Essays on Autonomy, Legality and Pluralism in European law

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4. Interpreting the EU Internal Market

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I'm forever blowing bubbles
Pretty bubbles in the air
They fly so high
Nearly reach the sky
Then like my dreams
They fade and die.[1]

I. Searching for Reasonableness in the Autonomous Legal System

What does it mean to interpret the free movement of goods, persons, services or capital under EU law reasonably? For all doctrinal attempts to find a grand unified theory of EU internal market law, deducing ever more principles from the expanding body of case law,[2] the European Court of Justice (ECJ) has never succumbed to calls for settling these questions once and for all, stoically persisting in pragmatism and judicial minimalism.[3] Taking a bird's eye perspective, perhaps the case law can be roughly summarised as follows.[4] First, reasonable

[1] Jaan Kenbrovin, *I'm Forever Blowing Bubbles* (1918).

[2] S. Enchelmaier, 'Four Freedoms, Ever More Principles?' (2016) 36 *Oxford Journal of Legal Studies* 192; R. Schütze, 'Of Types and Tests: Towards a Unitary Doctrinal Framework for Article 34 TFEU?' (2016) 41 *European Law Review* 826.

[3] On judicial minimalism, see C.R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press 2001).

[4] Compare the commonly cited (satirical) restatement of the US law of interstate commerce: 'Although the power of the Federal Government over interstate commerce is plenary, the states may regulate commerce some, but not too much. If a state attempts to regulate commerce too much such regulation will be unconstitutional. Caveat: This Restatement is not intended to express any opinion as to how much regulation is too much', (1932) 1 *Harvard Law Revue* 5, 11-12, quoted in W. Lockhart, Y. Kamisar and J. Choper, *Constitutional Law: Cases and Materials*, 4th edn (West 1975) 349.

measures of the Member States are compatible with EU internal market law.[5] Second, direct and indirect discrimination is usually unreasonable.[6] Third, truly non-discriminatory barriers to free movement are usually reasonable,[7] but sometimes they are not.[8] Fourth, what is 'reasonable' and 'unreasonable' is ultimately for the Court to decide. What about proportionality, one might ask; surely it takes centre stage in internal market adjudication?[9] Yes and no. Obviously, most hard cases are settled at the justification stage.[10] On the other hand, what is suitable, necessary and proportionate is again a function of reasonableness. 'How suitable' and 'how necessary' a measure ought to be in order to meet the required standard of proof are questions that the proportionality principle itself cannot possibly answer.[11]

This perspective on EU internal market law puts the latter in a rather difficult position in view of determinacy and predictability of legal prescriptions as part of 'law's own virtue'.[12] As we have learned from the brilliant work of Joseph Hutchinson,[13] Jerome Frank,[14] Felix

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[5] *Procureur du Roi v Benoît and Gustave Dassonville*, 8/74, EU:C:1974:82, para. 6.

[6] For notable exceptions, see e.g. *Commission of the European Communities v Kingdom of Belgium*, C-2/90, EU:C:1992:310; and *Marc Michel Josemans v Burgemeester van Maastricht*, C-137/09, EU:C:2010:774, para. 84.

[7] Either because they fall outside the scope of free movement law (e.g. *Criminal proceedings against Bernard Keck and Daniel Mithouard*, C-267/91 and C-268/91, EU:C:1993:905, paras. 15–16; *Mobistar SA v Commune de Fléron and Belgacom Mobile SA v Commune de Schaerbeek*, C-544/03 and C-545/03, EU:C:2005:518, paras. 29–31) or because they are justified (e.g. *Alpine Investments BV v Minister van Financiën*, C-384/93, EU:C:1995:126, paras. 51–56).

[8] E.g. *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, C-415/93, EU:C:1995:463; *Commission of the European Communities v Kingdom of the Netherlands*, C-282/04 and C-283/04, EU:C:2006:608 (among numerous other 'Golden Shares' judgments).

[9] B. van Leeuwen, 'Rethinking the Structure of Free Movement Law: The Centralisation of Proportionality in the Internal Market' (2017) 10 *European Journal of Legal Studies* 235.

[10] Ibid.

[11] G. Lübbe-Wolff, 'The Principle of Proportionality in the Case-law of the German Federal Constitutional Court' (2014) 34 *Human Rights Law Journal* 12, 17: 'the three-level-structure of the proportionality test […] is just a rationalising heuristic tool identifying elements of any intuitive judgment of practical rationality'. See also A. Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012) 371–378.

[12] J. Raz, 'Law's Own Virtue' (2019) 39 *Oxford Journal of Legal Studies* 1, on the rule of law as a content-independent virtue of law related to 'its mode of generation and application'.

[13] E.g. J.C. Hutchinson, 'The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision' (1929) 14 *Cornell Law Quarterly* 274.

[14] E.g. J. Frank, *Law and the Modern Mind* (Transaction Publishers 2009 [1930]).

Cohen,[15] Karl Llewellyn[16] and other jurists associated with the American legal realist movement, judges are likely to be influenced considerably more by social and political factors than by rules and precedents.[17] The realists' analysis of the underdetermination of judicial outcomes by pre-existing rules – and consequently, the role of extra-legal factors – applies with particular force to fields of law where principles, standards and loosely formulated rules reign. These would include, ostensibly at least, EU internal market law. But perhaps all is not lost, and there is more to say about the specific meaning of reasonableness in EU internal market law.

If reasonableness is central to EU internal market law, the Court's seminal *Dassonville* judgment seems to contain right about everything one needs to know.[18] On the one hand, 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions'.[19] In the absence of EU harmonisation, however, Member States may adopt measures 'subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all Community nationals'.[20] Obviously such measures should not amount to arbitrary discrimination or disguised trade barriers.[21] That would be unreasonable, after all.

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[15] E.g. F. Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Columbia Law Review* 809.

[16] E.g. K.N. Llewellyn, *The Bramble Bush* (Oxford University Press 2008 [1930]); and *The Common Law Tradition: Deciding Appeals* (Little Brown & Co. 1960).

[17] As is now commonly recognised, '*the* American realists' in fact included a variety of scholars holding diverging views on many issues. On American legal realism generally, see e.g. W. Twining, *Karl Llewellyn and the Realist Movement* (Cambridge University Press 2012); and H. Dagan, 'The Real Legacy of American Legal Realism' (2018) 38 *Oxford Journal of Legal Studies* 123.

[18] Perhaps only adding mutual recognition as icing on the cake in *Rewe-Zentrale v Bundesmonopolverwaltung für Branntwein*, C-120/78, EU:C:1979:42 (*Cassis de Dijon*): L.W. Gormley, 'Free Movement of Goods and Their Use – What Is the Use of It? (2010) 33 *Fordham International Law Journal* 1589, 1627.

[19] *Dassonville*, 8/74, EU:C:1974:82, para. 5.

[20] *Dassonville*, 8/74, EU:C:1974:82, para. 6.

[21] *Dassonville*, 8/74, EU:C:1974:82, para. 7.

All loud and clear: the rules of EU internal market law apply as 'rules of reason'.[22] However, since reasonableness is in the eye of the beholder,[23] and it is unclear what a 'reasonable' approach to the legal rules entails,[24] the guiding function of EU law would benefit

[22] P. VerLoren van Themaat and L.W. Gormley, 'Prohibiting Restriction of Free Trade within the Community: Articles 30–36 of the EEC Treaty' (1981) 3 *Northwestern Journal of International Law & Business* 577; and R. Barents, 'New Developments in Measures Having Equivalent Effect' (1981) 18 *Common Market Law Review* 271. Today, most scholarship no longer uses the term 'rule of reason' in the context of EU internal market law, for it causes confusion with the 'rule of reason' in US antitrust law. The latter has an entire life of its own, even though the initial rationale for introducing it is quite similar to the one for interpreting the *Dassonville* rule reasonably, i.e. to avoid that a a-contextual and literal application of the rule leads to absurd outcomes. See n. 24 below; and see further Section III below.

[23] In Stone's words, a 'category of illusory reference': J. Stone, *Legal System and Lawyers' Reasoning* (Stanford University Press 1968) 263; N. MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press 2005) 165. This is perhaps most clearly illustrated by the amusingly tautological definitions of the substantive standard for *Wednesbury* unreasonableness, including 'so unreasonable that no reasonable authority could ever have come to it' (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 233–234 (Lord Greene)); 'within the range of responses which a reasonable decision-maker might have made in the circumstances' (*Gokool v Permanent Secretary for the Ministry of Health and Quality of Life* [2009] UKPC 54, para. 18).

[24] One may draw a comparison with the rule of reason in US antitrust law. Introduced in *Standard Oil Co. v United States*, 221 US 502 (1911), the rule of reason indicates that section 1 of the Sherman Act cannot possibly prohibit *all* restraints of trade or commerce, even though section 1 of the Sherman Act prohibits precisely that. Earlier, Justice White had already pointed out that a literal interpretation of the Sherman Act would entail prohibition of all business agreements (*United States v Trans-Missouri Freight Association* 166 US 290, 343–374 (1897) (White, J., dissenting)). However, what it *means* to apply section 1 reasonably is far from clear. It is usually colloquially observed that the rule of reason requires 'balancing pro-competitive and anti-competitive effects', but in practice actual balancing of pro- and anti-competitive effects takes place in only 2–4 % of rule of reason cases (M.A. Carrier, 'The Real Rule of Reason: Bridging the Disconnect' [1999] *Brigham Young University Law Review* 1265, 1364; M.A. Carrier, 'The Rule of Reason: An Empirical Update for the 21st Century' (2009) 16 *George Mason Law Review* 827, 834–835). See also S. Hemphill, 'Less Restrictive Alternatives in Antitrust Law' (2016) 116 *Columbia Law Review* 927. Accordingly, while the rule of reason requires in any case that the plaintiff must prove market power and anti-competitive conduct, its operation varies considerably depending on the circumstances. In *Ohio v American Express Co.*, 585 US __ (2018), for example, the majority opinion of Justice Thomas and the dissenting opinion of Justice Breyer disagree fundamentally about the requirements of the rule of reason as applied to multisided transaction platforms (see to this extent e.g. H. Hovenkamp, 'Platforms and the Rule of Reason: The *American Express* Case' (2019) *Faculty Scholarship at Penn Law* 2058. See generally H. Hovenkamp, 'The Rule of Reason' (2018) *Florida Law Review* 81. A related debate in EU competition law centres on questions related to the evidential burden of proof and the balancing of positive and negative effects on competition under Art. 101(1) TFEU under the 'workable competition' objective of EU competition law and the so-called 'ancillary

from some further clarification. At the same time, the EU legal system's relative youth entails that the substantive content of EU law is at an early stage of development, and the meaning of autonomous EU concepts is only developing as appropriate cases arise.[25] Consequently, it is up to the ECJ to exercise good judgement in individual judgments.

This chapter asks one simple question: where should we locate the meaning of 'reasonableness' in the EU law on free movement? The subsequent four sections will focus on four possible sources of reasonableness: the notion of 'regulatory autonomy' (II), the definition of a trade barrier (III), the burden and standard of proof (IV) and the notion of 'holistic interpretation' (V). While I shall certainly not claim that these four options are exhaustive, they do provide, in my view, the most important interpretive sources of a 'reasonable' interpretation to EU internal market law. In this chapter, I will mainly refer to the case law on the free movement of goods, although most of the topics concerned apply equally to the other fundamental freedoms.

II. The Autonomy of EU Law and the Mythology of Regulatory Autonomy

EU law is, or at least claims to be, an autonomous legal system.[26] The formal autonomy, i.e. self-referentiality, of the EU legal system implies that its legal norms are given autonomous meanings and its proper interpretation cannot be normatively inferred from extra-legal sources.[27] Nonetheless, the proper scope of the free movement provisions is often conceived as a matter of balancing the effectiveness of the EU internal market against the Member States' regulatory autonomy. By regulatory autonomy, I refer to the idea that there is a core of Member State regulatory competence which is beyond the legitimate scope of the free movement provisions of EU internal market law. Regulatory autonomy is then perceived as an outer limit to a purposivist and effects-based interpretation of EU internal market law focused on

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restraints doctrine'. I leave this issue aside here, see for an overview and analysis: I. Lianos and V. Korah with P. Siciliani, *Competition Law: Analysis, Cases, & Materials* (Oxford University Press 2019) 588–617.

[25] For a very critical analysis of the ECJ's jurisprudence, see A. Somek, 'Is Legality a Principle of EU Law?' in S. Vogenauer and S. Weatherill (eds.), *General Principles of Law: European and Comparative Perspectives* (Hart Publishing 2017), arguing that EU law fails to live up to the ideal of Fullerian legality because EU law is only known by the ECJ's decision.

[26] See 'Why EU Law Claims Supremacy', Chapter 2; and 'Legality and Autonomy of EU Law: You'd Better Believe It', Chapter 3.

[27] See 'Introduction', Chapter 1; and 'Why EU Law Claims Supremacy', Chapter 2.

removing trade barriers. However, this juxtaposition of ensuring the effectiveness of EU internal market law and respecting regulatory autonomy is beguiling but misleading, because it fails to recognise that the interpretation of EU internal market law is an internal, interpretive question of EU law itself. There can be no such thing as regulatory *autonomy* of the Member States.

While legal systems are not cognitively closed to their environments, and have to interact continuously with extra-legal informants, they do have a formal autonomy which is manifested by their claims of supremacy and authority. In a series of articles and books which have transformed legal philosophy, Joseph Raz has argued that there is a conceptual connection between law and authority: we cannot understand the concept of law without the notion that law necessarily claims a comprehensive, legitimate authority to regulate human behaviour.[28] Legal norms claim to provide reasons for action while also providing exclusionary reasons for disregarding other reasons against this action (for instance moral reasons that run counter to what the law requires).[29] Law consequently distinguishes itself from other normative systems by the fact that its exclusionary scope is comprehensive and unspecified.[30] While legal systems clearly have jurisdictional boundaries (geographical, personal, and/or in the case of the EU legal system also, substantive), within its defined[31] jurisdiction, any legal system will deny the normative relevance of other normative systems.[32] Hence, in the context of hard cases

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[28] See e.g., J. Raz, *The Authority of Law* (Clarendon Press 1979); J. Raz, *The Morality of Freedom* (Clarendon Press 1986); J. Raz, 'Authority, Law, and Morality' in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1995). See also e.g. S.J. Shapiro, 'Authority' in J.L. Coleman, K.E. Himma and S.J. Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2004); L. Green, *The Authority of the State* (Oxford University Press 1988), chs. 2, 8 and 9; B. van der Vossen, 'Assessing Law's Claim to Authority' (2011) 31 *Oxford Journal of Legal Studies* 481.

[29] J. Raz, *Practical Reason and Norms* (Clarendon Press 1975), chs. 1 and 2 (referring to norms that provide both first-order and second-order reasons as 'mandatory norms') and Raz, *The Authority of Law* (n. 28) 17ff. (referring to the reasons which these norms provide as 'protected reasons').

[30] T.A.O. Endicott, 'Interpretation, Jurisdiction, and the Authority of Law' (2007) 6 *APA Newsletter* 14.

[31] The scope of this defined jurisdiction is usually not proclaimed by the legal system itself; generally legal systems deny principally set limits to the scope of their jurisdiction (cf. Sir Ivor Jenning's claim that the UK Parliament can theoretically legislate to ban smoking on the streets of Paris). This is what makes the *claims* of law comprehensive and unspecified. The actual limits to the jurisdiction of legal systems are mainly a function of its social effectiveness.

[32] Raz, *Practical Reason and Norms* (n. 29) 150–151. In this respect, the EU legal system is no different conceptually from any other (national) legal system. See 'Why EU Law Claims Supremacy', Chapter 2.

regarding the interpretation of the free movement provisions, EU (internal market) law decides for itself what is reasonable and what is not. Regulatory autonomy, then, is an unworkable starting point for analysis because it presumes that there is a certain sphere of Member State competence which EU internal market law could never penetrate. Even if EU law were to employ the vocabulary of 'regulatory autonomy' in relation to a reasonable interpretation of, say, Article 34 TFEU (which, to the best of my knowledge, it never does), this would still be an internal statement of EU law, not a description of the inter-systemic relationship between the EU legal system and the national legal system(s).[33]

Beyond the ivory tower of legal theory, the impossibility of regulatory autonomy as a source of reasonableness is clearly supported by the ECJ's case law as well. The Court has persistently made clear that there is no core of Member State competences or policy fields which are immune to the scope of EU internal market law.[34] Member States ought to comply with EU law even when they are exercising their retained powers, such as direct taxation or healthcare regulation.[35] To what extent EU law nonetheless applies a marginal standard of proportionality review or otherwise defers to the Member States, is again up for the ECJ to decide.[36]

Accordingly, the question of how the norms of EU internal market law should be interpreted is an *interpretive* question. This overarching interpretive question can be divided into a plethora of sub-questions pertaining to the concept and objectives of European

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[33] See similarly, on the fact that Art. 4(2) TEU cannot possibly provide a limit to the supremacy of EU law, 'Why EU Law Claims Supremacy', Chapter 2.

[34] See also K. Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205; L. Azoulai, 'The "Retained Powers" Formula in the Case Law of the European Court of Justice: EU Law as Total Law?' (2011) 4 *European Journal of Legal Studies* 192.

[35] See e.g., as to education, *Rhiannon Morgan v Bezirksregierung Köln and Iris Bucher v Landrat des Kreises Düren*, C-11/06 and C-12/06, EU:C:2007:626, para. 24; as to direct taxation, *Finanzamt Köln-Altstadt v Roland Schumacker*, C-279/93, EU:C:1995:31, para. 21; as to social security, *Duphar BV and Others v Kingdom of the Netherlands*, 238/82, EU:C:1984:45, para. 16; as to nationality, *Janko Rottmann v Freistaat Bayern*, C-135/08, EU:C:2010:104, para. 45. See also 'Why EU Law Claims Supremacy', Chapter 2.

[36] For a lenient application of the proportionality test, see e.g. *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, C-36/02, EU:C:2004:614. For an analysis of varying intensity of review in the free movement of services case law, see e.g. F. de Witte, 'The Constitutional Quality of the Free Movement Provisions: Looking for Context in the Case Law on Article 56 TFEU' (2107) 42 *European Law Review* 313.

integration,[37] the degree of deference towards the Member States, taking into account that the internal market is a shared competence,[38] and the definition of a trade barrier,[39] to name just a few. All such considerations, however, are internal to the normativity of EU law itself. In fact, to argue that the effectiveness of the internal market law should be balanced against some notion of regulatory autonomy implies a rather impoverished conception of the internal market and European integration more broadly. Does one really want to argue that considerations such as margin of appreciation, deference and national constitutional identity have no role in the normativity of EU internal market law itself?

The value of regulatory *freedom* certainly has an important place in EU internal market law. Not as a counterweight against the pursuit of effectiveness of the EU internal market, but as an intrinsic part of the meaning[40] of the EU internal market. Considerations related to the value of regulatory freedom are 'higher-order' interpretive norms which justify the interpreter's choice for certain 'lower-order' interpretive norms, such as a more purpose-driven or textual-driven interpretive methodology.[41] For the same reason, the value of regulatory freedom cannot be juxtaposed with the *effet utile* of the fundamental freedoms. Effectiveness-based arguments are interpretive norms based on some presumed conception of the objectives of the internal market as manifested in higher-order interpretive norms. In other words, questions of effectiveness *follow* questions about the degree of regulatory freedom, not the other way around. Any conception of the degree of regulatory freedom granted to the Member States is inherently part of these objectives and consequently the conception of the EU internal market itself.[42] This conception then has repercussions for the meaning of reasonableness in

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[37] See also I. Lianos, 'Updating the EU Internal Market Concept' in F. Amtenbrink et al. (eds.), *The Internal Market and the Future of European Integration* (Cambridge University Press 2019).

[38] See also E. Spaventa, 'Drinking Away Our Sorrows? Regulatory Conundrums After *Scotch Whisky*' in Amtenbrink et al. (eds.), *The Internal Market* (n. 37).

[39] See also S. Weatherill, 'Surrendering the Right to Regulate' in Amtenbrink et al. (eds.), *The Internal Market* (n. 37).

[40] By 'meaning', I loosely refer to the object or 'referent' of an interpretation of a concept, following R.H. Fallon, 'The Meaning of Legal "Meaning" and its Implications for Theories of Legal Interpretation' (2015) 82 *University of Chicago Law Review* 1235.

[41] S. Brewer, 'Figuring the Law: Holism and Tropological Inference in Legal Interpretation' (1988) 97 *Yale Law Journal* 823, 832–836.

[42] See e.g. I. Lianos and D. Gerard, 'Shifting Narratives in European Economic Integration: Trade in Services, Pluralism and Trust' in I. Lianos and O. Odudu (eds.), *Regulating Trade in Services in the EU and the WTO:*

free movement law and implicated questions such as 'what counts as a trade barrier' and 'when are trade barriers justified'.[43]

More than twenty years ago, Judge Kakouris surgically demolished the myth that the Member States possessed a 'procedural autonomy' for similar reasons as the ones described above.[44] The myth of regulatory autonomy has proved more resilient, but it is equally in need of abandonment. It obscures by suggesting that there is some realm of Member State action into which the EU internal market provisions cannot penetrate, and it unjustifiably simplifies by reducing the meaning of the EU internal market to that of a deregulatory vehicle. Abandoning the myth of regulatory autonomy does not provide us with any direct answers as to how to interpret the EU internal market; but at least we establish that the questions surrounding the scope of EU internal market law are primarily hermeneutical questions, not 'constitutional' or 'federal' ones.[45]

In light of the fact that questions surrounding the reasonable application of the free movement provisions are inherent to EU law itself as an autonomous system of norms, the meaning of reasonableness should be located in the proper interpretation of free movement law. The substantive test for identifying prima facie prohibited obstacles to trade will be our first and foremost candidate, before moving towards the burden and standard of proof (section IV) and holistic interpretation (V).

III. A Rule in Search of its Meaning

Trust, Distrust and Economic Integration (Cambridge University Press 2012), proposing a rather different conception of EU economic integration which focuses on trust-building among Member States.

[43] Ibid; I. Lianos, 'Shifting Narratives in the European Internal Market: Efficient Restrictions of Trade and the Nature of "Economic" Integration' (2010) 21 *European Business Law Review* 705.

[44] C.N. Kakouris, 'Do the Member States Possess Judicial Procedural "Autonomy"?' (1997) 34 *Common Market Law Review* 1389. See also M. Bobek, 'Why There Is No Principle of "Procedural Autonomy" of the Member States' in B. de Witte and H.-W. Micklitz (eds.), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012). On the role of procedural rules of Member States in relation to direct effect and autonomy, see 'Legality and Autonomy of EU Law: You'd Better Believe It', Chapter 3.

[45] Of course, the hermeneutics of EU internal market law has direct repercussions on the EU's constitutional and federal structure. See also R. Schütze, *From International to Federal Market: The Changing Structure of European Law* (Oxford University Press 2017); and Lianos, 'Shifting Narratives' (n. 43).

Most of the questions surrounding the substantive test of the free movement provisions centre on the proper interpretation of the *Dassonville* and can be reduced to the seminal question with which Advocate General Tesauro opened his Opinion in the *Hünermund* case:

> 'Is Article 30 of the Treaty a provision intended to liberalize intra-Community trade or is it intended more generally to encourage the unhindered pursuit of commerce in individual Member States?'[46]

This question centres both on the interpretation of Article 34 TFEU (and by extension, the other fundamental freedoms)[47] and the meaning of the *Dassonville* – a logical consequence of the fact that the judgment clarified some interpretive questions, but in doing so created many new ones. For a starter, we may ask the question what kind of norm did *Dassonville* introduce in the first place. Paragraph 5 is frequently referred to as the *Dassonville* principle[48] or the *Dassonville* formula,[49] but its logical structure is perhaps better described as a rule.[50] Reference to the possibility for Member States to take 'reasonable' measures in paragraph 6, in turn, moves the legal test towards what is typically called a 'standard'.[51] This is common for rules in general, which tend to converge with standards.[52]

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[46] Opinion of AG Tesauro in *Ruth Hünermund and Others v Landesapothekerkammer Baden-Württemberg*, C-292/92, EU:C:1993:863, para. 1.

[47] Similar deliberations can be found in e.g. the Opinion of AG Tizzano in *CaixaBank France v Ministère de l'Économie, des Finances et de l'Industrie*, C-442/02, EU:C:2004:187, paras. 58–62, concerning the freedom of establishment (Art. 49 TFEU).

[48] L.W. Gormley, 'Inconsistencies and Misconceptions in the Free Movement of Goods' (2015) 40 *European Law Review* 925, 926.

[49] E.g. S. Weatherill, *The Internal Market as a Legal Concept* (Oxford University Press 2017) 52.

[50] If one believes in the distinction between rules and principles, of course. Compare e.g. R. Dworkin, 'The Model of Rules' (1967) 35 *University of Chicago Law Review* 25, and R. Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002), 44–48 (both distinguishing categorically between rules and principles), with J. Raz, 'Legal Principles and the Limits of Law' (1972) 81 *Yale Law Journal* 823, and F. Schauer, 'Prescriptions in Three Dimensions' (1997) 82 *Iowa Law Review* 914) (both arguing that the distinction between rules and principles is a sliding scale, indicating degree of generality.

[51] W. Wils, 'The Search for the Rule in Art. 30 EEC: Much Ado About Nothing?' (1993) *European Law Review* 475 argued that *Dassonville* operates more as a 'standard' than as a 'rule'. Whether the distinction between rules and standards is a helpful one is contested (see e.g. the next footnote).

[52] F. Schauer, 'The Convergence of Rules and Standards' [2003] *New Zealand Law Review* 303) argues that adaptive behaviour on part of courts and other institutions tends to push all rules towards standards and vice versa

One may ask the question whether *Dassonville*'s paragraph 6 would not suffice to counter the overinclusiveness of paragraph 5: 'whatever may affect trade between Member States is prohibited, unless it is reasonable'. If this is a rule at all, however, which can be seriously questioned,[53] it produces hardly any guidance or certainty as to what national measures are prohibited. In subsequent cases, however, starting with *Cassis de Dijon*, *Dassonville*'s openness was reduced by means of a clear choice for the distribution of the burden of proof: the rule of reason does not amount to the rule becoming a standard, but entails that violations of the basic rule can be justified by unwritten justifications adding to those already present in the Treaty.[54] By subjecting indistinctly applicable product requirements to Article 34 TFEU, fully in line with a strict application of the *Dassonville* rule, the Court protected its prerogative to decide on the reasonableness of national measures, adding the obligation for the Member State to prove it and connecting the risk of false positives to the standard of proof for justifications.[55]

With the benefit of adding clarity to the basic rule governing Article 34 TFEU and the manner in which 'reasonable' measures should reveal themselves (i.e. by demonstration on part of the Member State), *Cassis de Dijon* paved the way for Advocate General Tesauro's

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This is clearly visible for example in the development of section 1 of the Sherman Act, which reads as a rule, but has subsequently moved towards a standard through the 'rule of reason'. In turn, the subsequent development of the rule of reason in US antitrust resulted in the introduction of more specific rules, e.g. regarding the burden and standard of proof. One of the key reasons for this convergence is that in spite of their potentially numerous virtues, rules can be awkward. They constrain decision-makers by substituting an all-things-considered judgment about what is the best decision in this case for a reduction of the possible factors that can be taken into account. See to this end, e.g. F. Schauer, 'Formalism' (1988) 97 *Yale Law Journal* 509; and F. Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press 2012) 29–35. Hence, rule-based decision-making *intrinsically* produces false positive and false negative outcomes. The breadth of the *Dassonville* rule – 'an all-out rallying cry against the ethos of protectionism' (J.H.H. Weiler, 'The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods' in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1999) 362) – inevitably would create false positive outcomes in future cases, creating incentives for a standard-based approach.

[53] It seems that this would be a rule which hardly functions as one, since decision-making choice for the Court is not limited at all except by categorically prohibiting 'unreasonable' measures.

[54] For a schematic overview of this structural change, see C. Kaupa, *The Pluralist Character of the European Economic Constitution* (Hart Publishing 2016) 180. See also Barents, 'New Developments' (n. 22) 294–295. For a detailed analysis of the early case law on Art. 34 TFEU, including the development from *Dassonville* to *Cassis de Dijon*, see L.W. Gormley, *Prohibiting Restrictions on Trade within the EEC* (North Holland 1985).

[55] See section IV below.

seminal – though perhaps slightly dramatic – question. What makes his question particularly remarkable, however, is that the answer is so obvious and yet hardly offers any guidance on how to interpret the free movement provisions. That is to say, any reasonable human being would agree that Article 34 TFEU, or any of the other fundamental freedoms, is *not* intended to encourage the unhindered pursuit of commerce in individual Member States. However, knowing this is unhelpful, because it merely eliminates one radical interpretation of *Dassonville* while failing to provide clear guidance to the critical follow-up question: should we not avoid a situation where virtually all Member States would have to be justified, subjecting them to a standard of proof that is significantly higher than the one borne by the plaintiff, and if so, how to do this?

Consequently, the potential breadth of the *Dassonville* rule in combination with the principle of mutual recognition makes it extremely powerful, but at the same time it is its most profound weakness.[56] While it certainly counts as an interpretation of Article 34 TFEU in the

[56] I should note here that in a recent and stimulating contribution, Schütze has argued that the 'mainstream' interpretation of *Dassonville*, focusing on the plain, acontextual meaning of para. 5 and emphasising its excessive breadth, is a profound misunderstanding of *Dassonville*'s true meaning: R. Schütze, '"Re-reading" *Dassonville*: Meaning and Understanding in the History of European Law' (2018) 24 *European Law Journal* 376. According to Schütze, indistinctly applicable measures would prima facie fall *outside* the scope of Art. 34 TFEU unless they are not 'reasonable' in the sense of para. 6 of *Dassonville*. Only in *Cassis de Dijon*, says Schütze, did the Court introduce a presumption of illegality for indistinctly applicable product requirements and a shift in the burden of proof towards the Member States for proving the existence of a justification. I cannot engage with Schütze's sophisticated and refined analysis in detail here. Whether his argument can be sustained remains, for now, obscure because his article presages – and refers extensively to – a yet unpublished monograph on the meaning and reception of the *Dassonville* judgment, and his articles relies on, in his words, a 'methodological shortcut' by drawing on the work of intellectual historian Quentin Skinner. Skinner's theory of meaning and understanding in historical studies, however, is not unproblematically applied to judicial texts. Arguably, a central aim of court judgments is to *clarify* the otherwise unclear meaning and application of the law. As Skinner developed his seminal theory to understand the meaning of historical texts of political philosophy in their own historical context, including in particular the works of Hobbes and Locke, one may question whether this 'methodological shortcut' is useful for interpreting ECJ judgments. Surely both the intellectual sophistication of, say, Hobbes' work, as well as the historical distance between him and us, requires particular attention to what Skinner calls the 'interlocutionary force' (relying on J.L. Austin, P.F. Strawson and John Searle's work on speech acts) instead of the plain, semantic meaning of the text. But should we require Schütze's intellectual *tour de force* in order to understand the proper meaning of *Dassonville*? What does the fact that multiple generations of scholars have *all* misunderstood *Dassonville*'s meaning mean for the judgment's usefulness in terms of clarification of the law? Even if Schütze is right about the 'interlocutionary force' of *Dassonville*, the ECJ should be the one to blame, for it had meant to say something completely different (the *Dassonville* rule is merely a jurisdictional rule) than what

sense of paraphrasing it,[57] it does not clarify much because it remains at a similar level of abstraction as the text of the provision itself. Certainly, the rule clarified some things. For example, it explained that the scope of Article 34 TFEU is not limited to overt discrimination, nor to direct or actual restrictions to trade.[58] It also explained that Article 34 TFEU does not prohibit 'reasonable' measures by the Member States which pursue a justified objective. These two extremities, however, do not prevent *Dassonville* from being a typical example of the type of precedent which the American legal realists lamented: one which does not really bind future courts in the manner in which purports to do so, because it is too abstract to be of real value in deciding future cases.[59]

This weakness of *Dassonville* causes what Richard Fallon calls 'interpretive dissonance':

> 'a felt experience of discordance between what might be thought of as a statute's first-blush meaning – what its words, construed relatively acontextually, would seem to require – and an interpreter's immediate, equally provisional expectations concerning what well-written legislation by either an actual or a reasonable legislature would likely direct'.[60]

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it actually said in para. 5 (the *Dassonville* rule is the basic rule on what falls under the term 'measures having equivalent effect', only *mitigated* and not replaced by para. 6). Why Schütze chose to chastise J.H.H. Weiler, instead of the ECJ, remains unclear, also because his analysis of Weiler's contributions is unproductively *ad hominem*.

[57] An interpretation of a text necessarily paraphrases it. As Brewer observes this is the only way to distinguish interpretation from repetition (Brewer, 'Figuring the Law' (n. 41) 824) using the example of the poet who is asked to state the meaning of his poem, and responds by saying: 'Oh, I can tell you exactly what it means', and then reads the poem aloud (S. Cavell, *Must We Mean What We Say?* (Cambridge University Press 2015) 70).

[58] An example of the breadth of the *Dassonville* rule is the case on the French standards on goods sold under the description 'foie gras': *Commission v France*, C-184/96, EU:C:1998:495.

[59] Many American legal realists indeed argued in favour of more a fact-specific legal doctrine and precedent which is more capable of guiding and restraining courts in future cases. Some of them attempted to reconceptualise existing categories and doctrine better to match social reality and thereby increase the role of rule-following in adjudication. See e.g. H. Oliphant, 'A Return to *Stare Decisis*' (1928) 14 *ABA Journal* 71; and L. Green, *The Judicial Process in Tort Cases* (West 1939). On Llewellyn's attempt to remodel contract formation, see D.K. Hart, 'Cross Purposes and Unintended Consequences: Karl Llewellyn, Article 2 and the Limits of Social Transformation' (2013) 1 *Theory and Practice of Legislation* 9.

[60] R.H. Fallon, 'Three Symmetries between Textualist and Purposivist Theories of Statutory Interpretation – and the Irreducible Roles of Values and Judgment within Both' (2014) 99 *Cornell Law Review* 685, 688 and 689 (references omitted).

Interpretive dissonance is a psychological and linguistic phenomenon which invokes the need for theories of interpretation such as textualism and purposivism. It is not a theory of interpretation itself, but rather the presupposed triggering mechanism for all prescriptive theories of interpretation,[61] arguably the result of the awkwardness of rules and formalism.[62] Fallon introduces the concept of interpretive dissonance in the context of statutory and constitutional interpretation. However, adjudication and doctrinal analysis is often just as much about the interpretation and analogical application of case law as it is about the interpretation of constitutional and legislative norms. In EU internal market law it is primarily case law which has to be interpreted,[63] and it is the case law which creates persistent interpretive dissonance.

At first sight, and understood relatively a-contextually, the *Dassonville* rule clearly seems to imply that all national measures which affect commercial freedom – even indirectly and/or potentially – need to be justified. This amounts *de facto* to a general proportionality control of virtually all Member State regulation,[64] which arguably lacks hermeneutic support by Article 26 TFEU as well as political and social legitimacy.[65] By contrast, a contextually enriched and perhaps more reasonable understanding of *Dassonville* is that the Court merely intended to clarify that direct discrimination need not be proved, while national measures still need to have a disparate effect on market access to qualify as trade restrictions.[66] It might also be that the Court never intended, or in any case never should have intended, the free movement provisions to extend beyond direct *and indirect* nationality discrimination,[67] but it merely phrased the

[61] Ibid. 702.

[62] See F. Schauer, *Playing by the Rules* (Clarendon Press 1991) ch. 7.

[63] This is a consequence of the fact that the legal meaning of substantive EU law – pursuant the autonomy of the EU legal system – develops mainly by judicial decision-making.

[64] See E. Spaventa, 'From *Gebhard* to *Carpenter*: Towards a (Non-)Economic European Constitution' (2004) 41 *Common Market Law Review* 743.

[65] E.g. A. Somek, 'The Argument from Transnational Effects I: Representing Outsiders through Freedom of Movement' (2010) 16 *European Law Journal* 315. See also F.W. Scharpf, 'The Asymmetry of European Integration, Or Why the EU Cannot be a "Social Market Economy"' (2009) 8 *Socio-Economic Review* 211.

[66] See e.g., G. Davies, 'The Court's Jurisprudence on Free Movement of Goods: Pragmatic Presumptions, Not Philosophical Principles (2012) 2 *European Journal of Consumer Law* 25; I. Lianos, 'In Memoriam *Keck*: The Reformation of the EU Law on the Free Movement of Goods' (2015) 40 *European Law Review* 225.

[67] See G. Davies, *Nationality Discrimination in the European Internal Market* (Kluwer Law International 2003) chs. 3–5.

Dassonville rule in such broad terms to give itself the greatest possible decision-making freedom for the future.[68]

Broad, pompous formulations and definitions can be very helpful for affording courts sufficient interpretive leeway in the future. But there might be a price to be paid for such ambition: for the ECJ it was the infamous Sunday Trading case law; the 'pathological end-game' of *Dassonville* for some commentators.[69]

When confronted by an increasing case-load following the Sunday Trading cases, the Court decided to solve the issue by altering the substantive test itself in *Keck*,[70] with a corresponding change in the placement of the evidential burden of proof. Certain selling arrangements which have no directly or indirectly discriminatory effects are presumed not to be obstacles to trade, even though we would have to subsume them under a first-blush and a-contextual understanding of the *Dassonville* rule.

Thus, *Keck* can be regarded as a response to the sense of interpretive discomfort which was felt by applying the first-blush sense of the *Dassonville* rule to national measures which intuitively we did not expect to be captured by the free movement provisions. It is not, therefore, a retreat to 'formalism' as is sometimes suggested,[71] but exactly the opposite of formalism: a change of heart resulting from the discomfort that a formal application of the

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[68] This explanation of the *Dassonville* rule could itself be understood in different ways. It might for example be regarded as a matter of judicial politics, i.e. a refusal to unnecessarily constrain itself in future cases. However, it could also be interpreted as an expression of neoliberal thinking insofar as the latter is *not* understood as discarding regulation altogether, but as re-regulating and protecting capitalism at a global (or in this case, European) scale in order to protect capitalism against democratic decision-making at national level. See in this regard Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018). However, the intellectual history of neoliberal thought is certainly not fleshed out entirely, and Slobodian's analysis is quite different from 'mainstream' interpretations of neoliberal thinking which tend to understand it as a theory of free markets with minimal or no government intervention (see e.g. D. Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007); and C. Crouch, *The Strange Non-Death of Neoliberalism* (Polity Press 2011)).

[69] Weiler, 'The Constitution of the Common Market Place' (n. 52) 369. But cf. L.W. Gormley, 'Annotation of Case 145/88, *Torfaen Borough Council*' (1990) 27 *Common Market Law Review* 141; and L.W. Gormley, 'Recent Case Law on the Free Movement of Goods: Some Hot Potatoes' (1990) 27 *Common Market Law Review* 825. On the Sunday Trading case law generally, see E. Sharpston, 'About That Sunday Trading Mess…' in Amtenbrink et al. (eds.), *The Internal Market* (n. 37).

[70] *Criminal proceedings against Bernard Keck and Daniel Mithouard*, C-267/91 and C-268/91, EU:C:1993:905.

[71] E.g N. Reich, 'The "November Revolution" of the European Court of Justice: *Keck*, *Meng* and *Audi* Revisited' (1994) 31 *Common Market Law Review* 459, 465–468; Davies, *Nationality Discrimination* (n. 67) 55.

Dassonville rule would entail.[72] Broad and pompous formulations appear useful until they backfire. The remaining options are either to overrule previous cases, or to use our intellectual or rhetorical capabilities to reinterpret the rule so as to be clear that the internal market is not (correction: has never been[73]) merely a vehicle of deregulation. From an interpretive perspective, *Keck* is to *Dassonville*, what *Church of the Holy Trinity v United States* is to the Alien Contract Labor Act.[74]

Whether the manoeuvre in *Keck* was desirable is a question of separate debate.[75] One conclusion, however, is hardly avoidable. At a structural level the Court failed in what it purported to do, i.e. clarify its case law and provide a more precise, predictable and workable understanding of what constitutes a trade barrier.[76] The artificial distinction between 'product requirements' and 'certain selling arrangements' proved to be an unhelpful proxy for the possible effects of state regulation on the functioning of the internal market, as became clear in judgments like *Mars*,[77] *Familiapress*,[78] and *Gourmet International*.[79]

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[72] Some scholars were never troubled by the *Dassonville* rule, and criticised *Keck* precisely for *not* following the approach of the Sunday Trading case law. See e.g. L.W. Gormley, 'Reasoning Renounced: The Remarkable Judgment in *Keck and Mithouard*' (1994) 5 *European Business Law Review* 63. Possibly such scholars would not consider themselves 'formalists', but this may well be because the term 'formalism' is poisoned by its pejorative and hardly helpful usage. For a reminder, see B.Z. Tamanaha, *Beyond the Formalist–Realist Divide: The Role of Politics in Judging* (Princeton University Press 2009) ch. 3 ('The Myth about "Mechanical Jurisprudence"') and ch. 9 ('The Emptiness of "Formalism" in Legal Theory').

[73] As is well known, the ECJ adheres to a 'civil law tradition' style of reasoning by claiming that it never creates new law, but merely 'discovers' the meaning which the law always had.

[74] *Church of the Holy Trinity v United States*, 143 US 457. This case concerned the question of whether the Alien Contract Labor Act, which prohibits assisting the immigration of an alien under contract to perform 'labor or service of any kind', prevented the Holy Trinity Church to appoint a foreign clergyman as its minister. On its face, the text of the Act is very clear, as 'labor or service *of any kind*' clearly also covers the services provided by a minister. Further scrutiny of the context of the Act, however, led the Supreme Court to conclude that the Act ought to have been construed to apply to manual labour and services alone, thus excluding clerical services.

[75] The judgment caused a true avalanche of academic commentary. Notable responses include Reich, 'The "November Revolution"' (n. 71); S. Weatherill, 'After *Keck*: Some Thoughts on How to Clarify the Clarification' (1996) 33 *Common Market Law Review* 885; and L.W. Gormley, 'Two Years After *Keck*' (1996) 19 *Fordham International Law Journal* 866.

[76] For a sharp prediction, see Reich, 'The "November Revolution"' (n. 71) 470–472.

[77] *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH*, C-470/93, EU:C:1995:224.

[78] *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*, C-368/95, EU:C:1997:325.

[79] *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)*, C-405/98, EU:C:2001:135.

Underneath the surface of the distinction between 'product requirements' and 'certain selling arrangements', *Keck* of course also presaged the shift of attention from 'obstacles' to 'market access'.[80] In doing so, the Court suggested that a discriminatory approach underlies the entire functioning of the free movement provisions.[81] The relationship between *Dassonville*'s obstacle approach and *Keck*'s market access criterion, as well as the extent to which the approach towards 'certain selling arrangements' reaches into the heart of the definition of a measure having equivalent effect, took centre stage in the so-called 'use cases',[82] where the Court had to decide whether restrictions on the use of products by Member States should be subject to the *Dassonville* rule or to the *Keck* exception.[83] Famously, the Court opted for neither, and purported to clarify its previous case law by conceiving of discriminatory measures and indistinctly applicable product requirements as *examples* of measures which hindered market access.[84]

It can certainly be argued that the introduction of the market access test does not add anything to the principles which *Dassonville* had already established.[85] However, even if the market access test is merely a semantic modification, semantics often do matter and paraphrasing can often clarify. Both *Mickelsson and Roos* and *Italian Trailers* emphasised the relevance of consumer demand in determining whether a measure falls within Article 34 TFEU,

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[80] *Keck and Mithouard*, C-267/91 and C-268/91, EU:C:1993:905, para. 17.

[81] Ibid. reading: 'Provided that [the *Keck* criteria] are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules *therefore* fall outside the scope of Article 30 of the Treaty'. The way the sentence is phrased indicates that the discriminatory market access test is not only applicable to certain selling arrangement; these fall outside the scope of the *Dassonville* rule *because* their effect on market access is not discriminatory.

[82] *Commission of the European Communities v Portuguese Republic*, C-265/06, EU:C:2008:210; *Åklagaren v Percy Mickelsson and Joakim Roos*, C-142/05, EU:C:2009:336; *Commission of the European Communities v Italian Republic*, C-110/05, EU:C:2009:66; *Criminal proceedings against Lars Sandström*, C-433/05, EU:C:2010:184.

[83] For a detailed analysis of the uses cases, with particular emphasis to the Opinions of the Advocates General involved, see Gormley, 'Free Movement of Goods and Their Use' (n. 18).

[84] *Commission v Italy*, C-110/05, EU:C:2009:66, paras. 35–37; *Mickelsson and Roos*, C-142/05, EU:C:2009:336, para. 24.

[85] J. Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 *Common Market Law Review* 437; Gormley, 'Free Movement of Goods and Their Use' (n. 18).

in contrast with the typical supply-side focus of earlier case law.[86] More broadly, the concept of 'market access' is at least in theory capable of clarifying what the free movement provisions aim to protect. For this reason, at least in principle it seems that the use cases do enrich the *Dassonville* rule doctrinally, even though all these principles can be subsumed under the latter *ex post facto*.

The disturbing result, however, is that the use cases did not really as much clarify as they obscured the case law. *Italian Trailers* repeats the paragraph from *Keck* which strongly suggests that free movement of goods in general is not applicable at all to national measures which affect domestic and foreign goods equally.[87] This consideration is, however, immediately followed by a semantically modified restatement of the *Dassonville* rule which denies up front that any directly or indirectly discriminatory effect on market access is required.[88] Consequently, some commentators have understood the use cases as effectively abandoning *Keck*,[89] while others read them as an explicit confirmation of that judgment,[90] with Gormley being the meat in the proverbial sandwich.[91] If we take all of these commentators seriously (as I do), their contradictory accounts strongly suggest that the Court simply again failed to explain itself properly.[92]

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[86] *Mickelsson and Roos*, C-142/05, EU:C:2009:336, para. 26; *Commission v Italy*, C-110/05, EU:C:2009:66, paras. 56–57.

[87] *Commission v Italy*, C-110/05, EU:C:2009:66, para. 36, referring to *Keck and Mithouard*, C-267/91 and C-268/91, EU:C:1993:905, para. 17.

[88] Ibid. para. 37: '[…] Any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept'. If *Dassonville* really is a discriminatory market test as per para. 36, would it be really so difficult to add 'any more than it impedes the access of domestic products'?

[89] E.g. E. Spaventa, 'Leaving *Keck* Behind? The Free Movement of Goods After the Rulings in *Commission v Italy* and *Mickelsson and Roos*' (2009) 35 *European Law Review* 914; Lianos, 'In Memoriam *Keck*' (n. 66).

[90] P. Wenneräs and K. Boe Moen, 'Selling Arrangements, Keeping *Keck*' (2010) 35 *European Law Review* 393; P. Oliver, 'Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurtling in a New Direction?' (2011) 33 *Fordham International Law Journal* 1423.

[91] Gormley, 'Free Movement of Goods and Their Use' (n. 18) 1627: 'It seems, with respect, that pragmatism triumphed, and that recent reports of the death of *Keck* may, like those of Mark Twain's death, prove to be greatly exaggerated'.

[92] It is not implausibly the case that this is a deliberate choice of the Court. See S. Weatherill, 'The Court's Case Law on the Internal Market: "A Circumloquacious Statement of the Result, Rather than a Reason for Arriving at It"?' in M. Adams et al. (eds), *Judging Europe's Judges* (Hart Publishing 2013), referring to the brilliant F. Rodell, *Woe Unto You, Lawyers!* (Reynal and Hitchcock 1939), available at

Where does this leave us? To this day, the Court has chosen the path of repeating and paraphrasing *Dassonville* without further explanation. When forced to say something more, most notably in *Keck* and the use cases, it chose to 'clarify' by way of new and largely meaningless phrases, distinctions and slogans.[93] The critical follow-up question to the rhetorical question asked by Advocate General Tesauro is the following: granted that the free movement provisions are not intended to protect the unhindered pursuit of commerce, how do we prevent the apparently clear meaning of the *Dassonville* rule from having this result, and how do we interpret the rule reasonably so as to incorporate the broader values on which the EU is based? This is the central question for operationalising the philosophy of the EU internal market into clear, predictable, and sensible legal rules and principles. In all of its attempts to clarify the meaning of the case law, the Court failed – and not for lack of available ideas.[94] We do not know whether the free movement provisions are intended only to capture discriminatory measures (thus extending its material scope beyond the latter only for judicial convenience), whether it requires justification for literally all obstacles to trade, or whether some indistinctly obstacles to trade are outside the scope of free movement while others are not. What we are left with are definitions that – notwithstanding the *grandeur* of bold proclamations – fail to

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http://www.constitution.org/lrev/rodell/woe_unto_you_lawyers.htm: 'As though, in any case, any abstract legal phrase could conceivably contain the right key – or any key – to the solution of a concrete social or political or human problem. Dealing in words is a dangerous business, and it cannot be too often stressed that what The Law deals in is words'.

[93] Snell, 'The Notion of Market Access' (n. 85).

[94] In the past, numerous categorisations have been proposed which could have clarified the meaning of a trade restriction. To mention just two, in his Opinion in *Alfa Vita Vassilopoulos AE and Carrefour Marinopoulos AE v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon*, C-158/04 and C-159/04, EU:C:2006:212, AG Poiares Maduro suggested a tripartite classification to identify restrictions on trade, specifically focused on distinguishing between legitimate and wrongful supplementary costs which affect market access (paras. 42–46). AG Bot's Opinion in *Commission v Italy*, C-110/05, EU:C:2006:646, remained more in line with the Court's case law, but at least he admitted the confusion caused by *Keck and Mithouard*, and explained his reasons for rejecting a classification approach, describing how the trade obstacles approach should work in practice (paras. 79–107). The Court, unfortunately, never actively endorsed any of the suggested clarifications, just as it never responded to explicit calls to clarify the applicability of the case law based justifications to discriminatory measures (cf. Opinion of AG Jacobs in *PreussenElektra AG v Schhleswag AG, in the presence of Windpark Reußenköge III GmbH and Land Schleswig-Holstein*, C-379/98, EU:C:2000:585, para. 229), and the degree of horizontal effect of the free movement of goods (Opinion of AG Trstenjak in *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) — Technisch-Wissenschaftlicher Verein*, C-171/11, EU:C:2012:176, para. 44).

deliver on their hermeneutic temptations which invite the reader to search futilely for some deeper meaning or message.[95] The rules are perfectly clear, and yet their application is not.

Of course, many legal concepts are never fully explained. Moreover, as the cliché goes, the Court decides cases, it does not write textbooks. This need not be a problem if the law can be applied sufficiently accurately and predictably on the basis of pragmatism and common sense.[96] In such a situation, reasonableness may be found primarily in the *process* of adjudication. To safeguard a reasonable and proper application of the *Dassonville* rule, and avoiding false positive outcomes,[97] a proper application of the burden and standard of proof becomes essential for the reasonable application of the law.[98]

IV. The Elephants in the Room

The plaintiff should prove the existence of a restriction, and it is for the Member State to prove the existence and proportionality of a justification. Hardly any other aspect of EU internal market law seems so undisputed as the division of the burden of proof. This certainly has been the general line in the case law of the Court. [99] However, taking the imperative of interpreting

[95] S. Žižek, *Violence* (Profile 2008), 65. In this regard, the ECJ's case law can be particularly painful for doctrinal constructivists when all attempts to make sense of the case law fail: 'what is most difficult to accept is […] meaninglessness' (65).

[96] Cf. Davies, 'The Court's Jurisprudence on Free Movement of Goods' (n. 66); and Gormley, 'Free Movement of Goods and Their Use' (n. 18).

[97] A false positive outcome, in this case, would be the prohibition of a national measure notwithstanding the fact that said measure should not be contrary to EU internal market law. The question of what 'should not be' is a normative assessment that would largely be based on the objectives of the EU internal market (which themselves can be contested). This could be caused for instance by too high a standard of proof for proving justifications, or an erroneous assessment of the necessity of a national measure. *Commission v Austria*, C-320/03, EU:C:2005:684, could qualify as a false positive outcome.

[98] By analogy, the application of the burden and standard of proof have taken centre-stage in interpreting US antitrust law, in particular in the context of the rule of reason: A. Gavil, 'Burden of Proof in US Antitrust Law', in *Issues in Competition Law and Policy*, vol. 1 (ABA Section of Antitrust Law 2008), 125. Increasingly this appears to be the case in EU competition law as well, see e.g. *Intel Corp. v European Commission*, C-413/14P *Intel*, EU:C:2017:632, and in particular the Opinion of AG Wahl (EU:C:2016:788).

[99] See e.g., *Firma Denkavit Futtermittel GmbH v Minister für Ernähung, Landwirtschaft und Forsten des Landes Nordrhein-Westfalen*, 251/78, EU:C:1979:252, para. 5; *Commission of the European Communities v French Republic*, C-24/00, EU:C:2004:70, para. 53; *European Commission v French Republic*, C-333/08, EU:C:2010:44, para. 87. But see, *European Commission v United Kingdom of Great Britain and Northern Ireland*, C-308/14,

Dassonville 'reasonably' as a starting point again, both the legal[100] and evidential[101] burden of proof as well as the standard of proof[102] might actually be two substantial elephants in the room. In EU internal market law, both concepts are significantly under-theorised, notwithstanding their profound influence on our understanding of the EU internal market.

As mentioned in section III above, if we trace the case law based justifications back to *Dassonville* itself, rather than *Cassis de Dijon*,[103] the Court does not explicitly place the burden of proof for proving the reasonableness of national measures on the Member States. This would suggest that it might be for the plaintiff to prove that a national measure is unreasonable,[104] perhaps in conjunction with a legal presumption that discriminatory measures are in any case prima facie unreasonable.[105]

Indeed, in *Keck* the presumption that certain selling arrangements have no effect on intra-EU trade amounts to shifting the evidential burden of proof to the plaintiff, who has to adduce evidence that the selling arrangement in question has a discriminatory effect on market access.

EU:C:2016:436, para. 85: '[T]he Commission, which has the task of proving the existence of the alleged infringement […] has not provided evidence or arguments showing that such checking does not satisfy the conditions of proportionality'.

[100] The legal burden of proof determines which party bears the risk of not persuading the court. See e.g., M. Brealey, 'The Burden of Proof before the European Court' (1985) 10 *European Law Review* 250, 257.

[101] The evidential burden of proof determines which party has to adduce evidence as to a particular fact or statement. By contrast, unlike the legal burden of proof, the evidential burden can shift between the parties multiple times during the proceedings. See e.g. J. Thayer, 'The Burden of Proof' (1890) 4 *Harvard Law Review* 45, 48; H. Prakken and G. Sartor, 'Presumptions and Burdens of Proof' in T. van Engers (ed.), *Legal Knowledge and Information Systems* (JURIX 2006) 24–26.

[102] The standard of proof determines the qualitative and quantitative minimum requirements that must be met in order to convince the court of the alleged facts. See e.g., S. Haack, *Evidence Matters: Science, Proof and Truth in the Law* (Cambridge University Press 2014) 47–77.

[103] The case law based justifications were not introduced in *Cassis de Dijon*, C-120/78, EU:C:1979:42, but are inherent to *Dassonville*, 8/74, EU:C:1974:82 itself (para. 6).

[104] See again, by analogy, *Commission v United Kingdom*, C-308/14, EU:C:2016:436, para. 85. It could certainly be argued that as regards the case law-based justifications, the *legal* burden of proof is always borne by the party alleging the infringement of Art. 34 TFEU, since the justification is woven into the hermeneutics of the prohibition (unlike the Treaty-based justifications). However, obviously this does not prevent the *evidential* burden of proof from switching to the Member State once a prima facie case of infringement has been put forward.

[105] Cf. Art. 3 Commission Directive 70/50/EEC of 22 December 1969 based on the provisions of Article 33 (7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty [1970] OJ L13/29. See also Schütze, '"Re-reading" *Dassonville*' (n. 56).

Adding to the confusion surrounding the substance of *Keck*, *Ker-Optika* appears to maintain the *Keck* exception with another reversal of the evidential burden of proof for 'certain selling arrangements'.[106]

More recently, in *Deutsche Parkinson Vereinigung*,[107] the Court emphasised that a prohibition of mail-order sales of medicinal products does not affect the sale of national medicinal products in the same way that it affects the sale of foreign medicinal products, and should therefore be subsumed under the *Dassonville* rule.[108] The *Dassonville* rule, however, does not require proving a directly or indirectly discriminatory effect. Does *Deutsche Parkinson Vereinigung* imply that the plaintiff should always prove that there is a disparate effect on market access in order to meet the standard of proof? Or is it for the Member State, after it is established that a national measure is capable of obstructing imports between Member States, to prove that the measure has *no* disparate effect on market access, with the existence of a measure having equivalent effect deemed to be proved if the Member States fails to prove the existence of equal burdens in law and in fact? In light of the Court's case law, the latter seems more likely, but this is far from obvious in light of how the Court described the market access category in *Italian Trailers*. The obscurity of what *Dassonville* actually intended to say, as discussed in the previous section, leads to further complexities in distributing the evidential burden of proof.

In the context of justifying a trade obstacle, distinguishing between the legal burden of proof and the evidential burden of proof further raises the question of the extent to which the *evidential* burden of proof could shift back to the plaintiff after the Member State has provided a prima facie defensible argument. We could imagine that a 'reasonable' application of the *Dassonville* rule (including its proto-*Cassis de Dijon* rule of reason in paragraph 6) would allow the evidential burden of proof to shift back and forth depending on the arguments submitted by the parties. This could for example require the plaintiff to substantiate his or her claim that a national measure is disproportionate, if the Member State provided a sufficiently substantiated argument as to why its measure is suitable and necessary. This was the position of the General

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[106] *Ker-Optika bt v ÀNTSZ Dél-dunántúli Regionális Intézete*, C-108/09, EU:C:2010:725, para. 51. Schütze, 'Of Types and Tests' (n. 2) conceives of *Ker-Optika* as an attempt to a unitary framework of analysis under Art. 34 TFEU. With Schütze, I fail to see how this attempt clarifies the relationship between *Dassonville*, *Keck* and *Italian Trailers* in terms of the burden of proof.

[107] *Deutsche Parkinson Vereinigung eV v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV*, C-148/15, EU:C:2016:776.

[108] *Deutsche Parkinson Vereinigung*, C-148/15, paras. 22–25.

Court in the *Microsoft* case in the context of proving the objective justification of an abuse of a dominant position:

> '[I]t is for the dominant undertaking concerned […] to raise any plea of objective justification and to support it with arguments and evidence. *It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted*'.[109]

Like the case law based justifications in free movement law, the objective justification is read into Article 102 TFEU as a reasonable escape from the provision's syllogism.[110] However, in the context of free movement law, the Court has not explained if, and how, shifts in the evidential burden of proof can be relevant.

The placement of the legal and evidential burden of proof is particularly decisive for the interpretive outcome in individual cases in light of the qualitative asymmetry between the standard of proof for establishing a restriction and the standard of proof for justifying it. The standard of proof for proving a restriction to intra-community trade is hard to pin down exactly.[111] While the standard of proof and the substantive interpretation of the norm should not be conflated, they are often interrelated. Hence, the broad interpretation of obstacles to trade in *Dassonville* has clear consequences for the standard of proof for the Commission and individual plaintiffs. In a Treaty infringement case, the Court noted that:

> It is the Commission's responsibility to place before the Court all the factual information needed to enable the Court to establish that the obligation has not been fulfilled and, in so doing, the Commission may not rely on any presumption.[112]

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[109] *Microsoft Corp. v Commission of the European Communities*, T-201/04, EU:T:2007:289, para. 688 (emphasis added).

[110] In contrast to Art. 101(3) TFEU which provides an exception to Art. 101(1) TFEU, and the Treaty-based derogations to restrictions of free movement in Arts. 36, 45, 51, 52 and 65 TFEU.

[111] This is also because of the fact that in litigation before national courts, the standard of proof is partly determined by national procedural law within the limits of the principles of equivalence and effectiveness.

[112] *European Commission v Kingdom of Spain*, C-400/08, EU:C:2011:172, para. 58.

In practice, 'all the factual information needed' need not be a particularly high standard in light of the material scope of the free movement provisions: a potential barrier to intra-community trade is sufficient, and only truly hypothetical or too remote effects on trade fall beyond the scope of the fundamental freedoms.[113]

Two other factors appear to have further lowered the *de facto* standard of proof. The first is the case law's apparent focus on folk economics and armchair sociology rather than concrete empirical data, illustrated for example by *Gourmet International*:

> In the case of products like alcoholic beverages, the consumption of which is linked to traditional social practices and to local habits and customs, a prohibition of all advertising directed at consumers […] is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are instantly more familiar.[114]

Similar use of assumptions can be found in *Deutscher Apothekerverband v DocMorris*, where the Court held that a prohibition on mail-order sales of certain medicines is more of an obstacle to pharmacies outside Germany because 'for pharmacies not established in Germany, the internet provides a more significant way to gain direct access to the German market'.[115]

This low standard of proof for establishing a trade restriction stands in sharp contrast with the standard of proof for justifications put forward by the Member States. Member States must submit 'conclusive evidence' for the existence of a mandatory requirement and the

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[113] On the remoteness test, see, *H. Krantz GmbH & Co. v Ontvanger der Directe Belastingen and Kingdom of the Netherlands*, C-69/88, EU:C:1990:97, para. 11; *Criminal proceedings against Matteo Peralta*, C-379/92, EU:C:1994:296, para. 24

[114] *Gourmet International*, C-405/98, EU:C:2001:135, para. 21.

[115] *Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval*, C-322/01, EU:C:2003:664, para. 74. This low standard of proof may also be related to a Bainian conception of a barrier to entry. See, Lianos, 'Shifting Narratives', 726–8. According to economist Joe Bain, a barrier to entry is any advantage for incumbent firms which allows them to raise prices above a competitive level without attracting market entry. Cf. the Stiglerian approach according to which a barrier to entry refers to costs borne by potential market entrants which have not been borne by incumbent firms. The ECJ's *DocMorris* judgment assumes that local, incumbent pharmacies have an advantage over foreign pharmacies because the former have access to (local) customers in their physical outlets. This would not be considered a barrier to entry in the Stiglerian sense. On different theories of barriers to entry, see generally R.P. McAfee, H.M. Mialon and M.A. Williams, 'What Is a Barrier to Entry?' (2004) 94 *American Economic Review* 461.

proportionality of the contested measure.[116] In recent case law, the Court has further explained what is needed for the Member States to justify a trade restriction. Increased attention seems to be laid on objective, empirical evidence.[117] In *Scotch Whisky Association*, the Court emphasised that Member States must provide 'appropriate […] and specific evidence, substantiating its arguments'. National courts must then 'examine objectively whether it may reasonably be concluded from the evidence submitted [whether the national measure is appropriate and necessary]'.[118]

However, the standard of proof is not always applied in the same manner, in particular as regards the proportionality test. This is partly because the substantive content of the proportionality test is not always the same: while usually confined to suitability and necessity, the Court in some cases also applied a proportionality analysis *stricto sensu*.[119] Consistency requirements are sometimes also read into the test, for example in the gambling case law.[120] Moreover, in the application of the individual limbs of proportionality, different standards of proof have been applied throughout the case law. While the Member States are usually required to demonstrate that a no less onerous measure would have been able to attain the mandatory requirement, in *Italian Trailers*, the Court emphasised that the Member States' burden of proof

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[116] *Commission v Spain*, C-400/08, EU:C:2011:172, para. 62. See also *Commission of the European Communities v Grand Duchy of Luxemburg*, C-319/06, EU:C:2008:350, para. 51 ('appropriate evidence'); and (requiring 'specific evidence substantiating its arguments', and *Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française*, C-73/08, EU:C:2010:181, para. 71 (requiring 'detailed analysis, supported by figures [...] capable of demonstrating, with solid and consistent data […] genuine risks to public health').

[117] See N. Nic Shuibhne and M. Maci, 'Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law' (2013) 50 *Common Market Law Review* 965.

[118] *Scotch Whisky Association and Others v The Lord Advocate and The Advocate General for Scotland*, C-333/14, EU:C:2015:845, paras. 54, 56.

[119] See e.g., *Commission of the European Communities v Kingdom of Denmark*, 302/86, EU:C:1988:421, paras. 20 and 21; *Council of the City of Stoke-on-Trent and Norwich City Council v B & Q plc*, C-169/91, EU:C:1992:519, para. 16; *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, EU:C:2007:772, para. 79.

[120] E.g. *Criminal proceedings against Piergiorgio Gambelli and Others*, C-243/01, EU:C:2003:597, para. 67; *Ladbrokes Betting & Gaming Ltd and Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator*, C-258/08, EU:C:2010:308, para. 30. For analysis, see W. Sauter and J. Langer, 'The Consistency Requirement in EU Law' (2017) 20 *Columbia Journal of European Law* 39.

[sic[121]] does not require them to prove that 'no other conceivable measure could enable the legitimate objective pursued to be attained under the same conditions'.[122]

To some extent this is inherent to the proportionality test, which is naturally susceptible to a varying standard of review depending on the subject matter, the discretion of the decision maker, and considerations of institutional and constitutional deference.[123] However, the ECJ has not done particularly well in providing guidance on the exact standards which Member States must meet to justify their measures, most notably when it comes to assessing necessity,[124] apart from vague and general observations.[125]

In addition to the substantive content of the *Dassonville* rule, the burden and standard of proof provide some guidance on the question of what the reasonable meaning of the fundamental freedoms is. However, neither of them really clarifies the fundamental presumptions and the general philosophy underlying the EU internal market. While the division of the legal burden of proof has become a commonplace in EU law, the exact functioning of the evidential burden of proof remains largely obscured by clouds. As for the standard of proof, it continues to be difficult to predict what exactly is required from the Member States for them to justify their measures in individual cases, no less what would be *reasonable* in terms of the standard that Member States ought to meet.[126]

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[121] The Court does not always distinguish between the burden and standard of proof. What the Court is referring to here is the standard of proof.

[122] *Commission v Italy*, C-110/05, EU:C:2009:66, para. 66.

[123] Barak, *Proportionality* (n. 11) 374. In establishing the standard of review for the proportionality test, it is often difficult to avoid tautologies, since proportionality, like reasonableness, belongs to the categories of illusory reference (see n. 23).

[124] The key question here is whether Member States should prove that their measure is necessary to attain *their* national standard or an autonomous EU standard. Schütze, *From International to Federal Market* (n. 45), 218–225 shows that the case law is not particularly consistent in this respect.

[125] E.g. *Commission v Italy*, C-110/05, EU:C:2009:66, para. 65.

[126] See however, K. Purnhagen, 'Keck is Dead, Long Live Keck?: How the Court of Justice Tries to Avoid a Sunday Trading Saga 2.0' in Amtenbrink et al. (eds.), *The Internal Market* (n. 37), who argues that the Court has provided clearer directions in *Scotch Whisky Association* and *Deutsche Parkinson Vereinigung* as to the proportionality assessment and the standard of proof for Member States' justifications. I am not so convinced of the reduced elusiveness of the Court's conception of proportionality (if it has any such consistent conception at all) in its potential to guide national courts. The same applies to the practical feasible of the Court's observations regarding the standard of proof required of Member States, of which I am not at all certain that it reflects a reasonable interpretation of Art. 34 TFEU.

The resulting conclusion after the previous two sections is that the case law has not yet developed sufficiently clear guidelines as to what a reasonable and proper application of the *Dassonville* rule would entail. In other words, we are left with pragmatism and common sense in order to discern the compatibility of national measures with EU internal market law. Likewise, we are left with pragmatism and common sense to answer the critical follow-up questions to Advocate General Tesauro's Opinion: how do we prevent the apparently clear meaning of the *Dassonville* rule from applying to all measures which limit the unhindered pursuit of commerce? How are the broader values of the EU relevant to the interpretation of the EU internal market? In the absence of specific legal guidance from the case law, we return to the realm of the higher-order norms of interpretation, i.e. the norms of political morality which direct us as to how we should interpret the law. This brings me to the last section of this chapter, in which the task of interpreting *Dassonville* reasonably will be discussed from the perspective of the popular idea that legal norms should be interpreted 'systemically' or 'holistically', implying a significant interpretive role of the broader, non-economic values of the Treaty, including respect for the regulatory freedom of the Member States. Does reasonableness imply holism?

V. The Charms of the Lorelei

'More holistic' approaches to law are *en vogue*, inside and outside EU law. Unsurprisingly, because who would want to be a reductionist? The reductionist seems to be in the same lamentable position as the positivist and the formalist: hardly anyone would admit out loud that he or she is one, and the term derives its meaning almost entirely from its pejorative use.

As applied to EU internal market law, what I mean by 'more holistic approaches' is the idea that in the interpretation and application of the EU internal market provisions, non-market values should play a more prominent role, for example in the definition of certain legal concepts, the standard of proof or the intensity of judicial review. 'More holistic' understandings are already visible in the ECJ's case law on balancing the fundamental freedoms with fundamental rights,[127] the incorporation of non-economic values including

[127] E.g. *Eugen Schmidberger, Internationale Transporte und Planzüge v Austrian Republic*, C-112/00, EU:C:2003:333; *Omega Spielhallen*, C-36/02, EU:C:2004:614. The element which makes this approach 'more holistic' than the ECJ's earlier understanding of the internal market, is the less intrusive application of the proportionality test and the greater degree of deference granted to the Member States. For analysis see e.g., N.

environmental protection[128] and family life[129] into the concept of trade obstacles,[130] and the interpretation of the concept of a restriction of competition under Article 101 TFEU.[131] 'More holistic' approaches in the literature critical of the Court's case law have focused on the Court's bias towards economic freedoms, most notably of course in *Laval*[132] and *Viking*.[133] A somewhat similar debate in EU competition law as well as US antitrust law centres on whether competition law should be interpreted more holistically, for example by taking into account non-economic values and heterodox schools of economics.[134]

A 'more holistic' understanding of EU internal market law is clearly liable to entail more regulatory freedom for the Member States. Gormley has clearly warned of attempts in this direction:

> It would be unwise to fall for the charms of the Lorelei, who seek to draw the unwary from the safe flowing current of the free movement principle and on to the treacherous rocks of local interests and (sometimes very thinly disguised) market partition.[135]

Nic Shuibhne, 'Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law' (2009) 32 *European Law Review* 230.

[128] *PreussenElektra*, C-379/98, EU:C:2001:160, para. 76.

[129] *Mary Carpenter v Secretary of State for the Home Department*, C-60/00, EU:C:2002:434, para. 38.

[130] For an analysis of this 'integrated interpretation approach', see C. O'Brien, 'Social Blind Spots and Monocular Policy Making: The ECJ's Migrant Worker Model' (2009) 46 *Common Market Law Review* 1107, 1137–1140.

[131] See e.g., *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, C-67/96, EU:C:1999:430; *J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap*, C-309/99, EU:C:2002:98.

[132] *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others*, C-341/05, EU:C:2007:809.

[133] *Viking Line*, C-438/05, EU:C:2007:772. Both cases caused an avalanche of critical commentary. See e.g., C. Barnard, 'Social Dumping or Dumping Socialism?' (2008) 67 *Cambridge Law Journal* 262; C. Joerges and F. Rödl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*' (2009) 15 *European Law Journal* 1.

[134] See e.g. I. Lianos, 'Polycentric Competition Law' (2018) 71 *Current Legal Problems* 1; and in the context of US antitrust, L. Khan, 'Amazon's Antitrust Paradox' (2017) 126 *Yale Law Journal* 710. Cf. J.D. Wright et al., 'Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust' (2019) *Arizona State Law Journal* (forthcoming). For the argument that value-free, 'purely' economics-based competition law is illusionary, A. Ezrachi, 'Sponge' (2017) 5 *Journal of Antitrust Enforcement* 49.

[135] L.W. Gormley 'Inconsistencies and Misconceptions in the Free Movement of Goods' (2015) 40 *European Law Review* 925, 939.

It is absolutely clear that the *Dassonville* approach to EU internal market law, even if reasonably applied, is biased towards free trade and deregulation, because it is for the Member States to demonstrate the necessity and proportionality of their measures.[136] This should not come as a surprise: EU internal market law has never claimed to be value-neutral, at least not in its means, nor is there any reason why it should necessarily be so.[137] Nevertheless, one may certainly question whether it is reasonable to apply a bias in favour of unhindered trade by virtue of a higher standard of proof for the Member States' justifications than for the plaintiff's proving the existence of a restriction.[138]

Why then fall for the charms of the Lorelei? In other words, why should we give more regulatory freedom to the Member States and balance economic and non-economic values in our interpretation of the EU internal market more equally? One could suggest that the answer can be found in the phenomenon of interpretive dissonance, which is after all rooted in a perceived disharmony between various sets of values. However, interpretive dissonance is only a *symptom* of the bewitching powers of the Lorelei, and symptoms should not too easily be mistaken for reasons.[139]

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[136] Particularly in combination with the asymmetry between the standard of proof for establishing a trade barrier and that for establishing the justification. See further section IV above.

[137] I do not want to play down the relevance of questions surrounding the democratic, political and justice deficits of the EU. My point is that these problems do not necessarily apply more to the EU than they apply to numerous other legal regimes. Many, if not all, legal systems, including national ones, are far removed from their claims of political and value neutrality in their actual operation, see R. Unger, *The Critical Legal Studies Movement: Another Time, A Greater Task* (Verso 2015).

[138] See e.g. Kaupa, *The Pluralist Character* (n. 54).

[139] This is of course a gross oversimplification of the relevance of (interpretive or moral) dissonance and the importance of coherence. See e.g., John Rawls' theory of reflective equilibrium, which states that moral theories become justified through a process of reflective deliberation in which we revise our judgments and principles until we reach a situation in which our moral principles and moral judgments match (J. Rawls, *A Theory of Justice*, rev. edn (Harvard University Press 1999) 42–45. But cf. N. Kolodny, 'Why Be Disposed to Be Coherent?' (2008) 118 *Ethics* 438. But in the context of law, it is questionable whether reflective equilibrium can be of avail. As law is (partly) a product of political decision-making, as a whole the posited materials are likely to be messy, incoherent and potentially conflicting. Hence, the possibility of reflective equilibrium and global coherence is certainly not obvious, if not unlikely, at least as applied to positive law: see e.g. G. Letsas, 'Harmonic Law' in J. Dickson and P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford University Press 2012). Sceptical as to the possibility of global coherence in law, J. Raz, 'The Relevance of Coherence' in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1995).

For our purposes, the question is whether a reasonable interpretation of *Dassonville* might require us to favour 'holistic interpretations' over 'reductionist interpretations' of what EU internal market law is. Is it reasonable to maintain a broad definition of obstacles to trade and a strict assessment of justifications; or do the broader values of the Treaties and the value of regulatory freedom necessitate a more contextual interpretation of the *Dassonville* in order for it to reasonable? To say something useful about this, we first need to have a better idea of what a 'more holistic' approach actually means, and why 'holistic approaches' are so beguiling. Only then can the question be raised of whether there are theoretical or doctrinal reasons to apply a more holistic interpretation of the free movement provisions, and if so, how this should be operationalised.

A. The Seducer

What is this fashionable thing called 'holism'? It would be foolish to pretend to provide a full understanding of the term. As its meaning frequently remains obscure, however, perhaps a couple of remarks will nonetheless be useful. Holism is usually associated with schools in philosophy of language and epistemology which focus on the necessary interconnectedness of words and statements. In this regard a distinction is usually made between 'meaning holism' and 'epistemological holism'. Meaning holism can roughly be summarised as the view mainly associated with W.V.O. Quine and Donald Davidson that the meaning of individual words and statements always depends on the entire web of meaning of a language.[140] Epistemological or confirmation holism is the claim that a single hypothesis can never be verified or falsified in isolation. Any empirical test of the hypothesis always depends on background assumptions of

[140] M.D. Resnik, 'Quine and the Web of Belief', in S. Shapiro (ed.), *The Oxford Handbook of Philosophy of Mathematics and Logic* (Oxford University Press 2005), 414. W.V.O. Quine, 'Two Dogmas of Empiricism' (1951) 60 *Philosophical Review* 20, 42 and 43. On Davidson's holistic theory of meaning and interpretation, see J.E. Malpas, *Donald Davidson and the Mirror of Meaning: Holism, Truth, Interpretation* (Cambridge University Press 1992). See also C.G. Hempel, 'Problems and Changes in the Empiricist Criterion of Meaning' (1950) 4 *Revue internationale de Philosophie* 41.

the entire web of beliefs (also known as the Duhem–Quine thesis),[141] or even, to use Kuhn's terms, on the entire scientific paradigm of which it is part.[142]

According to meaning holism as applied to legal-normative[143] knowledge, the interpretation and application of legal norms is necessarily holistic in that the meaning of legal norms is constituted within the meaning web of the entire language. As such, the insights of meaning holism have profound consequences for our understanding of the process of interpretation.[144] Today, even textualists do not deny that the meaning of legal norms always depends on context.[145] The increased attention for context and the pragmatics of legal meaning naturally entails a reinforced role for coherence as a constitutive criterion in legal interpretation. However, the insights of meaning holism for the nature of legal interpretation are merely descriptive, and from this perspective legal interpretation cannot be more or less holistic – fundamentally legal norms are always interpreted holistically.

The argument for a 'more holistic' understanding of the EU internal market seems to go further. It not only claims that we can only understanding individual norms in light of the entire legal framework, but also that we should reinterpret our understanding of the EU internal market, to the extent that broader values and principles, notably non-economic ones, should have normative force in interpreting the specific provisions of EU internal market law. In other words, the interpretive outcome should reflect a proper balance between economic and/or efficiency value on the one hand, and non-economic values such as environmental protection, consumer protection and distributive justice on the other.[146] A fully holistic interpretation of EU internal market law would imply that when we assess whether some national measure

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[141] P. Duhem, *The Aim and Structure of Physical* Theory, trans. P.P. Wiener (Atheneum 1962 [1904–1905]); and Quine, 'Two Dogmas' (n. 141). See further, M. Curd and J.A. Cover (eds.), *Philosophy of Science: The Central Issues*, 2nd edn (W.W. Norton & Company 2013), section 3: 'The Duhem–Quine thesis and Underdetermination'.

[142] Kuhn's historic turn in the philosophy of science was strongly influenced by Quine's work on the analytic–synthetic distinction in 'Two Dogmas' (n. 141). T.S. Kuhn, 'A Discussion with Thomas S. Kuhn' in T.S. Kuhn, *The Road Since Structure* (University of Chicago Press 2000) 273.

[143] By 'legal-*normative* knowledge' I mean knowledge 'related to legal *norms*'. I do not therefore mean a certain normative approach to law or anything else, in the sense of 'evaluative' or 'critical'.

[144] Brewer, 'Figuring the Law' (n. 41).

[145] E.g. F.H. Easterbrook, 'Text, History, and Structure in Statutory Interpretation' (1994) 17 *Harvard Journal of Law & Public Policy* 61, 64; J.F. Manning, 'What Divides Textualists from Purposivists?' (2006) 106 *Columbia Law Review* 70, 73, 79 and 80; A. Scalia and B.A. Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West 2012) 32–34.

[146] See e.g. Lianos, 'Shifting Narratives' (n. 43).

breaches free movement law, all the values and principles of the entire legal order are actively taken into account. As opposed to epistemological or meaning holism, this viewpoint can be described as 'normative holism'.

Lastly, holism and coherence should not be conflated, but they fit each other well. The degree of holism in legal interpretation is directly related to the scope of the 'base' of values and principles with which an interpretation should cohere in order to be valid.[147] An interpretation which is more coherent with a broader set of values than another interpretation signifies that more values have been taken actively into account. A fully holistic approach to legal interpretation would require that any interpretation of the law be fully coherent with all other norms and values, a situation which is sometimes called 'global coherence'.[148]

B. The Seductions

Having a rough idea of what a 'more holistic' understanding of EU internal market law would entail, why should we go down this road? This question can be approached from many different angles, of which I will only briefly discuss the doctrinal and theoretical viewpoints.

Beginning with the latter, it is sometimes argued that law is necessarily one coherent whole, or at least that law necessarily strives for global coherence. This view is most notably associated with Ronald Dworkin's theory of law as integrity.[149] Dworkin famously argued that law is a 'seamless web'.[150] For Dworkin, law is a content-dependent system at the heart of which lies a set of moral principles which courts use to interpret the black-letter legal sources as much as possible as though they were part of one coherent set of norms.[151] Properly interpreting black-letter legal sources then means interpreting them as if part of a seamless web.

The quintessential question, of course, is why on earth law should be a seamless web, and why courts should be committed to global coherence and normative holism. The thesis is premised on the unity of value and the impossibility of genuine conflicts between moral and/or

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[147] Raz, 'The Relevance of Coherence' (n. 139).

[148] See e.g., B.B. Levenbook, 'The Role of Coherence in Legal Reasoning' (1984) 3 *Law and Philosophy* 355; J. Dickson, 'Interpretation and Coherence in Legal Reasoning', *Stanford Encyclopedia of Philosophy* (2010).

[149] R. Dworkin, *Law's Empire* (Harvard University Press 1986).

[150] R. Dworkin, 'Hard Cases' in *Taking Rights Seriously* (Harvard University Press 1978).

[151] E.g. ibid. 105–119; R. Dworkin, 'No Right Answer' in P. Hacker and J. Raz (eds.), *Law, Morality and Society. Essays in Honour of H.L.A. Hart* (Clarendon Press 1977) 84.

legal values.[152] The unity of a moral value is deeply contested, however.[153] Moreover, even if the possibility of moral unity is accepted, this does not imply that global coherence also applies to law. The idea that law is necessarily internally non-contradictory[154] has been put into question by the possibility of having multiple Rules of Recognition within a single legal system.[155] Since consistency is a necessary but not sufficient condition for coherence as the latter is generally understood,[156] it is not at all obvious that the law should be, or even can be, globally coherent, nor that there is a moral or legal obligation for legal officials to aspire towards global coherence in law.[157]

It follows that it is at least highly contestable whether legal interpretation in general ought to be 'more' or even 'completely' holistic in a normative sense, and whether courts should aim to interpret legal norms in a 'globally coherent' way. Of course, this does not mean that there are no specific reasons why EU internal market law ought to be interpreted in a holistic or 'more holistic' manner. This requires a more doctrinal approach focused on EU law specifically.

From a doctrinal perspective, a 'more holistic' interpretation of the free movement provisions, and of EU law generally, is usually substantiated by reference to the broader normative framework of Treaties, in particular, Article 2 TEU.[158] Using a systemic approach to legal interpretation, we could argue that the ultimate objective of European integration is not

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[152] See e.g., R. Dworkin, *Justice for Hedgehogs* (Harvard University Press 2013).

[153] For an overview of the monism–pluralism debate, see E. Mason, 'Value Pluralism', *Stanford Encyclopedia of Philosophy* (2018).

[154] This view has been expressed among others by H. Kelsen in *General Theory of Law and the State* (Harvard University Press 1945) 407–408.

[155] Raz, *Practical Reason and Norms* (n. 29) 130, 147.

[156] Coherence is generally understood as requiring something 'more' than logical consistency among statements, but what exactly this 'more' is, is far from clear. See e.g., A. Marmor, 'Coherence, Holism, and Interpretation: The Epistemic Foundations of Dworkin's Legal Theory' (1991) 10 *Law and Philosophy* 383, 385; and Raz, 'The Relevance of Coherence' (n. 139). The influential account N. MacCormick, 'Coherence in Legal Justification', in A. Peczenik et al. (eds), *Theory of Legal Science* (Reidel 1984) understands coherence as 'unity of principle', but this raises the question to what extent coherence is anything more than consistency at the principle-level.

[157] Not that Dworkin would be even remotely impressed by this argument. He consistently maintained that – acknowledging that the legal directives issued by political authorities are frequently messy and inconsistent – *legality* is the coherent set of *moral* principles that systematises the political and legal practice in the morally best way. See further 'Why EU Law Claims Supremacy', Chapter 2.

[158] This point is made by Lianos, 'Shifting Narratives' (n. 43).

economic efficiency or maximising intra-community trade per se, but that economic integration is merely a means to approach the ultimately non-economic goals of peace and prosperity. This view is reinforced by the fact that non-economic values and interests have always been part of the EU internal market in some way.[159] Why would we not square the circle by incorporating further evidence-suppressing presumptions in the concept of a trade barrier, for example by establishing a legal fiction that the activities of trade unions, or the exercise of fundamental rights as protected by national constitutional law, or, dare I suggest, the regulation of 'certain selling arrangements', fall outside the scope of the free movement provisions by definition?[160]

This argument is captivating. The Treaties are not at all confined to economic efficiency, deregulation and liberalisation. The *Dassonville* rule clearly has the potential to function as a discrimination-independent, deregulatory mechanism if it is read and understood a-contextually. The way in which trade barriers need to be justified ensures that there will always be a smaller or larger, depending on the standard of proof, bias towards deregulation.[161] This bias can be completely justified in light of the normative relationship between the prohibitions and the derogations in the Treaty, after which the case law based justifications are modelled. However, in light of the Treaty as a whole, this bias seems less warranted, and a more inclusive and less skewed application of *Dassonville* seems more reasonable.

Nevertheless, there are also several caveats at the doctrinal level, of which I would like to mention four. First and foremost, a systemic interpretation of particular provisions or dicta in light of the most general values and principles of the constitutional order runs the risk of falling victim to the self-idealising language of the law. One of the virtues of the 'spirit of legal positivism', in the words of Alexander Somek, has been legal positivism's demystifying stance towards the legal sources. Somek is completely correct in holding that '[n]o legal positivist who is not completely out of her mind would say that God is the author of a constitution whose preamble states that the constitution was adopted "in the name of God from whom all law

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[159] See e.g. the mandatory requirements in *Cassis de Dijon*, C-120/78, EU:C:1979:42.

[160] The point here of course is that if such presumptions are incorporated into the concept of a trade barrier, it is no longer for the Member States to prove the existence of such a justification. Arguably, this could create a more symmetrical relationship between the economic and non-economic values.

[161] See Somek, 'The Argument from Transnational Effects I' (n. 65); Scharpf, 'The Asymmetry of European Integration' (n. 65); Kaupa, *The Pluralist Character* (n. 54) ch. 3. See also C. Kaupa, 'Maybe Not Activist Enough? On the Court's Alleged Neoliberal Bias in its Recent Labor Cases' in B. de Witte, M. Dawson and E. Muir (eds.), *Judicial Activism at the European Court of Justice: Causes, Responses and Solutions* (Edward Elgar Publishing 2013).

originates"'.[162] Admittedly, the founding values and principles of the EU as expressed in Articles 1 and 2 TEU, and elsewhere, do not refer to any deity, but a healthy degree of scepticism is needed nonetheless. One cannot avoid the impression that the EU justifies its existence by reference to all that is good and beautiful in the world: it is on a mission of political messianism.[163] But a messiah complex is perhaps not a sufficient reason to take all these values and principles into account when interpreting a particular norm of EU law.

Secondly, and as mentioned above, the broader and partly non-economic values of the Treaties have always played a role in the Court's interpretation of the internal market. There are no apparent conflicts between the current interpretation and application of the fundamental freedoms, and the broader values of the Union. The value of regulatory freedom has its place in the existence of Treaty-based and case law-based justifications for trade restrictions. Legally, there is no compelling reason why environmental protection, consumer protection, fundamental rights and so on, should be taken more into account in the interpretation of the concept of a trade restriction or the application of the proportionality test. I do not want to be too legalistic here. Nothing in the Treaty, however, suggests that market values and non-market values should always be taken into account equally in every interpretive question, let alone in the interpretive questions concerning the EU internal market.

Thirdly, the previous point is reinforced by the fact that the fundamental freedoms are the essential *means* to attaining the overarching objectives of the European integration project. While purpose is definitively a relevant factor in interpreting content, the two should not be conflated. The substantive content of individual norms is often distinct from their purpose,[164]

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[162] A. Somek, 'The Spirit of Legal Positivism' (2011) 12 *German Law Journal* 729, 734.

[163] J.H.H. Weiler, 'In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration' (2012) 34 *Journal of European Integration* 825. See also Lindeboom et al., 'Introduction: Steering the Good Ship Lollipop' in Amtenbrink et al. (eds.), *The Internal Market* (n. 37).

[164] Consider road speed limits. The purpose of speed limits is to increase road safety and decrease road accident casualties (and increasingly, reduce the environmental impact of road traffic). The substantive content of a speed limit, however, is usually not 'drive at a safe speed' or 'drive at an environmentally friendly speed', but consists of a specific maximum speed which is by-and-large considered to contribute to its purpose. In probably the best work on rule-following ever written, Frederick Schauer shows how rules – which he conceives as 'entrenched generalisations' – *replace* the underlying purposes that justify them. Thus, over- and under-inclusiveness are an unavoidable consequence of replacing decision-making on the balance of reasons by decision-making on the basis of simplified generalisations. See Schauer, *Playing by the Rules* (n. 62), chs. 1–3. In fact, rules would be useless if they did not 'supply resistance' when it appears that their application does not result in a correct outcome, all things considered (ibid. 210).

and the same applies more strongly to the distinction between the substantive content of individual norms and the overall purpose of the legal system of which they are members. Accepting that the ultimate purpose of the EU is non-economic, the means through which this purpose aims to be achieved can be fully economic in substance. Whether the current conception of the EU internal market and its model of economic integration are sufficient to achieve welfare and peace,[165] and whether there might have been different roads available,[166] are separate questions concerning the political morality of the EU.[167]

Lastly, the question of how holistically we should interpret the EU internal market can only be discussed within the historical-judicial constraints of the EU's constitutional narrative. The meaning of legal norms is shaped profoundly by previous judicial interpretation. I do not merely refer to the doctrine of precedent or the self-referential judicial style.[168] Jurisprudence also has a hermeneutic impact in the sense that it bridges the historical distance between the enactment of a norm and the present-day circumstances in which it ought to be applied.[169] Accordingly, the meaning itself of legal norms is path-dependent: notwithstanding the rhetoric of interpretive theories such as originalism and textualism, how we understand legal norms and how we apply them is always partly determined by the way in which courts have interpreted them in previous cases. The viability of the current legal framework governing restrictions to free movement cannot be evaluated in a vacuum. It follows that any alteration to how we

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[165] Cf. e.g. A.J. Menéndez, 'The Existential Crisis of the European Union' (2013) 14 *German Law Journal* 453; and D. Kukovec, 'Law and the Periphery' (2015) 21 *European Law Journal* 406.

[166] G. de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105 *American Journal of International Law* 649.

[167] Cf. A.T. Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29 *Oxford Journal of Legal Studies* 549.

[168] On the role of precedent and case-based reasoning in EU law, see T. Tridimas, 'Precedent and the Court of Justice: A Jurisprudence of Doubt?', in Dickson and Eleftheriadis (eds.), *Philosophical Foundations* (n. 139); and M.A. Jacob, *Precedents and Case-based Reasoning in the European Court of Justice* (Cambridge University Press 2014).

[169] H.-G. Gadamer, *Truth and Method* (Sheed and Ward 1979), 290–293. On Gadamerian hermeneutics in the context of legal interpretation, see F.S. Ravitch, 'The Continued Relevance of Philosophical Hermeneutics in Legal Thought' in B.G. Slocum (ed.), *The Nature of Legal Interpretation* (Chicago University Press 2017). On the concept of 'distance' in hermeneutics as applied to constitutional interpretation and the implications for the originalist–purposivist debate, see, R. Peters, 'Constitutional Interpretation: A View from a Distance' (2011) 50 *History and Theory* 117, 127–135.

understand the EU internal market – both at a global level and in its application to individual cases – is invariably shaped by the well-established jurisprudence of the Court.

None of the above is to argue that 'more holistic' approaches to EU internal market law are necessarily a bad idea, nor is it a plea for reductionism. This section merely aimed to show that it is often not straightforward to make sense of what 'holism' and a 'more holistic' understanding of the EU internal market actually mean, and that it is not obvious whether regulatory freedom and non-market values should play a more prominent role in forming a reasonable conception of the EU internal market. On the other hand, no constitution is immune to the inevitable decline of its meaning and value, which necessitates its reinterpretation or even reconstituting the polity's constitutional foundations.[170] The EU internal market will continue to interact with the broader political, moral and economic foundations of the Treaties, moving ever closer to a hopefully reasonable equilibrium. With its content being impossible to predict, this equilibrium is likely to be the result of an ongoing string of pragmatic judgments, rather than a refinement of the abstract meaning of legal rules and principles.

Meanwhile, whether these individual judgments are 'reasonable' applications of the free movement provisions in view of the value of holistic interpretation remains obscure, for it is precisely unclear what the value of holism consists of, and to what extent holism should inform the proper interpretation of EU internal market law. Even if holism has normative value, perhaps as part of reflective equilibrium as a method of justification, it remains to be seen to what extent it is up for the EU courts and national courts to apply holistic methods of interpretation.[171]

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[170] J. Boyd White, *When Words Lose Their Meaning* (University of Chicago Press 1984). Searching for a new justificatory *raison d'etre* for the EU, e.g., G. de Búrca, 'Europe's *raison d'être*' in D. Kochenov and F. Amtenbrink (eds.), *The European Union's Shaping of the International Legal Order* (Cambridge University Press 2013).

[171] Ronald Dworkin famously argued, of course, that it is precisely the task of the judge to interpret legal norms in light of the morally best interpretation of the legal system as a whole. See Dworkin, *Law's Empire* (n. 150). But the implication of Dworkin's theory of law is that the 'morally best interpretation of the legal system as a whole' would force an interpretation that is quite different from the semantic meaning of that norm or the legislature's intention. Most radically, as Brian Leiter rightly points out, it might imply that 'some prior legislative enactments and prior court decisions might not really be law, since they might not follow from the best constructive interpretation of the system. Indeed, it means that no one may actually know what the real law is in the United States, or in any other jurisdiction'. See B. Leiter, 'Legal Positivism about the Artifact Law: A Retrospective Assessment' in L. Burazin, K.E. Himma and C. Roversi (eds.), *Law as an Artifact* (Oxford University Press 2018) 24. A useful example in the context of EU law is the case of *Carpenter*, C-60/00,

VI. Keeping Calm and Carrying On

One of the brilliant insights of the American legal realists has been that many legal rules and principles, including many of those laid down in case law, are so general and abstract that they do not really guide courts in future cases, leaving them primarily to 'respond to the stimulus of the facts in the concrete case before them rather than to the stimulus of over-general and outworn abstractions in [prior] opinions and treatises'.[172] Whether this is good or bad is hard to say – the answer certainly depends on the extent to which we trust the ECJ and the national courts to achieve reasonable outcomes in individual cases.[173] The quality of the Court's reasoning varies, ranging from logical applications of the existing rules to instances of *uncommunautaire* reasoning and hardly intelligible analogical references to earlier cases.[174]

The virtues of autonomy notwithstanding, one of the detrimental effects of the Court's insistence to construct its body of case law incrementally – 'stone by stone', as it were[175] – and without either extra-legal reference or a particularly impressive elaboration of *ratio decidendi*, is that attempts to extract the meaning and implications of a judgment can be a rather gruesome,

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EU:C:2002:434, where the ECJ inferred a derivative residence right for Ms. Carpenter by interpreting her husband's freedom to provide services in light of the right to family life in Art. 8 ECHR. Arguably an exercise in Dworkinian interpretation *par excellence*, the Court's judgment received considerable criticism. See e.g. G. Davies, 'Freedoms Unlimited? Reflections on *Mary Carpenter v Secretary of State*' (2003) 40 *Common Market Law Review* 537; and P. Oliver and W. Henning Roth, 'The Internal Market and the Four Freedoms' (2004) 41 *Common Market Law Review* 407.

[172] Oliphant, 'A Return to *Stare Decisis*' (n. 59) 75, cited in B. Leiter, 'American Legal Realism' in W. Edmundson and M. Golding (eds.), *The Blackwell Guide to Philosophy of Law and Legal Theory* (Blackwell Publishing 2005) 52–53.

[173] On economies of trust and the allocation of interpretive discretion to courts, S.J. Shapiro, *Legality* (Harvard University Press 2011) 357–381.

[174] L.W. Gormley, 'Assent and Respect for Judgments: *Uncommunautaire* Reasoning in the European Court of Justice' in L. Krämer et al. (eds.), *Law and Diffuse Interests in the European Legal Order. Liber Amicorum N. Reich* (Nomos 1997). As to the quality of the ECJ's judgments generally, see also J.H.H. Weiler, 'Epilogue: Judging the Judges – Apology and Critique' in M. Adams et al. (eds.), *Judging Europe's Judges* (n. 92); and n. 179 below.

[175] K. Lenaerts, 'EU Citizenship and the European Court of Justice's "Stone-by-Stone" Approach' (2015) 1 *International Comparative Jurisprudence* 1.

if not impossible, exercise.[176] After more than forty years, in many respects we are still in the dark regarding the question of what it means to apply the *Dassonville* rule reasonably, and by extension, regarding our conception of the EU internal market and its interpretive sphere. Obviously, we should be reasonable in interpreting EU law, but predicting the implications of a reasonable application of the free movement provisions becomes no less a daunting task.

Two things are certain. Firstly, pragmatism in adjudication has triumphed: whether one likes it or not, hermeneutic temptations are best to be resisted. It seems wise to keep calm and carry on, perhaps not expecting any grand, unitary philosophy in the case law. In fact, as the metaphysics of ethical value itself might be pluralistic, it might be quite incredible if the legal doctrine that is based on ethical notions such as reasonableness could ever be captured in such a unitary philosophy.[177] At the minimum, however, we should continue to subject the Court's reasoning to critical analysis, with a sharp eye for any signs of Weberian *q'adi* justice,[178] and

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[176] One may also point at the case law on direct effect of directives in order to make the same point. See 'The Normative Impact of Invoking Directives: Casting Light on Direct Effect and the Elusive Distinction between Obligations and Mere Adverse Repercussions', Chapter 5.

[177] See 'In Search of Foundations: Ethics and Metaethics in Constitutional Adjudication', Chapter 6.

[178] The notion of *q'adi* justice was popularised among others by R. Pound, 'The Decadence of Equity' (1905) 5 *Columbia Law Review* 20; and in particular Max Weber, who described it as 'informal judgments rendered in terms of concrete ethical or practical valuations […] Kadi-justice knows no reasoned judgment whatever' (M. Weber, 'Bureaucracy and Law' in *From Max Weber: Essays in Sociology*, H.H. Gerth and C. Wright Mills ed. and trans. (Oxford University Press 1946), 216). Weber's account has been recognised as largely inaccurate from the perspective of Islamic law, and surely not lacking in Orientalism. The same applies to Judge Frankfurter's famous account in *Terminiello v Chicago*, 337 US 1, 11 (1949) (Frankfurter J., dissenting):

'This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency'.

For one thing because – as I have been given to understand – no-where in the sharia or in the fiqh do *q'adi* judges sit under trees. See by way of introduction, H. Ala Hamoudi, 'Judges on Cushions and under Trees: Thoughts on "Qadi Justice" and Hyperpolemics' (28 May 2015), available at muslimlawprof.org/2015/05/judges-on-cushions-and-under-trees-thoughts-on-qadi-justice-and-hyperpolemics/. It should be noted, however, that *q'adi* judges *can* be found sitting under trees in the *The Arabian Nights* (Everyman's Library 2014), which unfortunately does not really help against the Orientalist charge. Regardless, the American legal realists were particularly disturbed by what they called *q'adi* justice, though they deemed it inevitable to some degree. See as regards the jury system, J. Frank, 'Are Judges Human?' (1931) 80 *University of Pennsylvania Law Review* 17, 24–31. In the context of EU law, it is somewhat ironic that the ECJ purports to eliminate any impression of *q'adi* justice by way of its magisterial self-referentiality – from a substantive point of view not infrequently empty at best, and close to absurd

pragmatism which goes so far as to make free movement law entirely devoid of rules.[179] Secondly, having survived the Sunday Trading 'drama in five acts',[180] the *Keck* confusion, and the semantic threat of the market access slogan,[181] *Dassonville* remains valid case law.[182] Case law which raises more questions than it answers – but valid case law nonetheless. In heaven, its true meaning will be found.[183]

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at worst – which however cannot always fully disguise clear instances of judicial law-making (see, 'Why EU Law Claims Supremacy', Chapter 2). Sadly so, because there is nothing disturbing or special about judicial law-making per se. In the long term, for the purpose of maintaining judicial legitimacy, opacity is never a good alternative to honesty and transparency, as the common law courts have known for centuries. There is no reason whatsoever why this would not apply to courts in the so-called 'civil law tradition' (whatever that may be) as well. See also, J.H.H. Weiler, 'The Judicial Après Nice', in G. de Búrca and J.H.H. Weiler (eds.), *The European Court of Justice* (Oxford University Press 2001) 225; and see generally of course, M. de S.-O.-l'E. Lasser, *Judicial Deliberations* (Oxford University Press 2004) esp. chs. 4, 7 and 12.

[179] Even the champion of legal pragmatism – who indeed considers reasonableness 'the ultimate criterion of pragmatic adjudication' – disapproves of abandoning 'backward-looking' rule-following entirely. See R.A. Posner, 'Legal Pragmatism Defended' (2004) 71 *University of Chicago Law Review* 683, 683–685. But of course, rules have virtues as well as vices, and rule-bound decision-making is not necessarily superior to ad hoc decision-making in all circumstances.

[180] C. Barnard, 'Sunday Trading: A Drama in Five Acts' (1994) 57 *Modern Law Review* 449.

[181] Snell, 'The Notion of Market Access' (n. 85).

[182] *Scotch Whisky Association*, C-333/14, EU:C:2015:845, para. 31.

[183] Cf. Gormley, 'Free Movement of Goods and Their Use' (n. 18) 1628.