

Can We Make the European Fundamental Freedoms Less Constraining? A Literature Review

Article by an MPIFG researcher

Martin Höpner, Susanne K. Schmidt: Can We Make the European Fundamental Freedoms Less Constraining? A Literature Review. In: Cambridge Yearbook of European Legal Studies (published online December 2, 2020). Cambridge University Press
The original publication is available at the publisher's web site: <https://doi.org/10.1017/cel.2020.11>

Martin HÖPNER

Max Planck Institute for the Study of Societies, Cologne, Germany

Susanne K. SCHMIDT*

University of Bremen

Abstract

This article reviews the legal and political science literatures on the extensive interpretation of the European fundamental freedoms and on possible ways out. The common market rules were originally laid down in an international treaty, the Treaty of Rome. In functional terms, this treaty became a *de facto* constitution, implying that its content, including the fundamental freedoms, were constitutionalised. We review how this constitutionalisation constrains legislators at the Member State and European levels. In order to identify possible ways out, we also review several reform options: institutional reforms of the European judicial system; the de-constitutionalisation of the fundamental freedoms; counterbalancing these freedoms with further strengthened social rights; and contestation of over-constitutionalisation within the given primary law framework. We conclude that reform options are available that could gradually free the legislators from the over-constitutionalisation of the common market rules. Such options should become part of the ‘Conference on the Future of Europe’ process and debates about EU reforms in general, as more flexibility is warranted in a heterogeneous EU.

Keywords: Court of Justice of the European Union, fundamental freedoms, constitutionalisation, Treaty reform, European secondary law

I. INTRODUCTION

With the lost referenda in France and the Netherlands in the year 2005, the idea to provide the European Union with a formal constitution died. In functional terms, however, there had been a constitution anyway.¹ In declaring the supremacy and direct effect of European law in 1963/64, the European Court of Justice (‘ECJ’, now

* We are most grateful for very detailed comments that Nik de Boer gave us, which helped to significantly improve our argument. Further thanks are due to Gareth Davies and Miriam Hartlapp. For research assistance, we would like to thank Lena Kempermann and Elias Kerperin.

¹ T Isiksel, *Europe’s Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford University Press, 2016).

‘CJEU’) effectively constitutionalised the European Economic Community (‘EEC’) Treaty and thereby enabled itself to repeatedly give important impulses to European integration. From this time on, ‘integration through law’² became a feature of the EU. Among the most far-reaching of these impulses was the re-interpretation of the meaning and scope of the fundamental economic freedoms in the *Dassonville*³ and *Cassis de Dijon*⁴ cases.⁵

Both judicial and political sciences recognise the Court as a major actor of European integration. But the practical implications of an intergovernmental treaty being transformed into a constitution are less clear. As Grimm points out,⁶ both kinds of legal texts have different foci. A national constitution determines state organisation as well as basic civic and political rights, but it is usually silent as to the content of material policy to be pursued by democratic majorities. The original EEC Treaty provided the equivalent to state organisation in detailing the European institutions’ rights and obligations. As an intergovernmental treaty, however, the EEC Treaty also contained many statements as to policy, such as the common market rules. Initially included as goals of intergovernmental cooperation, constitutionalisation of these policy issues allowed the Court to overshadow the legislative process with its case law.⁷ The Court became, in the terminology of Horsley, a ‘direct policy-maker’.⁸ Increasing constraints on the policymaking of the Member State and the European levels have resulted until today, making it paramount to identify options for overcoming these constraints on political manoeuvre, and hence for democratic decision making. The available reform options have, to our knowledge, never been systematised. This is where this article steps in. We review the relevant literature and extract insights that shall inform academic readers and political reformers alike.

In short, we show that the constraints that the fundamental freedoms impose on democratic choices at the Member State level as well as the economically liberal bias of these constraints are largely uncontroversial. Much more contested, in contrast,

² M Cappelletti, S Monica, and J H H Weiler, *Integration Through Law. Europe and the American Federal Experience. Volume 1: Methods, Tools and Institutions* (Walter de Gruyter, 1986); G Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press, 2005); R D Kelemen, ‘The Political Foundations of Judicial Independence in the European Union’ (2012) 19(1) *Journal of European Public Policy* 43.

³ *Procureur du Roi v Benoît and Gustave Dassonville*, C-8/74, EU:C:1974:82.

⁴ *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, C-120/78, EU:C:1979:42.

⁵ K J Alter and S Meunier-Aitsahalia, ‘Judicial Politics in the European Community. European Integration and the Pathbreaking *Cassis de Dijon* Decision’ (1994) 26(4) *Comparative Political Studies* 535.

⁶ D Grimm, *The Constitution of European Democracy* (Oxford University Press, 2017).

⁷ L M P P Maduro, *We the Court. The European Court of Justice and the European Economic Constitution* (Hart Publishing, 1998), pp 7–34; S K Schmidt, *The European Court of Justice and the Policy Process* (Oxford University Press, 2018).

⁸ T Horsley, *The Court of Justice of the European Union as an Institutional Actor. Judicial Lawmaking and Its Limits* (Cambridge University Press, 2018), p 13; K J Alter, ‘Tipping the Balance: International Courts and the Construction of International and Domestic Politics’ (2011) 13 *Cambridge Yearbook of European Legal Studies* 1, p 9.

are the degrees of freedom of the European policymaker and its judicial and procedural capacity to partly or entirely correct the fundamental freedoms jurisprudence of the CJEU. With regard to potential countermeasures, we review a number of reform options: institutional reforms of the European judiciary, the transfer of the fundamental freedoms to secondary law, defining the fundamental freedoms as bans on economic discrimination rather than as bans on restriction of the Common Market, counterbalancing the fundamental freedoms with further strengthened social rights, and defining areas that shall remain outside the scope of the common market freedoms.

Since far-reaching institutional reforms of the European judiciary are particularly difficult to achieve, we argue, the Member States are better off to write a more autonomy-protective reading of the fundamental freedoms into the treaties if they can agree on such a reading. Going back to the fundamental freedoms as bans on transnational economic discrimination and identifying policy areas that shall not fall into the reach and scope of the market freedoms are the most promising reform strategies. Such strategies, however, require treaty changes. If no respective window of opportunity opens up in the short to mid run, judicial and political reformers should focus on more contestation by the means of oversight by national courts and a more courageous political testing of the ‘fundamental freedoms rigidity’ of European secondary law.

In the following, we will proceed in two steps. First, by reviewing analyses from jurisprudence and political science, we will describe how the Court’s broad interpretation of the common market rules as constitutional individual rights has moved policy matters towards the discretion of judges (II.A–II.C), providing European integration with a particular liberal economic bias. In a second step, we will discuss reform options aiming at more autonomy-protective market freedoms (III.A–III.C).⁹ As we will demonstrate, the over-constitutionalisation of the European market rules cannot be changed easily. But reform is not impossible either. Strategies to limit the impact of the fundamental freedoms and thereby to enlarge the room for manoeuvre of democracy at the European and Member State levels should become part of the ‘Conference on the Future of Europe’ process.

II. OVER-CONSTITUTIONALISATION OF THE COMMON MARKET RULES

When the EEC was founded in 1958, the Treaty of Rome included several aims for cooperation among the six founding Member States. Until the late 1960s, the premier cooperation goal was building the common market, relying on the four freedoms—relating to the free movement of goods, services, people (of workers and of establishment), and capital—as well as cartel law and state aid, next to realising a common

⁹ In this article, we use the terms ‘market freedoms’ and ‘fundamental freedoms’ interchangeably. Note that fundamental freedoms must not be confused with fundamental rights. N J de Boer, ‘Fundamental Rights and the EU Internal Market: Just How Fundamental Are the EU Treaty Freedoms? A Normative Enquiry Based on John Rawls’ Political Philosophy’ (2013) 9(1) *Utrecht Law Review* 148; T Kingreen, ‘Fundamental Freedoms’ in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law*, 2nd ed (Springer, 2010).

agricultural and transport policy. Later treaties added further policy aims, such as citizenship rights and monetary union at Maastricht. Establishing direct effect and supremacy in the 1960s gave constitutional status to these policy goals.

In this Section, we will revisit the literature on how this constitutionalisation of the Treaty of Rome's market freedoms frees individual economic activity from state regulation (II.A), imposing a liberal bias (II.B), and far-reaching constraints on majoritarian policymaking (II.C).

A. *Economic Freedoms as Constitutionalised Individual Rights*

The CJEU's case law on the fundamental freedoms builds the core of the single market. A large literature has analysed the dynamism that this case law provides to the integration process. Originally, the freedoms were interpreted as *prohibitions of discrimination*. Member States were barred from imposing *additional* restrictions on goods, services, or persons from other Member States, but market participants had to comply with the domestic regulatory setting. With its famous *Dassonville* decision, the Court extended the scope of the freedom of goods in today's Article 34 Treaty on the Functioning of the EU ('TFEU') by arguing for a much more far-reaching prohibition of restriction. All 'measures likely to prohibit, impede or render less attractive'¹⁰ the exercise of the market freedoms, even if equally imposed upon domestic and foreign market participants, may violate European law.

Under this interpretation, Member States' market regulations, when potentially restricting cross-border economic activity, have to be justified with a proportionality test, originally developed in the *Cassis de Dijon* decision and subsequently applied to all market freedoms following the ruling in *Gebhard*.¹¹ According to this test, restrictions are justified if they do not discriminate against foreigners, if they are justified by imperative requirements of the general interest, if they are suitable for securing the attainment of the objective, and if they do not go beyond what is necessary. Reynolds¹² summarises the vast literature on the fundamental freedoms by arguing: 'Most free movement lawyers would agree that the transformation of free movement has occurred across four main axes, covering the expansion in the material scope of the market freedoms, the widening of their personal scope, the extension of their direct effect, and the strengthening of a decentralised system of enforcement'.

As a consequence of this broad interpretation, democratic choices of Member States are significantly constrained even in areas in which they have not provided

¹⁰ Opinion of AG Poiares Maduro in *Marks & Spencer plc v Halsey (Her Majesty's Inspector of Taxes)*, C-446/03, EU:C:2005:201, para 37. Cited after T Bekkedal, 'The Reach of Free Movement. A Defence of Court Discretion' in M Andenas, T Bekkedal, and L Pantaleo (eds), *The Reach of Free Movement* (T.M.C. Asser Press, 2017), p 32.

¹¹ *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, C-55/94, EU:C:1995:411. See P Oliver and W Roth, 'The Internal Market and the Four Freedoms' (2004) 41 *Common Market Law Review* 407, p 411.

¹² S Reynolds, 'Explaining the Constitutional Drivers Behind a Perceived Judicial Preference for Free Movement over Fundamental Rights' (2016) 53(3) *Common Market Law Review* 643, p 655.

the European legislator with competences.¹³ In theory, the application of the fundamental freedoms is restricted to transnational constellations. In practice, however, it is difficult to come up with economic and social regulations which do not at least potentially also affect foreign exchange.¹⁴ The literature agrees that it is difficult to make out with clarity where Member States retain authority to regulate their markets.¹⁵ Private litigants requesting the preliminary reference procedure of Article 267 TFEU in national courts as well as the Commission with the infringement procedure under Article 258 TFEU can use the re-interpreted market freedoms as an effective weapon against unwanted regulations at the Member-State level.¹⁶ The dynamism that European integration can draw from the interpretative shift to a non-restrictions approach can hardly be over-stated.

B. *The Liberal Bias*

The literature has not only identified dynamism, undermining Member States' regulatory competence, it has also identified and often criticised the resulting liberal bias which Scharpf has famously described as 'negative integration'.¹⁷ Once the fundamental freedoms are interpreted as prohibitions of restriction, the common market can be realised without agreeing on common rules, merely by less and less accepting different national market regulations as legitimate barriers to trade. The dynamic that is unleashed is one of considerable liberalisation.¹⁸

Conflicts with the market freedoms only emerge where regulations, from the point of view of the litigant, intervene too much. Where national liberalisation measures have gone too far, undermining public policy objectives, European law offers no lever for regulatory reform.¹⁹ Thus, the balance of power between proponents and opponents of market-correcting measures is changed, because only those opposing

¹³ F Fontanelli and A Arena, 'The Charter of Fundamental Rights and the Reach of Free Movement Law' in *The Reach of Free Movement*, note 10 above, p 296; Horsley, note 8 above. In the words of Azoulai, the market freedoms have a 're-programming function' even in areas in which the European level lacks political competences: L Azoulai, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for Its Realization' (2008) 45(5) *Common Market Law Review* 1335, p 1342.

¹⁴ P C de Sousa, 'Catch Me if You Can? The Market Freedoms' Ever-Expanding Outer Limits' (2011) 4(2) *European Journal of Legal Studies* 162.

¹⁵ M Andenas, 'The Reach of Free Movement and the Gradualist Approach of the CJEU: An Introduction' in *The Reach of Free Movement*, note 10 above.

¹⁶ D Edward, 'National Courts – the Powerhouse of Community Law' (2003) 5 *Cambridge Yearbook of European Legal Studies* 1, p 5.

¹⁷ The term was firstly used by Jan Tinbergen in 1954. See J Tinbergen, *International Economic Integration* (Elsevier, 1954); F W Scharpf, 'Negative and Positive Integration in the Political Economy of European Welfare States' in G Marks (ed), *Governance in the European Union* (Sage, 1996); F W Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999).

¹⁸ Kingreen, note 9 above, p 523.

¹⁹ F W Scharpf, 'Legitimacy in the Multilevel European Polity' (2009) 1(2) *European Political Science Review* 173.

domestic market-restricting measures may turn to European law. In fact, Garben argues that the primacy of economic freedoms ‘gives governments a tool to eliminate social rules that they do not support, without having to face the normal political contestation at the national level. This leaves social rules systematically vulnerable to attack at both the European and the national level’.²⁰

Litigants depend, however, on the willingness of national courts to apply EU law and to demand clarification from the CJEU, when in doubt. In deciding for a reference to the CJEU or against, Member-State courts can either safeguard their national legal order from European law influence, or push legal development in a way that judges regard as preferable. Disagreement in the national court hierarchy on legal development fuels this process. The overlapping incentives of litigants, lower national courts, and the CJEU can set in motion a self-dynamic process that pushes market integration further.²¹

The reference to litigants makes clear that Member States are not unitary actors, and that liberalisation policies being furthered via the European level find important interlocutors at the national level. In his important book ‘Eurolegalism’, Daniel Kelemen has shown that the European multi-level system offers incentives for strategic litigation that resemble those in the US context.²² The provisions of EU law can be regarded as an opportunity structure for actors in search of a more favourable regulatory environment.²³ Supremacy and direct effect allow them to litigate in domestic courts for the application of EU law, if this appears more beneficial, often resulting in preliminary questions to the CJEU, providing it with the opportunity to develop its case law.

The fundamental freedoms not only potentially challenge Member States’ laws. They also apply horizontally.²⁴ In this context, many proponents of ‘Social Europe’ perceived the famous *Viking*²⁵ and *Laval*²⁶ rulings as shocks:²⁷ the Court

²⁰ S Garben, ‘The Constitutional (Im)balance between ‘the Market’ and ‘the Social’ in the European Union’ (2017) 13(1) *European Constitutional Law Review* 23, p 36.

²¹ K J Alter, *Establishing the Supremacy of European Law* (Oxford University Press, 2001).

²² R D Kelemen *Eurolegalism. The Transformation of Law and Regulation in the European Union* (Harvard University Press, 2011).

²³ M Höpner and A Schäfer, ‘A New Phase of European Integration: Organized Capitalisms in Post-Ricardian Europe’ (2010) 33(2) *West European Politics* 344; M Höpner and A Schäfer, ‘Embeddedness and Regional Integration. Waiting for Polanyi in a Hayekian Setting’ (2012) 66(3) *International Organization* 429.

²⁴ Oliver and Roth, note 11 above, p 421; Azoulai, note 13 above, p 1343.

²⁵ *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.

²⁶ *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet afdelning 1, Byggettan and Svenska Elektrikerförbundet*, C-341/05, EU:C:2007:809.

²⁷ 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(1) *European Law Journal* 1. See also J Malmberg and T Siegman, ‘Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice’ (2008) 45(4) *Common Market Law Review* 1115; and on the practical consequences of

declared that the exercise of the fundamental right to strike falls within the scope of the fundamental freedoms and must therefore pass the proportionality test. Fundamental rights were originally incrementally developed by the ECJ in its jurisprudence, notably in response to the criticism of the German Constitutional Court starting in 1967.²⁸ Much later, the European Charter of Fundamental Rights codified fundamental rights, becoming directly effective with the Treaty of Lisbon in 2009.²⁹ These rights bind EU-institutions, and national institutions when executing EU law.³⁰ *Viking* and *Laval* not only became important signposts for the extent to which the market freedoms endanger social rights, they also put a halt on hopes that a further strengthening of fundamental rights at the European level could sufficiently tame the interpretation of the common market rules (compare Section III.C): while recognising the right to strike as a European fundamental social right for the first time in these rulings,³¹ the Court curbed its exercise as a violation of the fundamental freedoms right away.

The *Laval* ruling can serve as a good illustration of Kelemen's argument of strategic litigation. *Laval* had a deep impact on Swedish industrial relations. The Confederation of Swedish Industry financed the legal dispute and used the ruling to put pressure on the unions.³² Within the national context, the employers would not have had the political clout to enact these changes that could be realised via European law.

The literature states an increasing overlap between fundamental freedoms and fundamental rights.³³ Yet, the conflict between market freedoms and fundamental rights is not solved on an equal footing in the way of 'practical concordance'³⁴ as practiced by the *Bundesverfassungsgericht* when balancing different fundamental rights. To

(*F*'note continued)

Laval, E Bengtsson, 'Social Dumping Cases in the Swedish Labour Court in the Wake of *Laval*, 2004–2010' (2016) 37(1) *Economic and Industrial Democracy* 23; S Deakin, 'Regulatory Competition after *Laval*' (2010) 8 *Cambridge Yearbook of European Legal Studies* 581; M Rönmar, 'Free Movement of Services Versus National Labour Law and Industrial Relations Systems: Understanding the *Laval* Case from a Swedish and Nordic Perspective' (2008) 10 *Cambridge Yearbook of European Legal Studies* 493.

²⁸ Bekkedal, note 10 above, p 25.

²⁹ Article 6 Treaty on European Union ('TEU'): 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights ...'.

³⁰ C I Nagy, 'Do European Union Member States Have to Respect Human Rights? The Application of the European Union's Federal Bill of Rights to Member States' (2017) 27(1) *International & Comparative Law Review* 1, p 4.

³¹ Azoulay, note 13 above, p 1338.

³² D Seikel, 'Class Struggle in the Shadow of Luxembourg. The Domestic Impact of the European Court of Justice's Case Law on the Regulation of Working Conditions' (2015) 22(8) *Journal of European Public Policy* 1166. M Blauburger, 'With Luxembourg in Mind ... the Remaking of National Policies in the Face of ECJ Jurisprudence' (2012) 19(1) *Journal of European Public Policy* 109.

³³ V Trstenjak and E Beysen, 'The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case Law of the CJEU' (2013) 38(3) *European Law Review* 293.

³⁴ The term stems from K Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (C F Müller, 1988), paras 72, 318.

the contrary, the *Cassis de Dijon* procedure, developed for identification and abandonment of illegitimate protectionisms, is intentionally asymmetric in favour of the fundamental freedom.³⁵ While Trstenjak and Beysen argue for a symmetric double proportionality test, where ‘the realisation of a fundamental freedom constitutes a legitimate objective which may limit a fundamental right and vice versa’,³⁶ there appears broad agreement in the literature as to the continued primacy of the fundamental freedoms. ‘Social fundamental rights and economic freedoms have not been recognised as having the same legal force in EU law’, Robin-Olivier writes.³⁷ The diagnosis is one of a ‘constitutional asymmetry’ in favour of economic rights.³⁸

One may suspect that liberal market economies asymmetrically profit from the judicially driven liberal bias. But reality is more complex. Since all kinds of socio-economic orders rely on certain balances between market and non-market features, there are no clear winners and losers among Member States.³⁹ Brexit can be taken as an illustration. Not only did criticism about the powerful role of the Court in the EU policy process play an important role in the British discussion about EU membership. Far reaching social rights under the free movement of labour were also in the centre, although one should have expected the UK with its rather liberal type of capitalism to be a central beneficiary of the liberalisation process.

In summary, the constitutionalisation of the fundamental freedoms imposes a significant liberalising bias on integration.

C. Constraining EU Policymaking

The common market rules constrain, as we have seen above, democratic discretion at the Member State level. This part of the story is not controversial in the literature reviewed here. In contrast, the effects on the political system of the EU—that is, on European secondary law—are much more controversially discussed. Let us start from a purely legal point of view. Most European law students or political scientists without particular expertise on the common market would spontaneously argue that the secondary lawmaker is bound by the market freedoms, simply because secondary law is bound by primary law. But whether this holds true for the fundamental freedoms is more contested than one might expect.

Von Bogdandy,⁴⁰ for example, argues that the fundamental freedoms constrain the national, but not the European, legislator. According to this view, the European

³⁵ W Sauter, ‘Proportionality in EU Law: A Balancing Act?’ (2013) 15 *Cambridge Yearbook of European Legal Studies* 439, pp 445, 455.

³⁶ Trstenjak and Beysen, note 33 above, p 314.

³⁷ S Robin-Olivier, ‘Fundamental Rights as a New Frame: Displacing the *Acquis*’ (2018) 14(1) *European Constitutional Law Review* 96, p 105.

³⁸ Reynolds, note 12 above, p 646.

³⁹ O Larsson and D Naurin, ‘Split Vision: Multidimensionality in the European Union’s Legal Policy Space’ (2019) 63(3) *International Studies Quarterly* 492.

⁴⁰ A von Bogdandy, ‘Grundrechtsgemeinschaft als Integrationsziel? Grundrechte und das Wesen der Europäischen Union’ (2001) 56(4) *JuristenZeitung* 157, pp 165–66.

legislator may use secondary law to correct CJEU jurisprudence interpreting the fundamental freedoms. Other authors such as Kingreen,⁴¹ Mortelmans,⁴² Sørensen,⁴³ and Sypris⁴⁴ argue that the fundamental freedoms bind the European legislator in a less rigid way than they bind Member State legislators. Yet others, such as Frenz,⁴⁵ argue in favour of a neat and strong binding. It is fair to conclude from this part of the literature that only the extreme positions, if anything, can be ruled out: it is neither very likely that secondary law operates completely outside the range of application of the fundamental freedoms, nor that the common market rules legally constrain European secondary law precisely as much as they constrain Member State law. Everything in between these extremes, however, is ambiguous (we will come back to this problem under Section III.D).⁴⁶

The legal dimension, however, covers only part of the problem. There are, in addition, political and procedural repercussions of case law. Even if the fundamental freedoms bind the European legislator rather loosely in legal terms, the CJEU may nevertheless overshadow and guide the democratic process. In the words of Garben: ‘The effect of the case law on the bargaining conditions in the Council makes it difficult for the legislator to deviate from that case law in practical terms’.⁴⁷ Scharpf emphasises that consensus requirements put measures of positive integration at a significant disadvantage.⁴⁸ Procedurally, the Commission is the only European institution that can start legislative processes, and it almost always bases its proposals on the existing interpretation of the Treaty. It is therefore challenging to get diverging readings of the fundamental freedoms in. Then, a double majority of 55% of Council members representing at least 65% of the population in the Council and a majority in the European Parliament (‘EP’) are needed. Thus, if the legislator aims at correcting a CJEU ruling, the unwanted CJEU ruling, rather than the *status quo ante*, will be the fall-back option in the legislative process.⁴⁹

How far-reaching are these constraints? In the political science literature, we find again two positions—one that tends to play them down, and one that emphasises the

⁴¹ T Kingreen, ‘Allgemeine Lehren der Grundfreiheiten’ in C Calliess and M Ruffert (eds), *EUV/AEU. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta. Kommentar. 5. Auflage* (C.H. Beck, 2016).

⁴² K Mortelmans, ‘The Relationship between the Treaty Rules and Community Measures for the Establishment and Functioning of the Internal Market – Towards a Concordance Rule’ (2002) 39(6) *Common Market Law Review* 1303.

⁴³ K E Sørensen, ‘Reconciling Secondary Legislation and the Treaty Rights of Free Movement’ (2011) 36(3) *European Law Review* 339.

⁴⁴ P A J Sypris, ‘The Relationship between Primary and Secondary Law in the EU’ (2015) 52(2) *Common Market Law Review* 461.

⁴⁵ W Frenz, *Handbuch Europarecht. Band 1: Europäische Grundfreiheiten* (Springer, 2012), p 129.

⁴⁶ See also G Davies, ‘Legislative Control of the European Court of Justice’ (2014) 51(6) *Common Market Law Review* 1579, p 1581.

⁴⁷ Garben, note 20 above, p 42.

⁴⁸ Scharpf, note 17 above.

⁴⁹ S K Schmidt, ‘Only an Agenda Setter? The European Commission’s Power over the Council of Ministers’ (2000) 1(1) *European Union Politics* 37.

strictness of the constraints that CJEU case law imposes on the EU policy process. The literature that argues in favour of rather weak constraints can be summarised with a view to two foci: one part of the literature argues that the CJEU aligns its rulings closely with the preferences of Member States. Thus, from this perspective, rulings do not matter much for EU legislation because they broadly lay down what Member States want anyway. Another line argues that the EU legislature is well able to depart from rulings, implying that the power of the Court has been overrated by Scharpf and those arguing in his direction. According to this view, politics rather than judicial reasoning have the upper hand.

Naurin and colleagues⁵⁰ as well as Carrubba and Gabel⁵¹ have analysed Member States' observations to cases at the CJEU. Member States can join proceedings when they see their interests implicated in any way. In this case, they can tell the Court how they regard the legal question at hand. The Commission normally joins all procedures and Larsson and Naurin find that the Court follows the Commission in 75% of all cases.⁵² Larsson and Naurin see judges respond to potential legislative override. Similarly, Carrubba and Gabel argue that judges are concerned about potential non-compliance of Member States.

These are important findings. The quantitative analyses, however, do not allow differentiating between more relevant and hardly relevant cases, those that steer the integration process and those that do not. In path breaking cases like *van Gend*, *Costa*, *Dassonville*, *Cassis*, and others, the Court often decided *against* Member States' opinions. That many other cases were more closely aligned with Member States' preferences does not matter so much, once the Court with its own rulings constitutionalised the Treaty, allowing it to change the integration path of the single market by making the requirement of full harmonisation obsolete, for instance. In fact, in a highly interesting network analysis, Larsson and colleagues show how some rulings establish new precedent and stand in the centre of case law development in an area.⁵³

By not being able to weigh the qualitative importance of rulings, the quantitative analyses do tell us that the Court does not fully disobey Member States' preferences, but not more. As Karen Alter argues, a court that would consistently rule against political preferences would be odd.⁵⁴ There is ample scope for case law to alter the status quo, and therefore the bargaining dynamics in EU policymaking. We are back here at Kelemen's insight about strategic litigation and the use of EU law to bring about European or domestic institutional change that would not receive sufficient political

⁵⁰ O Larsson and D Naurin, 'Judicial Independence and Political Uncertainty: How the Risk of Override Impacts on the Court of Justice of the EU' (2016) 70(2) *International Organization* 1.

⁵¹ C Carrubba and M Gabel, *International Courts and the Performance of International Agreements: A General Theory with Evidence from the European Union* (Cambridge University Press, 2014).

⁵² Larsson and Naurin, note 50 above.

⁵³ O Larsson et al, 'Speaking Law to Power: The Strategic Use of Precedent of the Court of Justice of the European Union' (2016) 50(7) *Comparative Political Studies* 879.

⁵⁴ K J Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press, 2014), p 338.

support in the European or domestic political context of legislatures, but can be enacted with the help of the CJEU.

Martinsen, in her important book, *An Ever More Powerful Court?*,⁵⁵ combines a quantitative analysis of all social policy legislative proposals between 1958 and 2014 as to whether they respond to case law with a qualitative analysis of three cases: the Posted Workers Directive and the Patient Mobility Directive, both influenced by case law on the freedom to provide services, and the Working Time Directive, where case law related to secondary law. Martinsen argues that the importance of the Court has been overrated. She distinguishes four reactions of the legislature to case law of the Court: codification, modification, non-adoption, and override, and hardly finds examples for instances of override, where the EU legislature overturns a ruling. Rather, she bases her assessment on the strength of the legislature on frequent instances of ‘modification’, where legislation responds to case law but adds onto it.

‘Where the “judicialisation of politics” theoretical approach assumes politics to be the receptive part of judicial dialogues, we find that politics also influences the judiciary’,⁵⁶ Martinsen points out. This surely makes sense, also given the insights by Naurin, Carruba and Gabels, and others. But also remember Alter’s remark here, cited above: a court consistently deciding against the Member States’ preferences would be strange. Note in addition that Martinsen adopts very strict criteria for ‘codification’, based on the assumption that case law could give full-fledged descriptions of policy, so that the enactment of any additional legislative rules is used to categorise the case as ‘modification’. The weakness of the Court that the author finds is therefore also due to very high expectations concerning the extent to which case law could in principle shape policy, expectations that even scholars who argue in favour of a strict binding of the legislator may not share.

Other political science research emphasises the constraints that case law poses on policymaking. Bulmer had shown already in 1994 that the adoption of the merger regulation needs to be explained with the pressure of case law.⁵⁷ Blauburger and Weiss⁵⁸ show that the Council decided to adopt the Defence Procurement Directive in 2009, after having declined to do so a few years earlier, because of the way the Court interpreted the common market principles in the meantime. In her book *The European Court of Justice and the Policy Process*, Schmidt⁵⁹ analyses the development of case law on the four freedoms as a path-dependent process, starting out in the relatively non-conflictual area of the free movement of goods. She then presents case studies on different directives and regulations, showing how case law

⁵⁵ D S Martinsen, *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union* (Oxford University Press, 2015).

⁵⁶ Martinsen, note 55 above, p 180.

⁵⁷ Bulmer, S J, ‘Institutions and Policy Change in the European Communities: The Case of Merger Control’ (1994) 72(3) *Public Administration* 423.

⁵⁸ M Blauburger and M Weiss, ‘If You Can’t Beat Me, Join Me!’ How the Commission Pushed and Pulled Member States into Legislating Defence Procurement’ (2013) 20(8) *Journal of European Public Policy* 1120.

⁵⁹ Schmidt, note 7 above.

interpreting the Treaty strongly constrained the EU legislator. The failure of the EU legislature to respond to the *Laval* and *Viking* cases with the so-called Monti II regulation as well as to codify the Court's case law on direct company taxation show the limits of driving integration via the Court. At times, then, a very fragmented regulatory picture results as case law describes limits to national policies but no consensus is possible on how to embed this case law in a common EU policy.

In sum, the research literatures of both legal and political sciences discuss the extent to which the CJEU's fundamental freedoms jurisprudence binds the secondary lawmaker controversially. It is fair to conclude that case law never fully dictates the content of secondary law. But it nevertheless changes the rules of the political game and often steers secondary law in certain directions. For us, the importance of the CJEU lies in its mandate to allow for European or domestic institutional change that could not be enacted by the means of politics alone. That said, we close this part of the review and turn to potential countermeasures.

III. REFORM OPTIONS

In the following Sections, we will consult those parts of the literature that deal with reform options. We will distinguish options targeting institutional procedures of the Court (III.A) from attempts to change the status and content of material EU law, in order to end the privilege of economic freedoms in EU jurisprudence (III.B–III.D).

A. *Institutional Reforms*

Suggestions for institutional reform of the European judicial sphere have a long tradition and are still part of the EU reform debate. For example, given the breadth of the CJEU's jurisdiction and the lack of appeal in all those areas where the General Court has no mandate,⁶⁰ there have been considerations of institutionalising a greater judicial specialisation, either through specialised courts, or through more specialised chambers. The hope is that greater specialisation would make the Court more attentive to the negative repercussions of its case law. A chamber specialised in social matters, for example, might be prone to more sensitivity with regard to the autonomy of social protection and the wage-bargaining regimes of the Member States.

Specialised chambers would reform the CJEU without fundamentally altering the logic of the European judicial system. The same holds true for the Rasmussen's famous call for permitted and published dissenting opinions on the side of the judges.⁶¹ Much more fundamental is the idea, first voiced by Weiler, of complementing the

⁶⁰ The General Court is mainly responsible for individuals' judicial review against EU administrative or legislative acts, competition law, as well as for employment matters regarding EU employees.

⁶¹ H Rasmussen and L N Rasmussen, 'Comment on Katalin Kelemen—Activist EU Court Feeds on the Existing Ban on Dissenting Opinions: Lifting the Ban is Likely to Improve the Quality of EU Judgments' (2013) 14(8) *German Law Journal* 1373. On the pros and cons of dissenting opinions in general: K Kelemen, 'Dissenting Opinions in Constitutional Courts' (2013) 14(8) *German Law Journal* 1345.

CJEU with an additional ‘Constitutional Council’,⁶² ‘European High Court’,⁶³ or ‘Court of Appeal’.⁶⁴ This Court, according to Weiler, should have jurisdiction over issues of competence only. Any EU institution, any Member State and the EP should have the right to refer cases to it. The president of the new Court should be the president of the CJEU, and its judges should be sitting members of the highest Courts of the Member States. This Appeals Court would be superior to the CJEU and should be able to revoke the CJEU’s rulings.

The debate about such ideas revived after the German Constitutional Court’s ruling on the European Central Bank’s asset purchase programs in 2020.⁶⁵ In this context, together with Sarmiento, Weiler updated his proposal.⁶⁶ The authors propose a new appeal procedure within the province of the CJEU, with a ‘Mixed Grand Chamber’ being composed of six CJEU judges and six judges from the highest Courts of the Member States, presided by the CJEU president. As in the earlier proposal, the new chamber would only deal with conflicts over the distribution of competences, and a decision validating a contested European measure would have to be supported by at least eight or nine judges.

In the context of our review on the fundamental freedoms, a decisive question would be whether a narrow (empowerment to legislate) or a wide definition of competence conflicts would apply. If Sarmiento and Weiler’s ‘Mixed Grand Chamber’ would only deal with the supposed overstretching of the right to legislate, fundamental freedoms conflicts of the *Laval* kind would be out of its scope; if it would deal with all kinds of authorisation conflicts, its case load may become huge. Another question would be the purpose of the Chamber if European and national constitutional law clearly provide different answers to a problem, given that a ‘meta law’ above them does not exist. In such constellations, as Sölter has convincingly argued,⁶⁷ the compromise to be found can only be of a political kind—and we may ask why judges should be the architects of such compromises anyway. In line with such considerations, Scharpf has presented an alternative institutional solution by arguing for a political rather than constitutional check of CJEU decisions. He suggested that if Member States were seriously negatively affected by a ruling, they should be allowed to turn to the European Council and should have to accept the ruling only if a qualified majority of Member States supports the interpretation of the Court.⁶⁸

Given the rigidity of the constitutional structure of the EU, institutional reforms of the CJEU are, on the one hand, difficult to accomplish. On the other hand, reforms

⁶² J H H Weiler, *The Constitution of Europe* (Cambridge University Press, 1999), p 322.

⁶³ Horsley, note 8 above, p 282.

⁶⁴ K Weber and H Ottmann, *Reshaping the European Union* (Nomos, 2018), pp 180–81.

⁶⁵ 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915.

⁶⁶ D Sarmiento and J H H Weiler ‘The EU Judiciary after *Weiss*’ (*Verfassungsblog*, 2 June 2020), <https://verfassungsblog.de/the-eu-judiciary-after-weiss>.

⁶⁷ N Sölter, ‘Ein Schiedsgericht für die Gerichte?’ (*Verfassungsblog*, 15 June 2020), <https://verfassungsblog.de/ein-schiedsgericht-fuer-die-gerichte>.

⁶⁸ Scharpf, note 19 above, pp 198–200.

have indeed occurred in the past. The establishment of the General Court in 1989 as a Court of First Instance was the result of such a reform, responding to the increase in case load. The saga of reforming the General Court, however—ending in the doubling of the number of judges in order to achieve the backing of Member States, while abolishing the Civil Service Tribunal as a specialised court—surely limits the Member States’ enthusiasm concerning further negotiations about reforms of the court system.⁶⁹

Would institutional reforms of the judicial system effectively curb the over-constitutionalisation of the common market rules? Both Weiler and Scharpf suggest (partly) intergovernmentally composed appeal bodies. This idea has a comprehensive logic: while intergovernmental and supranational institutions balance each other out in the European legislative and executive branches, the supranational CJEU lacks an intergovernmental counterbalance.⁷⁰ A more balanced European judiciary may consequentially prevent or slow down further extensive interpretations of the market freedoms. But it would, at the most, lead to a very incremental (if any) *retrospective* correction of the CJEU’s interpretation of the fundamental freedoms that has emerged over decades. Even the introduction of an Appeal Court might therefore enact few changes to the over-constitutionalisation of the common market rules.

Recently, Scharpf suggested a more limited, procedural change. He proposed tackling the extensive development of case law by letting the preliminary references and infringement procedures apply to cases of potential non-compliance with secondary law only, but not to cases that concern the policy goals of the TFEU (Titles I–IV, VI, and VII).⁷¹ If litigation was only allowed to ask whether national law conforms to EU secondary law, the interpretation of the fundamental freedoms could no longer dynamically undermine national regulations, and push European integration along.

We conclude from this Section of the review that solid ideas for institutional reforms exist. But the reforms would rather not turn back the over-constitutionalisation discussed in this literature review. They could, however, protect the status quo of Member States’ regulatory competence to legislate. If Member States can agree on a more autonomy-sensitive reading of the market freedoms, they may be better off to write it directly into the treaties, a possibility to which we turn now.

⁶⁹ F Dehousse, *The Reform of the EU Courts (II). Abandoning the Management Approach by Doubling the General Court*, 83 *Egmont Paper* (Egmont, 2016). See also A Alemanno, L Pech, and F Dehousse, ‘EU Judge Dehousse’s Farewell Address, with a Short Introduction by Professors Alemanno & Pech’ (*Verfassungsblog*, 21 October 2016), <https://verfassungsblog.de/eu-judge-dehousse-farewell-address-with-a-short-introduction-by-professors-alemanno-pech>.

⁷⁰ M Höreth, *Die Selbstautorisierung des Agenten. Der Europäische Gerichtshof im Vergleich zum U.S. Supreme Court* (Nomos, 2008), pp 309–66.

⁷¹ F W Scharpf, ‘De-Constitutionalisation and Majority Rule: A Democratic Vision for Europe’ (2017) 23(5) *European Law Journal* 315, p 322.

B. Re-defining the Fundamental Freedoms

A peculiarity of the next literature parts is that they largely originate from German authors. This may be due to the prominent role of the German Constitutional Court ('GCC') within the national polity and within the EU. Its series of the so-called *Solange* rulings⁷² on the limits of European supremacy were an important stimulus for the CJEU to develop its own fundamental rights jurisprudence. The GCC seems to have stimulated a more lively academic debate on the legitimate protection of legislative autonomy than other constitutional courts have done elsewhere.

Along with his normative criticism of over-constitutionalisation and its impact on democracy, Grimm suggests de-constitutionalising European law by transferring the TFEU from primary into secondary law.⁷³ Although Grimm's suggestion does not specifically target the market freedoms, they would be part of the transfer. Let us therefore consider the pros and cons of that idea. The advantage would be that any re-interpretation of the fundamental freedoms would, from now on, be nothing else than a re-interpretation of secondary law. Consequently, whenever the way the CJEU interprets the fundamental freedoms becomes contentious, the EU legislator would undisputedly have the mandate to correct this case law, irrespective of the extent of the 'fundamental freedoms rigidity' of secondary law discussed under Section II.C. The enlarged probability of correction alone should encourage less expansive common-market jurisprudence.⁷⁴ However, all problems which derive from the Commission's monopoly of legislative initiation and from the veto points inside the political system of the EU would remain in place.⁷⁵

Clearly, changing the Treaty to such a significant extent has a low prospect to be realised. But are there valid counterarguments against the substance of the idea? The proposal would place the protection of the common market entirely into the hands of the European legislator. Because most of the CJEU's fundamental market *acquis* has been codified in European or national secondary law or both,⁷⁶ it would apply until the (EU or Member States') legislators impose changes. A wave of legal uncertainty among market participants needs not be feared. For the moment, the reform would only imply that national market regulations could no longer be individually

⁷² The series started in 1974 with *Solange I*, BVerfGE 2 BvL 52/71. See M Kumm, 'Who Is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice' (1999) 36(2) *Common Market Law Review* 351.

⁷³ Grimm, note 6 above, p 18, pp 36–37. Scharpf makes a similar suggestion in: F W Scharpf, 'After the Crash: A Perspective on Multilevel European Democracy' (2015) 21(3) *European Law Journal* 384, p 403.

⁷⁴ M A Pollack, 'Delegation, Agency, and Agenda Setting in the European Community' (1997) 51(1) *International Organization* 99; W Mattli and A-M Slaughter, 'Revisiting the European Court of Justice' (1998) 52(1) *International Organization* 177.

⁷⁵ Scharpf, note 71 above, p 323.

⁷⁶ Schmidt, note 7 above, chs 3–4.

challenged. Remembering that trans-border rights are very comprehensive in the EU, particularly in comparison to the US,⁷⁷ and that the enlarged Union of 27 Member States requires more rather than less regulatory diversity, there are good arguments for this solution. But less invasive alternatives could be available.

We have seen in Section II.A that the CJEU re-interpreted the fundamental freedoms by replacing the ban on the discrimination of foreign-market participants with a ban on the restriction of the common market. This re-interpretation allowed the Court to tackle a much wider range of potential protectionisms among the Member States, however, at the cost of blurring the line between protecting the common market and liberalising matters internal to the Member States with only modest (if any) significance for trade. We may therefore ask whether Pandora's Box may be closed today the same way as it was opened back in the 1970s: by correcting the interpretation of fundamental freedoms as bans on restriction and going back to their normative meaning as bans on the discrimination of foreign market participants.

We are not aware of academic authors who ask the Member States to write such a correction into the treaties, though they could put down in the TFEU that the market freedoms only target unequal treatment of internal and foreign market participants.⁷⁸ Rather, the CJEU judges are the addressees of this idea. Kingreen,⁷⁹ for example, argues that the fundamental freedoms *are* essentially bans on direct and indirect discrimination and that their interpretation as bans on restrictions even if equally imposed upon internal and foreign market participants has always been a misconception. He therefore asks the CJEU for judicial self-correction.⁸⁰

Concerning the potential effectiveness, first, the *acquis* would change only with new legislation because of the extent of codification. A wave of uncertainty among market participants would not emerge. The option would mainly curb potential future clashes between Member States' market-correcting regulations and the principle of non-restriction. However, second, the effects of the reform may remain below the reformers' aims because of the concept of indirect discrimination, without which discrimination bans cannot be effective.⁸¹ Valta argues that most cases of restriction can also be modelled as cases of—widely interpreted—indirect discrimination, which could allow the Court to often stick to its extensive interpretation of the fundamental freedoms.⁸² The effectiveness of the reform would, therefore, require significant empathy on side of the CJEU. It would have to recognise, accept, and implement the intentions of the reformers—but this caveat is likely true for any reform scenario.

⁷⁷ C Barnard, 'Restricting Restrictions: Lessons for the EU from the US?' (2009) 68(3) *Cambridge Law Journal* 575; Scharpf, note 71 above.

⁷⁸ Also, the treaty partners could complement the reform with a legal interpretation aid in the form of a treaty protocol, in order to make the intentions of the 'masters of the treaty' as clear as possible.

⁷⁹ Kingreen, note 9 above, pp 532–38.

⁸⁰ See also J Heuschmid, 'Der Arbeitskampf im EU-Recht' in W Däubler (ed), *Arbeitskampfrecht: Handbuch für die Rechtspraxis* (Nomos, 2018).

⁸¹ G Davies, *Nationality Discrimination in the European Internal Market* (Kluwer, 2003), p 28.

⁸² S Valta, *Grundfreiheiten im Kompetenzkonflikt* (Duncker & Humblot, 2013), pp 107ff.

C. *Re-balancing Fundamental Freedoms and Social Rights*

Another set of reform proposals suggests altering the relationship between fundamental freedoms and social rights. Such a proposal is the Social Progress Protocol that was drafted by the European Trade Union Confederation ('ETUC') in direct reaction to *Viking* and *Laval*. Among the proponents in the literature are Iossa,⁸³ Hayes et al,⁸⁴ Bücken,⁸⁵ and Bruun.⁸⁶ The proposed protocol text underwent some revisions after its first presentation in March 2008,⁸⁷ and has been politically supported by the S&D political group in the EP⁸⁸ and the Social Democratic Parties of many EU Member States.⁸⁹ The primary aim of the proposal is to shield the autonomy of collective bargaining from the European fundamental freedoms. Decisive for this is Article 3: 'Nothing in the treaties, in particular economic freedoms, shall have priority over fundamental social rights. In case of conflict fundamental social rights shall take precedence'.

Thus, the proposal assumes an implicit hierarchy among fundamental freedoms and social rights and aims at placing the latter above the former. Critics have argued that the proponents are asking for 'super-fundamental rights', supreme above all other rights that are protected by European law.⁹⁰ This is an important point because the CJEU did not, neither in *Viking* and *Laval* nor anywhere else, declare the market freedoms to be superior to social or other fundamental rights, although the outcomes resemble such a hierarchy.⁹¹ Rather, in *Viking* and *Laval*, the Court had let the exercise of the right to strike fall within the scope of application of the fundamental

⁸³ A Iossa, 'Protecting the Right to Collective Action and Collective Bargaining: Developments and New Perspectives at European and International Level' in A Bücken and W Warneck (eds), *Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert* (Nomos, 2011), pp 309–11.

⁸⁴ L Hayes, T Novitz, and H Reed, 'Applying the *Laval* Quartet in a UK context: Chilling, Ripple and Disruptive Effects on Industrial Relations' in *Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert*, note 83 above.

⁸⁵ A Bücken, 'A Comprehensive Social Progress Protocol Is Needed More than Ever' (2013) 4(1) *European Labour Law Journal* 4.

⁸⁶ N Bruun, 'Economic Governance of the EU Crisis and Its Social Policy Implications' in N Bruun, K Lörcher, and I Schömann (eds), *The Lisbon Treaty and Social Europe* (Hart, 2012).

⁸⁷ The current version is to be found here: https://www.etuc.org/sites/default/files/social_progress_protocolEN_1.pdf.

⁸⁸ See 'Social Europe Is Not a Slogan. The Social Pillar Must Bring Concrete Solutions to Our Citizens, Say S&Ds' (*S&D*, 15 November 2017), <http://www.socialistsanddemocrats.eu/newsroom/social-europe-not-slogan-social-pillar-must-bring-concrete-solutions-our-citizens-say-sds>.

⁸⁹ For the German example, see https://www.spdfraktion.de/system/files/documents/web-pos-21-2016-soziales_europa.pdf and <https://www.spd-europa.de/pressemitteilungen/ein-erster-schritt-aber-lange-nicht-hinreichend-3248>.

⁹⁰ See for a critical view T Kingreen, *Soziales Fortschrittsprotokoll: Potenzial und Alternativen* (Bund, 2014), p 61; C Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future' (2014) 67(1) *Current Legal Problems* 199, p 225.

⁹¹ Joerges and Rödl, note 27 above; P Syrpis and T Novitz, 'Economic and Social Rights in Conflict: Political and Judicial Approaches to Their Reconciliation' (2008) 33(3) *European Law Review* 411.

freedoms, and then proceeded as usual: it applied the *Dassonville*⁹² formula on common market restrictions and performed the *Gebhard*⁹³ proportionality test. It is therefore unclear how much a ban on subordination⁹⁴—‘shall [never] have priority over’—could really change.

The experience with the Charter of Fundamental Rights is worth considering here. Not only does the Charter honour the right of collective action in Title IV, it also includes several other rights to solidarity. Being binding on all acts of the European institutions since 2009, the Charter could in principle have brought the change to the interpretation of the fundamental freedoms that the Social Progress Protocol aims at—but it turned out that the introduction of the Charter did not alter the relationship between fundamental rights and fundamental freedoms.⁹⁵ Robin-Olivier⁹⁶ sees an ‘inequality of force’ and criticises that the CJEU has even further strengthened the pro-market bias by referring to the Charter’s ‘freedom to conduct a business’. It is, thus, unlikely that additional strengthening of the normative meaning of the social rights could curb the interpretation of the fundamental economic freedoms.

Akin to the Social Progress Protocol, another reform suggestion⁹⁷ is to exclude areas from the scope of application of the fundamental freedoms. Examples for this already exist. Thus, the free movement of workers in Article 45(4) TFEU does not apply to employees in public services. In the *Keck*⁹⁸ decision, the Court ruled that sales methods are ‘outside the scope’⁹⁹ of the ban on restrictions of the inner-European products markets.¹⁰⁰ Interestingly, in *Keck*, the Court explicitly underlined its intention to curb the liberalisation potential of the fundamental freedoms: ‘In view of the increasing tendency of traders to invoke [the free movement of goods] as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on

⁹² *Procureur du Roi*, note 3 above.

⁹³ *Reinhard Gebhard*, note 11 above.

⁹⁴ Bücken interprets the Social Progress Protocol not as the demand for ‘super fundamental rights’ but as a ban on subordination. Bücken, note 85 above, p 15.

⁹⁵ Trstenjak and Beysen, note 33 above.

⁹⁶ Robin-Olivier, note 37 above.

⁹⁷ Further authors who share the general aim of a rebalancing of common market freedoms and social rights include Garben (note 20 above), who calls for a ‘political awakening’ (pp 52, 60) in the form of a political re-balancing of the judge-made relationship between the common market rules and social matters in the EU. Similarly, Reynolds, note 12 above, p 644, calls to tackle the ‘structural disadvantage’.

⁹⁸ *Keck and Mithouard*, C-267/91 and C-268/91, EU:C:1993:905.

⁹⁹ *Ibid*, para 17.

¹⁰⁰ According to an alternative reading of *Keck*, the Court argued that ‘the legal commitment to free trade appears to entail the abolition of discrimination, or protectionism, but no more than this’. In this interpretation, the ECJ delivered exactly the ‘back to non-discrimination’ decision which Kingreen had asked for (compare Section III.B). See S de Vries, ‘Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice’ (2013) 9(1) *Utrecht Law Review* 169.

this matter'.¹⁰¹ *Keck* exceptions must not be confused with justifications on the level of the *Cassis* test: If the respective regulations are outside the scope of the fundamental freedoms, there is no need for justification.

Similarly, matters such as collective bargaining—the contested matters in *Viking* and *Laval*¹⁰²—could in principle be exempted from the scope of application of the fundamental freedoms.¹⁰³ After all, in its *Albany*¹⁰⁴ decision the Court has already excluded collective bargaining from the application of European competition law; a treaty change, likewise, could exclude it from the scope of application of the fundamental freedoms. Bast et al¹⁰⁵ and Heuschmid,¹⁰⁶ taking collective bargaining as an example, have made detailed suggestions regarding the possible wordings of such exemptions as well as their potential positioning within the TFEU. Horsley makes a similar point, asking the Member States to make clearer statements about areas which shall be excluded not only from the usual EU policymaking but also from what he calls the CJEU's 'direct policymaking'.¹⁰⁷

In sum, the essence of the option is to ask the treaty partners to steer the application range of the market freedoms politically rather than to leave the definition of '*Keck* exceptions'¹⁰⁸ or '*Albany* exceptions'¹⁰⁹ in the discretion of judges.¹¹⁰ For that purpose, the treaty partners would have to write a negative list of matters that shall remain outside their scope, or perhaps even better, write a positive list of what shall remain within. However, as for all the other reform options discussed so far, a change of the Treaty would be necessary. Given that this is a high barrier,¹¹¹ it is useful to end this review with possibilities that leave the Treaty untouched.

¹⁰¹ Ibid, para 14.

¹⁰² Notes 21 and 22 above.

¹⁰³ Trade unionists argued in the context of *Viking* and *Laval* that collective actions *are* actually excluded from the scope of application of the market freedoms, given that they are also excluded from the political competences of the European legislator—an argument that clearly did not succeed. See Azoulai, note 13 above, p 1341.

¹⁰⁴ *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, C-67/96, EU:C:1999:430.

¹⁰⁵ J Bast, F Rödl, and J P Terhechte, 'Funktionsfähige Tarifvertragssysteme als Grundpfeiler von Binnenmarkt und Währungsunion' (2015) 48(8) *Zeitschrift für Rechtspolitik* 230.

¹⁰⁶ Heuschmid, note 80 above, p 162.

¹⁰⁷ Horsley, note 8 above, pp 279–80.

¹⁰⁸ A Portuese, 'Principle of Proportionality as Principle of Economic Efficiency' (2013) 19(5) *European Law Journal* 612, p 624; A Kaczorowska, 'Gourmet Can Have His *Keck* and Eat It!' (2004) 10(4) *European Law Journal* 479, p 480; M Derlen and J Lindholm, 'Article 28 E.C. and Rules on Use: A Step towards a Workable Doctrine on Measures Having Equivalent Effect to Quantitative Restrictions' (2009) 16(1) *Columbia Journal of European Law* 191, pp 204–05.

¹⁰⁹ J Stuyck, 'EC Competition Law After Modernisation: More than Ever in the Interest of Consumers' (2005) 28(1) *Journal of Consumer Policy* 1, p 11; M Freedland and N Kountouris, 'Some Reflections on the "Personal Scope" of Collective Labour Law' (2017) 46(1) *Industrial Law Journal* 52, p 60.

¹¹⁰ Compare also P C de Sousa, 'Negative and Positive Integration in EU Economic Law: Between Strategic Denial and Cognitive Dissonance?' (2012) 13(8) *German Law Review* 979, p 1010.

¹¹¹ L Klenk, *Die Grenzen der Grundfreiheiten* (Mohr Siebeck, 2020), p 412.

D. Contesting Over-constitutionalisation

In principle, three types of actors could challenge the over-constitutionalisation of the common market rules within the existing primary law framework: the CJEU judges themselves, other actors in the multi-level European Court system, and the European legislator.

Focusing on CJEU judges, Horsley asks the Court to recognise the limits of the EU Treaty's framework in its judicial interpretations.¹¹² In principle, all claims that the CJEU's reading of the fundamental freedoms has become too extensive can be understood as requests for judicial self-correction and more self-restraint after that correction. In questions of detail, such self-correction can always occur, at the CJEU no less than elsewhere.¹¹³ But to reverse the over-constitutionalisation of the common market rules would be such a far-reaching self-correction, decades after *Dassonville* and *Cassis de Dijon*, and more than one decade after *Laval* and *Viking*, that it would contradict the incrementalism of case-law development. At least, we lack any indication that such a revolutionary judicial U-turn may be forthcoming.

It is more likely that impulses for change occur from within the broader judicial system. The CJEU depends on the integrated European court system, where national courts pass on preliminary references to enquire about the interpretation of European law and where under the 'acte claire' doctrine, national courts independently apply European law alongside their national law. While there is no data on the independent application of EU law in national proceedings, the literature has shown that requests for preliminary rulings differ widely among the Member States.¹¹⁴ In general, such differences motivate scholars to call for a more comprehensive training of national judges, in order to assure that supreme European law is uniformly applied throughout the EU.¹¹⁵ This assumes that despite all heterogeneity among the Member States, uniform rules applied throughout and targeting increasing areas of national legal orders can make for a successful integration.

Davies has recently forwarded a very different argument in favour of interpretative pluralism.¹¹⁶ Because constitutional courts have to be embedded into a political context, and the CJEU is hardly able to recognise and factor in the implications of its rulings in 27 different national jurisdictions, he argues that national courts have a critical duty towards the CJEU.¹¹⁷ If the case law of the CJEU leads to salient political

¹¹² Horsley, note 8 above, reform proposal no 1, ch 7.

¹¹³ Among many others: R A Posner, 'The Meaning of Judicial Self-Restraint' (1983) 59(1) *Indiana Law Journal* 1. For the CJEU, see in particular the literature on *Keck*.

¹¹⁴ M Wind, D S Martinsen, and G P Rotger, 'The Uneven Legal Push for Europe. Questioning Variation When National Courts go to Europe' (2009) 10(1) *European Union Politics* 63.

¹¹⁵ J A Mayoral, T Nowak, and U Jaremba, 'Why More Needs to Be Done to Improve National Judges' Knowledge of EU Law' (*LSE Blog*, 18 June 2015), <http://blogs.lse.ac.uk/europpblog/2015/06/18/why-more-needs-to-be-done-to-improve-national-judges-knowledge-of-eu-law>.

¹¹⁶ G Davies, 'Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-Constitutionalisation' (2018) 24(6) *European Law Journal* 358.

¹¹⁷ See also Horsley, note 8 above, pp 280–83, and Klenk, note 111 above, pp 419–22.

problems in a Member State, courts need to contest these implications, and have to critically challenge the case law before integration as such becomes at stake.¹¹⁸ In principle, such challenges could also include the ‘nuclear option’ of constitutional courts declaring CJEU rulings as domestically non-binding. But such incidents are extremely rare for good reasons, and none of the few cases so far was a fundamental freedoms case. We are also not aware of proponents of the ‘nuclear option’ in jurisprudence or political science who specifically argue that constitutional courts should declare certain ECJ decisions on the market freedoms as non-binding.

Another initiator of change within existing primary law may be the European legislator. Remember that the extent to which the market freedoms legally bind the European legislator is contested in the literature, as discussed under Section II.C. For those who argue that the market freedoms tightly bind the secondary lawmaker, the opinion of Advocate General Sánchez-Bordona in the legal dispute over the reform of the Posted Workers Directive must have come as a surprise in the year 2020: harmonisation directives, he argued, are allowed to impose common market restrictions that would violate the freedom of services if single member states imposed them.¹¹⁹ The CJEU has, so far, largely avoided declaring European regulations as violations of the ban on restrictions, as long as the regulations were non-discriminatory.¹²⁰ Although the contours of the respective degrees of freedom remain unclear until today, these observations encourage the conclusion that secondary law *has* significant, but yet to be specified, legal leeway vis-à-vis the fundamental freedoms. As Davies criticises, ‘if the legislature fails to punch its weight in the European Union, then that must be at least as much to do with its own choices: there has been little attempt to autonomously steer the course of integration, at least of economic integration’.¹²¹

But remember that procedural forces bind the legislator, too. Practically, political actors who aim at contesting extensive interpretations of the fundamental freedoms on the side of the Court will often find themselves on the defensive, due to the Commission’s monopoly to initiate legislation, due to the multitude of supermajority requirements and veto points in the political system of the EU, and due to the fact that the new status quo of the extensive interpretation on the side of the Court, rather than

¹¹⁸ In this context, a large literature which we cannot discuss in detail in this review deals with the ‘final say’ that at least eight national Constitutional Courts claim for themselves when European decisions clash with constitutional law at the Member State level. See, among many others: A Bogdandy and S Schill, ‘Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty’ (2011) 48(5) *Common Market Law Review* 1417, p 1433.

¹¹⁹ Opinion of AG Sánchez-Bordona in *Poland v the European Parliament and the European Council*, C-626/18, EU:C:2020:394, para 34. At the time of writing, the case was not decided by the ECJ.

¹²⁰ Sørensen, note 43 above; Mortelmans, note 42 above, pp 1324–25; C Teichmann, ‘Überprüfung von Sekundärrecht am Maßstab der Grundfreiheiten’ in P C Müller-Graff, S Schmah, and V Skouris (eds), *Europäisches Recht zwischen Bewährung und Wandel – Festschrift für Dieter H. Scheuing* (Nomos, 2011), pp 747–48.

¹²¹ Davies, note 46 above, p 1606. He goes on (p 1607): ‘Serious thought about what a market should be, and indeed what a union of peoples should be, beyond the banalities of ever more, ever closer, ever freer, has not emerged from the EU legislative institutions’.

the status quo ante will always be the fall-back option (compare Section II.C).¹²² We should nevertheless not confuse the practical rigidity of the political system of the EU with a potential constitutional ban on the political steering of the scope of the market freedoms by the means of secondary law. Political rigidity can be overcome under conditions of exceptional politicisation, as it happened in the case of the reform of the Posted Workers Directive.¹²³

In sum, the over-constitutionalisation of European law places significant responsibility in the hands of the CJEU. Nevertheless, if the EU legislator and national courts do not blindly accept the supremacy of European case law but critically reflect what it means for the political order at the European and the Member States' levels, the extensive interpretation of the fundamental freedoms can be challenged.

IV. CONCLUSION

With the announcement of the 'Conference on the Future of Europe' process at the end of 2019, the Commission and the European Parliament have opened up a debate about reforms of the EU architecture that shall last for at least two years. A first attempt to start such a debate was the Commission's 'White Paper on the Future of Europe', already published in 2017.¹²⁴ It is striking that the discussions which followed the White Paper were almost entirely focused on the distribution of political competences among the EU and its members. The EU, however, does not only act by passing legislation. The discussion remained largely silent with respect to European actions which proceed behind the backs of the European and national legislators. The constitutionalisation and extensive interpretation of the European market freedoms are among the reasons why so many European *de facto* policies are judge-made. Rather than just pushing for 'more integration', this kind of activism constrains political choices in fields with only modest significance for European integration. It also undermines majoritarian decision making and thereby political participation.

This constellation is neither God-given nor written in stone. But how can the fundamental freedoms become less constraining? The interdisciplinary research literature on European integration may offer help, but the respective literature strands are difficult to access. Specifically, to our knowledge, potential ways out of the over-constitutionalisation of the common market rules have never been systematised. To identify and critically evaluate reform options has been the purpose of this review. As we have shown, reform ideas are available that, if implemented, could correct the ever-more extensive interpretation of the European fundamental freedoms, without

¹²² Scharpf, note 19 above.

¹²³ What we would nevertheless rule out is that a 'negative list' on the scope of application of the fundamental freedoms, such as the one discussed in Section III.C, could be introduced in secondary law. Such a list would have to be placed where the fundamental freedoms are placed, that is, in the common market chapters of the TFEU.

¹²⁴ European Commission, *White Paper on the Future of Europe: The Way Ahead* (European Commission, 2017).

being overly invasive and therefore without endangering the transnational access to the inner-European market.

The reform options discussed in this review differ with respect to their invasiveness, persuasiveness, and probability of being realised. Complete overhauls of the European judicial systems are particularly unlikely to succeed. In our view, restricting litigation via infringement procedures or preliminary references to secondary law, narrowing the scope of the fundamental economic freedoms to the equal treatment of national and EU economic actors, and defining areas such as collective bargaining that shall be outside the range of application of the market freedoms are particularly promising reform concepts. But they all require Treaty changes. If no respective window of opportunity opens up, a better oversight by Member State courts and a more courageous political testing of the ‘fundamental freedom rigidity’ of European secondary law are the only options left. But even raising the academic and public awareness towards the power of the Court’s case law would be a step forward.

Reforms of the fundamental freedoms have the potential of enlarging the democratic discretion at both the Member State and the European levels—a positive-sum game that could serve the legitimate call for a better autonomy protection in sensitive policy fields, and that could make European elections more meaningful at the same time. Enlarging the EU reform debate towards such options would therefore also break-up the unproductive split between ‘integrationists’ and ‘EU sceptics’. In general, careful interdisciplinary work at the intersection of jurisprudence and political science can bring about results that offer orientation in the complex debates about the future of the European Union.