



## UvA-DARE (Digital Academic Repository)

### Equal respect, capabilities and the moral limits of market exchange: denigration in the EU internal market

Tjon Soei Len, L.K.L.

**DOI**

[10.1080/20414005.2017.1321949](https://doi.org/10.1080/20414005.2017.1321949)

**Publication date**

2017

**Document Version**

Final published version

**Published in**

Transnational Legal Theory

**License**

CC BY-NC-ND

[Link to publication](#)

**Citation for published version (APA):**

Tjon Soei Len, L. K. L. (2017). Equal respect, capabilities and the moral limits of market exchange: denigration in the EU internal market. *Transnational Legal Theory*, 8(1), 103-118. <https://doi.org/10.1080/20414005.2017.1321949>

**General rights**

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

**Disclaimer/Complaints regulations**

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

*UvA-DARE is a service provided by the library of the University of Amsterdam (<https://dare.uva.nl>)*

# Equal respect, capabilities and the moral limits of market exchange: denigration in the EU internal market

Lyn K. L. Tjon Soei Len<sup>a,b</sup>

<sup>a</sup>Assistant Professor, Women's Studies Program, Law and International Feminist Studies, University of New Hampshire, Durham, NH, USA; <sup>b</sup>Researcher, Centre for the Study of European Contract Law, Amsterdam Law School, Amsterdam, The Netherlands



## ABSTRACT

The EU's central task is to improve the lives of European citizens. The EU acts out that task by enhancing its internal market, on the assumption that market exchanges are a primary way individuals pursue their own conceptions of the good life. While the EU aims to enable market exchange through its legal structures, it does not demarcate the moral limits of its internal market. As such, the EU approach to the internal market has decoupled market logic from morality. However, justice requires that European citizens are treated with equal respect and that the exchanges they wish to pursue are subject to a generalisable normative standard. This paper explores the question of how and where the moral limits of the internal market are drawn as a question of justice, and argues that the current European approach to this question fails to safeguard European citizens from denigration.

**KEYWORDS** Capabilities; political liberalism; moral limits of the internal market; sexual morality; denigration

## 1. Introduction

The EU portrays the establishment of the internal market as one of its biggest achievements within the larger project of European unification. However, concerns about a disjunction between, on the one hand, European integration through the internal market and, on the other hand, ideals of justice have become widespread.<sup>1</sup> Particularly, the EU has been scrutinised for failing to ensure justice in the internal market through a legal framework that governs the foundations of private exchange, that is, general rules of contract law.

**CONTACT** Lyn K. L. Tjon Soei Len  [Lyn.TjonSoeiLen@unh.edu](mailto:Lyn.TjonSoeiLen@unh.edu)  Women's Studies Program, University of New Hampshire, 203 Huddleston Hall, Durham, NH 03824, USA

<sup>1</sup> In relation to contract law, see Daniela Caruso, 'Qu'ils mangent des contrats: Rethinking Justice in EU Contract Law' in Gráinne de Burca and others (eds), *Europe's Justice Deficit?* (Hart Publishing, 2015). All websites accessed 24 April 2016.

© 2017 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group

This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial-NoDerivatives License (<http://creativecommons.org/licenses/by-nc-nd/4.0/>), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original work is properly cited, and is not altered, transformed, or built upon in any way.

First, to the extent that the EU enacts legal instruments that aim to promote internal market exchange, critics argue that the dominant justificatory narrative of economic efficiency and market growth displaces substantive notions of justice.<sup>2</sup> Second, the failure to enact, on a European level, a system of legal rules that safeguards even a minimum standard for just market conduct represents an important justice deficit in the EU, revealing an internal market without an institutional framework that provides background justice.<sup>3</sup>

In part, these justice concerns regarding the EU relate to a broader set of worries about the changing role that markets play in human lives. Channeled as marketisation and commodification concerns, they express the idea that some ‘things’ and relationships should be sheltered from the market and its rationality.<sup>4</sup> Said differently, some exchanges should simply not occur on the market at all, because they are beyond its moral limits. Currently, there exists no European legal articulation of the moral limits of internal market exchange. This means that on a European level, there are no proposed or enacted rules of general contract law that set substantive standards for the validity of private exchanges. In other words, the EU leaves it up to Member States to determine if the private exchanges that people may wish to engage in on the European internal market, are legally binding, and qualify as binding contracts to begin with.

Viewpoints on the appropriate moral limits of market exchange vary widely between the national contract laws of different European states. If the EU strives to be just, it must set some limits to private exchange.<sup>5</sup> The question of how and where these limits should be drawn is a matter of justice within the larger project of an ever-closer EU.<sup>6</sup>

---

<sup>2</sup> See Gert Brüggemeier and others, ‘Social Justice in European Contract Law: A Manifesto’ (2004) 10(6) *European Law Journal* 653; Marija Bartl, ‘Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political’ (2015) 21(5) *European Law Journal* 572.

<sup>3</sup> See Martijn Hesselink, ‘Unjust Conduct in the Internal Market’ (2016) Centre for the Study of European Contract Law Working Paper Series 2014–14, online: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2532375](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2532375).

<sup>4</sup> See Margaret Jane Radin, *Contested Commodities. The Trouble with Trade in Sex, Children, Body Parts, and Other Things* (Harvard University Press, 1996); Martha Ertman and Joan C Williams (eds), *Rethinking Commodification: Cases and Readings in Law and Culture* (New York University Press, 2005); Debra Satz, *Why Some Things Should Not Be for Sale: The Moral Limits of Markets* (Oxford University Press, 2010); Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Farrar, Straus and Giroux, 2012).

<sup>5</sup> Without such limits, those who are disadvantaged may be willing to engage in desperate exchanges (eg exchanging organs for money), unable to engage in political life (eg market for political votes) or unable to afford police protection. For a powerful illustration, see Joseph William Singer, ‘Things That We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society’ (2006) 2 *Harvard Law & Policy Review* 139.

<sup>6</sup> The idea that contract law in Europe is subject to requirements of justice has been explored and argued elsewhere. This paper moves forward on the premise that the EU can be appropriately regarded as subject to requirements of justice. For a discussion of this connection within the political liberal tradition of justice, see Hesselink (n 3); Josse Gerard Klijnsma, ‘Contract Law as Fairness. A Rawlsian Perspective on the Position of SME's in European Contract Law’ (2014) Centre for the Study of European Contract Law; Lyn Tjon Soei Len, *The Effects of Contracts Beyond Frontiers: A Capabilities Perspective on Externalities and*

This paper argues that the European approach to the moral limits of its internal market gives rise to an important justice concern that is distinct from issues of marketisation and commodification. Namely, the approach gives rise to a political liberal concern regarding denigration, that is, a failure to treat European citizens with equal respect. From one perspective, the European approach can be portrayed as aspiring to a ‘neutral stance’ towards plural, and potentially conflicting conceptions of the moral limits of market exchange on a national level. As such, the EU appears responsive to issues of plurality and divergence on the matter of values among the Member States. However, if the aspiration of neutrality is understood from a political liberal perspective on justice, the European approach to the moral limits of its internal market may fail to live up to its ambition. In a pluralistic society, the purpose of the state’s neutral stance is to treat citizens with equal respect; neutrality serves to avoid denigration of *persons*, as they pursue their own conceptions of the good. From this political liberal viewpoint, the state should abstain from endorsing any particular (controversial) ideal of the good life and granting advantages to those who pursue it, while denigrating and disadvantaging those who do not. However, the EU’s approach of noninterference does not safeguard persons from denigration, but rather focuses on neutrality between national articulations of the market’s moral limits. This paper argues that by leaving the matter of the moral limits of the internal market to the Member States, the EU fails to ensure that the legal structures that govern internal (European) market exchange will treat its citizens with equal respect.

The establishment of the internal market enables European citizens to engage in exchange with each other, and to improve their lives in accordance with their own conceptions of the good. The central task of the EU—to improve the lives of European citizens—is embedded in the commitment to enhance the functioning of the internal market. Legal demarcations of moral limits to market exchange aid in this task. This paper considers the European approach to these legal demarcations from a political liberal perspective on justice. This view holds that the state should not impose serious burdens on individuals as they pursue reasonable conceptions of the good by excluding them from the advantages attached to the availability of state power for the enforcement of their exchanges. If the exclusion is based on moral standards that denigrate the reasonable conceptions of the good that some citizens hold and pursue, that places them at a serious disadvantage and would fail to treat them with the equal respect that they deserve as citizens. It is not the aim of this paper to comprehensively show that the national diverging moral standards for market exchange are disrespectful in this way. Nor does this

paper argue that the EU approach should be viewed from the political liberal viewpoint presented here. Instead, the paper aims to show that the EU fails to safeguard its citizens from being subject to national moral standards that could be disrespectful, because it does not preclude the applicability of national standards that denigrate (some) European citizens. In short, the paper will argue that if denigration—the failure to treat European citizens with equal respect—is a serious justice concern, there are compelling reasons to explore alternative approaches to the legal demarcation of the moral limits of the internal market. This paper shows that, as it stands, the EU legal framework that governs internal market exchange does not ensure that the applicable national standards of morality do not disrespect European citizens.

Section 2 sketches the contours of the European approach to the moral limits of the internal market in its legal framework, focusing both on the moral exceptions that are enshrined in the EU constitutional framework and in the national private law rules concerning contractual immorality. Section 3 outlines a capabilities-oriented interpretation of political liberalism that is committed to the political value of equal respect and emphasises the importance of the lives that individuals are able to live to questions of justice. This interpretation of political liberal justice focuses on the creation and preservation of a space of substantive individual freedoms to formulate, hold and pursue one's reasonable conceptions of the good. The paper advances its arguments by understanding the EU's aspiration to neutrality through this political liberal lens. This section ends by detailing some of the implications for demarcations of the moral limits of the market in the EU's legal structures. Section 4 illustrates the risk of denigration in the internal market through the example of sexual morality and will discuss a range of legal demarcations of the moral limits of the internal market that would be incompatible with the political value of equal respect.

## **2. The EU's approach to the moral limits of the internal market**

The EU seemingly take a 'hands-off approach' towards demarcating the moral limits of internal market exchange in its legal structures. The EU demonstrates this approach in (1) its constitutional framework and (2) its approach to contract law on a European level. In effect, the European approach to the moral limits of its internal market reflects the legal competence and ultimate authority of Member States to demarcate the moral limits of internal market exchange.

### ***2.1. Moral exceptions in the EU constitutional framework***

Within the EU's constitutional framework, fundamental freedoms are central to the creation of a single market, the ideal of which includes the absence of

internal obstacles to the free movement of goods (Articles 34–36 TFEU). In pursuit of that ideal, the EU’s constitutional framework guarantees, in principle, the free movement of things that are lawfully produced or marketed in one Member State, across the internal market as a whole.<sup>7</sup> The EU aims to preclude national measures if they discriminate against imported goods in a protectionist manner,<sup>8</sup> in order to overcome obstacles that divergences among national standards may otherwise present. Yet even when a good lawfully enters (or is created in) the EU’s internal market, Member States may still impose, as a matter of exception to the general rule, diverging standards for moral reasons. Namely, the EU provisions on the free movement of goods allow measures that restrict the movement of goods on grounds of public morality (Article 36 TFEU).<sup>9</sup> Member states enjoy a considerable margin of discretion when it comes to the moral demarcation of the internal market space of free movement, demonstrated by a ‘hands off approach’ of the Court of Justice in its case law that addresses the justification of public morality exceptions.<sup>10</sup>

The public morality exception played an explicit role in *Henn and Darby* and *Conegate*, regarding restrictions imposed by Member States on the import of pornographic goods. In *Henn and Darby*, the Court held that ‘in principle, it is for each Member State to determine in accordance with its own scale of values and judgment of its appropriate form, the requirements of public morality in its territory’.<sup>11</sup> The particular case involved the import of pornographic books and films that were deemed to be of an indecent or obscene nature in (parts of) the UK, that is, offending a ‘recognized standard of propriety’. The goods considered ‘obscene’ were to be barred on the ground that they tend to ‘deprave and corrupt those exposed to the material’.<sup>12</sup> While the Court stated a condition of non-discrimination—the applicable rules for

<sup>7</sup> On the principle of mutual recognition, see Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837; Case 120/78 *Cassis de Dijon* [1979] ECR 649.

<sup>8</sup> Gareth Davies, ‘The Court’s Jurisprudence on Free Movement of Goods: Pragmatic Presumptions, Not Philosophical Principles’ (2012) 2 *European Journal of Consumer Law* 25.

<sup>9</sup> The general exceptions to the free movement of goods are stated in the *Treaty on the Functioning of the European Union*, 13 December 2007, C115/47, online: <<http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:12012E/TXT>> at art 36.

The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

‘Public morality’ and ‘public policy’ are used interchangeably in this paper to express legal demarcations of the moral limits of the internal market.

<sup>10</sup> See Christine Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press, 2013) 42–43.

<sup>11</sup> Case 34/78 *Regina v Maurice Donald Henn and John Frederick Ernest Darby* [1979] ECR 3795, [15].

<sup>12</sup> *Ibid* [6]–[7].

similar domestic goods must comprehensively, prohibit the making and marketing of such goods—it demonstrated a ‘hands off approach’ to the national conception of morality itself. In *Conegate*, involving the import of life-size female shaped dolls, the Court rehearsed this approach stating that ‘although Community law leaves the Member States free to make their own assessments of the indecent or obscene character of certain articles’ public morality reasons

cannot be regarded as sufficiently serious to justify restrictions on the free movement of goods where the Member States concerned does not adopt, with respect to the same goods manufactured or marketed within its territory, penal measures or other serious and effective measures intended to prevent the distribution of such goods in its territory.<sup>13</sup>

In these cases, the court demonstrated its ‘hands-off approach’ with regard to where and how Member States demarcate the moral limits of EU free movement on the internal market qualifying only for reasons of discrimination. In *Jany* the Court affirmed the margin of appreciation concerning national morality standards with regard to the provision of sexual services. As to remind the Member States of their authority in determining what is to be considered immoral, the Court stated that

So far as concerns the question of the immorality of that activity [...] it is not for the Court to substitute its own assessment for that of the legislatures of the Member States where an allegedly immoral activity is practised legally.<sup>14</sup>

In other case law, the ECJ demonstrated a similar approach with regard to the authority of Member States to demarcate the moral limits of the internal market on the basis of fundamental rights. In *Omega* and *Schmidberger*, the Court held that ‘the protection of [fundamental] rights is a legitimate interest which, in principle, justifies a restriction of [...] a fundamental freedom guaranteed by the Treaty such as the free movement of goods’.<sup>15</sup> In these cases the Court left it to the assessment of the Member States to draw the moral limits of the internal market, on the basis of values protected through national fundamental rights. While the Court held that Member States cannot determine the scope of public policy unilaterally,<sup>16</sup> the control on a European level is restricted to the standard of proportionality, that is, ‘only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive

<sup>13</sup> Case 121/85 *Conegate Limited v HM Customs & Excise* [1986] ECR 1007, [15].

<sup>14</sup> Case 268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* [2001] ECR I-8615, [56].

<sup>15</sup> Case 112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR 5659 [74]; Case 36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*. [2004] ECR 9609, [35].

<sup>16</sup> Case 36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*. [2004] ECR 9609, [30].

measures'.<sup>17</sup> It thus remains a matter of Member State authority to provide a substantive conception of public policy—for instance through fundamental rights—and assess whether internal market activities are contrary to it. While the aforementioned ECJ cases do not directly address internal market exchanges between private actors, they impact the ability of EU citizens to engage in internal market exchange. On a European level, the task is to determine whether in invoking morality, Member States employ restrictions that are non-discriminatory and proportionate.

## 2.2. Contractual immorality

The morality of individual market exchanges on the EU internal market is not evaluated and governed by a European instrument of general contract law, but instead by national rules of private law. National legislators (in the case of civil codes) enact open norms (eg good morals) that govern the question of contractual immorality, leaving it to the courts to determine its substantive content in reference to the facts of a particular case.<sup>18</sup> Case law also varies greatly with respect to which exchanges are considered immoral and which sorts of reasoning are applied. Among other methods, courts give effect to fundamental and constitutional rights in private relationships through the concept of contractual immorality.<sup>19</sup> Such references to constitutional rights occur alongside reliance on other legal sources, that is, treaties, legislation, case law and general principles of law, which are understood to express a society's common view of morality over time.

Through contractual immorality, courts demarcate the moral limits of exchange, holding that certain exchanges are contrary to society's *common* or *shared* view of morality. This idea is sometimes expressed by referring to common social opinion (Netherlands),<sup>20</sup> but also by reference to the views that are shared and endorsed by 'the right thinking' members of society.<sup>21</sup> Although courts interpret these open norms in specific cases, it remains obscure how one can fathom which moral viewpoints ought to be regarded as common and shared in these ways and, for instance, whether the degree

---

<sup>17</sup> *Ibid* [36].

<sup>18</sup> See Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [*Bundesgesetzblatt*] (FRG) Section 138. and article 3:40 DCC (Dutch Civil Code).

<sup>19</sup> See Chantal Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (Kluwer Law International, 2008).

<sup>20</sup> Vincent van den Brink, *De rechtshandeling in strijd met de goede zeden* (Boom Juridische Uitgevers, 2002) 128–9.

<sup>21</sup> The German term *Anstandsformel* refers to a sense of decency in those who are reasonable and fair thinkers. This older term of reference is criticised for its lack of determinate guidance, though this legal formula may still offer value by excluding the use of certain methodologies for determining contractual morality. Christian Armbrüster, *Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB Band 1 Allgemeiner Teil* (Beck Juristischer Verlag, 2012) 1652.



of consensus that is desirable for such a label is, for instance, of a majoritarian or minimum nature.

On a European level, several initiatives initially moved towards the creation of a comprehensive European Civil Code and later, the creation of a common frame of reference and a Common European Sales Law (CESL).<sup>22</sup> These developments revealed diverging stances towards a common European norm of immorality for contractual conduct.<sup>23</sup> While some projects explicitly intended to avoid diverging national conceptions of immorality by referring to fundamental principles found across the EU,<sup>24</sup> the most recent initiative, the CESL, excluded issues of contractual morality from its scope entirely.<sup>25</sup> The latter approach is in line with the status of moral exceptions in the EU constitutional framework discussed in the previous section. Namely, the CESL deals with the rights and obligations that arise from contracts entered into on the internal market; yet, it does not govern whether an internal market exchange qualifies as a binding contract to begin with. The latter is a matter of diverging national conceptions of contractual immorality, which define what is and is not to be considered a contract, that is, which private exchanges are beyond the moral limits of the internal market.

The underlying reasons for the continued absence of a common European standard on contractual morality, and consequently on the moral limits of the EU internal market, are in part related to cultural and nationalistic defenses of private law.<sup>26</sup> The diversity of national private laws, and in particular of the moral conceptions contained in them, has been fiercely defended as representations of national identities and traditions. And it has proven difficult to find political support for the articulation of common European standards in a

---

<sup>22</sup> European Commission, *On European Contract Law* (2001) COM (2001) 398 Final. European Commission, *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* COM (2011a) 635 Final.

<sup>23</sup> For instance, the Part I of the Principles of European Contract Law (PECL) excluded the subject matter from its scope

because of the great variety among the legal systems of Member States as to which contracts are regarded as unenforceable on these grounds [...] further investigation is needed to determine whether it is feasible to draft European Principles on these subjects.

Ole Lando and Hugh Beale, *Principles of European Contract Law* (Kluwer Law International, 2000) Article 4:101. Part I, C 4, art 4:101. But Part III included the following rule in the chapter on 'illegality': 'A contract is of no effect to the extent that it is contrary to principles recognised as fundamental in the laws of the Member States of the European Union'. Ole Lando and others, *Principles of European Contract Law: Parts III* (Kluwer Law International, 2003) s 15:101.

<sup>24</sup> For instance, in the PECL and the Draft Common Frame of Reference (DCFR). 'A contract is void to the extent that: a) it infringes a principle recognized as fundamental in the laws of the Member States of the European Union; and b) nullity is required to give effect to that principle'. Christian von Bar and others, *Draft Common Frame of Reference: Principles Definitions, and Model Rules of European Private Law (Outline Edition)* (Sellier European Law Publishers, 2009) Book II, C 7, s 301.

<sup>25</sup> See Commission, *Proposal for a Regulation on a 'Common European Sales Law'*, COM (2011) 635 final, 20.

<sup>26</sup> For an elaborate treatment of these issues see Guido Comparato, *Nationalism and Private Law in Europe* (Hart Publishing, 2014); and Ralf Michaels, 'Why We Have No Theory of European Private Law Pluralism' in Leone Niglia (ed), *Pluralism and European Private Law* (Hart Publishing, 2013).

context where ideas about a European shared identity and community are shaky. Yet, as a justification, national tradition is not a compelling reason as to why the EU should refrain from demarking the moral limits of its own internal market.

Instead, we may interpret the EU approach as an ambition for justice. Namely, the EU approach to the question of how and where the moral limits of the internal market are drawn can be read as an aspiration to neutrality amidst divergent moral views in a pluralistic society.<sup>27</sup> This neutral stance resembles a central commitment to justice understood within a political liberal framework.

However, the European ‘hands-off’ approach is not a truly political liberal conception of justice. Political liberal justice is informed by the active defense of equal respect for persons. If the EU’s central task is to improve the lives of its citizens, its current approach allows for the denigration of people in the internal market and raises concerns of justice.

### 3. Equal respect and capabilities

Political liberal conceptions of justice envision a state that aspires to be sufficiently neutral in response to the problem of our diverse and possibly conflicting comprehensive views of justice and the good.<sup>28</sup> At its core lies the political value of equal respect, which holds that the state ought to refrain from endorsing—and thereby giving preferential treatment to—any one comprehensive conception of the good. The question arises: What does it mean for a state (in this case, the EU) to be sufficiently neutral in this way?<sup>29</sup>

There are multiple interpretations of what political liberalism entails, which share a general commitment to a stance of sufficient neutrality towards variations of *reasonable* conceptions of the good, while making no such commitment to *unreasonable* conceptions of the good. This paper postulates that the EU’s aspiration for neutrality, understood as a political liberal project, reflects an account of the distinction between *reasonable* and *unreasonable* conceptions.<sup>30</sup> This account posits the acceptance of the political

---

<sup>27</sup> For instance, in a Communication on the CESL, the European Commission prefaces the exclusion of immorality by stating that topics that are ‘very important for national laws [...] will not be addressed by the Common European Sales Law’. Commission Communication ‘A Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market’, COM (2011) 636 final, 8. The views that Member States express on matters of morality are presented as having deep ties with national identity. See Comparato (n 26).

<sup>28</sup> John Rawls, *Political Liberalism* (Columbia University Press, 1993); Charles Larmore, *The Morals of Modernity* (Cambridge University Press, 1996); Martha Nussbaum, ‘Perfectionist Liberalism and Political Liberalism’ (2011) 39:1 *Philosophy and Public Affairs* 3.

<sup>29</sup> This paper does not claim that the EU is a state in all respects, but rather that its structures can be appropriately evaluated in light of the requirements of political liberal justice, in part because the EU has a basic and pervasive influence on the lives that its citizens are able to live.

<sup>30</sup> See Nussbaum (n 28).

value of equal respect as the only decisive, and distinguishing factor between *reasonable* and *unreasonable* conceptions of the good. Nussbaum refers to the distinction in the following way:

[...] respect in political liberalism is, first and foremost, respect for persons, not respect for the doctrines they hold, for the grounding of those doctrines, or for anything else about them. [...] A 'reasonable' citizen is one who respects other citizens as equals. A 'reasonable' comprehensive doctrine is one endorsed by such a reasonable citizen, that is, including a serious commitment to the value of equal respect for persons as a political value.<sup>31</sup>

In other words, if we understand the EU's commitment to neutrality from this viewpoint, the state's stance of sufficient neutrality is directed towards individuals who hold conceptions of the good that are compatible with their endorsement of the value of equal respect for political purposes. In this view, unreasonable conceptions of the good are identified by their incompatibility with equal respect and nothing else. From this perspective, the political liberal view on the appropriate role of the state is that it should refrain from endorsing any particular comprehensive conception of the good to show equal respect for persons.

More perfectionist liberal views of justice argue that the state should promote a conception of the good; its appropriate role is to encourage and enable people to live their lives in accordance with a more comprehensive conception of what the good life entails.<sup>32</sup> From these viewpoints, the commitment of political liberalism to the *political* value of equal respect is too minimal: it leaves too much room for conceptions of the good that are incompatible with what is ultimately valuable in human lives.<sup>33</sup> And from a perfectionist liberal stance, there is no compelling reason for the state to support such pursuits.

It is beyond the scope of this paper to explore these debates and critiques in full, but for the purpose of the current argument it should be noted that the implications of a more perfectionist liberal view for the legal demarcations of the moral limits of the market seem to align with current legal practices.<sup>34</sup> This paper, then, results in a critical reflection of those practices. Namely, if we pursue the idea that the EU's commitment to justice can be read, in part, as a political liberal commitment to neutrality, its approach to contract law's function of demarcating the moral limits of the market is problematic.<sup>35</sup>

---

<sup>31</sup> *Ibid.*

<sup>32</sup> For an example of a perfectionist understanding of private law, see Hanoch Dagan, 'The Utopian Promise of Private Law' (2016) 66(1) *University of Toronto Law Journal* 392. Dagan presents the enhancement of autonomy as the ultimate purpose of private law.

<sup>33</sup> For instance, autonomy as self-authorship, see Dagan (n 32).

<sup>34</sup> Notably, this conception aligns with the ways in which legal conceptions of contractual immorality refer to common moral views. See for examples, section 'The Case of Exchanges of Money for Sex' below.

<sup>35</sup> While the current paper details the problem in terms of disrespect and denigration of persons who hold conceptions of the good that differ from those that the state may endorse, a similar neutrality concern

### 3.1. *The ability to engage in exchange and moral limits to the internal market*

A capabilities-oriented interpretation of political liberalism emphasises the creation and preservation of a space of substantive individual freedoms. For individuals to have the substantive freedom—true ability or capability—to do and be what they regard as valuable, the state ought not only abstain from imposing restrictions, but also engage in the (positive) creation of the necessary preconditions that enable them to freely choose to do and be what they regard as valuable.<sup>36</sup> The political value of equal respect requires that a society ensures that each individual has the ability to pursue reasonable conceptions of the good on equal grounds with others. Market exchanges form important means through which individuals pursue their own conceptions of the good and live the lives they deem valuable, for example, how they obtain income, where they live, what they eat.<sup>37</sup> In order to speak of any meaningful ability to engage in exchange on an equal basis with others, people need support from legal institutions. Such support is dependent on the rules that define contractual relations. These rules—notably including standards of contractual immorality—determine if the private exchanges that people may wish to engage in, are legally binding, and as such are regarded *as contracts*.<sup>38</sup> In fulfilling this function, contract law excludes some exchanges from contractual recognition explicitly for reasons of morality. The defining structure of contractual relations is important for substantive individual freedom, because it determines if private parties can rely on the power of the state to help them realise their individual pursuits through exchange.<sup>39</sup> In such cases, the transacting parties are excluded from using the coercive power of the State to enforce of their exchange because their endeavor is considered to be morally unacceptable by the State. That evaluation of the morality of private exchange and market conduct represents the private legal mechanism of demarcating the moral limit of market exchange.

---

could be couched in terms of disrespectful paternalism. See Dagan (n 32) 18, and more elaborately Seana Shiffrin, 'Paternalism, Unconscionability, and Accommodation' (2000) 29 *Philosophy and Public Affairs* 205.

<sup>36</sup> See Amartya Sen, *Inequality Reexamined* (Oxford University Press, 1992); Amartya Sen, *Development as Freedom* (Oxford University Press, 1999); Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press, 2000); Martha Nussbaum, *Frontiers of Justice* (Harvard University Press, 2006).

<sup>37</sup> Some have argued that the ability to decide one's own consumption pattern can be closely tied to individual identity and self-determination through lifestyle. See Alan Strudler and Eleonora Curlo, 'Consumption as Culture: A Desert Example' in David A Crocker and Toby Linden (eds), *Ethics of Consumption* (Rowman & Littlefield Publishers, 1998) 269–6.

<sup>38</sup> See Tjon Soei Len (n 6).

<sup>39</sup> For an account of contractual capacity as a precondition for market participation, see Simon Deakin, 'Capacitas: Contract Law and the Institutional Preconditions of a Market Economy' (2006) 2 *European Review of Private Law* 317.

### 3.2. Contractual recognition and denigration

While exclusion from the advantage of state contractual enforcement is pertinent to issues of distributive justice, the state's expression of moral disapproval is significant in light of equal respect. What does it mean for the state to exclude certain exchanges from the advantage of contractual recognition?

First, the legal structure that demarcates the moral limits of the market grants advantages (ie the availability of state enforcement) to some over others by supporting the life plans (ie market pursuits) of some individuals, while barring those of others. Concerns about fair distributions of advantage and disadvantage are thus salient to the question of moral limits of markets. Second, the exclusion from contractual recognition and enforcement is based on moral standards that are independent of the moral views held by the contracting parties.<sup>40</sup> When the state refuses to recognise a market exchange as a contract for reasons of the sort examined in this paper, the state also expresses moral disapproval of the market pursuits that parties are engaged in. At the same time, the state expresses its endorsement of the moral views on which that disapproval is based. Political liberalism requires that state refrains from endorsing any particular *comprehensive* conception of the good when doing so, and instead, performs this task in accordance with the political value of equal respect. Endorsing a comprehensive view of the good while condemning alternatives, denigrates citizens who hold and pursue an incompatible, but reasonable conception of the good. In short, legal standards that exclude market exchanges on comprehensive moral grounds would create a market order where some individuals' moral views are denigrated.

The current EU approach risks denigrating some of its citizens, because it allows for the potential prioritisation and endorsement of some comprehensive views of the good when demarcating the moral limits of the European, internal market (Section 2). The latter would be incompatible with the political value of equal respect and thus unjust within a political liberal framework (Section 3). The last section of this paper aims to illustrate this risk through the example of sexual morality and will discuss a range of legal demarcations of the moral limits of the internal market that would be incompatible with the political value of equal respect.

### 4. The risk of denigration in the internal market: an illustration through sexual morality

There are many different accounts of why certain goods or activities may be regarded as morally objectionable, and why they should be blocked from

---

<sup>40</sup> See Tjon Soei Len (n 6).

markets.<sup>41</sup> Although a separate question, these normative accounts often resonate with the justifications offered for legal measures that block certain types of exchange from the market, or withhold collective support for the recognition and enforcement of those exchanges through contractual immorality. To the extent that these accounts are, however, based on comprehensive conceptions of the good, they ought not to be endorsed by the State as demarcating accounts of the moral limits of the internal market. This section briefly outlines a range of accounts of the legal demarcation of sexual morality to illustrate how the EU approach risks denigration of some of its citizens in the internal market.<sup>42</sup>

#### **4.1. The case of exchanges of money for sex**

National conceptions of sexual morality, expressed in the legal treatment of prostitution, vary greatly across the EU. While some Member States recognise exchanges of money for sex as legally binding contracts, many others do not, either because certain activities associated with prostitution are criminalised (eg consumption, solicitation, procurement) or because standards of contractual morality deem them morally unacceptable.<sup>43</sup> On what normative grounds could national legal standards regard exchanges of money for sex morally objectionable?

First, some accounts rely on particular religious traditions to inform a moral objection to market exchanges of money for sex. These accounts invoke a comprehensive (religious) conception of the good to justify the moral limits of the internal market. For instance, the laws of Member States with a strong Catholic tradition have long been influenced by comprehensive doctrines that regard all forms of sexual activity outside a heterosexual monogamous marital relationship as immoral, that is, sinful.<sup>44</sup> The endorsement by the state of such a comprehensive conception of the good, however, is incompatible with equal respect. In so doing, the State disrespects and denigrates individuals who hold different conceptions of the good.

Second, legal standards informed by a conception of a 'true' value of sex are incompatible with equal respect, as the state would express and endorse an authoritative view of the 'essential' value and meaning of sexual activity. Arguments from corruption offer an illustrative example. For instance, one may

---

<sup>41</sup> See (n 4).

<sup>42</sup> Sexual morality provides a relevant illustration as it is a central example in national doctrines of contractual immorality and is subject to broad national variance across the EU.

<sup>43</sup> See Lyn Tjon Soei Len, 'Consumer Protection, Sexual Services and Vulnerability: Exploring Social Justice in European Contract Law' (2015) 11(2) *European Review of Contract Law* 127.

<sup>44</sup> See Adam McCann, 'Ireland' (2014) 22(1) *European Review of Private Law* 199, online: [www.kluwerlawonline.com/document.php?id=ERPL2014010](http://www.kluwerlawonline.com/document.php?id=ERPL2014010). See discussion by Martha Nussbaum, 'Whether from Reason or Prejudice. Taking Money for Bodily Services' in *Sex and Social Justice* (Oxford University Press, 2000) 286.

argue that sex is an intimate activity that would be inappropriately valued once exchanged for money on the market.<sup>45</sup> In this view, exchanges of money for sex reduce sexual activities to its monetary value, corrupting the real, intimate value of sexual activity.<sup>46</sup> Some argue that moral objections based on corruption are fundamental in determining whether or not goods should be sold for money on the market.<sup>47</sup> If such moral objections were to inform *legal* standards, the restrictions on people's abilities to engage in exchanges of sex for money would reflect a view on the ultimate meaning of sex by resounding the belief that money corrupts sexual activity. From a political liberal viewpoint, a state should not risk disrespecting reasonable persons, eg, those who embrace the idea of 'good matches' between intimacy and money,<sup>48</sup> by communicating that their views are morally wrong. Third, legal restrictions on commercial sexual activity can be informed by arguments from harm that point to the potential for physical and mental diseases, drug addiction and loss of self-respect for those engaged in these market exchanges.<sup>49</sup> This view relies on the idea that the moral limits of market exchange reflect an unacceptable risk of harm for transacting parties.<sup>50</sup> However, to the extent that these views would be offered as decisive justifications for the moral limits of the market, one would expect that many other risky market activities, for instance many forms of professional sports such as football, racing a car or kick-boxing, would be similarly regarded as morally problematic and at least morally suspicious. Concerns regarding harm do not seem to support the legal demarcation of the moral limits of the internal market, unless a wide range of other risky market activities would also be subject to it. A commitment to equal respect in the internal market would preclude that its citizens would be subject to the arbitrary application of legal standards of morality.

Fourth, legal demarcations of moral limits of the market can be informed by concerns regarding gender inequality.<sup>51</sup> Market exchanges of money for

<sup>45</sup> See for discussion of the view that money corrupts intimacy: Viviana Zelizer, 'Money, Power, and Sex' (2006) 18 *Yale Journal of Law and Feminism* 305

<sup>46</sup> There is a lack of empirical evidence for the claim that intimate sexual relations cannot coexist alongside commercial sexual services. See Ann Lucas, 'The Currency of Sex: Prostitution, Law and Commodification' in Martha Ertman and Joan C. Williams (eds), *Rethinking Commodification: Cases and Readings in Law and Culture* (New York University Press, 2005) 253; Margaret Jane Radin, 'Market-Inalienability' (1987) 100(8) *Harvard Law Review* 1912–1913.

<sup>47</sup> See Michael Sandel, 'What Money Can't Buy: The Moral Limits of Markets' in Grethe Peterson (ed), *The Tanner Lectures on Human Values* (University of Utah Press, 19th edn 1998).

<sup>48</sup> See Viviana Zelizer, 'Money, Power, and Sex' (2006) 18 *Yale Journal of Law and Feminism* 307.

<sup>49</sup> See Peter de Marneffe, *Liberalism and Prostitution* (Oxford University Press, 2012).

<sup>50</sup> Two clarifications. First, legal restrictions of course include a wide range of potential regulatory measures, including safety regulation and minimum wages, that do not speak to the issue of moral market limits of the sort that this paper addresses. And second, I do not mean to suggest here that arguments from harm cannot be invoked as justificatory bases for legal restrictions by the state, but rather that those arguments should not be arbitrarily applied, if the state's commitment to neutrality is understood from a political liberal viewpoint.

<sup>51</sup> See European Parliament Committee on Women's Rights and Gender Equality, 'Draft Report on sexual exploitation and prostitution and its impact on gender equality' 2013/2103(INI) online: [www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-519.748+01+DOC+PDF+V0//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-519.748+01+DOC+PDF+V0//EN).

sex are gendered phenomena, with an enormous majority of female service providers and a predominance of male consumers. Prostitution has therefore been described as ‘a theatre of inequality’ that reflects a practice of male dominance,<sup>52</sup> degrading women by reflecting female subordination to male sexual desire.<sup>53</sup> In this light, the moral limits of the internal market could be grounded in an aspiration to ameliorate the general socially inferior status of women, and could be compatible with a commitment to equal respect. In a sense, the socially inferior status of women could be viewed as an unacceptable negative externality addressed by the law. From this angle, gender inequality as a normative justification for the legal demarcation of the moral limits of the internal market need not encounter problems of denigration.

However, the extent to which this normative justification can avoid the problem of denigration will depend on its precise application. There are at least two difficulties to navigate in this respect. First, exchanges of money for sex are not homogeneous phenomena, but internally diverse. While some exchanges may conform to images of male dominance and female subordination, others may represent countervailing phenomena of female empowerment.<sup>54</sup> For instance, well-compensated, high-end escorts may be able to exchange money for sex independently and under comfortable conditions, while streetwalkers may rely on pimps for protection. The state should be cautious not to invoke gender inequality as a comprehensive normative justification for the legal demarcation of the moral limits of the market as it regards all exchanges of sex for money. As a blanket justification, gender inequality can convert into a claim about the true meaning of exchanges of sex for money, that is, female subordination. As such, it would risk denigrating persons who view such exchanges as empowering, and as subversions of male domination. The objection would then follow the same structure as expressed in relation to arguments from corruption. Second, gender inequality is a pervasive factor in society that affects a wide range of market exchanges in explicit and implicit ways. The concern of equal respect arises, if gender inequality is not consistently invoked as a justification for the legal demarcation of the moral limits of the internal market in relation to exchanges that can serve as appropriate analogies to exchanges of sex for money. In that case, the objection follows the same structure as expressed in relation to arguments from harm.

---

<sup>52</sup> See Debra Satz, *Why Some Things Should Not Be for Sale: The Moral Limits of Markets* (Oxford University Press, 2010) 147.

<sup>53</sup> See Carol Pateman, *The Sexual Contract* (Stanford University Press, 1988); Catherine MacKinnon, ‘Prostitution and Civil Rights’ (1993) 1(13) *Michigan Journal of Gender and Law* 29–30.

<sup>54</sup> See Katherine Franke, ‘Theorizing Yes: An Essay on Feminism, Law and Desire’ (2001) 101 *Columbia Law Review* 199.



From a capabilities-oriented interpretation of justice, each of the normative grounds discussed above can denigrate people. Notably, to the extent that the moral limits of the internal market can be and are demarcated by national standards that are based on comprehensive (and thus controversial) conceptions of the good the EU fails to safeguard (some of) its citizens from denigration in the internal market. If we understand the European approach to the moral limits of its internal market as an aspiration to justice in the neutral, political liberal sense, the EU should ensure that the applicable (national) legal standards do not denigrate European citizens. Legal standards that demarcate the moral limits of the internal market should be compatible with moral reasons of equal respect. Moreover, a capabilities-oriented interpretation connects the legal standards that demarcate the moral limits of the internal market to the EU's central task to improve the lives that its citizens are able to live. In this view, the moral limits of the internal market should strive to advance the substantive freedom of individuals to pursue their reasonable conceptions of the good when participating in the internal market.

## 5. Conclusion

The European approach to the moral limits of its internal market currently fails to ensure that European citizens are treated with equal respect when engaging in exchange. Currently, even if national legal standards of morality would be explicitly incompatible with the political value of equal respect the EU approach ensconces no opportunity for substantive scrutiny. As long as Member States apply national standards in a non-discriminatory and proportional manner, the endorsement of a comprehensive conception of the good encounters no objection within the foundational legal framework that governs the EU's internal market. This approach thus leaves open the possibility that legal standards would denigrate some European citizens, which constitutes an injustice in light of the political value of equal respect. If justice matters within the EU, it is important to explore the ways in which the internal market and its underlying legal structures advantage some over others, and to work towards ameliorating the position of those who are least advantaged in terms of the abilities they have to do and be what they regard as valuable.

## Disclosure statement

No potential conflict of interest was reported by the author.