LEGAL EMPATHY IN THE INTERNAL MARKET:

FREE MOVEMENT LAW AS A COMPARATIVE DIALOGUE

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Abstract

This paper characterises and analyses free movement law as an exercise in legal empathy. Negative integration in the internal market is based on and facilitated by differences in national laws, which are explored through the free movement provisions. This process results in dialogues between Member States, in which they are required to recognise and respond to the legal position of other Member States. Each of the pillars of the structure of free movement law has a distinct role to play in structuring these dialogues. Legal empathy in the internal market is about exploring and understanding differences in national laws. As such, negative integration becomes an exercise in comparative law. Comparative dialogues in the internal market result in learning effects, which may encourage or require Member States to amend rules. A balance should be maintained between harmonisation and negative integration to ensure that Member States engage in legal empathy. Brexit shows that legal empathy is difficult to achieve without a general commitment to communicate through free movement law. Finally, comparative lawyers should play a more prominent role in free movement cases to improve the quality of comparative dialogues in free movement law.

I. Introduction

This is going to be an idealistic paper about the foundations of free movement law. Some might even call it romantic, and I would have no problem with that characterisation. In the last years, research on the internal market has focussed primarily on technical aspects. This is not surprising,

because there have been many technological developments. Telecommunications, energy, AI and the platform or sharing economy: just a few examples of areas of the internal market that require highly technical responses and analyses. In parallel, there is an assumption that many of the big questions of free movement law have been answered in the last decades. "Why are you still researching free movement law?", a judge at the Court of Justice of the EU ("the Court") asked me not too long ago. "Is this really where the real developments in EU law are taking place?". Apparently, the days of being excited or outraged by *Keck*[1] and *Viking*[2] and *Laval*[3] are long gone. With a few exceptions,[4] fundamental research on free movement law is not attractive anymore.

Research on free movement law has always focussed more on the *outcome* than on the *process* of negative integration. Can Member States maintain national rules or should they be amended? Is there a need for harmonisation or can national restrictions on free movement remain in place? This paper will characterise free movement law as a process, which should be protected without it necessarily being regarded as an outcome-driven exercise.[5] As such, it does not matter what the result of free movement cases is. What matters most of all is the Member States' commitment to a particular mode of communication and conflict-solving. One of the main modes of communication in the internal market is negative integration through the free movement provisions. As a result, free movement law establishes a dialogue between Member States,[6] and this dialogue will be dissected in this paper.

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[1] Case C-267/91, *Keck and Mithouard*, EU:C:1993:905.

[2] Case C-438/05, *Viking*, EU:C:2007:772.

[3] Case C-341/05, *Laval*, EU:C:2007:809.

[4] EU citizenship is definitely among the exceptions: e.g. N. Nic Shuibhne, "Reconnecting the free movement of workers and equal treatment in an unequal Europe" (2018) 43 *EL Rev* 477; and C. O'Brien, *Unity in Adversity* (Hart Publishing, 2017). The proportionality test is also a good contender: e.g. J. Zglinski, *Europe's Passive Virtues: Deference to National Authorities in EU Free Movement Law* (OUP, 2020). Another recent example would be the historical approach to free movement cases: e.g. R. Schütze, "'Re-reading' Dassonville: Meaning and understanding in the history of EU law" (2018) 24 *ELJ* 376; and A. Albors Llorens, C. Barnard and B. Leucht (eds.), *Cassis de Dijon: 40 Years On* (Hart Publishing, 2021).

[5] B. van Leeuwen, "Euthanasia and the Ethics of Free Movement Law: The Principle of Recognition in the Internal Market" (2018) 19 *German Law Journal* 1417, 1426-1428.

[6] On dialogues in the internal market more generally, see L. Azoulai, "The European Court of Justice and the duty to respect sensitive national interests" in M. Dawson, B. de Witte and E. Muir (eds.), *Judicial Activism and the European*

In doing so, I will make a connection between free movement law and the concept of empathy. The aim is to apply insights from psychology to the interaction between Member States in the internal market.[7] However, this is not going to be a "law and" paper. I will approach free movement law through the "lens" of empathy. Empathy becomes a metaphor for analysing the structure of free movement law.[8] As such, the focus and approach of this paper is legal. I will use examples from well-known and less well-known free movement cases to analyse the various components of the comparative dialogues between Member States in free movement law.

The argument of the paper is as follows. Free movement law is based on and facilitated by differences in national laws. These differences are explored through the free movement provisions. The process of negative integration results in dialogues between Member States, in which they are required to recognise and respond to the legal position of other Member States. This does not mean that each and every free movement case leads to a comparative dialogue between Member States. However, through their membership of the internal market, Member States are committed to a mode of conflict-solving which requires them to engage in comparative dialogues on a regular basis. Each of the pillars of the structure of free movement law – scope, direct effect, restriction, justification and proportionality – has a distinct role to play in facilitating and structuring these dialogues. Legal empathy in the internal market is about exploring *differences* in national laws. As such, negative integration becomes an exercise in comparative law. These comparative dialogues lead to learning effects, which may encourage or require Member States to amend rules – either at the national or at the European level. If negative integration leads to harmonisation, there is a risk

Court of Justice (Edward Elgar Publishing, 2013), 182-183. See also L. Azoulai, "The Force and Forms of European Legal Integration" *EUI Working Papers LAW* 2011/06, 7-9 and J. Mulder, "Responsive Adjudication and the Social Legitimacy of the Internal Market" (2016) 22 *ELJ* 597.

[7] I have previously used this approach when I analysed the relationship between the Court and national courts in the preliminary reference procedure as a therapeutic relationship. See B. van Leeuwen, "The Psychology of Judicial Co-operation: The Preliminary Reference Procedure as a Therapeutic Relationship" in L. de Almeida, M. Cantero, M. Durovic and K. Purnhagen (eds.), *The Transformation of Economic Law: Essays in Honour of Hans-W. Micklitz* (Hart Publishing, 2019), 317-335.

[8] For a similar kind of analysis of private international law through the lens of "hospitality", see H. Muir Watt, "Hospitality, Inclusion and Tolerance in Legal Form: Private International Law and the Politics of Difference" (2017) 70 *CLP* 111.

that harmonisation reduces rather than improves legal empathy, because it removes the need for Member States to analyse each other's legislation. Therefore, it is important that a balance is maintained between positive and negative integration in the internal market. Brexit shows that legal empathy is difficult to achieve without a general commitment to communicate through free movement law. This commitment requires a limitation of sovereignty and is conditional on membership of the internal market. Finally, to improve the quality of comparative dialogues in free movement law, comparative lawyers should play a more prominent role in free movement cases. Free movement lawyers should rely more regularly on comparative law methods in analysing the differences between national rules.

II. Legal empathy in the internal market

i. From empathy to legal empathy

This article places empathy at the heart of the internal market. As a concept, empathy has been approached from different perspectives and by different disciplines – most prominently, by psychology and philosophy.[9] The definitions of empathy are diverse and often dependent on whether a psychological, neuro-scientific or philosophical perspective is taken.[10] Nevertheless, it is possible to identify common strands in the literature. At its core, empathy is about the ability "to put oneself in the shoes of another" – to understand the position of another person and to be able to engage with that position. As such, empathy has at least two dimensions: *recognition* and *response*.[11] First, empathy is about the ability to *recognise* the feelings of another person.[12] This requires a willingness and an ability to understand the feelings and the emotions of that person. Second, empathy is about the ability to *respond* to the other person's position – the capacity to act on the recognition. Empathy is inter-personal. As a result, the process of recognition cannot

[9] For an overview, see A. Coplan and P. Goldie, *Empathy: Philosophical and Psychological Perspectives* (OUP, 2014).
[10] A. Coplan, "Understanding Empathy: Its Features and Effects" in Coplan and Goldie, above n 9, 3-4.
[11] Ibid., 5-7. See also S. Baron-Cohen, *Zero Degrees of Empathy* (Penguin, 2012), 11-13. For a neuroscientific perspective which relies on the concepts of perception and action, see S. Preston and F. de Waal, "Empathy: Its ultimate and proximate bases" (2002) 25 *Behavioral and Brain Sciences* 1, 3-5.
[12] Ibid., 13-14.

remain purely introspective. It has to lead to a reaction – the response – that is felt by the person with whom the person is empathising.[13] Some authors have identified a third component of empathy, which focusses on the conditions for being able to empathise with another. In essence, they argue that recognition and response are only possible if there is a sufficient degree of qualitative similarity between the subject and the object of empathy. In the absence of such "affective matching",[14] it is not possible to recognise and respond to the feelings of the other, because the starting points are fundamentally different. This paper will apply the concepts of recognition and response to the interaction between Member States in free movement law. I will not discuss affective matching in detail, but I will return to this concept in the analysis of the relationship between Brexit and legal empathy.

In the legal context, empathy has mostly been discussed in the context of criminal law and criminology.[15] A lack of empathy for the victim could be an important reason to impose a more severe sentence. Similarly, a lack of empathy – possibly an anti-social personality disorder – could result in an offender being classified as dangerous. More generally, empathy has been analysed as a catalyst to push for changes in the law – in particular, to support minority groups who are struggling to have their position recognised in society.[16] This paper will adopt a less abstract and more structured approach to empathy in the internal market. It will show how the concept of empathy is embedded in the very structure of free movement law. Negative integration through the free movement provisions engages Member States in a dialogue that focusses on the differences between national legislation. This comparative dialogue forces Member States to recognise and respond to the position of other Member States. Therefore, negative integration is an exercise in empathy – a process of empathy that is structured through the free movement

[13] Baron-Cohen, above n 11, 12-13.
[14] Coplan, above n 10, 6-9.
[15] See, for example, C. Posick, M. Rocque and M. DeLisi, "Empathy, Crime, and Justice" in M. DeLisi and M. Vaughn, *Routledge International Handbook of Biosocial Criminology* (Routledge, 2015), 571-584.
[16] M. Hoffman, "Empathy, Justice, and the Law" in Coplan and Goldie, above n 9, 230-254.

provisions. As such, negative integration becomes an exercise in comparative law. Certain types of free movement cases, which will be explored in more detail below, do not require Member States to engage in a comparison of legal rules. A comparative dialogue is not required in every single free movement case. However, the commitment of the Member States to interact and communicate through free movement law means that they have to engage in comparative dialogues on a regular and continuous basis.

This comparative exercise is a form of "legal empathy", since Member States are required to engage with the *legal* position of other Member States. It is more rational and structured than what we would expect of empathy in the human context. The concept of legal empathy is not new – Kalypso Nicolaïdis has introduced it in the context of the internal market.[17] She has made a direct link between empathy and the concept of mutual recognition.[18] For Nicolaïdis, the concept of mutual recognition is the very core of empathy in free movement law – "the expression of empathy in action".[19] Mutual recognition facilitates the recognition of the universal nature of legal rules and social choices made by the EU Member States.[20] It is based on trust between Member States, but it also allows them to maintain differences. As such, "empathy connects the many without merging them into one".[21]

ii. Distinguishing legal empathy from mutual recognition

My starting point is that a distinction should be made between the concepts of legal empathy and mutual recognition. This distinction is twofold. First, legal empathy can be found in the entire structure of free movement law – not just in the principle of mutual recognition. The entire structure of free movement law (scope, direct effect, restriction, justification and proportionality)

[17] K. Nicolaïdis, "My EUtopia: Empathy in a Union of Others" in M. Segers and Y. Albrecht, *Re: Thinking Europe: Thoughts on Europe: Past, Present and Future* (Amsterdam University Press, 2016), 145-146.
[18] K. Nicolaïdis, "Mutual Recognition: Promise and Denial, from Sapiens to Brexit" (2017) 70 *CLP* 227, 244.
[19] Ibid., 232.
[20] Ibid.
[21] Nicolaïdis, above n 17, 140.

has a role to play in facilitating and requiring Member States to recognise and respond to the legal rules of other Member States. Second, mutual recognition cannot lead to legal empathy if it was only about assessing whether or to what extent the rules of other Member States are *similar* or *equivalent* to our own. If mutual recognition in the internal market was only about saying "your standards are good enough for me because they are sufficiently similar to my own", this would not constitute an exercise in legal empathy. Ultimately, such an exercise would remain self-oriented.[22] The recognition of ourselves in the other does not constitute an exercise in empathy, since it is self-oriented and does not require a detailed investigation into the position and motives of the other.[23] Empathy requires an ability to recognise and respond to the position of other people whose background and personality might be very different from our own. This process has to be other-oriented.[24] It is no doubt easier to empathise with people who are similar to ourselves. However, the real challenge – and the most genuine kind of empathy – is to be able to place ourselves in the position of people who are different from ourselves.[25] It is precisely this effort that is required by empathy, and it is only through this effort that are we able to take a perspective that is genuinely other-oriented. As such, empathy is more about understanding and engaging with *differences* than with similarities.

This interpretation of empathy has important consequences for the relationship between legal empathy and mutual recognition. Mutual recognition can only lead to legal empathy in cases where Member States *refuse* to recognise the legislation of other Member States. This refusal forces Member States to engage in detail with the legislation of other Member States. If there was automatic mutual recognition, Member States would not be required to investigate the motives or the reason for the legislation in other Member States. In other words, if mutual recognition was

[22] See H. Muir Watt, above n 8, who has made a distinction between "tolerance" and "hospitality".
[23] Coplan, above n 10, 9-12.
[24] S. Freud, *Group Psychology and the Analysis of the Ego* (Hogarth Press, 1922). For Freud, empathy was "that which plays the largest part in our understanding of what is inherently foreign to our ego in other people".
[25] Coplan, above n 10, 15-17.

unconditional, it would not result in legal empathy.[26] The underlying presumption of trust or equivalence that would justify automatic recognition would "obscure" legal empathy, because there is no obligation on Member States to engage with the substance of the rules of another Member States. It is precisely when there are differences in national legislation that legal empathy is required.

This does not mean that there is no link between legal empathy and mutual recognition at all. In practice, as Stephen Weatherill has emphasised, the way in which the principle of mutual recognition operates in the internal market is mostly conditional.[27] Therefore, mutual recognition is in fact much more about differences than about similarities between the legislation of Member States.[28] Member States are required to explain on what basis they do *not* accept the rules of another Member State as equivalent to their own. As a result, in these situations, mutual recognition is more about *response* than about *recognition*. Therefore, the principle of mutual recognition can only lead to legal empathy if it requires Member States to engage in a dialogue on the differences between their rules[29] – a dialogue on differences, not on similarities.

iii. From an outcome-oriented to a process-oriented perspective on negative integration

My concept of legal empathy is directly linked to the aims of the internal market. In discussions about the aims of the internal market, the focus is often on the substance of free movement law – economic integration. The risk of this approach is that insufficient attention is paid to negative integration – and the internal market itself – as a *process*.[30] A more explicit distinction should be made between the *substance* (economic integration) and the *process* of free movement law (negative integration combined with positive integration). The procedural dimension of negative integration makes an important contribution to protecting the functioning of the internal market. At its very

[26] This is recognised by Kalypso Nicolaïdis, who has made a distinction between "pure" or "blind" mutual recognition and the concept of "managed mutual recognition". See K. Nicolaïdis, "Trusting the Poles? Constructing Europe through mutual recognition" (2007) 14 *JEPP* 682, 694-695.
[27] S. Weatherill, "The principle of mutual recognition: it doesn't work because it doesn't exist" (2018) 43 *EL Rev* 224, 224-225.
[28] Nicolaïdis, above n 26, 685-688.
[29] Weatherill, above n 27, 226-227.
[30] See the preface of S. Weatherill, *The Internal Market as a Legal Concept* (OUP, 2017).

core, the aim of the internal market is to guarantee peace and to improve the well-being of EU citizens.[31] This is achieved by limiting the sovereignty of the Member States. The sovereignty of the Member States is not just limited by a commitment to economic integration. It is similarly limited by a commitment to engage in dialogues on legal differences, and to use the structure of free movement law as the mode of communication to resolve conflicts. As such, free movement law prevents unilateral conduct. Member States are engaged in a process in which they have to recognise and respond to the legislation in other Member States. Free movement law engages them in a continuous process of communication about national rules.

From this perspective, negative integration is not exclusively outcome-oriented. It is not only about the substance – about removing obstacles to free movement. If an obstacle to free movement is justified, this does not immediately endanger the functioning of the internal market. It is the process itself – the dialogue between Member States – that is of fundamental importance.[32] As such, negative integration should be regarded as the "operationalisation" of legal empathy. This process of legal empathy has horizontal and vertical dimensions. It does not only create dialogues between Member States – it can also create dialogues between private parties. Both processes are horizontal. At the vertical level, negative integration establishes a dialogue between EU citizens and the Member States. In this paper, I will focus on the horizontal dimensions of legal empathy – i.e. legal empathy between Member States.[33] However, as I will show below, EU citizens play a fundamental role in engaging Member States in these comparative dialogues.

For legal empathy to be successful, Member States have to have trust in the process of negative integration. The traditional response of Member States is that sensitive cases – e.g. about abortion,

[31] See Article 3(1) TEU.
[32] For a private law perspective from the perspective of experimentalism, see O. Gerstenberg, "Constitutional Reasoning in Private Law: The Role of the CJEU in Adjudicating Unfair Terms in Consumer Contracts" (2015) 21 *ELJ* 599, 619-620.
[33] See also M. Maduro, "Contrapunctual Law? Europe's Constitutional Pluralism in Action" in N. Walker (ed.), *Sovereignty in Transition* (Hart Publishing, 2006), 519-520.

drugs or assisted dying – should fall outside the scope of the free movement provisions.[34] In such cases, "unity in diversity" is protected by "insulating" Member States from the perspective of other Member States.[35] In essence, this means that they do not have to recognise and respond to the positions of other Member States – no legal empathy is required. However, legal empathy on sensitive issues is still important as a comparative process, without this process being biased in favour of one particular outcome.[36] One of my aims is to show that dialogues on sensitive topics should still be established between Member States. After all, who's afraid of negative integration when it is an exercise in legal empathy? Should Member States not be encouraged to engage in comparative dialogues on sensitive issues to learn to understand and engage with each other's positions? They are more likely to do so if they have confidence that the process does not result in – or is not biased in favour of – a certain substantive outcome.[37]

In the next sections, I will show that each of the pillars of the structure of free movement law has a role to play in facilitating and structuring legal empathy between Member States. A distinction will be made between five structural "pillars":[38] the scope of application of the free movement provisions; their direct effect; restrictions on free movement; the grounds of justification and the proportionality test. Although the concepts of scope, direct effect and restriction are often merged into one, each concept has a separate role to play in facilitating comparative dialogues between Member States. Through the concepts of scope, direct effect and restriction, Member States are forced to *recognise* the different legal approaches taken in other Member States and to define the differences between them. The concepts of justification and proportionality are about the Member State's *response* to these differences. In relying on a ground of justification for a restriction on free movement, Member States explain why they are acting differently from another Member State.

[34] F. de Witte, "Sex, Drugs and EU Law: The Recognition of Moral and Ethical Diversity in EU Law" (2013) 50 *CML Rev* 1545, 1562-1565.
[35] Ibid., 1562.
[36] Van Leeuwen, above n 5, 1423-1425. See also Gerstenberg, above n 32, 619-620.
[37] Ibid., 1425. See also De Witte, above n 34, 1577.
[38] B. van Leeuwen, "Rethinking the Structure of Free Movement Law: The Centralisation of Proportionality in the Internal Market" (2017) 10 *EJLS* 235, 237.

The proportionality test focusses on the methodology adopted. In what way is a Member State acting differently, and to what extent is this method linked to the motive (the ground of justification) for acting differently? Each of these steps will now be analysed in more detail.

III. Recognition in free movement law

i. "Let's have a conversation": The scope of application of free movement law

If a case falls within the scope of application of the free movement provisions, Member States are required to engage in a comparative dialogue. In other words, if a case comes within the scope of application, the mode of communication is determined by the structure of free movement law. The concept of scope is necessary to *establish* the dialogue. Member States remain free to refuse to engage in dialogues in cases that fall outside the scope of free movement law.[39] In those cases, there is no limitation of the sovereignty of the Member States and they are able to determine their own rules without any kind of interaction with the rules of other Member States. From this perspective, the concept of scope "gets the conversation going". Furthermore, it determines the *parameters* of the dialogue. Member States are not required to show legal empathy in all areas of society – there has to be a link to the free movement provisions. The concept of scope determines the geographical and substantive dimensions of the conversation.

First, cases only fall within the scope of application of the free movement provisions if there is a cross-border element.[40] This immediately confirms the comparative dimension of free movement law. Every free movement case is based on the interaction between the legal regimes of different Member States. If a case does not have such a cross-border comparator, there would be no dialogue between Member States. Free movement law cannot require a similar conversation to take place *within* borders. This was confirmed in *Walloon Government*,[41] which involved a conflict

[39] De Witte, above n 34, 1562-1565.
[40] For a detailed analysis of the cross-border requirement and wholly internal situations, see A. Arena, "*The Wall* Around EU Fundamental Freedoms: The Purely Internal Rule at the Forty-Year Mark" (2019) 38 *YEL* 153.
[41] Case C-212/06, *Walloon Government*, EU:C:2007:398.

between different regions in Belgium. This conversation between regions in the same Member State was not governed by the rules of free movement law. At the same time, free movement law can establish a conversation if a Member State has voluntarily decided to apply EU law to disputes without a cross-border dimension. In such cases, the Member State has essentially decided to "mimic" EU law at the national level.[42] The Court's judgment in *Ullens de Schooten* confirmed that such cases are brought within the scope of application of free movement law.[43] In these situations, the Member State has voluntarily decided to limit its sovereignty and has shown a willingness to engage in a dialogue based on the structure of free movement law.

From a substantive point of view, the concept of scope determines in which areas of the law Member States are required to engage in a comparative dialogue. This determines the subject matter of the conversation. The focus of the free movement provisions used to be on economic activity. As a result, most dialogues had a strong economic dimension. However, the scope of free movement law has broadened significantly in the last decades.[44] The creation of EU citizenship in the Treaty of Maastricht has brought a lot of situations without an economic link within the scope of application of the free movement provisions.[45] As a result, by way of illustration, Member States have to engage in dialogues on the use of noble titles or the way in which surnames are registered. Through the structure of free movement law, Member States have to communicate much more explicitly and much more precisely about the differences in legislation in various areas of society that are defined by a Member State's history and culture.

At the same time, it is still possible to protect Member States from having to engage in a dialogue. For example, in *Grogan*,[46] the subject matter of the conversation – abortion – was deemed too

[42] On the relationship between mimicking and empathy, see A. Goldman, "Two Routes to Empathy: Insights from Cognitive Neuroscience" in Coplan and Goldie, above n 9, 36-38.
[43] Case C-268/15, *Ullens de Schooten*, ECLI:EU:C:2016:874. See A. Arena, above n 40, 208-213.
[44] N. Nic Shuibhne, *The Coherence of EU Free Movement Law* (OUP, 2013), Chapter 4.
[45] See E. Spaventa, "From *Gebhard* to *Carpenter*: Towards a (non-)Economic European Constitution" (2004) 41 *CML Rev* 743 and E. Spaventa, "Seeing the Woods Despite the Trees? On the Scope of EU Citizenship and its Constitutional Effects" (2008) 45 *CML Rev* 13.
[46] Case C-159/90, *Grogan*, ECLI:EU:C:1991:378.

sensitive to force Member States to engage in a comparative dialogue. Similarly, in *Josemans*,[47] the Dutch soft drugs policy was held to fall outside the scope of application of free movement law. Therefore, the Netherlands did not have to engage in a conversation about these rules. It should be noted that the Court's decision to take this case outside the scope of application of the free movement provisions was itself based on a comparative exercise. The Court held that the owner of a coffee shop could not rely on free movement law because the supply of cannabis was (formally) prohibited in all Member States. As such, the decision not to establish a dialogue between Member States was based on a comparative exercise conducted by the Court.[48] In taking the case outside the scope of application of free movement law, the Court recognised that the Member States had already taken similar positions on this issue. It was not necessary to require them to engage in a dialogue on the differences between national legislation.

ii. "You have to listen to me": Direct effect of free movement law

While the concept of scope is necessary to establish a conversation between Member States, the procedural and relational dimensions of the dialogue are facilitated by the concept of direct effect. Direct effect is one of the distinctive features of EU law and plays an important role in free movement law.[49] It determines *where* the dialogue is to take place and *which parties* are involved in the dialogue. From a procedural perspective, the direct effect of the free movement provisions enables individuals to bring a free movement case before the national courts of a Member State. In doing so, they facilitate and "activate" a comparative dialogue between Member States. This dialogue does not have to take place in a procedure between Member States. Most differences in legislation are not explored in infringement proceedings brought by one Member State against

[47] Case C-137/09, *Josemans*, ECLI:EU:C:2010:774.
[48] Ibid., paras. 36-41.
[49] S. Enchelmaier, "Horizontality: The Application of the Four Freedoms to Restrictions Imposed by Private Parties" in P. Koutrakos and J. Snell (eds.), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar, 2017), 54-81. See also C. Krenn, "A Missing Piece in the Horizontal Effect "Jigsaw"? Horizontal Direct Effect and the Free Movement of Goods" (2012) 49 *CML Rev* 177.

another.[50] Similarly, the number of infringement proceedings brought by the European Commission is relatively low in comparison with the number of free movement cases brought by individuals.[51] In a typical vertical direct effect case, an EU citizen relies on the free movement provisions against a Member State. This creates a triangular relationship in which the citizen forces their home or host Member State to engage with the legal position of another Member State. The reliance on direct effect by an individual forces a Member State to recognise that its legislation is different from the rules in another Member State. As such, vertical direct effect often leads to a horizontal dialogue between Member States. Even when both parties in a case are private parties, the comparative dialogue that takes place is often between Member States. Purely horizontal comparative dialogues – where private parties are required to investigate and compare the legal position of another private party – are still quite rare in free movement law.

To illustrate how a "typical" a vertical direct effect case can lead to a dialogue between Member States, let us look at *Sayn-Wittgenstein*.[52] Ilonka Sayn-Wittgenstein was an Austrian national who worked in Germany as an estate agent. She acquired the title of *Fürstin* (Princess) when she was adopted by the *Fürst* (Prince) von Sayn-Wittgenstein. When she moved back to Austria, the Austrian authorities refused to register her title, because a royal or noble title was incompatible with the principle of equality in the Austrian Constitution. As a result, in Austria, Ilonka could only use the last name "Sayn-Wittgenstein" – the "von" (indicating nobility) had been removed. She challenged the refusal of recognition before the Austrian courts. In doing so, she opened a dialogue between Germany and Austria on the use of noble or royal titles. Although her aim was for Austria to recognise her individual position, the comparative dialogue that took place was between the

[50] There have only been a very limited number of infringement proceedings brought by a Member State under Article 259 TFEU. See L. Prete and B. Smulders, "The Coming of Age of Infringement Proceedings" (2010) 47 *CML Rev* 9, 27-28.
[51] See C. Harlow and R. Rawlings, "Accountability and Law Enforcement: The Centralised EU Infringement Procedure" (2006) 31 *EL Rev* 447, 453-454.
[52] Case C-208/09, *Sayn-Wittgenstein*, ECLI:EU:C:2010:806.

German and the Austrian legislation. As such, although the case had a vertical frame (Ilonka vs. Austria), it resulted in a horizontal dialogue between Member States.

Such a horizontal dialogue between Member States can take place even when both parties in a case are private. To use another example of a German-Austrian dialogue, in *Familiapress*,[53] an Austrian magazine brought a case against a German magazine sold on the Austrian market, because the German magazine contained a prize contest. This was prohibited under Austrian law. Although both parties were private, the Austrian magazine effectively as the agent of the State in enforcing the Austrian legislation. The dialogue that took place was between Austria and Germany and focussed on the extent to which press freedom could be protected by prohibiting prize contests. Some cases might result in dialogues between Member States and dialogues between private parties. In *Laval*,[54] a case between a Latvian company and a Swedish trade union, the focus of the dialogue was on the different standards of worker protection under the Swedish and Latvian legislation. But because trade unions were given such an important – and autonomous – role in enforcing the Swedish employment standards on the Swedish territory, the case also forced the trade unions to engage with the legal position of the Latvian workers.[55]

Finally, take *Fra.bo*:[56] a German private certification body refused to recognise a report issued by an Italian laboratory. The Court's conclusion that the private certification body had to comply with the free movement provisions meant that it had to investigate and compare the legal position – and the standards relied on – by another private party. Although *Fra.bo* is often characterised as more vertical than horizontal because the German State played an important role in putting the certification body in a position of regulatory power,[57] the substantive dialogue as a result of the

[53] Case C-368/95, *Familiapress*, EU:C:1997:325.
[54] *Laval*, above n 3.
[55] See M. Rönnmar, "Laval Returns to Sweden: The Final Judgment of the Swedish Labour Court and Swedish Legislative Reforms" (2010) 39 *ILJ* 280.
[56] Case C-171/11, *Fra.bo*, EU:C:2012:453.
[57] See, for example, H. van Harten and T. Nauta, "Towards horizontal direct effect for the free movement of goods? Comment on Fra.bo" (2013) 38 *EL Rev* 677.

application of the free movement provisions was essentially between private parties. This shows that it is also possible for free movement law to lead to a comparative dialogue between private parties.

iii. "You are acting differently from me": Restrictions on free movement

While the concepts of scope and direct effect establish the dialogue between Member States by creating the forum and by bringing together the parties to the dialogue, the substantive dialogue takes place through the concept of restriction. It is at this point where the legislation of one Member State is confronted with the legislation of another Member State. The concept of restriction in free movement law is based on differences between legal regimes. EU citizens are able to claim that there is a restriction on free movement because there is a conflict or a difference between national rules. As such, the tool of restriction is dependent on such a clash of national legislation – it is essentially a "conflict of laws" that is resolved in accordance with the structure of free movement law. In the identification of the restriction, Member States are made to appreciate the differences in legislation. This is very much the core of the recognition stage of empathy – free movement law forces Member States to assess the differences between their own legislation and the legislation in another Member State.

For certain types of restriction, no comparison between the rules of different Member States is required. Cases in which Member States have adopted rules that are directly discriminatory on the ground of nationality, or where the indirect discrimination is exclusively based on – or closely linked to – a nationality requirement do not normally require a comparative dialogue. If a Member State engages in direct discrimination on the ground of nationality – "this job is only open to our own nationals" – this does not require a comparison with the legislation of another Member State. Similarly, cases about language requirements do not necessarily require a comparison of national

rules.[58] This is because there is a close link between a language requirement and a nationality requirement – a language requirement is not normally linked to the legislation of another Member State. Therefore, in this type of cases, the restriction stage does not involve a comparative dialogue.

However, with other types of indirectly discriminatory rules, there is a greater likelihood that the advantage given to home nationals is based on the differences between national legislation. This can most clearly be seen in cases on the recognition of professional qualifications. In *Vlassopoulou*,[59] the German Bar Association refused to register a Greek lawyer as an advocate in Germany because she had not obtained a master's degree in Germany. This refusal was indirectly discriminatory, because German nationals were more likely to have received a master's degree in Germany. The Court held that the German Bar Association had to engage in a substantive comparison of the law degree that Ms Vlassopoulou had obtained in Greece with the requirements for a German law degree.[60] It was only on this basis of this substantive assessment that they could identify the differences which could make it possible to refuse to register Ms Vlassopoulou as a German lawyer.

In the last decades, the Court has increasingly relied on an obstacle test to identify restrictions on free movement. The threshold to identify an obstacle to free movement is low – the Court will assess whether the national rule makes it more difficult or less attractive to exercise free movement rights.[61] It has repeatedly stated that the simple fact that the legislation in two Member States is different is not sufficient to find a restriction on free movement.[62] As a result, the obstacle test requires a qualitative assessment by the Member State that is alleged to have breached free movement law. Are the differences really so significant that they have an impact on free movement between Member States? Through the obstacle test, a Member State is required to explore the differences with the legislation in another Member State and to conduct an assessment of the

[58] See, for example, B. de Witte, "Cultural Policy Justifications" in P. Koutrakos, N. Nic Shuibhne and P. Syrpis, *Exceptions from EU Free Movement Law* (Hart Publishing, 2016), 131-142.
[59] Case C-340/89, *Vlassopoulou*, EU:C:1991:193.
[60] Ibid., paras 16-17.
[61] Case C-76/90, *Säger*, EU:C:1991:331.
[62] See, for example, Case C-134/03, *Viacom*, EU:C:2005:94.

impact of the differences on free movement. The Court has developed various mechanisms to find that the differences between legislation are not sufficiently serious to amount to an obstacle to free movement.[63] However, for a Member State to be able to defend national legislation on such remoteness grounds, it must first have engaged in a comparison between its own legislation and the legislation in another Member State. Therefore, the obstacle test requires an in-depth investigation into the legislation of another Member State.

IV. Response in free movement law

i. "This is why I do things differently from you": Justifying restrictions on free movement

After it has been established that there is a difference in legislation between Member States that requires a response, the justification and proportionality stage shift the perspective from recognition to response. It is at these stages where a Member State is required to respond to the other Member State – where, based on the process of recognition, the Member State is required to explain on what basis and through what mechanisms it has adopted rules that have created a restriction on free movement. The first step is for the Member State to provide a ground of justification. This is in essence an explanation of *why* the Member State has decided to adopt a different legal position. The "why" should not come as a surprise to the other Member State. After all, the Member States have agreed on a number of permissible justifications in free movement law. The TFEU contains a catalogue of justifications (so-called "Treaty derogations") that can be relied on by Member State to explain the motivation for a particular piece of legislation.[64] As such, it contains a catalogue of shared values and interests that all Member States are agreed on – most prominently, public health, public security and public policy. If a Member State relies on one of these reasons to justify a restriction on free movement, the fact that this ground is relied on should not in itself come as a surprise to the other Member State. Rather, the difference in legislation is

[63] For an overview, see N. Nic Shuibhne, above n 44, 115-188. See also T. Horsley, "Unearthing Buried Treasure: Art. 34 TFEU and the Exclusionary Rules" (2012) 37 *EL Rev* 734.
[64] Articles 36, 45(3), 52 and 65 TFEU. See C. Barnard, *The Substantive Law of the EU* (OUP, 2019), Chapters 5 and 12.

caused by a difference in the *level* of protection. Through the justification stage, a Member State has to explain why it provides a higher level of protection to a particular interest than another Member State. As a result, the justification stage is primarily about exploring differences in the level of protection.

In *Cassis de Dijon*,[65] the Court introduced a new category of justifications: the so-called "mandatory requirements", objective justifications or public interest requirements. This is a non-exhaustive category of justifications that is developed through the case law. Therefore, it is always possible for a Member State to rely on a new ground of justification to justify a restriction on free movement. Although "famous" mandatory requirements like environmental protection and consumer protection will not come as a surprise to Member States, if the public interest is less obvious or less shared between the Member States, a Member State might sometimes have to work a bit harder to explain on what basis it is taking a particular measure.[66]

For the Treaty derogations, the discussion between Member States will focus on the differences in the level of protection. This can best be explained through some examples. In the field of public health, some Member States take a more cautious approach than others. They rely more heavily on the precautionary principle – the idea that as long as there is no scientific evidence to confirm that a particular substance or product is safe, it should not be allowed on the market. The Court has explicitly allowed Member States to maintain different levels of protection. In *Sandoz*,[67] the Court laid down a temporary element to this justification. Member States are allowed to take precautions when they are still investigating the health risks or impact of a particular substance or product. However, if the research subsequently establishes that there are no risks to health, the difference in legislation can no longer be maintained. As a result, the discussion about the motivation for a difference in national legislation is combined with an obligation to take action.

[65] Case C-120/78, *Rewe-Zentral AG ("Cassis de Dijon")*, EU:C:1979:42.
[66] See C. Barnard, above n 63, 168-170.
[67] C-174/82, *Sandoz*, EU:C:1983:213.

Member States have to show that the different level of protection continues to be justified in the light of scientific research.[68]

A similar dialogue about differences in the level of protection has taken place in the field of fundamental rights. In *Omega*,[69] a local authority in Germany banned a laser-tagging concept that had been imported from the United Kingdom. The justification for his ban was the protection of the principle of human dignity – a concept which was strongly protected by the German Constitution. For the German authorities, "playing at killing" constituted an infringement of human dignity. This dialogue between the rules in Germany and United Kingdom showed the particular importance attached by Germany to the concept of human dignity.[70] It resulted in a dialogue between Member States that showed how history led the German authorities to adopt a different position on the lawfulness of laser-tagging. In essence, *Omega* became a lesson in history – a lesson in the long-lasting impact of war. The free movement provisions facilitated this dialogue.

For mandatory requirements, the dialogue is essentially similar. For some less well-known public interest requirements, there will be more of a burden on the Member State to explain in detail what the reason for the restriction on free movement is. However, in most cases, the dialogue is again about differences in the level of protection provided. In consumer protection cases, from *Cassis de Dijon*, free movement cases have highlighted how Member States adopt different definitions of the "average consumer".[71] In environmental protection, similar dialogues have taken place on renewable energy and recycling.[72]

ii. "This is how I do things differently": The proportionality test

[68] Ibid., paras 11-16.
[69] Case C-36/02, *Omega Spielhallen*, EU:C:2004:614.
[70] It should be noted that the regional authorities in *Omega* may have adopted a stricter definition of the concept of human dignity than other regions in Germany. See M. Finck, "Fragmentation as an agent of integration: Subnational authorities in EU law" (2017) 15 *ICON* 1119, 1122-1124.
[71] See A. Johnston and H. Unberath, "The double-headed approach of the ECJ concerning consumer protection" (2007) 44 *CML Rev* 1237.
[72] See, for example, Case C-302/86, *Commission v Denmark*, EU:C:1998:421 and Case C-379/98, *PreussenElektra*, EU:C:2001:160.

Finally, after a Member State has explained why it has adopted a different legal approach from another Member State, the proportionality test focusses on the methods that have been adopted in the implementation of the legislation. The proportionality test involves a comparison of the tools or means relied on by Member States to protect a particular public interest.[73] As a result, it leads to a dialogue about the various methods that can be employed by Member States to protect public interests. The test has (at least[74]) two limbs: the suitability and the necessity test. The suitability test focusses on whether the chosen method is appropriate to achieve the Member State's aim. Moreover, it assesses whether the Member State is genuine about its justification for restricting free movement. A measure can only be held to protect public health if it works – if it really does something to improve the protection of health in the Member State. Consistency and coherence have become core principles of the suitability test,[75] and they are used as an "honesty" test for Member States. Hypocritical or "lying" Member States will be caught out if they cannot show that their chosen tool or method genuinely contributes to the protection of the public interest they are relying on. The necessity test assesses whether there are alternative tools that would be less restrictive of free movement. From this perspective, the necessity test engages the Member States in a comparative assessment of the tool it has adopted. This will often force Member States to assess the tools that have been adopted by other Member States. Therefore, the necessity test leads most directly to a comparative dialogue.

The suitability test is regarded as the less intrusive limb of the proportionality test. At the same time, it requires Member States to show that they "have done their homework". This homework is an important component of the response stage, because it requires Member States to establish a causal connection between their ground of justification and the chosen tool. They have to be

[73] T. Marzal, "From Hercules to Pareto: Of bathos, proportionality, and EU law" (2017) 15 *ICON* 621, 635-636.
[74] See W. Sauter, "Proportionality in EU Law: A Balancing Act?" (2013) 15 *CYELS* 439, 452-464. See also T. Tridimas, "Proportionality in Community law: Searching for the appropriate standard of scrutiny" in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, 1998), 68.
[75] Ibid., 455-456.

able to establish that they are achieving the aim they are relying on. If the national legislation fails the suitability test, this means that the chosen method does not justify a restriction on free movement. In other words, the method is not sufficiently effective to maintain the differences between the legislation. *Deutsche Parkinson Vereinigung* provides a good example.[76] Germany had adopted legislation that enabled the Government to set fixed prices for prescription-only medication. When a Dutch online pharmacy sold drugs against Parkinson's disease below the fixed price, legal proceedings were initiated against it. In defending the fixed price rule, the German State claimed that it was necessary to restrict price competition in order to prevent local pharmacies in rural areas from having to close. However, Germany could not provide any evidence that price competition could potentially lead to these pharmacies going bankrupt. Therefore, the Court was unable to find that the measure was suitable.[77] The inadequate response by the German State highlighted a lack of legal empathy – the German legislation was not sufficiently thought through.

This case can be contrasted with *Scotch Whisky Association*,[78] which focussed on the necessity test. The Scottish Government had adopted a minimum price per unit of alcohol rule to lower alcohol consumption in Scotland. The question of whether the measure could be upheld under the free movement provisions ultimately turned on the necessity of the rule. The Court identified the possibility of an increase in taxation as a less restrictive measure.[79] This required the Scottish Government to engage in a very detailed justification of the chosen tool. This exercise was based on a wealth of scientific evidence that had been commissioned by the Scottish Government. Although the application of the free movement provisions resulted in a strong confrontation on the possible alternatives, in the end, when the case returned to the UK, the Scottish Government was able to convince the national courts that the measure was necessary.[80] This shows that Member

[76] Case C-148/15, *Deutsche Parkinson Vereinigung*, EU:C:2016:776.
[77] Ibid., paras 37-45.
[78] Case C-333/14, *Scotch Whisky Association*, EU:C:2015:845.
[79] Ibid., paras 42-48.
[80] *Scotch Whiskey Association and others v The Lord Advocate and another* [2017] UKSC 76.

States are still able to prefer their own tool after having been confronted with alternatives through the proportionality test. In *Scotch Whisky*, Scotland was able to say "I have heard your alternatives, but they do not convince me". It was able to do this because it had engaged in a lot of detail with the alternative tools – some of which it had been pointed to when the rule was challenged under the free movement provisions.[81] *Deutsche Parkinson Vereinigung* and *Scotch Whisky* show that the intensity of the proportionality review is often based on the willingness of the Member State to engage with and respond to the position in other Member States.

Finally, in addition to the intensity of the review, another contentious aspect of the proportionality test is *who* the final arbiter of whether a measure is proportionate should be.[82] Should the Court decide on the proportionality of restrictions, or should this assessment be undertaken by the national court? From the perspective of legal empathy, the "location" of the proportionality test is not crucial. It could be said that an assessment by the Court might force the Member State more directly to compare its own position with that of other Member States – also because other Member States might intervene in the proceedings before the Court. However, the national court might have more detailed information about the reasons behind the national legislation. As such, it might be in a better position to conduct the proportionality review. As Jan Zglinski has shown,[83] the Court has relied on various "mixed techniques". The role of the national court is likely to depend on the sensitivity of the subject matter. Legal empathy requires a detailed response to the position of the other Member State. The "forum" for this response is not decisive. National courts do not necessarily need the Court to engage in detailed comparisons of legislation between Member States. At the same time, it is important that the Court create the framework or guidance

[81] See O. Bartlett and A. Macculloch, "Evidence and Proportionality in Free Movement Cases: The Impact of the *Scotch Whisky* Case" (2020) 11 *EJRR* 109. See also N. Dunne, "Minimum Pricing: Balancing the 'Essentially Incomparable' in *Scotch Whisky*' (2018) 81 *MLR* 890.
[82] Zglinski, above n 4, 30-36.
[83] Ibid., 34.

under which the assessment takes place.[84] This dualistic approach to the proportionality test is likely to ensure the most effective response by Member States.

V. Free movement law as a comparative dialogue

i. Comparative dialogues on differences

The analysis above has shown that the structure of free movement law requires Member States to engage in legal empathy. The result of this exercise is that Member States are required to engage in comparative dialogues. They have to compare and contrast their own legislation with the rules of other Member States. As a result, free movement law is a method for Member States to learn about what other Member States are doing and to recognise the differences between Member States in the protection of public interests and the tools chosen to protect them. As such, legal empathy can be characterised as "a route to knowledge".[85] Negative integration is a learning process.[86] In the next sub-section, the learning effects of free movement law will be identified – in other words, what Member States can do with the knowledge they have acquired through free movement cases. But before I do this, it is important to focus in more detail on the substance of the comparative dialogue in free movement law.

The entire structure of free movement law is focussed on establishing and accentuating differences between Member States. In the recognition stage, it starts with the characterisation of the rules of another Member State as sufficiently different to result in a restriction on free movement. In the response stage, the perspective switches to an explanation of why these differences exists, and why and how they should be maintained. Therefore, negative integration is not directly about convergence. In the first place, negative integration is about differences in legal approaches.[87] This

[84] See B. van Leeuwen, "Towards Europeanisation through the proportionality test? The impact of free movement law on medical professional discipline" (2020) 16 *ELJ* 61.
[85] D. Matravers, "Empathy as a Route to Knowledge" in A. Coplan and P. Goldie, above n 9, 19.
[86] This creates a direct link to comparative law. The acquisition of knowledge and understanding is one of the main aims of comparative law. See M. Siems, *Comparative Law* (CUP, 2018), 3-4.
[87] See H. Muir Watt, above n 8, 113-115.

is the ultimate kind of empathy: we understand that we are all different, but we still make an effort to recognise and respond to the position of other persons – however different their approach might be.[88]

The risk of choosing negative integration as the method to explore differences is that these differences might ultimately be removed.[89] This risk is inherent in every free movement case: if a Member States cannot provide an adequate response, the national legislation is considered a restriction on free movement that cannot be justified and should be removed. On the one hand, this risk could be characterised as a threat. Legal empathy in the internal market is not a voluntary exercise. This could lead to the conclusion that the dialogues between Member States are not genuine dialogues – they are more like blackmail. On the other hand, it is precisely this pressure that forces Member States to make a genuine effort to engage in a dialogue. The higher the pressure, the more detailed the response of a Member State will be. Without negative integration, this kind of dialogue between Member States would be much less precise and detailed. To illustrate this, let us compare *Scotch Whisky* with *Deutsche Parkinson Vereinigung*. In *Scotch Whisky*, the Scottish Government had made an enormous effort to explain on what basis it wanted to introduce a minimum price per unit of alcohol, and why this kind of measure was necessary. The judgment of the Court put additional pressure on the Scottish Government to be more precise about the aims of the rule and its effects. Scotland would not have been so detailed on the why and the how of the legislation without the involvement of free movement law.[90] In *Deutsche Parkinson Vereinigung*, Germany was unwilling or unable to engage and respond with the same level of detail. The Court refused to accept Germany's ground of justification because it had not been able to provide any kind of evidence to show that its fixed price policy improved the protection of health. In effect, it showed that Germany had not engaged in a genuine dialogue. Therefore, the threat of obstacles

[88] See P. Glenn, *The Cosmopolitan State* (OUP, 2013). See also S. Douglas-Scott, *Law after Modernity* (Hart Publishing, 2013), Chapter 10.
[89] Weatherill, above n 30, 143-149.
[90] Bartlett and Macculloch, above n 81, 125-126.

to free movement being removed through negative integration is important to ensure that Member States engage in a detailed dialogue. Legal empathy in the internal market does not come naturally.

In the most sensitive areas of the internal market, which are closely linked to the moral and ethical traditions of Member States, the pressure exercised by negative integration should be less strong. The respect for the differences between Member States should be even stronger. However, this should not prevent comparative dialogues from taking place. The instinctive reaction of Member States in sensitive cases is still to argue that they should fall outside the scope of application of the free movement provisions, because they would not have to provide a ground of justification and establish the proportionality of the measure.[91] This approach would prevent Member States from having to engage in comparative dialogues at all. However, legal empathy requires that a dialogue should take place. The Court has shown that it is able to respect national differences in the field of morality and ethics.[92] In such cases, a comparative dialogue is still necessary for Member States to investigate and establish the extent to which differences between Member States really exist. If it turns out that the differences are in fact non-existent, Member States should not be allowed to maintain restrictions on free movement.[93]

Negative integration is necessary as a method to identify and confirm these differences. In these cases, the emphasis should not be on the justification of differences, but on showing that the differences between Member States exist. In most cases, this would not be a problem: in cases like *Sayn-Wittgenstein* and *Omega*, there was no doubt that one Member State provided a different level of fundamental rights protection from the other Member State. The Court did not challenge the level of protection provided and focussed on what was necessary for the Member State to achieve that level of protection.[94] However, in some cases, free movement law might show that the Member States has not characterised the intention or effect of its own legislation in an accurate

[91] De Witte, above n 34, 1562-1565.
[92] Van Leeuwen, above n 5, 1423-1425.
[93] Ibid., 1430-1431.
[94] Ibid., 1424-1425.

way. This could lead to the conclusion that there are in fact no differences between Member States, and that the restriction on free movement should be removed.[95]

ii. The learning effects of comparative dialogues

The next step is to analyse what kind of impact comparative dialogues in free movement law have on Member States. How do Member States respond to differences in national legislation that have been identified through free movement law? What are the learning effects? The instinctive response of a free movement lawyer will be to point to positive integration – harmonisation of national laws at the European level. Negative integration is often regarded as a "prelude" towards positive integration if the differences between Member States are too significant for free movement to be effective.[96] This would result in the elimination of differences between Member States. It would require action to be taken by all (or at least a qualified majority) of the Member States and the European Parliament.[97] The relationship between negative integration and positive integration will be discussed in the next section. In this sub-section, I will focus on the effect of legal empathy on individual Member States. Three types of impact will be investigated.[98] First, Member States can decide to "learn to live with differences". Second, Member States can "learn from differences and adapt". Third, Member States can "learn to predict conduct by other Member States". These three patterns are not necessarily mutually exclusive.

First of all, after a comparative dialogue through a free movement case, a Member State may decide to maintain the differences in legislation. In such cases, the Court or the national court must have found that the differences are allowed under free movement law. This usually means that the restriction on free movement has been found to be justified and proportionate. A Member State may decide to maintain its original approach and learn to live with the difference. This would not

[95] Ibid., 1432-1434.
[96] Weatherill, above n 30, 151-153. See also Barnard, above n 63, 559-560.
[97] Article 114(1) TFEU.
[98] For a private international law perspective on the reactions as a result of interaction between legal regimes, see H. Muir Watt, above n 8, 126-139.

require any kind of change in behaviour.[99] The national legislation would be maintained and the comparative dialogue that took place through free movement law would not result in any change of legislation. This is the most likely response by Member States. It does not require any additional effort and it confirms the concept of "unity in diversity" in the internal market.

Second, a Member State may decide to learn from the legislation in another Member State and adopt similar legislation. Charles Sabel and Jonathan Zeitlin have described how the regulatory framework, the governance structure and the institutional architecture of the EU have encouraged Member States to learn from differences in various areas of the internal market.[100] A similar kind of "learning from difference" is taking place through negative integration. The comparative dialogues under the free movement provisions can result in a direct learning effect: a Member State learns from the approach taken by another Member State and now wishes to adopt it as its own.[101] This could be because the restriction on free movement could not be justified. However, it could be that even though the restriction was justified, the Member State might still have reached the conclusion that the approach taken by the other Member State should be preferred. In *Humanplasma*,[102] Austria wanted to increase the number of blood donors. However, the Austrian legislation provided that blood donors could not receive any kind of financial reimbursement. They could not even receive a cup of coffee or reimbursement of their travel costs. The Court based its finding that the restriction could not be justified to an important extent on a comparative analysis of what other Member States were doing.[103] This comparative exercise led to the conclusion that it was still possible to achieve the same aim through a less restrictive means: blood

[99] See L. Conant, *Justice Contained: Law and Politics in the European Union* (Cornell University Press, 2002).
[100] C. Sabel and J. Zeitlin, "Learning from Difference: The New Architecture of Experimentalist Governance in the EU" (2008) 14 *ELJ* 271.
[101] See, for an example, B. van Leeuwen, "The Patient in Free Movement Law: Medical History, Diagnosis and Prognosis" (2019) 21 *CYELS* 162, 182-183.
[102] Case C-421/09, *Humanplasma*, EU:C:2010:670.
[103] Ibid., paras 40-45.

donors could at least be reimbursed for their travel costs. As such, through the free movement case, Austria was made to learn from the approach taken by other Member States.

Third, another type of learning effect of comparative dialogues would be that Member States learn to predict each other's behaviour. This would be the ultimate effect of legal empathy: an ability not only to engage with the differences in legislation, but also to predict what Member States are going to do. This does not necessarily require Member States to develop highly sensitive radars or antennas. It could simply mean that Member States already engage with other Member States when they are in the process of adopting rules that might result in restrictions on free movement. In such cases, Member States could establish an informal dialogue with another Member State without waiting for free movement cases. A good example of this kind of interaction was the German plan to introduce a new toll for the use of motorways in Germany. This motorway toll would indirectly discriminate against motorway users from other Member States. When the legislative proposal was discussed in the German Parliament, Austria and the Netherlands intervened in the process and attempted to engage in a dialogue with Germany on the effects of the new toll rules on free movement. When Germany decided to continue and adopt the proposal, Austria and the Netherlands still had to bring an infringement procedure against Germany.[104] However, what this example shows is that it is possible for Member States to engage in informal dialogues on the differences between national legislation. This kind of dialogue is possible because Member States are able to discuss legislative choices from the perspective of free movement law. It may not always work – as the German toll case shows –, but it shows a willingness by Member States to engage and compare before formal rules are adopted.

VI. Legal empathy and harmonisation in the internal market

i. The motive behind harmonisation and the legislative process

[104] C-591/17, *Austria v Germany*, EU:C:2019:504.

In this section, the relationship between harmonisation and legal empathy will be analysed. On the one hand, harmonisation could be regarded as the ultimate manifestation of legal empathy. Harmonisation at the European level involves the coming together of the Member States to agree on a common set of legal rules that will become applicable to all Member States. From this perspective, harmonisation is an act of legal empathy, since it requires the Member States to have a dialogue and to agree on what kind of legal rules should be adopted. On the other hand, harmonisation is necessarily intended to remove differences between Member States. As such, after the harmonisation has been adopted, it is no longer possible for Member States to maintain differences in legislation unless the harmonisation itself explicitly allows this.[105] As a result, there will be no more need for Member States to engage in comparative dialogues – there is nothing to compare and the rules should be similar in all Member States. If a narrow perspective on the purpose of the internal market was adopted, this would be regarded as a positive development. After all, obstacles to free movement would be removed through the adoption of harmonisation. However, as I have argued above, free movement law is not only about the result. It is also about the process, and negative integration plays an important role in engaging Member States in comparative dialogues. Therefore, it is important that there is always a good balance between positive integration and negative integration. I will return to this balance below.

The legislative process to adopt the harmonisation itself involves a comparative dialogue between Member States. This is directly linked to the legal basis for harmonisation to improve the internal market: Article 114 TFEU. In *Tobacco Advertising*,[106] the Court made it very clear that the EU's powers to harmonise under Article 114 TFEU are not unlimited. It has to be shown that there are genuine or likely obstacles to free movement or appreciable distortions of competition as a result of the differences in the legislation of the Member States.[107] Nothing less will do – the EU has to

[105] See M. Klamert, "What we talk about when we talk about harmonisation" (2017) 17 *CYELS* 360, 375-377.
[106] Case C-376/98, *Germany v Parliament and Council*, EU:C:2000:544.
[107] Ibid., paras. 97-105.

show that the harmonisation makes a real contribution to the elimination of obstacles to free movement. As a result, it is clear that there has to be a comparative dialogue in the legislative process. However, this dialogue is inherently more political than legal. The main players in the adoption of harmonisation on the basis of Article 114 TFEU are the Council and the European Parliament. Although they will be assisted by impact assessments and legal advice,[108] the decisions that are taken are ultimately of a political nature. The conditions laid down by the Court in *Tobacco Advertising* have more of an *ex post* relevance – they will be taken into account by the Court in actions for annulment that challenge the validity of the harmonisation. It is questionable to what extent comparative dialogues play an important role in the legislative process.[109]

Against this background, the motivation behind the harmonisation process becomes important. If harmonisation were just about removing obstacles to free movement *per se* – harmonisation for the sake of harmonisation[110] – it would not have a positive impact on legal empathy between Member States. However, if harmonisation was the result of a series of free movement cases, it could be directly linked to one of the learning effects analysed above. This would be particularly true if Member States decided to base the harmonisation on a model developed by one Member State, whose rules had been identified as an example of good practice or effective regulation. In such cases, the harmonisation would follow a comparative process – facilitated by negative integration – and would be based on a conscious decision to follow a model that had been proven successful.[111] This would be a follow-up learning effect from negative integration. Harmonisation would then be an act of legal empathy itself. However, if the focus was solely on removing differences between Member States, this would not be sufficient to guarantee legal empathy.

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[108] See E. van Schagen and S. Weatherill (eds.), *Better Regulation in EU Contract Law* (Hart Publishing, 2019).
[109] S. Weatherill, "The limits of legislative harmonization ten years after *Tobacco Advertising*: How the Court's case law has become a drafting guide' (2011) 12 *GLJ* 827.
[110] The debates about "harmonisation for the sake of harmonisation" are not too different from the debates about "convergence for the sake of convergence" in European private law and comparative law. See W. van Gerven, "Bridging the unbridgeable: Community and national tort laws after *Francovich* and *Brasserie*" (1996) 45 *ICLQ* 507.
[111] For a comparative law perspective, see K. Pistor, "The Standardization of Law and Its Effect on Developing Economies" (2002) 50 *American Journal of Comparative Law* 97, 108-109. See also Siems, above n 86, 5.

ii. Protecting the balance between positive and negative integration

Because more harmonisation leads to fewer differences between national rules, it is important that a balance between positive and negative integration is maintained. If legal empathy is about comparative dialogues on differences, harmonisation cannot always be the preferred tool to improve the functioning of the internal market. It is precisely the balance between positive and negative integration that is important and should be protected. Legal empathy is not just about showing Member States that the differences between them might not be as significant as they think – it is also about teaching Member States to learn to live with differences. As such, relying on negative integration as a regulatory tool to protect the functioning of the internal market is of fundamental importance. Negative integration as a mode of governance in the internal market should be valued and protected rather than regarded as a mere prelude to harmonisation at the European level.

Finally, even when the decision is made to adopt harmonisation, the balance between positive and negative integration should still be protected. This is primarily done through the choice of the method of harmonisation. In adopting legislation under Article 114 TFEU, the EU has a choice to adopt minimum or maximum harmonisation.[112] With maximum harmonisation, the EU sets the absolute standard. There is no more scope for diversity at the national level – Member States have to implement the standards laid down in the harmonisation. As a result, the free movement provisions have no more role to play. There is no more room for comparative dialogues under the free movement provisions. This is different when the EU chooses to adopt minimum harmonisation. With minimum harmonisation, the EU sets minimum standards. It remains possible for Member States to adopt higher or more stringent standards. If they do this, their national rules will be assessed under the free movement provisions. The same logic applies to the

[112] Klamert, above n 106. See also M. Dougan, "Minimum harmonisation and the internal market" (2000) 37 *CML Rev* 853.

distinction between partial and exhaustive harmonisation. To facilitate Member States in engaging in comparative dialogues, it is again important that the EU vary in the use and adoption of minimum and maximum harmonisation and partial and exhaustive harmonisation.[113]

VII. Legal empathy and Brexit

Finally, a connection will be made between legal empathy and Brexit. A lot has already been written about Brexit and empathy – in particular, by Kalypso Nicolaïdis.[114] In this final section, I will focus on two aspects of Brexit. First, I will return to the concept of affective matching, which I introduced at the start of this paper. This will be used to show that, even though comparative dialogues will continue to take place after Brexit, the starting point of the UK and the EU Member States will be fundamentally different. This will make it much more difficult to facilitate genuine legal empathy. Second, through the UK Internal Market Act 2020,[115] the UK has implemented the concept of an internal market at the national level. This includes a strong emphasis on free movement of goods and services between the four devolved administrations of the UK: Northern Ireland, Scotland, England and Wales.[116] I will argue that, although some techniques and concepts in the UK Internal Market Act have been "borrowed" from EU law, negative integration in the UK is unlikely to lead to genuine comparative dialogues and legal empathy between the devolved administrations.

One of the core parts of the Withdrawal Agreement is the protection of citizens' rights after Brexit.[117] EU citizens in the UK and UK citizens in the EU will continue to enjoy their rights under EU law, in particular the right to residence and the right to equal treatment.[118] As a result, EU

[113] See also S. Weatherill, *Contract Law of the Internal Market* (Intersentia, 2016), 241-244.
[114] See K. Nicolaïdis, *Exodus, Reckoning and Sacrifice: Three Meanings of Brexit* (Unbound, 2019). See also Nicolaïdis, above n 18, 263-265.
[115] UK Internal Market Bill, HL Bill 135 – EN.
[116] See Department for Business, Energy & Industrial Strategy, *White Paper on the UK Internal Market* (July 2020) (accessed at: https://www.gov.uk/government/publications/uk-internal-market).
[117] Part II on Citizens' Rights in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.
[118] Articles 13 and 23 of the Withdrawal Agreement.

citizens in the UK will continue to be able to rely on the free movement provisions. In doing so, they can engage the UK in a comparative dialogue with the EU Member States.

In December 2020, the EU and the UK concluded a Trade and Cooperation Agreement, which includes provisions on trade in goods between the EU and the UK.[119] Customs duties and quantitative restrictions on goods will be prohibited.[120] This creates the possibility for continued comparative dialogues between the Member States and the UK. However, the starting points of the UK and the Member States will be fundamentally different after Brexit. Throughout the negotiations of the new agreement, the UK already insisted on its sovereignty. This emphasis on unilateralism is difficult to reconcile with the spirit of co-operation and dialogue that the internal market is based on. The fact that the European Commission had to threaten the UK with an infringement procedure for a breach of the duty of sincere co-operation in Article 4(3) TEU in the adoption of the UK Internal Market Act shows that the UK was already acting as being outside the internal market before the end of the transition period.[121] This fundamental difference in starting point leads to a lack of "affective matching" between the UK and the EU Member States. This lack of affective matching is going to make legal empathy much more difficult after Brexit. Legal empathy necessarily involves a limitation of sovereignty combined with a willingness to solve disputes through the structure of free movement law. Comparative dialogues based on the free movement provisions will be of a different quality if one of the parties has not signed up to the same commitment as the other State. As a result, it is much more difficult for comparative dialogues to be genuine and effective if they take place with countries that have not limited their sovereignty by being a member of the internal market.

[119] Trade and Cooperation Agreement between the EU and the UK [2020] OJ L 444/1.
[120] See Title I of Part 2 of the Trade and Cooperation Agreement.
[121] Press Release of the European Commission of 1 October 2020, "Withdrawal Agreement: European Commission sends letter of formal notice to the United Kingdom for breach of its obligations" (accessed at https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1798).

In December 2020, the UK Parliament adopted the UK Internal Market Act 2020.[122] One of the key features of this Act is the creation of an internal market for goods and services *within* the UK. Free movement of goods and services between the four devolved administrations would be guaranteed.[123] The Act focusses on negative integration with a strong emphasis on the principles of non-discrimination and mutual recognition.[124] As a first reaction, we might say that there is a certain irony – or hypocrisy – in the UK wanting to leave the EU because EU membership involves a limitation of sovereignty, while simultaneously trying to impose the very same model on its devolved administrations. Apparently, a limitation of sovereignty is only seen as problematic in certain specific and limited contexts. This is directly linked to the motive for proposing the UK Internal Market Act. The emphasis on negative integration is likely to result in a centralisation of power away from the devolved administrations to the central UK Government in Westminster.[125] As such, implementing an internal market has more to do with limiting the powers of the devolved administration than with a genuine appreciation of the EU internal market as a model for integration between states or regions.

A more optimistic reading of the UK Internal Market Act could lead to the conclusion that the proposal constitutes a kind of "mimicking" of the interaction that takes place between Member States in the EU internal market. A parallel could be made with the voluntary decision of Member States to make EU law applicable to situations without a cross-border element. In essence, adopting an internal market at the national level could be considered the ultimate learning effect of legal empathy – it shows that the UK recognises the importance of free movement law as a tool to achieve more integration between states or regions. After all, even after the UK has left the internal market, it would still like its devolved administrations to continue to engage in comparative

[122] UK Internal Market Act 2020.
[123] See Part 1 and Part 2 of the UK Internal Market Act.
[124] Articles 2-4, 5-9 and 19-21 of the UK Internal Market Act.
[125] See the briefing paper of the UK in a Changing Europe project, "UK Internal Market Bill, Devolution and the Union" (October 2020) (accessed at https://ukandeu.ac.uk/wp-content/uploads/2020/10/UK-internal-Market-Bill-devolution-and-the-union.pdf.

dialogues. However, the selective approach taken by the UK Government to the implementation of the model of the internal market means that the UK internal market would be significantly different from the EU internal market. In particular, it would be (even) easier to establish restrictions on free movement.[126] Furthermore, the opportunities for the administrations to justify restrictions on free movement law are much more limited.[127] As a result, the comparative dialogues that would take place in the UK internal market would be less detailed. They would provide less of an opportunity to the devolved administration to engage in detailed comparisons of rules at the national level. Therefore, the substance of the UK Internal Market Act suggests that its aim is more about centralisation of power than about integration through free movement law.

VIII. Conclusion

By way of conclusion, I will end with two pieces of advice – or rather two "calls". These calls are directly linked to two fundamental starting points of this paper: a stronger emphasis on free movement law as a *process* without taking an outcome-oriented perspective, and a definition of legal empathy as an exercise in recognising and responding to *differences* rather than similarities between national laws.

First, since I have characterised free movement law as a comparative dialogue, it would be beneficial to the development of free movement law if comparative lawyers played a more prominent role in free movement cases. So far, the involvement of comparative lawyers in free movement lawyers has remained limited – although Walter van Gerven is a prominent exception.[128] This is a missed opportunity, because free movement law should be an interesting

[126] Ibid., 5-6.
[127] J. Zglinski, "Goods in the Internal Market Bill: The Emperor's New Clothes?", *EU Relations Law Blog*, 15 September 2020 (accessed at https://eurelationslaw.com/blog/goods-in-the-internal-market-bill-the-emperors-new-clothes). See also P. Oliver, "Goods in the UK Internal Market: a Closer Look at the Exception Clauses", EU Relations Law Blog, 12 October 2020 (accessed at: https://eurelationslaw.com/blog/goods-in-the-uk-internal-market-a-closer-look-at-the-exception-clauses).
[128] His approach was not neutral: it was intended to bring about convergence or Europeanisation of national laws through dialogues between national courts (an "open method of convergence"). See W. van Gerven, "Bringing (Private) Laws Closer to Each Other at the National Level" in F. Cafaggi (ed.), *The Institutional Framework of European Private Law* (OUP, 2006).

and fertile playground for comparative lawyers. And they have an important contribution to make: too often, in free movement cases, the approach to analysing national law is very "broad-brush".[129] This applies to cases at the European as well as at the national level.

The quality of comparative dialogues in free movement law should be improved. For a detailed analysis of the nature of the restriction, the ground of justification and the proportionality of a restriction, a good and detailed understanding of the national legislation is required. In many cases, the Court and national courts lack either the knowledge or the resources to engage in a detailed assessment and comparison of provisions of national law. This is where an important role could be played by comparative lawyers.[130] But the invitation cannot remain one-way traffic. As free movement lawyers, we should be not be afraid to learn from comparative law.[131] If free movement law is a process to compare and assess the differences between national legislation, the way in which these differences are identified and analysed could still be improved. The ability to rely on comparative law methods would help free movement lawyers to make comparative dialogues in the internal market more detailed. This will ultimately improve legal empathy in the internal market.

Second, and with a particular focus on the UK, free movement lawyers should be cautious about getting too involved in debates about the UK Internal Market. After Brexit, there might be a certain kind of pressure – or temptation – on free movement lawyers to re-brand EU Internal Market Law courses as "EU and UK Internal Market Law" or even "EU Relations Law".[132] In light of my

[129] See also B. van Leeuwen, above n 84, 79-80.
[130] Siems, above n 86, 3-5.
[131] For an overview of comparative methods, see Siems, above n 86, Chapter 2.
[132] I am very sympathetic to the recent project by Monckton Chambers and the Centre for European Legal Studies at the University of Cambridge to explore "a new, developing area of law" called "EU Relations Law" (https://eurelationslaw.com/). I have been impressed by the quality of the substantive analysis of the issues in the seminars and blog posts. At the same time, I see this project primarily as an "umbrella project" to bring together different disciplines rather than the creation (or confirmation) of a new area of law. While such an exercise may be interesting to practitioners from a marketing perspective, EU law academics in the UK might want to take a bit more distance and focus on the protection of EU law itself instead of swiftly and strategically moving to a new "area of law". This is closely linked to the protection of EU law as one of the core "foundation subjects" in UK law degrees.

substantive analysis of the UK Internal Market Act above, the UK internal market is likely to become a battlefield for UK constitutional lawyers.[133] In putting the UK Internal Market Act together, the UK Government has engaged in an exercise of cherry-picking. It has selected a number of principles from the EU internal market that appear useful to increase the powers of the UK Government vis-à-vis the devolved administrations.

If free movement lawyers decide to enter this battlefield, it should be to highlight and emphasise the *differences* between the EU internal market and the approach taken by the UK Government.[134] As I have argued above, the beauty – and importance – of free movement law lies in the detailed and structured way through which it engages Member States in comparative dialogues. To establish and facilitate these dialogues, it is essential that the complete structure of free movement law (scope, direct effect, restriction, justification and proportionality) is maintained. The UK Government could first have engaged in a dialogue with free movement lawyers to learn and understand the model of the EU internal market before it decided to implement an inferior copy of this model in the UK.

[133] See the briefing paper of the UK in a Changing Europe project, above n 132, 11-12.
[134] Similar to Zglinski, above n 134, and Oliver, above n 134.