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## The Common Market at 50

*Niamh Nic Shuibhne\**

### 1. Introduction

This contribution reflects on both the state and the value of the internal market within the broader context of European integration. The paper seeks to engage with two core themes, running in parallel throughout. First, an outline of the character and design of the internal market from a legal perspective is presented, to identify both the informing legal principles that underpin the internal market and the changing influence and priorities of the EU institutional actors within that process. Second, the role and significance of the internal market within the *current* EU framework and its durability *beyond* this will be questioned, bearing in mind that this framework presents a structure radically evolved and deeply complex relative to that within which the market project was originally embedded. This also raises a tension between the market's intrinsic importance yet curious fragility, both structural and ideological/political. In focusing on a thematic overview of things in this way, the contribution is thus intended to complement the studies in this volume that engage with more specific expressions of internal market rights.<sup>1</sup>

To explore these ideas in more depth, the paper is structured in three main sections: first, a brief sketch of some internal market 'evolutions' to map certain features of the changing internal market landscape; second, analysing in more detail some of the legal principles underpinning the realisation of that market; and third, some remarks on the actors participating in and thereby shaping the present and likely directions of the market. In its concluding remarks, the paper looks very much to the future, framing a challenge about both the willingness towards and methodology of seeing the internal market well into old(er) age.

### 2. Evolutions

What is the context in which the internal market now sits? What is its purpose, 50 years on? Two very big questions; we can hope, at best, to pick out some trends that have shaped how they might be answered in looking over the past five decades.

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<sup>1</sup> See in particular, the papers by Dermot Cahill (free movement of goods) and Patricia Conlon (free movement of persons).

There is no doubting the post-War instinct that propelled the common market idea and yielded a Treaty of Rome which mapped a basic programme of work for its realisation. Now, its descendant the internal market clearly does jostle for position in a global market, yet it can finally relish too the rise of the Euro as a genuinely significant international currency force. It is a sophisticated market that embraces values such as protection of the environment and of the consumer as inherent concerns alongside the fundamental freedoms. Article 14 EC reflects this complexity very simply but powerfully, characterising the market as an ‘area’ – as broad a conceptual space as any, and one that can accommodate prevailing interests and counter-interests without too much difficulty (the idea of accommodating these interests in a *legal* sense is picked up again below). The contemporary internal market of 27 includes States that did not exist in 1957, and States that did exist but would have been a poor prediction for common market membership. The subjects (if that is the right word) of the internal market have also assumed a variety of personae over time, evolving from factors of production, to consumers, ultimately to citizens and perhaps the more straightforward ‘persons’ in the ‘area of freedom, security and justice’ (see for example, Article 2 EU and Article 61 EC). *How* we trade has been utterly transformed too. The (abridged) story of services captures this evolution very nicely, tracing from the ‘craftsmen’ of Article 50 EC, through the telephonic provision of services in *Alpine Investments*,<sup>2</sup> to the complicated E-Commerce Directive.<sup>3</sup>

Set against and into those contexts, there are also points of legal evolution. Rather than attempting to construct or repeat a detailed chronology of the internal market here,<sup>4</sup> some defining legal trends or moments will be briefly outlined instead. The classic judgments in *Dassonville*<sup>5</sup> and *van Binsbergen*<sup>6</sup> established a strongly market-oriented interpretative

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<sup>2</sup> Case C-384/93 *Alpine Investments v Minister van Financiën* [1995] ECR I-1141.

<sup>3</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’), OJ 2000 L178/1.

<sup>4</sup> For more thorough expositions of the internal market story, see P. Craig, ‘The evolution of the single market’, in C. Barnard and J. Scott (eds.), *The Law of the Single European Market: Unpacking the Premises*, (Oxford: Hart Publishing, 2002), 1-40, and L. Gormley, ‘The internal market: History and evolution’, in N. Nic Shuibhne (ed.) *Regulating the Internal Market* (Cheltenham: Edward Elgar Publishing, 2006), 14-28. It is also worth noting that any substantive meaning drawn from the overlap or otherwise of the ‘internal’, ‘single’ and ‘common’ market concepts is removed by the Lisbon Treaty’s exclusive reference to the internal market throughout the text (if somewhat confused by the Commission’s latest Communication on the topic of the ‘single market’, see further notes 77 and 82 below, and accompanying text).

<sup>5</sup> Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837.

<sup>6</sup> Case 33/74 *Van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299.

framework through which actual or potential restrictions on free movement continue to be assessed. The ‘mandatory requirements’ doctrine, implicit in *van Binsbergen*<sup>7</sup> but more overtly developed in *Cassis*,<sup>8</sup> softened things for the Member States. This doctrine has since rippled across the freedoms under various vocabulary guises<sup>9</sup> and marks a realistic recognition that not all public interest arguments are necessarily protectionist (and nor can they be captured in finite Treaty provisions). Finally, even where public interest arguments are accepted in principle, they must yet satisfy stringent proportionality requirements.<sup>10</sup> Some of these concepts are picked up in section 3 below, in the context of an internal market underpinned by ideas of both discrimination and access.

Picking up the thread of evolutions, the market momentum shifted from the Court to the Commission through the post-*Cassis* emphasis on realising the principle of mutual recognition, a process that delivered the landmark 1985 White Paper<sup>11</sup> and in turn the Single European Act. But the mid 1980s mark, on one view, the last days of that single market golden era. The focus of successive Treaty amendments after the Single European Act shifted more towards objectives either to flank or go beyond a strictly-market purpose. The new Treaty provisions that emerged from those processes dipped into the pool of mandatory requirements and added them in a positive sense i.e. as legitimate policy objectives for the EC to pursue in a collective way, so that environmentally conscious technical standards or questions about product safety would not just be ‘negative’ i.e. State-centred justifications put

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<sup>7</sup> *Van Binsbergen*, para. 12.

<sup>8</sup> Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.

<sup>9</sup> See for example: *Alpine Investments* (services; para. 40, ‘an imperative reason in the public interest’); Case C-415/93 *Union Royal Belge des Sociétés de Football Association v Bosman* [1995] ECR I-4921 (workers; para. 45, ‘imperative requirements’); Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703 (citizenship; para. 66, ‘objective considerations that are independent of the nationality of the persons concerned’); Case C-446/03 *Marks & Spencer plc v Halsley (Her Majesty Inspector of Taxes)* [2005] ECR I-10837 (establishment; para. 44, ‘an overriding reason in the public interest’).

<sup>10</sup> An archetypal expression of the justification/proportionality framework can be found in Case C-55/94 *Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para. 37: ‘national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.’ For an in-depth, empirical study of the case law on justification and proportionality, see C. Barnard, ‘Justifications, proportionality and the four freedoms: Do they really protect State interest?’, in C. Barnard and O. Odudu (eds) *The Outer Limits of EU Law* (Oxford: Hart Publishing, forthcoming).

<sup>11</sup> European Commission, *Completing the Internal Market*, COM (85) 310.

forward defensively on an individual or case-by-case basis. The loose concept of the 'area' was noted above as reflecting and pursuing precisely that sense of something 'more than' a market, or more than a market idea very crudely or narrowly drawn at least.

The legal developments that punctuated this enriched and unfolding context demonstrate the tensions that fall to be reconciled in a more encompassing market structure than that which had been attempted under the earlier four-freedoms-plus-*Cassis* model. The boundaries of legislative harmonisation were tested, for example, by invoking a forked undercurrent in *Tobacco Advertising* of both excessive regulatory competence claims on the one hand and the propriety of public health regulation under Article 95 EC on the other.<sup>12</sup> The frontiers of social solidarity were (and continue to be) challenged in the case law on healthcare and education.<sup>13</sup> There is also a sense that legislation is becoming 'the new case law' through increased regulation of traditional market sectors that once drove the jurisprudence. For example, while the boundaries of Article 28 EC will remain a work in progress for some time to come,<sup>14</sup> there is no shortage of comprehensive legislation on the free movement of goods.<sup>15</sup> Similarly, services (we have already noted the E-Commerce Directive, for example); here, additionally, the passage of what started life as the Bolkestein Directive culminated in a partly failed attempt to generalise the rights of service provision and receipt.<sup>16</sup> This type of 'case law capture' legislation raises obvious challenges for institutional balance and for inter-institutional relations. All of this provokes interesting questions more broadly too, not just about *why* but *how* we regulate. It makes us think about the need for and value of legislation and harmonisation in an era of EU governance; about

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<sup>12</sup> Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419; and the sequel, Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573.

<sup>13</sup> Case law examples now abound in both spheres but for good overviews of the development of the case law, see the opinions and judgments in Case C-372/04 *The Queen, on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health* [2006] ECR I-4325 (healthcare) and Case C-76/05 *Schwarz and Gootjes-Schwarz v Finanzamt Bergisch Gladbach*, judgment of 11 September 2007, not yet reported (education).

<sup>14</sup> See, for example, contrasting opinions recently delivered in two (at the time of writing, still pending) cases addressing restrictions on the use of products, Case C-110/05 *Commission v Italy* (pending; Opinion of AG Léger delivered on 5 October 2006) and Case C-142/05 *Åklagaren v Mickelsson and Roos* (pending; Opinion of AG Kokott delivered on 14 December 2006).

<sup>15</sup> A striking example is Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), OJ 2006 L396/1, which continues from p. 1 through to p. 849 of that volume of the OJ.

<sup>16</sup> The original Commission (Bolkestein) proposal was published as COM (2004) 2 final/3; a second, heavily revised proposal was published in summer 2006 (COM (2006) 160 final), now enacted as Directive 2006/123/EC on services in the internal market, [2006] OJ L376/36.

why and how we regulate *effectively* in the enlarged 27 State market; and about the role of law within the regulatory function. These questions are picked up again in sections 3 and 4 below.

Looking at a final question in the context of market evolutions, the humanising influence of EU citizenship is difficult to gauge and raises interesting questions about the ‘personality’ of the internal market. There is no denying the legally tangible impact of citizenship, over the last decade especially. There are strong examples in the case law where recourse to Article 18 EC made the legal difference, where the individual’s status as an EU citizen generated rights that might have been ruled out by the national court on an assessment of the facts under, for example, Article 39 EC and the free movement of workers.<sup>17</sup> But is it arguable that, even without Article 18 EC, a humanising momentum applied consistently to the ‘basic’ free movement provisions might have arrived at the same legal place? The sufficient resources and comprehensive medical insurance criteria predate the EC Treaty amendments that codified EU citizenship; those conditions could originally be found in the ‘general’ residence directives.<sup>18</sup> The application of proportionality to the conditions in *Baumbast* was certainly facilitated by EU citizenship, but not necessarily dependent on it.<sup>19</sup> The significance of reading free movement rights through the lens of fundamental rights has had decisive effect outwith citizenship also.<sup>20</sup> And the tricky question of national budgetary autonomy has also been pierced, as noted earlier, by developments in the field of healthcare (hooked there on Article 49 EC and the receipt of services). An internal market could thus deliver very human results; but of course, those rights are arguably more fragile if they stay grounded in secondary legislation rather than in the clear primary statements of Article 18 EC. The humanising trend within free movement law was therefore a necessary prerequisite for successful EU citizenship law, but probably not sufficient on its own to deliver the substance of it.

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<sup>17</sup> E.g. Case C-85/96 *Martínez Sala v Freistaat Bayern* [1998] ECR I-2691; Case C-456/02 *Trojani v Centre public d’aide sociale de Bruxelles (CPAS)* [2004] ECR I-7573.

<sup>18</sup> Directives 90/364, 90/365 and 93/96 (OJ 1990 L180/26, L180/28 and OJ 1993 L317/59 respectively; now repealed and replaced by Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L229/35.

<sup>19</sup> Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091; at para. 91 of the judgment, the Court states that ‘those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality’ without an express supporting reference to the law or principles of EU citizenship.

<sup>20</sup> See especially, Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

Turning from this broad contextual outline of the internal market, the following section seeks to explore in more legal depth the development of its key underpinning principles.

### 3. Underpinning principles

The idea of general principles of Community law is familiar to all of us. It encapsulates a highest-level code of good behaviour and includes vital concepts such as equal treatment, legitimacy, accountability, and so on. The keyword, not surprisingly, is 'general' since these principles inform and constrain the exercise of competences across the full span of the Treaty. Welded into the legal evolutions condensed in section 2 above, there are distinct currents of general principles that resonate especially strongly for internal market law. They are not tied in isolation to any particular judgment or piece of legislation, nor necessarily tied to any one of the fundamental freedoms. These are the legal principles that underpin the *arc* of internal market law, that make it an often coherent whole as against more specific or sectoral expressions through a particular subset of free movement rights. This doesn't mean that internal market law is heterogeneous or uniform, or that any free movement situation can be analysed or resolved using a fixed and non-varying legal toolkit. Rather, a notion of legal currents generates the idea of an internal market legal framework held together by common principles, working broadly in tandem with each other but not striving for uniformity of approach as an absolute value in and of itself.<sup>21</sup>

The principles of justification and proportionality introduced above form part of the backbone of internal market law. They form a sort of 'counter-principle' against the scope of free movement rights. In other words, for every Treaty freedom, there is both an express area for Member State derogation<sup>22</sup> and as we saw in section 2, a wider (implied) area through the doctrine of objective justification. The Court of Justice has established some further principles on the relationship between free movement rights and the justification of national measures actually or potentially restricting those rights:

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<sup>21</sup> For an example of academic work exploring the convergence of free movement rights, see C. Barnard, 'Fitting the remaining pieces into the goods and persons jigsaw?', (2001) 26 *European Law Review* 35-59.

<sup>22</sup> See Article 18(1) EC (citizenship); Article 39(3) EC (workers); Article 46(1) EC (establishment); Article 55 EC (services); Article 58 EC (capital).

1. *The scope of free movement will be interpreted widely, but the scope of justification will be construed narrowly:* This is a long and firmly established canon of EC Treaty interpretation. The evolution of this principle is illustrated very well through the interpretation of derogations from the free movement of persons: thinking of how the space for Member State derogation has been constrained over time, we started with an early Directive (64/221<sup>23</sup>) adding more specific limitations to the exercise of public health, policy and security competence on the part of Member States; we then saw a series of cases narrowing that scope even further on the basis of the freedom widely/justification narrowly interpretative mechanism;<sup>24</sup> and now, a newer Directive that sought deliberately to capture this case law (2004/38) and to reflect the added intensity caused by the realisation of EU citizenship.<sup>25</sup>
  
2. *Even where a justification argument is found to be legitimate, the requirements of proportionality will often defeat the State measures under review:* Staying with the free movement of persons as an example, the requirements of proportionality must be respected and can still have a decisive impact on the outcome of disputes grounded in legitimate Member State derogations.<sup>26</sup> This holds true across the freedoms.<sup>27</sup> Sometimes, however, the application of proportionality can offer a way out for the Member States. The decision in *Collins* shows this very neatly. It was established in that case that for an EU citizen to be entitled to a job-seeker's allowance in a host State (there, the UK), it was legitimate to attach an integration condition to that claim i.e. 'after it has been possible to establish that a genuine link exists between the person seeking work and the employment market of that State'.<sup>28</sup> The Court added a proviso, however, 'while a residence requirement is, in principle, appropriate for the

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<sup>23</sup> Directive 64/221/EEC (OJ Sp. Ed. 1964 850/64, p. 117; now repealed and replaced by Directive 2004/38.

<sup>24</sup> Some classic examples include: Case 36/75 *Rutili v Ministre de l'intérieur* [1975] ECR 1219, Case 30/77 *R v Bouchereau* [1977] ECR 1999, and Joined Cases 115 and 116/81 *Adoui and Cornuaille v Belgium* [1982] ECR 1665.

<sup>25</sup> See Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri v Land Baden-Württemberg* [2004] ECR I-5257, para. 65 ('[i]t must be added that a particularly restrictive interpretation of the derogations from that freedom is required by virtue of a person's status as a citizen of the Union').

<sup>26</sup> See Case 118/75 *Watson v Belmann* [1976] ECR 1185 for an early application, and more recently, Case C-100/01 *Ministre de l'Intérieur v Aitor Oteiza Olazabal* [2002] ECR I-10981, especially at paras. 41-44.

<sup>27</sup> See again, C. Barnard, 'Justifications, proportionality and the four freedoms', above n. 10, who demonstrates this through detailed empirical analysis of case law.

<sup>28</sup> Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703, para. 69.



purpose of ensuring such a connection, if it is to be proportionate it cannot go beyond what is necessary in order to attain that objective'.<sup>29</sup> This leaves the door open for the national referring court to find that the residence requirement is necessary, and therefore proportionate (as happened back in the UK, with Mr Collins ultimately losing back in the Court of Appeal). Extensive empirical research would be needed to discover what happens back in referring national courts more generally; it is perhaps safe to conjecture, though, that in most judgments, the Court of Justice leaves referring courts and tribunals with very little room within which the fundamentals of proportionality can be manoeuvred.

3. *Arguments based on economic grounds are not acceptable justifications*: While this is, again, a basic principle long underpinning the interpretation of free movement (or more precisely, arguments seeking to justify restrictions on free movement), it would be misleading to describe it as an enduring 'hard and fast' rule. It is clear that the Court always has seen (and continues to see) economic protectionism as the antithesis of the internal market rationale. But it is also clear that as the subject matter of the internal market and the substantive impact of free movement law evolved in ways outlined earlier, Member State concerns could not be written off purely because the associated arguments were economically oriented. What we are left with is not altogether coherent. There are three key points here. First, it is still fair to say that economically centred arguments tend not succeed. Second, this still casts the Court, therefore, as an advocate against economic protectionism, with 'aims of a purely economic nature' usually getting short shrift.<sup>30</sup> But third, the reasons behind these outcomes can sometimes be a bit more complex than 'no economic

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<sup>29</sup> *Ibid.*, para. 72; the Court goes on in this paragraph to give more specific expression to this general idea, adding that 'its application by the national authorities must rest on clear criteria known in advance and provision must be made for the possibility of a means of redress of a judicial nature. In any event, if compliance with the requirement demands a period of residence, the period must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State.'

<sup>30</sup> See, for example, Case C-120/95 *Decker v Caisse de Maladie des Employés Privés* [1998] ECR I-1831 (para. 31; free movement of goods); Case C-35/98 *Staatssecretaris van Financiën v BGM Verkooijen* [2000] ECR I-4071 (para. 48, free movement of capital); Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509 (para. 72, free movement of services). And beyond the freedoms, see Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [1998] ECR I-4075 (para. 44, protection of the environment); Case C-361/98 *Italy v Commission* (para. 48, transport).

justifications please'. The Court does listen to some of these arguments,<sup>31</sup> since it is often clear that the judgments proceed to *refute* them rather than simply *dismiss* them. The Court also suggests in some cases that it is the thinness of Member State submissions in terms of economic *evidence*, rather than their reflection of budgetary or other economic *concerns*, that defeats the claim.<sup>32</sup>

4. *Whether express or implied justifications may be used depends on the nature or character of the measure under review*: This statement captures another principle that holds true for the most part but which has developed fuzzier edges over time. We have seen above how the concept of justification works. But an added condition is that when a directly discriminatory or distinctly applicable State measure is being reviewed, then only the derogations expressly listed in the Treaty should be considered. In cases of indistinctly applicable measures, whether indirectly discriminatory or not discriminatory at all in their effect, then arguments can be drawn from the broader 'objective justification' doctrine. Rationalising this simplistically, the 'worse' or more deliberately discriminatory the State act, then the fewer possibilities it has available to it when trying to defend the measure; and vice versa. We have also seen, however, a more general inclination within the Court at least to listen to justification arguments that the Member States wish to have considered; and this has, at times, meant that public interests not expressly specified in the Treaty alongside the freedom in question *have* been considered even for directly discriminatory measures.<sup>33</sup> Advocate-General Jacobs very directly asked the Court to confront this evolution in *PreussenElektra*.<sup>34</sup> His plea rested in an appeal to legal certainty: in a general or theoretical sense, the 'old' principle remains intact and so this means that any individual inroads into it are simply left there without reasoned explanation as

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<sup>31</sup> The case law on medical services provides another good example of this; see for example, Case C-158/96 *Kohll v Union des Caisses de Maladie* [1998] I-ECR 1931, para. 41.

<sup>32</sup> See Case C-147/03 *Commission v Austria* [2005] ECR I-5969, para. 65: '[i]t must be pointed out that no estimates relating to other courses have been submitted to the Court and that the Republic of Austria has conceded that it does not have any figures in that connection.' See also, *Kohll*, para. 42; for a more measured approach where financial implications *are* taken into consideration, see Case C-372/04 *The Queen, on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health* [2006] ECR I-4325 (paras. 110-114, going on as might be expected, however, to assert the proviso of proportionality).

<sup>33</sup> The classic example here is the *Walloon Waste* case i.e. Case C-2/90 *Commission v Belgium* [1992] ECR I-4431; and see again, the judgment in *Decker*.

<sup>34</sup> See paras. 220-228 of Advocate-General Jacobs' Opinion in Case C-379/98 *PreussenElektra AG v Schleswag AG* [2001] ECR I-2099.

to ‘why in this case’. But the Court remained silent on this particular question and so the Advocate-General’s challenge remains.

This analysis suggests that the interpretation of principles underpinning both the freedoms and justifications has undoubtedly become more fluid over time. In reality, the Court is willing to listen to most arguments in most cases. And this again reflects the idea of the internal market as a complex amalgam of trade and non-trade values.<sup>35</sup> The last point about the nature or character of free movement restrictions merits further examination, however, as it raises two further questions about underpinning principles: (a) is the requirement of ‘movement’ itself a principle of an internal market law? (b) if the character of restrictions on movement still matters, how do the principles of non-discrimination and market access fit together? These questions will be looked at in turn.

*a. Movement as a principle*

It might seem a little odd to think of movement as a ‘principle’. But movement is the axis on which internal market law essentially turns. We saw at the outset how the way in which we trade has been transformed since the birth of the common market; these factual, economic and technological developments have also had an impact on the way in which movement is interpreted. Taken into account for the purposes of opening up the application of EC law to different factual situations, we can now find substantive Community rights grounded in all kinds of movement: past movement,<sup>36</sup> sporadic movement,<sup>37</sup> future movement,<sup>38</sup> virtual

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<sup>35</sup> In the context of non-trade values and Article 95 EC, see together, S. Weatherill, ‘Supply of and demand for internal market regulation: Strategies, preferences and interpretation’ and B. de Witte, ‘Non-market values in internal market legislation’, in N. Nic Shuibhne (ed.) *Regulating the Internal Market*, (Cheltenham: Edward Elgar, 2006), 29-60 and 61-86 respectively.

<sup>36</sup> E.g. Case C-370/90 *R v Immigration Appeal Tribunal and Singh, ex parte Secretary of State for the Home Department* [1992] ECR I-4265 (freedom of establishment).

<sup>37</sup> This is obviously part and parcel of the freedom to *provide* services; but the legislature and Court together extended the scope of Article 49 EC to service *receipt* also, through Directive 73/148, OJ 1973 L172/14 (now repealed and replaced by Directive 2004/38/EC) and Joined Cases 286/82 and 26/83 *Luisi and Carbone v Ministero del Tesoro* [1984] ECR 377 (paving the way for the legal logic of citizenship in due course; see further n. 44 below).

<sup>38</sup> Although the Court rejected the possibility that purely hypothetical movement could be used to invoke the protection of citizenship rights (see Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629), other decisions come closer to protecting an as-yet-to-be exercised right to move (for example, Case C-348/96 *Criminal Proceedings against Donatella Calfa* [1999] ECR I-11, in the context of expulsion *for life* from Greece on the basis of criminal convictions; Case C-148/02 *Garcia Avello v Belgium* [2003] ECR I-11613, para. 36 in particular, on the inconvenience ‘liable to be caused’ by different rules on surnames). Advocate-General Sharpston has also

movement,<sup>39</sup> the movement of others,<sup>40</sup> contractual movement,<sup>41</sup> passport movement,<sup>42</sup> and downright deliberate movement.<sup>43</sup> It is also true that a fundamental disconnect between the *nature* of the movement and the *substance* of the rights being claimed has been allowed to evolve over time.<sup>44</sup> This means in consequence that there is not necessarily a *qualitative* relationship between the extent of the movement undertaken and the extent of the rights protected in turn (again, clearly illustrated by *Carpenter*, where temporary service provision from time to time in other States (nature of movement) was still strong enough to secure spousal home State residence rights (substance of rights claimed).

The fact remains that movement, in at least one of the variable even inchoate shapes outlined above, *must* occur if the protection of internal market law is to be triggered.<sup>45</sup> But in

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emphasised the distinction between 'purely hypothetical' and 'potential' (see her Opinion in Case C-212/06 *Government of the French Community and Walloon Government v Flemish Community*, pending; Opinion delivered on 28 June 2007, para. 64 *et seq* in particular). The 'potential' impact of a restriction on the free movement of goods is long established, but comes into sharper relief in case law skirting close to purely internal effect (for example, Joined Cases C-321-324/94 *Criminal proceedings against Pistre* [1997] ECR I-2343, Case C-448/98 *Criminal proceedings against Guimont* [2000] ECR I-10663; see also, the Opinion of Advocate-General Poiares Maduro in Case C-72/03 *Carbonati Apuani Srl v Comune di Carrara* [2004] ECR I-8027).

<sup>39</sup> *E.g.* *Alpine Investments*, where the movement (of services) in question was over telephone lines.

<sup>40</sup> *E.g.* Case C-255/99 *Humer* [2002] I-1205 (movement of the worker's dependent relative); Case C-403/03 *Schempp v Finanzamt München V* [2005] ECR I-6421 (movement of the EU citizen's former spouse).

<sup>41</sup> *E.g.* Case C-214/94 *Boukhalfa v Bundesrepublik Deutschland* [1996] ECR I-2253, where the governing of a contract of employment by the law of another Member State enabled the worker to invoke Community law rights.

<sup>42</sup> *E.g.* *Collins*; Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925.

<sup>43</sup> It is a well established principle that deliberately taking advantage of Community rights by moving with that express intent does not constitute an abuse of Community law (for example, Case C-212/97 *Centros* [1999] ECR I-1459, freedom of establishment; Case C-109/01 *Secretary of State for the Home Department v Akrich* [2003] ECR I-9607, free movement of workers).

<sup>44</sup> This separation of personal and material scope is illustrated very well in Case C-85/96 *Martínez Sala v Freistaat Bayern* [1998] ECR I-2691, but had been established before then through case law on the receipt of services (Case 186/87 *Cowan v Trésor Public* [1989] ECR 195). The decision in *Carpenter*, also grounded in services, perhaps marked a high watermark of this disconnect (Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279), since no formal link between Mr Carpenter's service provision in other Member States and his (third country national) wife's residence in his home State (the UK) was required to be shown.

<sup>45</sup> In quite a different sense, it is worth noting the significance of including free movement clauses in directives by contrasting the first (Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, especially para. 104) and second (Case C-380/03 *Germany v Parliament and*

thinking about the essence of that variability, real questions fall to be answered about the shrinking core of purely internal matters that can, in a comparative sense, lead to reverse discrimination against home State producers or home State nationals. In 2002, I articulated a view that the preservation of the purely internal State space in subject fields regulated by Community law (inasmuch as imports from or nationals, for example, of other Member States were concerned) was difficult to sustain given how increasingly easy it had become to fulfil the requisite movement condition.<sup>46</sup> I qualified this with a rider that the constitutional implications of breaking down that final internal barrier would be so profound, however, that any attempt so to do should come not from the Court but from the Member States themselves. At that time, judgment had just been delivered in *Carpenter*, a case that laid bare the artificialness of the ‘freedom stretching’ point so very strongly.<sup>47</sup> Since that time, however, the device of EU citizenship has been used more effectively by the Court in cases where the ‘market’ link in terms of the traditional four freedoms was really quite tenuous, thus marking a shift into more ‘general’ movement of the person/citizen and being all the more legally palatable for it.<sup>48</sup> But the basic questions about reverse discrimination remain, and are arguably as exacerbated by citizenship as they are in other ways resolved by it.<sup>49</sup> Advocate-General Sharpston recently summarised some of the problematic asymmetries generated by reverse discrimination very plainly:

I must confess to finding something deeply paradoxical about the proposition that, although the last 50 years have been spent abolishing barriers to freedom of movement between Member States, decentralised authorities of Member States may nevertheless reintroduce barriers through the back door by establishing them within

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*Council* [2006] ECR I-11573, at paras. 73-75) *Tobacco Advertising* judgments, relating to the extent to which State regulatory differences can survive legislative harmonisation via directives under Article 95 EC.

<sup>46</sup> See N. Nic Shuibhne, ‘Free movement of persons and the wholly internal rule: Time to move on?’, (2002) 39 *Common Market Law Review* 731-771.

<sup>47</sup> See in particular the very critical *Common Market Law Review* editorial on the judgment, ‘Freedoms unlimited?’ (2003) 40 *Common Market Law Review* 537-543.

<sup>48</sup> E.g. Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925, paras. 21-23 especially, where the Court reasoned that ‘[Directive 73/148] cannot in any event serve as a basis for a right of residence of indefinite duration of the kind with which the main proceedings are concerned’, which confirms one half of the decision in *Carpenter*; but the Court did not address in *Chen* whether that right could stem from Article 49 EC (able to use Article 18 EC in this case, of course, it didn’t have to).

<sup>49</sup> See E. Spaventa, ‘Reversing reverse discrimination: Some issues about equality, judicial review and Union Citizenship’, in Barnard and Odudu (eds), (forthcoming); in the same volume, see also A. Tryfonidou, ‘The outer limits of Article 28 EC: Purely internal situations and the development of the Court’s approach through the years’.

Member States. One might ask rhetorically, what sort of a European Union is it if freedom of movement is guaranteed between Dunkirk (France) and De Panne (Belgium), but not between Jodoigne and Hoegaarden?<sup>50</sup>

The internal market is defined in Article 14 EC Treaty (and reaffirmed by the Lisbon Treaty) in a sufficiently open way so as to enable the Court to break the purely internal barrier if it chooses to; putting it bluntly, there are no borders, internal or external, in this 'area'.<sup>51</sup> But it is political and constitutional rather than legal complexity that we need still to be careful about here. The fact remains that while we may have gotten into this legal untidiness through liberal jurisprudence on the interpretation of 'movement', the solution to it remains too important, too contested and too fundamental a constitutional evolution to come through that same route.<sup>52</sup>

*b. The nature of restrictions: restricting what?*

Despite the years of thought that have gone into unpacking the ideas of discrimination and market access, this section will attempt (somewhat dangerously!) to highlight some of the problematic or unresolved issues that continue to drive a current debate.<sup>53</sup> There is no doubting the pivotal significance of non-discrimination (on grounds of nationality) as a cornerstone principle of internal market law over the decades; and in the EC internal market, that principle guided the breaking down of barriers for beneficiaries of all four freedoms (although as might be expected, the language of non-discrimination veers much more into the territory of fundamental (even human) rights when the situation relates to the movement of natural persons). Accepting this to be true, however, does not sidestep very difficult remaining questions: *Does discrimination retain functionality as a principle in today's internal market? Should it? What about the relationship between discrimination and market access? Can they co-exist, or are they mutually exclusive? If there is a limb of market access in the current application of internal market law? If there is, is it the right one? And how does market access relate to the thorny question of de minimis?*

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<sup>50</sup> See again *Government of the French Community and Walloon Government v Flemish Community*, para. 116 of the Opinion.

<sup>51</sup> See again *ibid.*, paras. 127-130 especially.

<sup>52</sup> Advocate-General Sharpston does take some account of this, encouraging in the first instance at least 'fuller participation from the Member States and (as a corollary) a more developed presentation by the Commission' (*ibid.*, para. 156).

<sup>53</sup> These questions receive much fuller treatment in the contribution to this volume (on the free movement of goods) by Dermot Cahill.

Claims about the non-functionality of discrimination do not call the conceptual qualities of the principle (or its achievements) into question; they are more in the vein of ‘necessary but not sufficient’ or ‘not fit for purpose’ arguments. Through that debate, it can be said that there clearly still exists a fundamental tension between a *positive* sense of the internal market that calls for a test based on access to the market outwith the comparative assessments inherent in a discrimination test, and a conceivably more *negative* one that focuses strongly on the movement/border idea and tries only, therefore, to effect a level playing field within each State ‘pocket’ of the market – equal treatment(s), not special treatment.

As suggested at the outset of this piece, the roots of a market access approach were not discovered in the mid 1990s but lie back as far as the foundational cases of *Dassonville* (goods) and *van Binsbergen* (services). In *Dassonville*, the definition of measures having equivalent effect to a quantitative restriction<sup>54</sup> was borrowed from competition law,<sup>55</sup> but crucially, without transposing also formative tests such as the *de minimis* threshold. The formulae adopted in *van Binsbergen* continued the notion of *access* to the market, through the use of language both relating to but also beyond discrimination:

[T]he restrictions to be abolished pursuant to [Article 49 EC] include *all requirements* imposed on the person providing the service by reason *in particular* of his nationality or of the fact that he does not habitually reside in the state where the service is provided, which do not apply to persons established within the national territory *or which may prevent or otherwise obstruct* the activities of the person providing the service.<sup>56</sup>

In *Keck*,<sup>57</sup> the Court sought very deliberately, to check the sense that Article 28 EC was careering off a logical interpretative course; yes, there is (in paragraph 17) direct reference to the notion of market access, but the Court stated very plainly that it was to be applied in a comparative way (thus looking for guidance to the situation of home producers or home sellers or home service providers, and so on). In other words, the Court sought in *Keck* to dispel a construction or presumption that *any* imagined limitation of the freedom to market imported goods fell within the scope of the *Dassonville* formula and did not need to be tested against the reality of access to the actual marketplace where domestic and imported goods were to compete for the attention of the consumer. *Keck* thereby sought to retain attention on the domestic marketplace of the Member State of import. But by referring to *modalités de vente*

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<sup>54</sup> *Dassonville*, para. 5.

<sup>55</sup> See Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235, p. 249.

<sup>56</sup> *Van Binsbergen*, para. 10 (emphasis added).

<sup>57</sup> Case C-267-268/91 *Criminal proceedings against Keck and Mithouard* [1993] ECR I-6097.

(poorly translated into English as ‘selling arrangements’), this only made the confusion worse since the judgment did not define at what point or points in the supply chain the selling arrangement might apply. It also meant that an almost mystical but in fact really distracting significance became attached to the notion of a selling arrangement that misses the more fundamental points in the judgment about markets and access to them and how that access was intended to be measured.

Despite the now renowned reactions to *Keck* from both within<sup>58</sup> and outwith<sup>59</sup> the Court, the compound *comparative access* test devised there was repeated shortly afterwards in *Alpine Investments*, in the context of services.<sup>60</sup> Shedding light on the counter-intuitive notion of non-discrimination, a market access approach was also used to demolish the football transfer system in *Bosman*, under the auspices of Article 39 and the free movement of workers.<sup>61</sup> A more ‘access friendly’ approach is clearly detectable over time in post-*Keck* Article 28 case law.<sup>62</sup> But even more openly, in *Säger* the Court stressed that:

Article [49 EC] requires *not only the elimination of all discrimination* against a person providing services on the ground of his nationality but also *the abolition of any restriction, even if it applies without distinction* to national providers of services and to those of other Member States, when it is liable to prohibit *or otherwise impede* the activities of a provider of services established in another Member State where he lawfully provides similar services.<sup>63</sup>

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<sup>58</sup> E.g. Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec v TFI Publicité SA* [1995] ECR I-179 (Opinion of Advocate-General Jacobs, especially para. 39 onwards).

<sup>59</sup> E.g. S. Weatherill, ‘After *Keck*: Some thoughts on how to clarify the clarification’ (1996) 33 *Common Market Law Review* 885-906.

<sup>60</sup> *Alpine Investments*, para. 37.

<sup>61</sup> *Bosman*, paras. 103 and 129 especially; in the latter paragraph, the Court referred quite strikingly to the ‘*fundamental right of free access to employment which the Treaty confers individually on each worker in the Community*’ (emphasis added).

<sup>62</sup> See especially, Case C-254/98 *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH* [2000] ECR I-151 and Case C-405/98 *Konsumentombudsmannen v Gourmet International Products AB (GIP)* [2001] ECR I-1795 (see also the Opinion of Advocate-General Jacobs, especially paras. 29-31; Case C-416/00 *Morellato* [2003] ECR I-9343; Case C-20/03 *Criminal proceedings against Burmanjer* [2005] ECR I-4133; Case C-158/04 *Alfa Vita* [2006] ECR I-8135.

<sup>63</sup> Case C-76/90 *Säger v Dennemeyer* [1991] ECR I-4221, paragraph 12.



And within EU citizenship and the field of personal movement, we can trace a parallel loosening of movement and residence rights from the mooring of discrimination and Article 12 EC.<sup>64</sup>

Does this mean the end of discrimination in internal market law? Probably not; or at least, not yet. The *Common Market Law Review* has described *Säger* as the ‘grandfather’ of the country of origin principle.<sup>65</sup> But the failure to have that principle embedded in the provision and receipt of services via the original Bolkestein draft directive suggests that the (majority of the) Community institutions are not quite ready to give up the comparative notion of market access just yet. Nonetheless, and a bit like the pursuit in physics of a Theory of Everything, the enticing prize attached to the working out of a coherent philosophy and scheme of market access continues to provoke both Court<sup>66</sup> and academic<sup>67</sup> attention. As noted above, the label of ‘selling arrangement’ probably continues unhelpfully to confuse (and possibly to constrain) how we think about these issues today.<sup>68</sup> If market access is ultimately the best criterion, applicable across the complete reach of internal market law, then the residual role and function of discrimination must (if any) needs to be considered and worked out very carefully.<sup>69</sup> There must also be some way of delimiting the scope of the freedoms in relation to non-discriminatory obstacles. Here, the immature concept of remoteness might yet have a very important part to play.<sup>70</sup> And all of this demonstrates that anyone who thought the dilemmas posed/created by *Keck* were passé in internal market law would need to think again.

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<sup>64</sup> See Advocate-General Ruiz-Jarabo Colomer in Joined Cases C-11/06 and C-12/06 *Morgan v Bezirksregierung Köln; Bucher v Landrat des Kreises Düren* (judgment of 23 October 2007, not yet reported; Opinion delivered on 20 March 2007), para. 43.

<sup>65</sup> (Editorial), ‘The services directive proposal: Striking a balance between the promotion of the internal market and preserving the European social model?’, (2006) 43 *Common Market Law Review* 307-311, p. 309.

<sup>66</sup> E.g. Case C-158/04 *Alfa Vita* [2006] ECR I-8135 (Opinion of Advocate-General Maduro).

<sup>67</sup> E.g. D. Wilsher, ‘Does *Keck* discrimination make any sense? An assessment of the non-discrimination principle within the European Single Market’, (2008) 33 *European Law Review* 3-22.

<sup>68</sup> See note (13ish) above, on two cases currently pending that challenge the outer limits of Article 28 EC but not in a ‘selling arrangement’ sense.

<sup>69</sup> Attempts to reconcile rather than choose between discrimination and market access can be seen in N. Nic Shuibhne, ‘The free movement of goods and Article 28 EC: An evolving framework’, (2002) 27 *European Law Review* 408; S. Enchelmaier, ‘Four freedoms, how many principles?’, (2004) 24 *Oxford Journal of Legal Studies* 155.

<sup>70</sup> This issue is discussed more fully in D. Edward and N. Nic Shuibhne, ‘Continuity and change in the law relating to services’, in A. Arnull, P. Eeckhout and T. Tridimas (eds.), *Continuity and Change: Essays in honour of Sir Francis Jacobs*, (Oxford: OUP, 2008), pp. 256-258.

The preceding sections have traced the practical evolution of how we trade and the legal evolution of how that trade is regulated within the internal market. We turn more overtly now to siting the market in its current and future contexts, and to exploring a bit further who plays what role in determining those contexts.

#### 4. Market Actors

Although they are of course so much more as well, states are also markets. And state markets involve a combination of regulatory institutions and the participation of both economic and private actors. In other words, we would not have or need to have a market without market actors. In the EC internal market, the levels of participation are more varied and therefore more complicated than those that apply in the case of state markets. Even presenting a very simplified construction,<sup>71</sup> the key players or actors in the vast transnational, cross-border internal market include consumers/citizens, legal persons, States, regional and national institutions (legislative, administrative and judicial) and EC institutions (legislative, administrative and judicial).

The significance and benefits of the internal market for consumers are key limbs of the momentum charged with rationalising its existence and the pursuit of its 'completion'; but also of its legitimacy, and the legitimacy of the servicing legal order it has generated. It's all about the consumer; and increasingly, all about the consumer/citizen. The rights of the consumer/citizen are primarily grounded in free movement, as discussed throughout this paper. Thinking about market actors, however, it is worth noting that we can also see through this lens a sense of duty or responsibility as well as privilege and rights. All of this is an unavoidable consequence of the 'new legal order...the subjects of which comprise not only Member States but also their nationals'.<sup>72</sup> The traditional dichotomy between regulation of the market (addressed to States and effected through free movement law) and regulation of the actors participating in the market (effected through competition law) no longer holds

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<sup>71</sup> Leaving out the raft of Comitology committees, for example (see further, P. Lindseth, "'Weak" constitutionalism? Reflections on comitology and transnational governance in the European Union', (2001) 21 *Oxford Journal of Legal Studies* 145-163 and C. Bergstrom, *Comitology: Delegation of Powers in the European Union and the Committee System*, OUP, 2005); and the varied EC agencies and bodies both central and peripheral to regulating and sustaining the internal market.

<sup>72</sup> Famously, from Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

steadfast, with speckled patterns of horizontality spreading across free movement law.<sup>73</sup> The most 'complete' version of horizontality is attached to Article 39 EC.<sup>74</sup> More generally, beyond situations where standards are regulated on a collective basis,<sup>75</sup> the idea of *state* responsibility (based on Article 10 EC) for erroneously *allowing* counter-market behaviour by private actors is the most likely far extent to which a horizontality of sorts will reach.<sup>76</sup>

The Commission's 2007 Single Market Review<sup>77</sup> is very firmly rooted in this ideology of a market 'for' the citizen. Its vision is grounded in informing consumers/citizens, and thereby empowering them; and for their benefit, in tackling the immense contemporary challenges stemming from trading in a global, technologically advanced and environmentally insecure market. Using precisely the imagery of interlinked market actors, the Commission concludes that '[a]s a joint endeavour of all stakeholders and all levels of government, the single market will show how Europe can deliver results for its citizens.'<sup>78</sup> Does the citizen/consumer actually know this, however? The number of 'fully moving' EU consumers/citizens (e.g. those taking up work in a host State on a fairly permanent basis) has always been relatively small; but almost everyone is touched by the *reality* of the internal market on a daily basis – a cursory glance at the shelves of any grocery shop with a moment's reflection on where the products come from will show this. And yet, popular rejection of the Constitutional Treaty in the Netherlands and France was shown to relate, at least to some extent, not to the codification of primacy or the working out of Council voting (the natural preoccupations of the States negotiating the eventual text); but to concerns about social and economic issues (against a heightened climate of EU enlargement) – in other words, to

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<sup>73</sup> For a more in-depth overview of horizontality in the internal market, see J Baquero Cruz, 'Free movement and private autonomy', (1999) 24 *European Law Review* 603-620; R. Lane, 'The internal market and the individual', in N. Nic Shuibhne (ed), *Regulating the Internal Market* (Cheltenham: Edward Elgar, 2006), 245-276.

<sup>74</sup> This follows a track from rules of private origin that restricted access to employment on a collective basis (Case 36/74 *Walrave v Union Cycliste Internationale* [1974] ECR 1405; confirmed in *Bosman*), to a statement that 'the prohibition of discrimination on grounds of nationality laid down in Article [39 EC] must be regarded as applying to private persons as well', Case C-281/98 *Angonese v Cassa di Risparmio di Bolzano* [2000] ECR I-4139 (para. 36).

<sup>75</sup> For example, the judgment in *Walrave* relates also to services, confirmed recently in Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Eyggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet*, judgment of 18 December 2007, not yet reported, para. 98; on freedom of establishment, see Case C-438/05 *International Transport Workers' Federation v Finnish Seamen's Union*, judgment of 11 December 2007, not yet reported.

<sup>76</sup> E.g. on the free movement of goods, see Case C-265/95 *Commission v France* [1997] ECR I-6959 and Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659.

<sup>77</sup> European Commission, *A single market for 21st century Europe*, COM(2007) 724 final.

<sup>78</sup> *Ibid.*, p. 14.

concerns about the internal market. This suggests a disconnect between the force-fed centrality of the internal market to the EU project in institutional communications (it was reaffirmed consistently throughout the 2007 review, for example) and the engagement of consumers *in fact* with its function, purpose, objectives and benefits. Two recent legislative initiatives – on mobile phone roaming charges and airline passenger compensation<sup>79</sup> – are real achievements by the Community legislature, very much ‘for’ the consumer and ‘against’ reluctant, resistant, and powerful, traders/industries. But do people even know, when they have lower bills after returning from holiday or receive a food voucher because their flight has been delayed, that these benefits originated with the legislative initiative and persistence of the EC institutions? This is where the focus on better information comes in, and where it can have a tangible gains touch-point without just resting too abstractly in the domain of high integration rhetoric.

Looking at the institutions and the States as actors and questioning their commitment to the internal market does not necessarily reveal coherence or shared objectives either.<sup>80</sup> It is commonplace that States effectively disown their own role in and commitment to internal market legislation, for example, preferring instead to sigh wearily or angrily (as best politically befits the issue in question and the mood or feeling of the national electorate(s) about it) and assign all culpability to ‘Brussels’. The European Parliament is the institution most clearly linked to the consumer/citizen; yet its handling of the recent services directive amendments contributed sorely to the ultimate emasculation of the measure and revealed very starkly the vulnerability of Parliament to the pressures of competing market petitioners.<sup>81</sup> The 2007 Review sheds further light on institutional relationships for the ‘21st century internal market’. The use of a legislative programme to deliver the objectives of the Review is expressly excluded, demonstrating the evolution of the market over time and the

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<sup>79</sup> Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community, OJ 2007 L171/32; Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, OJ 2004 L46/1.

<sup>80</sup> It is rather striking (and not a little depressing) that a recent House of Lords European Union Committee Report stressed as a core finding the need for States to inject a sense of urgency into the review of the single market (*e.g.* para. 59, 5th Report of Session 2007-2009, *The Single Market: Wallflower or dancing partner?*, available via <http://www.parliament.the-stationery-office.co.uk/pa/ld/ldeucom.htm>).

<sup>81</sup> Tracing the life-story of what is now Directive 2006/123 and the processes that contributed to the ‘many detrimental consequences for [its] technical legal quality’, see B. de Witte, *‘Setting the Scene: How did Services get to Bolkestein and Why?’*, Mitchell Working Paper Series No. 3/2007, available at <http://www.law.ed.ac.uk/mitchellworkingpapers/index.aspx>

range of regulatory methods (of which legislation is just one) that the Commission feels is best suited 'to foster[ing] flexibility and adaptability while maintaining the legal and regulatory certainty necessary to preserve a well-functioning single market'.<sup>82</sup> This vision of things reflects the Commission's understandable concern with the implementation and enforcement of internal market law as well as its innovation. But this seems rather different from the Court's vision of and commitment to free movement law, which remains deeply committed to a more prescriptive uniformity of internal market law. How are the two to be reconciled? The approach of the Court reflects a framework designed over 50 years ago for six States. But can the uniform application of market law be sustained robustly in a market with 27 State actors? Internal markets are robust entities in their state incarnations; think about the USA, for example, a market that is far from crumbling internally even though it can tolerate the devolution and thus diversity of, for example, sales tax rates – a fiscal framework that would be complete anathema to the creed of the EC customs union.

A critical point here is confidence – confidence to appreciate the economic, social, political and legal advances of the past 50 years; and related to this, the confidence expressly to acknowledge the inseparable link between the achievement of the internal market and the consolidation of the new legal order that evolved to enable it.<sup>83</sup> But the legal order is not so new now; and it is worth, at least, asking the question about whether the approach inherited from the market of six at the beginning of an extremely ambitious trans-national experiment remains the right approach today. What we fail to acknowledge in this context is that the experiment has largely *succeeded*. The EC and later EU have transformed more than the State markets they sought to bond; they have challenged profound doctrines of legal and political thought, perhaps none more so that sovereignty. But any individual problem, any difficult issue, any disagreement, legal or political, has the capacity still to have the States and/or the citizenry reaching for hyperbolic language of failure – if that judgment is challenging, then this surely means the whole EU has failed; if that one negotiation delivers a stalemate, then surely the whole EU is doomed. We cannot seem to separate the sum from its parts, or the value of the sum from its parts.

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<sup>82</sup> *A single market for the 21st century.*, p. 4.

<sup>83</sup> This connection is reflected almost unconsciously by several authors; see for example, Schepel and Wesseling, '[t]he authors of Europe rally as one around the Court in its patient creation of a genuine supreme European legal order' H. Schepel & R. Wesseling, 'The legal community: Judges, lawyers, officials and clerks in the writing of Europe' (1997) 3 *European Law Journal* 165-188, p. 186. Cf. Eeckhout, however, who reminds us too that 'ultimately, here, we are not speaking of the role of one particular court, but of the role of law and lawyers' (P. Eeckhout, 'The European Court of Justice and the legislature', (1998) 18 *Yearbook of European Law* 1-28, p. 28).

We need, quite simply, to get over this. If we accept that the EU (and by implication, its internal market) is going nowhere any time soon, then perhaps we can then gather the confidence to ask whether the legal and political mechanisms attached to the market are, in the language of regulation, fit for purpose. This is a conversation inexcusably absent from most of the recent Treaty (or more accurately, Treaties) reform process(es). We also need to face up to the fact that our reliance on the Court to step in when we (collectively, States and citizens) have not faced up to difficult questions is generated by *us* and not by some mercenary and/or self-serving institutional power-hunger. But we need also to be very careful. First, the Court's primary responsibility in interpreting Community law comes from Article 220 EC; so it can only interpret what it's given within the Treaty construct (broadly read, to include the spirit and scheme as well as the wording, in accordance with the *van Gend en Loos* framework). There is also the tension, applicable to all courts, about the proper boundaries between creative interpretation and making policy.<sup>84</sup> Moreover a Court of 27 judges, multiple chambers and a full court quorate at just 15/27 is unlikely to gel in a way that enables a coherence of output to the extent that would be necessary to steer the internal market through such a marked period of self-reflection and transition.

More broadly than the Court, however, we need also to reflect on the role of law more generally in sustaining the internal market. It is perhaps understandable that an internal market lawyer develops an insular sense of the significance and effectiveness of law as a mechanism for delivering the market. But it would be very unwise not to reflect more deeply on this, and to take into account very carefully the economics of integration and the economics in particular of preferential trading areas within a global market. The recent political drama over the status of free competition in the internal market area (plugged eventually into a compromise-laden Protocol) demonstrates that the political actors may not have the heart just now to take on the sustainability challenge either. Where does that leave us then?

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<sup>84</sup> And the term policy is deliberately chosen here over the term law, since courts *do* make law, all the time. For one view on the difficult question of courts and policy-making, see Eeckhout, above n. 70, p. 2, who sees legislation as the 'distillation product of policy-making. And policies are to be made by political institutions, ultimately responsible to citizen-voters through general elections.'

## 5. Concluding Remarks

One of the most poignant anecdotes about the signing of the original Treaty of Rome is that, owing to shortage of time and typists, the signatories put their names to a sheaf of largely blank pages for the official signing ceremony and photo-call. In so many ways, this has had resonance for the life since then of the internal market and internal market law. It also says something about who the authors of the course of the internal market actually are. The 2007 Review, as noted, highlighted the global, technological and environmental challenges that face the 50 year old common market as it enters its sixth decade. But an overarching challenge, and one perhaps that is just as much internal as external, is the question of *sustainability* – of the market, of its objectives, and looking to the focus of this volume, of its law.

The analysis presented here suggests that, notwithstanding the achievements of the past 50 years, and notwithstanding the variety of actors contributing to the structure and substance of this market, there is a striking abdication of responsibility for its next phase. The 1985 White Paper had a strong agenda, a clearly mapped programme for the achievement of that agenda, and the serendipity of the institutions and States working largely together with a definite commitment to and optimism about the whole thing. Looking back just over twenty years on the occasion of a significant later birthday is an inevitable aspect of nostalgia; and we should be careful not to seek replication of the objectives and methods of that time for that reason. But the 2007 Review emits a sense of defeat, almost a hopelessness in the face of the scale of the challenges. There is also a feeling that the institutions are not quite working together at the moment; that there are visions rather than a vision of things. This would not have to create dysfunction but could in fact contribute to a healthy and interesting debate on the future of the internal market. But the most worrying thing of all is that such a debate seems very far off the agenda – anyone's agenda. The 2007 Review is an excruciating attempt to outline *some* kind of agenda, but the thinness of its ambition serves only to magnify problems and not plot how to resolve them.

We, collectively (as citizens, States and institutions), need to grasp this particularly stinging nettle and work out just what a 21st century internal market really *does* demand, and *how* that can be achieved – all against a more clearly stated assumption of wanting it, and being willing to let go of forcing upon it a fragility that defies its accomplishments in reality. We should not let the prolonged Treaty reform processes of recent years put us off a *real* review of the internal market; we should not be concerned about how long it takes and we

should be willing to engage with whatever it might reveal, politically, legally and socially as well as economically. We owe it that much.

And then, with luck, many happy returns.