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Personal Conviction and Strategic Litigation in *Wijsenbeek*

JOHN MORIJN

INTRODUCTION

“Ik wuif er hoogstens mee!” That is what Florus Ariël Wijsenbeek, a Dutch Member of European Parliament (MEP), replied on 17 December 1993 when asked by a Dutch border officer to show his passport to establish his identity after arriving on a flight from Strasbourg to Rotterdam. “At the very most I will wave it at you!” By refusing to show his passport, Mr. Wijsenbeek deliberately violated the Dutch Aliens Order, incurring a fine of 65 guilders (about 30 euros). When he refused to pay, the public prosecutor initiated criminal proceedings against him. Six years after Mr. Wijsenbeek’s simple act of defiance, the European Court of Justice (ECJ) ruled¹ in what is widely viewed as a “classic” case about the (lack of) direct effect of what are now articles 21 and 26 Treaty on the Functioning of the European Union (TFEU)²; the legal implications of the concept of Community/Union citizenship³; and the transition from an area without internal frontiers to an area of freedom, security and justice.⁴

¹ Case C-378/97, Criminal proceedings against Florus Ariël Wijsenbeek [1999] ECR I-6207. For the most relevant case notes, see: D. Martin, Comment on Florus Ariël Wijsenbeek and Arblade, (2000) (2) European Journal of Migration and Law 101–07; Jeremy Evans, (14) (1999–2000) Georgetown Immigration Law Journal 255–56.

² On this aspect, see Paul Craig, Gráinne de Búrca, EU Law – Texts, Cases and Materials, Oxford University Press: Oxford, fifth edition, 2011, at 589; Catherine Barnard, The Substantive Law of the EU – The Four Freedoms, Oxford University Press: Oxford, fourth edition, 2013, at 11; Alan Dashwood (e.a.), European Union Law, Hart Publishing: Oxford, sixth edition, 2011, at 246; George A. Bermann, Roger J. Goebel, William J. Davey and Eleanor M. Fox, Cases and Material on European Union Law, West Publishing, third edition, 2011, at 637–38.

³ On this aspect, see Francis G. Jacobs, Citizenship of the European Union – A Legal Analysis, (2007) 13(5) European Law Journal 591–610, at 606–07.

⁴ On this aspect, see, for example Vassilis Hatzopoulos, With or without you . . . judging politically in the field of the Area of Freedom, Security and Justice, (2008) (33(1)) European

Based on access to Mr. Wijsenbeek's personal files and interviews with him, national and European court documents unavailable to the public, as well as Dutch newspaper articles, this chapter aims to contextualize Mr. Wijsenbeek's legal saga and provide a fuller picture of the case. By examining various previously unreported new elements to the story, we will be able to view *Wijsenbeek* in a different light. The story of *Wijsenbeek* centers on a driven, integrationist-minded MEP cooperating with other MEPs to go to great practical lengths to force a court case only to find the national referring judge rewarding him with any lawyer's Holy Grail: a *carte blanche* to draft the questions for a preliminary ruling inviting the ECJ to turn a case of principle concerning the very nature of the Community's 'area without internal frontiers' into a standard ruling. In that way *Wijsenbeek* and its 'making of' offer a rare occasion to examine how strategic litigation, irrespective of the motives, ultimately hinges on an effective litigation strategy.

BACKGROUND AND CONTEXT

Why did Mr. Wijsenbeek force a case? Why were policy-making avenues blocked, or moving too slowly in his view, leading to the need for a strategic effort to achieve his political objectives in court? And in what way is it relevant for truly appreciating the full implications of the case that it was initiated in December 1993 (one month after the Maastricht Treaty's entry into force) and decided in September 1999 (only four months after the entry into force of the Amsterdam Treaty)? To provide background information critical to understanding Mr. Wijsenbeek's motives, this section describes the legal, judicial and policy context surrounding his legal saga; distinguishes crucial developments pre-Maastricht Treaty, Maastricht Treaty-period and post-Treaty of Amsterdam, within and outside the (E)EC/EU setting; and examines the gap between the slow-paced policy debates among the Member States and the speedier judicial developments in Luxembourg. This will provide a framework in which to discuss the legal proceedings initiated by Mr. Wijsenbeek and to critically assess his approach.

Law Review 44–65, at 46 (“... the Court established a clear connection between the first and third pillars of the EU Treaty ... in tandem, it set the conditions for the parallel interpretation of the rules of the two pillars ... furthermore, the creation of the Area of Freedom, Security and Justice ceased being a mere political choice but also appeared as a legal necessity.”)

Pre-Maastricht Policy Arena – Developments within the (E)EC

The furtherance of the free movement of persons through the elimination of border controls at the internal borders is a policy aim that pre-dates *Wijzenbeek*. It is an issue that has resurfaced in a variety of ways over the years and created considerable tensions between Member States, cooperating inside and outside the Community context, and Community institutions. Reference to free movement of persons dates back to the original Rome Treaty. Article 3 (c) of the Rome Treaty provided that

the activities of the Community shall include ... in accordance with the timetable set out [in the Treaty] an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of ... persons.

While Article 8 introduced an ambitious twelve-year transitional period to achieve this policy objective, early secondary legislation such as Directive 68/360⁵ and Directive 73/148⁶ sought to flesh out the Rome Treaty's bare-bones statements. For instance, Article 3(1) of both Directives required Member States to admit to their territory those persons to whom the directives applied, merely upon presentation of a valid identity card or passport.

In the mid-1970s, the European Commission (Commission) and the European Council⁷ proposed further steps to abolishing internal border controls. When the European Council of 9 and 10 December 1974 tabled plans to create a passport union, the Commission issued a report⁸ on 3 July 1975 describing the total abolition of passport control within the Community as a *sine qua non* for attaining that objective.⁹ The Commission therefore clearly believed that, apart from a symbolic function, the European passport union plan should also hold some practical value. The 1975 Tindemans report to the

⁵ Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, Official Journal, English Special Edition 1968 (II), p. 485.

⁶ Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, [1973] O.J., p. 14.

⁷ Note that in 1974 the European Council was not yet an EU institution, but a meeting of heads of states and governments taking place outside of the EEC context.

⁸ European Commission, Towards European Citizenship – Implementation of point 10 of the final communiqué issued at the European Summit held in Paris on 9 and 10 December 1974 – A Passport Union, COM (75) 322, 3 July 1975.

⁹ The report stated: 'It is thus clear that the abolition of passport control within the Community means the abolition of passport control at Community internal frontiers' (point 2.3.1, p. 11).

European Council,¹⁰ in which the Belgian prime minister laid down his views on the various implications of using the term ‘European Union’, used similar wording with regard to the internal borders. It argued for the ‘gradual disappearance of frontier controls on persons moving between member countries, as a corollary of a passport union’.¹¹

These developments in the 1970s resulted in a Commission draft resolution of 9 July 1982 on the easing of the formalities relating to checks on citizens of Member States at the Community’s internal frontiers.¹² Article 2(b) of the resolution provided that by 31 December 1984, the Member States would undertake ‘to consider that, in principle, proof of citizenship of a Member State may be supplied either by *presenting* a uniform passport, *given that its standard external format will immediately identify the holder as citizen of a Member State*, or by presenting an identity card’.¹³ The idea, to be more precise, was that only a *closed* passport with a recognizable format would have to be presented when crossing a border. Unsurprisingly, this idea drew a lot of fire, including criticism centred on its implications for security and crime prevention in the EU. This critique resulted in the elimination of this particular provision by the Council of Ministers when it finally adopted a resolution by June 1984.¹⁴

Yet, the policy idea of removing all internal border controls remained on the agenda. One month later, the European Council of 26 July 1984 stressed the importance of the removal of all police and customs formalities at the intra-Community borders. The *ad hoc* committee set up to propose practical measures to this effect, known by the name of its president, Mr. Adonnino, presented its report in March 1985. Among the committee’s proposals was a specially designed sticker – a white “E” against a green background – to be attached to cars. The idea was that border officers could in this way recognize EC citizens crossing an internal border so that they would not have to stop every single car. Indeed, precedent existed at the time for this practice. As part of a wider cooperation effort, France and Germany already relied on this practice.¹⁵

¹⁰ ‘European Union’, Report by Mr. Leo Tindemans, Prime Minister of Belgium, to the European Council, 29 December 1975, Bulletin of the European Communities, Supplement 1/76.

¹¹ *Ibid.*, p. 27.

¹² Draft Council resolution on the easing of the formalities relating to checks on citizens of Member States at the Community’s internal frontiers, OJ 1982 C 197/6.

¹³ Emphases added.

¹⁴ Council Resolution on the establishment of a Passport Union, [1984] O.J. C 159/1.

¹⁵ In the city of Saarbrücken, France and Germany had taken the symbolic initiative – intended as a gesture to make some progress with the creation of a citizens’ Europe – to relax the checks at the common French-German border, in particular for car drivers having a green sticker on

Furthermore, the committee proposed a measure that, while revolutionary at the time, is now commonplace – physically separating EC and non-EC citizens in European (air)ports.¹⁶ Months later the Commission's famous 1985 White Paper¹⁷ also referred to the issue of border controls at the EEC internal borders. After having characterized controls at internal borders as a 'constant and concrete reminder to the ordinary citizen of the incompleteness of the Community' and an 'outward sign of an arbitrary administrative power over individuals', the Commission announced it would propose measures by 1988 to eliminate border controls between Member States.¹⁸

The Single European Act, which entered into force on 1 July 1987, contained two legislative innovations: Article 8A EC and Article 100A EC. The first article provided that 'the Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992'. However, the provision also went on to state that the adoption of such measures should be done 'in accordance with the provisions of ... Article 100A'. That clause stated that the general powers of the Community to pass directives aimed at the establishment or functioning of the common market could not be used for provisions relating to free movement of persons.

As announced in its White Paper, the Commission in December 1988 published a Communication on the abolition of controls of persons at intra-Community borders. This document¹⁹ illustrates well the paradox of the treaty text's deadline of '31 December 1992'.²⁰ While the EEC would need to establish an area without internal frontiers by that date, it lacked the competences to implement the necessary 'flanking measures'²¹ to bring about these changes in a prudent and balanced fashion. Instead, the document listed a

their car as evidence of being EC citizens; See J. J. E. Schutte, *Schengen: Its Meaning for the Free Movement of Persons in Europe* (1991) 28 *Common Market Law Review* 549–70, at 549.

¹⁶ 'L'Europe des citoyens – Rapports du comité ad hoc', *Bulletin des Communautés européennes*, Supplément 7/85, at 10.

¹⁷ COM(85)310 final, *Completing the Internal Market – White Paper from the Commission to the European Council*, 14 June 1985.

¹⁸ COM(85)310, par. 47–54. ¹⁹ COM(88) 640 final, 7 December 1988.

²⁰ The legal value of the date in the Treaty led to some debate in legal literature; A. G. Toth, *The Legal Status of the Declarations Annexed to the Single European Act* (1986) (23) *Common Market Law Review* 803–12; H. G. Schermers, *The Effect of the Date 31 December 1992* (1991) (28) *Common Market Law Review* 275–89.

²¹ Measures put in place to compensate for abolishing checks on persons at internal borders, such as a common security arrangements at the external borders and a more coordinated approach to police and justice cooperation within the European Community.

wide variety of fora²² in which these ‘flanking measures’, such as tighter police and justice cooperation, were being developed *outside* the EEC. A list of similar measures describing what was still needed to hit the deadline of 31 December 1992 that was submitted to the European Council of Madrid in June 1989, the so-called Palma-document, once again divided the work over these intergovernmental fora, in this way bypassing the Commission (and, of course, by implication also the European Parliament (EP)).

Pre-Maastricht Political Arena – Developments Outside the (E)EC

Meanwhile, the aforementioned Franco-German agreement formed the basis for the Schengen Agreement on the gradual abolition of border control of 14 June 1985, in which the Benelux countries also participated.²³ Developed outside the context of the EEC by a select group of EC Member States, the Schengen Agreement sought to create a common territory without internal border controls. The Schengen Agreement’s logic was simple: abolish all internal border controls and transfer them to a common external frontier. To achieve this policy aim, the participating states would, in advance, attempt to harmonize border formalities and establish complementary measures to safeguard security and control migration. Initially, the participating States set 1 January 1990 as the deadline. However, they only concluded the Schengen Implementing Convention on 19 June 1990. Consistent with the policy aim of abolishing internal border controls, Article 2 established the principle that internal borders may be crossed without checks on persons. By way of derogation, however, the agreement also provided that border checks could be carried out for a limited period for public policy or national security reasons.²⁴ The Agreement and its Implementing Convention eventually entered into force in March 1995. Under its terms, the external boundaries of the Schengen area remained the only place left to carry out border controls on persons, though airports and seaports were still treated as external frontiers.

²² To name but a few: the TREVI-group discussed subjects connected with police, security and terrorism, the ad hoc Immigration group was called upon to deal with asylum, controls at the external borders and visa matters. Other fora included CELAD (Coopération Européenne pour la Lutte Anti-Drogue) dealing with narcotic drugs and a group called Coopération Judiciaire, occupied with judicial cooperation.

²³ The Benelux countries already had a system of ‘open internal borders’ since 1960 amongst themselves. See L. D. H. Hamer, Free movement of persons – An exploration from a Dutch perspective (1989) *Legal Issues of European Integration* 49–59, at 51.

²⁴ J. Handoll, Free movement of persons in the EU, Chancery Law Publishing, London, 1995, at 430.

The Schengen instrument, with its five Member States, did not go unnoticed by the Community and its institutions. At its most basic level, the instrument shared the same objectives as article 8a EEC/7a EC.²⁵ At the time, the Commission stressed these similarities, viewing the initiatives as “a testing-ground for the Community, from the standpoint of completion of the internal market, and as a driving force for those Member States which are not signatories of the Schengen Agreements”.²⁶ The Commission also stated that “the substance of the solutions that have emerged also provides a source of inspiration – and even, in some cases, a blueprint – for work by the Twelve”.²⁷ As a testing ground, the Schengen cooperation provided clear evidence that the policy logic and the political realities moved at vastly different speeds.

Pre-Maastricht Judicial Arena

As political efforts aimed at integration unfolded in political arenas elsewhere, the ECJ applied the logic of European integration when ruling on several key cases related to the issue of internal border controls. Removed from the heated and partisan policy discussions in Brussels and Strasbourg, the Court established fairly clear parameters in the 1980s and early 1990s on the abolition of restrictions on movement of persons based on the principles of free movement and non-discrimination.²⁸ In *Regina v. Pieck*,²⁹ the Court clarified that the restriction on grounds of public policy, public security and public health must not be regarded as imposing a condition precedent to the acquisition of the right of entry; rather, the restriction would be permissible in individual cases where there is sufficient justification to impose restrictions on the exercise of that right. In *Commission v. Belgium*,³⁰ the Court

²⁵ This awareness also worked the other way around. The Schengen Implementing Convention contained provisions about its relationship with Community law. Article 134 provided that provisions of the Implementing Convention could only apply in so far as compatible with Community law. Furthermore, following article 142 provisions of the Implementing Convention would be changed in case the Twelve came to an agreement about the establishment of the internal market within the Community framework. See David O’Keeffe, *The Free Movement of Persons and the Single Market*, (1992) *European Law Review* 3–19, at 12.

²⁶ See Commission Answer to WPQ 3044/90 (OJ 1991 C 214/12) and Commission Answer to WPQ 43/89 (OJ 1990 C 90/11).

²⁷ *Ibid.* ²⁸ See O’Keeffe, above n. 20. ²⁹ Case 157/79, *Regina v. Pieck*, [1980] ECR 2171.

³⁰ Case 321/87, *Commission v. Belgium* [1989] ECR 997. In this case the Commission accused Belgium of subjecting nationals of other Member States residing in Belgian territory to certain non-systematic controls at the frontier, in particular requiring them to produce a residence or establishment permit apart from their passport. The Commission maintained this to be in violations of Directives 68/360 and 73/148, mentioned above.

held that carrying out controls upon entry into the territory of a Member State may, depending on the circumstances, constitute a barrier to the free movement of persons. In particular, this would be the case if it were found that the controls were carried out in a systematic, arbitrary or unnecessarily restrictive manner. In the 1991 case *Commission v. The Netherlands*,³¹ the ECJ introduced a further limitation on border controls. Asked about the compatibility of national legislation by virtue of which citizens may be required to answer questions regarding the purpose and duration of their journey and the financial means at their disposal before being allowed to enter a territory, the Court stated that requiring the production of a valid identity document or passport is the *only* pre-condition a Member State is allowed to impose.³²

Maastricht Treaty Period: Continuing a Two-Track Approach

The Treaty on European Union (TEU), which entered into force on 4 November 1993, introduced a ‘Third Pillar’ of the European Union provisions for cooperation in the field of Justice and Home Affairs. These provisions, listed in Article K.1 EU, paragraph 1 to 6, were principally intended to facilitate the adoption of the flanking measures needed for a more complete set of regulations on the free movement of persons. The Third Pillar provided for a mainly intergovernmental form of cooperation. The mainly political nature of the cooperation was underlined by the fact that the ECJ was completely sidelined *ex Article L EU*. The TEU also introduced another provision important for our analysis. Article 8A EC (now 21(1) TFEU) established the right to free movement as one of the core elements of the Citizenship of the Union:

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.
2. The Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1; save as otherwise provided in this Treaty, the Council shall act unanimously on a proposal from the Commission and after obtaining the assent of the European Parliament.

³¹ Case 68/89, *Commission v. The Netherlands*, [1991] ECR I-2637.

³² *Ibid*, points 15–16.

On 18 November 1993, eleven months after the passing of the Single European Act's December 1992 deadline, two weeks after the entry into force of the Maastricht Treaty, and several weeks before Mr. Wijsenbeek was arrested at Rotterdam airport, the EP sued the Commission for failure to act. In the EP's view, the Commission should have come up with proposals to regulate the crossing of external borders and to institute the abolition of controls on persons crossing the intra-Community borders. The EP maintained that the Commission should not have allowed the Member States to step outside the framework of the EEC Treaty by means of the Schengen cooperation in which they effectively agreed on subject matters that should be dealt with within the Community context exclusively.³³

On 24 August 1995, the Commission responded by issuing three proposals for directives related to the free movement of persons.³⁴ This package came to be known by the name of the Commissioner proposing it, Mr. Monti. The three proposals did not lead to any result, even if the Council of Ministers considered them on the basis of the competences laid down in the new Maastricht Treaty. The reason was that unanimity was still required. The United Kingdom, which maintained that the abolition of border controls should only concern EU citizens, caused this deadlock. Such a construction, however, implies that one would still have to control *everybody* crossing the border, simply because one could only establish whether somebody is an EU citizen by examining his or her passport.³⁵ Another contribution to the deadlock was that many policy-makers believed the abolition of control at internal borders should actually go hand in hand with adopting common rules for control at the external borders and the creation of an immigration and asylum policy, for which the Community was not thought to have clear competencies, even in the Maastricht Treaty.³⁶ Article K.9 EU, the so-called 'passerelle' provision that offered the possibility to communitarize the flanking measures listed in Article K.1, paragraph 1 up to 6 EU has never been used.

³³ Case C-445/93, [1994] O.J. C 1/22

³⁴ COM(95)346, COM(95)347 and COM(95)348, respectively proposals for Council directives on the right of third-country nationals to travel in the Community, on the elimination of controls on persons crossing internal frontiers and amending the abovementioned Directive 68/360/EEC and 73/148/EEC, 24 August 1995.

³⁵ An important background issue for the United Kingdom's position was a long-standing dispute with Spain over Gibraltar. This also led to the blockage of related issues such as an External Frontiers Convention as was proposed by the Commission (COM(93) 684 final, Commission proposal for a decision, based on Article K.3 of the TEU establishing the Convention on the crossing of the external frontiers of the Member States, 10 December 1993).

³⁶ G. Papagianni, *La circulation des citoyens de l'Union: de Maastricht à Amsterdam et au-delà* (1999) *Actualités du Droit* 625–65, at 646.

The only practical result of the “Monti-package,” therefore, was that the EP’s case was scratched from the docket by the ECJ on 11 July 1996. After all, the Commission had repaired its inactivity. For all other practical purposes it was back to square one within the Community. Despite considerable effort, the set of measures laid down in the Treaties turned out to not be sufficient to simultaneously formulate measures to abolish internal border controls and flanking measures.

Amsterdam Treaty Period: Integrating Schengen into the Treaties

Shortly after this, in May 1997, the then fifteen Member States reached agreement about the Treaty of Amsterdam. This integrated the Schengen Agreement and Schengen Implementing Convention into the EC Treaty.³⁷ The move effectively resulted in the application of the Schengen acquis³⁸ in thirteen Member States, as the United Kingdom and Ireland decided to opt out. Title IV of the Amsterdam version of the Treaty on European Community (TEC), titled ‘Visa, asylum, immigration and other policies related to free movement of persons’, promised progressively to establish an area of freedom, security and justice. Article 62(1) provided that within a period of five years measures would be taken ‘with a view to ensuring, in compliance with Article 14, the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders’. However, visible traces of intergovernmental decision-making remained. Article 67(1) required that the Commission share its right to initiative with Member States during the first five years. Moreover, Article 68(2) provided that ‘in any event, the Court of Justice shall not have jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) relating to the maintenance of law and order and the safeguarding of internal security’. Yet it was clear that everything was in place for the Council of Ministers finally to act decisively in implementing a comprehensive free movement of persons agenda.

THE MAKING OF WIJZENBEEK: A BEHIND-THE-SCENES ACCOUNT

Let us go back to January 1993. The Single European Act deadline of 31 December 1992 had just passed. Many integrationist policy-makers and politicians were furious about what, in their view, amounted to decades of

³⁷ [1997] O.J. C 340/93, Treaty of Amsterdam, Protocol integrating the Schengen acquis into the framework of the European Union.

³⁸ [2000] O.J. L 239, The Schengen acquis.

political foot-dragging and partial delivery on policy commitments laid down in the Treaty texts. Adding insult to injury, the most noteworthy advancements in the realms of free movement of persons and the abolition of internal border controls were taking place *outside* of the Community, sidelining both the EP and the Commission. Why was it proving so difficult to follow through on these issues politically when the ECJ had shown itself to be quite capable of generating a body of law in the very same area, all while applying general integrationist interpretational principles to the law?

Florus Ariël Wijsenbeek (born 1944) was one of the integrationist-minded European parliamentarians deeply frustrated by the state of affairs. Trained in political science and law at Leiden and Harvard, Mr. Wijsenbeek entered politics straight out of university. From 1970 to 1971, he served as the political adviser to H. J. de Koster, the then-junior minister of foreign affairs in the Dutch government. After a brief spell at the Commission Legal Service (1971–1972), he served as spokesperson for the EP's Liberal Political Group (1972–1973). From 1973 to 1975, he acted as *chef de cabinet* of the EP President, C. Berkhouwer, one of the more powerful political appointee positions in the Parliament's administration. After serving as a founding Secretary-General of the European Liberal Party (ELDR) (1976–1982) and completing another brief spell as a legal adviser (this time for the EP's Liberal Political Group), Mr. Wijsenbeek became an MEP on 24 July 1984. He served three five-year terms, focusing primarily on issues related to parliamentary immunities, legal affairs and citizens' rights as well as transport and tourism, before returning to the Netherlands in 1999 after almost thirty years of service inside the EP.³⁹

Mr. Wijsenbeek's view and personal conviction was fiercely and unapologetically pro-European and federalist. When a new liberal political leader, Frits Bolkestein, emerged in Dutch politics in the early 1990s with a position that was markedly more critical of European integration, Mr. Wijsenbeek refused to change tack. Asked about his views on the new party line, he reportedly declared: "You can hardly expect me to state that I have been wrong the last 20 years."⁴⁰ In addition to being an unabashed integrationist, Mr. Wijsenbeek was also known for his mildly contrarian manner – something that, as we will see shortly, is crucial to how he managed to bring his case all the way up to Luxembourg. For instance, when the new Brussels EP building

³⁹ His profile can be found here: www.europarl.europa.eu/meps/en/1450/FLORUS+A._WIJSENBEEK_home.html.

⁴⁰ Hendrik Spiering, Rob Meines and Derk Jan Eppink, "Euroliberalen op ijs gelegd" (Euroliberals put on ice), NRC (Dutch national newspaper), 15 June 1992.

opened, Mr. Wijsenbeek regularly went cycling within its massive premises, storing his foldable bicycle in the shower of his private office.⁴¹ Even after receiving an official reprimand from one of the EP's Quaestors,⁴² Richard Balfe, Mr. Wijsenbeek refused to budge, flatly denying that his behaviour would bring the office of an MEP into disrepute or cause any danger.⁴³ But there was also a deeper political message to Mr. Wijsenbeek's comically hard-headed behaviour. It effectively served to protest against the cost of installing private shower facilities in Brussels, which was ordered by the Quaestor to replicate the situation with the Strasbourg EP premises and caused controversy in the Dutch media.⁴⁴ While these sort of fraternity-like antics earned Mr. Wijsenbeek a following in some quarters,⁴⁵ they also reportedly led the political leadership of the Dutch liberal party to view Mr. Wijsenbeek as somewhat of a loose cannon and a political liability.⁴⁶ In any event, it may be precisely Mr. Wijsenbeek's unique combination of integrationist personal conviction and lightly contrarian persistence that led to *Wijsenbeek*. In the following section, we describe Mr. Wijsenbeek's case from its inception in the Rotterdam criminal court of first instance to its arrival in the Court in Luxembourg.

*A Fuller Account of the Facts and Judicial Proceedings in
Rotterdam and Luxembourg*

The facts as conventionally reported are the following: On 17 December 1993, Mr. Wijsenbeek, "a Dutch national", took "a regularly" scheduled flight from Strasbourg to Rotterdam. At that time, Rotterdam airport was used exclusively for flights to and from other Member States. While all travellers were asked for their passports upon arrival in Rotterdam, Mr. Wijsenbeek refused to show his

⁴¹ Ben van der Velden, "'Het Bureau' bestelde douches à 28.400 gulden" ("The Bureau" [the EP governing body] ordered 28.400 Dutch guilder showers), NRC (Dutch national newspaper), 26 November 1997.

⁴² The College of Quaestors is the European Parliament's body responsible for administrative and financial matters directly concerning Members and their working conditions.

⁴³ Ben van der Velden, "Verwijdering van filmploegen schokt Europarlement" (Removal of camera crews shocks European Parliament), NRC (Dutch national newspaper), 4 December 1997.

⁴⁴ Ben van der Velden, "'Het Bureau' bestelde douches à 28.400 gulden" ("The Bureau" [the EP governing body] ordered 28.400 Dutch guilder showers), NRC (Dutch national newspaper), 26 November 1997.

⁴⁵ Derk Jan Eppink, "Blazergehalte bij liberalen moet omlaag" ("Suit-and-tie" density should decrease at the Liberals), NRC (Dutch national newspaper), 30 November 1992.

⁴⁶ Derk-Jan Eppink, "Sluimerende ruzie in VVD over Europa" (Lingering disagreement about Europe within the liberal party), NRC (Dutch national newspaper), 27 March 1992.

passport to the border control officer. However, he did give his name, place and date of birth and address, and, as evidence of these facts, showed the border control officer his Belgian driver's license. When the border control officer refused to accept this information as a valid means of identification, Mr. Wijsenbeek was charged with violating the Dutch Aliens Order, incurring a 30 euro fine. To challenge this fine in court, Mr. Wijsenbeek hired "a lawyer".

However, the conventional narrative paints a rather one-sided picture of what really happened, both before and after Mr. Wijsenbeek's showdown with the Dutch border control officer. Through national court documents, Dutch newspaper articles and interviews with Mr. Wijsenbeek, we are able to see, for the first time, the other side of the *Wijsenbeek* story. First, Mr. Wijsenbeek's interaction with the border control officer on 17 December was most certainly not his first attempt at passing through Dutch customs while showing only a national identification card. In fact, since 1 January 1993, right after the 31 December 1992 deadline, Mr. Wijsenbeek consistently refused to show his passport at Rotterdam airport when flying to or from Strasbourg. He was not alone in his efforts; at least two other MEPs undertook similar attempts,⁴⁷ but without "result". To the increasing frustration of Mr. Wijsenbeek, however, the Rotterdam border officers regularly allowed him through customs, notwithstanding his consistent refusal to show his passport. Finally, Mr. Wijsenbeek met his match – a new border control officer unwilling to play along. Interestingly, Mr. Wijsenbeek continued this practice long after the Dutch court slapped him with the fine on 17 December 1993 (since, as we will see below, the Dutch judges initially refused to run with his arguments). A newspaper article even describes his deliberate refusal to show his passport well into 1995. It also reports how Mr. Wijsenbeek's "monthly preaching" about how the Dutch Alien Act was violating Community law became a running joke among the Rotterdam airport security staff and often led to "comical situations and conversations", in part because it was always done in a good-natured fashion.⁴⁸

Secondly, the regular scheduled flight was not, in fact, so regular. Rather, it was a special EP charter flight carrying only MEPs and their personnel. Significantly, specific procedural rules relevant to such flights meant that a special identification regime applied. Under this special identification regime, MEPs only had to show an official EP identification badge. Of course,

⁴⁷ Martin Sommer, "Don Florus", *Volkskrant* (Dutch national newspaper), 18 March 1995.

⁴⁸ Martin Sommer, "Don Florus", *Volkskrant* (Dutch national newspaper), 18 March 1995.

Mr. Wijsenbeek dutifully avoided showing this badge to start with upon his arrival in Rotterdam as an MEP. In turn, the border control officer, as a fallback option, requested other means of identification. This is illustrative of how Mr. Wijsenbeek aimed to further a broader political agenda, all while acting in his personal capacity.

Third, the fact that Mr. Wijsenbeek's documents had *already* been checked upon departure in Strasbourg was stressed several times in the national proceedings – although this fact remained remarkably absent from the discussions at the Court in *Wijsenbeek*. Finally, Mr. Wijsenbeek's lawyer throughout the course of his legal saga was not just any lawyer. Rather, Mr. Janssen van Raaij was himself an MEP and member of the EP Committee of Legal Affairs and Citizens' Rights.⁴⁹ In effect, it was repeatedly discussed within this very EP Committee whether to come to a joint effort to try and "get caught". The then Committee chair would not have any of it, but could not, of course, prevent some of its members going ahead regardless. In any event, right from the outset Mr. Wijsenbeek's lawyer was very much at the centre of his attempt to push the integrationist political agenda by forcing a court case.

On 9 January 1995, Mr. Wijsenbeek appeared before the Rotterdam criminal court of first instance.⁵⁰ He argued that Rotterdam airport could not be treated as an external frontier since it was only used for intra-Community flights. As part of his litigation strategy, moreover, Mr. Wijsenbeek asked the judge to refer his case to the ECJ for a preliminary ruling about the effect of article 14 EC and 18 EC. In doing so, he reasoned, the Court could deal with his case alongside the case the EP brought.⁵¹ However, the judge was not willing to play along. In his judgment of 8 May 1995, he condemned Mr. Wijsenbeek to pay the 30 euros fine.

Not swayed by the result, Mr. Wijsenbeek appealed. The appeals case was initially scheduled for 14 June 1996. However, when the Commission issued its promising Monti package on 14 August 1995, Mr. Wijsenbeek's lawyer sent a letter to the prosecutor on 24 May 1996 requesting to stay the proceedings. As noted above, the issuance of the Monti package also resulted in the withdrawal on 11 July 1996 of the case brought by the EP against the Commission for failure to act. Once it became apparent that the most recent round of Commission initiatives yet again reached a deadlock in the Council of Ministers on account of the United Kingdom's position, Mr. Wijsenbeek's

⁴⁹ See: www.europarl.europa.eu/meps/en/1455/JAMES+L._JANSSEN+VAN+RAAY_home.html.

⁵⁰ 'Politierechter' (i.e. literally: police judge). ⁵¹ Case C-445/93, above.

appeal was reactivated and rescheduled for 2 October 1997 – the day the Amsterdam Treaty was signed. In a 29 September 1997 letter to the prosecutor, Mr. Wijsenbeek's lawyer took the unusual step of proposing the preliminary questions to be asked, virtually spelling them out word for word. Mr. Wijsenbeek finally got his wish when, in an intermediate ruling on 30 October 1997, the Court of Appeals halted the national proceedings and referred the following questions to the ECJ:

Are the second paragraph of Article 7A EC, which provided that the internal market is to comprise an area without internal frontiers in which the free movement of persons is ensured, and Article 8A EC, which confers on all citizens of the Union the right to move and reside freely within the territory of the Member States, to be interpreted as precluding national legislation of a Member State, imposing an obligation, accompanied by criminal penalties for failure to comply, on persons (whether or not citizens of the European Union) to present a passport on entry into a Member State whenever that person enters the Member State through the national airport coming from another Member State?

Does any other provision of Community law preclude such an obligation?

An essential point to note in the *Wijsenbeek* narrative is that the Dutch Court of Appeals' preliminary questions to the Court mirrored how Mr. Wijsenbeek's lawyer framed the questions in his 29 September 1997 letter to the prosecutor. The Court of Appeals' wording, however, included a slight wrinkle. The Appeals Court added the wording "(whether or not citizens of the European Union)" in the first question. Paradoxically, this extra wording muddled the (political) purpose of the referral considerably. Rather than conveying the message of a case of principle based on the notion that this was about the fundamental value of free movement of persons within the Community, this nuance in wording immediately shifted the focus to the most vexing practical complexity in realizing the ideal Mr. Wijsenbeek was fighting for: How could or should EU citizens travelling within the Community be separated from non-EU citizens without a commonly agreed-upon policy to that effect? How could free movement be guaranteed without a form of control to verify whom to control in the first place?

Interestingly, Mr. Wijsenbeek was not the first person (or politician) to attempt to bring a case based on an argument about the additional value of the newly included article 8A EC (citizenship) over and above the previously existing article 7A EC (internal market clause). A bit over eight months after the entry into force of the Maastricht Treaty, Northern Irish politician Gerard (Gerry) Adams tried his luck too, challenging a decision by UK authorities to

refuse him entry. In particular, on 29 July 1994, the referring court, as far as relevant here, put forward the following questions:⁵²

Does Article 8a(1) of the EC Treaty confer rights of free movement additional to those which existed under the EEC Treaty prior to its amendment by the Treaty on European Union?

Does Article 8a(1) of the EC Treaty give rise to directly effective rights which citizens of the Union may invoke before national courts?

Compared to the wording of the *Wijsenbeek* referral, the questions in the Adams case were framed in more legally straightforward terms. However, the Adams case did not last long in the Court's register, as it was removed on 5 May 1995. The circumstances leading to the removal of the Adams case can be traced back to the UK government lifting its exclusion order against Mr. Adams on 21 October 1994. Although Mr. Adams attempted to sustain the case, the referring court withdrew its questions as the issue became academic. Mr. Adams's attempts to bring his case to the European Commission of Human Rights (ECHR) (the predecessor of the European Court of Human Rights) also failed when the ECHR declared his case inadmissible in January 1997.⁵³

Within the ECJ, *Wijsenbeek* was referred to the Full Court, a sign of the political importance of the case. The hearing took place on 12 January 1999, some four months before the entry into force of the Amsterdam Treaty. Mr. Wijsenbeek argued that his "spontaneous" refusal to show his passport was to be appreciated in the light of the deadline by which the Member States should have established the internal market: 31 December 1992.⁵⁴ He made his case in internal market terms: If goods can cross borders without control, why should the same not apply to persons?⁵⁵ And since the Court considers every tourist as a potential enjoyer of services in the Member State of visit, why should it not view everyone crossing an internal border as a potential consumer?⁵⁶ To this effect, Mr. Wijsenbeek argued that both article 7A and 8A EC had direct effect.

However, Mr. Wijsenbeek was very much alone in his argument before the Court, since none of the other participants in the hearing shared his sweeping

⁵² OJ C 275/18, 1 October 1994, Case C-229/94 (Reference for a preliminary ruling by the Divisional Court, Queen's Bench Division, by order of that court of 29 July 1994, in the case of *The Queen against the Secretary of State for the Home Department, ex parte: Gerard Adams*).

⁵³ European Commission of Human Rights, Application Nos. 28979/95 and 30343/96, *Gerard Adams and Tony Benn against the United Kingdom*, 13 January 1997.

⁵⁴ Report of the Hearing, par. 23. ⁵⁵ *Ibid.* ⁵⁶ Report of the Hearing, par. 41.

interpretation of articles 7A and 8A, including the Commission and the Dutch, Spanish, Finnish, Irish and British governments. With regard to article 7A, the majority of the other participants pointed out that abolishing border controls could only be effectuated upon implementation of sufficient “flanking measures”, such as a common policy on external borders, immigration and asylum issues.⁵⁷ The Irish government in particular vehemently opposed the notion of direct effect of article 7A,⁵⁸ asserting that such an interpretation carried significant legal, political and security implications in light of the discussions leading up to the entry into force of the Amsterdam Treaty, where it, alongside the United Kingdom, had negotiated an opt-out.⁵⁹ With regard to article 8A, the Commission argued in favour of its direct effect.⁶⁰ It viewed the right as an autonomous substantive right, exceptions to which should be construed narrowly, but also conceded that, as the law stood, passport checks would not be a disproportionate interference with the free movement of persons.⁶¹ Despite the Commission’s more nuanced view on article 8A, all participating Member States argued against the direct effect of article 8A.⁶²

In his Opinion of 16 March 1999, Advocate-General (AG) Cosmas stressed his view of the relevancy and immediacy of the *Wijzenbeek* case:⁶³

This case is of particular interest in that it offers the Court an opportunity to interpret the content and effects in law of Articles 7A and 8A of the EC Treaty on the basis of a systematic approach and, by extension, to make a current and global examination of the question of the freedom of movement for persons as it presents itself after the successive revisions of primary Community law.

In an analysis well worth reading today, AG Cosmas first considered the practice of systematic border controls in the light of EC free movement law as it stood at the time (i.e. anno 1999). Cosmas concluded that, although the requirement to identify oneself at the border in itself constitutes a restriction on free movement, primary Community law could not be interpreted so extensively as to require an absolute freedom to cross borders.⁶⁴ With regard to article 7A (14) EC, AG Cosmas concluded, employing unusually candid argumentation, that it “does not have direct effect, especially as regards the complete elimination of the internal frontiers of the Community ... for

⁵⁷ Report of the Hearing, par. 25.

⁵⁸ Report of the Hearing, par. 27–29.

⁵⁹ Report of the Hearing, par. 29.

⁶⁰ Report of the Hearing, par. 40.

⁶¹ Report of the Hearing, par. 47.

⁶² Report of the Hearing, par. 38–39.

⁶³ Opinion Advocate-General Cosmas in Case 378/97, [1999] ECR I-6207, par. 1.

⁶⁴ *Ibid.*, par. 35.

reasons of legal logic, methodology and good policy in terms of judicial decision-making.”⁶⁵

AG Cosmas’s reasoning on the scope and binding nature of article 8A (18) EC constitutes the most innovative aspect of his Opinion. He argued that the provision was inspired by a more anthropocentric philosophy than other Community law provisions, and that it positioned freedom of movement as a goal in and of itself, not – like article 7A – as merely a function of the common market. In his own words:⁶⁶

Article 8A does not simply enshrine in constitutional terms the *acquis communautaire* as it existed when it was inserted into the Treaty and complement it by broadening the category of persons entitled to freedom of movement to include other classes of person not pursuing economic activities ... Article 8A also enshrines a right of a different kind, a true right of movement, stemming from the status as a citizen of the Union, which is not subsidiary in relation to European unification, whether economic or not.

Even if the AG pointed out that this reading of article 8A could on future occasion force the Court to adopt “a revised, updated reading ... of the content and scope of the principle of freedom of movement”,⁶⁷ he was not prepared to view the issue of border controls as a sufficiently burdensome infringement on free movement. According to the AG, Community law did not stand in the way of border controls at the internal borders since such internal controls were applied in a non-discriminatory fashion and corresponded to the imperative of common checks at the Community’s external borders. Moreover, he argued that internal controls are a suitable means to attaining that aim and not disproportionate.⁶⁸ Therefore, the AG concluded that Articles 7A and 8A EC could not be construed as requiring the automatic, complete and general lifting of systematic border controls on EU citizens crossing internal Community frontiers.

The ECJ issued its ruling on 21 September 1999, immediately making clear that it was not prepared to wade into the nuances of Mr. *Wijsenbeek*’s more principled debate. In as few as six paragraphs,⁶⁹ the Court declared first that the date of 31 December 1992 could not lead to an interpretation of article 7A requiring an immediate abolition of border controls at the internal frontiers of the Community at the date of expiry.⁷⁰ The Court then adroitly side-stepped the thorny issue of direct effect by stating somewhat evasively that, “even if ... nationals of the Member States did have an unconditional right to move freely

⁶⁵ *Ibid.*, par. 73. ⁶⁶ *Ibid.*, par. 85. ⁶⁷ *Ibid.*, par. 86. ⁶⁸ *Ibid.*, par. 106.

⁶⁹ Case-378/97, par. 39–44. ⁷⁰ *Ibid.*, par. 40.

within the territory of Member States”, based on articles 7A and 8A, “Member States retained the right to carry out identity checks at the internal frontiers of the Community . . . in order to establish whether the persons concerned is a national of a Member State, thus having the right to move freely within the territory of the Member States, or a national of a non-member country, not having that right.”⁷¹ In response to the preliminary questions, the Court then effectively swept the legs out from underneath Mr. Wijsenbeek’s arguments on the direct effect of articles 7A and 8A when it stated that

as Community law stood at the time of the events in question . . . neither Article 7a nor Article 8a of the EC Treaty . . . precluded a Member State from requiring a person, whether or not a citizen of the European Union, under threat of criminal penalties to establish his nationality upon his entry into the territory of that Member State by an internal frontier of the Community, provided that the penalties applicable are comparable to those which apply to similar national infringements and are not disproportionate.⁷²

After the Court’s ruling, Mr. Wijsenbeek’s case went back to the Rotterdam Court of Appeals. There, Mr. Wijsenbeek once again stressed that his case was a case of principle, not a test trial. He intended to invite the ECJ to rule on the extent to which the Community institutions and Member States are under a duty to fulfill promises and respect deadlines laid down in treaty provisions. In the final pleading on 20 January 2000, Mr. Wijsenbeek reiterated this point by stating: “For me and for many with me it has been an attempt to ask for a judgment on the true value of the duty of those who sign a Treaty to do everything in their capacity to live by their commitment.”⁷³ It did not help him in the least. The Appeals Court upheld the original 65 guilders fine. Mr. Wijsenbeek appealed again on points of law, arguing, in essence, that the Dutch Appeals Court should have considered the case *ex nunc* (i.e. in the light of the situation post-Schengen) and not *ex tunc* (in the light of the situation in 1993). This case equally failed. What started as a golden chance to force a favourable ruling ended in bitter disappointment (although, as Mr. Wijsenbeek conceded to this author in one of the interviews, forcing a case is very good for name recognition in European circles).

The Court’s judgment in *Wijsenbeek* has been described as “a sign of judicial realism and caution”,⁷⁴ and even the Court’s “most cautious ruling”⁷⁵

⁷¹ Ibid., par. 43. ⁷² Ibid., par 45.

⁷³ Unpublished court documents put at the disposal of the author by Mr. Wijsenbeek.

⁷⁴ Á. Castro Oliveira, *Workers and Other Persons: Step-By-Step From Movement To Citizenship – Case Law 1995–2001* (2002) 39 *Common Market Law Review* 77–127, at 103.

⁷⁵ Ibid, 126.

in the field of free movement of persons, border controls and citizenship in the period of 1995–2001. But why? Knowing what we now know, could a different outcome have emerged from Mr. Wijsenbeek's efforts in initiating and propelling this case forward? In particular, when given such wide latitude in drafting the preliminary questions, could Mr. Wijsenbeek have better persuaded the Dutch national court into “seducing” the Court of Justice into turning a case of principle into a standard ruling? If the aim was strategic litigation, did this story's protagonist – Mr. Wijsenbeek – actually employ the soundest litigation strategy available? We will now turn to these issues.

Between Principle and Pragmatism: Was There a Tension between the Political Objective and an Effective Litigation Strategy?

It is fascinating to try and put oneself in the shoes of Mr. Wijsenbeek and his fellow MEP/lawyer Mr. Janssen van Raaij during these last days of September in 1997. Mr. Wijsenbeek wanted his appeals case reactivated. The Monti package that forced the withdrawal of the EP's case against the Commission had, once again, stalled. The Amsterdam Treaty was to be signed within days, and well-connected politicians like Mr. Wijsenbeek and Mr. van Raaij, must have known of its contents, including new legal commitments to develop elusive flanking measures ensuring the free movement. If you were to convince the Dutch Appeals Court to refer preliminary questions, and if you could then get the ECJ some five or six years later to rule on the facts as they were in late 1993, where would you want the case to come out? What sort of litigation strategy would have been best suited to gain traction in such a politically deadlocked situation?

Judging from the draft preliminary questions proposed in his letter to the prosecutor of 29 September 1997, we can see that Mr. Wijsenbeek's litigation strategy, consciously or not, was a composite of highly nuanced legal and political considerations. Legally, Mr. Wijsenbeek went for an all-or-nothing, rather than an incremental, approach. Firstly, even if the legal framework in which Member States were to cooperate to develop flanking measures was about to change, Mr. Wijsenbeek wanted the Court to pronounce that the (previous) Maastricht Treaty's combination of Articles 7A and 8A already forced Member States to abolish border controls at intra-Community borders, even in the absence of these flanking measures. In other words: as a matter of Community law, Member States were under an obligation to open their borders even if they had not yet agreed to any flanking measures.

Given Mr. Wijsenbeek's integrationist convictions, perhaps the manner in which he went about drafting the preliminary questions contained a deeper

meaning. At heart, Mr. Wijsenbeek wanted the Court to proclaim that free movement of persons on EU soil was and should have always remained, exclusively, a matter of Community law. From that perspective, attempts to find solutions *outside* of the Community (such as the Schengen cooperation) or solutions found inside the Community but not equally applicable to all Member States (such as the impending Amsterdam Treaty Irish and UK opt-out from the Communitarized Schengen *acquis*) should have been viewed, for those reasons alone, as impermissible as a matter of Community law.

Viewed in this light, Mr. Wijsenbeek's preliminary questions were essentially a twofold political message wrapped in legal language. It was a call on the ECJ to issue a judgment that would have amounted to a ruling stating that much of what Member States occupied themselves with since at least the entry into force of the Maastricht Treaty was flatly at odds with their obligations stemming from Articles 7A and 8A EC. Not only had the Member States impermissibly cooperated outside of the EC context, but they also maintained illegal border checks. Such a ruling would have been far-reaching, and not necessarily a very comfortable position for the Court to put itself in. On balance, then, given his own legal background, Mr. Wijsenbeek must have been aware that his approach in drafting the preliminary questions was more about restating his political views than about maximizing his chances to win the case, including by offering the Court a clear path for going about its reasoning.

Given how sensitive a pronouncement of principle would have been for the Court in this instance, it is an interesting thought-exercise to consider the other litigation strategies that may have been available to Mr. Wijsenbeek. In devising a litigation strategy designed purely and only to win in the Court, in hindsight, it might have been crucial to first subtly coax the Court into issuing a ruling based on the law as it would stand *at the time of its judgment* instead of the law as it stood in December 1993. Moreover, should the Court prove unwilling to take up the gauntlet in seeking full confrontation with the Member States, it would have been important to provide it with an off-ramp, or alternatives, upon which to issue a ruling based on common sense arguments. For instance, one option would be to persuade the Court to state that there would be various practical measures available for *immediate* implementation, notwithstanding the absence of flanking measures securing the common protection of the external borders fully in place.

Judging by the facts, Mr. Wijsenbeek had a number of promising variables he could have leveraged in this regard. Mr. Wijsenbeek was already checked in Strasbourg when boarding a plane known to be destined for another

Member State. Even if nothing in Community law prevented border controls at internal borders, i.e. in Strasbourg, why conduct another check *again* in Rotterdam if the rationale for the execution of border checks at internal borders was argued to be lying in the protection of the EU's *external* borders? Moreover, the fact that Rotterdam airport only received flights from other Member States was also relevant. Rotterdam airport was a travel hub akin to a railway station, just a stone's throw from the Court, Luxembourg Central station. Even if most trains arriving at that hub originated in Belgium, France, and Germany, it lacked the same intensity of border controls, let alone controls at both stations of departure and arrival. Where, then, was the justification in treating airports differently as a matter of principle? Why could Member States not at least start taking practical measures in line with the realities of specific travel hubs, focusing only on those that actually received travellers from outside of the EU? In summary, would the whole idea of creating a single market not require, at the very least, that Member States reconsider practices that were evidently inconsistent in focus and duplicative by nature?

We will, of course, never know, but such an incremental approach in *Wijsenbeek* could have furnished the Court with arguments allowing it to steer clear of having to rule on principle. Through a more incremental approach, the Court could have related directly to what was actually happening on the ground in the absence of flanking measures, while also addressing the real-life inconveniences that the then-state of affairs was causing to travellers. If the Court pronounced that Member States were to adapt some of the practices inherent in border controls at intra-Community borders, because their operation (rather than their very existence) constituted an unjustifiable barrier to free movement of goods, this could have had very far-reaching and immediate consequences. It could have even put considerable pressure on Member States to fast-track the development of the flanking measures just months after the Amsterdam Treaty's entry into force. This would have positioned the Court precisely where it has often liked to be and where it has made the biggest impact: subtly setting the agenda for future legislative developments by relying on technical arguments framed as self-evident links in an organic chain of jurisprudence. In this way, perhaps, *Wijsenbeek* is also a case where – after being handed a golden opportunity to help the court to turn a case of principle into a standard case – political motivation eventually undercut our protagonist's litigation strategy. After all, the “win” that Mr. Wijsenbeek sought at the ECJ was implausible right from the outset, given the position it would have placed the Court in had it fully taken on board Mr. Wijsenbeek's integrationist vision.

CONCLUSION

Today, *Wijsenbeek* is viewed as a central early ruling about the (lack of) direct effect of what are now articles 21 and 26 TFEU and an important harbinger case about rights attached to the concept of Community/Union citizenship. Despite its outcome, *Wijsenbeek* is also widely seen as having served as a legal and political catalyst for moving from the common market to the area of freedom, security, and justice. It has become known as an “EU law classic” on these terms, and has found its place in almost every important handbook.⁷⁶ For a case based on personal conviction and strategic litigation, *Wijsenbeek* is a great achievement by any account.

But *Wijsenbeek* also tells numerous other stories. It is a story about the power of the humorous and contrarian approach of a strongly pro-European politician. It is a remarkable story about the extent to which a Dutch Appeals Court granted almost complete leeway to Mr. Wijsenbeek and his MEP-lawyer to frame the case towards the Luxembourg Court. This, in turn, provides a unique occasion to consider the tantalizing question of whether Mr. Wijsenbeek pursued his case fully “strategically”, and whether, ultimately, it was as successful as it could have been in litigation terms. But above all, *Wijsenbeek* is a story about a concerted political effort by different MEPs to leverage Luxembourg’s judicial weight in pursuit of a specific political agenda when Europe’s political arena remained deadlocked on an issue. This vividly illustrates, once again, that well-known story unique to the development of EU law: just how influential and decisive the Court has been seen to be all along in pushing the integrationist agenda.

⁷⁶ See above, n. 3.