

Fordham International Law Journal

Volume 33, Issue 5

2011

Article 2

Federalism and the Rule of Law: Perspectives from the European Court of Justice

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Koen Lenaerts

Abstract

This Article unfolds as follows: Section I looks at the “pervasive effect” of European Union (“EU”) law upon the substantive law of the Member States. Instead of attempting to cover all cases where this effect has arisen, a selective but in-depth approach is preferred. In this regard, four areas falling within the competences of the Member States will be discussed, namely education, family law, direct taxation, and health care. Section II is devoted to the pervasive effects of EU law upon national rules of procedure. Taking four cases as examples, this Section sets out to demonstrate that the European Court of Justice (“ECJ”) takes into account the general procedural principles enshrined in national law when applying the principles of equivalence and effectiveness. Finally, Section III provides a brief conclusion on the link between substantive EU law and national laws of Member States.

ARTICLES

FEDERALISM AND THE RULE OF LAW: PERSPECTIVES FROM THE EUROPEAN COURT OF JUSTICE

*Koen Lenaerts**

“I do not think [the case law shows] that the Court has exceeded its jurisdiction or has adopted a federalist approach contrary to the provisions of the Treaty itself. It seems to me that the Court has sought to do what the Treaty required it to do. I certainly never saw myself as one of a unanimous group of committed federalists conspiring to push federation beyond the limits laid down by the Treaty. If we had been such, a great deal of the hard-headed discussion in thrashing out judgments within the framework of the Treaty could have been avoided. Instead we sought to decide in accordance with the Treaty and the object and purpose of the legislation.”

—Lord Slynn of Hadley¹

INTRODUCTION

This Article honors the late Lord Slynn in that it confirms the above statement through an examination of federalism and the rule of law in the work of the European Court of Justice (“ECJ” or “Court”). A classical approach might suggest examining the role that the Court has had in monitoring the legislative competences of the European Union (“EU”), or in setting a common standard of protection of fundamental rights²

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1. Lord Slynn of Hadley, *Critics of the Court: A Reconsideration*, in EUROPEAN COMMUNITY LAW IN THE ENGLISH COURTS 3–11 (Mads Andenas & Francis Jacobs eds., 1998).

2. See Piet Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, 39 COMMON MKT. L. REV. 945, 945 (2002).

under the Treaty of the Functioning of the European Union (“TFEU”) and, where appropriate, under the new Treaty on European Union (“EU Treaty”).³ Without neglecting the constitutional importance of the case law relating to these matters,⁴ the purpose here is to explore federalism in a broader context, in particular, by looking at the way in which EU law imposes negative limits upon the powers retained by the Member States, i.e., the “pervasive effects of federalism.”

Federalism, understood as the balance of power between the federation and its component entities,⁵ cannot be reduced to the principle of conferral alone. The reason is twofold. On the one hand, federalism operates in areas of law that indisputably fall within the competence of the EU. In addition to drawing the borderline between EU and national competence, federalism defines the relationship between the two levels of governance when they occupy the same policy field. For instance, when measuring the degree of discretion left to the Member States by a directive, the ECJ simultaneously decides whether to allocate powers to the EU or to the Member States.⁶ Likewise, when

3. The Treaty of Lisbon (“Reform Treaty”) entered into force on December 1, 2009. *See* The Treaty of Lisbon, Dec. 13, 2007, 2007 O.J. C 306/1 (entered into force Dec. 1, 2009) [hereinafter Reform Treaty]. The Reform Treaty modifies the Treaty on European Union (“EU Treaty”) and replaces the Treaty Establishing the European Community (“EC Treaty”) by the Treaty on the Functioning of the European Union (“TFEU”). References to articles of the new EU Treaty will be followed by the acronym “TEU post-Lisbon,” and references to articles of the TFEU will be followed by the acronym “TFEU.” All references to the new EU Treaty and to the TFEU must be understood as references to their consolidated versions. *See* Consolidated Version of the Treaty on European Union, 2010 O.J. C 83/13 [hereinafter TEU post-Lisbon]; Consolidated Version of the Treaty on the Functioning of the European Union, 2010 O.J. C 83/47 [hereinafter TFEU]; Consolidated Version of the Treaty Establishing the European Community, 2006 O.J. C 321 E/37 [hereinafter EC Treaty].

4. *See, e.g.,* Germany v. Parliament, Case C-380/03, [2006] E.C.R. I-11573; The Queen, *ex rel.* Alliance for Natural Health v. Sec’y of State for Health, Joined Cases C-154 & C-155/04, [2005] E.C.R. I-6451; The Queen *ex rel.* Swedish Match AB v. Sec’y of State for Health, Case C-210/03, [2004] E.C.R. I-11893; Arnold André GmbH & Co. v. Landrat des Kreises Herford, Case C-434/02, [2004] E.C.R. I-11825; The Queen v. Sec’y of State for Health *ex parte* British American Tobacco (Investments) Ltd., Case C-491/01, [2002] E.C.R. I-11,453; Germany v. Parliament, Case C-376/98, [2000] E.C.R. I-8419.

5. *See* Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205, 205 (1990).

6. *See* The Queen v. Ministry of Agric., Fisheries & Food, *ex parte* Hedley Lomas Ireland Ltd., Case C-5/94, [1996] E.C.R. I-2553, ¶ 28 (holding that Council Directive No. 74/577, O.J. L 316/10 (1974) (on stunning of animals before slaughter) precluded the United Kingdom from invoking article 36 TFEU (article 30 EC) to impose a ban on

examining whether national law conflicts with EU law, the ECJ is, at the same time, deciding whether to limit the regulatory capacities of the Member States.⁷

On the other hand, federalism also takes place beyond the bounds laid down by article 5 TEU (“Treaty on European Union”) post-Lisbon (article 5 EC (“Treaty Establishing the European Community”)).⁸ At first sight, this statement may seem far-fetched. Yet, no one would dispute that once there is a cross-border element or link that triggers the application of the substantive law of the EU, no area of national law—not even areas traditionally reserved to the Member States—remains a “safe haven.” In this regard, it will be argued that this “pervasive effect” of federalism has two consequences. First, it compels Member States to “think federal.” When passing legislation, for example, Member States must take into account any possible nexus with EU law. Unless the application of a measure is reserved to purely internal situations, Member States are to place their policies in an EU law framework. Compliance with EU law may then force national or regional legislators to regulate aspects

exports of animals to Spain). Since the interests the British authorities sought to protect were already safeguarded by the directive, and given that they failed to prove that Spanish slaughterhouses were in breach of the directive, the European Court of Justice (“ECJ”) ruled that the United Kingdom had overstepped the margin of discretion allowed by the EU legislator. *Id.* ¶¶ 19–21. More recently, the Court observed that Council Directive No. 80/987, O.J. L 283/23 (1980) (on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer), only compelled the Member States to adopt measures protecting the accrued pension rights of employees in the event of the insolvency of their employer. The Member States were not required to guarantee these rights with public funding. Nor was there an obligation to set up a system funding these rights in full. Yet, the ECJ considered that a national system that may occasionally lead to a reduction of eighty percent in entitlement benefits did not comply with article 8 of the directive. Clearly, such reduction would render the objectives laid down in the directive devoid of purpose. *See* *Robins v. Sec’y of State for Work & Pensions*, Case C-278/05, [2007] E.C.R. I-1053, ¶ 69.

7. *See generally* KOEN LENAERTS, *LE JUGE ET LA CONSTITUTION AUX ÉTATS-UNIS D’AMÉRIQUE ET DANS L’ORDRE JURIDIQUE EUROPÉEN* (1988); Eugene D. Cross, *Pre-Emption of Member State Law in the European Economic Community: A Framework for Analysis*, 29 *COMMON MKT. L. REV.* 447 (1992); Robert Schütze, *Supremacy without Pre-Emption? The Very Slowly Emergent Doctrine of Community Pre-Emption*, 43 *COMMON MKT. L. REV.* 1023 (2006); Stephen Weatherill, *Beyond Preemption? Shared Competence and Constitutional Change in the European Community*, in *LEGAL ISSUES OF THE MAASTRICHT TREATY* 13–33 (David O’Keeffe & Patrick Twomey eds., 1994).

8. TEU post-Lisbon, *supra* note 3, art. 5, 2010 O.J. C 83, at 18; EC Treaty, *supra* note 3, 2006 O.J. C 321 E, at 46.

of family law, property law, education, public health, or direct taxation in ways that do not necessarily reflect the first choice of their constituency. Second, the application of EU law to areas traditionally reserved to the Member States may produce a spillover effect.⁹ Since the “pervasiveness” of EU law only applies to cross-border situations, purely internal situations are not affected.¹⁰ EU law allows national or regional legislators to discriminate against non-movers.¹¹ Yet, it is very unlikely for reverse discrimination to be left unaddressed.¹² Since non-movers tend to be nationals, they have access to the national or regional political process to claim the extension of EU rights to all citizens.¹³ Alternatively, the national judiciary may decide to rely on the national constitution—the principle of equality—to improve the rights of non-movers.¹⁴ Moreover, the “pervasive

9. The “spillover” effect of EU law may be defined as the application by national authorities of EU norms (*e.g.*, rules, principles, concepts) to situations governed entirely and exclusively by national law. Obviously, this effect is not mandated by EU law but takes place either because of a policy choice (national authorities consider that the solution adopted by the EU is a positive development that should be emulated) or because national law prohibits to treat purely internal situations less favorably than cross-border situations (reverse discrimination). *See* Christiaan Timmermans, *The European Union’s Judicial System*, 41 *COMMON MKT. L. REV.* 393, 401 (2004) (referring to the “spillover” effect of EU law as “a phenomenon of legal osmosis”).

10. *See, e.g.*, *Jacquet & Uecker v. Land Nordrhein-Westfalen*, Joined Cases C-64 & C-65/96, [1997] E.C.R. I-3171; *Ministère Public v. Mathot*, Case 98/86, [1987] E.C.R. 809, ¶¶ 8–9; *Oosthoek’s Uitgeversmaatschappij BV*, Case 286/81, [1982] E.C.R. 4575, ¶ 9; *Knooks v. Staatssecretaris van Economische Zaken*, Case 115/78, [1979] E.C.R. 399; *Ministère Public v. Auer*, Case 136/78, [1979] E.C.R. 437; *The Queen v. Saunders*, Case 175/78, [1979] E.C.R. 1129; *see also* Niamh Nic Shuibhne, *Free Movement of Persons and the Wholly Internal Rule: Time to Move On?*, [2002] 39 *Common Mkt. L. Rev.* 731.

11. *See* Timmermans, *supra* note 9, at 393–405.

12. In matters falling within the competence of the EU, a possible solution putting an end to reverse discrimination would be harmonization. However, this solution is not possible where the EU lacks legislative powers. Therefore, the situation would have to be addressed internally or by means of horizontal cooperation between the Member States (*e.g.*, international treaty).

13. *See* *Dzodzi v. Belgium*, Joined Cases C-297/88 & C-197/89, [1990] E.C.R. I-3763, ¶ 4 (where Belgian law provided that the spouse of a Belgian citizen shall be treated as an EU citizen, rendering the rights granted by EU law applicable to purely internal situations).

14. *See* Timmermans, *supra* note 9, at 400 (indicating that the *Hoge Raad* may have been inclined to follow the case law of the ECJ relating to the principle of proportionality and state liability in internal situations); *see also* *R. (Alconbury Devs. Ltd.) v. Sec’y of State for the Env’t, Transp., & the Regions*, [2001] UKHL 23, at [51], [2003] 2 A.C. 295, 320–21 (2001) (H.L.) (appeal taken from Eng.) (where Lord Slynn posited that “the time has come to recognize that [the EU principle of proportionality] is part of English administrative law, not only when judges are dealing with [EU] acts but

effect” of EU law affects not only the substance of national law, but also its rules of procedure. Even if the EU is committed to respecting the procedural autonomy of the Member States, the principles of equivalence and effectiveness¹⁵ impose a minimum threshold of judicial protection. Like the substance of national law, national rules of procedure may also be modified whenever the ECJ considers that EU rights are not adequately safeguarded. This means that the impetus to “think federal” and the “spillover” effect of EU law are reproduced in the context of national procedural law. When adopting rules of procedure, national legislators must take into account whether they satisfy EU standards of judicial protection. Likewise, the “spillover” effect of EU law has been especially important in relation to the law of remedies.¹⁶

This Article unfolds as follows: Section I looks at the “pervasive effect” of EU law upon the substantive law of the Member States. Instead of attempting to cover all cases where this effect has arisen, a selective but in-depth approach is preferred. In this regard, four areas falling within the competences of the Member States will be discussed, namely education, family law, direct taxation, and health care. Section II is devoted to the pervasive effects of EU law upon national rules of procedure. Taking four cases as examples, this section sets out to demonstrate that the ECJ takes into account the general procedural principles enshrined in national law when applying

also when they are dealing with acts subject to domestic law. Trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing.”); TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EU LAW* 141 (2006) (stating that the principle of proportionality has “percolated through English administrative law”). See also the decision of the Italian Constitutional Court, ruling that reverse discrimination would breach the principle of equality as provided by the Italian Constitution. *Corte cost.*, 30 dec. 1997, n.443, *Giur. It.* 1998, III, 3, 2093, *Foro It.*, 1998, I, 1, 701. In support of national courts stepping in, see Miguel Poiars Maduro, *The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination*, in *THE FUTURE OF REMEDIES IN EUROPE* 117–40 (Kilpatrick et al. eds., 2000).

15. See, e.g., *Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland*, Case 33/76, [1976] E.C.R. 1989, ¶¶ 2–3 (discussing equivalent effects); *Comet BV v. Produktschap voor Siergewassen*, Case 45/76, [1976] E.C.R. 2043, ¶¶ 3–5 (prohibiting Member States from passing laws which effectively overturned EU law).

16. See *M v. Home Office*, [1994] 1 A.C. 377 (H.L.) (appeal taken from Eng.) (extending the effect of *The Queen v. Sec’y of State for Transp., ex parte Factortame Ltd.*, Case C-213/89, [1990] E.C.R. I-2433, so as to allow “injunctions against the Crown” in purely internal situations).

the principles of equivalence and effectiveness. Finally, Section III provides a brief conclusion.

I. *FRAMING THE SUBSTANTIVE LAW OF THE MEMBER STATES*

Substantive law falling within the competences of the Member States may be framed by the treaty provisions on non-discrimination on grounds of nationality, free movement, EU citizenship, and competition law applicable to the Member States. Regardless of the substantive area of national law involved, these treaty provisions operate as limits to the exercise of the regulatory and taxing powers of the Member States. For instance, the ECJ has tested the compatibility with these treaty provisions of national measures adopted in the fields of criminal law,¹⁷ education,¹⁸ family law,¹⁹ public health,²⁰ social security,²¹ and direct taxation.²² Consequently, in order to determine whether Member States duly operate within an EU law framework, it is necessary to assess the scope of application of the TFEU.

In addition to the specific conditions of application for each of these treaty provisions, a common feature shared by all is that

17. *See, e.g.*, *Geffroy & Casino France SNC*, Case C-366/98, [2000] E.C.R. I-6579; *Calfa*, Case C-348/96, [1999] E.C.R. I-11.

18. *See, e.g.*, *Commission v. Austria*, Case C-147/03, [2005] E.C.R. I-5969; *Commission v. Belgium*, Case C-65/03, [2004] E.C.R. I-6427; *Gravier v. City of Liège*, Case 293/83, [1985] E.C.R. 593.

19. *See, e.g.*, *Grunkin-Paul v. Standesamt Niebüll*, Case C-353/06, [2008] E.C.R. I-7639; *Garcia Avello v. Belgium*, Case C-148/02, [2003] E.C.R. I-11,613; *Konstantinidis v. Stadt Altensteig*, Case C-168/91, [1993] E.C.R. I-1191.

20. *See, e.g.*, *The Queen ex rel. Watts v. Bedford Primary Care Trust*, Case C-372/04, [2006] E.C.R. I-4325; *Müller-Fauré v. Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen*, Case C-385/99, [2003] E.C.R. I-4509; *B.S.M. Geraets-Smits v. Stichting Ziekenfonds VGZ (Smits & Peerbooms)*, Case C-157/99, [2001] E.C.R. I-5473; *Kohll v. Union des Caisses de Maladie*, Case C-158/96, [1998] E.C.R. I-1931; *Decker v. Caisses de Maladie des Employés Privés*, Case C-120/95, [1998] E.C.R. I-1831.

21. *See, e.g.*, *Geven v. Land Nordrhein-Westfalen*, Case C-213/05, [2007] E.C.R. I-6347; *Hartmann v. Bayern*, Case C-212/05, [2007] E.C.R. I-6303; *Meints v. Landbouw, Natuurbeheer en Visserij*, Case C-57/96, [1997] E.C.R. I-6689; *Lepore v. Office National des Pensions*, Joined Cases C-45-46/92, [1993] E.C.R. I-6497; *Paraschi v. Landesversicherungsanstalt Württemberg*, Case C-349/87, [1991] E.C.R. I-4501.

22. *See, e.g.*, *Finanzamt Dinslaken v. Meindl*, Case C-329/05, [2007] E.C.R. I-1107; *Commission v. Sweden*, Case C-104/06, [2007] E.C.R. I-671; *Marks v. Halsey*, Case C-446/03, [2005] E.C.R. I-10,837; *Finanzamt Köln-Altstadt v. Schumacker*, Case C-279/93, [1995] E.C.R. I-225; *Wielockx v. Inspecteur der Directe Belastingen*, Case C-80/94, [1995] E.C.R. I-2493.

there must be a link or nexus with EU law. No link exists where the situation at issue is purely internal (or does not have an EU dimension, in the case of competition law). Accordingly, in the absence of a link, EU law cannot display its pervasive effect. Situations that remain purely internal (without an EU dimension) are thus entirely governed by national law. As recognized by the ECJ, reverse discrimination is then permitted. A Member State may discriminate against persons not benefiting from the protection of EU law.

It has been argued that this link is no less than the reformulation of the principle of conferral for the judicial enforcement of treaty limits imposed upon the Member States. Others have argued that it enshrines the principle of subsidiarity.²³ Be that as it may, the truth is that determining the presence or the absence of a link with EU law has significant repercussions on the vertical allocation of powers.

The laxer the way the link with EU law is interpreted, the wider the EU law framework becomes, and the fewer situations where reverse discrimination may arise. From a federal perspective, a broad link with EU law would significantly restrict the exercise of competences pertaining to the Member States.²⁴ On the contrary, a strict interpretation would leave more room to the national legislator.

The case law relating to free movement and EU citizenship indicates that the ECJ has opted for a rather broad interpretation of the required EU link. This has been done in different ways. Thus, the ECJ has applied EU law to situations where barriers are erected to insulate a territory from other parts of the same

23. The principle of subsidiarity is defined in article 5(3) TEU post-Lisbon. This treaty provision states:

in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

TEU post-Lisbon, *supra* note 3, art. 5(3), 2010 O.J. C 83/13, at 18; *see also* Peter Oliver, *Some Further Reflections on the Scope of Articles 28–30 (ex 30–36) EC*, [1999] 36 *Common Mkt. L. Rev.* 783, 784 (arguing that “[t]he draftsmen of the Treaty plainly took the view that it is no business of the [EU] to prevent Member States from imposing restrictions on trade in goods and services within their own territory. To use terminology which is more fashionable in some quarters, it is a question of subsidiarity.”).

24. *See* SÍOFRA O’LEARY, *THE EVOLVING CONCEPT OF COMMUNITY CITIZENSHIP: FROM THE FREE MOVEMENT OF PERSONS TO UNION CITIZENSHIP* 276 (1996).

Member State.²⁵ It has also adopted a relaxed approach when examining whether a contested national measure had a deterrent effect on the exercise of EU rights.²⁶ Likewise, EU law applies when free movers return to their own Member State.²⁷ Furthermore, it is possible for a party to invoke the EU rights of a third party, insofar as there is a “direct link” between the legal position of the first party and the rights of the third party.²⁸ Concerning the application of the treaty provisions on EU citizenship, it is sufficient that a national of a Member State lawfully resides (or has resided) in a Member State other than that of his or her nationality.²⁹

Finally, far from being rigid and immovable, the EU law framework has “shifting contours.” This is due to the fact that, even if there is in principle a breach of EU law, Member States can still invoke reasons of general interest recognized by the EU to justify their actions. Therefore, provided that the Member State concerned relies on one of these reasons and complies with the principle of proportionality, the national action will be upheld.³⁰ Ultimately, it is thus for the ECJ, as interpreter of the

25. See, e.g., *Angonese v. Cassa di Risparmio di Bolzano SpA*, Case C-281/98, [2000] E.C.R. I-4139; *Pistre, Barthes, Milhau & Oberti*, Joined Cases C-321–24/94, [1997] E.C.R. I-2343; *Lancry v. Direction Générale des Douanes*, Joined Cases C-363, 407–11/93, [1994] E.C.R. I-3957. More recently, see *Gouvernement de la Communauté Française v. Gouvernement Flamand*, Case C-212/06, [2008] E.C.R. I-1683.

26. See *Jia v. Migrationsverket*, Case C-1/05, [2007] E.C.R. I-1; *Carpenter v. Sec’y of State for the Home Dep’t*, Case C-60/00, [2002] E.C.R. I-6279.

27. See *De Cuyper v. Office National de l’Emploi*, Case C-406/04, [2006] E.C.R. I-6947, ¶¶ 37–47; *Tas-Hagen v. Raadskamer WUBO van de Pensioen-en Uitkeringsraad*, Case C-192/05, [2006] E.C.R. I-10,451, ¶¶ 24–34.

28. See *Schempp v. Finanzamt München V*, Case C-403/03, [2005] E.C.R. I-6421, ¶¶ 17–21.

29. See *Zhu v. Sec’y of State for the Home Dep’t*, Case C-200/02, [2004] E.C.R. I-9925, ¶ 45. When the treaty provisions on EU citizenship apply, they can be relied against the Member State whose nationality the EU citizen possesses. See *Grunkin-Paul v. Standesamt Niebüll*, Case C-353/06, [2008] E.C.R. I-7639, ¶ 21; *Turpeinen*, Case C-520/04, [2006] E.C.R. I-10,685, ¶ 18; *D’Hoop v. Office National de l’Emploi*, Case C-224/98, [2002] E.C.R. I-6191, ¶ 40.

30. When applying this principle to restrictions on the fundamental freedoms or EU citizenship rights, the ECJ has often applied the “least restrictive alternative” test. However, the application of this test is not mechanical. Due to its open-textured nature, the principle of proportionality is highly influenced by the legal and factual context in which it is applied. It is an area where casuistry largely controls. See *TRIDIMAS*, *supra* note 14, at 214–18; see also CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU* 112–13, 243–44 (2004). For a recent example where the ECJ appears to depart from the “least restrictive alternative” to respect fully Member State responsibility for road safety, see *Commission v. Italy*, Case C-110/05, [2009] E.C.R. I-519. In the same vein, for the social

TFEU, to evaluate through the medium of balancing whether the competences retained by the Member States have been consistently exercised in an EU law framework.

Let us now turn to illustrating this line of analysis with some cases involving national law on access to higher or university education, the giving of surnames, the mobility of same-sex married couples, direct taxation, and patient mobility.

A. *Education: Access to Higher or University Education*

Articles 165 and 166 TFEU (articles 149 and 150 EC) provide that it is for the Member States to set up the contents of, and to organize, education and vocational training.³¹ Accordingly, a Member State may decide either to require candidates wishing to pursue university studies to pass an entry examination or to grant free access upon completion of secondary studies. Each policy pursues a legitimate aim. While the former tries to make sure that there are sufficient places and resources available for the best students, the latter aims to reduce social differences by giving the same opportunities to all students. Obviously, the latter policy is only sustainable insofar as the education system can cope with the demand for specific courses. If the number of applicants is too high, then the national authorities would certainly be forced to redefine their policy, establishing a maximum number of students per course (a system of *numerus clausus*).

However, the fluctuations in demand are not conditioned by national students or students residing in a Member State alone, but also by European students wishing to study outside their home country. Indeed, ever since *Gravier v. City of Liège*,³² the ECJ has consistently held that free movement law covers access to vocational training, understood as both higher and university education. Accordingly, even if the Member States remain competent to regulate access to higher and university education,

protection of victims of road traffic accidents, see *Commission v. Italy*, Case C-518/06, [2009] E.C.R. I-3491. For public health, see *Commission v. Italy*, Case C-531/06, [2009] E.C.R. I-4103, and *Apothekerkammer des Saarlandes v. Saarland*, Joined Cases C-171-72/07, [2009] E.C.R. I-4171.

31. TFEU, *supra* note 3, arts. 165–66, 2010 O.J. C 83, at 47; EC Treaty, *supra* note 3, arts. 149–50, 2006 O.J. C 321 E, at 112–13.

32. *Gravier v. City of Liège*, Case 293/83, [1985] E.C.R. 593.

their policy choices are limited by free movement law. For instance, students having completed secondary studies in France and failing to pass the national entry examination may wish to move to Belgium where access is easier. Due to the difference in size of both countries,³³ the impact of free movement upon the Belgian education system could be rather large. However, even if there was a flood of EU students deciding to study in Belgium, this Member State could, as a matter of principle, not deny access to higher or university education on a discriminatory basis. If there is free access for all students holding a Belgian secondary education degree, then access has to be granted to all EU students holding comparable qualifications.

In *Commission v. Belgium* (the *certificat d'enseignement secondaire supérieur* ("CESS") case) decided in 2004,³⁴ faced with such a factual scenario, the Court ruled that by submitting holders of secondary education diplomas awarded in other Member States to additional entry requirements, while not doing so for holders of the Belgian CESS, Belgium had breached article 18 TFEU (article 12 EC).³⁵ One year later, in *Commission v. Austria*,³⁶ the Court repeated that by imposing additional entry requirements to holders of secondary education diplomas awarded in a Member State other than Austria, this Member State had breached article 18 TFEU (article 12 EC). As opposed to Belgium, which provided no justification, Austria justified its legislation by (1) the existence and homogeneity of its higher or university education system, (2) the prevention of the abuse of EU law and (3) the honoring of a previous international agreement. In relation to the first justification, Austria argued that if students who completed their secondary studies in a Member State other than Austria, and failed to pass the national entry examination therein, were given automatic access to Austrian universities, then the system would be put under enormous financial and structural pressure.³⁷ However, the ECJ

33. France had about 64 million inhabitants as of about 2008, whereas Belgium has about 4.2 million French speaking citizens. See France Prioux, *Recent Demographic Developments in France: Expectancy Still Rising*, 63 *POPULATION* 375, 375 (English ed., 2008); CENT. INTELLIGENCE AGENCY, *THE CIA WORLD FACTBOOK* 2010 68 (2009).

34. *Commission v. Belgium*, Case C-65/03, [2004] E.C.R. I-6427.

35. *Id.* ¶¶ 28, 29.

36. *Commission v. Austria*, Case C-147/03, [2005] E.C.R. I-5969.

37. *Id.* ¶¶ 49–50.

held that there were other less restrictive means to counter the excessive demand for specific courses, such as establishing an entry examination or setting minimum grade requirements.³⁸ By not proving that the system would collapse unless the discriminatory legislation remained in force, Austria's justification did not comply with the principle of proportionality.³⁹ As to the second justification, Austria argued that its law sought to prevent Austrian students from abusing EU law.⁴⁰ Nonetheless, the Court recalled empathically that far from being an abuse, the possibility for a student of the EU who studied outside Austria to be treated equally amounted to "the very essence of the principle of free movement for students guaranteed by the Treaty."⁴¹ Finally, regarding the last justification, the Court ruled that article 351 TFEU (article 307 EC) does not govern intra-Union situations.⁴² As a result, the ECJ stated that Austria failed to fulfill its obligations under the treaty.⁴³

From these two cases, it follows that Belgium and Austria are forced, in effect, to modify their policies on access to higher or university education, not as a result of EU harmonization, which is not allowed in the field of education or vocational training, but because of the enforcement of the treaty provisions on free movement and non-discrimination on grounds of nationality. If Belgium and Austria decide to counter the increasing demand for higher or university education in a way consistent with these provisions, they might have to consider establishing a *numerus clausus* system, which is not in line with the local traditions and certainly not popular with the local electorate. However, after harshly criticizing the ruling of the ECJ, Austrian authorities reserved a percentage of study places to holders of an Austrian secondary education diploma. For instance, in relation to medical and pharmaceutical studies, a quota of seventy-five percent was adopted.⁴⁴ The *Communauté française de Belgique*

38. *Id.* ¶ 61.

39. *See id.* ¶ 66.

40. *Id.* ¶ 54.

41. *Id.* ¶ 70.

42. *Id.* ¶ 73.

43. *See id.* ¶ 74.

44. Clemens Rieder, *Case C-147/03, Commission v. Austria, Judgment of the Court (Second Chamber) 7 July 2005*, 43 COMMON MKT. L. REV. 1711, 1711 (2006).

enacted similar measures.⁴⁵ Although it did not take long for the Commission to send a letter of formal notice, infringement proceedings were put on hold.⁴⁶ The Commission decided to grant Austria and Belgium a period of five years during which they must supply data proving that the contested measures are necessary to remedy the shortage of health care professionals practicing in Austria and Belgium, while maintaining an adequate level of quality in the delivery of health care services.⁴⁷

Regardless of the follow-up of these two cases, positive as well as negative implications of free movement must be recognized by the Member States. Selective application of this principle would put the EU project at risk. Put simply, Member States must take “the bitter with the sweet” of free movement law.

B. *Family Law: National Rules on Surnames*

It is uncontested that Member States retain the autonomy to regulate surnames. Some Member States prefer to adopt a “single-surname” system, whereas others allow parents to give more than one surname to their child. Yet, just as it happens with education policy, the law relating to surnames is also limited by free movement and EU citizenship rights. Three cases illustrate this point.

In *Konstantinidis v. Stadt Altensteig*, the Court began by recognizing that EU law did not contain rules concerning the transliteration of Greek names into the Roman alphabet.⁴⁸ The Court nonetheless ruled that German law, which prevented Mr. Konstantinidis—a Greek national working in Germany as a self-employed masseur—from correcting the transcription of his name, was contrary to article 49 TFEU (article 43 EC). The Court reasoned that a modification in the spelling of his name could give rise to its different pronunciation, resulting in his clients confusing him with others.⁴⁹ *Konstantinidis* was decided in 1993,

45. *Id.* at 1717, n.39.

46. *Id.* at 1716.

47. Commission Press Release, IP/07/1788 (Nov. 28, 2007). In the meantime, the issue reached the ECJ on a reference for a preliminary ruling from the Belgian Constitutional Court. See *Bressol v. Gouvernement de la Communauté Française*, Case C-73/08 (ECJ Apr. 13, 2010) (not yet reported).

48. *Konstantinidis v. Stadt Altensteig*, Case C-168/91, [1993] E.C.R. I-1191, ¶¶ 13–14.

49. *Id.* ¶¶ 10, 16.

before the entry into force of the EU citizenship provisions. Yet, it will be shown that the rationale underlying *Konstantinidis* does not differ from that of subsequent cases, namely, national law putting an EU citizen at a disadvantage simply because he or she has exercised his or her EU rights infringes EU law.⁵⁰

Ten years later, in *Garcia Avello v. Belgium*, Mr. Garcia Avello and Ms. Weber—a Spanish-Belgian couple living in Belgium—decided to follow Spanish law when naming their son and daughter; they used the first surname of the father followed by the first surname of the mother (“Garcia Weber”).⁵¹ However, the application was rejected by the Belgian Registrar for Birth, Marriages and Deaths, on the ground that, in Belgium, children bear their father’s surname.⁵² The ECJ held that, even though rules relating to surnames remain within the competences of the Member States, insofar as there is a link with EU law, such competences must be exercised in a way consistent with the fundamental principles thereof.⁵³ Unlike Mr. Konstantinidis, the son and daughter of Mr. Garcia Avello and Ms. Weber were not economically active. Yet, since they were Spanish nationals lawfully residing in Belgium, they could invoke the EU citizenship provisions.⁵⁴ To this effect, the ECJ ruled that Belgian law contravened articles 18 and 20 TFEU (articles 12 and 17 EC), by putting children with dual nationality at a disadvantage. They would have to cope with the inconveniences at professional and private levels resulting from the difficulties in benefiting, in one

50. Advocate General Jacobs agreed with the ECJ, holding that the German rule on transliteration gave rise to discrimination. *See* Opinion of Advocate General Jacobs, *Konstantinidis*, [1993] E.C.R. I-1191, ¶ 46. However, he added that the challenged measure could also be set aside for non-compliance with fundamental rights. *Id.* The Advocate General reckoned that a person having exercised his right to free movement is “entitled to a common code of fundamental values” which is binding upon the host Member State and that regardless of the presence of discrimination, a free mover “is entitled to say ‘civis europeus sum’ and to invoke that status in order to oppose any violation of his fundamental rights.” *Id.*

51. *Garcia Avello v. Belgium*, Case C-148/02, [2003] E.C.R. I-11,613, ¶ 15.

52. *Id.* ¶¶ 17–18.

53. *Id.* ¶ 25 (citing *Elsen v. Bundesversicherungsanstalt für Angestellte*, Case C-135/99, [2000] E.C.R. I-10,409, ¶ 33).

54. *See id.* ¶¶ 27–28 (pointing out that the fact that the children also have Belgian nationality was irrelevant). In any event, the ECJ indicated that Belgium could not deny recognition of their Spanish nationality “by imposing additional requirements, with a view to the exercise of fundamental freedoms provided for in the treaty.” *See* *Airola v. Commission*, Case 21/74, [1975] E.C.R. 221, ¶¶ 10–11; *Micheletti v. Delegación del Gobierno en Cantabria*, Case C-369/90, [1992] E.C.R. I-4239, ¶ 10.

Member State of which they are nationals, from the documents or diplomas obtained in another Member State of which they are also nationals.⁵⁵ Belgium tried to justify its law on two grounds: preventing the risks of confusion as to the identity or parentage of persons and facilitating integration.⁵⁶ The ECJ rejected both arguments. First, it held that the Belgian measure was not indispensable, as it could adapt itself to accommodate circumstances such as the ones of the case.⁵⁷ Moreover, in light of the scale of migration within the EU, the identity and family ties of a person residing in a Member State cannot be assessed solely by reference to the laws applicable in that Member State.⁵⁸ On the contrary, the recognition of the rules governing names of other Member States could actually contribute to reducing the risks of confusion.⁵⁹ Second, Belgian law was neither necessary nor appropriate to promote integration, given that it hindered the coexistence of different systems for the attribution of surnames of persons residing in the country.⁶⁰ Consequently, Belgian law could not be justified.

Finally, in *Grunkin-Paul*,⁶¹ delivered in 2008, similar questions as those addressed in *Garcia Avello* were raised. Dr. Paul and Mr. Grunkin—two German citizens living in Denmark—decided to name their son Leonhard Matthias Grunkin-Paul. In spite of the fact that Leonhard is German, Danish law was applicable because his parents resided in Denmark at the time of his birth. The use of a double-barreled surname composed of the surnames of both the father and the mother was permitted under Danish law.⁶² However, when his parents approached the German registry office, the latter refused to recognize the surname of the child.⁶³ German authorities reasoned that, in accordance with article 10 of the Law Introducing the German Civil Code, the surname of a person is determined by the law of his or her nationality.⁶⁴ Since the German Civil Code precluded

55. *Garcia-Avello*, [2003] E.C.R. I-11,613, ¶ 36.

56. *Id.* ¶ 40.

57. *Id.* ¶¶ 41–42.

58. *See id.* ¶¶ 47–49.

59. *See id.* ¶¶ 42–49.

60. *See id.* ¶¶ 42–43.

61. *Grunkin-Paul v. Standesamt Niebüll*, Case C-353/06, [2008] E.C.R. I-7639.

62. *See id.* ¶ 3.

63. *See id.* ¶ 7.

64. *Id.*

the use of a double-barreled surname, the registration of Leonhard's surname as provided by Danish law was not possible. In civil proceedings brought by Leonhard's parents, the referring court questioned the compatibility of the German conflict of laws rule with articles 18 and 21 TFEU (articles 12 and 18 EC).⁶⁵

At the outset, the Court recognized that the rules governing surnames fall under the competences of the Member States. However, in the presence of a link with EU law, the Member States must exercise this competence in compliance with EU law.⁶⁶ It was clear that the link existed, because Leonhard is a German citizen living in Denmark. In relation to article 18 TFEU (article 12 EC), the ECJ found no discrimination. German law applied to all German citizens alike.⁶⁷ Yet, the German conflict of laws rule in question, as applied in the concrete case, led to an outcome in breach of article 21 TFEU (article 18 EC). As indicated in *Garcia Avello*, German law could cause serious "inconveniences for [Leonhard] at both professional and private levels."⁶⁸ Leonhard's German nationality meant that only Germany could issue him a passport, but this passport would contain a different name than the one he was given in Denmark. These divergences would raise doubts concerning his identity and suspicions of misrepresentation. Likewise, in recalling *Garcia Avello*, the ECJ held that it would be difficult for Leonhard to use the diplomas or documents obtained in Denmark when returning to Germany. Therefore, by placing some German nationals at a disadvantage simply because they have exercised their freedom to live and reside in another Member State, German law constituted a restriction of the rights guaranteed by article 21 TFEU (article 18 EC).⁶⁹

The ECJ rejected the justifications put forward by Germany. According to Germany, its legislation sought to ensure that siblings have the same name. Additionally, Germany argued that its law treated all persons with the same nationality alike.⁷⁰ The ECJ responded that the grounds put forward by Germany could not justify the restriction under circumstances such as those of

65. *See id.* ¶ 13.

66. *Id.* ¶ 16.

67. *See id.* ¶ 20.

68. *Id.* ¶ 23.

69. *Id.*

70. *Id.* ¶ 30.

the case.⁷¹ In particular, the ECJ pointed out that the German conflict of laws rule as well as provisions relating to surnames was not without exception. For instance, Germany also applied the criterion of residence where one of the parents lives in Germany.⁷² Likewise, the use of double-barreled surnames was permitted for German citizens where one of the parents is a national of another Member State and the name is given pursuant to the laws thereof.⁷³ In any event, the ECJ pointed out that Germany had not proven—and in fact, not even argued—that the Danish law on surnames was contrary to its public policy.⁷⁴ Therefore, Leonhard could register his surname given in accordance with Danish law with the German authorities.

In contrast to *Konstantinidis*, *Garcia Avello* and *Grunkin-Paul* involved EU citizens relying on EU law against their own state. These cases concern the capacity of Member States to define rules on surnames that may be given to their own citizens. Nationality, understood as the connecting factor between a Member State and its own citizens, is not always strong enough to insulate national law from the application of EU law.⁷⁵ Stated differently, where there is a link that triggers the application of EU law, the bond between the EU and its citizens may be stronger than that between a Member State and its own citizens. At first sight, this could seem at odds with the first paragraph of article 20 TFEU (article 17 EC), which states that “Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.”⁷⁶ However, even though EU citizenship is established by reference to national citizenship, it does not mean that the former is subjected to the latter. On the contrary, provided that there is an EU law nexus, EU citizenship may limit the application of rules having nationality as their connecting factor.⁷⁷

71. *Id.* ¶ 31.

72. *See id.*

73. *See id.* ¶ 37.

74. *See id.* ¶ 38.

75. *See id.* ¶¶ 2, 39.

76. TFEU, *supra* note 3, art. 20, 2010 O.J. C. 83, at 56; EC Treaty, *supra* note 3, art. 17, 2006 O.J. C. 321 E, at 49.

77. *See* Stephen Hall, *Loss of Union Citizenship in Breach of Fundamental Rights*, 21 EUR. L. REV. 129, 129 (1996).

Finally, before turning to the next section, imagine the following scenario. An EU citizen having the nationality of Member State “A” moves to Member State “B.” By means of deception, he then acquires by naturalization the nationality of Member State “B,” losing simultaneously his original nationality. Subsequently, Member State “B” decides to revoke its nationality and because of the non-revival of the original nationality, this person becomes stateless. Does EU law oppose this situation, which is inspired from *Rottmann*, decided in 2010?⁷⁸ In that case, the ECJ held that “it is not contrary to [EU] law, in particular to Article 17 EC [article 20 TFEU], for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalization when that nationality has been obtained by deception, on condition that the decision to withdraw observes the principle of proportionality.”⁷⁹ In cross-border situations, a Member State does not enjoy full discretion to strip a citizen of the Union from his nationality and, consequently, from his EU citizenship. On the contrary, the ECJ reasoned that national authorities must strike the right balance between the public interest of Member States in protecting nationality—understood as “the special relationship of solidarity and good faith between

78. *Rottmann v. Bayern*, Case C-135/08 (ECJ Mar. 2, 2010) (not yet reported); *see also* Opinion of Advocate General Maduro, *Rottmann* (ECJ Mar. 2, 2010) (not yet reported) (concluding that, even though rules on the acquisition and loss of nationality remain within the competence of the Member States, these powers must be exercised in compliance with EU law; for instance, treaty provisions on EU citizenship would oppose a national law that deprives an EU citizen of his nationality simply because he established his permanent residence in a Member State other than that of which he is a national). In the Advocate General’s view, “in compliance with EU law” must be understood broadly, so that it includes any legal norm pertaining to the EU legal order, notably customary international law. *Id.* The Advocate General observed that, while international law sought to reduce situations giving rise to stateless persons, it authorized the loss of nationality acquired by intentional deception. *Id.* Therefore, since Mr. Rottmann had acquired the German nationality by fraudulent means, EU law did not preclude Germany from ordering its revocation. Likewise, Austria was not obliged to revive Mr. Rottmann’s original nationality. *Id.* In any event, if the revocation of his German nationality applied retroactively, Austrian law alone would decide whether Mr. Rottmann was entitled to recover his Austrian nationality, provided that the principle of equivalence was respected. *Id.*

79. *Rottmann* (ECJ Mar. 2, 2010) (not yet reported), ¶ 59. As to the principle of proportionality, the ECJ held that, when examining a decision withdrawing naturalization, the national court must take into account the implications of such decision for the person concerned and his family, the gravity of the offence committed by that person, the time elapsed between the withdrawal decision and the naturalization decision, and whether the recovery of his original nationality is possible. *Id.* ¶ 56.

[a Member State] and its nationals and also the reciprocity of rights and duties”⁸⁰—and the individual rights stemming from EU citizenship.

C. *Mobility of Same-Sex Married Couples*

Another aspect of family law that is likely one day to find its way to Luxembourg concerns the mobility of same-sex married couples. Like national rules on surnames, no one would question the premise that legalizing same-sex marriage is a political decision to be taken at the national level. Although same-sex couples enjoy some sort of legal recognition in the majority of Member States, only Belgium, the Netherlands, Spain, and most recently Sweden, allow same-sex marriage. Problems may arise when same-sex married couples decide to move to another Member State where their civil status is not recognized, and, accordingly, they cannot fully benefit from the protection of EU law.

Directive 2004/38⁸¹ adopted a broad definition of “family member” so as to include registered partnerships.⁸² However, the European Parliament was unable to mobilize the Council to mention expressly that the term “spouse” laid down in article 2(2)(a) of Directive 2004/38 also applies to spouses of the same sex. The EU legislator opted for a hands-off approach, leaving this sensitive decision to judicial interpretation.⁸³ Indeed, if a national court asks for guidance in the interpretation of this

80. *Id.* ¶ 51.

81. Council Directive on the Rights of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States, No. 2004/38, 2004 O.J. L 158/77 [hereinafter Citizenship Directive], corrected version in 2005 O.J. L 197/34 (dealing with the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States).

82. The non-registered partner of an EU citizen is not considered a family member under the Directive. *Id.* pmbl. (5), art. 2(2), 2004 O.J. L 158, at 79, 88. However, article 3 provides that the host Member State must facilitate the entry and residence of persons with whom an EU citizen has a durable relationship, provided that it can be duly attested. *Id.* art. 3(2), 2004 O.J. L 158, at 89.

83. See HELEN TONER, PARTNERSHIP RIGHTS, FREE MOVEMENT, AND EU LAW 60–68 (2004) (explaining that the regime laid down in the directive was the result of a political compromise among conservative and liberal Member States).

concept, the ECJ would have no choice but to provide a definition through the medium of common-lawmaking.⁸⁴

When confronted with the interpretation of “spouse,” the ECJ has three alternatives. First, under the “state of origin principle,” the term “spouse” may be interpreted in accordance with the civil law under which the marriage took place. This option would be the most favorable to same-sex couples, since the exercise of free movement rights would have no adverse repercussion on their civil status. However, the host Member State could object that this interpretation would be too intrusive, causing excessive erosion to its competence to regulate family law and exercise its police powers.

Second, under the “host state principle,” the ECJ could defer to the laws of the host Member State. This option has been followed by the EU legislator when defining the legal effects of registered partnerships. Indeed, registered partners are considered family members only “if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State.”⁸⁵

Finally, the ECJ, under the concept of judicial autonomy, could adopt its own independent definition of “spouse” without referring to either the laws of the home or the host State. The ECJ could choose, for example, to exclude same-sex marriages from the scope of the directive. This solution would foster

84. See Koen Lenaerts & Kathleen Gutman, “Federal Common Law” in the European Union: A Comparative Perspective from the United States, 54 *AM. J. COMP. L.* 1, 55 (2006). The authors point out that the attitude of the EU legislator is in clear contrast with that of the U.S. Congress. *Id.* Not only did Congress rule out federal common law in interpreting marriage, but it also exempted states from giving effect to marriages (or equivalent relationships) contracted under the laws of a sister state. *Id.* To this effect, the Defense of Marriage Act (“DOMA”) provides that, for the purposes of federal law, marriage is defined as “a legal union between one man and one woman as husband and wife,” and the word spouse is defined as “a person of the opposite sex who is a husband or a wife.” Defense of Marriage Act § 3, 1 U.S.C. § 7 (2006). In addition, the DOMA also states that “No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.” *Id.* § 2(a), 28 U.S.C. § 1738C; see also TONER, *supra* note 83, at 42–43.

85. Citizenship Directive, No. 2004/38, art. 2(2)(b), 2004 O.J. L 158, at 88.

uniformity and legal certainty, but it would disregard the sensitivities of some Member States to the benefit of others.

Although the ECJ has not yet defined the term “spouse” under Directive 2004/38, one may draw some interesting insights from *D & Sweden v. Council*.⁸⁶ There, the ECJ was called upon to define marriage with a view to determining whether certain benefits reserved to married couples under the staff regulations of officials of the European Communities (“staff regulations”) could be extended to same-sex registered partnerships. At the time, the staff regulations made no mention of registered partnerships.⁸⁷ This, however, did not discourage the applicant and the Swedish Government from urging the ECJ to follow the law under which the partnership had been registered.⁸⁸ They argued that if the state of registration puts same-sex registered partnerships and marriages on a similar footing, then the staff regulations should be interpreted in the same vein.⁸⁹ Benefits given to married couples should also be given to same-sex registered partnerships. However, the ECJ disagreed. It began by recalling that the Council had rejected a similar amendment proposed by the Swedish Government.⁹⁰ Further, the ECJ observed that “It is not in question that, according to the definition generally accepted by the Member States, the term marriage means a union between two persons of the opposite sex.”⁹¹ Finally, the ECJ noted that, even though there was a common trend in the Member States towards giving some sort of legal recognition to same-sex unions, these new legal arrangements could not be assimilated to marriage.⁹² As a result, the ECJ confirmed the ruling of the European General Court (“EGC”)—formerly the Court of First Instance—and dismissed the appeal.

After this ruling, the staff regulations were amended so that certain benefits previously reserved to married couples are now also available to staff members with a registered partnership,

86. *D v. Council (D & Sweden)*, Joined Cases C-122 & C-125/99, [2001] E.C.R. I-4319.

87. *See id.* ¶¶ 2, 12.

88. *See id.* ¶ 29.

89. *Id.*

90. *Id.* ¶ 32.

91. *Id.* ¶ 34.

92. *Id.* ¶ 36.

provided that four conditions are fulfilled.⁹³ One of these conditions is that “the couple has no access to legal marriage in a Member State,” that is, “where the members of the couple [do not] meet all the conditions laid down by the legislation of a Member State permitting marriage of such a couple.”⁹⁴ Therefore, where a same-sex couple has access to legal marriage, it cannot claim benefits under a registered partnership. This suggests that the staff regulations recognize same-sex marriage legally contracted under the law of a Member State, and only where the latter is not possible, same-sex couples with a registered partnership may claim benefits. Accordingly, the definition of marriage provided by the ECJ in *D & Sweden v. Council* appears to have been superseded by the EU legislator.

D & Sweden v. Council dealt with a common definition of marriage in a field of exclusive competence of the EU—the staff regulations; as such, the case involved questions of statutory interpretation alone. Perhaps that is why the ECJ decided to accommodate its interpretation of the staff regulations with the prevailing view of the national legal systems, as opposed to the notions embraced by a limited number of them.⁹⁵ The ruling of the ECJ in this case cannot, however, be extended without reservation to the mobility of same-sex married couples.⁹⁶ *D & Sweden v. Council* did not examine the alterations in the civil status of same-sex couples resulting from free movement. The application of the treaty provisions on free movement to national measures regulating the civil status of same-sex couples operates to frame the exercise of legislative powers by the Member States.

Though delivered in the context of social law, *Maruko*⁹⁷ illustrates this point. In this case, the ECJ was asked to clarify whether a German compulsory occupational pension scheme that awarded benefits to married couples while refusing them to partnerships registered in Germany was compatible with Directive 2000/78. German law reserves marriage to different-sex couples while same-sex couples have access only to registered

93. See Council Regulation Amending the Staff Regulations of Officials of the European Communities, No. 723/2004, annex I, ¶ 97, 2004 O.J. L 124/1, at 37.

94. *Id.*

95. See *D & Sweden*, [2001] E.C.R. I-4319, ¶ 39.

96. See TONER, *supra* note 83, at 187.

97. *Maruko v. Versorgungsanstalt der deutschen Bühnen*, Case C-267/06, [2008] E.C.R. I-1757.

partnerships.⁹⁸ For Mr. Maruko, whose registered male partner was insured under this pension scheme, this meant that he could not claim a survivor's pension.⁹⁹ He challenged the German pension scheme on the ground that it was contrary to Directive 2000/78.¹⁰⁰ After noting that the payments under the pension scheme constituted "pay" within the meaning of article 3 of Directive 2000/78, the ECJ held that "civil status and the benefits flowing there from are matters which fall within the competence of the Member States and [EU] law does not detract from that competence. However, it must be recalled that in the exercise of that competence the Member States must comply with [EU] law."¹⁰¹ For the case at issue, this meant that Germany was free to decide whether same-sex registered partnerships enjoy a comparable civil status to marriage. If so, then any difference in treatment on grounds of sexual orientation produced by measures falling within the scope of application of Directive 2000/78/EC is forbidden.¹⁰² Thus, the ECJ ruled that it was for the referring court to evaluate whether, under German law, same-sex registered partnerships and marriage stand on comparable footing. If the finding is in the affirmative, then the German pension scheme would be in violation of the directive, given that a widower's pension was refused on the ground of the applicant's sexuality.¹⁰³

In the context of free movement, the ECJ should embark on an analogous legal reasoning. While Member States enjoy absolute discretion over the definition and legal effects of marriage, registered partnership, divorce, and other domestic issues, a change in the civil status of incoming same-sex couples may be seen as an obstacle to free movement.¹⁰⁴ *Carpenter*¹⁰⁵ and the cases that followed it point in this direction. Just as "it is clear that the separation of Mr and Mrs Carpenter would be

98. *See id.* ¶ 63.

99. *See id.* ¶¶ 22–23.

100. *Id.* ¶ 23.

101. *Id.* ¶ 59; *see also* Opinion of Advocate General Colomer, *Maruko*, [2008] E.C.R. I-1757, ¶ 77.

102. *See, e.g.*, *Eman v. College van Burgemeester en Wethouders van Den Haag*, Case C-300/04, [2006] E.C.R. I-8055, ¶¶ 44–45, 52–53.

103. *See Maruko*, [2008] E.C.R. I-1757, ¶ 72.

104. *See TONER*, *supra* note 83, at 254–57.

105. *Carpenter v. Sec'y of State for the Home Dep't*, Case C-60/00, [2002] E.C.R. I-6279, ¶¶ 38–39.

detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom,”¹⁰⁶ the adverse repercussions deriving from a change in the civil status of same-sex married couples would hinder free movement. As a consequence, in order not to recognize their legal status, the host Member State would be forced to rely on overriding reasons of general interest. The justification advanced by that Member State would have to be applied in compliance with fundamental rights, particularly the protection of family life.¹⁰⁷ Indeed, as indicated by recital 31 of Directive 2004/38, implementing Member States are bound by fundamental rights and the principle of non-discrimination.¹⁰⁸ Additionally, since the EU law framework stems directly from the TFEU, the EU legislator must also abide by it. This implies that the directive must be interpreted with a view to facilitating free movement, while having regard to the justifications put forward by the host Member State. Put simply, the definition of “spouse” must be consistent with the rationale underpinning the legal basis of the directive.

Of the three aforementioned alternatives, it seems that the first option, the state of origin principle, is the most consistent with the fundamental freedoms. However, given that the EU legislator deferred to the judiciary, it seems appropriate to proceed on a case-by-case analysis. Thus, in principle, the definition of “spouse” would not exclude same-sex marriages legally entered into under the laws of a Member State. Yet, the host Member State would still be entitled to invoke overriding reasons of general interest in order to deny their legal

106. *See id.* ¶ 39.

107. *See* Minister voor Vreemdelingenzaken en Integratie v. Eind, Case C-291/05, [2007] E.C.R. I-10,719, ¶ 44; Commission v. Germany, Case C-441/02, [2006] E.C.R. I-3449, ¶ 109; Commission v. Spain, Case C-503/03, [2006] E.C.R. I-1097, ¶ 41; Commission v. Spain, Case C-157/03, [2005] E.C.R. I-2911, ¶ 26; *Mouvement Contre le Racisme, L’antisémitisme et la Xénophobie ASBL (MRAX) v. Belgium*, Case C-459/99, [2002] E.C.R. I-6591, ¶ 53; *Carpenter*, [2002] E.C.R. I-6279, ¶ 38; *see also* TONER, *supra* note 83, at 85–88 (opining that “[c]learly, the argument that the same-sex couple are ‘family members’ under the [EU] law regulations is not ruled out by the current [European Court of Human Rights] stance”).

108. Citizenship Directive No. 2004/38, pmbl. ¶ 31, 2004 O.J. L 158, at 86. This would mean, for example, that once a person is qualified as “a family member,” the host Member State cannot deprive him or her from receiving the benefits to which he or she is entitled under Directive 2004/38/EC just because of his or her sexual orientation, age, race, and the like. *See id.*

recognition. Therefore, the term “spouse” laid down in Directive 2004/38 must be interpreted in light of the principle of mutual recognition. The ECJ would thus engage in a balancing exercise, scrutinizing whether the reasons put forward by the host Member State pass muster under free movement law.

D. *Direct Taxation*

In the absence of harmonization,¹⁰⁹ the ECJ has consistently held that direct taxation falls within the competence of the Member States.¹¹⁰ National legislators are competent to choose the tax base, tax rate, and tax advantages. Most importantly, they enjoy absolute discretion to decide whether to exercise their tax powers as a “home state” (taxing the income of fiscal residents regardless of where it is produced) or alternatively as a “source state” (taxing the income on a territorial basis even if the taxpayer is not a resident).¹¹¹

As shown in the previous sections, insofar as there is a link with EU law, policy choices in the realm of direct taxation may not disadvantage EU citizens who exercise their rights under EU law. However, in contrast to education policy or family law, not all negative changes in the tax status of free movers may be read as being contrary to the treaty provisions. Given that the TFEU allows different national tax systems to exist side-by-side, adverse financial repercussions stemming directly from this juxtaposition

109. See TFEU, *supra* note 3, arts. 114–15, 2010 O.J. C 83, at 94–95; EC Treaty, *supra* note 3, arts. 94–95, 2006 O.J. C 321 E, at 79–80. Some aspects of direct taxation can be harmonized, such as the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States. See Council Directive on the Common System of Taxation Applicable to Mergers, Divisions, Transfer of Assets and Exchange of Shares Concerning Companies of Different Member States, No. 90/434, 1990 O.J. L 225/1. Yet, owing to the fact that unanimity is the voting rule for the harmonization of fiscal measures, there is little secondary legislation on direct taxation.

110. See *Finanzamt Hamburg-Am Tierpark v. Burda GmbH*, Case C-284/06, [2008] E.C.R. I-4571, ¶ 69; *Oy AA v. Finland*, Case C-231/05, [2007] E.C.R. I-6373, ¶ 18; *Test Claimants in Class IV of the ACT Group Litig. v. Comm’rs of Inland Revenue*, Case C-374/04, [2006] E.C.R. I-11,673, ¶ 36; *Cadbury Schweppes plc v. Comm’rs of Inland Revenue*, Case C-196/04, [2006] E.C.R. I-995, ¶ 40; *Marks & Spencer plc v. Halsey*, Case C-446/03, [2005] E.C.R. I-10,837, ¶ 29; *Metallgesellschaft Ltd. v. Comm’rs of Inland Revenue*, *Joined Cases C-397 & C-410/98*, [2001] E.C.R. I-1727, ¶ 37.

111. See Suzanne Kingston, *A Light in the Darkness: Recent Developments in the ECJ’s Direct Tax Jurisprudence*, 44 COMMON MKT. L. REV. 1321 (2007).

are not caught by these provisions.¹¹² Therefore, EU law does not, as such, preclude double taxation of cross-border activities resulting from the interaction of two national tax systems.

Avoiding the erosion of the fiscal powers retained by the Member States while at the same time ensuring compliance with the treaty provisions on free movement seems a very complex and delicate task, especially if one bears in mind the sensitivities that direct taxation awakens in the Member States. Relying on the principle of non-discrimination, the ECJ has, nonetheless, taken important steps towards the EU law framing of the exercise of national taxing powers. Yet due to the different criteria adopted by national legislators in defining their tax jurisdiction, the ECJ has refined the principle of non-discrimination according to whether a Member State is acting in a home state or source state capacity.

Acting as a home state, a Member State may not distinguish between domestic income and income produced in another Member State.¹¹³ For corporate income taxation, for example, this means that if a Member State taxes all income generated by its residents regardless of where it is produced and grants a tax credit which is offset against tax on domestic dividends, the same financial treatment must be extended to dividends produced by companies located abroad.¹¹⁴ Similarly, tax incentives granted to residents investing domestically must also be accorded to residents investing in cross-border activities.¹¹⁵

As for tax jurisdiction exercised territorially, in a source state capacity, the principle of non-discrimination essentially prevents

112. See *Block v. Finanzamt Kaufbueren*, Case C-67/08, [2009] E.C.R. I-884, ¶ 35; *Deutsche Shell v. Finanzamt für Großunternehmen*, Case C-293/06, [2008] E.C.R. I-1129, ¶ 43; *Schempp v. Finanzamt München V*, Case C-403/03, [2005] E.C.R. I-6421, ¶ 45; *Lindfors v. Finland*, Case C-365/02, [2004] E.C.R. I-7183, ¶ 34; see also Opinion of Advocate General Geelhoed, *Test Claimants in Class IV of ACT Group Litig.*, [2006] E.C.R. I-11,673, ¶¶ 35–40.

113. See *Rewe Zentralfinanz v. Finanzamt Köln-Mitte*, Case C-347/04, [2007] E.C.R. I-2647, ¶¶ 36, 70; *Finanzamt Offenbach am Main-Land v. Keller Holding GmbH*, Case C-471/04, [2006] E.C.R. I-2107, ¶¶ 34, 50; *Commission v. Denmark*, Case C-150/04, [2007] E.C.R. I-1163, ¶¶ 42–77.

114. See, e.g., *Manninen v. Finland*, Case C-319/02, [2004] E.C.R. I-7477, ¶ 55; *Lenz v. Finanzlandesdirektion für Tirol*, Case C-315/02, [2004] E.C.R. I-7063, ¶¶ 20–21, 49; *Staatssecretaris van Financien v. B.G.M. Verkooijen*, Case C-35/98, [2000] E.C.R. I-4071, ¶¶ 34–36, 62.

115. See *Svensson v. Ministre du Logement et de l'Urbanisme*, Case C-484/93, [1995] E.C.R. I-3955, ¶¶ 5–8.

national authorities from taxing non-residents and residents differently.¹¹⁶ For example, tax benefits accorded to resident companies must also be accorded to permanent establishments of non-resident companies.¹¹⁷ Similarly, a Member State cannot impose a higher corporate tax to a foreign company than to resident companies.¹¹⁸

From the foregoing, it appears that determining whether a tax system is discriminatory depends to a large extent on the choice of the comparator.¹¹⁹ Indeed, discrimination will not take place where, for tax purposes, cross-border and domestic situations are not objectively comparable. By way of illustration, this would be so where, with a view to alleviating economic double taxation, a source state conditions the grant of a tax credit on the company receiving dividends having income tax liability.¹²⁰ In the case of outgoing dividends paid to non-resident companies not liable to the source state's income tax, the latter may not claim access to tax credits related to these dividends. In those circumstances, denying tax credits to outgoing dividends is not a discriminatory measure, since resident and non-resident companies do not find themselves in a comparable situation. The former are subject to income tax and thus have a right to tax credits so that the source state does not tax the profits of the dividend-distributing company first and then the dividends themselves as income of the receiving company. By contrast, since non-resident companies do not pay income tax, there is no risk of economic double taxation imposed by the source state. Put simply, insofar as the source state is concerned,¹²¹ dividends

116. See *D.M.M.A. Arens-Sikken v. Staatssecretaris van Financiën*, Case C-43/07, [2008] E.C.R. I-6887, ¶ 52.

117. See *The Queen v. Inland Revenue Comm'rs, ex parte Commerzbank AG*, Case C-330/91, [1993] E.C.R. I-4017, ¶ 13; *Commission v. France (Avoir Fiscal)*, Case 270/83, [1986] E.C.R. 273, ¶¶ 22, 27–28.

118. See *Royal Bank of Scot. plc v. Greece*, Case C-311/97, [1999] E.C.R. I-2651, ¶ 34.

119. See *Opinion of Advocate General Sharpston, Deutsche Shell GmbH v. Finanzamt für Großunternehmen in Hamburg*, Case C-293/06, [2007] E.C.R. I-1129, ¶¶ 28–30.

120. See *Test Claimants in Class IV of the ACT Group Litig. v. Comm'rs of Inland Revenue*, Case C-374/04, [2006] E.C.R. I-11,673, ¶¶ 70, 72, 81.

121. The fact that outgoing dividends would be subsequently taxed by the home state (double taxation) cannot be seen as discrimination either, since this is just an adverse consequence of having parallel national tax systems. See *Opinion of Advocate*

are equally taxed for resident and non-resident companies, that is, only at the level of the distributing company.¹²²

Furthermore, the ECJ has not adopted a formalistic approach when qualifying two situations as comparable. In addition to examining the legal provisions applied to domestic and cross-border situations, the ECJ also makes a comparative assessment of the factual context.¹²³ The classic example is provided by *Schumacker*.¹²⁴ There, the ECJ ruled that discrimination arises where a worker earns most of his income (ninety percent) in the state of employment, and neither that state nor the state of residence takes into account his personal and family circumstances for the purposes of awarding tax benefits.¹²⁵ Likewise, not only does discrimination occur where there is unequal treatment between domestic and cross-border situations, but it also manifests itself where a Member State awards preferential treatment to cross-border situations involving a given Member State.¹²⁶

It becomes more complex when it is not possible to find an immediate domestic equivalent to a cross-border situation. *Deutsche Shell*¹²⁷ provides a good example. A German company sought to deduct the currency loss suffered from the repatriation of start-up capital previously granted to its permanent establishment in Italy.¹²⁸ Given that currency loss is impossible in domestic situations, it was not deductible under either German

General Geelhoed, *Test Claimants in Class IV of the ACT Group Litig.*, [2006] E.C.R. I-11,673, ¶¶ 83–86.

122. Conversely, discrimination occurs where a home state adopts an exemption system for domestic dividends and a credit system for foreign dividends, and the first system affords a more favorable tax treatment than the latter. *See Test Claimants in the FII Group Litig. v. Comm’rs of Inland Revenue*, Case C-446/04, [2006] E.C.R. I-11,753, ¶ 57.

123. Michael Lang, *Recent Case Law of the ECJ in Direct Taxation: Trends, Tensions, and Contradictions*, 18 EC TAX REV. 98, 101 (2009).

124. *See Finanzamt Köln-Altstadt v. Schumacker*, Case C-279/93, [1995] E.C.R. I-225; Lang, *supra* note 123, at 101 n.24.

125. *See Schumacker*, [1995] E.C.R. I-225, ¶¶ 47–49.

126. *See, e.g., Staatssecretaris van Financiën v. Orange European Smallcap Fund NV*, Case C-194/06, [2008] E.C.R. I-3747, ¶¶ 106–08. *But see D. v. Inspecteur van Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, Case C-376/03, [2005] E.C.R. I-5821, ¶¶ 60–63.

127. *Deutsche Shell GmbH v. Finanzamt für Großunternehmen in Hamburg*, Case C-293/06, [2008] E.C.R. I-1129.

128. *See id.* ¶¶ 9–10.

or Italian law.¹²⁹ The question then arose whether the inability to deduct currency loss ran counter to the treaty provisions on free movement.¹³⁰

There are two ways of answering this question. On the one hand, one may adopt a restriction-based approach whereby non-discriminatory measures on direct taxation fall within the scope of these provisions,¹³¹ similar to other areas of substantive law.¹³² However, the adoption of a restriction-based approach runs the risk of requiring all negative changes in the tax status of free movers to be submitted to strict scrutiny.¹³³ Arguably, in order not to substantially diminish the powers retained by the Member States, the adoption of a restriction-based approach must be examined with caution.¹³⁴ On the other hand, one may read the principle of non-discrimination as requiring not only that objectively comparable situations are treated equally, but also that different situations are treated unequally.¹³⁵ In *Deutsche Shell*, the ECJ ultimately endorsed this latter rationale. Since currency losses may only arise in cross-border situations, a company having exercised its free movement rights has to face higher economic risks than domestic companies.¹³⁶ Consequently, it would be contrary to the principle of non-discrimination for Member States to ignore this distinctive feature when awarding tax deductions or credits. Moreover, *Deutsche Shell* is not an isolated case, but it reflects a jurisprudential trend, according to which a

129. *See id.* ¶¶ 11–21.

130. *See id.* ¶ 27.

131. This was the approach followed by Advocate General Sharpston. *See* Opinion of Advocate General Sharpston, *Deutsche Shell*, [2008] E.C.R. I-1129, ¶ 34 (arguing that in this case, trying to find a comparator for currency loss would amount to what in social law is like finding a comparator for a pregnant woman).

132. *See, e.g.*, *Alpine Investments BV v. Minister van Financiën*, Case C-384/93, [1995] E.C.R. I-1141, ¶¶ 29–31 (services); *Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano*, Case C-55/94, [1995] E.C.R. I-4165 (workers).

133. *See* Kingston, *supra* note 111, at 1330–31; *see also* Richard Lyal, *Non-discrimination and Direct Tax in Community Law*, 12 EC TAX REV. 68, 74 (2003).

134. *See* Opinion of Advocate General Geelhoed, *Test Claimants in Class IV of the ACT Group Litig. v. Comm’rs of Inland Revenue*, Case C-374/04, [2006] ECR I-11,673.

135. *See* *Royal Bank of Scot. plc v. Greece*, Case C-311/97, [1999] E.C.R. I-2651, ¶ 26; *Finanzamt Köln-Altstadt v. Schumacker*, Case C-279/93, [1995] E.C.R. I-225, ¶ 30.

136. *Deutsche Shell GmbH v. Finanzamt für Großunternehmen in Hamburg*, Case C-293/06, [2008] E.C.R. I-1129, ¶¶ 29–30.

more elaborate concept of discrimination is preferred to a restriction-based approach.¹³⁷

Finally, the case law of the ECJ has not been immune from criticism. Some scholars argue that as a result of applying the principle of non-discrimination to both home and source states, the Court has failed to follow a consistent tax policy.¹³⁸ Others posit that the ECJ has engaged in judicial activism by creating new “taxing rights” and by unduly bending the tax jurisdiction of the Member States to the benefit of free movers.¹³⁹ However, most of the perceived inconsistencies or tensions could easily be addressed by EU secondary legislation. Given the lack of consensus among Member States to pass such legislation, the ECJ is called upon to enforce EU primary law, that is, to strike the best possible balance between not depriving the Member States from their taxing powers while making sure that direct taxation does not become an insurmountable obstacle to market integration. Of course, even if divergences between the Member States were to disappear so that legislation could be passed, the treaty provisions on free movement would still operate to frame the agreed-upon tax paradigm. This is clearly demonstrated by the case law involving indirect taxation, where the ECJ’s decisions complete the system laid down by the EC legislator.¹⁴⁰ In the absence of a legislative consensus on direct taxation underpinning a certain tax policy, the ECJ has decided not to examine direct taxation beyond the bounds of discrimination.

137. See, e.g., *Belgium v. Truck Ctr. SA*, Case C-282/07, [2008] E.C.R. I-10,767; *Test Claimants in the FII Group Litig. v. Comm’rs of Inland Revenue*, Case C-446/04, [2006] E.C.R. I-11,753; *Test Claimants in Class IV of the ACT Group Litig.*, [2006] E.C.R. I-11,673; *Cadbury Schweppes v. Comm’rs of Inland Revenue*, Case C-196/04, [2006] E.C.R. I-7995; *Conijn v. Hamburg-Nord*, Case C-46/04, [2006] E.C.R. I-6137; *Ritter-Coulais v. Germersheim*, Case C-152/03, [2006] E.C.R. I-1711; *Bouanich v. Skatteverket*, Case C-265/04, [2006] E.C.R. I-923; *Mobistar SA v. Commune de Fléron*, Joined Cases C-544-45/03, [2005] E.C.R. I-7723; *Blanckaert v. Inspecteur van de Belastingdienst*, Case C-512/03, [2005] E.C.R. I-7685.

138. See Michael J. Graetz & Alvin C. Warren Jr., *Income Tax Discrimination and the Political and Economic Integration of Europe*, 115 *YALE L.J.* 1186, 1219 (2006) (arguing that prohibiting discrimination based on destination—the home state—is ultimately inconsistent with prohibiting discrimination based on origin—the source state).

139. See *id.* at 1201.

140. See Frans Vanistendael, *Does the ECJ Have the Power of Interpretation to Build a Tax System Compatible with the Fundamental Freedoms?*, 17 *EC TAX REV.* 52, 52 (2008) (inviting the Court to take an analogous approach to that followed for indirect taxation).

But market integration driven without any support or guidance from the legislature is doomed to suffer from shortcomings.¹⁴¹ Far from being a sign of inconsistency, this jurisprudence shows that the ECJ pays full respect for the competences retained by the Member States in an area so fundamental to national sovereignty.¹⁴²

E. *Health Care: Patient Mobility*

Most of the litigation involving patient mobility has dealt with situations “where a patient goes to another Member State with the explicit goal of receiving medical care at the expense of the health care system with which he is insured.”¹⁴³ Initially, mobility was confined to the cases provided for by article 22 (1) of Regulation No. 1408/71¹⁴⁴ (now article 20 of Regulation No. 883/2004)¹⁴⁵. Adopted on the legal basis of article 48 TFEU (article 51 EC), this regulation sought to facilitate the coordination of the social security rights of migrant workers and their families. The regulation laid down a system of prior authorization for non-emergency treatment. Article 22(1)(c) indicates that Member States must grant authorization where the treatment concerned is provided for by the state of affiliation and it cannot be given within the time normally necessary for obtaining it,¹⁴⁶ taking into account the patient’s current state of

141. See *Damseaux v. Belgium*, Case C-128/08, [2009] E.C.R. 6823, ¶ 33; *Kerckhaert v. Belgium*, Case C-513/04, [2006] E.C.R. I-10,967, ¶ 22; see also Koen Lenaerts & Ludovic Bernardeau, *L’encadrement Communautaire de la Fiscalité Directe*, 43 *CAHIERS DE DROIT EUROPÉEN* 19 (2007).

142. See Karen Banks, *The Application of the Fundamental Freedoms to Member State Tax Measures: Guarding Against Protectionism or Second-Guessing National Policy Choices?*, 33 *EUR. L. REV.* 482, 506 (2008).

143. Koen Lenaerts & Tinne Heremans, *Contours of a European Social Union in the Case-Law of the European Court of Justice*, 2 *EUR. CONST. L. REV.* 101, 108 (2006).

144. See Council Regulation on the Application of Social Security Schemes to Employed Persons and Their Families Moving Within the Community, No. 1408/71, art. 22(1), 149 *J.O.* 2 (1971), *O.J. Eng. Spec. Ed.* (II) 1971, at 416.

145. See European Parliament and Council Regulation on the Coordination of Social Security Systems, No. 883/2004, art. 20, 2004 *O.J. L* 166/1, at 31.

146. Council Regulation No. 1408/71, *supra* note 144, art. 22(1)(c), *O.J. Eng. Spec. Ed.* (II) 1971, at 428. By contrast, article 20 of Regulation No. 883/2004 provides that the treatment must be provided within a time limit that is “medically justifiable, taking into account [the patient’s] current state of health and the probable course of his illness.” European Parliament and Council Regulation on the Coordination of Social Security Systems, No. 883/2004, art. 20, 2004 *O.J. L* 166/1, at 31.

health and probable course of illness. In essence, patients treated under article 22(1)(c) are covered as if they were insured under the regime of the host Member State.¹⁴⁷ However, given the limited scope of this provision and the reluctance of Member States to grant authorizations, free movement of patients was marginal.¹⁴⁸

Patients thus sought to bypass the limitations of article 22 by relying directly on the treaty provisions on free movement. For this strategy to succeed, health care services provided in the context of a social security scheme would have to constitute economic activities. The ECJ found this to be the case. In contrast to national education systems¹⁴⁹ and to the application of the treaty provisions on competition,¹⁵⁰ the ECJ has consistently held that for the purpose of free movement, these services are of an economic nature.¹⁵¹ Accordingly, insofar as there is a cross-border element, medical service providers,¹⁵² as well as patients, may invoke their free movement rights.

147. *See* Vanbraeckel v. Alliance Nationale des Mutualités Chrétiennes, Case C-368/98, [2001] E.C.R. I-5363, ¶ 32. *But see* Inizan v. Caisse primaire d'assurance maladie des Hauts-de-Seine, Case C-56/01, [2003] E.C.R. I-12,403, ¶¶ 20–21 (stating that “the length of the period during which benefits are provided alone [remains] to be governed by the legislation of the . . . Member State [of affiliation]”).

148. *See* Anthony Dawes, “*Bonjour Herr Doctor: National Healthcare Systems, the Internal Market and Cross-border Medical Care within the European Union*,” 33 *LEGAL ISSUES ECON. INTEGRATION* 167, 167 (2006) (arguing that free movement of patients under this regime was “more of an illusion than [sic] a reality”).

149. *See* Belgium v. Humbel, Case 263/86, [1988] E.C.R. 5365, ¶¶ 17–19. There, the ECJ indicated three cumulative characteristics that prevented national systems of public education from having an economic nature. First, there is no agreement on the price to be paid for the services received; second, the Member States are not driven by profit making when adopting their policies; and third, public spending primarily finances these services. *Id.*

150. *Federación Española de Empresas de Tecnología Sanitaria v. Commission*, Case C-205/03 P, [2006] E.C.R. I-6295, ¶¶ 8, 25 (holding that activities adopted on the basis of the principles of universal health coverage and solidarity could not be qualified as economic).

151. *See* The Soc’y for the Protection of Unborn Children Ir. Ltd. v. Grogan, Case C-159/90, [1991] E.C.R. I-4685, ¶ 18; *Luisi v. Ministero del Tesoro*, Joined Cases 286/82 & 26/83, [1984] E.C.R. 377, ¶ 16.

152. This section will not examine national rules that impede health care service providers from providing services temporarily or permanently in the host Member State. For cases on this issue see, for example, ; *Apothekerkammer des Saarlandes v. Saarland and Ministerium für Justiz, Gesundheit und Soziales*, Joined Cases C-171 & C-172/07, [2009] E.C.R. I-4171; *Commission v. Italy*, Case C-531/06, [2009] E.C.R. I-4103; and *Hartlauer Handelsgesellschaft mbH v. Wiener Landesregierung*, Case C-169/07, [2009] E.C.R. I-1721.

However, article 168(7) TFEU (article 152(5) EC), states that “[u]nion action shall respect the responsibilities of the Member States for the definition of their health policy and for the organization and delivery of health services and medical care.”¹⁵³ This means that Member States are free to opt for a system based on benefits in kind or reimbursement; that they enjoy discretion in establishing the entitlements covered by their social security schemes;¹⁵⁴ that they may cap or fix a flat rate of reimbursement;¹⁵⁵ or that national authorities are entitled to establish a waiting list before a patient can undergo a highly demanded medical treatment.¹⁵⁶

Yet, the margin of maneuver enjoyed by the Member States in the field of health care cannot render the application of the treaty provisions on free movement devoid of purpose. As Advocate General Tesauro so eloquently noted, article 168(7) TFEU (article 152 EC) “by no means implies that the social security sector constitutes an island beyond the reach of [EU] law.”¹⁵⁷ Or, in the Court’s own words, although “[EU] law does not detract from the power of the Member States to organize their social security systems and to adopt, in particular, provisions intended to govern the organization of health services . . . in exercising that power, . . . the Member States must comply with [EU] law, in particular the provisions of the Treaty on the freedoms of movement.”¹⁵⁸

It follows that it is for the ECJ to strike the right balance between, on the one hand, ensuring that social security systems are not obstacles to free movement, and, on the other hand, not depriving the Member States from all competence in this field.

153. TFEU, *supra* note 3, art. 168(7), 2010 O.J. C 83, at 123; EC Treaty, *supra* note 3, art. 152(5), 2006 O.J. C 321 E, at 115.

154. See *B.S.M. Geraets-Smits v. Stichting Ziekenfonds VGZ (Smits & Peerbooms)*, Case C-157/99, [2001] E.C.R. I-5473, ¶¶ 86–87; *Duphar BV v. The Netherlands*, Case 238/82, [1984] E.C.R. 523, ¶ 17.

155. See *Müller-Fauré v. Onderlinge Waarborgmaatschappig OZ Zorgverzekeringen UA*, Case C-385/99, [2003] E.C.R. I-4509, ¶ 98.

156. See *Watts v. Bedford Primary Care Trust*, Case C-372/04, [2006] E.C.R. I-4325, ¶ 67.

157. Opinion of Advocate General Tesauro, *Decker v. Caisse de Maladie des Employés Privés*, Case C-120/95, [1998] E.C.R. I-1831, ¶ 17.

158. *Hartlauer v. Wiener*, Case C-169/07, [2009] E.C.R. I-1721 ¶ 29; see also *Commission v. Germany*, Case C-141/07, [2008] E.C.R. I-6935, ¶¶ 22–23; *Watts*, [2006] E.C.R. I-4325, ¶¶ 92, 146; *Duphar*, [1984] E.C.R. 523, ¶ 16.

The application of the EU law framework in the realm of social security is not an easy task, for two main reasons. Vertically, social security systems operate on a territorial basis. Their sustainability lies in the principle that benefits are awarded to those who contribute to the state treasury. Therefore, exporting social rights beyond territorial borders would upset the financial stability that national authorities endeavor to reach in spite of limited resources and increasing demand. Horizontally, social security and market integration are governed by different rationales. Social security is based on a system of cross-subsidies, whereby some persons contribute more than what they receive while others receive more than what they contribute. Financial solidarity is thus the underlying principle of social security systems, which is at odds with the dynamics governing market integration and free competition.¹⁵⁹ As a result, by welcoming an alternative system of patient mobility, the ECJ has agreed to engage in the delicate challenge of delineating the contours of a “European Social Union.”¹⁶⁰

How has the ECJ reconciled individual interests to move with a fair distribution of limited health care resources? In the seminal cases *Decker*¹⁶¹ and *Kohll*,¹⁶² the Court took the first steps toward framing the capacity of the Member States to organize and deliver their national health services. Unlike medical treatment received or medical products bought domestically, Luxembourg conditioned the reimbursement of the cost for medical services received or medical products bought in another Member State upon obtaining a prior authorization. The Court ruled that this requirement was an obstacle to free movement,¹⁶³ holding that the system of prior authorization dissuades patients from purchasing foreign medical goods and from receiving services abroad. As for Luxembourg’s justification, the ECJ

159. See Christopher Newdick, *Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity*, 43 *COMMON MKT .L. REV.* 1645 (2006) (arguing that the ECJ should only review national measures pertaining to the organization and delivery of health care on procedural grounds, otherwise the national commitment to welfare would be eroded and the credibility of the EU would be undermined).

160. See *Lenaerts & Heremans*, *supra* note 143, at 114–15.

161. *Decker*, [1998] E.C.R. I-1831.

162. *Kohll v. Union des Caisses de Maladie*, Case C-158/96, [1998] E.C.R. I-1931.

163. See *Decker*, [1998] E.C.R. I-1831, ¶ 36 (free movement of goods); *Kohll*, [1998] ECR I-1931, ¶ 35 (freedom to provide services).

recognized the interest of the Member States in avoiding “the risk of seriously undermining the financial balance of the social security system”¹⁶⁴ and in “maintaining a balanced medical and hospital service opened to all”¹⁶⁵ as well as guaranteeing “the maintenance of a treatment facility or medical service on national territory.”¹⁶⁶ Yet, since the social security system at issue reimbursed health care expenses at a flat rate, the ECJ found that there was actually no financial risk.¹⁶⁷ Services provided in a Member State other than Luxembourg would not be more burdensome than internal provisions of care. As a result, the Court ruled that the system of prior authorization was contrary to the treaty.

Decker and *Kohll* suggest that, in contrast to the regime introduced by Regulation No. 1408/71 (now Regulation No. 883/2004),¹⁶⁸ where patients are treated as though they were insured in the host Member State, the application of the treaty provisions on free movement in the realm of health care implies that patients should be treated as though the treatment were provided in the Member State of affiliation. This is demonstrated by the fact that tariffs of reimbursement and entitlements are defined by the regulations of the Member State of affiliation, so that the economic implications of patient mobility cannot be more onerous than domestic provisions of care.¹⁶⁹ In addition, it follows from *Decker* and *Kohll* that it is virtually impossible for the Member States to justify a system of prior authorization for ambulant health care. To this date, the ECJ has not upheld a system of prior authorization for non-hospital services. Moreover, the Court has relied on a quantitative argument to play down the dramatic consequences of patient mobility for non-hospital services. In its view, linguistic, geographic, economic, and cultural barriers would significantly limit the number of cross-border patients seeking ambulant care.¹⁷⁰ Finally, *Decker* and *Kohll*

164. *Decker*, [1998] E.C.R. I-1831, ¶ 39; *Kohll*, [1998] ECR I-1931, ¶ 41.

165. *Kohll*, [1998] E.C.R. I-1931, ¶ 50.

166. *Id.* ¶ 51.

167. *See Decker*, [1998] E.C.R. I-1831, ¶ 40; *Kohll*, [1998] E.C.R. I-1931, ¶ 42.

168. *See supra* notes 144–55 and accompanying text.

169. *See Müller-Fauré v. Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA*, Case C-385/99, [2003] ECR I-4509, ¶ 98; *Kohll*, [1998] E.C.R. I-1931, ¶ 42.

170. *See Müller-Fauré*, [2003] E.C.R. I-4509, ¶¶ 95–97.

left unanswered two important questions,¹⁷¹ namely (1) whether this line of case law also applied to social security systems based on benefits in kind, and (2) whether a system of prior authorization for intramural care could be justified.

As for the first question, contrary to the views advanced by Advocates General Saggio and Ruiz-Jarabo Colomer,¹⁷² the ECJ replied in the affirmative. In *Smits & Peerbooms*, the ECJ ruled that the treaty provisions on free movement apply regardless of whether social security systems are based on benefits in kind or on a reimbursement scheme.¹⁷³ In order for a medical treatment to constitute a service, the patients are not required to assume health care expenses directly. Instead, what matters is for the medical treatment to be provided for remuneration, that is, as consideration for the service in question.¹⁷⁴ In *Müller-Fauré*,¹⁷⁵ the Court added that, just as in social security systems based on reimbursement, patients insured under a social security system based on benefits in kind who travel to another Member State with a view to receiving medical treatment first have to pay the doctors providing the medical services and then request the refund of the expenses from the Member State in which they are insured.¹⁷⁶ From this perspective, not only does the difference between the two types of social security systems disappear, but also the economic nature of the medical services provided becomes self-evident.¹⁷⁷

As for the second question, the ECJ has held that intramural care is not an exception to the application of the free movement principle.¹⁷⁸ In effect, “the application of any national rules which have the effect of making the provision of services between

171. See BARNARD, *supra* note 30, at 365.

172. See Opinion of Advocate General Ruiz-Jarabo Colomer, B.S.M. Geraets-Smits v. Stichting Ziekenfonds VGZ (*Smits & Peerbooms*), Case C-157/99, [2001] E.C.R. I-5473; Opinion of Advocate General Saggio, Vanbraekel v. Alliance Nationale des Mutualités Chrésiennes, Case C-368/98, [2001] E.C.R. I-5363.

173. See *Smits & Peerbooms*, [2001] E.C.R. I-5473.

174. See *id.* ¶ 58.

175. See *Müller-Fauré*, [2003] E.C.R. I-4509.

176. See *id.* ¶ 39.

177. See Vassilis G. Hatzopoulos, *Killing National Health and Insurance Systems but Healing Patients? The European Market for Health Care Services After the Judgments of the ECJ in Vanbraekel and Peerbooms*, 39 COMMON MKT. L. REV. 683, 692–93 (2002) (opining that the ECJ relied on an “atypical” situation to find the economic nature of health care services).

178. See *Smits & Peerbooms*, [2001] E.C.R. I-5473, ¶ 53.

Member States more difficult than the provision of services purely within a Member State”¹⁷⁹ needs to be justified. However, this does not mean that the ECJ obviates the possibility that patient mobility involving intramural care may threaten the financial balance of social security systems and run the risk of disturbing health care planning. In *Smits & Peerbooms*, *Müller-Fauré*, and more recently in *Watts*, the ECJ acknowledged that a system of prior authorization for intramural care may be justified. Since intramural care requires Member States to plan “the number of hospitals, their geographical distribution, the mode of their organization and the equipment with which they are provided, and even the nature of the medical services which they are able to offer,”¹⁸⁰ to guarantee “sufficient and permanent access to a balanced range of high-quality hospital treatment”¹⁸¹ on the national territory, and “to control costs and to prevent, as far as possible, any wastage of financial, technical and human resources,”¹⁸² the ECJ has ruled that a system of prior authorization is “both necessary and reasonable.”¹⁸³ However, a system of prior authorization may only comply with the principle of proportionality insofar as a series of substantive and procedural conditions are fulfilled. In relation to the former conditions, although the Member State of affiliation may refuse to authorize an experimental or unconventional treatment, its decision must be based on up-to-date international scientific information.¹⁸⁴ Additionally, unless the Member State of affiliation provides an equally effective treatment without undue delay, an authorization must be granted. When evaluating whether a treatment can be given without undue delay, the competent national authorities must examine, on a case-by-case

179. *Watts v. Bedford Primary Care Trust*, Case C-372/04, [2006] E.C.R. I-4325, ¶ 94; *see also Smits & Peerbooms*, [2001] E.C.R. I-5473, ¶ 61; *Kohll v. Union des Caisses de Maladie*, Case C-158/96, [1998] E.C.R. I-1931, ¶ 33.

180. *Smits & Peerbooms*, [2001] E.C.R. I-5473, ¶ 76; *see also Watts*, [2006] E.C.R. I-4325, ¶ 108; *Müller-Fauré v. Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA*, Case C-385/99, [2003] E.C.R. I-4509, ¶ 77.

181. *Watts*, [2006] E.C.R. I-4325, ¶ 109; *Smits & Peerbooms*, [2001] E.C.R. I-5473, ¶ 78; *see also Müller-Fauré*, [2003] E.C.R. I-4509, ¶ 79.

182. *Watts*, [2006] E.C.R. I-4325, ¶ 109; *Müller-Fauré*, [2003] E.C.R. I-4509, ¶ 80; *Smits & Peerbooms*, [2001] E.C.R. I-5473, ¶ 79.

183. *See Watts*, [2006] E.C.R. I-4325, ¶ 110; *Müller-Fauré*, [2003] E.C.R. I-4509, ¶ 81; *Smits & Peerbooms*, [2001] E.C.R. I-5473, ¶ 80.

184. *See Smits & Peerbooms*, [2001] E.C.R. I-5473, ¶ 94.

basis, the medical condition and history of the patient, the level of pain suffered by him, and how the nature of his disability could adversely affect his professional activities.¹⁸⁵ As for the procedural conditions,¹⁸⁶ the system of prior authorization must be accessible to patients. Decisions of the competent authority must be based on objective, predetermined, and non-discriminatory criteria. Finally, decisions must be taken within a reasonable time and subject to judicial or quasi-judicial review.

Furthermore, with a view to curtailing the degree of discretion enjoyed by the Member States under article 22(1) of Regulation No. 1408/71, the ECJ has decided to partially extrapolate its case law under article 56 TFEU (article 49 EC).¹⁸⁷ As mentioned above, under this provision, the competent Member State may not refuse to issue an authorization if medical treatment cannot be given within “the time normally necessary” for obtaining it.¹⁸⁸ In *Inizan*,¹⁸⁹ the ECJ was called upon to clarify how “normally necessary” must be interpreted. Quoting *Smits & Peerbooms* and *Müller-Fauré*, the ECJ ruled that “normally necessary” must be read *mutatis mutandis* as the Court interprets “without undue delay” under article 56 TFEU (article 49 EC).¹⁹⁰ In the same way, the ECJ also held that article 22 (1) is subject to the same procedural conditions as those introduced under this treaty provision.¹⁹¹ However, in spite of this partial alignment, important differences between the two systems of cross-border health care persist, especially with regard to the level of reimbursement of costs,¹⁹² traveling costs, and accommodation expenses.¹⁹³

185. See *Müller-Fauré*, [2003] E.C.R. I-4509, ¶ 90; *Smits & Peerbooms*, [2001] E.C.R. I-5473, ¶ 104.

186. See *Watts*, [2006] E.C.R. I-4325, ¶ 116; *Müller-Fauré*, [2003] E.C.R. I-4509, ¶ 85; *Smits & Peerbooms*, [2001] E.C.R. I-5473, ¶ 90.

187. TFEU, *supra* note 3, art. 56, 2010 O.J. C 83, at 70; EC Treaty, *supra* note 3, art. 49, 2006 O.J. C 321 E, at 34–35.

188. See *Watts*, [2006] E.C.R. I-4325, ¶ 2.

189. *Inizan v. Caisse Primaire d'Assurance Maladie des Hauts-de-Seine*, Case C-56/01, [2003] E.C.R. I-12,403.

190. See *id.* ¶¶ 44–46.

191. See *id.* ¶ 48.

192. For patient mobility directly based on the treaty, the level of reimbursement may be limited to the cost of equivalent treatment in the Member State of affiliation. By contrast, under the regulation, health care will be covered as if the cross-border patient

In summary, the case law on patient mobility demonstrates that the ECJ has not tilted the balance in favor of either market integration or social security. On the one hand, by drawing the distinction between hospital and non-hospital services,¹⁹⁴ the ECJ makes sure that the overriding reasons of general interest put forward by the Member States are significant and real. On the other hand, while recognizing that a system of prior authorization for hospital care is “both necessary and reasonable” in order to optimize the allocation of limited financial, logistical and professional resources, the ECJ also makes sure that Member States do not exercise this power arbitrarily. Member States must adduce the medical reasons based on international, objective, and scientific criteria. They must also adopt their decision in accordance with a process that safeguards patients’ right to move. Most importantly, the principle of proportionality reminds the Member States that before making a decision, the latter must take into account the right of patients to move freely within the EU.

II. *FRAMING THE PROCEDURAL LAW OF THE MEMBER STATES*

The application of EU law is decentralized.¹⁹⁵ It is for the national courts, as *juges de l’Union*, to enforce EU rights. There is thus a division of tasks between the two levels of governance: EU law provides the right, while national rules of procedure provide the remedy.¹⁹⁶ This distribution of power, embodied in the

was insured under the regime of the host Member State. *See* *Acereda Herrera v. Servicio Cántabro de Salud*, Case C-466/04, [2006] E.C.R. I-5341, ¶ 1.

193. While these types of costs are not covered under the regulation, they are for cross-border patients relying directly on the treaty, provided that the Member State of affiliation covers these costs for patients moving internally (for example, from a city to another city of the same Member State). *Compare* *Leichtle v. Bundesanstalt für Arbeit*, Case C-8/02, [2004] E.C.R. I-2641 *with* *Acereda Herrera*, [2006] E.C.R. I-5341.

194. Nevertheless, this distinction may be difficult to apply. For example, is this distinction governed by the type of medical treatment or the place where it takes place? *See* Elies Steyger, *National Health Care Systems Under Fire (but not too heavily)*, 29 *LEGAL ISSUES OF ECON. INTEGRATION* 97, 105 (2002).

195. *See generally* KOEN LENAERTS ET AL., *PROCEDURAL LAW OF THE EUROPEAN UNION* (Robert Bray ed., 2d ed. 2006); TRIDIMAS, *supra* note 14, at 418–23; MICHAEL DOUGAN, *NATIONAL REMEDIES BEFORE THE COURT OF JUSTICE* (2004).

196. *See* Opinion of Advocate General Léger, *Kühne v. Productschap voor Pluimvee en Eieren*, Case C-453/00, [2004] E.C.R. I-837, ¶ 18; *see also* Walter Van Gerven, *Of Rights, Remedies and Procedures*, 37 *COMMON MKT. L. REV.* 501, 502 (2000).

principle of procedural autonomy, requires the Member States to organize the administration of justice. To enforce their EU rights, applicants must thus look at national law for rules on limitation periods, compensation, unjust enrichment, standing before national courts, the effects of final administrative decisions, and so forth.

Yet, in the absence of harmonization, EU rights would be seriously weakened if their enforcement were at the Member States' absolute mercy. The principles of primacy and direct effect would be reduced to programmatic postulates. That is why, paraphrasing the U.S. Supreme Court in *Cooper v. Aaron*, primacy and direct effect must "make constitutional ideas into living truths,"¹⁹⁷ that is, EU rights must be accompanied by effective remedies.¹⁹⁸

Therefore, an underlying tension exists between, on the one hand, the principles of primacy and direct effect and, on the other hand, the principle of national procedural autonomy. Extreme solutions are barred. There is neither a communitarization of all rules of procedure, nor are the rules merely left alone when they adversely affect the effectiveness of EU rights. Instead, when two constitutional principles point at diverging directions, *balancing* emerges as the adequate solution. To this effect, the ECJ has conditioned the lawfulness of national rules of procedure upon compliance with two principles, namely the principle of equivalence and the principle of effectiveness.

While the first principle is no less than the extrapolation of the general principle of non-discrimination to the law of remedies,¹⁹⁹ the second requires that the enforcement of EU

197. See *Cooper v. Aaron*, 358 U.S. 1, 20 (1958); see also TRIDIMAS, *supra* note 14, at 422.

198. This principle is now codified in article 19 TEU post-Lisbon which provides that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." TEU post-Lisbon, *supra* note 3, art. 19, 2010 O.J. C 83, at 27.

199. Opinion of Advocate General Kokott, *Impact v. Minister for Agric. & Food*, Case C-268/06, [2008] E.C.R. I-2483, ¶ 67. The ECJ has ruled that claims based on EU law must not be treated less favorably than claims based on national law. In order to apply this principle, "the purpose and cause of action" of both claims must be similar. *Levez v. Jennings Ltd. (Harlow Pools)*, Case C-326/96, [1998] E.C.R. I-7835, ¶ 41. The principle of equivalence includes both direct and indirect discrimination. See *Preston v. Wolverhampton Healthcare NHS Trust v. Midland Bank plc*, Case C-78/98, [2000] E.C.R. I-3201, ¶ 51; *Harlow Pools*, [1998] E.C.R. I-7835, ¶¶ 46-47; see also *Transportes*

rights at the national level must not be “virtually impossible or excessively difficult,” that is, national rules of procedure must ensure a basic threshold of judicial protection.²⁰⁰ Thus, these two principles operate as a framework limiting the procedural autonomy of the Member States.

There are three phases that can be distinguished in the case law as to the application of this framework.²⁰¹ First, from the beginning until the mid-1980s, the ECJ took a very conservative approach. National remedies were the rule, and EU law “was not intended to create new remedies.”²⁰² By contrast, from the mid-1980s to the early 1990s, the ECJ adopted a very active stand. It was posited that the ECJ had embarked on the harmonization of the law of remedies.²⁰³ A look at cases such as *Francoovich*²⁰⁴ and *Brasserie*²⁰⁵ reveals that these assertions were not entirely misguided. In fact, this situation led some scholars to argue that the ECJ often tilted the balance in favor of EU law,²⁰⁶ accusing it of not being an impartial umpire. Today, these criticisms may still echo in the mind of some commentators²⁰⁷ when reading cases such as *Köbler*,²⁰⁸ *Khüne*,²⁰⁹ or *Muñoz*.²¹⁰

A close look at recent cases, however, shows a different picture. Having laid down the foundations of the EU remedial edifice, the ECJ has moved onto a new paradigm. Currently, it is

Urbanos y Servicios Generales SAL v. Administración del Estado, Case C-118/08, [2010] E.C.R. ___, [2010] 2 C.M.L.R. 1053, 1074.

200. See Van der Weerd v. Minister van Landbouw, Natuur en Voedselkwaliteit, Joined Cases C-222 & C-225/05, [2007] E.C.R. I-4233, ¶ 17.

201. See TRIDIMAS, *supra* note 14, at 420–22; DOUGAN, *supra* note 195, at 28–34.

202. Rewe Handelsgesellschaft Nord mbH v. Hauptzollamt Kiel, Case 158/80, [1981] E.C.R. 1805, ¶ 44.

203. See ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 268 (2006) (arguing that “[i]n the second phase, the [ECJ] adopted a much more interventionist stance in which greater emphasis was given to the need to ensure the effective protection of [Union] rights”).

204. *Francoovich v. Italy*, Joined Cases C-6 & C-9/90, [1991] E.C.R. I-5357.

205. *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland*, Joined Cases C-46 & C-48/93, [1996] E.C.R. I-1029.

206. See Mark Hoskins, *Tilting the Balance: Supremacy and National Procedural Rules*, 21 *EUR. L. REV.* 365, 367 (1996).

207. See Peter J. Wattel, *Köbler, CILFIT and Welthgrove: We Can't Go on Meeting Like This*, 41 *COMMON MKT. L. REV.* 177, 190 (2004)

208. *Köbler v. Austria*, Case C-224/01, [2003] E.C.R. I-10,239.

209. *Kühne v. Productschap voor Pluimvee en Eieren*, Case C-453/00, [2004] E.C.R. I-837.

210. *Muñoz y Cia SA v. Frumar Ltd.*, Case C-253/00, [2002] E.C.R. I-7289.

less assertive, and its approach towards the law of remedies has become more nuanced. The Court follows an “objective justification model”²¹¹ or “selective deference,”²¹² whereby some cases are left to the national courts to decide, while the ECJ takes a more proactive attitude in others. One could also suggest that in cooperation with national courts, the ECJ strives to protect the interests embodied in the national rules of procedure while maintaining a sufficient level of judicial protection of EU rights.²¹³ At this time, it cannot be argued that the ECJ does not pay attention to the principle of procedural autonomy. On the contrary, by taking into account the procedural principles enshrined in national law, such as legal certainty, the right of defense, the fair conduct of litigation, or procedural economy, the ECJ and national courts work hand in hand to improve the quality of enforcement of EU rights.

A. *Respecting National Standing Doctrines*

In states with common-law traditions, applicants are often allowed to seek injunctive or declaratory relief against possible acts of public authorities. There is generally no need for the applicants to obtain an administrative act before they can challenge the legislation on which the act is based. For instance, in the United Kingdom, the problem that gave rise to the discussion in *UPA*²¹⁴ and later in *Jégo-Quéré*²¹⁵ would not have arisen. Applicants in the United Kingdom can even bring proceedings against the intention of the legislator to implement a directive.²¹⁶ Likewise, in light of the principle of equivalence, applicants in the United Kingdom enjoy a declaratory-type action

211. DOUGAN, *supra* note 195, at 30.

212. TRIDIMAS, *supra* note 14, at 418–22.

213. See Andrea Biondi, *How to Go Ahead as an EU Law National Judge*, 15 EUR. PUB. L. 225, 238 (2009) (noting that “the relationship between the ECJ and the national courts is pretty healthy, with both sets of courts striving to provide efficient remedies to guarantee the rights of the citizens”).

214. Unión de Pequeños Agricultores v. Council (*UPA*), Case C-50/00P, [2002] E.C.R. I-6677, ¶¶ 7–8, 61.

215. Commission v. Jégo-Quéré, Case C-263/02P, [2004] E.C.R. I-3425, ¶ 1.

216. See Int’l Assoc. of Indep. Tanker Owners v. Sec’y of State for Transport, Case C-308/06, [2008] E.C.R. I-4057; *The Queen, ex rel. Alliance for Natural Health v. Sec’y of State for Health*, Joined Cases C-154 & C-155/04, [2005] E.C.R. I-6451, ¶¶ 49–51; *The Queen v. Sec’y of State for Health, ex parte British American Tobacco (Investments) Ltd.*, Case C-491/01, [2002] E.C.R. I-11,453.

to challenge national laws conflicting with EU law. By contrast, in civil-law states, direct and free-standing challenges against legislation are seen as unduly intruding upon the proper functioning of political institutions.²¹⁷ Applicants wishing to contest the lawfulness of legislative measures must seek indirect challenges, such as an action for damages or raise a plea of illegality against such measures when seeking the annulment of the administrative act based on them. It follows that in states governed by common-law traditions, applicants have easier access to direct legal remedies.

Does this mean that Member States banning free-standing declaratory-type actions are in breach of the principle of effectiveness? Far from being trivial, this question strikes at the epicenter of constitutional justice. Defining when and how applicants may challenge legislative measures has important repercussions not only for applicants' rights, but also for the principle of separation of powers. Granting an open access to courts would result in a critique of the judiciary for intruding in the political process.²¹⁸ In 2007, the ECJ answered this question in the negative in *Unibet*.²¹⁹ That would be otherwise "only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under [EU] law."²²⁰ Consequently, the principle of effectiveness is neutral vis-à-vis direct and indirect legal remedies. Nonetheless, where applicants are forced to face criminal penalties or administrative sanctions in order to avail themselves of the only possible indirect remedy, the ECJ considers that this principle is being infringed.²²¹

It follows that the Member States are free to decide how national legislative measures conflicting with EU law may be challenged, provided that a minimum threshold of judicial protection is attained, it being understood that a remedy which

217. See Alec Stone Sweet, *Why Europe Rejected American Judicial Review and Why It May Not Matter*, 101 MICH. L. REV. 2744, 2744 & n.2 (2003).

218. See, e.g., Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882-83 (1983).

219. *Unibet Ltd. v. Justitiekanslern*, Case C-432/05, [2007] E.C.R. I-2271.

220. *Id.* ¶ 41.

221. See *id.* ¶ 64.

consists of “testing the lawfulness of the law by breaking it”²²² is not an effective one. In so doing, the ECJ duly takes into account cultural traditions as well as ethical values that underpin national rules of procedure.

B. *Simplification of the Legal Process*

An interesting question for national legislators is whether they can create specialized courts whose jurisdiction is limited to enforcing particular national laws. In other words, claims having the same form of action but directly based on EU law would be excluded from the purview of these specialized courts, and directed to ordinary courts. Additionally, actions partly based on national law and partly based on EU law would have to be split in order to have access to these specialized courts.

In essence, this was the issue which the ECJ confronted in *Impact*, decided in 2008.²²³ There, the ECJ held that, insofar as dividing the action into two separate complaints would result in procedural disadvantages for individuals seeking to rely directly on EU law, the principle of effectiveness mandates specialized courts to expand their jurisdiction accordingly.²²⁴ This would be the case where the costs, the duration, and rules of

222. See Opinion of Advocate General Sharpston, *Unibet*, [2007] E.C.R. I-2271, ¶ 44 (echoing the argument previously advanced by Advocate General Jacobs in *UPA*, Case C-50/00P, [2002] E.C.R. I-6677, ¶ 43, in the context of the judicial review of community measures). In *UPA*, Advocate General Jacobs criticized the case law of the ECJ under ex-article 230 EC on the ground that Community regulations not requiring further national implementing measures would force applicants not having standing to breach Community law, exposing them to administrative sanctions, which they could then challenge. Advocate General Jacobs, consequently, urged the ECJ to adopt a more generous approach in defining “individual concern.” Opinion of Advocate General Jacobs, *Unión de Pequeños Agricultores v. Council (UPA)*, [2002] E.C.R. I-6677, ¶ 59. Yet, the ECJ persisted in not departing from its previous case law, holding that this would require a treaty amendment, and noted that, in any event, it is for the national legislators to facilitate indirect challenges. See *UPA*, [2002] E.C.R. I-6677, ¶¶ 40–41. *But see* TFEU, *supra* note 3, art. 263, 2010 O.J. C 83, at 162–63; EC Treaty, *supra* note 3, art. 230, 2006 O.J. C 321 E, at 146 (no longer requiring applicants to be “individually concerned” in relation to “[EU] regulatory act[s] which [are] of direct concern to them and [do] not entail implementing measures”). Arguably, in the light of *Unibet*, it seems that the ECJ is more demanding with national courts than it is with itself. See Anthony Arnall, *Note on Case C-432/05 Unibet (London) Ltd. and Unibet (International) Ltd. v. Justitiekanslern*, 44 COMMON MKT. L. REV. 1763, 1776 (2007).

223. *Impact v. Minister for Agric. & Food*, Case C-268/06, [2008] E.C.R. I-2483, ¶ 37.

224. *Id.* ¶ 55.

representation rendered the exercise of EU rights excessively difficult.²²⁵ The ECJ did not decide whether the applicant was put in a disadvantaged position. This determination was left to the national court.²²⁶

One could object that the Court intruded into the realm of national rules of procedure, since the applicant could have filed its complaint before an ordinary court in the first place. However, this argument is difficult to uphold in light of two procedural principles. First, as indicated by Advocate General Kokott,²²⁷ the allocation of certain claims to specialized courts ensures the efficient administration of justice. In light of their legal expertise, specialized courts are better equipped to provide parties with a faster and more accurate legal solution to the question brought before them than an ordinary court.²²⁸ Secondly, the ruling of the ECJ is consistent with the principle of procedural economy. It aims to prevent applicants invoking EU rights from facing procedural complications and thus improves the procedural system as a whole. Not only would parallel litigation increase the costs of the applicant, but also those of the defendant. National courts would also waste precious time and resources by examining the same legal issues twice. Seen from this perspective, the ECJ and the referring national court cooperated in pursuing the same goal, namely ensuring the quality and speed of the administration of justice.

C. *Endorsing General Procedural Principles of National Law*

EU law does not require national courts to “abandon the passive role assigned to them in civil proceedings by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than

225. *See id.* ¶ 51.

226. *Id.* ¶ 54. However, Advocate General Kokott went a step further, holding that the specialized court should exercise its jurisdiction over the claim directly based on EU law. She opined that any separation of jurisdiction would render a direct reliance on EU rights excessively difficult, weakening its direct effect. *See* Opinion of Advocate General Kokott, *Impact*, [2008] E.C.R. I-2483, ¶ 65. As for the principle of equivalence, she drew a comparison between actions filed before ordinary courts and actions lodged before specialized courts, concluding that the former were considerably more formal, complex, costly, and time-consuming than the latter. *Id.* Accordingly, applicants directly invoking EU law were in a worse position than those relying on national law. *Id.* ¶ 76.

227. *Id.* ¶ 55.

228. *See* Biondi, *supra* note 213, at 230.

those on which the party with an interest in application of [EU law] bases his claim.”²²⁹ Otherwise, the right of defense and the proper conduct of proceedings may be jeopardized. Yet, national courts must raise a point of EU law of their own motion when national law requires or authorizes them to do so,²³⁰ particularly when that point of EU law concerns public policy.²³¹ In relation to consumer protection, EU law vests in national courts the procedural power to examine the unfair character of a jurisdictional clause or of any other contractual term of their own motion.²³²

In *Heemskerk*²³³ delivered in 2008, a Dutch court asked the ECJ whether a national court should invoke EU law of its own motion in order to redress a violation of EU law, despite the fact that this would contravene the principle of Dutch law prohibiting *reformatio in pejus* by putting the individual bringing the action in a less favorable position than if he had not brought that action in the first place.

Advocate General Bot answered this question in the affirmative. He pointed out that the principle of effectiveness, understood as the effective exercise of rights conferred by EU law, was not an appropriate reference for the case at issue.²³⁴ Since no party would raise a plea contrary to its own interests and no administrative authority would be enthusiastic to admit it made a mistake, he urged the ECJ not to look at the “private interests of individuals,” but to examine whether the general interest at the EU level (the financial interests of the EU as well as animal welfare) was safeguarded.²³⁵ To this effect, the Advocate General considered that, as “the last line of defence for

229. *Van Schijndel v. Stichting Pensioenfonds voor Fysiotherapeuten*, Joined Cases C-430-31/93, [1995] E.C.R. I-4705, ¶ 22.

230. *See id.* ¶ 14.

231. *See Eco Swiss China Time Ltd. v. Benetton Int’l NV*, Case C-126/97, [1999] E.C.R. I-3055.

232. *See Mostaza Claro v. Centro Móvil Milenium SL*, Case C-168/05, [2006] E.C.R. I-10,421; *Cofidis v. Jean-Louis Fredout*, Case C-473/00, [2002] E.C.R. I-10,875; *Océano Grupo Editorial v. Murciano Quintero*, Joined Cases C-240 & C-244/98, [2000] E.C.R. I-4941. For a more recent case, see *Pannon GSM Zrt. v. Erzsébet Sustikné Gyórfi*, Case C-243/08, [2009] E.C.R. I-4713.

233. *Heemskerk BV & Firma Schaap v. Productschap Vee en Vlees*, Case C-455/06, [2008] E.C.R. I-8763.

234. *See* Opinion of Advocate General Bot, *Heemskerk*, [2008] E.C.R. I-8763, ¶ 122.

235. *Id.* ¶ 127.

correcting a misapplication of [EU] law by a competent national authority,”²³⁶ the referring court should mandate of its own motion the recovery of all sums already paid, even if this entails setting aside the principle of Dutch law prohibiting *reformatio in pejus*.

The ECJ, however, took a different approach. It held that EU law does not require national courts to violate the prohibition of *reformatio in pejus* contained in national law. In its view, “[s]uch an obligation would be contrary not only to the principles of respect for the rights of the defence, legal certainty and protection of legitimate expectations . . . ,” but it would also put the applicant “in a less favorable position than he would have been in, had he not brought that action.”²³⁷

Heemskerk thus demonstrates the ECJ’s serious commitment to respecting the principles enshrined in national rules of procedure. While the approach defended by the Advocate General would have encouraged national authorities to be more rigorous when exercising their discretion and would have prevented recipients from retaining unlawfully obtained funds,²³⁸ the ECJ reckoned that these concerns were not pressing enough to depart from the principle of Dutch law prohibiting *reformatio in pejus*. The Court prioritizes the defense of the procedural rights of the parties over endorsing *à tout prix* effectiveness of the judicial enforcement of the general interest at EU level. This case also indicates that the ECJ is not so keen on limiting the principle of procedural autonomy where the applicant’s EU rights are not at risk.

D. *Preserving the Division of Jurisdiction between the ECJ and National Courts*

The principle of *res judicata* aims at reinforcing legal certainty by establishing that judicial proceedings at some stage become final. Not only has this principle been recognized by the ECJ in relation to judicial review of EU acts,²³⁹ but also as to

236. *Id.* ¶¶ 128–29.

237. *Heemskerk*, [2008] E.C.R. I-8763, ¶ 47.

238. See Opinion of Advocate General Bot, *Heemskerk*, [2008] E.C.R. I-8763, ¶ 144.

239. See *Associazione Industrie Siderurgiche Italiane v. High Auth. of the Eur. Coal & Steel Cmty.*, Case 3/54, [1955] E.C.R., 63; *Italy v. High Auth. of the Eur. Coal & Steel Cmty.*, Case 2/54, [1954] E.C.R. 37, ¶ 55; *France v. High Auth. of the Eur. Coal & Steel*

national judicial proceedings involving EU law.²⁴⁰ However, as recognized by the national systems themselves²⁴¹ and by the European Court of Human Rights,²⁴² this principle is not absolute. For instance, where a judicial decision blatantly violates fundamental rights, its final character cannot be upheld. By the same token, the principle of *res judicata* should not stand in the way of principles vital for the EU, such as the principle of primacy or conferred competence. Thus, in *Lucchini*,²⁴³ the ECJ was asked whether a Commission decision, declaring that state aid granted to an Italian company was unlawful, had to be given effect by Italian authorities despite a final decision of an Italian civil court to the contrary. Not having brought annulment proceedings against the Commission decision, the recipient of the aid sought to rely on the principle of *res judicata* in order to avoid recovery. In a succinct judgment, the ECJ held that EU law required national courts to comply with the Commission decision, even if this meant “refusing . . . to apply any conflicting provision of national legislation.”²⁴⁴

The ruling of the ECJ in *Lucchini* has been criticized on the ground that it erodes the *res judicata* principle. Critics argued that regardless of whether one agrees or not with the argument that state liability for acts of the judiciary undermines the principle of *res judicata*, *Köbler* at least did not adversely affect the rights of private parties, whereas in *Lucchini*, the recipient of the aid was forced to reimburse it more than twelve years after the flawed judicial decision became final.²⁴⁵ The right avenue would

Cmty., Case 1/54, [1954] E.C.R. 1, 17; see also *P & O European Ferries v. Commission*, Joined Cases C-442 & C-471/03P, [2006] E.C.R. I-4845, ¶ 43; *Commission v. AssiDomän Kraft Products*, Case C-310/97P, [1999] E.C.R. I-5363, ¶ 54.

240. See *Kapferer v. Schlank & Schick GmbH*, Case C-234/04, [2006] E.C.R. I-2585, ¶¶ 20–21; *Kühne v. Productschap voor Pluimvee en Eieren*, Case C-453/00, [2004] E.C.R. I-837, ¶ 23, 28; *Köbler v. Austria*, Case C-224/01, [2003] E.C.R. I-10,239, ¶¶ 38–39; *Eco Swiss China Time Ltd. v. Benetton Int’l NV*, Case C-126/97, [1999] E.C.R. I-3055, ¶¶ 46–47.

241. See Opinion of Advocate General Geelhoed, *Ministero dell’Industria, del Commercio e dell’Artigianato v. Lucchini SpA*, Case C-119/05, [2007] E.C.R. I-6199, ¶ 37.

242. See *S.A. Dangeville v. France*, 2002-III Eur. Ct. H.R. 71.

243. *Lucchini*, [2007] E.C.R. I-6199, ¶ 48.

244. *Id.* ¶ 61.

245. See Petr Briza, *Lucchini SpA—Is There Anything Left of Res Judicata Principle?*, 27 *CIV. JUST. Q.* 40, 44 (2008).

rather have been for the Commission to initiate infringement proceedings against Italy.²⁴⁶

However, these arguments seem to play down the crux of the ECJ's rationale. In addition to being a clear violation of EU law, the flawed judicial decision threatened the vertical allocation of powers between the EU and the Member States. In contrast to previous cases where the principle of *res judicata* was discussed, *Lucchini* involved the encroachment by a national court on an exclusive competence of the EU.²⁴⁷ Not only did the Italian court misinterpret the obligations EU law imposes on it, but it also exceeded its jurisdiction. Such upfront attack on the principle of primacy could not be tolerated, even if cloaked in the principle of national procedural autonomy.

Indeed, no one will contest that the principle of primacy would be reduced to nothing if the principle of *res judicata* prevented a final decision issued by a national court, which declares void an EU act, from being set aside.²⁴⁸ The same constitutional damage is suffered by the EU legal order when a national court strips the Commission of its exclusive competence to declare state aid incompatible with the common market. Therefore, in order to protect the constitutional equilibrium, the ECJ had no other option but to intervene.

Finally, suppose that the Commission decision had been unsuccessfully challenged by the recipient and that no appeal had been brought against the ruling of the EGC. There would then be two conflicting rulings, both final. Using a temporal criterion to award preclusive effect does not seem appropriate, especially if the earlier ruling is issued by a national court that lacks jurisdiction. Far from undermining the principle of *res judicata*, the ECJ is simply relying on the principle of primacy to avoid parallel EU and national litigation leading to jurisdictional conflicts. Thus, in *Lucchini*, the ECJ did not forever turn its back on the principle of *res judicata*. On the contrary, in so far as national courts operate within their jurisdiction, due account must be taken of this principle.

246. *See id.* at 49.

247. *See* Opinion of Advocate General Geelhoed, *Lucchini*, [2007] E.C.R. I-6199, ¶ 47.

248. *See* Foto-Frost v. Hauptzollamt Lübeck-Ost., Case 314/85, [1987] E.C.R. 4199, ¶ 20 (holding that the EU judiciary enjoys exclusive jurisdiction to declare void an EU act held to be illegal).

CONCLUSION

There are no enclaves of national sovereignty precluding EU law from displaying its pervasive effects. Instead, provided that there is a link with the substantive law of the Union, there is an EU framework that percolates through all areas of national law, limiting the discretion of national legislators and administrative authorities. Consequently, the latter must foresee possible links with EU law and draft national measures accordingly (alternatively, they may also decide to limit the application of a given measure to purely internal situations).

Ultimately, it is therefore the existence (or absence) of this link that is decisive in the vertical allocation of powers. The area of law within which the conflict between national law and EU law arises does not really matter in this respect. As a corollary of this link, EU law leaves unaddressed reverse discrimination. For example, a German couple who has always resided in Germany may not use a double-barreled surname when naming their child. Traditionally, these situations are left to the national political process to tackle or are redirected to the judicial process where they would have to pass muster under the relevant national constitutional provisions. For example, it would be for the German legislator or for the German courts applying the German constitution to put an end to reverse discrimination.

Furthermore, since Member States may justify restrictions prohibited in principle by the treaty provisions on free movement and EU citizenship by referring to reasons of general interest (as recognized by the EU), the degree of scrutiny employed by the ECJ in assessing their validity is also crucial in defining how much power is left to the Member States.

In the absence of harmonization, pursuant to the principles of equivalence and effectiveness, it is for national procedural rules to afford a sufficient level of judicial protection to EU rights. Recent case law demonstrates that the ECJ and national courts cooperate to improve the quality of litigation while not neglecting the protection of EU rights. In sum, the ECJ takes into account the principles enshrined in national rules of procedure.

Finally, far from being immutable, the EU framework has shifting contours, and the pervasive effect of EU law must be assessed on a case by case basis. This is not surprising. As shown by the examples taken from the case law of the ECJ, the

application of the treaty provisions on free movement and EU citizenship as well as the application of the principles of equivalence and effectiveness often involve balancing colliding interests of equal constitutional ranking. The ECJ must perform this challenging task in a constructive dialogue with national courts.