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The Reach of Free Movement

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Editors
Mads Andenas
Faculty of Law
University of Oslo
Oslo
Norway

Tarjei Bekkedal
Faculty of Law
University of Oslo
Oslo
Norway

Luca Pantaleo
Faculty of Public Management, Law and Safety
The Hague University of Applied Sciences
The Hague
The Netherlands

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List of Contributors

Mads Andenas is Professor at the Department of Private Law, University of Oslo. He has held senior academic appointments in the United Kingdom, including Director of the British Institute of International and Comparative Law, London and Director of the Centre of European Law at King's College, University of London. He remains a Visiting Research Fellow of the Institute of European and Comparative Law, University of Oxford and a Senior Research Fellow at the Institute of Advanced Legal Studies, School of Advanced Studies, University of London. He holds the degrees of Cand jur (Oslo), Ph.D. (Cambridge) and MA and DPhil (Oxford).

Dr. Amedeo Arena is Associate Professor of European Union Law at the University of Naples "Federico II" School of Law, where he teaches EU Internal Market law. He co-authored a textbook on EU free movement law (Giappichelli, Turin, 2016) and published several articles on that subject in edited books and peer-review journals, including the Common Market Law Review, the Yearbook of European Law, and the Columbia Journal of European Law.

Tarjei Bekkedal is Professor at the Centre for European Law, University of Oslo and is also the head of the Norwegian Association for European Law. His main interests are European Law, Constitutional Law and Human Rights Law.

Eszter Belteki is currently a Ph.D. candidate in EU and Comparative Constitutional Law at Durham University. After finishing her LL.B. studies in Business Law with First Class Honours from London Metropolitan University, Eszter graduated from Durham University with a Distinction in LL.M. European Trade and Commercial Law. She was also a Michigan Grotius Research Scholar at the University of Michigan Law School and the PGR Co-Convenor and subsequently the PGR Convenor of the Durham European Law Institute.

Francesco De Cecco is Lecturer in Law at Newcastle Law School, Newcastle University (United Kingdom). He is the author of several articles, book chapters and a monograph entitled State Aid and the European Economic Constitution (Hart Publishing, 2013). Together with François-Charles Laprévote and Joanna Gray, he has recently edited the Research Handbook on State Aid in the Banking Sector (Edward Elgar, 2017).

Prof. Dr. Olha O. Cherednychenko holds the Chair in European Private Law and Comparative Law at the University of Groningen. She is also the Founder and Director of the Groningen Centre for European Financial Services Law. She has written extensively on issues relating to the impact of EU primary law and fundamental rights law on private law relationships and the interplay between public regulation of EU origin and national private law systems, in particular in the area of financial services. She has also conducted studies in the area of EU law / financial services law for national and European institutions, in particular the European Parliament.

Stefan Enchelmaier studied law, philosophy and Latin at the Universities of Cologne, Hamburg, and Edinburgh; obtained his doctorate from the University of Bonn with a thesis on European competition law, and his habilitation from the University of Munich with a thesis on comparative Anglo-German property law; following a stint in practice and academic posts in Oxford, Munich, and York, he is now Professor of European and comparative law at the University of Oxford, and a fellow of Lincoln College, Oxford.

Christoffer C. Eriksen is Professor at the Department of Public and International Law, University of Oslo. He is the author of several publications studying the relation between legal orders within and beyond state borders, including The European Constitution, Welfare States and Democracy: The Four Freedoms vs National Administrative Discretion. His current research explores the possibilities of critique of international law and global governance.

Niels Fenger is Judge in the Eastern Court of Appeal and Professor in Administrative Law at Copenhagen University, Dr.jr. (habilitation) 2004 on the relationship between EU law and national administrative law. Fenger is former head of the Legal Service at the EFTA Surveillance Authority and former legal secretary at the Court of Justice. Previously he has also held posts in the Danish Ministry of Justice and the Ministry of the Interior. Fenger is the author of 11 books and more than 90 articles on EU law, administrative law and procedural law.

Dr. Filippo Fontanelli is Lecturer of International Economic Law at the University of Edinburgh. He read Law at the University of Pisa, at the Sant'Anna

School and at NYU. He worked at Cleary, Gottlieb, Steen and Hamilton LLP and at the International Court of Justice. Dr Fontanelli is a fellow of the Higher Education Academy, a member of the Centre for Judicial Cooperation of the European University Institute, a member of the Faculty of the Master in International Law of the Universidad La Sabana (Bogota) and Visiting Lecturer at the University of Stockholm. He is co-rapporteur of the ILA Committee on the Procedure of International Courts and Tribunals.

Tor-Inge Harbo is Professor of Law at the School of Business and Law at the University of Agder, Norway. He has a Ph.D. in Political Science from the Free University in Berlin and a Ph.D. in Law from the European University Institute in Florence. He teaches in and writes on the fields of European law, European integration, international law, constitutional law, human rights law, and legal and political theory. He has held leading positions in the Norwegian public administration.

Vassilis Hatzopoulos is Professor of EU Law and Policies at the Democritus University of Thrace (Greece). He is visiting Professor at the College of Europe, Bruges (Belgium) and honorary Asst. Professor at the University of Nottingham (United Kingdom). His interests cover EU institutional law and governance, the EU internal market with special focus on service liberalisation and the provision of services of general economic interest, state aid and public procurement, as well as EU asylum and immigration law. He has published three monographs, on the principle of mutual recognition in the internal market (in French, Bruylant/Sakkoulas, 1999), on the doctrine of essential facilities under EU competition law (in Greek, Sakkoulas, 2002) and on the regulation of services in the EU (in English, OUP, 2012). He has also published over a hundred articles and case notes, in English, French and Greek, in all the major EU-related reviews and periodicals and in edited volumes. He has a longstanding experience as a lawyer, practicing before the highest national courts and the Court of Justice of the EU. He has consulted i.a. the Greek Government (on the OECD-led regulatory reform), the EU Commission (on the Services Directive) and the European Parliament (on EU patients' rights). Lately his research interests turn around the sharing economy and the EU preferential trade agreements (TTIP, CETA etc.).

Agustín José Menéndez is Lecturer of Political and Legal Philosophy, Universidad de León, Spain and research fellow at ARENA, Universitetet i Oslo. He is currently editor in chief of the European Law Journal. He is the author of Justifying Taxes, and The Constitution's Gift (together with John Erik Fossum).

Dr. Luca Pantaleo obtained a Ph.D. in International and EU Law in 2013 at the University of Macerata (Italy). His Ph.D. thesis focused on EU Member States International Agreements and EU Law. In the course of his academic career,

Pantaleo has been appointed visiting researcher in several institutions, such as the Pontifical Catholic University of San Paulo/PUC SP (Brazil), the Max Planck Institute for Comparative Public Law and International Law, and the Department of Private Law of the University of Oslo under the 'Yggdrasil' Programme. Before joining the Hague University of Applied Sciences in August 2016, he worked at the University of Luxembourg as Senior Researcher (Postdoc) and at the Asser Institute, where he served as both Senior Researcher in EU Law and Academic Coordinator of CLEER.

Jørgen A. Stubberud is advocate, cand.jur and cand.mag. He is currently a practicing lawyer and a Ph.D. student at the Faculty of Law of the University of Oslo. He is also the President of the Norwegian section of the IVR, the Norwegian Association for Legal Philosophy.

Dr. Alina Tryfonidou is Associate Professor in EU Law at the School of Law, University of Reading (United Kingdom). Before joining the University of Reading in 2011, she was a Lecturer in Law at the University of Leicester (2007-2011) and a Visiting Tutor (2005-2007) and Visiting Lecturer (2010-2011) at King's College London. Dr Tryfonidou obtained her LL.B. (2001), LL.M. (2002) and Ph.D. (2008) from King's College London and is an Associate of King's College (AKC) (2008). She is a non-practising member of the Cyprus Bar since 2003, a Fellow of the Centre of European Law at King's College London since 2007, and a Fellow of the Higher Education Academy since 2016.

Dr. Pål Wennerås is advocate, Office of the Attorney General, Norway. He holds the degrees of Cand.jur (Oslo), LL.M. (University of Amsterdam) and Ph.D. (University of Amsterdam). He has written extensively on issues relating to the enforcement of EU law, including the monograph The Enforcement of EC Environmental Law (Oxford 2007). Dr. Wennerås was awarded the IUS Commune Prize (2006).

Chapter 1
The Reach of Free Movement and the Gradualist Approach of the CJEU: An Introduction

Mads Andenas

Abstract The article introduces the topic of this book: the reach of free movement, and the book's focus on what constitutes a *restriction* to free movement. That threshold remains low, for all freedoms. However, the discussion of what constitutes restriction continues. That is not surprising: the restriction concept is the most basic component of free movement. The article sets out the argument for different tests, discrimination, market access or *de minimis* thresholds. It puts forward one explanation for the CJEU's *Keck* line of cases on selling arrangements and use restrictions. It is an incremental approach to forms of restrictions without impact on free movement in the Internal Market. The CJEU cannot replace this jurisprudence with a general test different from 'restriction', which in practice would mean that many forms of restrictions, including new ones, would not be reviewed by the CJEU. This incremental approach is in the nature of court review. Academic scholarship has criticised the *Keck* approach, and those defending it have not provided much in terms of analysis. Scholarship should be a force for coherence and convergence, and assist in the development of general free movement and Internal Market concepts. This chapter also provides an overview of the contributions in the book and explains how they fit into this project.

Keywords Free movement · Restriction · Discrimination · Market access · Selling arrangements · Use restrictions · Internal Market · Unified freedom jurisprudence · Charter of Fundamental Rights · Citizenship · Constitution

M. Andenas (✉)
Department of Private Law, University of Oslo, St. Olavs plass,
PO Box 6706, 0130 Oslo, Norway
e-mail: mads.andenas@jus.uio.no

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1.1 The Topic of the Book

The topic of this book is the reach of free movement, and the focus on what constitutes a restriction to free movement.[1]

That threshold remains low, for all freedoms. Anything that makes movement less attractive or more burdensome, which dissuades or discourages, may constitute a restriction. Restrictions require justifications, and they are only justified if they are proportionate. Discriminatory measures can only be justified if they fall into one of the explicit categories that are listed. With such a low threshold, the real review is at the justification stage, and that is a proportionality review.

However, the discussion of what constitutes restriction continues. That is not surprising: the restriction concept is the most basic component of free movement. When does free movement apply? It is fundamental in the Internal Market, both for the economic constitution and more and more for individual rights in a European legal order that provides constitutional guarantees for rights, also beyond free movement. The interaction between fundamental rights and fundamental freedoms to movement sets the EU legal order apart from the national.

Some continue to argue for different forms of discrimination tests, others that the restriction must be on market access or *de minimis* thresholds.

The CJEU has identified certain categories of state measures which only constitute a restriction if they are discriminatory. First out was *Keck*[2] in 1993, on the category of 'certain selling arrangements', as opposed to 'product bound measures' or 'product requirements'. Only if discriminatory did these selling arrangements constitute a restriction under Article 34 TFEU (ex Article 28 EC). Selling arrangements, the CJEU clarified in its subsequent jurisprudence, were certain restrictions on when, where and by whom goods may be sold (such as Sunday trading restrictions), certain restrictions on advertising and certain price controls.

[1] This book is one outcome of a long-term project on The Reach of Free Movement, see under Sect. 1.3 below.

[2] Joined Cases C-267/91 and 268/91 *Keck and Mithouard* [1993] ECR I-6097.

Sixteen years later, in 2009, *Commission v. Italy (Trailers)*[3] made clear that a market access criterion had to be added to the discrimination test for the *Keck* category. The same year, the CJEU in *Mickelsson & Roos*[4] kept to the limited boundaries of the *Keck* category, selling arrangements, and restrictions on use did not fall in under the same discrimination/market access or any similar test more lenient to national measures.

There is an intense discussion in the CJEU, the Commission and other EU legislative bodies, and in academic writing. Member States most often argue against wider restrictions concepts which also have consequences for the legal base for EU competences and action, including legislation and the division of powers between the EU and Member States, even in external relations.

The interplay between the fundamental freedoms is a central cross-cutting theme for the book. EU secondary legislation and jurisprudence apply the freedoms as they are set out in the treaties with separate parts for free movement of goods, persons and capital.

Each question and criterion is discussed in relationship to the respective freedom applied. There is little common ground in general freedom case law or jurisprudence. Close reading of the cases and their interpretation in later cases or legislation is required to understand what the main rule is in a particular sector. The cases are a force of fragmentation, and the CJEU seldom make explicit contributions to general freedom jurisprudence or a unified jurisprudence of free movement. The CJEU refers to general principles of the internal market but does not take that down to the level of a general law of free movement, across the different freedoms.

The interaction between scholarship, legislation and jurisprudence has continued to be intense since the 1980s. Community legislation and the jurisprudence of the CJEU move between different concepts of what constitutes a 'restriction' and free movement rights, and always within the boundaries of one of the freedoms. Many of the questions remain the same and unanswered: is discrimination still a core concept or will it be replaced by a more neutral, general and sweeping 'market access' criterion? Does the concept of 'market access' pave the way for another approach where the ambition is to eliminate burdensome and inefficient regulation in a matured internal market? What are the implications for the review of proportionality? Does the market access test confirm a uniform approach towards the fundamental freedoms, and would a uniform approach be desirable?

The reach of free movement is a classical dilemma of EU law. The contributions in this book argue the different sides in the discussion. It still remains unclear whether the right to free movement is exhausted by the right to equal treatment, *de iure* and *de facto*, of EU market operators in the broad sense, or whether the rights conferred by the treaties have a broader scope. A particularly controversial issue is whether the set of rights connected with the freedom of movement reach as far as to converge into a general protection of individual freedom as such.

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[3] Case C-110/05 *Commission v. Italy (Trailers)* [2009] ECR I-519.

[4] Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] I-4273.

There has been a convergence towards the threshold the CJEU set for establishment and then for goods under Article 34 TFEU. Free movement has been applied to sector after sector. An early battle in the 1970 was about the professions where the legal profession provided strong resistance to the right of establishment.[5] In the 1980s patents and immaterial rights more generally was subjected to free movement[6] against opposition from industry and the legal profession servicing it. By the turn of the century the turn came for German company law[7] and in the 2000s the right to collective action.[8]

Just completed, the unified free movement jurisprudence broke up with the *Keck*[9] exception for 'selling arrangements' for goods. Suggestions to extend the *Keck* exception for goods to 'use restrictions' have not been adopted.[10] Neither has the *Keck* exception been received outside goods. What was a narrow majority for an uneasy compromise in *Keck*, was not strong enough to expand further in the field of goods or carry over into the other freedoms. There is no agreement on the impact of *Commission v. Italy (Trailers)*[11] which made clear that a market access criterion had to be added to the discrimination test for the *Keck* category. It may have opened up for a more general criterion and may promote convergence. Restrictions on the *export* of free movement of goods are prohibited in Article 35 TFEU, and there the case law has moved from a more narrow discrimination concept to the same restrictions concept as under Article 34 for the import of goods. That is one move in the direction of a unified free movement jurisprudence, *within* the free movement of goods.

Free movement rights remain primarily a right against the state, or that of a private party against public authorities. The limitation is less important as the law has to be applied to give effect to free movement also between private parties. The duty of the state to give effect to free movement also leads to damages liability when it does not prevent restrictions on free movement rights in the actions of private parties. The convergence between the freedoms seemed to be broken up each time the CJEU advanced free movement rights between private parties, so-called horizontal direct effect. The jurisprudence makes this distinction between

[5] Case 2/74 *Reyners v Belgium* [1974] ECR 631, Case 33/74 *Van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299 and Case C-71/76 *Jean Thieffry v Conseil de l'ordre des avocats à la cour de Paris* [1977] ECR 765.

[6] Case 192/73 *Van Zuylen v Hag* (Café Hag I), [1974] ECR 731 and Case C-10/89 *CNL-Sucal v Hag* (Café Hag II) [1990] ECR I-3711.

[7] C-212/97 *Centros Ltd v Erhvervs-og Selskabsstyrelsen* [1999] ECR I-01459 and C-208/00 *Überseering BV v Nordic Construction GmbH* [2002] I-9919.

[8] C-438/05 *International Transport Workers Federation v Viking Line ABP* [2007] ECR I-10779, *Laval Un Partneri Ltd v Svenska Byggnadsarbetareforbundet Laval and Partneri* [2007] ECR I-11767.

[9] Joined Cases C-267/91 and 268/91 *Keck and Mithouard* [1993] ECR I-6097.

[10] Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] I-4273.

[11] Case C-110/05 *Commission v Italy (Trailers)* [2009] ECR I-519.

horizontal and vertical direct effect less important and also seem to gradually extend horizontal direct effect across the freedoms.[12]

Yet another aspect of the reach of free movement is the relationship between free movement and competition law. The way in which these areas develop makes the traditional dichotomy between state—private party (fundamental freedoms) and private parties/undertakings—less relevant. State aid and public procurement rules add further issues, and in the jurisprudence all sets of rules may possibly be applied to the same restriction or private law relationship.

Legislation and scholarship is more fragmented than jurisprudence: courts move from one field to another and carry with them concepts and insights. From any or all angles discussed above, it is not given that the development of the rules are to take place within jurisdictional limitations and dichotomies such as between 'private parties'/'undertakings' and 'state'/'public authorities'.

The developments in the case law of the CJEU raise important constitutional questions. What are the constitutional foundations for the jurisprudence of the CJEU? What are the implications for the balancing of power between the Union and the Member States, and between legislators and courts? The question of legitimacy is relevant to the determination of the outer limits of what constitutes a restriction. It is clear that the reach of free movement does not only relate to the functioning of the common market in the strict sense. It also gives rise to constitutional concerns, as it affects the balancing of power both between the EU and domestic jurisdictions and between legislators and courts. Much is left to the CJEU, too much, some of the contributors to this book argue. However, it is also possible to consider the CJEU as an enabler. A far-reaching restriction criterion will vest the institutions of the European Union with flexible competences which enable them to pursue the project of European integration. The CJEU itself can apply the principle of proportionality as a filter to show deference towards the democratic processes of the Member States, especially in fields where no secondary legislation exists.

The flexible concept of a "restriction" is dependent upon the objectives of the European Union, but at the same time it plays an important role in confirming, and re-defining, them. One well established objective is to provide those who conduct business access to the European market. Another and more general objective, which also can serve as a source of legitimacy, is to provide the European citizen new opportunities—but possibly at the cost of the protection traditionally provided for by their national states. An important question in this regard is to what extent the concept of European citizenship changes the relationship between the EU and its states, and between the states and its citizens. The citizens' status as Europeans is a catalyst towards an ever more expansive notion of free movement, which could make it appropriate in certain regards to consider free movement as a fundamental right. The increasing interplay between the fundamental freedoms and the EU

[12] Case C-171/11, *Fra.bo*, ECLI:EU:C:2012:453.

Charter of Fundamental Rights constitutes a new dynamism which will further this development.

The aim of the book is to provide the reader with an analysis of such issues, with a view to assessing the constitutional reach of the rights conferred by the Treaties in the framework of the freedom of movement.

1.2 Explaining the Gradualist Approach of the CJEU

The current pressure points are often in the field of the free movement of persons, and stopping so-called benefit tourism has become a political priority. The EU as legislator provides for restrictions in the face of political pressure from some Member States. The CJEU allows restrictions it would not have done only a few years ago. The CJEU not only slows the development towards free movement down but is taking steps backwards. This happens at a time when EU citizenship and the Charter together had started to have joint effect on free movement, speeding up the movement forward towards free movement.

The low threshold remains for all the freedoms. The *Keck* exception for 'selling arrangements' is the one exception, and it applies only for goods. One explanation is that what was a narrow majority for an uneasy compromise in *Keck*, has not been strong enough to expand further in the field of goods or carry over into the other freedoms.

There is one further explanation. The CJEU had a rich jurisprudence on goods and selling arrangements. It was in a position to conclude that most selling arrangements would not constitute any restriction on free movement or have any negative impact on the internal market. The more relaxed test in *Keck* would not threaten the internal market. The same test across free movement of goods or across the freedoms could.

Free movement cases come before the CJEU either as Commission actions against Member States or as references from national courts. National courts would rarely see the need or any duty to refer a question of what constitutes a selling arrangement to the CJEU. The consequence of *Keck* could be that the CJEU would get very few cases about restrictions on selling arrangements before it. That has proved right. In practice, national courts and national authorities apply the *Keck* test without much actual or potential supervision from the CJEU. The same test, or any other test, across free movement of goods or across the freedoms would have dramatic consequences for that supervision of the CJEU on most free movement issues and severely limit the effectiveness of EU law.

Keck provides an alternative route towards a new test. The CJEU approaches the matter in an incremental way, the way in which courts are best suited to operate, without ceding jurisdiction. *Keck* may be a way to try out a test of discrimination for more general application, and perhaps through further categories added to 'selling arrangements.' It may also in the event reject a more general discrimination test.

1.3 The Long-Term Project on the Reach of Free Movement

This book is one outcome of a long-term project on The Reach of Free Movement, of which the 2003 book on *Services and Free Movement in EU Law*[13] was one of the first publications. This was followed up with the major 2007 conference on 'The Direction of Free Movement', organised with the UK Association of European Law, King's College, University of London, the Institute of Advanced Legal Studies, University of London and the British Institute of International and Comparative Law.[14]

The most recent events are several seminars at the University of Oslo, organised with the Norwegian Association of European Law, including 'The Reach of Free Movement' at the Department of Private Law, University of Oslo in 2011[15] and 'The Constitutional Implications of Free Movement' in 2014.[16]

Services of general interest is the subject of one parallel project with the book on *Developments in Services of General Interest*,[17] and the conference on 'Services of General Interest in a Global World' and the work shop 'On SGEIs, The European Social Model and Free Movement', at the Institute of Advanced Legal Studies, London 2009.[18] Another closely related project at the University of Oslo is the project on 'International Financial Market Regulation, Institutions and Efficiency' of which this book is a part.[19]

1.4 Outline of This Book

The book falls into four parts. Part I has the heading 'The Reach of Free Movement', Part II 'Justifications and Proportionality', Part III 'Fundamental Rights' and Part IV 'Looking Abroad'.

Part I 'The Reach of Free Movement'
Chapter 2 has the title 'The Reach of Free Movement. A Defence of Court Discretion'. Professor Tarjei Bekkedal, Oslo, argues that the reach of the

[13] Andenas and Roth 2003.

[14] https://www.biicl.org/files/2729_programme_3_28_april.pdf.

[15] http://www.jus.uio.no/ifp/forskning/prosjekter/markedsstaten/arrangementer/2011/free-movement-oslo/.

[16] http://www.jus.uio.no/english/research/networks/european-law-network/events/other-events/06112014.html.

[17] Szyszczak et al. 2011.

[18] http://www.jus.uio.no/ifp/forskning/prosjekter/markedsstaten/arrangementer/2009/vedlegg/programme_government_services_280509.pdf.

[19] http://www.jus.uio.no/ifp/english/research/projects/financial-market-regulation/. See Andenas and Wooldridge 2009, Andenas 2012, Andenas et al. 2012, Andenas 2015, Andenas 2016 and Andenas et al. 2016.

fundamental freedoms and the content of the notion of a "restriction" cannot and should not be expressed in a rule-like manner. To the contrary, the fundamental freedoms function as overarching constitutional principles that both demand and legitimize the execution of court discretion. Public bodies, like courts, are vested with discretion in situations where rules are to be avoided, due to the magnitude of phenomena that are subject to regulation. Because of their stiffness, rules cannot serve the purposes of a legal system that pursues numerous, shifting and colliding objectives, such as the EU legal order. Any attempt to establish tests or categorizations that aim to define and exhaust the reach of the fundamental freedoms in a rule-like manner will obstruct the nature of the principles through which free movement is established, secured and developed, and the nature of the legal order in which they operate. Tarjei Bekkedal explores the legal basis for court discretion, whether discretion is compatible with the principle of legal certainty, how discretion can fit a conception of the right to free movement as a personal individual right and the constitutional limitations to court discretion.

In Chap. 3, Dr. Alina Tryfonidou, Reading, explores 'Free Movement of Persons Through the Lenses of "Discrimination" and "Restriction"'. The notions of 'restriction' and 'discrimination' are the soul and life of EU free movement law. These are the notions that define what is caught within the net of the free movement provisions, as well as the limits that are placed on their scope of application. These concepts are not monolithic but their interpretation is constantly changing and adapting and, together with this, the relationship between them is redefined. Dr. Tryfonidou seeks to consider the reach of the provisions governing the free movement of persons, taking as its point of reference the ECJ's interpretation of the notions of 'discrimination' and 'restriction' in this context. In particular, she analyses how the meaning of the above notions has developed through the years and it will explore how the relationship between the two has evolved from originally being one of interdependence to one that is of (almost) complete independence. Dr. Tryfonidou concludes that the main reason behind these developments is the (gradual) attribution to the free movement of persons provisions of a double status of instrumental freedoms and fundamental (citizenship) rights.

Chapter 4 has the title 'Restrictions on the Use of Goods and Services'. Professor Stefan Enchelmaier, Oxford, picks apart 'market access' as applied by the CJEU for establishing whether the free movement of goods and the freedom to provide services are restricted. So far, Professor Enchelmaier says, the criterion is ill-defined, especially in its application to restrictions of use. Professor Enchelmaier suggests that predictability can be restored to the assessment under both freedoms through a properly understood discrimination test, complemented by a prohibition of universal bans, proceeding in the following steps:

(1) Does the restriction of use apply in law equally to domestic producers and providers as to those from other Member States (i.e. is it 'indistinctly applicable')? If yes,

(2) Does the restriction have the same factual repercussions on imports and domestic products/on services provided by operators established in the same Member State as the recipient, and on services in whose provision a border between Member States is crossed (if there are any domestic goods or services)? If yes,
(3) Does the restriction prohibit the last remaining use in the Member State in question in a situation where either such use remains legal in at least one other Member State, or the importing Member State is the last to allow this use?

If the answer to (1) or (2) is 'no', or if it is 'yes' to (3), Professor Enchelmaier suggests, the measure restricts the free movement of goods or the freedom to provide services, and therefore requires a justification. Otherwise, it does not because it leads to a mere reduction in the volume of trade.

Chapter 5 has the title 'To Use or Not to Use—That's the Question. On Article 34 and National Rules Restricting the Use of Lawfully Marketed Products'. Professor Niels Fenger, Copenhagen, examines the extent to which Article 34 TFEU encompasses national rules that neither prohibit the sale or the use of a product, but merely regulate how, where and when the product may be used. He argues that the CJEU was right not to apply its case law concerning selling arrangements to such kinds of rules. He also discusses whether the Court's approach to use restrictions, and the market access test that the Court applies in such cases, has a spill over effect on other aspects of its case law under Article 34 TFEU. Finally, he provides a suggestion for how to draw the line for when a restriction on the use of a legally marketed product constitutes a measure of equivalent effect.

Part II 'Justifications and Proportionality'

Chapter 6 has the title 'The Justifications for Restrictions to Free Movement: Towards a Single Normative Framework?' Professor Vassilis Hatzopoulos, the Democritus University of Thrace, addresses overriding reasons of general interest, including objective justifications, express exceptions and economic justifications, and explains how they fit into a proportionality analysis. In the vast majority of internal market cases a restriction is readily identified, and it is at the level of justification that the basic judicial choices operate. This is done either by virtue of 'objective justifications' or by the much more limited list of express exceptions foreseen by the Treaty. These two 'systems' of justifications have been developed in partial contradiction with one another in terms of the types of measures upheld and the *ex ante/ex post* application of the justification. Throughout the years, however, the practical differences as well as the normative underpinnings of the two systems have been greatly confused. So much so that, nowadays, it seems more exact from a positivist view and more desirable from a normative point of view to view all the justification grounds as parts of a single normative framework. The proposed framework would be 'single' in two ways, in the sense it should apply both to all the fundamental freedoms alike (material unicity), and to discriminatory and

non-discriminatory measures (restriction unicity). Professor Hatzopoulos exposes the incoherencies and inconsistencies of the current situation before he explains why the conditions are now ripe for a new unified approach. He explores how a single justification framework could be affected by other, neighbouring, EU rules.

In Chap. 7, 'The Justification and Proportionality of Certain Administrative, Regulatory and Political Concerns', Dr. Pål Wennerås, Oslo, continues the analysis of justification and proportionality. He is critical of the current state of the law where the scope of the four freedoms has become so broad that it is liable to capture a plethora of national acts that, at least originally, would have appeared to lie on the outer fringes of the Court of Justice's competence. In Dr. Pål Wennerås' view this situation is exacerbated by the fact that administrative considerations are in principle not capable of justifying restrictions on freedom of movement. Proportionality presents several substantive and procedural hurdles for attaining legitimate regulatory and political concerns. Member States will therefore often find it difficult to justify measures that restrict freedom of movement, irrespective of the fact that they are not intended to regulate freedom of movement and clearly pursue a common good. More recent developments in case law suggest, however, that the Court of Justice has become increasingly aware that such a situation poses not only challenges for Member States, but also for the Court itself and the proper role of the judiciary in an EU of 28 or 27 Member States. Some recent judgments thus seem to temper the concept of restrictions on the freedom of movement, but above all the Court seems more willing to entertain the justification and proportionality of certain administrative, regulatory and political concerns that entail restrictions on the freedom of movement.

Chapter 8 has the title 'The Guardianship of European Constitutionality: A Structural Critique of European Constitutional Review'. Professor Agustín José Menéndez, Universidad de León, Spain, develops a critical analysis of proportionality which gives economic freedoms above collective goods and socio-economic rights. On his analysis, European courts have radically altered the substance of European law under the cloth of the projection of the national principle of proportionality to Union law. This has been done both to supranational and national constitutional law and by means of redefining its substantive content. European courts have through proportionality assigned an abstract and a concrete constitutional weight to the right to private property and to entrepreneurial freedom through the four economic freedoms and the principle of undistorted competition. That has placed outside the realm of the constitutionally possible key public policies without which some of the fundamental collective goods at the core of the social and democratic *Rechtsstaat* become extremely vulnerable. Professor Menéndez shows how this accentuated bias of the European socio-economic constitution follows from the way in which European courts have defined economic freedoms as the yardstick of European constitutionality. This entails the automatic assignment of the argumentative benefit to economic freedoms, the construction of all other constitutional goods in the semblance of economic freedoms, and the use of asymmetric standards of evidence when having to justify the adequacy and necessity of economic freedoms and other constitutional goods.

Chapter 9 has the title 'The Criterion of "Consistent and Systematic Manner" in Free Movement Law'. It is by Professor Dr. Tor-Inge Harbo, Agder, Norway. His starting point is that the conflict between the four freedoms and national regulation is not merely about colliding interests but also of colliding values and thus has, potentially, constitutional implications. The conflict has often been phrased as one between national sovereignty and European integration, but is far more than this. It is about marked liberalism and market regulation, the latter constituting the very fundament upon which the European welfare states rest.

In settling conflicts between the two constitutional orders—the ordo-liberal and the welfare-state constitutions—the Court of Justice of the European Union (CJEU) applies the proportionality principle. However, the proportionality principle is arguably of such a discretionary character that one could question its legal credentials. The discretionary character of the proportionality principle thus threatens to undermine the legitimacy of the Court and in turn the legitimacy of the European legal order.

In this chapter, the author discusses the invocation of the "consistent and systematic manner" criterion. Has it contributed to the formalization of the proportionality analysis? Does it secure the legitimacy for the Court's proportionality analysis and its corresponding market liberalizing effects? The point of departure is taken in the gambling case saga.

Part III 'Fundamental Rights'

Chapter 10 has the title 'Legitimacy and the Charter of Fundamental Rights Post-Lisbon', and is by Professor Christoffer C. Eriksen and Jørgen A. Stubberud, Oslo. They ask if the incorporation of the Charter of Fundamental Rights into the Lisbon Treaty has strengthened our reasons for accepting the powers entrusted to the European Union. The Charter of Fundamental Rights was adopted and later transformed into primary law in order to enhance the legitimacy of the EU. This echoed a critique of the gradually expanding powers of the EU, including the expanding reach of the right to free movement, more supranational decision-making procedures and new Union powers in novel policy areas such as the area of justice and home affairs. One line of criticism held that the wide powers of the Union were not balanced with sufficient level of democratic control and effective protection against abuse. The Lisbon Treaty sought to enhance legitimacy in three ways: decision-making processes were to some extent democratised; the Member States agreed that the Union shall accede to the ECHR; and the Charter was transformed into primary law. There is a partly competing perspective from which the EU's legitimacy may depend more on its ability to facilitate effective problem-solving to acute problems of public policy including migration and economic crises. In this chapter, we inquire to what extent the transformation of the Charter into primary law has and may succeed in providing better reasons for accepting the powers entrusted to the EU. In this context we provide, first, an analysis of certain questions regarding the interpretation and application of the Charter, questions which are key to assessing what changes to EU law the said transformation has and may lead to, as compared to older epochs of EU law when fundamental rights were based on

unwritten law. In the final assessment, we argue that the answer to the legitimacy question depends on the extent to which European courts will allow Member States with flexibility regarding how fundamental rights are protected in different institutional environments. Effective problem-solving may require the ability to adapt different solutions in different locations and to different situations, based upon different weighing of interests.

In Chap. 11, 'False Friends and True Cognates: On Fundamental Freedoms, Fundamental Rights and Union Citizenship', Francesco De Cecco, Newcastle, analyses the relationship between these concepts upon which the EU order builds.

Both the case law on fundamental freedoms, and the selective manner in which these freedoms are incorporated in the Charter of Fundamental Rights of the EU are consistent with an account of fundamental rights that places a non-instrumental focus on the protection of the interests of the right-holder (the Union citizen). According to the account advanced here, those free movement rights that are non-instrumental in nature are treated as fundamental rights, whereas those free movement rights that remain predominantly instrumental are not. Yet, developments in the case law on Union citizenship that have occurred during the current decade present a challenge to this account. On the one hand they appear to draw on the conceptual toolkit of fundamental rights; on the other, they contradict key features of a fundamental rights conception of Union citizenship.

In Chap. 12, 'Fundamental Freedoms, Fundamental Rights, and the Many Faces of Freedom of Contract in the EU', Professor Olha O. Cherednychenko, Groningen, turns to contract law. As a result of the growing involvement of the EU in regulating private conduct and private law relationships, EU law increasingly affects the scope of freedom of contract. In this way, it shapes the European model of freedom of contract based first and foremost on the internal market rationale, sparkling tensions with the concepts of freedom of contract that have evolved in the national contract laws of the Member States.

Whilst EU secondary legislation plays a major role in this context, the understanding of freedom of contract can also be profoundly affected by EU primary law. Professor Olha Cherednychenko seeks to determine the reach of EU free movement law in the contractual sphere, with a particular focus on (financial) services. It explores the conceptualisation of freedom of contract in free movement law in light of the concept of 'formal' freedom of contract and that of 'substantive' freedom of contract in national contract laws, as well as the notion of the freedom of contract regulated in the name of the internal market in EU secondary legislation. Particular attention in this context is given to the interplay between fundamental economic freedoms and fundamental rights.

Chapter 13, 'The Charter of Fundamental Rights and the Reach of Free Movement Law' is written by Dr. Filippo Fontanelli, Edinburgh, and Dr. Amedeo Arena, Naples. They discuss two underrated and connected aspects that determine the applicability of the Charter in the area of the market freedoms.

First, the Charter can be a decisive standard of review for domestic measures only when they are covered by EU law but are not precluded by it. In this respect, the distinction between non-preclusion and non-application of EU law is

overlooked in the case law and in the scholarship. Second, because the applications of EU law and the Charter are aligned, the latter suffers from the uncertainties of the former. Dr. Fontanelli and Dr. Arena conclude that the entry into force of the Charter has exposed the blurred contours of the application of EU law, in particular in the area of the market freedoms.

Part IV 'Looking Abroad'

Chapter 14 provides a comparative perspective: 'Creating a national market in the United States through the dormant commerce clause?' Eszter Belteki, Durham, compares the development of the internal market in the EU and the creation of the national market in the United States of America.

The author claims that the US experience provides an excellent starting point for understanding the EU Internal Market. The author demonstrates, through a historical analysis, how such a market could materialise without an express provision about this in the Constitution of the United States of America. She first examines the drafting and early interpretation of the commerce clause in the first part. She then turns to the main decisions of the US Supreme Court, in which the negative or dormant commerce clause developed, focusing on the extent to which limitation placed on the states under this clause assisted in the creation of the national market. The author finally turns to what she sees as a worrying trend. Even though there is a strict scrutiny of state laws under the modern interpretation of the commerce clause, recent Supreme Court decisions allow discriminatory laws to be imposed by the states against other states and their nationals.

Chapter 15 moves on to external relations: 'Beyond Parallel Powers. EU Treaty-Making Power Post-Lisbon'. The authors Mads Andenas, Oslo, and Dr. Luca Pantaleo, The Hague, analyse EU external treaty-making and internal law-making powers. In the codification and development in the Treaty of Lisbon and the developments subsequent case law and practice, there is an emerging trend towards a conceptual and practical separation of EU external and internal powers—that is, EU treaty-making and law-making powers. This trend is reflected in the framework of the Common Commercial Policy. This is natural, as EU trade policy is traditionally the most proactive of EU foreign policies. However, the same dynamics may apply to other EU external powers, such as development cooperation, as showed by the Philippines case.

The authors argue that the principle of parallel powers only works in one direction. The principle requires that EU internal competences be mirrored by corresponding parallel external competences. However, it does not impose a parallel in the other direction. This position may well entail that the EU has the power to conclude an agreement even in areas where the corresponding internal powers belong to the Member States. The competence of the latter would not be infringed or encroached upon by the conclusion of such an agreement to the extent that the Member States retain the power, at the very least, to implement the agreement at the internal level. It is worth noting that this does not imply a breach of the principle of conferral. That principle would be infringed in the case of a so-called reverse ERTA-effect, as codified by Article 216 TFEU, in other words, if the EU could

derive implied internal powers from express external powers. This is evidently not the case.

The uncoupling of EU external powers from the internal division of competence would mark the constitutional ripeness of a system that is becoming less and less a common market and more and more an inextricable set of interconnected policies. The development may be slowed down if the full court (plenary) of the CJEU follows the Advocate General's Opinion in Opinion Procedure 2/15 on the Singapore Free Trade Agreement. (The CJEU did not, and the development continues, as explained in the post scriptum to this chapter, written after the CJEU's opinion.)

References

Andenas M (2012) European Monetary Law. In: Wolfrum R (ed) Max Planck Encyclopedia of Public International Law. Oxford University Press, Oxford

Andenas M (2015) Civil Liability of Credit Rating Agencies in the European Union 11 International and Comparative Corporate Law Journal, Special Issue: Civil Liability of Credit Rating Agencies in the European Union

Andenas M (2016) The European Union as a Global Model for Trade and Investment. Social Science Research Network. ISSN 1556–5068

Andenas M et al. (eds) (2012) Theory and Practice of Harmonisation. Edward Elgar Publishing, London

Andenas M et al. (eds) (2016) Regulating and Supervising European Financial Markets. More Risks than Achievements. Kluwer, Heidelberg

Andenas M, Roth WH (eds) (2003) Services and Free Movement in EU Law. Oxford University Press, Oxford

Andenas M, Wooldridge F (2009) European Comparative Company Law. Cambridge University Press, Cambridge

Szyszczak E, Davies J, Andenas M, Bekkedal T (eds) (2011) Developments in Services of General Interest. TMC Asser Press, The Hague

Part I
The Reach of Free Movement

Chapter 2
The Reach of Free Movement. A Defence of Court Discretion

Tarjei Bekkedal

Abstract This chapter argues that the reach of the fundamental freedoms and the content of the notion of a "restriction" cannot and should not be expressed in a rule-like manner. To the contrary, the fundamental freedoms function as overarching constitutional principles that both demand and legitimize the execution of court discretion. Public bodies, like courts, are vested with discretion in situations where rules are to be avoided, due to the magnitude of phenomena that are subject to regulation. Because of their stiffness, rules cannot serve the purposes of a legal system that pursues numerous, shifting and colliding objectives, such as the EU legal order. Any attempt to establish tests or categorizations that aim to define and exhaust the reach of the fundamental freedoms in a rule-like manner will obstruct the nature of the principles through which free movement is established, secured and developed, and the nature of the legal order in which they operate. The chapter explores the legal basis for court discretion, whether discretion is compatible with the principle of legal certainty, how discretion can fit a conception of the right to free movement as a personal individual right and the constitutional limitations to court discretion.

Keywords Charter of Fundamental Rights · Constitution · Discretion · Discrimination · Free movement · Individual rights · Legal certainty · Market access

T. Bekkedal (✉)
University of Oslo, St. Olavs plass, PO Box 6706, 0130 Oslo, Norway
e-mail: tarjei.bekkedal@jus.uio.no

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2.1 Introduction—The Fetish for Rules

The provision on the free movement of goods (Article 34 TFEU), the provision on the freedom of establishment (Article 49 TFEU), the provision on the freedom to provide services (Article 56 TFEU) and the provision on the free movement of capital (Article 63 TFEU) prohibit restrictions on free movement. Workers (Article 45) and EU-citizens (Article 21) enjoy a personal right to move freely within the territory of the Member States. Superficially, this promises both unity and simplicity. The reach of free movement and, in this respect, the reach of EU law, hinges on the notion of a "restriction".

We all know that things are not as simple as they appear. So much ink has been spilt on the topic that one observer has noted that EU lawyers may be accused of "fetishizing" the case law on the scope of the Treaty rules.[1] One reason is that the reach of free movement is of seminal practical importance; another is the constitutional implications. If a restriction is identified, courts can proceed and subject national legislation to scrutiny, pursuant to the principle of proportionality. Thus, the notion of a restriction has been described as a mechanism for the allocation of competences between the supranational and the national sphere, and between lawmakers and courts. The understanding of the term "restriction", its content and its nature, pose the intriguing question of what EU law is about, and what it is not

[1] Dougan 2010, p. 165.

about—whether we should apply a protectionist reading of the Treaty, an economic freedom reading, or search for a third way.[2]

In spite of all the efforts, no consensus has been established with regard to what a restriction is, and what it should be. The only thing upon which everyone would seem to agree is that not *every* piece of national legislation can be regarded as a restriction without any further qualification and that measures which only incur extra costs or reduce the volume of trade do not as such affect the right to access the market.[3] The opposite position would represent an application of EU law which is too simplistic and it would raise serious concerns about legitimacy if courts were to second-guess every minor decision enacted by national lawmakers. This is where all the problems start. Apart from the negative finding, no one seems to have identified the rule, or the combined set of rules, that define the notion of a restriction in a manner which is generally accepted among other scholars and which is able to account for the practice of the ECJ in the field.[4] To add to the difficulties, this practice is often accused of being inconsistent or unsystematic.[5]

In this chapter, I will argue that the rules are not yet identified because no rules exist, nor should exist. Secondary legislation provides rules. To the contrary, the fundamental freedoms function as overarching constitutional principles that both demand and legitimize the execution of court discretion. Public bodies, like courts, are vested with discretion in situations where rules are to be avoided, due to the magnitude of phenomena that are subject to regulation. Because of their stiffness, rules cannot serve the purposes of a legal system that pursues numerous, shifting and colliding objectives, such as the EU legal order. Any attempt to establish tests or categorizations that aim to define and exhaust the reach of the fundamental freedoms in a rule-like manner will obstruct the nature of the principles through which free movement is established, secured and developed, and the nature of the legal order in which they operate. The one fetish that should be tempered is lawyers' affinity for rules. Instead we will have to explore the legal basis for court discretion (Sect. 2.2), whether discretion is compatible with the principle of legal certainty (Sect. 2.3), how discretion can fit a conception of the right to free movement as a personal individual right (Sect. 2.4) and the constitutional limitations to court discretion (Sect. 2.5).

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[2] See e.g. Bernard 1996, p. 82; Maduro 1998, pp. 58–60; Snell 2002, pp. 1–4; Oliver and Roth 2004, p. 413; Dougan 2010, p. 165; Snell 2010, p. 469; Nic Shuibhne 2013, p. 189 and the famous opinion of AG Tesauro in Case C-292/92, *Hünermund*, EU:C:1993:863.

[3] Established case law. See e.g. Joined Cases C-267/91, *Keck and Mithouard*, EU:C:1993:905, para 13; Case C-20/03, *Burmanjer*, EU:C:2005:307, paras 30–31; Case C-518/06, *Commission v. Italy*, EU:C:2009:270, paras 62–63; Opinion of AG Poiares Maduro in Case C-446/03, *Marks & Spencer plc v Halsey (Her Majesty's Inspector of Taxes)*, EU:C:2005:201, para 37: Jansson and Kalimo 2014, p. 526.

[4] See e.g. Enchelmaier 2004 and 2016 for a critical assessment of the seminal works of Snell 2002 and Nic Shuibhne 2013. For a convincing critique of Maduro 1998 and the conception of the four freedoms as fundamental political rights, see Roth 2002, p. 22 in particular.

[5] See e.g. Snell 2010, pp. 461–467; Davies 2011, p. 9; 2012b, p. 25; Jansson and Kalimo 2014, p. 530.

2.2 The Legal Basis for Court Discretion

2.2.1 Introduction

In Sect. 2.2.2 below, it will be argued that the far-reaching notion of a restriction established by the written treaty provisions on free movement constitutes a textual legal basis for the execution of court discretion. It is submitted that even the proponents of a restrained and rule-based approach to the reach of free movement (normally grounded in a wide notion of discrimination) must accept discretion as a fundamentally important concept within the EU legal order in general, and within free-movement law in particular. In the absence of discretion, the requirement of self-restraint, which is so often argued in favour of, cannot be construed.

Section 2.2.3 proves that discretionary decision-making is foreseen, legitimized and required by Article 19 TEU, which states that the Court "shall ensure that in the interpretation and application of the Treaties the law is observed". A number of constitutionally important examples have shown how the European legal order was construed through the exercise of court discretion; this has become an established and accepted necessity of the European legal system.

2.2.2 The Treaty Provisions

The Treaty provisions on free movement establish the competence of the CJEU and of the national courts to assess whether national regulatory measures restrict free movement. The provisions legitimize judicial review, and in this regard, the execution of what we might call court discretion in the "thin" sense. By this, I refer to the considerations which judges cannot avoid taking into account, weigh and assess, whenever they conduct a review of whether the law is observed, except for in cases where the outcome follows mechanically from the wording of the relevant provision.

From a literal point of view one could actually argue that at least some of the provisions on free movement, those that apply the term "restriction", do not allow for court discretion, as the term is clear to the extent that it demands a mechanical application of the law. "Restriction" means anything that restricts those who are subject to regulation, or in short: anything. Article 45 TFEU could be taken to support such an encompassing and literal interpretation as the latter provision; in contrast to its seemingly more all-encompassing cousins, only requests the "abolition of any discrimination based on nationality". Of course, such a broad, unconstrained and utterly naïve application of the restriction criterion is methodologically wrong and would run counter to the far more nuanced practice of the CJEU. Still, it reveals, as I will submit, the dynamic potential that is inherent in the

textual law on free movement, a potential that the CJEU has carefully preserved, although not always applied to its fullest extent.[6]

In its case law, the Court tends to present the notion of a restriction in sweeping terms which comes close to the naïve and literal reading of the Treaty which was explained above. According to the famous judgment in Dassonville[7]:

> [a]ll 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.

In the field of services, the judgment in *Binsbergen* provided an early confirmation that even if the concept of discrimination is central to the notion of a restriction, it is not exhaustive[8]:

> The restrictions to be abolished pursuant to Articles [56 and 57 TFEU] include all requirements imposed on the person providing the service by reason in particular of his nationality or of the fact that he does not habitually reside in the State where the service is provided, which do not apply to persons established within the national territory *or which may prevent or otherwise obstruct the activities of the person providing the service*.

In the famous *Gebhard* ruling, on the freedom of establishment, the Court stated[9]:

> It follows, however, from the Court's case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.

In the latter formula, the open term "hinder or make less attractive" defines the notion of a restriction, while the concept of discrimination fulfils a more limited role: The functioning of the latter is to clarify that unless the national measure is non-discriminatory, the doctrine of mandatory requirements cannot be invoked.[10] The antithesis is that non-discriminatory measures may indeed constitute restrictions.

In accordance with the wording of the Treaty provisions on free movement, the Court has consistently repeated its broad interpretation of what may constitute a

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[6] See also Nic Shuibhne 2013, p. 191: "It is thus important to note that it is not (just) *the Court* that is pushing for an understanding of restrictions beyond discrimination it is (also) the Treaty."

[7] Case 8/74, *Procureur du Roi v Dassonville*, EU:C:1974:82, para 5, cf. e.g. Case C-320/03, *Commission v. Austria*, EU:C:2005:684, para 67.

[8] Case 33/74, *Van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, EU:C:1974:131, paras 10–11 (emphasis added).

[9] Case C-55/94, *Gebhard*, EU:C:1995:411, para 37.

[10] Cf. Case C-375/14, *Laezza*, EU:C:2016:60, para 25.