Chapter 2
The Reach of Free Movement. A Defence of Court Discretion

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Abstract This chapter argues that the reach of the fundamental freedoms and the content of the notion of a "restriction" cannot and should not be expressed in a rule-like manner. To the contrary, the fundamental freedoms function as overarching constitutional principles that both demand and legitimize the execution of court discretion. Public bodies, like courts, are vested with discretion in situations where rules are to be avoided, due to the magnitude of phenomena that are subject to regulation. Because of their stiffness, rules cannot serve the purposes of a legal system that pursues numerous, shifting and colliding objectives, such as the EU legal order. Any attempt to establish tests or categorizations that aim to define and exhaust the reach of the fundamental freedoms in a rule-like manner will obstruct the nature of the principles through which free movement is established, secured and developed, and the nature of the legal order in which they operate. The chapter explores the legal basis for court discretion, whether discretion is compatible with the principle of legal certainty, how discretion can fit a conception of the right to free movement as a personal individual right and the constitutional limitations to court discretion.

Keywords Charter of Fundamental Rights · Constitution · Discretion · Discrimination · Free movement · Individual rights · Legal certainty · Market access

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2.1 Introduction—The Fetish for Rules

The provision on the free movement of goods (Article 34 TFEU), the provision on the freedom of establishment (Article 49 TFEU), the provision on the freedom to provide services (Article 56 TFEU) and the provision on the free movement of capital (Article 63 TFEU) prohibit restrictions on free movement. Workers (Article 45) and EU-citizens (Article 21) enjoy a personal right to move freely within the territory of the Member States. Superficially, this promises both unity and simplicity. The reach of free movement and, in this respect, the reach of EU law, hinges on the notion of a "restriction".

We all know that things are not as simple as they appear. So much ink has been spilt on the topic that one observer has noted that EU lawyers may be accused of "fetishizing" the case law on the scope of the Treaty rules.[1] One reason is that the reach of free movement is of seminal practical importance; another is the constitutional implications. If a restriction is identified, courts can proceed and subject national legislation to scrutiny, pursuant to the principle of proportionality. Thus, the notion of a restriction has been described as a mechanism for the allocation of competences between the supranational and the national sphere, and between lawmakers and courts. The understanding of the term "restriction", its content and its nature, pose the intriguing question of what EU law is about, and what it is not

[1] Dougan 2010, p. 165.

about—whether we should apply a protectionist reading of the Treaty, an economic freedom reading, or search for a third way.[2]

In spite of all the efforts, no consensus has been established with regard to what a restriction is, and what it should be. The only thing upon which everyone would seem to agree is that not *every* piece of national legislation can be regarded as a restriction without any further qualification and that measures which only incur extra costs or reduce the volume of trade do not as such affect the right to access the market.[3] The opposite position would represent an application of EU law which is too simplistic and it would raise serious concerns about legitimacy if courts were to second-guess every minor decision enacted by national lawmakers. This is where all the problems start. Apart from the negative finding, no one seems to have identified the rule, or the combined set of rules, that define the notion of a restriction in a manner which is generally accepted among other scholars and which is able to account for the practice of the ECJ in the field.[4] To add to the difficulties, this practice is often accused of being inconsistent or unsystematic.[5]

In this chapter, I will argue that the rules are not yet identified because no rules exist, nor should exist. Secondary legislation provides rules. To the contrary, the fundamental freedoms function as overarching constitutional principles that both demand and legitimize the execution of court discretion. Public bodies, like courts, are vested with discretion in situations where rules are to be avoided, due to the magnitude of phenomena that are subject to regulation. Because of their stiffness, rules cannot serve the purposes of a legal system that pursues numerous, shifting and colliding objectives, such as the EU legal order. Any attempt to establish tests or categorizations that aim to define and exhaust the reach of the fundamental freedoms in a rule-like manner will obstruct the nature of the principles through which free movement is established, secured and developed, and the nature of the legal order in which they operate. The one fetish that should be tempered is lawyers' affinity for rules. Instead we will have to explore the legal basis for court discretion (Sect. 2.2), whether discretion is compatible with the principle of legal certainty (Sect. 2.3), how discretion can fit a conception of the right to free movement as a personal individual right (Sect. 2.4) and the constitutional limitations to court discretion (Sect. 2.5).

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[2] See e.g. Bernard 1996, p. 82; Maduro 1998, pp. 58–60; Snell 2002, pp. 1–4; Oliver and Roth 2004, p. 413; Dougan 2010, p. 165; Snell 2010, p. 469; Nic Shuibhne 2013, p. 189 and the famous opinion of AG Tesauro in Case C-292/92, *Hünermund*, EU:C:1993:863.

[3] Established case law. See e.g. Joined Cases C-267/91, *Keck and Mithouard*, EU:C:1993:905, para 13; Case C-20/03, *Burmanjer*, EU:C:2005:307, paras 30–31; Case C-518/06, *Commission v. Italy*, EU:C:2009:270, paras 62–63; Opinion of AG Poiares Maduro in Case C-446/03, *Marks & Spencer plc v Halsey (Her Majesty's Inspector of Taxes)*, EU:C:2005:201, para 37: Jansson and Kalimo 2014, p. 526.

[4] See e.g. Enchelmaier 2004 and 2016 for a critical assessment of the seminal works of Snell 2002 and Nic Shuibhne 2013. For a convincing critique of Maduro 1998 and the conception of the four freedoms as fundamental political rights, see Roth 2002, p. 22 in particular.

[5] See e.g. Snell 2010, pp. 461–467; Davies 2011, p. 9; 2012b, p. 25; Jansson and Kalimo 2014, p. 530.

2.2 The Legal Basis for Court Discretion

2.2.1 Introduction

In Sect. 2.2.2 below, it will be argued that the far-reaching notion of a restriction established by the written treaty provisions on free movement constitutes a textual legal basis for the execution of court discretion. It is submitted that even the proponents of a restrained and rule-based approach to the reach of free movement (normally grounded in a wide notion of discrimination) must accept discretion as a fundamentally important concept within the EU legal order in general, and within free-movement law in particular. In the absence of discretion, the requirement of self-restraint, which is so often argued in favour of, cannot be construed.

Section 2.2.3 proves that discretionary decision-making is foreseen, legitimized and required by Article 19 TEU, which states that the Court "shall ensure that in the interpretation and application of the Treaties the law is observed". A number of constitutionally important examples have shown how the European legal order was construed through the exercise of court discretion; this has become an established and accepted necessity of the European legal system.

2.2.2 The Treaty Provisions

The Treaty provisions on free movement establish the competence of the CJEU and of the national courts to assess whether national regulatory measures restrict free movement. The provisions legitimize judicial review, and in this regard, the execution of what we might call court discretion in the "thin" sense. By this, I refer to the considerations which judges cannot avoid taking into account, weigh and assess, whenever they conduct a review of whether the law is observed, except for in cases where the outcome follows mechanically from the wording of the relevant provision.

From a literal point of view one could actually argue that at least some of the provisions on free movement, those that apply the term "restriction", do not allow for court discretion, as the term is clear to the extent that it demands a mechanical application of the law. "Restriction" means anything that restricts those who are subject to regulation, or in short: anything. Article 45 TFEU could be taken to support such an encompassing and literal interpretation as the latter provision; in contrast to its seemingly more all-encompassing cousins, only requests the "abolition of any discrimination based on nationality". Of course, such a broad, unconstrained and utterly naïve application of the restriction criterion is methodologically wrong and would run counter to the far more nuanced practice of the CJEU. Still, it reveals, as I will submit, the dynamic potential that is inherent in the

textual law on free movement, a potential that the CJEU has carefully preserved, although not always applied to its fullest extent.[6]

In its case law, the Court tends to present the notion of a restriction in sweeping terms which comes close to the naïve and literal reading of the Treaty which was explained above. According to the famous judgment in Dassonville[7]:

> [a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.

In the field of services, the judgment in *Binsbergen* provided an early confirmation that even if the concept of discrimination is central to the notion of a restriction, it is not exhaustive[8]:

> The restrictions to be abolished pursuant to Articles [56 and 57 TFEU] include all requirements imposed on the person providing the service by reason in particular of his nationality or of the fact that he does not habitually reside in the State where the service is provided, which do not apply to persons established within the national territory *or which may prevent or otherwise obstruct the activities of the person providing the service*.

In the famous *Gebhard* ruling, on the freedom of establishment, the Court stated[9]:

> It follows, however, from the Court's case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.

In the latter formula, the open term "hinder or make less attractive" defines the notion of a restriction, while the concept of discrimination fulfils a more limited role: The functioning of the latter is to clarify that unless the national measure is non-discriminatory, the doctrine of mandatory requirements cannot be invoked.[10] The antithesis is that non-discriminatory measures may indeed constitute restrictions.

In accordance with the wording of the Treaty provisions on free movement, the Court has consistently repeated its broad interpretation of what may constitute a

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[6] See also Nic Shuibhne 2013, p. 191: "It is thus important to note that it is not (just) *the Court* that is pushing for an understanding of restrictions beyond discrimination it is (also) the Treaty."

[7] Case 8/74, *Procureur du Roi v Dassonville*, EU:C:1974:82, para 5, cf. e.g. Case C-320/03, *Commission v. Austria*, EU:C:2005:684, para 67.

[8] Case 33/74, *Van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, EU:C:1974:131, paras 10–11 (emphasis added).

[9] Case C-55/94, *Gebhard*, EU:C:1995:411, para 37.

[10] Cf. Case C-375/14, *Laezza*, EU:C:2016:60, para 25.

restriction.[11] Legal scholars, however, have been somewhat reluctant to accept these sweeping Court-made re-assertions without any further qualification, for reasons that closely mirror the arguments against a literal reading of the Treaty provisions in the first place. If we accept that additional qualifiers are demanded, they will have to be Court-made. Even if a common understanding exists that at least some limitations must be identified and established, this exercise cannot sensibly be described as discretion in the "thin sense". On the contrary, concerns about democratic legitimacy and Member State autonomy, which are commonly referred to as arguments in favour of judicial deference towards national policy choices, appear to be some of the blurriest deductions that a court can ever make, because they must be abstracted from an uncertain perception of the functioning of the legal system as such. A claim for limitations is thus a claim for the execution of judicial discretion, though it is often framed in terms that are more acceptable to lawyers, like "self-restraint".

Lawyers tend to look for the *rules* on self-restraint in the case law of the Court. Pursuant to a classical legal approach, the ideal of which is to identify rules, emphasis will be put on analysis of the law in its application phase. The classical approach rests on the premise that the application of a rule must necessarily mirror the rule itself; thus the rule can be identified through its application. It does not matter what the Court says, what matters is what the Court does. The status of the generally worded formulas applied by the Court in its introduction of the "rule", are thereby reduced to preliminary remarks, which may appear to be misleading rather than helpful. Bernard's explanation of the judgment of *Vlassopoulou* illustrates this legal approach. The case concerned the mutual recognition of diplomas. According to the Court[12]:

> It must be stated in this regard that, even if applied without any discrimination on the basis of nationality, national requirements concerning qualifications may have the effect of hindering nationals of the other Member States in the exercise of their right of establishment guaranteed to them by Article 52 of the EEC Treaty. That could be the case if the national rules in question took no account of the knowledge and qualifications already acquired by the person concerned in another Member State.

Bernard claims that "[d]espite the wording of this last sentence, *Vlassopoulou* can still be seen as a discrimination case. Insistence on a national diploma will disadvantage nationals of other Member States, since they are less likely to have studied in the host State."[13] On the facts, it is hard to disagree. However, it is also clear that the Court did not approach the restriction criterion as a prohibition on

[11] See e.g. Case C-76/90, *Säger*, EU:C:1991:331, para 12, Case C-415/93, *Bosman*, EU:C:1995:463, para 99; Case C-212/06, *Walloon*, EU:C:2008:178, para 48; Case C-442/02, *Caixa Bank*, EU:C:2004:586, para 11; Case C-65/05, *Commission v Greece ('Electronic games')*, EU:C:2006:673, para 27; Case C-142/05, *Mickelsson and Roos*, EU:C:2009:336, para 24; Case C-110/05, *Commission v. Italy* ("*Trailers*"), EU:C:2009:66, para 37; Case C-375/14, *Laezza*, EU:C:2016:60, para 21.

[12] Case C-340/89, *Vlassopoulou*, EU:C:1991:193, para 15.

[13] Bernard 1996, p. 84.

discrimination. In a forward-looking statement about how we should understand and interpret the (case-) law, it is somewhat problematic to disregard what the Court actually says about the potential reach of an overarching principle, and to substitute it for a narrower rule which is construed by reference to some more limited rationale which the Court, operating in full accordance with the wording of the Treaty, did not apply.

Still, it is probably fair to say that in the field of free movement of goods, persons and services, the academic legal debate "focused on more direct forms of discrimination [in the early years], followed by several decades of jurisprudential and legal debate over more indirect kinds of discrimination".[14] "[T]he free movement of persons—workers, establishment and services were generally regarded as an expression of the general principle of non-discrimination".[15] The approach towards the free movement of goods was to some extent understood as more expansive, but also in this field has it been argued that the notion of a "restriction" in the case-law of the CJEU largely coincided with the finding of discrimination, meaning that the existence of different treatment will appear as the guiding rationale if the facts of the cases are taken into consideration.[16] The famous judgment in *Keck* was deemed to confirm that rationale and to literally spell out the rules that a careful analysis of the case law would have proved existed beforehand.[17]

Conceived of as an exercise of discretion, the case law of the Court will present itself in quite another manner. The "rule" will by definition be wider than the concrete assessment, as discretion is exercised within the "rule" but is also guided by a number of different and supplementary objectives, which are of concrete relevance to the case at hand. Accordingly, outcomes will normally be narrower than the potential reach of the "rule", as they reflect the rationale that solves the particular case at a particular time.[18] Its limited use will not affect or change the "rule" itself, however, which is why I do not refer to the fundamental freedoms as "rules", but as principles. Applying Kelsen's notion of discretion, the principle of free movement can be seen as "a legal norm that governs the process whereby another legal norm is created, and also governs—to a different degree—the content of the norm to be created".[19] In other words, there is an important difference between the rational of the overarching principles on free movement and their potential reach, compared to the narrower rules that they produce in the assessment of concrete cases. The fact that the rules defining the concrete outcomes may differ

[14] de Búrca 2002, p. 184.

[15] Oliver and Roth 2004, p. 411.

[16] Opinion of AG Maduro in Joined Cases C-158/04 and C-159/04, *Alfa Vita Vassilopoulus*, EU:C:2006:212, para 46: "It seems to me that a consistent approach emerges from this case-law. These three criteria, as they have been applied by the Court, amount in substance to identifying *discrimination against the exercise of freedom of movement*."

[17] See in particular the elegant analysis of Enchelmaier 2003.

[18] The dynamic development of the free movement of capital is illumining in this regard, see Flynn 2001.

[19] Kelsen 1998, p. 63.

does not necessarily entail that the practice of the CJEU is inconsistent. Convergence can still exist on the level of principles.

For a long period, the prevailing objective in free movement law was of an instrumental and to some extent narrow character: to establish a common market without internal frontiers.[20] If the objectives that guide the execution of court discretion change, broaden, mature or become more ambitious—as we are about to witness—it is fully legitimate that the written law on free movement produces other outcomes. The Treaty provisions are worded in a broad and sweeping manner, thereby leaving much to the judge's discretion.

2.2.3 *The Case Law of the Court and the Nature of the European Legal Order*

The Union is based on the rule of law. The Court has never understood this notion as the law of rules, but as an ideal, an objective that must not only be guarded, but also *realized*. Discretion is foreseen by Article 19 TEU, which states that the Court "shall ensure that in the interpretation and application of the Treaties the law is observed." Obviously, this constitutes a competence that is more comprehensive than a mere obligation to interpret and apply the Treaties.

As noted by Federico Mancini in 1989, [if] one were asked to synthesize the direction in which the case-law produced in Luxembourg has moved since 1957, one would have to say that it coincides with the making of a constitution for Europe.[21] The transformation of a multilateral treaty into a legal order could not have taken place in the absence of the "activism" of famous cases such as *Van Gend en Loos*, *Costa v. Enel* and *Commission v. United Kingdom* through which the principles of direct effect, supremacy and pre-emption were established.[22]

Another and better word for "activism" is "discretion", firstly because the findings of the Court were guided by the perceived objectives of the legal system in which it operated and not by the personal preferences of the judges. Secondly, while the term "activism" hints at the unacceptable, described by Hjalte Rasmussen as "revolting judicial behaviour", the discretionary findings of the Court became not only good law, but constitutional axioms, because indeed they were accepted.[23] The latter observation reveals a hidden but extremely important source both for the legitimacy and for the control of Court discretion. A national supreme court can do wrongs, and they will still stand. The CJEU is dependent on the loyalty of national courts. If their judgments do not deserve that loyalty, they will fall. A good

[20] See e.g. Lianos 2010; Case C-112/00 *Schmidberger*, EU:C:2003:333, paras 53–54.

[21] Mancini 1989, p. 595.

[22] Case 26/62, *Van Gend en Loos*, EU:C:1963:1; Case 6/64 *Costa v. Enel*, EU:C:1964:66; Case 804/79 *Commission v. United Kingdom*, EU:C:1981:93.

[23] Rasmussen 1986, p. 12.

illustration is the way in which the threat of non-loyalty has, in the extreme sense, necessitated and guided discretion. On 18 October 1967, the German Constitutional Court declared that the Community legal order had no lawful democratic basis, as it lacked a catalogue of human rights. Thus, its compatibility with basic constitutional requirements had to be examined at the national level. The CJEU responded in *Nold* and declared that "fundamental rights form an integral part of the general principles of law".[24] As Mancini rhetorically asks: "what book would they have to consult for the identification and the protection of such rights?"[25] Not the rulebook at any rate.[26]

Court discretion is at the core of free movement law as well. Below we shall return to the dynamic notion of a restriction, but let us first have a look at the closely related concept of justifications. The seminal judgment in *Cassis* established that "obstacles to movement within the community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy *mandatory requirements*".[27] This was a brave step. Contrary to the examples set out above, the Treaty did not lack written law in this regard. All the fundamental freedoms are subject to a catalogue of exceptions. As noted by Gormley[28]: "The rule of reason is entirely the creation of the Court of Justice." Still, the discretionary expansion was both principled and legitimate, due to one reason that is of particular importance to us. It anticipated and facilitated a similar expansion of the notion of a restriction, the purpose of which was to refine the functioning of the market.

In *van Duyn*, the Court noted that "the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities *an area of discretion within the limits imposed by the Treaty*".[29] This observation affects the understanding of the notion of a restriction as well. It should be remembered that originally, the doctrine on mandatory requirements was not set out as an additional, unwritten and Court-made list of new exceptions, but as an interpretation of the very rules of the Treaty: Measures which can be justified due to some objective policy concern do not constitute restrictions in the first place.[30] The concepts of "restrictions" and justifications are thus

[24] Case 4/73, *Nold*, EU:C:1974:51, para 13.

[25] Mancini 1989, p. 610.

[26] For another example, see the judgment in Case C-159/90 *Grogan*, [1991] I-4685, ingeniously analyzed by Lindahl 2008, pp. 303–313.

[27] Case 120/78, *Cassis de Dijon*, EU:C:1979:42, para 8 (emphasis added).

[28] Gormley 2005, p. 22.

[29] Case 41/74, *van Duyn*, EU:C:1974:133, para 18.

[30] E.g. Case 113/80, *Commission v. Ireland*, EU:C:1981:139, Case 177/83 *KOHL v. Ringelhan*, EU:C:1984:334; Case 207/83, *Commission v. United Kingdom*, EU:C:1985:161. According to Weiler 1999, p. 366 this approach was "no more than formalist sophistry", and as pointed to by Hatzopoulus in another chapter in this volume, we have witnessed a change. The Court frequently applies the term "overriding requirements of general public importance", see e.g. Joined Cases

inextricably linked. To state that discretion must be exercised within the limits imposed by the treaty is the same as saying that the treaty imposes discretion. Court discretion appears as the necessary corollary to the discretion that is vested in the Member States.

The observations above proves how the European legal order in general, and the functioning of the principle of free movement in particular, have been established and developed through the exercise of court discretion, which constitutes an indispensable component of the Courts competence, attributed to it by the open ended provisions in the Treaty, read in conjunction with the basic requirement that the law must both be observed *and realized*. As Halberstam has noted[31]:

> All too frequently, we encounter… a jaundiced view of individual actors' motivations. Some scholars, for example, suggest that judges are simply clever opportunists who appeal to purported legal norms solely as a means to promote "their independence, influence and authority" Others suggest that law is merely a "mask" for the promotion of one particular set of political objectives against contending objectives in the purely political sphere". In general, these critics would seem to imply that granting supranational actors any "strategic zone of discretion" must be a mistake. Decisional autonomy, on this view is simply an invitation to another set of actors to engage in self-promotion. In the case of the ECJ, the suggestion seems to be that the Court's law talk simply has the rest of us fooled…We must recognise, however, that the decisional autonomy of judges (and other individual actors) creates an important space for principled behaviour.

Court discretion is not something we should fear. Although the findings of the CJEU may in some instances be criticized, it is the best institution overall to handle and understand the content and reach of EU law, and its implications on a case-by-case basis. Discretion is controlled by the requirement that the national Courts and the political institutions of the Member States must accept it—and indeed, discretion has been accepted.

2.3 The Objections: Court Discretion Is Arbitrary and Disregards the Principle of Legal Certainty

2.3.1 Introduction

The objections against court discretion are quite predictable. Discretion is seen as being arbitrary or at least as something which does not pay due respect to the principle of legal certainty. In its strongest version, the argument would be that discretion runs contrary to the basic ideal of the "rule of law". Discretion is exactly the evil which the legal order was established to curtail, namely, a "rule of men".

(Footnote 30 continued)

C-34/95, C-35/95 and C-36/95 *de Agostini*, EU:C:1997:344, para 45 or similar expressions, see e.g. Joined Cases C-340/14 and C-341/14 *Trijber* ECLI:EU:C:2015:641.

[31] Halberstam 2005, pp. 781–782.

This part will proceed in three steps. In Sect. 2.3.2, I explain why legal discretion differs from free and personal choice. Far from being arbitrary, discretion is a particular form of legal decision-making subject to normative guidelines and constraints. Section 2.3.3 assesses the principle of legal certainty and the quest for clarity in more detail. Section 2.3.4 turns to the practical questions. It is submitted that a seemingly more rule-like approach to the fundamental freedoms, grounded in a wide concept of discrimination, is actually a prime example of court discretion. When it is realized that discretion cannot be avoided, it becomes clear that the resort to a wide notion of discrimination hides rather than guides.

2.3.2 *Court Discretion*

Court discretion is a necessary component of every legal system.[32] If we accept that it is (yet) not possible to enter the relevant legal provisions and the facts of a case into a computer and ask it to calculate the outcome mathematically; we will also have to accept legal discretion to some extent.

Court discretion is sometimes referred to as an exercise of intuition informed by subjective preferences.[33] That is to confuse legal discretion and true discretion. True discretion, or discretion in its strongest sense, exists when the decision-maker may simply refer to the existence of discretion as the legitimate reason for the choice being made, and thereby legitimately ignore any rational counter-argument. An example would be the smoker, who, confronted by all the rational arguments that go against smoking, validly defends his personal choice simply by stating that he smokes because he wants to. Generally speaking, the existence of true discretion is the corollary of either private autonomy or unfettered authority. Courts are public organs. They have to provide rational reasons for their findings, and as observed by Schauer: "The act of giving reasons is the antithesis of authority."[34]

It is not possible to provide a full-blown account of how court discretion works within the space constraints of this chapter. Instead, I will point to the practically most important manner of reasoning in discretionary decision-making: the "substantially the same argument". The most common technique, both in law and rhetoric, is to establish a starting point on which everyone will agree, and then to prove that the particular situation which is being assessed is "substantially the same".

The intriguing and well-known judgments of the CJEU on restrictions on use are illuminating (*Mickelsson and Roos* / *Italian trailers*). As a starting point, it is

[32] Dworkin 1963, p. 624.

[33] Snell 2010, p. 469; Jansson and Kalimo 2014, p. 540.

[34] Schauer 1995, pp. 636–637.

common ground that total bans on the sale of a commodity constitutes a restriction.[35] We can agree that restrictions on the use of a product do not constitute an absolute ban, but, so goes the argument, if the restriction on use has "a considerable influence on the behaviour of consumers", the effects are substantially the same as the effects of a total ban.[36] Thus, the legal approach towards severe restrictions on use should be the same as the approach towards total bans. Notably, opponents of this finding would argue in the same manner, but choose a different paradigm as their starting point.[37] In the field of goods, "selling arrangements" do not constitute restrictions as long as both national and foreign products are treated in the same manner, even though the volume of sales is being reduced. Thus, it may be argued that restrictions on use are substantially the same as "selling arrangements".[38] The latter is also a discretionary choice, but the pick between the two solutions is by no means unbound: it is guided by traditional and rational legal arguments. For one thing, restrictions on use *are not* "selling arrangements", and it would be easy to circumvent the prohibition on total bans if severe restrictions on use were not treated in the same manner. Most importantly, the Treaty provision on goods provides solid support to the approach chosen by the Court.[39] "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited". An effects-based application of the "substantially the same" argument is not demanded by the legal system in the mechanical sense, but it is definitely the execution of discretion which best fits the system.

The findings of the Court in the judgments on restrictions on use can of course be criticized, but they cannot be criticized for being arbitrary. On the contrary, the Court's approach is open to criticism because the judgments are not arbitrary, but based on rational arguments. Our engagement in the discussions on the outcome of the cases rests on the premise that the prevailing arguments should be the best arguments, and with regard to that, opinions will normally differ. The reason why we engage, however, is grounded in the belief that it is possible to have a meaningful discussion about what the better arguments are. If our sense of meaningfulness is true, it must also be true that legal discretion is not unbound, but can be guided by rational considerations.

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[35] See e.g. case C-34/79 *Henn and Darby*, EU:C:1979:295, para 12: "a prohibition on imports […] is the most extreme form of restriction".

[36] Case C-142/05 *Mickelsson and Roos*, EU:C:2009:336, para 26; Case C-110/05 *Commission v. Italy* ("*Trailers*"), EU:C:2009:66, para 56, Opinion of AG *Léger* in *Trailers*, C:2006:646, para 40; opinion of AG Bot in *Trailers*, EU:C:2006:646, paras 103–105 and paras 157–159.

[37] See Enchelmaier in Chap. 4 in this volume.

[38] Opinion of AG Kokott in *Mickelsson and Roos*, EU:C:2006:782, paras 47–56.

[39] In the same manner AG Bot in *Trailers*, para 102 of the opinion.

2.3.3 *Legal Certainty*

2.3.3.1 Introduction

Some observers have praised the rule-like approach in the judgment in *Keck* for providing clarity and legal certainty.[40] To assess whether a formalist approach towards the application of the restriction criterion is more favourable than a discretionary case-by-case assessment, we have to ask ourselves: What exactly is meant by references to clarity or legal certainty? Why is it important and what (if anything) do we lose if we choose to pursue these ideals?

2.3.3.2 The Principle of Legal Certainty

In its strongest version, the clarity provided by a rule-like application of the restriction criterion can be understood as a requirement stemming from the principle of legal certainty. That principle however, is not at stake, and will not be challenged by an approach which embraces judicial discretion.

Due to the rule of precedent, the case law of the ECJ will provide paradigmatic guidance on the interpretation of free movement law. Absolute prohibitions constitute restrictions, the same is true for national regulations that create double burdens, have a disparate impact on products and services from other member states, and so on. Because of the dynamic character of the interpretation of free movement law, the hard cases will normally occur when the question is whether to push the reach of free movement further, into new territory, as in the cases on restrictions on use mentioned above. From the perspective of the plaintiffs, it must have appeared as highly unpredictable whether the Court would assert their arguments in favour of a broad reading of the provision on the free movement of goods. That uncertainty however, is of a far more general and practical character than the specific values and interests that are being protected by the principle of legal certainty. The core objective of that principle is to protect the citizen from state *interference* that is not specified in a clear rule. It would appear as a misunderstanding of the principle, which would run contrary to its objective of protecting the citizens, if the plaintiffs in *Mickelsson & Roos* lost the case, by reference to the fact that they tried to break new legal ground.

The rule of law is a way of restraining state power by "rational principles of civic order".[41] The principle of legal certainty is one element of the rule of law. The admission to argue in favour of an expansive interpretation of a right, with recourse to rational arguments is another. There is no conflict between the principle of legal certainty and Court discretion, which should instead be regarded as complementary components of the rule of law, for the protection of the citizen.

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[40] See in particular Oliver 1999, pp. 793–799.

[41] Selznick 1969, p. 11.

2.3.3.3 Practical Uncertainty

If discretion is introduced, it may be argued that it will be more difficult for national courts to understand and apply EU law and the notion of a "restriction".[42] Obviously, the courts themselves are not protected by the principle of legal certainty, but, from a practical perspective, it may be held that discretion introduces some kind of ambiguity, which in the end threatens the efficiency of EU law.[43] For a number of reasons, this fear seems to be exaggerated.

For a start, it is debatable whether a rule-like approach towards the application of the rules on free movement and the notion of a restriction is able to provide its promised clarity. In his assessment of the Keck-judgment in *Trailers*, AG Bot noted that[44]:

> The distinction made by the Court may therefore be artificial and the demarcation line between those different categories of measures may be uncertain. In some cases, the Court describes rules on product characteristics as 'selling arrangements'. In other cases, it treats measures concerning selling arrangements for goods as rules concerning product characteristics. That applies, in particular, to rules governing advertising where they have an effect on the packaging of the product. Finally, it may happen that the Court abandons that distinction and makes an analysis based only on the effects of the rules. Those examples demonstrate the difficulties which the Court may encounter in classifying certain measures. It is therefore, in my view, difficult to work on the basis of categories when, in practice, national courts and the Community judicature may be confronted with very different rules, which they must assess having regard to the circumstances of each individual case.

In short, the point of AG Bot is that rule-like classifications of national regulatory measures create their own difficulties, and that the resort to a discretionary assessment, case-by-case, is more straight-forward than a rule-like approach.

In any case, difficulties with regard to the interpretation and application of EU law is foreseen and remedied by the preliminary-rulings mechanism enshrined in Article 267 TFEU.[45] Further, it must be emphasized that the application of EU law in national courts has always been a highly discretionary exercise.[46] If a restriction exists, Union objectives and national objectives will have to be reconciled through the application of the principle of proportionality. A complex and case-specific assessment is required. The outcome will be decisive to the efficiency

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[42] See e.g. Enchelmaier in Chap. 4 in this volume.

[43] See e.g. Snell 2010, p. 459.

[44] AG Bot in *Trailers*, para 81 of the opinion.

[45] I.e. Case 166/73, *Rheinmühlen*, EU:C:1974:3; Case C-224/01, *Köbler*, EU:C:2003:513.

[46] As Maduro 1998 rhetorically asks at pp. 163–164: "if the court is the more appropriate and legitimate institution, in the second stage, to balance all the interests and values involved, why is this not always the case?"

of EU law. Still, a very basic tenet of free movement law is that the assessment of proportionality is solely a task for the national courts.[47]

Principally, it is submitted that it is mistaken to focus on the possible challenges that a discretionary approach to the restriction criterion may pose when the reach of EU law is being negotiated in the courtroom. The voluminous case law of the CJEU leaves us with the impression that EU law and the application of the fundamental freedoms are primarily being handled by courts.[48] In fact, it is the supranational and national lawmakers who are primarily coping with the provisions on free movement. From the latter perspective, a rule-like definition of where EU law stops and national legal autonomy starts appears to be counterproductive and could actually threaten the efficiency of EU law.

At the outset, it seems evident that a clear defining line between EU objectives and national objectives and between the competence of the Union and the autonomy of the Member States does not exist out-there somewhere, neither as an empirical nor as a legal fact. In *Germany v. Parliament and Council*, the Court clarified the reach of the legislative competence of the Union, and established that[49]:

> While a mere finding of disparities between national rules is not sufficient to justify having recourse to Article [114 TFEU], it is otherwise where there are differences between the laws, regulations or administrative provisions of the Member States which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market.

As noted by Weatherill, the Court bestows the Union legislature with a competence that is "strikingly broad" and leaves "a significant breadth of discretion".[50] The Court's finding reflects that by nature, the interface between the national legal systems and the EU legal order is of a highly complex nature.

Should the CJEU *introduce* and apply rules that establish and define a more clear-cut interface between EU law and national law in fields where there does not (yet) exist secondary legislation, and where the reach of free movement will thus mark the borderline between national autonomy and Union objectives? Resorting to formalism will of course amount to a mere fiction, introduced for the sake of clarity, addressing the alleged needs of national courts.[51] One problem which will not be further elaborated upon here is the hypothesis that such an artificially construed defining line may negatively affect the reach of the legislative competence of the

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[47] E.g. Joined Cases C-34/95, C-35/95 and C-36/95, *de Agostini*, EU:C:1997:344, para 45; Case C-438/05, *Viking*, EU:C:2007:772, para 80; Case C-142/05, *Mickelsson and Roos*, EU:C:2009:336, para 26; Joined Cases C-340/14 and C-341/14, *Trijber* EU:C:2015:641, para 75; Davies 2012b.

[48] See e.g. Roth 2002, p. 8: "Control of Member State measures by the ECJ involves a replacement of a decision reached in the national political process through the Community judiciary."

[49] Case C-380/03 *Germany v. Parliament and Council*, EU:C:2006:772, para 37.

[50] Weatherill 2009, pp. 900–991.

[51] On the introduction of a fiction, see Oliver 1999, p. 798.

Union legislature, because the substance of free movement-law constitutes one component of the competences that are conferred to the Union.[52] Instead, I will concentrate on the other side of the problem that relates to the role of national lawmakers in the European project.

AG Maduro has observed that it is not the task of the Court "to review the political choices made by the Member States. Judicial review of measures likely to prohibit, impede or render less attractive the exercise of the freedoms of movement rather seeks to ensure that those choices take account of the impact which they may have on transnational situations."[53] These two axioms are easy to accept, but difficult to reconcile in practice. More or less all national political choices may in some sense affect transnational situations and actors, and may in some sense make it less attractive to exercise the freedom of movement.

From a normative theoretical perspective, it could instead be argued that the rules on free movement should reach further when they address national lawmakers than when applied in the courtroom.[54] For one thing, national parliaments have a greater *political* obligation to consider the European project than do the national courts, and to consider the possibility of harmonization even though it is not strictly demanded. In addition, lawmakers possess greater flexibility than courts. The latter will have to apply or disapply national rules, while the lawmaker has the possibility to consider whether the national rules can be shaped in a manner which is slightly less burdensome ("more proportionate") for international actors. To the national lawmakers, a discretionary and possibly far-reaching right to free movement introduces a general requirement of good governance.[55]

At the practical level however, it seems impossible to establish two different notions of a restriction, one to be applied in court, and one which addresses national lawmakers. Then the latter should prevail. The most important constitutional question when the reach of free movement is defined is not the extent to which courts should be vested with the competence to scrutinize political choices, but the extent to which the national lawmakers should be generally subject to taking the European perspective into account. A fluid conception of the notion of a restriction, clarified through the exercise of discretion on a case-by-case basis, may prove to be overreaching when applied in the courtroom, in the sense that measures which consistently will be "Court-proportionate" will be caught to a greater degree than

[52] On the intimate relationship between the notion of a restriction and the legislative competences of the Union, see e.g. Dougan 2010, pp. 171–179.

[53] Opinion of AG Poiares Maduro in Case C-446/03 *Marks & Spencer plc v Halsey (Her Majesty's Inspector of Taxes)*, EU:C:2005:201, para 37.

[54] On proportionality as a "bridge between courts and legislatures", see in particular Jackson 2015, pp. 3144–3147.

[55] See also Kumm 2010.

pursuant to a rule-based notion of a restriction. It is not necessarily the case that such measures are also "lawmaker-proportionate", in the sense that national law-makers should not be required to consider whether better and less burdensome solutions are possible, *strictu sensu*.

In short therefore, an account of the notion of a restriction which rests on discretion, not rules, is the one that best reflects law-making as an exercise of discretion. If the finding of a restriction hinges on the discretionary identification of some relevant Union objective, all possible Union objectives must be investigated, assessed and accounted for in the national regulatory process. To the contrary, if the notion of a restriction is made dependent on rule-like, fictional categorizations, relevant considerations may be ruled out and ignored in the national law-making process.

2.3.3.4 The Floodgate of Cases?

The risk that a somewhat vague restriction criterion can be used by traders to invoke the "Treaty as a means of challenging any rules whose effect is to limit their commercial freedom", must be taken seriously, and indeed was taken seriously by the Court in its judgment in *Keck*.[56] While the judgment is often being discussed as a constitutional clarification of the objectives and reach of the principle of free movement, the argument provided by the Court was far more pragmatic. Apparently, the claimant would lose the case at the level of proportionality anyway. In practical terms, what the Court stated was that "restrictions" which we foresee that we will *always* judge as being (court-)proportionate are henceforth no longer called "restrictions"—and thus a simplified judicial procedure was established for some specific national measures ("certain selling arrangements"). When it comes to practical arguments about workload, the Court is definitely the best institution to consider their weight, and in this regard, the judgment in *Keck* is a perfect example of legitimate court discretion.

The risk of overload may however be questioned, as the timeliness and costs of legal processes will discourage plaintiffs from challenging national measures which are undoubtedly court-proportionate. In addition, fewer situations are guided solely by the fundamental freedoms today than in 1993, as the amount of secondary legislation has increased. It suffices to say that the Court has not repeated its practical concerns in other fields of free movement law, and though it could be argued that it should, such arguments are not particularly weighty unless the Court itself puts them forward.

[56] Joined Cases C-267/91 *Keck and Mithouard*, EU:C:1993:905, para 14.

2.3.4 *Is There Any Alternative? The Broad Concept of "Discrimination" as a Prime Example of Court Discretion*

2.3.4.1 Introduction

Those who argue in favour of a rule-based approach to free movement law, and the notion of a restriction, will normally resort to a wide concept of discrimination, to avoid the alleged uncertainty and potential overreach of a discretionary approach. It is submitted that their proposition has three flaws. The first is the lack of a convincing normative theory. The second is that the application of a *wide* concept of discrimination is indeed an exercise of discretion.[57] The third is that the approach is out of line with the approach of the CJEU. As noted by AG Kokott, it is established case law that the notion of a restriction encapsulates both the prohibition of discrimination and indistinctly applicable measures that constitute a hindrance to free movement.[58]

2.3.4.2 The Core Meaning of Discrimination

To substantiate the critical observations set out above, I will make use of a well-known proposition devised by Hart as a starting point. Rules have a core meaning and a penumbra where their meaning is more uncertain.[59] It has been observed that the "more complex and changing the phenomenon being regulated, the wider that penumbra is likely to be; indeed in the most difficult contexts the penumbra of uncertainty swallows up the core".[60] As we shall see, a *wide* notion of discrimination explores the penumbra. For that reason it is encumbered with uncertainty, it lacks a normative foundation, and in the end, it poses a threat to the core concept of discrimination that it is crucial to preserve.

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[57] Bernard 1996, p. 95.

[58] Opinion of AG Kokott in Case C-222/07, *Unión de Televisiones Comerciales Asociadas (UTECA) v Administración General del Estado*, EU:C:2008:468, para 77 referring to, on free movement for workers: Case C-415/93, *Bosman*, EU:C:1995:463, paras 92, 103 and 104; Case C-190/98, *Graf,* EU:C:2000:49, paras 21–23 and Case C-464/02, *Commission* v Denmark, EU:C:2005:546, para 45; on freedom of establishment: Case C-55/94, *Gebhard*, EU:C:1995:411, para 37, and Case C-442/02, *CaixaBank France*, EU:C:2004:586, para 11; on freedom to provide services: Case C-76/90, *Säger*, EU:C:1991:331, para 12 and Case C-490/04, *Commission* v *Germany*, EU:C:2007:430, para 63; on the free movement of capital: the golden shares judgments Case C-367/98, *Commission* v *Portugal*, EU:C:2002:326, para 44, Case C-483/99, *Commission* v *France*, EU:C:2002:327, para 40 and Joined Cases C-463/04 and C-464/04, *Federconsumatori and Others*, EU:C:2007:752, para 19.

[59] Hart 1961.

[60] Braithwaite 2002, p. 54.

In European Union law, the prohibition against discrimination has a clear legal basis in Article 18 TFEU, which defines its core in very precise words. Discrimination *on grounds of nationality* is prohibited. The rationale is obvious. Considerations about nationality are simply irrelevant in a single market. Discrimination in this core meaning, in academic legal writing often presented as direct or overt discrimination, does not appear very often. Of greater practical importance are the obstacles to free movement stemming from the disparities created by the different laws of the Member States. Measures which create dual burdens or which conserve established trading patterns are well known examples. Such measures are motivated by sensible and legitimate concerns in the general interest, like the protection of health, irrespective of nationality.[61] They differ from discrimination in the true sense—perhaps not always in their practical effects, but definitely from a normative point of view.[62] In many instances, the foreigner's claim is *not* to be treated in the same manner as the national actors.[63] The foreigner wants to be treated *as a foreigner*, and to rely wholly on the regulation in his home state. The foreigner's problem is not discrimination in any direct or personal sense, but that the market is fragmented from a regulatory point of view, something that creates "obstacles to movement".[64]

As part of his critique of Nic Shuibhne, Stefan Enchelmaier, a strong proponent of a rule-like approach grounded in a wide notion of discrimination, has observed that: "The prohibition of *such discrimination* [the wide notion of discrimination] follows not from Article 18, as this is not a case of discrimination based on nationality, but from Article 26."[65] There is definitely some truth in this, but at the same time, the observation may seem to fall on its own sword. "Such discrimination" (e.g. regulation which creates disparate impacts) is actually not "discrimination" according to the definition of the term contained in Article 18 TFEU, but apparently some other kind of discrimination according to Article 26 TFEU. The latter provision does however not apply the term "discrimination" at all. It protects free movement by stating, "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."

From the foregoing it is clear that a *wide* application of the concept of discrimination would be the perfect example of the penumbra swallowing the core. The problem with a conceptualization as Enchelmaier's is that it threatens to compromise the basic notion of discrimination, the fundamental right not to be

[61] E.g. Case C-405/98 *Gourmet* [2001] ECR I-1795.

[62] See also Ortino 2002, pp. 161–183.

[63] Case 136/78 *Auer* [1979] ECR 437, para 21.

[64] The expression used in *Cassis de Dijon* Cited *supra* note 27, para 8. For a similar link to "the single market and […] the achievement of its objectives" in the field of services, see e.g. Case C-522/04 *Commission v. Belgium* [2007] ECR I-5701, para 37.

[65] Enchelmaier 2016 p. 14.

discriminated against.[66] According to the Dworkinian conception, a fundamental right can be rebutted by a clear and major public benefit, but not by a mere reference to the general interest. In the latter situation, the claim of a fundamental right would be pointless, and would show that the term is used in some sense other than the strong sense.[67] On this conception of a right, the prohibition on discrimination is fundamental, as the doctrine of mandatory requirements cannot be invoked to justify direct discrimination; the only available justification will be the written exceptions in the Treaty.[68] This is the narrow conception of discrimination which the Court tried to preserve in its Gebhard-formula, quoted in Sect. 2.2.2 above. The judgment made it clear that the notion of a restriction reaches further than the notion of discrimination, but the latter concept does still have an important role to play. It suspends the possibility of invoking the mandatory requirements doctrine, and conserves the fundamental status of the core-right not to be discriminated against *on the basis of nationality*.

2.3.4.3 The Wide Notion of Discrimination

If the concept of "discrimination" is to be applied outside its core, in an attempt to conserve a rule-like definition of the restriction-criterion, it becomes nothing but an exercise of discretion. For one thing, we (or in the last instance the Court) will have to define how "wide" the notion is. Oliver has argued that the "concept of discrimination should be as wide as possible", but what exactly does that mean?[69] Supposedly, the concept can be construed extremely broadly, as rules do always have a disparate impact, in the sense that those who are subject to regulation feel the effects differently. For a business to have to cope with 28 different legal regimes is in itself burdensome, even though the troublesome rules no not create disparate impacts in a narrow sense. Why not therefore apply the notion of disparate impact in its widest sense? We did so with the notion of discrimination, leaving its normative rationale behind. Why not repeat the manoeuvre and simply state the obvious: that all rules have a disparate impact?[70]

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[66] While on the other hand the right to free movement is construed too narrowly, see Sect. 2.4.

[67] Dworkin 1977, p. 192.

[68] E.g. Case 120/78 *Cassis de Dijon*, [1979] ECR 649; Case C-55/94 *Gebhard* [1995] ECR I-4165; *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, para 36; Case C-546/07 *Commission v. Germany* [2010] ECR I-439, paras 39–53; Joined Cases C-344/13 and C-367/13 *Blanco & Fabretti* ECLI:EU:C:2014:2311, para 37; Case C-375/14 *Laezza* EU:C:2016:60, para 25.

[69] Oliver 1999, p. 796.

[70] To paraphrase the Court in the "posted workers" judgment, it may be argued that every national rule "involves an additional administrative and financial burden for undertakings established in another Member State, so that the latter are not on an equal footing". Undertakings established in another Member State must adjust to the peculiarities of the regulation in the host state, to which national undertakings have already adapted. Cf. Case C-319/06, *Commission v. Luxembourg*, EU:C:2008:350, para 85.

The problem with the term "discrimination" is that, outside its core, detached from its normative rationale, it is just a word, a label. It cannot guide us when we try to solve the questions set out above. The answers will not be an exercise of informed and legally constrained discretion, but a matter of personal choice. In this regard, it is quite telling how the notion of "discrimination" has been applied in a notoriously unclear manner in legal scholarship, as famously described by Hilson.[71]

The Court escapes the criticism. Normally it avoids the language of discrimination.[72] This has been explained by reference to the fact that the term is "loaded".[73] A term that is scarcely used can hardly be "loaded" in the linguistic sense. The straightforward explanation is that the term is loaded with normative content, and that its normative content does not fit the penumbra cases. Another explanation is that other terms such as "market access" or simply the "functioning of the internal market", as applied in Article 26.1 TFEU, provide more precise guidance in such situations. Judicial discretion cannot be avoided, but the questions set out above can be answered in a more precise and direct manner than a wide concept of discrimination would entail. The following observation presented by Davies, in a defence of a wide notion of discrimination, can be used to illustrate the point[74]:

> It may be suggested that the picture above does not work in reality. For example, a regulation increasing the costs of market entry, even if applicable to all market participants, may deter businesses in states where it is hard to raise capital, or may deter smaller businesses who may consider it too risky. Even equal-burden rules may therefore, it could be argued, deter entry in the real world. However, this misses the logical point: if the measure actually has the effects described, so that as a result of problems with access to capital or varying firm sizes it discourages market entry, then it will be, as a matter of fact, discriminatory in effect. The identity between inequality and restraints on market access is not a contingent one, but a necessary one.

The argument made by Davies is much the same as to accept that, in the real world, the real effect of regulation on market access and the functioning of the market must be taken into account, but then to reassert that if a restriction on market access exists, it proves that the contested regulation is in fact discriminatory. It is of course possible to argue in this manner, but it would seem to hide rather than to guide. If (at least in some instances) the notion of market access informs the application of the concept of discrimination, then the latter is just a useless and misleading label.

Another illustration is the observation made by Bernard, that[75]:

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[71] Hilson 1999, pp. 448–451.

[72] According to Davies 2003, p. 58, even though the Court has eliminated the concept of indirect discrimination from its language, it is still relevant and at the core of the restriction criterion. "It is just that the discussion of it is avoided." However, one has to wonder: Can a court announce that it will no longer discuss the only thing that matters?

[73] Snell 2010, pp. 449, 468.

[74] Davies 2011, p. 22.

[75] Bernard 1996, pp. 86–87 (emphasis added).

> It is not that the Treaty cannot be interpreted so as to prohibit discrimination against one's own nationals. While this is an aspect of discrimination that the Founding Fathers *probably did not have in mind, it would not be unreasonable* to argue that the notion of a common market necessarily implies a uniform treatment of all regardless of nationality and therefore prohibits any kind of discrimination, even discrimination by a state against its own nationals.

Even if the suggested approach may lead to correct outcomes in substantial terms, a finding that hinges on the argument that something is "not unreasonable" appears to be highly discretionary. It may also appear to be arbitrary if it is anchored in a wide concept of discrimination. Even if applied in its wide sense, discrimination is by definition confined to the different treatment of actors from other Member States. It is simply not possible for a Member State to discriminate against its own nationals. Again, what we see is an approach where "discrimination" is reduced to an empty slogan, which derives its substance from other considerations, namely that "the notion of a common market necessarily implies a uniform treatment of all regardless of nationality". The Court has been right in addressing this issue from a different angle, the right to access the market.[76]

To artificially force new considerations into old concepts hides rather than guides. Instead, we should let the notion of discrimination perform its basic function according to its normative rational, and focus more directly on the substantial question. What will the notion of a restriction designate if discretion is guided by the objective of creating a truly uniform single market and to protect its "functioning", as required by Article 26 TFEU?[77]

2.4 Discretion and the Individual Right to Access the Market

2.4.1 From Instrumental to Personal Rights

As observed by Ioannis Lianos, until recently the political necessity of completing the internal market led to a somewhat narrow, instrumental application of the fundamental freedoms, the objective of which was to remove existing barriers to economic integration. To some extent, this approach marked a decoupling from other objectives.[78] We may be about to witness a change, as the regulation of the Union is more and more becoming the regulation of a society, a development to which the functioning of the market, and the application of its four freedoms must contribute. A qualified prediction is that the character and the application of the fundamental freedoms will shift. To an increasing extent, the four freedoms will be

[76] As in Case C-384/93 *Alpine Investments*, [1995] ECR I-1141, paras 37–38.

[77] In the opposite direction, Snell 2010, p. 449.

[78] Lianos 2010, pp. 705–706.

taken to constitute not only instrumental rights, but also personal rights.[79] As noted by AG Maduro: It would be neither "satisfactory nor true to the development of the case-law to reduce freedom of movement to a mere standard of promotion of trade between Member States. It is important that the freedoms of movement fit into the broader framework of the objectives of the internal market and European citizenship. (…). They represent the cross-border dimension of the economic and social status conferred on European citizens."[80]

The personalization of economic rights that were initially of a purely instrumental character is not an unprecedented process. The judgment in *Lilli Schröder* is both famous and illumining. The case concerned the interpretation of Article 119 of the EC Treaty, now Article 157 TFEU. The Court stated that the original aim of the provision was "to avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers as regards pay".[81] It proceeded by emphasizing that the provision formed a "part of the social objectives of the Community, which is not merely an economic union but is at the same time intended, by common action, to ensure social progress and seek constant improvement of the living and working conditions of the peoples of Europe, as is emphasised in the Preamble to the Treaty".[82] Based on that observation and referring to the developments in the case-law, the conclusion of the Court was that the "economic aim pursued by Article 119 of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right".[83]

Today, there are two main catalysts to the personalization of the right to free movement: The increasing importance of the concept of citizenship analysed in detail in other chapters in this volume and the enactment of the Charter of Fundamental Rights.[84] In *Grzelczyk* the Court stated that "Union citizenship is destined to be the fundamental status of nationals of the Member States".[85] The Charter of Fundamental Rights establishes a similar requirement of fit, as fundamental rights are by definition the overarching guideline for the application of the other provisions contained in a legal system.[86] The enactment of the Charter signals

[79] See De Cecco 2014.

[80] Opinion of AG Maduro in Joined Cases C-158/04 and C-159/04, *Alfa Vita Vassilopoulus*, EU:C:2006:212, para 40.

[81] Case C-50/96, *Deutsche Telekom AG* v *Lilli Schröder*, EU:C2000:72, para 54.

[82] *Lilli Schröder*, para 55.

[83] *Lilli Schröder*, para 57.

[84] See the contributions of Tryfonidou, Eriksen and Stubberud, and De Cecco in Chaps. 3, 10 and 12 in this volume.

[85] Case C-184/99, *Grzelczyk*, EU:C:2001:458, para 31.

[86] Petersman 2012, p. 307.

an "individual rights approach" to European Union Law in general, marked by its Article 16, which constitutionalizes the right to conduct a business.[87] Further, the Charter reflects the constitutional conception of the status of Union Citizens. Article 45 establishes that every citizen has the right to move and reside freely within the territory of the Member States while Article 15 protects the freedom to choose an occupation and the right to engage in work. Other provisions, such as Articles 35 and 36 mark the integration between fundamental rights, citizens' rights, market rights and social rights, by recognizing the right to *access* healthcare and services of general economic interest.[88]

Based on the observations above, it seems uncontroversial to state that "the relationship between fundamental freedoms and fundamental rights is characterized by a broad convergence both in terms of *structure and content*".[89] However, how is the basic requirement that the application of the fundamental freedoms must fit into its legal surroundings to be coped with in practice?

The focus in scholarly literature has been on the content of rights. While appreciating the importance of such analyses, the remaining part of this chapter will focus on another question: How does the *structure and character* of rights affect the process of reviewing and interpreting their content? The basic observation is as follows: The application of instrumental rights may legitimately be made dependent on rule-like tests. One breaks some eggs, so to speak, to gain other benefits, such as clarity and procedural economy. The reach and content of individual rights that have status as "fundamental" or "personal" cannot be cut off as easily. They require a thorough, substantive and individual assessment. As we shall see, the personalization of rights seems to demand court discretion.

2.4.2 *The Structure of the Legal Assessment and the Notion of "Market Access"*

The judgment in *Keck* has been thoroughly analysed in writings on the fundamental freedoms. Mainly, the academic interest stems from the presupposition that the rationale behind the rule-like categorizations established in that judgment may help to define both the objective and the reach of free movement law in general. In other words, *Keck* is very often subject to analysis when the content of the free movement rights is being assessed. However, as pointed to by Niels Fenger in another chapter in this volume, the importance of the judgment stems largely from its *structuring* of the legal assessment[90]:

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[87] Petersman 2005.

[88] On the integration, see Bekkedal 2011.

[89] Opinion of Trstenjak AG in Case C–271/08 *European Commission v. Federal Republic of Germany*, EU:C:2010:183, para 187 (emphasis added).

[90] See Chap. 5 in this volume, Sect. 5.4.2.

> …one of the main purposes of *Keck* was to avoid the need for (…) concrete assessments by making that evaluation once and for all with regard to the types of rules covered by the judgment, *i.e.*, rules concerning to whom, where and when a product might be sold. Or to put it differently, with the statement that no market access is restricted by non-discriminatory selling arrangements, the Court in *Keck* insisted on a legal fiction in the name of legal certainty and operability.

The position taken by AG Jacobs in his famous opinion in *Leclerc-Siplec* marks a diametrically opposed approach to the question of how the legal assessment is to be *structured*.[91] The AG argued in favour of a "market access" test[92]:

> There is one guiding principle which seems to provide an appropriate test: that principle is that 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. In spite of occasional inconsistencies in the reasoning of certain judgments, that seems to be the underlying principle which has inspired the Court's approach from *Dassonville* through "Cassis de Dijon" to *Keck*. Virtually all of the cases are, in their result, consistent with the principle, even though some of them appear to be based on different reasoning.

Notably, the AG did not challenge neither the objective nor the rational on which *Keck* rests. He reasserted that "the central concern of the Treaty provisions on the free movement of goods is to prevent unjustified obstacles to trade between Member States", emphasizing that it was the Court's reasoning in *Keck*, not the result, that he considered to be "unsatisfactory".[93] Subject to the criticism of AG Jacobs was the *structure* of the judgment and its legal reasoning, the rule-like approach to the legal assessment. The AG criticized rule-like categorizations for their rigidity: their fictional boxing in of matters that, to the individual affected by burdensome regulatory measures, are a matter of degree.[94] What the AG acknowledged is that a rule-based approach may be unable to produce outcomes that realize the objectives that justified the rules in the first place. As noted by Fredrick Schauer: "Rule based decision making is … the theory of the second best".[95] "A decision-maker instructed to make decisions according to a set of rules is … instructed not to consider certain facts, certain reasons and certain arguments".[96] Rules conserve the competence of the instructor and deprives the decision-maker of the possibility of making, in the substantive sense, the best decision. A "non-mistaken rule-constrained decision-maker can never do better

[91] As noted by Snell 2010, p. 455 the recent developments in the case law of the ECJ may indicate that the Court has finally embraced the approach suggested by AG Jacobs.

[92] Opinion of Jacobs AG in Case C-412/93, *Leclerc-Siplec*, EU:C:1994:393, para 41.

[93] Para 39 of the opinion, cf. para 48.

[94] Para 38 of the opinion.

[95] Schauer 1991, p. 152.

[96] Schauer 1991, p. 158.

than a non-mistaken particularistic decision maker can do under the same substantive theory of decision, but can often do worse".[97]

For obvious reasons, the AG did not suggest another rule. Far more radically, he favoured discretion. He argued that legal fictions and constructions should be eliminated and substituted by concrete assessments on a case-by-case basis.[98] For that reason, in my opinion, to ask what rule the term "market access" is intended to represent is to pose the wrong question.[99] The notion was invented to become the negation of any specific rule, to facilitate a discretionary assessment that ensures the full realization of individual rights in the substantive sense.[100]

Not only will an approach as set out by the AG cope with the under- and over-inclusiveness of rules, compared to their objectives; the open term "market access" is a sponge that makes it possible for the Court to realize the requirement that its assessments must fit into the legal surroundings.[101] It may also tend to change and to widen our perception of what the relevant Union objectives are, as we have to actively start and search for them. Rules cages in specific objectives. Since it is difficult to make rules for every thinkable situation, rules will tend to focus on the *main* objective(s) only. Guided by rules, we will not bother with the thinkable, but resort to what has already been thought. Discretion on the other hand, will allow us to produce new rules when needed, and will demand that we elaborate upon whether a Union objective exists that can legitimize a particular construction of the restriction criterion in the particular case.

2.4.3 The Increasing Use of the Term "Market Access"

The sections above provide some explanation as to why the term "market access" is increasingly being used by the CJEU in its assessment of whether national regulation constitutes a restriction on free movement. The notion provides flexibility and in that regard it vests the Court with discretion. Its introduction may be seen as a necessary step to enable the Court to manage the personalization of the right to free movement. This point will be further elaborated upon in the sections below. First, I shall present some additional basic reasons for the Court's adherence to the notion.

As a start, the term "market access" expresses a self-explanatory objective that provides a neutral guideline for the execution of discretion. While the term "discrimination" is loaded with specific normative content and should be reserved for

[97] Schauer 1991, p. 157.

[98] Para 42 of the opinion.

[99] Snell 2010.

[100] Thus, as noted by Snell 2010, p. 468 "the notion of market access has in practice had several different usages"—but that in itself is not a valid criticism of the use of the concept.

[101] As noted by Enchelmaier in Chap. 4 in this volume, Sect. 4.4.2: "Market access is not a test but an objective".

discrimination in its true sense, the term "market access" advances a realistic approach to the "penumbra-cases".[102] The judgment in *Gourmet* can serve as an example. The case concerned the Swedish general ban on commercial advertising of alcoholic beverages in periodicals. According to the Court, the ban affected "the marketing of products from other Member States more heavily than the marketing of domestic products". Thus, it constituted "an obstacle to trade between Member States", as advertising is an indispensable tool when entering new markets.[103] Even though the regulation created disparate impacts, it would seem strained to characterize the Swedish rules as discriminatory.[104]

Many other examples can be mentioned. One is the approach of the Court to national regimes that require registration or licensing prior to the exercise of an economic activity. Such regimes *may* be used to discriminate against foreign actors. They *may* be compared to absolute bans, as the activity will normally be forbidden until a licence has been issued. In any case, it is both realistic and straightforward to state that the proportionality and necessity of a system of prior approval should always be assessed. Systems of prior approval are set up to control access to the market and thus, by definition, affect market access.[105] The conclusion that they constitute restrictions can be reached without further ado. The more general point is that quite often it appears construed to handle the wide notion of discrimination and the notion of market access as "two distinctly relevant and distinctly applied devices" or to present the discrimination theory as the "initial framework for case analysis" while the "market access theory fulfils an ancillary role".[106] "Covert discrimination" or "discrimination in fact" should rather be conceived of as a specific (but not exhaustive) instance of hindrances to market access, as regulation which creates disparate impacts obviously impedes free movement.

A second reason explaining the increasing use of the term 'market access' is that many direct obstacles to trade and free movement exist that do not constitute discrimination even in its widest sense, but which still have to be dealt with, like absolute bans, restrictions on use, or the closure of important roads and transit routes.[107] The inevitable logic of the argument of AG Jacobs in his opinion in *Leclerc Siplec*, that if "an obstacle to inter-State trade exists, it cannot cease to exist simply because an identical obstacle affects domestic trade" was adhered to by the

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[102] See Sect. 2.3.4.2.

[103] Case C-405/98, *Gourmet*, EU:C:2001:135, para 25.

[104] Case C-442/02, *CaixaBank France*, EU:C:2004:586, para 11 provides a similar example.

[105] E.g. Case C-473/98 *Toolex*, EU:C:2000:379, para 35; Case C-205/99 *Analir*, EU:C:2001:107, para 22; Case C-483/99 *Commission* v. *France*, EU:C:2002:327, para 41; Case C-372/04 *Watts*, EU:C:2006:325, paras 95–98; Case C-400/08 *Commission* v. *Spain*, EU:C:2011:172, paras 66–70; Case C-472/14, *Canadian Oil Company Sweden and Rantén*, EU:C:2016:171, para 44.

[106] Nic Shuibhne 2013, p. 206; Meulman and de Waele 2006, p. 218.

[107] Case 34/79 *Henn and Darby*, EU:C:1979:295; Case C-275/92 *Schindler*, EU:C:1994:119; Case C-42/07 *Liga Portoguesa*, EU:C:2009:519; Case C-142/05 *Mickelsson and Roos*, EU:C:2009:336; Case C-110/05 *Commission v. Italy* ("*Trailers*"), EU:C:2009:66; Case C-112/00 *Schmidberger*, EU:C:2003:333; Case C-320/03 *Commission v. Austria*, EU:C:2005:684.

Court in *Bosman*.[108] It has been restated in later cases, like *Commission v. Cyprus* where the Court held that:[109]

> As regards the Republic of Cyprus's argument that the legislation at issue in the present case does not treat migrant workers less favourably on the ground that it applies indiscriminately to all workers choosing to leave the Cypriot civil service in order to work in their Member State of origin or in another Member State, it should be recalled that for a measure to restrict freedom of movement, it is not necessary for it to be based on the nationality of the persons concerned or even for it to have the effect of bestowing an advantage on all national workers or of operating to the detriment solely of nationals of other Member States, but not of nationals of the State in question. It is enough that the measure should benefit certain categories of persons pursuing occupational activity in the Member State in question.

The third and most intriguing reason that can explain the increasing use of the notion of market access is that it gives the fundamental freedom teeth, which realize the protection of the individual right to free movement fully. This particular feature will be assessed below.

2.4.4 Example: Restrictions on Use—The Constitutional Twist in the Court's Case Law

The hypothesis of Sect. 2.4, as set out above, is that the personalization of rights seems to require individual and substantive assessments that demand court discretion. To make the hypothesis less abstract, this section will present a concrete example, before we return to the general issues in Sect. 2.4.5 below. First we shall study how the judgments on restrictions on use, as introduced above, may reveal the links between the personalisation of rights, the introduction and application of a market access test and the resort to court discretion.[110]

It has been argued that goods are not persons, and for that reason, the right to free movement of goods should continue to be treated as instrumental rather than fundamental or personal.[111] Still, "[f]ree movement of goods concerns not only traders but also individuals"; namely buyers.[112] If persons are missing, it does not require much creativity to introduce them. It is submitted that the Court did so in its judgments on restrictions on use by referring to the demand of citizens. The main catalyst for the dynamic interpretation of Article 34 in *Trailers* and *Mickelsson &*

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[108] Opinion of Jacobs AG in Case C-412/93 *Leclerc-Siplec*, EU:C:1994:393, para 39; Case C-415/93 *Bosman*, EU:C:1995:463.

[109] Case C-515/14 *Commission v. Cyprus*, EU:C:2016:30, para 46. Cf. e.g. Case C-370/05 *Festersen*, EU:C:2007:59, para 25.

[110] *Mickelsson & Roos*, para 28; *Trailers* para 58.

[111] Oliver and Roth 2004, p. 441; De Cecco 2014, pp. 384, 390.

[112] Case C-362/88 *GB-INNO*, EU:C:1990:102, para 8. Cf. opinion of AG Trstenjak in case C-445/07, *Danske Slagterier*, EU:C:2008:464, para 83.

Roos was the observation that the restrictions on use had a "considerable influence on the behaviour of consumers".[113] This may at first glance look as pragmatic reasoning, but in fact, it is a constitutional observation, pointing to the most fundamental consideration of them all. Why bother to establish a market if not for the fulfilment of public demand?

The doctrine of "demand limitation" originated in *Höfner*, which concerned the application of the competition rules to Members States. According to the doctrine, a restriction is said to exist if the actors on a market, due to excessive regulation, are "manifestly not in a position to satisfy demand".[114] A few decades ago, the constitutional rational of the doctrine on demand limitation provided the necessary force to pave the way for EU law into fields of the economy which were formerly monopolized or highly regulated as they were considered by the Member States to be of general economic interest. In its modernized version, considerations about demand limitation have been central to the reasoning of the Court when the fundamental freedoms have been applied in the health-sector.[115]

The demand limitation test appears as a natural source of inspiration when the difficult question of when limitations on use should count as restrictions on the right to free movement is being solved. In the end, that will require a concrete assessment. If we accept that fulfilment of demand is an individual right of basic constitutional importance, we will also have to accept that discretion is being executed in the assessment of whether the traders' right to access the market, to the benefit of consumers, is being affected by national regulatory measures. No rule can define once and for all, and in a precise manner, when the citizen's interest in the market is duly respected. The court clothed its assessment in the language of "market access".

The judgments in *Trailers* and *Mickelsson & Roos* provide another feature of an individual, rights-based approach to free movement law as well. Contrary to a classical rule-based approach, analogous to the handling of "certain selling arrangements", the assessment of the Court did not attribute any weight to concerns about democracy or Member State autonomy. If rights are seen as instrumental, their reach may be subject to limitations grounded in considerations about the nature of the international cooperation to which they belong. Substantive, individual rights cannot be cut-off in the same manner. To the contrary, the reach of an individual right must be considered to pursue the interests of the individual until the right, interpreted on its own terms, is exhausted. Broader considerations that are of no relevance to the concerned individual, who is protected in his own right, cannot inform the interpretation of the scope of a personal right. The relevancy and weight of concerns about democracy and Member State autonomy are accounted for

[113] *Mickelsson & Roos*, para 26; *Trailers* para 56.

[114] Case C-41/90 *Höfner*, EU:C:1991:161, paras 25 and 31. For a presentation of the doctrine on demand limitation, see Buendia Sierra 1999, pp. 163 et seq.

[115] Case C-475/99 *Ambulanz Glöckner*, EU:C:2001:577; Case C-157/99 *Smits & Peerbooms*, C:2001:404, para 103; Case C-385/99 *Müller-Fauré*, EU:C:2003:270, para 91; Case C-372/04 *Watts*, EU:C:2006:325, paras 73–74.

through the construction of the principle of proportionality, and will only appear at the later stage of the proportionality review.

2.4.5 *Market Access and the Personal Right to Free Movement*

2.4.5.1 Diversification or Unification?

Section 2.4.4 above proved how an individual-rights account of the right to free movement might explain the intriguing judgments on restrictions on use. Let us now address the bigger picture. How can the personalization of the right to free movement be explained in general, and what are the consequences?

A preliminary observation would be that it is a mere (instrumental) fiction to submit that the elimination of any kind of discrimination will mark the full realization of an internal market. Such a timid achievement will provide for the formal right to move between 28 different national markets, but it will not contribute to the establishment of a single, uniform market. It is one thing to say that it is as easy to travel to Stockholm as to Rome; it is quite another thing to claim that the two cities are identical.

The Swedish tourist would probably appreciate that the secrets and pitfalls of Rome are other than those of Stockholm. The pleasure is more doubtful from the perspective of a European business, struggling with the peculiarities of the massive amounts of rules in the different Member States.[116] The judgment of the Court's grand chamber in *Commission v. Italy* provides a good illustration. The case concerned Italian regulation, which imposed an obligation to contract upon on all insurance undertakings operating in the field of third-party liability motor insurance, and in relation to all vehicle owners. The Court found that the Italian system restricted both the freedom to provide services and the freedom of establishment as it dissuaded insurance undertakings established in other Member States from establishing themselves or offering services in Italy. The system was said to constitute a substantial interference in the freedom to contract which rendered the right to access the market less attractive.[117]

> Inasmuch as it obliges insurance undertakings which enter the Italian market to accept every potential customer, that obligation to contract is likely to lead, in terms of organisation and investment, to significant additional costs for such undertakings. If they wish to enter the Italian market under conditions which comply with Italian legislation, such undertakings will be required to re-think their business policy and strategy, inter alia, by considerably expanding the range of insurance services offered.

[116] Cf. opinion of AG Alber in case C-176/96 *Lehtonen*, EU:C:1999:321, para 48.

[117] Case C-518/06, *Commission v. Italy*, EU:C:2009:270, paras 69–70.

The reasoning is realistic from an individual rights-based perspective. Substantial differences among the regulatory regimes of the Member States may in many instances discourage free movement to a greater extent than e.g. regulation that creates disparate impacts in the narrow sense. As argued in Sect. 2.3.2 above, the "substantially the same argument" is central to the notion of dynamic rights, and then the answer begs the question. Why should the bigger hindrance not be considered to constitute a restriction?

Some would argue that the bigger hindrance is simply irrelevant, as it is something you experience after you have exercised (exhausted) your right to free movement, i.e. after you have accessed the market, as the Treaty provisions only require the elimination of obstacles *to move between the Member States*. On such grounds, Oliver has criticized the more visionary ambition set out by the judgment in *Gaston Schul*, where the Court stated:[118]

> The concept of a common market as defined by the Court in a consistent line of decisions involves the elimination of all obstacles to intra-Community trade in order to *merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market*. It is important that not only commerce as such but also private persons who happen to be conducting an economic transaction across national frontiers should be able to enjoy the benefits of that market.

According to Oliver, "it is scarcely open to the Court to ignore the clear wording of the Treaty", while Davies has asserted that the "clear intention of the text of Article 34 is to capture measures which *specifically* affect cross-border movement".[119] Let us assess these submissions in more detail.

As a preliminary observation, it would seem rather formal to disregard the regulatory problems that may be experienced by a business only after the exercise of its right to access a new market. Rational actors do not shut their eyes, move and hope for the best. Problems which—in theory—will appear only after the exercise of the right to free movement, are—realistically speaking—impediments to free movement in the first place. The question is therefore whether the wording of the Treaty rules may exclude an interpretation that from the individual point of view would appear both realistic and efficiency-oriented.

Contrary to the observations referred to above, it is submitted that terms such as "between Member States" are notoriously unclear. The wording of Article 34 is open to interpretation. There is nothing in that specific Article, or similar provisions, which requires that a measure cannot be caught unless it *specifically* affects cross border-movement. To the opposite, the words "having equivalent effect" legitimize the gradual development of the law—a discretionary exercise that must be guided by the judge's vision of what a single market in the true sense should

[118] Case 15/81, *Gaston Schul*, EU:C:1982:135, para 33 (emphasis added).

[119] Oliver 1999, p. 785; Davies 2012a, b, p. 27 (emphasis added).

entail.[120] With regard to the latter, there is no objective answer and opinions will vary. Still a choice will have to be made.

Bernard has observed that the "most obvious consequence of a theory of free movement based on discrimination is that it promotes regulatory diversity: (…) It is therefore a very different picture from that of a single market characterised by uniform rules apparently implied in some dicta of the Court".[121] Two points can be deducted from this important observation, the first being that it is the vision of what the internal market should entail which informs the interpretation and understanding of the wording of the Treaty, not the other way around. The second point is that it is far from obvious that "regulatory diversity" would fit a conception of a genuinely internal market, construed upon a set of individual rights: the fundamental freedoms. It suffices to say that at the least it appears as a legitimate act of discretion if the Court chooses a more ambitious approach, aiming for unification rather than diversification.

2.4.5.2 The Protection of Substantive Individual Rights

Nic Shuibhne presents another possible objection to a substantive, rights-based reading of the fundamental freedoms[122]:

> Even taking the particular plight of new market entrants into account, is the obligation to 'rethink business policy and strategy' really that objectionable a burden to place on an economic operator seeking—choosing—to exploit a new market? Or, put another way, why is it so objectionable a burden that the EU should intervene and assess it?

It is tempting simply to counter-assert that a burden does exist which, from the individual point of view, may make it less attractive to exercise the right to free movement. That is enough to legitimize the way in which the Court executed its discretion. Its chosen approach fits both the objective of establishing a genuine internal market, and the personalization of the right to free movement as described in Sect. 2.4.1 above. To ask whether the obligation to rethink business policy and strategy is "really that objectionable" is much the same as asking, "is an elephant really that heavy?" The question is impossible to answer in the absence of a proportionality review, the prerequisite of which is that the national measure qualifies as a restriction in the first place.

Davies presents a seemingly more principled objection: "Litigants who challenge non-protectionist regulation are not in fact claiming that they are denied

[120] Similarly Weiler 1999, p. 353: "the prohibition in the Treaty on (…) measures having an equivalent effect to quantitative restrictions seems (…) opaque and (…) open-textured. [T]he text seems to invite a teleological interpretation conditioned by an overarching vision of the Community as a single market place (…)".

[121] Bernard 1996, p. 103.

[122] Nic Shuibhne 2013, p. 243.

market access. They are claiming that a different market should exist."[123] Indeed. That is the claim of the right to free movement as well, the aim of which is to merge 28 national markets into one. One may of course argue that the rules on free movement *should* be interpreted and construed in a manner which is not too intrusive, and that their focus *should* be on restrictions that appear at the border and which thereby affect free movement in a direct sense. Such reasoning will necessitate a distinction between access to the market and the exercise of an activity, as suggested by AG Lenz in his opinion in *Bosman*.[124] The Court, however, has not endorsed that view, for reasons spelled out in *Commission v. Denmark*:

> The manner in which an activity is pursued is liable also to affect access to that activity. Consequently, legislation which relates to the conditions in which an economic activity is pursued may constitute an obstacle to freedom of movement within the meaning of that case-law.[125]

Notably, the approach of the Court is not in any way legally demanded. A choice has to be made, but the way in which the Court has executed its discretion is legitimate if the comprehensive legal framework is taken into consideration: it makes sense from a personal, rights-based perspective. The stage on which the restriction appears is simply irrelevant. What matters is that the burdens created by national regulation are substantial enough to make free movement less attractive. It must be emphasized that his does not entail that the interpretation of the Treaty collapses into an "economic freedom reading", protecting individual freedom as such.[126] As proven by several judgments, e.g. the judgment in *Graf*, it is not enough that individual freedom is touched upon; the national rules must affect free movement.[127] The approach taken by the Court marks a third way, one that mediates between a protectionist reading and an economic freedom reading of the Treaty. Or, as Roth and Oliver have put it: "the Court of Justice has moved into the role of arbiter between the demand of the internal market on the one hand and the effectiveness of a decentralized decision making process on the level of the Member states on the other."[128]

2.4.5.3 "As Union Law Now Stands"… The Indispensable Notion of Discretion

The mediation between "the demand of the internal market on the one hand and the effectiveness of a decentralized decision making process on the level of the Member states on the other" requires legal discretion. The existence of discretion in law may

[123] Davies 2012b, p. 29.

[124] Opinion of AG Lenz in Case C-415/93 *Hünermund*, EU:C:1995:293.

[125] Case C-464/02, *Commission v. Denmark*, EU:C:2005:546, para 37.

[126] Snell 2010, p. 438.

[127] Case C-190/98, *Graf*, EU:C:2000:49, paras 24–25.

[128] Oliver and Roth 2004, p. 413.

in turn affect the conception of what the law is. To illustrate the point, I will briefly discuss Enchelmaier's claim that the problems which non-discriminatory regulation causes to individual traders are of a "factual" nature only: "We can look at the economic realities as much as we want, we will not find the legal principle. The question is not empirical, it is normative".[129]

While the latter is true, the question of what a restriction connotes to is normative, it would also be true that the answer to the question "what counts as normative?" depends, at least to some extent, on how the principle of free movement is being interpreted by the Court.

One *could* assert that the right to access the market is unlawfully restricted *only* if Member States "either discriminate (treat differently without justification) or impose unjustified bans".[130] Apparently, one would then be wrong, empirically speaking, as a descriptive account of the case law proves that the Court has opted for a more far-reaching notion of the right to free movement. Still, if the assertion is true in the normative sense, one could of course try and claim the victory of being correct normatively speaking, implying that the Court is correct in the descriptive sense only (which a court of last instance is by definition). Moreover, an important role of scholarly literature is indeed to present a normative corrective to existing practice.

However, if we accept that legal discretion both exist as a part of legitimate legal reasoning, and does mark that a specific creative (constitutional) competence is attributed to the courts, the sharp distinction between the normative and the descriptive evaporates. As long as the discretion exercised by the Court is at the least *legitimate*, one will be wrong not only in the descriptive sense but also in the normative sense, if one not only criticizes the choices made by the Court, but also argues that some other solution is actually, not to say continuously or eternally, the one and only normatively correct solution. It is important to note in this regard that one is wrong in the practical *normative* sense even if one's criticism of the Court, on some abstract philosophical, normative level, is correct. Why?

Court discretion is not about finding the one answer that is objectively correct, i.e. to distinguish between the lawful and the unlawful in the strict metaphysical sense. Court discretion entails a practical competence to choose between *possibly* lawful alternatives, implying that even though one solution may, on some abstract level, be proven to be the best in objective terms, the inferior solution will still be binding and valid in the normative sense as long as it can legitimately be argued in favour of, *and* has actually been chosen by the authority which possesses the *creative constitutional competence* to do so: the Court. To draw a comparison: A law which is enacted according to the correct procedures is still good law, even if one may successfully argue, on some normative, philosophical level, that it is not a terribly good law, but only a terrible one.

[129] Enchelmaier 2016, p. 17.

[130] Enchelmaier 2016, p. 23.

For such reasons alone, Enchelmaier overstates the point when he argues that the burdens created by the different legal systems in the Member States are merely a factual problem. Through the exercise of its discretion, vested to it by the Treaties, the Court has turned such burdens into a normative problem. In his defence, Enchelmaier, who is a strong proponent of a rule-like approach would probably not approve the notion of discretion that this chapter argues in favour of. His critique does, however, show the importance of such a notion. Without it, there will only be rights and wrongs. In practical law, the concept of discretion represents an indispensable intermediate level which does not provide us with the truth, but more modestly and thus more importantly, establishes the prevailing norms at the time. Without it, EU law would lose its ability to respond dynamically to relevant and changing concerns. If that was the case, EU law would also lose itself.

2.5 The Constitutional Limits to Court Discretion

In his famous opinion in *Hünermund*, AG Tesauro asked whether the right to free movement is intended to liberalize intra-Community trade, or, more generally, to encourage the unhindered pursuit of commerce in individual Member States.[131] In scholarly literature, this dichotomy has been presented as the choice between two interpretative paradigms: a protectionist reading of the Treaty and an economic-freedom reading of the Treaty.[132] As it has become clear that the Court understands the notion of a restriction to include more than discrimination, it could appear that it has opted for the latter reading of the Treaty, i.e. the economic freedom reading. Spaventa's claim is that[133]:

> A new layer of protection to personal freedom is added, and the very claim which traditionally pertains to the realm of national constitutional law, the right not to be constrained without a good reason, becomes a Community right, albeit restricted mainly to the economic dimension.

However, there are constitutional limits to court discretion. An economic freedom reading of the Treaty would mark that the Court overstepped its competences. Why?

Admittedly, freedom or liberty is the basic constitutive value of both the national and the supranational legal order. Nevertheless, (constitutional) courts never can or

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[131] Opinion of AG Tesauro in Case C-292/92, *Hünermund*, EU:C:1993:863, para 1.

[132] See in particular Maduro 1998, pp. 58–60; Snell 2002, pp. 1–4; 2010, p. 471.

[133] Spaventa 2004, p. 765. According to Spaventa, this would not amount to a neo-liberal reading of the Treaty, as long as the proportionality test is flexible and not hostile to regulation as such, just measures that are unnecessary. However, there is a thin wall between the two, and one could very well argue that the hallmark of the neo-liberal approach would be that the necessity of every piece of legislation is questioned (in this regard, see also paras 62–63 of the opinion of AG Tizzano in *CaixaBank*).

will protect freedom or liberty as such, i.e. in the broad and unqualified sense. According to every national constitution, that belongs exclusively to the elected. We live in the era of rights, but let us not forget that regulation is not the juxtaposition of freedom, but its expression. Throughout history, when the People have reclaimed their liberty, when blood has flowed in the streets like champagne, the People have achieved the freedom to govern themselves: liberty. There is a basic and conceptual difference between the political freedom/liberty to rule one-self on the one hand and civil rights/liberties on the other.

Constitutions and Courts protect the right to freedom/liberty in the thick albeit unqualified sense, in a formal manner only (the formal notion of the rule of law). The simplest example is the procedural requirement that democratic will must be enacted through laws. Of great practical importance is the requirement, adopted by the ECJ, that statutes that vest the national administration with powers must be sufficiently clear and precise.[134] In the substantive, material sense, courts confine themselves to protect liberties. Liberties are characterized by being (far) more specific and qualified than liberty, and thus the different constitutional systems include a catalogue of them. The difference between liberty and liberties mirrors the difference between freedom and freedoms—like in the four freedoms.

Provisions that establish liberties or freedoms need to be interpreted. In international law generally, and in EU law in particular, a dynamic interpretation is legitimate. Nevertheless, even if a legal question is highly unclear and leaves considerable room for judicial discretion, there is one limitation of fundamental constitutional importance: The judge cannot legitimately choose a certain interpretation of specific liberties/freedoms, only because it will enhance freedom in the general sense. A collapse of everything into a broad protection of freedom would ignore the institutional differences between lawmakers and courts. It would be unconstitutional and lack any historical parallel in the legal traditions of the Member States.

Of course AG Tesauro knew all this, when the opinion in *Hünermund* was written. He had made his point some months before, in the opinion in *Meng*, where he emphasized that "the progressive development of the case law should not lose sight of the ever necessary normative aspect, which underlies and shapes the strict interpretative approach which must be adopted in reading the Treaty".[135] The Court adhered to his arguments.[136] The conception of the Treaty as an "economic constitution" which could be used as a liberalizing tool turned out to be nothing more than "political wishful thinking"—it always was and still is.[137] The question posed by the AG in his opinion in *Hünermund* was highly rhetorical, as the dichotomy is false.

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[134] E.g. Case 124/81 *Commission v. United Kingdom*, EU:C:1983:30; Joined Cases C-358/93 and C-416/93 *Bordessa*, EU:C:1995:54; Case C-157/99 *Smits and Peerbooms*, EU:C:2001:404; Case C-250/06 *UPC*, EU:C:2007:783. Cf. Eriksen 2011.

[135] Opinion of AG Tesauro in Case C-2/91 *Meng*, EU:C:1993:308, para 29 of the opinion.

[136] See Reich 1994.

[137] Neergaard 1998, pp. 225–226.

Obviously, the right to free movement cannot be cut off to mimic one of the alternatives in some presupposed dichotomy which in fact does not exist. A protectionist reading of the Treaty is illegitimate simply because individual rights must be interpreted in their own terms. On the other hand, the minimal requirement which can be deducted from there being a catalogue of liberties/freedoms, is that the judge must qualify what, in the particular case, which touches upon an objective that is *more specific* than freedom in the general sense, and thus defines the content of the freedoms which the judge administers. That the execution of the judge's discretion can never collapse into the protection of freedom as such marks the basic constitutional limitation to the discretionary competence which an *individual rights reading of the Treaty* vests in courts.

2.6 Conclusions

In areas that are not exhausted by secondary legislation, cases that concern free movement must be assessed based on the principles of the Treaty. Where no rules exist, the execution of court discretion is required. In the field of free movement, legal theory should not try to rationalize the practice of the ECJ in a rule-like manner. That would re-introduce the problem of generalizations which discretion by definition is meant to avoid.

The notion of market access should be accepted as the main guideline and qualifier when the reach of the right to free movement is being assessed. The concept provides a link to the objectives of the Treaty, which can guide the execution of discretion in every instance, on the facts, without formal rules, categorizations or tests as an intermediary. At the same time, the market access criterion underscores that there must be a link between the national measure and the functioning of the market if the national measure is to count as a restriction.

Constitutional and institutional considerations establish further limits to the legitimate execution of court discretion. It would be unconstitutional if national measures were taken to constitute restrictions only because that finding will enhance freedom/liberty in the general and broad sense. The minimal requirement that can be deducted from there being a catalogue of free movement rights is that the judge must qualify what, in the particular case, touches upon an objective that is *more specific* than freedom in the general sense, and thus defines the content of the freedoms that the judge administers.

A protectionist reading of the Treaty is too narrow. An economic-freedom reading of the Treaty is too broad. The construed dichotomy has turned parts of the academic discussion in the field of free movement into a hypothetic exercise of which of the alternatives to choose if one was forced to.[138] In his famous opinion in *Hünermund*, AG Tesauro did not state any reasons that explain where the

[138] Snell 2010, p. 471 insists that a choice has to be made.

dichotomy is rooted. His point was mainly rhetorical, and a normative explanation would have been impossible to provide. The right to free movement, and the project of European integration, cannot be reduced to a simple question of which of the two theoretically construed alternatives one should pick. Instead, an individual rights reading of the Treaty makes it possible to concentrate on the multitude of objectives and concerns that lie between them. That will require court discretion.

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