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The Wall Around EU Fundamental Freedoms: the Purely Internal Rule at the Forty-Year Mark

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Abstract: 'Purely internal situations' are sets of facts entirely confined within a single Member State. According to the 'purely internal rule', introduced by the European Court of Justice (ECJ) in 1979, purely internal situations lie outside the scope of the internal market fundamental freedoms and of other EU provisions having a cross-border scope. On the fortieth anniversary of the jurisprudential genesis of the purely internal rule, this article seeks to examine its origins, rationale, and evolution, by analyzing the most relevant patterns in the over 250 preliminary rulings handed down in disputes involving purely internal situations. This survey will enable an assessment of the systemic significance of the purely internal rule and of the consequences that abolishing that rule would have for the European integration process.

I. Introduction

In 1979, Pink Floyd released their universally-acclaimed album *The Wall*. That year, the European Court of Justice (ECJ) too erected an invisible 'wall' around the internal market fundamental freedoms: the so-called 'purely internal rule'.

'Purely internal situations' are sets of facts that are entirely confined within a single Member State. As per the 'purely internal rule', those situations lie outside the scope of the internal market fundamental freedoms. This is consistent both with the wording[1]

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[1] Arts 30, 34, and 35 TFEU concern the free movement of goods '*between* Member States'; Art. 49 TFEU provides for the right of establishment 'of nationals of a Member State in the *territory of another Member State*'; Art. 56 TFEU sets out the freedom to provide services 'in respect of nationals of Member States who are established *in a Member State other* than that of the person for whom the services are intended'; Art. 63 TFEU provides for the free movement of capital and payments '*between* Member States' (emphasis added).

and the goal of those freedoms,[2] ie the liberalization of trade *between* Member States rather than *within* each of them.[3]

According to a recent survey, over 190 million Union citizens have never set foot in a Member State other than their own.[4] Because of the purely internal rule, those citizens cannot, in the absence of other cross-border elements, rely on the provisions of the Treaty on the Functioning of the EU (TFEU) on free movement within the internal market. More importantly, absent other connecting factors with 'the scope of [EU] law'[5] or the 'implementation of EU law'[6]—such as the transposition of a directive[7]—those citizens are not protected by fundamental rights as general principles of EU law[8] or as codified by the Charter of fundamental rights.[9]

However, it has not always been that way. For instance, in the famous *Costa v ENEL* ruling of 1964,[10] concerning the compatibility of Italy's electricity nationalization statute with the EEC Treaty's rules on, inter alia, commercial monopolies and the right of establishment, neither the Italian government—which had argued that the preliminary reference was 'absolutely inadmissible'—nor the ECJ judges—who ruled that the reference was admissible—seemed to take into consideration that all the facts of the case were confined to Italy.

The purely internal rule, indeed, made its appearance in the ECJ jurisprudence with the *Saunders* judgment of March 1979.[11] On the fortieth anniversary of the jurisprudential genesis of that rule, this article seeks to examine its origins,

[2] Joined Cases C-159/12 to C-161/12, *Alessandra Venturini v ASL Varese and Others (C-159/12), Maria Rosa Gramegna v ASL Lodi and Others (C-160/12)*, and *Anna Muzzio v ASL Pavia and Others (C-161/12)*, Opinion of Advocate General Wahl, EU:C:2013:791, para. 27; A Tryfonidou, *Reverse Discrimination in EC Law* (Alphen aan den Rijn: Kluwer Law, 2009), 60.

[3] Cf. Case C-292/92, *Ruth Hünermund v Landesapothekerkammer Baden-Württemberg*, Opinion of Advocate General Tesauro, EU:C:1993:863, para. 1.

[4] See Special Eurobarometer no 414, 2014, 130–1.

[5] Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, EU:C:1991:254, para. 42.

[6] See Art. 51 (1) of the Charter of fundamental rights. See generally F Fontanelli, 'The Implementation of European Union Law by Member States Under Article 51(1) of the Charter of Fundamental Rights' (2014) 20 Columbia Journal of European Law, 194–247.

[7] See Case C-516/17, *Spiegel Online GmbH v Volker Beck*, EU:C:2019:625, para. 20.

[8] See Case C-299/95, *Friedrich Kremzow v Republik Österreich*, EU:C:1997:254, paras 16–19 (holding that the ECJ could not provide guidance as to the compatibility with fundamental rights as general principles of EU law of national legislation that was 'not designed do secure compliance with rules of [EU] law' in a situation that, because of the lack of cross-border elements, did not 'fall within the field of application of [EU] law')

[9] See Case C-27/11, *Anton Vinkov v Nachalnik Administrativno-nakazatelna deynost*, EU:C:2012:326, paras 59–60 (declaring the inadmissibility of a preliminary reference seeking guidance as to the compliance with the Charter of fundamental rights of national legislation that did not constitute 'a measure implementing EU law' or was 'connected in any other way with EU law' in the course of proceedings involving a 'purely internal' dispute).

[10] Case 6/64, *Flaminio Costa v E.N.E.L.*, EU:C:1964:66.

[11] Case 175/78, *The Queen v Vera Ann Saunders*, EU:C:1979:88. For an assessment of the ECJ's earlier mentions of the purely internal rule, see the discussion in n 76 below.

rationale, and evolution. This will be accomplished by analyzing the most relevant patterns in the over 250 preliminary rulings handed down by the ECJ in disputes involving purely internal situations.[12]

To that end, Section II will outline the origins of the purely internal rule, and of the complementary notion of 'cross-borderness', by looking at the inception and development of international trade law, at the ECJ's internal market jurisprudence of the first two decades, at the conundrums inherent in *Cassis de Dijon*, and at the solutions provided by introduction of the purely internal rule. This analysis will be carried out against the background of the three major philosophies of economic integration: the international, federal, and national market models.[13]

The following three sections will examine the three approaches to the purely internal rule adopted by the ECJ over the last four decades: the 'traditional' approach (Section III), the 'expansive' approach (Section IV), and the 'reflective' approach (Section V). It is worth emphasizing that, whilst these approaches have emerged at different times (the 'traditional' one in 1979, the 'expansive' one in 1988, and the 'reflective' one in 1995), they have developed in parallel and they still co-exist within the ECJ's jurisprudence.

In particular, Section III will provide an anthology of the ECJ rulings attributable to the 'traditional' approach, where a finding that the case in the main proceedings lacks inter-State elements leads to a ruling that the internal market fundamental freedoms do not apply or do not preclude the contested domestic measure or, more recently, to a ruling that the ECJ has no jurisdiction to provide a preliminary ruling or that the question submitted by the referring court is inadmissible. Section IV, devoted to the ECJ's 'expansive' approach, will survey the six exceptions to the purely internal rule enabling the ECJ to provide preliminary rulings as to the interpretation of EU cross-border provisions in the context of disputes involving purely internal situations. Section V will focus on the 'reflective' approach, ie on the correctives introduced by the ECJ to five of the above exceptions, so as to engage in a more meaningful dialogue with the referring courts in cases involving no inter-State elements.

Section VI will then examine the codification of the ECJ's jurisprudence on the purely internal rule, looking at the systematizations proposed by Advocates General and by legal scholars and focusing on the ECJ's own codification of that rule in the *Ullens de Schooten* judgment of November 2016.

[12] Although the notion of 'purely internal situations' occasionally also appears in infringement proceedings and actions for annulment, the purely internal rule mostly features in preliminary rulings stemming from references seeking a determination as to whether EU provisions having a cross-border scope (typically, the internal market fundamental freedoms or related legislation) must be interpreted as precluding a given Member State measure. For reasons of space, this article will mostly focus on preliminary rulings applying the purely internal rule to internal market fundamental freedoms.

[13] For this taxonomy, see R Schütze, *From International to Federal Market*: *The Changing Structure of European Law* (Oxford: Oxford University Press, 2017), 5–6.

Finally, Section VII will attempt to outline the future developments of the purely internal rule, having regard to the implications for the European integration process that the abolition of that rule would entail.

II. The origins of the purely internal rule

To trace the origins of the purely internal rule, regard must be had to the evolution of the notion of 'cross-borderness', which has characterized international trade law since its inception. That concept has two dimensions: *material cross-borderness*, indicating the presence of inter-State elements in a given set of facts, and *legal cross-borderness*, indicating the ability of a State measure to produce effects beyond that State's borders. Purely internal situations can thus be understood as sets of facts devoid of material cross-borderness, ie situations that are entirely confined within the boundaries of the same State.

Trade agreements ascribable to the *international market model*[14] of economic integration usually rely on a discrimination-based notion of *legal cross-borderness*: they typically limit or prohibit border measures (ie measures distinctly applicable to foreign goods, such as custom duties and quantitative restrictions)[15] and require internal measures (ie measures indistinctly applicable to national and foreign goods, such as product requirements) to be applied in a non-discriminatory manner to national and foreign goods (national treatment).[16]

In the context of disputes involving trade agreements of this kind, *material cross-borderness* is usually taken for granted: the treaty rules concerning border measures are, by definition, applicable only to cross-border situations; the treaty rules concerning internal measures are applicable both to purely internal and cross-border situations, but they are generally invoked only in cross-border situations, as purely internal ones are, by definition, already subject to national treatment. As situations involving no material cross-borderness are typically not affected by trade agreements ascribable to the international market model, there is no need for a 'rule' governing purely internal situations.

The General Agreement of Tariffs and Trade (GATT) of 1947 provides an excellent illustration of the international model.[17] It relies on a discrimination-based understanding of legal cross-borderness that revolves around Article XI GATT, which prohibits quantitative restrictions, and Article III GATT, which requires national treatment in the application of internal measures. As the World

[14] Ibid., 5–6.
[15] For instance, the 1703 Methuen Treaty between England and Portugal required England to grant a preferential tariff to Portuguese wine and Portugal to abolish its quantitative restrictions on English cloth.
[16] For instance, the 1786 Eden Treaty between England and France required each contracting party to apply to products imported from the other party the same internal rules applicable to its own products.
[17] See Schütze (n 13), 38–47.

Trade Organisation (WTO) dispute resolution system only provides for inter-State disputes,[18] it is impossible for a situation having no material cross-borderness to come before a panel or the Appellate Body. It is thus unsurprising that no functional equivalent to the purely internal rule has ever emerged in the interpretation of GATT provisions.

Instead, *material cross-borderness* acquires an autonomous relevance in trade agreements that set out liberalization obligations going beyond the international model. That is the case with Bilateral Investment Treaties (BITs), which enable the establishment of arbitration proceedings for the protection of international investments and require their contracting parties to ensure a fair and equitable treatment of those investments.[19] As this treatment may be more favourable than national treatment, domestic investors have occasionally tried to disguise themselves as international investors, so as to invoke the protection afforded by BITs. However, in awards such as *Phoenix Action v Czech Republic*[20] and *Philip Morris v Australia*,[21] the arbitrators refused to grant protection under the relevant BITs to 'domestic investments disguised as international investments'[22]—thus suggesting that also international investment law has a 'purely internal rule' of sorts.

A. The infancy of the internal market: a narrow conception of cross-borderness

The Spaak report[23] advocated the removal of barriers to trade between the six participants to the Messina Conference as an 'absolute necessity'.[24] To that end, the Spaak Report envisaged a twofold strategy, involving both *negative integration*, ie the progressive elimination of border measures and a ban on discriminatory internal measures,[25] and *positive integration*, ie the enactment of common rules seeking to correct distortions arising from the diversity of internal measures.[26]

[18] Article 1 of the WTO Understanding on rules and procedures governing the settlement of disputes provides that it applies 'to consultations and the settlement of disputes *between* Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization' (emphasis added).
[19] See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States—International Centre for Settlement Of Investment Disputes, Washington 1965, Article 25(1) ('The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State [. . .] and a national of another Contracting State').
[20] *Phoenix Action, Ltd. v The Czech Republic*, ICSID Case No. ARB/06/5.
[21] *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12.
[22] Ibid para. 144.
[23] Intergovernmental Committee Established by the Messina Conference, Report of the Heads of Delegation to the Ministers of Foreign Affairs ('Spaak Report'), 21 April 1965.
[24] Ibid 13.
[25] Ibid 27, 38.
[26] Ibid 64.

The recommendations set out in the Spaak Report shaped the common market provisions of the EEC Treaty. A litmus test for the conception of *legal cross-borderness* underlying EEC Treaty is the scope of the prohibition on Measures having an Equivalent Effect to Quantitative Restrictions (MEEQR) laid down in Article 30 EEC. The European Commission, in Directive 70/50, tried to push beyond the international model, by requiring Member States to abolish, in addition to border measures, also internal measures whose 'restrictive effects on the free movement of goods [were] out of proportion to their purpose'.[27] In *GB Inno*,[28] however, the ECJ ruled that the MEEQR ban caught, in addition to border measures, only internal measures that entailed de facto *discrimination* against imported goods.[29]

In sum, the early judicial interpretation of the MEEQR ban relied on a discrimination-based conception of legal cross-borderness, in line with the *international market model*.[30] Also, the prevailing interpretation of the other fundamental freedoms laid down in the EEC Treaty[31] was, for several years, inspired by the same model, as attested by the ECJ's insistence on national treatment in cases such as *Ugliola* (free movement of workers),[32] *Reyners* (right of establishment),[33] and *van Binsbergen* (freedom to provide services).[34]

[27] Commission Directive 70/50/EEC of 22 December 1969 based on the provisions of Art. 33 (7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty, OJ L 13, 19 January1970, 29–31, Art. 3 (2) (emphasis added).

[28] Case 13/77, *SA G.B.-INNO-B.M. v Association des détaillants en tabac (ATAB)*, EU:C:1977:185.

[29] Ibid para. 52 ('Although a maximum price *applicable without distinction* to domestic and imported products does not in itself constitute a measure having an effect equivalent to a quantitative restriction, it may have such an effect, however, when it is fixed at a level such that the sale of imported products becomes . . . *more difficult than that of domestic products*') (emphasis added).

[30] See Schütze (n 13), 124 (noting that the ECJ's early jurisprudence on MEEQR was largely equivalent to the treatment of border measures and internal measures under, respectively, Art. XI GATT and Art. III:4 GATT).

[31] The language of several EEC Treaty provisions revolved around the concepts of *discrimination* and *national treatment*: Art. 7 EEC prohibited 'any discrimination on the grounds of nationality' within the field of application of the EEC Treaty; Art. 48 (2) EEC provided that freedom of movement of workers 'shall entail the abolition of any discrimination based on nationality between workers of the Member States'; Art. 52 (2) EEC enshrined the freedom of establishment, which was supposed to occur 'under the conditions laid down for its own nationals by the law of the country where such establishment is effected'; Art. 95 (1) EEC provided that 'A Member State shall not impose, directly or indirectly, on the products of other Member States any internal charges of any kind in excess of those applied directly or indirectly to like domestic products.'

[32] Case 15/69, *Württembergische Milchverwertung-Südmilch AG v Salvatore Ugliola*, EU:C:1969:46, para. 6 ('Art. 48 [EEC] does not allow Member States to make any exceptions to the equality of treatment . . . Consequently, . . . a rule of national law protecting workers from the unfavourable consequences [of military service] must also be applied to the nationals of other Member States employed in the territory of the State in question who are subject to military service in their country of origin').

[33] Case 2/74, *Jean Reyners v Belgian State*, EU:C:1974:68, para. 19 ('Art. 52 [EEC] expresses the guiding principle in the matter by providing that freedom of establishment shall include the right to take up and pursue activities as self-employed persons "under the conditions laid down for its own nationals by the law of the country where such establishment is effected"').

[34] Case 33/74, *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, EU:C:1974:131, para. 17 ('the national law of a Member State cannot, by

With such a narrow conception of legal cross-borderness, it is no wonder that *material cross-borderness* (and the complementary concept of 'purely internal situations') made no appearance in the ECJ's early internal market jurisprudence. After all, why would one invoke free movement provisions to challenge a domestic measure in the context of a purely internal situation? Border measures, by definition, did not apply to those situations; internal measures did apply to them, but invoking free movement provisions would usually make sense only in cross-border situations,[35] as purely internal situations were, again by definition, already subject to national treatment.[36]

The interpretation of free movement provisions based on the international model enabled each Member State to impose its internal measures on goods, services, persons, and capital from other Member States.[37] This model, also known as 'Host-State control', enabled a degree of coordination between national markets, but was not conducive to their integration, as economic operators wishing to conduct business in multiple Member States had to comply with multiple domestic requirements, which undoubtedly constituted a restriction to trade within the Community.[38]

In the intention of the drafters of the EEC Treaty, those trade restrictions were meant to be eliminated through positive integration, ie the adoption of common rules that would gradually replace the various domestic requirements. However, whilst unanimity voting in the Council was meant to be a transitional arrangement, the Luxembourg compromise had turned it into a permanent feature of the EEC law-making process, thus significantly hindering the enactment of harmonization measures.[39]

In truth, two decades after the entry into force of the EEC Treaty, except for the abolition of customs duties and quantitative restrictions, very little had been achieved to ensure free movement within the common market. This called for a broader notion of legal cross-borderness—one that would also catch *restrictions to trade* within the Community.

imposing a requirement as to habitual residence within that State, deny persons established in another Member State the right to provide services, where the provision of services is not subject to any special condition under the national law applicable').

[35] The facts underlying *Costa v ENEL* are, in this respect, quite exceptional: that lawsuit had indeed been carefully 'constructed' by Gian Galeazzo Stendardi, a scholar of the relationship between EEC and Italian law, for political reasons, namely to oppose the nationalization policy pursued by the Italian Christian Democrat majority and to undermine its incipient political alliance with the Italian Socialist Party at the height of the Cold War. See A Arena, 'From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of *Costa v. ENEL*', (2019) 30 (3) European Journal of International Law, 1017–1037.

[36] Case 136/78, *Criminal proceedings against Vincent Auer*, EU:C:1979:34, para. 20 ('In so far as it is intended to ensure . . . the benefit of national treatment, Art. 52 [EEC] concerns only—and can concern only—in each Member State *the nationals of other Member States*, those of the host Member State *coming already, by definition, under the rules in question*') (emphasis added).

[37] See Schütze (n 13), 5.

[38] Ibid 6.

[39] Ibid 125.

B. Towards a broader conception of cross-borderness: *Cassis de Dijon* and its unsolved conundrums

The term 'restrictions' appeared in the wording of several free movement provisions of the EEC Treaty.[40] Indeed, the ECJ had ruled in *Dassonville* that the MEEQR ban set out in Article 30 EEC covered 'all trading rules ... capable of *hindering*, directly or indirectly, actually or potentially, *intra-Community trade*'[41] and in *Van Binsbergen* that 'the *restrictions* to be abolished pursuant to Articles 59 and 60 [EEC] include[d] all requirements ... which may *prevent or otherwise obstruct* the activities of the person providing the service'.[42] Although the domestic measures at issue in *Dassonville* and *Van Binsbergen* involved elements of discrimination and the intention of the ECJ judges at the time was, in all likelihood, not that of bringing trade restrictions within the mischief of the fundamental freedoms,[43] by the end of the 1970s a *restrictions*-based reading of the free movement provisions had gained considerable traction.[44]

The ECJ famously addressed the issue in the *Cassis de Dijon* judgment of 1979.[45] The facts of the case are well known: German law only allowed the marketing of spirits with a minimum alcohol strength of 25 per cent, thus precluding the marketing of beverages such as the famous French liqueur 'Cassis de Dijon', having a lower alcohol volume.[46] In the context of a lawsuit between a German

[40] For instance, Art. 30 EEC prohibited 'quantitative *restrictions* on importation and all measures with equivalent effect'; Art. 34 EEC banned 'Quantitative *restrictions* on exportation and any measures with equivalent effect'; Art. 52 EEC outlawed '*restrictions* on the freedom of establishment'; Art. 59 EEC banned 'restrictions on the free supply of services'; Art. 67 EEC proscribed '*restrictions* on the movement of capital'.

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

[42] Case 33/74, *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, EU:C:1974:131, para. 10.

[43] See R Schütze, "Re-reading' Dassonville: Meaning and understanding in the history of European law' (2018) 24 European Law Journal, 405 (arguing that the original meaning of the *Dassonville* formula was to apply the MEEQR ban to both '*quantitative* and *qualitative* restrictions of intra-Union trade', thus transposing the 'pattern-of-trade' jurisdictional test developed in the context of competition law); See also A Biondi, 'Recurring Cycles in the Internal Market: Some Reflections on the Free Movement of Services', in A Arnull, P Eeckhout, and T Tridimas, *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford: Oxford University Press, 2008), 230 ('The essential issue in [*Van Binsbergen*] was clearly one of discrimination ... The Court ... however, did not miss the opportunity to add that there might have been other requirements that could affect the free flow of services ... the seeds for an *approach based on the effects on trade in services* ... had been planted').

[44] For an overview of the various interpretations of the MEEQR ban prevailing in the mid-1970s, see AWH Meij and JA Winter, 'Measures Having an Effect Equivalent to Quantitative Restrictions' (1976) 13 CML Rev, 79, at 82–6; L Gormley, 'Silver Threads Among the Gold ... 50 Years of the Free Movement of Goods' (2007) 31 (6) Fordham International Law Journal, 1637, at 1645–6; for a restrictions-based interpretation of the freedom to provide services, see H Bronkhorst, 'Freedom of establishment and freedom to provide services under the EEC-Treaty' (1975) 12 CML Rev, 245, at 246.

[45] Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')*, EU:C:1979:42.

[46] Ibid para. 3.

importer of that liqueur, Rewe, and the Germany monopoly administration on alcoholic beverages, the ECJ was thus requested to determine whether Article 30 EEC should be interpreted as precluding internal measures such as the German minimum alcohol strength requirement.[47]

In its submission to the ECJ,[48] Rewe argued that, as the minimum alcohol strength requirement precluded the marketing in a Member State of a product of another Member State, that requirement hindered directly and immediately the import of that product and thus constituted a MEEQR as per the ECJ's definition in *Rewe-Zentralfinanz*,[49] which reproduced almost verbatim the *Dassonville* formula.[50]

The German Government, instead, argued that the MEEQR ban only caught discriminatory measures and that trade restrictions arising from the diversity of non-discriminatory requirements such as the one at issue had to be removed by recourse to the approximation of national laws.[51]

The German Government also raised three objections against Rewe's interpretation of the MEEQR ban. First, it would entail that the minimum alcohol strength of a given product in Germany would no longer be determined by German law, but by French law, whose provisions would also have to be extended to Germany's own products, so as not to give rise to what would be known as '*reverse discrimination*'.[52] Secondly, the Member State with the most permissive requirements would effectively set the minimum alcohol strength for a given product throughout the Community, without the consent or knowledge of other Member States, thus leading to a '*race to the bottom*' in regulatory standards.[53] Third, Rewe's reading of the MEEQR ban would jeopardize the '*functional separation of powers*' between the Community and its Member States,[54] as it would bring within the scope of that ban a broad variety of national laws, many of which concerned aspects of 'social, consumer, or fiscal law', ie matters where the Member States, in the absence of harmonization measures, were supposed to enjoy a 'wide margin of discretion'.[55]

[47] Ibid para. 5.
[48] Original case file CJUE-2209 (Case 120/78), Observations on behalf of Rewe of 16 June 1978, 5. Access to the (redacted) case file can be requested at: https://archives.eui.eu/
[49] Case 4/75, *Rewe-Zentralfinanz eGmbH v Landwirtschaftskammer*, EU:C:1975:98, para. 3 ('For the purposes of [the MEEQR] prohibition it is enough for the measures in question to be capable of acting as a direct or indirect, real or potential hindrance to imports between Member States').
[50] Case 8/74, *Procureur du Roi v Benoît and Gustave Dassonville*, EU:C:1974:82, para. 5 (holding that the MEEQR ban covers measures 'which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade').
[51] Original case file CJUE-2209 (Case 120/78), Observations on behalf of the German government of 4 August 1978, 16.
[52] Ibid 20.
[53] Ibid 21.
[54] Ibid 26.
[55] Ibid 24.

The ECJ, at the outset, noted that, 'in the absence of common rules relating to the production and marketing of alcohol' it was 'for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory'.[56] The ECJ added that the '*obstacles to movement* within the Community *resulting from disparities between the national laws* relating to the marketing of the products in question' would be allowed,[57] but only 'in so far as those provisions may be recognized as being necessary in order to satisfy *mandatory requirements*', such as 'the effectiveness of fiscal supervision',[58] the 'protection of public health', the 'fairness of commercial transactions', and the 'defence of the consumer'.[59]

After establishing that the contested measure did 'not serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods',[60] the ECJ thus laid down the *principle of mutual recognition*: 'there is . . . no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State'.[61] Accordingly, the Community judges ruled that 'the unilateral requirement imposed by the rules of a Member State of a minimum alcohol content for the purposes of the sale of alcoholic beverages constitutes an *obstacle to trade* which is incompatible with the provisions of Article 30 of the Treaty'.[62]

By ruling that Article 30 EEC had to be interpreted as precluding a domestic measure because it constituted an '*obstacle to trade*', the ECJ ruling in *Cassis de Dijon* extended the notion of legal cross-borderness underlying the MEEQR ban beyond the international model. What alternative market philosophy did the ECJ embrace? Indeed, two different market models outlaw trade restrictions: the federal market model and the national market model.

The *federal market model*[63] pursues the integration of different national markets by balancing the regulatory claims of the States concerned. This model's conception of legal cross-borderness focuses on *obstacles to inter-State trade* arising from the cumulative application of the domestic requirements of two (or more) States. As per the principle of mutual recognition, the Host State may no longer impose its internal measures on imported products that have already been regulated (in a presumably equivalent manner) by the Home State.[64] However, the Host State remains free to regulate domestic products.

[56] Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')*, EU:C:1979:42. para. 8.
[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Ibid para. 14.
[61] Ibid.
[62] Ibid.
[63] Schütze (n 13), 6, 130.
[64] Ibid.

The *national market model*, instead, pursues the unification of different State markets into a single national market by ensuring a certain uniformity of policy choices.[65] This model is based on the assumption that any obstacle to trade in a part of the national market inevitably hinders trade within the whole market.[66] Accordingly, legal cross-borderness under this model encompasses all measures liable to restrict trade above the relevant national standard,[67] including the measures applied by the Host State to its domestic products.[68]

Whilst the reference in *Cassis de Dijon* to the principle of *mutual recognition* pointed towards a federal market philosophy, the three conundrums raised by the German Government remained unanswered: did the MEEQR ban also preclude the application of the Host State's internal measures to its *domestic products*? How could the risk of a *race to the bottom* in regulatory standards be averted? How could the *functional separation of powers* between the Community and its Member States be preserved?

C. *Saunders:* the jurisprudential genesis of the purely internal rule

Just a few weeks after *Cassis de Dijon*, the ECJ judges handed down their ruling in *Saunders*.[69] That case concerned a British national, Ms Saunders, who had pleaded guilty to a charge of theft and had been sentenced by the Crown Court of Bristol to move to Northern Ireland and not to return to England or Wales for a period of three years.[70] As Ms Saunders had broken that undertaking, the Crown Court of Bristol, before giving judgment, wished to know whether its previous ruling was compatible with the free movement of workers laid down in Article 48(b) EEC.[71]

It is worth emphasizing that the referring court's preliminary question was based on a *national market* conception of the free movement of workers: as Ms Saunders 'appear[ed] to be an English national',[72] the issue was not whether the Crown Court's prior ruling entailed *discrimination* on the basis of nationality (international model) or an *obstacle* arising from the cumulative application of the requirements of another Member State (federal model); rather, the issue was whether that ruling could '*restrict* [Ms Saunders'] freedom of movement *within* the territory of [the] Member State' where she resided and of which she was a citizen.[73]

[65] Ibid 283.
[66] Ibid 282.
[67] Ibid 6.
[68] Ibid.
[69] Case 175/78, *The Queen v Vera Ann Saunders*, EU:C:1979:88.
[70] Ibid para. 2.
[71] Ibid para. 4.
[72] Ibid.
[73] Ibid para 5 (emphasis added).

The ECJ ruled that the purpose of the free movement of workers was to abolish provisions 'according to which a worker *who is a national of another Member State* is subject to more severe treatment or is placed in an unfavourable situation in law or in fact as compared with the situation of a national in the same circumstance'.[74] Thus, that fundamental freedom did not 'restrict the power of the Member States to *lay down restrictions, within their own territory, on the freedom of movement* of all persons subject to their jurisdiction in implementation of domestic criminal law'.[75]

The ECJ thus laid down the purely internal rule:[76] '*the provisions on the free movement* of workers,' averred the Community judges, '*cannot . . . be applied to situations which are wholly internal to a Member State*, in other words, where there is no factor connecting them to any of the situations envisaged by Community law'.[77]

The purely internal rule was transposed to the free movement of goods just three years after *Saunders*,[78] thus providing a solution to the three conundrums left unsolved by *Cassis de Dijon*.

First, by taking purely internal situations outside the scope of the fundamental freedoms, the purely internal rule sanctioned the Host State's prerogative to set regulatory standards for its domestic products,[79] even when those standards are stricter than those set by the Home State (reverse discrimination).[80]

Secondly, under certain circumstances, stricter regulatory standards may turn from a competitive disadvantage (eg higher compliance costs) to a competitive

[74] Ibid para. 9 (emphasis added).
[75] Ibid para. 10 (emphasis added).
[76] To be precise, the ECJ had already hinted at the purely internal rule in two rulings handed down a few weeks before *Saunders*: Case 115/78, *J. Knoors v Staatssecretaris van Economische Zaken*, EU:C:1979:31, para. 24 ('the provisions of the Treaty relating to establishment and the provision of services cannot be applied to situations which are purely internal to a Member State') and Case 136/78, *Criminal proceedings against Vincent Auer*, EU:C:1979:34, operative part ('The nationals of a Member State cannot rely on [Art. 52 EEC] with a view to practising the profession of veterinary surgeon in that Member State on any conditions other than those laid down by national legislation'). However, the reference to the purely internal rule in *Knoors* is merely a *dictum*, as the ECJ recognized that that rule did not apply to a Netherlands national wishing to carry on in that Member State the same trade he had engaged in during his lengthy residence in Belgium; in *Auer*, instead, the application of the purely internal rule was arguably unwarranted, as Mr Auer's situation involved clear-cut cross-border elements (he sought to rely in France, the Member State of which he had become a citizen by naturalization, on professional qualifications acquired in Italy).
[77] Ibid para. 11 (emphasis added).
[78] See Case 286/81, *Criminal proceedings against Oosthoek's Uitgeversmaatschappij BV*, EU:C:1982:438.
[79] Ibid para. 9 ('the application of the Netherlands legislation to the sale in the Netherlands of encyclopaedias produced in that country is in no way linked to the importation or exportation of goods and does not therefore fall within the scope of Arts 30 and 34 of the EEC Treaty').
[80] See Case 355/85, *Mr Driancourt, Commissioner of Police, Thouars, carrying out the duties of Public Prosecutor v Michel Cognet*, EU:C:1986:410, para. 10 ('The purpose of [Art. 30 EEC] is to eliminate obstacles to the importation of goods and not to ensure that goods of national origin always enjoy the same treatment as imported or reimported goods'); see also Case 98/86, *Criminal proceedings against Arthur Mathot*, EU:C:1987:89, para. 7.

advantage (eg better product reputation).[81] This, in turn, may prompt other Member States to adopt even stricter requirements, thus leading to a race to the top, rather than one to the bottom, in regulatory standards.[82]

Thirdly, the purely internal rule provided a bright-line test to identify domestic measures liable to have an effect on cross-border trade. If a situation involves inter-State elements, it can be presumed that the domestic measure applicable to that situation has some effect on inter-State trade.[83] Conversely—the argument goes—if a dispute involves only intra-State elements, then the relevant domestic measure presumably has no impact on inter-State trade.[84] By requiring an *actual connection* with cross-border trade, the purely internal rule set a tighter jurisdictional limit to the MEEQR ban than the *Dassonville* formula, which only requires a *potential connection* with cross-border trade,[85] thus preserving the 'functional separation of powers' between the Community and its Member States.[86]

Read together, *Cassis de Dijon* and *Saunders* define the ECJ's *federal market* philosophy: a market where *legal cross-borderness* is understood as concerning the obstacles to trade between Member States arising from the cumulative application of domestic measures and where *material cross-borderness* acts as a limit to the scope of the free movement provisions, thus enabling Member States to regulate purely internal situations without interference.

However, just as the ECJ, over the years, has embraced different market philosophies for different fundamental freedoms (and, sometimes, for different provisions in the framework of the same fundamental freedom),[87] also its purely internal rule jurisprudence has branched into three different approaches: a 'traditional' one, inspired by the *federal market* philosophy; an 'expansive' one, embracing a *national market* ethos; and a 'reflective' one, reaffirming the *federal market* model. It is to these three approaches that this article now turns.

[81] Cf. Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')*, Opinion of Advocate General Capotorti, EU:C:1979:3, ECR (1979) 649, at 674 (arguing that 'the consumer is [not] guided in his purchases solely by price').

[82] This is the so-called 'California effect'. D Vogel, 'Trading Up and Governing Across: Transnational Governance and Environmental Protection' (1997) Journal of European Public Policy, 561–3.

[83] See ME Bartoloni, *Ambito d'applicazione del diritto dell'Unione europea e ordinamenti nazionali* (Naples: ESI, 2018), 25 (arguing that an obstacle to free movement can be presumed in situations having cross-border elements).

[84] Joined Cases C-159/12 to C-161/12, *Alessandra Venturini v ASL Varese and Others (C-159/12), Maria Rosa Gramegna v ASL Lodi and Others (C-160/12)*, and *Anna Muzzio v ASL Pavia and Others (C-161/12)*, Opinion of Advocate General Wahl, EU:C:2013:791, para. 38 ('When . . . the facts are all confined within one Member State, cross-border effects cannot be presumed.')

[85] See Schütze (n 13), 209.

[86] Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')*, EU:C:1979:42, ECR (1979) 649, at 656.

[87] Ibid 279 (arguing that, for all fundamental freedoms, the EU has '*generally* moved from an international to a federal market model', but noting that, within the free movement of goods, the case law on custom duties embraces 'a national market philosophy', whereas the case law on MEEQR on exports and, generally, on fiscal measures has 'remained loyal to an international law structure').

III. The ECJ's 'traditional' approach

The ECJ's 'traditional' approach surfaced in 1979 with the *Saunders* ruling.[88] This approach, which can be regarded as 'part and parcel' of the ECJ's *federal market* philosophy,[89] relies on an absolute version of the purely internal rule: if the case in the main proceedings involves no inter-State elements, then the internal market fundamental freedoms do not apply to that situation. Whilst *Saunders* heralded that approach in the context of the free movement of workers,[90] the ECJ soon extended it to the other fundamental freedoms[91] and, in some cases, even to secondary legislation.

The application of the purely internal rule has, on a few occasions, prevented individual litigants from escaping the only set of rules applicable to them–an outcome that would have been possible in the context of a *national market* – thus ensuring that the extension of the *restrictions-approach à la Cassis de Dijon* from the free movement of goods to the other fundamental freedoms would not result in a deviation from the *federal market* philosophy.[92]

For instance, in *Nino*,[93] Italian citizens facing criminal proceedings for providing certain paramedical treatments in Italy without the necessary professional qualifications[94] sought to rely on the right of establishment to escape those qualification requirements by claiming that, in other Member States, the provision of the same treatments was not subject to any professional qualification.[95] The ECJ, however, ruled that 'the provisions of the EEC Treaty on freedom of establishment do not apply to . . . a situation where the *nationals of a Member State engage*

[88] Case 175/78, *The Queen v Vera Ann Saunders*, EU:C:1979:88. See also the other 1979 judgments mentioned in n 76 above.

[89] See Schütze (n 13), 138 (arguing that reverse discrimination is 'part and parcel of the federal model').

[90] For other early applications of the purely internal rule to the free movement of workers see Joined cases 35 and 36/82, *Elestina Esselina Christina Morson v State of the Netherlands and Head of the Plaatselijke Politie within the meaning of the Vreemdelingenwet; Sweradjie Jhanjan v State of the Netherlands*, EU:C:1982:368, paras 15–18; Case 180/83, *Hans Moser v Land Baden-Württemberg*, EU:C:1984:233, paras 13–20; Case 298/84, *Paolo Iorio v Azienda autonoma delle ferrovie dello Stato*, EU:C:1986:33, paras 14–15.

[91] For the extension of the purely internal rule to the free movement of goods, see n 78, above.

[92] For a restrictions-based reading of the other fundamental freedoms, see Case C-19/92, *Dieter Kraus v Land Baden-Württemberg*, EU:C:1993:125, para. 32 (free movement of workers and freedom of establishment); Case C-55/94, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, EU:C:1995:411, para. 37 (freedom of establishment); Case C-76/90, *Manfred Säger v Dennemeyer & Co. Ltd.*, EU:C:1991:331, para. 12 (freedom to provide services); Case C-439/97, *Sandoz GmbH v Finanzlandesdirektion für Wien, Niederösterreich und Burgenland*, EU:C:1999:499, para. 19 (free movement of capital). See also PJG Kapteyn and P Verloren van Themaat, *Introduction of the Law of the European Communities* (LW Gormley ed., 1998), 716, 756, 767 (suggesting that the ECJ had contemplated a *restrictions*-based reading of the above fundamental freedoms as early as the 1970–1980s)

[93] Joined cases C-54/88, C-91/88, and C-14/89, *Criminal proceedings against Eleonora Nino and others*, EU:C:1990:340.

[94] Ibid para. 2.

[95] Ibid para. 8.

within its territory in a self-employed activity in respect of which they *cannot rely on any previous training or experience acquired in another Member State*'.[96]

Batista Morais[97] is a case in point as regards the free movement of services. Mr Batista Morais, an instructor with a driving school established in Lisbon, had been charged with giving driving lessons in another municipality, contrary to Portuguese law.[98] The criminal court hearing his case, thus, stayed proceedings to ask the ECJ whether the free movement of services should be interpreted as precluding the national provision at issue. The ECJ noted that 'there [wa]s no factor connecting [Mr Batista Morais'] situation to any of those envisaged by Community law'[99] and that 'the rules of the Treaty on the free movement of . . . services do not apply to *barriers affecting nationals of a Member State in that State*'.[100]

Petit[101] provides an example of an application of the purely internal rule to a preliminary reference concerning the interpretation of secondary legislation. Regulation 1408/71 provided that national courts could not reject claims by Community workers 'written in an official language of another Member State'.[102] The ECJ was thus requested to clarify whether this provision also applied to workers who, like Mr Petit, were nationals of a Member State and sought to bring legal proceedings in that Member State in the language of another Member State.[103] The ECJ, however, ruled that 'the provisions of the Treaty on freedom of movement and the regulations implementing those provisions cannot be applied to *activities which are confined in all respects within a single Member State*',[104] such as those in the main proceedings.[105]

A. The corollaries of the purely internal rule

As noted above, the purely internal rule sets a jurisdictional limit to the application of fundamental freedoms. What are the consequences of the application of that rule in the context of preliminary ruling proceedings? Based on a survey of the ECJ's jurisprudence, the finding that the dispute in the main proceedings

[96] Ibid para. 12 (emphasis added).
[97] Case C-60/91, *Criminal proceedings against José António Batista Morais*, Case C-60/91, EU:C:1992:140.
[98] Ibid para. 2.
[99] Ibid para. 8.
[100] Ibid para. 9 (emphasis added).
[101] Case C-153/91, *Camille Petit v Office national des pensions*, EU:C:1992:354.
[102] Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149, 5 July 1971, 2–50.
[103] Ibid para. 5.
[104] Ibid para. 8 (emphasis added).
[105] Ibid para. 9.

involves a purely internal situation results in either a 'substantive' or 'procedural' ruling.[106]

In *substantive rulings*, the ECJ undertakes an actual examination of the EU provisions of which an interpretation is sought in the order for reference and rules: (i) that those provisions *are not applicable* to the purely internal situation at issue in the main proceedings (non-applicability rulings), or (ii) that they should be *interpreted as not precluding* the domestic measure at issue (non-preclusion rulings). Usually, these rulings take the form of a judgment, although they can take the form of an order, especially in the cases envisaged by Article 99 of the ECJ's rules of procedure.

Moser[107] provides an example of *non-applicabilty ruling*. Mr Moser had been denied admission to postgraduate training necessary to secure a position as a school teacher because he was a member of the German Communist Party.[108] The ECJ was thus requested to provide guidance on the compatibility between the free movement of workers and the German provision making access to employment in public service conditional upon allegiance to the German Basic Law. However, the ECJ only averred that the free movement of workers '*cannot be applied* to situations which are wholly internal to a Member State'[109] such as that of Mr Moser.[110]

Instead, in *Peralta*[111] the ECJ gave a *non-preclusion ruling*. The case concerned a potential conflict between the free movement of workers and an Italian rule that sanctioned the dumping of toxic waste at sea with the suspension of the professional qualification of 'Master of vessel'.[112] On that occasion, the ECJ did not confine itself to finding that the free movement of workers 'may not be applied to a situation purely internal to a Member State' such as that of Mr Peralta,[113] but added that the above freedom '*does not preclude* legislation like the Italian' rules at issue.[114]

In more recent times, instead, the ECJ has favoured *procedural rulings* in cases involving purely internal situations. The underlying assumption is that if the purely internal situation in the main proceedings lies outside the scope of the EU provisions mentioned in the order for reference, then a preliminary ruling on the interpretation of those provisions cannot be regarded as necessary for the

[106] See Cf C-393/08, *Emanuela Sbarigia v Azienda USL RM/A and Others*, Opinion of Advocate General Jääskinen, EU:C:2010:134, para. 29 (suggesting a quadripartite taxonomy of preliminary rulings involving purely internal situations).
[107] Case 180/83, *Hans Moser v Land Baden-Württemberg*, EU:C:1984:233.
[108] Ibid.
[109] Ibid para. 15 (emphasis added).
[110] Ibid para. 20.
[111] Case C-379/92, *Criminal proceedings against Matteo Peralta*, EU:C:1994:296.
[112] Ibid para. 4.
[113] Ibid para. 27.
[114] Ibid para. 29 (emphasis added).

resolution of the lawsuit pending before the referring court.[115] Accordingly, the ECJ can either rule (i) that it *(manifestly) lacks jurisdiction* to give the preliminary ruling requested by the national court or (ii) that the question for a preliminary ruling is *(manifestly) inadmissible.* Usually, the findings of lack of jurisdiction and inadmissibility take the form of a judgment, whereas the findings of *manifest* lack of jurisdiction and *manifest* inadmissibility take the form of an order as per Article 53(3) of the ECJ's rules of procedure.

For instance, in *Vajnai*[116] the ECJ had been requested to rule whether a Hungarian provision criminalizing the public display of a symbol consisting of a five-point red star was compatible with the general principle of non-discrimination.[117] The ECJ found that Mr Vajnai's (purely internal) situation was 'not connected in any way with any of the situations contemplated by the provisions of the Treaties'[118] and that the ECJ 'clearly ha[d] *no jurisdiction*' to answer the question referred by the national court.[119]

In *Vinkov*,[120] instead, the ECJ had been asked to determine whether the principle of mutual recognition judicial decisions precluded the non-recognition in Bulgarian law of a right of appeal against decisions involving the deduction of points from driving licences.[121] The ECJ noted that the principle of mutual recognition could 'by definition, only relate to cross-border proceedings'[122] whereas the dispute in the main proceedings was a 'purely internal' one.[123] Accordingly, the ECJ declared the reference for a preliminary ruling '*inadmissible*'[124] as the interpretation of EU law requested by the referring court was 'of no relevance to the outcome of that dispute'.[125]

Although in the context of preliminary rulings involving purely internal situations the ECJ seems to employ the concepts of 'lack of jurisdiction' and 'inadmissibility' interchangeably,[126] the two notions should be

[115] Joined Cases C-159/12 to C-161/12, *Alessandra Venturini v ASL Varese and Others (C-159/12), Maria Rosa Gramegna v ASL Lodi and Others (C-160/12) and Anna Muzzio v ASL Pavia and Others (C-161/12)*, Opinion of Advocate General Wahl, EU:C:2013:791, para 28 ('To the extent that the Treaty rules do not apply to the case before a referring court, an answer to the questions referred is not relevant for the resolution of the dispute and, consequently, those questions should be regarded as hypothetical').
[116] Case C-328/04, *Criminal proceedings against Attila Vajnai*, EU:C:2005:596.
[117] Ibid para. 8.
[118] Ibid para. 14.
[119] Ibid para. 15 (emphasis added).
[120] Case C-27/11, *Anton Vinkov v Nachalnik Administrativno-nakazatelna deynost*, EU:C:2012:326.
[121] Ibid para. 30.
[122] Ibid para. 53.
[123] Ibid para. 54.
[124] Ibid para. 60 (emphasis added).
[125] Ibid para. 54.
[126] See R Grimbergen, 'How Boundaries Have Shifted: On Jurisdiction and Admissibility in the Preliminary Ruling Procedure' (2015) Review of European Administrative Law, 67; J Krommendijk, 'Wide Open and Unguarded Stand our Gates: The CJEU and References for a Preliminary Ruling in Purely Internal Situations' (2017) German Law Journal, 1367; C Iannone,

distinguished,[127] as the former ruling entails a final assessment by the ECJ as to the purely internal nature of the case,[128] whereas the latter is an interlocutory ruling highlighting one or more deficiencies in the order for reference, enabling the referring court to submit a new reference that meets the requirements set out in Article 94 of the ECJ Rules of Procedure.[129]

As to the choice between a 'substantive' or a 'procedural' ruling, Advocate General Jääskinen in *Sbarigia*[130] took the view that, in cases of doubt, 'the Court should fundamentally proceed on the assumption that, as a general rule, questions referred for a preliminary ruling should be examined as to their substance rather than declared inadmissible'[131] because '[m]erely stating that the question is inadmissible might be perceived by the national courts as contrary to the principle of good cooperation with those courts'.[132] However, as Advocate General Wahl pointed out in *Venturini*,[133] the principle of cooperation 'works both ways',[134] so national courts should 'endeavour to assist [the ECJ] by providing it with all the information and evidence required to ensure that it is able to exercise its interpretative function'.[135] If national courts fail to do their part, a 'procedural' ruling seems, after all, the most appropriate response from the ECJ.

B. The shortcomings of the 'traditional' approach: false negatives

The presumption underlying the purely internal rule, ie that domestic measures applying to purely internal situations have no effects on inter-State trade, constitutes a handy heuristic tool for the ECJ in preliminary proceedings concerning the compatibility of domestic measures with the internal market fundamental freedoms.[136] Indeed, the absence of inter-State elements in the dispute before the

'Le ordinanze di irricevibilità dei rinvii pregiudiziali dei giudici italiani' (2018) Il Diritto dell'Unione Europea, 255.

[127] Case C-497/12, *Davide Gullotta and Farmacia di Gullotta Davide & C. Sas v Ministero della Salute and Azienda Sanitaria Provinciale di Catania*, Opinion of Advocate General Wahl, EU:C:2015:168, para. 22.

[128] Ibid: 'Lack of jurisdiction cannot, in principle, be remedied or corrected by the referring court. Accordingly, a reference dismissed for lack of jurisdiction is doomed never to be considered by the Court unless, obviously, there were key elements of fact of which the Court had been unaware'.

[129] Ibid.

[130] Case C-393/08, *Emanuela Sbarigia v Azienda USL RM/A and Others*, Opinion of Advocate General Jääskinen, EU:C:2010:134.

[131] Ibid para. 35.

[132] Ibid.

[133] Joined Cases C-159/12 to C-161/12, *Alessandra Venturini v ASL Varese and Others (C-159/12), Maria Rosa Gramegna v ASL Lodi and Others (C-160/12), and Anna Muzzio v ASL Pavia and Others (C-161/12)*, Opinion of Advocate General Wahl, EU:C:2013:791.

[134] Ibid para. 56.

[135] Ibid.

[136] Ibid 80–1.

referring court enables the ECJ to rule out the possibility of a conflict without actually assessing the cross-border effects of the domestic measure at issue.[137]

This presumption, however, can be impaired by 'false negatives',[138] which occur when the case in the main proceedings has no inter-State elements, but the relevant domestic measure is nonetheless liable to affect cross-border trade and should thus be regarded as falling within the scope of the internal market fundamental freedoms.[139]

Smanor[140] is a case in point. French law reserved the name 'yoghurt' for fresh yoghurt, thus prohibiting the marketing of deep-frozen yoghurt under that name.[141] The French authorities adopted several measures to prevent a French company, Smanor, from marketing frozen yoghurt in France.[142] In the context of insolvency proceedings, a French Commercial Court asked the ECJ whether the free movement of goods had to be interpreted as precluding national provisions such as the French law at issue.[143]

In the course of proceedings before the ECJ, the French government argued that the reference was inadmissible, as the situation was a purely internal one and accordingly lay outside the scope of free movement provisions.[144] The ECJ, however, realized that the case at issue was a 'false negative' and noted that, as deep-frozen yogurts were 'lawfully manufactured and marketed under that name in other Member States',[145] it could not be ruled out 'that such products may be imported into France and that the [contested] French legislation will apply to them'.[146]

The ECJ thus resolved to examine 'whether and to what extent Article 30 of the Treaty precludes regulations such as the French rules prohibiting the

[137] See Joined Cases C-159/12 to C-161/12, *Alessandra Venturini v ASL Varese and Others (C-159/12), Maria Rosa Gramegna v ASL Lodi and Others (C-160/12)*, and *Anna Muzzio v ASL Pavia and Others (C-161/12)*, Opinion of Advocate General Wahl, EU:C:2013:791, para. 28 ('where the factual situation in the case before the referring court lacks any connection with the exercise of a fundamental freedom, an examination of the compatibility of the relevant domestic legislation with the EU provisions invoked is, in principle, unnecessary for the national court to make a ruling'). See also Tryfonidou (n 2), 57.

[138] D O'Keeffe and A Bavasso, 'Four freedoms, one market and national competence: in search of a dividing line', in D O'Keeffe and A Bavasso (eds), *Liber Amicorum in Honour of Lord Slynn of Hadley: Judicial Review in European Union Law* (Alphen aan den Rijn: Kluwer Law International, 2000), 554–5: ([One] could easily imagine [an] internal matter with a major effect on the common market').

[139] Tryfonidou (n 2), 58 ('just because the case happens to be brought before a court by a national producer of goods and thus there is no inter-state movement on the facts before the Court, this does not mean that the application of the measure . . . does not have, also, an effect on inter-state trade').

[140] Case 298/87, *Proceedings for compulsory reconstruction against Smanor SA*, EU:C:1988:415.

[141] Ibid para. 3.

[142] Ibid para. 2.

[143] Ibid para. 6.

[144] Ibid para. 7.

[145] Ibid para. 8.

[146] Ibid.

marketing, on national territory, ... of yoghurts that have been deep frozen'[147] and eventually considered that Article 30 EEC should be interpreted as precluding the contested French rules, as they were liable to 'impede, at least indirectly, trade between Member States'[148] and were 'disproportionate in relation to the objective of consumer protection'.[149]

C. Reverse discrimination and the solutions devised at the national level

A defining feature of the *federal market* model is a State's freedom to regulate situations that are devoid of inter-State elements: the recognition, in the ECJ's 'traditional' approach, of this 'autonomous space for national regulatory autonomy', however, is the root cause of the issue of 'reverse discrimination'. [150]

In this context, the expression 'reverse discrimination' refers to circumstances where purely internal situations are subject to a less advantageous legal regime than that applicable to cross-border situations having equivalent features. This difference in treatment can arise either from the non-application to purely internal situations of favourable EU rules (eg fundamental rights) applicable to cross-border situations[151] or, conversely, from the application to purely internal situations of unfavourable domestic rules that, as a result of a conflict with directly applicable EU law provisions (eg fundamental freedoms), are not applicable to cross-border situations.[152]

Kremzow[153] provides an excellent illustration of the former type of situations. Mr Kremzow was an Austrian citizen who claimed that his right to free movement and his fundamental rights had been infringed because the Austrian authorities had unlawfully sentenced him to life imprisonment following a conviction for murder.[154] The ECJ, in the context of a preliminary ruling, reminded that it only had jurisdiction to rule on situations falling within the scope of Community law (cross-border situations);[155] in contrast, the situation in the main proceedings had no connection to the free movement of persons (purely internal situation).[156] The ECJ thus ruled that it lacked jurisdiction to rule on the compatibility of the contested national measure with fundamental rights insofar

[147] Ibid para. 10.
[148] Ibid para. 12.
[149] Ibid para. 23.
[150] See Schütze (n 13), 141 (defining reverse discrimination as 'a necessary evil that directly flows from a conception of the common market that accepts collective differences stemming from distinct political communities: the Member States').
[151] See Tryfonidou (n 2), 15–16.
[152] Ibid 34–5.
[153] Case C-299/95, *Friedrich Kremzow v Republik Österreich*, EU:C:1997:254.
[154] Ibid para. 13.
[155] Ibid para. 15.
[156] Ibid paras 16–17.

as that measure concerned a situation falling outside the 'field of application of Community law'.[157]

Drei Glocken[158] is, instead, an example of the latter type of situations. The ECJ found that the Italian provisions prohibiting the sale of non-durum wheat pasta were incompatible with the free movement of goods.[159] The ECJ, however, clarified that the relevant Italian provisions had to be set aside only *vis-à-vis* pasta products imported from other Member States (cross-border situations), whereas those provisions could continue to apply to pasta products made in Italy (purely internal situations).[160] This clearly placed Italian pasta producers at a competitive disadvantage relative to producers established in other Member States, as the former could only employ durum wheat, whereas the latter could also employ less expensive species of wheat.[161]

The ECJ has traditionally adopted an agnostic approach to the issue of reverse discrimination. For instance, *Mathot*[162] concerned the compatibility with the free movement of goods of a Belgian provision requiring domestic butter producers to indicate on the package their name and address, but not imposing the same requirement on producers from other Member States.[163] On that occasion, the ECJ ruled that the free movement of goods sought 'to eliminate obstacles to the importation of goods and not to ensure that goods of national origin always enjoy the same treatment as imported goods'.[164] The ECJ reached the same conclusion in *Cognet*,[165] concerning the French rules on fixed book prices, and added that the general principle of non-discrimination did not preclude the unfavourable treatment of national goods *vis-à-vis* imported goods in a non-harmonized sector falling outside the scope of Community law.[166]

The ECJ has consistently held that it is for Member States to regulate purely internal situations and, accordingly, to deal with the issue of reverse discrimination as they see fit. In *Ueker & Jacquet* the ECJ stated that '[a]ny discrimination which nationals of a Member State may suffer under the law of that State fall within the scope of that law and must therefore be dealt with within the

[157] Ibid para. 19.
[158] Case 407/85, *Drei Glocken GmbH and Gertraud Kritzinger v USL Centro-Sud and Provincia autonoma di Bolzano*, EU:C:1988:401.
[159] Ibid para. 28.
[160] Ibid para. 25 ('It should first be stressed that it is the extension of the law on pasta products to imported products which is at issue, and that Community law does not require the legislature to repeal the law as far as pasta producers established on Italian territory are concerned').
[161] See A Tryfonidou, 'The Outer Limits of Article 28 EC', in C Barnard and O Odudu (eds) *The Outer Limits of European Union Law* (Oxford: Hart Publishing, 2009) 204.
[162] Case 98/86, *Criminal proceedings against Arthur Mathot*, EU:C:1987:89.
[163] Ibid para. 3.
[164] Ibid para. 7.
[165] Case 355/85, *Mr Driancourt, Commissioner of Police, Thouars, carrying out the duties of Public Prosecutor v Michel Cognet*, EU:C:1986:410.
[166] Ibid para. 11.

framework of the internal legal system of that State'[167] and, in *Steen*,[168] the judges in Kirchberg added that 'Community law does not preclude a national court from examining the compatibility with its constitution of a national rule which [in the context of a purely internal situation] treats national workers less favourably than nationals from other Member States'.[169]

Indeed, one of the solutions devised by certain Member States for the issue of reverse discrimination is the *judicial equalization* of purely internal and cross-border situations by virtue of the principle of equality laid down in national constitutions. Turning back to *Drei Glocken*, the Italian Constitutional Court in judgment no 443 of 1997[170] found that the ECJ ruling had created a difference in treatment between domestic pasta producers and producers established in other Member States[171] and that, accordingly, the 'only viable solution' the extension to Italian producers of the regime applicable to producers from other Member States.[172] This was achieved by declaring the Italian legislation on pasta products unconstitutional 'to the extent that it did not allow domestic producers to employ ingredients lawfully employed by producers established in other Member States'.[173]

Another solution that Member States have employed to address the issue of reverse discrimination is *spontaneous harmonization*, ie the adoption of domestic rules extending to a given purely internal situation the legal regime provided by EU law for a 'reference' cross-border situation. A case in point is the Italian equal treatment *generalklausel* laid down in Section 53 of Law 234 of 2012,[174] which provides that 'Italian provisions giving rise to discrimination between Italian citizens and the citizens of the European Union shall be inapplicable'. According to legal commentators, this clause enables Italian courts to disapply domestic provisions that give rise to reverse discrimination set out in regulatory acts and in legislative acts adopted before Law 234 of 2012,[175] but does not allow the disapplication of *subsequent* legislative acts.[176]

[167] Joined cases C-64/96 and C-65/96, *Land Nordrhein-Westfalen v Kari Uecker and Vera Jacquet v Land Nordrhein-Westfalen*, EU:C:1997:285, para. 23.
[168] Case C-132/93, *Volker Steen v Deutsche Bundespost*, EU:C:1994:254.
[169] Ibid para. 11.
[170] Italian Constitutional Court, Judgment no 443 of 16 December 1997.
[171] Ibid paras 4–6.
[172] Ibid para. 6.
[173] Ibid first paragraph of the operative part.
[174] Law no 234 of 24 December 2012, 'General provisions on Italy's participation to the enactment and the implementation of EU legislation and policies', in Official Journal of the Italian Republic no. 3 of 4 January 2013.
[175] R Mastroianni, 'Il dialogo tra la Corte costituzionale e le corti europee: dal conflitto alla contaminazione', in Corti europee e giudizi nazionali: Atti del XXVII Convegno nazionale, Verona, 25–26 settembre 2009, 407, fn 29.
[176] F Spitaleri, 'Le discriminazioni alla rovescia nel diritto dell'Unione europea' (2010) Aracne, 183.

IV. The ECJ's 'expansive' approach

The ECJ's 'expansive' approach, inspired by a *national market* philosophy, made its appearance alongside the 'traditional' one with the *Smanor* ruling of 1988[177] and gets its name because it is characterized by a twofold *motus expandens*: on the one hand, the ECJ has applied the internal market fundamental freedoms to cases having very tenuous or even merely potential cross-border elements, on the other hand, the ECJ has affirmed its jurisdiction to provide preliminary rulings even in the context of disputes involving purely internal situations.

This twofold expansion occurred as a consequence of the introduction, by the ECJ, of six exceptions to the purely internal rule, ie six sets of circumstances where even though all the relevant facts are confined within a single Member State, the relevant domestic measures might nonetheless have inter-State effects,[178] thus warranting the application of the internal market fundamental freedoms[179] (and of other EU cross-border provisions) and the ECJ's jurisdiction to provide preliminary rulings as to whether those freedoms must be interpreted as precluding the above domestic measures.[180]

One of the features common to the six exceptions to the purely internal rule is their *abstract character*: the ECJ applies them without verifying whether they actually reflect the circumstances of the case or whether the ECJ's ensuing preliminary ruling can really be relevant the resolution of the dispute in the main proceedings.[181]

A number of systemic circumstances account for the inception of the 'expansive' approach. The elimination of physical borders on 1 January 1993 made it anachronistic to attach importance to the crossing of the (often invisible) boundaries between Member States.[182] The establishment of Union citizenship, in turn, made reverse discrimination, as well as the application of certain benefits

[177] Case 298/87, *Proceedings for compulsory reconstruction against Smanor SA*, EU:C:1988:415.

[178] See Case C-367/12, *Susanne Sokoll-Seebacher*, EU:C:2014:68, para. 11 ('While it is admittedly clear . . . that all the factual aspects of the main proceedings are confined to one Member State . . . the legislation at issue in the main proceedings is nevertheless capable of producing effects which are not confined to that Member State').

[179] Joined Cases C-159/12 to C-161/12, *Alessandra Venturini v ASL Varese and Others (C-159/12), Maria Rosa Gramegna v ASL Lodi and Others (C-160/12)*, and *Anna Muzzio v ASL Pavia and Others (C-161/12)*, Opinion of Advocate General Wahl, EU:C:2013:791, para. 35 ('To the extent that there are sufficient grounds for considering that national legislation is *capable* of producing the cross-border effects . . . then that legislation is falling squarely within the scope of those Treaty provisions').

[180] Ibid ('there is no reason to limit the Court's jurisdiction, in the context of preliminary rulings, to cases which have an *actual* and *direct* cross-border element').

[181] Ibid para. 54 ('in some cases the Court seems to have established its jurisdiction on the basis of mere assumptions, without undertaking any real examination as to whether the relevant conditions were fulfilled').

[182] See H D'Oliveira, 'Is reverse discrimination still permissible under the Single European Act?', in Forty Years on: the Evolution of Postwar Private International Law in Europe: symposium in celebration of the 40th anniversary of the Centre of Foreign Law and Private International Law, University of Amsterdam, on 27 October 1998 (Alphen aan den Rijn: Kluwer Law International,

(eg family reunification) only to 'mobile' citizens, unacceptable to many commentators.[183]

By extending the scope of internal market fundamental freedoms to purely internal situations, the ECJ nipped the 'reverse discrimination' problem in the bud. In other cases, the ECJ did not expressly state that those freedoms applied to the purely internal situation at issue in the main proceedings, but was nonetheless willing to provide a preliminary ruling that could be 'useful' to the referring court in dealing with the reverse discrimination issue.[184]

The ECJ also embraced the 'expansive' approach to avert the risk of 'false negatives', ie to declare national measures having obvious restrictive effects on inter-State trade incompatible with the fundamental freedoms even when those measures are brought to the ECJ's attention in the context of a lawsuit arising from a purely internal situation, rather than to wait for another preliminary reference involving the same domestic measure but stemming from a dispute having sufficient inter-State elements.[185]

Indeed, although preliminary rulings establishing that the internal market fundamental freedoms must be interpreted as precluding a given domestic measure require the disapplication of that measure only in cross-border situations, national legislatures and courts have often been willing to extend the effects of those rulings to purely internal situations by repealing or annulling the offending measure altogether. For instance, four months after the ECJ's ruling in *Smanor* that the free movement of goods 'preclude[d] a Member State from applying *to products imported from another Member State* . . . national rules which reserve the right to use the name "yoghurt" solely to fresh yoghurt',[186] the French authorities repealed those rules for domestic and imported products alike.[187]

Thus, the ECJ's 'expansive' approach to the purely internal rule has sometimes led to outcomes akin to those of a *national market*, where obstacles to intra-State trade are just as prohibited as obstacles to inter-State trade. This occurred, in

1990), 84: ('Aiming at an internal market, or completing it, while at the same time continuing to attach importance to the crossing of national frontiers is self-contradictory').

[183] See K Lenaerts, 'L'égalité de traitement en droit communautaire: un principe unique aux apparences multiples' (1991) Cahiers de droit européen, 19.

[184] See Joined Cases C-159/12 to C-161/12, *Alessandra Venturini v ASL Varese and Others (C-159/12), Maria Rosa Gramegna v ASL Lodi and Others (C-160/12)*, and *Anna Muzzio v ASL Pavia and Others (C-161/12)*, Opinion of Advocate General Wahl, EU:C:2013:791, para. 41 ('to the extent that there is a domestic rule or principle prohibiting reverse discrimination, and the national regulations challenged can also apply to foreign operators, the national court may need *assistance from the EU judicature* to interpret correctly the pertinent EU provisions') (emphasis added).

[185] C Ritter, 'Purely internal situations, reverse discrimination, *Guimont, Dzodzi* and Article 234' (2006) European Law Review, 701: ('the Court wants to seize the opportunity to rule on a purely internal matter, even though its preliminary ruling will not/may not apply in the underlying case, because the Court fears that in a future cross-border case where Community law will apply unequivocally, the national court will not refer a question').

[186] Case 298/87, *Proceedings for compulsory reconstruction against Smanor SA*, EU:C:1988:415, para. 1 of the operative part.

[187] Section 2 of Decree no 88-1203 of 30 December 1988, in Journal Officiel de la République Française of 31 December 1988.

particular, in the field of Charges having Equivalent Effect to Customs Duties (CEECD), where the ECJ wholeheartedly espoused a national market philosophy by extending the ban on charges applicable to trade *between* Member States also to charges applicable to trade *within* Member States,[188] so as to establish a Customs Union 'without internal frontiers'.[189]

A. The 'potential cross-borderness' exception *(Jersey Produce)*

The ECJ introduced the 'potential cross-borderness' exception in the late 1980s and applied it to various Treaty provisions in the area of the free movement of goods. This exception enables the ECJ to set aside the purely internal rule whenever the contested domestic measure concerns products that, at some stage, *might cross a border* between two different Member States.[190]

As to the ban on CEECD, in *Legros*[191] and *Lancry*[192] the ECJ ruled that a French charge applicable to the *import* in the French overseas departments of goods originating either from another part of the French territory or from other Member States was incompatible with that ban, because it was 'very difficult, if not impossible, in practical terms, to distinguish between products of domestic origin and products originating in other Member States'[193] and because the notion of Customs Union 'requires the free movement of goods generally, as opposed to inter-State trade alone, to be ensured'.[194]

In *Simitzi*[195] and *Carbonati Apuani*[196] the ECJ reached the same conclusion with regard to charges applicable to the *export* of goods from a certain region of a Member State to other regions of the same Member State or to other Member States. In *Carbonati Apuani*, the ECJ justified its finding that charges 'internal' to a Member State amounted to CEECD just like 'external' ones by highlighting that the Treaty defined the internal market as 'an area without internal frontiers',

[188] See Schütze (n 13) , 240 (arguing that the jurisprudence on Art. 30 TFEU 'undoubtedly points towards a "national" model that is completely disconnected from inter-State trade').
[189] Art. 26 (2) TFEU.
[190] Cf. A Tryfonidou, 'Case C-293/02, 'Jersey Produce Marketing Organisation Ltd v. States of Jersey and Jersey Potato Export Marketing Board, Judgment of the Court (Grand Chamber) of 8 November 2005, not yet reported' (2006) 43 CML Rev, 1738 (regarding the 'potential crossborderness' exception as the 'beginning of the end of the purely internal rule')
[191] Case C-163/90, *Administration des Douanes et Droits Indirects v Léopold Legros and others*, EU:C:1992:326.
[192] Joined cases C-363/93, C-407/93, C-408/93, C-409/93, C-410/93, and C-411/93, *René Lancry SA v Direction Générale des Souanes and Société Dindar Confort, Christian Ah-Son, Paul Chevassus-Marche, Société Conforéunion and Société Dindar Autos v Conseil Régional de la Réunion and Direction Régionale des Douanes de la Réunion*, EU:C:1994:315.
[193] Ibid para. 31.
[194] Ibid para. 29.
[195] Joined cases C-485/93 and C-486/93, *Maria Simitzi v Dimos Kos*, EU:C:1995:281.
[196] Case C-72/03, *Carbonati Apuani Srl v Comune di Carrara*, EU:C:2004:506.

'without drawing any distinction between inter-State frontiers and frontiers within a State'.[197]

In *Jersey Produce*,[198] the ECJ came full circle by declaring incompatible with the ban on CEECD a contribution applicable *only* to the export of potatoes between the Island of Jersey and the rest of the United Kingdom, because such potatoes 'might then be re-exported to other Member States, with the result that the contribution in question may be levied on goods which, after having passed through the United Kingdom in transit, are in fact exported to other Member States'.[199]

Turning to the ban on MEEQR *on imports*, in *Smanor*[200] and *Pistre*[201] the ECJ assessed the consistency with that ban of some French rules concerning the marketing of goods under certain denominations, even though the main proceedings involved purely internal situations, because the domestic rules at issue could *also* be applied to imported goods[202] and thus could 'at least potentially' hinder inter-State trade.[203]

The ECJ reached the same conclusion in *Jersey Produce*[204] and *Kakavetsos*[205] in respect of the ban on MEEQR *on exports* with reference to domestic rules that made the export of goods from one region to another of the same Member State subject to certain requirements, insofar as the goods in questions 'might then be re-exported to other Member States'[206] and could thus 'at the very least potentially' affect the volume of exports to other Member States.[207]

The 'potential cross-borderness' exception is clearly linked to one of the assumptions underlying the *national market model*, ie that trade restrictions in a part of the national market inevitably have repercussions on the whole market.

[197] Ibid para. 23.
[198] Case C-293/02, *Jersey Produce Marketing Organisation Ltd v States of Jersey and Jersey Potato Export Marketing Board*, EU:C:2005:664.
[199] Ibid para. 65.
[200] Case 298/87, *Proceedings for compulsory reconstruction against Smanor SA*, EU:C:1988:415.
[201] Joined cases C-321/94, C-322/94, C-323/94 ,and C-324/94, *Criminal proceedings against Jacques Pistre (C-321/94), Michèle Barthes (C-322/94), Yves Milhau (C-323/94) and Didier Oberti (C-324/94)*, EU:C:1997:229.
[202] Case 298/87, *Proceedings for compulsory reconstruction against Smanor SA*, EU:C:1988:415, para. 8; Joined cases C-321/94, C-322/94, C-323/94, and C-324/94, *Criminal proceedings against Jacques Pistre (C-321/94), Michèle Barthes (C-322/94), Yves Milhau (C-323/94), and Didier Oberti (C-324/94)*, EU:C:1997:229, para. 46.
[203] Joined cases C-321/94, C-322/94, C-323/94, and C-324/94, *Criminal proceedings against Jacques Pistre (C-321/94), Michèle Barthes (C-322/94), Yves Milhau (C-323/94), and Didier Oberti (C-324/94)*, EU:C:1997:229, para. 45.
[204] Case C-293/02, *Jersey Produce Marketing Organisation Ltd v States of Jersey and Jersey Potato Export Marketing Board*, EU:C:2005:664.
[205] Case C-161/09, *Kakavetsos-Fragkopoulos AE Epexergasias kai Emporias Stafidas v Nomarchiaki Aftodioikisi Korinthias*, EU:C:2011:110.
[206] Case C-293/02, *Jersey Produce Marketing Organisation Ltd v States of Jersey and Jersey Potato Export Marketing Board*, EU:C:2005:664, para. 79.
[207] Case C-161/09, *Kakavetsos-Fragkopoulos AE Epexergasias kai Emporias Stafidas v Nomarchiaki Aftodioikisi Korinthias*, EU:C:2011:110, paras 28–29.

However, it seems that the ECJ has deliberately espoused this philosophy only in respect of the CEECD ban.[208] In contrast, the ban on MEEQR on exports is still largely inspired by an international market philosophy,[209] whereas the ban on MEEQR on imports features, for different categories of internal measures, different jurisprudential lines ascribable to the international, federal, and national models,[210] which have occasionally been combined into a unitary analytical framework.[211]

Nonetheless, it seems fair to say that, in the context of the free movement of goods, the purely internal rule no longer sets a tighter jurisdictional limit to the MEEQR ban than the *Dassonville* formula, for purely internal situations involving 'potential cross-borderness' *à la Jersey Produce* are often governed by domestic measures having a 'potential effect' on inter-State trade *à la Dassonville*, thus blurring the distinction between those two notions in practice.[212]

B. The 'genuine enjoyment of Union citizenship' exception *(Zambrano)*

Unlike the internal market free movement provisions, the provisions on Union citizenship do not appear to have a cross-border scope.[213] The acquisition of Union citizenship as well as the exercise of some of the rights stemming from that status, such as the right to petition the European Parliament, to apply to the European Ombudsman, and to correspond with the EU Institutions, do not seem to be contingent upon the crossing of a border between two Member States.[214]

To understand the relevance of material cross-borderness in this context, regard must be had to the origin of the provisions on Union citizenship. The rights associated with that status started to develop in the 1960s as a 'spill-over' of free movement rights.[215] In order to promote the free movement of persons, Community law granted certain non-economic rights to migrants who were

[208] See Schütze (n 13), 240.
[209] Ibid at 205.
[210] Ibid at 165–72.
[211] Ibid at 172–5.
[212] See Schütze (n 13), 211 (arguing that the 'normative' approach to purely internal situations 'aligns the purely-internal-situation doctrine perfectly to the *Dassonville* formula understood as a jurisdictional formula') (parentheses omitted); A Tryfonidou, 'What can the Court's response to reverse discrimination and purely internal situations contribute to our understanding of the relationship between the "restriction" and "discrimination" concepts in EU free movement law?', available at www.jus.uio.no, 21, fn 121.
[213] See D Kochenov and R Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text' (2012) European Law Review, 377 ('neither the Preamble, nor any of the articles in the Treaties dealing with EU citizenship, connect the enjoyment of this status either with . . . cross-border movement').
[214] See Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, EU:C:2010:560, para. 79.
[215] See Kochenov and Plender (n 213), 373.

nationals of a Member State.[216] Due to their link to the functioning of the internal market, these rights were subject to the same limits as the fundamental freedoms, including the purely internal rule.[217]

Morson[218] is a case in point. The Dutch authorities had denied two Third-Country Nationals (TCNs) the right to reside with their children, who were Netherlands nationals and were employed in that Member State.[219] When the case came before the ECJ, the latter observed that those Community workers had 'never exercised the right to freedom of movement within the Community'.[220] Accordingly, their situation was a purely internal one and they could not rely on the free movement of workers as grounds for family reunification.[221] In their case, indeed, the recognition of a right to family reunification was not deemed instrumental to the functioning of the internal market, as the workers concerned had expressed no interest in moving to a Member State other than the Netherlands.[222]

Remarkably enough, the codification of Union citizenship by the Maastricht Treaty did not entail a change in approach by the ECJ, which for several years continued to apply citizenship rights in accordance with the internal market paradigms, including the purely internal rule.[223]

The picture started to change in 2000, when some Union citizenship rights gradually broke free from their subservience to the internal market fundamental freedoms and, accordingly, from the purely internal rule.[224] This can be seen, for instance, in *Garcia Avello*,[225] where some Spanish and Belgian nationals who had always lived in Belgium and had never exercised their free movement rights were allowed to rely on Union citizenship to challenge the Belgian authorities' denial

[216] See Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community OJ L 257, 19.10.1968, 2–12.
[217] See Kochenov and Plender (n 213), 373; Tryfonidou (n 2), 164–5.
[218] Joined cases 35 and 36/82, *Elestina Esselina Christina Morson v State of the Netherlands and Head of the Plaatselijke Politie within the meaning of the Vreemdelingenwet; Sweradjie Jhanjan v State of the Netherlands*, EU:C:1982:368.
[219] Ibid para. 2.
[220] Ibid para. 17.
[221] Ibid paras 16 and 18.
[222] Joined cases 35 and 36/82, *Elestina Esselina Christina Morson v State of the Netherlands and Head of the Plaatselijke Politie within the meaning of the Vreemdelingenwet; Sweradjie Jhanjan v State of the Netherlands*, EU:C:1982:339, ECR (1982) 3723, at 3742 (noting that the right to family reunification 'derive[d] from the principle of a freedom of movement for workers, and not from a right of residence, throughout the Community').
[223] See J Weiler, 'Europa: "Nous coalisons des Etats, nous n'unissons pas des hommes"', in M Cartabia and A Simoncini (eds), *La Sostenibilità della democrazia nel XXI secolo* (Bologna: Il Mulino, 2009), 82 (arguing that the problematic aspect of the post-Maastricht case law is that it failed to replace market with citizenship as the underpinning of free movement); Kochenov and Plender (n 213), 374.
[224] See A Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe' (2009) Legal Issues of Economic Integration, 53. Possibly, the change started with Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department*, EU:C:2002:434.
[225] Case C-148/02, *Carlos Garcia Avello v Belgian State*, EU:C:2003:539.

of their request to change their surname in accordance with the relevant Spanish rules, as that denial could have caused 'serious inconveniences' if those individuals wanted to rely in Belgium on documents bearing their surname recognized under Spanish law.[226]

The turning point, however, was the ECJ ruling in *Zambrano*.[227] The Belgian authorities had denied a request by a Colombian national, Mr Zambrano, to reside and work in Belgium with his young children, two of whom were Belgian nationals and, accordingly, Union citizens.[228] When the case reached the ECJ, the Commission and several Member States objected that the situation in the main proceedings was a purely internal one, as the Zambrano children had never exercised their free movement rights.[229]

The ECJ, after recalling that Union citizenship is 'intended to be the fundamental status of nationals of the Member States',[230] averred that Article 20 TFEU, which applied to the Zambrano children *qua* Union citizens, could be invoked to challenge national measures that had the effect of depriving those children of the '*genuine enjoyment of the substance of the rights* conferred by virtue of their status *as citizens of the Union*'.[231] According to the ECJ, that was the case of the Belgian authorities' decisions concerning Mr Zambrano, which would have compelled the Zambrano children 'to leave the territory of the Union in order to accompany their parents'.[232] Accordingly, the ECJ ruled that Article 20 TFEU had to be interpreted as precluding a Member State from refusing a TCN a residence and a work permit in a situation such as that in the main proceedings.[233]

In a way, *Zambrano* constitutes the transposition to Union citizenship of the 'potential cross-borderness' exception developed in the context of the free movement of goods. Just as in *Jersey Produce*[234] the ECJ did not require evidence that the domestic measure at issue applied to goods that had already crossed a national border, but emphasized that the affected goods could potentially be re-exported to other Member States, in *Zambrano* the ECJ focused not so much on the *prior exercise* by the Zambrano children of their free movement rights, but on the *potential exercise* of those rights, which would have been impeded by the refusal to grant Mr Zambrano the permit to reside and take up employment in Belgium.[235]

[226] Ibid para. 36.
[227] Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, EU:C:2011:124.
[228] Ibid para. 36.
[229] Ibid para. 37.
[230] Ibid para. 41.
[231] Ibid para. 42 (emphasis added).
[232] Ibid para. 44.
[233] Ibid para. 45.
[234] Case C-293/02, *Jersey Produce Marketing Organisation Ltd v States of Jersey and Jersey Potato Export Marketing Board*, EU:C:2005:664.
[235] See S O'Leary, 'The past present and future of the Purely Internal Rule in EU law' (2009) Irish Jurist, 37, 31 ('the court seems to construct the necessary connecting factor and bring a case within the scope of application of EU law by looking not at past movement, but at the effect which the

C. The 'certain cross-border interest' exception *(Coname)*

The ECJ introduced the 'certain cross-border interest' exception at first in the context of cases involving the award of concession contracts. As concession contracts, unlike public contracts, were for many years not subject to harmonization measures,[236] those contracts were often awarded, through opaque procedures, by authorities of a given Member State to companies of the same Member State. As a consequence of the lack of transparency, those awards, most of the times, were challenged only by companies established in the same Member State as the contracting authority.[237] Under the ECJ's 'traditional' approach, domestic courts hearing those cases would be prevented from requesting a preliminary ruling from the ECJ due to the purely internal character of the dispute.

However, it soon became apparent that the application of the purely internal rule to those cases could give rise to 'false negatives': the absence of cross-border elements was not the consequence of the lack of inter-State relevance of the concession contract in question, but only of the insufficient transparency of the award procedure, which had effectively deprived potential tenderers established in other Member States of the opportunity to take part in the bidding process.[238]

However, in *Coname*,[239] a case involving the award to an Italian company of a concession contract for the provision of heating fuel in the Italian municipality of Cingia de' Botti,[240] the ECJ for the first time took the view that, insofar as the concession contract at issue could 'have been *of interest* to an undertaking located in [another] Member State',[241] the complete lack of transparency surrounding its award constituted 'a difference in treatment to the detriment of the undertaking

impugned national measure or decision could have on the status of Union citizen and on the exercise by the applicant of rights conferred by that status').

[236] Whilst national rules on the award of public contracts have been harmonized since the 1970s, the harmonization of national rules concerning concession contracts only occurred in 2014 by virtue of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance, OJ L 94, 28 March2014, 1–64.

[237] See Joined Cases C-159/12 to C-161/12, *Alessandra Venturini v ASL Varese and Others (C-159/12), Maria Rosa Gramegna v ASL Lodi and Others (C-160/12), and Anna Muzzio v ASL Pavia and Others (C-161/12)*, Opinion of Advocate General Wahl, EU:C:2013:791, para. 36 ('It is often easier for nationals of the Member State concerned——since the investment required on their part is smaller, they do not face linguistic barriers, and they are better acquainted with both the domestic legal system and local administrative practice——to challenge national regulations which are incompatible with the rules on the internal market').

[238] Case C-231/03, *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti*, Opinion of Advocate General Stix-Hackl, EU:C:2005:212, para 27 (arguing that the circumstance that all the participants in a given award procedure come from the same Member State as the contracting authority 'could even be construed as an indication that the requisite announcement of the award procedure had not in fact taken place and, therefore, that no foreign undertaking could participate in it').

[239] Case C-231/03, *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti*, EU:C:2005:487.

[240] Ibid para. 2.

[241] Ibid para. 17 (emphasis added).

located in the other Member State',[242] amounting to 'indirect discrimination on the basis of nationality' incompatible with the Treaty provisions on establishment and services.[243]

In other words, the ECJ ruled that the principles of transparency, publicity, and impartiality also apply to the award of concession contracts in the context of purely internal situations as long as those contracts are of 'certain cross-border interest' for companies established in other Member States. As Advocate General Stix-Hackl put it in her Opinion in *Coname*, 'undertakings from other Member States need only be *potentially concerned* for there to be a cross-border situation and, thus, for a criterion for the application of the fundamental freedoms to be met'.[244]

The ECJ gradually extended the 'certain cross-border interest' exception from concession contracts to public contracts not covered by harmonization measures (eg belonging to sectors excluded by secondary legislation[245] or having a value below the threshold set in secondary legislation)[246] and, more recently, to a broad variety of cases dealing with the right of establishment[247] and the freedom to provide services.[248]

In one line of decisions, including the seminal *Coname* ruling, the ECJ treated the 'certain cross-border interest' exception as a 'working hypothesis', ie it gave a preliminary ruling 'provided that'[249], 'where',[250] or 'insofar as'[251] the pursuit of the relevant economic activity could be of interest to companies established in other Member States.

[242] Ibid para. 18.
[243] Ibid para. 19.
[244] Case C-231/03, *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti*, Opinion of Advocate General Stix-Hackl, EU:C:2005:212, para. 27 (emphasis added).
[245] That is the case of the so-called 'services that are not of priority interest' listed in Annex II B of Directive 2014/18. See case C-507/03, *Commission v Ireland*, EU:C:2007:676, paras 29–30.
[246] That is the case of the so-called 'below-the-threshold' contracts. See Joined cases C-147/06 and C-148/06, *SECAP SpA (C-147/06) and Santorso Soc. coop. arl (C-148/06) v Comune di Torino*, EU:C:2008:277, para. 21.
[247] Case C-384/08, *Attanasio Group Srl v Comune di Carbognano*, EU:C:2010:133, para. 24; Joined cases C-570/07 and C-571/07, *José Manuel Blanco Pérez and María del Pilar Chao Gómez v Consejería de Salud y Servicios Sanitarios (C-570/07) and Principado de Asturias (C-571/07)*, EU:C:2010:300, para. 40; Joined cases C-159/12 to C-161/12, *Alessandra Venturini v ASL Varese and Others (C-159/12), Maria Rosa Gramegna v ASL Lodi and Others* (C-160/12), and *Anna Muzzio v ASL Pavia and Others* (C-161/12), EU:C:2013:791, para. 25.
[248] Case C-380/05, *Centro Europa 7 Srl v Ministero delle Comunicazioni and Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*, EU:C:2008:59, para. 66; Case C-470/11, *SIA Garkalns v Rīgas dome*, EU:C:2012:505, para. 21; Case C-265/12, *Citroën Belux NV v Federatie voor Verzekerings- en Financiële Tussenpersonen (FvF)*, EU:C:2013:498, para. 33.
[249] Case C-159/11, *Azienda Sanitaria Locale di Lecce and Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others*, para. 23.
[250] Case C-274/09, *Privater Rettungsdienst und Krankentransport Stadler v Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau*, EU:C:2011:130, para. 49.
[251] Case C-231/03, *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti, Opinion of Advocate General Stix-Hackl*, EU:C:2005:212, para. 17.

Serrantoni[252] is a case in point. An Italian company had been excluded from the bidding procedure for a below-the-threshold contract awarded by the Municipality of Milan.[253] When the case came before the ECJ, the EU judges recalled that the application of fundamental freedoms to below-the-threshold contracts is '*based on the premiss* that the contracts in question are of certain cross-border interest'[254] and, accordingly, stated that their 'answers to the questions referred *take as their premiss*, that is none the less for the referring court to ascertain', that the contract at issue was of 'certain cross-border interest'.[255]

In another line of cases, the ECJ treated the 'certain cross-border interest' exception as a 'pure conjecture', not corroborated by any evidence. In other words, the ECJ provided a preliminary ruling just because the existence of 'certain cross-border interest' was 'far from inconceivable',[256] 'certainly possible',[257] or at least 'conceivable'.[258]

Parking Brixen[259] is, possibly, the first instance of the 'pure conjecture' variant of the 'certain cross-border interest' exception. The dispute stemmed from the award by the Italian Municipality of Bressanone of a concession contract to an Italian company for the management of two parking lots. The award was challenged only by another Italian company. In the course of proceedings before the ECJ, one of the parties objected that the case was a purely internal one.[260] The ECJ, however, considered that it was '*possible* that, in the main proceedings, undertakings established in Member States other than the Italian Republic might have been interested in providing the services concerned'[261] and accordingly decided to provide the preliminary ruling requested by the referring court.

Whilst in some ECJ rulings the application of the 'pure conjecture' variant appears justifiable, as the economic activity at issue clearly was of 'certain cross-border interest' (eg the exercise of nationwide broadcasting services in *Centro Europa 7*),[262] in other rulings recourse to that argument seems unwarranted, as

[252] Case C-376/08, *Serrantoni Srl and Consorzio stabile edili Scrl v Comune di Milano*, EU:C:2009:808.
[253] Ibid para. 2.
[254] Ibid para. 24 (emphasis added).
[255] Ibid para. 25 (emphasis added).
[256] Joined cases C-570/07 and C-571/07, *José Manuel Blanco Pérez and María del Pilar Chao Gómez v Consejería de Salud y Servicios Sanitarios (C-570/07) and Principado de Asturias (C-571/07)*, EU:C:2010:300, para. 40; Joined cases C-159/12 to C-161/12, *Alessandra Venturini v ASL Varese and Others (C-159/12), Maria Rosa Gramegna v ASL Lodi and Others (C-160/12), and Anna Muzzio v ASL Pavia and Others (C-161/12)*, EU:C:2013:791, para. 25.
[257] Case C-347/06, *ASM Brescia SpA v Comune di Rodengo Saiano*, EU:C:2008:416, para. 62.
[258] Case C-265/12, *Citroën Belux NV v Federatie voor Verzekerings- en Financiële Tussenpersonen (FvF)*, EU:C:2013:498, para. 33.
[259] Case C-458/03, *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG*, EU:C:2005:605.
[260] Ibid para. 54.
[261] Ibid para. 55 (emphasis added).
[262] Case C-380/05, *Centro Europa 7 Srl v Ministero delle Comunicazioni and Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*, EU:C:2008:59, para. 66.

the activities concerned had a limited economic value and a narrow geographical extension (eg the purchase and lease of immovable property in certain communes in *Libert*).[263]

In *Trijber*[264] the ECJ stretched the boundaries of the 'certain cross-border interest' exception even further, by taking into account not only the interest of entrepreneurs established in other Member States to provide boat tour services in Amsterdam, but also the interest of individuals from other Member States to receive that service.[265] Absent a clear willingness on the part of the ECJ to embrace a *national market model*, this variant of the 'certain cross-border interest' exception is clearly overbroad: in the context of an internal market where the free movement of persons and services is ensured, it is almost always possible to assume potential cross-border demand for a given service.

As noted above, one of the aims underlying the introduction of the 'certain cross-border interest' exception is the correction of 'false negatives'. However, the ECJ's enthusiastic reliance on that exception may have given rise to a number of 'false positives', leading to preliminary rulings being issued also in cases where the economic activity at issue had no cross-border dimension. Whilst the 'working hypothesis' variant of the exception requires the referring court to check whether the ECJ correctly assumed the existence of 'certain cross-border interest', the 'pure conjecture' variant often creates the impression that that determination has been already made by the ECJ, thus deterring the referring court from correcting a potential 'false positive'.

D. The '*renvoi* to EU law' exception (*Dzodzi*)

As outlined above, one of the solutions devised by Member States to the issue of reverse discrimination is the so-called 'spontaneous harmonization', ie the enactment of domestic provisions extending the treatment provided by EU law for cross-border situations to the corresponding purely internal situations.[266] This is usually achieved by virtue of a *renvoi*, set out in domestic legal texts, to the EU provisions applicable to the 'reference' cross-border situation.[267] Alternatively,

[263] Joined Cases C-197/11 and C-203/11, *Eric Libert and Others v Gouvernement flamand (C-197/11) and All Projects & Developments NV and Others v Vlaamse Regering (C-203/11)*, EU:C:2013:288, para. 34.

[264] Joined cases C-340/14 and C-341/14, *R.L. Trijber v College van Burgemeester en Wethouders van Amsterdam and J. Harmsen v Burgemeester van Amsterdam*, EU:C:2015:641.

[265] Ibid para. 41 ('while it is true that [the boat tour] service provided by Mr Trijber . . . is in essence intended for residents of the Netherlands, the fact remains that . . . that service may also *be enjoyed by nationals of other Member States* and that the scheme at issue could impede access to the market for all *service providers, including those from other Member States* who wish to establish themselves in the Netherlands in order to provide such a service') (emphasis added).

[266] See Tryfonidou (n 2), 123.

[267] For instance, Section 1(4) of Law no 287 of 10 October 1990 (the Italian competition law statute), in OJIR no 240 of 13 October 1990 provides that 'the interpretation of the provisions set out in [Chapter I of that statute] shall be carried out in accordance with the Community law principles on the protection of competition'.

this can also be achieved by laying down domestic rules for purely internal situations that reflect the wording of the EU rules governing the corresponding cross-border situations.[268]

Thus, it may occur that national courts hearing a purely internal case involving national rules that refer to or are modelled after EU rules with a cross-border scope may have doubts as to the interpretation of those rules. Should they be allowed to refer the matter to the ECJ for a preliminary ruling? According to the ECJ's 'traditional' approach, the answer should be in the negative: in spite of the *renvoi* to EU law, the case remains a purely internal one, so it lies outside the scope of EU cross-border provisions and, accordingly, of the ECJ's preliminary jurisdiction. Yet, in its seminal ruling in *Dzodzi*,[269] the ECJ took a more cooperative approach *vis-à-vis* the referring court.

The *Dzodzi* case arose from the Belgian authorities' decision not to grant a residence permit to Mrs Dzodzi, a Togolese national and the widow of a Belgian national who had never exercised his free movement rights.[270] In order to prevent reverse discrimination, Belgian law extended the rights of the spouses of Community citizens residing in Belgium to the spouses of Belgian nationals, even if they had never exercised their free movement rights.[271] In the course of legal proceedings brought by Mrs Dzodzi to challenge the above decision, the issue arose whether the ECJ could provide a preliminary ruling on the interpretation of the Community provisions governing the rights of spouses of Community citizens.[272]

Contrary to Advocate General Darmon's Opinion, arguing that the preliminary ruling procedure was meant to ensure the uniform interpretation of Community provisions 'only within the field of application of Community law',[273] the ECJ affirmed its jurisdiction to provide the interpretative ruling requested by the referring court on three grounds: first, it was solely for the referring court to determine the need for a preliminary ruling to deliver judgment in the main proceedings;[274] second, neither the 'wording' nor the 'aim' of the Treaty provisions on the preliminary ruling procedure excluded the ECJ's jurisdiction in 'the specific case where the national law of a Member State refers to the content of [a Community law] provision in order to

[268] For instance, Sections 2 and 3 of the Italian competition law statute reflect, almost verbatim, the wording of Articles 101 and 102 TFEU. This has been expressly acknowledged by the ECJ in Case C-280/06, *Autorità Garante della Concorrenza e del Mercato v Ente tabacchi italiani—ETI SpA et al. and Philip Morris Products SA et al. v Autorità Garante della concorrenza e del Mercato et al.*, EU:C:2007:775, para. 24.
[269] Joined cases C-297/88 and C-197/89, *Massam Dzodzi v Belgian State*, EU:C:1990:360.
[270] Ibid para. 3.
[271] Ibid para. 4.
[272] Ibid para. 29.
[273] Joined cases C-297/88 and C-197/89, *Massam Dzodzi v Belgian State*, EU:C:1990:274, para. 8.
[274] Ibid paras 34–35.

determine rules applicable to a situation which is purely internal to that State';[275] third, in order to 'forestall future differences of interpretation',[276] it was 'manifestly in the interest of the Community legal order' that 'every Community provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied',[277] ie also when those rules were made applicable to purely internal situations by virtue of a *renvoi* set out in national law.

The ECJ applied the '*renvoi* to EU law' exception in a broad variety of cases: when national law 'faithfully reproduces' an EU law provision,[278] when a national provision 'did not reproduce . . . *verbatim*' the wording of the EU rule,[279] but 'in regulating purely internal situations adopts the same solutions as those adopted in Community law in order',[280] in particular in order 'to avoid discrimination against nationals of the Member State in question'[281] or 'any distortion of competition',[282] or else 'to provide for one single procedure in comparable situations'.[283]

However, on certain occasions, the ECJ affirmed its preliminary jurisdiction on the basis of 'blank' references to EU law, ie national provisions that referred to EU law in extremely generic terms.

Federconsorzi[284] is a case in point. The contract between two Italian companies provided that liability in a case of loss of olive oil had to be determined on the basis of the 'amount stipulated by the Community legislation in force'.[285] The ECJ took the view that the above contractual proviso, in spite of its generic wording, 'refer[red] to the content of rules of Community law in order to determine the extent to which one of the parties may incur financial liability' and thus decided to provide the interpretation of Community law requested by the referring court.[286] It must be noted, however, that a common market organization for

[275] Ibid para. 36.
[276] Ibid para. 37.
[277] Ibid.
[278] Case C-32/11, *Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal*, EU:C:2013:160, para. 21. Case C-413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, EU:C:2014:2411, para. 19.
[279] Case C-306/99, *Banque internationale pour l'Afrique occidentale SA (BIAO) v Finanzamt für Großunternehmen in Hamburg*, EU:C:2003:3, para. 92.
[280] Case C-28/95, *A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2*, EU:C:1997:369, para. 32.
[281] Case C-126/10, *Foggia—Sociedade Gestora de Participações Sociais SA v Secretário de Estado dos Assuntos Fiscais*, EU:C:2011:718, para. 21.
[282] Case C-3/04, *Poseidon Chartering BV v Marianne Zeeschip VOF, Albert Mooij, Sjoerdtje Sijswerda, Gerrit Schram*, EU:C:2006:176, para. 16.
[283] Case C-130/95, *Bernd Giloy v Hauptzollamt Frankfurt am Main-Ost*, EU:C:1997:372, para. 28.
[284] Case C-88/91, *Federazione Italiana dei Consorzi Agrari v Azienda di Stato per gli Interventi nel Mercato Agricolo*, EU:C:1992:276.
[285] Ibid para. 3.
[286] Ibid para. 8.

oils and fats was in place,[287] which also regulated the value of olive oil, so the contract at issue concerned a matter falling within a harmonized sector.

The ECJ went even further in *Schoonbroodt.*[288] Belgian law granted exemptions from excise duties on imports 'to the same extent and subject to the same conditions' as exemptions from import duties set by Community law.[289] Although Advocate General Jacobs himself expressed doubts as to what Community provision the Belgian law at issue sought to refer to,[290] the ECJ resolved to provide the interpretation requested by the referring court because 'the relevant provisions of Belgian law refer to the solutions devised by Community law'.[291] In other words, the ECJ asserted its jurisdiction on the basis of a 'blank' reference that, unlike the one in *Federconsorzi*, concerned a matter not subject to harmonization measures.

Cases like *Federconsorzi* and *Schoonbroodt* suggest that, whilst the '*renvoi* to EU law' exception stems from the lofty goal of assisting national courts in dealing with the issue of reverse discrimination,[292] the ECJ may have occasionally gone too far. The EU judges have relied on the above exception to provide preliminary rulings even in cases where the link to EU law was so tenuous as to make those rulings potentially irrelevant for the resolution of the dispute before the referring court, thus distorting the purpose of the preliminary ruling procedure.

E. The 'corresponding cross-border situation' exception *(Guimont)*

In addition to 'spontaneous harmonization', another solution devised at the national level to address the issue of reverse discrimination is 'judicial equalization' between a given purely internal situation and its corresponding cross-border situation. According to the 'traditional' approach, the domestic courts confronted with that task cannot request the ECJ's assistance, as the purely internal character of the case precludes the application of the fundamental freedoms or excludes the ECJ's preliminary jurisdiction altogether.

Yet, since the *Guimont* judgment of 2000,[293] the ECJ has been willing to provide preliminary rulings in such cases on grounds that a ruling on the correct interpretation of EU law could be useful to the referring court should the latter be

[287] See Regulation No 136/66/EEC of the Council of 22 September 1966 on the establishment of a common organization of the market in oils and fats, OJ 172, 30 September 1966, 3025–35.
[288] Case C-247/97, *Marcel Schoonbroodt, Marc Schoonbroodt and Transports A.M. Schoonbroodt SPRL v Belgian State*, EU:C:1998:586.
[289] Ibid para. 3.
[290] Case C-247/97, *Marcel Schoonbroodt, Marc Schoonbroodt and Transports A.M. Schoonbroodt SPRL v Belgian State*, Opinion of Advocate General Jacobs, EU:C:1998:323, para. 20 ('it may well be that the relevant Community legislation in the present proceedings is the Directive, rather than the Regulation, since the Directive was in force at the material time and its provisions governed the duty-free admission of fuel in respect of commercial vehicles travelling between Member States').
[291] Ibid para. 15.
[292] Tryfonidou (n 2), 125.
[293] Case C-448/98, *Criminal proceedings against Jean-Pierre Guimont*, EU:C:2000:663.

required by its domestic law to apply to the purely internal situation at issue in the main proceedings the same treatment provided by EU law for the corresponding cross-border situation.

The *Guimont* case stemmed from a request for a preliminary ruling made in the context of criminal proceedings against Mr Guimont, a French entrepreneur, charged with marketing Emmental cheese without rind, in breach of the relevant French provisions on deceptive labelling.[294]

Contrary to Advocate General Saggio's recommendations,[295] the ECJ observed that the interpretation of Community law requested by the referring court 'might be useful to it if its national law were to require, in proceedings such as those in this case, that a national producer must be allowed to enjoy the same rights as those which a producer of another Member State would derive from Community law in the same situation'.[296] The ECJ thus affirmed its jurisdiction to determine 'whether a national rule such as that at issue in the main proceedings might, in so far as applied to imported products, constitute a measure having equivalent effect to a quantitative restriction'.[297]

It is worth noticing that the ECJ's ruling in *Guimont* has been of little use to the eponymous entrepreneur.[298] When his case eventually reached the French Court of Cassation, the latter ruled that neither Community law nor French law required French producers to be subject to the same rules as those applicable to producers from other Member States.[299]

As noted by Advocate General Maduro in *Centro Europa 7*,[300] this exception reveals the ECJ's willingness to take responsibility for the EU origin of the reverse discrimination phenomenon and to assist national courts wishing to address that problem.[301] Moreover, the 'corresponding cross-border situation' exception provides yet another remedy against 'false negatives', by enabling the ECJ to declare that EU law should be interpreted as precluding certain trade-restrictive measures even when those measures are brought to the EU judges' attention in the context of a purely internal dispute.[302]

[294] Ibid paras 2–4.
[295] Case C-448/98, *Criminal proceedings against Jean-Pierre Guimont*, Opinion of Advocate General Saggio, EU:C:2000:117, para. 8.
[296] Case C-448/98, *Criminal proceedings against Jean-Pierre Guimont*, EU:C:2000:663, para. 23.
[297] Ibid para. 24 (emphasis added).
[298] See V Verbist, 'Reverse discrimination in the European Union' (2017) Intersentia, 183–96.
[299] See French Court of Cassation, judgment no 03-13.171 of 3 May 2006.
[300] Case C-380/05, *Centro Europa 7 Srl v Ministero delle Comunicazioni and Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*, Opinion of Advocate General Maduro, EU:C:2007:505, para. 30.
[301] See Krommendijk (n 126), 1389.
[302] See Ritter (n 185), 701 ('it might be that the Court wants to seize the opportunity to rule on a purely internal matter, even though its preliminary ruling will not/may not apply in the underlying case, because the Court fears that in a future cross-border case where Community law will apply unequivocally, the national court will not refer a question under Art. 234').

The 'corresponding cross-border situation' exception contributed significantly to the expansion of the ECJ's jurisdiction, even beyond the scope of EU law proper. In some rulings, however, this exception amounts to little more than 'boilerplate', a liturgical repetition of the *Guimont* formula without an actual definition of the 'corresponding cross-border situation' at issue.

Salzmann[303] is a case in point. It concerned the compatibility with the free movement of capital of the prior authorization requirement laid down by Austrian law for the acquisition of building plots.[304] The issue arose in the context of a dispute between Ms Salzmann, an Austrian citizen, and the Austrian authorities.[305] After ascertaining that 'all the facts in the main proceedings [we]re confined to a single Member State',[306] the ECJ averred that its ruling could have been useful in a 'situation where national law requires that a national be allowed to enjoy the same rights as those which nationals of other Member States would derive from Community law in the *same situation*'.[307] The ECJ did not clarify what the wording 'same situation' meant in that case, but went on to review the Austrian provision's compliance with the free movement of capital as if the dispute in the main proceedings were not a purely internal one.[308]

Rulings referring to the 'boilerplate' variant of the 'corresponding cross-border situation' exception often rely also on the 'pure conjecture' variant of the 'certain cross-border interest' exception to justify the EU judges' decision to depart from the purely internal rule.[309] It is clear, however, that neither of those variants, alone or in conjunction with the other, is suitable to ensure that the preliminary ruling sought by the referring court is necessary for the resolution of the dispute in the main proceedings, thus turning the preliminary ruling procedure into an 'objective' review of the consistency of national

[303] Case C-300/01, *Doris Salzmann*, EU:C:2003:283.
[304] Ibid paras 7–10.
[305] Ibid para. 2.
[306] Ibid para. 32.
[307] Ibid para. 33.
[308] Ibid para. 36.
[309] See, eg, Case C-470/11, *SIA Garkalns v Rīgas dome*, EU:C:2012:505, para. 20 (corresponding cross-border situation exception) and para. 21 (certain cross-border interest exception); Joined cases C-159/12 to C-161/12, *Alessandra Venturini v ASL Varese and Others (C-159/12), Maria Rosa Gramegna v ASL Lodi and Others (C-160/12), and Anna Muzzio v ASL Pavia and Others (C-161/12)*, EU:C:2013:791, para. 25 (certain crossborder interest exception) para. 28 (corresponding cross-border situation exception); Case C-327/12, *Ministero dello Sviluppo economico and Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture v SOA Nazionale Costruttori—Organismo di Attestazione SpA*, EU:C:2013:827, para. 48 (certain cross-border interest exception) and para. 49 (corresponding cross-border situation exception); Case C-367/12, *Susanne Sokoll-Seebacher*, EU:C:2014:68, para. 10 (certain cross-border interest exception) and para. 12 (corresponding cross-border situation exception); Case C-380/05, *Centro Europa 7 Srl v Ministero delle Comunicazioni and Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*, EU:C:2008:59, para. 66 (certain cross-border interest exception) and para. 69 (corresponding cross-border situation exception).

measures with EU law, a type of assessment that should be arguably be carried out only in the context of infringement proceedings.[310]

F. The 'annulment of indistinctly applicable measures' exception *(Libert)*

The assumption underlying the purely internal rule is that cases having no cross-border elements typically involve domestic measures that have no inter-State effects. However, it may happen that a purely internal dispute concerns the domestic validity of an indistinctly applicable measure. In that case, an ECJ ruling establishing that the internal market fundamental freedoms must be interpreted as precluding that measure may lead to its annulment by national courts, thus affecting the regime of cross-border situations and purely internal situations alike.

This is what happened in *Libert*.[311] The ECJ had been requested by the Belgian constitutional court to assess the compatibility with the Treaty rules on establishment and services of a Flemish decree that reserved the purchase and the lease of immovable property in certain Flemish communes to persons who had a 'sufficient connection' with those communes.[312] That issue had been raised in the course of a purely internal dispute concerning the constitutionality of the above Flemish Decree, which 'appl[ied] not only to Belgian nationals but also to nationals of other Member States'.[313] The ECJ thus considered that '*the decision of the referring court* that will be adopted pursuant to the present judgment *will also have effects on the nationals of other Member States*'[314] and that it was therefore appropriate to give the preliminary ruling requested by the Belgian Constitutional Court.[315]

The ECJ employed the same exception in *Malta Dental*.[316] That judgment stems from a preliminary reference made in the context of a dispute between the Malta Dental Technologists Association and the Maltese authorities over the latter's refusal to recognize in Malta the professional qualifications of clinical dental

[310] See R Mastroianni, 'La libertà di prestazione dei servizi nella giurisprudenza comunitaria: i principi generali' (2007) Studi sull'integrazione europea, 539.
[311] Joined Cases C-197/11 and C-203/11, *Eric Libert and Others v Gouvernement flamand (C-197/11) and All Projects & Developments NV and Others v Vlaamse Regering (C-203/11)*, EU:C:2013:288.
[312] Ibid para. 22.
[313] Ibid para. 35.
[314] Ibid para. 36 (emphasis added).
[315] Ibid.
[316] Case C-125/16, *Malta Dental Technologists Association and John Salomone Reynaud v Superintendent tas-Saħħa Pubblika and Kunsill tal-Professjonijiet Kumplimentari għall-Medi·ina*, EU:C:2017:707.

technologists.[317] Following the Austrian government's objection that the situation at issue in the main proceedings was a purely internal one,[318] the ECJ noted that the dispute concerned the 'lawfulness of national provisions which apply, not only to Maltese nationals, but also to nationals from other Member States',[319] so that '*the decision* which th[e referring] court will adopt following the ruling of the Court of Justice *will also have effects on the nationals of other Member States*'.[320] Accordingly, the EU judges ruled that the preliminary reference was admissible.[321]

V. The ECJ's 'reflective' approach

The 'reflective' approach is the ECJ's most recent approach to the purely internal rule: it emerged in 1995 with the *Kleinwort Benson* judgment.[322] Since then, it has developed in parallel with the other two approaches and has gradually become the ECJ's predominant approach to cases involving purely internal situations.

The 'reflective' approach stems from the ECJ's 'reflection', prompted by Advocates General and legal commentators, on some of the exceptions to the purely internal rule introduced by the 'expansive' approach, which had led to an excessive expansion of the ECJ's preliminary jurisdiction and to a significant number of 'false positives', ie to the inclusion within the scope of the internal market fundamental freedoms of domestic measures that in fact had a negligible impact on inter-State trade.

If the 'expansive' approach to the purely internal rule had sometimes led to outcomes akin to that of a *national market*, the 'reflective' approach marks a return to the *federal market* philosophy of *Cassis de Dijon* and *Saunders*. Arguably, the 'reflective' approach represents, on the level of material cross-borderness, the reversal that *Keck*[323] brought about on the level of legal cross-borderness. Both 'revolutions' stem from the realisation that their antecedents—respectively, the 'expansive' approach to the purely internal rule and the classification of 'selling arrangements' as MEEQR in *Torfaen* and its short-lived progeny[324]—were

[317] Ibid para. 2.
[318] Ibid para. 27.
[319] Ibid para. 30.
[320] Ibid (emphasis added).
[321] Ibid para. 31.
[322] Case C-346/93, *Kleinwort Benson Ltd v City of Glasgow District Council*, EU:C:1995:85.
[323] Joined cases C-267/91 and C-268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard*, EU:C:1993:905.
[324] Case C-145/88, *Torfaen Borough Council v B & Q plc*, EU:C:1989:593; Case C-332/89, *Criminal proceedings against André Marchandise, Jean-Marie Chapuis and SA Trafitex*, EU:C:1990:418; Case C-312/89, *Union départementale des syndicats CGT de l'Aisne v SIDEF Conforama, Société Arts et Meubles and Société Jima*, EU:C:1990:418; Case C-169/91, Council of the City of Stoke-on-Trent and Norwich City Council v B&Q plc., EU:C:1992:300.

national market solutions, at odds with the *federal market* philosophy underlying the EU internal market.[325]

The tangible result of the ECJ's 'reflection' is the introduction of a number of correctives that turned five of the six exceptions to the purely internal rule from unconditional to conditional derogations, ie to judicial tests applied *in concreto*, having regard to the specific circumstances of the case. Thus, whilst the 'traditional' approach has the effect of limiting the scope of the internal market fundamental freedoms (and, accordingly, of the ECJ's preliminary jurisdiction) and the 'expansive' approach has the effect of extending it, the 'reflective' approach can have either effect, depending on whether the facts of the case fit within one (or more) of the 'corrected' exceptions to the purely internal rule.

The only exception of the 'expansive' approach that has not been the subject of this 'reflection' is the 'potential cross-borderness' exception, developed in the context of the free movement of goods. Arguably, the reasons for the ECJ's unwillingness to depart from its earlier jurisprudence in this sector vary depending on the specific provision concerned. With reference to CEECD, as noted above, the ECJ has consciously abandoned the federal market model in favour of the national market philosophy, so there was no need to update the 'potential cross-borderness' exception.[326] As to MEEQR on exports, instead, the ECJ has never renounced the international market model,[327] so probably the EU judges regarded the discrimination-based conception of legal cross-borderness prevailing in this area as an adequate limit to the scope of Article 35 TFEU. With regard to MEEQR on imports, finally, the reason for not adding correctives to the 'potential cross-borderness' exception might be that the ECJ has meanwhile developed other doctrines (eg the *Keck* doctrine for 'selling arrangements',[328] the *Krantz* doctrine of 'remoteness', etc.),[329] to limit the scope of the *Dassonville* formula.

[325] For this characterization of the *Torfaen* and *Keck* jurisprudence, see Schütze (n 13), 149–58.
[326] See above Section IV.A.
[327] See Case 15/79, *P.B. Groenveld BV v Produktschap voor Vee en Vlees*, EU:C:1979:253, para. 7 ('[Art. 35 TFEU] concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the *establishment of a difference in treatment* between the domestic trade of a member state and its export trade') (emphasis added); Case C-205/07, *Lodewijk Gysbrechts and Santurel Inter BVBA*, EU:C:2008:730, para. 43 (declaring that a domestic measure was contrary to Art. 35 TFEU because 'its actual effect [was] greater on goods leaving the market of the exporting Member States than on the marketing of goods in the domestic market of that Member State'). See also Schütze (n 13), 205 ('The move from *Groenveld* to *Gysbrechts* is consequently a move from direct to indirect discrimination—that is, a move *within* the international model. Under Article 35, the Union has thus not yet embraced the federal model').
[328] Joined cases C-267/91 and C-268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard*, EU:C:1993:905, paras 16–17. Interestingly, *Keck* itself involved a purely internal situation, but rather than dismissing the preliminary reference, the ECJ took advantage of it to accomplish its *revirement* in the area of 'selling arrangements'.
[329] Case C-69/88, *H. Krantz GmbH & Co. v Ontvanger der Directe Belastingen and Netherlands State*, EU:C:1990:97, paras 9–11.

A. Rethinking *Zambrano*: the 'leaving the EU territory' corrective

The application by the ECJ in *Zambrano* of the provisions on Union citizenship to a situation having no cross-border elements led several commentators to believe that the ECJ sought to abolish the purely internal rule, at least in this particular area.[330] The 'genuine enjoyment of Union citizenship' exception had, at first sight, a significant expansion potential, as it could turn Union citizenship into the quintessential link with EU law, applicable even in the absence of cross-border elements.[331]

The ECJ's subsequent rulings in *Dereci*[332] and *O&S*,[333] however, dispelled those 'great expectations'.[334]

The *Dereci* judgment stemmed from a number of questions for a preliminary ruling made in the course of five different judicial proceedings concerning the right of residence of TCNs who were family members of EU citizens.[335] Those EU citizens had never exercised their free movement rights and were not dependent on the above TCNs for their subsistence.[336]

The ECJ noted that the Treaty rules governing the free movement of persons and their implementing legislation could not be applied to purely internal situations,[337] but added that the situation of EU citizens who had never exercised their free movement rights could not 'for that reason alone' be assimilated to a purely internal situation.[338] The ECJ indeed recalled that, as previously held in *Zambrano*,[339] Article 20 TFEU precludes 'national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status'.[340]

[330] O'Leary (n 235), 37 et seq.; G Aiello and S Lamonaca, 'Diritto di soggiorno dei familiari del cittadino europeo: erosione del limite delle situazioni puramente interne e delimitazione del nucleo essenziale del diritto di cittadinanza' (2012) Rivista Italiana di Diritto Pubblico Comunitario, 332.
[331] Kochenov and Plender (n 213), 387–388.
[332] Case C-256/11, *Murat Dereci and Others v Bundesministerium für Inneres*, EU:C:2011:734.
[333] Joined Cases C-356/11 and C-357/11, *O & S v Maahanmuuttovirasto and Maahanmuuttovirasto v L*, EU:C:2012:776.
[334] Possibly, the ECJ's retrenchment from *Zambrano* started with Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department*, EU:C:2011:277, where the ECJ found that, having regard to the facts of the case, the contested measure was not liable to oblige Mrs McCarthy to leave the EU territory. It is only in Case C-256/11, *Murat Dereci and Others v Bundesministerium für Inneres*, EU:C:2011:734, however, that the ECJ expressly introduced some corrections to the 'genuine enjoyment of Union citizenship' exception.
[335] Case C-256/11, *Murat Dereci and Others v Bundesministerium für Inneres*, EU:C:2011:734, para. 22.
[336] Ibid.
[337] Ibid para. 60.
[338] Ibid para. 61.
[339] Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, EU:C:2010:560, para 42.
[340] Case C-256/11, *Murat Dereci and Others v Bundesministerium für Inneres*, EU:C:2011:734, para 64.

The ECJ then provided an important clarification on the 'genuine enjoyment of Union citizenship' exception, ie that it only applied to 'situations in which the *Union citizen has, in fact, to leave* not only the territory of the Member State of which he is a national, but also *the territory of the Union as a whole*'.[341] The ECJ added that the above scenario was 'specific in character' and that it could only result in the recognition of a right of residence to TCNs who are family members of EU citizens when 'the effectiveness of Union citizenship enjoyed by that [EU citizen] would otherwise be undermined'.[342] The ECJ further noted that economic or family reunification reasons were 'not sufficient' to 'support the view that the Union citizen will be forced to leave Union territory' if that citizen's TCN family member is not granted a right of residence.[343]

The ECJ, however, left it to the referring courts to apply this 'corrected' version of the 'genuine enjoyment of Union citizenship' exception to the disputes in the main proceedings. As noted by some legal commentators, this choice deprived the 'genuine enjoyment of Union citizenship' exception of its EU dimension and hindered its development in subsequent ECJ rulings.[344]

Indeed, after *Dereci*, the ECJ confined itself to providing minor clarifications on the 'genuine enjoyment of Union citizenship' exception.[345] Notably, in *O&S*[346] the ECJ highlighted that a key factor in the application of that exception is the 'relationship of dependency'[347] between the Union citizen and the TCN who is refused a right of residence, because that dependency may compel the Union citizen 'to leave not only the territory of the Member State of which he is a national but also that of the European Union as a whole'.[348]

These judgments show that the ECJ has gradually turned the 'genuine enjoyment of Union citizenship' exception into a prospective analysis of the probability of the Union citizen's departure from the territory of the EU as a consequence of a national measure affecting a TCN with whom that citizen has a relationship of dependency. Whilst in *Zambrano* the ECJ had seemingly acted as the Union's supreme court, since *Dereci* it has increasingly acted as the Union's immigration tribunal, thus dispelling the hopes (and fears) for a 'constitutional change' stemming from the *Zambrano* ruling.[349]

[341] Ibid para. 66 (emphasis added).
[342] Ibid para. 67.
[343] Ibid para. 68.
[344] Kochenov and Plender (n 213), 392–3.
[345] See, eg, Case C-82/16, *K.A. et al. v Belgische Staat*, EU:C:2018:308, para. 76; Case C-304/14, *Secretary of State for the Home Department v CS*, EU:C:2016:674, para. 50; Case C-165/14, *Alfredo Rendón Marín v Administración del Estado*, EU:C:2016:675, para. 87.
[346] Joined Cases C-356/11 and C-357/11, *O & S v Maahanmuuttovirasto and Maahanmuuttovirasto v L*, EU:C:2012:776.
[347] Ibid para. 56 (emphasis added).
[348] Ibid.
[349] Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, EU:C:2010:560, para. 177.

B. Rethinking *Coname:* proving the existence of 'certain cross-border interest'

The 'certain cross-border interest' exception, in its 'pure conjecture' variant, entails that preliminary references stemming from purely internal disputes must be regarded as admissible whenever 'it is possible' or 'it is not inconceivable' that individuals or companies from other Member States may be interested in carrying out the economic activity at issue in the main proceedings.

This approach, criticized by several commentators,[350] is difficult to reconcile with the ECJ's jurisprudence on the inadmissibility of 'hypothetical' preliminary questions.[351] Accordingly, the ECJ has introduced correctives to flesh out the 'certain cross-border interest' exception, by making the burden of proof of that interest increasingly onerous.

The first ruling in this direction is *Centro Europa 7*,[352] concerning the Italian authorities' failure to make broadcasting frequencies available to the successful tenderer for the award of a broadcasting concession, where the ECJ expressly stated that the existence of 'certain crossborder interest' was 'for the national court to determine'.[353]

Two years later, in *Wall*,[354] the ECJ referred to a specific circumstance pointing to the existence of 'certain cross-border interest', namely the publication of the relevant call for tenders in 'the official gazette of the City of Frankfurt at "EU-wide" level'.[355] Likewise, in *Duomo* the ECJ expressly referred to the 'high overall value of the contracts' for the collection of taxes in an Italian municipality as evidence of a 'certain cross-border interest' to carry out that activity.[356]

In *Tecnoedi*[357] the ECJ, for the first time, provided an indication as to the *intensity of the burden of proof* that the referring court is expected to satisfy: 'a conclusion that there is certain cross-border interest cannot be inferred hypothetically from certain factors which, considered in the abstract, could constitute evidence to that effect, but must be the *positive outcome of a specific assessment*

[350] See, eg. Krommendijk (n 126), 1377; Shuibhne (n 461), 741; C de Sousa, *The European Fundamental Freedoms: A Contextual Approach* (Oxford: Oxford University Press, 2015), 186; D Sarmiento, 'The purely internal situation in free movement rules: Some clarity at last from the ECJ', in EU Law Analysis Blog, 16 November 2016.
[351] Case 244/80, *Pasquale Foglia v Mariella Novello*, EU:C:1981:302, para. 18 ('the duty assigned to the court by Article [267 TFEU] is not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States').
[352] Case C-380/05, *Centro Europa 7 Srl v Ministero delle Comunicazioni and Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*, EU:C:2008:59.
[353] Ibid para. 67.
[354] Case C-91/08, *Wall AG v La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs- und Service (FES) GmbH*, EU:C:2010:182.
[355] Ibid para. 35.
[356] Joined Cases C-357/10 to C-359/10, *Duomo Gpa Srl and Others v Comune di Baranzate and Comune di Venegono Inferiore*, EU:C:2012:283, para. 40.
[357] Case C-318/15, *Tecnoedi Costruzioni Srl v Comune di Fossano*, EU:C:2016:747.

of the circumstances of the contract at issue'.[358] The EU judges added that 'the referring court may not merely submit to the Court of Justice evidence showing that certain cross-border interest cannot be ruled out but must, on the contrary *provide information capable of proving that it exists*'.[359]

Most recently, the ECJ has increased the intensity of the burden of proof even further. The EU judges in *Oftalma*[360] averred that 'certain cross-border interest' must be 'proved on the basis of *objective and consistent factors*'.[361] In *Nova Kreditna Banka Maribor*,[362] the ECJ added that the order for reference 'must clearly set out *specific factors*, that is, *not hypothetical considerations but specific evidence*' of the existence of 'certain cross-border interest'.[363]

As to the type of circumstances that may indicate that a given contract is of 'certain cross-border interest', a survey of the ECJ's jurisprudence suggests that the 'value of the contract' is often of the utmost importance: the closer that value is to the thresholds set by EU public procurement legislation, the stronger the evidence of 'certain cross-border interest'.[364] The margin of profit of the successful tenderer, instead, is usually not a decisive factor, as securing the award of an unprofitable contract may still be of interest for a company wishing to enter a new market.[365] Another relevant circumstance, instead, is the 'place where the work is to be carried out':[366] if that place is close to a national border, then 'even low-value contracts may be of certain cross-border interest'.[367]

Regard must also be had to the 'specific characteristics of the goods concerned'.[368] Thus, a contract for the procurement of goods bearing an international trademark (eg computers with an 'Intel Core i5 3, 2 Hz or equivalent' CPU)[369] is more likely to be of 'certain cross-border interest' than one conerning products to be manufactured in accordance with national specifications (eg Austrian fireworks display permits).[370] Moreover, the ECJ has regarded the

[358] Ibid para. 22 (emphasis added).
[359] Ibid (emphasis added).
[360] Case C-65/17, *Oftalma Hospital Srl v Commissione Istituti Ospitalieri Valdesi (CIOV) and Regione Piemonte*, EU:C:2018:263.
[361] Ibid para. 39 (emphasis added).
[362] Case C-215/17*, Nova Kreditna Banka Maribor d.d. v Republika Slovenija*, EU:C:2018:901.
[363] Ibid para. 44 (emphasis added).
[364] See Case C-298/15, *UAB 'Borta' v VĮ Klaipėdos valstybinio jūrų uosto direkcija*, EU:C:2017:266, para. 45 ('the value of that contract, although below the thresholds laid down in Article 16(b) of Directive 2004/17, is relatively significant').
[365] Case C-388/12, *Ancona v Marche*, EU:C:2013:734, para. 51.
[366] Case C-65/17*, Oftalma Hospital Srl v Commissione Istituti Ospitalieri Valdesi (CIOV) and Regione Piemonte*, EU:C:2018:263, para. 40.
[367] See Joined cases C-147/06 and C-148/06, *SECAP SpA (C-147/06) and Santorso Soc. coop. arl (C-148/06) v Comune di Torino*, EU:C:2008:277, para. 31.
[368] Case C-65/17, *Oftalma Hospital Srl v Commissione Istituti Ospitalieri Valdesi (CIOV) and Regione Piemonte*, EU:C:2018:263, para. 40.
[369] Case C-278/14, *SC Enterprise Focused Solutions SRL v Spitalul Județean de Urgență Alba Iulia*, EU:C:2015:228, para. 9.
[370] Case C-187/16, *Commission v Austria (identity documents)*, EU:C:2018:194, para. 107.

publication of the call for tenders in the official journal of a large city,[371] and *a fortiori* in the EU Official Journal,[372] as proof of the existence of 'certain cross-border interest'.

Of course, the participation of companies established in Member States other than that of the contracting authority in a given award procedure provides direct evidence of the existence of 'certain cross-border interest'.[373] Conversely, the participation of companies established in the same Member State as that of the contracting authority, even if located at a significant distance from the place where the work is to be carried out, provides no indication of 'certain cross-border interest'.[374]

Finally, in *Spezzino* the ECJ noted that the referring court may, in its overall assessment of the existence of 'certain cross-border interest', also take account of 'complaints [to the Commission] brought by operators situated in other Member States, provided that it is determined that those complaints are real and not fictitious'.[375] In *Airport Shuttle*, for instance, Advocate General Kokott pointed out that some companies established in Member States other than that of the contracting authority (Italy) had submitted complaints to the Commission just to express their support to one of the parties in the main proceedings, rather than out of a genuine interest in establishing themselves in Italy to provide car and driver hire services.[376]

C. Rethinking *Dzodzi*: the 'direct and unconditional *renvoi*' corrective

The '*renvoi* to EU law' exception has attracted significant criticism. It has been observed that the ECJ should not give preliminary rulings outside the scope of EU law,[377] whose boundaries cannot be modified by unilateral decisions of the

[371] Case C-91/08, *Wall AG v La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs- und Service (FES) GmbH*, EU:C:2010:182, para. 11.
[372] Case C-226/09, *Commission v Ireland (language translations)*, EU:C:2010:697, para. 33.
[373] Ibid; Case C-298/15, *UAB 'Borta' v VĮ Klaipėdos valstybinio jūrų uosto direkcija*, EU:C:2017:266, para. 45.
[374] Case C-318/15, *Tecnoedi Costruzioni Srl v Comune di Fossano*, EU:C:2016:747, paras 24–25.
[375] Case C-113/13, *Azienda sanitaria locale n. 5 'Spezzino' and Others v San Lorenzo Soc. coop. Sociale and Croce Verde Cogema cooperativa sociale Onlus*, EU:C:2014:2440, para. 49.
[376] Joined cases C-162/12 and C-163/12 and Joined cases C-419/12 and C-420/12, *Airport Shuttle Express scarl and Giovanni Panarisi (C-162/12) and Società Cooperativa Autonoleggio Piccola arl and Gianpaolo Vivani (C-163/12) v Comune di Grottaferrata* and *Crono Service scarl and Others (C-419/12) and Anitrav—Associazione Nazionale Imprese Trasporto Viaggiatori (C-420/12) v Roma Capitale and Regione Lazio (C-420/12)*, Joined opinion of Advocate General Kokott, EU:C:2013:617, para 39.
[377] Joined cases C-297/88 and C-197/89, *Massam Dzodzi v Belgian State*, Opinion of Advocate General Darmon, EU:C:1990:274, para. 8 ('the preliminary ruling procedure … clearly applies only within the field of application of Community law, as it is defined by Community law and by Community law alone'); Joined cases C-28/95 and C-130/95, *A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2*, *Bernd Giloy v Hauptzollamt Frankfurt am Main-Ost*, Opinion of Advocate General Jacobs, EU:C:1996:332, para. 47. See also S Kaleda, 'Extension of

Member States, as that would undermine the autonomy of EU law.[378] Moreover, it has been argued that, contrary to the ECJ's finding in *Dzodzi*,[379] the EU legal order has no interest in a uniform interpretation of its provisions when they apply to a purely internal situation by virtue of a *renvoi* set out in domestic law.[380] Furthermore, it has been objected that the *Dzodzi* doctrine is inconsistent with the spirit and purpose of the preliminary ruling procedure:[381] the ECJ should not rule on the interpretation of domestic provisions, even when they set out a *renvoi* to EU law or reproduce its contents.[382]

The ECJ did not turn a deaf ear to those criticisms and in *Kleinwort Benson*[383] introduced a corrective to the *Dzodzi* doctrine, ie that the *renvoi* to EU law be 'direct and unconditional'.[384] In most of the cases where the ECJ referred to the 'direct and unconditional *renvoi*' corrective, it resolved not to provide the preliminary ruling requested by the referring court.[385] Since 2016, however, the ECJ has also employed that 'corrected' exception to affirm its preliminary jurisdiction.[386]

the preliminary rulings procedure outside the scope of Community law: the Dzodzi line of cases' *European Integration on line Papers*, http://eiop.or.at, 19 September 2000.

[378] Case C-1/99, *Kofisa Italia Srl v Ministero delle Finanze, Servizio della Riscossione dei Tributi—Concessione Provincia di Genova—San Paolo Riscossioni Genova SpA*, Opinion of Advocate General Ruiz-Jarabo Colomer, EU:C:2000:498, para. 39; Case C-306/99, *Banque internationale pour l'Afrique occidentale SA (BIAO) v Finanzamt für Großunternehmen in Hamburg*, Opinion of Advocate General Jacobs, EU:C:2001:608, para. 62.

[379] Joined cases C-297/88 and C-197/89, *Massam Dzodzi v Belgian State*, EU:C:1990:360, para. 37 ('it is manifestly in the interest of the Community legal order that, in order to forestall future differences of interpretation, every Community provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied').

[380] Joined cases C-297/88 and C-197/89, *Massam Dzodzi v Belgian State*, Opinion of Advocate General Darmon, EU:C:1990:274, para. 11; Case C-1/99, *Kofisa Italia Srl v Ministero delle Finanze, Servizio della Riscossione dei Tributi—Concessione Provincia di Genova—San Paolo Riscossioni Genova SpA*, Opinion of Advocate General Ruiz-Jarabo Colomer, EU:C:2000:498, para. 37.

[381] Case C-346/93, *Kleinwort Benson Ltd v City of Glasgow District Council*, Opinion of Advocate General Tesauro, EU:C:1995:17, para. 27.

[382] Case C-231/89, *Krystyna Gmurzynska-Bscher v Oberfinanzdirektion Köln*, Opinion of Advocate General Darmon, EU:C:1990:276, para. 12; Joined cases C-28/95 and C-130/95, *A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2, Bernd Giloy v Hauptzollamt Frankfurt am Main-Ost*, Opinion of Advocate General Jacobs, EU:C:1996:332, para. 72.

[383] Case C-346/93, *Kleinwort Benson Ltd v City of Glasgow District Council*, EU:C:1995:85.

[384] Ibid para. 16.

[385] See, e.g., Case C-2/97, *Società Italiana Petroli SpA (IP) v Borsana Srl*, EU:C:1998:613, paras 60–61; Case C-186/07, *Club Náutico de Gran Canaria v Comunidad Autónoma de Canarias*, EU:C:2008:227, paras 20–22; Case C-139/12, *Caixa d'Estalvis i Pensions de Barcelona v Generalidad de Cataluña*, EU:C:2014:174, para. 46; Case C-92/14, *Liliana Tudoran, Florin Iulian Tudoran, Ilie Tudoran v SC Suport Colect SRL*, EU:C:2014:2051, para. 41; Case C-281/15, *Soha Sahyouni v Raja Mamisch*, EU:C:2016:343, paras 30–31; Joined cases C-692/15 to C-694/15, *Security Service Srl (C-692/15), Il Camaleonte Srl* (C-693/15), *Vigilanza Privata Turris Srl* (C-694/15) *v Ministero dell'Interno (C-692/15 and C-693/15), Questura di Napoli, Questura di Roma (C-692/15)*, EU:C:2016:344, para. 29.

[386] See Case C-234/14, *Ostas celtnieks SIA v Talsu nova- da pašvaldība and Iepirkumu uzraudzības birojs*, EU:C:2016:6, paras 20–21; Joined cases C-459/17 and C-460/17, *SGI and Valériane SNC v Ministre de l'Action et des Comptes publics*, EU:C:2018:501, para. 28.

Kleinwort Benson stems from a request for a preliminary ruling made in the course of a dispute between an English bank and a Scottish municipality as to the determination, in accordance with the Civil Jurisdiction and Judgments Act of 1982 (CJJA), of the British court having jurisdiction.[387] As the wording of the relevant provisions of the CJJA 'was substantially the same' as that of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (1968), the national court hearing the dispute requested the ECJ to provide a preliminary ruling on the interpretation of those provisions.[388] Did the ECJ have jurisdiction to provide that ruling?[389]

In his Opinion, Advocate General Tesauro advised the ECJ 'reconsider its *Dzodzi* judgment'[390] because it '[flew] in the face of the logic of the preliminary-ruling procedure, actually resulting [. . .] in a misuse of procedure' and in a 'contradiction' of the ECJ's 'most recent case-law on the preliminary-ruling procedure'.[391]

The ECJ did not go so far as to repudiate the *Dzodzi* jurisprudence,[392] but it did refuse to give a preliminary ruling in the case at issue, noting that the CJJA, '[f]ar from containing a direct and unconditional *renvoi* to provisions of Community law', took the Brussels Convention 'as a model only' and did not 'wholly reproduce the terms thereof'.[393] Not only did certain provisions of the CJJA 'depart from the wording of the corresponding Convention provision',[394] but the CJJA enabled the British authorities 'to adopt modifications' designed 'to produce divergence' between the provisions of the CJJA and the corresponding provisions of the Convention, as interpreted by the ECJ.[395]

Accordingly, the ECJ ruled that the relevant provisions of the Brussels Convention could not be regarded 'as having been rendered applicable as such, in cases outwith the scope of the Convention, by the law of the contracting state concerned'.[396] Moreover, the ECJ observed that its interpretation of the Convention would not have been 'binding' on the referring court,[397] which was only required to 'have regard to the [ECJ]'s case-law'.[398] As it was unacceptable that a preliminary

[387] Case C-346/93, *Kleinwort Benson Ltd v City of Glasgow District Council*, EU:C:1995:85, para. 2.
[388] Ibid para. 13.
[389] Ibid paras 14–15.
[390] Case C-346/93*, Kleinwort Benson Ltd v City of Glasgow District Council*, Opinion of Advocate General Tesauro, EU:C:1995:17, para. 27.
[391] Ibid.
[392] Ibid para. 27.
[393] Case C-346/93, *Kleinwort Benson Ltd v City of Glasgow District Council*, EU:C:1995:85, para. 16.
[394] Ibid para. 17.
[395] Ibid para. 18.
[396] Ibid para. 19.
[397] Ibid para. 23.
[398] Ibid para. 21.

ruling be regarded as 'purely advisory and without binding effect', the ECJ ruled that it had no jurisdiction to rule on the question submitted by the referring court.[399]

To fully appraise the innovative potential of the 'direct and unconditional *renvoi*' test introduced in *Kleinwort Benson*, regard must be had to its impact on 'blank' reference cases, ie purely internal proceedings where the applicable national provisions contain extremely generic references to EU law.

In *Cicala*[400] the ECJ had been requested to provide an interpretation of the EU provisions on the duty to give reasons (Article 296(2) TFEU and Article 41(2)(c) of the Charter of Fundamental Rights) in the context of a dispute between an Italian citizen, Ms Cicala, and an Italian Region, over the legality of a decision reducing Ms Cicala's pension.[401] The referring court argued that, by stating that administrative action had to comply with the 'principles of the Community legal order', the Italian law on administrative procedure made EU law applicable to the main proceedings.[402]

The ECJ, instead, ruled that Italian law made 'a *renvoi* in a general manner' to EU principles,[403] so that the EU provisions on the duty to give reasons could not be regarded as having been made applicable 'directly' by Italian law[404]. Moreover, the ECJ found that the above '*renvoi* to EU law' was not 'unconditional',[405] ie liable to make the EU provisions applicable 'without limitation' to the situation at issue in the main proceedings.[406] Accordingly, the ECJ ruled that it had no jurisdiction to answer the questions submitted by the referring court.[407] The ECJ confirmed that the Italian law on administrative procedure does not contain a direct and unconditional *renvoi* to EU law in its subsequent rulings in *Romeo*[408] and *De Bellis.*[409]

D. Rethinking *Guimont:* the 'corresponding cross-border situation *in concreto*' corrective

The 'corresponding cross-border situation' exception has been criticized for being at odds with the ECJ's case-law on the inadmissibility of 'hypothetical'

[399] Ibid para. 25.
[400] Case C-482/10, *Teresa Cicala v Regione Siciliana*, EU:C:2011:868.
[401] Ibid para. 2.
[402] Section 1(1) of Law no 241 of 7 August 1990, New rules governing administrative procedure and access to administrative documents, in OJIR no 192 of 18 August 1990, 7.
[403] Ibid para. 25.
[404] Ibid para. 26.
[405] Ibid para. 27.
[406] Ibid.
[407] Ibid para. 30.
[408] Case C-313/12, *Giuseppa Romeo v Regione Siciliana*, EU:C:2013:718, para. 37.
[409] Case C-246/14, *Vittoria De Bellis and Others v Istituto Nazionale di Previdenza per i Dipendenti dell'Amministrazione Pubblica (INPDAP)*, EU:C:2014:2291, para. 19.

preliminary references,[410] as rulings based on that exception might in fact be of no use to referring courts in addressing the issue of reverse discrimination.[411]

Indeed, for reverse discrimination to arise, both the contested domestic measure[412] and the EU provisions whose interpretation is sought[413] must be applicable to the 'corresponding cross-border situation'. Yet, in rulings attributable to the 'expansive' approach the ECJ does not check whether that is actually the case, as the 'corresponding cross-border situation' is not defined at all ('boilerplate' variant) or is defined only *in abstracto*.[414]

However, in *Sbarigia*,[415] the ECJ, for the first time, defined the 'corresponding cross-border situation' '*in concreto*', ie having regard to the purely internal situation at issue in the main proceedings, and checked whether the EU provisions invoked by the referring court actually applied to that 'corresponding cross-border situation'.[416] The case arose from the Italian authorities' denial of a request by Ms Sbarigia, an Italian citizen running a pharmacy in a pedestrianized area of Rome, to be exempted from the compulsory closing times and periods for pharmacies.[417] In the ensuing lawsuit before the Latium administrative court, the issue arose whether that denial was consistent, inter alia, with some of the internal market fundamental freedoms.[418]

[410] Case 244/80, *Pasquale Foglia v Mariella Novello*, EU:C:1981:302, para. 18.
[411] See Krommendijk (n 126), 1391 ('The Guimont case law is thus essentially a partial return to pre-Foglia liberal case law in which the CJEU exercised more deference towards the national courts' questions'); Ritter (n 185), 700; P. Caro de Sousa, 'Catch Me If You Can? The Market Freedoms' Ever-Expanding Outer Limits' (2011) European Journal of Legal Studies, 176.
[412] Joined Cases C-159/12 to C-161/12, *Alessandra Venturini v ASL Varese and Others (C-159/12), Maria Rosa Gramegna v ASL Lodi and Others (C-160/12)*, and *Anna Muzzio v ASL Pavia and Others (C-161/12)*, Opinion of Advocate General Wahl, EU:C:2013:791, para. 43 ('the Court should also ensure that the national legislation concerned is capable of being applied also to cross-border situations and that it does not only concern situations governed by national laws.') (footnotes omitted).
[413] See A Arena, 'I limiti della competenza pregiudiziale della Corte di giustizia in presenza di situazioni puramente interne: la sentenza Sbarigia' (2011) Diritto dell'Unione Europea, 217.
[414] Case C-380/05, *Centro Europa 7 Srl v Ministero delle Comunicazioni and Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*, Opinion of Mr Advocate General Poiares Maduro, EU:C:2007:505, para. 30.
[415] Case C-393/08, *Emanuela Sbarigia v Azienda USL RM/A and Others*, EU:C:2010:388. The ECJ had already hinted at the 'corresponding cross-border situation in concreto' exception in Case C-250/03, *Giorgio Emanuele Mauri v Ministero della Giustizia and Commissione per gli esami di avvocato presso la Corte d'appello di Milano*, EU:C:2005:96 para. 21 (defining the 'corresponding cross-border situation' of 'an Italian candidate for the State examination [for authorization to practise as an advocate]' as that of 'a candidate of another Member State').
[416] Other rulings based on the corresponding cross-border situation in concreto exception include: Joined Cases C-419/12 and C-420/12, *Crono Service scarl and Anitrav——Associazione Nazionale Imprese Trasporto Viaggiatori v Roma Capitale and Regione Lazio*, EU:C:2014:81, paras 39–41; Joined Cases C-162/12 and C-163/12, *Airport Shuttle Express scarl and Giovanni Panarisi (C-162/12) and Società Cooperativa Autonoleggio Piccola arl and Gianpaolo Vivani (C-163/12) v Comune di Grottaferrata*, EU:C:2014:74, paras 45–47.
[417] Ibid para. 2.
[418] Ibid para. 16.

In the context of the proceedings before the ECJ, some of the parties objected that the interpretation sought by the referring court had no connection with the main proceedings, as they concerned a purely internal situation.[419] The ECJ recalled the 'corresponding cross-border situation' exception[420] but, this time, went on to ascertain whether the EU provisions mentioned in the order for reference actually applied to 'a *national from another Member State* . . . if he were *in the same situation as Ms Sbarigia*',[421] ie operating a pharmacy in Rome and faced with a decision denying an exemption from the compulsory closing times and periods for pharmacies.[422]

The ECJ found that none of the EU provisions recalled by the referring court or the parties applied to the above 'corresponding cross-border situation' defined '*in concreto*'. The freedom to provide services was 'not relevant for the outcome of the main proceedings'[423] as the professional activity at issue would have been carried out on a 'stable and continuous basis'.[424] The right of establishment was 'also not relevant',[425] because a national from another Member State in the same situation as Ms Sbarigia 'would *already* be pursuing a professional activity on a continuous basis' in Italy.[426] The Treaty rules on competition and the free movement of goods were, respectively, 'manifestly inapplicable'[427] and 'not relevant'[428] insofar as the denial of a single application for exemption from the compulsory closing times and periods was not liable to affect the trade in goods between Member States.[429] Therefore, the ECJ ruled that the request for a preliminary ruling submitted by the referring court was inadmissible.[430]

However, defining the 'corresponding cross-border situation' '*in concreto*' is not enough to ensure the relevance of the preliminary ruling in the main proceedings: it must also be ascertained whether the referring court's legal order enables (or requires) that court to extend the legal regime of the 'corresponding cross-border situation' to the purely internal situation at issue in the main dispute—something the ECJ seemed to take for granted in its 'expansive' approach rulings. Ironically, that is precisely what occurred in *Guimont*, where the eponymous French entrepreneur was not allowed to take advantage of the more favourable regime applicable to cheese manufacturers from other Member States.[431]

[419] Ibid para. 23.
[420] Ibid.
[421] Ibid para. 24 (emphasis added).
[422] Ibid.
[423] Ibid para. 25.
[424] Ibid para. 26.
[425] Ibid para. 27.
[426] Ibid para. 28 (emphasis added).
[427] Ibid para. 29.
[428] Ibid para. 36.
[429] Ibid paras 32 and 35.
[430] Ibid para. 38.
[431] See M Maduro, 'The scope of European remedies: the case of purely internal situations and reverse discrimination', in C Kilpatrick, T Novitz, and P Skidmore (eds), *The Future of Remedies in*

The ECJ's judgment in *Omalet*[432] marks a change of direction.[433] That case concerned the consistency with the right of establishment of Belgian legislation that provided for the joint and several liability of the principal contractor for the social security obligations of its subcontractors established in Belgium.[434] The ECJ noted that the main proceedings concerned a purely internal situation,[435] but observed that the 'corresponding cross-border situation' exception did 'not apply in the present case',[436] because the Belgian Constitutional Court had already established that 'situations relating exclusively to the domestic legal system could not be compared with those falling within the jurisdiction of European Union law',[437] so that the referring court was under no obligation 'to grant undertakings established in Belgium the same rights that undertakings established in other Member States in the same situation would derive from European Union law'.[438] The ECJ thus declared the request for a preliminary ruling inadmissible.[439]

E. Rethinking *Libert*: the '*erga omnes* effects' corrective

As noted above, the ECJ employed the 'annulment of indistinctly applicable measures' exception for the first time in *Libert*.[440] In his Opinion in that case,[441] Advocate General Mazák argued that a preliminary ruling would be warranted only if, first, the contested domestic measure were applicable 'both to Belgian nationals and to those of other Member States'[442] and, second, the decision of

Europe, (Oxford: Hart Publishing, 2000), 138; E. Cannizzaro, 'Esercizio di competenze comunitarie e discriminazioni "a rovescio"' (1996) in Diritto dell'Unione Europea, 354 and 371.

[432] Case C-245/09, *Omalet NV v Rijksdienst voor Sociale Zekerheid*, EU:C:2010:808.

[433] See also Case C-122/13, *Paola C. v Presidenza del Consiglio dei Ministri*, EU:C:2014:59, para. 17 ('it is not apparent from the order for reference itself that Italian law requires the national court to grant [Paola] C the same rights as those which a national of another Member State would derive from European Union law in the same situation'); Case C-139/12, *Caixa d'Estalvis i Pensions de Barcelona v Generalidad de Cataluña*, EU:C:2014:174, paras 45–48; Case C-92/14, *Liliana Tudoran, Florin Iulian Tudoran, Ilie Tudoran v SC Suport Colect SRL*, EU:C:2014:2051, paras 40–42.

[434] Ibid para. 8.

[435] Ibid paras 13–14.

[436] Ibid para. 16.

[437] Ibid.

[438] Ibid para. 17.

[439] Ibid para. 19.

[440] Joined Cases C-197/11 and C-203/11, *Eric Libert and Others v Gouvernement flamand (C-197/11) and All Projects & Developments NV and Others v Vlaamse Regering (C-203/11)*, EU:C:2013:288, para. 35. In truth, the ECJ in Joined Cases C-357/10 to C-359/10, *Duomo Gpa Srl and Others v Comune di Baranzate and Comune di Venegono Inferiore*, EU:C:2012:283, para. 28 had noted, in passing, that 'the lawfulness of the legislation at issue in the main proceedings depend[ed] on the interpretation by the Court of Articles 43 EC and 49 EC'.

[441] Joined Cases C-197/11 and C-203/11, *Eric Libert and Others v Gouvernement flamand (C-197/11) and All Projects & Developments NV and Others v Vlaamse Regering (C-203/11)*, Opinion of Advocate General Mazák, EU:C:2012:621.

[442] Ibid para. 23.

the referring court on the validity of that measure had '*erga omnes* effects, including on nationals of other Member States'.[443]

Whilst the ECJ rulings ascribable to the 'expansive' approach have had regard only to the first element indicated by Advocate General Mazák, the rulings ascribable to the 'reflective' approach have also focused on the second one.

Fremoluc,[444] for instance, stems from a preliminary reference made by the Court of Brussels in the context of a dispute over the validity of a contract for the purchase of plots of land located in Belgium by a governmental agency.[445] According to Fremoluc that contract was null and void, as it sought to implement a housing policy incompatible with the internal market fundamental freedoms and Directive 2004/38.[446] The Brussels Court had thus requested the ECJ to rule whether the above EU norms should be interpreted as precluding the relevant housing scheme.[447]

In the course of the proceedings before the ECJ, some of the parties objected that the dispute involved a purely internal situation.[448] The ECJ recalled the 'annulment of indistinctly applicable measures' exception and observed that, whilst in *Libert* the decision to be adopted by the referring court, following the preliminary ruling, would also have effect in respect of 'nationals of other Member States',[449] in the present case the main dispute was 'a specific civil law case, which may lead only to a decision applicable as between the parties'.[450] Accordingly, the ECJ ruled that the question for a preliminary ruling submitted by the Brussels Court was inadmissible.[451]

VI. The codification of the ECJ's jurisprudence on the purely internal rule

The ECJ jurisprudence on the purely internal rule is characterized by an increasing degree of heterogeneity. Whilst all the ECJ rulings on purely internal situations handed down between 1979 and 1988 belong to the 'traditional' approach, the 'expansive' approach emerged in 1988, followed by the 'reflective' approach in 1995. These three approaches have developed in parallel ever since, taking turns as the ECJ's prevailing approach.[452] Moreover, the 'expansive' approach

[443] Ibid.
[444] Case C-343/17, *Fremoluc NV v Agentschap voor Grond- en Woonbeleid voor Vlaams-Brabant (Vlabinvest ABP) and Others*, EU:C:2018:754.
[445] Ibid para. 2.
[446] Ibid para. 11.
[447] Ibid para. 14.
[448] Ibid para. 17.
[449] Ibid para. 26.
[450] Ibid para. 25.
[451] Ibid para. 33.
[452] A survey of the ECJ rulings concerning purely internal situations handed down between November 2016 and November 2018 suggests that the 'reflective' approach has become the

consists of six different exceptions and the 'reflective' approach introduced correctives to five of those exceptions.

As the ECJ's case law is so chaotic,[453] it is no wonder that several legal scholars have proposed taxonomies for the classification of the ECJ jurisprudence in this area. As early as in 1990, one commentator suggested that the application of the purely internal rule could be based on a 'geographical' criterion, ie the absence of inter-State elements in the main proceedings, or a 'legal' criterion, ie the absence of cross-border effects of the domestic measure concerned.[454] This prompted other scholars to distinguish, in the context of the ECJ's jurisprudence, a 'traditional' approach, focusing an 'inter-state movement for an economic purpose' and 'a link between the right claimed under E[U] law and the exercise of that movement',[455] from a 'new' approach, concentrating on the impact of the contested measure on the functioning of the internal market.[456]

With the inception of the 'expansive' approach, most legal scholars focused on the individual exceptions to the purely internal rule introduced by the ECJ. Several contributions examined the '*renvoi* to EU law'[457] and the 'corresponding cross-border situation'[458] exceptions. Other commentators, instead, analyzed the application of the purely internal rule in specific sectors, such as the free movement of goods,[459] the right of establishment and the freedom to provide services,[460] the free movement of persons, and Union citizenship.[461] Moreover, a significant number of contributions focused on the issue of reverse discrimination.[462]

prevailing one, accounting for over half of the rulings. See A Arena, *Le situazioni puramente interne nel diritto dell'Unione europea* (Naples: Editoriale Scientifica, 2019), 250.

[453] See Sarmiento (n 350).

[454] D'Oliveira (n 182), 73–4.

[455] See Tryfonidou (n 2), 10–13.

[456] See P Oliver and W Roth, 'The internal market and the four freedoms' (2004) CML Rev, 430; O'Leary (n 235), 29.

[457] Kaleda (n 377), n. 1

[458] Ritter (n 185), 690 et seq.; P Pallaro, 'La sentenza Guimont: un definitivo superamento "processuale" dell'irrilevanza comunitaria "sostanziale" delle c.d. "discriminazioni a rovescio"?' (2001) Rivista Italiana di Diritto Pubblico Comunitario, 95 et seq..

[459] P Oliver, 'Some Further Reflections on the Scope of Articles 28–30 EC' (1999) CML Rev, 783 et seq.; A Tryfonidou, 'The Free Movement of Goods, the Overseas Countries and Territories, and the EU's Outermost Regions: Some Problematic Aspects' (2010) Legal Issues of Economic Integration, 325–31.

[460] V Hatzopoulos, 'The Court's approach to services (2006–2012): From case law to case load?' (2013) CML Rev, 469–74; S Enchelmaier, 'Always at your service (within limits): the ECJ's case law on article 56 TFEU (2006–11)' (2011) European Law Review, 621–6.

[461] N Shuibhne, 'Free movement of persons and the wholly internal rule: time to move on?' (2002) CML Rev, 741; F Biltgen, 'Citizenship of the Union and Purely Internal Situations: Discrimination of One's Own Citizens?' New Journal of European Criminal Law, 151 et seq. 1doi.org/10.1177/203228441600700205.

[462] See, eg, D Hanf, 'Reverse discrimination' in EU Law: Constitutional aberration, Constitutional necessity, or judicial choice?' (2011) Maastricht Journal of European and Comparative Law, 29–61; M Maduro (n 431), 117–40; Tryfonidou (n 224), 43–67.

Also Advocates General have proposed taxonomies to classify the ECJ's jurisprudence on the purely internal rule. In *Sbarigia*, for instance, Advocate General Jääskinen described four different types of ECJ rulings handed down in cases involving purely internal situations.[463]

In *Venturini*,[464] Advocate General Wahl identified three groups of cases where the ECJ departed from the purely internal rule: the '*Oosthoek* case-law', where the contested measure was regarded as having cross-border effects in spite of the purely internal character of the dispute;[465] the '*Guimont* case-law', where the ECJ was willing to provide a preliminary ruling to assist the referring court in the task of judicial equalization;[466] and the '*Thomasdünger* case-law', where the ECJ ruled on the interpretation of EU law provisions that had been made applicable by national law to the purely internal situation at issue in the main proceedings.[467]

A few days later, also Advocate General Kokott proposed a classification of the ECJ's jurisprudence on the purely internal rule in her Joined Opinion in *Airport Shuttle & Crono Service*.[468] She took the view that the ECJ had set that rule aside in two cases: when 'nationals of other Member States might also be confronted in identical cases in the course of exercising their freedom of establishment with the legal provisions of the Member State in question in the main proceeding'[469] and when 'the national law in the main proceedings requires that a national must be allowed to enjoy the same rights as those which a national of another Member State would derive from European Union law in the same situation'.[470]

Finally, regard must be had to Advocate General Wahl's Opinion in *Gullotta*.[471] After recalling the taxonomy he had proposed in *Venturini*, he noted that the latest ECJ rulings 'seem to signal greater stringency in the Court's evaluation of its jurisdiction under Article 267 TFEU'[472] and that the ECJ 'seems no longer to presume, in cases which are purely internal, that the conditions for its

[463] Case C-393/08, *Emanuela Sbarigia v Azienda USL RM/A and Others*, Opinion of Advocate General Jääskinen, EU:C:2010:134, para. 29 et seq.
[464] Joined Cases C-159/12 to C-161/12, *Alessandra Venturini v ASL Varese and Others (C-159/12), Maria Rosa Gramegna v ASL Lodi and Others (C-160/12), and Anna Muzzio v ASL Pavia and Others (C-161/12)*, Opinion of Advocate General Wahl, EU:C:2013:791.
[465] Ibid paras 33–38.
[466] Ibid paras 39–45.
[467] Ibid para. 46 et seq.
[468] Joined cases C-162/12 and C-163/12 and Joined cases C-419/12 and C-420/12, *Airport Shuttle Express scarl and Giovanni Panarisi (C-162/12) and Società Cooperativa Autonoleggio Piccola arl and Gianpaolo Vivani (C-163/12) v Comune di Grottaferrata and Crono Service scarl and Others (C-419/12) and Anitrav—Associazione Nazionale Imprese Trasporto Viaggiatori (C-420/12) v Roma Capitale and Regione Lazio (C-420/12)*, Joined opinion of Advocate General Kokott, EU:C:2013:617.
[469] Ibid para. 30.
[470] Ibid para. 44.
[471] Case C-497/12, *Davide Gullotta and Farmacia di Gullotta Davide & C. Sas v Ministero della Salute and Azienda Sanitaria Provinciale di Catania*, Opinion of Advocate General Wahl, EU:C:2015:168.
[472] Ibid para. 37.

jurisdiction are met when the case file contains only vague evidence to suggest this'.[473]

A. The ECJ's judgment in *Ullens de Schooten*

The opportunity to engage in a codification of the heterogeneous jurisprudence on the purely internal rule was served to the ECJ on a silver platter in *Ullens de Schooten*.[474] Indeed, the Brussels Court of Appeal had expressly requested the ECJ to clarify 'the concept of a "purely internal situation"'.[475]

Mr Ullens de Schooten, a Belgian national running a clinical biology laboratory in Belgium, had brough a State liability action against the Belgian state for maintaining in force and applying a law, allegedly inconsistent with the internal market fundamental freedoms, that made the management of clinical biology laboratories and the reimbursement of the services they provided by national social security institutions subject to the requirement that the manager of those laboratories hold a university degree in medicine, pharmacy, or chemistry—a requirement that Mr Ullens de Schooten did not meet.[476]

The action for State liability is but the last step of a 'judicial marathon' started in 1989,[477] which saw Mr Ullens de Schooten on a losing streak before a number of Belgian courts and even before the European Court of Human Rights.[478] In particular, both the Belgian Council of State and the Belgian Constitutional Court had pointed out that Mr Ullens de Schooten could not rely on fundamental freedoms to challenge the application of the Belgian law on clinical laboratories because all the facts of the case were confined within a single Member State.[479]

When Mr Ullens de Schooten's action for State liability reached the Brussels Court of Appeal, the latter requested the ECJ to clarify whether the Treaty provisions on services, establishment, and capital as well as the notion of 'purely internal situations' should be interpreted as precluding 'the application of EU law in proceedings between a Belgian national and the Belgian State in which redress is sought for damage caused by an alleged infringement of [EU] law resulting from the adoption and maintaining in force of Belgian legislation' on clinical biology laboratories 'which applies without distinction to Belgian nationals and nationals of other Member States'.[480]

[473] Ibid para. 43.
[474] Case C-268/15, *Fernand Ullens de Schooten v État belge*, EU:C:2016:874.
[475] Ibid para. 37, second question.
[476] Ibid para. 2 et seq.
[477] See E Dubout, 'Voyage en eaux troubles: vers une épuration des situations "purement" internes?' (2016) Revue des Affaires Européennes, 681.
[478] Case C-268/15, *Fernand Ullens de Schooten v État belge*, EU:C:2016:874, para. 11 et seq..
[479] Ibid para. 28.
[480] Ibid para. 37, second question.

The ECJ, in replying to that question, pointed out that 'the non-contractual liability of a State for damage caused to individuals by breaches of EU law can be engaged only if the rule of EU law concerned is intended to confer rights on those individuals'.[481] Accordingly, it was necessary to determine 'whether an individual in a situation such as that of Mr Ullens de Schooten derives rights from the relevant provisions of the FEU Treaty'.[482]

The EU judges thus started their codification of the purely internal rule by restating the absolute version of that rule under the *'traditional' approach*: 'the provisions of the FEU Treaty on the freedom of establishment, the freedom to provide services and the free movement of capital do not apply to a situation which is confined in all respects within a single Member State'.[483] That is what occurred in the main proceedings, considering that Mr Ullens de Schooten was a Belgian national, had operated a clinical biology laboratory in Belgium, and had sued the Belgian State over legislation allegedly at variance with EU law.[484]

The ECJ then turned to codify its *'expansive' approach* by referring to four sets of circumstances in which it had departed from the purely internal rule.

First, the ECJ recalled that it had given preliminary rulings in purely internal proceedings 'on the ground that it was not inconceivable that nationals established in other Member States had been or were interested in making use of those freedoms for carrying on activities in the territory of the Member State that had enacted the national legislation in question',[485] thus codifying the 'certain cross-border interest' exception.

Secondly, the ECJ noted that it had ruled in the context of purely internal situations 'where the referring court ma[de] a request for a preliminary ruling in proceedings for the annulment of provisions which apply not only to its own nationals but also to those of other Member States' so that 'the decision of the referring court that [would] be adopted following the Court's preliminary ruling [would] also have effects on the nationals of other Member States'.[486] These passages codify the 'annulment of indistinctly applicable measures' exception.

Thirdly, the ECJ reminded that it had handed down preliminary rulings in purely internal situations 'where national law require[ed] the referring court to grant the same rights to a national of its own Member State as those which a national of another Member State in the same situation would derive from EU law'.[487] Arguably, this constitutes the codification of the 'corresponding cross-border situation' exception.

[481] Ibid para. 46.
[482] Ibid.
[483] Ibid para. 47.
[484] Ibid para. 48.
[485] Ibid para. 50.
[486] Ibid para. 51.
[487] Ibid para. 52.

Fourthly, the ECJ observed that it had provided preliminary rulings in spite of the absence of cross-border elements when the relevant 'provisions of EU law ha[d] been made applicable by national legislation, which, in dealing with situations confined in all respects within a single Member State, follow[ed] the same approach as that provided for by EU law'.[488] This passage codifies the '*renvoi* to EU law' exception.

Before applying any of the above exceptions to the case at issue, the ECJ went on to codify its *'reflective' approach*, by observing that, in order to obtain a preliminary ruling in the context of a dispute involving a purely internal situation, the referring court, as per Article 94 of the ECJ's rules of procedure, has to provide 'specific factors that allow a link to be established between the subject or circumstances of a dispute' and the EU provisions mentioned in the order for reference,[489] and has to explain 'in what way the dispute pending before it, despite its purely domestic character, has a connecting factor with the provisions of EU law on the fundamental freedoms that make the preliminary ruling on interpretation necessary for it to give judgment in that dispute'.[490]

The ECJ then ruled that it was not apparent from the order for reference that the 'corresponding cross-border situation' or the '*renvoi* to EU law' exceptions could be applied to Mr Ullens de Schooten's situation.[491] Oddly enough, the ECJ did not apply the 'certain cross-border interest' exception although Advocate General Bot had relied on that exception to recommend the EU judges to provide the ruling requested by the Brussels Court of Appeal.[492]

The ECJ thus concluded that the dispute in the main proceedings did not display any connection with the EU provisions invoked in the order for reference, which were intended 'to protect persons making actual use of the fundamental freedoms',[493] and accordingly ruled that those freedoms could not be relied upon by Mr Ullens de Schooten as grounds for non-contractual liability of the Member State concerned.[494]

B. Assessment of the ECJ's codification of the purely internal rule

Most commentators agree in regarding *Ullens de Schooten* as a 'Decalogue ruling'[495] seeking to provide clarity on the purely internal rule,[496] for the benefit of

[488] Ibid para. 53.
[489] Ibid para. 54.
[490] Ibid para. 55.
[491] Ibid para. 56.
[492] Case C-268/15, *Fernand Ullens de Schooten v État belge*, Opinion Advocate General Bot, EU:C:2016:439, paras 55–60.
[493] Ibid para. 57.
[494] Ibid.
[495] See E Dubout (n 477), 679.
[496] See Sarmiento (n 350); Krommendijk (n 126), 1392; 24. N Wahl and L Prete, 'The gatekeepers of Article 267 TFEU: on jurisdiction and admissibility of the references for preliminary rulings' (2018) CML Rev, 24.

national courts wishing to request preliminary rulings in the context of disputes involving purely internal situations.

The main added value of *Ullens de Schooten* is that it has combined the three approaches adopted by the ECJ in this area into a *structured framework of analysis*: upon receiving a preliminary reference stemming from a purely internal situation, the ECJ will dismiss it as per the *purely internal rule* ('traditional' approach), unless one of the *four exceptions* to that rule is invoked ('expansive' approach) and its *conditions are satisfied* having regard to the concrete circumstances of the case ('reflective' approach). Although the ECJ's 'expansive' approach is premised on a *national market* philosophy, the above framework, considered as a whole, reflects a *federal market* approach.

However, some aspects of the ECJ's codification of the purely internal rule raise doubts. The codification of the 'traditional' approach, for starters, does not clarify the scope of the inquiry that must be carried out to classify a given sets of facts as a purely internal situation.[497] The *Ullens de Schooten* judgment, indeed, only refers to circumstances that point to the absence of cross-border elements, such as Mr Ullens de Schooten's nationality, the place of business of the clinical biology laboratory, and the Member State that adopted the contested measure.[498] However, the ECJ did not mention any of the cross-border elements pointed out by Mr Ullens de Schooten and mentioned by Advocate General Bot, such as the involvement of Luxembourg capitals in the financing of the laboratory and the provision of laboratory services to customers from other Member States.[499] It could be argued that the link between these cross-border elements and the dispute in the main proceedings was too tenuous, but the question remains as to what the appropriate scope of the inquiry for cross-border elements should be.[500]

Moreover, the codification of the 'expansive' approach only took into account four of the six exceptions introduced by the ECJ, leaving out both the 'potential cross-borderness' and the 'genuine enjoyment of Union citizenship' exceptions. This is hardly surprising, considering that neither the provisions on the free movement of goods nor those on Union citizenship were relevant to Mr Ullens de Schooten's situation. So, a reference by the ECJ to those two exceptions would have arguably been *ultra petita*.

Furthermore, in the codification of the 'reflective' approach, the ECJ focused only on the referring court's duty, under Article 94 of the ECJ rules of procedure, to provide evidence of the connecting factors warranting one of the exceptions to the purely internal rule, but failed to mention that, under Article 101 of the ECJ

[497] See Tryfonidou (n 212), 10 (arguing that, even though the ECJ 'has never, formally, established a test for determining whether a situation is purely internal to a Member State, a "linking factor test" can be discerned from the Court's case-law over the years').
[498] Case C-268/15, *Fernand Ullens de Schooten v État belge*, EU:C:2016:874, para. 48.
[499] Case C-268/15, *Fernand Ullens de Schooten v État belge*, Opinion Advocate General Bot, EU:C:2016:439, fn 13.
[500] See Tryfonidou (n 2), 10 (noting that, in fact, the ECJ 'has never specified exactly when a situation is considered to be "wholly internal to a Member State"').

rules of procedure, the ECJ can also seek clarifications from the referring court in order to obtain any information that might be missing from the order for reference.[501] Moreover, the ECJ did not mention that also the parties may provide important information, as occurred in a number of cases involving purely internal situations.[502] Arguably, in the interest of the fairness of judicial proceedings, the ECJ's silence on those aspects in *Ullens de Schooten* should not be construed as meaning that the the referring court must be regarded as the *only* source of relevant information for the application of the purely internal rule and of its exceptions.

Finally, the ECJ in *Ullens de Schooten* referred to four exceptions to the purely internal rule as articulated in the context of the 'expansive' approach, ie without mentioning any of the correctives to those exceptions introduced by the ECJ in its 'reflective' approach. It is, however, possible that, by stating that the referring court has to provide 'specific factors' enabling the application of the exceptions to the purely internal rule,[503] the EU judges sought to refer to those correctives by implication.

In this connection, it is worth noticing that the codification of the purely internal rule started in *Ullens de Schooten* continued in *Fremoluc*.[504] On that occasion, the ECJ restated the purely internal rule,[505] recalled the four exceptions mentioned in *Ullens de Schooten*,[506] and applied two of them—the 'annulment of indistinctly applicable measures' and the 'certain cross-border interest' exceptions—in their 'reflective' version.[507] It is thus possible that future decalogue rulings may complete the codification of the purely internal rule by also referring to the 'potential cross-borderness' and the 'genuine enjoyment of Union citizenship' exceptions.

In any case, a survey of the ECJ's rulings involving purely internal situations handed down within a period of two years after *Ullens de Schooten* suggests that the latter has already had a profound impact: more than half of those rulings expressly cite *Ullens de Schooten*;[508] even the rulings that do not refer to that judgment appear to follow its reasoning to an appreciable degree.[509] This suggests

[501] See Krommendijk (n 126), 1393 (calling for 'a more frequent use' of the request for clarification instrument by the ECJ).
[502] For instance, in Case C-84/11, *Marja-Liisa Susisalo*, EU:C:2012:374, para. 21 the ECJ could apply the 'corresponding cross-border situation *in concreto*' exception only because one of the parties at the hearing averred that Finnish administrative law prohibits reverse discrimination.
[503] Case C-268/15, *Fernand Ullens de Schooten v État belge*, EU:C:2016:874, para. 54.
[504] Case C-343/17, *Fremoluc NV v Agentschap voor Grond- en Woonbeleid voor Vlaams-Brabant (Vlabinvest ABP) and Others*, EU:C:2018:754.
[505] Ibid para. 18.
[506] Ibid para. 20.
[507] Ibid paras 25–31.
[508] See, most recently, Joined Cases C-469/18 and C-470/18, *IN v Belgische Staat*, EU:C:2019:895 paras 21–26.
[509] For a statistical analysis of the impact of *Ullens de Schooten* on subsequent jurisprudence, see Arena (n 452), 244–50.

that, at least in the near future, *Ullens de Schooten* will constitute the *locus classicus* for the ECJ's preliminary rulings in cases involving purely internal situations.

VII. Conclusions

Between 1979 and 2019, the ECJ applied the purely internal rule in over 250 preliminary rulings. That rule has a broad coverage *ratione materiae*: whilst over three-quarters of those rulings concern the internal market fundamental freedoms and related legislation, the purely internal rule also features in rulings in the area of competition, judicial cooperation, indirect taxation, private international law, etc.

This article has distinguished three main approaches in the ECJ's jurisprudence on the purely internal rule, which emerged at different times but have developed in parallel over the years.

The 'traditional' approach, introduced in 1979, is based on an absolute version of the purely internal rule: if a given situation has no inter-State elements, then it lies outside the scope of the internal market fundamental freedoms. It follows that in cases involving purely internal situations the ECJ has no jurisdiction to provide preliminary rulings on the interpretation of fundamental freedoms and that preliminary questions to that effect must be deemed inadmissible.

The purely internal rule constitutes a counterweight to the *approfondissement* of the internal market fundamental freedoms that took place in the 1970s: as the ECJ moved away from a discrimination-based conception of negative integration (*international market model*) to one focusing on 'obstacles to trade', it had to build a 'wall' around the fundamental freedoms to prevent them from encroaching upon Member States' competences in a broad variety of matters, and to restrict the scope of those freedoms to domestic measures liable to have an impact on inter-State trade (*federal market model*).

However, the ECJ's 'traditional' approach to the purely internal rule entails the risk of '*false negatives*', ie cases having no inter-State elements but involving domestic measures liable to have appreciable cross-border effects. Moreover, the purely internal rule is the root cause of *reverse discrimination*, which occurs when purely internal situations are treated less favourably than equivalent situations involving cross-border elements.

These and other considerations have prompted the ECJ, since 1988, to develop an 'expansive' approach to the purely internal rule, leading to the extension of the internal market fundamental freedoms to situations having only tenuous or potential inter-State elements and to the expansion of the ECJ's jurisdiction to preliminary references stemming from disputes involving purely internal situations.

This development, inspired by the *national market model*, was possible thanks to the introduction of six exceptions to the purely internal rule: the 'potential

cross-borderness' exception (*Jersey Produce*), the 'genuine enjoyment of Union citizenship' exception (*Zambrano*), the 'certain cross-border interest' exception (*Coname*), the '*renvoi* to EU Law' exception (*Dzodzi*), the 'corresponding cross-border situation' exception (*Guimont*), and the 'annulment of indistinctly applicable measures' exception (*Libert*).

These exceptions, however, gave rise to a number of 'false positives', ie to the inclusion within the scope of the internal market fundamental freedoms of several domestic measures that in fact had a negligible impact on inter-State trade. Moreover, the ECJ handed down a number preliminary rulings that could hardly be of use to the referring courts, in that they concerned fictitious cross-border situations that only remotely resembled the purely internal situations at issue in the main proceedings. Also, the extension of the ECJ's preliminary jurisdiction associated with the 'expansive' approach resulted in a significant increase in the number of preliminary references to the ECJ.

The ECJ thus introduced, in 1995, its 'reflective' approach to the purely internal rule, featuring correctives to five of the six exceptions to that rule. Those correctives call for an *in concreto* evaluation of the facts of the case, so as to determine whether the ECJ's preliminary ruling may be relevant for the resolution of the dispute pending before the referring court. This development, arguably, constitutes a reaffirmation of the *federal market* model as the predominant philosophy underlying the EU internal market.

Most recently, the ECJ started to codify its jurisprudence on the purely internal rule. In the November 2016 judgment in *Ullens de Schooten*, in particular, the ECJ restated the purely internal rule underlying the 'traditional' approach, referred to four of the six exceptions to that rule introduced in the context of the 'expansive' approach, and called upon the referring courts to provide concrete factors enabling the application of the above exceptions, thus recalling the 'reflective' approach. The recent judgment in *Fremoluc* has carried on the codification process, by providing further clarifications on the 'annulment of indistinctly applicable measures' and the 'certain cross-border interest' exceptions.

The purely internal rule has attracted criticism from legal commentators since its inception. It has been deemed inconsistent with the definition of the internal market as a space 'without internal frontiers', insofar as it attaches importance to the crossing of national borders.[510] It has been regarded as antithetical to the *ethos* of Union citizenship, as Union citizens should enjoy the rights stemming from that status wherever they are and regardless of the exercise of their free movement rights.[511] It has been criticized as an unreliable indicator of the scope of fundamental freedoms and of the ECJ's preliminary jurisdiction.[512] Accordingly,

[510] D'Oliveira (n 182), 84.
[511] Tryfonidou (n 224), 44 et seq.
[512] O'Keeffe and Bavasso (n 138), 554–5.

several scholars have called for the abolition of the purely internal rule,[513] thereby cutting the Gordian knot of reverse discrimination once and for all.[514]

The most conspicuous consequence of abolishing the purely internal rule would be an ubiquitous application of the internal market fundamental freedoms. According to the ECJ's interpretation, those freedoms require 'the abolition of any restriction, even if it applies without distinction'[515] and the elimination of all 'national measures liable to hinder or make less attractive the exercise of fundamental freedoms'.[516] Without the purely internal rule acting as a jurisdictional limit, the fundamental freedoms could be invoked not only to liberalize trade *between* Member States, but also to promote the 'unhindered pursuit of commerce [*within*] individual Member States',[517] thus transforming the EU internal market from a *federal market* to an EU-wide *national market*.

The fundamental freedoms, thus, would play a role similar to that of the outdated US notion of *economic due process*,[518] ie the protection of individual economic initiative against any form of national or local regulation.[519] Drawing inspiration from actual ECJ rulings, with the purely internal rule out of the way, a citizen of a Member State could, say, board a local train with a ticket for a different domestic destination and argue that national railway regulations hinder his freedom of movement;[520] operate a pharmacy in a Member State and invoke the internal market fundamental freedoms to challenge the application of the local rules on compulsory closing times and periods;[521] acquire an authorization to operate a car and driver hire service from a given municipality and invoke the right of establishment to provide that service in other municipalities of the same Member State;[522] etc.

Admittedly, not all Member States' rules would be 'prohibited as a matter of principle'[523] as a consequence of the abolition of the purely internal rule:

[513] Kochenov and Plender (n 213), 396; S Iglesias Sánchez, 'Purely Internal Situations and the Limits of EU Law: A Consolidated Case Law or a Notion to be Abandoned?' (2018) European Constitutional Law Review, 28.
[514] See Shuibhne (n 461), 770; Cannizzaro (n 431), 355.
[515] Case C-76/90, *Manfred Säger v Dennemeyer & Co. Ltd.*, EU:C:1991:331, para. 12.
[516] Case C-55/94, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, EU:C:1665:411, para. 37.
[517] Case C-292/92, *Ruth Hünermund v Landesapothekerkammer Baden-Württemberg*, Opinion of Advocate General Tesauro, EU:C:1993:863, para. 1.
[518] *Lochner v. New York*, 198 U.S. 45 (1905).
[519] The US Supreme Court has abandoned the 'economic due process' doctrine in *Nebbia v New York*, 291 U.S. 502 (1934), and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
[520] Case 298/84, *Paolo Iorio v Azienda autonoma delle ferrovie dello Stato*, EU:C:1986:33, para. 4.
[521] Case C-393/08, *Emanuela Sbarigia v Azienda USL RM/A and Others*, EU:C:2010:388.
[522] Joined Cases C-419/12 and C-420/12, *Crono Service scarl and Anitrav——Associazione Nazionale Imprese Trasporto Viaggiatori v Roma Capitale and Regione Lazio*, EU:C:2014:81; Joined Cases C-162/12 and C-163/12, *Airport Shuttle Express scarl and Giovanni Panarisi (C-162/12) and Società Cooperativa Autonoleggio Piccola arl and Gianpaolo Vivani (C-163/12) v Comune di Grottaferrata*, EU:C:2014:74.
[523] Case C-442/02, *CaixaBank France v Ministère de l'Économie, des Finances et de l'Industrie*, Opinion of Advocate General Tizzano, EU:C:2004:187, para. 63.

some would still lie outside the scope of the fundamental freedoms insofar as they concern 'certain selling arrangements',[524] have 'too uncertain and indirect' an effect on inter-State trade,[525] are 'inherent in the conduct of an international high-level sports event',[526] etc. Moreover, the ECJ may consider that an internal market whose fundamental freedoms also extend to purely internal situations is 'mature' enough to go back to a conception of negative integration more respectful of Member States' regulatory autonomy, such as one based on *discrimination*,[527] although this change would arguably legalize a number of domestic measures restricting inter-State trade.

Moreover, as Member States would no longer be exclusively responsible for regulating purely internal situations, the risk of a 'race to the bottom' would significantly increase: each Member State would have to disapply domestic requirements liable to restrict trade not only for products imported from other Member States, but also for domestic products, thus potentially leading to a complete deregulation of the products in question. True, Member States could attempt to halt this 'race to the bottom' by pulling the 'mandatory requirements' handbrake, but doing so would inevitably entail, as befits a *national market*, the recognition of the ECJ as the sole and final arbiter of the public policy goals worthy of protection and of their acceptable level of protection throughout the EU, even for transactions confined to a single Member State.[528]

The most significant consequence of the abolition of the purely internal rule, however, would be a sweeping application of fundamental rights as general principles of EU law and as codified in the Charter of fundamental rights.[529] Thanks to their broad scope, no longer constrained by the purely internal rule, fundamental freedoms would play a role equivalent to that of the 'due process' clause under the 14th Amendment to the US Constitution: the 'incorporation' of the rights set out in the Bill of Rights and their transformation into 'nation-wide' constraints on State action, even in the context of the competences attributed

[524] Joined Cases C-267/91 and C-268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard*, EU:C:1993:905, para. 16.
[525] Case C-69/88, *H. Krantz GmbH & Co. v Ontvanger der Directe Belastingen and Staat der Nederlanden*, EU:C:1990:97, para. 11.
[526] Joined Cases C-51/96 and C-191/97, *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo (C-51/96) and François Pacquée (C-191/97)*, EU:C:2000:199, paras 64 and 69.
[527] C Barnard, 'Restricting restrictions: lessons for the EU from the US?' (2009) Cambridge Law Journal, 600–6.
[528] Ritter (n 185), 710; Schütze (n 13), 283.
[529] See, eg, Case C-260/89, *Radiophonia Tiléorassi AE v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas*, EU:C:1991:254, para. 42 ('where [domestic] rules do fall within the scope of Community law [the ECJ] must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures'); Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105, para. 21 ('The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter').

to States and even in the absence of an inter-State element or the enactment of federal laws.[530]

Therefore, again drawing inspiration from real ECJ rulings, a citizen of a Member State sentenced to life imprisonment by that country on the basis of domestic criminal provisions having no connection with EU law could claim that his conviction precludes him from moving freely within the EU and could thus invoke fundamental rights as general principles of EU law to challenge his sentence.[531] Likewise, the citizen of a Member State, arrested pursuant to the laws of that Member State for failing to produce identification documents to police agents, could rely upon the limitation of his free movement rights to bring into play the Charter of Fundamental Rights.[532]

Yet, some legal scholars have recently called for the extension of the Charter of Fundamental Rights to purely internal situations to challenge domestic measures undermining the rule of law.[533] Moreover, it is undeniable that a notion of 'Union citizenship' worthy of that name should also grant rights to Union citizens who have *not* exercised their right of free movement[534] and should have an *effet utile* that goes beyond the exceptional circumstances so far recognized by the ECJ.[535]

Nonetheless, as Advocate General Sharpston put it in her Opinion in *Zambrano*, making the Charter of fundamental rights applicable in the absence of cross-border elements 'would involve introducing an overtly federal element into the structure of the EU's legal and political system',[536] bringing about a change 'analogous to that experienced in US constitutional law after the decision in *Gitlow v New York*, when the US Supreme Court extended the reach of several rights enshrined in the Constitution's First Amendment to

[530] See S Adam and P Van Elsuwege, 'EU Citizenship and the European Federal Challenge through the Prism of Family Reunification', in D Kochenov (ed.), *EU Citizenship and Federalism. The Role of Rights* (Cambridge: Cambridge University Press, 2017), 17; see also A Knook, 'The Court, the Charter, and the vertical division of powers in the European Union' (2005) CML Rev, 374–9.

[531] See Case C-299/95, *Friedrich Kremzow v Austria*, case C-299/95, EU:C:1997:254.

[532] See Case C-27/11, *Anton Vinkov v Nachalnik Administrativno-nakazatelna deynost*, EU:C:2012:326.

[533] See A Jakab, 'Application of the EU CFR by National Courts in Purely Domestic Cases', in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford: Oxford University Press, 2017), 252–63.

[534] Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, Opinon of Advocate General Sharpston, EU:C:2010:560, para. 167 ('A person who had not yet exercised [his or her free movement] rights [should] not need to set about doing so in order to create the circumstances in which he could benefit from fundamental rights protection'). D Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator', University of Groningen Faculty of Law Research Paper no 7/2017, 76.

[535] Kochenov and Plender (n 213), EU Citizenship, 395.

[536] Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, Opinon of Advocate General Sharpston, EU:C:2010:560, para. 172.

individual states',[537] which turned out to be one of the most powerful instruments to integrate the individual States into a single *nation*.[538]

Such a bold step in the European integration process,[539] however, could not be taken by the ECJ unilaterally, but only following 'an unequivocal political statement from the constituent powers of the EU (its Member States), pointing at a new role for fundamental rights in the EU'.[540] The consequences of that step, indeed, would be far-reaching. The generalized application of the Charter of fundamental rights would inevitably bring about a harmonization of the protection of fundamental rights within the EU, even in matters where the Member States have so far been allowed to ensure different levels of protection as per their constitutional traditions.[541] Whilst an analogous outcome materialized in the US as a result of the 'incorporation' doctrine, it must be highlighted that the protection of fundamental rights at the State level was sometimes deficient,[542] unlike what generally occurs in most EU Member States.[543] Besides, some may argue that the ECJ lacks the necessary 'moral authority' to take the lead in a sensitive and controversial matter such as that of the protection of fundamental rights.[544]

Moreover, the extension of the scope of the Charter of fundamental rights to purely internal situations would exponentially increase the number of preliminary references concerning the compatibility between domestic measures and the rights enshrined in the Charter and, consequently, the opportunities for conflict between the ECJ and Member States' supreme and constitutional courts. It is worth remembering that, unlike the US Federal Government, the EU does not dispose of coercive instruments liable to ensure compliance with EU law *within* the Member States, such as *EU* courts and law enforcement agencies located in the territory of the Member States distinct from *domestic* courts and police forces.[545] The President of the European Commission cannot take command of the armed forces of a Member State to ensure compliance with an ECJ ruling, as did President Eisenhower to secure the implementation of the US Supreme

[537] Ibid.
[538] M Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford: Clarendon, 1989), 395.
[539] See Jakab (n 533), 257 (calling for a 'a fresh step towards federalization').
[540] Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, Opinion of Advocate General Sharpston, EU:C:2010:560, para. 173.
[541] Cfr. K Lenaerts, 'Fundamental rights to be included in a Community Catalogue' (1991) European Law Review, 389 (referring, in the early 1990s, to a Community catalogue of fundamental right as a 'federalizing device').
[542] See X Groussot et al., 'The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication', Eric Stein Working Paper n. 1/2011, 24, fn 104.
[543] See Knook (n 530), 395.
[544] See K Lenaerts, 'Respect for fundamental rights as a constitutional principle of the European Union' (2000) Columbia Journal of European Law, 21; Jakab (n 533), 258.
[545] M Tushnet, 'Enforcement of National Law against Subnational Units in the US', in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford: Oxford University Press, 2017), 317.

Court's ruling in *Brown v Topeka* in certain Southern States.[546] Domestic judicial defiance of ECJ rulings on the protection of fundamental rights in the context of purely internal situations could prompt Member States' organs to also disregard the rest of the EU *acquis*, thus calling into question the effectiveness of the EU legal order as a whole.[547]

In definitiva, 40 years after its emergence in the ECJ's case law, the purely internal rule does not seem to be an 'infant disease',[548] bound to go away on its own as the EU 'comes of age',[549] or just a criterion used by EU judges to determine the scope of their preliminary jurisdiction and the reach of EU cross-border provisions such as the internal market fundamental freedoms. The purely internal rule, in fact, is one of the defining features of the EU integration process as we know it today: deeper than the level of integration commonly achieved by *international organizations*, but shallower than that usually seen in *nation states*, for EU law is still largely dependent upon the cooperation of domestic organs to fully unfold *within* the Member States.[550] To borrow a line from Pink Floyd's 1979 concept album, it is thus for the Future of Europe to 'tear down the wall' of the purely internal rule and to enable every European to enjoy the ultimate dimension of free movement: freedom *without* movement.

[546] Ibid 324.
[547] But see Jakab (n 533), 261–2 (regarding generalized defiance by national courts as unlikely).
[548] Cf. P Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (1983) 8 European Law Review, 155.
[549] See K. Mortelmans, La discrimination à rebours et le droit communautaire, in Diritto comunitario e degli scambi internazionali, 1980, 7 (regarding the issue of reverse discrimination as a 'trouble de croissance' of EU law)
[550] See A. Pellet, *Les fondaments juridiques internationaux du droit communautaire* (Alphen aan den Rijn: Kluwer, 1997) 231.