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Space to Breathe: Subsidiarity, the Court of Justice and EU Free Movement Law

By Thomas Horsley LL.B (Hons) LL.M (Edinburgh)

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Declaration

In accordance with 2.5 of the Assessment Regulations for Research Degrees at the University of Edinburgh, I confirm:

- (a) That this thesis has been composed by me;
- (b) That the work contained in this thesis is my own; and
- (c) That the work contained in this thesis has not been submitted for any other degree or professional qualification.

Thomas Horsley, 11 March 2012

Abstract

This thesis explores subsidiarity's untapped potential as an enforceable legal principle in EU law. To date, discussion of the principle's function in European integration remains overly focused on its effect as a restraint on the Union legislature. In the first part of the thesis, I seek to challenge this entrenched view. Specifically, I question whether or not the subsidiarity principle could and, ultimately, should apply also as a brake on the interpretative authority of the Court of Justice. Arguing that subsidiarity does indeed have a role to play in this context, I then turn to examine, in the second part of the thesis, the implications of this conclusion for the Court's interpretation of the scope of the Treaty provisions guaranteeing intra-EU movement. In the final analysis, I argue that the subsidiarity principle necessitates an adjustment of the Court's current approach to defining the concept of an obstacle to intra-EU movement. This adjustment isolates and protects an appropriate sphere of Member State regulatory competence from the Court's scrutiny at Union level. In so doing, it ensures that, in the process of establishing and managing a functioning internal market, Member States retain some space to breathe.

List of Abbreviations

Journals

<i>CLJ</i>	<i>Cambridge Law Journal</i>
<i>CMLRev</i>	<i>Common Market Law Review</i>
<i>Columbia Law Rev</i>	<i>Columbia Law Review</i>
<i>CYELS</i>	<i>Cambridge Yearbook of European Legal Studies</i>
<i>ELJ</i>	<i>European Law Journal</i>
<i>ELRev</i>	<i>European Law Review</i>
<i>EuConst</i>	<i>European Constitutional Law Review</i>
<i>EuGRZ</i>	<i>Europäische Grundrechte-Zeitschrift</i>
<i>EuR</i>	<i>Europarecht</i>
<i>Fordham Int. LJ</i>	<i>Fordham International Law Journal</i>
<i>GLJ</i>	<i>German Law Journal</i>
<i>Harvard Int. LJ</i>	<i>Harvard International Law Journal</i>
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
<i>Int J Constitutional Law</i>	<i>International Journal of Constitutional Law</i>
<i>Int Tax Public Finance</i>	<i>International Tax and Public Finance</i>
<i>JCMS</i>	<i>Journal of Common Market Studies</i>
<i>JEL</i>	<i>Journal of Economic Literature</i>
<i>JPP</i>	<i>Journal of Political Philosophy</i>
<i>JUR</i>	<i>Irish Jurist</i>
<i>LIEI</i>	<i>Legal Issues in Economic Integration</i>
<i>RabelsZ</i>	<i>Rabels Zeitschrift für ausländisches und internationales Privatrecht (Rabel Journal of Comparative and International Private Law)</i>
<i>Yale LJ</i>	<i>Yale Law Journal</i>
<i>YEL</i>	<i>Yearbook of European Law</i>

Other abbreviations

<i>BVerfGE</i>	<i>Entscheidung des Bundesverfassungsgerichts (Decision of the Federal Constitutional Court of the Republic of Germany)</i>
<i>EEC</i>	<i>European Economic Community</i>
<i>EC</i>	<i>European Community</i>
<i>ECR</i>	<i>European Court Reports</i>
<i>EU</i>	<i>European Union</i>

List of Abbreviations

<i>GG</i>	<i>Das Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany)</i>
<i>OJ</i>	<i>Official Journal of the European Union</i>
<i>TEU</i>	<i>Consolidated version of the Treaty on European Union</i>
<i>TFEU</i>	<i>Consolidated version of the Treaty on the Functioning of the European Union</i>

Introduction

This thesis examines the function of subsidiarity as a legal principle in European integration. Its primary objective is to assess whether or not this principle could and, ultimately, should also apply as a brake on the interpretative authority of the Court of Justice of the European Union (ECJ or the Court).

Subsidiarity

In European Union law, the principle of subsidiarity has one specific purpose. The principle aims to protect Member State autonomy in areas of concurrent competence; that is, in areas in which competence to act is shared by both the Union and the Member States. This objective is achieved by placing conditions on the exercise of competence by the Union institutions in defined areas of shared competence (these areas are set out in Art 4 TFEU). The founding Treaty of Rome made no reference to the subsidiarity principle. However, the principle subsequently made its way into the constitutional framework of the European Union and was finally formalized as a general constitutional principle by the Maastricht Treaty.¹

The core subsidiarity test in EU law is now to be found in Art 5(3) TEU.² This provision states that, in order to exercise concurrent competences, the Union institutions must first demonstrate that there is a need for intervention at Union level. In summary, this test comprises two cumulative requirements. First, it must be shown that Union action is necessary in order to address regulatory problems exhibiting sufficient transnational or ‘cross-border’ effects. Secondly, subsidiarity requires the Union institutions to demonstrate that their action will bring with it clear benefits or ‘added value’ as compared to continued (or no) unilateral action at Member State level. Again, only where both conditions are satisfied does the Union enjoy the right to exercise competence in the relevant area of shared responsibility.

Subsidiarity’s (rebuttable) presumption in favour of Member State autonomy is based on a normative belief in the value of localised decision-making. Subsidiarity

¹ Treaty on European Union (Maastricht Treaty) [1992] OJ C 190/1.

² See also Art 1 TEU.

seeks to protect the right of Member State institutions to respond unilaterally to regulatory problems at the national/sub-national level. The desire to carve out and safeguard a meaningful role for national/sub-national decision-making bodies in the integration process has both economic and political significance. From an economic perspective, localised decision-making is considered better able to satisfy voter preferences and thus capable of achieving more efficient outcomes. In political terms, increasing the proximity between decision-makers and those affected by the decisions they take is associated with greater democratic legitimacy.

The buzz around subsidiarity has certainly faded since the principle's introduction into the Treaty framework nearly 20 years ago. Indeed, until very recently, one might have ventured to say that subsidiarity had largely served its purpose. The principle had successfully unlocked the political deadlock at Maastricht and, to a certain degree, also sent an important message to the Union institutions that more integration was not necessarily to be equated with more *Union* intervention. Post-Maastricht, subsidiarity has unquestionably remained a key phrase in the vocabulary of European integration. Furthermore, attempts have been made to flesh out the principle's substance in more detail.³ But, the initial excitement around subsidiarity was never really recaptured, particularly in the legal scholarship.

In recent years, however, the spotlight has returned to subsidiarity. During the Union's turbulent process of constitutional reform, the principle played a key part in securing the passage of the Lisbon Treaty.⁴ Indeed, one might go so far as to say that subsidiarity has gone from being the 'word that saved Maastricht' to the word that saved Lisbon.⁵ Yet, this recent resurgence in interest in subsidiarity should come as no surprise. After all, the very problem that the principle is designed to resolve has not gone away. On the contrary, concerns over the appropriate distribution of competence between the Union institutions and the Member States remain at the forefront of debates on European integration. The Member States (or at least some of

³ See, in particular, Protocol on the Application of the Principles of Subsidiarity and Proportionality [1997] OJ C 340/105.

⁴ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306/01.

⁵ The allusion here is to D. Z. Cass, 'The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community' (1992) 29(1) *CMLRev* 1107.

them) continue to express genuine concerns over the loss of regulatory competence to the Union. Equally, the Union institutions are still searching for stronger normative bases to support and legitimatise their own activities.

Scope of this thesis

The principle of subsidiarity has been subject to extensive – and, some may argue, exhaustive – analysis in the scholarship on European integration. However, current analysis, particularly amongst legal writers, remains rather narrowly focused. For many years now, studies into subsidiarity’s role as a legal principle have clustered around analysis of a single substantive issue: the function of the subsidiarity principle as a restraint on the actions of the Union legislature.⁶ This narrow approach to the analysis of subsidiarity reflects an established and now widely held view that the principle’s core contribution to the integration process is as a political principle that operates to guide the legislative rather than judicial process. This view is also reflected in the substance of the most recent Treaty reforms. The entry into force of the Lisbon Treaty has introduced a series of new innovations that are specifically designed to bolster the principle’s effectiveness in the legislative context.⁷

This thesis seeks to challenge the entrenched view that subsidiarity is only relevant to the actions of the Union legislature. It is motivated by a firm belief that subsidiarity can – and should – be made to work much harder in the integration process. Specifically, this thesis questions whether the principle could and, ultimately, should also apply as a source of self-restraint on the interpretative functions of the Court of Justice. To date, this issue has remained largely overlooked in the academic literature. Legal commentators, in particular, have remained broadly critical of subsidiarity’s effectiveness as an enforceable legal principle and, perhaps for this reason, have not explored its possible broader implications in any great detail. It is

⁶ See eg A. Estella, *The EU Principle of Subsidiarity and its Critique* (Oxford: OUP, 2002), G. Davies, ‘Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time’ (2006) 43(1) *CMLRev* 63, M. Kumm, ‘Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union’ (2006) 12(4) *ELRev* 503 and R. Schütze, ‘Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?’ (2009) 46(3) *CLJ* 525.

⁷ See here esp. Art 12 TEU and Art 5(3) TFEU, and the procedures set out in Protocol (No. 1) on the Role of National Parliaments in the European Union [2010] OJ C 83/203 and Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality [2010] OJ C 83/206.

submitted that this criticism of subsidiarity's function as a legal principle is misplaced. Subsidiarity is more than simply a political principle of concern only for the Union legislature. On the contrary, it is a useful legal tool with considerable untapped potential as a source of restraint on the Court's functions as a Union institution.

The case study

This thesis does not seek to analyse subsidiarity's implications for the Court of Justice in broad terms. It also examines the principle's practical impact in a specific substantive context. The Court's interpretation of the term 'obstacle to intra-EU movement' in EU free movement law is selected as the most appropriate case study.⁸ The definition of this concept constitutes the first limb of the Court's review of Member State preferences against the Treaty framework. In cases where a particular national measure is found to fall within the scope of the Treaty freedoms as an obstacle to intra-EU movement, it is always open to the Member State concerned to try and defend their policy preference within the Union derogation framework. This requires the Member State, first, to identify a suitable ground for derogation and, secondly, to demonstrate that the contested national measure is a proportionate means of securing that derogation.

The Court's case law on obstacles to intra-EU movement is chosen as a suitable testing ground for subsidiarity analysis for two key reasons. First, the Court's interpretation of the scope of the Treaty freedoms can be shown to meet the prerequisites for the application of the subsidiarity principle. When asked to interpret the scope of the individual provisions on intra-EU movement, the Court is, in effect, making a decision about the distribution of competence between the Union and the Member States in an area of shared competence: the regulation of the internal market (Art 4(2) TFEU). The Court's preferred reading of the scope of the Treaty freedoms determines the extent to which the Member States are required to defend their particular policy preferences at Union level. If the Court chooses, for example, to

⁸ This is synonymous with the definition of the scope of the Treaty provisions guaranteeing the free movement of goods, services, persons and capital within the internal market. The individual Treaty freedoms are set out in Arts 21, 34, 35, 45, 49, 56 and 63(1) TFEU.

define obstacles to intra-EU movement broadly, then this has the effect of subjecting a greater range of Member State policies to scrutiny at Union level. Conversely, a narrower interpretation of the Treaty freedoms operates to safeguard many more national policy choices from review at Union level. This is exactly the type of decision that subsidiarity was introduced to structure.

The second reason for selecting the Court's jurisprudence on obstacles to intra-EU movement as a case study is that there is a genuine 'subsidiarity problem' in this area. In recent years, the Court has confirmed its preference for an extremely broad effects-based reading of the scope of the Treaty freedoms.⁹ The case law across the freedoms can now be shown to be converging around expansive tests based on the potential 'deterrent' or 'dissuasive' effects of a particular Member State policy on intra-EU movement.¹⁰ The Court's shift in this direction sits uncomfortably alongside the logic of the subsidiarity principle. Applied literally, the Court's preferred reading of the scope of the Treaty freedoms could bring virtually any national policy within the scope of its review as an obstacle to intra-EU movement. This would leave the Member State little meaningful space to contribute unilaterally to the regulation of the internal market as an area of shared responsibility.

⁹ See here, in particular, Case C-110/05 *Commission v. Italy (Motorcycle Trailers)* [2009] ECR I-519 at para. 33, Case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC* [2010] ECR I-2177 at para. 34.

¹⁰ For Art 21 TFEU, see eg Case C-184/99 *Grzelczyk* [2001] ECR I-2691 at para. 32, Case C-138/02 *Collins* [2004] ECR I-2703 at para. 61, Case C-209/03 *Bidar* [2005] ECR I-2119 at para. 32 and Case C-524/06 *Huber* [2008] ECR I-9705 at para. 35; for Art 34 TFEU, see eg Case 8/74 *Dassonville* [1974] ECR 837 at para. 5 and Case C-110/05 *Commission v. Italy (Motorcycle Trailers) op. cit.* at note 9 at para. 33; for Art 35 TFEU see eg Case C-161/09 *Kakavetsos-Fragkopoulos AE*, judgment of the Court (First Chamber) of 3 March 2011 (nyr) at para. 29; for Art 45 TFEU, see eg Case C-415/93 *Bosman* [1995] ECR I-4921 at para. 96, Case C-109/04 *Kranemann* [2005] ECR I-2421 at para. 26 and Case C-208/05 *ITC* [2007] ECR I-181 at para. 31; for Art 49 TFEU see eg Case C-19/92 *Dieter Kraus v Land Baden-Württemberg* [1993] ECR I-1663 at para. 32, Case C-318/05 *Commission v Germany (School Fees)* [2007] ECR I-6957 at para. 81 and Case C-281/06 *Jundt* [2007] ECR I-12231 at para. 52; for Art 56 TFEU, see eg Case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd* [1991] ECR I-4221 at para. 11, Case C-136/00 *Danner* [2002] ECR I-8147 at para. 29 and Joined Cases C-544/03 and C-545/03 *Mobistar and Belgacom Mobile* [2005] ECR I-7723 at para. 30; for Art 63(1) TFEU, see eg Case C-35/98 *Staatssecretaris van Financiën v B.G.M. Verkooijen* [2000] ECR I-4071 at para. 34, Case C-367/98 *Commission v Portugal (Golden Shares)* [2002] ECR I-4731 at para. 45 and Joined Cases C-155/08 and C-157/08 *X (C-155/08) and E. H. A. Passenheim-van Schoot (C-157/08)* [2009] ECR I-5093 at para. 39.

Relationship to the existing scholarship on EU free movement law

In the legal literature, there is certainly no shortage of possible explanations of and justifications for the Court's expansion of the scope of the Treaty freedoms. According to the leading school of thought, the Treaty freedoms should focus on scrutinizing national measures that place severe restrictions on economic freedom within the internal market.¹¹ This view is certainly capable of rationalising the Court's shift to expansive tests that focus on a measure's 'deterrent' or 'dissuasive' effects on intra-EU movement. On another view, the same set of rules should now be re-interpreted in light of the introduction of the status of Union citizenship.¹² Read together with this new legal status, it has been argued that the term 'obstacle to intra-EU movement' now grants the Court the power to review all Member State measures that interfere disproportionately with the personal freedom of Union citizens.

The existing conceptual models all offer convincing explanations for the Court's expansion of the scope of the Treaty freedoms. However, it is argued that their shared (and fatal) weakness is their failure to engage with the subsidiarity principle. Those writers who support, at least to some degree, the Court's continued expansion of the Treaty freedoms overlook the implications of subsidiarity as an important source of restraint on the Court. They assume that the Court is essentially free to shape its reading of the scope of the Treaty freedoms as it sees fit. This thesis argues that this position is *wrong*. It argues that subsidiarity functions as a brake on the Court's competence to contribute to the regulation of the internal market through its interpretation of the Treaty freedoms. In the final analysis, it is argued that subsidiarity does not demand a total revolution in the case law. On the contrary, the conclusion reached is more modest, and calls only for an adjustment of the jurisprudence at the margins. However, it is submitted that this adjustment is worth making.

¹¹ Those supporting the market access approach include, eg the Opinion of AG Jacobs in Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179 at paras 38-49, S. Weatherill, 'After *Keck*: Some Thoughts on How to Clarify the Clarification' (1996) 33(5) *CMLRev* 885 at pp 96-101, J. Steiner et al *EU Law* (9th Ed.) (Oxford: OUP, 2009) esp. at p. 388 and C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (3rd Ed.) (Oxford: OUP, 2010) at p. 144.

¹² See, in particular, E. Spaventa, *Free Movement of Persons in the European Union: Barriers to Movement in the Constitutional Context* (AH Alphen aan den Rijn: Kluwer, 2007).

Chapter overview

Chapter 1 examines the meaning, origins and evolution of subsidiarity as a legal principle in EU law. It concludes that, despite considerable scepticism in the commentary, there is clear evidence that the Court has in fact transformed subsidiarity into an enforceable legal test – at least during one period of its post-Maastricht case law. This test operates to restrain the Union *legislature* in the exercise of its shared regulatory competence to regulate the internal market (Art 114 TFEU).

Chapter two assesses the implications of the subsidiarity principle for the Court of Justice as a Union institution. This analysis starts with a critical review of the existing literature on this point. Thereafter, the chapter surveys the case law for any evidence to suggest that the Court is already engaging with subsidiarity as a source of restraint on its interpretative functions. The second part of the chapter then addresses the normative dimension, namely whether or not the Court should be considered bound by subsidiarity. After dealing with some of the possible challenges and objections to this line of argument, the chapter concludes that there are no obstacles to applying subsidiarity *to the Court*.

Chapter 3 isolates the case law on obstacles to intra-EU movement as a suitable case study to test the subsidiarity argument developed in Chapter 2. The chapter then proceeds to consider how the Court currently defines the scope of the individual Treaty freedoms. In summary, it is argued that the Court's reading of the scope of the Treaty freedoms is now converging around expansive effects-based tests. Applied literally, the Court's preferred approach could bring virtually any national measure within the scope of the Court's scrutiny. This, it is argued, sits uncomfortably with the demands of subsidiarity.

Chapter 4 presents a critical analysis of the key judicial devices that the Court has developed to manage its broad effects-based definition of obstacles to intra-EU movement. These include: the wholly internal rule, the concept of an inherent obstacle to intra-EU movement, the criterion of 'effects too uncertain and indirect' and the *de minimis* test. Examining these devices in turn, it is argued that, whilst the

existence and use of these judicial rules demonstrate the Court's awareness of the need to place limits on its own powers of review, their effect in practice is rather limited. Of the various judicial devices, it is argued that only an implicit and qualitative *de minimis* test has any impact on the case law on obstacles to intra-EU movement. However, it is submitted that the Court has set the threshold for this test too low to make a meaningful contribution to the protection of Member State autonomy.

Chapter 5 reviews the competing interpretative models that are presently used to rationalise the case law on obstacles to intra-EU movement. On the one hand, several writers favour a narrow approach to the obstacle concept. This focuses on (1) eliminating national measures that discriminate on grounds of Member State nationality and/or on (2) ensuring adherence to the principle of mutual recognition.¹³ On the other hand, most commentators defend a broader reading of the Treaty freedoms. This extends, in principle, to permit scrutiny at Union level of genuinely non-discriminatory Member State rules that simply characterise the conditions for economic and/or non-economic activity within individual Member States.¹⁴ It is argued that both approaches to defining the scope of obstacles to intra-EU movement are problematic and, moreover, fail to engage fully with the subsidiarity principle.

Finally, Chapter 6 brings together the conclusions of the overall analysis and offers a conceptual framework to define an obstacle to intra-EU movement in EU free movement law. In summary, it is argued that subsidiarity is an important – and to date overlooked – source of self-restraint on the exercise of the Court of Justice's competence to interpret the scope of the Treaty freedoms. Furthermore, it is submitted that the principle provides the key to resolving one of the great and persisting points of dispute in the case law and literature on intra-EU movement: whether the Treaty freedoms are intended to liberalise intra-EU trade or are intended

¹³ See eg N. Bernard, *Multilevel Governance in the European Union* (Amsterdam: Kluwer, 2002), J. Snell *Goods and Services in EC Law* (Oxford: OUP, 2002) and G. Davies, *Nationality Discrimination in the European Internal Market* (The Hague: Kluwer, 2003).

¹⁴ See eg Weatherill *op. cit.* at note 11, Barnard *op. cit.* at note 11 and Spaventa *op. cit.* at note 11.

more generally to encourage the unhindered pursuit of economic activity within individual Member States.¹⁵

¹⁵ See the Opinion of AG Tesouro in Case C-292/92 *Hünernund* [1993] ECR I-6787 at para. 1. See also, more recently, eg the Opinion of AG Bot in Case C-110/05 *Commission v. Italy (Motorcycle Trailers)* *op. cit.* at note 9 at para. 74.

Chapter 1

Subsidiarity and its evolution as a legal principle in EU law

1. Introduction

This chapter examines the principle of subsidiarity and its evolution as a legal principle in EU law. It begins in section 2 by offering a working definition of the principle and examining (briefly) its origins and evolution as a normative principle in constitutional, political and economic theory. In section 3, attention turns to the introduction and development of subsidiarity in European integration. Here it is argued that subsidiarity has been formalised in the Treaties as a constitutional principle, which draws on both the principle's economic and political characteristics for its operation. Section 4 then traces the evolution of subsidiarity in the case law and literature. In spite of a considerable degree of scepticism in the commentary over the principle's effectiveness, it is argued that the Court has in fact transformed subsidiarity into an enforceable legal principle restraining the Union legislature in the exercise of its shared regulatory competences. The inherent limits of the Court's review have, however, prompted the introduction of a new system of ex ante compliance monitoring, which is designed to bolster the principle's effectiveness in this specific context.

2. Definition, origins and evolution

2.1 Definition

At its most abstract, the principle of subsidiarity is a principle structuring the relationship between individuals. It governs their interaction as they exist simultaneously as members of different social groupings. It is not itself a democratic principle, but a principle that may be employed to structure the distribution and exercise of authority within a democracy.¹ It is premised on the existence of a hierarchical order of at least two autonomous social units, unified through the pursuit

¹ N.W. Barber, 'The Limited Modesty of Subsidiarity' (2005) 11(3) *ELJ* 308 at p. 315.

of a common objective.² The principle has both a negative and positive dimension.³ As a negative proposition, it seeks to protect the autonomy of the smaller constituent social groups to accomplish unilaterally that which they are in fact capable of achieving themselves. Intervention by the higher entities in an area of shared competence is therefore confined to those tasks that the lower units are incapable of realising sufficiently well when acting independently. This latter, supporting, role of the higher unit(s) forms the basis of the principle's positive dimension.

2.2 Origins

The principle of subsidiarity is most frequently associated in EU legal scholarship with Catholic social doctrine and, in particular, the encyclical *Quadragesimo Anno*, published in 1931 under the authority of Pope Pius XI.⁴ This work refers to respect for *subsidiarii officii principium*, the principle of the subsidiary office. Only through translation and further analysis did this concept emerge as the 'principle of subsidiarity.'⁵ According to this 'unshaken and unchangeable' principle, the primary right of action rests with smaller social groupings within a community and, ultimately, the individual.⁶ Intervention by larger and higher units – notably the State – in activities that can be accomplished successfully by smaller and lower communities is condemned as a serious evil (*grave damnum*) and a disruption of proper order (*recti ordinis perturbatio*).⁷

Whilst it is correct that the 'principle of subsidiarity' so-called was indeed formalised – albeit through translation – through Catholic social doctrine, it is generally

² N. Bernard, 'The Future of European Economic Law in the Light of the Principle of Subsidiarity' (1996) 33(4) *CMLRev* 633 at p. 653 and, most clearly, C. Calliess, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union* (Baden-Baden: Nomos, 1996) at p. 29.

³ Calliess *op. cit.* at note 2 at pp 21-2.

⁴ Pope Pius XI, *Quadragesimo Anno* (London: Catholic Truth Society, 1936) at p. 31. As noted by eg N. Emiliou, 'Subsidiarity: An Effective Barrier against "the Enterprise of Ambition"?' (1992) 17(5) *ELRev* 383 at p. 384 and G. A. Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94(2) *Columbia Law Rev* 331 at p. 339 and Barber *op. cit.* at note 1 at p. 310.

⁵ P. Pescatore, 'Mit der Subsidiarität Leben' in *Festschrift für Ulrich Everling* (Baden-Baden: Nomos, 1995) 1071 at p. 1072.

⁶ Pope Pius XI, *Quadragesimo Anno op. cit.* at note 4 at p. 31.

⁷ *Ibid.* See also Emiliou *op. cit.* at note 4 at pp 384-385 and Pescatore *op. cit.* at note 5 at p. 1072.

accepted that its roots may be followed back much further.⁸ For example, Estella traces the principle back to the writings of Aristotle.⁹ Framing society in terms of a series of autonomous groups forming part of a larger body, Aristotle advocated respect for the autonomy of individual groups to perform their particular tasks free from interference by the other bodies. The individual groups only enjoyed a right of intervention in each other's affairs in cases of strict necessity.¹⁰ This thesis, as subsequently developed by others, sits comfortably with the subsidiarity principle's negative presumption. In the same vein, to emphasise the positive dimension of subsidiarity (intervention by the larger group in support of the smaller unit(s)), commentators rely on the fruits of etymological research. In particular, it is often noted that the Latin *subsidium* has its origins in a military context, in which it denoted a body of reserve troops who entered the field of conflict only when the resources of front line troops proved insufficient.¹¹

A comprehensive re-examination of the development of subsidiarity in historical, philosophical and political thought is, however, beyond the scope of the present inquiry.¹² It is sufficient, for present purposes, to note that, despite a considerable degree of indeterminacy, there is a common thread running through the various expositions. Underpinning the rationale of subsidiarity since Aristotle is a desire, in principle, to safeguard the primary autonomy of smaller constituent units of a larger unity.¹³ As Estella rightly notes:

‘the ethos underlying subsidiarity is the protection of the autonomy of smaller entities (and, in the last instance, the individual) against intervention by larger entities. This is irrespective of whether we speak of the public-public level, the public-private, or the private-private one.’¹⁴

⁸ See eg Calliess *op. cit.* at note 2 at pp 24-6, K. Endo, ‘The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors’ (1994) 44(6) *Hokkaido Law Review* 2064-1965 and A. Estella, *The EU Principle of Subsidiarity and its Critique* (Oxford: OUP, 2002) at p. 76.

⁹ Eg Estella *op. cit.* at note 8 at pp 76-79.

¹⁰ *Ibid.*, at p. 77.

¹¹ Calliess *op. cit.* at note 2 at p. 21. See also R. Schütze, ‘Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism’ (2009) 68(3) *CLJ* 525 at p. 525.

¹² For discussion, see eg Endo *op. cit.* at note 8 and also the collected essays in A. Riklin and G. Batliner (Eds.) *Subsidiarität: Ein interdisziplinäres Symposium* (Baden-Baden: Nomos, 1994).

¹³ Calliess *op. cit.* at note 2 at p. 21.

¹⁴ Estella *op. cit.* at note 8 at p. 80.

Viewed in this light, the principle of subsidiarity as presented in the *Quadragesimo Anno* is therefore merely one particular contextual formulation of a broader general principle. It emerged against a background of an increasing consolidation of power by totalitarian regimes with the specific objective of ‘steer[ing] [society] between the twin perils of individualism and collectivism.’¹⁵ Addressing both state and private interests indiscriminately, it is also an extremely broad expression of subsidiarity.¹⁶

2.3 Evolution

In more recent years, subsidiarity has found particular expression in the specific contexts of federal, political and economic theory.¹⁷ This section does not present an exhaustive inquiry into the position of subsidiarity in each of these individual fields. Instead, the aim is more modest. It attempts only to show that, in all three disciplines, subsidiarity functions as a normative principle designed to structure the distribution of competences in systems of multi-level governance. The analysis in this section forms useful background for the discussion of the introduction and development of subsidiarity in EU law – the specific focus of inquiry in this thesis – in section 3.

As we shall see in this section, the three main disciplinary expressions of the subsidiarity principle – the federal, the political and the economic – are not mutually exclusive.¹⁸ There is in fact a considerable degree of overlap between the three individual manifestations of the principle. That said, it is important to point out that each discipline approaches subsidiarity differently. Federal, economic and political theories are motivated by distinct concerns and, therefore, place particular emphasis on different outcomes and input variables.

¹⁵ Barber *op. cit.* at note 1 at p. 310.

¹⁶ *Ibid.*, at p. 311.

¹⁷ Eg Bermann *op. cit.* at note 4, J. Pelkmans, *European Integration: Methods and Economic Analysis* (Harlow: Pearson, 2006) and R. Schütze, *From Dual to Cooperative Federalism* (Oxford: OUP, 2009).

¹⁸ On this point, see also J. Pelkmans, ‘Testing for Subsidiarity’ in T. Bruha and C. Nowak (Eds.), *Die Europäische Union: Innere Verfasstheit und Globale Handlungsfähigkeit* (Baden-Baden: Nomos, 2006).

2.3.1 Subsidiarity as a constitutional principle

As a constitutional principle in federal systems, the starting point for subsidiarity analysis is the recognition that a federal state is characterised by the coexistence of diversity and unity. In this context, the basic problem that subsidiarity – or, where not expressly referred to, its logic – seeks to address is simple enough. Subsidiarity is designed to ensure that the individuality of distinct component states is maintained and protected, whilst at the same time, also brought together for a common purpose in the development of the federation.¹⁹ In connection with this dynamic struggle between, on the one hand, preserving the identity of the individual states and, on the other hand, exploiting the advantages of centralised action, subsidiarity can be used in two distinct contexts. First, subsidiarity may be employed to question the extent to which the division of competences between the states and the federation reflects – or indeed offends – the logic of the principle.²⁰ This means critiquing, for example, the decision to *reserve* as exclusive specific substantive areas of competence to the federation *ex ante* against the ability of the individual states to achieve the relevant objective unilaterally.

More frequently, however, subsidiarity arises in a second context: the *exercise* of competences shared by the federation and the states. Leaving discussion of the European Union aside, a clear example can be found in the German *Grundgesetz*.²¹ Although the term ‘subsidiarity’ does not feature expressly in this document, its logic can be found to operate in Art 72(2) GG.²² According to this provision, in the designated areas of concurrent competence, the *Länder* (States) retain competence to the extent that the *Bund* (the Federal State) has not exercised its power through

¹⁹ For discussion with respect to the German Constitution, see eg K. Hesse, *Der Unitarische Bundesstaat* (Karlsruhe: C.F Müller, 1962) at p. 12. See also, with respect to the constitutional settlement in the United States, eg A. de Tocqueville, *Democracy in America* (4th Ed), translated by H Reeve, edited by F Bowen (Cambridge: Sever & Francis, 1864) at p. 206: ‘The federal system was created with the intention of combining the different advantages which result from the magnitude and littleness of nations.’

²⁰ Schütze *op. cit.* at note 17 at p. 246.

²¹ See also Emiliou *op. cit.* at note 4 at pp 388-390 and esp. J. Isensee, *Subsidiaritätsprinzip und Verfassungsrecht* (Berlin: Dunker & Humblot, 2001). For discussion of the implicit operation of subsidiarity in US constitutional law and practice, see eg Bermann *op. cit.* at note 4 at pp 403-447.

²² For discussion of the operation of the subsidiarity principle as a contested principle of German constitutional law, see eg Isensee *op. cit.* at note 21.

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legislation. In other words, unless and until the *Bund* has intervened at the federal level, regulatory competence remains with the individual *Länder*. This sits comfortably with the negative presumption at the heart of the subsidiarity principle. Furthermore, according to Art 72(2) GG, the *Bund* is empowered to legislate in areas of shared responsibility only ‘if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.’²³ Again, this carries distinct echoes of the positive, supporting, function at the core of the subsidiarity principle.

Significantly, since 1994, Art 72(2) GG has been justiciable.²⁴ According to Art 93(2a) GG, the Federal Constitutional Court (*Bundesverfassungsgericht*) is now expressly authorised to rule on the compatibility of federal legislation with the requirements set out in Art 72(2) GG. Exercising its express power of review in recent years, the Court has not shied away from its responsibilities. In at least two cases, the Court’s review under Art 72(2) GG has resulted directly in federal legislation being declared invalid.²⁵ Indeed, the Court’s approach to its task has prompted what many now view as a subsequent dilution of the principle’s justiciability through constitutional reform in 2006.²⁶ Although leaving the wording of Art 72(2) GG unchanged, the recent amendments have excluded substantive areas from the scope of that provision to reduce the breadth of the Court’s subsidiarity review.²⁷

²³ Art 72(2) GG, taken from the official translation, available at: <https://www.btg-bestellservice.de/pdf/80201000.pdf> (last accessed 14.09.11).

²⁴ Art 93(1)(2a) GG *op. cit.* at note 23.

²⁵ BVerfGE 111, 10 (Shop Trading Hours) (2004) and BVerfGE 112, 226 (University Fees) (2005). For discussion of subsidiarity principle by the Court, see also BVerfGE 106, 62 (Geriatric Care) (2002), BVerfGE 110, 141 (Dangerous Dogs) (2004) and BVerfGE 111, 226 (Junior Professors) (2004).

²⁶ For discussion, see G. Taylor, ‘Germany: The Subsidiarity Principle’ (2006) 4(1) *Int J Constitutional Law* 115.

²⁷ See the new proviso inserted into Art 72(2) GG. Effectively, this has created two categories of concurrent legislative powers, only one of which subjects the federal legislature to the subsidiarity test in that provision.

2.3.2 Subsidiarity as a political principle

Subsidiarity features (often implicitly) in many of the great political and philosophical works, from the writings of Aristotle, through those of St Thomas Aquinas and Althusius, to the more recent work of Neil MacCormick.²⁸ As a political principle, subsidiarity is typically seen as a device to safeguard individual liberty against excesses of state authority.²⁹ As Emilou surmises:

‘Liberty is natural and therefore in defining the sphere of the individual and that of the state there should be a presumption in favour of the individual. At this point subsidiarity can be helpful in the sense that in dividing responsibility between the individual, the community and the state, everything is reserved for the individual and the community, except what is granted to the state by the constitution and only in so far as the objectives of society cannot be sufficiently achieved by the individual or community action.’³⁰

More recently, the principle has also become synonymous with efforts to promote ‘good governance’ and to increase the proximity of citizens to the political decision-making processes that affect them.³¹ As Calliess notes, ‘decentralised solutions reduce the complexity of the decision-making process and thereby contribute to increased transparency. Those affected are better able to identify with the political decision, where it is taken as closely as possible to them.’³² Subsidiarity is therefore embraced as a principle that is capable of enhancing the democratic character of the political process. In an attempt to bolster this effect, other commentators have also discussed the principle in the context of institutional reform. Here, subsidiarity is

²⁸ For a comprehensive historical review, see eg C. Millon-Delsol, *L'état Subsidaire* (Paris: PUF, 1992) and A. Føllesdal, ‘Survey Article: Subsidiarity’ (1998) 6(2) *JPP* 190 esp. at pp 198-213. For an overview of MacCormick’s work, see N. MacCormick, ‘Democracy and Subsidiarity in the European Commonwealth’ in N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: OUP, 1999) at pp 137-156.

²⁹ Though, as discussed above, the principle is also employed to structure private relations between individuals. See here eg Pope Pius XI *Quadragesimo Anno op. cit.* at note 4.

³⁰ Emilou *op. cit.* at note 4 at p. 388 (discussing Blackstone’s work on liberty).

³¹ Calliess *op. cit.* at note 2 at p. 26.

³² *Ibid* (this author’s translation). See, to same effect, eg E. Swaine, ‘Subsidiarity and Self-Interest: Federalism at the European Court of Justice’ (2000) 41(1) *Harvard Int. LJ* 1 at p. 52 and C. Ritzer and M. Ruttloff, ‘Die Kontrolle des Subsidiaritätsprinzips: Geltende Rechtslage und Reformperspektiven’ (2006) *EuR* 116 at p. 118.

invoked as a justification for the creation of new tiers of localised political decision-making bodies.³³

Related to these developments and to the preceding arguments on democracy and transparency, there is now also an increasing belief in the value of localised decision-making per se. In particular, policy-makers recognise that, despite increasing globalisation, certain problems are in fact best regulated – or at least managed and resolved – locally.³⁴ In both competition and environmental policy, for example, the logic of subsidiarity finds expression in the view that sub-national actors may enjoy information advantages vis-à-vis centralised authorities and are frequently better placed to implement policies in the particular context in which problems arise.³⁵

The political dimension of the subsidiarity principle also serves a particularly important function. The politics of subsidiarity provide the case for the defence of the principle's substantive *a priori* claim in favour of the autonomy of the smaller, lower units. The benefits associated with localised decision-making, notably increased transparency, accountability and democratic legitimacy, all serve to strengthen subsidiarity's fundamental defence of the right of lower units to govern their own affairs without interference from centralised bodies as far as possible.³⁶

2.3.3 Subsidiarity as an economic principle

Finally, in economics, the subsidiarity principle finds expression in the theory of fiscal federalism.³⁷ This theory addresses the allocation of public economic functions

³³ Barber *op. cit.* at note 1 at p. 312. See also A. Scott, J. Peterson and D. Miller, 'Subsidiarity: A "Europe of the Regions" v. the British Constitution?' (1994) 32(1) *JCMS* 47, who reflect on the pressures to decentralise decision-making within the United Kingdom in light of the introduction of the subsidiarity principle into the (then) EC. See also, to the same effect, D. Miller and A. Scott, 'Subsidiarity and Scotland' in A. Duff (Ed.) *Subsidiarity within the European Community: A Federal Trust Report* (London: Federal Trust, 1993) 87.

³⁴ Calliess *op. cit.* at note 2 at p. 26.

³⁵ With respect to EU competition law, see eg the reforms introduced by Regulation 1/2003 EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2004] OJ L 1/1. In the area of environmental law, see recently eg the Commission proposal for a regulation of the European Parliament and of the Council on the Common Fisheries Policy, COM (2011) 425 final, which seeks, amongst other things, to decentralise the governance of fisheries.

³⁶ Calliess *op. cit.* at note 2 at p. 27.

³⁷ For a summary of the evolution of fiscal federalism, see W. Oates, 'Towards a Second-Generation Theory of Fiscal Federalism' (2005) 12(4) *Int Tax Public Finance* 349.

in systems of multi-level governance. In this context, subsidiarity – also referred to as the ‘decentralisation theorem’ – seeks to secure an optimum balance of unity and diversity in order to maximise global welfare.³⁸ In line with the politics of ‘good governance,’ the starting point is the assertion that all-out centralisation is sub-optimum. In other words, local, not central, governments are considered better able to satisfy voter preferences. This is due to their increased proximity to citizens. However, the decentralisation theorem also acknowledges that the benefits and burdens of local policies often extend beyond the jurisdictional boundaries of the regulating local authority. For example, the environmental impact of industrial activities may transcend local frontiers. Likewise, the provision of certain public goods such as defence or healthcare at local level is often associated with increased costs when compared with centralised provision.

Against this background, subsidiarity operates within fiscal federalist theory to direct regulatory competence both ways along the vertical axis. In accordance with the logic of subsidiarity, there is a rebuttable presumption in favour of localised decision-making. Externalities or ‘spill-over effects’ associated with particular policy decisions should therefore be addressed by the lowest tier of government capable of internalising their effect at the lowest cost. On the other hand, and in line with the principle’s positive dimension, subsidiarity supports intervention by the centralised regulator in order to exploit clear economies of scale that are associated with significant cost-savings.³⁹ Broadly speaking, it is argued that, in result, the subsidiarity principle restricts intervention by the central authority to three cases: (1) the correction of market failures arising from externalities (including the provision of

³⁸ See Oates *op. cit.* at note 37 at p. 351. Whilst not using the term himself, Oates notes expressly that ‘fiscal decentralisation’ is referred to as ‘the principle of subsidiarity’ in Community law: See W. Oates, ‘An Essay on Fiscal Federalism’ (1999) 37(3) *JEL* 1120 at p. 1122, footnote 6. See also Pelkmans, *European Integration: Methods and Economic Analysis op. cit.* at note 17 at p. 37.

³⁹ The debate over the relative advantages of centralised intervention versus the benefits of local regulation has become more nuanced in recent years. The evolving approach to fiscal federalism – the so-called second-generation fiscal federalism – now incorporates insights from, *inter alia*, public choice theory and work on information issues. In so doing it challenges, in particular, the traditional assumption of the benevolent public authority acting in the general interest. See on this generally, Oates *op. cit.* at note 37 pp 356-368.

certain ‘national’ public goods such as defence); (2) the redistribution of income; and (3) ensuring macro-economic stability.⁴⁰

2.3.4 Summary

As this brief introductory review of the definition, origins and evolution of the principle has revealed, subsidiarity has a ‘diverse and rich’ history as a structural principle in systems of multi-level governance.⁴¹ The principle finds expression in contemporary constitutional, political and economic theory. Each discipline approaches subsidiarity differently and seeks to instrumentalize it for particular purposes. However, notwithstanding such differences, there is a common thread. In each context, subsidiarity is employed as a device designed to negotiate an optimum balance of unity and diversity in areas of shared regulatory responsibility.

From this starting point, this chapter turns now to consider how the principle was introduced and developed in European integration. The next section begins with a brief review of early expressions of the principle in the integration process. It then considers, in greater detail, the formalisation of subsidiarity as a legal principle of EU law through the Maastricht Treaty and the principle’s subsequent evolution thereafter. This discussion forms the basis for the analysis of subsidiarity in the literature and case law in section 4.

3. Subsidiarity and the European Union

3.1 Early expressions

The term subsidiarity did not feature in the original Treaty of Rome. However, the concept began to emerge in the 1970s in connection with debates over the ongoing trajectory of European integration.⁴² For example, the subsidiarity principle was referred to expressly in both the Tindemans Report on the European Union and the

⁴⁰ Oates *op. cit.* at note 37 at p. 1121.

⁴¹ Bernard *op. cit.* at note 2 at p. 635.

⁴² Emiliou *op. cit.* at note 4 at p. 391 and Estella *op. cit.* at note 8 at p. 85.

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MacDougall Report on fiscal federalism.⁴³ In the latter, the principle was in fact invoked to support increased intervention by the then Community institutions.

The European Parliament's proposed Draft Treaty establishing the European Union contains the first clear reference to subsidiarity as a general principle.⁴⁴ In its preamble, the Draft Treaty refers to the intention to 'entrust the common institutions, in accordance with the principle of subsidiarity, only with those powers required to complete successfully the tasks they may carry out more satisfactorily than the States acting independently.' Art 12 of the Draft Treaty set out the specifics of the subsidiarity test. Following the approach in the German *Grundgesetz* discussed above, this provision introduced a distinction between exclusive and concurrent competences.⁴⁵ With respect to areas of concurrent competence, Art 12(2) sought to confer the primary right to legislate on the Member States. The Union institutions were to be empowered to act:

'only... to carry out those tasks which may be undertaken more effectively in common than by the Member States acting separately, in particular those whose execution requires action by the Union because their dimension or effects extend beyond national frontiers.'

Although the Draft Treaty never entered into force, it is generally considered to have influenced the subsequent Treaty reform process prior to the express adoption of the subsidiarity principle at Maastricht. Art 130r EEC,⁴⁶ which formalised the Community's competence in environmental policy, provides the clearest example in this respect.⁴⁷ According to this provision, which was introduced by the Single European Act, 'the Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at

⁴³ Report by Mr Leo Tindemans to the European Council, *Bulletin of the European Communities*, Supplement 1/76; Report of the Study Group on the Role of Public Finance in European Integration (1977) OOPEC, Luxembourg (the MacDougall Report).

⁴⁴ Draft Treaty establishing the European Union, *Bulletin of the European Communities*, 2/84 at pp 8-26.

⁴⁵ Calliess *op. cit.* at note 2 at p. 36 and Emiliou *op. cit.* at note 4 at p. 392.

⁴⁶ Post-Lisbon, environmental protection is listed as a 'shared competence' (Art 4(2)(e) TFEU) and, as such, is now subject to the subsidiarity principle in Art 5(3) TEU. See also earlier, eg Case C-114/01 *AvestaPolarit Chrome Oy* [2003] ECR I-8725 at para. 56.

⁴⁷ Supporting this analysis, see eg Emiliou *op. cit.* at note 4 at pp 393-394, F. Röhling, *Europäische Fusionskontrolle und Subsidiaritätsprinzip*, (Baden-Baden: Nomos, 2002) at p. 65. See also the Padoa-Schioppa Report of the Commission (Luxembourg, 1987), available at http://ec.europa.eu/economy_finance/emu_history/documentation/chapter12/19870410en149efficiencestabil_a.pdf (last accessed 14.09.11).

Community level than at the level of the individual Member States.’ As the reference to the ‘respective spheres of competence’ in the following paragraph confirms, competence in the substantive field of environmental policy was therefore shared by the Community and the Member States, with intervention by the former conditional on its capacity to respond to specific problems ‘better’ than the individual states.

3.2 The Maastricht Treaty

The Treaty on European Union formalised the subsidiarity principle as a constitutional principle of European integration. This Treaty introduced subsidiarity as a general principle of EU law in both the amended EC Treaty and the newly created Treaty on European Union. The classic reference to subsidiarity was contained within the first of these Treaties. Art 3b(2) of the amended EC Treaty provided that:

‘In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.’

Alongside the above provision, both the preamble to and Art 1 of the TEU also contained an express reference to the subsidiarity principle. These provisions established that, in the evolving process of European integration, decisions are to be taken ‘as closely as possible to the citizen.’

The formalisation of subsidiarity at Maastricht was prompted by concerns over increasing centralisation in the integration process.⁴⁸ In particular, the introduction of majority voting *de jure* and *de facto* in core substantive policy areas through the Single European Act disturbed the historical balance of European Integration.⁴⁹ The shift in favour of increased qualified majority voting in the Council took a considerable degree of control over the pace and depth of integration out of the hands of individual Member States, who, acting alone, were no longer able to block

⁴⁸ Ritzer and Ruttloff *op. cit.* at note 32 at p. 116.

⁴⁹ Estella *op. cit.* at note 8 at p. 179. For Estella, subsidiarity was specifically introduced as a ‘counter-majoritarian instrument.’

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specific legislative proposals in key areas.⁵⁰ As Bermann notes, this development ‘generated press for a principle like subsidiarity.’⁵¹ In particular, the Governments of the United Kingdom and Germany were most troubled by the prospect of further centralisation, albeit for differing reasons.⁵² Whereas the UK Government was more hostile to federal ambitions for the Community and anxious to restrict integration to *market* integration, the German Government sought to protect the legislative competence of its individual *Länder*.⁵³ The principle of subsidiarity was therefore embraced as a means of addressing – or even appeasing⁵⁴ – these concerns directly in order to ensure the continuing development of the European integration project.⁵⁵

In terms of substance, the subsidiarity principle as introduced through the Maastricht Treaty draws on both the economic and political expressions of the principle to guide its operation. First, in line with the wording of the defunct Draft Treaty discussed above, the references to ‘sufficiency,’ ‘scale and effects’ and ‘better achieved’ in Art 5(2) EC alluded to the economic dimension of subsidiarity outlined earlier.⁵⁶ As noted in section 2.3.3 above, in economic theory, subsidiarity provides, inter alia, a normative basis for intervention by the centralised regulator in order to address the spill-over effects of particular policies enacted at lower levels. Further support for an economic reading of Art 5(2) EC could be found in the first Subsidiarity Protocol,

⁵⁰ For discussion of this important development and its implications for the Member States in the process of integration see, in particular, see J. Weiler, ‘The Transformation of Europe’ (1991) 100(8) *Yale LJ* 2403 esp. at p. 2454.

⁵¹ Bermann *op. cit* at note 4 at p. 348. See also eg T. Schilling, ‘Subsidiarity as a Rule and a Principle’ (1994) 14 *YEL* 203 at p. 209.

⁵² Röhling *op. cit.* at note 47 at p. 66. See also Calliess *op. cit.* at note 2 at p. 50.

⁵³ Calliess *op. cit.* at note 2 at pp 51-55.

⁵⁴ This is the critical view of Pescatore *op. cit.* at note 5 at p. 1073 and pp 1075-6.

⁵⁵ On this point, see the statement of the then Prime Minister of the United Kingdom, John Major, to the House of Commons: ‘The Maastricht Treaty marks the point at which, for the first time, we have begun to reverse [the] centralizing trend. We have moved decision-taking back towards the Member States in areas where Community law need not and should not apply. ...The future of Europe is now based on a different foundation.’ House of Commons Hansard (1992) Vol. 209 Columns 265-270, available at <http://www.publications.parliament.uk/pa/cm199293/cmhansrd/1992-05-20/Debate-3.html> (last accessed 14.09.11).

⁵⁶ It is important to note that, in many key respects, the Union remains incomparable with the federal state model that continues to frame theories of fiscal federalism discussed in section 2.3.3 above. The Union has, for example, no tax raising powers and only limited competence for redistribution. Accordingly, discussion of subsidiarity as an economic principle in Union law is restricted to its use in determining ‘allocative functions’: establishing a transnational market and maximising its efficiency. For further discussion of this point, see J. Pelkmans, ‘Testing for Subsidiarity’ (2006) BEEP Briefing No. 13, available at: <http://www.coleurop.be/template.asp?pagename=BEEP> at pp 19-25 (last accessed 14.09.11).

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annexed to the subsequent Treaty of Amsterdam.⁵⁷ In Art 5, this Protocol set out supplementary guidance to assist in the determination of whether or not intervention by the then Community met the demands of the subsidiarity principle. In particular, this provision referred to the requirement to examine whether or not ‘the issue under consideration [had] transnational aspects which cannot be satisfactorily regulated by action by Member States.’⁵⁸

The economic characteristics of subsidiarity set out in Art 5(2) EC may be distinguished from the principle’s expression in the Treaty on European Union (TEU). In both the preamble to and Art 1 of the TEU, subsidiarity’s normative claim was more political than economic. The requirement that decisions are taken as closely as possible to the citizens they affect appeals directly the political values of localised decision-making. As noted in section 2.3.2 above, this is associated with enhanced transparency and democratic legitimacy, both of which remain important concerns in European integration today. Indeed, as will be discussed further below, recent efforts to bolster the effectiveness of subsidiarity as a legal principle in EU integration have returned to consider this particular dimension of subsidiarity more directly.

3.3 Subsequent development within EU law

Subsidiarity has been rightly described as ‘the word that saved Maastricht.’⁵⁹ However, subsidiarity cannot simply be dismissed as a ‘Maastricht moment.’ The commitment of the Member States to the principle has been strengthened progressively through subsequent Treaty amendments and remains firm. In terms of substance, the principle is largely unchanged since Maastricht. Following the entry into force of the Lisbon Treaty, Art 5(2) EC (ex Art 3b(2) EC) now finds expression in Art 5(3) of the Treaty on European Union with no substantive amendment.⁶⁰ Similarly, the preamble to and Art 1 of the revised TEU continue to refer to the objective of ensuring that decisions are taken as closely as possible to the citizens

⁵⁷ Protocol on the Application of the Principles of Subsidiarity and Proportionality [1997] OJ C 340/105.

⁵⁸ *Ibid.*, Art 5.

⁵⁹ D. Z. Cass, ‘The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community’ (1992) 29(1) *CMLRev* 1107.

⁶⁰ Note: the revised Art 5(3) TEU now refers expressly to action by sub-national actors.

that they affect. As noted above, the addition of the first Subsidiarity Protocol, annexed to the Amsterdam Treaty, provided a welcome source of clarification. However, it did not alter the substance of the principle.

What has changed in more recent years is not the commitment to subsidiarity itself.⁶¹ Instead, the focus has been on developing more effective mechanisms to ensure that the principle is properly enforced. The most significant change in this respect entered into force in December 2009 with the Lisbon Treaty.⁶² This Treaty introduced a new system of ex-ante control. In accordance with the procedure set out in the revised Subsidiarity Protocol and the new Protocol on the Role of National Parliaments,⁶³ Member State parliaments are now engaged as the ‘watchdogs’ of subsidiarity.⁶⁴ The detail of these recent amendments is discussed in section 4.4 below. In the next section, we turn first to examine the reception and evolution of subsidiarity as a legal principle in both the case law and literature.

4. Subsidiarity in the legal literature and case law

Notwithstanding its central position within the Treaty framework, legal commentators have never really rated subsidiarity as a legal principle. From its introduction into the Treaty framework at Maastricht onwards, the principle has been repeatedly criticised as an ineffective legal tool. Piecing together some of the classic descriptions in the legal literature, subsidiarity is interpreted as a ‘great white hope,’⁶⁵ empty ‘Eurospeak’⁶⁶ or a ‘formula for failure’⁶⁷ that is incapable of ‘solv[ing] a single substantive problem’⁶⁸ within the Union.⁶⁹

⁶¹ Commitment here is understood to denote an intention not to deviate from an agreed course of action. This interpretation is borrowed from Estella *op. cit.* at note 8 at p. 88.

⁶² Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306/1.

⁶³ Protocol (No. 1) on the Role of National Parliaments in the European Union [2010] OJ C 83/203 and Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality [2010] OJ C 83/206.

⁶⁴ I. Cooper, ‘The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU’ (2006) 44(2) *JCMS* 281.

⁶⁵ G. Davies, ‘Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time’ (2006) 43(1) *CMLRev* 63 at p. 66.

⁶⁶ G. P. Smith, ‘Subsidiarity and Article 9’ (1992) *Int. Merger Law: Events and Commentary* (No. 24), cited in Bermann *op. cit.* at note 4 at p. 333.

⁶⁷ Mackenzie-Stuart ‘A Formula for Failure’ in *The Times* (London), 11 Dec 1992.

⁶⁸ Pescatore *op. cit.* at note 5 at p. 1073 (this author’s translation).

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Broadly speaking, criticism of subsidiarity as a legal principle of European integration can be divided under two headings.⁷⁰ First, the principle has been attacked on technical grounds. It is argued that subsidiarity lacks substance as an enforceable legal rule and, for that reason, is simply ineffective. In the words of Estella, ‘functionally speaking, the principle seems devoid of any clear legal content, which makes its implementation, especially its legal implementation, problematic.’⁷¹ Secondly, subsidiarity has also been criticised on normative grounds. In this connection, it has been argued that the principle is destructive to the integration project itself.⁷² Toth, for example, denounced the introduction of the principle into the Treaty framework at Maastricht as a ‘retrograde step’: ‘Without providing any cure for the any of the Community’s ills, it threatens to destroy hard-won achievements. It will weaken the Community and slow down the integration process.’⁷³

To test the strength of this persisting negative opinion, this section examines how subsidiarity has been interpreted in both the commentary and case law. The analysis will focus primarily on addressing the first line of the subsidiarity critique: the technical critique of subsidiarity as an enforceable legal rule. The literature and jurisprudence will be examined concurrently in order to trace the evolution of subsidiarity as a *legal* norm in EU integration. In summary, it is argued, contrary to the prevailing view in the legal literature, that the Court has in fact transformed subsidiarity into an enforceable legal principle restraining the Union legislature in its exercise of shared regulatory competences. The inherent limits of the Court’s review have, however, prompted the introduction of the new system of ex ante compliance monitoring provided for in the Lisbon Treaty.

⁶⁹ For other terms see eg T. Bruha, ‘Das Subsidiaritätsprinzip im Recht der Europäischen Gemeinschaft’ in Riklin u. Batliner (Eds.), *Subsidiarität: Ein interdisziplinäres Symposium op. cit.* at note 12 at p. 399 and Bermann *op. cit.* at note 4 at p. 332-333.

⁷⁰ Following Estella *op. cit.* at note 8 at pp 1-2.

⁷¹ See also eg S. Weatherill, ‘The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law has Become a “Drafting Guide”’ (2011) 12(3) *GLJ* 827 at pp 845-846: ‘Subsidiarity is potentially helpful in so far as it directs an engagement with relevant learning such as that exploring the economics of federalism as a basis for calculating the virtues and vices of centralized rule-making as opposed to local autonomy. ...But this is remote from legal rules of the type apt to form the basis of judicial review of [Union] legislation.’

⁷² Estella *op. cit.* at note 8, noted expressly in his conclusions at p. 177.

⁷³ A. Toth, ‘The Principle of Subsidiarity in the Maastricht Treaty’ (1992) 29(4) *CMLRev* 1079 at p. 1105.

4.1 The initial view from the commentary

Following the principle's introduction at Maastricht, commentators focused closely on assessing the implications of Art 5(2) EC (now Art 5(3) TEU) as an enforceable legal principle.⁷⁴ In particular, their efforts centred on discussing the principle's effect as a legal restraint on the actions of the Union legislature. As will be argued in Chapter 2, this rather narrow, institution-specific view of subsidiarity as a principle of EU integration does not necessarily follow from the wording of either the Treaties or the Subsidiarity Protocols. Indeed, there is no reason not to consider the principle's effect in other contexts. However, notwithstanding this point, the fact remains that analysis of subsidiarity in the literature focused initially on discussing the principle's effect as a brake on the Union legislature.

In the early literature on subsidiarity, there was significant disagreement among commentators over both the substance and legal effect of Art 5(2) EC. Turning first to substance, the key dispute concerned the interpretation of 'non-exclusive' competences.⁷⁵ This was a fundamental issue as the reference to non-exclusive competences in Art 5(3) TEU ultimately determined whether or not the principle of subsidiarity actually applies. Of course, following the entry into force of the Lisbon Treaty, this issue is now of only historical interest. Articles 3-6 of the Treaty on the Functioning of the European Union (TFEU) now categorise Union competences (using broad policy headings) as exclusive, shared, coordinating and supporting. For present purposes, Art 4 TFEU is the key provision. This article sets out the areas of competence that are held concurrently by the Union and the Member States. These include, in particular, competence for the regulation of the internal market; economic, social and territorial cohesion; environmental policy; consumer protection and energy policy.

With respect to the operative criteria in Art 5(2) EC, there was (and remains) noticeably less dispute in the commentary. The exercise of shared competence by the

⁷⁴ See esp. A. Toth, 'Is Subsidiarity Justiciable' (1994) 19(3) *ELRev* 268.

⁷⁵ Contrast here eg the narrow view adopted by J. Steiner, 'Subsidiarity under the Maastricht Treaty' in D. O'Keeffe and P. M. Twomey (Eds.), *Legal Issues of the Maastricht Treaty* (London: Chancery Law, 1994) 49 at pp 57-58 with the broad view favoured by A. Toth in 'A Legal Analysis of Subsidiarity' in the same volume at pp 39-40.

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Community was viewed as being subject to a two-step analysis.⁷⁶ The first criterion, the requirement that the objective of the proposed action ‘cannot be sufficiently achieved’ by the Member States,’ is framed as a negative test. It refers not to the inadequacy of any actual or potential action by the Member States, but to their inability to realise the proposed objective unilaterally.⁷⁷ The concept of inability is defined by reference to the need for Union intervention to address issues exhibiting an overt transnational dimension.⁷⁸ This view is also supported by the wording of the second limb of Art 5(2) EC, which refers to the ‘scale and effects’ of the relevant issue. With respect to the second additional test, the requirement that the objective can be ‘better achieved’ by the Union, this is viewed as causally linked through the reference to ‘and therefore.’ Whilst this is correct, satisfying the second limb of Art 5(2) EC is not considered to be automatic.⁷⁹ In line with the original Subsidiarity Protocol, this positive criterion is viewed as having an independent function. It needed to be shown that Community action ‘adds value.’

Turning now from questions of substance to enforcement, the key question in early subsidiarity debates was whether or not Art 5(2) EC was justiciable. Prior to the Court’s first decision on this point (discussed in the next section), commentators offered differing approaches.⁸⁰ At the extreme end of the spectrum, it was argued that Art 5(2) EC was a fully justiciable rule, enabling the (then) Community courts to determine absolutely the respective spheres of competence of the Community and the Member States.⁸¹ Reaching the opposite conclusion, other commentators argued that Art 5(2) EC was too imprecise to unfold anything other than political effect.⁸² Indeed, according to Mackenzie-Stuart, the subsidiarity principle in that provision

⁷⁶ Eg Calliess *op. cit.* at note 2 at p. 92, Ritzer and Ruttloff *op. cit.* at note 32 at p. 118 and Röhling, *op. cit.* at note at 47 at p. 66.

⁷⁷ H. D. Jarass, ‘KG-Kompetenzen und das Prinzip der Subsidiarität nach Schaffung der Europäischen Union’ (1994) 21 *EuGRZ* 209 at p. 210, who adopts a strict approach, arguing that intervention by the Community in cases other than those in which Member States are incapable of addressing transnational problems was simply wrong, irrespective of any political support the measure may command.

⁷⁸ See esp, Jarass *op. cit.* at note 77 at p. 215 and Ritzer and Ruttloff *op. cit.* at note 32 at p. 118.

⁷⁹ Jarass *op. cit.* at note 77 at p. 211.

⁸⁰ For a summary, see esp. Röhling, *op. cit.* at note 32 at pp 69-72.

⁸¹ See, most strongly here M. Heinze, ‘Europäische Einflüsse auf das nationale Arbeitsrecht’ (1994) *RdA* 1 at p. 3. See also M. Zuleeg ‘Justiziabilität des Subsidiaritätsprinzips’ in K. W. Nörr and T. Oppermann (Eds.) *Subsidiarität: Idee und Wirklichkeit* (Tübingen: Mohr, 1997) at p. 203.

⁸² See eg Emiliou *op. cit.* at note 4. For a summary, see Röhling, *op. cit.* at note 47 at p. 71.

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was ‘gobbledygook.’⁸³ It required judges ‘to answer questions which are, by their nature, essentially political,’ which, he maintained, was ‘fundamentally wrong’ in principle.⁸⁴ For the overwhelming majority of commentators, however, the question was not whether Art 5(2) EC was amenable to judicial review but rather the extent of that review.⁸⁵ Even amongst its most vocal critics, the provision was recognised as a legal principle in the Treaty, the observance of which the Community courts were bound to ensure according to Art 220 EC (now Art 19 TEU).⁸⁶ Art 5(2) EC was ‘a mandatory restriction on the exercise of Community competence,’ and any act of the Union legislature adopted contrary to that provision was liable to be set aside by the ECJ.⁸⁷

With respect to the intensity of the Court’s review, the initial consensus in the literature was that Art 5(2) EC was amenable only to very limited review.⁸⁸ The review of assessments of whether the objectives of a legislative measure may be ‘sufficiently achieved’ by the Member States was considered a ‘judicial no man’s land.’⁸⁹ Any attempt at substantive review would inevitably lead the Court to substitute its own assessment for that of the Union legislature. Accordingly, commentators maintained that control by the Community courts should be largely restricted to monitoring compliance with procedural formalities. This included, in particular, ensuring that the Community legislature’s decision to act was adequately reasoned on subsidiarity grounds.⁹⁰ In substantive terms, it was generally accepted that the Court’s review of Art 5(2) EC was much more limited. As Toth noted, ‘all the Court may be expected to do... is to examine whether in arriving at its decision

⁸³ Mackenzie-Stuart *op. cit.* at note 67. See also, in the same vein, eg D. Grimm, ‘Subsidiarität ist nur ein Wort’ in the *Frankfurter Allgemeine Zeitung*, 17 Sept. 1992 at p. 38.

⁸⁴ Mackenzie-Stuart *op. cit.* at note 67.

⁸⁵ Those supporting the justiciability of Art 5(2) EC in principle include Bermann *op. cit.* at note 4, Emiliou *op. cit.* at note 4, Schilling *op. cit.* at note 51 and Toth *op. cit.* at note 74.

⁸⁶ Referring here to Pescatore *op. cit.* at note 5 at p. 1090.

⁸⁷ Jarass *op. cit.* at note 78 at p. 211 (this author’s translation).

⁸⁸ Bermann *op. cit.* at note 4 at p. 456 and Toth *op. cit.* at note 75 at p. 281.

⁸⁹ Röhling *op. cit.* at note 47 at p. 69 (this author’s translation).

⁹⁰ Toth *op. cit.* at note 74 at pp 283-285.

the Council has not committed a manifest error or a misuse of powers or has not patently exceeded the bounds of its discretion.’⁹¹

Perspectives on the justiciability of subsidiarity have remained relatively unchanged. In summary, the broad consensus in the legal literature remains that Art 5(2) EC (now Art 5(3) TEU) is, in principle, subject to judicial review by the Court of Justice and to the degree outlined by Toth above.⁹² This position largely reflects the accepted reading of the Court’s case law on subsidiarity, to which we now turn to consider.

4.2. The case law of the Court of Justice

Following the formal integration of subsidiarity into the Community legal order, it was only a matter of time before the principle reached the Community courts. References to subsidiarity soon began to emerge in submissions and, in particular, in the opinions of the Advocates General.⁹³ Indeed, post-Maastricht, aligning arguments with subsidiarity arguably became rather fashionable. In *van Schijndel*, for example, Advocate General Jacobs interpreted the Court’s historic efforts to balance effective judicial protection with respect for national procedural autonomy as a ‘precise reflection’ of the subsidiarity principle.⁹⁴

Leaving brief allusions to the principle aside, judicial engagement with subsidiarity has centred almost exclusively on the ECJ’s review of the respect for Art 5(2) EC by the Union legislature.⁹⁵ In a series of cases, the ECJ was requested to address challenges to the validity of Community legislation on subsidiarity grounds. Notably, though rather unsurprisingly, the leading voices behind the introduction of the

⁹¹ *Ibid.*, at p. 284. See, to the same effect, Emiliou *op. cit.* at note 4 at p. 403 and Jarass *op. cit.* at note 77 at p. 212.

⁹² See eg Davies *op. cit.* at note 65, M. Kumm, ‘Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union’ (2005) 12 (4) *ELRev* 503, Ritzer and Ruttloff *op. cit.* at note 32 and Weatherill *op. cit.* at note 71.

⁹³ See eg the Opinion of AG Jacobs in Joined Cases C-430/93 and C-431/93 *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705 at para. 27 and the Opinion of AG Lenz in Case C-209/94 P *Buralux SA, Satrod SA and Ourry SA v Council of the European Union* [1996] ECR I-615 at paras 83-85 and Case C-192/94 *El Corte Inglés SA v Cristina Blázquez Rivero* [1996] ECR I-1281 at para. 27.

⁹⁴ Joined Cases C-430/93 and C-431/93 *van Schijndel and van Veen op. cit.* at note 93 at para. 27.

⁹⁵ The exceptions to this paradigm case are examined in Chapter 2. See further, section 5 below.

subsidiarity principle – the United Kingdom and Germany – instigated a number of these proceedings.⁹⁶ Responding to these complaints and others, the ECJ was forced to confront the issues raised in the early subsidiarity commentary discussed above, most notably the justiciability of Art 5(2) EC.

4.2.1 Case C-84/94 *United Kingdom v. Council (Working Time)*

The first case requiring the ECJ to engage comprehensively with the subsidiarity principle was *United Kingdom v. Council (Working Time)*.⁹⁷ In this decision, the applicant challenged the validity of Council Directive 93/104, laying down minimum health and safety requirements for the organisation of working time.⁹⁸ In support of its argument, the United Kingdom Government invoked the subsidiarity principle in Art 5(2) EC. It took the view that:

‘the Community legislature [had] neither fully considered nor adequately demonstrated whether there were transnational aspects which could not be satisfactorily regulated by national measures, whether such measures would conflict with the requirements of the EC Treaty or significantly damage the interests of Member States or, finally, whether action at Community level would provide clear benefits compared with action at national level.’⁹⁹

However, for reasons that are difficult to fathom, the applicant stated expressly that it was not seeking to raise an infringement of Art 5(2) EC as a separate plea.¹⁰⁰

In a gesture of goodwill to the applicant, the Court did, in effect, isolate and address the Directive’s conformity with Art 5(2) EC as a distinct plea.¹⁰¹ However, the Court’s review did very little to attribute substance to subsidiarity as a legal principle. Essentially, the ECJ only considered the negative criterion in Art 5(2) EC.

⁹⁶ See the discussion in section 3.2 above.

⁹⁷ Case C-84/94 *United Kingdom v. Council of the European Union (Working Time Directive)* [1996] ECR I-5755.

⁹⁸ Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time [1993] OJ L 307/18.

⁹⁹ Case C-84/94 *Working Time op. cit.* at note 97 at para. 46.

¹⁰⁰ *Ibid.*, at para. 46. For comments on the poor quality of the applicants’ arguments in this context, see also G. A. Bermann, ‘Proportionality and Subsidiarity’ in C. Barnard and J. Scott (Eds.), *The Law of the Single European Market: Unpacking the Premises* (Oxford: OUP, 2002) 75 at p. 87, Davies *op. cit.* at note 65 at pp 81-22 and Swaine *op. cit.* at note 32 at p. 59.

¹⁰¹ The Court turned to consider subsidiarity *after* concluding that the Directive was adopted on the correct legal basis. The ECJ had therefore already confirmed that the Community legislature enjoyed the competence to act (Art 5(1) EC) before moving to address – under the heading of subsidiarity – whether the legislature *should* have acted. See Case C-84/94 *Working Time op. cit.* at note 97 at paras 25-46, and esp. at para 46.

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The question of whether any (necessary) action by the Community also brought with it ‘clear benefits’ was not examined at all.¹⁰² In summary, the Court concluded that Art 138 EC (the relevant legal basis) empowered the Council to adopt measures contributing to the improvement of the health and safety of workers achieving that objective.¹⁰³ The decision to make recourse to this legal base in the Treaty was, however, left entirely to the Council, to be resolved solely through political negotiation:

‘[o]nce the Council has found that it is necessary to improve the existing level of protection as regards the health and safety of workers and to harmonize the conditions in this area while maintaining the improvements made, achievement of that objective through the imposition of minimum requirements necessarily presupposes Community-wide action.’¹⁰⁴

The Court’s approach in *Working Time* provides little evidence to support subsidiarity’s operation as a legal restraint on the Union legislature. The judgment made it clear that the Court was prepared only to engage in the review of other matters. This included, first and foremost, whether or not the contested Directive had been enacted using the correct legal basis.¹⁰⁵ In effect, this amounted to little more than an examination of whether the Directive had as its principal objective the improvement of the health and safety of workers.¹⁰⁶ Thereafter, the Court scrutinised (albeit rather lightly) the Directive’s proportionality; in other words, it examined whether the means which that instrument employed were suitable for the purpose of achieving the desired objective and whether they did not go beyond what was necessary to achieve it.¹⁰⁷ By contrast, the Court did not even engage in the most cursory assessment of the subsidiarity principle.¹⁰⁸ In particular, no attempt whatsoever was made to distinguish between, on the one hand, the *existence* of the Council’s competence to act (pursuant to Art 138 EC) and, on the other hand, its right to *exercise* that same competence.

¹⁰² The ECJ addressed this point only later on in the context of its Art 5(3) EC proportionality review and stated that it could be rejected at the outset. It did not consider the positive criterion to be distinct from the negative one. See Case C-84/94 *Working Time op. cit.* at note 97 at paras 54-56.

¹⁰³ *Ibid.*, at paras 25-46, esp. at para. 46

¹⁰⁴ *Ibid.*, at para. 47 (this author’s emphasis).

¹⁰⁵ *Ibid.*, at paras 25-45, following its earlier approach in eg Case 45/86 *Commission v Council (Tariff Preferences)* [1987] ECR 1493 at para. 11 and Case C-300/89 *Commission v Council (Titanium Dioxide)* [1991] ECR I-2867 at para. 10.

¹⁰⁶ Case C-84/94 *Working Time op. cit.* at note 97 at para. 45.

¹⁰⁷ *Ibid.*, at paras 50-67.

¹⁰⁸ *Ibid.*, at para. 47.

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The above distinction between the existence and exercise of regulatory competence is not pulled out of thin air, but rather follows expressly from the wording of Art 5 EC (now Art 5 TEU). The existence of competence to act is a matter for the principle of conferral in Art 5(1) EC (now Art 5(2) TEU). This provision established that, ‘the Community shall within the limits of the powers conferred upon it by this Treaty.’ In line with the structure of Art 5 EC (Art 5 TEU), the identification of a legal basis in the Treaty necessarily precedes the assessment, in so far as shared competences are concerned, of whether or not the Community (now Union) legislature actually enjoys the right to *exercise* that competence. This second limb is governed by the subsidiarity test in Art 5(2) EC. Where the subsidiarity test is met, attention then turns to the final limb of the Treaty’s competence control mechanism in Art 5 EC (Art 5 TEU): the proportionality test. This criterion seeks to control the nature and intensity of Community (Union) intervention, a point that is now made very clear by the revised wording of Art 5(4) TEU (ex Art 5(3) EC). According to this provision, ‘Under the principle of proportionality, the *content and form* of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.’¹⁰⁹

In subsequent cases, the Court adhered closely to its approach in *Working Time*. For example, on several occasions the ECJ was requested to scrutinise the legal basis of particular Community measures.¹¹⁰ As in *Working Time* (and before), the ECJ’s review on this point focused exclusively on whether or not the contested Community instrument served the substantive objective that its chosen legal basis was designed to advance. In other cases, the Court was also asked to adjudicate on the proportionality of Community measures or alleged misuse of powers by the Community legislature.¹¹¹ Here again the Court followed the same fairly light-touch approach that it used in *Working Time*, making it clear that it would only step in to control manifest errors.¹¹² Crucially, subsidiarity did not really feature in any of this

¹⁰⁹ This author’s emphasis. The original Art 5(3) EC provided that ‘any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.’

¹¹⁰ See eg Case C-22/96 *Parliament v Council (Telematic Networks)* [1998] ECR I-3231 at paras 22-38, Joined Cases C-164/97 and C-165/97 *Parliament v Council (Forest Protection)* [1999] ECR I-1139 at paras 12-20 and Case C-209/97 *Commission v. Council (Mutual Assistance Regulation)* [1999] ECR I-8067 at paras 12-33.

¹¹¹ See eg Joined Cases C-248/95 and C-249/95 *SAM Schiffahrt GmbH* [1997] ECR I-4475 at paras 21-24 and Case C-127/95 *Norbrook Laboratories Ltd* [1998] ECR I-1531 at paras 86-95.

¹¹² See eg Joined Cases C-248/95 and C-249/95 *SAM Schiffahrt op. cit.* at note 111 at para. 24.

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case law. Following *Working Time*, the principle was raised again only in *Germany v. Parliament and Council (Deposit Guarantee Schemes)*.¹¹³ However, in this case, the applicant did not rely on subsidiarity as a tool to attack the Community legislature's assessment of the substantive criteria in Art 5(2) EC. By contrast, the German Government sought to argue (unsuccessfully) that the contested Directive was invalid by reason of its failure to refer expressly to the subsidiarity principle.¹¹⁴

4.2.2 Case C-376/98 *Germany v. Parliament and Council (Tobacco Advertising)*

The ruling in *Tobacco Advertising* marked an important change in approach to the application of subsidiarity as a justiciable restraint on the Union legislature.¹¹⁵ In this case, the Court can be seen, for the first time, to tease out a fundamental distinction between the *existence* of legislative competences and the conditions under which such competences may be *exercised*. Unfortunately, this important point is not immediately apparent from the wording of the decision. However, this fact perhaps goes some way to explaining why the Court's change of approach to the review of Union legislation on subsidiarity grounds is largely overlooked in the legal commentary.¹¹⁶ Legal writers tend to focus instead on examining the function of the principles of conferral¹¹⁷ and proportionality as restraints on the Community legislature's functions.¹¹⁸

¹¹³ Case C-233/94 *Germany v. European Parliament and Council (Deposit Guarantee Schemes)* [1997] ECR I-2405.

¹¹⁴ *Ibid.*, at para. 24. See also thereafter with reference to the proportionality principle, Case C-150/94 *United Kingdom v. Council (Toys)* [1998] ECR I-7235 at para. 37.

¹¹⁵ Case C-376/98 *Germany v. European Parliament and Council of the European Union (Tobacco Advertising)* [2000] ECR I-8419.

¹¹⁶ This interpretation is frequently overlooked in the commentary. See also eg Davies *op. cit.* at note 65 at pp 72-75, Estella *op. cit.* at note 8 esp. at p. 140 in footnote 5, S. Weatherill 'Competence and Legitimacy' in C Barnard and O Odudu (Eds.) *The Outer Limits of European Union Law* (Oxford: Hart, 2009) at pp 20-22. For an exception, see Kumm *op. cit.* at note 92 esp. at pp 518-524.

¹¹⁷ The principle of conferral here tends to be understood narrowly as referring to the selection of an appropriate legal basis within the Treaty, rather than the conditions under which such powers may be exercised (which, in areas of shared responsibility, is a matter for the related but distinct subsidiarity principle). That said, there is certainly a degree of overlap in the literature, with most commentators failing to make a clear distinction between the principle of conferral in Art 5(2) TEU and the subsidiarity principle in Art 5(3) TEU.

¹¹⁸ See eg Bermann *op. cit.* at note 100, Davies *op. cit.* at note 64 and Weatherill *op. cit.* at note 116.

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In *Tobacco Advertising*, the German Government sought the review of Directive 98/43, approximating national laws on the advertisement of tobacco products.¹¹⁹ In support of its argument, the German Government maintained, amongst other things, that the Directive infringed the subsidiarity principle in Art 5(2) EC. However, the applicant did not locate and develop the relevant supporting arguments on this point under the heading of subsidiarity. Instead, the German Government opted to place its key subsidiarity objections at the centre of its (first) allegation that the Directive had been enacted on the incorrect legal basis.

In summary, the German Government argued that the Community legislature did not enjoy competence to enact a broad ban on tobacco advertising within the internal market. In its view, the advertising of tobacco products was ‘essentially an activity whose effects do not extend beyond the borders of individual Member States.’¹²⁰ In particular, the applicant objected to the Directive’s prohibition on ‘static advertising media’ such as posters and cinema advertising.¹²¹ It argued that cross-border trade in such products was ‘practically non-existent.’¹²² Finally, the German Government also maintained that the Directive did not contribute to the elimination of distortions of competition in the tobacco sector within the Union.¹²³

In its review of the legal basis of the Directive, the Court in *Tobacco Advertising* can be seen to differentiate clearly between the existence and exercise of competence under Art 95 EC (now Art 114 TFEU). The Court first affirmed the existence of the Community legislature’s competence to act in terms of Art 5(1) EC (now Art 5(2) TEU). It noted that Art 95 EC empowered the Council¹²⁴ to adopt measures for the approximation of national laws that have as their object the establishment and functioning of the internal market.¹²⁵ The remainder of the Court’s legal basis analysis is, however, more directly concerned with the conditions under which the

¹¹⁹ Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [1998] OJ L 213/9.

¹²⁰ Case C-376/98 *Tobacco Advertising op. cit.* at note 115 at para. 12.

¹²¹ *Ibid.*, at para. 15.

¹²² *Ibid.*

¹²³ Case C-376/98 *Tobacco Advertising op. cit.* at note 115 at para. 21.

¹²⁴ In accordance with the Art 251 EC procedure; now, the ordinary legislative procedure in Art 294 TFEU.

¹²⁵ Case C-376/98 *Tobacco Advertising op. cit.* at note 115 at paras 81 and 82.

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Union legislature may *exercise* that competence. In areas of shared competence, such as the regulation of the internal market, the right to exercise competence is, of course, the proper domain of the subsidiarity principle.

Although not referring at all to subsidiarity directly at this junction in its analysis, it is submitted that the Court nonetheless unquestionably integrated the principle's logic into its reasoning.¹²⁶ Specifically, the Court stated that the existence of Community competence under Art 95 EC was not to be construed as granting the Community legislature a 'general power to regulate the internal market.'¹²⁷ In line with the logic of the subsidiarity principle, the use of Art 95 EC was instead conditional on the existence of national measures forming *barriers to intra-EU movement and/or appreciable distortions of competition* within the internal market.¹²⁸ This position follows precisely the first limb of the subsidiarity test in Art 5(2) EC, as supplemented by the original Subsidiarity Protocol.¹²⁹ As discussed earlier, these instruments sought to restrict Community intervention to the resolution of regulatory problems with clear transnational aspects which cannot be satisfactorily regulated by action by the Member States.¹³⁰

From the above starting point, the Court then proceeded to examine the substance of the contested Directive. In effect, this resulted in a reduction in the scope of Community intervention in the regulation of tobacco advertising in line with the demands of subsidiarity principle. With respect to 'static media,' the ECJ concluded that the prohibition on advertising could not be justified by a need to eliminate obstacles to the free movement of such products within the Union.¹³¹ Moreover, referring implicitly to the positive criterion in Art 5(2) EC, the Court also stated that the Directive did not 'help to facilitate trade in the products concerned' – in other words, it did not 'add value.'¹³² Equally, the Court also found that the effects of disparate national laws gave rise to appreciable distortions of competition only in

¹²⁶ Supporting this view, see Kumm *op. cit.* at note 92 at p. 531.

¹²⁷ Case C-376/98 *Tobacco Advertising op. cit.* at note 115 para. 83.

¹²⁸ *Ibid.*, at para. 95.

¹²⁹ Protocol on the Application of the Principles of Subsidiarity and Proportionality *op. cit.* at note 57.

¹³⁰ *Ibid.*

¹³¹ Case C-376/98 *Tobacco Advertising op. cit.* at note 115 at paras 99-100.

¹³² *Ibid.*, at para. 101.

certain specific contexts, for example, in relation to the sponsorship of international sporting events.¹³³

4.2.3 Beyond *Tobacco Advertising*: retrograde steps?

The decision in *Tobacco Advertising* marked an important stage in the evolution of subsidiarity as a legal restraint on the Community (now Union) legislature. As Kumm rightly notes, ‘without using the language of subsidiarity directly, the Court of Justice’s focus [in that case] on “obstacles to trade” and “distortion of [intra-EU] competition”... operationalize[d] the commitment to subsidiarity in its interpretation of Art 95 EC.’¹³⁴ In so doing, the Court made it clear to the Community legislature that its power to use that provision to contribute to the establishment of a functioning internal market was not without limits and also subject to ex post judicial review.

In its subsequent case law, the Court has cleared up some of the confusion surrounding its subsidiarity test. Specifically, the Court has usefully linked the subsidiarity analysis that it first formulated as part of the ‘legal basis’ review to its analysis of Art 5(2) EC (Art 5(3) TEU) proper. This important step was first taken by the Court in *British American Tobacco*.¹³⁵ In this case, the Court stated expressly that, according to the principle of subsidiarity in (now) Art 5(3) TEU, the Union legislature:

‘does not [enjoy]... exclusive competence to regulate economic activity on the internal market, but only a certain competence for the purpose of improving the conditions for its establishment and functioning by eliminating barriers to (here) the free movement of goods... or by removing distortions of competition.’¹³⁶

The Court’s reasoning here reflects exactly the approach to subsidiarity developed in *Tobacco Advertising* under a different heading.

The decision in *Tobacco Advertising* remains to date the only case in which the Court has struck down an act of the Union legislature (implicitly) for non-

¹³³ *Ibid.*, at paras 109-114.

¹³⁴ Kumm *op. cit.* at note 92 at p. 531.

¹³⁵ Case C-491/01 *British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453.

¹³⁶ *Ibid.*, at para. 179. See thereafter, Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health* [2005] ECR I-6451 at paras 102 and 103 and Case C-58/08 *Vodafone and Others*, judgment of the Court (Grand Chamber) of 8 June 2010 (nyr) at paras 74-75.

compliance with the subsidiarity principle. At first sight, the ECJ appears to have reverted to a much lighter review in subsequent decisions. Several commentators have also made this same point, although without direct reference to subsidiarity.¹³⁷ For Dougan, ‘it is not that the *Tobacco Advertising Directive* judgment has been formally overruled in law; it seems rather that its spirit has been steadily undermined by a series of small yet significant steps.’¹³⁸ Similarly, Weatherill has argued that the Court’s case law on Art 114 TFEU has since evolved into little more than a neat ‘drafting guide,’ which actually operates to increase the scope for legislative intervention under that provision.¹³⁹

There is certainly evidence to support the view that, post-*Tobacco Advertising*, the Court has loosened its control of the Community legislature’s use of Art 95 EC (Art 114 TFEU). First, in several cases, the Court appears to have expanded the scope for legislative intervention under that provision. For example, in *Germany v. Parliament and Council (Tobacco Advertising II)*, the Court stated that the validity of Union legislation was not conditional on the proof of ‘an actual link with free movement between the Member States in every situation covered by the measure.’¹⁴⁰ Similarly, in *Ireland v. Parliament and Commission (Data Retention)*, the Court also hinted at a lowering of the threshold for intervention in order to eliminate distortions of competition within the internal market by dropping the reference to ‘appreciability.’¹⁴¹ In a second strand of case law, the Court has upheld the validity of Union legislation enacted under Art 95 EC that, on one view, goes against the very purpose of that provision. For example, in *Swedish Match*, the ECJ upheld as valid the Community’s recourse to Art 95 EC in order to introduce a total ban on a

¹³⁷ See eg M. Dougan ‘Legal Developments’ (2010) 48 (supplement) *JCMS* 163 at pp 171-179 and Weatherill *op. cit.* at note 71.

¹³⁸ Dougan *op. cit.* at note 137 at p. 176.

¹³⁹ For Weatherill, the Court’s evolving case law ‘does not disclose an effective basis for policing the limits of EU competence in general and those pertaining to Art 114 TFEU in particular. The case law is a drafting guide for the legislature: the Court is empowering, not restraining, the legislative institutions.’ See Weatherill *op. cit.* at note 71 at p. 850.

¹⁴⁰ Case C-380/03 *Germany v. Parliament and Council (Tobacco Advertising II)* [2006] ECR I-11573 at para. 80. See also earlier Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989 at para. 41.

¹⁴¹ Case C-301/06 *Ireland v. Parliament and Commission (Data Retention)* [2009] ECR I-593 at para. 63.

particular product within the internal market.¹⁴² If anything, this measure prevented intra-EU movement, rather than securing it.

Does this apparent weakening of the Court's review signal a break with the approach to subsidiarity first formulated in *Tobacco Advertising*? Perhaps, though not necessarily. First, in the above cases compliance with the demands of subsidiarity was not really at issue. Indeed, in the individual cases, it is possible to argue that the Community legislature enjoyed, in principle, the right to exercise its competence under Art 95 EC. In each of the above decisions, the Community legislature provided evidence of the existence or likely emergence of obstacles to intra-EU movement and/or appreciable distortions of competition giving rise to the competence to intervene at Community level. The concerns motivating the applicants lay elsewhere. For example, in *Ireland v. Parliament and Commission*, the applicant was seeking to contest the choice of Art 95 EC over an alternative legal basis in the Treaty.¹⁴³ Similarly, in *Swedish Match*, the dispute centred on the legislature's preferred response – the decision to enact a total ban.¹⁴⁴ This issue arises *once it has been established*, in accordance with the demands of subsidiarity, that the Community legislature enjoys competence to act in the first place.

Secondly, when critiquing the Court's post-*Tobacco Advertising* subsidiarity case law, we must always remain aware of the nature of Court's ex post review. Importantly, the Court does not conduct its own de novo subsidiarity assessment. Instead, it restricts itself to examining whether or not the evidence relied upon by the Union legislature to support its decision to intervene in the regulation of the internal market 'adds up.'¹⁴⁵ This follows its approach to the review of complex economic

¹⁴² Case C-210/03 *Swedish Match AB* [2004] ECR I-11893.

¹⁴³ See, on this point, Case C-301/06 *Ireland v. Parliament and Commission (Data Retention)* *op. cit.* at note 141 at para. 28.

¹⁴⁴ See here also Case C-66/04 *United Kingdom v. Parliament and Council (Smoke Flavourings)* [2005] ECR I-10553.

¹⁴⁵ Specifically, the Court restricts itself to verifying whether the exercise of such powers has been vitiated by a manifest error of appraisal or a misuse of powers, or whether the legislature has manifestly exceeded the limits of its discretion. See eg Case C-84/94 *Working Time* *op. cit.* at note 97 at para. 24, Case C-491/01 *British American Tobacco (Investments) Ltd* *op. cit.* at note 135 at para. 179 at para. 132 and Case C-380/03 *Germany v. Parliament and Council (Tobacco Advertising II)* *op. cit.* at note 140 at para. 145.

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and political assessments more generally.¹⁴⁶ As such, only where the applicant demonstrates that this is clearly not the case can the ECJ be expected to step in and strike down Union legislation. In *Tobacco Advertising*, the German Government presented clear, targeted and reasoned objections to the Union legislature's exercise of competence to regulate tobacco advertising within the Union.¹⁴⁷ By contrast, in subsequent cases, the parties seeking to strike down Union legislation on the same basis have failed (or simply not sought) to adduce sufficient evidence to overturn the Union legislature's decision to exercise its competence in an area of shared responsibility.

Finally, even if it is accepted that *Tobacco Advertising* marks the high-water mark of the Court's Art 114 TFEU subsidiarity review, this does not actually weaken the present argument. The finding that the Court has since diluted its scrutiny of Union legislation on subsidiarity grounds is a distinct issue for separate critique. What is important for the purposes of this thesis is the fact that, following *Tobacco Advertising*, the Court can be seen to have integrated the demands of Art 5(3) TEU into its scrutiny of the Union legislature's decision to exercise its competence under Art 114 TFEU. Moreover, for present purposes, it is also particularly important to note how subsidiarity has been operationalized as a legal principle. In summary, the Court has made it clear that Art 5(3) TEU restricts the exercise of competence by the Union legislature in areas of shared responsibility to the elimination (1) obstacles to intra-EU movement and (2) appreciable distortions of competition within the internal market.

4.3 Renewed Critique

In the previous section, it has been argued that, following the decision in *Tobacco Advertising*, the Court has transformed Art 5(2) EC (Art 5(3) TEU) into a substantive legal test restraining the Union legislature in the exercise of competences that are shared with the Member States. This test developed initially under the heading of

¹⁴⁶ See eg Case C-343/09 *Afton Chemical Limited*, judgment of the Court (Fourth Chamber) of 8 July 2010 (nyr) at para. 28. See also earlier eg Case 57/72 *Westzucker v Einfuhr- und Vorratsstelle für Zucker* [1973] ECR 321 at para. 114 and Case C-169/95 *Spain v Commission* [1997] ECR I-135 at para. 39.

¹⁴⁷ Case C-376/98 *Tobacco Advertising op. cit.* at note 115 at paras 13-22.

‘legal basis’ review. However, it has since been linked to the review of subsidiarity as a separate plea (in *British American Tobacco*). Focused on the need to demonstrate negative externalities, the ECJ has clearly modelled its approach to subsidiarity as a legal principle on the economic dimension of subsidiarity. However, owing to the nature of the complex political and economic assessments the ECJ is asked to review, it must be conceded that judicial supervision is limited. The ECJ will only examine whether the facts support the conclusions drawn by the Union legislature, paying particular attention to any reasoned objections submitted to the contrary.

In spite of the fact that the Court has attributed substance to subsidiarity as a legal principle binding the Union legislature in the manner detailed above, recent analyses of the principle have remained largely critical.¹⁴⁸ In particular, commentators continue to criticise the effectiveness of subsidiarity as a device capable of structuring the exercise of shared regulatory competences. At least one writer has also questioned the institutional role of the Court of Justice in the principle’s enforcement as an ex post restraint on the Union legislature. However, as will be argued below, there are considerable weaknesses in both lines of argument.

Davies has offered the strongest critique of subsidiarity’s capacity to ensure an appropriate balance of power between the Union and the Member States in areas of shared competence. For Davies, subsidiarity remains ‘the wrong idea, in the wrong place, at the wrong time.’¹⁴⁹ He maintains that subsidiarity ‘misses the point’:

‘its central flaw is that instead of providing a method to balance between Member State and [Union] interests...it assumes the [Union] goals, privileges their achievement absolutely, and simply asks who should be the one to do the implementing work.’¹⁵⁰

Examining two hypothetical examples – the harmonisation of contract laws and higher education – Davies concludes that ‘subsidiarity does not provide a convincing reason why these measures should not be taken [by the Union].’¹⁵¹

¹⁴⁸ See, for example, Davies *op. cit.* at note 65, Estella *op. cit.* at note 8, Röhling, *op. cit.* at note 47 and Weatherill *op. cit.* at note 71 and note 116.

¹⁴⁹ Davies *op. cit.* at note 65 at p. 66 and citing the article’s title.

¹⁵⁰ *Ibid.*, at pp 67-8.

¹⁵¹ *Ibid.*, at pp 68-70.

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As a solution to the underlying problem, Davies points to the proportionality principle. In the determination of the scope of Union competences, it is argued that the Court should attribute a *competency*-related function to proportionality.¹⁵² He argues that the principle should be applied to examine whether or not the importance of the relevant Union measure is sufficient to justify its effects on particular national interests, such as the social and cultural significance of maintaining independent education and legal systems (his chosen illustrations).¹⁵³ This application of proportionality is distinct from its current use by the Court as a tool to assess the relationship between the means used to achieve the objective at issue.¹⁵⁴ The latter application of proportionality does not weigh up the advantages associated with Union intervention against the loss of Member State autonomy. Instead, it simply examines whether or not the contested Union legislation represents the least restrictive alternative.¹⁵⁵

The central difficulty with the critique offered by Davies is that it rests on an incorrect reading of Art 5(3) TEU. Subsidiarity is not applied to the central issue it seeks to address: the *decision* of the Union legislature to act.¹⁵⁶ It is this error that leads Davies to give up on subsidiarity too easily and to seek instead to develop proportionality into a tool to address what remain *subsidiarity* concerns (structuring the distribution of competence between the Union and the Member State in areas of shared regulatory responsibility).¹⁵⁷ For Davies, Art 5(3) TEU is interpreted as meaning that:

‘the [Union] should only act where the objectives of the proposed action cannot be sufficiently achieved by the Member States and by reason of the scale or effects of the proposed action the [Union] could achieve these better. Thus where the [Union] decides that a goal must be reached, it has to ask

¹⁵² See also eg Kumm *op. cit.* at note 92 at p. 531.

¹⁵³ Davies *op. cit.* at note 65 at pp 81-83 esp. at p. 83.

¹⁵⁴ Kumm *op. cit.* at note 92 at pp 522-524.

¹⁵⁵ This application of the proportionality principle features prominently in the case law on intra-EU movement, discussed in Chapter 3. For discussion of proportionality in EU free movement, see eg J. Jans, ‘Proportionality Revisited’ (2000) 27(3) *LIEI* 239.

¹⁵⁶ This mistaken reading of Art 5(3) TFEU can be seen in his analysis of two hypothetical examples dealing with the harmonisation of national contract law and secondary school education systems. See Davies *op. cit.* at note 65 at pp 68-71.

¹⁵⁷ The tendency in the literature to conflate subsidiarity and proportionality is discussed further in Chapter 2. See also section 5 below.

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*itself how much of the work of reaching that goal really needs to be done at [Union] level, and how much could be left to the Member States.*¹⁵⁸

However, this is not a correct understanding of the subsidiarity principle. Davies does not use subsidiarity to restrain the Union legislature's decision to act, but instead reads Art 5(3) TEU as little more than a principle of optimum decentralisation.

In a separate line of argument, Estella has criticised the Court's implementation of the subsidiarity principle. Alongside others, Estella views the Court's interpretation of Art 5(3) TEU as 'prudent,' with the ECJ prepared to exercise control only in respect of manifest error.¹⁵⁹ However, Estella goes further in his critique of subsidiarity. With respect to the Court's approach to what he defines as 'procedural' subsidiarity – compliance with the procedural demands imposed on the Union legislature – it is argued that the ECJ's approach has been conditioned by its own institutional 'integrationist' agenda.¹⁶⁰ Estella argues that, even in this rather more clear cut context, the Court has in fact afforded the Union legislature a questionable degree of leeway. According to Estella, the Court considers subsidiarity to be a 'threat to integration,' which explains why it chooses not to implement the procedural dimension of the principle with any real vigour either.¹⁶¹

It is certainly true that the ECJ has adopted a rather relaxed approach to the supervision of procedural requirements in certain cases. For example, and as noted above, in *Germany v. Parliament and Council (Deposit Guarantee Schemes)* the Court upheld the validity of the contested Directive notwithstanding the fact that the Community legislature had failed to refer expressly to its compliance with the subsidiarity principle.¹⁶² However, Estella's charge is rather difficult to defend when considered in the broader context. As the above analysis of the case law has demonstrated, the ECJ has in fact transformed subsidiarity into a legal principle,

¹⁵⁸ Davies *op. cit.* at note 65 at p. 67 (this author's emphasis).

¹⁵⁹ Estella *op. cit.* at note 8 at p. 165.

¹⁶⁰ The role of the ECJ as the 'motor of integration' in this context is also noted by Röhling *op. cit.* at note 47 at p. 77.

¹⁶¹ Estella *op. cit.* at note 8 at p. 178.

¹⁶² Case C-233/94 *Germany v. Parliament and Council (Deposit Guarantee Schemes)* *op. cit.* at note 113 at paras 22-29. See also thereafter, by analogy, Case C-150/94 *United Kingdom v. Council (Toys)* *op. cit.* at note 114 at para. 37.

which operates to restrain the Union legislature in the exercise of its competences in areas of shared responsibility (typically: Art 114 TFEU). Estella's critique overlooks this development completely. He declares both *Tobacco Advertising* and *Netherlands v. Parliament and Council* – the most recent decisions at the time of his analysis – 'irrelevant' on the basis that the Court did not address subsidiarity under that heading expressly.

Admittedly, and in Estella's defence, the Court's transformation of subsidiarity into a legal principle restraining the Union legislature has followed a rather torturous path. However, some of the blame for this must rest with the Member States. As detailed above, it is the latter who have persistently failed to locate their subsidiarity-based arguments under that heading. Instead, they have tended to subsume their objections to the Union legislature's exercise of competence under the 'legal basis' heading. However, this approach fails to recognise the important distinction between the principles of conferral and subsidiarity; between, on the one hand, the existence of competence to act in the Treaty and, on the other hand, the right to exercise that competence in specific cases.

4.4 Bolstering subsidiarity's effectiveness

As the previous section has demonstrated, much of the continued criticism of the legal attributes of the subsidiarity principle does not withstand closer scrutiny. The most serious line of attack, presented by Davies, starts from a false premise. Put simply, Davies does not apply the subsidiarity test to contest the Union legislature's decision to exercise its competence to contribute to the regulation of shared areas of responsibility. His criticism falls down for this reason.

Notwithstanding such weaknesses, it would be wrong to deny that there are any difficulties associated with the Court's application of Art 5(3) TEU as an enforceable legal principle. As argued in section 3.2 above, the Court's use of this provision as an ex post check on the Union legislature's decision to exercise competence under Art 114 TFEU is subject to serious limitations. In particular, it is clear that, for obvious reasons, the Court is extremely reluctant to engage in any de novo assessment of

whether or not the conditions for Union intervention in the regulation of the internal market are met in particular cases.

There have been two distinct responses to the limits of the Court's *ex post* subsidiarity review. The first seeks to enhance the effectiveness of the Court's existing *ex post* review by reconfiguring the subsidiarity principle as a proportionality test.¹⁶³ Schütze maintains that the Court should reinterpret subsidiarity in terms of a principle of 'federal proportionality.'¹⁶⁴ This approach seeks to take subsidiarity analysis beyond the issue of determining whether or not the Union legislature has the right to exercise competence in areas of shared regulatory responsibility. In short, it involves asking the Court to examine, in addition, whether or not the EU legislature has 'unnecessarily restricted national autonomy in the exercise of its legislative competences.'¹⁶⁵ As Schütze freely admits, this would demand much more of the Court. It would require it to engage much more closely in review of sensitive political choices.¹⁶⁶ However, he argues that this should not be considered problematic by reason of the fact that Court of Justice is a constitutional court and, as such, must be prepared to take difficult decisions on occasions.¹⁶⁷

There is some support for Schütze's line of argument. First and foremost, it will be recalled that Art 5(3) TEU does in fact include a reference to the proportionality of Union intervention in areas of shared competence.¹⁶⁸ Specifically, that provision states that the institutions of the Union shall act 'only in so far as' the objectives of the proposed action cannot be sufficiently achieved by the Member States acting alone. However, as will be discussed in greater detail in the next chapter, the proportionality limb of Art 5(3) TEU is distinct from the strict subsidiarity inquiry in

¹⁶³ This follows Davies' argument discussed above. Davies reaches the same end result, although he does not connect his arguments to the subsidiarity principle. See also Kumm *op. cit.* at note 92 at p. 531. Like Davies, Kumm also argues that the proportionality principle has an important competency function: 'the proportionality requirement, as it applies in the jurisdictional context, imposes further requirements [on the Union legislature]. Only if EU legislative intervention furthers a legitimate purpose in a way that is narrowly tailored to achieve it, *and does not lead to a disproportionate loss of Member State autonomy*, is legislative intervention justified, all things considered' (this author's emphasis).

¹⁶⁴ Schütze *op. cit.* at note 11 at pp 533-535.

¹⁶⁵ Schütze *op. cit.* at note 11 at p. 533.

¹⁶⁶ *Ibid.*, at pp 534-535.

¹⁶⁷ *Ibid.*

¹⁶⁸ For discussion see eg Swaine *op. cit.* at note 32 at p. 52.

that same provision. In brief, discussion of the nature or intensity of Union intervention arises *after* the determination of whether or not the Union enjoys the right to exercise regulatory competence in the first place.

A second, and dominant, line of argument shifts the focus away from judicial review altogether. Instead, it supports the introduction of new mechanisms of *ex ante* political control.¹⁶⁹ The argument here is that ensuring compliance with the demands of subsidiarity in the course of the Union legislative procedure is the most appropriate – and effective – means of attributing substance to the principle. As early as 1994, Bermann argued that subsidiarity should be ‘recast’ as an essentially procedural principle, that is, ‘as a principle directing the legislative institutions of the Union to engage in a particular inquiry *before* concluding that action at Union rather than Member State level is warranted.’¹⁷⁰ Significantly, this second line of reasoning has been embraced as the latest solution to the problem of ensuring that the demands of the subsidiarity principle are adhered to by the Union legislature.¹⁷¹ As noted in section 3.3 above, the Lisbon Treaty recently introduced a new layer of *pre*-legislative subsidiarity control. For the first time, national parliaments are to be involved directly in the task of monitoring compliance with the subsidiarity principle.¹⁷²

In brief, according to Art 6 of the revised Subsidiarity Protocol, national parliaments are now granted an eight-week window within which to submit to the EU institutions a reasoned opinion stating why they consider the proposed measure incompatible

¹⁶⁹ For discussion, see eg Cooper *op. cit.* at note 64, G. A. Bermann, ‘The Lisbon Treaty: National Parliaments and Subsidiarity: An Outsider’s View’ (2008) 4(3) *EuConst* 453 at p. 456 and esp. at p. 459 and J-V. Louis, ‘National Parliaments and the Principle of Subsidiarity – Legal Options and Practical Limits’ (2008) 4(3) *EuConst* 429. See also Weatherill *op. cit.* at note 71 esp. at pp 849-860.

¹⁷⁰ Bermann *op. cit.* at note 4 at p. 336 (this author’s emphasis).

¹⁷¹ In line with the conclusions of the Working Party on the Principle of Subsidiarity (2002) CONV 286/02: ‘The Group considered that as the principle of subsidiarity was a principle of an essentially political nature, implementation of which involved a considerable margin of discretion for the institutions (considering whether shared objectives could be “better” be achieved at European level or at another level), monitoring of compliance with that principle should be of an essentially political nature and take place before the entry into force of the act in question’ (at p. 2).

¹⁷² See Arts 5(3) and 12 TEU, together with Protocol (No. 1) on the Role of National Parliaments in the European Union *op. cit.* at note 63 and Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality *op. cit.* at note 63.

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with the subsidiarity principle.¹⁷³ The Union legislature is prevented from proceeding further with its proposal during the standstill period and, if objections are raised, is obliged to take these into consideration.¹⁷⁴ Where at least one third of the national parliaments contest the measure's compliance with subsidiarity, the Union legislature is compelled to instigate a formal review of its proposal.¹⁷⁵ Thereafter, it may resolve to maintain, amend or withdraw the proposal, subject to a requirement to state the reasons for its decision.¹⁷⁶

Taking a step back from the detail of the reforms anticipated in the Protocols, it is clear that current attempts to enhance the credibility of the subsidiarity commitment are based on dispersed supervision and on encouraging the resolution of disputes through political negotiation.¹⁷⁷ The involvement of national parliaments in the *pre-legislative* process is designed to function as a 'safety valve,' relieving the Court of pressure to risk its integrity by engaging in comprehensive scrutiny of complex political and economic assessments. The resolution of such issues is instead shifted to the most appropriate forum: political negotiation. However, the colour of the national parliaments' card is only yellow and not red.¹⁷⁸ There is, of course, no guarantee that conflicts will always be resolved through the legislative process.¹⁷⁹ In the end, the Court of Justice remains ultimately responsible for the enforcement of subsidiarity in line with the approach discussed in section 4.2 above.

In substantive terms, the involvement of national parliaments in policing subsidiarity is much more than just a means of ensuring that the Union legislature respects the economics of the principle. Granting national actors a voice on proposed interventions by the Union legislature also contributes to credibility by increasing the *legitimacy* of the decision-making process *per se*. The recent reforms seek, therefore,

¹⁷³ Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality *op. cit.* at note 63.

¹⁷⁴ Art 7 Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality *op. cit.* at note 63.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ See eg Cooper, *op. cit.* at note 64 and Weatherill *op. cit.* at note 71 at p. 853. The absence of a 'red card' veto option also supports this view.

¹⁷⁸ This sporting analogy is taken from Cooper *op. cit.* at note 64 at p. 289. See also Bermann *op. cit.* at note 169 at p. 456.

¹⁷⁹ For discussion of the difficulties faced by national parliaments, see eg Bermann *op. cit.* at note 169 at p. 458.

also to bolster the political dimension of subsidiarity by contributing to the objective of ensuring that decisions are taken as closely as possible to the citizens they affect. Indeed, this objective has been elevated to the opening lines of the preamble to the revised Subsidiarity Protocol.¹⁸⁰ The connection between the two facets of subsidiarity is important. Recalling the discussion in section 2, the desire to find the optimum level of decentralised decision-making is an inherent component of the principle of subsidiarity.

5. Conclusion

This opening chapter has examined the principle of subsidiarity and its evolution as a legal principle in EU integration. In contemporary constitutional, political and economic theory, subsidiarity features as a normative principle designed to structure, in particular, the exercise of shared regulatory competences. Each discipline approaches the principle with its own particular emphasis. However, the basic normative claim is the same. In each context, subsidiarity operates as a rebuttable negative presumption in favour of localised regulatory autonomy. In order to overturn this presumption, the centralised regulator must demonstrate clearly why there is a need for intervention at the higher level.

The principle of subsidiarity was formalised as a constitutional principle of European integration through the Treaty of Maastricht. In terms of substance, it draws on both the economic and political characteristics of subsidiarity. In order to overturn the presumption in favour of Member State autonomy in areas of shared regulatory responsibility, Art 5(3) TEU requires the Union institutions to demonstrate clearly that there is a need for Union intervention in order to address regulatory problems with sufficient transnational effects. Furthermore, there is also a comparative efficiency test. The Union legislature must demonstrate that Union intervention is associated with clear benefits or added value as compared to continued unilateral action (or inaction) by individual Member States. Alongside Art 5(3) TEU, subsidiarity also finds expression in Art 1 TEU. This provision, referring to the need

¹⁸⁰ Preamble to Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality *op. cit.* at note 63.

to ensure that decisions are taken as closely as possible to the citizens they affect, captures the political expression of subsidiarity.

This chapter has argued, contrary to prevailing opinion, that the Court of Justice has in fact transformed subsidiarity into a justiciable legal principle, which operates to restrain the Union legislature in the exercise of its shared regulatory competences. These competences include, first and foremost, Art 114 TFEU, which empowers the Union legislature to enact measures that have as their object the establishment and functioning of the internal market. In this context, subsidiarity precludes the Union legislature from using that provision as a ‘general power to regulate the internal market.’ Instead, subsidiarity operates to restrict the Union legislature’s exercise of its competence in Art 114 TFEU to the regulation of two categories of measure: (1) obstacles to intra-EU movement and (2) appreciable distortions of intra-EU competition.

Admittedly, the development of the Court’s subsidiarity test was not entirely transparent. The Court’s test emerged as part of its ‘legal basis’ review. However, some of the blame for this must rest with the Member States, who have failed to grasp the key distinction between the principles of conferral and subsidiarity; between the existence of competence (outlined in the Treaties) and the right to exercise that competence in specific cases. In any case, the Court has since clarified the position somewhat by linking its implicit ‘legal basis’ subsidiarity test to the analysis of Art 5(3) TEU proper (in *British American Tobacco*).

In terms of its effectiveness, there are obvious limits to the Court’s ex post review of the Union legislature’s use of Art 114 TFEU on subsidiarity grounds. The Court is reluctant to conduct its own de novo assessment of the reasons motivating the Union legislature to exercise its regulatory competence for the regulation of the internal market. As a result, the burden is firmly on the party seeking the measure’s annulment to demonstrate why the Union legislature’s subsidiarity assessment does not add up. The inherent limits of the Court’s powers of review were clearly behind the Lisbon Treaty reforms on the enforcement of subsidiarity as a restraint on the Union legislature. Interestingly, the new system of ex ante compliance monitoring builds on the political characteristics of the subsidiarity principle. The involvement

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of national parliaments in the pre-legislative process does not just present the latter with a new opportunity to check whether or not the conditions for Union intervention are met. More importantly, it also attributes increased political legitimacy to any action taken by the Union legislature. This follows from the fact that the directly elected representatives of the individual Member States now enjoy a right, in principle, to express their concerns in the Union legislative process.

The continued efforts to make subsidiarity work as a restraint on the Union legislature must be welcomed. The subsidiarity principle is not a miracle solution to the problems of transnational integration. It does, however, have an important role to play in ensuring that, where relevant, both the Union and the Member States play their appropriate roles. As Toth rightly notes, subsidiarity is a yardstick against which the ‘constitutionality’ of certain acts of the Union must be measured.¹⁸¹ Properly understood, it is difficult to see why the principle is subject to such intense normative criticism, particularly amongst legal writers. More often than not, subsidiarity provides a stronger normative basis to justify intervention at the Union level. In cases where the Union legislature can point, for example, to the existence of appreciable distortions of competition within the internal market, subsidiarity provides an explicit rationale for legislative intervention using Art 114 TFEU. As such, it is unlikely to paralyse continued market integration. Instead, the principle simply operates to protect the legitimate right of the Member States to contribute unilaterally, where appropriate, to the regulation of the internal market as an expressly defined area of shared responsibility (Art 4(2)(a) TFEU).

In view of the above, it is perhaps rather surprising to note that, of those few commentators who continue to discuss the principle in detail, most have dismissed or abandoned subsidiarity as a legal principle in favour of alternative devices. Opinion in the legal literature tends to favour the development of alternative mechanisms or rules to enhance Member State autonomy. These include, in particular, the proportionality principle. This principle, which is discussed further in Chapter 2, operates at the second-stage of inquiry, namely, *after* the decision to exercise

¹⁸¹ Toth *op. cit.* at note 74 at pp 278-279.

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competence has been taken.¹⁸² In this context, the principle contributes to the protection of Member State autonomy by ensuring that the form and intensity of Union intervention do not go beyond that which is necessary to achieve the objective in point. Proportionality is undoubtedly an important limit on the actions of the Union legislature. Moreover, and as we shall see in the next chapter, it has also been adopted as a general principle of EU law. However, irrespective of its value as a legal principle, proportionality complements and does not displace subsidiarity. For that reason, it is argued that one should not overlook the importance of examining the independent function of the latter as a legal principle of EU integration.

Building on the preceding analysis, the next chapter breaks with the dominant line of subsidiarity inquiry. It argues that, although valuable, the continued efforts to take subsidiarity seriously as a restraint on the Union legislature have come at the expense of exploring the principle's wider implications. Chapter 2 seeks to correct this imbalance by examining whether or not subsidiarity also affects the interpretative authority of the Court of Justice – an important, but largely overlooked issue.

¹⁸² On this distinction, see eg Toth *op. cit.* at note 74 at p. 270.

Chapter 2

Subsidiarity as a legal principle: more than just a restraint on the Union legislature?

1. Introduction

Chapter 1 surveyed the current position of subsidiarity as a legal principle in EU law. The conclusion reached was that, at present, the principle functions as a legal restraint on the actions of the Union legislature in areas of shared competence. Furthermore, it was argued that, notwithstanding recent reforms, commentators continue to argue over the possibilities for, and merits of, bolstering subsidiarity's effect as a judicial restraint in this context.

Discussing possible ways of enhancing the Court's review of the Union legislature's compliance with subsidiarity remains a valuable exercise. However, it is important not become trapped in analysis of this isolated application of the principle. After all, subsidiarity is a general principle of Union law, listed in the 'common provisions' of the TEU. From that starting point, this chapter questions whether or not subsidiarity does – and, ultimately, *should* – play an increased and stronger role as a legal principle in the integration process. Specifically, this chapter asks: does subsidiarity also apply *to* the Court *qua* Union institution, i.e. as a legal limit on the exercise of its interpretative functions? If this is indeed the case, as this chapter will argue, then it is necessary to ensure that the Court's interpretative choices meet the demands of the subsidiarity principle (where it applies). Otherwise, there is a real risk that the Court could itself end up suppressing legitimate claims by the Member States to respond to localised regulatory problems at the national level. This would clearly undermine the recent efforts to bolster the effectiveness of subsidiarity introduced by the Lisbon Treaty.

This chapter is divided into two parts. The first part (sections 2 and 3) examines the current state of play. It offers a critical review of both the existing literature and case law addressing the issue of whether or not the subsidiarity principle binds – or should

bind – the Court of Justice as a Union institution. The analysis in sections 2 and 3 is largely descriptive. In short, it is argued that there is some support for the application of the subsidiarity principle as a restraint on the Court of Justice as an institutional actor. In the second part (section 4), discussion shifts from the descriptive to the normative. This section considers the arguments for, and also the implications of, applying subsidiarity *to the Court* as an institutional actor. In sum, the conclusion reached is that there are no obstacles to extending the scope of the principle's application in this manner. For that reason, it is argued that this overlooked dimension of the subsidiarity principle should be examined more closely through the lens of a particular case study.

2. The view from the literature

In spite of the fact that most commentators frame subsidiarity as a general if not 'constitutional' principle in Union law, there has been remarkably little attempt in the legal literature to consider the full implications of this statement.¹ In 1998, de Búrca noted that, '[a]part from considering its use *by* the Court in reviewing the other institutions, the debate has only rarely touched upon the impact of subsidiarity *on* the Court's exercise of its own powers.'² This statement continues to hold true many years later. Subsidiarity is presented as a general constitutional principle of European integration. However, in the vast majority of cases, no reference whatsoever is made to the implications of the subsidiarity principle beyond its function as a brake on the Union legislature.³

This lack of direct academic engagement with the implications of the subsidiarity principle for the Court of Justice is rather surprising for a number of reasons. First, as

¹ On this point, see also G. A. Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94(2) *Columbia Law Rev* 331 at p. 400 and E. Swaine, 'Subsidiarity and Self-Interest: Federalism at the European Court of Justice' (2000) 41(1) *Harvard Int. LJ* 1 at p. 60.

² G. de Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor' (1998) 36(2) *JCMS* 217 at p. 220 (emphasis in the original).

³ See eg N. Emiliou, 'Subsidiarity: An Effective Barrier against "the Enterprise of Ambition"?' (1992) 17(5) *ELRev* 383, A. Toth, 'The Principle of Subsidiarity in the Maastricht Treaty' (1992) 29(4) *CMLRev* 1079, A. Estella, *The EU Principle of Subsidiarity and its Critique* (Oxford: OUP, 2002), N.W. Barber, 'The Limited Modesty of Subsidiarity' (2005) 11(3) *ELJ* 308, G. Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 43(1) *CMLRev* 63 and R. Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism' 68(3) *CLJ* (2009) 525.

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noted in the introductory remarks, subsidiarity is framed in the Treaties as a general principle of Union law. In particular, the wording of Art 5(3) TEU clearly states that ‘the Union’ and not just the ‘Union legislature’ is subject to its demands. Nothing in the wording of the Treaties or, for that matter, the Subsidiarity Protocol would therefore appear to excuse the Court as an institution from compliance with the principle. Secondly, the absence of a wealth of literature on subsidiarity’s implications for the Court of Justice is also surprising given that institution’s historical role as a key driver in the integration process.⁴ It is an accepted starting point in the study of EU law that the Court has assumed, and continues to play, a leading role in this process. To take one classic example, it was the Court that developed the fundamental principles of direct effect and primacy to transform the Community from an international grouping of states into a new legal order.⁵ Collectively, these two principles enabled the Court to advance market integration at a remarkable pace. However, what effect, if any, does the formalisation of subsidiarity as a general principle of EU law at Maastricht have on the Court’s freedom to engage in such acts of judicial creativity?

To date, Bermann, Schilling and de Búrca offer the key in-depth responses to this important question.⁶ In each case, discussion of subsidiarity’s implications for the Court of Justice has focused on the Court’s freedom to interpret primary (Treaty) law. In this connection, the debate has centred largely on the principle’s effect on the Court’s interpretation of the Treaty rules on intra-EU movement (and Art 34 TFEU on the free movement of goods in particular).⁷ As will be argued in detail further below, this is both a suitable and obvious arena in which to test subsidiarity’s untapped potential as a restraint on the Court’s interpretative freedom. In this specific substantive context, the Court is faced with interpretative choices that meet the

⁴ For a classic account, see eg J. Weiler, ‘The Transformation of Europe’ (1991) 100(8) *Yale LJ* 2403.

⁵ Case 26/62 *van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1 and Case 6/64 *Costa v E.N.E.L* [1964] ECR 585. The validity of both constitutional principles continues to rest on the Court’s own judicial authority.

⁶ Bermann *op. cit.* at note 1, T. Schilling, ‘Subsidiarity as a Rule and a Principle’ (1994) 14 *YEL* 203 and de Búrca *op. cit.* at note 2. See also, to a lesser extent, N. Bernard, ‘The Future of European Economic Law in the Light of the Principle of Subsidiarity’ (1996) 33(4) *CMLRev* 633 at pp 636-639 and M. Rohe, ‘Zum Verhältnis von Binnenmarktziel und Subsidiaritätsprinzip nach dem Maastricht-Vertrag’ (1997) 61 *RabelsZ* 1 and Swaine *op. cit.* at note 1.

⁷ For an exception, see Swaine *op. cit.* at note 1 esp. at pp 77-128, who conducts an inquiry into subsidiarity’s implications for the Court’s case law on state liability.

criteria for the application of the subsidiarity principle (see further section 2 below). However, before discussing the detail of this further, it is necessary to consider the views in the literature noted above more closely.

2.1 Bermann: *Taking subsidiarity seriously*

Bermann was the first writer to reflect in any great detail on the implications of the subsidiarity principle as a restraint on the Court's freedom to interpret primary EU law. As noted in chapter 1, Bermann maintains that the principle's essential function in EU law is as a political principle guiding the legislative process. However, writing shortly after the principle's introduction at Maastricht, he also noted that, in order to ensure that subsidiarity was 'taken seriously' as a principle of integration, it would also be necessary for the Court to show some engagement with its demands.⁸ This, he argued, followed from the fact that:

‘the demand for subsidiarity among Europeans [was] fuelled not only by the perception of legislative excess on the part of the Commission and Council, but also by the perception, at least amongst those aware of the Court of Justice's role in legal integration, of judicial excess on the Court's own part.’⁹

To test this thesis, Bermann briefly examines the Court's jurisprudence on the free movement of goods.¹⁰ As will be argued in subsequent chapters, the Court's interpretation of this provision has met with considerable criticism over the years. In particular, the Court's interpretation of the term 'measure having equivalent effect to a quantitative restriction' (MEQR) in Art 34 TFEU (ex Art 28 EC) has been attacked for its extreme breadth. As Bermann notes, the classic definition of this term would appear to catch virtually all Member State regulation, irrespective of the nature or magnitude of its effect on intra-EU trade.¹¹ In *Dassonville*, the Court famously defined a MEQR as capturing 'all trading rules enacted by Member States which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade.'¹² For Bermann, the breadth of the *Dassonville* formula posed an 'obvious threat' to subsidiarity, by reason of the fact that it granted the Court the power to

⁸ Bermann *op. cit.* at note 1 at p. 400.

⁹ *Ibid.* See also Schilling *op. cit.* at note 6 at p. 209 and discussed further below.

¹⁰ Bermann *op. cit.* at note 1 at pp 400-403.

¹¹ *Ibid.*, at p. 401.

¹² Case 8/74 *Dassonville* [1974] ECR 837 at para. 5.

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review particular national regulations against the Treaty without any real consideration of the scale of their effects on intra-EU trade.¹³ Bermann then contrasts the ruling in *Dassonville* with the Court's subsequent decision in *Keck*.¹⁴ In this case, the Court famously qualified its approach to the review of national measures against Art 34 TFEU.¹⁵ Specifically, the Court curtailed its own powers of review by removing from the scope of the *Dassonville* formula a certain category of non-discriminatory 'selling arrangements.'¹⁶ For Bermann, this ruling, which was delivered shortly after the entry into force of the Maastricht Treaty, sits comfortably with the logic of subsidiarity:

'Whatever may have been the Court's purposes in retreating from well-established Art [34 TFEU] case law, the *Keck* ruling demonstrates the Court's willingness to leave Member States the kind of regulatory scope that the principle of subsidiarity requires of the Community's political branches.'¹⁷

Bermann's argument is two-fold. First, he maintains that the Court should acknowledge the fact that its decisions can also suppress national/sub-national regulatory autonomy.¹⁸ This threat is not only posed by the actions of the Union legislature. Secondly, Bermann calls for the Court to show greater awareness of the subsidiarity principle in its free movement case law. He argued that:

'the Court [should] pay more attention in particular cases as to whether the exercise of regulatory authority by a Member State or its subcommunities *sufficiently* impairs cross-border mobility to justify suppression of the relevant measure in the interest of the common market.'¹⁹

Unfortunately, Bermann does not go into the specifics of his test. The criterion of sufficiency certainly appeals to the economic characteristics of subsidiarity discussed in Chapter 1. It implies that the Court should only interfere with national regulatory choices in cases where the effects on intra-EU movement surpass a certain threshold. However, on one view, this does not yet translate into a workable legal rule that is

¹³ Bermann *op. cit* at note 1 at p. 401.

¹⁴ *Ibid.*, at pp 401-402. Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

¹⁵ As will be discussed in subsequent chapters, the Court has since altered its approach to Art 34 TFEU further still.

¹⁶ Joined Cases C-267/91 and C-268/91 *Keck and Mithouard op. cit.* at note 14 at paras 15-17.

¹⁷ Bermann *op. cit.* at note 1 at p. 402. See also, to the same effect, Rohe *op. cit.* at note 6 at p. 82, who argues that, post-Maastricht, the Court's case law on intra-EU movement has been conditioned by the introduction of the subsidiarity principle.

¹⁸ Bermann *op. cit.* at note 1 at p. 402.

¹⁹ *Ibid* (this author's emphasis).

capable of being applied by the Court with minimal scope for discretionary judicial assessments.

In subsequent analyses, the work of at least two commentators can be viewed as attempts to inject greater precision into Bermann's criterion of 'sufficient effects.' First, in his brief review of the principle's implications for the Court's case law on intra-EU movement, Bernard reached a clear conclusion. He argued that subsidiarity necessarily inclined the Court's reading of the scope of the Treaty freedoms towards the elimination of two categories of national measure: (1) discriminatory national rules and (2) non-discriminatory measures that block intra-EU movement.²⁰ In his more recent work, Rohe offered a slightly different approach. He also proposed, though again without detailed explanation, that subsidiarity should operate to limit the Court's reading of obstacles to intra-EU movement to the elimination of all national measures that discriminate on nationality grounds. However, for Rohe, the Court's review of non-discriminatory national measures should be subject to a *de minimis* threshold; in other words, he argues that the Court should only examine such measures in cases where they exhibit 'appreciable' effects on intra-EU movement.²¹ We shall return to consider the detail of these lines of argument in Chapter 6. The present analysis continues to review the leading academic literature that engages with subsidiarity's potential as a source of restraint on the interpretative functions of the Court of Justice.

2.2 Schilling: *Subsidiarity as a rule and a principle*

Along with Bermann, Schilling also argued in favour of applying the subsidiarity principle to the Court's interpretation of the Treaty freedoms.²² However, he offers an alternative solution to that proposed by Bermann. Schilling's subsidiarity analysis is based on Dworkin's distinction between legal rules and legal principles.²³ According to Dworkin, the two categories differ in the nature of the legal direction they give. Whereas legal rules apply in an all or nothing manner, legal principles

²⁰ Bernard *op. cit.* at note 6 at p. 638.

²¹ Rohe *op. cit.* at note 6 at p. 82.

²² Schilling *op. cit.* at note 6.

²³ R. Dworkin, 'The Model of Rules I' in R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1987) at p. 14 and p. 22, cited in Schilling *op. cit.* at note 6 at p. 213.

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operate to incline decisions in a particular direction. Where the latter conflict with other relevant principles, they must be balanced, taking into account their relative weight. Transposing this distinction to Union law, Schilling interprets the subsidiarity principle in Art 5(3) TEU (ex Art 5(2) EC) as a legal rule.²⁴ He argues that:

‘the subsidiarity principle as laid down in Art [5(3) TEU] must be considered, in spite of its name, as a rule.... The Community is only allowed to legislate, within its concurrent competences, when certain requirements are met. There is no weighing of intersecting principles. Either the requirements are met – then the Community is permitted to act – or they are not met – then it is prevented from acting.’²⁵

The application of the subsidiarity principle in the above sense is not controversial and was discussed in the previous chapter. However, in order to take subsidiarity seriously, Schilling argues in favour of developing an additional role for subsidiarity as a legal *principle*.²⁶ He maintains that ‘[s]ubsidiarity, taken seriously, must be given an additional role as a principle in its technical sense, with the aim, among other things, to defend the position of the subsidiarity rule [in Art 5(3) TEU].’²⁷ Furthermore, he submits that, as a broader legal principle, subsidiarity does not only apply to the actions of the Union legislature. On the contrary, he argues that subsidiarity is a ‘pervading principle to be respected by all the institutions of the Community, including the Court of Justice.’²⁸ Moreover, the principle ‘also applies to the interpretation and application of Community law.’²⁹ To operationalise subsidiarity as a broader legal principle, Schilling then turns, in particular, to the preamble to the EU Treaty (now, TEU). He maintains that subsidiarity’s basic message is clear: ‘the Union should only act when, and in so far as, a decision closer to the citizen, i.e. on a national level is not possible.’³⁰

How then does Schilling see subsidiarity, expressed as a broader legal principle, affecting the Court’s interpretation of primary EU law? In short, he argues that, as a

²⁴ Schilling *op. cit.* at note 6 at pp 213-215.

²⁵ *Ibid.*, at p. 214.

²⁶ *Ibid.*, at pp 215-217.

²⁷ *Ibid.*, at p. 216.

²⁸ *Ibid.*, at p. 217.

²⁹ *Ibid.*

³⁰ *Ibid.*, at p. 216.

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legal principle, subsidiarity operates to qualify the principle of primacy in EU law – in certain cases.³¹ According to Schilling, primacy has a very specific objective. In his view, primacy seeks to secure the uniformity of economic law throughout the Union.³² In line with his analysis of subsidiarity, Schilling maintains that primacy functions as both a rule and a broader legal principle. The question of whether or not primacy functions as a legal rule or as a broader principle is determined by the *nature* of the national law at issue. Primacy operates as a legal *rule* – and therefore applies in an absolute manner – in cases where the conflicting Member State law is not *intended* to regulate an economic matter falling within (as then) Art 3 EC.³³ By contrast, it is argued that primacy functions as legal *principle* in cases dealing with national measures regulating non-economic policy areas.³⁴ In the latter cases, where the contested measure is not *intended* to regulate trade, Schilling argues that the demands of the primacy principle – favouring Union intervention – must be ‘balanced’ with the competing claim of the subsidiarity principle.³⁵ This of course favours Member State autonomy in such areas.

To illustrate his argument, Schilling points to several examples in the Court’s free movement case law.³⁶ To aid comparison with Bermann’s approach, we shall focus on Schilling’s analysis of Art 34 TFEU on goods, which he himself also views in isolation as a ‘special case.’³⁷ Applied to the case law on Art 34 TFEU, Schilling starts from the same point as Bermann. He argues that subsidiarity precludes a sweeping interpretation of the scope of that provision to capture almost all types of national regulation.³⁸ Schilling then offers his distinction between legal rules and principles to resolve the tension in the case law over the scope of Art 34 TFEU. He argues that, as a legal *rule*, Art 34 TFEU should be interpreted as prohibiting only

³¹ Schilling refers to the supremacy principle. However, for clarity, the label primacy is preferred in this thesis.

³² Schilling *op. cit.* at note 6 at pp 233-234 and p. 237. This rather narrow view of primacy is contestable.

³³ *Ibid.*, at p. 239.

³⁴ Schilling uses the label ‘non-economic matters of national public policy’. See Schilling *op. cit.* at note 6 at p. 236.

³⁵ Schilling *op. cit.* at note 6 at p. 241.

³⁶ *Ibid.*, at pp 242-253.

³⁷ *Ibid.*, at p. 247. Schilling also applies his subsidiarity analysis to examples from the case law on workers and services. See pp 242-247.

³⁸ *Ibid.*, at p. 247.

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those national measures that are *intended*³⁹ to restrict imports.⁴⁰ This category of intentional restrictions would include all quantitative restrictions. With respect to all other measures, Schilling maintains that Art 34 TFEU (as a specific expression of the primacy principle in favour of the uniformity of Union economic law)⁴¹ must be reduced to a *principle*. In such cases, the Court is required to balance the Union interest in intra-EU movement with the demands of subsidiarity as a general *principle*. The latter principle, he argues, operates to protect the national legislature's right to choose between different non-economic policy objectives as it sees fit.⁴²

In the final analysis, Schilling argued that, at the time of writing, his rule/principle analysis could better explain the Court's case law on Art 34 TFEU.⁴³ This included the decision in *Keck*.⁴⁴ Schilling maintained that the national measure at issue in *Keck* – a rule prohibiting the resale of products at a loss – was not intended to regulate intra-EU trade.⁴⁵ Instead, he argued that the rule was designed to promote 'fair competition.'⁴⁶ For that reason, the French measure should be considered to be subject to his balancing test.⁴⁷ The end result of this assessment is the same as the outcome reached by the Court. However, Schilling believes that his approach provides a superior framework within which to take the competing interests of intra-EU movement and Member State autonomy fully into account. He argues that, whilst broadly approximate in result, the Court's preferred approach, based on the

³⁹ However, note that Schilling's own definition of intentional restrictions does not appear so limited. At one point, he defines this category to include rules 'of which it can be said with a reasonable degree of certainty that they hinder the free movement of goods.' Schilling *op. cit.* at note 6 at p. 249. Contrast this with his view on p. 251.

⁴⁰ The regulation of trade is interpreted as falling within the economic policy objectives of the then Community. Of course, this is not problematic.

⁴¹ Schilling *op. cit.* at note 6 at p. 248.

⁴² For discussion of the specifics of the balancing test in particular factual scenarios, see Schilling *op. cit.* at note 6 at p. 250.

⁴³ Schilling *op. cit.* at note 6 at p. 252.

⁴⁴ Joined Cases C-267/91 and C-268/91 *Keck and Mithouard op. cit.* at note 14.

⁴⁵ On this point, see Joined Cases C-267/91 and C-268/91 *Keck and Mithouard op. cit.* at note 14 at para. 12. The Court noted that 'national legislation imposing a general prohibition on resale at a loss is not designed to regulate trade in goods between Member States.'

⁴⁶ Schilling *op. cit.* at note 6 at p. 252.

⁴⁷ *Ibid.*

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distinction between rules regulating ‘product characteristics’ and ‘selling arrangements’ is normatively weaker.⁴⁸

There is much to commend Schilling’s argument. It represents a coherent attempt to explore the implications of subsidiarity for the Court of Justice as a Union institution. However, even at this early stage of analysis, it is possible to point to some problems with his approach. The main criticism relates to his preference for a distinction in the application of subsidiarity according to the substantive nature of the particular national rules at issue. Schilling seems overly concerned with whether or not Member States measures regulate – or better: *seek* to regulate – intra-EU trade or other ‘economic matters’ falling within the Union’s broad objectives. Essentially, he maintains that subsidiarity is only applicable as a restraint on the Court’s own functions in cases where the contested national rule addresses a non-economic matter of national public policy. Only in such cases does subsidiarity function as a general principle which must then be balanced with the competing Union interest in intra-EU movement. In all other cases, subsidiarity is considered inapplicable. Primacy – as expressed in specific provisions including Art 34 TFEU – applies as the *rule*.

It is difficult to accept Schilling’s underlying approach for determining whether or not subsidiarity applies to affect the Court’s interpretation of primary EU law. It will be recalled from Chapter 1 that the application of the subsidiarity principle in EU law is not conditional on any such distinction between economic and non-economic measures. The principle instead applies in all cases in which regulatory competence is shared between the Union and the Member States. As Schilling indeed argues, this covers the regulation of the internal market as a shared regulatory space.⁴⁹ Chapter 1 discussed the implications of the subsidiarity principle for the Union legislature. It will be recalled that, in connection with the latter’s use of its legislative competence to regulate the internal market (Art 114 TFEU), no distinction is made according to the nature of the national rules at issue. Subsidiarity is instead concerned only with the (transnational) *effects* of national measures. In short, it is unclear why the position should be any different in so far as the application of the subsidiarity

⁴⁸ *Ibid.*, at pp 252-253.

⁴⁹ *Ibid.*, at pp 231-232.

principle as a restraint on the Court of Justice is concerned. In both cases, we are dealing with the same principle and the exercise of Union competence in the same area of (shared) regulatory competence.

Full discussion of how the subsidiarity test could apply to guide the Court in its own efforts to contribute to the internal market aim is reserved for chapter 6. However, at this stage in the analysis, it should be clear that Schilling's method, though detailed, appears to sit uncomfortably with our understanding of how subsidiarity currently operates at present as a principle of EU law. This may be contrasted with Bermann's view discussed above. Bermann does not make any such distinction according to the nature of particular national regulations.⁵⁰ More promisingly, he structured his approach around the *effects* of Member State rules on intra-EU movement.

2.3 De Búrca: *The Court of Justice as an institutional actor*

Finally, in 1998, de Búrca offered an insightful and fresh analysis of subsidiarity's implications for the Court as an institutional actor.⁵¹ In line with the views of Bermann and Schilling above, de Búrca also argues that the Court must respond to the introduction of subsidiarity as general principle of integration in connection with the exercise of its own interpretative functions. However, in contrast to the preceding analyses, de Búrca is less concerned with how subsidiarity should be operationalised in specific contexts. By contrast, she focuses primarily on discussing whether or not the Court should in fact be subject to the principle's demands in the first place.

De Búrca makes a strong case in broad terms for the application of subsidiarity to the Court as an institutional actor. She challenges the view that the Court does not contribute directly to the integration process as a unilateral policy actor.⁵² De Búrca argues that the Court is in fact regularly confronted with interpretative choices that are comparable – though not identical – to those faced by the Union legislature in the exercise of its legislative competences.⁵³ For example, she reasons that, although negatively worded, the Treaty provisions are 'open to a number of interpretations

⁵⁰ See also Bernard *op. cit.* at note 6 at pp 636-639 and Rohe *op. cit.* at note 6 at p. 82.

⁵¹ De Búrca *op. cit.* at note 2.

⁵² *Ibid.*, at pp 229-232.

⁵³ *Ibid.*, at pp 230-232.

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capable of expanding the scope of Community law and, correspondingly, restricting the scope of action of Member States.⁵⁴ The act of judicial interpretation can therefore constitute ‘the exercise of law-making power by the Court.’⁵⁵ Importantly, de Búrca notes that this finding is entirely overlooked in the Subsidiarity Protocol and other guidelines designed to inform the application of the subsidiarity principle in EU law.⁵⁶ Recalling the discussion of the revised Protocols and other amendments in Chapter 1, this still remains the position at the time of writing.

De Búrca concludes that there is considerable scope to develop subsidiarity as a legal restraint on the Court’s interpretative freedom. To this end, she isolates a number of possible mechanisms that could be adopted in order to attribute substance to the principle.⁵⁷ For example, it is argued that the Treaty could be amended to provide for judicial or legislative review of decisions of the Court of Justice on subsidiarity grounds. However, de Búrca’s preferred solution is to develop the principle *within* the Treaty existing framework. She maintains that:

‘it is incumbent on the ECJ itself to find a way of responding to the complex problems which are being brought before it, rather than avoiding acknowledgement of the interpretative choices it makes and presenting its rulings as the incontrovertible reading of an uncontested text.’⁵⁸

Specifically, de Búrca calls for the Court to show ‘greater responsiveness and sensitivity... to the difficult questions which are raised by the issues of subsidiarity and proportionality, and [asks] that they are better reflected in [its] reasoning.’⁵⁹ Finally, it is important to stress that this line of argument does not challenge the Court’s ultimate authority to interpret the Treaties. This power flows directly from the Treaty.⁶⁰ Instead, as de Búrca notes, it simply questions whether the Court should be constrained in the *exercise* of this interpretative monopoly.⁶¹

⁵⁴ *Ibid.*, at p. 222.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, at pp 232-233.

⁵⁸ *Ibid.*, at p. 234.

⁵⁹ *Ibid.*, pp 233-234.

⁶⁰ See section 4.2 below.

⁶¹ De Búrca *op. cit.* at note 2 at p. 226.

3. The view from the case law

The previous section reviewed the key literature discussing the potential for applying subsidiarity as a restraint on the Court's interpretative freedom. As we have seen, different commentators have offered both complementary and competing visions about how the principle could be operationalised in this respect. Before engaging with these arguments further (section 4), it is necessary first to consider the position in the case law. The question here is simple. Are there any indications that subsidiarity has already emerged as a brake on the Court's own functions as an institutional actor?

The subsidiarity principle has been referred to in a number of the Court's decisions. Most references to subsidiarity in the case law arise where either the Court or the parties to the dispute do nothing more than simply restate particular provisions of Union legislation that contain express references to the principle.⁶² In other cases, the principle is invoked to support Member State autonomy generally, often in combination with references to the principle of proportionality and without any explanation of why – and how – subsidiarity is relevant to the resolution of the case in point.⁶³ This section is not concerned with such fleeting references to subsidiarity. Instead, the focus is squarely on those cases in which the parties made a clear attempt to invoke subsidiarity as a limit on the Court's freedom to determine the distribution of regulatory competence between the Union and the Member States through its interpretation of EU law. In short, we are looking for evidence of a judicial response to de Búrca's call for the Court to show 'greater responsiveness and sensitivity' to

⁶² See eg Case C-15/00 *Commission v. EIB* [2003] ECR I-7281 at para. 28, Case C-271/01 *Ministero delle Politiche Agricole e Forestali* [2004] ECR I-1029 at para. 26, Case C-240/02 *Asempre* [2004] ECR I-2461 at para. 3, Case C-303/05 *Advocaten voor de Wereld VZW* [2007] ECR I-3633 at para. 5, Case C-55/06 *Arcor AG* [2008] ECR I-2931 at para. 3, Case C-66/08 *Szymon Kozłowski* [2008] ECR I-6041 at para. 4, Case C-317/07 *Lahti Energia Oy* [2008] ECR I-9051 at para. 3, Case C-411/06 *Commission v. Parliament and Council (Waste Shipments)* [2009] ECR I-7585 at para. 8, Case C-343/08 *Commission v. Czech Republic (Occupational Retirement)*, judgment of the Court (Third Chamber) of 14 January 2010 (nyr) at para. 2 and Case C-439/08 *VEBIC*, judgment of the Court (Grand Chamber) of 7 December 2010 (nyr) at para. 7.

⁶³ See eg Case C-110/03 *Belgium v. Commission (State Aids)* [2005] ECR I-2801 at paras 56-58, Case C-64/05 P *Sweden v. Commission and Others (Document Access)* [2007] ECR I-11389 at para. 74 and Case C-176/09 *Luxemburg v. Parliament and Council (Airport Charges)*, judgment of the Court (Third Chamber) of 12 May 2011 (nyr) at paras 73-84.

the demands of subsidiarity in its own actions.⁶⁴ In the following paragraphs, the case law dealing with the Court's interpretation of primary (Treaty) and secondary (Union legislation) is considered in turn. As we shall see, there is astonishingly little case law in either area. To date, subsidiarity has been invoked as a source of restraint on the Court's interpretative functions in only a handful of isolated cases. This is in spite of the fact that, in the relevant substantive areas, the Court's case law has been subject to intense criticism for encroaching too far on national regulatory autonomy in areas of shared responsibility – the precise operating conditions for the subsidiarity principle.

3.1 Primary law

3.1.1 Case C-415/93 *Bosman*

The decision in *Bosman* remains to date the clearest illustration of an attempt to apply subsidiarity as a brake on the Court's interpretative freedom.⁶⁵ In this case, the applicant, a professional footballer, invoked the Treaty provisions on the free movement of workers (now Art 45 TFEU) in order to contest the national and international regulatory frameworks governing the transfer and fielding of professional footballers by clubs established within the Union. In particular, Mr Bosman challenged the requirement for the payment of a transfer fee by his previous employer before he could contract with a football club established in another Member State. In this context, the German Government, intervening in the case in support of the UEFA, the defendant regulatory body, invoked subsidiarity in an attempt to shield the contested rules from judicial scrutiny at Union level. It argued that, according to the principle of subsidiarity, intervention by the Union (including, by implication, the Court itself) in the area at issue – the regulation of sporting activities – should be limited to what was 'strictly necessary.'⁶⁶

⁶⁴ De Búrca *op. cit.* at note 2 at pp 233-234.

⁶⁵ Case C-415/93 *Bosman* [1995] ECR I-4921. This case is also discussed by de Búrca *op. cit.* at note 2 at pp 227-228.

⁶⁶ Case C-415/93 *Bosman op. cit.* at note 65 at para. 72. On this point, see also de Búrca *op. cit.* at note 2 at p. 227.

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At first sight, the *Bosman* ruling does not appear to offer much support for the operation of subsidiarity as a legal principle outside the review of Union legislation. In that case, the ECJ swiftly rejected the German Government's subsidiarity-based arguments. The Court stated that:

‘subsidiarity, as interpreted by the German Government to the effect that intervention by public authorities, and particularly [Union] authorities, in the area in question must be confined to what is strictly necessary, cannot lead to a situation in which the freedom of private associations to adopt sporting rules restricts the exercise of rights conferred on individuals by the Treaty.’⁶⁷

In other words, the Court made it clear that subsidiarity had no effect on its competence to review the contested regulations against the Treaty as an obstacle to the free movement of workers within the internal market. However, it would be incorrect to conclude from this statement that the Court refused outright to accept, in principle, that subsidiarity might operate as a broader restraint in EU law. In fact, the reverse is probably true. On one view, the Court's observation in *Bosman* that subsidiarity ‘cannot lead to a situation’ actually masks an *implicit* acceptance of the principle's operation in this context.

The real problem in *Bosman* was that the German Government asked the wrong question. In its submission to the Court, the German Government appeared to confuse subsidiarity with the related, but distinct, principle of proportionality.⁶⁸ As noted in Chapter 1, the latter principle is designed to regulate the nature and intensity of Union intervention *after* it is established that regulatory competence exists at Union level. The German Government's argument demonstrates its confusion on this important distinction between, on the one hand, the existence of and right to exercise competence at Union level (governed by Art 5(2) and 5(3) TEU) and, on the other hand, the manner in which that competence is exercised (governed by Art 5(4) TEU). In essence, it tried to use subsidiarity to manage the intensity of the Court's intervention into the regulation of the specific substantive area at issue (‘intervention... confined to what is strictly necessary’). Yet, this necessarily assumed that the Union (the Court) enjoyed the right, in principle, to *exercise*

⁶⁷ Case C-415/93 *Bosman op. cit.* at note 65 at para. 81.

⁶⁸ The relationship between subsidiarity and proportionality is discussed further in section 4.2.2 below.

competence in the area in question – the very question that subsidiarity is designed to contest.

3.1.2 Case C-174/04 *Commission v. Italy (Energy Markets)* and Case C-326/07 *Commission v. Italy (Energy Markets)*

The decision in *Bosman* addressed the Court's interpretation of the *scope* of the Treaty provisions on intra-EU movement. The concern here is with the definition of what constitutes an obstacle to free movement within the internal market. As will be discussed further in Chapter 3, this question forms only the first part of the Court's review of national measures against the Treaty rules on free movement. Subsidiarity also features in the case law on the *justification* of obstacles to intra-EU movement. This forms the second limb of the Court's review of national rules against the Treaty freedoms. At this stage of inquiry, the Court must determine whether or not national rules that are found to fall within the scope of the Treaty freedoms can be justified in EU law. This involves, first and foremost, reviewing the Member State's *choice* of the specific ground(s) for derogating from the Treaty freedoms.⁶⁹

The decision in *Commission v. Italy (Energy Markets)* and the subsequent ruling of the same name provide isolated examples of attempts to invoke subsidiarity in connection with the *justification* of obstacles to intra-EU movement.⁷⁰ Both cases concerned Italian legislation affecting the rights of persons holding shares in certain recently privatised energy companies established in that State. In the first case, the contested Italian measure provided for the suspension of the voting rights of a defined category of investor. The second ruling addressed Italian legislation that reserved to the competent national minister special powers to veto important corporate decisions. In both cases, the Court concluded that the rules at issue constituted obstacles to the free movement of capital and the freedom of

⁶⁹ As will be discussed in Chapter 3, Member States can seek to justify prohibited national measures using either the express derogation grounds set out in the TFEU or, alternatively, using a broader non-exhaustive list of 'overriding public interest requirements.' See eg Case 120/78 *Cassis de Dijon* [1979] ECR 649 at para. 8 and Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 at para. 37.

⁷⁰ Case C-174/04 *Commission v Italy (Energy Markets)* [2005] ECR I-4933 and Case C-326/07 *Commission v Italy (Energy Markets)* [2009] ECR I-2291. See also earlier, Case C-53/05 *Commission v. Portugal (Rental Rights)* [2006] ECR I-6215 at para. 29.

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establishment. The issue was whether or not the Italian rules could be justified under EU law. To support this view, the Italian Government referred expressly to the subsidiarity principle in both cases. It argued that this principle operated to protect its right to maintain the aforementioned restrictions on the rights of shareholders in the undertakings concerned.

In the first of the two decisions, the Italian Government picked up on the reference to subsidiarity set out in Directives 96/92 and 98/30 on energy market liberalisation.⁷¹

According to these instruments:

‘Member States shall ensure, on the basis of their institutional organisation *and with due regard for the principle of subsidiarity*, that, without prejudice to paragraph 2, electricity undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive market in electricity, and shall not discriminate between these undertakings as regards either rights or obligations.’⁷²

For the Italian Government, the reference to subsidiarity in these instruments was taken to denote the right on its part to take temporary action at *national level* in order to correct difficulties arising in the process of liberalising energy markets within the Union.⁷³ Specifically, it sought to argue that the contested national law was necessary in order to prevent recently privatised national energy companies from being acquired and thereby controlled by energy companies that remained in public control.⁷⁴ In the second *Commission v. Italy (Energy Markets)* ruling, the Italian Government again sought to rely on the principle of subsidiarity at the justification stage. However, on this occasion, it argued that the prohibited national rules were required to safeguard public security within that State. According to the Italian Government, ‘the principle of subsidiarity must apply. Domestic legislation is more suitable than Community legislation for regulating situations presenting a real risk to the vital interests of the State, situations that only the State can evaluate directly and in good time.’⁷⁵ Moreover, it submitted that it – as a Member State – should enjoy

⁷¹ Directive 96/92/EC concerning common rules for the internal market in electricity [1997] OJ L 27/20 and Directive 98/30/EC concerning common rules for the internal market in natural gas [1998] OJ L 204/1.

⁷² Article 3(1) of Directive 96/92/EC *op. cit.* at note 71 (this author’s emphasis).

⁷³ Case C-174/04 *Commission v. Italy (Energy Markets)* *op. cit.* at note 70 at para. 39.

⁷⁴ The contested rules targeted French energy suppliers that remained in public ownership.

⁷⁵ Case C-174/04 *Commission v. Italy (Energy Markets)* *op. cit.* at note 70 at para. 25.

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broad discretion in this connection, ‘for [Member States] are best placed to deal with emergencies affecting the vital interests of the State.’⁷⁶

In contrast to the ruling in *Bosman*, the Court did not respond directly to the Italian Government’s efforts to invoke subsidiarity as a limit on its freedom to determine whether or not the contested rules could be justified in EU law. In both cases, the principle was discussed only by the Advocates General. In relation to the first decision, Advocate General Kokott rejected the arguments of the Italian Government. She concluded that ‘not even the principle of subsidiarity can ever justify national measures in breach of the fundamental freedoms.’⁷⁷ The Italian Government received an equally blunt reply from Advocate General Ruiz-Jarabo Colomer in the second ruling. However, in this case, the rejection was based on the manner in which the Italian Government presented its subsidiarity argument. In the opinion of the Advocate General, the Italian Government’s subsidiarity plea was not sufficiently defined. He concluded that, ‘using the principle of subsidiarity in such imprecise terms is contrary to the legal certainty required by the Court of Justice.’⁷⁸

Notwithstanding the views of the Advocates General, it is submitted that it is possible to interpret the Court’s silence on subsidiarity in both cases rather more favourably. In fact, the subsidiarity principle arguably *improves* our understanding of the Court’s final conclusions in each case. This is particularly true with respect to the first of the two decisions. In this case, the subsidiarity principle supports the Court’s clear rejection of the Italian Government’s efforts to justify its restrictive measure. In accordance with the principle of subsidiarity, the Italian Government could *not* assume responsibility for the specific ‘overriding interest’ it sought to use in order to justify its legislation. The specific justification advanced – the protection of competition for the supply of energy *within the internal market* – could *not* be achieved through unilateral Member State action. This is an issue with clear transnational effects. On this interpretation, the subsidiarity principle was therefore

⁷⁶ *Ibid.*, at para. 67.

⁷⁷ Opinion of AG Kokott in Case C-174/04 *Commission v. Italy (Energy Markets)* *op. cit.* at note 70 at para. 41. Note also that the AG referred here to the conclusions of the ECJ in *Bosman* in support of her argument.

⁷⁸ Opinion of AG Ruiz-Jarabo Colomer in Case C-326/07 *Commission v. Italy (Energy Markets)* *op. cit.* at note 70 at para. 75.

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not inapplicable in that case, but instead provided a stronger normative basis to support the Court's decision to exclude unilateral Member State intervention on this specific ground.⁷⁹

Similarly, the conclusions of the Court in the subsequent ruling in *Commission v. Italy (Energy Markets)* sit comfortably alongside the logic of subsidiarity. In contrast to the earlier decision, the Court accepted, in principle, the Italian Government's proposed derogation ground. The Court concluded that the defendant Member State could seek to justify its legislation on the grounds advanced, specifically, the maintenance of a minimum supply of energy resources and goods essential to the public as a whole, national defence and the continuity of public service.⁸⁰ In so doing, the ECJ recognised these specific objectives as distinctly *national* interests that the Member State was capable of securing *unilaterally*. Admittedly, the Court then concluded, in the final analysis, that the contested rules could not in fact be considered to be justified.⁸¹ However, this finding does not undermine the subsidiarity analysis discussed here. The Court's conclusion was in fact solely based on the *disproportionate* nature of the rules in question.⁸² As has already been noted on several occasions, this proportionality assessment forms a separate (and subsequent) limb of the Court's justification framework in EU free movement law.

⁷⁹ Further support for this line of argument can be found in the Opinion of the Advocate General. Indeed, the Advocate General noted expressly that 'a Member State is not permitted to respond to distortions *in the internal market* by way of unilateral measures that obstruct the free movement of capital.' Furthermore, she also observed that, 'if serious distortions to the internal market should arise [as a consequence of the liberalisation process] ...it is for the [*Union*] to remedy the situation by amending the directives' (this author's emphasis). Opinion of AG Kokott in Case C-174/04 *Commission v. Italy (Energy Markets)* *op. cit.* at note 70 at paras 40-41.

⁸⁰ Case C-326/07 *Commission v. Italy (Energy Markets)* *op. cit.* at note 70 at para. 45.

⁸¹ *Ibid.*, at paras 46-55.

⁸² *Ibid.*

3.2 Secondary legislation

3.2.1 Case C-332/00 *Commission v. Belgium (Butter)* and Case C-103/01 *Commission v. Germany (Personal Protective Equipment)*

As we have seen, subsidiarity is very rarely invoked as a restraint on the Court's freedom to determine the distribution of regulatory competence between the Union and the Member States through its interpretation of primary Union law. The position with respect to secondary law (Union legislation) is no different. In this context, litigants – and the Member States in particular – are also yet to exploit subsidiarity's potential as a brake on the Court's freedom, under certain circumstances,⁸³ to adjudicate on the distribution of competence between the Union and the Member States through the exercise of its interpretative functions. Generally speaking, in the isolated cases where subsidiarity is raised by the Member States, the principle is simply used to defend Member State autonomy per se. For example, in *Commission v. Germany (Personal Protective Equipment)*, it was argued that the subsidiarity principle granted the Member States (greater) discretion to determine the scope of a particular derogation set out within Directive 89/686.⁸⁴ Similarly, in the earlier case of *Commission v. Belgium (Butter)*, the Belgian Government argued that, under the principle subsidiarity, it retained competence to determine the products covered by the term 'butter' for the purposes of a particular Regulation.⁸⁵

In a further blow to its function as a legal principle, there are strong grounds to question the merits of the defendants' arguments in the above isolated cases. First, in the latter case (*Commission v. Belgium (Butter)*), the subsidiarity principle was invoked to support Member State competence in an area of *exclusive* Union competence. However, it will be recalled from Chapter 1 that the principle does not

⁸³ The parameters of the subsidiarity test as applied to the Court's interpretative functions are examined in section 4.2 below.

⁸⁴ Case C-103/01 *Commission v. Germany (Personal Protective Equipment)* [2003] ECR I-5369 at para. 19. Directive 89/686/EEC of 21 December 1989 on the approximation of the laws of the Member States relating to personal protective equipment [1989] OJ L 399/18.

⁸⁵ Case C-332/00 *Commission v. Belgium (Butter)* [2002] ECR I-3609 at para. 22. Regulation No 985/68 of the Council of 15 July 1968 laying down general rules for intervention on the market in butter and cream [1968] OJ L 169/1.

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apply in this sphere.⁸⁶ Secondly, there also doubts about the arguments of the German Government in *Commission v. Germany (Personal Protective Equipment)*. Although rightly invoking subsidiarity in an area of shared regulatory responsibility (the Directive was enacted using Art 100a (now Art 114 TFEU)), the defendant failed to operationalise the principle correctly. The German Government did not rely on subsidiarity to contest the *decision* of the Union legislature to exercise competence under Art 100a to enact legislation regulating the characteristics of personal protective equipment within the internal market.⁸⁷ Instead, the defendant was simply seeking to contest the interpretation of the phrase ‘designed and manufactured specifically for the forces which maintain law and order.’ It sought to argue that the duties of its fire-fighters fell within the scope of that exemption. It is unclear what subsidiarity had to offer here.⁸⁸

3.2.2 Case C-518/08 *Fundación Gala-Salvador Dalí*

Notwithstanding the above, the case law on secondary legislation is not all bad news in so far as subsidiarity is concerned. There is in fact some implicit support for the view that the Court has, *of its own accord*, shown sensitivity to the principle’s impact on its freedom to interpret the scope of Union legislation. The ruling in *Fundación Gala-Salvador Dalí* provides an isolated, but clear example of this point.⁸⁹ In this case, the Court was asked to rule on the scope of Directive 2001/84 on the resale right for the benefit of the author of an original work of art.⁹⁰ This Directive was adopted under Art 95 EC (Art 114 TFEU), the legal basis for intervention by the

⁸⁶ See here also Joined Cases C-96/03 and C-97/03 *Tempelman and Others* [2005] ECR I-1895 at para. 23.

⁸⁷ To its credit, the Court rightly examined the German Government’s subsidiarity complaint in these terms: ‘With regard to the principle of subsidiarity, since the national provisions in question differ significantly from one Member State to another, they may constitute, as is noted in the fifth recital in the preamble to the PPE Directive, a barrier to trade with direct consequences for the creation and operation of the common market. The harmonisation of such divergent provisions may, by reason of its scope and effects, be undertaken only by the Community legislature.’ Case C-103/01 *Commission v. Germany (Personal Protective Equipment) op. cit.* at note 84 at para. 47.

⁸⁸ However, see section 4.3 below. It could be argued that subsidiarity was relevant to the distribution of shared *adjudicative* competences between the Union and the Member States. After all, the key issue in that case was about determining who had the competence to interpret this provision – the Court of Justice or the Member States.

⁸⁹ Case C-518/08 *Fundación Gala-Salvador Dalí*, judgment of the Court (Third Chamber) of 15 April 2010 (n.r.) at paras 24-36.

⁹⁰ Directive 2001/87/EC of 27 September 2001 on the resale right for the benefit of the author of an original work of art [2001] OJ L 270/32.

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Union legislature in the regulation of the internal market. As such, it represented an exercise of competence by the Union legislature in an area of shared regulatory responsibility. On the strength of the conclusions in Chapter 1, it is submitted that this decision to intervene by the Union legislature was subject to the demands of the subsidiarity principle in Art 5(2) EC (Art 5(3) TEU).

Against the above background, the Court was asked to determine whether Directive 2001/84 precluded a provision of French law which reserved the benefit of the right of resale – introduced by the Directive – to the artist’s heirs alone. In effect, the contested French measure excluded testamentary legatees from enjoying the benefits of the Directive. In its reply to the referring court, the ECJ concluded that the French legislation was not contrary to EU law. For present purposes, it is the reasoning leading to this conclusion that is particularly interesting. In its review of the scope of the Directive, the Court noted that the Union legislature ‘did not, in accordance with the principle of subsidiarity, consider it appropriate to take action through that Directive in relation to Member States’ laws of succession.’⁹¹ This was based on the legislature’s assessment that there was no need to eliminate differences between national laws, such as those on succession, which cannot be expected to affect the functioning of the internal market.⁹² Importantly, the Court did not challenge the Union legislature’s assessment of the appropriate scope for intervention at Union level in the substantive area at issue. It simply accepted that, applying the principle of subsidiarity, the Union legislature had *already* concluded that it was *not* appropriate to take action at Union level to harmonise national rules on succession. Taken in its most favourable light, it is argued that this finding provides evidence of the Court’s own sensitivity to the demands of subsidiarity in connection with its interpretation of secondary EU law. Put simply, the Court did not exercise its interpretative freedom in a manner that contested the subsidiarity assessment that the Union legislature had already made. It could have done so, but it did not.

⁹¹ Case C-518/08 *Fundación Gala-Salvador Dalí* *op. cit.* at note 89 at para. 32.

⁹² *Ibid.*, at para. 31.

4. The normative dimension

4.1 Should subsidiarity bind the Court?

The above review provides some evidence to support the view that the subsidiarity principle is already operating implicitly as a restraint on the Court of Justice as an institutional actor.⁹³ In connection with its interpretation of both primary and secondary Union law, it is possible to argue, at the very least, that the Court is not going against the logic of subsidiarity in cases where the principle is invoked *expressly*. However, it is important to stress that we are dealing with a handful of isolated cases. Furthermore, in order to square these examples with the subsidiarity principle, it is admittedly necessary to engage in a certain degree of intellectual gymnastics. The Court does not always respond expressly to appeals to subsidiarity, leaving much to implication. Equally, the Member States do not yet seem to have worked out how and when to operationalise subsidiarity as a restraint on the Court's interpretative functions – with respect to both primary and secondary Union law. This is very much in line with their attempts to challenge the validity of Union legislation enacted under Art 114 TFEU on subsidiarity grounds (see Chapter 1). In this context, it was argued that the Member States continue to struggle with subsidiarity and, in particular, have difficulties in understanding how the principle relates to the principles of conferral and proportionality. However, discussion of the current state of play in the case law can only take us so far. The fundamental question is normative. It is now necessary to ask whether or not subsidiarity *should* restrain the Court in its own functions. Only if this is the case is there a need thereafter to work out the detail of how exactly the subsidiarity principle should unfold its effects in particular areas.

Following the arguments of Bermann, Schilling and de Búrca, it is difficult to see why the Court should be immune, in principle, from the demands of the subsidiarity principle in connection with its interpretation of EU law. In line with the views of those commentators, and the arguments of de Búrca in particular, the Court makes an

⁹³ It is important to stress that it is *not* suggested that the entirety of the Court's post-Maastricht case law sits comfortably with the subsidiarity principle. For discussion of tension in the specific area of EU free movement law, see Chapters 3-5 below.

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important contribution to the integration process as an independent policy actor – at least in certain circumstances. Although its role remains distinct from that of the Union legislature, the Court is often confronted with choices that are comparable to those faced by the former institution. This fact should now be apparent from the discussion of the case law in the preceding section. As de Búrca rightly notes, when faced with questions about the appropriate interpretation of Union law, the Court is effectively engaging in acts of judicial law-making. This can have important implications for the distribution of competence between the Union and the Member States. To the extent that such acts of interpretation affect the balance of power in areas of shared regulatory responsibility, the conditions for the application of the subsidiarity principle would appear to be met.

The wording of the core subsidiarity provision, Art 5(3) TEU, also lends normative support to the application of subsidiarity *to the Court*.⁹⁴ That provision states clearly that subsidiarity applies to the exercise of competences shared by ‘the Union’ and the Member States. Art 13 TEU then expressly lists the ‘Court of Justice’ as part of the institutional framework of the Union. Paragraph 3 of this provision provides further that ‘each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them.’⁹⁵ Art 5(3) TEU and Art 13 TEU thereby establish the key link between principle and institution.⁹⁶ In strict legal terms, this is a sufficiently clear argument in favour of subsidiarity’s application to the Court in its capacity as an institution of the Union.

Of course, one may argue that the detail of Art 5(3) TEU precludes the application of subsidiarity as a brake on the Court’s interpretative functions. For example, the wording of both Art 5(3) TEU and, in particular, the Protocol on Subsidiarity (as amended) is framed in language that speaks directly to the principle’s effect as a brake on the Union legislature.⁹⁷ Equally, one could argue that the exercise of the

⁹⁴ On this point, see also Swaine *op. cit.* at note 1 at pp 60-1.

⁹⁵ For confirmation, see Case C-110/03 *Belgium v. Commission (State Aid)* [2005] ECR I-2501 at para. 57.

⁹⁶ See also on this point, A. Toth, ‘Is Subsidiarity Justiciable’ (1994) 19(3) *ELRev* 268 at p. 273.

⁹⁷ See also here de Búrca *op. cit.* at note 2 at p. 221.

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Court's own functions does not meet the key criterion in Art 5(3) TEU. This refers to the requirement for (voluntary) 'action' on the part of the Union institutions concerned.⁹⁸ On this point, it could be argued that, unlike the Union legislature, the Court does not 'act' when exercising its interpretative functions. On one view, the Court is in fact simply required to respond to requests for interpretations of points of EU law that are brought before it. This absence of any independent right of policy initiation, comparable to that enjoyed by the Union's legislative branch, could be viewed as fatal to the application of subsidiarity to the Court. As will be discussed in section 4.2 below, the above concerns present important challenges to subsidiarity's functions as a restraint on the Court *qua* Union institution. However, it will be argued that none of the above points are fatal to the core arguments. Instead, they simply illustrate the need to construct, from first principles, a clear and detailed analysis of subsidiarity's implications for the Court in connection with the exercise of its own functions.

Finally, it is important to stress that there are good reasons to submit the Court's functions to the demands of the subsidiarity principle. Extending the application of subsidiarity in this way (where appropriate) can only strengthen the integration process. Ensuring the Court's compliance with subsidiarity through its actions as an institutional actor would serve to bolster its legitimacy and, in addition, inject additional normative support for the interpretative choices it makes in its rulings. This would correct a clear imbalance that exists between the Union institutions. It will be recalled from Chapter 1 that the actions of the Union legislature are now subject to increased scrutiny on subsidiarity grounds in an attempt to enhance the protection of Member State competences. There is no reason why the Court should escape similar controls – at least to the extent that the operating conditions for the subsidiarity principle are met.

4.2 How should subsidiarity function?

From the above starting point, it is submitted here that the decisive issue is not whether subsidiarity binds the Court. Instead, it is about determining what that

⁹⁸ I am very grateful to David Edward for this point.

principle means for the Court outside its review of legislative acts for compliance with subsidiarity (discussed in Chapter 1).⁹⁹ In this connection, there are two key points to address. The first relates to the scope of the principle's application, in other words, to the extent to which the Court is in fact bound by the demands of subsidiarity. Put simply, is subsidiarity relevant to every interpretative act of the Court or is its application as a restraint on the Court's functions limited to specific contexts? The second concern addresses the mechanics of the principle's application. Once the scope of its application is confirmed, *how* should the Court actually engage with the demands of the subsidiarity principle in practice?

The remainder of this chapter is concerned with the first of these two important issues. It focuses on determining the principle's scope of application as a brake on the Court's interpretive functions. In particular, it discusses how subsidiarity interacts with other core constitutional principles of EU integration such as the principles of attributed powers and proportionality. As we have seen already, there appears to be some confusion over the relationship between subsidiarity and the latter principle. Although listed as distinct legal principles in Art 5 TEU, the three principles of conferral, subsidiarity and proportionality are frequently conflated. After discussing subsidiarity's scope of application in broad terms, this chapter concludes by identifying a specific substantive area of EU law to test the practical implications of subsidiarity as a restraint on the Court's functions. The remainder of this thesis then focuses on how the mechanics of subsidiarity could be developed in the chosen area.

4.2.1 Determining subsidiarity's scope of application

In terms of scope, the application of the subsidiarity principle to the interpretative functions of the Court would appear to be subject to two preconditions. Both conditions are broadly comparable to those governing the principle's application as a restraint on the actions of the Union legislature, as discussed in Chapter 1. First, the Court itself must have competence to act. In other words, the Court must enjoy a right of interpretation. Secondly, and more importantly, for subsidiarity to apply, the

⁹⁹ For Swaine, this is also 'the most difficult task.' See Swaine *op. cit.* at note 1 at p. 66.

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Court must actually be engaged in the review of a substantive policy area that is held concurrently by the Member States and the Union.

This first requirement, the existence of the Court's competence to act, is a matter for the attribution of powers. This is governed by Art 5(2) TEU. According to this provision, the 'Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties.' In Chapter 1, it was noted that the attribution of powers defines substantive areas in which the Union legislature enjoys, in principle, the right to enact legislative measures. For example, Art 114 TFEU grants the Union legislature competence to enact measures in order to contribute to the establishment of a functioning internal market. Of course, as was argued in Chapter 1, the *existence* of this specific competence does not mean that the Union legislature may *exercise* it without restraint. Indeed, it was argued that recourse to Art 114 TFEU is subject to the demands of the subsidiarity principle. This key distinction between the existence and exercise of Union competences now finds expression, post-Lisbon, in Art 5(1) TEU. This new provision states that 'the limits of Union competences are governed by the principle of conferral. The *use* of Union competences is governed by the principles of subsidiarity and proportionality.'¹⁰⁰

Transposed to the present discussion, the first criterion for the application of subsidiarity, the attribution of powers, refers to the legal basis for judicial interpretation set out in the Treaties. Art 19 TEU provides, in broad terms, that the Court of Justice 'shall ensure that in the interpretation and application of the Treaties the law is observed.'¹⁰¹ The individual judicial procedures are set out in Part 6 of the Treaty on the Functioning of the European Union and in the Statute of the Court of Justice.¹⁰² These include, for example, the direct action for the annulment of legislative acts of the Union (Art 263 TFEU), infringement proceedings instigated by the Commission or Member States against Member States for alleged infringements of EU law (Arts. 258, 259 and 260 TFEU) and the preliminary reference procedure (Art 267 TFEU). It is important to stress that the subsidiarity principle does not

¹⁰⁰ Art 5(1) TEU (this author's emphasis).

¹⁰¹ Ex Art 220 EC.

¹⁰² Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C 83/47 and Protocol on the Statute of the Court of Justice of the European Union [2010] OJ C 83/210.

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challenge the existence of Court's competence to interpret the Treaties under any of these proceedings. Recalling de Búrca's conclusions noted earlier, subsidiarity simply questions whether the Court should be constrained in the *exercise* of this interpretative freedom *within* the contexts of the specific judicial proceedings outlined in the Treaty.¹⁰³

The second of the two preconditions is therefore the most important. This refers to the *substance* of the legal dispute before the Court in any one of the judicial procedures set out in the Treaty. In short, for the subsidiarity principle to apply, it is submitted that the Court must be engaged in the review of a substantive policy area that is held concurrently by the Member States and the Union. This second requirement sets out the core limit of the principle's application as a restraint on the Court's interpretative functions. Subsidiarity is only relevant in cases where the Court is faced with an interpretative choice over the limits of Union intervention in areas of shared regulatory competence. In other words, the Court should be required to engage with the demands of subsidiarity exclusively in cases where it is confronted with a decision about whether or not it should exercise competence at Union level in an area of shared competence. It is in this particular sphere of activity that the Court can properly be said to be free to 'act' for the purposes of Art 5(3) TEU.

In the above context, the Court is effectively confronted with a comparable decision to that faced by the Union legislature when the latter is contemplating exercising its competence to regulate in an area of shared responsibility. The Court must decide whether there is a need for Union intervention in the area of shared responsibility concerned. Importantly, it is argued that this requirement on the Court to determine whether or not there is a need for it to exercise its competence in an area of shared responsibility can arise in different contexts. For example, the Court may be confronted with a subsidiarity issue when requested to interpret a provision of the Treaty, such as Art 34 TFEU on the free movement of goods. Alternatively, the Court may be subject to the demands of subsidiarity when requested to interpret

¹⁰³ De Búrca *op. cit.* at note 2 at p. 226.

provisions of secondary Union legislation (see here eg *Fundación Gala-Salvador Dalí*). Finally, the Court may be required to engage with the subsidiarity principle in cases where provisions of primary and secondary Union law co-exist. In the latter two cases, the Court's obligation to act in accordance with the demands of Art 5(3) TEU may come into conflict with the subsidiarity assessment *already* conducted by other Union institutions, notably the Union legislature. This adds an interesting further intra-institutional dimension to the application of the subsidiarity principle *to the Court*.

Clearly, there is a need to discuss in more concrete terms how the Court should engage with this subsidiarity obligation in specific substantive areas. However, this is a matter for subsequent chapters. The remainder of this chapter comments on the limits of the subsidiarity test as applied to the Court and also addresses some possible objections to the core argument.

4.2.2 The limits of subsidiarity

With the scope of its application defined, it is now possible to comment on the limits of subsidiarity as a restraint on the Court's interpretative freedom. In this connection, the first point to note is that subsidiarity is not a principle that favours Member State autonomy generally. Its operation is restricted to cases in which the Court is required to make interpretative choices in areas of shared responsibility. The principle is therefore wholly irrelevant where the Court is dealing with the interpretation of areas of exclusive Union competence. In such cases, only the proportionality principle in Art 5(4) TFEU can be invoked to safeguard Member State autonomy. This principle protects Member States by restricting the form and intensity of all Union action.¹⁰⁴ In line with the above conclusions on subsidiarity, there is no reason not to consider proportionality as being relevant to the Court's actions as a Union institution either. Art 5(4) TEU again clearly states that *Union* action is subject to the proportionality principle.

¹⁰⁴ On this point, see also eg Toth *op. cit.* at note 96 at p. 270.

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In a similar vein, the principle of subsidiarity is of no help to the Member States in cases where there are doubts over the *existence* of any competence to regulate specific substantive areas at Union level. This scenario also presents a problem that subsidiarity is incapable of resolving. In such cases, the Court is effectively making a decision about whether or not to *extend* the scope of Union competences into new substantive areas that are (clearly) outwith the scope of the Treaties.¹⁰⁵ This interpretative choice is broadly comparable to any attempt by the Union legislature to harmonise national laws on, inter alia, crime prevention;¹⁰⁶ education, vocational training youth and sport;¹⁰⁷ culture;¹⁰⁸ public health;¹⁰⁹ industry¹¹⁰ or tourism.¹¹¹ In each of these areas, the Union legislature enjoys only a lesser degree of ‘supporting’ or ‘co-ordinating competence’ and, importantly, is expressly excluded from harmonising the laws and regulations of the Member States.¹¹²

Interestingly, there is in fact some evidence in the case law to suggest that the Court is aware – or at least has at times been aware – of limits to the *existence* of Union competence in connection with the exercise of its own interpretative authority. The Court’s pre-citizenship judgments on education and vocational policy provide a clear illustration of this point. For example, in *Brown*, the Court expressly acknowledged

¹⁰⁵ For an illustration, see eg Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame III* [1996] ECR I-1029. This case concerned the right to reparation for damages suffered as a result of breaches of Union law by Member States. The German Government argued that a general right of reparation for individuals in EU law could only be *created* by Union legislation – if at all. It maintained that for the Court to create such a remedy of its own accord would be ‘incompatible with the allocation of powers as between the [Union] institutions and the Member States’ (at para. 24). De Búrca discusses this line of argument, and the Court’s failure to respond to it expressly, through the lens of subsidiarity (de Búrca *op. cit.* at note 2 at pp 226-229. See also, thereafter, Swaine *op. cit.* at note 1 at pp 78-128). However, it is respectfully suggested that this is misplaced. The issue in this case was not with the Court’s decision to exercise its interpretative functions in an area of shared regulatory responsibility (such as the internal market), but instead had more to do with the question of whether or not the Union institutions (including the Court) had any competence to *create* judicial remedies in Union law in the first place. This is matter for the attribution of powers in Art 5(2) TEU and was certainly open to question in that case.

¹⁰⁶ Art 84 TFEU.

¹⁰⁷ Art 165(4) TFEU and Art 166(4) TFEU.

¹⁰⁸ Art 167(5) TFEU.

¹⁰⁹ Art 168(5) TFEU.

¹¹⁰ Art 173(3) TFEU.

¹¹¹ Art 195(2) TFEU.

¹¹² Of course, harmonisation is legally permitted in these substantive areas to the extent that they fall within the scope of Arts 114 or 115 TFEU. See here, with respect to public health, Case C-376/98 *Germany v. European Parliament and Council of the European Union (Tobacco Advertising)* [2000] ECR I-8419 at paras 77-78.

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and respected the existence of limits – at the material time – to the scope of Union competence to regulate national rules on financial assistance for university studies.¹¹³ In that case, the Court was requested to determine whether or not student maintenance grants fell within the scope of Community law.¹¹⁴ The Court's conclusion was that they did not. Significantly, this finding was reached *after* the Court had assessed the Community's competence to regulate national rules on education and vocational training.¹¹⁵ On this key point, the Court noted that:

‘at the present stage of development of Community law, assistance given to students for maintenance and for training falls in principle outside the scope of the EEC Treaty.’¹¹⁶

The Court's review of discriminatory rules on maintenance grants has of course moved on since the ruling in *Brown*.¹¹⁷ This reflects changes in the Union's competence in the substantive area concerned, together with the introduction of the new legal status of Union citizenship.¹¹⁸ However, for present purposes, the ruling remains important.¹¹⁹ It provides a clear (historical) example of an awareness on the part of the Court about the existence of inherent limits to the scope of its own interpretative freedom. The fact that the example used here concerned the attribution of powers (Art 5(2) TEU) rather than the subsidiarity principle (Art 5(3) TEU) is of no great significance. It has already been argued that both provisions, together with the related principle of proportionality in Art 5(4) TEU, operate to restrain the Court *qua* Union institution in the exercise of its own interpretative functions. The Court's

¹¹³ Case 197/86 *Brown v The Secretary of State for Scotland* [1988] ECR I-3285. This interpretation was also noted by the Court in Case C-209/03 *Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119 at para. 38.

¹¹⁴ In the earlier decisions in *Graizier* and *Blaizot*, the Court had already ruled that the Treaty prohibited discriminatory treatment of Member State nationals with respect to the payment of any tuition or enrolment fees. In both cases, this position was reached *after* an assessment of the Community's competences in the area concerned. See Case 293/83 *Gravier v City of Liège* [1985] ECR 593 at paras 19-25 and Case 24/86 *Blaizot v University of Liège and others* [1988] ECR 379 at para. 24.

¹¹⁵ Case 197/86 *Brown op. cit.* at note 113 at para. 18.

¹¹⁶ *Ibid.*

¹¹⁷ See eg Case C-209/03 *Bidar op. cit.* at note 113 at paras 39-48. See now also Art 24(2) of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77.

¹¹⁸ See now Arts 18, 20 and 21 TFEU and Title XII of the same Treaty.

¹¹⁹ It is also interesting to note that the ruling in *Brown* was delivered prior to the introduction of Art 5 TEU by the Treaty of Maastricht.

ruling in *Brown* is therefore relevant to the present analysis of subsidiarity by direct analogy.

4.3 Possible objections to the application of subsidiarity as a restraint on the Court's interpretive functions

The previous section discussed, in broad terms, the implications of the subsidiarity principle as a restraint on the Court's actions. It was argued, first, that there are no real obstacles to the application of subsidiarity in this manner. It was then argued, secondly, that subsidiarity should only be considered relevant to certain interpretative acts of the Court. Specifically, the principle operates to protect Member State autonomy in cases where the Court is confronted with a decision about whether or not it should exercise competence at Union level in an area of shared responsibility. It is only in this specific sphere of activity that the Court must ensure that its interpretative freedom is exercised in accordance with the demands of Art 5(3) TEU.

Those conclusions notwithstanding, there are a number of possible concerns surrounding the application of subsidiarity as a brake on the Court's interpretative functions. To strengthen the main line of argument, these points should be openly acknowledged. The first possible concern relates to the definition of areas of 'shared regulatory competence'. As noted earlier, this, of course, delimits the scope of the principle's application as a restraint on the Court. This follows from the fact that, according to Art 5(3) TEU, subsidiarity is only relevant in connection with the exercise of 'non-exclusive' competences. In spite of the changes introduced by the Lisbon Treaty,¹²⁰ it remains possible to argue that the lack of more precisely defined areas of shared competences weakens the case for applying subsidiarity in this manner. The Treaty now sets out, for the first time, broad areas of shared regulatory competences in Art 4 TFEU. However, although helpful, this new attempt to categorise Union competences more clearly in Title 1 of the TFEU does not guarantee a precise division of competences. For example, where is the boundary between 'economic, social and territorial cohesion' (a shared competence, subject to

¹²⁰ See especially Art 4 TFEU, which defines the shared regulatory competences according to broad thematic policy areas.

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Art 5(3) TEU) and ‘education, vocational training, youth and sport’ (a supporting competence only, *not* subject to Art 5(3) TEU)?

Secondly, even where areas of shared competence can be agreed on, the application of the subsidiarity principle may seem entirely inappropriate in certain contexts. In short, the principle’s logic may challenge core – or even ‘fundamental’ – policy objectives set out in the Treaties. These include, for example, the elimination of discrimination on the grounds of nationality (Art 18 TFEU), sex, racial or ethnic origin, and religion (Art 10 TFEU); the promotion of gender equality (Art 8 TFEU) or environmental protection (Art 11 TFEU). In areas of shared competence, it may well be the case that Member States are perfectly capable, in principle, of meeting these objectives at the national level. Does this mean that the Court is precluded from intervening to secure these important flanking policy objectives except in cases that meet the criteria for intervention at Union level in Art 5(3) TEU? For example, does subsidiarity restrict the Court’s review of discriminatory national rules to those measures that exhibit sufficient transnational effects? Such an approach would mark a radical departure from the Court’s existing case law in certain fields.¹²¹

Thirdly, the application of subsidiarity to the Court’s exercise of shared competences is also arguably obstructed by practical problems. Recalling the discussion in Chapter 1 above, the subsidiarity principle now requires the Union legislature to make complex political and economic assessments about the nature and transnational effects of specific national policies when it seeks to exercise its legislative competences in areas of shared regulatory responsibility (e.g. Art 114 TFEU). According to Art 5 of the revised Subsidiarity Protocol, the Union legislature must set out its ‘reasons for concluding that a Union objective can be better achieved at Union level.’¹²² Furthermore, these grounds for legislative intervention must be ‘substantiated by qualitative and, wherever possible, quantitative indicators.’¹²³ It is certainly open to question whether or not the Court is capable of making a similar

¹²¹ Notably from the case law on age discrimination, which typically addresses disputes that are, on the facts, confined to the territory of a single Member State. See eg Case C-144/04 *Mangold v Helm* [2005] ECR I-9981.

¹²² Protocol (no. 2) on the Application of the Principles of Subsidiarity and Proportionality [2010] OJ C 83/206.

¹²³ *Ibid.*, Art 5.

assessment in order to overturn subsidiarity's presumption in favour of Member State autonomy. We shall return to address this objection, together with the preceding concerns over the appropriateness of applying subsidiarity in certain policy areas, in chapter 6.

Finally, there is also the secondary but important issue of enforcement. Even if we accept that subsidiarity extends to bind the Court in the exercise of its interpretative functions, this leaves open the question of how the principle should be enforced. Is it enough to argue that subsidiarity should be considered as a self-enforcing limit on the actions of the Court or does proper compliance-monitoring demand the introduction of additional (ex post) review mechanisms? In previous studies (discussed in section 2 above), enforcement was generally left to the Court. De Búrca, for example, concluded that, 'it is incumbent on the ECJ itself to find a way of responding to the complex problems which are being brought before it, rather than avoiding acknowledgement of the interpretative choices it makes and presenting its rulings as the incontrovertible reading of an uncontested text.'¹²⁴ This suggestion appears to be based on the view that the Court is capable of adjusting its approach to the exercise of its own interpretative functions to meet the demands of the subsidiarity principle. Equally, it is also underpinned by the sense that the Court risks undermining its own legitimacy as a Union institution should it choose not to do so.

4.3.1 Too many difficulties to overcome?

In sum, the above concerns may leave the distinct impression that the application of subsidiarity to the Court's interpretative functions is confronted by too many obstacles. For this reason, it may seem more appropriate to fall back on alternative mechanisms to ensure that the Court does not violate the subsidiarity principle through the exercise of its own interpretative functions.¹²⁵ For example, one option would be to leave things as they are and argue instead for a Treaty amendment to empower the Union legislature to override individual Court decisions on subsidiarity

¹²⁴ De Búrca *op. cit.* at note 2 at p. 234.

¹²⁵ *Ibid.*, at pp 232-234.

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grounds.¹²⁶ This could provide the missing check on the Court's contribution to integration in areas of shared competence. This particular proposal would also resolve the secondary issue of ensuring the principle's enforcement as a restraint on the Court. Similarly, the Treaty could be amended to provide for the judicial review of decisions of the Court of Justice.¹²⁷ This review could be conducted by the Full Court or specialised judicial panels created for this purpose.

Another alternative would be to abandon the subsidiarity principle altogether and focus instead on developing the *proportionality* principle as a restraint on the Court's interpretative functions. Again, this particular constitutional principle could be developed in isolation as a self-enforcing restraint on the Court's actions or, alternatively, it could be combined with a new system of ex post legislative override along the lines discussed above. As noted earlier, proportionality is also a general constitutional principle of European integration. Moreover, it was also argued that, in common with the subsidiarity principle, there are no obvious obstacles to its application as a restraint on the Court's own interpretative functions. Indeed, the principle could be used to protect Member State autonomy from disproportionate interferences at the hands of the Court in a much broader sphere. Recalling the discussion above, the proportionality principle applies to govern the intensity of *all* Union action and not just its action in areas of shared regulatory competence. As such, its scope of application as a restraint on the Court of Justice is potentially much broader.

In recent years, the proportionality principle has also found increasing favour amongst commentators as the appropriate key limit on the scope of Union action.¹²⁸ In most cases, the concern is, of course, with the scope of intervention by the Union legislature. However, this line of argument could again be transposed to an assessment of the nature and intensity of the Court's interpretative decisions. Davies's critique of the subsidiarity principle as an effective restraint on the Union

¹²⁶ *Ibid.*, at p. 233.

¹²⁷ *Ibid.*

¹²⁸ See esp. Davies *op. cit.* at note 3. See also eg G. A. Bermann, 'Proportionality and Subsidiarity' in C. Barnard and J. Scott (Eds.), *The Law of the Single European Market: Unpacking the Premises* (Oxford: OUP, 2002) 75 at p. 89.

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legislature (discussed in Chapter 1) provides an example of a proportionality-based approach to the protection of Member State autonomy that could be transposed and applied to guide the exercise of the Court's interpretative freedom.¹²⁹ For Davies, in its review of acts of the Union legislature, the Court should focus on questions of proportionality not subsidiarity. Specifically, he argues that the Court should 'ask whether the importance of a Union measure is sufficient to justify its effect on the Member States.'¹³⁰

Even those who continue to view subsidiarity more favourably have resorted to proportionality in an attempt to bolster the effectiveness of the former principle.¹³¹ For example, Schütze argues that subsidiarity should be reconceived as a principle of 'federal proportionality.'¹³² This would involve asking the Court to examine whether or not the Union legislature has 'unnecessarily restricted national autonomy in the exercise of its legislative competences.'¹³³ Support for this broader reading of subsidiarity can of course be found in the wording of Art 5(3) TEU itself. It is possible to argue that this provision extends to include an assessment of the proportionality of Union intervention in areas of shared competence. It provides that, according to the principle of subsidiarity, 'the Union shall act only if *and insofar as* the objectives of the proposed action.'¹³⁴

However, notwithstanding the wording of Art 5(3) TEU, it is submitted that the related, but distinct, principles of subsidiarity and proportionality should not be conflated. Whilst it is correct that Art 5(3) TEU would appear to contain its own reference to proportionality ('and insofar as the objectives of the proposed action'), this should not be used to undermine the subsidiarity test at the core of that provision. The assessment of the nature and intensity of Union intervention in an area of shared responsibility (the proportionality assessment) is only relevant *after* it

¹²⁹ Davies *op. cit.* at note 3. See also M. Kumm, 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union' (2006) 12(4) *ELRev* 503 at pp 522-525, who seeks to develop the same proportionality assessment *alongside* a subsidiarity test.

¹³⁰ Davies *op. cit.* at note 3 at p. 83.

¹³¹ Schütze *op. cit.* at note 3 at pp 532-536. See also, to the same effect, Schilling *op. cit.* at note 6 at p. 253.

¹³² Schütze *op. cit.* at note 3 at pp 532-535.

¹³³ *Ibid.*, at p. 533.

¹³⁴ Art 5(3) TEU (this author's emphasis).

has been established, in accordance with the demands of the subsidiarity test, that the Union enjoys the right to exercise competence in the first place. Both Davies and Schütze overlook this fundamental distinction between subsidiarity and proportionality. In essence, they (wrongly) seek to use proportionality to address what remains a matter for the subsidiarity principle: determining whether or not there is a need for Union intervention in an area of shared responsibility.

4.3.2 Summary

In spite of potential difficulties associated with its application and the lure of the proportionality principle as a potential alternative, it is argued that subsidiarity's function as a restraint on the Court's own interpretative functions is still worth exploring. The Court should not be excused from the requirements of the principle simply because its application may, at first sight, appear challenging. The Court of Justice continues to make a vital contribution to the process of European integration through its interpretation of EU law. This role presents the Court with opportunities to steer policies in particular directions or to fill gaps in existing legislative acts. The existence of such interpretative choices was apparent through discussion of the existing subsidiarity case law in section 2 above. In its capacity as the ultimate interpreter of the Treaties, the Court is often faced with decisions over whether or not there is a need for it to exercise its competence at Union level in areas of shared regulatory responsibility. For this reason, its action should be reviewed against subsidiarity where the conditions for the principle's application are met.

Equally, it is further argued that we should not simply fall back on the proportionality principle as a suitable safeguard of Member State autonomy from the excesses of judicial interpretation. It is of course absolutely true that proportionality is a key principle of integration. However, proportionality cannot be relied upon as a suitable catch-all principle. Its function as a safety valve to protect Member State autonomy is actually rather restricted. In particular, the principle *cannot* be used to challenge the *decision* of either the Court or the Union legislature to exercise regulatory competence at Union level in an area of shared responsibility. Proportionality can only deal with the effects of that decision once taken.

Subsidiarity, on the other hand, scrutinises the prior decision to exercise competence at Union level in the first place – at least where this is held concurrently with the Member States. Subsidiarity therefore has its own distinctive role to play and should be explored separately and in greater detail.

4.3 Is subsidiarity only relevant to the Court's substantive functions?

The preceding sections have examined the implications of subsidiarity for the Court's freedom to interpret Union law within the context of the proceedings before it. It has been argued that the principle has an important role to play in this sphere. Specifically, subsidiarity applies to restrain the Court when it is faced with interpretative choices that affect the distribution of regulatory (i.e. *substantive*) competences between the Union and the Member States in areas of shared responsibility. The application of subsidiarity *to the Court* in this manner represents the logical complement to the principle's use as a brake on the functions of the Union legislature, discussed in Chapter 1. It also reflects the way in which subsidiarity was discussed in broader terms by Bermann, Schilling and de Búrca (see section 2 above). However, it is also important to consider whether there are other, additional, roles for subsidiarity outside of this specific context.

The preliminary reference procedure in Art 267 TFEU (ex Art 234 EC) is perhaps the most obvious candidate for scrutiny against the subsidiarity principle outside of the substantive context. This particular procedure establishes a sphere of shared *adjudicative* competence. Under Art 267 TFEU, competence to resolve legal disputes requiring (a) the interpretation of a point of Union law and/or (b) the assessment of the validity of acts of the Union institutions is shared by the Court of Justice and the referring Member State courts and tribunals. Neither the Court of Justice nor the national referring courts enjoy, therefore, exclusive competence to settle the categories of dispute in question. The preliminary reference procedure continues to play a key role in Union law.¹³⁵ It feeds a diverse range of disputes into the Union

¹³⁵ For discussion, see eg T. Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' (2003) 40(1) *CMLRev* 9 esp. at pp 10-16.

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judicial system (some would argue too many).¹³⁶ It is also the principal framework within which the Court contributes to the development of substantive Union law as an institutional actor.

In line with the discussion of its substantive dimension in the preceding sections, the subsidiarity principle poses no threat whatsoever to the *existence* of the Court's adjudicative competences under Art 267 TFEU. The existence of this power flows from the wording of that provision itself. This provides that the Court of Justice 'shall have jurisdiction to give preliminary rulings' on both the interpretation of the Treaties and validity of Union measures. However, there is a strong argument that subsidiarity should be considered in connection with the Court's *exercise* of its interpretative functions under this provision. When exercising its competence under Art 267 TFEU, the Court of Justice is engaged with the national referring court in a shared adjudicative process. For that reason, it should be aware of the need to ensure that its own interpretative choices meet the demands of the subsidiarity principle. This is the logical complement to the obligation on the same Court to ensure that its actions as a Union institution in the substantive sphere do not encroach unnecessarily on the regulatory autonomy of the Member States in areas of shared responsibility.

By way of illustration, it is possible to point to one obvious area of tension in the Court's current approach to the preliminary reference procedure. This concerns the Court's particular view of the term 'interpretation' in Art 267 TFEU. As others have argued, this task is, for want of a better description, itself open to different interpretations.¹³⁷ For example, the Court of Justice could adopt a rather narrow approach. It could simply formulate abstract legal propositions and leave the national courts to apply these to the facts at issue. Alternatively, the Court of Justice could adopt a much broader view of its own adjudicative competence. It could understand the concept of interpretation in Art 267 TFEU as denoting a requirement for an

¹³⁶ For a critique of the current system of preliminary references, see eg J. Komarek, 'In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure' (2007) 34(4) *ELRev* 476.

¹³⁷ For discussion, see eg. G. Davies, 'Abstractness and Concreteness in the Preliminary Reference Procedure: Implications for the Division of Powers and Effective Market Regulation' in N. Nic Shuibhne, *Regulating the Internal Market* (Cheltenham: Elgar, 2006) p. 210 at pp 214-225.

assessment of the Treaty rules in light of the facts in particular cases.¹³⁸ As Davies has argued, the Court of Justice tends to favour the latter, more expansive view, of its interpretative role:¹³⁹

‘Building judgments around the way national rules work and their consequences, and discussing and deciding these, is the norm. There is no sense of a court whose competence is in any sense confined to the Treaty.’¹⁴⁰

It is submitted that subsidiarity could certainly be invoked to bolster criticisms of the Court’s preference, in a considerable number of cases, to ‘decide’ individual cases. This approach leaves referring courts with little scope for unilateral action. In effect, it may simply leave the national court with nothing more to do than to approve formally the Court’s ruling at the national level. On this basis, subsidiarity could be relied upon to question the need for this level of judicial intervention at Union level. In particular, the Court’s expansive reading of its shared adjudicative role in the preliminary reference procedure sits uncomfortably alongside the principle’s normative claim in favour of taking decisions ‘as closely as possible to the citizens they affect.’ Of course, the Court of Justice may have its own reasons for monopolising the preliminary reference procedure. Micro-managing the detail of individual cases is an excellent way of ensuring that Union law is applied throughout the Union as the Court intends.¹⁴¹ However, there is a good argument that this benefit – if there is one – comes at the expense of the increased proximity of localised adjudication, which subsidiarity is designed to protect.

In summary, the preliminary reference procedure offers an excellent arena within which to explore subsidiarity’s function as a brake on the Court’s adjudicative competences. Furthermore, it also demonstrates the breadth of subsidiarity’s potential impact as legal tool to structure the relationship between the EU and national legal orders in areas of shared responsibility. However, for reasons of scope, this thesis must leave the subsidiarity’s adjudicative dimension to one side. Instead,

¹³⁸ See here eg. J. Bongoetxea, N. MacCormick and L.M 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* (Oxford: OUP, 2001) at p. 60.

¹³⁹ Davies *op. cit.* at note 137.

¹⁴⁰ *Ibid.*, at p. 222.

¹⁴¹ The Court appeals to the need to ensure the uniformity of Union law to achieve this objective. On this point, see eg Davies *op. cit.* at note 137 at p. 228 and Komarek *op. cit.* at note 136 at pp 470-475.

as explained more fully below, the Court's case law on the interpretation of the Treaty provisions on intra-EU movement is chosen as a suitable – and arguably more pressing – case study to test subsidiarity's impact on the exercise of the Court's functions.

5. Conclusion

This chapter has discussed subsidiarity's broader implications as a legal principle in EU law. The specific focus has been on whether or not subsidiarity should also have a role to play as a brake on the actions of the Court of Justice as an institutional actor in European integration. The first part of the chapter reviewed the existing references to this broader and underdeveloped dimension of subsidiarity in the commentary. Though rarely discussed, it was argued that there is some academic support for the use of the subsidiarity principle to guide the Court in the exercise of its own functions. This is also supported, at least to some degree, by the Court's responses to efforts to invoke subsidiarity expressly in this manner. On one (rather generous) interpretation, the Court's reasoning in several isolated cases masks its implicit acceptance of subsidiarity as a limit on its interpretative freedom.

Section 4 then addressed the normative issue. In this section, it was argued that subsidiarity should also be considered to bind the Court as a Union institution. This conclusion builds on the earlier analyses of Bermann, Schilling and, in particular, de Búrca. Developing these isolated attempts to explore the broader implications of subsidiarity beyond its function as a restraint on the Union legislature, it was argued that subsidiarity also has important consequences for the Court *qua* Union institution. Specifically, it was argued that the principle does not challenge the existence of the Court's competences under the Treaties. However, subsidiarity was shown to be applicable in connection with the exercise of these powers. In summary, it was argued, in broad terms, that the principle operates to restrain the Court's freedom to make interpretative choices about the need for Union intervention in areas of shared responsibility. Furthermore, it was noted that the relevant areas of shared competence may be both substantive and adjudicative. In both cases, subsidiarity requires the

Court to engage with the principle's demands when exercising its interpretative functions.

Moving forward, the question is now about how to apply this new dimension of subsidiarity in practice. It is one thing to conclude, in broad terms, that the Court must integrate subsidiarity analysis into its legal reasoning or adjudicative choices where the conditions for the principle's application are met. However, it is something quite different to set out the practical implications of this abstract conclusion in concrete cases. The next question, therefore, is this: how should the Court engage with subsidiarity in specific 'real life' situations?

This thesis will now explore subsidiarity's function as brake on the Court's freedom to interpret the concept of an 'obstacle to intra-EU movement' in EU free movement law.¹⁴² This specific case study is selected for several key reasons. First, the Court's interpretation of obstacles to intra-EU movement across the Treaty provisions on the free movement of goods, services, persons and capital meets the perquisites of the subsidiarity test developed in this chapter. When requested to interpret the scope of these provisions, the Court is directly engaged in the regulation of the internal market as an area of shared responsibility. Specifically, through its reading of the obstacle concept, the Court determines the extent to which Member States are free to regulate without any interference at Union level. After all, only where national rules are found to fall within the scope of the Treaty freedoms as obstacles to intra-EU movement are Member States obliged to subsume and defend their regulatory preferences within the Treaty justification framework.

Secondly, the case law on obstacles to intra-EU movement presents an obvious complement to the analysis of subsidiarity's function as a restraint on the Union legislature. It will be recalled from Chapter 1 that subsidiarity operates as a brake on the Union legislature's use of Art 114 TFEU – the legal basis for *legislative* intervention in the same area of shared regulatory responsibility, the internal market. In particular, subsidiarity precludes the Union legislature from using that provision

¹⁴² The term 'obstacle to intra-EU movement' is synonymous with the definition of the scope of the Treaty freedoms.

as a 'general power to regulate the internal market.' The principle restricts the Union legislature's exercise of its competence under Art 114 TFEU to the regulation of two categories of measure: (1) obstacles to intra-EU movement and (2) appreciable distortions of intra-EU competition.

Finally, and perhaps most importantly, there is a genuine 'subsidiarity problem' to resolve in the case law on obstacles to intra-EU movement. As we shall see in Chapters 3-5, the Court interprets the scope of the Treaty freedoms broadly and in a manner that sits uncomfortably alongside the demands of Art 5(3) TEU. Moreover, it continues to face strong criticism on the ground that it encroaches too far on Member State autonomy. Criticism on this ground is, of course, the natural domain of the subsidiarity principle.

The remainder of this thesis is divided into two parts. The first part (Chapters 3, 4 and 5) analyses the Court's current approach to the interpretation of the Treaty free movement provisions. Chapter 3 begins by examining the Court's evolving case law on obstacles to intra-EU movement across the individual Treaty freedoms. It is argued that the Court's approach is now converging around the broadest possible reading of this term, which, applied literally, could bring virtually any national measure within the scope of its review. This finding is clearly at odds with the subsidiarity principle. Chapter 4 then scrutinises the Court's own solution to the problem of managing the outer limits of the obstacle concept. This chapter demonstrates that the Court is aware of the need to delimit the scope of the Treaty freedoms and has developed some judicial tools in order to do so. However, it is argued that, on closer inspection, these devices are ill-defined, incoherent and inconsistently applied. Moreover, in practice, they also have little calming effect on the definition of the obstacle concept. Chapter 5 then completes the critical review of the current state of play by examining the key schools of thought in the literature. In this chapter, it is argued that there is a problem on all sides of the debate. On the one hand, those commentators who advocate a narrower reading of the scope of the Treaty freedoms (based on discrimination/mutual recognition) fail to connect their argument to the subsidiarity principle. Furthermore, on closer inspection, the strict discrimination/mutual recognition approach would appear to hand back too much

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autonomy to the Member States – even in the eyes of its own supporters. On the other hand, those writers who seek to defend the Court’s evolving, expansive approach to the definition of an obstacle to intra-EU movement overlook subsidiarity’s function as a key source of restraint on the Court’s interpretative freedom. In short, they simply assume that the Court is free to exploit its interpretative freedom to various ends.

The conclusions reached in Chapters 3, 4 and 5 form the basis of the final part of the thesis. In this part (Chapter 6), we return, with the benefits of the analysis in Chapters 3-5, to consider how subsidiarity affects the Court’s current interpretation of the scope of the Treaty freedoms. In conclusion, it is submitted that subsidiarity is the missing link in the critique of the Court’s reading of obstacles to intra-EU movement. Applied to the case law, it is argued that subsidiarity calls for an adjustment of the Court’s current approach. This has, in turn, a positive effect on Member State autonomy, ensuring that, in the process of establishing and managing a functioning internal market, they retain appropriate space to breathe.

Chapter 3

Obstacles to intra-EU movement: a converging and *expanding* framework

1. Introduction

The previous chapter discussed the implications of the subsidiarity principle for the Court of Justice in connection with its functions as a Union institution. It was argued, in broad terms, that the Court should be considered to be bound by the demands of subsidiarity in the exercise of both its substantive and adjudicative competences. Specifically, the conclusion reached was that subsidiarity must be integrated into the Court's interpretative choices where these involve decisions over whether or not there is a need for intervention at Union level in the exercise of regulatory or adjudicative competences that are shared with Member State institutions. The remainder of this thesis examines the implications of that broad conclusion through the lens of a particular case study. The Court's interpretation of the term 'obstacle to intra-EU movement' (which is synonymous with the definition of the scope of the Treaty freedoms on intra-EU movement)¹ is chosen as an ideal testing ground for the subsidiarity argument developed in Chapter 2.²

This chapter sketches out the Court's current approach to the definition of an obstacle to intra-EU movement across the Treaty freedoms on goods, services, persons and capital. It begins, in section 2, by outlining (briefly) the basic framework of the Treaty provisions on intra-EU movement and by emphasising the suitability of the term 'obstacle to intra-EU movement' as a case study to test the practical impact of subsidiarity on the exercise of the Court's interpretative functions. The section also points – as an excursus – to the potential to apply subsidiarity at other stages of

¹ Arts 21, 34, 35, 45, 49, 56 and 63(1) TFEU.

² The chosen case study is concerned exclusively with the Court's exercise of its *substantive* competence in this area. The adjudicative dimension, which addresses the exercise of the Court's shared competence to settle legal disputes involving points of EU law through the preliminary reference procedure (Art 267 TFEU), will not, for reasons of scope, be examined further.

the Court's review, specifically at the second-stage justification analysis. Section 3 then outlines the Court's evolving jurisprudence on obstacles to intra-EU movement across the individual freedoms. In summary, it is argued that the Court's case law is now converging around the broadest possible reading of this concept. The Court's preferred approach to defining the scope of Treaty freedoms increasingly targets Member State rules that are liable (actually or potentially) to deter or dissuade intra-EU movement or affect access to the market. Applied literally, this formula comes worryingly close to granting the Court a general power of review over virtually all Member State regulation – a position that is irreconcilable with the subsidiarity principle.

2. Obstacles to intra-EU movement

2.1 Introduction

The Treaty rules on intra-EU movement are set out in the Treaty on the Functioning of the European Union. The individual provisions seek to guarantee the free movement of goods (Arts 34 and 35 TFEU), services (Art 56 TFEU), persons (Arts 45 and 49 TFEU) and capital (Art 63(1) TFEU) within the internal market. In addition to these economic rights of movement, the Treaty also provides Member State nationals with the right to move and reside freely within the internal market as Union Citizens (Art 21 TFEU).

Analysis of whether or not a national measure is contrary to the above provisions is a three-step process. First, the Court must determine whether the contested national rule falls within the scope of one of the Treaty provisions as an obstacle to intra-EU movement. Assuming a positive answer to this first stage, it must be determined, secondly, whether that same national measure can nevertheless be justified against the Treaty framework. The obligation to defend national rules that are found to constitute obstacles to movement falls to the relevant Member State. That State can seek to defend its particular policy choices by using either the express grounds for derogation set out in the Treaty or by proposing an additional overriding public

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interest.³ In both cases, the relevant Member State must then demonstrate, thirdly, that the contested national measure is both a suitable means of ensuring the objective at issue and, more importantly, that it constitutes the least restrictive alternative available (the proportionality test).⁴

This thesis focuses on the first of the three stages – the determination of an obstacle to intra-EU movement. It is submitted that this is the ideal point at which to examine subsidiarity's practical impact on the Court's interpretative functions. The term 'obstacle to intra-EU movement' marks a critical dividing line between Member State and Union competence in an area of shared competence: the regulation of the internal market.⁵ As noted above, Member States are only required to justify their particular regulatory preferences to the extent that these preferences constitute obstacles to intra-EU movement. In all other cases, the Member States are left to contribute to the regulation of the internal market as an area of shared responsibility without interference from the Court. From the perspective of subsidiarity, the manner in which the Court chooses to define obstacles to intra-EU movement is therefore of fundamental importance. If the Court elects to define the term broadly, it thereby increases its own power to scrutinise national policy preferences. Pushed too far, there is clearly a danger that the Court's approach might conflict with the demands of subsidiarity.

³ The express derogations are set out in Arts 36, 45(3), 45(4), 51, 52 and 65 TFEU. For examples of the additional category of mandatory requirements or overriding public interest grounds, see eg Case 120/78 *Cassis de Dijon* [1979] ECR I-649 at para. 8 and Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 at para. 37. For detailed analysis, see C. Barnard, 'Derogations, Justifications and The Four Freedoms: Is State Interest Really Protected?' in C. Barnard and O. Odudu (Eds.) *The Outer Limits of European Union Law* (Oxford: Hart, 2009) 273. According to the Court, the additional category of mandatory requirements/overriding public interest grounds can only be used to justify indistinctly applicable national measures (i.e. those that apply without distinction to *both* imports/nationals of other Member State and domestic products/economic operators). See eg Joined Cases C-1/90 and C-176/90 *Aragonesa* [1991] ECR I-4151 at para. 13. However, on occasion, the Court has strayed from its official position. See eg Case C-2/90 *Commission v. Belgium (Wallon Waste)* [1992] ECR I-4431 at paras 29-36.

⁴ Eg Case 261/81 *Rau* [1982] ECR 3961 at para. 12 and Case C-55/94 *Gebhard op. cit.* at note 3 at para. 37. For discussion of proportionality in EU free movement, see eg J. Jans, 'Proportionality Revisited' (2000) 27(3) *LIEI* 239.

⁵ See Art 4(2)(a) TFEU.

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The constitutional significance of finding that a national measure amounts to an obstacle to intra-EU movement is well known in the legal scholarship.⁶ As Dougan points out, EU lawyers could rightly be accused of ‘fetishizing’ their analysis of the Court’s case law on this point.⁷ However, it is worth stressing, as Dougan himself does, that the significance of determining what constitutes an obstacle to intra-EU movement goes beyond law. If the Court furnishes itself with an extremely broad power of review over Member State regulatory choices, then this is not simply a legal problem. The Court’s preferred approach also has direct political and economic consequences. In political terms, an inappropriately wide reading of the scope of the Treaty freedoms risks undermining the integrity of national political processes. After all, to the extent that it elects to scrutinise national measures as obstacles to intra-EU movement, the Court is effectively reviewing the substance of political compromises struck at Member State level. Equally, there are also economic risks associated with the Court’s interpretation of the scope of the Treaty freedoms. Again, if developed without appropriate limits, the Court’s review of national measures as obstacles to intra-EU movement may undermine the economic benefits of regulatory diversity within the internal market.⁸

The broader political and economic dangers associated with the Court’s interpretation of the obstacle concept emphasise the relevance of subsidiarity to the debate. Subsidiarity is a natural focal point in discussions over the Court’s appropriate reading of the scope of the Treaty freedoms. Its primary concern is to protect, in so far as possible and for both political and economic reasons, the right of citizens to have decisions that affect them taken as closely as possible to them (see Chapter 1). As argued above, there is clearly scope for the Court’s reading of the scope of the Treaty freedoms to conflict with this right. Rather surprisingly, the link

⁶ See here esp. N. Bernard, ‘Discrimination and Free Movement in EC Law’ (1996) 45(1) *ICLQ* 82 at p. 82, M. Poiras Maduro, *We the Court: The European Court of Justice & the European Economic Constitution* (Oxford: Hart, 1999) esp. at p. 58, N. Bernard, *Multilevel Governance in the European Union* (Amsterdam: Kluwer, 2002) at p. 60, J. Snell, *Goods and Services in EC Law: A Study in the Relationship Between the Freedoms* (Oxford: OUP, 2002) at p. 48 and E. Spaventa, *Free Movement of Persons in the European Union: Barriers to Movement in the Constitutional Context* (AH Alphen aan den Rijn: Kluwer, 2007) at p. 76.

⁷ M. Dougan, ‘Legal Developments’ (2010) 48 *JCMS* 163 at p. 163.

⁸ See on this same point esp. C. Barnard and S. Deakin, ‘Market Access and Regulatory Competition’ in C. Barnard and J. Scott (Eds.) *The Law of the Single European Market* (Oxford: Hart, 2002) p. 197 at pp 198-202 and Snell *op. cit.* at note 6 at pp 35-45.

between subsidiarity and the Court's freedom to interpret the scope of the Treaty freedoms is virtually absent in the legal scholarship. This point is discussed further in Chapters 5 and 6.

The remainder of this chapter will now review the state of play in the Court's case law on obstacles to intra-EU movement. It will also comment, in general terms, on whether or not the Court's evolving approach seems to fit comfortably alongside the logic of the subsidiarity principle. However, before turning our full attention to these matters, it is worth illustrating briefly the extent to which subsidiarity might also be potentially relevant to the Court's exercise of its interpretative freedom at the *justification* stage; in other words, at the point where Member State are obliged to defend their regulatory preferences within the EU derogation framework. The conclusion reached in this section provides further support for the decision in this thesis to focus exclusively on analysing subsidiarity's implications for the Court's freedom to interpret obstacles to intra-EU movement.

2.2 Excursus: Subsidiarity and the justification of obstacles to intra-EU movement

At first sight, the justification stage may appear to be the most appropriate arena in which to apply subsidiarity as a restraint on the Court's interpretative freedom. At this stage of judicial inquiry, the Court is required to determine whether or not a particular national policy objective that conflicts with the Treaty freedoms can be defended in EU law. As noted above, there are two ways in which Member States can seek to defend their policy preferences. Broadly speaking, Member States can rely on one of the express Treaty derogations and/or invoke a supplementary 'mandatory requirement' to the same effect.⁹ In both cases, the Court examines whether or not the contested national rule can be saved on the justification ground(s) advanced. Assuming a positive answer at this stage, the focus then turns to the proportionality of the national rule. To constitute a valid justification in EU law, the national rule must be suitable to realise the derogation ground(s) at issue and also not go beyond what is strictly necessary to achieve that objective.

⁹ See note 3 and the case law and literature cited therein.

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Although closely tied up with questions about Member State autonomy, it is submitted that there is in fact surprisingly little scope to apply subsidiarity as a restraint on the Court at the justification stage. Here, the Court is not, strictly speaking, faced with interpretative choices that are subject to the demands of the subsidiarity principle. At the justification stage, the Court is not asked to decide whether or not there is a need to exercise competence at Union level to regulate the internal market (the subsidiarity test developed in Chapter 2). The decision to intervene in the regulation of the internal market at Union level through the interpretation of the Treaty free movement provisions has *already* been made. The issue at the justification stage is rather one of re-regulating the market at Union level. Put simply, the Court must decide whether and, if so, the extent to which a particular national policy can be squared with the Treaty's internal market objective. These issues would seem to go beyond subsidiarity.

Notwithstanding the above, it is submitted that there remains some scope to develop subsidiarity as a restraint on the Court's interpretative freedom at the justification stage. In particular, subsidiarity could be used to scrutinise *the selection of suitable mandatory requirements*. In this connection, the principle would require the Court to examine whether or not the relevant Member State is in fact *capable* of achieving – through action at the *national* level – the objective that it seeks to defend.¹⁰ In most cases, this test will be met, even in the context of a transnational market. For example, typical mandatory requirements such as consumer protection,¹¹ the protection of the environment¹² and safeguarding fundamental rights¹³ are all objectives that Member States are at least capable of contributing to through national action. However, the ruling in *Commission v. Italy (Energy Markets)*, discussed in

¹⁰ One could go a step further and argue that subsidiarity is only relevant to the assessment of mandatory requirements in so far as these seek to regulate areas of *shared* competence. However, for reasons of scope, it is not possible to explore this point further here.

¹¹ Eg Case 120/78 *Cassis op. cit.* at note 3 at para. 8, Case C-470/93 *Mars GmbH* [1995] ECR I-1923 at para. 15, Case C-313/94 *Graffione* [1996] ECR I-6039 at para. 17 and Case C-12/00 *Commission v. Spain (Chocolate)* [2003] ECR I-459 at para. 83.

¹² Eg Case 302/86 *Commission v. Denmark* [1988] ECR 4607 at para. 9, Case C-309/02 *Radberger Getränkegesellschaft* [2004] ECR I-11763 at para. 75 and Case C-320/03 *Commission v. Austria (Road Transport)* [2005] ECR I-9871 at para. 80.

¹³ Eg Case C-112/00 *Schmidberger* [2003] ECR I-5659 at para. 82, Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609 at para. 33 and Case C-341/05 *Laval un Partneri Ltd* [2007] ECR I-11767 at para. 93.

Chapter 2, illustrates that this might not always be the case.¹⁴ In that case, the Italian Government sought to justify its legislation governing the acquisition of shares in certain previously nationalised energy companies, which the Court had ruled contrary to the freedom of establishment and the free movement of capital. The defendant argued that the contested legislation was necessary in order to protect the competitiveness of the *Union* energy market.¹⁵ Although not referring to subsidiarity, the Court's rejection of this possible overriding public interest ground sits comfortably with the principle's logic. The 'overriding interest' that the Italian Government sought to safeguard could *not* be achieved through unilateral Member State action. Rather, as the Court noted, it was for the Commission to take any necessary measures to eliminate competitive distortions in the (transnational) Union energy market.¹⁶

It is important to note that the (limited) scope to apply subsidiarity in the above manner departs from the main argument advanced in this thesis. Any attempt to use subsidiarity in order to scrutinise the selection of mandatory requirements amounts to requiring the Court *to apply the principle as a substantive test*. In other words, it involves asking the Court to make its own assessment of whether or not – according to the demands of the subsidiarity principle – a particular policy is, in principle, capable of being realised at the national level. This must be distinguished from the subsidiarity test set out in Chapter 2. Crucially, this thesis does *not* seek to develop subsidiarity as a distinct test that should be *applied by the Court*, alongside, for example, the proportionality principle. The argument here is different. Following the analysis in Chapter 2, this thesis applies subsidiarity *to the Court*. It examines the implications of subsidiarity for the Court in the exercise of its own interpretative functions as a Union institution.

Leaving discussion of subsidiarity's broader implications aside, we now turn to the detail of the chosen case study: the concept of an obstacle to intra-EU movement. This begins, in this chapter, with an overview of the Court's evolving approach to

¹⁴ Case C-174/04 *Commission v Italy (Energy Markets)* [2005] ECR I-4933.

¹⁵ *Ibid.*, at para. 39. In practice, the contested Italian rules were specifically conceived to prevent *French* State-owned energy companies from acquiring control of newly privatised Italian energy undertakings.

¹⁶ *Ibid.*, at para. 38.

defining this term in the case law. The author is aware that this particular issue has already been subject to extensive analysis in the legal scholarship.¹⁷ Moreover, the case law discussed here will also be familiar to many readers. For both reasons, this section aims to be as succinct as possible, focusing only on the key developments of direct relevance to the core argument. In summary, section 3 seeks to emphasise two key points. First, it argues that the Court's reading of the scope of the Treaty freedoms is increasingly converging around a uniform test. Secondly, and more importantly, it is argued that, in substance, this test is worryingly broad. According to the Court, the term 'obstacle to intra-EU movement' now extends, in principle, to capture any national measure that is liable (actually or potentially) to deter or dissuade intra-EU movement or affect access to the market. Applied literally, this comes dangerously close to granting the Court a general power to scrutinise Member State legislation in the name of establishing a functioning internal market. This is clearly out of step with the demands of the subsidiarity principle.

3. What constitutes an obstacle to intra-EU movement?

3.1. Goods

The Treaty contains two provisions addressing non-fiscal barriers to intra-EU trade in goods.¹⁸ Art 34 TFEU prohibits 'quantitative restrictions on imports and all measures having equivalent effect.' Art 35 TFEU repeats the same prohibition with respect to the export of goods. The prohibition of quantitative restrictions on both imports and exports is straightforward. The term 'quantitative restriction' refers, for both provisions, to national measures that represent a total or partial restraint on imports, exports or goods in transit.¹⁹ In practice, this captures national measures

¹⁷ See, from a long list, eg S. Weatherill, 'After *Keck*: Some Thoughts on How to Clarify the Clarification' (1996) 33(5) *CMLRev* 885, C. Barnard, 'Fitting the Remaining Pieces into the Goods and Persons Jigsaw' (2001) 26(1) *ELRev* 34, Poiares Maduro *op. cit.* at note 6 at esp. pp 35-58, Bernard *op. cit.* at note 6 esp. at pp 15-62, N. Nic Shuibhne, 'The Free Movement of Goods and Article 28 EC: An Evolving Framework' (2002) 27(4) *ELRev* 408, Snell *op. cit.* at note 6 at pp 31-127, G. Davies, *Nationality Discrimination in the European Internal Market* (The Hague: Kluwer, 2003) at pp 21-89 and Spaventa *op. cit.* at note 6 esp. at pp 35-74 and pp 113-134.

¹⁸ For reasons of scope, this thesis will not examine the Treaty rules on fiscal barriers to the intra-EU movement of goods (Art 30 TFEU on custom duties and Art 110 TFEU on internal taxation).

¹⁹ Case 2/73 *Geddo v. Ente Nazionale Risi* [1973] ECR 865 at para. 7.

that impose quotas on the import or export of goods or, in the most extreme form, total bans on the same.²⁰

3.1.1 MEQRs - Art 34 TFEU

The tension in the case law on both Arts 34 and 35 centres on the definition of ‘measures having equivalent effect to a quantitative restriction’ (MEQRs). With respect first to imports, the starting point remains the Court’s formative decision in *Dassonville*.²¹ As Oliver notes, that decision is (and remains) the *fons et origo* of case law on Art 34 TFEU.²² In this case, the Court opted for an extremely broad reading of the scope of that provision. It interpreted the concept of an MEQR as capturing ‘all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially intra-[EU] trade [in goods].’²³ As the wording of this definition makes clear, the Court’s approach is focused on the *effects* of national measures on the importation of products from one Member State into another. This extends to include both existing (actual) and future (potential) obstacles to trade.²⁴

The definition of an MEQR has been subject to repeated instances of clarification. In the first instance, the ECJ confirmed in *Cassis de Dijon* that the term also covers indistinctly applicable national rules.²⁵ This refers to Member State measures that apply to *both* imported and domestic products alike. This marked a further extension in the scope of Art 34 TFEU. In *Cassis*, the Court concluded that, even where indistinctly applicable, national rules prescribing a minimum alcohol content for fruit liqueurs infringed Art 34 TEU *unless* it could be shown that they were necessary in

²⁰ Eg Case 34/79 *Henn and Darby* [1972] ECR 3795 at paras 12-13 (Art 34 TFEU), Case C-170/04 *Rosengren v. Riksåklagaren* [2007] ECR I-4071 at para. 33 (Art 34 TFEU), Case C-47/90 *Delhaize Frères* [1992] ECR I-3369 at paras 12-14 (Art 35 TFEU), Case C-5/94 *Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553 at para. 12 (Art 35 TFEU) and Case C-1/96 *Compassion in World Farming* [1998] ECR I-1251 at para. 39 (Art 35 TFEU).

²¹ Case 8/74 *Dassonville* [1974] ECR 837. As recently confirmed by the Grand Chamber of the Court in Case C-110/05 *Commission v. Italy (Motorcycle Trailers)* [2009] ECR 519 at para. 33.

²² P. Oliver, ‘Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurling in a New Direction?’ (2010) 33(5) *Fordham Int. LJ* 1423 at p. 1457.

²³ Case 8/74 *Dassonville op. cit.* at note 21 at para. 5.

²⁴ For confirmation of this point, see eg Case C-184/96 *Commission v. France (Foie Gras)* [1998] ECR I-6197 at para. 17. In this case, the Court noted that it was sufficient that the contested rule was ‘capable of hindering, *at least potentially*, intra-State trade’ (this author’s emphasis).

²⁵ Case 120/78 *Cassis op. cit.* at note 3.

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order to satisfy a proportionate mandatory requirement.²⁶ The Court's reasoning was simple: once a product had been lawfully produced and marketed in one of the Member States, there was no valid reason, in principle, why it should not be introduced into the markets of other Member States.²⁷

Unfortunately for the Court, the breadth of its preferred definition of MEQRs returned to haunt it in later case law. This resulted in the second, and most controversial, clarification of the *Dassonville* formula. The particular problem centred on traders' efforts to rely on the broad scope of Art 34 TFEU in order to review indistinctly applicable rules regulating the conditions under which products could be marketed within Member States.²⁸ The Court's initial response to such attempts was rather inconsistent. In certain cases, the Court ruled that such measures fell outside of the scope of Art 34 TFEU.²⁹ However, in other decisions, the Court concluded that rules of the same nature required justification as obstacles to intra-EU movement.³⁰ In *Keck*, the Court was pressed to clear up this confusion.³¹ In the words of Advocate General Léger, this ruling sought 'to put an end to the dangers of wandering off course inherent in the extremely broad definition of measures having effect equivalent to a quantitative restriction.'³² Interestingly, the Court's attempt to rein in the scope of Art 34 TFEU coincided with the introduction of subsidiarity into the Treaty framework at Maastricht.³³

²⁶ *Ibid.*, at para. 8.

²⁷ *Ibid.*, at para. 14. See here also Commission Communication Concerning the Consequences of the Judgment given by the Court of Justice on 20 February 1979 in Case 120/78 ("*Cassis de Dijon*") [1980] OJ C 256/2.

²⁸ Eg Joined Cases 60 and 61/84 *Cinéthèque SA and others* [1985] ECR 2605, Case 145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR 3851 and C-362/88 *GB-INNO-BM v Confédération du commerce luxembourgeois* [1990] ECR I-667. For background discussion, see eg E. White, 'In Search of the Limits to Art. 30 of the EEC Treaty' (1989) 26 *CMLRev* 235 and D. Chalmers, 'Free Movement of Goods within the European Community: An Unhealthy Addiction to Scotch Whisky?' (1993) 42(2) *ICLQ* 269. For recent in-depth analysis, see L. Gormley, 'Silver Threads Among the Gold... 50 Years of the Free Movement of Goods' (2007) 31(6) *Fordham Int. LJ* 1637.

²⁹ Case 75/81 *Blesgen* [1982] ECR 1211 at paras 7-11. See also Case 155/80 *Oebel* [1981] ECR 1993 at para. 19 and Case C-69/88 *Krantz* [1990] ECR I-538 at para. 10.

³⁰ See eg Joined Cases 60 and 61/84 *Cinéthèque SA and others op. cit.* at note 28 at para. 22 and Case 145/88 *Torfaen Borough Council op. cit.* at note 28 at para. 12.

³¹ Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1992] ECR I-6097. See here, in particular, the Opinion of AG Tesaurio in Case C-292/92 *Hünernund* [1993] ECR I-6787 at para. 1.

³² Opinion of AG Léger in Case C-309/99 *Wouters and Others* [2002] ECR I-1577 at para. 243.

³³ The relationship between Art 5(3) TEU and *Keck* is examined further in Chapter 6.

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In *Keck*, the Court sought to manage the scope of Art 34 TFEU by introducing a distinction between two different categories of national measure: (1) rules regulating product characteristics and (2) those governing certain selling arrangements. With respect to the first, the case law was to remain (and indeed remains)³⁴ unchanged.³⁵ In line with its earlier ruling in *Cassis*, the Court stated that national measures prescribing the characteristics to be met by products (eg composition, size, labelling, packaging etc) continue to fall automatically within the scope of Art 34 TFEU.³⁶ By contrast, Member State legislation governing the conditions under which goods may be sold in that State (eg shop opening hours or advertising rules), the second category, do not constitute obstacles to intra-EU movement *provided* two cumulative conditions are met.³⁷ First, they must apply to all traders established on the national territory. Secondly, the rules must apply to both domestic and imported goods in the same manner in law and in fact. In practice, only the latter limb (the discrimination test)³⁸ has emerged as a substantive test.

After a period of relative calm (1992-2005), the Court has recently sought to reassert the broadest possible reading of its formative *Dassonville* formula. In so doing, it has, on one view, departed from the spirit of its ruling in *Keck* and expanded (once again) its power to scrutinise the regulatory preferences of the Member States as obstacles to intra-EU movement. For example, in *Commission v. Netherlands (Roadworthiness Test)*, the Court emphasised that a mere (potential) ‘deterrent’ effect on intra-EU movement is sufficient to trigger Art 34 TFEU.³⁹ Similarly, in *Radberger Getränkegesellschaft*, the Court restated its earlier conclusion that the

³⁴ See post-*Keck* eg Case C-470/93 *Mars GmbH op. cit.* at note 11 at paras 12-13, Case C-368/95 *Heinrich Bauer Verlag* [1997] ECR I-3689 at paras 11-12 and Case C-12/00 *Commission v. Spain (Chocolate) op. cit.* at note 11 at paras 71-82.

³⁵ Although silent on this point, the *Keck* ruling also had no effect on the Court’s case law on national rules requiring licences, certificates or other documentation in order to import products from other Member States. The same is also true for the case law on import inspections. Both sets of case law remain subject to scrutiny against the *Dassonville* formula. See, post-*Keck*, eg Case C-189/95 *Harry Franzén* [1997] ECR I-5909 at para. 71 and Case C-170/04 *Rosengren and Others op. cit.* at note 20 at para. 36.

³⁶ Joined Cases C-267/91 and C-268/91 *Keck and Mithouard op. cit.* at note 31 at para. 15.

³⁷ *Ibid.*, at para. 16.

³⁸ For discussion, see eg D. Wilsher, ‘Does *Keck* Discrimination Make Any Sense? An Assessment of the Non-discrimination Principle within the European Single Market’ (2008) 33(1) *ELRev* 3.

³⁹ Case C-297/05 *Commission v. Netherlands (Roadworthiness Test)* [2007] ECR I-7467 at para. 53. See also earlier eg Case 65/05 *Commission v. Greece (Electronic Games)* [2006] ECR I-10341 at para. 28.

finding of an obstacle to intra-EU movement does not depend on the magnitude of the contested measure's effect on intra-EU trade.⁴⁰

Most recently, the Court (Grand Chamber) has broadened the scope of Art 34 TFEU through the application of a market access test. In *Commission v Italy (Motorcycle Trailers)*, the Court ruled that the concept of an MEQR extended to include '[a]ny other measure which hinders access of products originating in other Member States to the market of a Member State.'⁴¹ Unfortunately, the Court's reasoning does not really clarify how the market access test relates to the existing rulings in *Dassonville*, *Cassis* and *Keck*.⁴² However, on one view, the new market access test is simply a new label for the *Dassonville* test.⁴³ As such, it has opened up a greater sphere of Member State regulation to scrutiny – the key point for present purposes. At the very least, the Court's adjustment in *Commission v Italy (Motorcycle Trailers)* now permits the Court to review indistinctly applicable national measures that do not prescribe 'product characteristics' or govern 'certain selling arrangements.' However, the Court may yet opt to go further.

⁴⁰ Case C-309/02 *Radberger Getränkegesellschaft op. cit.* at note 11. At para. 68, the Court concluded that: 'A measure capable of hindering imports must be classified as a measure having equivalent effect to a quantitative restriction even though the hindrance is slight.' On the same point, see earlier eg Joined Cases 177/82 and 178/82 *Van de Haar* [1984] ECR 1797 at para.14. The existence of a *de minimis*/appreciability test in the case law on obstacles to intra-EU movement is examined in Chapter 4.

⁴¹ Case C-110/05 *Commission v. Italy (Motorcycle Trailers) op. cit.* at note 21 at para. 51. See also thereafter Case C-142/05 *Mickelsson and Roos* [2009] ECR I-4273 at paras 24-26. Market access had featured in the Court's earlier case law on Art 34 TFEU. However, as will be argued in Chapter 6, prior to the ruling in Case C-110/05 *Commission v. Italy (Motorcycle Trailers)*, the term was simply a synonym for indirect discrimination. See Joined Cases C-267/91 and C-268/91 *Keck and Mithouard op. cit.* at note 31 at para. 17 as interpreted in eg Case C-405/98 *Gourmet International Products* [2001] ECR I-1795 at paras 18-21.

⁴² For some, *Commission v. Italy (Motorcycle Trailers)* is read as confirming the position of market access as the basic test for Art 34 TFEU. See eg C. Barnard, *The Substantive Law of the EU: the Four Freedoms* (3rd Ed.) (Oxford: OUP, 2010) at pp 107-108 and p. 144 and A. Tryfonidou, 'Further Steps on the Road to Convergence amongst the Market Freedoms' (2010) 35(1) *ELRev* 36 at p. 48. Others argue that the ruling is far less significant and characterises more of a consolidation than a revolution of the case law on Art 34 TFEU. See eg P. Wennerås and K.B. Moen, 'Selling Arrangements, Keeping *Keck*' (2009) 35(3) *ELRev* 387.

⁴³ T. Horsley, 'Anyone for *Keck*?' (Case Comment) (2009) 46(6) *CMLRev* 2001. On this point, see also Oliver *op. cit.* at note 22 at p. 1460.

3.1.2 MEQRs - Art 35 TFEU

Although identical in wording, Art 35 TFEU on exports has followed a rather different and less dramatic evolutionary trajectory.⁴⁴ Until recently, the Court's reading of the scope of this provision remained narrower than its interpretation of Art 34 TFEU. In *Groenveld*,⁴⁵ the Court stated clearly that Art 35 TFEU prohibited only national rules:

‘which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the State in questions at the expense of the production or of the trade of other Member States.’⁴⁶

For many years, the Court adhered strictly to its *Groenveld* formula.⁴⁷ However, following earlier hints in this direction,⁴⁸ the Court (Grand Chamber) changed its approach in *Gysbrechts* and opted to expand the scope of Art 35 TFEU.⁴⁹ The dispute in *Gysbrechts* centred on the compatibility with Art 35 TFEU of Belgian rules prohibiting suppliers, engaged in cross-border distance selling, from requiring an advance or any payment from a consumer before the expiry of a mandatory withdrawal period. The applicant, the manager of a Belgian undertaking specialising in the sale of food supplements, maintained that this prohibition was contrary to Art 35 TFEU. Siding with the applicant, the Court broadened its interpretation of that provision. It concluded that:

‘even if applicable to all traders active in the national territory, the actual effect of the contested measure was greater on goods leaving the market of

⁴⁴ For discussion, see eg P. Oliver and S. Enchelmaier, ‘Free Movement of Goods: Recent Developments in the Case Law’ (2007) 44(3) *CMLRev* 649 and A. Dawes, ‘A Freedom Reborn? The New Yet Unclear Scope of Art 29 EC’ (2009) 34(4) *ELRev* 639.

⁴⁵ Case 15/79 *P.B. Groenveld* [1979] ECR 3409.

⁴⁶ *Ibid.*, at para. 7. In earlier cases, the Court had concluded that Art 35 TFEU captured export-specific measures without ruling, in broad terms, on the scope of that provision. See eg Case 53/76 *Bouhelier* [1977] ECR 197 at para. 16.

⁴⁷ See, from a list of many examples, Case 155/80 *Oebel op. cit.* at note 29 at para. 15, Case 237/82 *Jongeneel Kaas BV* [1984] ECR 483 at para. 22 and Case C-3/91 *Exportur* [1992] ECR I-5529 at para. 21 and, more recently, Case C-293/02 *Jersey Potatoes* [2005] ECR I-9543 at para. 73.

⁴⁸ See eg the Court's cumulative reading of Arts 34 and 35 TFEU in Case C-112/02 *Schmidberger op. cit.* at note 13 at paras 55-56. For discussion of this point, see Dawes *op. cit.* at note 44 at p. 640.

⁴⁹ Case C-205/07 *Gysbrechts* [2008] ECR I-9947.

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the exporting Member State than on the marketing of goods in the domestic market of that Member State.⁵⁰

In its subsequent case law, the Court has brought its reading of Art 35 TFEU even closer in line with its case law on Art 34 TFEU and the ruling in *Dassonville* in particular. In *Kakavetsos-Fragkopoulos AE*, the Court concluded that Art 35 TFEU extended to capture Greek legislation prohibiting a grape processor established in one area of that Member State from importing grapes from another part of that same State for the purpose of storage, processing and packing for sale – including for export to the markets of other Member States.⁵¹ The Court ruled that this legislation was ‘likely to hamper, at the very least potentially, intra-Community trade and therefore constitutes a [MEQR] on exports.’⁵² This was based on the finding that the Greek rule ‘undoubtedly [had] an impact on that operator’s volume of exports.’⁵³ The reference to the measure’s impact on the *volume* of intra-EU trade carries distinct echoes of the Court’s most controversial case law on Art 34 TFEU. Both its pre-*Keck* case law on indistinctly applicable trading rules and now also its post-*Keck* approach to indistinctly applicable Member State rules regulating product use (eg *Commission v Italy (Motorcycle Trailers)*) can be reduced to arguments on this same point.⁵⁴

3.2. Workers, establishment and services

3.2.1 Overview

As with goods, the Court’s interpretation of the scope of the Treaty provisions on the free movement of workers (Art 45 TFEU), the freedom of establishment (Art 49

⁵⁰ *Ibid.*, at para. 43. In support of this assessment, the Court noted that the effect of the Belgian legislation was to deprive traders concluding cross-border distance selling contracts for the sale of goods of an ‘efficient tool with which to guard against the risk of non-payment’ (see para. 41).

⁵¹ Case C-161/09 *Kakavetsos-Fragkopoulos AE*, judgment of the Court (First Chamber) of 3 March 2011 (nir). As the Advocate General noted in his Opinion, applying the traditional *Gysbrechts* test, the measure would fall outside the scope of Art 35 TFEU. In his view, it was ‘difficult to argue that the effect of the Greek legislation is that the domestic trade of the Hellenic Republic and its export trade are treated differently, since the prohibition on internal movement – prior to the prohibition on exports – applies to all currants, whether they are intended for export or for the domestic market.’ See the Opinion of AG Mengozzi in Case C-161/09 *Kakavetsos-Fragkopoulos AE* at para. 51. However, as the AG noted in his Opinion (at paras 49-50), one possible explanation for the Court’s decision in this case is that the measure at issue concerned a regulated market within meaning of Art 40 TFEU. The Court has historically adopted a broad approach to Art 35 TFEU (even before *Gysbrechts*) in such cases. See eg Case 94/79 *Vriend* [1980] ECR 327 at para. 8.

⁵² Case C-161/09 *Kakavetsos-Fragkopoulos AE op. cit.* at note 51 at para. 29.

⁵³ *Ibid.*, at para. 28.

⁵⁴ *Horsley op. cit.* at note 43 at pp 2010-2012.

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TFEU) and the freedom to provide intra-EU services (Art 56 TFEU) poses an increasing challenge to the regulatory autonomy of the Member States. The Court's evolving approach in each of the three areas is now converging around a broad effects-based test, which focuses on the (potential) 'deterrent' or 'dissuasive' effects of national measures on intra-EU movement. Equally, following the case law on Art 34 TFEU, the Court's interpretation of the term 'obstacle to intra-EU movement' in Arts 45, 49 and 56 also targets Member State rules that are liable to have an effect on market access. However, although now broadly comparable in result, the case law on workers, establishment and services has followed a different evolutionary path to that on goods (and Art 34 TFEU in particular). With respect to Arts 45, 49 and 56 TFEU, the Court's expansion of obstacles to intra-EU movement relied, in the first instance, on a broad reading of indirect discrimination. Only through later decisions has the Court brought its case law on workers, establishment and services⁵⁵ closer in line with its *Dassonville* test, which makes no reference to discrimination. Finally, the Court's *Keck* ruling has not been transposed to the case law on Arts 45, 49 and 56 TFEU.

3.2.2 Discrimination

The wording of Arts 45, 49 and 56 TFEU makes it clear that these provisions are concerned – at least in part – with eliminating all *discrimination* on the grounds of Member State nationality. Art 45 TFEU requires 'the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.' Similarly, Art 49 TFEU provides that the freedom of establishment 'shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings...under the conditions laid down for its own nationals by the law of the [Member State] where such establishment is effected.' Finally, Art 57 TFEU (which seeks to define 'services' for the purposes of the Treaty) states that service providers who are nationals of a Member State may 'temporarily pursue [their] activity in the

⁵⁵ In the case law on services, the expansion of the term 'obstacle to intra-EU movement' has its origins in the formative decision in Case 33/74 *van Binsbergen* [1974] ECR 1299 at para. 10. This point is discussed in section 3.2.3.1.

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Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.’

The Court has adopted a uniform approach to the prohibition of discrimination on the grounds of Member State nationality across Arts 45, 49 and 56 TFEU. It defines discrimination in clear terms: ‘discrimination arises through the application of different rules to comparable situations or the application of the same rules to different situations.’⁵⁶ As Spaventa rightly notes, the Court tends to assume that the situations of Member State nationals are comparable.⁵⁷ The key exception to this rule arises in the area of direct taxation. In this field, the Court has accepted the general principle of international tax law that the situations of resident and non-resident taxpayer are, in principle, not comparable.⁵⁸

Discrimination can be both direct and indirect. A national measure is directly discriminatory where it employs the prohibited criterion of Member State nationality expressly to introduce (usually) a difference in treatment on that basis. For example, in *Reyners*, the Court ruled that Art 49 TFEU prohibited a Belgian rule that permitted only nationals of the State to be admitted to the legal bar in Belgium.⁵⁹ Similarly, in *Commission v. Belgium (Public Sector Employment)*, the Court concluded that a Belgian law restricting a range of public sector posts to Belgian nationals was

⁵⁶ See, from a list of many examples, eg Case C-279/93 *Schumacker* [1995] ECR I-225 at para. 30 (Art 45 TFEU), Case C-80/94 *G. H. E. J. Wielockx* [1995] ECR I-2493 at para. 17 (Art 49 TFEU), Case C-107/94 *P. H. Asscher v Staatssecretaris van Financiën* [1996] ECR- I-3089 at para. 40 (Art 49 TFEU), Case C-391/97 *Gschwind* [1999] ECR I-5451 at para. 21 (Art 45 TFEU) and Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation v Commissioners of Inland Revenue* [2006] ECR I-11673 at para. 17 (Art 49 TFEU).

⁵⁷ Spaventa *op. cit.* at note 6 at p. 17. However, early in the case law, the Court had hinted that this might not be the case. In Case 152/73 *Giovanni Maria Sotgiu v Deutsche Bundespost* [1974] ECR 153, the Court was reluctant to assume that the situations of resident and non-resident workers were automatically comparable. Indeed, it concluded that there may be objective differences between the situations of the two categories of workers, which could justify differences in treatment (see paras 11-12).

⁵⁸ See eg Case C-279/93 *Schumacker op. cit.* at note 56 at para. 31, Case C-107/94 *P. H. Asscher op. cit.* at note 56 at para. 41, Case C-391/97 *Gschwind op. cit.* at note 56 at para. 22 and Case C-329/05 *Finanzamt Dinslaken v Gerold Meindl* [2007] ECR I-1107 at para. 23. For discussion, see J. Snell, ‘Non-discriminatory Tax Obstacles in Community Law’ (2007) *ICLQ* 56(2) 339 at pp 349-335. The ECJ scrutinizes the objective comparability of the situations of resident and non-resident taxpayers very closely. See eg Case C-234/01 *Gerritse* [2003] ECR I-5933 esp. at para. 43 and paras 50-53 and Case C-290/04 *Scorpio* [2006] ECR I-9461 at para. 43.

⁵⁹ Case 2/74 *Reyners v. Belgian State* [1974] ECR 631.

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contrary to Art 45 TFEU.⁶⁰ Examples of direct discrimination continue to surface in the Court's case law on workers, establishment and services.⁶¹ However, more frequently, the prohibited discriminatory treatment arises indirectly. Discrimination is indirect in cases where the contested national measure employs a criterion *other* than Member State nationality to achieve the same result as a directly discriminatory national rule.⁶² Common examples of surrogate criteria from the case law on workers, establishment and services include residency requirements,⁶³ language conditions⁶⁴ or requirements for particular qualifications issued by institutions established within that Member State.⁶⁵ In each case, the national rules apply without reference to the criterion of Member State nationality. However, in effect, they favour those persons whose activities are confined to the territory of that Member State. By definition, this operates to the advantage of nationals of that State.

Critically for present purposes, the Court has consistently exploited its freedom to define the contours of indirect discrimination in order to increase significantly its own powers of review. According to the Court, the prohibition of indirect discrimination extends to capture national rules that:

‘although applicable irrespective of nationality,... essentially affect migrant workers... or the great majority of those affected are migrant workers,... where they are indistinctly applicable but can be more easily satisfied by

⁶⁰ Case 149/79 *Commission v. Belgium (Public Sector Employment)* [1980] ECR 3881.

⁶¹ See eg Case C-465/01 *Commission v Austria (Works Councils)* [2004] ECR I-8291 (Art 45 TFEU) and Case C-263/99 *Commission v Italy (Transport Consultants)* [2001] ECR I-4195 (Arts 49 and 56 TFEU).

⁶² Case 152-73 *Sotgiu op. cit.* at note 57 at para. 11.

⁶³ Eg Case 33/74 *van Binsbergen op. cit.* at note 55 (Art 56 TFEU), Case 107/83 *Onno Klopp* [1984] ECR 2971 (Art 49 TFEU), Case 220/83 *Commission v France (Co-Insurance)* [1986] ECR 3663 at para. 18 (Art 56 TFEU), Case C-111/91 *Commission v Luxembourg (Child Benefits)* [1993] ECR I-817 (Arts 45 and 49 TFEU), Case C-274/96 *Bickel and Franz* [1998] ECR I-7637 (Art 56 TFEU), Case C-224/97 *Erich Ciola* [1999] ECR I-2517 at para. 14 (Art 56 TFEU), Case C-162/99 *Commission v Italy (Dentistry)* [2001] ECR I-541 at para. 21 (Arts 45 and 49 TFEU) and Case C-456/05 *Commission v Germany (Transitional Rules)* [2007] ECR I-10517 at paras 56-57 (Art 49 TFEU).

⁶⁴ Eg Case C-379/89 *Groener* [1989] ECR 3967 (Art 45 TFEU) and Case C-424/97 *Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123 (Art 49 TFEU).

⁶⁵ Eg Case 71/76 *Jean Thieffry* [1977] ECR 765. The leading case in this respect is Case C-340/89 *Irène Vlassopoulou v Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg* [1991] ECR I-2357 at paras 15-20. See thereafter eg Case C-164/94 *Georgios Aranitis v Land Berlin* [1996] ECR I-135 at paras 31-2, Case C-234/97 *Teresa Fernández de Bobadilla v Museo Nacional del Prado and Others* [1999] ECR I-4773 at paras 31-4 and Case C-31/00 *Nicolas Dreessen* [2002] ECR I-663 at para. 31.

national workers than by migrant workers... or where there is a risk that they may operate to the particular detriment of migrant workers.⁶⁶

Furthermore, the Court has also confirmed that it is not necessary to demonstrate that the contested national measure actually affects a substantially higher proportion of migrant workers. Instead, it is sufficient if the measure is 'liable to have such an effect.'⁶⁷ In result, this broad reading of indirect discrimination comes very close to the Court's approach to the scope of Art 34 TFEU in *Dassonville*.⁶⁸

3.2.3 Further expansion

In more recent years, the Court has further expanded the scope of Arts 45, 49 and 56 TFEU in two key ways. First, in a large body of decisions, the Court has abandoned its discrimination test in favour of an even more intrusive (from the perspective of Member State autonomy) effects-based approach. This targets non-discriminatory national measures that are liable to have 'deterrent' or 'dissuasive' effects on intra-EU movement. Secondly, in a separate line of case law, the Court has also introduced a market access test. This test, which has subsequently now entered the case law on Art 34 TFEU (see section 3.1.1), grants the Court the power to scrutinise any national measure that affects access to the markets of the Member States. Both developments have considerably broadened the potential for the Court to engage in the scrutiny of Member State regulation.

3.2.3.1 'Deterrent' and 'dissuasive' effects

The Court's decision to sideline the discrimination test in favour of an approach targeting national rules that exhibit 'deterrent' or 'dissuasive' effects marks the most significant expansion in the scope of Arts 45, 49 and 56 TFEU. Applied literally, this change in perspective effectively grants the Court a power to review virtually any Member State rule as an obstacle to intra-EU movement. After all, one can argue that

⁶⁶ Case C-237/94 *O'Flynn v Adjudication Officer* [1996] ECR I-2617 at para. 18. See also earlier, eg Case 41/84 *Pinna* [1986] ECR I at para. 24, Case 33/88 *Allué and Another v Università degli Studi di Venezia* [1989] ECR 1591 at para. 12, Case C-349/87 *Paraschi v Landesversicherungsanstalt Wuertemberg* [1991] ECR I-4501 at para. 23, Case C-279/89 *Commission v United Kingdom (Fisheries)* [1992] ECR I-5785 at para. 42 and Case C-204/90 *Bachmann v Belgian State* [1992] ECR I-249 at paras 9 and 11.

⁶⁷ Case C-237/94 *O'Flynn op. cit.* at note 66 at para. 21.

⁶⁸ On this point, see also *Barnard op. cit.* at note 42 at p. 241.

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nearly all Member State legislation might (actually or potentially) have a negative impact on intra-EU movement.⁶⁹ The origins of this expansion can be traced right back to the ruling in *van Binsbergen*.⁷⁰ In this formative decision on the scope of Art 56 TFEU, the Court opted for a broad reading of Art 56 TFEU. It concluded that this provision extended to capture not only discriminatory rules but also those that ‘may prevent or otherwise obstruct the activities of the person providing the service.’⁷¹

Many years later, the ECJ revisited (implicitly) its ruling in *van Binsbergen* and formulated a broad effects-based definition of the scope of the freedom to provide services.⁷² In *Säger*, the Court ruled that Art 56 TFEU required:

‘not only the elimination of all discrimination against a person providing services on the ground of his nationality *but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede* the activities of a provider of services established in another Member State where he lawfully provides similar services.’⁷³

Through subsequent rulings, the Court then extended its *Säger* ruling to the case law on workers and establishment. For example, in *Kraus*, the ECJ concluded that Arts 45 and 49 TFEU preclude national rules that, although applicable without discrimination on grounds of nationality, are ‘liable to hamper or to render less attractive the exercise by Community nationals.’⁷⁴ In summary, the language of non-discriminatory obstacles to intra-EU movement now finds expression across the case law on workers, establishment and services.⁷⁵ Most recently, the Court (Grand

⁶⁹ See eg Case C-439/97 *Sandoz GmbH* [1999] ECR I-7041 at para. 19. In this case, the Court accepted that disparities between national taxation regimes may have a deterrent effect on intra-EU movement. The substance – and extent – of this line of case law is discussed in Chapter 6.

⁷⁰ Case 33/74 *van Binsbergen op. cit.* at note 55.

⁷¹ *Ibid.*, at para. 11.

⁷² Case C-76/90 *Säger v Dennemeyer* [1991] ECR I-4221.

⁷³ *Ibid.*, at para. 12 (this author’s emphasis).

⁷⁴ Case C-19/92 *Dieter Kraus v Land Baden-Württemberg* [1993] ECR I-1663 at para. 32. However, see also earlier Case C-168/91 *Konstantinidis v Stadt Altensteig* [1993] ECR I-1191 esp at paras 13-16. In this case, the Court interpreted Art 49 TFEU as capturing national rules that ‘interfered’ with the exercise of the freedom of establishment.

⁷⁵ From a long list of cases see for Art 45 TFEU: eg Case C-415/93 *Bosman* [1995] ECR I-4921 at para. 96, Case C-109/04 *Kranemann* [2005] ECR I-2421 at para. 26 and Case C-208/05 *ITC* [2007] ECR I-181 at para. 31; for Art 49 TFEU eg Case C-318/05 *Commission v Germany (School Fees)* [2007] ECR I-6957 at para. 81, Case C-281/06 *Jundt* [2007] ECR I-12231 at para. 52 and Joined Cases C-155/08 and C-157/08 *X and Passenheim-van Schoot* [2009] ECR I-5093 at para. 32; for Art 56 TFEU eg Case C-158/96 *Kohll* [1998] ECR I-1931 at para. 33, Case C-136/00 *Danner* [2002] ECR I-8147 at para. 29 and Joined Cases C-544/03 and C-545/03 *Mobistar and Belgacom Mobile* [2005] ECR I-7723 at para. 30.

Chamber) has reaffirmed its commitment to an expansive reading of these provisions. In *Olympique Lyonnais*, it reiterated its view that:

‘national provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement... constitute restrictions on that freedom even if they apply without regard to the nationality of the workers concerned’⁷⁶

The emergence and proliferation of the Court’s case law on non-discriminatory obstacles to Arts 45, 49 and 56 TFEU has remained unaffected by the developments in the case law on goods. The expansion in scope of the Treaty rules on workers, services and establishment occurred at a time when the Court was just about to narrow (or, in its own words, ‘clarify’)⁷⁷ the scope of its case law on Art 34 TFEU in *Keck*. Significantly, the latter ruling appears to have had little subsequent impact on the Court’s case law in these three areas.⁷⁸ The ruling in *Keck* certainly did not nudge the Court back to its earlier discrimination-based reading of the scope of Arts 45, 49 and 56 TFEU. On the contrary, post-*Keck*, the Court has continued unabashed with its broad effects-based reading of these provisions.⁷⁹ Moreover, its increased focus on ‘deterrent’ and ‘dissuasive’ effects has also been supplemented by the application of an additional market access test, which we now turn to consider.

3.2.3.2 Market access

The market access test is an integral part of the Court’s expanding obstacle framework on workers, establishment and services.⁸⁰ In the case law in these three areas, market access found its first expression in *Alpine Investments BV* (Art 56

⁷⁶ Case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC* [2010] ECR I-2177 at para. 34. See also para. 33 of the same ruling.

⁷⁷ Joined Cases C-267/91 and C-268/91 *Keck and Mithouard op. cit.* at note 31 at para. 11.

⁷⁸ Snell also describes this period of expansion in the post-*Keck* case law as curious ‘as the general atmosphere in the Community seem[ed] to place more emphasis on subsidiarity and limitation of Community competences.’ Snell *op. cit.* at note 6 at p.110.

⁷⁹ See note 74 and the case law cited therein.

⁸⁰ In the view of many, market access is also the yardstick against which all national measures should be tested. See eg the Opinion of AG Jacobs in Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179 at paras 38-49, Weatherill *op. cit.* at note 17 at pp 96-101, Barnard *op. cit.* at note 17, L. Prete, ‘Of Motorcycle Trailers and Personal Watercrafts: the Battle over *Keck*’ (2008) 35(2) *LIEI* 131 at p.155, J. Steiner et al *EU Law* (9th Ed.) (Oxford: OUP, 2009) at p. 388, E. Spaventa, ‘Leaving *Keck* Behind? The Free Movement of Goods After the Rulings in *Commission v. Italy* and *Mickelsson and Roos*’ (2009) 36(4) *ELRev* 914 at p. 923, Barnard, *The Substantive Law of the EU op. cit.* at note 42 at p. 144. The literature on market access is examined fully in Chapter 5. At the present stage of enquiry, it is more relevant to note that market access features less frequently in the case law than the tests based on ‘deterrent’ or ‘dissuasive’ effects.

TFEU).⁸¹ This case concerned Dutch legislation prohibiting all undertakings established in that State from ‘cold-calling’ potential clients in connection with the marketing of certain financial products. Although acknowledging that the Dutch legislation was of a general and non-discriminatory nature, the ECJ concluded that it fell within the scope of Art 56 TFEU.⁸² This finding was based solely on the measure’s effect on the applicant’s access to the market of other Member States.⁸³ Specifically, the contested legislation prevented the applicant, an undertaking established in the Netherlands, from cold-calling potential customers in Germany, where this particular marketing technique was lawful.

The market access test subsequently found its way into the case law on workers and establishment. With respect first to the case law on workers, the Court invoked market access to support its decision in *Bosman* to scrutinise non-discriminatory rules governing the transfer of professional footballers between clubs established within the internal market.⁸⁴ According to the Court:

‘although the rules in issue in the main proceedings apply also to transfers between clubs belonging to different national associations within the same Member State and are similar to those governing transfers between clubs belonging to the same national association, they still directly affect players’ access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers.’⁸⁵

After a slight delay, market access then entered the case law on establishment. The leading case in this respect is *CaixaBank France*.⁸⁶ Here, the Court again relied on market access in order to scrutinise French legislation prohibiting retail banks established in that State from offering remunerated sight accounts. According to the Court:

‘[a] prohibition on the remuneration of sight accounts such as that laid down by the French legislation constitute[d], for companies from Member States other than the French Republic, a serious obstacle to the pursuit of their

⁸¹ Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141.

⁸² *Ibid.*, at para. 35.

⁸³ *Ibid.*, at para. 38.

⁸⁴ Case C-415/93 *Bosman op. cit.* at note 75. See also thereafter Case C-190/98 *Volker Graf v Filzmoser Maschinenbau GmbH* [2000] ECR I-493 at para. 23.

⁸⁵ Case C-415/93 *Bosman op. cit.* at note 75 at para. 103.

⁸⁶ Case C-442/02 *CaixaBank France v Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I-8961.

activities via a subsidiary in the latter Member State, affecting their access to the market.⁸⁷

Again, it is significant to note that the Court's market access case law on workers, establishment and services emerged during the post-*Keck* period. In view of this fact, one might have anticipated a degree of cross-pollination between, on the one hand, the Court's revised case law on the scope of Art 34 TFEU and, on the other hand, its interpretation of obstacles to intra-EU movement in Arts 45, 49 and 56 TFEU. Yet, there was clearly no such move. Instead, the Court's case law on the latter freedoms continued along an expansionist path. Attempts to invoke the ruling in *Keck* as a brake on the Court's interpretation of the Treaty freedoms on services (*Alpine Investments*) and, thereafter, on workers (*Bosman*) were swiftly rejected by the Court.⁸⁸ In result, this left us with a clear division between the case law on goods and that on workers, establishment and services.⁸⁹ Only recently has this gap been corrected (at least in part) through the Court's decision in *Commission v. Italy (Motorcycle Trailers)*.⁹⁰ However, as argued in section 2.2, this correction has *not* brought about any reduction in the scope of the Treaty freedoms. On the contrary, it has brought the case law on goods more closely in line with the broader approach underpinning Arts 45, 49 and 56 TFEU.

3.3 Capital

The Treaty rules on capital movements have followed a very different evolutionary trajectory to those on goods, workers, establishment and services and, for that reason, warrant separate attention.⁹¹ The ruling in *Casati* drove a wedge between the case

⁸⁷ *Ibid.*, at para. 12.

⁸⁸ Case C-384/93 *Alpine Investments BV op. cit.* at note 81 at paras 33-36 and Case C-415/93 *Bosman op. cit.* at note 75 at paras 102-103.

⁸⁹ See eg J. Snell, 'And Then There Were Two: Products and Citizens in Community Law' in T. Tridimas and P. Nebbia (Eds.), *European Union Law for the Twenty-First Century: Volume II* (Oxford: Hart Publishing, 2004) 49 at p. 71.

⁹⁰ Case C-110/05 *Commission v. Italy (Motorcycle Trailers) op. cit.* at note 21.

⁹¹ For detailed discussion, see eg L. Flynn, 'Coming of Age: The Free Movement of Capital Case Law 1993-2002' (2002) 39(4) *CMLRev* 773, J. Usher, 'The Evolution of the Free Movement of Capital' (2008) 31 *Fordham Int'l LJ* 1533, J. Snell, 'Free Movement of Capital: Evolution as a Non-Linear Process' in P. Craig and G. de Búrca, *The Evolution of EU law* (2nd Ed.) (Oxford: OUP, 2010) 547 and T. Horsley, 'The Concept of an Obstacle to Intra-EU Capital Movement in EU Law' in N. Nic Shuibhne and L. Gormley (Eds.) *From Single Market to Economic Union: Essays in Honour of John A. Usher* (OUP, forthcoming 2012).

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law on capital and the jurisprudence on the other Treaty freedoms.⁹² In this case, the ECJ ruled that, unlike its relations in the Treaty, the original provision governing intra-EU capital movements, Art 67(1) EEC, was not directly effective.⁹³ It was not until the Maastricht Treaty overhauled the provisions on capital movements that this position changed. This Treaty integrated the substance of Directive 88/361, which required in Art 1(1) the full liberalization of capital movements in the EU, into the Treaty framework. The revised Art 63(1) TFEU (ex Art 56 EC) now provides that, ‘within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States... shall be prohibited.’⁹⁴ In *Sanz de Lera*, the Court confirmed that this provision had direct effect. This move finally brought the provisions on capital movement into line with those on goods, workers, establishment and services.⁹⁵

In terms of scope, the Court has rapidly integrated Art 63(1) TFEU into its existing (and expanding) obstacle framework. Following its evolving case law on goods, workers, establishment and services, the Court quickly adopted a broad effects-based approach to defining the scope of that provision. This can be clearly seen in *Commission v. Portugal (Golden Shares)*.⁹⁶ In this case, the Court stated that the prohibition in Art 63(1) TFEU ‘goes beyond the mere elimination of unequal treatment, on grounds of nationality, as between operators on the financial markets.’⁹⁷ In the Court’s view, the scope of that provision extends to capture national measures that are simply ‘liable to impede’ intra-EU movement or ‘dissuade’ investors from exercising their rights under Art 63(1) TFEU.⁹⁸

⁹² Case 203/80 *Casati* [1981] ECR 2595.

⁹³ *Ibid.*, at para. 8. This finding was based on the fact that the provision was drafted in non-absolute terms. See Usher *op. cit.* at note 91 at p. 1534.

⁹⁴ Art 63(1) TFEU is also unique amongst the freedoms in that it applies both to intra-EU capital movements and those between the Member States and third countries. For discussion of this point, see eg see Usher, *op. cit.* at note 92 at pp1562-1569, S. Hindelang, *The Free Movement of Capital and Foreign Direct Investment* (Oxford: OUP, 2009), at pp 162-200 and Snell *op. cit.* at note 91 (see ‘section D’ of his review) at p. 573.

⁹⁵ Joined Cases C-163/94, C-165/94 and C-250/94 *Criminal proceedings against Lucas Emilio Sanz de Lera* [1995] I-ECR 4821 at para 41.

⁹⁶ Case C-367/98 *Commission v Portugal (Golden Shares)* [2002] ECR I-4731.

⁹⁷ *Ibid.*, at para. 44.

⁹⁸ *Ibid.*, at para. 45.

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In summary, the Court now interprets Art 63(1) TFEU as prohibiting national rules that are liable to ‘hinder,’ ‘impede,’ ‘deter’ or ‘dissuade’ intra-EU capital movements.⁹⁹ In line with the other freedoms, the language of discrimination now features only rarely in the case law on intra-EU capital movements. Exceptions include early cases addressing national rules that discriminated directly on the prohibited criterion of Member State nationality.¹⁰⁰ Aside from such cases, the language of discrimination also features in the case law dealing with national rules on direct taxation.¹⁰¹ Again, this is all very much in line with the case law on workers, establishment and services discussed above.

As with the Treaty rules on goods, workers, establishment and services, the Court’s case law on the scope of Art 63(1) TFEU also includes references to the effects of national rules on access to the market. In connection with intra-EU capital movements, *Commission v. Spain (Golden Shares)* contains the first reference to market access.¹⁰² In this case, the Court linked its application of the market access test to its reasoning based on ‘deterrent’ and ‘dissuasive’ effects. In connection with its review of Member State legislation imposing certain conditions on the acquisition of shares in recently privatised undertakings, the Court reached the following conclusion:

‘although the relevant restrictions on investment operations apply without distinction to both residents and non-residents, it must none the less be held that they affect the position of a person acquiring a shareholding as such and are thus liable to deter investors from other Member States from making such investments and, consequently, affect access to the market.’¹⁰³

⁹⁹ From a list of many, see eg Case C-35/98 *Staatssecretaris van Financiën v B.G.M. Verkooijen* [2000] ECR I-4071 at para. 34, Case C-367/98 *Commission v Portugal (Golden Shares)* [2002] ECR I-4731 at para. 45, Case C-436/00 *X and Y v Riksskatteverket* [2002] ECR 10829 at para. 70, Case C-319/02 *Petri Manninen* [2004] ECR I-7477 at paras 22-23, Case C-370/05 *Criminal proceedings against Uwe Kay Festersen* [2007] ECR I-1129 at para. 24 and Joined Cases C-155/08 and C-157/08 *X (C-155/08) and E. H. A. Passenheim-van Schoot (C-157/08) v Staatssecretaris van Financiën* [2009] ECR I-5093 at para. 39.

¹⁰⁰ See eg Case C-302/97 *Klaus Konle v Republik Österreich* [1999] ECR I-3099 at para. 23 and Case C-423/98 *Alfredo Albore* [2000] ECR I-5965 at paras 16-17.

¹⁰¹ See eg Case C-513/04 *Mark Kerckhaert and Bernadette Morres v Belgische Staat* [2006] ECR I-10967 at para. 18 and Case C-298/05 *Columbus Container Services BVBA & Co. v Finanzamt Bielefeld-Innenstadt* [2007] ECR I-10451 at para. 40.

¹⁰² Case C-463/00 *Commission v Spain (Golden Shares)* [2003] ECR I-4581.

¹⁰³ *Ibid.*, at para. 61. See thereafter eg Case C-98/01 *Commission v United Kingdom (Golden Shares)* [2003] ECR I-4641 at para. 47 and Case C-171/08 *Commission v. Portugal (Golden Shares)*, judgment of the Court (First Chamber) of 9 July 2010 (nyr) at para.67.

Finally, following its case law on workers, establishment and services, the Court has rejected arguments in favour of transposing the decision in *Keck* to the interpretation of Art 63(1) TFEU.¹⁰⁴ To date, this matter has only arisen in the Court's case law on golden shares. However, in this context, the Court has made its views very clear. In *Commission v. Spain*, the ECJ simply stated that such rules do not have 'comparable effects' to the measures at issue in *Keck*.¹⁰⁵

3.4 Union citizenship

In addition to integrating the legislative developments on capital movements into the Treaty framework, the Maastricht Treaty introduced an entirely new legal status of relevance to the examination of obstacles to intra-EU movement: Union citizenship. According to Art 20 TFEU (ex Art 17 EC) 'every person holding the nationality of a Member State shall be a citizen of the Union.' This status complements and does not replace Member State citizenship.¹⁰⁶ However, notwithstanding this express qualification, the Court has stated on numerous occasions that 'Union citizenship is destined to be *the* fundamental status of nationals of the Member States.'¹⁰⁷

The Treaty grants Union citizens a series of substantive rights. These are detailed in Arts 22-24 TFEU. This thesis is concerned exclusively with the rights of residency and movement that Union citizens enjoy under Art 21 TFEU.¹⁰⁸ This provision provides that '[e]very citizen of the Union shall have the right to move and reside freely within the territories of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.' The Court has confirmed that Art 21 TFEU is directly effective.¹⁰⁹ In its purpose, the

¹⁰⁴ Eg Case C-463/00 *Commission v Spain (Golden Shares)* at note 102 at para. 59 and Case C-171/08 *Commission v. Portugal (Golden Shares) op. cit.* at note 103 at paras 65-67.

¹⁰⁵ Eg Case C-463/00 *Commission v Spain (Golden Shares) op. cit.* at note 102 at para. 59. The Court's conclusion was linked to its application of the market access test in para. 61.

¹⁰⁶ Art 20(1) TFEU. The wording of this provision changed following the entry into force of the Lisbon Treaty. It now refers to Union citizenship as an 'additional' rather than 'complementary' status. The legal significance of this adjustment, if any, has not yet been tested.

¹⁰⁷ Case C-184/99 *Grzelczyk* [2001] ECR I-2691 at para. 31 (this author's emphasis). This phrase appears to have been inspired by the reflections of AG La Pergola in his Opinion in Case C-85/96 *Martínez Sala* [1998] ECR I-2691 at para. 18.

¹⁰⁸ For an overview of the political rights of Union citizenship, see eg Barnard *op. cit.* at note 42 at pp 417-748 and the literature cited therein.

¹⁰⁹ Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091 at para. 84.

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right of intra-EU movement in this provision differs from those rights set out in Arts 45, 49 and 56 TFEU. As the Court has observed, the latter rights are instrumental to the Treaty's fundamental economic objective of establishing a functioning internal market in which the free movement of goods, services, persons and capital is ensured in accordance with conditions of undistorted competition.¹¹⁰ By contrast, the right of movement enjoyed by Union citizens in Art 21 TFEU is exercisable on its own merit, with no requirement for a link to the aforementioned economic objective.¹¹¹

In terms of its substantive scope, that provision affords Union citizens, first and foremost, a right of entry and residency in the territory of the (other)¹¹² Member States.¹¹³ In addition, the Court has also linked Art 21 TFEU to the prohibition of discrimination on nationality grounds in Art 18 TFEU.¹¹⁴ In so doing, the Court has created, for the benefit of Union citizens, a powerful right to equal treatment in connection with their (cross-border) non-economic activities. In *Martínez Sala*, the Court concluded that Art 21 TFEU guarantees Union citizens a right to equal treatment with Member State nationals in all situations that fall within the material scope of the Treaty.¹¹⁵ In that particular case, the applicant, a Spanish national lawfully resident in Germany, successfully challenged State (*Land Bayern*)

¹¹⁰ Art 26(2) TFEU, read together with Arts. 101, 102 and 107 TFEU.

¹¹¹ As the Court noted in *Baumbast*: 'the Treaty... does not require that citizens of the Union pursue a professional or trade activity, whether as an employed or self-employed person, in order to enjoy the rights provided in Part Two of the EC Treaty [now Part Two of the TFEU], on citizenship of the Union.' Case C-413/99 *Baumbast and R op. cit.* at note 109 at para. 83. See also the Court's comments at para. 81

¹¹² However, see now Case C-34/09 *Ruiz Zambrano*, judgment of the Court (Grand Chamber) of 8 March 2011.

¹¹³ Case C-413/99 *Baumbast and R op. cit.* at note 109 at para. 80 and para. 84. Following the wording of Art 21 TFEU, the right of residency is not unconditional and remains subject to the 'limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.' Presently, this refers, in particular, to the limits set out in Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77. This Directive replaced Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L 180/26, Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L 180/28 and Directive 93/96/EEC of 29 October 1993 on the right of residence for students [1993] OJ L 317/59.

¹¹⁴ See also earlier in the case law on services, eg Case C-186/87 *Cowan v Trésor public* [1989] ECR I-195 and Case C-274/96 *Bickel and Franz op. cit.* at note 62.

¹¹⁵ Case C-85/96 *Martínez Sala op. cit.* at note 107 at para. 62. See thereafter, Eg Case C-184/99 *Grzelczyk op. cit.* at 107 at para. 32, Case C-148/02 *García-Avello v. Belgian State* [2003] ECR I-11613 at paras 22-23, Case C-138/02 *Collins* [2004] ECR I-2703 at para. 61, Case C-209/03 *Dany Bidar* [2005] ECR I-2119 at para. 32, Case C-158/07 *Jacqueline Förster* [2008] ECR I-8507 at para. 36 and Case C-24/06 *Heinz Huber* [2008] ECR I-9705 at para. 35. See also Art 24(1) of Directive 2004/38/EC *op. cit.* at note 113.

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legislation governing the payment of a child-raising allowance. The contested legislation required nationals of other Member States, who were ordinarily resident in Germany, to produce a formal residency permit in order to claim the allowance. The Court ruled that the imposition of this additional requirement was directly discriminatory and contrary to Art 21 TFEU.

Through subsequent case law, the Court has repeated its decision to read that provision as guaranteeing Union citizens the right to equal treatment with Member State nationals in all situations that fall within the material scope of the Treaty.¹¹⁶ The reference to ‘all situations that fall within the material scope of the Treaty’ is interpreted broadly. As the Court confirmed in *Grzelczyk*, it includes the very exercise of the right to move and reside freely in another Member State, as conferred by Art 21 TFEU of the Treaty itself.¹¹⁷ In other words, to trigger the right to equal treatment, all a Member State national need do is exercise (or have exercised) their right of movement under that provision. This can be achieved simply through holding dual Member State nationality.¹¹⁸

Importantly for present purposes, the Court has shifted its focus away from discrimination in favour of far broader tests of ‘discouragement’ and/or of ‘dissuasive’ or ‘deterrent’ effects.¹¹⁹ This can be seen in *Tas-Hagen*, which concerned Dutch legislation governing the payment of benefits to civilian war victims.¹²⁰ The contested rules required applicants to be resident in the Netherlands at the time of application. The Court concluded that this requirement was contrary to Art 21 TFEU. It defined the scope of that provision in the following broad terms:

¹¹⁶ Eg Case C-184/99 *Grzelczyk op. cit.* at 107 at para. 32, Case C-148/02 *Garcia-Avello op. cit.* at note 115 at paras 22-23, Case C-138/02 *Collins op. cit.* at note 115 at para. 61, Case C-209/03 *Bidar op. cit.* at note 115 at para. 32, Case C-158/07 *Förster op. cit.* at note 115 at para. 36 and Case C-524/06 *Huber op. cit.* at note 115 at para. 35.

¹¹⁷ Case C-184/99 *Grzelczyk op. cit.* at 107 at para. 33.

¹¹⁸ Eg Case C-148/02 *Garcia-Avello op. cit.* at note 115 and Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925. Though see recently, Case C-434/09 *McCarthy v. Secretary of State for the Home Department*, judgment of the Court (Third Chamber) of 5 May 2011. This case law is discussed further in Chapter 4.

¹¹⁹ On this point, see the Opinion of AG Jacobs in Case C-244/02 *Pusa* [2004] ECR I-5763. At para. 18, the AG argued that ‘discrimination on grounds of nationality, whether direct or indirect, is not necessary in order for Article 18 to apply. In particular, it is not necessary to establish that, for example, a measure adversely affects nationals of other Member States more than those of the Member State imposing the measure.’

¹²⁰ Case C-192/05 *Tas-Hagen* [2006] ECR I-10451.

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‘national legislation which places at a disadvantage certain of the nationals of the Member State concerned simply because they have exercised their freedom to move and to reside in another Member State is a restriction on the freedoms conferred by Article [21 TFEU] on every citizen of the Union.’¹²¹

The broad effects-based restriction formula now finds expression in much of the case law on Union citizenship.¹²² The only notable exceptions include cases dealing with national rules on direct taxation, in which the Court again appears to default to the language of discrimination.¹²³

The same concerns surrounding the Court’s switch to broad effect-based tests in the case law on the economic freedoms apply to its evolving interpretation of Art 21 TFEU. In both cases, the Court’s shift away from the discrimination framework has resulted in a significant expansion in the scope of the Treaty freedoms. This has the potential to enable the Court to engage in close scrutiny of nearly all aspects of Member State regulatory policy.

4. Conclusion: a converging and *expanding* framework

As the preceding analysis has demonstrated, the Court’s interpretation of the scope of the individual Treaty freedoms appears to be following an increasingly unitary trajectory.¹²⁴ The Court’s approach is predominately focused on the elimination of national rules that are liable to ‘hinder,’ ‘impede,’ ‘deter’ or ‘dissuade’ intra-EU movements or affect ‘access to the market.’ As a result, it is becoming increasingly difficult to maintain – on a descriptive level at least¹²⁵ – that there are significant differences in the Court’s basic approach. Previous points of tension that existed both

¹²¹ *Ibid.*, para. 31.

¹²² See eg Case C-24/02 *Pusa op. cit.* at note 119 at para. 19, Case C-406/04 *De Cuyper* [2006] ECR I-6947 at para. 39 and Case C-499/06 *Nerkowska* [2008] ECR I-3993 at para. 32.

¹²³ Eg Case C-403/03 *Schempp v Finanzamt München V* [2005] ECR I-6421 at para. 36.

¹²⁴ The convergence theory finds support in the literature. See eg Barnard *op. cit.* at note 42 at p. 114, S. Enchelmaier, ‘The ECJ’s Recent Case Law on the Free Movement of Goods: Movement in all Sorts of Directions’ (2007) 26 *YEL* 115 at pp 146-156, Steiner *op. cit.* at note 80 at p. 466 and at p. 492 and Tryfonidou *op. cit.* at note 42.

¹²⁵ Some writers have argued against convergence on normative grounds. Eg Oliver and Roth are in favour of a distinction between the provisions on persons and those dealing with economic transactions: ‘[surely] it is right that the same principle [governing the Treaty freedoms] should apply in the absence of any objective reason to make a distinction. Unwarranted divergences should clearly be avoided. But at the end of the day the four freedoms cannot be treated in the same way.’ See P. Oliver and W-H. Roth, ‘The Internal Market and the Four Freedoms’ (2004) 41(2) *CMLRev* 407 at pp 439-441. See also on the point, the Opinion of AG Fennelly in Case C-190/98 *Graf op. cit.* at note 84 at para. 18 and Snell *op. cit.* at note 89 at p. 71.

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within and between the individual freedoms are being eroded progressively. This includes, in the first instance, the distinct approaches to the assessment of national measures affecting the import (Art 34 TFEU) and export (Art 35 TFEU) of goods between the Member States. As we have seen, the Court has recently taken steps to close this gap and align its previously divergent case law on Art 35 TFEU with its reading of Art 34 TFEU (*Gysbrechts* and *Kakavetsos-Fragkopoulos AE*).

A similar trend towards convergence can also be seen across the Treaty freedoms. Until recently, the ruling in *Keck* (Art 34 TFEU) stuck out as an obvious point of divergence in the case law on the economic freedoms. In a series of decisions, the Court had firmly rejected all attempts to transpose the substance of this ruling to its case law on workers, establishment, services and capital.¹²⁶ This refusal could be taken as indicative of the Court's decision to maintain a division between, on the one hand, the scope of the Treaty provisions on goods and, on the other hand, the remaining economic freedoms.¹²⁷ However, following the ruling of the Grand Chamber in *Commission v. Italy (Motorcycle Trailers)*, it is increasingly difficult to defend this view. Although *Keck* remains good law (in the sense that it has not been overruled by the Court),¹²⁸ the decision in *Commission v. Italy (Motorcycle Trailers)* has had the effect of reducing that ruling's scope of application considerably. The ruling in *Keck* now has all the hallmarks of an isolated 'blip' in an otherwise coherent body of case law. As Spaventa argues, the *Keck* 'selling arrangement' exception seems to characterise a decision to exclude from the scope of Art 34 TFEU a very specific category of national measure (non-discriminatory 'selling arrangements') as a matter of policy.¹²⁹

The Court has not offered any real explanation of why it has sought increasingly to align (and expand) the scope of the individual Treaty freedoms. There has been no

¹²⁶ Case C-415/93 *Bosman op. cit.* at note 75 at paras 102-104 (Art 45 TEU), Case C-384/93 *Alpine Investments BV op. cit.* at note 81 at paras 33-38 (Art 56 TFEU) and Case C-463/00 *Commission v. Spain (Golden Shares) op. cit.* at note 102 at paras 59-61 (Art 63(1) TFEU).

¹²⁷ On this point, see Tryfonidou *op. cit.* at note 42 at pp 38-39.

¹²⁸ The application of the *Keck* formula was confirmed in Case C-531/07 *Fachverband der Buch- und Medienwirtschaft v LIBRO Handelsgesellschaft mbH* [2009] ECI-3717 at para. 17.

¹²⁹ The view of *Keck* as an isolated policy discussion of the Court, as opposed to a broader statement of principle, is discussed by E. Spaventa, 'The Outer Limit of the Treaty Free Movement Provisions: Some Reflections on the Significance of *Keck*, Remoteness and *Deliège*' in Barnard and Odudu (Eds.) *The Outer Limits of European Union Law op. cit.* at note 3 at p. 249.

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express acknowledgment of a need for change in the case law. Not since its ruling in *Keck* has the Court uttered the phrase ‘contrary to what has been previously decided.’¹³⁰ The convergence in the case law on obstacles to intra-EU movement could simply reflect the fact that, in many cases, the Court is asked to address several individual Treaty provisions in the same case.¹³¹ This could easily foster greater symmetry across the freedoms. On the other hand, it could also be the case that the Court is in fact actively engaged in the convergence process. For example, with respect to the market freedoms, Tryfonidou refers to the Court’s ‘unspoken determination’ to achieve convergence amongst the freedoms.¹³² In her particular view, the Court’s case law is best explained through the lens of Union citizenship.¹³³ She argues that:

‘the Court appears to be in the process of completing an economic constitution for the European Union through which Union citizens have the right to participate in the market without any unreasonable restrictions standing in their way.’¹³⁴

Yet, to a great extent, the convergence literature misses the key point. The fact that the case law on obstacles to intra-EU movement is increasingly convergent is an important finding. However, on one view, this should not surprise – at least in so far as the economic freedoms are concerned. After all, these provisions are united by a common objective, namely the establishment of a functioning internal market (Art 26 TFEU). Instead, it is the *nature* of the convergence that is more fundamental. As the analysis in this chapter has sought to argue, the narrative underpinning the Court’s reading of the scope of the Treaty freedoms is one of progressive expansion. The case law on obstacles to intra-EU movement is not converging around a narrow discrimination-based test, as prescribed by the wording of several of the Treaty freedoms. Equally, no attempt has ever been made to universalise the Court’s ruling in *Keck*, which now appears to mark an isolated example of judicial self-restraint. On

¹³⁰ Joined Cases C-267/91 and C-268/91 *Keck and Mithouard op. cit.* at note 31 at para. 16.

¹³¹ On this point, see also Barnard *op. cit.* at note 42 at p. 25.

¹³² Tryfonidou *op. cit.* at note 42 at p. 55.

¹³³ *Ibid.*

¹³⁴ *Ibid.*, at pp 49-50. This particular view of the Court’s evolving approach to the concept of an obstacle to intra-EU movement develops the earlier arguments of Spaventa and Advocate General Poirares Maduro, both of whom adopt similar positions. See the Opinion of AG Poirares Maduro in Joined Cases C-158/04 and C-159/04 *Alfa Vita Vassilopoulos AE* [2006] ECR I-8135 at paras 40-52 and E. Spaventa, *Free Movement of Persons in the European Union op. cit.* at note 6 at p. 136.

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the contrary, the general trend is very much in the opposite direction. The Court's case law appears to be pushing the *Dassonville* test back into the foreground, albeit using the new labels of 'deterrent' or 'dissuasive' effects together with the market access concept.

The Court's preferred interpretation of the term 'obstacle to intra-EU movement' presents an obvious subsidiarity problem. It would appear to grant the Court a general power to scrutinise virtually any Member State measure.¹³⁵ Of course, the existence of this powerful right of review does not necessarily mean that it will be applied literally in every case. In fact, as will be argued in Chapter 6, in many cases, the Court's language of 'deterrent' or 'dissuasive' effects is over-inclusive (and therefore disingenuous). Put simply, the Court's effects-based tests are frequently applied to review national measures that are simply indirectly discriminatory. However, in a growing body of case law, the Court *is* choosing to apply the full force of its 'deterrent' or 'dissuasive' tests or, alternatively, the market access concept. In so doing, the Court is scrutinising the very substance – and even *existence* – of Member State regulation. The application of the Treaty freedoms in this manner is very much out of step with the Union legislature's exercise of its competence to contribute to the same regulatory sphere: the internal market. In Chapter 1, it was argued that subsidiarity has taken hold as a restraint on the Union legislature's exercise of competence under Art 114 TFEU. Specifically, Art 5(3) TEU was shown to safeguard an appropriate sphere of Member State autonomy by preventing the Union legislature from using that provision as a 'general power to regulate the internal market.'

Crucially, the Court seems to be conscious of the potential dangers of its own case law on obstacles to intra-EU movement. In spite of its reluctance to admit officially any qualification to its broad effects-based tests, it has developed and applies a series of judicial devices to manage the scope of the Treaty freedoms. These include, in particular, the wholly internal rule, the criterion of effects 'too uncertain and indirect'

¹³⁵ The Court's approach has been given a further boost by the broad interpretations it has given to key concepts such as 'goods' and 'workers.' See here eg Case C-65/05 *Commission v Greece (Electronic Games)* *op. cit.* at note 39 at para. 23 (for goods) and Case C-188/00 *Kurz* [2002] ECR I-10691 at para. 32.

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and the *de minimis* test. Chapter 4 examines these rules in detail and questions whether or not these devices, which can be read as the Court's own response to the problem of judicial overreach, adequately address the subsidiarity problem identified in this chapter.

Chapter 4

Existing responses to the problem of judicial overreach

1. Introduction

In Chapter 3, it was argued that the Court's reading of the term 'obstacle to intra-EU movement' is now increasingly focused on scrutinising national rules with 'deterrent' or 'dissuasive' effects on intra-EU movement or those that affect market access. Applied literally, this expansive effects-based reading of the scope of the Treaty freedoms could bring almost *any* national rule within the scope of the Court's review. This presents a clear subsidiarity problem. Put simply, the Court's interpretation of the Treaty freedoms comes very close to affording it a general power to regulate the internal market. This is precisely what subsidiarity is designed to prevent. Recalling the discussion in Chapter 1, subsidiarity seeks to ensure that the Member States retain an appropriate sphere of competence to contribute to the regulation of the internal market as an area of shared responsibility. In Chapter 3, it was argued that the Court's expansion interpretation of the term 'obstacle to intra-EU movement' is very much out of sync with its view of subsidiarity's function as a restraint on the Union legislature's right to exercise its competence in the *same* area of shared responsibility. In the latter context, the Court has made it very clear that Art 114 TFEU does not confer upon the Union legislature a 'general power to regulate the internal market.'¹

This chapter does not yet examine the detail of subsidiarity's impact on the Court's freedom to interpret the scope of the Treaty freedoms. Discussion of this matter is reserved for Chapter 6. Instead, our immediate concern is with the Court's *existing* response to the dangers of judicial overreach identified in Chapter 3. As we have already seen, concerns about the expanding scope of obstacles to intra-EU movement have not fallen on deaf ears. In *Keck*, the Court recognised the need to draw lines

¹ Case C-376/98 *Germany v. Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419 at para. 83. See also thereafter to the same effect, eg Case C-491/01 *British American Tobacco (Investments) Ltd* [2002] ECR I-11453 at para. 179. Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health* [2005] ECR I-6451 at paras 102 and 103 and Case C-58/08 *Vodafone and Others*, judgment of the Court (Grand Chamber) of 8 June 2010 (nyr) at paras 74-75.

between Union and Member State competence in connection with the regulation of the internal market.² In that decision, the Court made it clear that it would respect the autonomy of the Member States to regulate the conditions under which products could be marketed in that State, *provided* that the chosen rules are genuinely non-discriminatory.³

Alongside the selling arrangement concept introduced in *Keck*, there is evidence in the case law of several other judicial rules that are used to manage the scope of the Treaty freedoms. In particular, in connection with its decision to exclude Member State measures from the scope of its review of obstacles to intra-EU movement, the Court has referred, on occasion, to the criterion of ‘effects too uncertain and indirect’;⁴ to the ‘insignificant’ nature of an alleged obstacle to intra-EU movement;⁵ to the absence of any ‘intention’ on the part of the Member States to regulate intra-EU trade;⁶ and, finally, to the existence of an ‘inherent restriction’ to intra-EU movement.⁷ In addition, the Court has placed further limits on its interpretative functions by stressing that the Treaty freedoms cannot be applied to situations that exhibit no ‘connecting factor’ to EU law (the principle of the wholly internal situation).⁸

² Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1992] ECR I-6097.

³ *Ibid.*, at para.16.

⁴ Eg Case C-69/88 *Krantz GmbH* [1990] ECR I-583 at para. 11, Case C-93/92 *CMC Motorradcenter* [1993] ECR I-5009 at para. 12, Case C-379/92 *Peralta* [1994] ECR I-3453 at para. 24, Case C-96/94 *Centro Servizi Spediporto Srl* [1998] ECR I-2883 at para. 41, Joined Cases C-140/94, C-141/94 and C-142/94 *DIP SpA* [1995] ECR I-3257 at para. 29, Case C-44/98 *BASF* [1998] ECR I-6269 at para.21 and Case C-266/96 *Corsica Ferries France SA* [1998] ECR I-3949 at para. 31, Case C-412/97 *Ed Srl* [1999] ECR I-3845 at para. 11, Case 190/98 *Volker Graf v Filzmoser Maschinenbau GmbH* [2000] ECR I-493 at para. 25 and Case C-291/09 *Francesco Guarnieri & Cie*, Judgment of the Court (First Chamber) of 7 April 2011 (nyr) at para. 17.

⁵ Eg Case C-20/03 *Burmanjer* [2005] ECR I-4133 at para. 31. See also to the same effect, eg Case C-134/03 *Viacom Outdoor Srl v. Giotto Immobilier SARL* [2005] ECR I-1167 at paras 36-37 and Joined Cases C-544/03 and C-545/03 *Mobistar SA v Commune de Fléron (C-544/03)* and *Belgacom Mobile SA v Commune de Schaerbeek (C-545/03)* [2005] ECR I-7723 at para 31.

⁶ Eg Case C-69/88 *Krantz op. cit.* at note 4 at para. 10, Case C-96/94 *Centro Servizi Spediporto op. cit.* at note 4 at para. 41, Case C-379/92 *Peralta op. cit.* at note 4 at para. 24 and Case C-266/96 *Corsica Ferries France SA op. cit.* at note 4 at para. 31. See here also Joined Cases C-267/91 and C-268/91 *Keck and Mithouard op. cit.* at note 2 at para. 12.

⁷ Joined Cases C-51/96 and C-191/97 *Delière* [2000] ECR I-2549 at para. 64.

⁸ Eg Case 175/78 *The Queen v Vera Ann Saunders* [1979] ECR 1129 at para. 11, Case 20/87 *Ministère public v André Gauchard* [1987] ECR 4879 at paras 10 and 12, Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-1979 at para. 37, Joined Cases C-64/96 and C-65/96 *Kari Uecker and Vera Jacquet* [1997] ECR I-3171 at para. 23, Case C-300/01 *Doris Salzmann* [2003] ECR

Each of the above devices can be cast as evidence of the Court's implicit response to the subsidiarity problem identified in Chapter 3. The individual judicial rules are all of its own creation and, in result, would appear to isolate and protect a sphere of Member State competence in connection with the regulation of the internal market. Unfortunately, the Court's case law is not always clear on the substance and scope of application of the above rules. As Spaventa correctly concludes:

‘the co-existence of different strands of case law, together with the use of different hermeneutical tools in relation to the same provisions, makes it extremely difficult to identify clear boundaries for the Treaty free movement provisions. Indeed, when the cases are closely scrutinised one might be excused for feeling a slight sense of desperation as to the chaotic picture arising from the Court's jurisprudence.’⁹

This chapter will attempt to present the Court's case law in its best light. It begins, in section 2, by examining the function of the wholly internal rule as a device to safeguard the Member States against the dangers of judicial overreach identified in Chapter 3. Section 3 then discusses the Court's use of the ‘inherent restriction’ concept. Section 4 analyses the criterion of ‘effects too uncertain and indirect.’ Finally, section 5 assesses the impact of the Court's references to the ‘insignificant’ nature of a particular measure's effect on intra-EU movement and enquires, more broadly, into the existence of a *de minimis* test in EU free movement law.

In conclusion, it is submitted that the Court's existing case law provides clear evidence of judicial sensitivity to the expansive scope of the Treaty freedoms. However, even when presented in their best light, the Court's existing attempts to manage the scope of the Treaty freedoms fail to address adequately the problem identified in Chapter 3. In the final analysis, it submitted that the breadth of the Court's preferred effects-based reading of the term ‘obstacle to intra-EU movement’ is really curtailed only by a qualitative *de minimis* test (within which *Keck* itself can also be subsumed). However, even here the operative threshold is set far too low to

I-4899 at para. 32 and Case C-212/06 *Government of Communauté française and Gouvernement wallon* [2008] ECR I-1683 at paras 38-39.

⁹ E. Spaventa, ‘The Outer Limit of the Treaty Free Movement Provisions: Some Reflections on the Significance of *Keck*, Remoteness and *Deliège*’ in C. Barnard and O. Odudu (Eds.) *The Outer Limits of European Union Law* (Oxford: Hart, 2009) 245 at p. 270. Supporting this view, see also G. Straetmans, ‘Market Access, The Outer Limits of Free Movement of Goods and... The Law?’ in Bulterman et al (Eds.), *Views of European Law from the Mountain* (The Hague: Kluwer, 2009) 91 at p.105.

make any measurable impact on the Court's competence. Furthermore, the Court's persistent refusal to acknowledge its implicit application of such a test makes it rather difficult to sustain the view that it has identified workable limits to its case law on obstacles to intra-EU movement.

2. The wholly internal rule

2.1 Origins and function

The wholly internal rule emerged early on in the case law as a possible source of restraint on the Court's understanding of obstacles to intra-EU movement.¹⁰ In *Saunders*, the Court concluded that a British national could not invoke the Treaty provisions on intra-EU movement (specifically: Art 45 TFEU) in order to contest a judicial order restricting her movements within the territory of that State for a set duration.¹¹ According to the Court, Art 45 TFEU (ex Art 39 EC) 'cannot... be applied to situations which are wholly internal to a Member State, in other words, where there is no factor connecting them to any of the situations envisaged by [Union] law.'¹² Thereafter in *Gauchard*, the Court ruled in similar terms that 'the absence of any element going beyond a purely national setting in a given case... means, in matters of freedom of establishment just as in any other sphere, that the provisions of [Union] law are not applicable to such a situation.'¹³

The classic connecting factor bringing a situation within the scope of the Treaty is, of course, the exercise of intra-EU movement in connection with economic activity.¹⁴ Thus, in order to rely on the Treaty freedoms on, for example, workers or establishment, a Member State national had to move to the territory of *another* Member State. Alternatively, Member State nationals could seek to invoke the

¹⁰ For discussion, see eg N. Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move On?' (2002) 39(4) *CMLRev* 763, A. Tryfonidou, *Reverse Discrimination in EC Law* (AH Alphen aan den Rijn: Kluwer, 2009) and S. O'Leary, 'The Past, Present and Future of the Purely Internal Rule in EU Law' (2009) 44(1) *JUR* 13.

¹¹ Case 175/78 *Saunders op. cit.* at note 8.

¹² *Ibid.*, at para. 11.

¹³ Case 20/87 *Gauchard op. cit.* at note 8 at paras 10 and 12.

¹⁴ A. Tryfonidou, 'In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?' (2009) 46(5) *CMLRev* 1591 at pp 1592-1595. The introduction of Union citizens has, of course, broadened this test to include the exercise of intra-EU movement in connection with non-economic activity. This is discussed further in section 2.3.3 below.

protection of the Treaty freedoms against their home Member State *after* having exercised economic activity elsewhere within the Union. In this latter case, the applicant's situation could be 'assimilated to that of another person enjoying their rights and liberties guaranteed by the Treaty.'¹⁵

2.2 Evaluating the impact of the wholly internal rule

Strictly speaking, the wholly internal rule does not alter the substance of the Court's case law on obstacles to intra-EU movement. Its function is instead to protect Member State autonomy by ensuring that the Court's case law on the scope of the Treaty freedoms is applied *only* to situations that exhibit a sufficient connecting factor to EU law. However, as a rule designed to control the scope of application of the Treaty and, in particular, manage the distribution of competence between the Union and the Member States, it goes to the core of the discussion in this chapter and is, for that reason, worth evaluating.

Applied strictly, the wholly internal rule would certainly carve out a sphere of protected Member State influence in connection with regulation of the internal market as a shared area of responsibility. However, the Court appears to be accepting ever more tenuous links to intra-EU movement – or no movement at all – as sufficient to trigger the review of national measures as obstacles to intra-EU movement. In so doing, it has diluted the (limited) protective benefits of the wholly internal rule for Member State autonomy.

2.2.1 Previous and actual intra-EU movement

In the first instance, the Court has adopted a rather broad view of both previous and actual cross-border movement. For example, in *Singh*, the Court seized upon a period of economic activity in another Member State in order to review, several years later, a decision of the United Kingdom immigration authorities to deport the third country national (almost-former) spouse of a British national.¹⁶ Thereafter, in *Carpenter*, the

¹⁵ Case 115/78 *Knoors* [1979] ECR 399 at para. 24. See also thereafter eg Case 61/89 *Bouchoucha* [1990] ECR I-3551, at para. 13 and Case C-19/92 *Dieter Kraus v Land Baden-Württemberg* [1993] ECR I-1663 at para. 16.

¹⁶ Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* [1992] ECR I-4265.

Court accepted as a sufficient connecting factor to EU law the fact that a British national provided services to clients established in other Member States.¹⁷

The decisions in *Singh* and *Carpenter* really test the requirement for actual or previous intra-EU movement in connection with economic activity. The ruling in *Singh* on previous intra-EU movement seems far removed from the logic underpinning the decision in *Knoors*, in which the Court first recognised the right of returning migrants to invoke the Treaty provisions against the Member State of origin. In that earlier case, the applicant sought to rely on their experience (and, in particular, a qualification recognised by Union law) acquired in another Member State in order to take up and pursue economic activity in their State of origin – a situation clearly related to the objective of establishing a functioning internal market.¹⁸ With respect to *Carpenter*, one might also express doubts about the strength of the connecting factor to intra-EU movement. Although the applicant's spouse was exercising cross-border economic activity in this case, the link to the dispute in hand was rather tenuous.¹⁹

2.2.2 Potential intra-EU movement

In a further challenge to the wholly internal rule, the Court has also permitted Member State nationals to invoke the Treaty freedoms against their home Member State (or State of establishment) on the basis of some *potential* effect on intra-EU movement. The term 'obstacle to intra-EU movement' is, of course, broad enough to capture such effects. In Chapter 3, it has already been shown that the Court reads the scope of the Treaty freedoms as extending to include national measures that might have a potential effect on intra-EU movement.²⁰ However, on a narrow reading of the wholly internal rule, we might not have expected the Court to permit Member State

¹⁷ Case C-60/00 *Mary Carpenter* [2002] ECR I-6279 at paras 28-30.

¹⁸ Case 115/78 *Knoors op, cit.* at note 15 at para. 24.

¹⁹ For criticism of this case, see eg 'Freedoms unlimited? Reflections on *Mary Carpenter v. Secretary of State*' (Editorial Comments) (2003) 40(3) *CMLRev* 537.

²⁰ See eg Case 8/74 *Dassonville* [1974] ECR 837 at para. 5, Case C-76/90 *Säger v Dennemeyer* [1991] ECR I-4221 at para. 12, Case C-415/93 *Bosman* [1995] ECR I-4921 at para. 96, Case C-367/98 *Commission v Portugal (Golden Shares)* [2002] ECR I-4731 at paras 44-45, Case C-110/05 *Commission v. Italy (Motorcycle Trailers)* [2009] ECR 519 at para. 33 and Case C-161/09 *Kakavetsos-Fragkopoulos AE*, judgment of the Court (First Chamber) of 3 March 2011 (nyr) at para. 29.

nationals to rely on the potential effects of a measure on intra-EU movement in situations in which the facts are otherwise confined to the territory of that Member States.²¹ If this were the case, then virtually any national rule could be exposed to the full force of the Court's obstacle case law, rendering the rule all but meaningless.

Yet it is clear from the case law that *some* potential effects on intra-EU movement are acceptable in order to establish a link to EU law. For example, in numerous cases dealing with Art 34 TFEU, the Court has accepted the fact that a particular measure was liable, within the meaning of the *Dassonville* formula, to have a potential impact on intra-EU trade in order to establish a connecting factor to EU law. For example, the defendants in *Keck* successfully appealed to the potential impact of a French rule prohibiting, within that State, the sale of products at a loss in order to establish (at least implicitly) the necessary intra-EU dimension required to trigger the application of the Treaty freedoms.²² Similarly, in *TK-Heimdienst*, the applicant, an Austrian undertaking engaged in economic activity within that State, relied on a similar argument. In that case, the applicant argued that Austrian legislation prohibiting them from offering goods for sale on rounds in districts other than those in which they were established or in adjoining districts was liable to have an impact on intra-EU trade in goods.²³

In its case law on services, the Court has also relied on the fact that Art 56 TFEU extends to protect the right of Member State nationals established/resident in other Member State to receive services from providers based in another Member State to bring factual scenarios within the scope of the Treaty. For example, in *Alpine Investments*, the Court permitted an undertaking to contest legislation applicable within its State of establishment by virtue of its effect on that undertaking's ability to

²¹ To support this view, see eg Case 180/83 *Hans Moser v Land Baden-Württemberg* [1984] ECR 2539 at para. 18. In this case, the Court stated that 'a purely hypothetical prospect of employment in another Member State does not establish a sufficient connection with [Union] law to justify the application of [Art 45 TFEU]' (this author's emphasis). See also thereafter Case C-299/95 *Friedrich Kremzow v Republik Österreich* [1997] ECR I-2629 at para. 16.

²² Joined Cases C-267/91 and C-268/91 *Keck and Mithouard op. cit.* at note 2.

²³ Case C-254/98 *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH* [2000] ECR I-151. See also eg Joined Cases 60 and 61/84 *Cinéthèque SA and others* [1985] ECR 2605, Case 145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR 3851, Case C-379/92 *Peralta op. cit.* at note 6, Case C-20/03 *Burmanjer* [2005] ECR I-4133 and Case C-110/05 *Commission v. Italy (Motorcycle Trailers) op. cit.* at note 20.

offer services to potential clients based in other Member States.²⁴ Similarly, in *Gourmet International Products*, the Court upheld the right of providers of advertising services to contest, as an obstacle to intra-EU movement, non-discriminatory legislation enacted by the Member State in which they were established.²⁵ Again, this finding was based on the fact that the contested measure might have an impact on the ability of undertakings established in that State to contract with potential clients based in other Member States.²⁶

As the above examples demonstrate, the wholly internal rule is pretty ineffective as a device to protect a sphere of Member State autonomy from the Court's case law on obstacles to intra-EU movement. To the extent that the Court accepts a potential effect on intra-EU movement as sufficient to trigger the scope of the Treaty freedoms in situations that are otherwise confined to the territory of a Member State, the wholly internal rule is basically redundant. It has simply merged with the Court's broad effects-based test, which alone will determine whether or not a particular national measure constitutes an obstacle to intra-EU movement.

2.2.3 Union citizenship

The introduction of Union citizenship at Maastricht, and Art 21 TFEU in particular, has also undermined the effectiveness of the wholly internal rule. For a start, it is no longer necessary to exercise intra-EU movement in connection with economic activity.²⁷ This has opened up an entirely new set of factual constellations to the Court's scrutiny. However, and more importantly, in this area of case law, the Court has further eroded the orthodox requirement for intra-EU movement. In the first instance, the Court has ruled that, irrespective of whether or not they have actually moved, the situation of a Member State national who resides in another Member

²⁴ Case C-384/93 *Alpine Investments* [1995] ECR I-1141.

²⁵ Case C-405/98 *Gourmet International Products* [2001] ECR I-1795. In the case law on Art 49 TFEU, see eg Case C-231/03 *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti* [2005] ECR I-7287 at paras 16-17 and Case C-458/03 *Parking Brixen GmbH* [2005] ECR I-8585 at paras 54-55. In these cases, the Court focused on the potential interest of undertakings established in other Member States in the contracts concerned in order to establish a sufficient connecting factor with EU law.

²⁶ Case C-405/98 *Gourmet International Products op. cit.* at note 25 at paras 37-39.

²⁷ As Tryfondiou argues, there is also evidence that the Court has since eroded the requirement for intra-EU movement in connection with the economic freedoms. See Tryfondiou *op. cit.* at note 14 above.

State falls automatically within the scope of the Treaty.²⁸ This constructive view of intra-EU movement has dealt an additional blow to Member State autonomy. For example, in *Garcia Avello*, Member State nationals holding dual Belgian and Spanish nationality and resident in Belgium were able to invoke the protection afforded to Union citizens under the Treaty against the Belgian State.²⁹ The fact that they had never resided in Spain was considered irrelevant. Similarly, in the earlier ruling in *Chen*, the Court accepted that a minor Member State national with Irish nationality was entitled to rely on her status as a Union citizen against the United Kingdom, notwithstanding the fact that she had never set foot in the Republic of Ireland.³⁰

2.2.4 Rottmann, Ruiz Zambrano and McCarthy

In its most recent case law on Union citizenship, the Court appears to be in the process of doing away with the requirement for any need for intra-EU movement (previous, actual, potential or constructive) in order to bring a situation within the scope of the Treaty. The Court's conclusions in *Rottmann* suggest that, in so far as Union citizenship is concerned, the simple fact that an individual holds the nationality of one of the Member States may be sufficient to establish a connecting factor to the Treaty.³¹ Briefly summarised, *Rottmann* addressed the situation of a German national who had acquired German nationality fraudulently. In response, the German authorities sought to strip the applicant of his German nationality. However, this would render him stateless and, in so doing, force him to forfeit his rights as a Union citizen. Although both the Commission and several of the intervening Governments maintained that the applicant's situation was internal to the German State, the Court took a different view. According to the Court, the applicant's situation fell squarely within the scope of the Treaty. This followed from the fact

²⁸ See Case C-148/02 *Garcia Avello* [2003] ECR I-11613 at paras 27-28 and Case C-353/06 *Grunkin and Paul* [2008] ECR I-7639 at para. 17.

²⁹ Case C-148/02 *Garcia Avello op. cit.* at note 27 at para. 28.

³⁰ Case C-200/02 *Zhu and Chen* [2004] ECR I-9925 at para. 19. The minor child in this case was born in Belfast (United Kingdom) and, in accordance with the laws applicable at the material time, was eligible to apply for Irish nationality.

³¹ Case C-135/08 *Rottman v Freistaat Bayern*, Judgment of the Court (Grand Chamber) of 2 March 2010 (nyr).

that, ‘the loss of the nationality of a Member State, was capable of causing [the applicant] to lose the status conferred by Article 20 TFEU and the rights attaching.’³²

At present, it remains unclear what impact the Court’s most recent qualification of the wholly internal rule will have on the case law on obstacles to intra-EU movement – the focus of the analysis here. In *Rottmann*, the Court did not refer expressly to the effects of the contested measure on the applicant’s exercise of the rights conferred by Art 21 TFEU. Instead, it referred to the loss of the *status* of Union citizenship (Art 20 TFEU) and, only in much more general terms, to the ‘right attaching thereto,’ which include, of course, Art 21 TFEU.³³ Likewise, in the subsequent case of *Ruiz Zambrano*, the Court also referred only to Art 20 TFEU.³⁴ In that case, the applicant sought to rely on his children’s status as Belgian nationals, and thus Union citizens, in order to found for himself and his wife a right of residency in that same Member State. The Court upheld the applicant’s case. It ruled that the Belgian authorities’ decision to deport the applicant (and his wife), Columbian nationals, from that State would have the effect of depriving his Belgian children of the genuine enjoyment of the substance of the rights conferred by virtue of [Art 20 TFEU].³⁵ The Court stated that, in effect, it would require the family to leave the territory of the Union.³⁶ However, as in *Rottmann*, no express reference was made to Art 21 TFEU.

Only in *McCarthy* did the Court engage expressly with Art 21 TFEU.³⁷ In that case, the applicant, a British national resident in that State, sought to rely on her dual (Irish) nationality to establish a right of residency under EU law in the United Kingdom for her Jamaican spouse. Importantly, for present purposes, the Court’s approach in *McCarthy* suggests that the Court has not (yet) opened up new possibilities for Member State nationals to review national measures – including those enacted by one’s home Member State – in light of the specific right of intra-EU

³² *Ibid.*, at para. 42.

³³ Case C-135/08 *Rottman op. cit.* at note 31 at para. 42.

³⁴ Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l’emploi*, judgment of the Court (Grand Chamber) of 8th March 2011 (nyr).

³⁵ *Ibid.*, at para. 42.

³⁶ *Ibid.*, at para. 44. In strict legal terms, this is not true. The applicant could rely on his children’s status as Belgian nationals in order to reside in the other Member States of the Union.

³⁷ Case C-434/09 *McCarthy v. Secretary of State for the Home Department*, judgment of the Court (Third Chamber) 5th May 2011 (nyr).

movement in Art 21 TFEU. Although restating its conclusions in *Rottmann* and *Ruiz Zambrano* about the need to protect ‘the genuine enjoyment of the rights of Union citizens,’ the Court concluded, in the final analysis, that the applicant’s situation did not exhibit a sufficient connecting factor to EU law. It stated that:

‘Article 21 TFEU [was] not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States.’³⁸

This finding sits uncomfortably alongside the Court’s constructive reading of intra-EU movement. In particular, in *Chen* the ECJ had concluded that the situation of a Member State national holding the nationality of another Member State fell within the scope of Art 21 TFEU.³⁹ This was notwithstanding the fact that, like Mrs McCarthy, the applicant had never lived in the Republic of Ireland. How then do we explain this difference in approach? Space precludes detailed analysis of this case law. However, in brief, everything appears now to turn on the Court’s understanding of the phrase ‘genuine enjoyment of the substantive rights of [Union citizenship].’⁴⁰ As things stand, it would seem that the Court is only prepared to establish a sufficient connecting factor to EU law in cases where a Union citizen’s right of residency in their home Member State is under direct threat. However, this may yet change, with further detrimental effects on Member State autonomy.

2.2.5 Summary

Interpreted strictly, the wholly internal rule would offer some respite to the Member States. It would ensure that the Court’s case law on obstacles to intra-EU movement was applied only to situations in which there had been actual or previous movement between the territories of the Member States in connection with either economic or non-economic activity. However, far from adhering to a narrow reading of the

³⁸ *Ibid.*, at para. 56.

³⁹ Case C-200/02 *Zhu and Chen op. cit.* at note 30 at para. 19

⁴⁰ N. Nic Shuibhne, ‘Seven Questions for Seven Paragraphs’ (Editorial) (2011) 36(2) *ELRev* 161.

wholly internal rule, the Court has progressively loosened the requirement for a connecting factor and, in particular, the requirement for intra-EU movement. In places, such as the case law on goods and services, the wholly internal rule appears to have simply merged with the Court's broad effects-based interpretation of the term 'obstacle to intra-EU movement.' As such, it has become entirely redundant. In other areas, its substance has also been affected by subsequent developments in the case law. These include, in the case law on Union citizenship, the Court's acceptance of constructive intra-EU movement as a sufficient connecting factor and, most recently, the Court's move to ensure the protection of the genuine enjoyment of the rights of Union citizenship, irrespective of any movement (previous, actual, potential or constructive).

The remainder of this chapter will now evaluate the effectiveness of some of the other judicial devices that the Court has developed in order to manage the scope of the Treaty freedoms. These are: (1) the notion of an inherent obstacle to intra-EU movement, (2) the criterion of effects too uncertain and indirect and, finally, (3) the *de minimis* test.

3. Inherent obstacles to intra-EU movement

3.1 Overview

The first of the remaining three judicial devices that we shall consider in the remainder of this chapter is the notion of an inherent obstruction to intra-EU movement. To date, the term inherent obstruction appears to have featured expressly only once in the case law.⁴¹ However, its logic can be seen to underpin several of the Court's rulings.⁴² In summary, the notion of an inherent obstacle protects Member State autonomy by removing certain national measures from the scope of the Treaty freedoms by reason of the fact that their obstructive effects on intra-EU movement are so closely tied up with their very purpose. Whilst offering a degree of protection to Member States, it is submitted that the inherent obstacle concept adds little to our

⁴¹ Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549.

⁴² See eg Case C-148/91 *Vereniging Veronica Omroep Organisatie v Commissariaat voor de Media* [1993] ECR I-487 at paras 9-14 and Case C-23/93 *TV10 SA v Commissariaat voor de Media* [1994] ECR I-4795 at para. 19.

existing understanding of the Court's EU free movement framework. In the end, the inherent obstacle concept can be shown to be nothing other than a 'rule of reason' approach to the application of the Treaty freedoms. Under this approach, the Court combines its assessment of whether or not a particular national measure constitutes an obstacle to intra-EU movement with its subsequent examination of whether that same national measure can be justified in EU law. This fact perhaps explains why very little has become of the inherent obstacle concept in the case law.

3.2 Joined Cases C-51/96 and C-191/97 *Deliège*

The Court's use of this concept can be seen in *Deliège*.⁴³ In that case, the ECJ was asked for guidance on the compatibility with Art 56 TFEU (ex Art 49 EC) (services) of regulations governing the selection of athletes for international sporting events. The contested regulations allowed only athletes who had been selected by the national federation to participate in high-level international sporting competitions. The applicant, Ms *Deliège*, was a Belgian judo player who had not been selected to participate in several international competitions by the Belgian federation. She sought to challenge this decision by arguing that the selection rules constituted an obstacle to Art 56 TFEU. In its reply to the referring court, the ECJ first confirmed that the factual situations giving rise to the main proceedings could fall within the scope of the Treaty (and Art 56 TFEU in particular).⁴⁴ However, turning to the crux of the matter, the Court then concluded that contested regulation did *not* constitute an obstacle to the applicant's freedom to provide intra-EU services. For the Court:

‘although selection rules like those at issue in the main proceedings inevitably have the effect of limiting the number of participants in a tournament, *such a limitation is inherent* in the conduct of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted. Such rules may not therefore in themselves be regarded as constituting a restriction on the freedom to provide services prohibited by [Art 56 TFEU].’⁴⁵

⁴³ Joined Cases C-51/96 and C-191/97 *Deliège op. cit.* at note 41. See, thereafter, the judgment of the General Court (ex Court of First Instance) in Case C-313/02P *Meca-Medina and Majcen v Commission* [2004] ECR II-3291 at para. 41.

⁴⁴ *Ibid.*, at paras 44-48. The Court also found that the applicant's activities could constitute economic activity for the purposes of Art 56 TFEU. See paras 49-60, though the final determination was left to the referring court.

⁴⁵ *Ibid.*, at para. 64 (this author's emphasis).

The same approach to the application of the Treaty freedoms can be seen in several other cases, though without express reference to the inherent obstacle concept. For example, in the same substantive area (the regulation of professional sporting activity within the Union), the Court had already concluded that the Treaty provisions concerning freedom of movement for persons:

‘do not prevent the adoption of rules or practices excluding foreign players from certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries. This restriction on the scope of [the Treaty freedoms] must however remain limited to its proper objective.’⁴⁶

There is also evidence of a similar approach in the case law on establishment and capital. In *Vereniging Veronica*, the Court was requested to examine a Dutch law prohibiting a broadcasting body established in that State from investing in media undertakings established in other Member States.⁴⁷ On the strength of the Court’s own test, this measure constituted an obstacle to intra-EU movement. However, the Court did not state this finding expressly. Instead, it focused *immediately* on the legitimacy of the national cultural policy objectives behind the contested legislation and, on that basis, concluded that the Dutch legislation could ‘not be regarded as incompatible with [Arts 56 TFEU and 63(1) TFEU].’⁴⁸

3.3 Evaluating the inherent obstacle device

Spaventa has suggested that the Court’s application of the inherent obstacle formula in *Deliège* can be viewed alongside its ruling in *Keck* and the criterion of effects too uncertain and indirect (discussed below) as a judicial device that is designed to manage the scope of the term obstacle to intra-EU movement.⁴⁹ In her opinion, the device operates to remove national measures from the scope of the Treaty freedoms ‘when the alleged barrier to [intra-EU movement] coincides with the very purpose of

⁴⁶ Case 13/76 *Donà v Mantero* [1976] ECR I-1333 at paras 14-15. See thereafter eg Case C-415/93 *Bosman op. cit.* at note 19 at para. 76. However, in the alternative, it might be argued that the Court’s reasoning suggests that football matches between national teams do not fall within the scope of the Treaty in the first instance by reason of the fact that this does not constitute economic activity for the purposes of Art 43 and 56 TFEU. See eg Case 13/76 *Donà v Mantero* at para. 12.

⁴⁷ Case C-148/91 *Vereniging Veronica op. cit.* at note 42 at paras 9-14. See also Case C-23/93 *TV10 SA op. cit.* at note 42 at para. 19 and also the pre-*Keck* ruling in Case 75/81 *Blesgen* [1982] ECR 1211.

⁴⁸ Case C-148/91 *Veronica op. cit.* at note 42 at para. 14.

⁴⁹ Spaventa *op. cit.* at note 9 at pp 265-270.

the rules.⁵⁰ In other words, she argues that, so long as the aim pursued by the specific rule in question is legitimate, the *Deliège* exception applies to protect Member State (or, where relevant, private regulatory autonomy)⁵¹ from the Court's scrutiny at Union level.⁵²

Spaventa's analysis of *Deliège* is an interesting one, and certainly offers some scope to increase the protection of Member State autonomy. However, at the same time, it does not offer a solution to the problem examined in this chapter – the need to control the breadth of the Court's interpretation of the scope of the Treaty freedoms. Crucially, in *Deliège*, the Court did not actually say that the contested selection rules do not constitute obstacles to intra-EU movement.⁵³ On the contrary, the Court noted that the contested rules fell within the scope of Union law and, further, that the applicant's activities could be considered to be economic in nature.⁵⁴ Instead, the ECJ seemed only to find that the obstructive effects of the measure could be *reconciled* with the demands of EU free movement law. This finding was reached by combining the analysis of whether or not a particular measure falls within the scope of the Treaty freedoms with the subsequent (second-stage) assessment of whether that measure can be *justified* in EU law.

This combined approach to the application of the Treaty freedoms can be used to rationalise the Court's findings in other cases cited in the previous sub-section.⁵⁵ For example, in *Donà v Mantero*, the Court's analysis of rules governing national football teams follows the natural rhythm of the justification framework.⁵⁶ In that case, the ECJ noted that such rules served a non-economic objective and applied the proportionality test. However, for present purposes, the key point is that the above

⁵⁰ *Ibid.*, at p. 270.

⁵¹ As the Court has noted on several occasions, Arts 49 and 56 TFEU have quasi-horizontal effect. They also extend to capture 'rules which are not public in nature but which are designed to regulate, collectively, self-employment and the provision of services.' See eg Case 36/74 *Walrave and Koch* [1974] ECR 1405 at paras 17 and 18, Case C-415/93 *Bosman op. cit.* at note 20 at paras 83 and 84, Case C-309/99 *Wouters and Others* [2002] ECR I-1577 at para.120 and Case C-341/05 *Laval un Partneri Ltd* [2007] ECR I-11767 at para. 98.

⁵² Spaventa further suggests that this reasoning could also be used to explain the Court's approach to the scrutiny of Member State tax rules. See Spaventa *op. cit.* at note 9 at p. 270

⁵³ Joined Cases C-51/96 and C-191/97 *Deliège op. cit.* at note 41 at paras 44-48.

⁵⁴ *Ibid.*, at paras 49-60.

⁵⁵ Case C-148/91 *Vereniging Veronica op. cit.* at note 42 at paras 9-14. See also Case C-23/93 *TV10 SA op. cit.* at note 42 at para. 19 and also the pre-*Keck* ruling in Case 75/81 *Blesgen op. cit.* at note 47.

⁵⁶ Case 13/76 *Donà v Mantero op. cit.* at note 46. See also Case C-415/93 *Bosman op. cit.* at note 19.

approach to the review of national measures does not actually limit the scope of the term ‘obstacle to intra-EU movement.’ It simply provides an alternative mechanism through which to conclude that particular rules that fall within the scope of the Treaty freedoms constitute justified (and proportionate) obstacles to intra-EU movement. Interestingly, the alternative inherent obstacle approach has been used exclusively to address *discriminatory* measures that would have otherwise been difficult to square with the Treaty.

3.4 Summary

As with the wholly internal rule, the Court’s approach to the management of the scope of the Treaty freedoms in *Deliège* and other decisions does not offer a solution to the problem of judicial overreach identified in Chapter 3 – though for different reasons. In short, the *Deliège* test does *not* challenge the Court’s competence to review national measures at Union level as obstacles to intra-EU movement. Instead, it simply provides an alternative way of applying the Treaty freedoms. It allows the Court to reconcile national policy objectives with those of the Union at the point at which the Court would usually simply conclude that the contested measure falls within the scope of the Treaty freedoms. The search for effective limits to the case law on obstacles to intra-EU movement continues in the next section with a review of the criterion of effects too uncertain and indirect.

4. ‘Effects too uncertain and indirect’

4.1 Overview

The criterion of ‘effects too uncertain and indirect’⁵⁷ first appeared in connection with the Court’s interpretation of Art 34 TFEU (ex Art 28 EC) on goods. However, it has since found expression in other areas of EU free movement law. On one view,

⁵⁷ In the literature, this criterion is usually framed as the ‘remoteness test.’ This is despite of the fact that this term is yet to feature in the case law. In the interests of accuracy, we shall adhere to the Court’s language and refer to the criterion of effects too uncertain and indirect throughout. For examples of the use of the remoteness label, see eg C. Barnard, *The Substantive Law of the EU: the Four Freedoms* (3rd Ed.) (Oxford: OUP, 2010) at p. 79 and p. 144, D. Doukas, ‘Untying the Market Access Knot: Advertising Restrictions and the Free Movement of Goods and Services’ (2006-2007) 9 *CYELS* 177 at p. 205 and P. Oliver, ‘Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurling in a New Direction?’ (2009-2010) 33(5) *Fordham Int’l L.J.* 1423 at p. 1430.

the criterion of effects too uncertain and indirect is a causation test.⁵⁸ In this guise, it is argued that the criterion protects Member State autonomy by ensuring that there is always a causal link between a particular national measure and the alleged obstacle to intra-EU movement.⁵⁹ However, on closer inspection it is argued that this reading of the criterion of effects too uncertain and indirect is incapable of adequately explaining the case law. Whilst it is absolutely correct to maintain that this criterion offers some degree of protection to Member State autonomy, it is submitted that it does not appear to do so through a test of causation. Instead, it is argued that the criterion of effects too uncertain and indirect provides evidence of a qualitative *de minimis* test, which now seems to permeate the case law across the freedoms under several different labels. This *de minimis* test is considered separately in section 5.

4.2 Case C-69/88 *Krantz GmbH*

The Court first referred to the criterion of effects too uncertain and indirect in *Krantz*.⁶⁰ That case concerned Dutch legislation, which granted the tax authorities in that State the power to seize movable property in order to recover tax debts. The applicant (*Krantz GmbH*) had sold machines (with reserved title pending full payment) to a Dutch company that had subsequently been declared insolvent. *Krantz* sought to contest the Dutch authorities' decision to seize these machines to recover the cost of unpaid taxes. It maintained that, had it been aware of the contested Dutch legislation, it would not have contracted with the defendant on instalment terms. The Court disagreed. It ruled that:

‘the possibility that nationals of other Member States would hesitate to sell goods on instalment terms to purchasers in the Member State concerned because such goods would be liable to seizure by the collector of taxes if the

⁵⁸ See eg the Opinion of AG La Pergola in Case C-44/98 *BASF op. cit.* at note 10 at para. 18, A. Biondi, ‘In and Out of the Internal Market: Recent Developments on the Principle of Free Movement’ (1999-2000) 19 *YEL* 469 at pp 487-8, Doukas *op. cit.* at note 10 at p.206 and Spaventa *op. cit.* at note 9 at pp 250-254 and esp. at p. 253. However, for Spaventa, the causation test is restricted to the assessment of national measures that are not intended to regulate intra-EU trade.

⁵⁹ Opinion of AG La Pergola in Case C-44/98 *BASF op. cit.* at note 4 at para. 18.

⁶⁰ Case C-69/88 *Krantz op. cit.* at note 4 at para. 11. See thereafter Case C-93/92 *CMC Motorradcenter op. cit.* at note 4 at para. 12, Case C-379/92 *Peralta op. cit.* at note 4 at para. 24, Case C-96/94 *Centro Servizi Spediporto Srl op. cit.* at note 4 at para. 41, Joined Cases C-140/94, C-141/94 and C-142/94 *DIP SpA op. cit.* at note 4 at para. 29, Case C-44/98 *BASF op. cit.* at note 4 at para.21, Case C-266/96 *Corsica Ferries France op. cit.* at note 4 at para. 31, Case C-412/97 *Ed Srl op. cit.* at note 4 at para. 11, Case 190/98 *Graf op. cit.* at note 4 at para. 25 and Case C-291/09 *Francesco op. cit.* at note 4 at para. 17.

purchasers failed to discharge their Netherlands tax debts is *too uncertain and indirect* to warrant the conclusion that a national provision authorising such seizure is liable to hinder trade between Member States.’⁶¹

Crucially for present purposes, the ruling *Krantz* provides us with clear evidence to support the view that the Court’s reading of the obstacle concept *is* subject to some qualification. At the time when the ruling was delivered, the Court was yet to ‘clarify’ its case law on the scope of Art 34 TFEU through its *Keck* ruling.⁶² Its approach to the definition of ‘measures having equivalent effect to quantitative restrictions’ was therefore governed solely by its rulings in *Dassonville* and *Cassis de Dijon*.⁶³ Applying this case law literally, it would have been perfectly conceivable for the Court to conclude that the contested Dutch legislation fell within the scope of Art 34 TFEU as an obstacle to intra-EU movement. The *Dassonville* formula is certainly broad enough to have captured the applicant’s assertion that the rules in question were capable of hindering directly or indirectly, actually or potentially intra-EU trade in the products concerned.⁶⁴ However, the Court chose *not* to apply the full force of this test. Instead, it opted to qualify its use, and thereby offer some degree of protection to Member State autonomy.

4.3 *Krantz* as a causation test

On one view, the ruling in *Krantz* introduced (or simply applied) a test of causation to the Court’s reading of the scope of the Treaty freedoms.⁶⁵ For example, Spaventa argues that the criterion of effects too uncertain and indirect requires the applicant, first and foremost, to demonstrate a link between the rule and the alleged barrier to intra-EU movement.⁶⁶ Similarly, Doukas also maintains that:

‘[u]nlike a *de minimis* test, which would include within the scope of the Treaty only measures having appreciable effects on intra-Community trade,

⁶¹ *Ibid.*, at para. 11.

⁶² Joined Cases C-267/91 and C-268/91 *Keck and Mithouard op. cit.* at note 2.

⁶³ Case 8/74 *Dassonville op. cit.* at note 20 and Case 120/78 *Cassis* [1979] ECR 649. As discussed in Chapter 3, the Court’s interpretation of the scope of Art 34 TFEU has been subjected to subsequent qualification. See here, in particular, the rulings in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard op. cit.* at note 2 and Case C-110/05 *Commission v. Italy (Motorcycle Trailers)* [2009] ECR 519.

⁶⁴ Case 8/74 *Dassonville op. cit.* at note 20 at para. 5.

⁶⁵ See eg the Opinion of AG La Pergola in Case C-44/98 *BASF op. cit.* at note 4 at para. 18, Biondi *op. cit.* at note 58 at pp 487-488, Doukas *op. cit.* at note 57 at p. 206 and Spaventa *op. cit.* at note 9 at pp 250-254 and esp. at p. 253.

⁶⁶ Spaventa *op. cit.* at note 9 at p. 253.

the remoteness test excludes from the ambit of the free movement provisions any situation where there is no causal link between the measures concerned and the impact on intra-Community trade, which is either lacking or dependant on unforeseen circumstances.⁶⁷

On this reading of *Krantz*, the contested Dutch rules on the seizure of moveable assets fell therefore outside of the scope of Art 34 TFEU by reason of the fact that their effect on intra-EU trade was *conditional* upon another (independent) variable: the insolvency of the purchaser.

At first sight, the causation test seems to provide a convincing means of rationalising the criterion of effects too uncertain and indirect. It seems to make sense to require a link between the existence of the contested national measure and the alleged obstacle to intra-EU trade. However, the problem with this approach is that it cannot deal with the applicant's core argument. In *Krantz*, the applicant objected to the very *existence* of the Dutch legislation. In his eyes, the contested Dutch rules had a deterrent effect on his decision to conclude intra-EU contracts with buyers established in that State.⁶⁸ The issue of whether or not contracting buyers in the Netherlands *subsequently* entered into insolvency proceedings was irrelevant. Rather, on one view, it was the fact that, should they do so, the Dutch tax authorities may then (lawfully) seize any goods supplied to them by the applicant. It was this potential risk that was liable to deter the applicant from exploiting the market for his products in that Member State.

As a test of causation, the criterion of effects too uncertain and indirect does not really tell us why the above deterrent effects on intra-EU trade do not fall within the scope of the (then) applicable *Dassonville* formula. After all, on the above interpretation, was the contested Dutch legislation not liable to hinder directly or indirectly, actually or potentially, intra-EU trade? At the very least, it might have led to a reduction in the *volume* of intra-EU trade in the products concerned.⁶⁹

⁶⁷ Doukas *op. cit.* at note 57 at p. 206.

⁶⁸ Case C-69/88 *Krantz op. cit.* at note 4 at para. 4.

⁶⁹ See, in this connection esp. Case C-145/88 *Torfaen Borough Council op. cit.* at note 23 at para. 4. Judgment in this ruling was delivered shortly before *Krantz*.

4.3 Case 190/98 *Graf v. Filzmoser Maschinenbau GmbH*

The tension between the causation test and the application of the Court's broad effects-based interpretation of obstacles to intra-EU movement can also be seen in the subsequent ruling in *Graf*.⁷⁰ In that case, the Court made express reference to the criterion of effects too uncertain and indirect in connection with its decision to exclude Austrian employment legislation from the scope of Art 45 TFEU (ex Art 39 EC). In *Graf*, the applicant, a German national working in Austria, had decided that he wished to cease his employment in Austria and return to his home Member State. However, he objected to the fact that, in so doing, he would necessarily forfeit his entitlement to specific employment benefits guaranteed under Austrian legislation. In particular, Mr Graf objected to the loss of insurance cover for involuntary redundancy.

In its reply to the referring court, the ECJ concluded that the contested Austrian legislation did not fall within the scope of Art 45 TFEU. Again, in support of this conclusion, it invoked the criterion of effects too uncertain and indirect. Moreover, the Court's reasoning provides further support to the views of those interpreting this criterion through the lens of causation. The Court concluded:

‘the legislation of the kind at issue... is not such as to preclude or deter a worker from ending his contract of employment in order to take a job with another employer, because the entitlement to compensation on termination of employment is not dependent on the worker's choosing whether to stay with his current employer but on a future and hypothetical event, namely the subsequent termination of his contract without such termination being at his own initiative or attributable to him.’⁷¹

The ruling in *Graf* can, on one view, be explained through the lens of causation.⁷² As the Court noted, the payment of the contested insurance benefit was not dependant on whether or not the applicant opted to remain in employment in Austria. Instead, it was conditional upon a future event that may never materialise.

⁷⁰ Case 190/98 *Graf op. cit.* at note 4.

⁷¹ *Ibid.*, at para. 24.

⁷² On another interpretation, the national measure in *Graf* fell outside of the scope of Art 45 TFEU by reason of the fact that it did not affect the applicant's access to the employment market of another Member State. See eg the Opinion of AG Fennelly in Case 190/98 *Graf op. cit.* at note 4 at paras 30-21 and, for discussion, J. Snell, ‘The Notion of Market Access: A Concept or a Slogan?’ (2010) 47(2) *CMLRev* 437 at pp 443-444. The market access concept is discussed further in Chapter 5.

Yet, as in *Krantz*, there are difficulties with the above line of argument. It is certainly true that *realisation* of the employment benefit at issue depended on a future hypothetical event (involuntary redundancy). However, this fact does not defeat the applicant's argument that, by choosing to exercise his rights to intra-EU movement, he was forced to forego what was, in effect, a valuable form of employment insurance. This same benefit may not be available in other Member States and, for that reason, may in fact have a considerable impact on the applicant's decision to move. Applying the Court's own test, the loss of this right was liable 'to preclude or deter [Mr Graf] from ending his contract of employment in order to take a job with another employer.'⁷³ In the end, the causation test cannot really explain why this *particular* 'deterrent' effect does not fall within the scope of the Court's definition of the scope of Art 45 TFEU.

4.4 Summary

The case law on effects too uncertain and indirect strongly indicates the existence of (some) limits to the scope of the Court's broad effects-based reading of the term obstacle to intra-EU movement. It can be taken as evidence that, by its own admission, the Court's expansive interpretation of the term 'obstacle to intra-EU movement' is subject to some limits. However, the fundamental problem is that it remains rather unclear *why* certain measures do not fall within the scope of the Court's own reading of obstacles to intra-EU movement. Why, for example, does a national measure that was liable to have an impact (actually or potentially, directly or indirectly) on intra-EU trade not fall within the scope of Art 34 TFEU? Equally, why did the Court overlook Mr Graf's argument that the loss of a valuable insurance benefit was not liable to deter him from exercising his rights to intra-EU movement? The causation test offers one possible explanation. However, when pressed, this approach has been shown to be incapable of rationalising the case law adequately.

Rather than applying a test of causation, it is argued that the case law on effects too uncertain and indirect is better viewed as providing early indications of a qualitative *de minimis* test, which can now be seen to permeate the case law on obstacle to intra-

⁷³ Case 190/98 *Graf op. cit.* at note 4 at para 23.

EU movement.⁷⁴ Under this test, the Court is effectively opting to exclude *certain* national measures from the scope of the Treaty freedoms. This decision is based on the Court's own view of the *qualitatively* insignificant effects that the measures in question have on intra-EU movement. The emergence and substance of the *de minimis* test are considered in the next section.

5. A *de minimis* test?

5.1 Overview

The Court has stated repeatedly that the term 'obstacle to intra-EU movement' is not subject to a *de minimis* test.⁷⁵ Yet, on closer analysis, there is irrefutable evidence of such a test in the case law. Support for the operation of this test is not only to be found in those cases in which the Court refers to the 'insignificant' or 'modest' impact of particular Member State rules on intra-EU movement.⁷⁶ On the contrary, the *de minimis* test can also be seen to permeate the case law under a variety of different labels, including the criterion of effects too uncertain and indirect discussed in section 4. In substance, the *de minimis* test is qualitative as opposed to quantitative. The Court is not concerned with the *number* of subjects affected by particular national measures. Instead, it focuses on the qualitative nature of their effects on intra-EU movement. In short, the evidence in the case law strongly suggests that the Court has formed specific views regarding the insignificance of certain *non-discriminatory* national rules. In electing not to review such national measures as obstacles to intra-EU movement, the Court is, of course, making important judgments on the scope of Treaty freedoms and, ultimately, the appropriate division of competence between the Union and the Member States in connection with the regulation of the internal market. Unfortunately, the qualitative threshold is

⁷⁴ Chapter 6 will reconsider this argument in light of the subsidiarity principle.

⁷⁵ Eg Joined Cases 177 and 178/82 *van de Haar* [1984] ECR 1797 at para. 13, Case 167/73 *Commission v France (Maritime Regulations)* [1974] ECR 359 at para. 44, Case C-49/89 *Corsica Ferries France* [1989] ECR 4441 at para. 8, Case C-9/02 *Hughes de Lasteyrie du Saillant v Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I-2409 at para. 43, Case C-309/02 *Radlberger Getränkegesellschaft* [2004] ECR I-11763 at para. 68 and Case C-170/05 *Denkavit Internationaal BV* [2006] ECR I-11949 at para. 22.

⁷⁶ Eg Case C-20/03 *Burmanjer op. cit.* at note 5 at para. 31, Case C-134/03 *Viacom Outdoor Srl op. cit.* at note 5 at paras 36-37 and Joined Cases C-544/03 and C-545/03 *Mobistar SA op. cit.* at note 5 at para. 31.

currently set too low to offer an adequate solution to the problem of judicial overreach identified in Chapter 3.

5.2 The Court's rejection of the *de minimis* test

The Court has firmly rejected the application of a *de minimis* test as a device to limit the scope of the Treaty rules on intra-EU movement. The Court first made this point in its ruling in *van den Haar*.⁷⁷ In this case, the Court stated in clear terms that Art 34 TFEU:

‘does not distinguish between measures having an effect equivalent to quantitative restrictions according to the degree to which trade between Member States is affected. If a national measure is capable of hindering imports it must be regarded as a measure having an effect equivalent to a quantitative restriction, even though the hindrance is slight.’⁷⁸

The Court has since reiterated its rejection of the *de minimis* test across the Treaty freedoms. For example, in *Commission v France (Maritime Regulations)*, the Court stated that Art 45 TFEU (workers) demanded ‘the abolition of any discrimination based on nationality, *whatever be its nature or extent*, between workers of the Member States as regards employment, remuneration and other conditions of work and employment.’⁷⁹ Similarly, the Court has repeatedly stated that ‘a restriction on freedom of establishment is prohibited by [Art 49 TFEU] even if of limited scope or minor importance.’⁸⁰ The Court’s rejection of the *de minimis* test is perhaps best summarised in its first *Corsica Ferries* ruling.⁸¹ In this case, the Court concluded, in broad cross-freedom terms, that ‘the articles of the [TFEU] concerning the free movement of goods, persons, services and capital are fundamental Community provisions and any restriction, even minor, of that freedom is prohibited.’⁸²

⁷⁷ Joined Cases 177 and 178/82 *van de Haar op. cit.* at note 75.

⁷⁸ *Ibid.*, at para. 13.

⁷⁹ Case 167/73 *Commission v France (Maritime Regulations) op. cit.* at note 75 at para. 44 (this author’s emphasis).

⁸⁰ Case 270/83 *Commission v France (Tax Credits)* [1986] ECR at para. 21, Case C-34/98 *Commission v France (Social Security)* [2000] ECR I-99 at para. 49, Case C-9/02 *Hughes de Lasteyrie du Saillant op. cit.* at note 75 at para. 43, Case C-309/02 *Radlberger Getränkegesellschaft op. cit.* at note 68 at para. 75 and Case C-170/05 *Denkavit Internationaal op. cit.* at note 75 at para. 22.

⁸¹ Case C-49/89 *Corsica Ferries op. cit.* at note 75.

⁸² *Ibid.*, at para. 8. For recent confirmation, see Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] ECR I-1683 at para. 52.

There are arguably good reasons behind the Court's principled rejection of a *de minimis* test in EU free movement law. First and foremost, it would be difficult to apply.⁸³ As a quantitative (i.e. numerical) criterion, the *de minimis* test would require much more precise economic analysis. In order to trigger the protection of the Treaty freedoms in individual cases, relevant product or services markets would have to be defined and volumes of intra-EU trade quantified. This could be criticised for increasing the cost and complexity of judicial proceedings. Furthermore, it might also place considerable strain on individual applicants, who would be required to conduct such assessments in the first instance. Of course, one might argue that the position is no different in the field of competition law. The application of the Treaty rules on anti-competitive agreements (Art 101 TFEU) and the abuse of a dominant position (Art 102 TFEU) are also subject to a quantitative *de minimis* test requiring detailed market analysis.⁸⁴ However, in competition proceedings, the burden of demonstrating that the *de minimis* threshold is met falls primarily to specialist public authorities entrusted with the task of administering and enforcing the Treaty competition rules.⁸⁵

A *qualitative* approach to *de minimis* in EU free movement law could also be attacked – though for different reasons.⁸⁶ Under this approach to the *de minimis* threshold, national measures would be removed from the scope of the Treaty freedoms as a matter of policy. For example, the Court might take the view that the Treaty freedoms should not be applied to particular *categories* of Member State legislation (as in *Keck*). Equally, it may seek to remove from the scope of the term 'obstacle to intra-EU movement' national rules that simply translate into a marginal increase in the cost of conducting economic activity for all parties concerned. The

⁸³ See eg J. Snell, *Goods and Services in EC Law: A Study in the Relationship Between the Freedoms* (Oxford: OUP, 2002) at pp 101-102 and G. Davies, *Nationality Discrimination in the European Internal Market* (The Hague: Kluwer, 2003) at pp 101-103.

⁸⁴ Case 5/69 *Völk and Vervaecke* [1969] ECR 295 at 300. See also the Commission Notice: Guidelines on the effect on trade concept [2004] OJ C101/07 (section 2.4). For discussion, see A. Jones and B. Sufrin, *EU Competition Law* (4th Ed.) (Oxford: OUP, 2010), esp. at pp 171-177.

⁸⁵ See also on this point, Snell *op. cit.* at note 83 at p. 101.

⁸⁶ The quantitative and qualitative readings of *de minimis* may overlap in result. However, whereas the quantitative approach relies on economic analysis (eg defined product markets and volumes of intra-EU trade) in order to place limits on the Court's case law on obstacles to intra-EU movement, the qualitative approach is based on the Court's judgments about the type of measures that, in its view, pose no threat to the establishment of a functioning internal market.

principal criticism of the qualitative reading of *de minimis* is that, in the end, it ultimately grants the Court of Justice a further policy-making function. It enables the Court to make judgments about how its own interpretation of obstacles to intra-EU movement should be applied. This risks undermining the function of the justification framework and may also result in an inconsistent or arbitrary application of Treaty freedoms.⁸⁷

5.3 The Court's implicit *de minimis* test

Although the Court has consistently rejected the operation of a *de minimis* test in EU free movement law, its case law tells a rather different story.⁸⁸ In the first instance, the Court has made clear reference, on several occasions, to the insignificance or insufficient effects of particular measures on intra-EU movement in connection with its decision to exclude such rules from the scope of the Treaty freedoms. For example, in *Viacom Outdoor*, the Court pointed to the 'modest' nature of a non-discriminatory municipal tax imposed on outdoor advertising in connection with its decision not to scrutinise that measure as an obstacle to the freedom to provide services.⁸⁹ Similarly, in *Mobistar SA*, the ECJ concluded that a non-discriminatory tax on mobile phone infrastructure installed on the national territory, the only effect of which was to create 'additional costs in respect of the [provision of] the service in question,' did not fall within the scope of the broad effects-based reading of Art 56 TFEU (ex Art 49 EC).⁹⁰

Further evidence of a *de minimis* test can be detected in the case law on persons. This includes, in particular, a relatively early example from the case law on Art 49 TFEU (ex Art 43 EC). In *Konstantindis*, a Greek national who was engaged in economic activity in Germany sought to contest the refusal of the German Registry Office to

⁸⁷ This point is discussed further in section 5.4 below.

⁸⁸ Those supporting a *de minimis* test include AG Jacobs in Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179 at paras 38-49, S. Weatherill, 'After *Keck*: Some Thoughts on How to Clarify the Clarification,' (1996) 33(5) *CMLRev* 885 at pp 896-900 (though he prefers the label 'substantial hindrance'), J. Steiner et al *EU Law* (9th Ed.) (Oxford, OUP, 2009) at p. 388 and Barnard, *The Substantive Law of the EU op. cit.* at note 57 at p. 144. Support for the *de minimis* criterion is typically linked to the market access test. This conceptual model is discussed in detail in Chapter 5.

⁸⁹ Case C-134/03 *Viacom Outdoor Srl op. cit.* at note 5 at para. 38. See also Case C-231/03 *Conorzio Aziende Metano (Coname) v Comune di Cingia de' Botti* [2005] ECR I-7287 at para. 20.

⁹⁰ Joined Cases C-544/03 and C-545/03 *Mobistar SA op. cit.* at note 5 at para 31.

correct the spelling of his surname.⁹¹ For the Court, this refusal constituted an obstacle to intra-EU movement. Importantly, in reaching this finding, the Court imposed a *de minimis* threshold. According to the Court, the German registry rules were to be regarded as incompatible with the freedom of establishment:

*‘only in so far as their application causes a Greek national such a degree of inconvenience as in fact to interfere with his freedom to exercise the right of establishment enshrined in that article.’*⁹²

In the final analysis, the ECJ directed the referring court to find the German rules contrary to Art 49 TFEU by reason of the fact that the misspelling of his surname might lead potential clients to confuse the applicant with other persons.⁹³ In its more recent case law on Union citizenship, the ECJ has followed a similar approach. Moreover, since *Konstantinidis*, it would appear to have raised the operative *de minimis* threshold considerably. For example, in *Runevič-Vardyn*, the Court concluded that the refusal of the Lithuanian authorities to permit changes to the spelling of their surname on official documents would only constitute an obstacle to Art 21 TFEU where this caused the applicant ‘serious inconvenience.’⁹⁴

Finally, in the case law on goods, particularly strong support for the application of a *de minimis* test can be found in *Burmanjer*.⁹⁵ In that case, the Court was requested to examine Belgian legislation prohibiting itinerant selling. The defendants were charged with offering subscriptions to Dutch and German periodicals, but sought to argue in their defence that the Belgian prohibition was contrary to Art 34 TFEU. In its reply to the referring court, the ECJ turned to consider the selling arrangement test in *Keck*. On the basis of the available information, the Court concluded that it was unable to determine whether or not the Belgian measure was liable to have a greater impact on imported publications (the selling arrangement discrimination test). This was left for the referring court to consider. However, and crucially for present

⁹¹ Case C-168/91 *Christos Konstantinidis v Stadt Altensteig* [1993] ECR I-1191.

⁹² *Ibid.*, at para. 15 (this author’s emphasis).

⁹³ *Ibid.*, at para. 16.

⁹⁴ Case C-391/09 *Runevič-Vardyn*, Judgment of the Court (Second Chamber) of 12 May 2011 (nyr) at para. 76. See also earlier, Case C-148/02 *Garcia Avello* [2003] ECR I-11613 at para. 36 and Case C-353/06 *Grunkin and Paul* [2008] ECR I-7639 at para. 23. Though in Case C-208/09 *Sayn-Wittgenstein*, judgment of the Court (Second Chamber) of 22 December 2010 (nyr) the Court appeared to accept a lesser standard of ‘confusion and inconvenience,’ closer to its position in *Konstantinidis*. See paras 66-71 of C-208/09 *Sayn-Wittgenstein*.

⁹⁵ Case C-20/03 *Burmanjer op. cit.* at note 5.

purposes, the Court stated clearly that, *even if* it were proven that the contested measure was discriminatory, it might *nonetheless* fall outside of the scope of Art 34 TFEU by reason of its *insignificant* effects on intra-EU trade.⁹⁶

5.4 *De minimis*: qualitative not quantitative

On the strength of the above examples, the *de minimis* test in EU free movement law would appear to be qualitative rather than quantitative.⁹⁷ In other words, the Court is excluding national measures from the scope of the Treaty freedoms according to its particular view on their insignificance in so far as the establishment of a functioning internal market is concerned. Specifically, *Viacom Outdoor* suggests that the Court is prepared to overlook non-discriminatory national measures that simply increase the cost of economic activity marginally;⁹⁸ *Konstantindis* can be taken as evidence that the Court is not concerned with non-discriminatory rules that cause Member State nationals no real inconvenience in connection with their economic and non-economic activities within the internal market;⁹⁹ finally, *Burmanjer* would appear to demonstrate the Court's desire to exclude from the scope of Art 34 TFEU national measures that are liable only to have an abstract effect on the volume of intra-EU trade in goods.¹⁰⁰

The Court's approach in the above decisions can be contrasted with its response to attempts to invoke the *de minimis* threshold in *Bluhme*.¹⁰¹ In that case, the defendant Member State's application of the criterion was more quantitative than qualitative. The Danish Government had sought to argue that a prohibition on the importation (and keeping) of non-native bee species on a particular island within the national territory did not constitute an obstacle to intra-EU movement. Specifically, it had

⁹⁶ *Ibid.*, at para. 31.

⁹⁷ D. Edward and N. Nic Shuibhne, 'Continuity and Change in the Law Relating to Services' in A. Arnall, P. Eeckhout & T. Tridimas (Eds.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford: OUP, 2008) 243 at p.255. The qualitative approach is also implicit in the arguments of those favouring the application of a *de minimis* criterion as a limit on the market access test. See here esp. AG Jacobs in Case C-412/93 *Leclerc-Siplec op. cit.* at note 88 at paras 38-49 and L. Prete, 'Of Motorcycle Trailers and Personal Watercrafts the Battle over *Keck*' (2008) 35(2) *LJEU* 133 at pp 149-150.

⁹⁸ Case C-134/03 *Viacom Outdoor Srl op. cit.* at note 5.

⁹⁹ Case C-168/91 *Konstantinidis op. cit.* at note 91.

¹⁰⁰ Case C-20/03 *Burmanjer op. cit.* at note 5.

¹⁰¹ Case 67/97 *Bluhme* [1998] ECR I-8033.

argued that the relevant geographical market was too small to trigger the application of Art 34 TFEU. As the facts of the case set out, the island in question was that of Læsø, with a geographical footprint of only 114 km² and a population (at the time) of a mere 2365 souls.¹⁰² Crucially, the Court rejected this quantitative reading of *de minimis*. It stated explicitly that the application of the *Dassonville* test was not conditional on the size of the relevant market.¹⁰³

5.5 The explanatory force of the qualitative *de minimis* test

Evidence of the qualitative *de minimis* test in EU free movement law is not only to be found in those cases in which the Court speaks expressly of ‘insignificant’ or ‘modest’ effects on intra-EU movement or matters of ‘serious inconvenience’ to Member State nationals. Instead, it appears to underpin and better explain a much broader body of decisions. In particular, it is argued that the qualitative *de minimis* test can be used to improve our understanding of the case law on effects too uncertain and indirect discussed in section 4 above.¹⁰⁴ Rather than applying a test of causation, it is submitted that this criterion is, in effect, really just another expression of the implicit qualitative *de minimis* test.¹⁰⁵ Put another way, the Court is also using the ‘effects too uncertain and indirect’ test to remove from the scope of the Treaty freedoms national measures that it considers – as a matter of policy – of no importance to the establishment of a functioning internal market.

On the above view, it is possible to explain the Court’s decision not to review the national measures in *Krantz* and *Graf* as obstacles to intra-EU movement.¹⁰⁶ As discussed in section 4 above, in both cases, the Court invoked the criterion of effects

¹⁰² *Ibid.* at para. 9.

¹⁰³ *Ibid.* at para. 20. See also earlier, eg Joined Cases C-1/90 and C-176/90 *Aragonesa* [1991] ECR I-4151 at para. 24 and Joined Cases C-277/91, C-318/91 and C-319/91 *Ligur Carni and Others* [1993] ECR I-6621 at para. 37.

¹⁰⁴ Eg Case C-69/88 *Krantz op. cit.* at note 4, Case C-93/92 *CMC Motorradcenter op. cit.* at note 4, Case C-379/92 *Peralta op. cit.* at note 4, Case C-96/94 *Centro Servizi Spediporto Srl op. cit.* at note 4, Joined Cases C-140/94, C-141/94 and C-142/94 *DIP SpA op. cit.* at note 4, Case C-44/98 *BASF op. cit.* at note 4, Case C-266/96 *Corsica Ferries France op. cit.* at note 4, Case C-412/97 *Ed Srl op. cit.* at note 4, Case 190/98 *Graf op. cit.* at note 4 and Case C-291/09 *Francesco op. cit.* at note 4.

¹⁰⁵ See here also the Opinion of AG Jacobs in Case C-112/00 *Schmidberger* [2003] ECR I-5659 at para 65: ‘It is generally said that there is no *de minimis* rule in relation to Article 28 EC. But, as I have had occasion to note, the Court has accepted that some restrictions may be so uncertain and indirect in their effects as not to be regarded as capable of hindering trade. I would suggest that they may also be so slight and so ephemeral as to fall into the same category.’

¹⁰⁶ Case C-69/88 *Krantz op. cit.* at note 4 and Case C-190/98 *Graf op. cit.* at note 4.

too uncertain and indirect in support of this finding. Yet, as argued earlier, it remained unclear *why* the contested Member State regulations were not caught by the scope of the Treaty freedoms. After all, in *Krantz*, the Dutch legislation on asset seizure could clearly impact on intra-EU trade within the meaning of the *Dassonville* formula. Likewise, the loss of the statutory employment insurance benefit at issue in *Graf* could very well have had a deterrent effect on the decision of a Member State national to exercise their rights under Art 45 TFEU. However, viewed through the lens of a qualitative *de minimis* test, it is submitted that the Court's decisions in both might make considerably more sense.

First, with respect to *Krantz*, it is possible to argue that the contested Dutch rules fell outside of the scope of Art 34 TFEU by reason of the fact that they had nothing other than an abstract effect on the *volume* of intra-EU trade. The rules on the seizure of assets applied without any discrimination as regards either the nationality of the contracting parties or the origin of the products concerned. In this sense, the rules were directly comparable to the non-discriminatory trading rules that the Court also chose to exclude, shortly thereafter, from the scope of the same provision through the selling arrangement concept in *Keck*.¹⁰⁷ This latter decision can also be read as an expression of the same qualitative *de minimis* test, according to which the Court has sought (at least at one stage in its case law) to exclude from the scope of the *Dassonville* test genuinely non-discriminatory Member State legislation that is, at worst, simply liable to have an impact on the volume of intra-EU trade.¹⁰⁸

With respect to *Graf*, it is suggested that the Court's decision not to bring the contested statutory benefit within the scope of Art 45 TFEU can also be reinterpreted through the lens of the qualitative *de minimis* test. This case can be viewed on the same spectrum as *Konstantindis* and (now) *Runevič-Vardyn* discussed above.¹⁰⁹ In other words, it is suggested that the Court chose not to accept the applicant's loss of

¹⁰⁷ Joined Cases C-267/91 and C-268/91 *Keck and Mithouard op. cit.* at note 2.

¹⁰⁸ The Court's recent ruling in Case C-110/05 *Commission v. Italy (Motorcycle Trailers)* suggests that the Court has since changed its view on this point, at least with respect to a particular category of national measures (product use rules). In this author's view, this provides a concrete example of the potential for inconsistency/arbitrary choices in connection with a qualitative approach to *de minimis* (see section 5.2 above).

¹⁰⁹ Case C-168/91 *Konstantindis op. cit.* at note 91 and C-208/09 *Sayn-Wittgenstein op. cit.* at note 94.

his Austrian redundancy insurance as sufficient to trigger the application of Art 45 TFEU, notwithstanding its deterrent effects on intra-EU movement, by reason of the fact that it did not cause him '(serious) inconvenience.'

In several other cases, the Court's use of the criterion of effects too uncertain and indirect can also be better explained through the *de minimis* lens. *Corsica Ferries* offers the clearest illustration of this point.¹¹⁰ That case addressed Italian rules requiring all vessels docking in ports within that Member State to make use of compulsory mooring services. These services, it was argued, were charged at above cost price. The applicant argued, on one of a number of grounds, that this legislation was contrary to Art 34 TFEU. The Court rejected this argument quickly, referring expressly to the fact that any effects on intra-EU trade in goods were 'too uncertain and indirect.'¹¹¹ Crucially, this finding was not based on the absence of any causal link between the contested measure and the alleged obstacle to intra-EU trade. It is absolutely clear that any increase in transportation costs could, within the meaning of the *Dassonville* formula, hinder intra-EU trade in goods. Instead, in order to shield them from the *Dassonville* formula, the Court appeared to rely solely on the fact that the only effect of the contested mooring services was to increase the cost of economic activity marginally.¹¹² This is the same qualitative *de minimis* test that can be seen in the subsequent decisions in *Vicom Outdoor/Mobistar SA*, discussed above.

6. Conclusion

This chapter has sought to evaluate the Court's existing responses to the problem of judicial overreach identified in Chapter 3. Presenting the case law in its best light, it is submitted that the Court's qualitative *de minimis* test is the only judicial device that has had any real impact on delimiting the scope of the Court's expansive reading of the scope of the Treaty freedoms. The wholly internal rule has done little to

¹¹⁰ Case C-266/96 *Corsica Ferries op. cit.* at note 4. See also eg Case C-134/94 *Esso Española SA* [1995] ECR I-4223 (requiring petrol producers to guarantee supplies throughout the territory of Member States), Case C-379/92 *Peralta op. cit.* at note 4 (requiring vessel owners to carry special equipment) and Joined Cases C-140-2/94 *DIP SpA op. cit.* at note 4 (imposing a licencing condition on the opening of new shops within local areas).

¹¹¹ Case C-266/96 *Corsica Ferries op. cit.* at note 4 at para. 24.

¹¹² *Ibid.*, at para. 24: 'the use of mooring services represent[ed] an additional cost for transported products of approximately 0.05%.'

safeguard Member State autonomy. On the contrary, its gradual erosion by the Court has actually accompanied and indeed bolstered the expansion of the term ‘obstacle to intra-EU movement.’ In so doing, a greater not lesser sphere of Member State autonomy is now exposed to the full force of the Court’s obstacles case law. Equally, it has been argued that neither the concept of an inherent obstacle to intra-EU movement nor the criterion of effects too uncertain and indirect have contributed to the management of the outer limits of the Treaty freedoms – though for different reasons. The first device, the inherent obstacle concept, does not actually challenge the Court’s decision to intervene in the regulation of the internal market in the first place – the key subsidiarity problem identified in Chapter 3. Instead, it simply provides an alternative framework to justify Member State measures at Union level. With respect to the latter device, the criterion of effects too uncertain and indirect, this was shown, in effect, to add nothing to the substance of the qualitative *de minimis* test.

In summary, the qualitative *de minimis* test would appear to exclude from the scope of the term ‘obstacle to intra-EU movement’ three distinct categories of *non-discriminatory* national measures. These are: non-discriminatory Member State rules that (1) are liable only to have an abstract effect on the *volume* of intra-EU trade in goods;¹¹³ (2) simply increase marginally the *cost* of economic activity;¹¹⁴ or (3) cause Member State nationals no *serious inconvenience* in connection with their economic and non-economic activities within the internal market.¹¹⁵

Yet, although offering some protection to Member State autonomy, the Court’s qualitative *de minimis* test cannot be taken as an adequate solution to the subsidiarity

¹¹³ See, from a list of many, eg Case 75/81 *Blesgen op. cit.* at note 47, Case C-69/88 *Krantz op. cit.* at note 4, Joined Cases C-267/91 and C-268/91 *Keck and Mithouard op. cit.* at note 2, Joined cases C-69/93 and C-258/93 *Punto Casa SpA* [1994] ECR I-2355, Case C-20/03 *Burmanjer op. cit.* at note 5, Case C-441/04 *A-Punkt Schmuckhandel v. Schmidt* [2006] ECR I-2043. Contrast here, of course, the recent ruling in Case C-110/05 *Commission v. Italy (Motorcycle Trailers) op. cit.* at note 20 and Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR I-4273. The tension between these two competing lines of case law is analysed further in Chapter 6.

¹¹⁴ Eg, Case C-379/92 *Peralta op. cit.* at note 4, Case C-134/94 *Esso Española SA* [1995] *op. cit.* at note 109, and Joined Cases C-140-2/94 *DIP SpA op. cit.* at note 4, Case C-266/96 *Corsica Ferries op. cit.* at note 4, Case C-134/03 *Viacom Outdoor Srl op. cit.* at note 5 and Joined Cases C-544/03 and C-545/03 *Mobistar SA op. cit.* at note 5.

¹¹⁵ Eg Case C-168/91 *Konstantinidis op. cit.* at note 91, Case C-190/98 *Graf op. cit.* at note 4, Case C-148/02 *Garcia Avello op. cit.* at note 94 and Case C-353/06 *Grunkin and Paul op. cit.* at note 94 and C-208/09 *Sayn-Wittgenstein op. cit.* at note 94.

concerns associated with the Court's interpretation of the scope of the Treaty freedoms. For a start, the *de minimis* test is buried in a body of openly contradictory decisions. Indeed, it is rather difficult to hold up this test as a workable solution to the problem of judicial overreach identified in Chapter 3 when the Court itself persists in reiterating that its case law on obstacles to intra-EU movement applies even where the obstacle is slight. Moreover, even when presented in its best light, there is still a fatal problem with the qualitative *de minimis* test. In short, the threshold is set far too low to have any measurable impact on the Court's broad effects-based reading of the obstacle concept. For that reason, we must conclude that, from the perspective of the subsidiarity principle, there is still a real problem in the case law on obstacles to intra-EU movement. The Court's reading of the latter term remains dangerously close to affording that institution a 'general power to regulate' the internal market.

In the next chapter, attention shifts to the competing interpretative models that have been developed in response to the need to provide a workable framework to manage the scope of the Treaty freedoms. Briefly summarised, there are two general schools of thought in the literature. On the one hand, several commentators favour a narrow reading of the term obstacle to intra-EU movement. Under this approach, it is argued that the Court should focus on the elimination of discrimination on nationality grounds and/or guaranteeing mutual recognition within the internal market.¹¹⁶ On the other hand, several writers argue that the Court should adopt a much broader approach to its interpretative task. For them, the Court should use the Treaty freedoms as tools to scrutinise Member State measures that, *inter alia*, affect market access or interfere disproportionately with the economic and/or personal freedom of Union citizens.¹¹⁷ The purpose of the Chapter 5 is to critique both the narrow and broader conceptual models.

¹¹⁶ Those supporting the narrower view include, eg N. Bernard, *Multilevel Governance in the European Union* (Amsterdam: Kluwer, 2002), Snell *op. cit.* at note 83 and Davies *op. cit.* at note 83.

¹¹⁷ Those supporting the broader view include, eg AG Jacobs in Case C-412/93 *Leclerc-Siplec op. cit.* at note 88, Weatherill *op. cit.* at note 88, AG Maduro in Joined Cases C-158/04 and C-159/04 *Alfa Vita Vassilopoulos* [2006] ECR I-8135, E. Spaventa, *Free Movement of Persons in the European Union: Barriers to Movement in the Constitutional Context* (AH Alphen aan den Rijn: Kluwer, 2007) and Barnard *op. cit.* at note 57.

Chapter 5

Obstacles to intra-EU movement: the view from the literature

1. Introduction

Chapter 4 presented a critical analysis of the key judicial devices that the Court has developed to manage its increasingly broad effects-based definition of obstacles to intra-EU movement. Four key devices were identified: (1) the wholly internal rule; (2) the inherent obstacle concept; (3) the criterion of effects too uncertain and indirect and (4) the *de minimis* test. It was argued that, of these four judicial devices, only the *de minimis* test offers a solution to the problem of judicial overreach identified in Chapter 3. In summary, the Court's implicit *de minimis* test removes from the scope of the Treaty freedoms national measures with effects on intra-EU movement that the Court considers to be *qualitatively* insignificant. This includes three distinct categories of *non-discriminatory* national measures. These are: non-discriminatory Member State rules that (1) have only abstract effects on the volume of intra-EU trade in goods; (2) simply increase marginally the cost of economic activity; or (3) cause Member State nationals no serious inconvenience in connection with their economic and non-economic activities within the internal market. In conclusion, it was argued that, although offering the Member States a degree of protection, the threshold is set too low for the qualitative *de minimis* test to function as an effective brake on the Court's case law on obstacles to intra-EU movement.

This chapter turns to examine the key interpretative models that are used to rationalise the Court's case law on the scope of the Treaty freedoms. As things currently stand, the case law on intra-EU movement has been examined through a number of different lenses. These include, in particular: (1) non-discrimination on nationality grounds;¹ (2) mutual recognition² and (3) market access.³ In addition to

¹ Eg N. Bernard, 'Discrimination and Free Movement in EC Law' (1996) 45(1) *ICLQ* 82, G. Davies, *Nationality Discrimination in the European Internal Market* (The Hague: Kluwer, 2003), K. Banks, 'The Application of the Fundamental Freedoms to Member State Tax Measures: Guarding against Protectionism or Second-guessing National Policy Choices?' (2008) 33(4) *ELRev* 482 and D. Wilsher, 'Does *Keck* Discrimination Make Any Sense? An Assessment of the Non-discrimination Principle within the European Single Market' (2008) 33(1) *ELRev* 3. For an approach that combines

the aforementioned models, several commentators have developed alternative frameworks. For example, Poiras Maduro has argued that the Court should use its freedom to interpret the scope of the Treaty freedoms to correct structural biases within national democratic processes.⁴ More recently, Spaventa has reassessed the case law in light of the evolving status of Union citizenship.⁵

The purpose of this chapter is both to describe and to critique these competing conceptual models. The chapter begins in section two by analysing the narrow view of obstacles to intra-EU movement. According to this view, the scope of the Treaty freedoms should be limited to the elimination of all discrimination on nationality grounds and/or ensuring that Member States respect the principle of mutual recognition. Section 3 then turns to consider the broader view. On this interpretation, the term ‘obstacle to intra-EU movement’ goes beyond the discrimination/mutual recognition models. It permits the Court to scrutinise national measures on the basis of their effects on (1) market access; (2) the commercial or personal freedom of Union citizens; and (3) national democratic processes.

In summary, it is argued that there are difficulties with both the narrow and broader interpretations of obstacles to intra-EU movement. Neither approach is capable of providing a coherent framework capable of placing effective limits on the Court’s expansive effects-based tests. The narrow approach, focusing on discrimination and mutual recognition, has a certain degree of explanatory force. Moreover, if adopted, it would clearly safeguard a greater sphere of Member State autonomy. However, the effectiveness of the narrow view is undermined by its own supporters, who end up pushing the discrimination/mutual recognition tests beyond breaking point in their

discrimination with market access. see eg N. Nic Shuibhne, ‘The Free Movement of Goods and Article 28 EC: An Evolving Framework’ (2002) 27(4) *ELRev* 408.

² Eg J. Snell *Goods and Services in EC Law* (Oxford: OUP, 2002) and N. Bernard, *Multilevel Governance in the European Union* (Amsterdam: Kluwer, 2002).

³ Eg the Opinion of AG Jacobs in Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, S. Weatherill, ‘After *Keck*: Some Thoughts on How to Clarify the Clarification’ (1996) 33(5) *CMLRev* 885, C. Barnard, ‘Fitting the Remaining Pieces into the Goods and Persons Jigsaw’ (2001) 26(1) *ELRev* 34, C. Barnard, *The Substantive Law of the EU: the Four Freedoms* (3rd Ed.) (Oxford: OUP, 2010).

⁴ M. Poiras Maduro, *We the Court: The European Court of Justice & the European Economic Constitution* (Oxford: Hart, 1999).

⁵ E. Spaventa, *Free Movement of Persons in the European Union: Barriers to Movement in the Constitutional Context* (AH Alphen aan den Rijn: Kluwer, 2007). See also thereafter, eg A. Tryfonidou, ‘In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?’ (2009) 46(5) *CMLRev* 1591.

efforts to provide a workable interpretative framework. By contrast, the broader models are able to explain fully the evolving case law on obstacles to intra-EU movement. However, the weakness of the broader view is that it rests on shaky normative foundations. Specifically, those who support a broader reading of the scope of the Treaty freedoms rely on a series of untested assumptions regarding both the objectives of market integration and also the Court's freedom to pursue these through its interpretation of obstacles to intra-EU movement.

2. The narrow view

2.1 Discrimination and mutual recognition

The narrow approach to defining obstacles to intra-EU movement centres on the principles of non-discrimination and mutual recognition.⁶ However, it may also cover the popular 'market access' approach (discussed separately below), *provided* that this term is understood simply as a more fashionable synonym for discrimination.⁷ Under the first alternative (non-discrimination), the Treaty provisions are interpreted as interfering with the regulatory autonomy of the Member States only to the extent that this treats non-nationals or imported products and services differently to those on the national market. As discussed in Chapter 3, discrimination requires the elimination of both: (1) differences in treatment on the grounds of Member State nationality in objectively comparable situations and (2) equalities in treatment in otherwise non-comparable circumstances.⁸

Under mutual recognition, the second alternative, obstacles to intra-EU movement are conceptualised by attributing the primary right to regulate economic or non-economic activity to a specific Member State.⁹ This is typically the Member State in which goods are produced or, for persons, an individual's economic activity is permanently centred. According to the principle of mutual recognition, the home Member State (or Member State of establishment) retains primary competence to

⁶ See esp. Bernard *op. cit.* at note, chapter 2 and Snell *op. cit.* at note 2 at pp 33-35. For discussion, see also Spaventa *op. cit.* at note 5 at pp 75-88.

⁷ As Nic Shuibhne argues, discrimination and market access are not mutually exclusive. See Nic Shuibhne *op. cit.* at note 1 at p. 417. See further section 2.2 below.

⁸ See Chapter 3 above.

⁹ Snell *op. cit.* at note 2 at p. 48.

regulate the activities of those persons established within its territory. The other Member States must recognise this competence and may only apply their own national rules to the extent that these can be subsumed and defended within the Treaty's derogation framework.¹⁰

The starting point for advocates of the narrow view is the legitimacy of national regulation.¹¹ Under the principles of both non-discrimination and mutual recognition, the Member States retain primary competence for market regulation in the process of integration.¹² Member State legislation is not simply a 'temporary stopgap' that is destined over time to be superseded in its entirety by substantive Union policy objectives.¹³ The function of the Treaty freedoms, as interpreted by the Court, is instead simply to co-ordinate the exercise of regulatory competence across the individual Member States.¹⁴ Under the discrimination approach, this simply involves removing 'discriminatory' elements from national legislation. As far as mutual recognition is concerned, this requires the Court to adjudicate exclusively on the extent to which one Member State may apply its own national rules to economic activities that have *already* satisfied the legislation of another Member State.

Importantly, supporters of the narrow view argue that the Treaty freedoms are not intended to grant the Court an additional, broader power to scrutinise the existence or quality of national legislation against alternative Union policy objectives.¹⁵ On the contrary, it is argued that the opportunity to reshape national legislation in light of the latter is strictly limited to those cases that deal with discriminatory national rules or conflicts between the legislation of the home and host Member States (for mutual recognition). In both cases, this re-assessment of the substance of national policy takes place at the secondary *justification* stage. To defend their view, advocates of the narrow reading of the obstacle concept point, in particular, to the fact that the

¹⁰ Bernard *op. cit.* at note 2 at pp 17-18.

¹¹ *Ibid.*, at p. 17. See also Spaventa *op. cit.* at note 5 at p. 77.

¹² Bernard *op. cit.* at note 2 at p. 17 and, to the same effect, Snell *op. cit.* at note 2 at p. 35.

¹³ Bernard *op. cit.* at note 1 at p. 103.

¹⁴ Snell *op. cit.* at note 2 at p. 48 and Spaventa *op. cit.* at note 5 at p. 76

¹⁵ Snell *op. cit.* at note 2 at p. 45, who argues that: 'In the context of the scope of the free movement provisions, the Court should be careful not to extend their reach too far and should not embark on a project of wholesale negative harmonisation...The Court should [instead] guarantee that products from other Member States are able to compete on truly equal terms with domestic products and to maintain their competitive advantage.' See also Bernard *op. cit.* at note 1 at p. 105.

Treaty does not provide any clear guidance on the specific type of market that is being created. As Bernard succinctly notes:

‘the free movement provisions [simply] tell us that there shall be a common market and that the obstacles created by the Member States to the existence of that market must be removed, but they do not tell us anything about the substantive characteristics of that market.’¹⁶

The only substantive characteristic that is clear and uncontested is the prohibition of all discrimination on the grounds of Member State nationality.¹⁷ It is universally accepted that the Treaty freedoms are specific expressions of the general prohibition of nationality discrimination in Art 18 TFEU. Beyond this, there is, however, no firm agreement on the specific policy objectives that are to be achieved through the interpretation of the Treaty freedoms. The prevailing view is that the Treaty framework (increasingly) reflects an ‘open economic constitution’ in which market freedom is balanced with other competing non-economic or ‘non-market’ interests.¹⁸

The above line of reasoning can also be applied to the mutual recognition test. Although framed in different language, there is arguably little to distinguish this approach from the discrimination test. On one view, it is simply an alternative and perhaps more useful way of conceptualising discrimination analysis within the internal market.¹⁹ Rather than discussing the fact that the legislation of another Member State may discriminate against goods/economic actors from other Member States, the mutual recognition approach focuses on the conflict between the two different regulatory regimes. However, this is simply a shift in perspective. The discussion is one of ‘dual regulatory burdens’ rather than indirect discrimination.²⁰ For example, in its decision in *Cassis*, the Court famously stated that:

¹⁶ Bernard *op. cit.* at note 1 at p. 105. See here also Spaventa *op. cit.* at note 5 at p. 76, who concedes that: ‘[it] is not self-evident that the Court’s generous interpretation of the free movement provisions is supported by the Treaty, which... does not give us any indication of the preferred type of market economy.’

¹⁷ Spaventa *op. cit.* at note 5 at p. 76.

¹⁸ C. Semmelmann, ‘The European Union’s Economic Constitution under the Lisbon Treaty: Soul-Searching Shifts the Focus to Procedure’ (2010) 35(4) *ELRev* 516 at p. 518, Spaventa *op. cit.* at note 5 at p. 74 and Póiares Maduro *op. cit.* at note 4 chapters 4, 5 and 6 and esp. at pp 159-161.

¹⁹ See here esp. Snell *op. cit.* at note 2 at p. 46: ‘[discrimination] encompasses situations where a Member State applies its rules to circumstances which have already been subject to the regulatory system of another Member State. Thus, a double regulatory burden is considered discrimination.’

²⁰ *Ibid.*

‘there is... no valid reason why, provided they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State.’²¹

This statement is widely taken to denote the origin of the ‘new approach’ to market regulation based on mutual recognition.²² Under this approach, the Court replaced a system of dual Member State regulation (by both the home and host States) with a single set of regulations (those of the home State).²³ However, the *Cassis* ruling can just as easily be squared with the prohibition of discrimination.²⁴ The contested German legislation imposing a minimum alcohol content on all fruit liqueurs was indirectly discriminatory. Although it applied to both domestic and imported products alike, the contested rules favoured competing national products, which necessarily met the prescribed conditions.

2.2 The strength of the narrow view

Whether expressed as discrimination or through the lens of mutual recognition, the narrow view has significant explanatory force.²⁵ This adds to its strength as a conceptual model. Notwithstanding the fact that the Court prefers increasingly to define the scope of the obstacle concept in broad effects-based language, much of the case law still deals with *discriminatory* national measures. This includes a number of the Court’s apparently groundbreaking rules on the scope of the Treaty freedoms, such as *Dassonville*, *Cassis*, *van Binsbergen*, *Säger*, *Kraus* and *Gourmet*.²⁶ Each of these rulings can be interpreted using the discrimination and/or mutual recognition models. Indeed, Davies has argued that there is:

‘very little one can point to as examples of non-discriminatory restrictions which have been found to fall within the scope of the Treaty.

²¹ Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649 at para. 14.

²² On this point, see Bernard *op. cit.* at note 2 at p. 18. See also the ‘Communication from the Commission Regarding the *Cassis de Dijon* Judgment’ [1980] OJ C 256/2.

²³ Barnard, *The Substantive Law of the EU op. cit.* at note 3 at p. 93.

²⁴ On this point, see eg Nic Shuibhne *op. cit.* at note 1 at pp 409-410.

²⁵ Spaventa *op. cit.* at note 5 at p. 76

²⁶ Case 8/74 *Dassonville* [1974] ECR 837, Case 120/78 *Cassis op. cit.* at note 21, Case 33/74 *van Binsbergen* [1974] ECR 1299, Case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd* [1991] ECR I-4221, Case C-19/92 *Dieter Kraus v Land Baden-Württemberg* [1993] ECR I-1663 and Case C-405/98 *Gourmet International Products AB* [2001] ECR I-1795. This argument is developed further in chapter 6.

Notwithstanding ambiguous language in the judgments the actual results of cases fall overwhelmingly within the definition of indirect discrimination.²⁷

Similarly, Bernard also maintains that the principle of mutual recognition provides the ‘best fit’ in the case law on the economic freedoms.²⁸ The implication of both commentators’ arguments is that the Court is simply being rather careless or, at worst, fundamentally disingenuous in its interpretation of the Treaty freedoms. Instead of more accurately adhering to the discrimination model, the Court is instead arguably trying to normalise a (potentially) much broader reading of obstacles to intra-EU movement. We shall return to consider this point in Chapter 6.

2.3 The weakness of the narrow view

The discrimination and/or mutual recognition approach to obstacles to intra-EU movement offers an effective solution to the problem of judicial overreach identified in Chapter 3. By re-focusing the Court’s case law on the elimination of discrimination and/or the co-ordination of national policies, the narrow approach would certainly increase respect for Member State autonomy. This would also seem to sit comfortably alongside the demands of the subsidiarity principle. However, the fundamental problem with the narrow view of the scope of the Treaty freedoms is that it does not appear to convince even its own supporters. In fact, those writers favouring either the discrimination and/or mutual recognition models actually seek to take the case law *further*.

The weakness of the narrow approach can be seen in Davies’ analysis of the *Bosman* ruling.²⁹ To date, Davies has offered one of the strongest defences of the discrimination model. However, in the final analysis, he effectively ends up integrating the non-discriminatory *Bosman* ruling into his obstacle framework. According to Davies, the *non-discriminatory* transfer rules at issue in *Bosman* constituted a ‘special type of restriction,’ and he concedes that it might be necessary to consider such rules as obstacles to intra-EU movement, which must be justified in EU law.³⁰ However, in adopting this position, he ends up undermining his otherwise

²⁷ Davies *op. cit.* at note 1 at p. 87. Davies defines indirect discrimination broadly. See esp. pp 55-56.

²⁸ Bernard *op. cit.* at note 2, chapter 2.

²⁹ Case C-415/93 *Bosman* [1995] ECR I-4921.

³⁰ Davies *op. cit.* at note 1 at pp 87-88.

coherent framework. Either the Treaty freedoms extend to capture certain non-discriminatory national measure or they do not.

Bernard and Snell also work hard to rationalise the Court's decisions in *Alpine Investments* and *Bosman* with their preferred conceptual model – mutual recognition.³¹ Bernard introduces a new criterion into his mutual recognition framework in order to distinguish between the Court's judgments in *Keck* (Art 34 TFEU) and *Alpine Investments* (Art 56 TFEU).³² Under his mutual recognition test, competence to regulate product selling arrangements (in *Keck*) and direct marketing methods (in *Alpine Investments*) falls to the host Member State; in other words, to the Member State in which the products were sold or the services marketed. This assertion follows from his argument that, under the mutual recognition principle, regulatory competence is divided between (1) the Member State of production or permanent establishment and (2) the Member State in which goods and services are offered on the market.

As Bernard concedes, the Court's ruling in *Alpine Investments* 'creates difficulties' for the above conceptual framework.³³ He argues that, in that case, it was the *home* and not the host Member State that was best placed to regulate the manner in which services were offered to potential recipients in *other* Member States. The Court also acknowledged this point.³⁴ In order to square the circle, Bernard qualifies his mutual recognition framework. He does so by arguing that, in each case, it is necessary to identify the 'country of establishment of the economic operator whose activity is being regulated.'³⁵ According to Bernard, it is this Member State of permanent establishment that retains primary competence for the regulation of that individual's economic activities throughout the internal market.³⁶

³¹ Bernard *op. cit.* at note 2, Snell *op. cit.* at note 5.

³² Bernard *op. cit.* at note 2 at pp 22-27. This distinction is drawn from his analysis of *Keck*, which he argues 'constitutes a return to an interpretation of the free movement provisions in the Treaty in terms of mutual recognition' (at p. 22). Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1992] ECR I-6097 and Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141.

³³ Bernard *op. cit.* at note 2 at p. 23.

³⁴ Case C-384/93 *Alpine Investments op. cit.* at note 32 at para. 48.

³⁵ Bernard *op. cit.* at note 2 at p. 25.

³⁶ *Ibid.*

Snell goes even further in order to legitimise the Court's rulings on non-discriminatory obstacles in *Alpine Investments* and *Bosman*. He abandons his otherwise coherent mutual recognition framework entirely. For Snell, the solution to the difficulties posed by *Alpine Investments* and *Bosman* is found using market access. This marks a complete break with the narrow view. To make sense of both rulings, Snell argues that the scope of Arts 45 and 56 TFEU should extend beyond mutual recognition to capture '[non-discriminatory] national rules creating a direct impediment to market access.'³⁷ This additional market access test is simply bolted on to the otherwise applicable mutual recognition framework. Again, Snell's model is open to the same criticism levelled at Davies: either mutual recognition is the guiding principle or it is not.

2.4 Summary

In principle, the narrow approach to defining the scope of the Treaty offers a possible solution to the need to place appropriate limits on the Court's case law. However, the problem with the non-discrimination and/or mutual recognition models is that they would seem to go too far in the opposite direction. In other words, they appear to hand back too much regulatory autonomy to the Member States – at least in the eyes of their own supporters. Indeed, as the above analysis has shown, those who advocate a narrow approach to obstacles to intra-EU movement ultimately abandon their own frameworks in order to bring a least *certain* non-discriminatory national measures within the scope of the Court's review.³⁸ An approach to delimiting the Court's reading of the Treaty freedoms cannot be based on interpretative models that rely on such intellectual gymnastics. Greater coherence is required.

³⁷ Snell *op. cit.* at note 2 at p. 127.

³⁸ The detail of their arguments and suggested motivation is discussed in Chapter 6.

3. The broader view

3.1 Overview

The broader view of obstacles to intra-EU movement comprises several key models. The first model uses market access to manage the scope of the Treaty freedoms.³⁹ Under the market access model, the term ‘obstacle to intra-EU movement’ is interpreted as prohibiting all national measures that affect access to the market of that Member State for goods, services or persons from other Member States. This test is usually qualified in the literature by a *de minimis* test (discussed in chapter 4). Alongside the market access approach, Spaventa has offered a second variant based on Union citizenship.⁴⁰ The basic argument here is that the Court’s interpretation of obstacles to intra-EU movement must be adjusted to reflect this legal status, which, in the Court’s own words, is now ‘destined to be the fundamental status of nationals of the Member States.’⁴¹ Finally, Poiares Maduro has formulated a third proposal.⁴² He argues that the Court’s freedom to interpret the scope of the Treaty freedoms should be used to correct structural biases within national democratic processes.

Under the broader view, the Treaty freedoms are interpreted as going beyond the mere elimination of discrimination on nationality grounds or the co-ordination of regulatory competence across different Member States. It is argued that they should also capture genuinely non-discriminatory national rules. In this sense, the Treaty freedoms acquire an additional function. They become tools that may be used to review of the very existence (i.e. substance) of national legislation against specific *Union* policy objectives. The Treaty freedoms may be used to seek the review of genuinely non-discriminatory national rules that simply define the characteristics of

³⁹ See eg the Opinion of AG Jacobs in Case C-412/93 *Leclerc-Siplec op. cit.* at note 3 at paras 38-49, Weatherill *op. cit.* at note 3, Barnard, ‘Fitting the Remaining Pieces into the Goods and Services Jigsaw’ *op. cit.* at note 3, J. Steiner et al *EU Law* (9th Ed.) (Oxford: OUP, 2009) at p. 388, E. Spaventa, ‘Leaving *Keck* behind? The Free Movement of Goods after the Rulings in *Commission v. Italy* and *Mickelsson and Roos*’ (2009) 36(4) *ELRev* 914, P. Wennerås and K B Moen, ‘Selling Arrangements, Keeping *Keck*’ (2009) 35(3) *ELRev* 387 and Barnard, *The Substantive Law of the EU op. cit.* at note 3 at p. 144.

⁴⁰ Spaventa *op. cit.* at note 5, as developed in E. Spaventa, ‘Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects’ (2008) 45(1) *CMLRev* 13 and Tryfonidou *op. cit.* at note 5. See also Opinion of AG Poiares Maduro in Joined Cases C-158/04 and C-159 *Alfa Vita Vassilopoulos AE* [2006] ECR I-8135 at paras 40-51.

⁴¹ Case C-184/99 *Grzelezyk* [2001] ECR I-2691 at para.31.

⁴² Poiares Maduro *op. cit.* at note 4.

particular Member State markets.⁴³ The broader reading of the scope of the Treaty freedoms therefore offers far less scope to limit the Court's expansive effects-based reading of the term 'obstacle to intra-EU movement.' In fact, it actually supports the Court's preferred expansive reading of the scope of that term.

3.2 Market access

Market access is currently the most favoured interpretative model in EU free movement law. A growing body of writers now argue that the Court should interpret the scope of the Treaty freedoms as capturing all national measures that affect access to the market of that Member State for goods, persons, services and capital lawfully circulating/operating elsewhere within the internal market.⁴⁴ Advocate General Jacobs forcefully made the case for a market access test in *Leclerc-Siplec*.⁴⁵ In his Opinion, the Advocate General criticised the substance of the Court's ruling in *Keck*. He argued against the Court's decision to introduce a rigid distinction between two different categories of national rule ('product measures' versus 'selling arrangements.')

In his view, certain non-discriminatory national rules regulating 'selling arrangements,' such as rules severely restricting the sale of products, could in fact constitute serious obstacles to imports.⁴⁶ To resolve this problem, he argued that the Court should alter its approach and interpret Art 34 TFEU as prohibiting all national measures that substantially hinder market access.⁴⁷ This test reflected his belief in a 'guiding principle' of market integration, according to which:

⁴³ It is important to stress the importance of the Court's justification analysis in determining the final outcome in particular cases. As others have rightly noted, the fact that the Court favours a broader reading of obstacles to intra-EU movement does not mean that, in result, the Court will adopt a particular substantive view on, say, the importance of economic efficiency. Indeed, it remains open to the Court to find genuinely non-discriminatory national rules justified on various grounds.

⁴⁴ Eg Weatherill *op. cit.* at note 3, Barnard, 'Fitting the Remaining Pieces into the Goods and Services Jigsaw' *op. cit.* at note 3, L. Prete, 'Of Motorcycle Trailers and Personal Watercrafts: the Battle over *Keck*' (2008) 35(2) *LIEI* 131, Steiner et al *op. cit.* at note 39 at p 388, Spaventa *op. cit.* at note 39, Barnard, *The Substantive Law of the EU op. cit.* at note 3, G. Straetmans, 'Market Access, The Outer Limits of Free Movement of Goods and... The Law?' in Bulterman et al (Eds.), *Views of European Law from the Mountain* (The Hague: Kluwer, 2009) at p. 91.

⁴⁵ Opinion of AG Jacobs in Case C-412/93 *Leclerc-Siplec op. cit.* at note 3 at paras 38-49.

⁴⁶ See also Barnard, 'Fitting the Remaining Pieces into the Goods and Services Jigsaw' *op. cit.* at note 3 at p. 52.

⁴⁷ Opinion of AG Jacobs in Case C-412/93 *Leclerc-Siplec op. cit.* at note 3 at para. 42. See also Weatherill *op. cit.* at note 3 at pp 896-897.

‘all undertakings which engage in a legitimate economic activity in a Member State should have unfettered access to the whole of the Community market, unless there is a valid reason for denying them full access to a part of that market.’⁴⁸

3.2.1 The strength of market access

The market access model draws considerable strength from its explanatory force. As Spaventa notes, ‘those who support the market access approach have... a reasonable claim that it reflects the state of the law better than the discrimination approach.’⁴⁹ Key rulings in this respect include, in particular, the landmark judgments in *Alpine Investments*, *Bosman* and *Commission v. Italy (Motorcycle Trailers)*.⁵⁰ In each of these decisions, the Court placed market access at the centre of its reasoning.⁵¹

In addition to its explanatory force, the market access test has other appealing features.⁵² First, on one view at least, the test is easier to apply than the discriminatory/mutual recognition models.⁵³ Unlike the latter tests, there is no need to identify comparators or determine the relevant ‘home’ and ‘host’ Member States. For this reason, the market access test can avoid some of the analytical weaknesses associated with the narrow view discussed above.⁵⁴ Secondly, it is often argued that a single test based on access to the market is desirable, as this would unify the case law on obstacles to intra-EU movement.⁵⁵ This would also have the advantage of eradicating persisting anomalies in the case law, such as the continued existence of the Court’s ‘selling arrangement’ test to remove a very specific category of non-discriminatory national rule from the scope of Art 34 TFEU. Under a uniform market access approach, such non-discriminatory trading rules would fall to be assessed like any other measure: on a case-by-case basis, requiring justification by the Member

⁴⁸ Opinion of AG Jacobs in Case C-412/93 *Leclerc-Siplec op. cit.* at note 3 at para. 41.

⁴⁹ Spaventa *op. cit.* at note 5 at p. 76. See also eg J. Snell, ‘The Notion of Market Access: A Concept or a Slogan?’ (2010) 47(2) *CMLRev* 437 at p. 437.

⁵⁰ Case C-384/93 *Alpine Investments op. cit.* at note 32, Case C-415/93 *Bosman op. cit.* at note 29 and Case C-110/05 *Commission v. Italy (Motorcycle Trailers)* [2009] ECR I-519.

⁵¹ See Chapter 3 for detailed discussion.

⁵² For critical discussion see eg Barnard, ‘Fitting the Remaining Pieces into the Goods and Services Jigsaw’ *op. cit.* at note 3 at pp 52-59 and Snell *op. cit.* at note 49.

⁵³ Contra Davies, who argues that the discrimination test is easier to apply. Davies *op. cit.* at note 1 at p. 104.

⁵⁴ Spaventa *op. cit.* at note 5 at p. 91.

⁵⁵ Barnard *op. cit.* at note 3 at pp 52-53.

State only to the extent that they affect access to the markets of the Member States for imported goods.

3.2.2 The weakness of market access

3.2.2.1 Descriptive critique: A ‘concept or a slogan’?⁵⁶

For all its popularity, there are serious problems with the market access model. Perhaps most obviously, it remains unclear what the term actually means.⁵⁷ To date, the Court has stubbornly refused to offer any detailed guidance on this important point, even when expressly invited to reflect on this precise issue.⁵⁸ Instead, the ECJ continues to present the market access test as a proposition of uncontested doctrinal clarity. Yet, the meaning of market access remains far from clear. As others now increasingly acknowledge, the term could mean several very different things.⁵⁹ First, market access could simply denote a right for goods, persons, services and capital to *enter* the market of a particular Member State; in other words, to ‘cross the border’ and ‘access’ a particular national (Member State) market. Secondly, market access might instead (or additionally) refer to a right of *equal treatment* with national goods or economic operators *within* a Member State (i.e. post-entry). Finally, under a third alternative, the same term could be interpreted in terms of a *right to pursue an economic activity* within a Member State free from arbitrary regulation.

The confusion over the exact meaning of market access is problematic. The scope of the Treaty freedoms – and therefore the Court’s power of review over national regulation – is radically different according to each interpretation. Under the first two alternatives (the entry and discrimination models), the term ‘obstacle to intra-EU movement’ does not actually extend beyond the boundaries of the narrow approach discussed above (section 2). In this context, market access is therefore simply a

⁵⁶ This label is borrowed from Snell Snell *op. cit.* at note 49.

⁵⁷ Oliver and Enchelmaier write of an ‘inherently nebulous’ criterion. P. Oliver and S. Enchelmaier, ‘Free Movement of Goods: Recent Developments in the Case Law’ (2007) 44(3) *CMLRev* 649 at p. 674. Spaventa refers to market access as a ‘concept in search of a definition.’ Spaventa *op. cit.* at note 5 at p. 89. See also Snell *op. cit.* at note 49 at p. 437.

⁵⁸ See most recently Case C-110/05 *Commission v. Italy (Motorcycle Trailers)* *op. cit.* at note 50. See T. Horsley, ‘Anyone for *Keck*?’ Case Comment (2009) 46(6) *CMLRev* 2001 at p. 2001.

⁵⁹ Davies *op. cit.* at note 1 at p. 104, Spaventa *op. cit.* at note 5 at pp 93-99, Horsley *op. cit.* at note 58 at pp 2012-2015 and Snell *op. cit.* at note 49.

‘slogan,’ adding little to our existing understanding of the case law.⁶⁰ By contrast, under the third alternative (the economic freedom reading), the scope of the Treaty freedoms is potentially far broader. As a right to be free from arbitrary Member State regulation, this reading of market access represents a clear step beyond the narrow model. Under this approach, the Treaty freedoms may be used to contest genuinely non-discriminatory national rules. Interestingly, it is this latter interpretation of market access that underpins Advocate General Jacobs’ view:

‘all undertakings which engage in a legitimate economic activity in a Member State should have unfettered access to the whole of the Community market, unless there is a valid reason for denying them full access to a part of that market.’⁶¹

Crucially, the case law suggests that, at times, the Court has supported all three uses of the market access term. For example, in *Alpine Investments* and *Bosman*, the Court referred to the concept in connection with regulations that actually prevented Member State nationals from moving between the markets of two different Member States.⁶² By contrast, in several other decisions, market access was concerned with ensuring equal treatment with existing market operators within specific national markets. This covers the decisions in *Gourmet International Products* (Art 34 TFEU) and *CaixaBank France* (Art 49 TFEU).⁶³ In the former case, the Court stated clearly that the contested ban on the advertising of alcoholic products in that State was liable to favour competing national brands with which Swedish consumers were generally more familiar.⁶⁴ Similarly, in the latter ruling, the French rules prohibiting banks from offering remunerated sight accounts to retail customers protected incumbent (French) banks from intra-EU competition. Finally, in another body of case law, the Court has used market access as a tool to scrutinise the very existence of market

⁶⁰ To borrow Snell’s phrase. See Snell *op. cit.* at note 49 at p. 437.

⁶¹ Opinion of AG Jacobs in Case C-412/93 *Leclerc-Siplec op. cit.* at note 3 at para. 41.

⁶² Case C-384/93 *Alpine Investments op. cit.* at note 32 and Case C-415/93 *Bosman op. cit.* at note 29. Technically, the contested measures in both decisions prevented the applicants from *leaving* the market of one Member State in order *thereafter* to enter the market of another. This point is discussed further in Chapter 6.

⁶³ Case C-405/98 *Gourmet International Products op. cit.* at note 26 and Case C-442/02 *CaixaBank France v Ministère de l’Économie, des Finances et de l’Industrie* [2004] ECR I-8961.

⁶⁴ Case C-405/98 *Gourmet International Products op. cit.* at note 26 at para. 18.

regulation. This includes aspects of the Court's case law on 'golden shares.'⁶⁵ As noted in Chapter 3, this line of case law deals with national measures that place restrictions on the ownership and/or management of previously State-owned undertakings.

To the extent that it is used to scrutinise the very existence of market regulation (the third alternative), market access falls down as an effective limit on the Court's interpretation of obstacles to intra-EU movement. In effect, the use of market access in this manner is all but indistinguishable from the Court's pre-*Keck* application of the *Dassonville* approach.⁶⁶ In both cases, the Court is invoking the Treaty freedoms in order to review the efficiency or reasonableness of market regulation. Of course, under the market access approach, the Court's scrutiny of Member State measures is now conditioned by the application (at least implicitly) of a qualitative *de minimis* test. However, as argued in Chapter 4, this judicial device does very little in practice to curb the scope of the Treaty freedoms. The operative qualitative threshold is set far too low for the *de minimis* test to have any real impact.

3.2.2.2 Normative weakness

So far the criticism of the market access model has been essentially descriptive. It has been argued that market access is essentially a rather neat judicial device without any autonomous meaning.⁶⁷ However, the greater problem for the market access test is normative. What justifies the Court's use of market access to shift its reading of obstacles to intra-EU movement beyond the elimination of discrimination and/or the co-ordination of Member State rules to the scrutiny of their very existence on efficiency (or other) grounds? It is perfectly possible to argue that the Treaty freedoms *should* guarantee Member State nationals 'unfettered access to entire

⁶⁵ Eg Case C-367/98 *Commission v Portugal (Golden Shares)* [2002] ECR I-4731 and Case C-463/00 *Commission v Spain (Golden Shares)* [2003] ECR I-4581. This line of case law is discussed further in Chapter 6.

⁶⁶ See here eg Joined Cases 60 and 61/84 *Cinéthèque SA and others* [1985] ECR 2605, Case 145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR 3851 and C-362/88 *GB-INNO-BM* [1990] ECR I-667. See here also Snell *op. cit.* at note 49 at p. 470, who also notes that the ambiguity of market access 'carries a permanent risk of being extended to cover situations that the original proponents of the terms may not have envisaged.'

⁶⁷ Snell *op. cit.* at note 49 at pp 470-472.

[Union] market.’⁶⁸ This follows from the inherently open-textured nature of the individual Treaty freedoms, many of which refer only to the elimination of ‘restrictions’ on intra-EU movement.⁶⁹ However, in order to normalise a broader view of the scope of these provisions, it is necessary to identify a clear normative basis in the Treaty framework to justify the shift beyond the non-discrimination/mutual recognition models. As Spaventa argues, ‘the expansion of the scope of the [TFEU] at the expense of national regulatory autonomy must be justified by sound hermeneutical principles or else its legitimacy might be doubted.’⁷⁰

To date, advocates of the market access test have yet to provide a coherent and convincing argument to support their view. It remains largely assumed that the Treaty supports a broader view of obstacles to intra-EU movement. This is despite of the fact that it is far from clear that the Treaty does in fact sanction the use of the Treaty freedoms as tools to scrutinise the efficiency or reasonableness of Member State regulation. Rather, as noted earlier, the prevailing view is that the Treaty reflects an ‘open economic constitution’ in which market freedom is balanced with other competing non-economic or ‘non-market’ interests.⁷¹

3.2.3 Summary

The market access test has a number of appealing features, which perhaps explain its current popularity amongst commentators. However, in the end, its effectiveness as a limit on the Court’s interpretation of the scope of the Treaty freedoms is compromised by both descriptive and normative weaknesses. At the level of description, market access adds little to our existing understanding of the case law. As Snell observes:

‘when pressed, the notion of market access collapses into economic freedom or anti-protectionism, and as a consequence it obscures more than it clarifies. The term could be abandoned with little loss to the law.’⁷²

⁶⁸ AG Jacobs in Case C-412/93 *Leclerc-Siplec op. cit.* at note 3 at para. 41.

⁶⁹ See Arts 34, 35, 49, 56 and 63(1) TFEU.

⁷⁰ Spaventa *op. cit.* at note 39 at p. 915.

⁷¹ Semmelmann *op. cit.* at note 18 at p. 518, Spaventa *op. cit.* at note 5 at p. 74 and Póitres Maduro *op. cit.* at note 4 chapters 4, 5 and 6 and esp. at pp 159-161.

⁷² Snell *op. cit.* at note 49 at p. 438.

The genius of market access is that it conceals the fact that there is a fundamental choice to be made between the narrow and broader readings of the Treaty freedoms. It offers the Court a ‘third way’ to navigate its way between the two competing approaches on a case-by-case basis.⁷³ Under the slogan of market access, and using the qualitative *de minimis* test, the Court is able to creep beyond the narrow discrimination/mutual recognition model in order to review the efficiency or reasonableness of market regulation, whilst avoiding the criticism that it has (once again) lost control over the scope of the Treaty freedoms. Yet, this intuitive approach still suffers from a key normative problem. Specifically, one may dispute whether and, if so the extent to which, the Treaty framework supports use of the Treaty freedoms as tools to advance economic freedom within the internal market.

3.3 Union citizenship

3.3.1 Overview

As discussed in Chapter 3, the Court has repeatedly stated that Union citizenship ‘is destined to be the fundamental status of all Member State nationals.’⁷⁴ Perhaps inspired by this judicial pronouncement, several writers and one Advocate General in particular have called for a reassessment of the case law on obstacles to intra-EU movement in light of this fundamental legal status. Importantly, commentators have also turned to Union citizenship in order to inject much needed normative support into the broader model.⁷⁵ However, although offering some strong arguments, it is submitted that, like market access, the Union citizenship model is also open to criticism on normative grounds.

⁷³ *Ibid.*, at p. 471. See also Spaventa *op. cit.* at note 5 esp. at p. 94, who characterises the Court’s approach to market access as intuitive.

⁷⁴ Case C-184/99 *Grzelczyk op. cit.* at note 41 at para.31. See thereafter eg Case C-148/02 *Garcia-Avello v. Belgian State* [2003] ECR I-11613 at 23 and Case C-135/08 *Rottman v Freistaat Bayern*, judgment of the Court (Grand Chamber) of 2 March 2010 (nyr) at para. 43.

⁷⁵ In the legal literature, see eg Spaventa, ‘Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects’ *op. cit.* at note 40, Spaventa, *Free Movement of Persons in the European Union op. cit.* at note 5 and A. Tryfonidou, ‘Further Steps on the Road to Convergence amongst the Market Freedoms’ (2010) 35(1) *ELRev* 36.

3.3.2 The Opinion of Advocate General Poiares Maduro in Joined Cases C-158/04 and C-159/04 *Alfa Vita Vassilopoulos AE*

In his Opinion in *Alfa Vita*, Advocate General Poiares Maduro linked the legal status of Union citizenship to his argument that the case law on the scope of the Treaty freedoms should be harmonised around a single test.⁷⁶ According to his test, the Court should review all national measures that, in effect, treat cross-border situations less favourably than purely national situations.⁷⁷ In his view, this move was ‘essential in the light of the requirements of genuine Union citizenship.’⁷⁸ For the Advocate General, the economic and non-economic rights of movement conferred by the Treaty characterise the ‘cross-border dimension of the economic and social status conferred on European citizens.’⁷⁹ In his view:

‘the protection of such a status [defined in Art 20 TFEU] requires going beyond guaranteeing that there will be no discrimination based on nationality. It means Member States taking into account the effect of the measures they adopt on the position of all European Union citizens wishing to assert their rights to freedom of movement.’⁸⁰

In terms of its substance, Advocate General Poiares Maduro’s citizenship-inspired reading of the case law on obstacles to intra-EU movement is more of a reconceptualization of existing principles under a new heading. His argument does not call for a radical leap in the scope of the Treaty freedoms. He defines his test as capturing three categories of national measure: (1) discriminatory national rules; (2) national rules that, although indistinctly applicable, impose supplementary costs on imports or non-national operators;⁸¹ and (3) Member State rules that impede access to the market. On closer inspection, this tripartite framework does not actually take us much further beyond the narrow discrimination model discussed above. At its most extreme, the Advocate General’s model overlaps with the intuitive market access test analysed in the previous section. His argument that the Treaty freedoms should extend to capture national rules that impede market access could be

⁷⁶ Joined Cases C-158/04 and C-159/04 *Alfa Vita Vassilopoulos AE op. cit.* at note 40 at paras 40-52.

⁷⁷ *Ibid.*, at para. 41.

⁷⁸ *Ibid.*, at para. 51.

⁷⁹ *Ibid.*, at para. 40.

⁸⁰ *Ibid.*

⁸¹ The AG makes it clear that this does not capture costs arising merely through the existence of disparities between the laws of different Member States. Instead, it is firmly focused on eliminating indirectly discriminatory national rules. See para. 44.

interpreted to include the review of the reasonableness or efficiency of market regulation under the broader model, though this appears unlikely.⁸²

3.3.3 Spaventa's constitutional thesis

Spaventa offers a far more revolutionary analysis of the impact of Union citizenship on the definition of obstacles to intra-EU movement.⁸³ She argues that the status of Union citizenship provides a normative basis to justify certain rather more controversial developments in the Court's case law. Spaventa's argument examines the Court's case law on the economic freedoms. It starts by recognising (rightly) that the Court has expanded the scope of the Treaty freedoms beyond the narrow discrimination/mutual recognition model. She concludes that, following *Gebhard*, it is possible to use the Treaty provisions 'to attack rules...which merely regulate an economic activity even though there is no double-burden or any intra-[Union] specificity.'⁸⁴ For Spaventa, this expansion in the case law on obstacles to movement represents a 'qualitative leap' in the content of the Treaty free movement provisions.⁸⁵ She notes that:

'[t]he free movement right is no longer construed as a mere right to move, but rather as a right to pursue economic activity in another Member State... [It] becomes akin to the claim that citizens have against their own state, in national contemporary liberal democracies, not to be unjustly limited in their freedom.'⁸⁶

Spaventa rightly acknowledges that this shift to a broader view of the scope of the Treaty freedoms requires an additional normative justification.⁸⁷ In her view, the traditional models based on economic due process or market access (discussed above) can – at best – only explain the developments in the case law. Equally, she argues that the case law has outgrown the orthodox internal market rationale. To justify the expansion of the obstacle concept, Spaventa turns to the status of Union citizenship. She argues that:

⁸² The examples he cites to illustrate his argument can be squared with the discrimination model. See para. 45.

⁸³ Spaventa *op. cit.* at note 5 and Tryfonidou *op. cit.* at note 75.

⁸⁴ Spaventa *op. cit.* at note 5 at p. 101.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, at p. 111.

⁸⁷ *Ibid.*, at pp 76 and 136. The detail of her argument is set out in Chapter 7, pp 135-156.

‘the legitimacy for the Court’s extensive interpretation [of the obstacle term] might be more convincingly found in a *joint* teleological interpretation of the free movement and citizenship provisions. As a result of the introduction of Union citizenship, the *telos* justifying the Court’s interpretation has shifted from the internal market to include the protection of individual rights.’⁸⁸

For Spaventa, Union citizenship is read as granting Member State nationals an enhanced right of judicial review. Examining the case law on Art 21 TFEU, Spaventa concludes that:

‘the Court has held that *any* limitation and condition imposed on the right to move, on the right to reside in another Member State or on the right to equal treatment must comply with the general principles of [Union] law and in particular with the principle of proportionality and fundamental rights.’⁸⁹

This constitutional approach to the protection of Member State nationals as Union citizens is transposed to the analysis of the case law on the economic freedoms.⁹⁰ Spaventa argues that, drawing on the developments in Union citizenship, the economic rights of intra-EU movement can now be reconceptualised (and normatively justified) as specific constitutional rights to pursue economic activity in another Member State. In her view, any limitation on the right of Member State nationals *qua* Union citizens to exercise this right must now comply with the general principles of Union law, including in particular the protection of fundamental rights. Spaventa considers this reconceptualisation of the case law on the free movement of workers, establishment and services as being broad enough to capture the Court’s expansion of the term ‘obstacle to intra-EU movement’ beyond the discrimination/mutual recognition model – the key point of interest for present purposes.

Spaventa’s argument has found favour with other commentators. Tryfonidou supports the view that economic freedoms can be reconstituted as substantive rights that Member State nationals enjoy as Union citizens to pursue economic activity within the internal market.⁹¹ She also concludes that:

‘the Court appears to be in the process of completing an economic constitution for the European Union through which Union citizens have the

⁸⁸ *Ibid.*, at p. xv (introductory remarks).

⁸⁹ *Ibid.*, at p. 136.

⁹⁰ *Ibid.*, esp. chapter 7, pp 135-156.

⁹¹ Tryfonidou *op. cit.* at note 75.

right to participate in the market without any unreasonable restriction standing in their way.’⁹²

Moreover, in her view:

‘[f]ully-fledged citizenship status appears to be requiring the Union to grant a number of minimum rights to all its citizens, including the (economic) right to freely conduct a commercial activity – to trade – in an inter-state context.’⁹³

3.3.3.1 The strength of the Union citizenship model

The Union citizenship model has a strong appeal. In the first instance, this reading of the Court’s case law on the scope of the Treaty freedoms offers a convincing framework capable of rationalising ‘difficult’ cases, such as the ruling in *Carpenter*.⁹⁴ As discussed in previous chapters, in that case a British national invoked Art 56 TFEU (services) against his home Member State in order to challenge a deportation order issued by that State against his third country national spouse. The Court ruled that the contested order constituted an obstacle to intra-EU movement by reason of the fact that it was liable to deter the applicant from providing cross-border advertising services to clients in other Member States.⁹⁵ This ruling is rather difficult to square with any of the traditional interpretative paradigms. In the first instance, the contested deportation order was genuinely non-discriminatory. There was also no issue of any dual regulatory burden. Equally, it is hard to argue that the order interfered with his access to the market of other Member States as an *economic* operator. The contested measure did not obstruct the applicant’s *commercial* freedom; for example, by imposing additional compliance costs on his activities in other Member States.

By contrast, interpreted using the Union citizenship model, the ruling makes considerably more sense. Applying Spaventa’s test, *any* limitation on the right of

⁹² *Ibid.*, at pp 49-50.

⁹³ *Ibid.*, at p. 44.

⁹⁴ Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279. This line of reasoning could also be used to re-read earlier ‘pre-citizenship’ cases such as Case 186/87 *Cowan v Trésor public* [1989] ECR 185 and Case C-168/91 *Konstantinidis v Stadt Altensteig* [1993] ECR I-1191. In addition, it could also usefully explain the more recent rulings in eg Case C-135/08 *Rottman op. cit.* at note 74 and Case C-34/09 *Ruiz Zambrano*, judgment of the Court (Grand Chamber) of 8 March, 2011. However, as noted in Chapter 4, the latter two cases focus primarily on Art 20 TFEU.

⁹⁵ Case C-60/00 *Carpenter op. cit.* at note 94 at para. 39.

Member State nationals to exercise their rights to pursue economic activity in another Member State must comply with the general principles of Union law, including in particular the protection of fundamental rights.⁹⁶ As the Court noted, ‘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.’⁹⁷ On the strength of this effect, Mr Carpenter was entitled to rely on the Art 56 TFEU in order to seek the review of the contested deportation order. In result, this led the ECJ to conclude that, *in his particular case*, the contested measure constituted a disproportionate interference with his fundamental rights.⁹⁸ For the Court:

‘[the] decision to deport Mrs Carpenter, taken in circumstances such as those in the main proceedings, [did] not strike a fair balance between competing interests, that is, on the one hand the right of Mr Carpenter to respect for his family life, and, on the other hand, the maintenance of public order and safety.’⁹⁹

The Union citizenship model also has a clear normative advantage over the market access model. In contrast to the latter, the Union citizenship model enjoys a much stronger basis in the Treaty. The status of Union citizenship is set out clearly in Art 20 TFEU. It is also now generally accepted that this status forms the centre of gravity or focal point for the analysis of both the economic and non-economic activities of Member State nationals within the internal market (and beyond) – it is the ‘fundamental status of all Member State nationals.’¹⁰⁰ On this basis, it is therefore much easier to argue that the Court’s shift to a broader reading of the scope of the Treaty freedoms is justified in the name of Union citizenship than for reasons of pure economic efficiency (under the market access model). As discussed above, a strict deregulatory reading of the Treaty freedoms does not find unambiguous support in the Treaty.

⁹⁶ Spaventa *op. cit.* at note 5 at p. 136.

⁹⁷ Case C-60/00 *Carpenter op. cit.* at note 94 at para. 39.

⁹⁸ *Ibid.*, at para. 43. Note that the right to non-diffuse judicial review at the justification stage is a central aspect of Spaventa’s Union citizenship model. See Spaventa *op. cit.* at note 5 at p. 154.

⁹⁹ Case C-60/00 *Carpenter op. cit.* at note 94 at para. 43. The Court ruled that the measure was disproportionate at para.45.

¹⁰⁰ Case C-184/99 *Grzelczyk op. cit.* at note 41 at para. 31.

3.3.3.2 The weakness of the Union citizenship model

The key difficulty with the Union citizenship model is that, despite appearances, it actually suffers from the same basic normative problem as the market access approach discussed above. In order for Union citizenship to support the Court's shift to the broader interpretation of the scope of the Treaty freedoms, it is necessary *first* to accept a particular understanding of that status. To rationalise the case law on intra-EU movement in its entirety, Union citizenship must first be taken as granting Member State nationals a substantive right not to suffer any disproportionate interference in their economic or personal freedom *per se*. Yet, it is not clear that this interpretation necessarily follows from the wording of the Treaty.

The leap of faith required to accept Spaventa's Union citizenship reading of the scope of the Treaty freedoms is evident in her reasoning. Indeed, she maintains that:

‘the right not to be constrained in one's activity without there being a good reason can be seen as an aspect of a more fundamental citizenship right, *if citizenship is also understood* as an empowering status which transforms the relationship between government and governed, and inherently limits the power of the former over the latter.’¹⁰¹

This right to protection against disproportionate State interference in individuals' economic or personal freedom is an important dimension of citizenship in national liberal democracies.¹⁰² It is also the normative basis around which Spaventa builds her arguments. However, it does not necessarily follow that the desire to ensure the same level of protection at Union level through the status of Union citizenship justifies (retrospectively) the Court's decision to expand the term ‘obstacle to intra-EU movement’ beyond the narrow model. At best, it is perhaps more accurate to state that, like market access, Union citizenship could offer a normative basis to rationalise the Court's expansion of the scope of the Treaty freedoms beyond the requirements of the narrow view.

Finally, it is also worth noting that accepting the Union citizenship model risks introducing new problems into the framework of obstacles to intra-EU movement. In

¹⁰¹ Spaventa *op. cit.* at note 5 at p. 136 (this author's emphasis).

¹⁰² *Ibid.* See eg Art 2(1) of the German Grundgesetz (Basic Law). This provides that: ‘Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.’

particular, if the scope of the economic Treaty freedoms were interpreted as granting Member State nationals (as Union citizens) a right to pursue economic activity without disproportionate State interference, then this would create a ‘two-tier’ system of protection with respect to the free movement of goods and capital.¹⁰³ Specifically, Union citizens would enjoy greater protection under Arts 34, 35 and 63(1) TFEU than non-Member State nationals, who may also invoke these particular Treaty provisions.

3.3.4 Summary

The Union citizenship model provides a further possible framework to guide the Court’s interpretation of the term obstacle to intra-EU movement. Under this model, the Treaty freedoms are interpreted as granting Member State nationals a substantive right not to suffer any disproportionate interference in their economic or personal freedom per se. As with the market access model, this approach to the scope of the Treaty freedoms does little to protect Member State autonomy from judicial scrutiny at Union level. Similarly, as with market access, the Union citizenship model is also open to normative criticism. In particular, supporters of the latter model assume that the status of Union citizenship justifies the Court’s expansive reading of the scope of the Treaty freedoms.

3.4 Poiares Maduro, *We the Court*

3.4.1 Overview

The final interpretative model discussed here approaches the need to place appropriate limits on the Court’s case law on obstacles to intra-EU movement from a different angle. In his thesis on Art 34 TFEU (goods), Poiares Maduro adopts an

¹⁰³ Tryfonidou supports this reading of Art 34 TFEU. She argues that, ‘[Art 34 TFEU], in conjunction with [Art 21 TFEU], can be read in the light of [Art 20(2) TFEU] in order to protect the free movement of all Union citizens when their movement has as its main aim the sale (or purchase) of goods. This would mean that any national measures that impede either the importation of goods into a Member State ([Art 34 TFEU]) or the access of traders or consumers into the market of a Member State ([Arts 34 TFEU and 21 TFEU]) would fall within the scope of [Union] law.’ See Tryfonidou *op. cit.* at note 75 at pp 45-46.

institutional perspective.¹⁰⁴ Specifically, he argues that the Court should use its freedom to interpret the Treaty freedoms in order to correct structural biases within national democratic processes. Póitares Maduro's thesis is open to the criticism that, amongst other things, it is rather difficult to apply. However, its great strength is the recognition of the important institutional role played by the Court in connection with its interpretation of the Treaty freedoms.

3.4.2 Póitares Maduro's institutional approach

According to Póitares Maduro, the debate over the definition of the scope of the Treaty freedoms (specifically: Art 34 TFEU on goods) is more than just a debate about substantive policy goals. Instead, he maintains that the interpretation of the term 'obstacle to intra-EU movement' also entails 'institutional choices'. In his view:

[w]hen reviewing national measures with an effect on trade under [Art. 34 TFEU], the Court of Justice must *both* decide *whether there should be regulation* and – if so – *who will have the power to regulate*.¹⁰⁵

For Póitares Maduro, the solution to the problem of defining obstacles to intra-EU movement is not simply to find arguments to bolster the first limb: '*whether there should be regulation*.' In other words, unlike those defending the market access and Union citizenship models discussed above, he does not seek only to legitimise the shift to the broader view of the scope of the Treaty freedom by appealing to particular substantive *Union policy objectives*, such as market liberalisation or the protection of the personal freedom and fundamental rights of Union citizens. On such issues, he remains essentially agnostic. He argues that the (economic) constitution of the European Union remains 'open' and presents the EU constitution as a dynamic framework of competing economic and non-economic policy objectives.¹⁰⁶

By contrast, Póitares Maduro focuses primarily on the second limb – '*who will have the power to regulate*' – in order to justify the move beyond the narrow (non-discrimination/mutual recognition) model in particular cases. To this end, he introduces 'institutional choice analysis' to help define the scope of the Treaty

¹⁰⁴ Póitares Maduro *op. cit.* at note 4. See also M. Póitares Maduro, 'Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights' (1997) 3(1) *ELJ* 55.

¹⁰⁵ Póitares Maduro *op. cit.* at note 4 at p. 58 (this author's emphasis).

¹⁰⁶ *Ibid.*, chapters 4, 5 and 6 and esp. pp. 159-161.

freedoms. For him, the decision to review national measures against the Treaty freedoms involves an *a priori* judgment about whether or not the cost/benefit analysis concluded at the national level should be replaced by the European Court's own cost/benefit analysis.¹⁰⁷ In his own words, it is a question of 'looking for... a test to determine when the State is the best (or legitimate) institution to balance the costs and benefits of a measure and when, instead, the best institution is the Court.'¹⁰⁸

In summary, Poiares Maduro argues that the ECJ may legitimately employ Art 34 TFEU in order to scrutinise national democratic processes. Specifically, he maintains that this provision should be used to correct what he terms 'representative malfunctions' associated with such processes.¹⁰⁹ For him, Art 34 TFEU should be employed as a tool to ensure that 'national legislatures have internalised within their national political processes all the interests affected by their regulation of the common market.'¹¹⁰ This includes, first and foremost, making sure that there is no underrepresentation of the interests of nationals of the other Member States.

Poiares Maduro formulates his arguments into a substantive test. This test juxtaposes two categories of interests: 'cross-national' and 'national'.¹¹¹ The first refers to regulatory concerns that are uniform throughout the EU. The latter denotes interests that diverge within the Union. In summary, he argues that only measures regulating 'national interests' should fall within the scope of Art 34 TFEU as per se 'obstacles to intra-EU movement.' By contrast, measures regulating 'cross-national' interests should be *presumed* to fall *outside* the scope of Art 34 TFEU. Evidence of discrimination is required to justify their review as 'obstacles to intra-EU movement.' The presumption of validity for 'cross-national' interest measures flows from the fact that there is no suspicion of bias in the national democratic process to the prejudice of 'out-of-State' actors.

¹⁰⁷ This Poiares Maduro terms the overarching 'meta-decision' underpinning the Court's interpretation of Art 34 TFEU. See Poiares Maduro *op. cit.* at note 4 at p. 171.

¹⁰⁸ *Ibid.*, at p. 164.

¹⁰⁹ *Ibid.*, at p.172.

¹¹⁰ *Ibid.*, Poiares Maduro developed this argument as Advocate General in his Opinion in Joined Cases C-158/04 and C-159/04 *Alfa Vita Vassilopoulos op. cit.* at note 40. See esp. para. 51.

¹¹¹ Poiares Maduro *op. cit.* at note 4 at pp 173-174.

In terms of its result, Poiares Maduro's thesis does not actually leave us very far from the decentralised model set out above in section 2. As the author himself stresses, the Treaty freedoms are not tools for the *per se* review of national policy choices.¹¹² In particular, his thesis essentially preserves the distinction between product characteristic measures and selling arrangements introduced in *Keck*. Poiares Maduro reads national rules on product characteristics to denote 'national interests' that automatically fall within the Court's Art 34 TFEU review. By contrast, he seeks to remove from the scope of that article non-discriminatory selling arrangements (presently excluded from the scope of Art 34 TFEU through *Keck*) using the concept of 'cross-national' interests. However, Poiares Maduro's thesis *does* leave the door to the broader model open. The test proposed overlaps with the discrimination model, but is not limited to the same. At several points in his analysis, he emphasises that the Treaty freedoms should no longer be limited to such a strict anti-protectionist reading.¹¹³ In the end, Poiares Maduro's primary concern is instead whether or not national legislatures have adopted a sufficient 'European' perspective in the exercise of their national regulatory autonomy.

3.4.3 Assessing the strength of Poiares Maduro's model

Poiares Maduro's thesis can be criticised for being rather difficult to apply in practice. In particular, his distinction between 'national' and 'cross-national' interests risks collapsing into a subjective judicial assessment. However, the strength of Poiares Maduro's thesis rests with the valuable institutional insights it brings to the debate on the scope of the Treaty freedoms. His argument takes us beyond questions about whether or not these provisions may be used to advance specific Union policy objectives. Crucially, it exposes and emphasises the role of the Court of Justice as an institutional actor. Poiares Maduro's thesis reminds us that the Court enjoys considerable freedom to make important constitutional *choices* in connection with its interpretation of the scope of the Treaty freedoms.

¹¹² *Ibid.*, at p. 173.

¹¹³ *Ibid.*, at pp 164 and 166. See also his subsequent conclusions in 'Harmony and Dissonance in Free Movement' in M. Andenas and W.H Roth (Eds.) *Services and Free Movement in EU law* (Oxford: OUP, 2001) 53 esp. at p. 68. Here, Poiares Maduro argues that the Court is expressly in favour of centralised supranational judicial activism when interpreting the Treaty provisions on the intra-EU movement of (natural) persons/Union citizens.

In his thesis, discussion of the Court's institutional choices when interpreting the scope of the Treaty freedoms is focused on correcting (perceived) democratic shortcomings in national democratic processes. However, the same argument can also be applied to the Court's use of the same provisions to achieve other substantive policy objectives. This includes, first and foremost, the liberalisation of national markets and the protection of individual freedom and fundamental rights under the market access and Union citizenship models considered above. Applied to both models, Poiares Maduro's thesis emphasises the fact that, to the extent that it shifts the interpretation of the term obstacle to intra-EU movement beyond the narrow discrimination model, the Court is exercising its freedom to contribute unilaterally to the regulation of the internal market as an institutional actor. This is a matter of direct concern for the subsidiarity principle – a point which Poiares Maduro unfortunately overlooks in his analysis.

4. Conclusion

This chapter has examined the competing interpretative models that are presently used to rationalise the case law on obstacles to intra-EU movement. It was argued that the individual models fall into two distinct categories. Under the narrow view, the Treaty freedoms target only discriminatory national measures and/or rules that impose a dual burden on imported goods or non-nationals. Under the broader view, the Treaty freedoms are interpreted as going beyond the mere elimination of discrimination on nationality grounds or the co-ordination of regulatory competence between different Member States. It is argued that they should also capture genuinely non-discriminatory national rules. In this sense, the Treaty freedoms acquire an additional function. They become tools that may be used to review of the very existence (i.e. substance) of national legislation against specific *Union* policy objectives. These objectives include the liberalisation of national markets and the protection of both the personal freedom and fundamental rights of Member State nationals as Union citizens. In addition, Poiares Maduro has argued that the Treaty freedoms should be used to correct perceived shortcomings in national democratic processes.

Reviewing the individual models, it has been argued that no single approach is capable of providing a workable framework. Both the narrow and broader models are open to criticism. With respect to the narrow approach, the key problem is conceptual. Those favouring the narrow view do not themselves seem to be entirely convinced of its effectiveness as a solution to the problem of judicial overreach identified in Chapter 3. In short, it would appear that the narrow view would require the Court to unravel too much of its existing case law; in other words, it affords the Member States too much space to breathe. However, the broader view also faces (normative) difficulties. In particular, those who support a broad reading of the scope of the Treaty freedoms rely on the assumption that the Treaty supports the particular substantive Union policy objective they seek to advance. For example, advocates of the Union citizenship model read the Treaty as supporting the use of the provisions on intra-EU movement as tools to protect Member State nationals from disproportionate State interference in the exercise of their rights of economic and non-economic movement. However, as has been argued above, the problem here is not that this (and other) substantive policies cannot be squared with the Treaty. Rather, the difficulty is that such policies characterise at best only *possible* objectives. In contrast to the prohibition of discrimination on nationality grounds, these alternative objectives do not find unambiguous support in the text of the Treaty.

Advocates of the broader reading of the obstacle concept rely on a second assumption. They assume that, irrespective of the specific Union policy objective at issue, the Court is itself free to interpret the Treaty freedoms to that particular end. It is simply assumed that the Court is free to ‘pick and choose’ between the range of policy objectives, such as market liberalisation or the protection of individual freedom, that can possibly be squared with the Treaty as the founding basis of an open economic constitution. Poiares Maduro’s thesis brings this important point to the fore. His thesis exposes the important *institutional* role of the Court underpinning its interpretation of the scope of the Treaty freedoms. However, whilst stimulating and insightful, Poiares Maduro also effectively sidesteps the same underlying issue of premise. His framework simply reacts to the problem of choosing between the narrow and broad views of the obstacle concept by introducing *another* normative

justification into the mix. He argues that the Court should use the Treaty freedoms as tools to correct shortcomings in national democratic processes. However, this argument is also based on an assumption that the Court is essentially free to structure its own interpretative role from first principles.

Crucially, the existing debates over the appropriate framework to define the term ‘obstacle to intra-EU movement’ fail to engage with the demands of the subsidiarity principle. This is despite the fact that we have a clear definition of subsidiarity to work with and, moreover, a firm Treaty commitment that requires the Court (as a Union institution) to adhere to the principle’s demands. Those favouring the narrow view based on discrimination and/or mutual recognition certainly make overtures to subsidiarity.¹¹⁴ In particular, they point to the economic advantages associated with a decentralised approach to market integration. However, there has been no express engagement with subsidiarity. The focus has instead centred on unpacking and defending the substance of the discrimination/mutual recognition tests. Equally, those favouring a broader approach to the definition of the scope of the Treaty freedoms overlook subsidiarity’s implications as a source of restraint on the Court’s interpretative freedoms. Even if we accepted their normative assumptions that the Treaty freedoms should be used to advance particular policy objectives, it remains to be seen whether or not this extension in scope of the obstacle concept can be squared with demands of the subsidiarity principle.

In the next and final chapter, we turn to consider the detail of subsidiarity’s impact on the Court’s case law on obstacles to intra-EU movement. This begins with an attempt to reduce the scope of the problem. Thereafter, we turn to consider subsidiarity’s impact on the most problematic line of case law and on the Court’s freedom to interpret the scope of the Treaty freedoms more generally.

¹¹⁴ See here esp. Snell *op. cit.* at note 49 at p. 76. According to Snell: ‘The principle [of subsidiarity] lends weight to an argument for a restrictive construction of [the term obstacle to intra-EU movement] in order to protect Member State competence against intervention by the [Union].’

Chapter 6

Subsidiarity and obstacles to intra-EU movement

1. Introduction

This chapter brings together the analysis in the previous chapters and offers a conceptual framework to define an obstacle to intra-EU movement in EU law. In summary, it is argued that subsidiarity is an important – and to date overlooked – source of self-restraint on the exercise of the Court of Justice’s competence to interpret the scope of the Treaty freedoms. Specifically, it is argued that subsidiarity precludes the Court from using these provisions to review a specific category of national rule: non-discriminatory measures that simply characterise the conditions for economic and/or non-economic activity within individual Member States. This category of measure is given the label ‘market circumstances rules’ throughout.¹ The issue of whether or not the Treaty freedoms extend to capture market circumstances rules marks the key point of tension in the case law and legal literature on intra-EU movement. Subsidiarity offers a new and normatively sound basis to support the view of those writers who argue that the Treaty freedoms should not be used as tools to scrutinise such measures at Union level. The end result calls for more of an ‘adjustment’ than a revolution in the current case law. However, it is submitted that this is an adjustment worth making.

The chapter starts by offering a fresh descriptive critique of the case law and literature on obstacles to intra-EU movement. Building on the conclusions in Chapters 3-5, this section (section 2) attempts to reduce the scope of the problem. Specifically, it isolates the Court’s case law on market circumstances rules as the key source of tension. Section 3 then introduces subsidiarity to the mix. First, this section develops subsidiarity as a substantive legal test. Attention then turns to examination of the principle’s implications for the review of market circumstances rules.

¹ This term is borrowed from C. Barnard, *The Substantive Law of the EU: the Four Freedoms* (3rd Ed.) (Oxford: OUP, 2010) at p. 119. For earlier uses, see also eg E. White, ‘In Search of the Limits to Article 30 of the EEC Treaty’ (1989) 26(2) *CMLRev* 235 at p. 246 ff, who refers to national rules regulating ‘the circumstances in which certain goods may be sold or used’ within a Member State.

Thereafter, section 3 reflects on subsidiarity's impact on review of less controversial national measures (specifically: discriminatory rules) as obstacles to intra-EU movement. Finally, the chapter concludes by offering a new conceptual framework that is both descriptively and normatively sound (section 4).

2. Obstacles to intra-EU movement

2.1 Introduction

Building on the conclusions of previous chapters, this section offers a descriptive re-assessment of the case law on obstacles to intra-EU movement. The focus is on non-discriminatory obstacles. The argument is two-fold. First, it is argued that the Court's apparent shift to the *language* of non-discriminatory obstacles is misleading. In the vast majority of cases, the Court's case law can be adequately explained using discrimination analysis. The true scope of the Court's case law on genuinely non-discriminatory obstacles is therefore much narrower than is frequently assumed. Secondly, it is argued that the Court's case law on genuinely non-discriminatory obstacles to intra-EU movement is, on closer inspection, not problematic in its entirety. On the contrary, commentators generally accept that the scope of the Treaty freedoms should extend to capture non-discriminatory national rules that actually *block* movement between the markets of different Member States. By contrast, there is considerable disagreement over the use of the Treaty freedoms to review market circumstances rules. The latter include *non-discriminatory*: (1) product use rules;² (2) tax rules;³ (3) 'golden shares'⁴ and (4) rules prescribing the conditions for the taking-

² Eg Case C-265/06 *Commission v. Portugal (Tinted Film)* [2008] ECR I-2245, Case C-110/05 *Commission v. Italy (Motorcycle Trailers)* [2009] ECR I-519 and Case C-142/05 *Åklagaren v. Percy Mickelsson and Joakim Roos* [2009] ECR I-427.

³ Eg Case C-439/97 *Sandoz GmbH* [1999] ECR I-7041, Joined Cases C-430/99 and C-431/99 *Sea-Land Service Inc* [2002] ECR I-5235, Case C-464/02 *Commission v. Denmark (Vehicle Registrations)* [2005] ECR I-7929, Case C-433/04 *Commission v. Belgium (Construction Tax)* [2006] ECR I-10653 and Case C-232/03 *Commission v. Finland (Vehicle Registrations)* [2007] ECR I-27.

⁴ Case C-367/98 *Commission v Portugal (Golden Shares)* [2002] ECR I-4731. See thereafter eg Case C-463/00 *Commission v Spain (Golden Shares)* [2003] ECR I-4581, Case C-98/01 *Commission v United Kingdom (Golden Shares)* [2003] ECR 4641, Joined Cases C-282/04 and C-283/04 *Commission v Netherlands (Golden Shares)* [2006] ECR I-9141, Case C-112/05 *Commission v Germany (Golden Shares)* [2007] ECR I-8995 and Case C-171/08 *Commission v. Portugal (Golden Shares)*, judgment of the Court (First Chamber) of 8 July 2010 (nyr).

up of economic activity within Member States.⁵ Significantly, it is the Court's use of the Treaty rules to scrutinise the above categories of national measures that is most problematic from the perspective of the subsidiarity principle.

2.2 Non-discriminatory obstacles: language versus substance

The use of the Treaty freedoms to prohibit all discrimination on nationality grounds is universally accepted. Even those writers who prefer to reason through alternative concepts such as market access and Union citizenship interpret the Treaty freedoms as capturing discriminatory national rules.⁶ The tension in the case law is instead focused on examining whether, and if so the extent to which, the scope of these provisions do – and ultimately should – extend also to permit review of genuinely non-discriminatory national rules. On the strength of the Court's recent case law, it would appear that the debate over whether the Treaty provisions also capture non-discriminatory national rules is now redundant. As discussed in Chapter 3, the Court's reading of the scope of the individual freedoms is increasingly converging around the broadest possible interpretation. This approach is focused on scrutinising any national measure that is liable (actually or potentially) to 'deter,' 'dissuade' or 'discourage' intra-EU movement.⁷ However, to a great extent, this effects-based

⁵ Eg Case C-55/94 *Gebhard* [1995] ECR I-4165, Case C-108/96 *Mac Quen and Others* [2001] ECR I-837, Case C-294/00 *Deutsche Paracelsus Schulen v Kurt Gräbner* [2002] ECR I-6515, Case C-140/03 *Commission v. Greece (Opticians)* [2005] ECR I-3177, Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR 4171 and Case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC* [2010] ECR I-2177.

⁶ See eg Opinion of AG Jacobs in Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179 at para. 43, S. Weatherill, 'After *Keck*: Some Thoughts on how to Clarify the Clarification' (1996) 33(5) *CMLRev* 885 at pp 896-897, C. Barnard, 'Fitting the Remaining Pieces into the Goods and Persons Jigsaw' (2001) 26(1) *ELRev* 34 esp. at p. 47, M. Poiares Maduro, *We the Court: The European Court of Justice & the European Economic Constitution* (Oxford: Hart, 1999) at pp 173-174, Opinion of AG Maduro in Joined Cases C-158/04 and C-159/04 *Alfa Vita Vassilopoulos AE* [2006] ECR I-8135 at para. 43, E. Spaventa, *Free Movement of Persons in the European Union: Barriers to Movement in the Constitutional Context* (AH Alphen aan den Rijn: Kluwer, 2007) at p. 16, Barnard *op. cit.* at note 1 at p. 18 and P. Oliver, 'Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurling in a New Direction?' (2010) 33(5) *Fordham Int. LJ* 1423 at pp 1469-1470.

⁷ For Art 21 TFEU, see eg Case C-184/99 *Grzelczyk* [2001] ECR I-2691 at para. 32, Case C-138/02 *Collins* [2004] ECR I-2703 at para. 61, Case C-209/03 *Bidar* [2005] ECR I-2119 at para. 32 and Case C-524/06 *Huber* [2008] ECR I-9705 at para. 35; for Art 34 TFEU, see eg Case 8/74 *Dassonville* [1974] ECR 837 at para. 5 and Case C-110/05 *Commission v. Italy (Motorcycle Trailers) op. cit.* at note 2 at para. 33; for Art 35 TFEU see eg Case C-161/09 *Kakavetsos-Fragkopoulos AE*, judgment of the Court (First Chamber) of 3 March 2011 (nyr) at para. 29; for Art 45 TFEU, see eg Case C-415/93 *Bosman* [1995] ECR I-4921 at para. 96, Case C-109/04 *Kranemann* [2005] ECR I-2421 at para. 26 and Case C-208/05 *ITC* [2007] ECR I-181 at para. 31; for Art 49 TFEU see eg Case C-19/92 *Dieter Kraus v Land Baden-Württemberg* [1993] ECR I-1663 at para. 32, Case C-318/05 *Commission v*

language is misleading. As others have argued, the bulk of the Court's case law can in fact still be squared with the discrimination framework.⁸

The gap between the language and substance of the Court's case law on obstacles to intra-EU movement emerged early on in the case law on goods.⁹ For example, despite the Court's preference for the language of non-discriminatory obstacles, the landmark rulings in *Dassonville* and *Cassis* (Art 34 TFEU) can be rationalised adequately with the discrimination model.¹⁰ The contested legislation in both decisions was discriminatory. In the former decision, the requirement to produce a certificate of origin issued by the exporting Member State applied only to imported goods. In the latter ruling, the discriminatory effect arose through an indistinctly applicable national rule (i.e. a rule applying to both domestic and imported products alike).¹¹ In *Cassis*, the contested German law prescribing 'product characteristics'¹² for certain alcoholic drinks operated to prevent products not meeting that description, but in lawful circulation elsewhere within the EU market, from entering the market

Germany (School Fees) [2007] ECR I-6957 at para. 81 and Case C-281/06 *Jundt* [2007] ECR I-12231 at para. 52; for Art 56 TFEU, see eg Case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd* [1991] ECR I-4221 at para. 11, Case C-136/00 *Danner* [2002] ECR I-8147 at para. 29 and Joined Cases C-544/03 and C-545/03 *Mobistar and Belgacom Mobile* [2005] ECR I-7723 at para. 30; for Art 63(1) TFEU, see eg Case C-35/98 *Staatssecretaris van Financiën v B.G.M. Verkooijen* [2000] ECR I-4071 at para. 34, Case C-367/98 *Commission v Portugal (Golden Shares)* *op. cit.* at note 4 at para. 45 and Joined Cases C-155/08 and C-157/08 *X (C-155/08) and E. H. A. Passenheim-van Schoot (C-157/08)* [2009] ECR I-5093 at para. 39.

⁸ On this point, see also N. Bernard, 'Discrimination and Free Movement in EC Law' (1996) 45(1) *ICLQ* 82 at p. 97, G. Davies, *Nationality Discrimination in the European Internal Market* (The Hague: Kluwer, 2003) at p. 87, J. Snell, 'Non-discriminatory Tax Obstacles in Community Law' (2007) *ICLQ* 56(2) 339 at p. 340 and K. Banks, 'The Application of the Fundamental Freedoms to Member State Tax Measures: Guarding against Protectionism or Second-guessing National Policy Choices?' (2008) 33(4) *ELRev* 482 at p. 483.

⁹ Though see also Case 33/74 *van Binsbergen* [1974] ECR 1299 at para. 10, which appeared to extend the scope of Art 56 TFEU beyond discrimination to the elimination of mere 'obstacles' to intra-EU movement. For early discussion of this point, see eg *White op. cit.* at note 1 esp. at p. 279: 'The *Dassonville* reformulation of Art [34 TFEU] cannot be taken literally. Indeed, it is clear from the [case law]... that the Court of Justice does not apply this formula literally itself.'

¹⁰ Case 8/74 *Dassonville op. cit.* at note 7, Case 120/78 *Cassis de Dijon* [1979] ECR 649 and Case C-76/90 *Säger op. cit.* at note 7.

¹¹ On this point, see also N. Nic Shuibhne, 'The Free Movement of Goods and Article 28 EC: An Evolving Framework' (2002) 27(4) *ELRev* 408 esp. at p. 410, and P. Wennerås and K. Bøe Moen, 'Selling Arrangements, Keeping *Keck*' (2010) 35(3) *ELRev* 87 at p. 388.

¹² See now Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1992] ECR I-6097 at para. 15.

of that State.¹³ This necessarily discriminated in favour of competing national products, of which there were many.¹⁴

The expansive language of the Court in *Dassonville* and *Cassis* undoubtedly played an important symbolic role in EU integration.¹⁵ It certainly encouraged economic actors to test the scope of Art 34 TFEU.¹⁶ Indeed, the persistent attempts by traders to rely on this particular Treaty provision in order to seek review of all sorts of restrictive national trading rules ultimately forced the Court to clarify its own case law in its infamous ruling in *Keck*.¹⁷ As discussed in Chapter 3, in this decision the Court changed its approach to the review of national measures regulating the conditions under which goods could be marketed in that Member State. In *Keck*, the Court concluded that such ‘selling arrangements’ would only fall within the scope of its review as obstacles to intra-EU movement if two cumulative conditions were met.¹⁸ However, for present purposes, what is most important is that, in substance, this amounted to a *re-introduction* of a discrimination requirement in connection with the review of this category of marketing rule.¹⁹

Discrimination analysis continues to underpin the case law on obstacles to intra-EU movement across the freedoms. When interpreting the individual Treaty provisions, the Court defaults (increasingly) to the language of non-discriminatory obstacles. However, in substance, the Court is in fact simply scrutinising indirectly discriminatory national measures.²⁰ Again, this finding covers a number of the

¹³ The Court in *Cassis* noted this key point at para. 14: ‘There is... no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State.’

¹⁴ Case 120/78 *Cassis op. cit.* at note 10 at para. 14.

¹⁵ See, eg J. Weiler, ‘The Constitution of the Common Market Place’ in P. Craig and G. de Búrca (Eds.) *The Evolution of EU Law* (Oxford: OUP, 1999) 349.

¹⁶ See Joined Cases 60 and 61/84 *Cinéthèque SA and others* [1985] ECR 2605, Case 145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR 3851 and C-362/88 *GB-INNO-BM* [1990] ECR I-667.

¹⁷ Joined Cases C-267/91 and C-268/91 *Keck and Mithouard op. cit.* at note 12.

¹⁸ *Ibid.*, at para. 16.

¹⁹ D. Wilsher, ‘Does *Keck* Discrimination Make Any Sense? An Assessment of the Non-discrimination Principle within the European Single Market’ (2008) 33(1) *ELRev* 3 at p. 4.

²⁰ From a list of possible examples see: for Art 21 TFEU, eg Case C-406/04 *De Cuyper* [2006] ECR I-6947 and Case C-499/06 *Nerkowska* [2008] ECR I-3993; for Art 34 TFEU eg Case C-405/98 *Gourmet International Products* [2001] ECR I-1795, Case C-254/98 *TK-Heimdienst Sass* [2000] ECR-151 and Case C-322/01 *DocMorris* [2003] ECR I-14887; for Art 35 TFEU, eg Case C-205/07 *Gysbrechts* [2008] ECR I-9947; for Art 45 TFEU, eg Case C-18/95 *F.C. Terhoeve* [1999] ECR I-345, Case C-232/01 *Criminal proceedings against Hans van Lent* [2003] ECR I-11525 and Case C-109/04 *Kranemann op. cit.* at note 7; for Art 49 TFEU, eg Case C-442/02 *CaixaBank* [2004] ECR I-8961 and

Court's key rulings, which apparently extended the scope of the individual freedoms beyond discrimination.²¹ This includes, for example, the decisions in *Kraus* (Arts 45 and 49 TFEU), *Säger* (Art 56 TFEU), *Verkooijen* (Art 63(1) TFEU) and *Tas-Hagen* (Art 21 TFEU).²² In *Kraus*, *Verkooijen* and *Tas-Hagen*, the contested national rules introduced a difference in treatment on residency grounds – the classic surrogate criterion for Member State nationality.²³ In *Kraus*, the contested legislation required holders of academic titles awarded by institutions other than those accredited by the German *Länder* to seek prior authorisation for their use in that State.²⁴ Similarly, in *Verkooijen*, the Dutch tax rules introduced a difference in treatment according to the place of establishment of the undertaking paying dividends to resident taxpayers. Finally, in *Tas-Hagen*, the applicant was treated differently to other recipients of a civilian war benefit paid by the Dutch state by sole reason of the fact that they were not resident on the national territory at the time of application. In *Säger* (Art 56 TFEU), the prohibited discriminatory treatment arose through the *equal* treatment of otherwise non-comparable situations – as is typical in the case law on services.²⁵ The contested German legislation on patent services imposed the conditions for permanent establishment on persons who were *already* lawfully integrated into the economy of another Member State and – importantly – were not seeking to establish themselves in that second State.²⁶ This equal treatment of non-comparable situations

Case C-446/03 *Marks & Spencer plc* [2005] ECR I-10837; for Art 56 TFEU, eg Case C-118/96 *Jessica Safir* [1998] ECR I-1897, Case C-58/98 *Josef Corsten* [2000] ECR I-7919 and Case C-372/04 *Watts* [2006] ECR I-4325; and for Art 63(1) TFEU, eg Case C-319/02 *Manninen* [2004] ECR I-7477, Case C-379/05 *Amurta SGPS* [2007] ECR I-9569 and Case C-256/06 *Jäger* [2008] ECR I-123.

²¹ See Chapter 3 for discussion of the Court's shift to expansive effects-based tests.

²² Case C-19/92 *Kraus op. cit.* at note 7, Case C-76/90 *Säger op. cit.* at note 7, Case C-35/98 *Verkooijen op. cit.* at note 7 and Case C-192/05 *Tas-Hagen* [2006] ECR I-10451.

²³ Other criteria include eg linguistic requirements. See eg Case C-379/89 *Groener* [1989] ECR 3967 and Case C-424/97 *Haim* [2000] ECR I-5123.

²⁴ Case C-19/92 *Kraus op. cit.* at note 7 at paras 4 and 5.

²⁵ The same logic also explains eg Case 33/74 *van Binsbergen op. cit.* at note 9, Case 279/80 *Webb* [1981] ECR 3305, Case C-154/89 *Commission v. France (Tourist Guides)* [1991] ECR I-651, Case C-67/98 *Zenatti* [1999] ECR I-7289, Case C-58/98 *Corsten op. cit.* at note 20, Case C-243/01 *Gambelli and Others* [2003] ECR I-13031 and Case C-215/01 *Proceedings against Bruno Schnitzer* [2003] ECR I-14847.

²⁶ On the distinction between establishment and services, see eg Case C-55/94 *Gebhard op. cit.* at note 5 at paras 22-26. See also Case C-131/01 *Commission v Italy (Patent Agents)* [2003] ECR I-1659 in which the ECJ noted: 'the decisive criterion for the purposes of the application of [Art 56 TFEU] is the absence of stable and continuous participation by the person concerned in the economic life of the host Member State' (para.23).

discriminated in favour of competing providers permanently established in the host State (Germany).²⁷

Interestingly, the true scope of the Treaty provisions – as prohibitions of discriminatory treatment on nationality grounds – often emerges in cases where litigants are actually seeking to rely on the *substance* of the Court’s broad effects-based tests. In such instances, the Court is forced to ‘reveal its hand’ and confirm that the prohibition of discrimination marks the outer limits of the Treaty freedoms. For example, as we have seen already, this was the outcome of the decision in *Keck*, in which the Court effectively re-introduced discrimination analysis in an effort to curtail the scope of Art 34 TFEU.²⁸ The same approach can also be seen in subsequent case law in other areas. For example, in several cases dealing with legislation on direct taxation, the Court has been forced to concede that, despite its own language to the contrary, the scope of the Treaty provisions on establishment, services and capital does not in fact extend beyond the prohibition of discriminatory treatment.²⁹

2.3 Genuinely non-discriminatory obstacles to intra-EU movement

As the discussion in the previous section has shown, discrimination analysis has significant explanatory force. In a great number of cases, including key formative decisions on the scope of the Treaty freedoms, the substance of the discrimination test lurks behind the language of deterrent or dissuasive effects. However, although a powerful explanatory tool, discrimination analysis not capable of rationalising all of the case law on intra-EU movement. Furthermore, it is now accepted (or at least conceded) that, rightly or wrongly, the Court’s case law extends to capture some genuinely non-discriminatory national rules. Significantly, there is also considerable agreement in the literature on this point. Even advocates of the narrower reading of

²⁷ The Court has acknowledged this point expressly in its case law on posted workers. See eg Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417 at para. 12.

²⁸ Joined Cases C-267/91 and C-268/91 *Keck and Mithouard op. cit.* at note 12 at para. 16.

²⁹ Eg Case C-391/97 *Gschwind* [1999] ECR I-5451 (Art 45 TFEU), Case C-387/01 *Harald Weigel and Ingrid Weigel v Finanzlandesdirektion für Vorarlberg* [2004] ECR I-4981 (Art 45 TFEU), Case C-403/03 *Egon Schempp v. Finanzamt München V* [2005] ECR I-6421 (Art 20 TFEU), Case C-298/05 *Columbus Container Services BVBA* [2007] ECR I-10451 (Arts. 49 and 63(1) TFEU) and Case C-284/06 *Finanzamt Hamburg-Am Tierpark* [2008] ECR I-4571 (Arts. 49 and 63(1) TFEU). The detail of this line of case law is discussed further in section 2.3.2.1 below.

the scope of the Treaty freedoms, for whom this development is most problematic, do not reject this expansion in its entirety.³⁰ On the contrary, supporters of the ‘dual burden’ and/or ‘mutual recognition’ approaches would appear to accept the extension in scope of the obstacle concept to capture a distinct category of non-discriminatory national rule.³¹ The particular category in question refers to non-discriminatory national rules that actually *block* intra-EU movement (i.e. those that actually prevent goods, services, persons and capital from entering/exiting the markets of the Member States). Furthermore, even Davies, who has argued most forcefully for a discrimination-only reading of the scope of the Treaty freedoms, in the end, tries extremely hard to legitimise this particular line of case law.³²

The tension in the case law and literature centres instead on the Court’s use of the Treaty freedoms to review genuinely non-discriminatory national rules that do not block intra-EU movement, but simply define conditions for the pursuit of economic and/or non-economic activity within that Member State. It is with respect to this specific type of non-discriminatory rule that there is both (increasing) inconsistency in the case law of the Court and genuine dispute in the academic commentary. Significantly, it is also here that the introduction of subsidiarity analysis will make its greatest impact as a principle of judicial self-restraint. The individual strands of the Court’s case law on genuinely non-discriminatory national measures will now be examined in turn. This starts with discussion of non-discriminatory rules that block intra-EU movement.

2.3.1 Non-discriminatory obstacles that *block* intra-EU movement

In several cases, the Court has extended the scope of the Treaty freedoms to capture genuinely non-discriminatory obstacles that block intra-EU movement. Key examples include: *Alpine Investments* (Art 56 TFEU), *Bosman* (Art 45 TFEU) and *Commission v. Portugal (Golden Shares)* (Art 63(1) TFEU).³³ In each of these cases,

³⁰ Those supporting the narrower view include N. Bernard, *Multilevel Governance in the European Union* (Amsterdam: Kluwer, 2002), J. Snell *Goods and Services in EC Law* (Oxford: OUP, 2002) and Davies *op. cit.* at note 8.

³¹ Bernard *op. cit.* at note 30 esp. at pp 23-27 and Snell *op. cit.* at note 30 esp. at p. 127.

³² Davies *op. cit.* at note 8 at pp 87-89. See also earlier, Bernard *op. cit.* at note 8 at pp 95-98.

³³ Case C-384/93 *Alpine Investments BV* [1995] ECR I-1141, Case C-415/93 *Bosman op. cit.* at note 7 and Case C-367/98 *Commission v Portugal (Golden Shares) op. cit.* at note 4. See also eg Case 34/74

the contested national rules did not discriminate, directly or indirectly, on the grounds of Member State nationality. Yet they operated to *block* – absolutely – the movement of goods, services, persons or capital *between* national markets. For example, in *Alpine Investments* (Art 56 TFEU), the contested prohibition on cold-calling prevented the applicant from extending their activities to the market of another State in which this marketing technique was lawful. Similarly, in *Bosman* (Art 45 TFEU), the non-discriminatory transfer rules under review blocked the applicant's right to move between football clubs established in different Member States.

The extension in scope of the Treaty freedoms to capture non-discriminatory obstacles that block intra-EU movement is not problematic for advocates of the broader view of the obstacle concept.³⁴ For example, the above decisions can be rationalised neatly within the market access model.³⁵ Indeed, that concept is the centrepiece of the Court's reasoning in each of the above decisions. In terms of substance, market access here could be read to denote the first of the three possible meanings outlined in Chapter 5: the right for goods, services, persons and capital to *enter* the market of another Member State (and, by implication,³⁶ to *leave* the market of a Member State). Similarly, as an alternative to market access, one could invoke the Union citizenship model to rationalise aspects of the same case law. For example, it could be argued (retrospectively) that the contested non-discriminatory transfer rules in *Bosman* represented a disproportionate interference with the applicant's freedom to pursue economic activity in another Member State. This would bring the Court's decision to review the transfer rules in line with *Spaventa's* Union

Henn and Darby [1979] ECR 3795 (Art 34 TFEU). In this case, we can assume that there was no (lawful) domestic market for the production of products in competition with those subject to the import ban. For Art 56 TFEU, see eg Case C-275/92 *Schindler* [1994] ECR I-1039, Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511 esp. at paras 26-7, Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609 and Case C-429/02 *Bacardi France SAS* [2004] ECR I-6613 at para. 35. With respect to the latter case, this applies only in so far as the ECJ's finding of an obstacle to intra-EU movement addresses the prohibition on the transmission of programmes including bill-board advertisements for alcohol that are broadcast lawfully elsewhere within the Union. For Art 63(1) TFEU, see also eg Case C-483/99 *Commission v France (Golden Shares)* [2002] ECR I-4781 esp. at paras 41 and 45.

³⁴ Those supporting the broader view include eg AG Jacobs in Case C-412/93 *Leclerc-Siplec op. cit.* at note 6, *Weatherill op. cit.* at note 6, AG Maduro in Joined Cases C-158/04 and C-159/04 *Alfa Vita Vassilopoulos op. cit.* at note 6, *Spaventa op. cit.* at note 6 and *Barnard op. cit.* at note 1.

³⁵ See eg *Weatherill, op. cit.* at note 6 at pp 896-897, AG Jacobs in Case C-412/93 *Leclerc-Siplec op. cit.* at note 6 at paras 38-49 and *Barnard op. cit.* at note 6 at p. 114.

³⁶ Art 35 TFEU guarantees this right expressly with respect to goods.

citizenship-inspired reading of the scope of the Treaty freedoms.³⁷ However, more significant for present purposes is the finding that the Court's extension of the Treaty freedoms to capture non-discriminatory rules that block intra-EU movement is not viewed as problematic by advocates of the narrower approach.³⁸ This points to the existence of broad consensus in the commentary in so far as the scope of the obstacle concept is concerned. It shows that there is a general acceptance of the use of the Treaty freedoms beyond the elimination of discriminatory national measures.

In the first instance, advocates of the dual burden and/or mutual recognition approaches have no difficulty with the Court's use of the Treaty freedoms to review non-discriminatory national rules that block the movement of products or services between the markets of different Member States.³⁹ This follows from the division of regulatory competence between the host and home Member States under Arts 34 and 56 TFEU. As discussed in Chapter 5, under both conceptual models (dual burden and mutual recognition) the primary right to regulate goods and services falls to the home Member State; that is, to the State in which goods are produced or the service provider is lawfully established.⁴⁰ Accordingly, provided that they are lawfully produced or provided in the home Member State, goods and services enjoy, in principle, the right to enter the market of all the other Member States in their original form. It is not necessary for the legislation of the host Member State to be discriminatory in order to interfere with this right, although this is typically the case.⁴¹ To trigger Arts 34 and 56 TFEU, it is simply enough that the contested host

³⁷ Spaventa *op. cit.* at note 6. See also thereafter A. Tryfonidou, 'In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?' (2009) 46(5) *CMLRev* 1591.

³⁸ Eg Bernard *op. cit.* at note 8 at pp 95-98, Bernard *op. cit.* at note 30 at pp 24-26, Snell *op. cit.* at note 30 at p. 127 and Davies *op. cit.* at note 8 at p. 87.

³⁹ Snell *op. cit.* at note 30 at p. 127 and Bernard *op. cit.* at note 30 at pp 24-26.

⁴⁰ Bernard *op. cit.* at note 30 at pp 17-18.

⁴¹ Examples of discriminatory rules that block market entry include Member State legislation prescribing product characteristics (for Art 34 TFEU) and national measures making the importation of products/provision of services subject to licence or conditional on the production of certifications or other documentation. See, from a long list of possible illustrations, for Art 34 TFEU eg Case 8/74 *Dassonville op. cit.* at note 7, Case 104/75 *Centrafarm BV* [1976] ECR 613, Case 120/78 *Cassis op. cit.* at note 10, Case C-470/93 *Mars GmbH* [1995] ECR I-1923, Case C-12/00 *Commission v. Spain (Chocolate)* [2003] ECR I-459 and Case C-170/04 *Rosengren and Others* [2007] ECR I-4071; for Art 56 TFEU see eg Case 279/80 *Webb op. cit.* at note 25, Case C-154/89 *Commission v. France (Tourist Guides) op. cit.* at note 25, Case C-76/90 *Säger op. cit.* at note 7, Case C-67/98 *Zenatti op. cit.* at note 25, Case C-58/98 *Corsten op. cit.* at note 20 and Case C-215/01 *Schnitzer op. cit.* at note 25.

State legislation prevents products or services lawfully circulating elsewhere within the Union from gaining entry into that market of that State.

Advocates of the narrower reading of the obstacle concept do, however, struggle with the decisions in *Bosman* (workers) and *Alpine Investments* (services).⁴² Neither case can be squared with the orthodox dual burden or mutual recognition reading of the Treaty freedoms. With respect first to *Bosman*, competence to regulate the conditions for the taking-up of employment is not divided between the host and home Member States. Instead, in accordance with the rules on workers (and also on establishment), the Member State in which the applicant is employed or permanently established retains the primary right to regulate the conditions for economic activity within that State, subject to the prohibition of discrimination.⁴³ In the second case, *Alpine Investments*, the orthodox division between home and host Member State regulatory competence discussed in the previous paragraph applies. However, the problem in that case is that the contested legislation preventing the service provider from entering the market of another Member State was imposed not by the host Member State as is typically the case, but instead by the *home* Member State (i.e. the State in which the undertaking concerned was permanently established).

Yet, in spite of the above difficulties, supporters of the narrow reading of the obstacle concept try very hard indeed to square *Bosman* and *Alpine Investments* with their preferred frameworks. As argued in Chapter 5, this can be read as indicative of a clear determination on their part to legitimise this line of case law. For example, as discussed in Chapter 5, Davies has argued forcefully that the term obstacle to intra-EU movement should be limited to the elimination of discriminatory measures. However, in the final analysis, he effectively ends up integrating the non-discriminatory *Bosman* ruling into his obstacle framework. For Davies, the decisive factor in *Bosman* is the contested measure's effect on intra-EU movement. As he notes, the transfer rules at issue did not simply impose an 'inconvenience' or

⁴² Bernard *op. cit.* at note 30, Snell *op. cit.* at note 30 and Davies *op. cit.* at note 8.

⁴³ For confirmation see eg Case C-61/89 *Bouchouca* [1990] ECR I-3551 at para. 12 and Case C-345/08 *Krzysztof Peśla* [2009] ECR I-11677 at para. 50. This point is discussed further in section 2.3.2.2 below.

‘administrative hurdle’ on the applicant.⁴⁴ Rather, the rules prevented, without concession, Mr Bosman from moving *between* the markets of two different Member States.⁴⁵ On the strength of this finding, Davies therefore concedes that ‘it may be therefore that this special type of restriction, these focussed bans, are always to be seen as obstacles which must be justified.’⁴⁶

Bernard and Snell also work hard to rationalise the Court’s case law on non-discriminatory obstacles that block intra-EU movement with their preferred conceptual model – mutual recognition.⁴⁷ For Snell, the solution is found using market access. To make sense of the rulings in both *Alpine Investments* and *Bosman*, he argues that the scope of Arts 45 and 56 TFEU should extend beyond mutual recognition to capture ‘[non-discriminatory] national rules creating a direct impediment to market access.’⁴⁸ Adopting a different view, Bernard focuses on rationalising *Alpine Investments*.⁴⁹ He argues that this decision can in fact be squared with a qualified mutual recognition test, according to which primary regulatory competence falls to the Member State in which the economic actor’s activities are permanently based.⁵⁰

Interestingly, in his earlier work, Bernard actually went a step further.⁵¹ He argued, without reference to the mutual recognition framework, that the scope of the Treaty freedoms should extend beyond the prohibition of discrimination to capture non-discriminatory obstacles that block intra-EU movement. For Bernard, the Treaty free movement provisions ‘should aim at removing barriers to *entry and exit* from one Member State to another and ensure equal treatment once inside the territory/market of each Member State.’⁵² As such, he argued that the Treaty provisions on intra-EU movement should not imply ‘a right to be free from regulation.’⁵³ Significantly for

⁴⁴ Davies *op. cit.* at note 8 at p. 87.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, at pp 87-88.

⁴⁷ Bernard *op. cit.* at note 30 and Snell *op. cit.* at note 30.

⁴⁸ Snell *op. cit.* at note 30 at p. 127.

⁴⁹ Bernard rejects the *Bosman* ruling as ‘troubling.’ Bernard *op. cit.* at note 30 at pp 33-34.

⁵⁰ Bernard *op. cit.* at note 30 at pp 24-26.

⁵¹ N. Bernard, ‘The Future of European Economic Law in the Light of the Principle of Subsidiarity’ (1996) 33(4) *CMLRev* 633 at pp 636-639.

⁵² *Ibid.*, at p. 638.

⁵³ *Ibid.*

present purposes, Bernard's reasoning here is linked to his analysis of the implications of the introduction of the subsidiarity principle for the Court's interpretation of the Treaty freedoms. Without going into great detail, Bernard argued that subsidiarity necessarily inclined the Court's reading of the scope of the Treaty freedoms towards the elimination of two categories of national measure: (1) discriminatory national rules and (2) non-discriminatory measures that block intra-EU movement.⁵⁴ We shall return to examine and test this hypothesis in section 3 below.

As the above analysis demonstrates, Bernard, Davies and Snell are clearly extremely keen to legitimise the Court's case law on non-discriminatory obstacles that block intra-EU movement.⁵⁵ However, the problem in each case is that their individual analyses are fundamentally incoherent. Put bluntly, in order to square the Court's case law on this particular type of non-discriminatory national measure with their preferred discrimination and/or mutual recognitions tests, the three commentators are forced to abandon these very same conceptual models. In particular, Davies and Snell end up 'bolting on' additional tests to their preferred discrimination and mutual recognition models.⁵⁶ In both cases, this move would appear to be based on an intuitive belief that *any* rule that blocks intra-EU movement should be considered to fall within the scope of the Treaty freedoms. However, neither the principle of mutual recognition nor the discrimination model is capable of explaining this belief. To date, only Bernard has made overtures to subsidiarity as a possible normative basis for this particular 'discrimination-plus' reading of the obstacle concept discussed in this section.⁵⁷ However, this line of reasoning was unfortunately not fully explored.

2.3.2 Market circumstances rules

The analysis so far has attempted to show, through descriptive critique, that there is considerably less dispute in the case law and literature concerning the scope of the

⁵⁴ *Ibid.*

⁵⁵ Of the three, Bernard is the least keen to do so. Bernard rejects the *Bosman* ruling as 'troubling.' See Bernard *op. cit.* at note 30 at pp 33-34.

⁵⁶ Snell *op. cit.* at note 30 at p. 127 and Davies *op. cit.* at note 8 at p. 87. Snell does express some caution about the implications of his additional market access test (at p. 127.)

⁵⁷ Bernard *op. cit.* at note 51 at p. 638.

Treaty freedoms than might be first apparent. At the same time, it has also pointed to the limits of the discrimination and/or mutual recognition models as coherent normative frameworks. In this sub-section, we turn to consider the exceptional line of case law that is considered problematic: case law on market circumstances rules. To repeat: these are non-discriminatory national rules that do not block intra-EU movement but simply define conditions for the pursuit of economic and/or non-economic activity within individual Member States. The extension in the scope of the Treaty freedoms to permit the scrutiny of such rules at Union level marks the fault line in the on-going debate over the proper function of these provisions.⁵⁸ For advocates of the narrower approach, the scope of the obstacle concept cannot be stretched this far. It is at this point that the Treaty freedoms shift from being tools to co-ordinate (legitimately) the exercise of regulatory competence between the Member States to become instruments to scrutinise (illegitimately) the substance and even very existence of national policies per se.⁵⁹ On the other hand, for supporters of the broader approach, the use of the Treaty freedoms to review market circumstances rules marks the point at which concepts such as market access or Union citizenship kick in as autonomous substantive tests. As discussed earlier, in a great many cases, both market access and Union citizenship are simply used to re-brand cases that can be adequately explained using the discrimination and/or mutual recognition models.

This section starts by emphasising the infrequency and nature of the Court's review of market circumstances rules as obstacles to intra-EU movement. Data from the case law on Art 34 TFEU (goods) is used to provide a clearer statistical context to the first point (the infrequent but growing body of case law on market circumstances rule). Thereafter, we turn to examine the nature of some of the most common forms of market circumstances across the freedoms. Section 2.3.2.2 then considers the detail

⁵⁸On this point see eg J. Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47(2) *CMLRev* 437 at p. 470, who also concludes that: '[the] most fundamental question for free movement law remains whether the law is about discrimination and anti-protectionism... or whether it is about economic freedom.' For earlier expressions to the same effect, see eg Weatherill *op. cit.* at note 6 at p. 889, Maduro *op. cit.* at note 6 at p. 40 and the Opinion of AG Bot in Case C-110/05 *Commission v. Italy (Motorcycle Trailers)* *op. cit.* at note 2 at para. 75.

⁵⁹ See here esp. Bernard *op. cit.* at note 8 at p. 106: 'While there is clearly a mandate for the Court to abolish obstacles that prevent [here: block] access to goods, services and labour markets in other [M]ember States, there is no mandate to define the characteristics of those markets and no basis on which to develop a "European Economic Constitution".'

of the rare, but increasing, number of cases across the Treaty freedoms in which the Court has opted to bring such measures within the scope of its review.

2.3.2.1 The exclusion of market circumstances rules from the scope of the Treaty freedoms

The Court is confronted with challenges to market circumstances rules relatively infrequently. For example, in the case law on Arts 34 TFEU (goods), the Court was asked between 1995 and 2010 to examine market circumstances measures on 30 occasions out of a total of 150.⁶⁰ However, the relatively minor position of market circumstances rules as a percentage of the total case law on obstacles to intra-EU movement (20%) tells only part of the story. Significantly, in the majority of those cases in which the Court is requested to rule on market circumstances rules, it typically concludes that such measures do *not* fall within the scope of the Treaty freedoms.⁶¹ In the case law on goods, the Court ruled, in only eight out of thirty cases, that the particular national measure constituted an obstacle to intra-EU movement, requiring justification in EU law (for the sample period 1995-2010).⁶²

The statistics on Art 34 TFEU also point to the emergence of an important third trend in the Court's case law on market circumstances rules. The numerical data demonstrates clearly that, over the last ten years, the Court has progressively altered its approach to the review of market circumstances rules. From around 2000 onwards, the Court has opted increasingly to scrutinise market circumstances rules as obstacles to intra-EU movement. In the case law on goods, the chosen test case here, the Court has shifted from a total exclusion of market circumstances rules from the

⁶⁰ Data taken from <http://eur-lex.europa.eu/de/index.htm> (last accessed 14.09.2011).

⁶¹ See eg Case C-412/93 *Leclerc-Siplec op. cit.* at note 6 at paras 18-24, Case C-63/94 *Groupement National des Négociants en Pommes de Terre de Belgique* [1995] ECR I-2467 at paras 9-15, Case C-387/93 *Banchero* [1995] ECR I-4663 at paras 32-44, Case C-266/96 *Corsica Ferries* [1998] ECR I-3949 at paras 29-32, Case C-6/98 *PRO Sieben Media AG* [1999] ECR I-7599 at paras 45-48, C-416/02 *Morellato* [2003] ECR I-9343 at para. 36, Case C-20/03 *Burmanjer* [2005] ECR I-4133 at paras 23-32, esp. at para. 31 and Case C-441/04 *A-Punkt Schmuckhandels GmbH* [2006] ECR I-2093 at paras 14-25.

⁶² Case C-473/98 *Toolex Alpha AB* [2000] ECR I-5681 at para. 35, Case C-112/00 *Schmidberger* [2003] ECR I-5659 at paras 55-64, Case C-366/04 *Georg Schwarz* [2005] ECR I-10139 at paras 28-29 and esp. para 39, Case C-320/03 *Commission v Austria (Lorries)* [2005] ECR I-9871 at paras 66-69, Case C-65/05 *Commission v Greece (Electronic Games)* [2006] ECR I-10341 at paras 27-30, Case C-265/06 *Commission v. Portugal (Tinted Film) op. cit.* at note 2 at paras 31-36, Case C-110/05 *Commission v. Italy (Motorcycle Trailers) op. cit.* at note 2 at para.58 and Case C-142/05 *Mickelsson and Roos op. cit.* at note 2 at para. 28.

scope of Art 34 TFEU (between 1995 and 2000) to a far more interventionist position.⁶³ From 2000 to 2005, the ECJ reviewed two market circumstances rules as obstacles to intra-EU movement.⁶⁴ During 2005-2010, this number rose to six national measures.⁶⁵ From 2010 to the time of writing, a further two cases have arisen.⁶⁶ As we shall see in section 2.3.2.2 below, the Court's changing approach in the area of goods is not atypical and is replicated across the individual Treaty freedoms.

In terms of their nature, typical examples of excluded measures include non-discriminatory tax laws⁶⁷ and non-discriminatory national measures regulating trading hours or marketing/operating practices.⁶⁸ The common feature uniting these different categories of rules is their effect on intra-EU movement. In each case, the specific rules at issue do not block movement between Member States and, provided they are genuinely non-discriminatory, simply characterise the regulatory environment within that State. Of course, this does not mean that these measures have no impact on intra-EU movement. For example, with respect to non-discriminatory tax rules, the Court noted in *Weigel* that the co-existence of different

⁶³ The Court's earlier review of market circumstances rules as obstacles to Art 34 TFEU (between 1985 and 1992) is discussed further below.

⁶⁴ Case C-473/98 *Toolex Alpha op. cit.* at note 62 at para. 35 and Case C-112/00 *Schmidberger op. cit.* at note 62 at paras 55-64.

⁶⁵ Case C-366/04 *Schwarz op. cit.* at note 62 at paras 28-29 and esp. para 39, Case C-320/03 *Commission v Austria (Lorries) op. cit.* at note 62 at paras 66-69, Case C-65/05 *Commission v Greece (Electronic Games) op. cit.* at note 62 at paras 27-30, Case C-265/06 *Commission v. Portugal (Tinted Film) op. cit.* at note 2 at paras 31-36, Case C-110/05 *Commission v. Italy (Motorcycle Trailers) op. cit.* at note 2 at para. 58 and Case C-142/05 *Mickelsson and Roos op. cit.* at note 2 at para. 28.

⁶⁶ Case C-433/05 *Lars Sandström*, judgment of the Court (Third Chamber) of 15 April 2010 (nyr) at para 32 and Case C-142/09 *Vincent Willy Lahousse and Lavichy BVBA*, judgment of the Court (First Chamber) of 18 November 2010 (nyr) at paras 44-45.

⁶⁷ Eg Case C-391/97 *Gschwind op. cit.* at note 29, Case C-387/01 *Weigel op. cit.* at note 29, Case C-403/03 *Schempp op. cit.* at note 29, Case C-134/03 *Viacom Outdoor Srl* [2005] ECR I-1167, Joined Cases C-544/03 and C-545/03 *Mobistar SA (C-544/03) and Belgacom Mobile SA (C-545/03)* [2005] ECR I-7723, Case C-513/04 *Mark Kerckhaert and Bernadette Morres v Belgische Staat* [2006] ECR I-10967 and Case C-298/05 *Columbus Container Services op. cit.* at note 29. For discussion, see Snell *op. cit.* at note 8 at pp 349-335.

⁶⁸ Eg Case 75/81 *Blesgen* [1982] ECR 1211, Case C-379/92 *Peralta* [1994] ECR I-3453, C-402/92 *Boermans* [1994] ECR I-2199, Case C-134/94 *Esso Española SA* [1995] ECR I-4223, Joined Cases C-140-2/94 *DIP SpA* [1995] ECR I-3257, Case C-71/02 *Herbert Karner* [2004] ECR I-3025, Case 20/03 *Burmanjer op. cit.* at note 61, Case C-441/04 *A-Punkt Schmuckhandels op. cit.* at note 61 and Case C-393/08 *Emanuela Sbarigia*, Judgment of the Court (First Chamber) of 1 July 2010 (nyr) at para. 35.

tax regimes across the Member States might affect intra-EU movement (favourably or unfavourably).⁶⁹ However, the Court stressed that:

‘the Treaty offers no guarantee to [here: a worker] that transferring his activities to a Member State other than the one in which he previously resided will be neutral as regards taxation.’⁷⁰

The Court’s ruling in *Keck* remains the most striking example of the Court’s attempt to place market circumstances rules beyond the scope of its review as obstacles to intra-EU movement.⁷¹ In that case, the Court excluded a specific category of such rules (‘non-product’ marketing rules) from the scope of Art 34 TFEU as ‘certain selling arrangements.’⁷² As noted above, this objective was achieved by reintroducing discrimination analysis into the assessment of such rules.⁷³ The Court’s *Keck* ruling marked a clear break with several of its previous decisions, in which the Court had sanctioned the use of Art 34 TFEU to review, for example, non-discriminatory national rules on shop opening hours.⁷⁴ As discussed in Chapter 3, the Court has been reluctant to extend the scope of its ‘selling arrangement’ concept to other categories of national measures that, on one view, exhibit comparable effects on intra-EU movement (these cases are discussed below).⁷⁵ However, notwithstanding this development, the *Keck* exception continues to apply.⁷⁶

2.3.2.2 Market circumstances rules as obstacles to intra-EU movement

The decision in *Keck* can be taken as a ruling of principle on the Court’s use of the Treaty freedoms to scrutinise market circumstances rules. Required to rule conclusively on whether such rules – or at least a particular category of such rules – fall within the scope of its review as obstacles to intra-EU movement, the ECJ

⁶⁹ Case C-387/01 *Weigel op. cit.* at note 29.

⁷⁰ *Ibid.*, at para. 55. See also eg Case C-403/03 *Schempp op. cit.* at note 29 at paras 34 and 45.

⁷¹ Joined Cases C-267/91 and C-268/91 *Keck and Mithouard op. cit.* at note 12.

⁷² *Ibid.*, at paras 14-16.

⁷³ For examples of discriminatory selling arrangements, see eg Case C-405/98 *Gourmet International Products op. cit.* at note 20, Case C-254/98 *TK-Heimdienst op. cit.* at note 20 and Case C-322/01 *DocMorris op. cit.* at note 20.

⁷⁴ See Joined Cases 60 and 61/84 *Cinéthèque SA op. cit.* at note 16, Case 145/88 *Torfaen BC op. cit.* at note 16 and C-362/88 *GB-INNO-BM op. cit.* at note 16. However, it should be noted that the Court in *Keck* did not actually overrule the aforementioned cases expressly.

⁷⁵ T. Horsley, ‘Anyone for *Keck*?’ Case Comment (2009) 46(6) *CMLRev* 2001 at pp 2008-2012.

⁷⁶ See eg Case C-531/07 *Fachverband der Buch- und Medienwirtschaft* [2009] ECR I-3717 at para. 20 and Case C-108/09 *Ker-Optika*, judgment of the Court (Third Chamber) of 2 December 2010 (nyr) at para. 51.

responded in the negative.⁷⁷ In so doing, it confirmed that Art 34 TFEU was a tool focused on liberalising intra-EU trade and not an instrument designed to maximise commercial freedom *per se*.⁷⁸ However, in the intervening years, the Court has, on occasion, departed from that position. This finding applies both to its case law on non-discriminatory rules governing the marketing of products (which the ruling in *Keck* might have been thought to exclude from the scope of Art 34 TFEU) and also to its case law on other Treaty freedoms. Taken together, this troublesome body of case law includes certain non-discriminatory: (1) product use rules;⁷⁹ (2) tax rules;⁸⁰ (3) ‘golden shares’;⁸¹ and (4) rules prescribing the conditions for the taking-up of permanent economic activity.⁸²

Turning first to the case law on goods, the Court’s departure from (or, at least, qualification of) the choice it made in *Keck* can be seen in a subsequent set of decisions dealing with product use rules.⁸³ The dispute here centres on the comparability of such rules with the selling arrangements category introduced in

⁷⁷ Prior to the decision in *Keck*, AG Tesouro had asked the Court to make a clear statement on the scope of Art 34 TFEU. He asked: ‘Is Article 30 of the Treaty a provision intended to liberalize intra-Community trade or is it intended more generally to encourage the unhindered pursuit of commerce in individual Member States?’ See the Opinion of the AG in Case C-292/92 *Hünernund* [1993] ECR-6787 at para. 1.

⁷⁸ The allusion is to AG Tesouro’s question in Case C-292/92 *Hünernund op. cit.* at note 77.

⁷⁹ Case C-265/06 *Commission v. Portugal (Tinted Film) op. cit.* at note 2, Case C-110/05 *Commission v. Italy (Motorcycle Trailers) op. cit.* at note 2 and Case C-142/05 *Mickelsson and Roos op. cit.* at note 2.

⁸⁰ Case C-439/97 *Sandoz op. cit.* at note 3, Joined Cases C-430/99 and C-431/99 *Sea-Land Service op. cit.* at note 3, Case C-464/02 *Commission v. Denmark (Vehicle Registrations) op. cit.* at note 3, Case C-433/04 *Commission v. Belgium (Construction Tax) op. cit.* at note 3 and Case C-232/03 *Commission v. Finland (Vehicle Registrations) op. cit.* at note 3.

⁸¹ Case C-367/98 *Commission v. Portugal (Golden Shares) op. cit.* at note 4. See thereafter e.g. Case C-463/00 *Commission v Spain (Golden Shares) op. cit.* at note 4, Case C-98/01 *Commission v United Kingdom (Golden Shares) op. cit.* at note 4, Joined Cases C-282/04 and C-283/04 *Commission v Netherlands (Golden Shares) op. cit.* at note 4, Case C-112/05 *Commission v Germany (Golden Shares) op. cit.* at note 4 and Case C-171/08 *Commission v. Portugal (Golden Shares) op. cit.* at note 4.

⁸² Case C-55/94 *Gebhard op. cit.* at note 5 (Art 49 TFEU), Case C-108/96 *Mac Quen and Others op. cit.* at note 5, Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes op. cit.* at note 5 (Art 49 TFEU), Case C-294/00 *Gräbner op. cit.* at note 5 (Art 49 TFEU), C-140/03 *Commission v. Greece (Opticians) op. cit.* at note 5 (Art 49 TFEU) and Case C-325/08 *Olympique Lyonnais op. cit.* at note 5 (Art 45 TFEU).

⁸³ Case C-110/05 *Commission v. Italy (Motorcycle Trailers) op. cit.* at note 2, Case C-142/05 *Mickelsson and Roos op. cit.* at note 2 and Case C-265/06 *Commission v. Portugal (Tinted Film) op. cit.* at note 2. See also earlier, Case C-473/98 *Toolex Alpha AB op. cit.* at note 62 and Case C-65/05 *Commission v Greece (Electronic Games) op. cit.* at note 62.

Keck.⁸⁴ In common with the latter category, non-discriminatory rules regulating product usage do not block the importation of such products into that State. Instead, they simply define the conditions under which they may be used (or not, as the case may be). Leaving aside any judgment on their merits, the only effect of non-discriminatory selling arrangements and product use rules is to reduce the *size* of the available product market in the relevant Member State. However, notwithstanding the above parallels, the ECJ has confirmed that Art 34 TFEU extends to permit the scrutiny of non-discriminatory product use rules. In *Commission v. Italy (Motorcycle Trailers)*, the Grand Chamber of the Court concluded that a ban on the towing of trailers by motorcycles constituted an obstacle to intra-EU movement.⁸⁵ In its subsequent ruling in *Mickelsson and Roos*, the Court (Second Chamber) reached the same result.⁸⁶ This time, the contested national rule imposed restrictions (but not a total ban) on the use of jet-skis and other personal watercraft on public waterways within the national territory.

Outside of the free movement of goods, it is possible to point to several clusters of cases in which the ECJ has exceptionally invoked the Treaty freedoms to review market circumstances rules. This growing body of case law post-dates the ruling in *Keck*.⁸⁷ As such, it provides further evidence of the Court's reluctance to explore the broader, cross-freedom implications of the choice it made in that key decision.

First, in several cases, the Court has applied the Treaty provisions to review genuinely non-discriminatory Member State tax rules.⁸⁸ As noted above, non-discriminatory tax rules characterise a classic example of market circumstances rules. Such rules do not block intra-EU movement, but simply structure the fiscal environment within a State. For that reason, the Court concludes, in the vast majority

⁸⁴ As noted by AG Bot in his Opinion in Case C-110/05 *Commission v. Italy (Motorcycle Trailers)* *op. cit.* at note 2 at para. 1.

⁸⁵ Case C-110/05 *Commission v. Italy (Motorcycle Trailers)* *op. cit.* at note 2 at para. 58. The goods in question were specifically designed for this purpose (see para. 54).

⁸⁶ Case C-142/05 *Mickelsson and Roos* *op. cit.* at note 2 at para. 28. See now also Case C-433/05 *Sandström* *op. cit.* at note 66 at para. 32.

⁸⁷ For an exception see Case C-370/90 *Surinder Singh* [1992] ECR I-4265 (discussed below).

⁸⁸ Case C-439/97 *Sandoz* *op. cit.* at note 3, Joined Cases C-430/99 and C-431/99 *Sea-Land Service* *op. cit.* at note 3, Case C-464/02 *Commission v. Denmark (Vehicle Registrations)* *op. cit.* at note 3, Case C-232/03 *Commission v. Finland (Vehicle Registrations)* *op. cit.* at note 3 and Case C-433/04 *Commission v. Belgium (Construction Tax)* *op. cit.* at note 3.

of cases, that non-discriminatory tax rules fall outside of the scope of the Treaty freedoms. However, in several cases, the ECJ has broken with this approach and required Member States to justify – at Union level – their decision to levy a particular tax in the first place.⁸⁹ As Banks rightly notes, the use of the Treaty freedoms in this manner represents a classic case of the Court ‘falling into the trap of its own rhetoric.’⁹⁰ It seems to follow from a literal application of its broad effects-based reading of the term obstacle to intra-EU movement. For example, in *Sandoz*, the ECJ concluded that, in order to trigger the protection of Art 63(1) TFEU, it was sufficient that the contested non-discriminatory stamp duty imposed on certain types of loan was ‘likely to deter’ residents from obtaining loans from providers established in other Member States.⁹¹ According to the Court, the Austrian stamp duty ‘deprived residents [of that State] of the possibility of benefiting from *the absence of taxation* which may be associated with loans obtained outside the national territory.’⁹²

Secondly, in another line of case law, the Court has required Member States to justify non-discriminatory legislation governing the taking-up of economic activity within that State on a permanent basis. Again, such rules simply define the market within a particular State. For that reason, in the absence of any discrimination on nationality grounds, the Court generally excludes such rules from the scope of the Treaty freedoms on workers and establishment (Arts 45 and 49 TFEU), which apply in this context. For example, in *Bouchoucha*, the ECJ concluded that:

‘in the absence of Community legislation... each Member State is free to regulate the exercise of that activity within its territory, without discriminating between its own nationals and those of the other Member States.’⁹³

However, since 2001, the Court has increasingly challenged the autonomy of Member States to outline the non-discriminatory conditions governing the taking-up

⁸⁹ For detailed analysis see Banks *op. cit.* at note 8 esp. at pp 493-499.

⁹⁰ *Ibid.*, at p. 490.

⁹¹ Case C-439/97 *Sandoz op. cit.* at note 3 at para. 19.

⁹² *Ibid.* (this author’s emphasis).

⁹³ Case C-61/89 *Bouchoucha op. cit.* at note 43 at para. 12. See also recently Case C-345/08 *Krzysztof Peśła op. cit.* at note 43 at para. 50: ‘Article [45 TFEU] does not, in order to be given practical effect, require that access to a professional activity in a Member State be subject to lower requirements than those normally required of nationals of that State.’

of economic activity within that State on a permanent basis.⁹⁴ For example, in *Apothekerkammer des Saarlands (Doc Morris II)*, the Grand Chamber of the Court condemned as a restriction under Art 49 TFEU a German law restricting the right to operate pharmacies on the national territory to pharmacists.⁹⁵ The contested measure was genuinely non-discriminatory. Admittedly, in substance, it was more restrictive than the legislative environment governing the same activity in other Member States. However, in so far as the freedom of establishment (and also workers) is concerned, this fact alone is not sufficient to bring national legislation within the scope of the Treaty freedoms. As advocates of the dual burden and mutual recognition approaches point out, the home Member State retains primary competence for the regulation of economic activity on a permanent basis.⁹⁶

Thirdly, on the free movement of capital, the Court's troublesome case law on market circumstances rules centres on its 'golden shares' jurisprudence.⁹⁷ Golden shares are national measures that reserve to Member States *as shareholder* special powers in the management of previously State-owned undertakings.⁹⁸ In a series of decisions, the Court has made it absolutely clear that the very existence of such golden shares constitutes an obstacle to Art 63(1) TFEU. With respect to certain golden share rights, this finding is not problematic. First, a number of such provisions were discriminatory.⁹⁹ Secondly, of those that were genuinely non-

⁹⁴ Case C-108/96 *Mac Quen and Others op. cit.* at note 5, Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes op. cit.* at note 5 (Art 49 TFEU), Case C-294/00 *Gräbner op. cit.* at note 5 (Art 49 TFEU), C-140/03 *Commission v. Greece (Opticians) op. cit.* at note 5 (Art 49 TFEU) and Case C-325/08 *Olympique Lyonnais op. cit.* at note 5 (Art 45 TFEU). However, see also earlier Case C-55/94 *Gebhard op. cit.* at note 5 (Art 49 TFEU).

⁹⁵ Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others op. cit.* at note 5 at paras 22-24. See also earlier Case C-55/94 *Gebhard op. cit.* at note 5 at paras 33-37.

⁹⁶ *Bernard op. cit.* at note 30 at p. 17 and *Snell op. cit.* at note 30 at p. 126.

⁹⁷ Case C-367/98 *Commission v. Portugal (Golden Shares) op. cit.* at note 4. See thereafter e.g. Case C-463/00 *Commission v Spain (Golden Shares) op. cit.* at note 4, Case C-98/01 *Commission v United Kingdom (Golden Shares) op. cit.* at note 4, Joined Cases C-282/04 and C-283/04 *Commission v Netherlands (Golden Shares) op. cit.* at note 4, Case C-112/05 *Commission v Germany (Golden Shares) op. cit.* at note 4 and Case C-171/08 *Commission v. Portugal (Golden Shares) op. cit.* at note 4.

⁹⁸ For discussion, see eg E. Szyszczak, 'Golden Shares and Market Governance' (2002) 29(3) *ILEI* 255 and H. Fleischer, 'Case Note on the Golden Share Cases' (2003) 40(2) *CMLRev* 493.

⁹⁹ Case C-367/98 *Commission v Portugal (Golden Shares) op. cit.* at note 4 at para. 40 (rules restricting the acquisition of shares by non-nationals) and Case C-174/04 *Commission v Italy (Golden Shares)* [2005] ECR I-4933 at para. 30 (rules on voting rights discriminating against public utility companies established in other Member States).

discriminatory, some operated to block intra-EU movement.¹⁰⁰ This was the case where the contested golden shares imposed a prior authorisation requirement on the acquisition (or disposal) of shares above a fixed threshold, irrespective of the nationality of the investor. Although non-discriminatory, this requirement operated to block the acquisition of shares by investors established in other Member States (which constitutes an intra-EU capital movement for the purposes of Art 63(1) TEU).¹⁰¹ However, in a separate line of reasoning, the Court has gone a step further and consistently ruled that Art 63(1) TFEU also extends to capture non-discriminatory golden shares that do not block intra-EU capital movements, but instead simply grant Member States powers over the on-going management of undertakings.¹⁰² This covers, for example, reserved rights to appoint board members or to veto certain corporate decisions (other than those relating to share acquisition/disposal). Although non-discriminatory, the ECJ ruled that the *very existence* of this category of special shareholding, in deviation from the general rules of company law in that State, constitutes an obstacle to intra-EU movement.¹⁰³

Finally, it is possible to point to examples of the Court's review of market circumstances rules as obstacles to intra-EU movement in the case law on persons. This includes the decisions in *Singh* and *Carpenter*.¹⁰⁴ In these rulings, the ECJ concluded that the scope of the Treaty rules on Arts 45, 49 and 56 TFEU extended to capture non-discriminatory national legislation governing the residency rights of third country national (TCN) spouses of migrant EU citizens. In *Singh*, the applicant successfully invoked Articles 45 and 49 TFEU (workers and establishment) in order

¹⁰⁰ Eg Case C-367/98 *Commission v Portugal (Golden Shares)* *op. cit.* at note 4 at paras 44-45 and Case C-483/99 *Commission v France (Golden Shares)* *op. cit.* at note 4 at paras 41 and 45.

¹⁰¹ For confirmation, see eg Case C-436/00 *X and Y v Riksskatteverket* [2002] ECR I-10829 at para. 66.

¹⁰² Case C-367/98 *Commission v Portugal (Golden Shares)* *op. cit.* at note 4, Case C-463/00 *Commission v Spain (Golden Shares)* *op. cit.* at note 4, Case C-98/01 *Commission v United Kingdom (Golden Shares)* *op. cit.* at note 4, Joined Cases C-282/04 and C-283/04 *Commission v Netherlands (Golden Shares)* *op. cit.* at note 4, Case C-112/05 *Commission v Germany (Golden Shares)* *op. cit.* at note 4 and Case C-171/08 *Commission v Portugal (Golden Shares)* *op. cit.* at note 4.

¹⁰³ Eg Case C-367/98 *Commission v Portugal (Golden Shares)* *op. cit.* at note 4 at para. 45, Case C-463/00 *Commission v Spain (Golden Shares)* *op. cit.* at note 4 at para. 61, Case C-98/01 *Commission v United Kingdom (Golden Shares)* *op. cit.* at note 4 at para. 47, Joined Cases C-282/04 and C-283/04 *Commission v Netherlands (Golden Shares)* *op. cit.* at note 4 at paras 20-30 and Case C-112/05 *Commission v Germany (Golden Shares)* *op. cit.* at note 4 at para. 52.

¹⁰⁴ Case C-370/90 *Surinder Singh* *op. cit.* at note 87 and Case C-60/00 *Carpenter* [2002] ECR I-6279. See also Case C-291/05 *Eind* [2007] ECR I-10719.

to secure a residency right for himself upon his spouse's return to her home Member State after a period of economic activity in another.¹⁰⁵ In *Carpenter*, the applicant relied on his current and future activities as a provider of intra-EU services to defeat a deportation order issued against his TCN spouse by his home Member State. In both cases, the contested national legislation was non-discriminatory. Furthermore, although it undoubtedly had a real impact on the individuals concerned, it did not actually block the applicants' rights of intra-EU movement. Both Mrs Singh and Mr Carpenter remained (as Member State nationals) free to move between the markets of different Member States.

For each of the above case clusters, it is possible to point to descriptive and normative explanation for the Court's decision to engage in review of the specific market circumstances rule at issue. For example, at the level of description, the Court's decision to scrutinise the characteristics of national markets could simply follow from a literal interpretation of its preferred broad effects-based tests (eg *Dassonville*). Indeed, the Court has fallen into this trap before in its pre-*Keck* case law on goods and there is no reason for it not to do so again in other areas.¹⁰⁶ More specifically and with respect to the case law scrutinising national rules governing permanent economic activity, it could also be argued that the Court's conclusions are based on a failure, on its part, to distinguish properly between the freedoms of establishment and services. For example, in *Grübner*, the ECJ clearly lost sight of this distinction and clumsily read the provisions on establishment and services together to conclude that the measure infringed *both* Arts 49 and 56 TFEU.¹⁰⁷ This had the unfortunate effect of bringing within the scope of Art 49 TFEU a body of non-discriminatory national rules that were only capable of constituting obstacles to the freedom to provide services.¹⁰⁸

¹⁰⁵ See also Case C-291/05 *Eind op. cit.* at note 104 at paras 35-39. Contrast Case C-434/09 *McCarthy*, judgment of the Court (Third Chamber) of 5 May 2011.

¹⁰⁶ Eg See Joined Cases 60 and 61/84 *Cinéthèque SA op. cit.* at note 16, Case 145/88 *Torfaen BC op. cit.* at note 16 and C-362/88 *GB-INNO-BM op. cit.* at note 16.

¹⁰⁷ Case C-294/00 *Grübner op. cit.* at note 5 at paras 38-40. Supporting this view, see the Opinion of AG Mischo in that case at para. 57.

¹⁰⁸ *Ibid.* With respect to Art 56 TFEU, the contested rules discriminated against economic operators permanently established in other Member States where the provision of such services was lawful and who were seeking to extend their activities to the host State on a non-permanent basis.

In other cases, the Court's scrutiny of the non-discriminatory conditions within national markets could be read as an attempt to respond to/rectify specific problems or perceived injustices arising in connection with the exercise of the Treaty rights of intra-EU movement. For example, the ruling in *Singh* might be viewed as an attempt on the Court's part to fill a gap in the scope of protection afforded to migrant workers by (then) Regulation 1612/68 and Directive 73/148.¹⁰⁹ As the Court noted, the latter Union measures granted rights of entry and residence to the family members of Member State nationals engaged in economic activity in other Member States. However, they did not extend to cover the applicant's situation (as a returning migrant). On one view, it could be argued that the Court was not satisfied with this situation and, presented with the opportunity to do so, used the Treaty freedoms to fashion an appropriate solution. The subsequent decision in *Carpenter* can also be explained through similar reasoning.¹¹⁰ However, in this case, the Court's concern was focused more specifically on the impact of the contested deportation order on the applicant's fundamental rights.¹¹¹ These rights, and the right to the protection of family life in particular (in point in *Carpenter*), form part of the constitutional framework of the internal market, which the Court must protect.¹¹²

In normative terms, the Court could certainly fall back on the arguments of those favouring a broader reading of the Treaty freedoms to support its intervention in all of the above cases. For example, under the market access model, the Court's decision to scrutinise the rules on product use rules, taxation, golden shares and permanent economic activity is justified by the restrictive nature of those

¹⁰⁹ Case C-370/90 *Surinder Singh op. cit.* at note 87. Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L 257/2 and Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1973] OJ L 172/14. See now, for the most part, Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L1 58/77.

¹¹⁰ Case C-60/00 *Carpenter op. cit.* at note 104.

¹¹¹ *Ibid.*, at paras 40, 41 and 46. See also, to similar effect, in the case law on Art 34 TFEU Case C-71/02 *Karner* [2004] ECR I-3025 at paras 48-52. In this case, the ECJ scrutinised an Austrian market circumstances rule governing advertising content against Art 10 ECHR (freedom of expression).

¹¹² Case C-60/00 *Carpenter op. cit.* at note 104 at paras 41. See also eg Case C-260/89 *ERT* [1991] ECR I-2925 at para. 43, Case C-36/02 *Omega Spielhallen op. cit.* at note 33 at para. 33 and Case C-112/00 *Schmidberger op. cit.* at note 62 at para. 71. See now also Art 6 TEU and the Charter of Fundamental Rights of the European Union, 2010 OJ C 83/02.

measures.¹¹³ Similarly, the Union citizenship model is capable of defending those cases in which the personal freedom and, indeed, fundamental rights of Member State nationals were at issue. Under this reading of the obstacle concept, it is the very purpose of the Treaty freedoms to ensure that Union citizens are not subject to disproportionate interferences of this nature in connection with their intra-EU activities.¹¹⁴

However, recalling the conclusion reached in Chapter 5, the problem with these normative models is that they rest on weak foundations. As argued in Chapter 5, both the market access and Union citizenship models are based on an untested assumption that the Court is essentially free to exercise its competence to define the concept of an obstacle to intra-EU movement as it sees fit. In other words, it is largely taken for granted that the ECJ can extend the scope of the Treaty freedoms to advance a particular ‘discrimination-*plus*’ readings of these provisions. However, the time has come to scrutinise this basic assumption against the demands of the subsidiarity principle. This principle is specifically designed to safeguard Member State autonomy from excessive Union intervention in areas of shared regulatory responsibility such as the internal market.

3. Subsidiarity and obstacles to intra-EU movement

3.1 Introduction

The above analysis has attempted to reduce the scale of the problem in the case law and literature on obstacles to intra-EU movement. In summary, it has been argued that the primary tension in the case law and literature centres on the Court’s extension of the scope of the Treaty freedoms to review market circumstances rules. The use of the Treaty freedoms in this manner has been shown to be exceptional, but spread across the individual provisions and increasing in frequency in recent years. It also cuts through a range of very different areas of national regulatory autonomy from more mundane legislation on product usage to highly sensitive matters of direct

¹¹³ See esp. AG Jacobs in Case C-412/93 *Leclerc-Siplec op. cit.* at note 6 at para 40: ‘Restrictions on trade should not be tested against local conditions which happen to prevail in each Member State, but against the aim of access to the entire Community market.’

¹¹⁴ Spaventa *op. cit.* at note 6 at p. 136. See also A. Tryfonidou, ‘Further Steps on the Road to Convergence amongst the Market Freedoms’ (2010) 35(1) *ELRev* 36 at pp 44, 49 and 50.

taxation and immigration policy. In this section, analysis shifts from the descriptive to the normative. Introducing subsidiarity into the debate, it is argued that this principle provides the clear (and missing) normative basis to declare the Court's troublesome market circumstances case law *wrong*.

We begin our analysis with discussion of the substance of subsidiarity test (section 3.2). Thereafter, the chapter turns to consider, in section 3.3, the implications of the proposed subsidiarity test for the review of market circumstances rules (as the 'problem cases'). We then examine the impact of subsidiarity on the Court's less problematic case law on discriminatory obstacles (section 3.4). Although the core tension is focused on market circumstances rules, this second strand of analysis remains important. A coherent and normatively sound conceptual framework must be capable of rationalising all of the Court's case law on obstacles to intra-EU movement.

3.2 Formulating the subsidiarity test

In Chapter 1, it was argued that subsidiarity aims to protect Member State autonomy in areas of concurrent competence (as defined in Art 4 TFEU). This objective is achieved by placing conditions on the *exercise* of competence by the Union institutions in such areas. According to Art 5(3) TEU, in order to exercise concurrent competences, Union institutions must demonstrate that there is a need for intervention at Union level. It was argued that the test comprises two cumulative requirements. First, it must be shown that Union action is necessary to address regulatory problems that exhibit sufficient transnational or cross-border effects. Secondly, subsidiarity requires that the Union institutions demonstrate that their action is associated with clear benefits or 'added value' as compared to continued unilateral action (or inaction) at Member State level. The desire to limit Union intervention in these terms is based on subsidiarity's presumption in favour of localised decision-making, which is considered to be superior for reasons of both economic efficiency and democratic legitimacy.¹¹⁵

¹¹⁵ See also Art 1 TEU, which emphasises subsidiarity's political character.

The conclusion reached in Chapter 2 was that the Court must integrate the demands of subsidiarity into its own interpretative choices. Specifically, subsidiarity applies where these choices involve decisions about whether or not there is a need for intervention at Union level in an area of shared competence. In Chapter 3, it was argued that the Court's interpretation of the scope of the Treaty freedoms meets the above prerequisites. This follows from the finding that, when interpreting the scope of these provisions, the Court is making a decision about the extent to which Member States are required to justify, at Union level, their contribution to the regulation of the internal market (as an area of shared competence). Only where a national measure falls within the scope of the Treaty freedoms is that Member State required to subsume and defend its policy choice within the Union derogation framework. In all other cases, the Member States are left to contribute to the regulation of the internal market unilaterally at the national level without interference from the Court (i.e. the Union).¹¹⁶

The question now is how subsidiarity functions in practice. How can this principle translate into a substantive test to restrain the Court in the exercise of its interpretive freedom to define the scope of the Treaty freedoms? The solution proposed in this section builds on the arguments of certain commentators, discussed in Chapter 2, who reflected briefly on subsidiarity's implications in this context. It also draws directly from the case law addressing the principle's application as a restraint on the Union legislature. Bringing these distinct strands of analysis together, it is argued that, as a source of self-restraint on its reading of the scope of the Treaty freedoms, subsidiarity precludes the Court from using those provisions as tools to scrutinise the efficiency, effectiveness or perceived fairness of non-discriminatory market circumstances rules.

¹¹⁶ Of course, the Member States remain subject to the underlying obligations of mutual recognition and non-discrimination in connection with the exercise of their regulatory autonomy. Failure to comply with either principle triggers review of the relevant national measure as an obstacle to intra-EU movement. The relationship between subsidiarity and the principles of non-discrimination and mutual recognition is discussed in sections 3.3 and 3.4 below.

3.2.1 Building on the literature and case law

In Chapter 2, we noted that, during an early flurry of academic interest post-Maastricht, a few commentators broke with the dominant line of analysis and reflected on the broader implications of the subsidiarity principle in EU law. Bermann, Schilling, Bernard and, more recently, de Búrca discussed, to varying degrees, how the principle might affect the Court's functions as an institutional actor.¹¹⁷ De Búrca focused primarily on discussing the procedural dimension; that is, whether or not the Court is capable of *responding* unilaterally to subsidiarity as a self-enforcing restraint or whether the introduction of new mechanisms of ex post review would be necessary to ensure its compliance with the principle. However, in so doing, de Búrca recognised that subsidiarity was relevant to the exercise of the Court's own functions. By contrast, in their earlier analyses, Bermann, Bernard and Schilling focused more on the substance of the subsidiarity test. All three commentators explored the principle's impact on the Court's case law on obstacles to intra-EU movement.

Both Bermann and Bernard called for the Court to show greater awareness of the subsidiarity principle in its free movement case law. Bermann argued, in broad terms, that:

‘the Court [should] pay more attention in particular cases as to whether the exercise of regulatory authority by a Member State or its subcommunities sufficiently impairs cross-border mobility to justify suppression of the relevant measure in the interest of the common market.’¹¹⁸

Bernard was more precise in his (brief) analysis. He concluded that, in accordance with the demands of subsidiarity, the ECJ should focus its reading of the Treaty freedoms on ‘removing barriers to entry or exit from one Member State to another and ensuring equal treatment once inside the territory/market of each Member State.’¹¹⁹ Schilling adopted a different view.¹²⁰ He argued that subsidiarity qualifies

¹¹⁷ G. A. Bermann, ‘Taking Subsidiarity Seriously: Federalism in the European Community and the United States’ (1994) 94(2) *Columbia Law Rev* 331, T. Schilling, ‘Subsidiarity as a Rule and a Principle’ (1994) 14 *YEL* 203, Bernard, ‘The Future of European Economic Law in the Light of the Principle of Subsidiarity’ *op. cit.* at note X and G. de Búrca, ‘The Principle of Subsidiarity and the Court of Justice as an Institutional Actor’ (1998) 36(2) *JCMS* 217.

¹¹⁸ Bermann *op. cit.* at note 117 at p. 402.

¹¹⁹ Bernard *op. cit.* at note 117 at p. 638.

¹²⁰ Schilling *op. cit.* at note 117.

the principle of primacy in EU law. For Schilling, in cases where the contested national rule is not *intended* to restrict imports, subsidiarity requires the Court to balance the Union interest in securing uniformity (which he interprets as the function of the primacy principle) with the protection of Member State autonomy (protected by subsidiarity).¹²¹ Of the three approaches offered, it was argued that Bermann's and Bernard's analyses were to be preferred. Schilling's argument falls down by reason of the fact that it does not focus on the *effects* of national measures on intra-EU movement – the core focus of the subsidiarity principle. Instead, his argument is based on a distinction between different categories of national measures – economic versus non-economic rules – which is of no relevance to the subsidiarity assessment.

Although preferred, Bermann's analysis is rather short on detail. In his brief review, he does not elaborate further on his criterion of 'sufficient cross-border impediment.' This decisive piece of the subsidiarity jigsaw is left out. Equally, whilst more precise in its outcome, Bernard's hypothesis also requires further development. In particular, his argument does not explain why the Court should always enjoy the right to review *discriminatory* national measures. As discussed in Chapter 2, it could be argued that, in a great many cases, the discriminatory effects of specific national policies do not in fact extend beyond the territory of that Member State. On that basis, the logic of subsidiarity would appear to preclude the Court's use of the Treaty freedoms to review such measures as obstacles to intra-EU movement (which would amount, of course, to a radical revision of the current case law).

To tackle the limitations inherent in the existing analyses and formulate a more precise subsidiarity test, it is argued that we should re-examine how the principle has developed as a restraint on the Union legislature. As discussed in Chapter 1, when exercising its competence to contribute to the regulation of the internal market (Art 114 TFEU), the Union legislature is faced with a comparable decision to that which the Court is required to take when defining the scope of the Treaty freedoms. Both instances involve a decision about whether or not there is a need for intervention at Union level or whether the Member States can be left to act unilaterally. The difference between the actions of the Union legislature and the Court in this specific

¹²¹ *Ibid.*, at p. 241.

sphere is one of perspective. When seeking to exercise its competence under Art 114 TFEU, the Union legislature is contemplating the adoption of new Union measures to tackle particular regulatory problems that met the subsidiarity test (see further below). By contrast, the Court of Justice, in the exercise of its competence to interpret the scope of the Treaty freedoms, does not enjoy this same right of initiation. Instead, its actions seek to police the boundaries of existing Member State action. The Court's role is to ensure that Member States exercise their competence to contribute to the regulation of the internal market responsibly¹²² and, where appropriate, to 're-regulate' these choices at Union level (using the justification framework as its filter) in cases where they do not.¹²³

In Chapter 1, it was argued that the Court has already crafted subsidiarity into a legal test to restrain the Union legislature's exercise of its competence under Art 114 TFEU. This ex post subsidiarity review was shown to have developed initially under the heading of the Court's 'legal basis' review. Analysing *Tobacco Advertising*, it was argued that the Court's scrutiny of whether or not the contested Union legislation had been enacted using the correct legal basis was in fact more concerned with review of the *exercise* of competence rather than its mere existence.¹²⁴ In connection with the assessment of Union legislation enacted under Art 114 TFEU, discussion of the conditions under which the Union legislature may exercise regulatory competence is the proper domain of the subsidiarity principle. However, in its subsequent case law, the Court was shown to have transposed its de facto subsidiarity reasoning to the analysis of subsidiarity proper; in other words, to its scrutiny of the Union legislature's actions against Art 5(3) TEU.¹²⁵

¹²² I.e. in compliance with the demands of the Treaties, including esp. Art 5(3) TEU.

¹²³ For Bernard, this is the characteristic feature of the decentralised (narrow) approach to market integration under the mutual recognition model. See Bernard *op. cit.* at note 30 at pp 17-18. See also, on the same point, Snell *op. cit.* at note 30 at p. 127.

¹²⁴ Case C-376/98 *Germany v. Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419 at paras 83, 84 and 95. See also thereafter, Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079 at paras 13-16 and Case C-301/06 *Ireland v Parliament and Council (Data Retention)* [2009] ECR I-593 at paras 62-71.

¹²⁵ See here esp. Case C-491/01 *British American Tobacco (Investments) Ltd* [2002] ECR I-11453 at para. 179. See thereafter Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health* [2005] ECR I-6451 at para. 103 and Case C-58/08 *Vodafone and Others*, judgment of the Court (Grand Chamber) of 8 June 2010 (nyr) at para. 75. For an exception, see Case C-301/06 *Ireland v Parliament and Council (Data Retention)* *op. cit.* at note 124. In the latter case, the Court followed its approach in

The Court's ex post review of Union legislation against the demands of the subsidiarity principle (both initially under the 'legal basis' heading and subsequently under Art 5(3) TEU proper) is important. In substantive terms, it tells us that, in accordance with Art 5(3) TEU, the Union legislature does *not* enjoy competence to engage in the per se review of the conditions for economic/non-economic activity within individual Member States. Art 114 TFEU does not, in the Court's own words, confer upon the Union legislature a 'general power to regulate the internal market.'¹²⁶ The practical effects of this conclusion can be most clearly seen in the decision in *Tobacco Advertising* itself. As discussed in Chapter 1, the German Government successfully contested the scope of Directive 98/43, approximating national laws on the advertisement of tobacco products.¹²⁷ In so far as the Directive affected intra-EU movement, the German Government's attack centred on the Directive's attempt to regulate the advertising of tobacco products through 'static advertising media.'¹²⁸ This covered, for example, the advertising of tobacco products using posters and parasols and also through cinema advertising within Member States. As the German Government argued, inter-State trade in such products was 'practically non-existent.'¹²⁹ It is submitted that the decision, at Member State level, to permit, restrict or prohibit the marketing of tobacco products using parasols or through cinema advertising is precisely the type of regulatory choice that subsidiarity was introduced to protect. This follows directly from the absence of any clear transnational effects associated with the regulation of these interests. Member State legislation governing the marketing of tobacco products using static advertising media (where enacted) simply defines the regulatory environment within individual

Tobacco Advertising and engaged in what is best interpreted as a de facto subsidiarity analysis under the heading of its legal basis review.

¹²⁶ Case C-376/98 *Tobacco Advertising op. cit.* at note 124 at para. 83. This clear statement of principle can be taken as a direct response to the German Government's submission in *Tobacco Advertising* that: 'If the [Union] legislature were permitted to harmonise national legislation even where there was no appreciable effect on the internal market, it could adopt directives in any area whatsoever' (para. 29). See also thereafter to the same effect, Case C-491/01 *British American Tobacco (Investments) Ltd op. cit.* at note 125 at para. 179, Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health op. cit.* at note 125 at para. 103 and Case C-58/08 *Vodafone and Others op. cit.* at note 125 at para. 75.

¹²⁷ Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [1998] OJ L 213/9.

¹²⁸ Case C-376/98 *Tobacco Advertising op. cit.* at note 124 esp. at paras 13-17.

¹²⁹ *Ibid.*, at para. 15.

Member States. Moreover, its existence and content (or absence) reflect the particular political preferences of voters within the respective Member States.

The decision in *Tobacco Advertising* remains, to date, the only case in which the Court has intervened to cut down an act of the Union legislature (implicitly) on subsidiarity grounds. For that reason, it could be argued that the above analysis rests on too weak a foundation to form the basis of a more specific subsidiarity test. However, this objection is easily refuted. As discussed in Chapter 1, the fact that the Court appears only to have corrected the scope of Union legislation on subsidiarity grounds in one specific case (*Tobacco Advertising*) does not necessarily reflect a subsequent change in its basic approach. Indeed, since *Tobacco Advertising*, the Court has been asked on at least three further occasions to review the compatibility with Art 5(3) TEU of Union legislation enacted under Art 114 TFEU.¹³⁰ In each case, the Court has repeated the substantive test it first formulated under Art 5(2) TEU in *Tobacco Advertising*. According to the ECJ, under Art 114 TFEU, the Union legislature:

‘does not [enjoy] exclusive competence to regulate economic activity on the internal market, but only a certain competence for the purposes of improving the conditions for its establishment and functioning by eliminating barriers to [here] the free movement of goods... or by removing distortions of competition.’¹³¹

Equally, in several other decisions, the Court has also reiterated its finding in *Tobacco Advertising* that ‘a mere finding of disparities between national rules is not sufficient to justify having recourse to [that same provision].’¹³²

The fact that the Court has not struck down more Union legislation on subsidiarity grounds can be explained on (at least) two grounds. First, it could be argued that the Union legislature has taken heed of the Court’s decision in *Tobacco Advertising* and

¹³⁰ Case C-491/01 *British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd op. cit.* at note 125, Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health op. cit.* at note 125 and Case C-58/08 *Vodafone and Others op. cit.* at note 125.

¹³¹ Case C-491/01 *British American Tobacco (Investments) Ltd op. cit.* at note 125 at para. 179, Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health op. cit.* at note 125 at para. 103 and Case C-58/08 *Vodafone and Others op. cit.* at note 125 at para. 75.

¹³² Case C-376/98 *Tobacco Advertising op. cit.* at note 124 at para. 84. As repeated in Case C-434/02 *Arnold André GmbH* [2004] ECR I-11825 at para. 30, Case C-210/03 *Swedish Match* [2004] ECR I-11893 at para. 29, Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health op. cit.* at note 125 at para. 28 and Case C-380/03 *Germany v. Parliament and Council (Tobacco Advertising)* [2006] ECR I-11573 at para. 37.

is now more careful (or less ambitious) in its attempts to enact legislation using Art 114 TFEU. Secondly, the absence of subsequent successful challenges could also be explained with reference to the particular nature of the Court's ex post review. As discussed in Chapter 1, when reviewing Union legislation against Art 5(3) TEU (and, for that matter, on other grounds), the ECJ does not conduct its own de novo inquiry. Instead, it restricts itself to examining whether or not the evidence relied upon by the Union legislature to support its decision to intervene in the regulation of the internal market 'adds up'. Only where the applicant demonstrates that this is clearly not the case can the ECJ be expected to step in and strike down Union legislation. In *Tobacco Advertising*, the German Government presented clear, targeted and reasoned objections to the Union legislature's exercise of competence to regulate tobacco advertising within the Union.¹³³ By contrast, in subsequent cases, the parties seeking to strike down Union legislation on the same basis have failed to adduce sufficiently convincing evidence to overturn the reasons for legislative action set out by the Union legislature.

Finally, even if it is accepted that *Tobacco Advertising* marks the 'high-water' mark of the Court's Art 114 TFEU subsidiarity review (which is a compelling view),¹³⁴ this does not actually weaken the present argument. The finding that the Court has since diluted its scrutiny of Union legislation on subsidiarity grounds is a distinct issue for separate critique.¹³⁵ What is important for this thesis is the fact that, in *Tobacco Advertising* at the very least, the Court can be seen to have integrated the demands of Art 5(3) TEU into its scrutiny of the Union legislature's decision to exercise its competence under Art 114 TFEU. It is this fact, and in particular, the detail of the Court's approach that is important here.

¹³³ Case C-376/98 *Tobacco Advertising op. cit.* at note 124 at paras 13-22.

¹³⁴ For discussion of the Court's apparent change of approach since *Tobacco Advertising* (though not through the lens of subsidiarity), see eg M. Dougan 'Legal Developments,' (2010) 48 (supplement) *JCMS* 163 at pp 171-179 and S. Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has Become a "Drafting Guide"' (2011) 12(3) *GLJ* 827.

¹³⁵ See Weatherill *op. cit.* at note 134.

3.3 Subsidiarity and non-discriminatory obstacles to intra-EU movement

To summarise, it has been argued that the Court's case on Art 114 TFEU – and the ruling in *Tobacco Advertising* in particular – provides a useful indication of subsidiarity's practical function in EU law as a restraint on the exercise of Union competence in connection with the regulation of the internal market. Put simply, the Court reads subsidiarity to preclude the use of Art 114 TFEU as a 'general power to regulate the internal market.' In practice, the evidence (which matches the substance of the subsidiarity test)¹³⁶ suggests that this amounts to preventing the Union legislature from using that provision as a basis to engage in nothing other than the re-regulation at Union level of the conditions for economic/non-economic activity within individual Member States. In this specific sphere, subsidiarity therefore protects the manner in which national markets are structured. In this section, we now turn to examine more closely what this subsidiarity test means for the Court's case law on obstacles to intra-EU movement. This begins with discussion of the principle's implications for the case law on *non-discriminatory* national measures.

In section 2.3, it was argued that the Court has extended the scope of the Treaty freedoms to capture two categories of genuinely non-discriminatory national rules. The distinguishing feature of these two categories is whether or not they operate to *block* intra-EU movement. Returning to this line of case law, it is submitted that the principle of subsidiarity poses no threat to the Court's continued use of the Treaty freedoms to review this category; that is, to permit the scrutiny at Union level of non-discriminatory measures that block intra-EU movement. On the contrary, subsidiarity actually provides a stronger normative basis to support the Court's continued use of the Treaty provisions in this manner. In cases where their policy choices block intra-EU movement, the Member States have clearly overstepped the limits of their autonomy to contribute to the regulation of the internal market as a shared regulatory space. Accordingly, there is a need for the Court to step in and engage in the scrutiny of these preferences at Union level. This intervention is essential in order to realise

¹³⁶ As discussed in detail in Chapter 1.

the shared objective of establishing a functioning internal market in which the free movement of goods, persons, services and capital is secured (Art 26 TFEU).

Far more problematic from the perspective of subsidiarity is the Court's exceptional, but increasing, application of the Treaty freedoms to review non-discriminatory rules that do not actually block intra-EU movement.¹³⁷ Transposing analysis of the case law on Art 114 TFEU, it is submitted that subsidiarity provides the missing normative basis to declare this line of case law *wrong*. The Court's use of the Treaty freedoms to scrutinise market circumstances rules amounts to nothing other than interference at Union level in the precise sphere of Member State regulatory autonomy that subsidiarity was introduced to protect. Whilst they may affect intra-EU movement, market circumstances rules do not exhibit the prerequisite transnational effects required by the subsidiarity principle to justify the Court's decision to use the Treaty freedoms as tools of review. For example, disparities between the tax rules of two different Member States might, in effect, lead an economic operator or Union citizen not to bother entering the market of that State. However, this should not give rise to an obstacle to intra-EU movement. It is not the existence of the tax that is important but the nature of its effects. Given that national tax rules are incapable of blocking intra-EU movement, the only question for EU free movement law is whether or not they are discriminatory (see section 3.4 below).

Why is it necessary to limit the Court's intervention to the review of non-discriminatory rules that actually block intra-EU movement? Should the Court not *also* enjoy competence to review market circumstances rules that, although genuinely non-discriminatory and not blocking intra-EU movement, nevertheless *severely restrict* personal or economic freedom within that State? This represents the popular view in the commentary and would also reflect closely the Court's current position on the scrutiny of such rules as obstacles to intra-EU movement (see section 2.3.2.2 above). The Court's existing qualitative appreciability test could serve a useful function here.¹³⁸ This judicial device could be used to manage the scope of the Court's scrutiny of market circumstances rules. However, whilst appealing to some,

¹³⁷ This line of case law was isolated in section 2.3.2.2 above.

¹³⁸ See Chapter 4 for detailed discussion.

it is submitted that even this, more targeted extension in the scope of the Treaty freedoms cannot be squared with the demands of subsidiarity. In so far as the subsidiarity principle is concerned, the use of the Treaty freedoms in the above manner is no different to their (broader) use to scrutinise *any* non-discriminatory market circumstances rule. In both cases, the Court is, in the end, simply scrutinising the conditions for economic/non-economic activity as defined by the Member State concerned. The severity or restrictiveness of particular market circumstances rules is irrelevant and must not be confused or conflated with subsidiarity's focus on *sufficient* transnational effects. To conclude otherwise risks sanctioning the review of the very existence of Member State legislation. And, as we have already seen, subsidiarity does not grant the Union institutions such a general power of review over conditions within the internal market.

Similarly, it does not matter how outdated, stupid or unreasonable the non-discriminatory preferences of a particular Member State may seem. If they do not block intra-EU movement, then it is not for the Court to review them as obstacles to intra-EU movement.¹³⁹ On the contrary, it falls exclusively to the enfranchised citizens of that Member State to pronounce – through national or sub-national democratic processes – on the merits (or otherwise) of such rules. This division of regulatory competence for the regulation of the internal market is precisely what subsidiarity is designed to achieve. Accordingly, if a Member State wishes to impose restrictions on the use of motorcycle trailers or jet-skis on its national territory; impose particularly high taxes on certain activities; place severe restrictions on the opening of shops within its jurisdiction; or outline particularly onerous conditions for the taking-up and pursuit of permanent economic activity within that State, then it should be free to do so without interference from the Court. Of course, it can be argued that such rules are economically inefficient or too restrictive of personal freedom. However, as noted already, this is entirely irrelevant. What is more important is that the contested rules reflect (at least when enacted) the particular preferences of that State. It is this competence – to determine and, where appropriate,

¹³⁹ On this point, see also Bernard *op. cit.* at note 51 at p. 638 and Banks *op. cit.* at note 8 at p. 506.

subsequently repeal/amend the characteristics of national markets through national democratic processes – that subsidiarity protects.

To adhere to subsidiarity's demands, the Court of Justice should not, therefore, allow itself to be captured by the complaints of disgruntled citizens (or the clever arguments of legal commentators) who object per se to the *existence* of regulation or the exercise of Member State competence in certain areas. It must always be remembered that alternative paths remain open to citizens at Member State level. For example, disgruntled citizens can seek to challenge such rules at the national level by lobbying for changes in national legislative or administrative practices. In European democracies, this will amount to trying to secure a majority view for such a change. Alternatively, applicants can exploit other avenues of judicial redress. For example, those seeking to contest non-discriminatory market circumstances rules that restrict their fundamental rights can seek to petition the European Court of Human Rights. Finally, in certain cases, a disgruntled economic operator or Union citizen can opt to transfer their interests to the territory of another Member State where the prevailing conditions are more favourable to them. This latter reality – the right to move and exercise choice within a diverse internal market – characterises the true wonder of the Treaty freedoms. They are not instruments to undermine – or sidestep – regulatory choices expressed through national democratic processes; instead, they are tools to empower individuals to exercise greater choice within an enlarged Union of 27 Member States.

Reflecting again on the case law, it is interesting to note that the Court appears already to be implicitly aware of subsidiarity's function as a restraint on its freedom to review market circumstances rules. First, recalling the analysis in section 2 above, it is clear that the Court does not consistently use the Treaty freedoms to scrutinise the existence of Member State regulation. In numerous cases, the Court continues to conclude that market circumstances rules fall outside of the scope of the Treaty freedoms.¹⁴⁰ This gives rise to a suspicion of selectivity, which could be explained by

¹⁴⁰ See eg Case C-387/01 *Weigel op. cit.* at note 29, Case C-71/02 *Karner op. cit.* at note 68, Case 20/03 *Burmanjer op. cit.* at note 61, Case C-403/03 *Schempp op. cit.* at note 29, Case C-134/03 *Viacom Outdoor Srl* [2005] ECR I-1167, Joined Cases C-544/03 and C-545/03 *Mobistar SA* (C-544/03) and *Belgacom Mobile SA* (C-545/03) *op. cit.* at note 67, Case C-441/04 *A-Punkt*

the Court's awareness of the fact that it does not enjoy a 'general power to regulate' market conditions per se. Secondly, the Court has also been shown sometimes to rely on a qualitative appreciability test in connection with its review of non-discriminatory national rules. The use of this threshold test provides further evidence of the Court's own concerns over the scope of its competence to contribute to the regulation of the internal market through the interpretation of the Treaty freedoms. On the basis of the analysis in Chapter 4, it would appear that the Court is prepared to overlook: (1) non-discriminatory national rules the only effect of which is to increase (marginally) the costs of a particular economic activity;¹⁴¹ (2) non-discriminatory measures that are liable to have a low-level impact on consumer behaviour;¹⁴² and (3) national measures that might cause natural persons no real inconvenience in connection with their activities as economic actors and/or Union citizens.¹⁴³

In addition to the above, it is submitted further that the Court has already reacted to the introduction of the subsidiarity principle and adjusted its reading of the obstacle concept accordingly. The case in point here is *Keck*.¹⁴⁴ Although not referring to the principle at any point, the Court's change of direction in that ruling can be re-interpreted as a precise reflection of the demands of subsidiarity. This should not surprise, as the decision was taken at a time when subsidiarity was emerging as a core principle of European integration.¹⁴⁵ Indeed, the decision in *Keck* can be read

Schmuckhandels GmbH op. cit. at note 61, Case C-513/04 *Kerckhaert and Morres op. cit.* at note 67, Case C-298/05 *Columbus Container Services op. cit.* at note 29, Case C-345/08 *Krzysztof Peśla op. cit.* at note 43 and Case C-393/08 *Emanuela Sbarigia op. cit.* at note 68.

¹⁴¹ Case C-266/96 *Corsica Ferries op. cit.* at note 61, Case C-134/94 *Esso Española SA op. cit.* at note 68, Case C-379/92 *Peralta op. cit.* at note 68 and Joined Cases C-140-2/94 *DIP SpA op. cit.* at note 68.

¹⁴² Eg Case 20/03 *Burmanjer op. cit.* at note 61 at para. 42.

¹⁴³ For examples of cases which were found to satisfy this threshold see eg Case C-168/91 *Christos Konstantinidis v Stadt Altensteig* [1993] ECR I-1191 at para 15, Case C-148/02 *Garcia-Avello v. Belgian State* [2003] ECR I-11613 at para. 36, Case C-353/06 *Grunkin and Paul* [2008] ECR I-7639 at paras 23-24 and Case C-391/09 *Runevič-Vardyn and Wardyn*, Judgment of the Court (Second Chamber) of 12 May 2011 (nyr) at para. 76.

¹⁴⁴ Joined Cases C-267/91 and C-268/91 *Keck and Mithouard op. cit.* at note 12.

¹⁴⁵ For discussion of subsidiarity in the literature during the period, see eg D. Z. Cass, 'The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community' (1992) 29(1) *CMLRev* 1107, N. Emiliou, 'Subsidiarity: An Effective Barrier against "The Enterprise of Ambition"?' (1992) 17(5) *ELRev* 383 and J. Steiner, 'Subsidiarity under the Maastricht Treaty' in D. O'Keefe and P. M. Twomey (Eds.), *Legal Issues of the Maastricht Treaty* (London: Chancery, 1994) 49.

alongside the subsequent ruling in *Tobacco Advertising* (for Art 114 TFEU) as the flipside of the same subsidiarity coin.¹⁴⁶ In accordance with the demands of the subsidiarity principle, the selling arrangement concept in *Keck* sought to exclude from the scope of Art 34 TFEU a specific category of market circumstances rule (non-product marketing rules). In parallel with the subsequent *Tobacco Advertising* ruling, this judicial rule was designed to ensure that Art 34 TFEU remained focused on the elimination of obstacles to intra-EU movement and did not become a tool granting the Court a ‘general power to regulate the internal market.’¹⁴⁷ It is therefore submitted that the *Keck* ruling offers a framework around which the Court’s case law on intra-EU movement should be adjusted to reflect the demands of subsidiarity. However, before discussing this conclusion further, it is first necessary to reflect on the principle’s implications for the Court’s less controversial case law on discriminatory national measures.

3.4 Subsidiarity and discriminatory obstacles to intra-EU movement

The use of the Treaty freedoms to scrutinise discriminatory national rules as obstacles to intra-EU movement is universally accepted in the literature. More importantly, it is also clearly signposted in the Treaty.¹⁴⁸ However, the Court’s decision to review discriminatory national rules must still be squared with the subsidiarity principle. Otherwise, we are left with an incomplete conceptual framework.

At first sight, subsidiarity presents a serious challenge to the Court’s case law on discriminatory obstacles to intra-EU movement. Very often, the contested discriminatory national measures do not actually block intra-EU movement (the criterion for judicial intervention under Art 5(3) TEU developed above). This is the case, for example, with respect to the jurisprudence on Member State tax laws.¹⁴⁹ Even where discriminatory, such rules do not block intra-EU movement. Instead,

¹⁴⁶ Case C-376/98 *Tobacco Advertising op. cit.* at note 124.

¹⁴⁷ *Ibid.*, at para. 83.

¹⁴⁸ See esp. Art 18 TFEU: ‘Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.’

¹⁴⁹ Case C-513/04 *Kerckhaert and Morres op. cit.* at note 67 and Case C-298/05 *Columbus Container Services op. cit.* at note 29.

they simply affect the attractiveness of the choices available to those operating/residing within the Union. The only difference is, of course, that, where discriminatory, the contested rules work to the advantage of those already operating/residing within the market/territory of that Member State. It could be argued that subsidiarity precludes the Court from exercising its competence to review discriminatory national rules *except* in those cases where intra-EU movement is actually blocked. Examples of such cases would include: Member State legislation prescribing product characteristic requirements;¹⁵⁰ national rules prohibiting the provision of services lawfully provided in other Member States in cases where this protects competing domestic operators;¹⁵¹ and *directly* discriminatory national rules prohibiting nationals of other Member States from taking-up employed or self-employed activity within that State.¹⁵²

Does this mean that the Court's reading of the scope of the Treaty freedoms must be radically cut down to capture only discriminatory (and non-discriminatory obstacles) that *block* intra-EU movement? After all, are the Member States not capable of eliminating – at the national level – discriminatory elements from their policy preferences?¹⁵³ Moreover, has it not been argued that subsidiarity operates to protect their very right to do so unilaterally?

Notwithstanding the above, it is submitted that there is strong argument to support the view that the Court should not alter its approach to the scrutiny of Member State measures that discriminate on nationality grounds. Although Member States may be perfectly capable of correcting discrimination at the national level through unilateral action, it is submitted that the Court's intervention at Union level remains necessary to safeguard the special constitutional significance of the principle of non-

¹⁵⁰ Eg Case 120/78 *Cassis op. cit.* at note 10, Case C-470/93 *Mars op. cit.* at note 41 and Case C-12/00 *Commission v. Spain (Chocolate) op. cit.* at note 41.

¹⁵¹ Eg Case 279/80 *Webb op. cit.* at note 25, Case C-76/90 *Säger op. cit.* at note 7, Case C-58/98 *Corsten op. cit.* at note 20 and Case C-215/01 *Schnitzer op. cit.* at note 25.

¹⁵² For Art 45 TFEU, see e.g. Case 149/79 *Commission v. Belgium (Public Sector Employment)* [1980] ECR 3881, Case 307/84 *Commission v. France (Nursing)* [1986] ECR 1725 esp. at para. 17, Case C-415/93 *Bosman op. cit.* at note 5 (nationality clause) and Case C-283/99 *Commission v. Italy (Private Security Guards)* [2001] ECR I-4363. For Art 49 TFEU, see e.g. Case 2/74 *Jean Reyners v Belgian State* [1974] ECR 631 and Case C-375/92 *Commission v Spain (Tourist Guides)* [1994] ECR I-923.

¹⁵³ This point was raised in Chapter 2.

discrimination on nationality grounds in EU free movement law. If the elimination of discrimination were to be left in the hands of national courts, then the level of protection may differ across the Member States to the detriment of Union citizens. On that basis and in line with the second limb of the subsidiarity test in Art 5(3) TEU, one can argue therefore that the ECJ is better able to secure the guarantee of non-discrimination on nationality grounds as compared with continued Member State regulation.

However, the above argument could be transposed to the many other guiding principles of EU integration. For example, one could argue that the Court should also enjoy the right to review market circumstances rules that are environmentally unsound (Art 11 TFEU), fail to guarantee adequate consumer protection (Art 12 TFEU) or undermine the Treaty's objectives of promoting a high level of employment, education and training or fighting social exclusion (Art 9 TFEU). Perhaps even more importantly, it could be argued that the Court should enjoy the right to scrutinise market circumstances rules that undermine the Treaty's guarantee of equality (on various grounds) (Arts 8 and 9 TFEU) or those measures that infringe fundamental rights as protected within the constitutional framework of the Union.¹⁵⁴ What is so special about the guarantee of non-discrimination on nationality grounds in connection with the Treaty provisions on intra-EU movement?

The key distinguishing feature, it is submitted, is that the prohibition of discrimination on the grounds of Member State nationality characterises the very substance of the Treaty provisions.¹⁵⁵ As the Court has repeatedly confirmed, the individual Treaty provisions are, first and foremost, specific expressions of the principle of non-discrimination on nationality grounds.¹⁵⁶ By contrast, it is submitted that the Treaty freedoms cannot be construed as proxies for additional constitutional

¹⁵⁴ See eg Case C-260/89 *ERT op. cit* at note 112 at para. 43, Case C-36/02 *Omega Spielhallen op. cit.* at note 33 at para. 33, Case C-60/00 *Carpenter op. cit* at note 104 at paras 41 and Case C-112/00 *Schmidberger op. cit* at note 62 para. 71.

¹⁵⁵ Barnard refers to the prohibition of discrimination on nationality grounds as the 'cornerstone' of the Treaty freedoms. See Barnard *op. cit.* at note 1 at p. 18.

¹⁵⁶ See eg Case 2/74 *Reyners op. cit.* at note 152 at para. 16 (Art 49 TFEU), Case 36/74 *Walrave and Koch* [1974] ECR 1405 at para. 32 (Art 56 TFEU), Case 298/84 *Iorio* [1986] ECR 247 at para. 13 (Art 45 TFEU) and Case C-105/07 *Lammers & Van Cleeff NV* [2008] ECR I-173 at para. 14 (Art 63(1) TFEU).

values, such as the protection of the environment or fundamental rights. Of course, to be absolutely clear, this does *not* mean that there is no space to secure and develop such objectives in EU free movement law. On the contrary, the Court does – and should – integrate the promotion of such flanking Union policy objectives into its review of national measures that are found to (1) discriminate (directly or indirectly) on nationality grounds and/or (2) *block* intra-EU movement (the subsidiarity test developed in section 3.3.). For example, it is well-established that values such as environmental and consumer protection and fundamental rights shape the Court’s ‘re-regulation’ of national policies at the second-stage *justification* review.¹⁵⁷

However, the key point is that the application of such principles in the justification context remains distinct from the function played by the principle of non-discrimination in EU free movement law. The other general principles do not define the scope of the Treaty freedoms, but instead simply inform their *implementation* at the justification stage; that is, once it has been established – in accordance with the demands of Art 5(3) TEU – that the Court has competence to intervene at Union level in the (re)regulation of the internal market. It is only in this residual sphere that the Treaty’s general principles on, *inter alia*, fundamental rights or environmental protection should kick in to shape the Court’s choices as a Union policy-maker.

4. A new normative framework

To bring together the conclusions of the above analysis, this section offers a new conceptual framework to guide the Court in its interpretation of the scope of the Treaty freedoms. It is submitted that the proposed framework provides a normatively sound response to the long-running dispute in the literature concerning the proper function of the Treaty freedoms. In terms of its result, the proposed solution comes close to that advocated by supporters of the narrower discrimination/mutual recognition based reading of the term ‘obstacle to intra-EU movement’.¹⁵⁸ However, subsidiarity is the key differentiating factor between the aforementioned existing models and the framework proposed here. Subsidiarity provides the necessary and

¹⁵⁷ Eg Case C-112/00 *Schmidberger op. cit.* at note 62 at paras 71 and 74 and Case C-36/02 *Omega Spielhallen op. cit.* at note 33 at paras 33 and 35.

¹⁵⁸ See, in particular, Bernard *op. cit.* at note 30, Davies *op. cit.* at note 8 and Snell *op. cit.* at note 30.

missing normative basis to justify the Court's expansion of the scope of the Treaty freedoms beyond the discrimination/mutual recognition models in specific instances.

It is submitted that, to comply with the demands of the subsidiarity principle, the Court's interpretation of the scope of the Treaty freedoms must be limited to the scrutiny of two distinct categories of national measure. These are: (1) discriminatory national rules and (2) genuinely non-discriminatory national rules that *block* intra-EU movement. Conversely, the conclusion reached is that subsidiarity precludes the Court's application of the Treaty freedoms to engage in the review of non-discriminatory national rules that simply define the characteristics of national markets (market circumstances rules). In so doing, the principle operates to isolate and protect a meaningful space for citizens residing within those States to exercise their non-discriminatory policy preferences (typically through national democratic processes).

As the above analysis has shown, subsidiarity does not call for a radical shake-up of the existing case law on obstacles to intra-EU movement; it demands an *adjustment* at the margins, not a total revolution. Indeed, much of the current confusion in the case law and literature can be resolved at the level of descriptive analysis. In particular, the Court's increasingly broad effects-based reading of the obstacle concept is worryingly misleading. This test is, in fact, most frequently used to review indirectly discriminatory national measures. In the interests of accuracy, it is argued therefore that the Court should adjust its approach to reflect this reality. This call for greater accuracy applies, a fortiori, in the context of the preliminary reference procedure (Art 267 TFEU). In accordance with the division of adjudicative competences inherent in this important procedure, the Court is charged with the task of providing referring national courts with interpretations of provisions of EU law. In the present context, there is a genuine risk that the Court's increasingly broad (and misleading) reading of the obstacle concept could cause real confusion among national judges. At worst, this could even threaten one of the Court's sacred cows – the uniformity of Union law.

With respect to genuinely non-discriminatory national rules, it has been argued that subsidiarity provides us with a normatively sound basis to support the exclusion of

market circumstances rules from the scope of the Court's review. In practical terms, the subsidiarity principle requires a *reversal of the burden of proof* in this exceptional body of case law. Under the principle of subsidiarity, market circumstances rules should be *presumed* to fall outwith the scope of the Treaty freedoms. Those seeking to contest such rules as obstacles to intra-EU movement must overturn this presumption. They must adduce (at least) some credible evidence to indicate that the national rule in question is either discriminatory or operates to block intra-EU movement.¹⁵⁹ For example, with respect to the ban on the use of motorcycle trailers in *Commission v. Italy*, it would no longer be sufficient to hide behind the ambiguous 'market access' test and simply rely on the contested measure's potential abstract effects on the volume of intra-EU trade in such products.¹⁶⁰ In order to trigger the Court's review of this measure as an obstacle to intra-EU movement, subsidiarity requires the Commission first to identify the domestic products or resident economic operators that this measure might reasonably be considered to protect from intra-EU competition.

Admittedly, the use of Art 34 TFEU in *Commission v. Italy* to review a national measure based solely on its potential abstract effects on the volume of intra-EU trade may, on one view, appear to follow from the wording of that same provision. This refers, of course, expressly to 'measures having equivalent effect to quantitative restrictions'; in other words, to national rules that simply affect (i.e. reduce) the quantity of imports.¹⁶¹ This broad effects-based reading of the scope of Art 34 TFEU is supported further by the wording of the Court's formative decision in *Dassonville*. However, it is submitted that such a reading of Art 34 TFEU, together with the literal interpretation of the *Dassonville* test, is simply wrong. Any reduction (actual or potential) in the *volume* of sales of imported products is only relevant to the assessment of an MEQR – and the concept of an obstacle to intra-EU movement generally – when it is connected to the existence of *discrimination* (actual or

¹⁵⁹ See here eg the analysis of AG Kokott in Case C-142/05 *Mickelsson and Roos op. cit.* at note 2 at paras 61-63.

¹⁶⁰ Case C-110/05 *Commission v. Italy (Motorcycle Trailers) op. cit.* at note 2.

¹⁶¹ See, on this point, Spaventa, who argues that total ban on the use of products 'is entirely consistent with the very notion of measures having equivalent effect to a quantitative restriction.' E. Spaventa, 'Leaving *Keck* behind? The Free Movement of Goods after the Rulings in *Commission v. Italy* and *Mickelsson and Roos*' (2009) 36(4) *ELRev* 914 at p. 921.

potential, direct or indirect) in favour of the national market. Subsidiarity tells us that, in all other cases, the Court of Justice only enjoys the right to review national measures that actually *block* movement between the markets of the different Member States. Only the latter type of rule exhibits the transnational effects required by Art 5(3) TEU. To conclude otherwise amounts to nothing less than sanctioning the use of the Treaty freedoms as tools to regulate market conditions within Member States *per se*.

As the example in *Commission v. Italy* illustrates, shifting the burden of proof with respect to market circumstances rules requires the introduction of some basic (market) analysis into the case law. Legal commentators tend to oppose this move.¹⁶² They argue, for example, that free movement law ‘is not competition law’ or that any requirement for market analysis is too costly or onerous for applicants to bear.¹⁶³ However, it is submitted that such objections are overstated. First, the current position in the case law is simply indefensible. At present, Court does not just simply excuse litigants from the burden of market analysis. It excuses them from the need to argue anything at all. This is not acceptable. Secondly, in EU free movement law, subsidiarity’s requirement for market analysis does not in fact take us beyond a properly functioning discrimination test. Following the above illustration from the case law on goods, all that is required in EU free movement law is the identification of *potential* competing products and/or economic operators operating within the Member State in question. This level of market analysis does not go beyond that which the Court already requires, for example, in its case law prohibiting (discriminatory) internal taxation.¹⁶⁴ In contrast with the Treaty rules on anti-competitive conduct (Arts 101 and 102 TFEU), there is no need for further market analysis; for example, analysis of market power or the definition of a specific intra-EU geographical market. In EU free movement law, the latter criteria remain constant variables: Member States are presumed to enjoy sufficient regulatory power

¹⁶² For a recent exception, see G. Davies, ‘Understanding Market Access: Exploring the Economic Rationality of Difference Conceptions of Free Movement Law’ (2010) 11(8) *GLJ* 671.

¹⁶³ Davies *op. cit.* at note 8 at pp 96-98. However, Davies would now appear to have adopted an alternative view. See now Davies *op. cit.* at note 162.

¹⁶⁴ See eg Case 106/84 *Commission v Denmark* [1986] ECR 833 at para. 12, Case C-265/99 *Commission v. France (Motor Vehicles)* [2001] ECR I-2305 at para. 42 and Case C-101/00 *Tulliasiamies and Siilin* [2002] ECR I-7487 at para 56.

and the relevant geographical market remains synonymous with the territory of the Member State in question.

In the final analysis, it is submitted that the subsidiarity principle effectively requires the universalisation of the Court's *Keck* ruling across the freedoms. As argued above, in this ruling, the Court demonstrated (implicitly) through its introduction of the 'selling arrangement' concept the very degree of self-restraint that subsidiarity demands. Sadly, in more recent years, the Court has clearly chosen to break with the normatively sound interpretative choice it made in this decision. This is unfortunate and should be reversed at the first appropriate opportunity. Should the Court not choose to do so, then it risks undermining further its own legitimacy as a Union institution.¹⁶⁵ To steer the Court back onto the correct path and ensure that Member States retain appropriate space to breathe in the integration process, the following subsidiarity-compliant reading of the scope of the Treaty freedoms is proposed:

The concept of an obstacle to intra-EU movement should be interpreted as precluding national measures that: (1) discriminate actually or potentially, directly or indirectly, on the grounds of Member State nationality (covering both natural and legal persons), together with: (2) genuinely non-discriminatory national measures that block (actually or potentially) the movement of goods, persons, services or capital between the markets of the individual Member States.

¹⁶⁵ Following Weatherill's observation that: 'the legitimacy of the European Union [and here: the ECJ] is damaged if it trespasses beyond the sphere of competences attributed to it by its founding treaties.' S. Weatherill, 'Competence and Legitimacy' in C. Barnard and O. Odudu (Eds.) *The Outer Limits of European Union Law* (Oxford: Hart, 2009) 17 at p. 17.

Conclusion

This aim of this thesis has been to examine the function of subsidiarity as a legal principle in European integration. Its primary objective has been to investigate whether or not this principle could and, ultimately, should also apply as a brake on the interpretative authority of the Court of Justice. The desire to explore subsidiarity's impact as a source of restraint on the Court's functions is motivated by a firm belief that subsidiarity has considerable untapped potential as a legal principle in EU integration. Subsidiarity is not a miracle solution to the tensions associated with continued integration and, in particular, the need to ensure an appropriate distribution of competence between the Union institutions and the Member States. However, it is one of the key instruments in the constitutional toolbox of EU law and should be made to work much harder.

At present, attention remains overly focused on bolstering the effectiveness of the subsidiarity principle as a restraint on the Union legislature. The recent Treaty innovations, engaging national Parliaments in the enforcement of subsidiarity, will undoubtedly prompt renewed academic interest in the principle's application in this area.¹ However, as this thesis has argued, subsidiarity is not only relevant to the actions of the Union legislature. It must also unfold its effects more widely and, in particular, take hold as a source of restraint on the exercise of the Court's interpretative functions in appropriate areas. The Court's power to contribute to the regulation of areas of shared regulatory responsibility, such as the internal market, through its interpretation of the Treaty provisions and secondary Union legislation is widely acknowledged. Yet, virtually no attempt has been made to assess subsidiarity's impact on the Court's interpretative choices. It is largely assumed that the Court enjoys a broad sphere of autonomy to shape the contours and outer limits of EU law as it sees fit.

¹ Early indications from the United Kingdom suggested that national parliaments are taking their new responsibilities seriously. At the time of writing, the House of Lords European Union Select Committee has already recommended the submission of a reasoned opinion for non-compliance with Art 5(3) TEU on at least two occasions.

See, <http://www.publications.parliament.uk/pa/ld201011/ldselect/lducom/35/3503.htm> and <http://www.publications.parliament.uk/pa/ld201011/ldselect/lducom/44/4403.htm> (last accessed 14.09.11).

The first part of this thesis challenged this assumption. It was argued that subsidiarity should also be applied *to the Court*. The conclusion reached was that subsidiarity does *not* challenge the existence of the Court's competence to interpret the Treaties and/or provisions of Union legislation. However, it does the operate to guide the *exercise* of this competence in certain circumstances. Specifically, the Court must engage with the subsidiarity principle in cases where it is confronted with interpretative choices that affect the distribution of competence between the Union and the Member States in areas of shared regulatory responsibility. In such instances, subsidiarity requires the Court to ensure that its choices respect the conditions imposed on Union intervention by Art 5(3) TEU. In particular, the Court must satisfy itself that its preferred reading of the Treaty/EU legislation remains focused on the scrutiny of regulatory problems that exhibit clear transnational effects. It must not use its interpretative freedom in order to establish a general power to regulate areas of shared responsibility at Union level.

The second part of this thesis tested the implications of the subsidiarity argument through a case study in EU free movement law. It examined the principle's impact on the Court's freedom to interpret the scope of the Treaty freedoms guaranteeing intra-EU movement within the internal market. In this specific area, the Court's interpretative choices were shown to meet the operating conditions for the subsidiarity tested developed in Chapter 2. Reviewing the case law, the Court's reading of the term obstacle to intra-EU movement was then shown to be converging around a series of extremely broad effects-based tests. Applied literally, these could bring almost any national measure within the scope of the Court's review – a position clearly at odds with subsidiarity. Crucially, the Court appears fully aware of the need to place limits on its own case law. As we observed in Chapter 4, the Court has developed a series of judicial devices in order to manage the scope of the Treaty freedoms. However, on closer inspection, these tools are poorly explained and inconsistently applied and, even when presented in their best light, offer the Member States little protection.

In the final analysis, it was submitted that subsidiarity requires only an adjustment of the Court's case law on obstacles to intra-EU movement. In summary, the principle

precludes the Court's use of the Treaty freedoms to review genuinely non-discriminatory national measures that simply characterise the conditions for the pursuit of economic or non-economic activity within individual Member States ('market circumstances' rules). The use of the Treaty freedoms to scrutinise such rules effectively affords the Court a general power to engage in the regulation of the internal market. It permits the Court to review at Union level the efficiency, reasonableness and even very existence of Member State regulation. In Chapter 1, it was argued that the Court has now made it very clear that, in accordance with Art 5(3) TEU, the Union legislature does not enjoy a comparable general power to regulate the internal market. Why therefore should the position be any different with respect to the Court's reading of the scope of the Treaty freedoms when the underlying objective is the same?

As argued in Chapter 6, the Court's use of the Treaty freedoms to review market circumstances rules is rarer than one might first expect, especially given the Court's unwavering preference for broad effects-based tests. However, in recent years there has been marked increase in the Court's scrutiny of market circumstances rules across the Treaty freedoms, which shows no sign of abating. This is a worrying trend. To the extent that it extends its interpretation of the scope of the Treaty freedoms in this manner, the Court is sacrificing the economic benefits of regulatory diversity. It is also trampling all over the right of Member State nationals to express their views through national and/or sub-national democratic processes. As argued in Chapter 5, the Court's scrutiny of market circumstances rules as obstacles to intra-EU movement enjoys considerable support in the commentary (to differing degrees). However, attempts to invoke, *inter alia*, the status of Union citizenship or the concept of market access in order to legitimatise its review of market circumstances rules all share the same fundamental weakness. These conceptual models all assume that the Court is essentially free to exploit its freedom to interpret the Treaty freedoms to advance specific Union policy objectives. Subsidiarity tells us that this is a false premise.

This thesis places considerable faith in the Court's own ability to respond unilaterally to the demands of the subsidiarity principle. This faith is not misplaced. The Court

has already demonstrated that it is capable of adjusting its case law on obstacles to intra-EU movement in line with the demands of Art 5(3) TEU. It did so implicitly in *Keck*. Furthermore, as we saw in Chapter 1, the Court played a leading role in crafting subsidiarity into a legal test that applies to restrain the Union legislature in connection with its exercise of its shared competence to regulate the internal market (Art 114 TFEU). Indeed, it was the Court that pieced together the poorly constructed arguments of the Member States to develop subsidiarity into a workable legal test.

Thus, the Court's capability to operationalise subsidiarity should not be doubted. However, the question remains: what is its incentive to adjust its case law on obstacles to intra-EU movement in line with the demands of Art 5(3) TEU? It is submitted that the need to comply with the subsidiarity principle is not simply a matter of judicial self-restraint. There is more at stake here. The Court's choice to use the Treaty freedoms to scrutinise market circumstances rules threatens its very legitimacy as a Union institution. There are no two ways about it. In the end, Art 5(3) TEU provides a clear normative basis to declare this application of the Treaty freedoms ultra vires. Should the Court therefore not choose to integrate the demands of the subsidiarity principle into its case law on obstacles to intra-EU movement, it might one day find itself struggling to assert its authority over Member State institutions and national constitutional courts in particular.

Appendix 1: Table of legislation

I. Primary legislation

Treaty on European Union (Maastricht Treaty) [1992] OJ C 190/1.

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306/1.

Consolidated version of the Treaty on the Functioning of the European Union [2010] OJ C 83/47.

Charter of Fundamental Rights of the European Union [2010] OJ C 83/02

II. Secondary legislation

The First Directive for the implementation of Art 67 of the Treaty [1959-62] OJ Spec. Ed. p. 49.

The Second Council 63/21/EEC Directive of 18 December 1962 adding to and amending the First Directive for the implementation of Article 67 of the Treaty [1963-4] OJ Spec. Ed. p. 5.

Regulation No 985/68 of the Council of 15 July 1968 laying down general rules for intervention on the market in butter and cream [1968] OJ L 169/1.

Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L 257/2.

Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1973] OJ L 172/14.

Council Directive 85/583/EEC of 20 December 1985 amending the Directive of 11 May 1960 on the implementation of Article 67 of the Treaty [1985] OJ L 372/39.

Council Directive 86/566/EEC of 17 November 1986 amending the First Directive of 11 May 1960 for the implementation of Article 67 of the Treaty [1986] OJ L 332/22.

Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [1988] OJ L 178/5.

Council Directive 89/686/EEC of 21 December 1989 on the approximation of the laws of the Member States relating to personal protective equipment [1989] OJ L 399/18.

Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L 180/26.

Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L 180/28.

Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [1993] OJ L 317/59.

Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time [1993] OJ L 307/18.

Council Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity [1997] OJ L 27/20.

Council Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas [1998] OJ L 204/1.

Council Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [1998] OJ L 213/9.

Council Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions [1998] OJ L 213/13.

Regulation 1/2003 EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2004] OJ L 1/1.

Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77.

III. Protocols

Protocol on the Application of the Principles of Subsidiarity and Proportionality [1997] OJ C 340/105.

Protocol (No. 1) on the Role of National Parliaments in the European Union [2010] OJ C 83/203.

Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality [2010] OJ C 83/206.

Protocol on the Statute of the Court of Justice of the European Union [2010] OJ C 83/210.

IV. Communications/Notices

Communication from the Commission regarding the *Cassis de Dijon* judgment [1980] OJ C 256/2.

Commission Notice on agreements of minor importance which do not appreciably restrict competition under Art 81(1) EC... (*de minimis*) [2001] OJ C 368/13.

V. Draft instruments

Draft Treaty establishing the European Union, *Bulletin of the European Communities* 2/84.

Appendix 2: Table of Cases

German Constitutional Court

BVerfGE 106, 62 (Geriatric Care) (2002).
BVerfGE 110, 141 (Dangerous Dogs) (2004).
BVerfGE 111, 10 (Shop Trading Hours) (2004).
BVerfGE 111, 226 (Junior Professors) (2004).
BVerfGE 112, 226 (University Fees) (2005).

European Court of Justice

-General Court

Case C-313/02P *Meca-Medina and Majcen v Commission* [2004] ECR II-3291.

-Court of Justice

Case 26/62 *van Gend & Loos* [1963] ECR 1.
Case 6/64 *Costa v E.N.E.L* [1964] ECR 585.
Case 5/69 *Völk and Vervaecke* [1969] ECR 295.
Case 57/72 *Westzucker v Einfuhr- und Vorratsstelle für Zucker* [1973] ECR 321.
Case 2/73 *Geddo v. Ente Nazionale Risi* [1973] ECR 865.
Case 152/73 *Giovanni Maria Sotgiu v Deutsche Bundespost* [1974] ECR 153.
Case 167/73 *Commission v France (Maritime Regulations)* [1974] ECR 359.
Case 2/74 *Reyners v. Belgian State* [1974] ECR 631.
Case 8/74 *Dassonville* [1974] ECR 837.
Case 33/74 *van Binsbergen* [1974] ECR 1299.
Case 36/74 *Walrave and Koch* [1974] ECR 1405.
Case 104/75 *Centrafarm BV* [1976] ECR 613.
Case 13/76 *Donà v Mantero* [1976] ECR I-1333.
Case 53/76 *Procureur de la République de Besançon v Les Sieurs Bouhelier* [1977] ECR 197.
Case 71/76 *Jean Thieffry* [1977] ECR 765.
Case 120/78 *Cassis de Dijon* [1979] ECR 649.
Case 115/78 *Knoors v Secretary of State for Economic Affairs* [1979] ECR 399.
Case 175/78 *The Queen v Vera Ann Saunders* [1979] ECR 1129.
Case 15/79 *P.B. Groenveld BV v Produktschap voor Vee en Vlees* [1979] ECR 3409.
Case 34/79 *Henn and Darby* [1972] ECR 3795.
Case 94/79 *Vriend* [1980] ECR 327.

Case 149/79 *Commission v. Belgium (Public Sector Employment)* [1980] ECR 3881.
Case 155/80 *Sergius Oebel* [1981] ECR 1993.
Case 203/80 *Casati* [1981] ECR 2595.
Case 279/80 *Webb* [1981] ECR 3305.
Case 75/81 *Blesgen* [1982] ECR 1211.
Case 261/81 *Rau* [1982] ECR 3961.
Joined Cases 177 and 178/82 *Criminal proceedings against Jan van de Haar* [1984] ECR 1797.
Case 237/82 *Jongeneel Kaas BV* [1984] ECR 483.
Case 107/83 *Onno Klopp* [1984] ECR 2971.
Case 180/83 *Hans Moser v Land Baden-Württemberg* [1984] ECR 2539.
Case 220/83 *Commission v France (Co-Insurance)* [1986] ECR 3663.
Case 270/83 *Commission v France (Tax Credits)* [1986] ECR 273.
Case 293/83 *Gravier v City of Liège* [1985] ECR 593.
Case 41/84 *Pinna* [1986] ECR 1.
Joined Cases 60 and 61/84 *Cinéthèque SA and others* [1985] ECR 2605.
Case 106/84 *Commission v Denmark* [1986] ECR 833.
Case 298/84 *Iorio* [1986] ECR 247.
Case 307/84 *Commission v. France (Nursing)* [1986] ECR 1725.
Case 355/85 *Michel Cognet* [1986] ECR 3231.
Case 24/86 *Blaizot v University of Liège and others* [1988] ECR 379.
Case 45/86 *Commission v Council (Tariff Preferences)* [1987] ECR 1493.
Case 98/86 *Criminal proceedings against Arthur Mathot* [1987] ECR I-809.
Case 197/86 *Brown v The Secretary of State for Scotland* [1988] ECR I-3285.
Case 302/86 *Commission v. Denmark* [1988] ECR 4607.
Case 20/87 *Ministère public v André Gauchard* [1987] ECR 4879.
Case 186/87 *Cowan v Trésor public* [1989] ECR 185.
Case C-349/87 *Paraschi v Landesversicherungsanstalt Wuerttemberg* [1991] ECR I-4501.
Case 33/88 *Allué and Another v Università degli Studi di Venezia* [1989] ECR 1591.
Joined Cases C-54/88, C-91/88 and C-14/89 *Criminal proceedings against Eleonora Nino and others* [1990] ECR I-3537.
Case C-69/88 *Krantz GmbH* [1990] ECR I-583.
Case 145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR 3851.
C-362/88 *GB-INNO-BM v Confédération du commerce luxembourgeois* [1990] ECR I-667.
Case C-49/89 *Corsica Ferries* [1989] ECR 4441.
Case C-61/89 *Bouchoucha* [1990] ECR I-3551.
Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417.
Case C-154/89 *Commission v. France (Tourist Guides)* [1991] ECR I-651.
Case C-260/89 *ERT* [1991] ECR I-2925.
Case C-279/89 *Commission v United Kingdom (Fisheries)* [1992] ECR I-5785.

Case C-300/89 *Commission v Council (Titanium Dioxide)* [1991] ECR I-2867.
Case C-340/89 *Irène Vlassopoulou v Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg* [1991] ECR I-2357.
Case C-379/89 *Groener* [1989] ECR 3967.
Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad and Publivia v Departamento de Sanidad* [1991] ECR I-4151.
Case C-2/90 *Commission v. Belgium (Wallon Waste)* [1992] ECR I-4431.
Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-1979.
Case C-47/90 *Delhaize Frères* [1992] ECR I-3369.
Case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd* [1991] ECR I-4221.
Case C-204/90 *Bachmann v Belgian State* [1992] ECR I-249.
Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* [1992] ECR I-4265.
Case C-3/91 *Exportur* [1992] ECR I-5529.
Case C-111/91 *Commission v Luxembourg (Child Benefits)* [1993] ECR I-817.
Case C-148/91 *Vereniging Veronica Omroep Organisatie v Commissariaat voor de Media* [1993] ECR I-487.
Case C-168/91 *Christos Konstantinidis v Stadt Altensteig* [1993] ECR I-1191.
Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.
Joined Cases C-277/91, C-318/91 and C-319/91 *Ligur Carni and Others* [1993] ECR I-6621.
Case C-19/92 *Dieter Kraus v Land Baden-Württemberg* [1993] ECR I-1663.
Case C-93/92 *CMC Motorradcenter* [1993] ECR I-5009.
Case C-275/92 *Schindler* [1994] ECR I-1039.
Case C-292/92 *Hünermund* [1993] ECR-6787.
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