# RETHINKING THE STRUCTURE OF FREE MOVEMENT LAW: THE CENTRALISATION OF PROPORTIONALITY IN THE INTERNAL MARKET

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*This article analyses three important developments in EU free movement law from the perspective of the structure of free movement law. Each of these developments – market access, horizontal direct effect and the assimilation of justifications – is caused by structural changes in the application of the free movement provisions. Firstly, the Court of Justice of the European Union has used 'backwards reasoning', which means that the Court no longer maintains the consecutive order of the structure. Moreover, the Court has increasingly merged what were previously distinct stages of inquiry in free movement cases. The result is that the proportionality test has become the most likely tool to solve free movement cases. This process of centralisation can be explained by the Court's aim to guarantee the* effet utile *of the free movement provisions. However, the centralisation of proportionality has a number of important consequences. Ultimately, the (almost) exclusive reliance on proportionality to solve free movement cases does not improve the functioning of the internal market. Therefore, the Court should also develop and rely on the other pillars of the structure of free movement law.*

**Keywords:** Free movement law, market access, horizontal direct effect, justifications, proportionality

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## I. INTRODUCTION

Free movement law has been built on solid foundations. Because of the open-ended nature of the Treaty provisions on free movement, the foundations of free movement law have primarily been developed through the case law of the Court of Justice of the European Union ('the Court'). They have resulted in what could be described as 'the structure of free movement law' – a framework of assessment that is used to assess free movement cases. In comparison with other sub-disciplines in EU law, it is this structure that makes free movement law such a clear and accessible subject. The structure is not only helpful to teach free movement law, but it is also used in practice. For example, in its preliminary reference in *Viking*,[1] the English Court of Appeal asked a number of questions that were structured precisely in accordance with the structure of free movement law.[2] This shows that the structure of free movement does not only facilitate students in studying free movement law, but that it is also applied by lawyers and courts in practice Nevertheless, free movement cases are rarely analysed from the perspective of their structure. Such a structural approach is inevitably rather technical. However, this exercise in 'dissection' shows how various developments in free movement law are connected and how they lead to the same result. The structure of free movement law is a technique that is used by the Court to protect the functioning of the internal market. Transformations in this structure show how the Court has changed its approach to guarantee the *effet utile* of the free movement provisions. As such, a structural approach to

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[1] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP*, EU:C:2007:772.

[2] Ibid, para 27.

analysing free movement cases reveals the Court's vision of how free movement should be protected in the internal market.

The structure of free movement law has four different pillars. These pillars constitute four separate stages of inquiry. Furthermore, they are consecutive and cumulative. Therefore, a party can only successfully establish a breach of the free movement provisions if each of the four stages is passed. First of all, cases have to come within the *scope* of the free movement provisions. This normally means that cases must have a cross-border element. Secondly, the free movement provisions have to be *directly effective* – a party who is claiming that their free movement rights have been breached has to be able to rely on the free movement provisions against the defendant. The third step is to see if there has been a *restriction* on free movement. Fourthly, a restriction can still be *justified* by reference to one of the express derogations in the Treaty on the Functioning of the European Union ('TFEU') or one of the public interest requirements developed in the case law of the Court. Before measures are justified, it has to be shown that they comply with the principle of proportionality. It is within this structure that free movement cases are solved.

The starting point of this article is that developments in the Court's case law make it necessary to rethink the structure of free movement law. The argument is based on two observations. Firstly, there is an increasing amount of interaction between what were previously distinct stages of inquiry in free movement cases. Secondly, the consecutive order of the structure of free movement law is no longer maintained. The result is that the assessment of the existence of a restriction has an impact on the question of whether a case comes within the scope of free movement law in the first place. Similarly, the question whether there is a restriction on free movement might determine whether the free movement provisions have direct effect. The Court has increasingly applied this 'backwards' reasoning, which challenges the consecutive order of the structure. As a consequence, the four pillars of the structure of free movement law have become more merged.

This process of interaction will be analysed to explain three important developments in free movement law. These developments – or

transformations – have been discussed extensively over the last decade or so.[3] However, an analysis from the perspective of the structure of free movement law is able to show that the three developments are in fact interconnected and, moreover, that they lead to the same result. Firstly, the interaction between scope and restriction has resulted in a market-access approach in free movement law. Secondly, the interaction between direct effect and restriction has brought about an increasing number of cases in which the free movement provisions were held to have horizontal direct effect. Thirdly, the interaction between restriction and justification has resulted in the assimilation of the express derogations in the Treaty and the public interest justifications developed in the Court's case law. As a consequence, the nature of a restriction is no longer relevant for the kind of justifications defendants in free movement cases can rely on.

The next step is to show that all three developments lead to the same result: they make the proportionality test the most likely tool to solve free movement cases. The Court is increasingly confident to make the proportionality test decisive. The underlying reason for this development is that the Court believes that the proportionality test is the most suitable tool to guarantee the effective application of the free movement provisions. This process of centralisation of proportionality has important consequences, which will be analysed in the final part of the article. The focus will not be on

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[3] See, for example, on market access: Jukka Snell, 'The Notion of Market Access: a Concept or a Slogan?' (2010) 47 Common Market Law Review 437; Gareth Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law' (2010) 11 German Law Journal 671; Max Jansson and Harri Kalimo, 'De Minimis Meets 'Market Access': Transformations in the Substance – and the Syntax – of EU Free Movement Law?' (2014) 51 Common Market Law Review 523; on horizontal direct effect: Julio Bacquero Cruz, 'Free movement and Private Autonomy' (1999) 24 European Law Review 603; Christoph Krenn, 'A Missing Piece in the Horizontal Effect 'Jigsaw': Horizontal Direct Effect and the Free Movement of Goods' (2012) 49 Common Market Law Review 177; on the (potential) assimilation of justifications: Eleanor Spaventa, 'On Discrimination and the Theory of Mandatory Requirements' (2002) 3 Cambridge Yearbook of European Legal Studies 45; Laurence Gormley, 'Inconsistencies and Misconceptions in the Free Movement of Goods' (2015) 40 European Law Review 925. More precise references can be found below.

the *substance* of the proportionality test,[4] but rather on the *role* that proportionality plays in the re-thought structure of free movement law. It will be argued that there is a risk in relying too much on proportionality to determine the outcome of free movement cases. The Court should not be afraid to explore its complete free movement toolbox and should also rely on other tools in the structure of free movement law (such as scope, direct effect and justification) to solve free movement cases. This variation in case-solving strategies will ultimately improve the functioning of the internal market.

## II. The Structure of Free Movement Law

Before the processes of interaction in the structure of free movement law can be analysed, it is necessary to set out the structure of free movement law as it has been developed by the Court. The approach will be horizontal across the various freedoms, although particular features of certain free movement provisions will be highlighted.

First of all, the free movement provisions are only applicable if cases come within their scope. The Court has developed three main mechanisms to find that cases fall outside the scope of the free movement provisions. The first is the 'wholly internal situation' rule.[5] The free movement provisions do not apply to situations that are internal to one Member State. If all aspects of a case relate to domestic matters, the cross-border element, which is necessary to justify the application of the free movement provisions, is missing. This approach has been used primarily for cases concerning the free movement of

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4 See Takis Tridimas, *General Principles of EU Law* (Oxford University Press 2006), Chapter 5; Nicholas Emiliou, *The Principle of Proportionality in European Law* (Kluwer 1996).

5 Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law* (Oxford University Press 2013), Chapter 4. See also Niamh Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move On?' (2002) 39 Common Market Law Review 741; Camille Dautricourt and Sébastien Thomas, 'Reverse Discrimination and Free Movement of Persons under Community Law: All for Ulysses, Nothing for Penelope?' (2009) 34 European Law Review 433. The rationale of the rule was strongly criticised by Advocate General Sharpston in her Opinion in Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government*, EU:C:2007:398.

persons.[6] Secondly, the free movement provisions do not apply to national rules if their effect on free movement is 'too indirect and uncertain'.[7] This is another way of saying that cases lack a sufficient cross-border element for the free movement provisions to be applicable.[8] Because the focus is on the effect of a national rule, it could be argued that this approach already combines the concepts of scope and restriction.[9]However, it is clear that this approach focusses on the scope of the free movement provisions. The best way to show this is to analyse the third mechanism which the Court has developed only for goods. This mechanism is the so-called *Keck* proviso.[10] Rules which affect the circumstances under which products can be sold fall outside the scope of Article 34 TFEU, as long as they apply to all relevant traders and do not discriminate in law or in fact against products coming from another Member State.[11] If the *Keck* proviso is fulfilled, a case falls outside Article 34 TFEU because the effect on cross-border trade is too indirect or uncertain.[12] Because there is no *de minimis* rule for goods, such cases fall outside the scope of Article 34 TFEU altogether. Therefore, relying on the concept of remoteness is another way of saying that cases fall outside the scope of the free movement provisions.[13] This confirms that national rules whose effect

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6 Case 175/78 *The Queen v Saunders*, EU:C:1979:88; Case C-299/95 *Friedrich Kremzow v Republik Österreich*, EU:C:1997:254. See Síofra O'Leary, 'The Past, Present and Future of the Purely Internal Rule in EU Law' (2009) Irish Jurist 13.

7 Eleanor Spaventa, 'From Gebhard to Carpenter: Towards a (Non)Economic European Constitution' (2004) 41 Common Market Law Review 743. See also Eleanor Spaventa, 'The Outer Limits of the Free Movement of Persons: Some Reflections on the Significance of Keck, Remoteness and Deliège', in Catherine Barnard and Okeoghene Odudu (eds), *The Outer Limits of European Union Law* (Hart Publishing 2008) 245-272.

8 Case C-69/88 *H. Krantz GmbH v Ontvanger der Directe Belastingen and Netherlands State*, EU:C:1990:97 (goods) and Case C-190/98 *Volker Graf v Filzmoser Maschinenbau GmbH*, EU:C:2000:49 (workers).

9 See Nic Shuibhne (n 5) Chapter 4. See also Catherine Barnard, 'Fitting the Remaining Pieces into the Goods and Persons Jigsaw?' (2001) 26 European Law Review 35, 52.

10 Case C-267/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard*, EU:C:1993:905.

11 Ibid, para 16.

12 Ibid, para 17.

13 Gormley (n 3) 925, 936.

on free movement is 'too indirect and uncertain' also fall outside the scope of the free movement provisions.[14]

If a case falls within the scope of the free movement provisions, the next step is to determine if the free movement provisions can be relied on against the defendant. In other words, are the free movement provisions directly effective against the defendant? The orthodox approach of the Court has been to hold that the free movement provisions have vertical direct effect and can be relied on against the State. However, they do not have horizontal direct effect. As a result, private parties are in principle not directly bound by the free movement provisions. This can most clearly be seen for goods, where the Court has always held that States are bound by the free movement provisions, while the conduct of private parties should be assessed under the competition law provisions. This statement does not adequately reflect the way the case law on direct effect has developed for the other freedoms. From early on in its case law, the Court has extended the application of the free movement provisions to private parties who were engaged in collective regulation and who exercised legal autonomy.[15] Through this approach the free movement provisions have been applied to organisations such as the UCI and the UEFA.[16] However, the Court has never explained what is meant by 'collective regulation' and 'legal autonomy'. Finally, there are some examples where the Court held that the free movement provisions were applicable to private parties in a purely horizontal situation even without a collective element. The best example is *Angonese*,[17] in which Article 45 TFEU was applied to a horizontal dispute between a job applicant and a private employer. As a result, Article 45 TFEU has horizontal direct effect in employment situations,[18] while Article 34 TFEU remains a 'fortress' of vertical direct effect only.[19]

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14 Thomas Horsley, 'Unearthing Buried Treasure: Art. 34 TFEU and the Exclusionary Rules' (2012) 37 European Law Review 734, 741.

15 Case 36/74 *Walrave and Koch v Union cycliste internationale*, EU:C:1974:140.

16 Case 36/74 *Walrave and Koch* (n 15), and Case C-415/93 *Union royale belge des societés de football association ASBL v Jean-Marc Bosman*, EU:C:1995:463 (UEFA).

17 Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, EU:C:2000:296.

18 Alan Dashwood, 'Viking and Laval: Issues of Horizontal Direct Effect' (2008) 10 Cambridge Yearbook of European Legal Studies 525.

19 Krenn (n 3).

Thirdly, the Court proceeds with the question of whether free movement has been restricted. Is there a *prima facie* breach which has to be justified by the Member State? Again, three main approaches to identify a restriction can be distinguished. First, the Court has used a discrimination test. This test is primarily used for persons – also because discrimination is explicitly referred to in Article 45 TFEU.[20] Both direct and indirect discrimination are prohibited. Direct discrimination means that there is a difference in treatment between national workers and non-national workers.[21] The discrimination is visible in how the rule has been formulated – as such, it is often called discrimination in law. With indirect discrimination, the formulation of the rule is neutral and does not appear to make a distinction between national workers and non-national workers. However, the effect of the rule is such that it is more difficult for non-national workers to comply with it.[22] This is called discrimination in fact. For goods, the Court does not use an approach based on discrimination. It uses the concepts of distinct and indistinct applicability. However, in essence, these concepts are the equivalent of direct and indirect discrimination for goods. A second approach which has been developed by the Court to identify a restriction is the so-called obstacle approach. Obstacles are national rules that make the exercise of free movement rights more difficult or less attractive. It is not strictly necessary to establish discrimination – in fact, the obstacle approach is also applied to genuinely non-discriminatory national rules.[23] However, because the test does not require an assessment of whether there is discrimination, it is also possible that discriminatory rules are classified as obstacles. In the analysis below, it will be shown that this has an impact on the interaction between restriction and justification. The application of the obstacle test is quite flexible and it is relatively easy to establish a restriction.[24] Thirdly, a restriction on the free movement of goods can be established

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20 In *Bosman* (n 16), the Court held that non-discriminatory obstacles to free movement of persons were also a restriction of Article 45 TFEU.

21 See Catherine Barnard, *The Substantive Law of the EU* (4th edn, Oxford University Press 2013) 279.

22 See, for example, Case C-379/87 *Anita Groener v Minister of Education*, EU:C:1989:599.

23 Case C-415/93 *Bosman* (n 16).

24 Barnard (n 21) 281-282.

through the *Keck* proviso. Selling arrangements fall outside the scope of Article 34 TFEU as long as they apply to all relevant traders and they affect domestic and foreign products in the same manner. Therefore, *Keck* appears to rely on a discrimination test to bring national rules on selling arrangements back in the scope of Article 34 TFEU on the basis of the existence of a restriction. This is a good example of 'backwards' reasoning by the Court. The identification of a restriction brings the case back in the scope of free movement law. The next section will analyse how this interaction has resulted in the development of a market access approach.

Fourthly, once a restriction on free movement has been established, the burden of proof is on the defendant to show that this restriction can be justified. The justification stage consists of two steps: first, the defendant has to show that there is a ground of justification. Second, the measure has to be proportionate. The proportionality test assesses whether the measure is suitable and necessary.[25] The suitability test assesses the connection between the tool chosen and the aim to be achieved – the ground of justification. Is the measure taken suitable to achieve this aim? The necessity test focusses on the question whether any alternative measures could have been adopted that would have been less restrictive of free movement. As regards the grounds of justification that can be relied on, for each free movement provision a corresponding list of justifications has been included in the TFEU. These justifications are called express derogations. Because of the exhaustive nature of the Treaty derogations, and the fact that most of them were already included in the Treaties in the 1950s, the Court has developed a second case law-based category of justifications that can be used to justify restrictions on free movement. In *Cassis de Dijon*,[26] the Court held that indistinctly applicable restrictions on free movement of goods could also be justified on the basis of so-called 'mandatory requirements'.[27] They are a non-exhaustive list of good reasons that Member States – or private parties – can rely on to justify restrictions on free movement. It is always open to a Member State to

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[25] See Takis Tridimas, 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny', in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999).

[26] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* ('*Cassis de Dijon*'), EU:C:1979:42.

[27] Ibid, para 8.

claim that a particular policy consideration constitutes a mandatory requirement. However, it is ultimately for the Court to assess whether a mandatory requirement should be accepted under EU law. The most commonly relied on mandatory requirements are consumer protection and environmental protection. This category of justifications has now also been extended to the other freedoms, where mandatory requirements are referred to as public interest requirements or objective justifications. The basic rule remains that these justifications can only be used to justify restrictions that are indirectly discriminatory, indistinctly applicable or obstacles. Rules that make a direct distinction between domestic and foreign products, or rules that discriminate directly on the ground of nationality, cannot be justified by mandatory requirements. The Treaty derogations are the only justifications that can be relied on to justify such restrictions. The distinction becomes more difficult to maintain if directly discriminatory rules are classified as obstacles by the Court. This could lead to interaction between restriction and justification. This process of interaction will be analysed below.

## III. Three Developments in Free Movement Law

### *1. Market Access: Interaction between Scope and Restriction*

In this section, three developments will be analysed to illustrate the changes that have taken place in the structure of free movement law. Again, the approach will be horizontal. Nevertheless, to be able to make a convincing case that these transformations have taken place across all freedoms, for each section at least two cases that concerned different freedoms will be discussed.

In the last two decades, the Court has increasingly made use of a market access test to identify restrictions on free movement. The concept of market access is not entirely new to EU law, since it has already been used in competition law.[28] In free movement cases, the Court appears to use the market access test to establish restrictions on the free movement provisions – national rules that prevent or hinder market access are considered to restrict free movement. However, market access is more than just the identification of a restriction. It has become a concept through which the

[28] Snell (n 3) 438-440.

Court is able to combine the issue of the scope of free movement law with the issue of a restriction on free movement. Therefore, market access is not solely about a restriction, but also incorporates the determination of whether a case falls within the scope of free movement law. This determination is based on the identification of a restriction on market access. As such, market access is an example of a tool whereby the Court uses 'backwards' reasoning – the Court starts with the identification of a restriction and uses its finding on that issue to bring a case within the scope of free movement law. The problem with this market access approach is that it has been applied in such a way that it does not only apply 'backwards' reasoning from restriction to scope, but that it also fuses the two concepts in such a way that they can no longer be distinguished. The result of this process of (con)fusion is that the Court's reasoning has become less clear and less predictable.[29]

The 'father' – or 'mother' – of the market access test is the Court's judgment in *Keck*. This might come as a surprise to some, because *Keck* is generally considered as a case that attempted to limit the scope of application of Article 34 TFEU. The Court tried to do this by creating a new category of national rules – selling arrangements – that fell outside Article 34 TFEU. However, *Keck* was a balancing exercise between two different interests. On the one hand, the Court wanted to take into account the concerns of the Member States that were worried about the increasing number of national rules which were challenged under the free movement provisions. On the other hand, the Court did not want to create a regulatory safe zone for Member States, in which they could adopt rules that could not be reviewed by the Court. The result was a compromise that led to the *Keck* proviso. Selling arrangements are outside Article 34 TFEU if they apply to all relevant traders and if they affect domestic and foreign products in the same manner.

The *Keck* proviso already represented a new kind of interaction between scope and restriction: the identification of disparate treatment would bring a case into the scope of Article 34 TFEU. As such, the *Keck* proviso for the first time established a test that went from restriction to scope. This is an example of the Court's 'backwards' reasoning. Nevertheless, in *Keck*, the two were still regarded as separate concepts – only if there is disparate treatment are selling arrangements brought back in the scope of Article 34 TFEU. There has

[29] Snell (n 3) 470; Jansson and Kalimo (n 3) 557.

always been discussion about the precise nature of the second *Keck* proviso.[30] In theory, the test requires the claimant to show that a selling arrangement has a negative effect on foreign products, and that there is indirect discrimination. However, in practice, the second proviso has been applied as a market access test by the Court.[31] This can clearly be seen in *De Agostini*,[32] which concerned a Swedish prohibition of advertisements aimed at children under the age of 12. An Italian publisher of children magazines about dinosaurs was prevented from showing commercials aimed at young children on Swedish television. This was a selling arrangement that complied with the first *Keck* proviso, as Swedish magazines could not show commercials aimed at young children either. It was less clear whether the prohibition on advertising also complied with the second proviso. De Agostini claimed that 'television advertising was the only effective form of promotion enabling it to penetrate the Swedish market'.[33] The Court held that, if this were true, the prohibition would not affect domestic and foreign products in the same manner, and there would be a restriction of Article 34 TFEU. This assessment had to be made by the national court on the basis of the evidence provided to it.[34] As a consequence, market access has become a criterion for the *Keck* proviso, but whether market access is restricted remains a factual assessment to be made by the national court. Furthermore, the two concepts of scope and restriction remain separate.

Market access has moved on since then. In *Commission v Italy (Trailers)*[35] and *Mickelsson and Roos*,[36] the Court for the first time introduced market access as

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30 Daniel Wilsher, 'Does Keck Discrimination Make Any Sense? An Assessment of the Non-Discrimination Principle within the European Single Market' (2008) 33 European Law Review 3; Stefan Enchelmaier, 'The Awkward Selling of a Good Idea, or a Traditionalist Interpretation of Keck' (2003) 3 Yearbook of European Law 249; Stephen Weatherill, 'After Keck: Some Thoughts on How to Clarify the Clarification' (1996) 33 Common Market Law Review 885.

31 Barnard (n 9) 44.

32 Case C-9/98 *Konsumentombudsmannen v De Agostini*, EU:C:1997:344.

33 Ibid, para 43.

34 Ibid, paras 44-45.

35 Case C-110/05 *Commission v Italian Republic*, EU:C:2009:66.

36 Case C-142/05 Åklagaren v Percy Mickelsson and Joakim Roos, EU:C:2009:336.

a self-standing test to establish a restriction of Article 34 TFEU.[37] It did so in the context of so-called bans or restrictions on use – national rules that did not ban the import of certain products, but that banned or restricted their use. Again, the Court reasoned from restriction to scope. However, the way this was done differed from the approach under the *Keck* proviso, since there was no clear distinction anymore between the two stages of inquiry.

*Mickelsson and Roos* concerned a Swedish ban on using jet skis. They could only be used on general waterways and on waters that had specifically been allocated by the Swedish authorities. At the time of the case, no waters had in fact been allocated. Therefore, it was very difficult to use jet skis in Sweden. The claimants argued that this ban constituted a restriction on the free movement of goods. The Court agreed. It held that this ban had 'a considerable influence on the behaviour of consumers'.[38] This may 'affect the access of that product to the market of that Member State'.[39] The Court accepted that the question of whether the Swedish rule had a disparate impact on foreign products should be answered by the national court. However, it held that rules which ban or greatly restrict the use of certain products have the effect of hindering access to the market and constitute a restriction on the free movement of goods.

Interestingly, while the Court left the assessment of whether a national rule banned or greatly restricted use to the national court, it automatically followed from such a finding that the rule hindered market access. This automatic link merges the concepts of scope and restriction. With the *Keck* proviso, it is the finding of a restriction that brings a case back in the scope of free movement law, but with this market access approach it is the presumption of a restriction on the basis of which a case is held to come within the scope of free movement law. The market access test is applied *in abstracto*.[40] The Court did not investigate where the jet skis in this case had been produced. The Court did not investigate the number of imports of jet

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37 See also Eleanor Spaventa, 'Leaving Keck behind? The Free Movement of Goods after the Rulings in Commission v. Italy and Mickelsson and Roos' (2009) 34 European Law Review 914.

38 Case C-142/05 *Mickelsson and Roos* (n 36), para 26.

39 Ibid.

40 Davies (n 3).

skis into Sweden. Mickelsson and Roos were both Swedish citizens who had used their jet skis on Swedish waters. As a result, the cross-border element was based on the abstract finding of a restriction on market access of parties that were not involved in the case. No assessment had to be conducted by the national court. The result is that market access has simply become a technique – or slogan[41] – to fuse the concepts of scope and restriction in such a way that Member States are put in a position where they have to justify restrictions on free movement.

The argument that market access is a technique rather than a test based on an economic or market assessment can most convincingly be made by making a link to the other freedoms. *Carpenter*[42] is often referred to. This case concerned an English service provider who claimed that his right to provide services in other Member States would be restricted if his wife, who was not an EU citizen, were deported to her home country. Again, the Court used an abstract finding of a restriction – the possibility that Mr Carpenter would have to travel to other Member States to provide services there – to bring the case within the scope of the free movement provisions. Although the language of market access was not used, the technique adopted by the Court was essentially similar.

This technique has even found its way into the Court's case law on citizenship. *Ruiz Zambrano*[43] constitutes the 'citizenship equivalent' of market access. A Colombian family was at risk of being deported from Belgium. The two children had been born in Belgium and had Belgian nationality. They had never left the Belgian territory. The result was that it was difficult for the family to claim that their case came within the scope of free movement law, since there was no cross-border element. The Court managed to find a way around this by focussing on the 'genuine enjoyment of the substance'[44] of the children's free movement rights under Article 20 TFEU. If the family were deported from Belgium, the children would not be able to exercise their free movement rights to move freely between EU

41 Snell (n 3).

42 Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department*, EU:C:2002:434.

43 Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi*, EU:C:2011:124.

44 Ibid, para 42.

Member States. This would deprive them of the genuine enjoyment of their rights.

Although *Carpenter* and *Ruiz Zambrano* were strongly influenced by the Court's aim to protect the right to family life,[45] the technique used in both cases is similar to the market access test. In both cases, the Court reasoned from restriction to scope, and there was no clear distinction between the two steps. The burden of proof then shifted to the Member State to show that the restrictions could be justified and were proportionate.

### *2. Horizontal Direct Effect: Interaction between Direct Effect and Restriction*

In the last decades, the free movement provisions have increasingly been applied to the actions of private parties. While there has never been much doubt that the free movement provisions had vertical direct effect, the extent to which private parties were also bound by them has been a topic of significant debate.[46] Already in 1974, the Court held in *Walrave and Koch* that the free movement provisions did not only apply to State measures, but that they also applied to actions of private parties that were 'aimed at regulating in a collective manner gainful employment and the provision of services'.[47] The Court based this on the need to preserve the effective and uniform application of the free movement provisions.[48] In some Member States certain activities were regulated by public authorities, while in other Member States these activities were regulated by private parties.[49] The actions of both

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45 Spaventa, 'From Gebhard to Carpenter' (n 7) 767-768.

46 See Bacquero Cruz (n 3); Krenn (n 3); Mirjam De Mol, 'The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination' (2011) 18 Maastricht Journal of European and Comparative Law 109; Eva Lohse, 'Fundamental Freedoms and Private Actors – towards an 'Indirect Horizontal Effect' (2007) 13 European Public Law 159; Gareth Davies, 'Freedom of Movement, Horizontal Effect, and Freedom of Contract' (2012) 3 European Review of Private Law 805; Jukka Snell, 'Private Parties and the Free Movement of Goods and Services' in Mads Andenas and Wulf-Henning Roth (eds), *Services and Free Movement in EU Law* (Oxford University Press 2002).

47 Case 36/74 *Walrave and Koch* (n 15), paras 17-18.

48 Stefaan van den Bogaert, 'Horizontality: The Court Attacks?' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002), 123-152.

49 Case 36/74 *Walrave and Koch* (n 15), para 19.

public and private parties had to be open to review under free movement law to ensure that the free movement provisions were applied effectively and uniformly.

In *Walrave and Koch*, it appears that two criteria were used to determine whether the actions of a private party could be reviewed under free movement law. First of all, the actions had to regulate employment or services in a collective manner. Secondly, the obstacles to free movement had to result from 'the exercise of legal autonomy' of private parties. Presumably, this meant that the private party had to enjoy a position of independence from other institutions – in particular, from the State.

The two criteria in *Walrave and Koch* were never meant to be formalistic – they were always supposed to be functional. The problem with the criteria is that the Court has never defined what it means by 'collective regulation' and 'legal autonomy'. The *Walrave and Koch* formula is used to justify the application of the free movement to private parties without any attempt by the Court to show that these private parties are involved in collective regulation and that they exercise legal autonomy.[50] The criteria are no more than an empty slogan that is used to justify horizontal direct effect. As a result, it is unclear precisely how the criteria should be interpreted. How broad should the scope of the actions of private parties be for their actions to be regarded as 'collective regulation'?[51] If a private party is exercising regulatory power on the basis of State legislation that defines its powers and scope of action, does this private party enjoy 'legal autonomy'? These are all important questions that should be relevant to deciding whether the free movement provisions can be applied to horizontal disputes. The Court, however, has consistently ignored them. Rather, it has adopted an approach

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50 Barend van Leeuwen, 'Private Regulation and Public Responsibility in the Internal Market' (2014) 33 Yearbook of European Law 277, 282.

51 Catherine Barnard, 'Viking and Laval: An Introduction' (2008) 10 Cambridge Yearbook of European Legal Studies 462, 473; Anne CL Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ' (2008) 37 Industrial Law Journal 26, 136.

based on the *impact* or *effect* of the actions of private parties on the exercise of free movement right by other private parties.[52]

This approach, based on an assessment of the effect of private parties' actions on the internal market, involves a similar kind of 'backwards' reasoning that was identified in the market access approach. It starts with the identification of a restriction, which is then used to justify the direct effect of the free movement provisions. There is no independent assessment of the direct effect issue – the impact of private action determines whether the free movement provisions are applicable.

This approach can most clearly be seen in *Fra.bo*.[53] Fra.bo was an Italian manufacturer of copper fittings that connected different pieces of water or gas piping. They wanted to place their products on the German market. The relevant German legislation on copper fittings required that the products be certified. Although they were not formally mentioned in the applicable legislation, the only body that offered this kind of certification was the Deutsche Vereinigung des Gas- und Wasserfaches ('DVGW'). Although Fra.bo's products were initially certified by DVGW, the certification was later withdrawn on the basis that Fra.bo did not comply with some of the requirements laid down in the technical standard that was used for certification by DVGW. Fra.bo wanted to challenge this standard under Article 34 TFEU. However, before they could do this, they had to show that Article 34 TFEU was directly effective against DVGW – in other words, that the certification activities of DVGW could be reviewed under Article 34 TFEU. A preliminary reference was made to the Court with the main question whether DVGW was bound by Article 34 TFEU in the exercise of its certification activities. The Court provided a positive reply to this question. The structure of its judgment clearly reveals the interaction between direct effect and restriction. The Court held that it had to be

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[52] Harm Schepel, 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law' (2012) 18 European Law Journal 177. See also Laurence Gormley, 'Private Parties and the Free Movement of Goods: Responsible, Irresponsible, or a Lack of Principles?' (2015) 38 Fordham International Law Journal 993.

[53] Case C-171/11 *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV*, EU:C:2012:453.

determined whether 'the activities of a private-law body such as the DVGW [have] the effect of giving rise to restrictions on the free movement of goods in the same manner as do measures imposed by the State'.[54] This statement makes it very clear that the question of direct effect has become dependent on the finding of a restriction. Article 34 TFEU was given direct effect *because* of the existence of a restriction.[55] Therefore, the two stages of direct effect and restriction have become merged. The result is again that DVGW was put in a position where it had to justify the restriction on Fra.bo's right to free movement of goods.

A similar approach can be seen in the Court's case law on the other freedoms. Two prominent examples are *Viking*[56] and *Laval*.[57] In these cases, Article 49 TFEU and Article 56 TFEU were applied to the activities of trade unions. In *Laval*, which concerned the right of a Latvian company to provide services in Sweden, the Court simply repeated the *Walrave and Koch* formula without investigating whether the trade unions in this case actually fulfilled the criteria.[58] As such, the Court did not investigate the role that the Swedish legislative framework played in the facilitation of the trade union's actions. Similarly, it did not analyse the complicated process of interaction between the Swedish State and the trade unions in the regulation of the labour market.[59] Article 56 TFEU was applied horizontally against the trade unions on the basis of the impact of their actions. The blockade created by the trade unions had made it impossible for Laval to provide services in Sweden.

In *Viking*, a Finnish ferry operator wanted to re-locate one of its ferries from Finland to Estonia. This would result in lower wages for the employees.

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54 *Fra.bo SpA v Deutsche Vereinigung des Gas* (n 53) para 26.

55 Barend van Leeuwen, 'From Status to Impact, and the Role of National Legislation: The Application of Article 34 TFEU to a Private Certification Organisation in Fra.bo' (2013) 4 European Journal of Risk Regulation 405, 407. See also van Leeuwen (n 50) 283.

56 Case C-438/05 *Viking* (n 1).

57 Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, EU:C:2007:809.

58 Ibid, para 98.

59 Barend van Leeuwen, 'An Illusion of Protection and an Assumption of Responsibility: The Possibility of Swedish State Liability after Laval' (2012) 14 Cambridge Yearbook of European Legal Studies 453.

Again, local trade unions – in co-operation with international trade unions – managed to prevent Viking from exercising its free movement rights. In *Viking*, the Court actually made an effort to apply the *Walrave and Koch* criteria to the case. First, the Court held that the actions of the trade unions were 'aimed at the conclusion of an agreement which is meant to regulate the work of Viking's employees collectively'.[60] Second, although the trade unions were not public authorities, they 'exercise the legal autonomy conferred on them, inter alia, by national law'.[61] Nevertheless, the Court again integrated the concept of restriction into the direct effect analysis, when it stated that it did not matter that 'the restriction at issue in the proceedings before the national court stems from the exercise of a right conferred by Finnish national law, such as, in this case, the right to take collective action, including the right to strike'.[62]

Overall, in both cases, the Court was heavily influenced by the significant impact the actions of trade unions had had on the exercise of free movement rights by other private parties. The Court did not investigate whether it was legitimate to expect trade unions to comply with the free movement provisions in light of their role in the legislative framework which had been created by the Member States in which they were operating.

The result of this process of 'backwards' reasoning is that the concepts of direct effect and restriction have merged to such an extent that a finding of direct effect in horizontal situations automatically means that there is also a restriction. Again, this means that private parties will be required to justify the restriction and to show that it is proportionate. The broader consequence is that discussions about horizontal direct effect are no longer about the question of what sort of organisations or entities should be bound by the free movement provisions. The main focus has now shifted to the question of what impact is required for the free movement provisions to be applicable. The risk of such an approach is that private parties who are able to restrict free movement rights of other parties can be held accountable under free movement law. This includes the possibility of private liability for breaches of the free movement provisions. However, it is uncertain whether the

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60 Case C-438/05 *Viking* (n 1), para 60.

61 Ibid.

62 Ibid, para 63.

imposition of liability on private parties is justified solely on the basis of an assessment of the impact of their actions.[63] It might be necessary to investigate more closely the context and the regulatory framework in which private action takes place. With an effects-based approach to direct effect, this important context is missing in the analysis.

### *3. Assimilation of Justifications: Interaction between Restriction and Justification*

The third process of interaction that will be analysed is the assimilation of Treaty and case law-based justifications. It will be shown that this involves a similar kind of backwards reasoning and merging of two stages of inquiry. Moreover, this process leads directly to the result that the outcome of cases is determined by the proportionality test.

In *Cassis de Dijon*, the Court held that indistinctly applicable measures could not only be justified by Treaty justifications, but also by mandatory requirements such as consumer protection or environmental protection.[64] It was based on the Court's recognition that the justifications listed in the Treaty were relatively limited and, moreover, that they did not reflect the current social and technological reality. The Court held that this could force Member States to take measures for reasons that were not anticipated at the time when the justifications were originally included in the Treaty. Furthermore, it reflects the idea that the internal market is about more than just market integration, and that it also respects non-economic values that are of importance not only to the Member States, but also to the EU. As a result, mandatory requirements provided a new source of justifications to Member States.[65] From the perspective of the Member States, the advantage of this source is that it is open-ended. In principle, it is always possible for a Member State to rely on a particular reason to restrict free movement. Through the case law it is possible to make a long list with very diverse mandatory requirements that have been accepted by the Court.[66] At the same time, the Court has always limited the kind of measures that could be justified

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63 van Leeuwen (n 50) 294-296.

64 Case 120/78 *Cassis de Dijon* (n 26), para 8.

65 See also Joanne Scott, 'Mandatory or Imperative Requirements in the EU and the WTO' in Barnard and Scott (n 48) 269.

66 See Barnard (n 21) 172-173.

by mandatory requirements – they could only justify indistinctly applicable or indirectly discriminatory measures. This is because distinctly applicable measures are considered to restrict free movement in the most serious way.

From early on, this rule has resulted in a tension between 'good reasons' and 'bad measures'. Even distinctly applicable measures are sometimes adopted for good reasons that have not been included in the Treaty. As a consequence, the Court has been confronted with a number of cases in which pressure was exercised by the Member State to accept that 'bad measures' had been adopted for good reasons. The Court has never expressly departed from the orthodox rule, but it has rather attempted to maintain 'a fiction of orthodoxy'. In doing so, the Court has reverted to a technique which is similar to the one it has used in market access and horizontal direct effect cases. It has reasoned backwards from justification to restriction. The two separate stages of inquiry have been merged with a view to provide the Member State the opportunity to justify the measure and to proceed to the proportionality test. In all cases, the process of merging the restriction and justification analysis necessarily meant that Member States were given the chance to show that their measures were proportionate. If this technique had not been used, the ground of justification would not have been accepted and the Court would not even have reached the proportionality stage.

One of the clearest examples of this technique is *PreussenElektra*.[67] In his Opinion, Advocate General Jacobs claimed that the classification of the restriction was separate from the assessment of the justification.[68] He used this to argue in favour of an approach whereby the Court would accept that mandatory requirements could be used to justify both distinctly and indistinctly applicable measures. His main argument in favour of this change was legal certainty – the current flexible application of the rule was unpredictable.[69] The main argument against this approach is that the Court would effectively be re-writing the Treaty, and that the Member States have

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67 Case C-379/98 *PreussenElektra AG v Schhleswag AG*, EU:C:2001:160.

68 Opinion of Advocate General Jacobs in Case C-379/98 *PreussenElektra* (n 68), para 225. He also argued that the Court had reasoned 'backwards' in Case C-2/90 *Commission v Belgium*, EU:C:1992:310.

69 Opinion of Advocate General Jacobs in Case C-379/98 *PreussenElektra* (n 68), para 229.

– despite numerous Treaty amendments – never made use of the possibility to include additional justifications in the Treaty.[70] This could lead to the conclusion that the Member States are actually quite satisfied with the current balance between the strict formulation of the rule and the application of the rule in practice. Regardless of whether the assimilation of the Treaty derogations and mandatory requirements is a good development, the focus will now be on the technique that the Court has used to 'keep up appearances'.

In *PreussenElektra*, Schleswig-Holstein – one of the German *Länder* – had adopted legislation that required energy suppliers in Germany to buy a certain percentage of renewable energy that had been produced in Germany. As such, the rule made a direct distinction between energy produced in Germany and energy produced in other Member States. Schleswig-Holstein wanted to justify this rule on the ground of environmental protection. However, a classification of the rule as distinctly applicable would prevent them from doing so, since environmental protection is not a Treaty derogation. For that reason, the Court deliberately avoided classifying the measure as distinctly applicable. All it did was to say that the measure was 'capable, at least potentially, of hindering intra-Community trade'.[71] The deliberate omission to mention the rule's distinct applicability enabled the Court to find that the restriction could be justified on the ground of environmental protection. However, the Court was well aware that this was a somewhat controversial move, and to mitigate its impact the Court also stated that environmental protection could in fact be regarded as part of the Treaty derogation to protect the health and life of humans, animals or plants. Overall, *PreussenElektra* provides a good example of a case where the Court's determination of the availability of a justification preceded its analysis of the restriction.

Although the discussion about the assimilation of justifications has been most prominent in the free movement of goods, there have also been cases in the other freedoms where the Court has used a similar approach. In *Kohll*,[72] a Luxembourg national applied for prior authorisation for his daughter to

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[70] Spaventa (n 3).

[71] Case C-379/98 *PreussenElektra* (n 67), para 71.

[72] Case C-158/96 *Raymond Kohll v Union des caisses de maladie*, EU:C:1998:171.

receive orthodontic treatment in Germany. Reimbursement of the costs of healthcare services in another Member State could only be obtained after prior authorisation had been given. Moreover, the procedure for prior authorisation did not apply to orthodontic treatment in Luxembourg. On that basis, the requirement clearly made a distinction between services received in Luxembourg and services received abroad. Despite this distinction, the Court stated that 'such rules deter insured persons from approaching providers of medical services established in another Member State and constitute, for them and their patients, a barrier to freedom to provide services'.[73] The classification of the restriction as a barrier was influenced by the fact that Luxembourg wanted to rely on an objective justification – maintaining the financial balance of the social security system. This would not have been possible if the rule had been classified as directly discriminatory or distinctly applicable. As a result, the Court again connected the concepts of restriction and justification to enable the Member State to provide a justification and to decide the case through the application of the proportionality test.

## IV. The Centralisation of Proportionality in the Internal Market

### *1. The Centralisation of Proportionality and the* Effet Utile *of the Free Movement Provisions*

The analysis of the developments in free movement law has shown that the Court has used a similar technique in all three developments. Firstly, the Court has abandoned its consecutive approach to the structure of free movement law. The Court has used an approach which has been referred to as 'backwards' reasoning – it has reasoned backwards from one of the pillars of the structure of free movement law to what used to be a preceding stage of inquiry. Secondly, the Court has no longer made a clear distinction between what were previously distinct stages of inquiry. The two stages of inquiry have become fused or merged to such an extent that they can no longer be regarded as separate. The focus of the analysis so far has been on *how* these developments have taken place in free movement law. The next step will be

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[73] *Raymond Kohll v Union des caisses* (n 72) para 35.

to assess *why* these developments have taken place and what their consequences are. The aim will be to look at the motivation for the processes of restructuring that have taken place in free movement law, and to analyse their effects. Finally, a link will be made between the aim and the consequences of the processes of restructuring.

If the three developments are combined, it becomes clear that there is one concept that unites them all. This is the concept of restriction – the restriction stage of inquiry plays a central role in each of the developments. However, this role is not identical. With market access and horizontal direct effect, the Court has reasoned from restriction to scope and direct effect. As a result, the concept of restriction has become the starting point of the Court's analysis. This has been different for the assimilation of express derogations and public interest justifications, where the Court has reasoned from justification to restriction. As such, the concept of restriction was the destination – not the starting point. Nevertheless, the central position of the concept of restriction shows why the developments have taken place. The Court's main concern has been to protect the *effet utile* of the free movement provisions – to guarantee the effective functioning of the internal market. The term *effet utile* has often been used in a rather abstract way,[74] but a structural analysis shows which elements the Court considers important to guarantee the effective application of the free movement provisions. The impact of measures or actions on the exercise of free movement rights becomes crucial. The market access approach is based on an analysis of the impact of national rules on the ability of companies or individuals to exercise their free movement rights. Based on this presumption or finding of impact, cases are brought in the scope of free movement law. Similarly, horizontal direct effect has developed in such a way that the effect of the actions of private parties has become the Court's main yardstick in deciding whether private parties should be bound by the free movement provisions. In both situations, the impact of measures or conduct has encouraged the Court to rethink the structure of free movement law.

A similar argument cannot be made to explain the assimilation of the justifications. The reasoning from justification to restriction does not start

74 See Urška Šadl, 'The Role of Effet Utile in Preserving the Continuity and Authority of European Union Law' (2015) 8 European Journal of Legal Studies 18.

by looking at the impact of actions. On the contrary, it directly affects the assessment of whether there is impact on free movement law. The classification of the breach is determined on the basis of the justification relied on by the Member State. The assimilation of the express derogations and public interest justifications shows that the Court considers the internal market – and the free movement provisions – as a balancing exercise between economic and non-economic interests. *Keck* already confirmed that the Court does not regard the internal market as a free market in which the unhindered pursuit of economic freedom can be exercised. The internal market is supposed to offer equal opportunities, but in offering equal opportunities different values – both economic and non-economic – should be taken into account. This means that the Court has to balance economic rights with social rights,[75] and economic rights with fundamental human rights.[76] The internal market in itself is a construct that involves a constant balancing exercise. As a result, it is not problematic for a justification relied on to have a direct impact on the Court's classification of the restriction, as long as this justification is consistent with the perceived aim of the internal market. As such, the aim of the free movement provisions is relied on to redefine the impact of measures on the internal market – and, in doing so, to redefine the concept of restriction in free movement law.

Finally, it should be analysed what the result of the restructuring of the structure of free movement law is. Each of the three developments makes it more likely – if not inevitable – that the outcome of free movement cases is determined by the application of the proportionality test. The assimilation of the justifications results directly in the application of the proportionality test – if the ground of justification is accepted and leads to a reclassification of the restriction, the immediate next step for the Court is to assess the proportionality of the measure. The market access approach and horizontal direct effect do not immediately lead to the application of the proportionality test. After all, it will first have to be shown that there is a ground of justification. However, in combination with the assimilation of the

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[75] Case C-438/05 *Viking* (n 1), and Case C-341/05 *Laval* (n 57).

[76] Case C-112/00 *Eugen Schmidberger v Republik Österreich*, EU:C:2003:333, and Case C-36/02 *Omega Spielhallen v Oberbürgermeisterin der Bundesstadt Bonn*, EU:C:2004:614.

justifications, it is likely that the proportionality test will be decisive. As a result, the proportionality test has obtained a more prominent role in the structure of free movement. It could almost be said that 'all roads lead to proportionality'. This centralisation of proportionality shows that the Court is confident to rely on the proportionality test to decide free movement cases.

This central role for proportionality can be linked to the aim of the processes of restructuring. The increasing significance of proportionality shows that the Court believes that the effective application of the free movement provisions can best be guaranteed by the proportionality test. A direct link is made between the proportionality test and the *effet utile* of free movement law. This is not entirely surprising. Two important reasons for the Court's increasing reliance on proportionality can be identified. First, the proportionality test involves a balancing exercise. It provides a tool through which the various interests in a case can be balanced.[77] As such, it is consistent and compatible with a vision of the internal market as a balancing exercise between economic and non-economic interests.[78] This balancing exercise can directly be achieved through the application of the proportionality test.[79] Second, the Court has developed the proportionality test in such a way that its application is inherently flexible.[80] It is flexible in at least two ways. The intensity of review can be adapted – in more sensitive areas the Court is more willing to adopt a hands-off approach. Second, the Court has been flexible in deciding *who* should conduct the proportionality test – the Court itself or the national court. In certain cases, the Court is prepared to leave a broad margin of assessment to the national court, while in other cases the Court more or less reserves the proportionality test to itself. From this perspective, it is not surprising that proportionality has obtained such an important role in free movement law.

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77 See Tridimas (n 4).

78 Loïc Azoulai, 'The Court of Justice and the Social Market Economy: The Emergence of an Idea and the Conditions for its Realization' (2008) 45 Common Market Law Review 1335.

79 Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 72 Columbia Journal of Transnational Law 72, 88.

80 Wolf Sauter, 'Proportionality in EU Law: A Balancing Act' (2013) 15 Cambridge Yearbook of European Legal Studies 439.

*2. The Consequences of the Centralisation of Proportionality*

It has been shown how and why proportionality has obtained a central position in the structure of free movement law. Two dimensions of this process of centralisation will now be analysed – the first is more procedural, the second more substantive. They are closely linked to the two characteristics of the proportionality test – the balancing exercise and its flexible application – that have made the test suitable for a central role in free movement law.

The first dimension that is affected by the centralisation of proportionality is the relationship between the Court and national courts. If free movement cases are increasingly decided through the application of the proportionality test, this has an impact on the role that national courts play in deciding free movement cases. There is a real risk that centralisation of the proportionality test might similarly result in a more central role for the Court. This is, first of all, because it is difficult for national courts to assess to what extent the proportionality test is within their own control. It is very difficult to systemise the Court's case law in such a way that national courts can say with a certain degree of certainty that they are able to conduct the proportionality test themselves. Secondly, it is very complicated for national courts to decide if the outcome of the proportionality test is sufficiently clear not to have to make a preliminary reference to the Court. The outcome of the balancing exercise involved in the proportionality test is not easy to predict.[81] This would be another reason for national courts to make a reference to Luxembourg. The result is that the Court obtains a central role in deciding free movement cases. Since cases in Luxembourg are not exactly dealt with quickly, it is doubtful whether this is helpful for the effective application of the free movement provisions. Furthermore, because of the inherent flexibility of the application of the proportionality test, a more central role for the Court does not help from the perspective of the uniform application of free movement law. The outcome of the proportionality test is often fact-specific. Therefore, cases that are decided through the proportionality test are generally not of much assistance to national courts or litigants who might be involved in litigation with similar characteristics.

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[81] Sauter (n 80).

The second dimension that is affected by the centralisation of proportionality is the relationship between the State and its citizens. More precisely, it affects the relationship between those who make rules that have an impact on the internal market – this could be the State or private parties – and those who are affected by these rules. The flexible application of the proportionality test leads to a certain degree of substantive uncertainty. This uncertainty makes it more difficult for parties with regulatory power to decide how to exercise that power. Similarly, it becomes more difficult for those who are affected by rules to decide whether to challenge them. As such, a central role for proportionality also affects legal certainty – not just in the relationship between courts, but also in the relationship between rule-makers and those affected by the rules. The significant variation in the intensity with which national rules or measures are reviewed makes it difficult to decide whether rules are proportionality-proof. It puts a significant burden on those who defend national rules and those who want to attack them to predict with what intensity rules could be reviewed and what the outcome of the review will be.[82] Moreover, legal certainty is necessary for individuals or companies to have the confidence to exercise their free movement rights. Although the proportionality test will always be important in free movement law, the other pillars of the structure of free movement law create more legal certainty in the internal market.

Overall, the centralisation of proportionality affects both the uniform application of the free movement provisions and legal certainty. These two concepts are also fundamental to the *effet utile* of the free movement provisions. Although the proportionality test might at first appear to be a suitable tool to guarantee the effective application of the free movement provisions, too much and too exclusive reliance on proportionality is ultimately not in the best interests of the internal market.[83] For that reason, the Court should not be afraid to rely more on the concepts of scope, direct

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[82] Jan Jans, 'Proportionality Revisited' (2000) 27 Legal Issues of Economic Integration 239. See also Gráinne de Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 Yearbook of European Law 105.

[83] See also Tor Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 European Law Journal 158.

effect and justification to decide free movement cases. The advantage of these pillars of the structure is that their application is more predictable.

The centralisation of proportionality has resulted in the neglect of some of the other tools in the structure of free movement law. The Court has to provide more guidance on which cases fall within the scope of the free movement provisions,[84] on the question in which situations private parties are bound to comply with the free movement provisions, and on which justifications are available to justify restrictions on free movement. As regards the scope of free movement law, the Court should be more precise about the cross-border impact that is required for cases to come within the scope of the free movement provisions. Clarification is required about the circumstances in which a hypothetical impact on free movement is sufficient. For horizontal direct effect, the Court should provide more substance to the concepts of collective regulation and legal autonomy laid down in *Walrave and Koch*. Private parties have to know in which circumstances or under what conditions they are expected to comply with the free movement provisions. The Court has not provided the required clarification in cases like *Viking*, *Laval* and *Fra.bo*. Finally, the Court should provide a list of mandatory requirements that can be used to justify distinctly applicable or directly discriminatory restrictions. If the assimilation of justifications was only necessary to provide a more prominent role to environmental protection – which is often considered the 'special one' among mandatory requirements – the Court should explicitly acknowledge this. To conclude, the Court has to give more guidance on the application of the pillars of the structure. Such guidance cannot be developed if cases are predominantly decided by relying on the proportionality test.

In the end, a more developed and precise approach to the scope of free movement, to direct effect and to the justifications will improve legal certainty in the internal market. If these concepts are developed more precisely and coherently, this will increase the confidence of national courts in applying them. Furthermore, it will provide more legal certainty to public and private parties that are exercising regulatory power in the internal market. In combination with the proportionality test, this structure of free

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[84] A good start has been made in Case C-268/15 *Fernand Ullens de Schooten v État belge*, ECLI:EU:C:2016:874.

movement law provides a solid foundation that is able to guarantee the effective functioning of the internal market.

## V. Conclusion

Market access, horizontal direct effect and the assimilation of justifications – three phenomena that have dominated discussions about free movement law in the last decades. This article has not attempted to provide revolutionary new definitions or interpretations of these developments. Rather, it has sought to combine them by choosing the perspective of the structure of free movement law. This perspective shows that the three developments are connected and have had the same consequences. The analysis has resulted in three main conclusions.

Firstly, the Court has used the same technique in market access, horizontal direct effect and assimilation of the justifications cases. This technique is based on 'backwards' reasoning from one pillar of the structure to what used to be a preceding pillar of the structure. The consecutive order of the structure of free movement law has been abandoned. Moreover, what used to be two separate stages of inquiry are no longer regarded as separate. They have become merged in such a way that it has become difficult to distinguish between them.

Secondly, for all three developments, the concept of restriction is either the 'starting point' or the 'destination' of the Court's reasoning. As a result, it is clear that the Court is concerned with guaranteeing the effective application of the free movement provisions. In order to do this, it is necessary to keep the aim of the free movement provisions in mind. They represent a balancing exercise between economic and non-economic interests. Therefore, it is not surprising that the proportionality test has become the Court's favourite tool to decide free movement cases.

Thirdly, the centralisation of proportionality in the internal market has important consequences. It affects the relationship between the Court and national courts, and it also affects the relationship between the State and its citizens. Although it is understandable that the flexibility of the proportionality test makes it a suitable tool to decide free movement cases, the uniform application of the free movement provisions and

legal certainty are not necessarily improved by a central role for proportionality. As a consequence, the Court should be encouraged to not only rely on the proportionality test to decide free movement cases, but also to use other concepts in the structure of free movement law. This is not criticism of the proportionality test as such, but rather of the role that proportionality has been given. The centralised role of proportionality in free movement law should be reconsidered.