhmann, such a social system is ‘operationally closed but cognitively open... they have the

¹⁹⁹ *Walrave and Koch*, above n 35

²⁰⁰ Case C-415/93 *Bosman* [1995] ECR I-4921

²⁰¹ *Walrave and Koch*, above n 35, paragraphs 16-17

²⁰² Case C-415/93 Opinion of Advocate General Lenz [1995] ECR I-4921

²⁰³ Scholten as cited by Koopmans, above n 170, 49

²⁰⁴ Mancini as cited by Koopmans, above n 170, 49

capacity to process information from the external environment in such a way as to as to make it meaningful in the context of their internal process. The legal system receives information from the social context in which its rules are applied – for example, the economy... [and then is] “coded” into juridicial form²⁰⁵.

B. The context providing objectives, the objectives providing a context

As will be described in section IV below, the Treaty scheme was used by the Court to derive an aim of integration through giving individuals rights, and therefore space for action and cross-border interaction, specifically to produce originally an internal market. This was the original meta-*telos*²⁰⁶ derived by the Court. Thus, in *Van Gend en Loos*, the Court announced itself settling on such a goal, derived from the ratio of the scheme, when it stated that ‘the objective of the EEC Treaty... is to establish a Common Market’²⁰⁷. However, this establishment of the objective in turns provides an ultimate context. In the words of Bengoetxea, MacCormick and Moral Soriano, drawing on the hermeneutic interpretive theory of Dworkin, ‘[t]he part makes sense in the context of the whole, and the whole gets its sense out of the dynamic interaction of the parts’²⁰⁸. What emerges is a system of objectives as will be described in section IV below.

The internal market is now no longer the only meta-*telos* or sub-objective in the grand project and purpose of integration. The Union now has now many sub-objectives and values. These sub-objectives and values posited in different provisions of primary and secondary Union law often clash. This makes systematic interpretation in light of a core sub-objective such as the internal market more difficult. However, it can be done and moreover it should be done in order to show the *point de départ* of the Court – the way the judges, Advocates General, and referendaires experience the legal issues that come before them. A core value of contextual interpretation is its capacity to provide coherence and stability, as will be expanded upon in section C below.

²⁰⁵ Deakin, above n 27, 674

²⁰⁶ Poiares Maduro, ‘Interpreting EU Law: Judicial Adjudication in a Context of Constitutional Pluralism’ (2008) 2 EJLS 1

²⁰⁷ Case 26/62 *Van Gend en Loos* [1963] ECR 1, 12

²⁰⁸ J. Bengoetxea, N. MacCormick and L. Moral Soriano, above n 122, 44

The golden thread that runs through the Treaty – and importantly the way it has been interpreted by the Court – in the areas of the fundamental freedoms, competition and Citizenship of the Union is the protection of the conditions of autonomy. An argument to why this is so with regard to the fundamental freedoms and Citizenship will be provided in section IV.B below²⁰⁹. However, it is important to note here with regard to autonomy's plausibility as a pre-eminent sub-objective that it is a value that insists on many other values – being committed to autonomy necessarily commits a person to value-pluralism. That opens the door for autonomy as the unifying factor in the purpose and project of integration. What cements its place as the unifying factor is the great extent with which other values aim at the conditions of autonomy – a description of this is provided in section IV.B below.

Moreover, the objection that such a great focus on the individual that this would provide does not pay close enough attention to the part played by Member States and their governments. First, they have been accounted for below as an environmental factor in the evolution of EU law. Second, EU law has since *Van Gend end Loos* been structured with the individual at its centre. The structure of a typical free movement case gives pride of place to the autonomy of the individual through the legal construct of whether his free movement right(s) have been infringed. It is the restrictor of that right – typically a Member State – who must justify that restriction with often close scrutiny in the form of a proportionality analysis.

This golden-thread then provides the way to link up the various parts of the legal system and various contexts in the project and purpose of integration. Legal norms are complex and abstract and can be fitted together in a variety of ways. The meta-teleology can thus be conceptualized as not itself a subject of this interpretive process, rather guiding the interpreter through it.

C. The use and value of contextual interpretation

Contextual interpretation provides for steadiness, coherence, and stability on the one hand and adaptability on the other. Reference to the context internal to the EU legal order usually provides for stability and reference to the context eternal to the EU legal order provides for adaptability.

²⁰⁹ Why it is so with regard to the completion provisions has been exposed by S. Grundmann, below n 252

Interpreting with regard to the context internal to the EU legal order only usually provides for stability as such a context, has been seen, can lead to creative and dramatic results.

The value of the coherence of the internal working of legal order is that the steadiness and stability allows individuals to rely on that legal order. If EU law is to provide individuals with the conditions of autonomy (see section IV) below, this implies a steadiness of commitment to this vision by the Court. Of course, individuals need to feel that their cross-border goals, projects and relationships are secure. In this sense, contextual interpretation provides for legal certainty. However also, steadiness is particularly required in the context integration through the interaction of individuals as the most integrating interaction occurs in the form of long-term project and relationships (as will be argued in section IV below).

Comparing legal rules to tools is again appropriate. As well as being a means to achieve objectives, the capacity to reach those objectives is affected by the quality of the tool. Just as textual interpretation of a provision provides for legal certainty and thus that particular rule as a tool being effective, systematic legal interpretation keeps many tools working smoothly together. It is for this reason that Lenearts and Gutierrez-Fons describe systemic interpretation as putting together the ‘different parts of the engine’²¹⁰.

The importance of this coherence – of this internal systemic consistency – to the Court is emphasised by the facts it seeks to justify its interpretation in these terms even when there is no such coherence. The Court in *Viking Line*²¹¹ cited *Schmidberger*²¹² and *Commission v France*²¹³ as support for the proposition that Article 49 TFEU could be relied on by a private undertaking against a trade union or an association of trade unions. *Schmidberger* and *Commission v France* both concerned restrictions caused by individuals acting collectively. However, crucially in those cases the free movement of goods was held to be able to be relied upon against a Member State who failed to adopt the measures to deal with obstacles²¹⁴. The Court in *Viking Line* cited the paragraphs to this effect to interpret Article 49 TFEU as being able to be relied upon against trade unions or associations of trade unions. In the words of Weatherill, this amounted to a

²¹⁰ Lenearts and Gutierrez-Fons, above n 81, 13

²¹¹ *Viking Line*, above n 49, 62

²¹² Case C-35/97 *Commission v France* [1998] ECR I-5325

²¹³ Case C-112/00 *Schmidberger* [2003] ECR I-5659

²¹⁴ *Commission v France* paragraph 30 and *Schmidberger* paragraph 57 and 62

shameless rewriting²¹⁵ *Schmidberger* and *Commission v France*. Such was the desire of the Court to make all the stones in the mosaic fit together that they removed two and repainted them.

This desire to present interpretations as being consistent with previous interpretations stems from a vision of law that routes the validity of law in its consistency. In the words of Deakin, '[e]ven incremental innovations in the law, and certainly more radical ones, depend for their validity in the internal legal order on being presented in terms which describe them as a development from the existing stock of precedents'²¹⁶.

Legal systems are of course however not closed systems. They must adapt to changes in other social systems in order to be relevant and socially accepted. The Court provides for this adaptation through interpreting EU law taking into account changing contexts external to the legal system. A good example of this is the Court adapting to the change in economic forms brought about by privatisation. In *Foster v British Gas*²¹⁷ the Court took a broad view of what counted as emanations of the state in order to hold a directive to have direct effect against the newly privatised British Gas. This taking account of the context is key to EU law effectively providing the conditions for autonomy in order to achieve cross-border action and interaction. It is in this way that if this type of contextual interpretation is done successfully, as acknowledged by a judge of the Court, the result is the construction of the material that is legal provisions 'in such a way as to correspond to the needs of social life'²¹⁸.

²¹⁵ S. Weatherill, 'The Elusive Character of Private Autonomy in EU Law' in D. Leczykiewicz and S. Weatherill (eds), *The Involvement of EU law in Private Law Relationships* (Hart Publishing, 2013) 15

²¹⁶ Deakin, above n 27, 678

²¹⁷ Case 188/89 *Foster v British Gas* [1990]ECR I-3343

²¹⁸ Koopmans, above n 170, 49 citing Wolfgang Friedmann of the sociological movement in law, the idea's origin finding itself with Geny.

IV. Teleological Interpretation

Teleological interpretation refers to techniques used to interpret provisions of law with reference to its purpose; whether that be the purpose of that particular rule, a particular group of rules, or a body of law as a whole. For our present purposes, that would correspond, for example, most locally to a particular provision of EU law such as Article 45 TFEU free movement of workers, more generally the fundamental freedoms or internal market as a whole, and on the largest scale the whole of the EU legal system.

Just as law becomes more and more specific as we move from the scale of a legal system as a whole to a specific provision of law in that legal system, so may the purpose. A particular grand objective may be served by aiming at several sub-objectives and sub-sub-objectives and so on, the technique for achieving these objectives being more and more specific provisions of law. Moreover, there may be a variety, or even a huge variety, of sub-objectives that may be aimed at in order to achieve a grand objective. In such a situation, particular sub-objectives may likely have to be chosen as the way forward for achieving the grand objective.

In this light, sub-objectives are conceived as being at the same time means. For example, if a business wishes that its employees work more efficiently (the grand objective), it may mandate that they achieve a certain production rate in a day or that they take regular breaks because it is found they tire. This is at the same time a new objective in itself and a means for achieving the grand objective of efficiency.

It must also be noted that for purposes of clarity of explanation I have here limited myself to a direct chain of objectives and sub-objectives. The resultant image is something akin to a strict Kelsenian pyramid of norms. While there is of course subjugation of objectives to others, with higher-order and lower-order objectives – indeed my analysis depends on this thought – there in fact exists a more complex relationship between objectives in a legal system. Complete descriptive accuracy would therefore require describing objectives as more or less higher order, this being a function of the interaction between objectives in all their complexity taken as a whole.

If, therefore, there is a body of law such as EU law which has a grand objective, a project, it is important to understand – for the purposes of understanding and teleological interpretation – not only the particular purpose of provisions and sub-sets of provisions, as well as the grand objective, but also the complete picture of the interaction and relation between the objectives of particular provisions and sub-sets of provisions and grander objectives. My presupposition here is that there is coherence between the purposes of provisions of EU law. This would be consistent with, and indeed demanded by, systematic interpretation of EU law (as demonstrated in section III above). As well as this being a rational reading of a system of law²¹⁹, specifically in the EU context, textual support may be garnered from the programmatic provision that is Article 7 TFEU which states that ‘[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account...’. Therefore, one can describe the more or less localised or general purposes present in a system of law such as that of the EU as a system of purposes.

This theoretical perspective provides a basis for describing the system of objectives present in the EU project at which EU law is aimed at achieving. With regard to the fundamental freedoms, the grand objective is European integration, that being the objective of the body of law as a whole. This is served by the fundamental freedoms which aim at allowing individuals space for cross-border action and interaction by ensuring them access to other Member States. As such, the fundamental freedoms provide for cross-border horizontal integration between private individuals from different Member States. A much more refined description of these objectives and their relationship will be given in sections IV.A and IV.B below.

At the most local end of the scale, teleological interpretation in EU law may therefore refer to interpretation with reference to the purpose of a particular provision of EU law. At the most general end of the scale, it may refer to interpretation with reference to the purpose of European integration (section IV. A). Between these two, at an intermediate level of purpose, lie the fundamental freedoms which aim at space for individual action and interaction, this being ultimately aimed at European integration (section IV.B).

²¹⁹ Lenaerts and Gutierrez-Fons argue that ‘[s]ystematic interpretation is based on the premise that the legislator is a *rational actor*’, above n 81, 13

A. The purpose and character of the EU and its impact on the interpretation of the Court

The competence of the EU may have greatly expanded since the Treaty of Rome in 1957. There may also have been more and more sub-objectives added to economic integration and economic and social progress achieved through liberation of private individuals – such as ‘reinforced cohesion and environmental protection’²²⁰. However, the grand purpose of European integration remains a constant, as is witnessed by the Preamble of the Treaty on European Union which starts by declaring ‘a new stage in the process of European integration’ and which finishes by resolving ‘to continue the process of creating an ever closer union among the peoples of Europe’²²¹.

The grand purpose of European integration can only be fully understood by reference to its inception. The Schuman Declaration of 1950 offered hope in the face of the despair of the peoples of a continent ravaged by two horrific wars in the first part of the twentieth century. It promised ‘a wider and deeper community between countries long opposed to one another by sanguinary divisions’. This meant the promotion of ‘peaceful achievements’, ‘economic development’ and ‘raising living standards’. That was and still remains a vision not lacking in adventure.

However, if this ultimate purpose was to be achieved, it would require, as the Schuman Declaration recognised, considerable efforts²²². An amalgamation and organisation of these efforts amount to a project. In light of this, European integration has a second sense; that of the project of European integration. A project that finds its driving force and energy in the idea of European integration as a purpose – the ‘ever closer union among the peoples of Europe’ and the peace and prosperity that this brings. In this regard, the Schuman Declaration – particularly segments here quoted – read, in the words of Weiler, as ‘ceremonial and sermon-like... grand, inspiring... [delivering] a compelling vision which has animated generations of European

²²⁰ Consolidated version of the Treaty on European Union, Preamble

²²¹ *Ibid.*

²²² The first line of the Schuman Declaration is a statement that ‘[w]orld peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it’.

idealists'²²³. This grand project with a purpose which promises peace and prosperity gives rise to – as was posited by the authors of the Treaty of Rome – a sense of ‘destiny’.

Two features may be distinguished resultant upon European integration being a project. First, such a project requires a great degree of creativity. Creativity has been mandated by the Treaties since the Treaty of Rome, and indeed before that the Schuman Declaration, up until the present day in the Treaty of Lisbon. With regard to two of the EU’s key sub-objectives, Article 3 TEU calls for the Union to ‘establish an internal market... establish an economic and monetary union whose currency is the euro’, establishing here being a creative act. The call for creativity does not only have the EU institutions (and Member States) as its addressees. Important sub-objectives such as an internal market, which presupposes individual action and cross-border interaction, can be read as, and should be read as (as will be argued in section iii below), a call for creativity from private individuals. Such a call for creativity is instructive and programmatic for the Court whose role as the interpreter of EU law, as was argued in section I above, is a very creative one.

Second, such a project stretches over time, building upon itself and requires the creative input of many. That this was so from the beginning lent systemic support by the Court in *Van Gend en Loos* that took account of the institutional architecture that was in place; ‘the establishment of institutions endowed with sovereign rights’. In this regard, perhaps the most important idea for the process of European integration present in the Schuman Declaration is that ‘Europe will not be made all at once, or according to a single plan’. The EU project – and thus interpretation of EU law – therefore evolves not only in line with the various contexts of the day (as was argued in section III above) but also building upon the work that has been done to bring the project to fruition thus far. As such, previous acts of integration legitimatise and provide the authority for further acts of integration.

Given that the EU may be described as a project with a purpose, and given that this is posited in the Treaties instead of precise substantive rules of law, it is not surprising that it has a particular importance in the interpretation of EU law. In the words of Pescatore, ‘[t]he Treaties establishing the Communities have been completely moulded by teleology... the Treaties establishing the

²²³ J. Weiler, ‘Deciphering the Political and Legal DNA of European Integration’ in J. Dickson and P. Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012) 146

European Communities are based on the concept of objectives to be obtained... In this context the teleological method is not simply one method of interpretation among others: far from it. It constitutes a method which is particularly suited to the special characteristics of the Treaties establishing the Communities'²²⁴. Such an orientation towards objectives also explains the often under-determined nature of the Treaties. They were, again described Pescatore, as no more than 'acts of mutual confidence'²²⁵ in achieving the shared objective of European integration.

As the Treaties are the source of the objectives in EU law, and as the determining of more or less general objective requires reading of the provisions of the Treaty on the required scale, in the words of Lenaerts and Gutierrez-Fons, 'teleological interpretation and systematic interpretation are often interlinked, since it is by virtue of the latter that the [Court] may identify the objectives pursued by the EU law provision in question. Put differently, it is the general scheme of the Treaties or, as the case may be, of the act of secondary EU law in question which enables the [Court] to clarify the objectives pursued by them'²²⁶. There is, as described above, a system of purposes that corresponds to the system of rules that makes up the body of EU law.

Given the creativity that teleological interpretation inspires, and given its pre-eminence in the body of law of a project and purpose, it is no surprise that teleological interpretive techniques form the foundation of many key landmark and foundational decisions of the Court. The resultant creativity present takes the Court beyond the interpretation of individual provisions of EU law into the territory of creation of new doctrines. A project and a purpose provides a strong reason for the creation of a constitutional architecture, a reason that does not exist in a body of law that does not relate to such a project and purpose, such as the national law of a particular Member State. No more is this so than with direct effect²²⁷ and primacy²²⁸ of EU law.

²²⁴ P. Pescatore, 'Les objectifs de la Communauté européenne comme principe d'interprétation dans la jurisprudence de la Cour de Justice', (Bruylant, 1972) 326-328; Tridimas similarly describes the Treaties as 'imbued by teleology' in 'The Court of Justice and judicial activism' (1996) 21 ELR 199, 205

²²⁵ Pescatore, above n 18, 19

²²⁶ Lenaerts and Gutierrez-Fons, above n 81, 25

²²⁷ The Court stated in *Van Gend en Loos* that '[t]he objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states'. The internal market is now not the only sub-objective that is present in the project of European integration; however as will be demonstrated in section B below, it remains a very important one.

²²⁸ The Court in *Costa v ENEL* stated that '[b]y creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and,

Moreover, as I argued in section I.B above, despite the rule of law being a sub-objective in its own rights – a value that binds the European polity – observance of the rule of law and making sure that there are no gaps in judicial protection often go hand in hand with integration and creation of an internal market, the former providing for the effective realisation of the latter as it enables individuals to enforce the system of rights that has established integration and the internal market. To be clear, the conception of the rule of law used to make this point in section I.B is formalist, law being described as an instrument used to carry out a task. In the words of Weiler, ‘... political messianic projects by their very nature go hand in hand with a formalist, self-referential concept of the rule of law... [t]ransnational legality helps prevent ‘free riding’ and provides stability and continuity...’²²⁹. As was argued in section I.A above, just as ‘a knife is not a knife unless it has some ability to cut’²³⁰, EU law must provide a clear space and regime of action for its subjects if it is to contribute to integration.

That said, this formal conception of the rule of law gives rise to at least one substantive principle – effective judicial protection – and indeed a fundamental right consecrated in Article 47 of the Charter – the right to an effective remedy. Through this sub-objective, teleology has continued beyond foundational doctrines to the steady creation of remedies by the Court (or more accurately requiring Member State courts to create remedies). Such protection is a ‘necessary corollary’ explained in *Brasserie du Pêcheur*²³¹ of a system of rights which are directly effective. The Court required creation of interim relief against the Crown in the UK in *Factortame*²³², Member State liability to pay compensation for breach of EU law in *Francovich*²³³, the application of that liability to the conduct of courts of last instance in *Köbler*²³⁴, relief against

more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

²²⁹ Weiler, above n 223, 150-151; Weiler argues that there is a ‘structural and conceptual continuity’ in the messianic projects of the EU and National Socialism and notes the latter was achieved through, and with full respect for, the ‘rule of law’ – albeit that the ‘European integration project is as noble as National Socialism was vile’.

²³⁰ Raz, above n 26, 225

²³¹ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* and *Factortame* [1996] ECR I-1131, paragraph 22

²³² Case C-213/89 *Factortame* [1990] ECR I-2466

²³³ Joined Cases C-6/90 and C-9/90 *Francovich* and *Bonifaci and ors* [1991] ECR I-5403

²³⁴ Case C-224/01 *Köbler* [2003] ECR I-10290

other individuals in the context of competition law in *Courage v Crehan*²³⁵, and interim relief against other individuals in *Mohamed Aziz*²³⁶.

B. The purpose and character of the fundamental freedoms and Citizenship of the Union: integration through securing the conditions for private autonomy

In terms of the system of purposes present in the EU legal system, and the Treaty scheme in particular, securing the conditions for private autonomy, the objective of the fundamental freedoms and Citizenship, is a purpose aimed at the grand objective of European integration. Together with efficiency, this may be said to be the purpose of the internal market – the fundamental freedoms and competition provisions – in general.

Creation of the internal market – creation of the conditions for the autonomy that it promotes – is a – if not still the – central sub-objective of the EU integration project. It was certainly the first objective – in *Van Gend en Loos* it was named as *the* objective of the EC Treaty²³⁷. It can no longer be said that it is the only sub-objective and thus sole ‘meta-teleology’²³⁸. Article 2 TEU lists others such as human dignity and freedom. There is also now the Citizenship chapter which is no more than a close cousin to the internal market provisions. However, in *Opinion 1/91* the Court cited it as the preeminent objective of the EEC Treaty²³⁹. Moreover, in *Karren Murphy* the Court schematically analysed ‘completion of the internal market’ as ‘the fundamental aim of the Treaty’²⁴⁰. As such, completion of the internal market is conceptualized as a sub-objective in the European project around which other sub-objectives in the Treaty revolve or to which they are subjugated.

How the fundamental freedoms aim at autonomy is therefore crucial to an explanation of the system of objectives that is contained in the EU legal order, on which the most crucial set of interpretive techniques of the Court – those of a teleological nature – are based.

²³⁵ Case C-453/99 *Courage v Crehan* [2001] ECR I-6314

²³⁶ *Mohamed Aziz*, above n 51

²³⁷ *Van Gend en Loos*, above n 4, 12

²³⁸ Poiares Maduro, above n 206

²³⁹ *Opinion 1/91* [1991] ECR I-6099

²⁴⁰ Joined Cases C-403/08 and C-429/08 *Karren Murphy* [2011] ECR I-0000, paragraph 115

The explanation of how autonomy achieves integration may be taken in three stages. First, autonomy is itself an ideal, independent of any subjugation to the rationale of integration (section i). Indeed, an ideal for which the fundamental freedoms and Citizenship secure the conditions (section ii). That said, being part of a system of purposes, securing the conditions of private autonomy is also done in such a way as to achieve the overarching ideal of European integration (section iii).

As well as being descriptively accurate of the fundamental freedoms, there are two further methodological reasons why focussing on individual action through the ideal of autonomy is the right starting point for describing the system of purposes present in EU law. First, it is concordant with the insights of anthropology which would lead to a conclusion that the legal rights a person has – and the legal regime he is subjected to – have a great effect on his constitution and thus the constitution of the society of which he is part. Second, and similarly, behavioural science has emphasised the importance of social systems such as the EU legal system in providing ‘the basis for the variety of forms of human action found in modern society and, more generally, for the coordination of complex social relations’²⁴¹ such as is necessarily the case in an integration project.

i. The ideal of autonomy

The ideal of autonomy is based on individuals deciding for themselves what course of action to take. It is the mechanism by which individuals self-create and shape their own future. It also provides a means through which economic efficiency may be achieved. As will be described in section iii below, both are crucial for achieving European integration.

A core objective of the Union is according to Article 3 TEU ‘to promote... the well-being of its peoples’. Autonomy acts as a particular conception of the well-being of people; more specifically of individuals. Therefore, the autonomy of individuals is, as well as being the objective of the fundamental freedom and Citizenship, a means to achieve the well-being of the peoples of the Member States of the Union.

²⁴¹ Deakin, above n 27, 675

Casting the fundamental freedoms and Citizenship as an instrument for the promotion of individual autonomy is by no means new. However, doing so with the aid of a theoretical framework will hopefully add definition to how the fundamental freedoms and Citizenship do so. The ideal of autonomy has been clearly stated by Raz²⁴². His conception can be used – and adapted to take account of autonomy being the chief mechanism to achieve economic efficiency – to provide a theoretical framework to describe the method and importance of the fundamental freedoms and Citizenship securing the conditions for private autonomy and how private autonomy achieves European integration:

- i) The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life.
- ii) An autonomous person's well-being consists in the successful pursuit of self-chosen goals, projects, and relationships.
- iii) In order to live this ideal, a person requires appropriate mental abilities, an adequate range of options of which they are informed and independence (the conditions for autonomy).
- iv) As the governing idea of autonomy is self-authorship, our duties towards others are for the most part to secure for them the conditions for autonomy.
- v) Securing the conditions for autonomy means securing the conditions for undistorted competition and thus economic efficiency.

To be clear, autonomy is only an ideal in an autonomy-supporting environment, paradigmatically a market economy. It is perhaps not an exaggeration to say that it is the only way a person may prosper in such an environment, where there is, for example, a great emphasis on the need to adapt to change. To declare that securing the conditions for autonomy means securing the conditions for undistorted competition brings the analysis full circle. The argument I develop in this section is to an extent skewed towards the ideal of autonomy. The importance for economic efficiency of private persons deciding for themselves what course of action to take has already been well developed by economic theory and applied in the context of EU law²⁴³. In reality, the market economy, and the economic efficiency that it is designed to engender, and the ideal of

²⁴² Raz, *The Morality of Freedom* (OUP 1986) 373 et seq.

²⁴³ See for example S Grundmann, 'Information, Party Autonomy and Economic Agents in European Contract Law' (2002) 39 *Common Market Law Review* 269, 270

autonomy are co-existent. The fundamental freedoms – as well as contributing to the European integration project through economic efficiency – provide for integration through creating the conditions for autonomy.

The ideal of autonomy may be objected to. It could be seen as an ideal where individuals are atomised and only self-interested. How could that be a model for European integration which would seem to imply a degree of (molecular) bonding, if not to a whole, Europeans at least bonding with each other? It is important to head off this criticism at an early stage. The ideal of autonomy is an ideal of self-creation, but it is also one that emphasises that value is created through the successful pursuit of goals, projects and relationships. Goals and projects in a market economy where there is a degree of specialisation will almost inevitably involve cooperation with others. These create other-orientated reasons for action, as well as reasons for action that benefit the individual as part of a collective. Relationships by their nature create other-orientated reasons for action. What is more, the ideal of autonomy requires that one consider the conditions for autonomy of others. It is of course true that one can choose, for example, a life of quiet reflection. That would indeed be compatible with the ideal of autonomy. However, for others, autonomy provides a platform for an increased space for and range of action; for increased interaction.

ii. The fundamental freedoms and Citizenship securing the conditions for autonomy

With regard to an account as to how the fundamental freedoms secure the conditions for autonomy, the starting point must be the autonomy-constituting actions for which conditions are secured. The fundamental freedoms are aimed at the economic life of persons – natural, workers and consumers etc. and legal, companies. The free movement provisions – Articles 34, 45, 49, 56 and 63 TFEU – prohibit restrictions on the free movement of goods, services, persons (workers and establishment) and capital respectively. A non-economic freedom – the free movement and residence of EU citizens, protected by Article 21 TFEU, is modelled on these economic freedoms and provide for movement and residence of individuals in Member States other than their Member State of origin. One may query the inclusion of companies as autonomy-capable

agents given that they are not, when thought of as a legal identity, people²⁴⁴. However, they are a collective vehicle through which their shareholders and stakeholders – including their employees – live autonomous lives. Moreover, as a key constituent of the economic make-up, companies taking decisions for themselves is a key contributor to economic efficiency, the co-existent and corollary of autonomy.

The core instrument in the economic life of a person to freely give effect to their goals, projects and relationships is the contract. In the words of Brownsword, '[p]aradigmatically, contract law is a licence for self-governance. It is not simply that the parties may make their own trades; more significantly, it is that they may... set their own terms of trade'²⁴⁵. Contracts facilitate 'special relationships with others; special, because contracts provide a reason for one party to treat the other's interests as superior to all others' interests in relation to the contract's subject matter'²⁴⁶. Legal provisions such as the fundamental freedoms aim at providing the conditions for economic activity, notably cross-border economic activity. This is as the sale and purchase of goods and services and the arrangement of labour and capital take place via contracts. Conversely, in the words of Davies, '[a]ny restriction on free movement – understood to mean cross-border economic activity – is therefore a restriction on the formation of contracts between domestic and foreign economic actors'²⁴⁷. If, therefore, the fundamental freedoms protect the conditions for free formation of contracts, they aim at the conditions for persons to be economically autonomous.

They do so. Let us recall the conditions for autonomy: the appropriate mental abilities, an adequate range of options of which they are informed and independence. There is nothing that the fundamental freedoms can do about the mental abilities of a person to lead an autonomous life. However, what mainly they can and do is increase a person's range of options. The fundamental freedoms are also intolerant of the actions of some that reduce the independence of others.

²⁴⁴ Although they are of course legal persons.

²⁴⁵ R. Brownsword, 'The Theoretical Foundations of European Private Law: A Time to Stand and Stare' in R. Brownsword, H-W. Micklitz, L. Niglia and S. Weatherill, *The Foundations of European Private Law* (Hart Publishing, Oxford and Portland, Oregon 2011) 161

²⁴⁶ M. Chen-Wishart, *Contract Law* (OUP 2012) 25

²⁴⁷ Davies, 'Freedom of Contract and the Horizontal Effect of Free Movement Law' in D. Leczykiewicz and S. Weatherill (eds), *The Involvement of EU law in Private Law Relationships* (Hart Publishing, 2013) 53

With regard to an adequate range in options, what is important is variety. A choice between one hundred options all the same is no choice at all. Such a choice does not allow for a degree of self-authorship as a person's choice between these hundred options all the same has no material impact upon the course that will be taken.

The core way that the fundamental freedoms provide for an increase in the variety of options is by banning national measures (mainly the measure of Member States) which discriminate against, or cause an obstacle for, goods, services, persons and capital from other Member States. More precisely, measures that impinge on private person concluding contracts with persons from other Member States in a way that would not impinge on concluding contracts with others in that Member State. The ban is far-reaching. For example, in the context of free movement of goods, the Court stated in *Dassonville* that it extends to an measures 'which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'²⁴⁸. Such measures across the freedoms include outright national prohibitions, quotas, product standards, advertising and labelling requirements, professional qualifications, and minimum capital ratios, to name but a few.

It of course includes discrete contracts, typically contracts of sale. With regard to contracts of sale, the increase in the variety of options available is usually a one-sided affair. There is for the buyer an increase in the variety of goods or services. For the seller, there is (usually) only an increase in profit, or efficiency consequent upon an economy of scale, available – although new markets may be conceived of as adding to his variety of options. Both are important for the vision of a prosperous Europe. And indeed can be indirectly autonomy enhancing in providing the resources to sell new goods and services. There is also increased competition driving efficiency. However, the immediate increase in the conditions for autonomy is for the buyer – the consumer. So, in the seminal case *Cassis de Dijon*²⁴⁹, a German law which required minimum alcohol content had the factual effect that a good freely available in France – cassis – could not be sold in Germany. Such a measure was contrary to Article 34 TFEU, the free movement of goods. The result is that the German consumer has the option to enjoy a Kir Royale, if he so wishes, as well as other alcohol products available on the German market.

²⁴⁸ *Dassonville*, above n 4, paragraph 5

²⁴⁹ Case 120/78 *Cassis de Dijon* [1979] ECR 649

There is no point in having an adequate range of options unless a person knows about them or can inform themselves about them. This is reflected in the Court's preference for information rules over outright prohibitions. In *Cassis de Dijon*, the Court made use of proportionality to hold the mandatory fixing of alcohol contents was not essential for consumer protection 'since it is a simple matter to ensure that suitable information is conveyed to the purchaser by requiring the display of an indication of origin and of the alcohol content on the packaging of the product'²⁵⁰. Information rules, therefore, not only increase the variety of options as they provide an alternative to not having a certain product on the market for example, but also inform the chooser that he has that variety of options. The choice between mandatory rules on the one hand and information rules on the other is therefore doubly stark. In the words of Grundmann, 'information primarily serves the aim of assisting parties in making decisions autonomously, while mandatory substantive rules prescribe a certain solution paternalistically and heteronomous order'²⁵¹.

This crucial role of information in providing for the conditions for autonomy, and the Court's premium on providing the conditions for autonomy, is put into sharp relief when a person is in a position where it is not possible to access information as to their options. This is particularly the case when coupled with other autonomy-reducing factors such as vulnerability (see below). In *A-Punkt Schmuckhandels*, the Court held a ban on home jewellery parties in Austria may be justified and proportionate when taking into account 'the specific features associated with the sale of silver jewellery in private homes, in particular the potentially higher risk of the consumer being cheated due to a lack of information, the impossibility of comparing prices or the provision of insufficient safeguards as regards the authenticity of that jewellery'²⁵².

Such an example also shows the intolerance of the fundamental freedoms for the abuse of dominant positions by private persons resultant, for example, on informational asymmetries. If autonomy is an ideal for all persons, there exists a duty to foster the conditions for autonomy for

²⁵⁰ *Ibid.* paragraph 13

²⁵¹ S. Grundmann, 'The Concept of the Private Law Society: After 50 Years of European Business Law' (2008) ELR 566; note however that the limit of the use of information rules is found when they no longer assist in providing the conditions for autonomy. S. Grundmann, 'Information, Party Autonomy and Economic Agents in European Contract Law' (2002) 39 CMLR 282 comments on *Cassis de Dijon* that 'the information to be given was not so complex that the other side had to incur considerable transaction and information costs. The party to be protected could process the information easily and take a meaningful decision on its basis.'

²⁵² Case C-441/04 *A-Punkt Schmuckhandels GmbH v Claudia Schmidt* [2006] I-2095, paragraph 29

others. Such a reading of the fundamental freedoms is supported by a schematic interpretation of the Treaty as a whole. It would be inconsistent for the competition provisions on one hand to curb the abuse of dominant positions while the fundamental freedoms on the other freely promote it.

An available variety of options implies the presence of both short-term and long-term options. If a person is to self-create through the pursuit of goals, projects and relationships they must be able to do so in all areas. The presence of long-term options is particularly important for providing the conditions for individuals to lead an autonomous life. Of course, if a person finds it satisfying, they can have a goal to not plan, to take every day as it comes. However, a life of self-chosen goals, projects and relationships implies options spreading out over time. It also implies the possibility of creating your own value in the form of successfully reaching goals or completing project or building ties and bonds in relationships.

It is particularly the free movement of persons and capital provisions which provide for an increase in long-term options. These provisions tend to cover more long-term and pervasive options such as to employment. The seriousness with which the free movement provisions – specifically in this instance Article 45 TFEU the free movement of workers – take the maintenance of pervasive options is demonstrated by the fact that it not only finds in its material scope measures unfriendly to entering into employment contracts in the first place, such as the law in *Commission v. Italy*²⁵³ which provided that private security work could be carried out only by Italian security firms employing Italian nationals, but also during the employment relationship. Regulation 492/11, implementing the free movement of workers, provides for equal treatment with national workers for migrant workers in respect of the terms and conditions of employment (Article 7(1)), social advantages, and tax advantages (Article 7(2)). One of the most long-term and pervasive options for a company is in which law it is constituted. Article 49 TFEU freedom of establishment provides for companies a broad freedom as to choice of law²⁵⁴. Despite a degree of EU harmonisation, company law varies significantly from Member State to Member State. Therefore, allowing companies a broad freedom of choice of law not only increases the pervasiveness of options available but also the variety. Providing private parties with a greater of

²⁵³ Case C-283/99 *Commission v Italy* [2001] ECR I-4363

²⁵⁴ Case C-212/97 *Centros* [1999] ECR I-1459

variety of options in terms of choice of laws also permeates the Court’s reasoning with regard to the core economic instrument for autonomy, the contract. As will be elaborated on below, the Court in *Alsthom Atlantique*²⁵⁵ refused to hold an Article of the French Civil Code – i.e. a national contract law – to be infringement of Article 34 TFEU partly because ‘the parties to an international contract of sale are generally free to determine the law applicable to their contractual relations and can avoid being subject to French law’²⁵⁶.

Options that one cannot feasibly take are not options at all. Therefore, providing for an adequate range options implies providing a person with the conditions that make the exercise of an option feasible. The Citizenship jurisprudence and secondary legislation demonstrate an understanding and implementation of this, particularly with regard to granting family members of EU citizens derivative rights. Recital 5 of the Preamble to the codifying Directive 2004/38/EC states, for example, that ‘[t]he right of all Union citizens to move and reside freely within the territory of Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality’²⁵⁷.

Widening the range of contractual options for persons across the Member States is of course value creating qua the contract itself providing a new important reason for action. However, the increased range of contractual options represents the facilitation of valuable option. For a company this could be access to more efficient machinery or more highly skilled employees. For a worker it is likely to be the opportunity of a more prosperous life. The free movement of workers demonstrates a particularly strong linkage between the role autonomy has for creating efficiency and prosperity for all and the well-being of the particular person concerned. In the words of Richard Plender, ‘...the articles in the founding treaty which provide for the free movement of labour were conceived in economic terms. The authors of the Spaak Report wrote of the need to make rational use of the “factors of production” in the Member States, and identified those factors as capital and manpower. They contemplated that the programme to establish freedom of movement would stimulate an increase in the volume of migration between

²⁵⁵ Case C-339/89 *Alsthom Atlantique* [1990] ECR I-108

²⁵⁶ *Ibid.* paragraph 15

²⁵⁷ Recital 5

the territories of the Members'²⁵⁸. However, this was accompanied from an early stage by an emphasis on the benefits it would bring the European individual who was a factor of production. In the preamble to Regulation 1612/68 EC on freedom of movement of workers within the Community, it is stated that the '...the mobility of labour within the [Union] must be one of the means by which the worker is guaranteed the possibility of improving her living and working conditions and promoting his social advancement, while helping to satisfy the requirements of the economies of the Member States'.

The logic of providing individuals with valuable economic options and preventing the undue interference in the cross-border autonomy of others finds potent expression in the case law of the Court concerning the horizontal direct effect of the fundamental freedoms. As Davies points out²⁵⁹, third-party interference in the contractual relations of others provides a neat conceptual explanation of when the Court will apply the fundamental freedoms to individuals and when it will not.

This focus on contractual relations also emphasises the importance of there being two contracting parties. In *Viking*, it is not only the contractual freedom of the relocating company that is being affected but also that of the potential Estonian workers who would be employed in the event of relocation. The ideal of autonomy requires the Court to pay equal concern to the autonomy of individuals from all parts of the Union – those from the Scandinavian social model who already share in the wealth created by the internal market and those from new Eastern countries who are by-and-large yet to. As Micklitz²⁶⁰ has emphasised, individuals must have a fair and realistic chance to participate in the internal market, or in philosophical conceptual terms, justice in autonomy. In such terms, there is at least an argument in favour of this most criticised of judgments of the Court.

As autonomy is aimed at successful or valuable goals, projects and relationships, it does not require the presence of repugnant options²⁶¹. Autonomy describes a way of being and as such

²⁵⁸ Richard Plender, 'An Incipient Form of European Citizenship' in F. G. Jacobs (ed), *European Law and the Individual* (Amsterdam, North-Holland Publishing Company 1976)

²⁵⁹ Davies, above n 247

²⁶⁰ H-W. Micklitz, 'Social Justice and Access Justice in Private Law' (2011) EUI Working Papers Law 2011/02 http://cadmus.eui.eu/bitstream/handle/1814/15706/LAW_2011_02.pdf?sequence=1 accessed 27 August 2014

²⁶¹ Note that such a conception of autonomy is not overly paternalistic as the ideal of autonomy requires many values – a diversity of values – with which person may choose to interact and this self-create.

does not exist independent of the values with which the autonomous person interacts²⁶².

Therefore, the fundamental freedoms permitting Member States to remove repugnant options through derogations contained in the Treaty and justifications added by the Court²⁶³, particularly where there is a fundamental rights violation, is entirely consistent with underlying objective of providing the conditions for autonomy. No better is this demonstrated than in *Omega Spielhallen*²⁶⁴ which concerned a decision by the Bonn Police Authority to ban Omega, a German company using British equipment, from running a laserdome where, through the use of laser guns fired at fixed sensory tags attached to players' jackets, it was possible to 'play at killing'. In finding the restriction on free movement to be justified, the Court noted that '... the Community legal order undeniably strives to ensure the respect for human dignity as a general principle of law' and that '... in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right'²⁶⁵.

The fundamental freedoms also aim at independence. A person is not in a position to self-create if he is coerced or manipulated into his choices. The fact that contracts are designed to enable economic autonomy explains why in the common law, for example, choices to enter into contracts which result from duress, misrepresentation, and undue influence may void or make voidable a contract. The fundamental freedoms also operate on an autonomy supporting logic when they are tolerant of Member State action specifically targeted at protecting independence and therefore the conditions for autonomy. In *Buet*²⁶⁶, which concerned a French prohibition on the doorstep selling of adult education materials, the Court was hostile to manipulation. In finding the measure to be justified and proportionate, the Court pointed out that 'there is a greater risk of an ill-considered purchase when the canvassing is for enrolment for a course of instruction or the sale of educational material. The potential purchaser often belongs to a category of people who, for one reason or another, are behind with their education and are seeking to catch up. That makes them particularly vulnerable when faced with salesmen of

²⁶²In this light, autonomy's operation in the modern world, particularly in a market economy, bears similarities with Aristotle's conception of *eudaimonia* as an 'activity of soul in accordance with complete virtue' (*Nicomachean Ethics* 1102a). Similarly, '[h]onour, pleasure, reason, and every virtue we choose indeed for themselves ... but we choose them also for the sake of *eudaimonia*, judging that through them we shall reach it' (1097b2).

²⁶³ Mandatory requirements in the public interest (*Cassis de Dijon*)

²⁶⁴ Case c-36/02 *Omega Spielhallen* [2004] ECR I-9609

²⁶⁵ *Ibid.* paragraph 34

²⁶⁶ Case 382/87 *Buet* [1989] ECR 1235

educational material who attempt to persuade them that if they use that material they will have better employment prospects'²⁶⁷. Likewise in *A-Punkt Schmuckhandels*, the Court noted 'the greater psychological pressure to buy'²⁶⁸ where jewellery sales are organised in a private setting.

If the fundamental freedoms were economic autonomy supporting, that is to say they support private parties exercising their economic autonomy through contractual formation, one would not expect the interference of the fundamental freedoms with national measures that enable private parties to exercise their economic autonomy, that is to say national civil rules, specifically national contract rules. In *Alsthom Atlantique*²⁶⁹ the national civil rule in question was Article 1643 of the French Code Civil which states that 'the vendor shall be liable for any latent defects, even if he unaware of those defects, unless he stipulates that he shall not be liable'. This is a default rule for when parties do not apportion risk for latent defects in contracts of sale. In *CMC Motorradcenter*²⁷⁰, the rule in question was the fact that in German law a fiduciary relationship between contracting parties arises from the beginning of negotiations, this entailing a duty to communicate information determinative of the decision of the party. In neither case did the Court find there to be an infringement of Article 34 TFEU. These rules applied without distinction and that was good enough for the Court. As Weatherill and Micklitz point out, these judgements demonstrate a 'clear reluctance by the Court to intervene in national civil measures by reference to primary [Union] rules... The Court is obviously not willing to understand national civil rules as barriers-to-trade'²⁷¹.

iii. The ideal of autonomy as a mode of integration

Options which involve individuals in other Member States constitute the increased variety of options for which the fundamental freedoms and Citizenship provides. It is not the fact these other individuals are situated in other Member States which *per se* constitutes the increase in variety. Rather, it the fact there is great diversity across the Member States. Presuming that at

²⁶⁷ *Ibid.* paragraph 13

²⁶⁸ Case C-441/04 *A-Punkt Schmuckhandels GmbH v Claudia Schmidt* [2006] ECR I-2093, paragraph 29

²⁶⁹ Case C-339/89 *Alsthom Atlantique* [1990] ECR I-108

²⁷⁰ Case C-93/92 *CMC Motorradcenter* [1993] ECR I-5010

²⁷¹ H-W. Micklitz and S. Weatherill, *European Economic Law* (Ashgate 1994) 370

least some individuals in one Member State prefer options involving individuals in other Member States²⁷² (those first individuals presenting an increased variety of options for those other individuals), there are individuals who are taking action and exercising their autonomy which involves individuals in other Member States reciprocally taking action and exercising their autonomy. There is, in short, intra-Union cross-border interaction between individuals. This model enlists the ‘inherent capacities for social or collective action, including a bias towards pro-social behaviour, which derive from some of the original conditions of human evolution’²⁷³ as has been noticed by behavioural and social scientists. If the ideal of autonomy is that of individual self-creation, the ideal of integration through autonomy is that of collective self-creation by individuals through acting on taking the cross-border options available to them. The ideal is one of a Europe – the project of integration – authored by individuals in their shared goals, projects and relationships. In terms of the Schuman Declaration, Europe is not being made not according to one single plan, rather according to the plans and creative efforts of the many millions that choose to take their cross-border options.

Concretely, individuals create Europe through their cross-border economic, personal, social and political interactions. With regard to economic interaction, the prime mode of interaction is as explained above contractual. Contracts of sale – mainly of goods and services – may very well lead to fulfilment of goals, the successful realisation of projects and meaningful relationships between individuals in varying Member States. This is particularly the case when the cross-border contract is for the transfer of ownership, notably in a company. However, it is mainly through longer-term contracts that these individuals successfully embark on their economic goals, projects and relationships.

For workers, the relationships with individuals from other Member States contained in the project of their employment include those with their employers and with other workers. Workers again are more than a mere factor of product, instead autonomous and relational individuals. This may include the formation of pan-European trade unions to assert their interests.

²⁷²This is likely to be the case given the result of the combination of economic and systems theory: ‘individual rationality is *situated* within the cognitive frames set by enduring institutional structures’ (Deakin, above n 27, 671)

²⁷³ Deakin citing Gintis, above n 27, 671

For firms, organisation and collaboration through contract or company law amounts to shared projects that can reduce transaction costs²⁷⁴. This is such an instance where the nexus between efficiency and autonomy is close. European regulated networks already exist for telecoms, electricity, gas and transport²⁷⁵ (which are essential material factors for multi-Member State autonomous European individuals). There however does not exist the same degree of collaboration among SMEs even though they are earmarked by the Commission as central for economic growth²⁷⁶. It does however recognise the importance of their relationships in this respect. Their long-lasting economically efficient interactions will require regulatory support in order to secure this key expansion in integration²⁷⁷.

This vision for the economic integration of the Union even finds traction with the Commission. Magnanimously it concedes that ‘the EU institutions cannot deliver an effective single market on their own. We need to rethink how to involve relevant actors... [in order to provide a more] decentralised and network-based [internal market]’²⁷⁸.

With regard to personal and social interaction, it is clear that the economic interactions engender personal interaction. Many of cross-border contracts, and particularly the longer term contracts, involve interactions far from the contractual paradigm of arm’s length dealing. There is the development of pan-European social networks and other social structures. This allows the development of trust and confidence in business relationships²⁷⁹. A core insight of Granoveter, writing from a sociological perspective, was that the ‘anonymous market of neoclassical models is virtually nonexistent in economic life and that transactions of all kinds are rife with... social connections.... [for example] many firms, small and large, are linked by interlocking directorates so that relationships among directors of firms are many and densely knit’²⁸⁰. Applying this analysis to the European business context means economic interactions knitting together business Europe personally as well as economically.

²⁷⁴ O. Williamson, ‘The Economics of Organization: The Transaction Cost Approach’ (1981) 87(3) *American Journal of Sociology* 548

²⁷⁵ S. Grundmann, F. Cafaggi and G. Vettori (eds), *From Exchange to Long-Term Network Cooperation in European Contract Law* (Ashgate 2013)

²⁷⁶ Agenda 2020 http://ec.europa.eu/europe2020/index_en.htm accessed 27 August 2014

²⁷⁷ Grundmann et al, above n 276

²⁷⁸ http://ec.europa.eu/citizens_agenda/docs/sec_2007_1521_en.pdf accessed 27 August 2014

²⁷⁹ M. Granoveter, ‘Economic Action and Social Structure: The Problem of Embeddedness’ (1985) 91(3) *The American Journal of Sociology* 481, 491

²⁸⁰ *Ibid.* 495

There is of course the opportunity for individuals (as natural persons) to form cross-border families and friendships. The result is ties and bonds with different Member States of the Union. These individuals with pan-European identities, themselves microcosms of integration, find their main protection in the Citizenship provisions. How crucial this is to integration is recognised by the Court in its firm protection of these ties and consequent identities in the ‘name cases’. In *Garcia Avello*²⁸¹, a Spanish father (Carlos Garcia Avello) and a Belgian mother (Isabelle Weber) applied to the Belgian authorities to have their dual nationality children’s surnames change to Garcia Weber, reflecting the Spanish pattern for surnames which compromise the first element of the father’s surname (Garcia) followed by the mother’s maiden name (Weber). The Belgian authorities refused. The Court looked to the principle of non-discrimination. As the Garcia Avello children were in a different situation to Belgian nationals who only held that nationality, holding joint Spanish and Belgian nationality, they had a ‘right to be treated in a manner different to that in which persons having only Belgian nationality are treated’²⁸². Here, therefore, the principle of non-discrimination can be seen to act not so much as a source for the conditions for autonomy and cross-border interaction, but rather protecting the integration resultant upon that exercise of that autonomy and cross-border interaction²⁸³.

With regard to political interaction, the conditions for autonomy and the creation of a European political space have provided the conditions for integration through transnational mobilization. The free movement of people has facilitated the movement of actors and transnational advocacy networks, empowering them through the creation of mobilization structures. As the social scientist Montoya explains, ‘the formation of transnational advocacy networks links actors in civil societies, states, and international organizations in a way that can multiply the opportunities for marginalized groups to mobilize’²⁸⁴. An acute example of how the free movement of people, and the power of according the European individual the basic of status of being an EU citizen, has facilitated the movement of actors and transnational advocacy structures is post-accession

²⁸¹ Case C-148/02 *Carlos Garcia Avello v Etat Belge* [2003] ECR I-11613

²⁸² *Ibid.*, paragraph 34

²⁸³ Note that further protection was given to integration which involved familial ties by moving to a restrictions based approach coupled with a threshold requirement of ‘serious inconvenience’ in Case C-353/06 *Grunkin-Paul* [2008] ECR I-7639 which concerned the refusal of the German authorities register a dual national (German and Danish) child’s double-barreled surname but which had been registered as the child’s name on his Danish birth certificate.

²⁸⁴ C. Montoya ‘The European Union, capacity building, and transnational networks: combating violence against women through the Daphne Program’, (2008) 62(2) International Organization 359

German-Polish LGBT activism. LGBT activism was already well established in Germany, particularly in Berlin near to Poland, which has comparatively greater LGBT visibility, awareness of LGBT issues, and more positive LGBT attitudes²⁸⁵. ‘Poland emerged from transition having had little discourse on LGBT issues prior to beginning the EU accession process... [i]n contrast, the 1960s sexual revolution and the 1980s HIV/AIDS epidemic politicized LGBT issues much earlier throughout the Federal Republic of Germany’²⁸⁶. For example, the highly publicised and illegal *Parada Równości* (Equality March) in 2005, as well as being significantly comprised of expatriate Poles and German citizens, was organised by a transnational group of activists organising events from both Poland and neighbouring Germany, many of the expatriate Poles using resources made available to them in Berlin²⁸⁷.

It is also of interest that during these marches that the protesters identified Europe with the ideal of autonomy (supporting my argument in section ii above). As an ideal of self-creation it supports many versions of the good life and requires value pluralism. Such an ideal requires individuals to be tolerant of others so as to not to interfere in their autonomous self-creation. In this regard, the protesters on the Warsaw Equality March wore t-shirts which read ‘Europa = Tolerancja’. After all, Article 2 TEU describes Europe as a society where pluralism and tolerance prevails²⁸⁸.

All in all, as Commandé argues, ‘business associations, social networks, technical standards bodies, scientific association, together with long term family relations and more transient transactions such as package holidays are building blocks of the transnational civil society in Europe’²⁸⁹.

²⁸⁵ Percentage of Poles who approve homosexuality was 15.68% in 2008, compared with 51.03% of German surveyed the same year (European Values Survey 1981-2008 (2011). Retrieved 28 April 2014 from <http://www.europeanvaluesstudt.eu/evs/data-and-downloads/>)

²⁸⁶ P. Ayoub, ‘Cooperative Transnationalism in Contemporary Europe: Europeanization and Political Opportunities for LGBT Mobilization in the European Union’ (2013) 5(2) *European Political Science Review* 279, 287

²⁸⁷ *Ibid.* 283

²⁸⁸ Among other ideas; Article 2, second paragraph TEU opines for a society where ‘pluralism, tolerance, justice, solidarity and equality between men and women prevail’.

²⁸⁹ G. Commandé, ‘The fifth union freedom: aggregating citizenship... around private law’ in H-W. Micklitz (ed), *Constitutionalisation of European private law* (OUP 2014) 61

What emerges from the cross-border interaction of individuals are a great diversity of economic, personal, social and political goals, projects and relationships. As part of self-creation, the value of integration centred on the interactions of autonomous individuals is the great scope for experimentation, ingenuity and the vitality that new combinations bring. Out of the very many cross-border visions, some survive and some do not. The goals, projects and relationships fuse continually with the most excellent ones remaining. There is after all a certain degree of competition between the visions, particularly when it comes to the economic sphere.

The successful variations feed back into the EU system of law – through the preliminary reference procedure – that helped to provide for the interactions in the first place. This forms the facts and societal context for new interpretations of the Court to make more precise and/or evolve the law of EU so as to provide the conditions for autonomy in this new setting and allow further autonomous cross-border interaction and consequent integration. Each new interpretation provides a ‘social memory’²⁹⁰ of what providing the conditions for autonomy requires. This is a model that reflects and draws upon the insight of behavioural and social scientists that ‘individual agency and social structures are mutually interdependent’²⁹¹. EU law evolves in the manner described above in sections I.B and III.A, but in response to changing conditions often brought about the autonomy enhancing nature of EU law. Adapting what has been described by Deakin, ‘[t]he EU legal system organizes the information it receives in such a way to formulate rules which are linked to each other [slightly moulding the system of objectives such as what for example the freedom of establishment would require in a particular case] and to the high-level conceptual abstraction [providing for cross-border action, interaction and therefore integration] which inform them’.

As such the teleological interpretation of the Court through providing the conditions of autonomy in changing social, political, economic, cultural etc. contexts is necessarily conceptually and structurally linked to contextual interpretation. The financial crisis played heavily on the mind of the Court in *Mohamed Aziz*²⁹² - a judgement I used to demonstrate socio-economic context above – in it creating a remedy of interim relief so that Mr Aziz had use of the substantive EU rules designed to protect his autonomy. Moreover, as LGBT individuals become

²⁹⁰ Deakin citing Luhmann 2004, above n 27, 234

²⁹¹ Deakin, above n 27, 671

²⁹² *Mohamed Aziz*, above n 51

more and more accepted in Europe, this provides a societal context in which the Court protects more and more this also valuable way of life.

The very broad and easily-triggered *Dassonville* formula as a definition of ‘measure of equivalent effect’ in the context of Article 34 TFEU led to the Court in the *Sunday Trading* cases²⁹³ to hold that national rules prohibiting retailers from opening their premises on Sunday were trade barriers for the purpose of Article 34 TFEU. The Court in *Keck and Mithouard* took note of the information being fed back through the preliminary reference mechanism that Article 34 TFEU was being used to challenge ‘any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States’²⁹⁴. This was of course insolent of the Court given that it was its broad *Dassonville* formula and confirmation of its broadness in cases such as the *Sunday Trading* cases which gave those traders the authority to challenge those rules. However, the Court does show a recognition that its decisions on Article 34 TFEU were not aimed precisely enough at the goal of providing the conditions of autonomy for individuals, in this the case option to enter into a new market. How does a measure aim at that if it, as the Court recognized in *Keck and Mithouard*, affects all relevant traders – those from other Member States and those from the home Member State – in the same manner in law and in fact as was the case in the *Sunday Trading* cases? Remember, as was explained in section ii above, all that providing the conditions for autonomy requires is that the individual has a fair and realistic chance to participate in the internal market through the taking of varied options, such as for a business the marketing of its product on the market of other Member State than its own.

The success of a variations and whether the Court chooses to protect them is determined through the system of rights and purposes which constitutes EU law depends in a large part on their coherence with other social systems, as well as the EU legal order which protects the autonomy of the individual. As such, providing for the conditions of autonomy is not the only evolutionary force which weighs on the Court while it aims at achieving the conditions for autonomy. The acceptance of EU rules in the Members States – its fit with other social systems such as national political systems – is something that the Court has in mind when it communicates its vision to the Member States, for the ultimate effectiveness of EU law depends on its acceptance.

²⁹³ Case 145/88 *Torfaen BC v B&Q plc* [189] ECR 765 and Case C-169/91 *Stoke on Trent and Norwich City Councils v B&Q plc* [1992] ECR I-6635

²⁹⁴ *Keck and Mithouard*, above no 42, paragraph 14

*Ruiz Zambrano*²⁹⁵ concerned a failed asylum seeker from Colombia living in Belgium, but benefiting from *non-refoulement* protection due to the civil war in Colombia. He and his Colombian wife had two children who were Belgian nationals. The Belgian authorities stopped him from working on finding out he did not possess a work permit. They also denied him unemployment benefit and refused him a residence permit. However, *prima facie* EU law could not offer any protection as it was a wholly internal situation. The EU law orthodox is that it only applies where there is cross-border element, thus clearly and directly providing for an increase in cross-border options for the individual. Textually, and concerning Citizenship, this would be reliance on the wording of Article 21 TFEU. The Court in *Rottman*²⁹⁶ introduced a new legal gene which was followed in *Ruiz Zambrano*²⁹⁷ – the reliance on Article 20 TFEU which contains a selection of Citizenship rights beyond free movement rights, to hold that even in the absence of a cross-border element that Article ‘precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union’²⁹⁸. The conduct of the Belgian authorities would in fact prevent such enjoyment by the Zambrano children, the Court concluded, as the parent would be forced to return to Colombia and the children ‘would [also] have to leave the territory of the Union in order to accompany their parents’²⁹⁹. This was not an experimentation which fitted well with social systems present in the national political orders. The interior ministries of Member States saw it as ‘driving a coach and horses’ through national immigration and social security policy³⁰⁰. In light of this pressure from national political systems, the Court has appeared to confine *Ruiz Zambrano* to the facts of the case. In *McCarthy*³⁰¹ for example the Court refused to extend to interpret the principle as applying to a British woman who wished to secure the entry into the United Kingdom of her Jamaican husband. In the terms of Esser’s hermeneutics, the Court oscillated its collective interpretive eye between the rule established in *Ruiz Zambrano*, the facts of the case, and the strength of view of national political orders. It found the draw towards strength of view of national political orders too overwhelming. Switching back to the

²⁹⁵ *Ruiz Zambrano*, above n 50

²⁹⁶ Case C-135/08 *Rottman* [2010] ECR I-1449

²⁹⁷ *Ruiz Zambrano*, above n 50, paragraphs 42-43

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid.* paragraph 44

³⁰⁰ I. Solanke, ‘Using the Citizen to Bring the Refugee in’ (2012) 75 *MLR* 101, 108-110

³⁰¹ *McCarthy*, above n 195; see also *Dereci, Iida* and *O & S* also limiting the *Ruiz Zambrano* genetic mutation, above n 50 et seq. xx-xx

terms evolutionary theory, it thus appears that this environmental factor prevented the development of this legal-genetic variation.

In the economic sphere, the vision bears resemblance to that of Collins who does not see European private law built through top-down codification but bottom-up, by and through the economic and social actors as well as their organisations³⁰². At a more general level, it is an argument against the existence of *finalité* in the Court's vision. In this regard, Walker has opined for an EU 'where the emphasis is on an inclusive, secular and adjustable process of political community-building rather than on the handing down and entrenchment of a sacred text'³⁰³. My argument in this section has been, in Walker's terms, that entrenchment of the sacred text *is* an inclusive, secular and adjustable process of community-building.

In this regard, the interactions are as such supported by the private enforcement by individuals of EU law rights (bestowed upon them direct effect). Individuals vindicate worthwhile options for themselves and others, for themselves and others to interact and integrate. In the conception of autonomy driven integration built here, the quotation from Lecourt should read 'when an individual appears before the judge [of a national court] to defend rights she derived from the Treaties, that individual does not only act in her own interest, she immediately becomes an auxiliary agent of *other individuals*'³⁰⁴.

iv. Integration through autonomous interaction: no sense of the 'whole'?

The model of European integration built here, while not atomising, in focussing on projects, goals, and relationships of individuals, emphasises the importance of the microcosm over the macrocosm. Geremek famously opined '[w]e have Europe. Now we must make Europeans'³⁰⁵. That is not quite right. We have Europe. We also have Europeans. However, and understandably so, their loyalties lie with their cross-border projects and relationships, rather than the

³⁰² H. Collins, *The European Civil Code: The Way Forward* (CUP 2008) 7

³⁰³ N. Walker, 'After Finalité? The Future of the European Constitutional Idea' (2007) EUI Working Paper No. LAW 2007/16, 16 <http://cadmus.eui.eu/bitstream/handle/1814/6864/LAW-2007-16.pdf?sequence=1> accessed 27 August 2014

³⁰⁴ Emphasis added – the original reads '...an auxiliary agent of the Community'. Lecourt, above n 115

³⁰⁵ B. Gemerek, *Le Monde* 18 February 2004

background consideration of the EU which facilitates those cross-border projects and relationships. These Europeans who exercise their autonomy are virtuous. Weiler has portrayed the European individual as individualistic and value-orientated, who thus lacks in virtue³⁰⁶. The successful European individual requires loyalty to his projects, determination in his goals, kindness in his relationships and bravery in leaving his home when taking a cross-border option. It is true the experience of the European individual requires of him particular virtues. However, lacking in virtue he is not. The autonomous person is a virtuous person, and the European individual being an autonomous person is therefore virtuous.

Perhaps the model of integration will change and the meta-teleology will switch from integration through autonomy to integration through some other sub-objective that will bind Europeans not only to each other but also to the European purpose and project. There were hints at this in *Ruiz Zambrano*. The Court argued that the *Zambrano* children would have to ‘leave the territory of the Union’³⁰⁷. This represented a discursive shift from framing issues in terms of the territories of Member States³⁰⁸. However, as was described above, this experimental attempt of the Court was snuffed out by environmental factors. More promising is the building of pan-European collectives of individuals as described by Commandé and Collins. They perhaps have the capacity to engender a sense of grander community that seems to currently lack in the context of the autonomy ideal. European individuals may in time become attached to the autonomy ideal and thus through it attached to Europe as whole – it is after all possible to think of it promoting a private law *society*. Whatever the case may be, through the system of objectives that it guards³⁰⁹, through its creative force, and through its oversight of the evolution of integration – that is to say its interpretation – the Court will play a central role.

³⁰⁶ J. Weiler, above n 223, 158 developed in a recent lecture at the EUI, Florence.

³⁰⁷ *Ruiz Zambrano*, above n 50, paragraph 44

³⁰⁸ I am grateful to Professor Loic Azoulay for this idea.

³⁰⁹ Despite the fact that it is the Commission which is often referred to as the ‘guardian’ of the Treaties.

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