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# SEX, DRUGS & EU LAW: THE RECOGNITION OF MORAL AND ETHICAL DIVERSITY IN EU LAW

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## 1. Introduction

Growing up in Maastricht, one of the first questions you learn to answer in French is: "*ou est le coffeeshop*"? It always caused a flurry of different emotions – the realization that French is not easy but giving directions is; the surprise with the foreigners' fascination with something that is pedestrian for locals; the visitors' confusion that something illegal "at home" might be legal "abroad"; and their elation that they can therefore freely buy soft drugs in the Netherlands. Many years later, answering the same question would require much more knowledge of French – in order to explain that even though the buying of soft drugs is condoned by the Dutch legislature and defended as "typically Dutch", it can only be purchased by locally resident EU nationals, and not by non-resident Dutch citizens, let alone by non-resident French or Belgian citizens. They might have better luck illegally buying their drugs off the dealer in the street next to the coffeeshop. *Quoi? Droit communautaire!*

It is common these days to argue that there is no area of national law that is insulated from the pressures that emerge from EU law. Nevertheless: while the impact of the demands of EU law on certain national policy areas has been discussed at length, the interaction of EU law with national norms that express a certain moral, ethical or cultural value has only been assessed with reference to very specific cases. And yet, it appears that these different values, which might range from drugs policy to the patentability of human cells, and from the consumption of seal meat to abortion, have something important in common: they ascribe a normative quality to a particular type of life, and typically reflect a communal, political understanding of what is "good". As such, many moral or ethical choices reflect first principles, and do not lend themselves naturally to practices of transnational rationalization insofar as

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they are not necessarily universal but rather particular to a certain Member State, as a reflection of idiosyncrasies that exist within that polity.

This contribution traces how EU law deals with morally or ethically contentious issues. The first sections deconstruct the arguments that inform the different positions on the effect that EU law *ought* to have. As such, the first section below argues that the *argument from self-determination* calls for respect for the diversity of moral and ethical choices made by Member States, which both result from and protect individual and collective self-determination through their political articulation (2). The *argument from containment*, on the other hand, that is implicit in the Union's regulation of the market and in the Court's case law on free movement, suggests that the individual rights guaranteed at the European level serve exactly to *limit* the externalities of this contractarian conception of political self-determination (3). EU law structurally pits different national visions of the "good life" against each other, and allocates the responsibility for resolving any ensuing conflict to the European level, where three main alternatives for their management can be distinguished: (i) direct normative intervention and Europeanization of the contentious moral or ethical choice; (ii) the insulation of national autonomy; or (iii) balancing through either a substantive or procedural version of the principle of proportionality. It is argued that only a sophisticated procedural understanding of proportionality can simultaneously engage with the argument from self-determination and the argument from containment (4).

## 2. The politics of diversity and the argument from self-determination

The diversity in the moral and ethical policies that exist in Europe can both be explained and normatively defended with reference to the *argument from (political) self-determination*. This argument is premised on the basic recognition that citizens are at the centre of any political project, and that the legitimacy of such a political project to a large extent hinges on its capacity to internalize the needs, objectives, concerns, and values of the citizens.[1] In this view, which will be elaborated in this section, "the political" is the site for the mediation between the different needs and values that citizens may have, connecting the individual citizen to a "community of fate", giving the citizen ownership and authorship over the salient and highly divisive aspects of the

1. See on the concept of political self-determination, Dawson and F. de Witte, "The constitutional balance of the EU after the euro-crisis", 76 MJ (2013), 871, and Halberstam, *Totalitarianism and the Modern Conception of Politics* (Yale University Press, 1999), p. 17.

development of the polity, and legitimizing the eventual policy choices. Law, here, performs primarily an *expressive* function. It expresses the parameters for permissive behaviour within the polity, sets out the mechanisms of administrative and legal coercion, and structures the continuous renegotiation of moral, ethical and cultural values within the polity. The argument from self-determination posits that we need to protect not only the expression of certain moral or ethical *values*, but also the autonomy of the political *forum* through which such values are articulated and renegotiated. When applied to the European integration project, the argument from self-determination may appear somewhat nationalistic. It suggests that we need to protect whatever moral or ethical choice is reached in every Member State, simply *because* it expresses values that have been politically legitimized. Such a suggestion is not based on the preference for "the national" over "the European" as the spatial texture for the development of norms *per se*, but highlights the incapacity of the EU to replicate the basic institutional preconditions that would allow for self-determination at the transnational level. The argument from self-determination, of course, provides a reason why *all* decisions – from markets to morals – are to be made by a politically constituted "people". As this section will highlight, however, the argument is much more compelling, and its denial much more problematic, on issues that reflect an individual or collective "sense of self", such as questions of morality or ethics.

Moral or ethical norms ascribe a normative quality to a type of life, typically as the reflection of a communal, political understanding of what is "good".[2] They reflect first principles, which are essentially emotive knee-jerk reactions on questions such as when life starts or ends, which range of action is considered morally "sinful", and how the State's obligations to look after the individual relate to the individual's own responsibility. Such decisions on first principles differ from choices that underlie most other policy areas insofar as they reflect values that transcend instrumental policy concerns or rational cost/benefit analysis.[3] These first principles, together with moral symbols and cultural markers, create a "moral environment" that structures and informs behaviour in a polity, and serve to "synthesize a people's ethos – the tone, character and quality of their life, its moral and aesthetic style and mood – and their worldview and . . . the most comprehensive ideas of order".[4] Moral and ethical norms set the parameters for permissive behaviour and reflect the "very specific understanding of the relation between state and society, of the

2. Sunstein, "On the expressive function of law", 144 *Univ. of Pennsylvania Law Rev.* (1995), 2021.
3. Mooney, "The politics of morality policy", 27 *Policy Studies Journal* (1999), 675.
4. Greetz, *The Interpretation of Cultures* (Basic Books, 2000), p. 89.

responsibility of the state to shield society from human passions and risky behaviour, and of the self or personhood".[5]

The requirement that citizens be at the centre of the development of such norms can be defended normatively from the perspective of self-expression. Ownership over moral, and ethical norms allows for self-expression insofar as it forces individuals to better understand themselves, their relationship with fellow citizens, and the overall normative project of the polity. Being able to make an assessment of what is "good" in moral or ethical terms, after all, requires an individual to make sense of personal knee-jerk reactions; to reflect on the impact of such assessments on the obligations and opportunities of fellow citizens; and to engage with the normative question that underlies the polity: in what kind of society do I want to live?[6] Ethical and moral principles, then, constitute a "thick" template of local societal and cultural values, which express "an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate and develop their knowledge about and attitudes towards life".[7] This connection between, on the one hand, personal self-understanding, and on the other hand, political or territorial self-understanding, ensures that citizens attach great significance to their ownership over moral and ethical norms, and actively see them as vehicles for (collective) self-expression.[8] In short, then, the capacity for citizens to be involved in the moral, ethical and cultural principles that inform their society and that set out the parameters for permissive behaviour facilitates and encourages self-expression, and ensures that the "moral environment" that results from such principles can be seen as a reflection of "a certain place, time and people".

The need to allow for ownership and authorship of citizens over moral, ethical and cultural norms can also be defended from the institutional perspective, in the sense that it serves at least three important legitimizing functions. First, placing citizens at the centre of the development of such norms legitimizes the moral or ethical *norm itself* by internalizing dissent and mediating between different views of "the good". This creates "a sense of normative obligation that helps to ensure voluntary compliance with undesired rules or decisions of governing authority".[9] Such a legitimizing function presupposes the existence of a political system that is sensitive to,

5. Kurzer, *Markets and Moral Regulation* (CUP, 2001), p. 5.

6. Somek, "Europe: Political, not cosmopolitan", 803 *WZB Working Paper* (2011), 9.

7. Greetz, loc. cit. *supra* note 4. See also Parsons, *The Social System* (Routledge, 1991), p. 349.

8. Kurzer, op. cit. *supra* note 5, p. 170.

9. Scharpf, "Legitimacy in the multi-level European polity", in Loughlin and Dobner (Eds.), *The Twilight of Constitutionalism?* (OUP, 2010).

and can mediate between, the different opinions that citizens may have as to the parameters of permissive behaviour.[10] As such, the political system, and the equal voice that every citizen has in it, institutionalizes dissent and conflict (in particular concerning first principles), justifies the "common good" produced, and legitimizes the legal and administrative authority which it carries.[11] Dani suggests that this presupposes a "pluralist constitution" that internalizes social conflict and serves the procedural function of allowing for dissent and the continuous renegotiation of first principles and moral symbols, and does not seek to entrench a particular moral or ethical choice.[12] This view closely fits the empirical data from morality studies that suggest that in morally or ethically salient policies, the continuous renegotiation of the limits of permissive behaviour is not only taking place, but is even indispensable in legitimizing the first principles that they express.[13]

Second, ownership and authorship of citizens over moral, ethical and cultural norms legitimizes the *coercive authority* that controls the parameters of permissive behaviour.[14] The collective will-formation that takes place through the political process is backed up by legal and administrative compliance mechanisms that enforce the moral or ethical choices. The coercive nature of such compliance mechanisms presuppose a degree of legitimacy that only come from the outcome of a democratic debate on what is permissive and what is not. Third, ensuring the centrality of citizens in deciding on moral or ethical norms legitimizes the *polity* as the political space through which the citizen makes sense of life.[15] The capacity of the State to structure moral or ethical issues facilitates a "form of communication between members of the public via government"[16] that not only strengthen associative ties between people, but also, structurally, "institute[s] reciprocal

10. This presupposes that citizens are free to make up their mind about the first principles and symbols that *ought to* structure society. This in itself, of course, comes with a plethora of rights: non-discrimination, political rights, fundamental rights, which arguable extend to include positive (social) rights. See Sen, *The Idea of Justice* (Penguin, 2010).

11. With political system I do not solely mean a parliament, but all the structures for engagement and contestation, such as courts, grassroots movement and civil society, that typify a "thick" political culture.

12. Dani, "The partisan constitution and the corrosion of European constitutional culture", in Toniatti and Dani (Eds.), *The Partisan Constitution – the Fundamental Law of Hungary and European Constitutional Culture* (forthcoming).

13. Domestic political institutions continuously explain and elaborate cultural markers against internal contestation and external actors (such as international norms). See Checkel, "Norms, institutions and national identity in contemporary Europe", 43 *International Studies Quarterly* (1999), 83.

14. Chalmers, "European restatements of sovereignty", (2013) *LSE Law Working Paper*, 10.

15. Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community* (MIT, 2005), p. 69.

16. Davies, "The EU's lack of expressive capacity" (on file with author).

obligations and entitlements and patterns of socialization which allow a sense of equality, mutual respect and self-esteem to develop amongst the actors".[17] In this sense, it allows for the continuous reconstruction of what a community "means" to its members, and ensures that a polity is not simply seen reflecting, but also as *containing* certain normative preferences.

In other words, the *forum* for the generation of moral or ethical norms is inextricably linked with the *norm itself*; and a commitment to communal self-expression comes with a commitment to the political process. If transposed to the European context, the argument from self-determination becomes somewhat nationalistic. The territorially bounded and historically contingent connection between the political process and the territorial unit of the nation State explains and justifies the great variety in moral and ethical policies that we find in the EU.[18] Each Member State has institutionalized their particular and unique ideological, demographic, geographic, historical, religious, and cultural idiosyncrasies.[19] So while abortion is castigated in moral terms in Ireland and Malta, it is acceptable in most other EU Member States; and while the Dutch are tolerant to the legal purchase of soft-drugs, most other Member States are not. The argument from self-determination is, simply (and slightly annoyingly), that each Member State is always right. We might disagree with the content of some of these norms, but we have to accept their normative validity (within the boundaries indicated by (inter)national human rights standards) exactly *because* they are an exercise in self-expression and self-determination.

The EU itself cannot replicate the institutional and normative preconditions required for it to be a space of communal self-expression. It lacks the sophisticated political framework,[20] its law lacks the capacity for socialization,[21] its system of governance is too rigid to allow for the continuous re-negotiation of first principles, and (therefore) the affective ties between its population are too weak to allow for a meaningful exercise in self-expression of the parameters of permissive behaviour. This, it has to be emphasized, is not a castigation of the European level as structurally incapable of allowing for self-determination, but one that argues that, *at the moment*, it

17. Chalmers, op. cit. *supra* note 14; see also Honneth, *The I in We: Studies in the Theory of Recognition* (2012, Polity), pp. 201–216.

18. See Studlar, Cagossi and Duval, "Is morality policy different? Institutional explanations for post-war western Europe", 20 *Journal of European Public Policy* (2013), 353.

19. Knill suggests that the main cleavages are based on the make-up of political parties and their propensity to frame policy discourses in moral terms. See Knill, "The study of morality policy: Analytical implications from a public policy perspective", 20 *Journal of European Public Policy* (2013), 311.

20. *Lisbon* ruling of BVerfG, 2 BvE 2/08 of 30 June 2009.

21. Chalmers, "The European redistributive State and a European law of struggle", 18 ELJ (2012), 667.

does not allow for it.[22] The argument from self-determination, then, calls for respect of the processes at the *national* level that allow for it. And, in fact, it seems that the EU generally recognizes this concern. The system of subsidiarity, the principle of conferral, the ring-fencing of more salient moral or ethical policy areas from Union influence, the Treaty references to "essential State functions" and "national identities, inherent in . . . fundamental structures ", and the flexibility that the Commission and other Member States generally show in allowing for national exclusions to protect vital moral or ethical concerns,[23] all show some level of respect for the need to insulate the capacity for self-determination at the national level. National parliaments and constitutional courts appear equally sensitive to the argument from self-determination.[24]

In short, the argument from self-determination is not about the protection of the nation State *per se*, but about the protection of the capacity of individuals to shape the fundamental norms that govern their society in conformity with their preferences and the horizontal commitments entered into with fellow citizens. Given, however, the absence of institutional preconditions that would allow for self-determination at the transnational level, the argument posits that we should cherish the diversity of moral and ethical choices across the EU, and insulate the capacity of national political processes to mediate between and legitimize such different outcomes from the dynamics of European integration.

## 3. EU law and the argument from containment

The argument that informs the EU and structures its legal effects seeks to attain the exact opposite. It seeks to *constrain* national self-determination, so as to mitigate what are regarded as its potential excesses: the exclusion of certain interests from the political process, and its capacity for sovereign violence in limiting permissible behaviour. This can be described as the *argument from containment*. The argument elaborated in this section essentially posits that, while the nation State with its sophisticated

22. Instead, the Union's commitment to individual and political self-determination is incorporated in many other ways. See Dawson and De Witte, op. cit. *supra* note 1, 817.

23. Kurzer highlights, e.g., the prohibition of harmonization in drugs policies inserted in the Schengen Convention, Protocol 35 attached to the Treaties which states that no EU act (including ECJ rulings) affects the application in Ireland of Art. 40.3.3.(anti-abortion) of the Irish Constitution, and concessions extracted by the Nordic countries to exclude their alcohol retail monopolies from competition law. See Kurzer, op. cit. *supra* note 5, 17.

24. E.g *Lisbon*, cited *supra* note 20, and on subsidiarity see Goldoni, "The first yellow card against the Monti II Regulation: A case of negative politics" (on file with the author).

institutional structures might be a useful instrument in the generation of the normative preconditions for self-expression, it also propagates certain normative deficiencies that are structurally connected to its closed territorial nature and limited possibilities for political inclusion. The argument from containment has been defended on three separate grounds, which will be discussed in depth below. First, it seeks to guarantee the incorporation in the decision-making process of interests that are formally excluded. This is commonly referred to as the *argument from transnational effects*. Second, it serves as an instrument to prevent sovereign violence – either in processes of internal exclusion or of external antagonism. This is usually referred to as the *argument from constrained democracy*. Third, it expands individual agency beyond the parameters of permissive behaviour in the citizens' own Member State, and as such provides a trampoline for the attainment of the individual's aspirations. This is the *argument from aspirational justice*. Different as these three normative defences may be, their legal structure is very similar. The argument from containment operates on the basis of the free movement provisions and the norms of non-discrimination attached to them – which make certain national policy decisions simply unavailable. This means that the argument from containment is almost the mirror image of the argument from self-determination: it is not communitarian but individualistic; it is normatively indifferent as to the nature of the national norm; places decision-making power not in the national polity but the transnational judiciary; and sanctions norms not on the basis of their democratic pedigree but the relative extent to which they accommodate trans-national mobility, which often translates into not a pluralistic but a majoritarian bias.

For lawyers, in fact, this account of how European integration serves to constrain certain national practices seems almost banal. This structural effect of EU law – this ethics of containment – has, after all, been developed primarily through legal mechanisms. The role of the Court in expanding this ethic into the constitutional framework that manages the interaction between integration and the democratic practices at the national level has been discussed at length, even if, surprisingly, its normative repercussions have received less attention.[25] The more recent recourse to technocracy in the Union's response to the euro-crisis is another page taken from the book on the ethics of containment.[26] The same logic has, ironically, also constrained the formation of robust democratic structures at the European level itself. On

25. E.g. Vauchez, "Integration through law: Contribution to a socio-history of EU political common sense", 10 *RSCAS Working Paper* (2008); Scharpf, op. cit. *supra* note 9; Weiler, "The political and legal culture of European integration: An exploratory essay", 9 *International Journal of Constitutional Law* (2011), 678–694.

26. See Chalmers, op. cit. *supra* note 21, 667, and Dawson and De Witte, op. cit. *supra* note 1, 871.

this view, the undemocratic nature of the EU itself is a deliberate strategy to prevent the reproduction of the risks connected to self-determination at the level beyond the State.

The most traditional defence of the ethics of containment is based on the argument from *transnational effects*, which is essentially a sophisticated elaboration of the idea of "no taxation without representation".[27] It seeks to extend national democratic practices to take account of unrepresented interests in an attempt to equate the objects and subjects of rule. In essence, it tackles the most evident externality of democracy: the fact that its norms might affect citizens, interests or institutions that are not represented in the institutional process, did not have a chance to voice their concerns, and that the norms expressed by that institutional process might therefore contain a parochial bias.[28] "[T]ransnational forms of integration, in particular market integration" in this argument, "are desirable on account of democracy itself".[29] As Azoulai summarizes, the norms of free movement and non-discrimination can be seen to ensure that Member States:

> "*recontextualize* the decision-making process at national level . . . to take account of interests coming from or situated in other Member States, which are not only interests of firms but also of citizens, workers or students. They also have a '*re-programming*' function to the extent that they should lead the national authorities to adapt their policies to the objectives of integration. The application of free movement provisions is based on an engagement on the part of the Member States to 'denationalize' their normative standards. It demands a profound turnaround of national practices".[30]

As such, EU law operates to contain national self-determination when it exhibits a parochial bias or excludes interests and voices external to the national political process.

Recently, a second, more historical argument has gained prominence in explaining and defending the argument from containment. Müller defends it with reference to the imperative to prevent the sovereign violence that plagued the European continent for generations. This can be called the argument from

27. Joerges, "European law as conflict of laws", in Joerges and Neyer (Eds.), "Deliberative supranationalism revisited", 20 *EUI Working Paper* (2006).

28. See Somek, "The argument from transnational effects I: Representing outsiders through freedom of movement", 16 ELJ (2010), 320.

29. Ibid., 315. Somek's critique, that the argument from transnational effects cannot justify the level of scrutiny applied by the Court, is well taken, but mitigated by the other arguments that underlie the argument from containment.

30. Azoulai, "The Court of Justice and the social market economy: The emergence of an ideal and the conditions for its realisation", 45 CML Rev. (2008), 1342–1343.

*constrained democracy*, which posits that limitations to national self-determination are necessary to prevent the "extremely violent practices of internal exclusion and external antagonism"[31] that culminated in the Second World War.[32] At its core, this argument suggests that the political processes of self-determination will almost invariably lead to scapegoating and territorial aggression, and to excesses of sovereign violence – both violence *of* the sovereign in restricting the capacity of the individual to partake in the development of society, and violence *in the name of* the sovereign, directed towards internal minorities or external "others".[33] The notion of constrained democracy is implemented by removing agency, or self-determination, from "the political" sphere, and re-allocating it to a different *type* of government, whether judicial (constitutional courts),[34] expert-based (executive agencies), administrative (as the EU is sometimes understood)[35] or the individual (through market structures). In more positive terms, the argument from constrained democracy is meant to allow the population to flourish by structurally incorporating "the other" within societal structures and creating a space of freedom for all subjects. The idea here is that until we manage to sufficiently incorporate appreciation of the differences between people, and of "the other", within ourselves, we can neither prevent the ethnic biases and sovereign violence that scar democratic self-government,[36] nor can we create sufficient space for individual self-determination and stable internal cooperation.[37] This, of course, strongly resonates within the European context, where "the other" is both geographically close and historically interchangeable.

A third, less explored, normative justification for the EU's ethics of containment looks to the relationship between the individual and national processes of political self-determination. EU law, on this view, serves to overcome limits on permissible behaviour imposed by Member States on their own citizens. In this sense, the free movement provisions operate as a type of trampoline that allows citizens to escape the normative limitations imposed by

31. Balibar, *We, the People of Europe?* (Princeton University Press, 2004), p. 184.
32. Müller, "Beyond militant democracy", 73 *New Left Review* (2012), 43, Müller, *Contesting Democracy* (YUP, 2011), pp. 128 et seq.
33. Parker, *Cosmopolitan Government in Europe* (Routledge, 2013), pp. 28 et seq.
34. Müller (2011), op. cit. *supra* note 32, pp. 146 et seq.
35. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation State* (OUP, 2010).
36. Kristeva, *Nations without Nationalism* (CUP, 1993), p. 51.
37. Parker, op. cit. *supra* note 33, p. 177.

their own Member State, and more fully pursue their individual aspirations.[38] As Weiler and Lockhart have put it: "part of the Community *ethos* . . . lies in the important civilizing effect [which] . . . is achieved through the intended inability of Member States, practical and legal, to screen off different social choices, legally sanctioned, in other Member States".[39] In other words, the argument of containment implies that Member States are no longer able to enforce the parameters of permissible behaviour on their citizens. EU law instead reorients compliance mechanisms to *territorial* structures. The theoretical defence for this effect of the argument from *aspirational justice* is that it overcomes the second externality of contractarian democracy: contractarianism collapses *individual* self-determination into *political*, collective self-determination, in the sense that in return for the citizen's voice in the political process, she must adhere to the negotiated outcome, even if it is not to her liking. EU law, and in particular its free movement provisions, cut through this limit, and free the individual to seek any of the other twenty-seven policy outcomes that may more closely fit her conception of the "good".[40] This argument, essentially, is premised on the recognition that national processes of collective will-formation are not very good at respecting the *individual's* preferences.

The argument from containment, in other words, posits that self-determination at the national level contains and perpetuates certain normative deficiencies, and imposes transnational legal constraints to overcome them. It seeks to prevent parochial biases and sovereign violence in limiting the parameters of permissive behaviour, and as such seeks to liberate the individual from those constraints. This argument is given legal shape through the norms of free movement and non-discrimination, and results in almost a mirror image of the argument from self-determination. It attaches legal significance to *individual* movement rather than *collective* policy decisions;[41] does not accept the national *political* process as the locus for the formation and re-negotiation of moral, ethical or cultural norms, but instead

38. Kingreen, "Fundamental freedoms", in Von Bogdandy and Bast (Eds.), *Principles of European Constitutional Law* (Hart, 2008), p. 561; and Kochenov, "On options of citizens and moral choices of states: Gays and European federalism", 33 *Fordham International Law Journal* (2009), 191.

39. Weiler and Lockhart, "'Taking rights seriously' seriously: The European Court of Justice and its fundamental rights jurisprudence", 32 CML Rev. (1995), 604.

40. F. de Witte, "The role of transnational solidarity in mediating conflicts of justice in Europe", 18 ELJ (2012), 694.

41. See for an overview of the critique, Menéndez, "The constitutional crisis of the European Union", 14 *German Law Journal* (GLJ) (2013), 453. See on the same argument in respect of redistributive norms, Scharpf, op. cit. *supra* note 9, 89 et seq.

allocates this task to the transnational level, and mainly its *judiciary*;[42] and sanctions norms not on the basis of their democratic pedigree but on the basis of their relative position in the transnational public order.[43] Empirical research suggests that this normative re-evaluation in light of external processes contains a strong majoritarian bias. Kurzer shows, for example, that distinct changes in Irish abortion policy, Dutch drugs policy, and Nordic alcohol policy towards the majoritarian standard in the EU can be attributed to the dynamics unleashed by individuals taking advantage of the potential of EU law to lift moral questions outside the local context of discussion,[44] while Cichowski shows that individual actors and support groups *do* see EU law and the Court as proxies for potential changes in moral or ethical norms.[45]

Within the context of our discussion, the intersection between the argument from self-determination and the argument from containment means that the different conceptions of the "good" that exist in different Member States are constantly and structurally pitted against each other. While the former insulates a particular idea of the "good", the latter is applied mechanically and is normatively indifferent as to what constitutes the "good", and instead allocates the resolution of conflicting ideas of the "good" in the European public space to the transnational legislature or (more often) judiciary. It is therefore at this intersection that questions arise such as whether Irish women *ought* to be allowed to have an abortion in Brussels; whether a Polish citizen *ought* to be allowed to use soft-drugs in Amsterdam, a Swedish citizen *ought* to be able to circumvent alcohol retail monopolies and directly import alcohol, or an Austrian gambling company *ought* to be allowed to offer online gambling services in Rome.

## 4. Between self-determination and containment: Three possible scenarios

The apparent incommensurability of the argument from self-determination and the argument from containment poses a fantastic challenge for the European Union. It is, moreover, a challenge of great societal and normative salience – one need only recall the outrage sparked when the Court applied the full force of the argument from containment to national social practices in the

42. See on the argument of depoliticization, F. de Witte, "EU law, politics and the social question", 14 GLJ (2013), 581.

43. See for a clear exposition, Poiares Maduro, *We, the Court: The European Court of Justice and the European Economic Constitution* (Hart, 1998).

44. Kurzer, op. cit. *supra* note 5, pp. 24–25.

45. Cichowski, *The European Court and Civil Society* (CUP, 2007).

area of collective bargaining and collective action.[46] When it comes to the capacity of citizens to make emotive sense of themselves and their community, it seems, the risks of "getting it wrong" are great and the political consequences potentially grave.

The EU legal order has, in very general terms, three possibilities of solving the conflict between the two different arguments. It could, first, usurp national policy autonomy to the European level, directly intervene and "Europeanize" the contentious moral, ethical or cultural choices (4.1.). A second option is the opposite – of insulating *national* policy choices in defiance of the transnational rights that companies and citizens derive from the EU legal order (4.2.). The third option is the most sophisticated, and seeks to somehow balance the two (4.3.). The legal method through which EU law seeks to make sense of this clash, by and large, is the principle of proportionality,[47] in which a *substantive* version, which rationalizes the national moral or ethical choice in reference to the transnational public space, can be distinguished from a *procedural* version, which rationalizes the *process* through which the national moral or ethical choices are articulated. While the Court has used all four approaches to manage the clash between the argument from self-determination and the argument from containment, it will be argued that only the latter test, that is, a procedural understanding of proportionality, is able to engage with the core of both arguments, and able to mediate between them in a satisfactory way.

### 4.1. *Towards a transnational morality and ethics*

The first solution lies in elevating a certain moral or ethical question beyond the national level, as EU law has done in several policy areas. This is usually accomplished through the political arena (by harmonization) or by the Court (by creating *autonomous* concepts of EU law, such as, for example, of the term "worker"). In making a *transnational* assessment of a certain moral or ethical norm, this first solution implies a replacement of the *national* citizens as the authors of moral or ethical norms with the *European* citizens. This solution was, for example, used in *Brüstle*, which elevated the question of the patentability of biotech inventions related to human embryos beyond the national political process and its possibility for contestation, and instead imposed an autonomous European answer to the deeply moral question as to when life begins.

46. See, among many others, Barnard, "A proportionate response to proportionality in the field of collective action", 37 EL Rev. (2012), 117.

47. See on the role of proportionality: Moller, *The Global Model of Constitutional Rights* (OUP, 2012).

Article 6(2)(c) of Directive 98/44, on the legal protection of biotechnological inventions, declares that inventions are considered unpatentable where their exploitation would be contrary to *ordre public* or morality, in particular where the invention makes use of human embryos. The use of embryonic stem cells for commercial purposes is heavily disputed: it relates to the question when human life begins, how advances in scientific and medical research relate to it, and deals with the commercialization of the human body. The appropriate answer to these questions is strongly contested in all Member States, and significant differences exist between them.[48] Indeed, the preamble to Directive 98/44 speaks of the respect for the ethical or moral principles recognized in *a* Member State,[49] and the European Parliament long halted the decision-making process by referring to the irreconcilable differences of opinion between the Member States, highlighting that it should be for States and their citizens to make their own assessments of these divisive moral questions.[50] When the legal basis for the Directive was challenged, the Court indeed held that a "wide scope for manoeuvre existed" for Member States in applying and interpreting Article 6, which, it held:

> "is necessary to take account of the particular difficulties to which the use of certain patents may give rise in the social and cultural context of each Member State, a context which the national legislative, administrative and court authorities are better placed to understand than are the Community authorities".[51]

Years later, Oliver Brüstle filed a patent for a treatment which transplanted cerebral cells from human embryonic stem cells into the nervous system of patients suffering from Parkinson's disease. The question arose whether this fell foul of Article 6 of the Biotech Directive, insofar as embryonic stem cells could qualify as "human embryos". The Court, following the lead of Advocate General Bot, decided to elevate the answer to this question to the *European* level, and iron out any differences between the perceptions of the different Member States, which, earlier, it had vowed to protect. It then offered a "strict

48. See Opinion of A.G. Bot in Case C-34/10, *Brüstle*, judgment of 18 Oct. 2011, nyr, paras. 68–70. See also Harmon and Laurie, "Dignity, plurality and patentability: The unfinished story of Brustle v Greenpeace", (2013) EL Rev. 95, and Appl. No. 53924/00, *Vo* v. *France,* 40 EHRR, 12.

49. Recital 39 to Directive 98/44. See for a good description of the Directive, Varju and Sandor, "Patenting stem cells in Europe: The challenge of multiplicity in European Union law", 49 CML Rev. (2012), 1007.

50. Ann, "Patents on human gene sequencing in Germany: On bad lawmaking and ways to deal with it", (2006) GLJ, 283. The legal challenge, as to the appropriate use of Art. 114 TFEU, was not upheld by the Court in Case C-377/98, *Commission* v. *Netherlands (Biotech Directive)*, [2001] ECR I-7079.

51. *Commission* v. *Netherlands (Biotech Directive)*, ibid., paras. 37–38.

and bewilderingly broad definition"[52] of the human embryo, including non-fertilized human ovum which are nonetheless capable of commencing development into a human being, as well as classifying as "unpatentable" other inventions which do not make use of human embryos, but require their destruction in the phase of research.[53]

While the ruling has been attacked from scientific, legal, moral and commercial angles,[54] the main drawbacks to this approach are, in my view, structural, and pertain first to the obfuscation of the deeply normative nature of the question, and second, the dangerous idea, implicit in particular in Bot's Opinion, that we ought to think of a European-wide and autonomous *ordre public*. Underlying both points, of course, lies the concern that giving full force to the argument from containment displaces the capacity of citizens to express themselves, individually and as a community, as to the first principles that ought to govern their societies.

While both Advocate General Bot and the Court recognize the moral and ethical dimension to the question raised, both claim not to have to engage with those issues. As the Court puts it: "the definition of human embryo is a very sensitive social issue in many Member States, marked by their multiple traditions and value systems, the Court is not called upon . . . to broach questions of a medical or ethical nature, but must restrict itself to a legal interpretation of the relevant provisions of the Directive".[55] Advocate General Bot even suggests that his Opinion is not to "decide between beliefs or impose them" concerning "the question of the definition of an embryo that the main points of different philosophies and religions and the continual questioning of science meet".[56] Further on, however, both Advocate General Bot and the Court offer a definition of the human embryo that is much wider than anticipated by specialist commentators, and that irons out the different religious, cultural, ethical or moral diversity that existed on the European continent on the matter. This exercise has been called, in my opinion correctly, "disingenuous".[57] The Court not only lifts an important moral question beyond the scope of national political contestation, but obfuscates this exercise by reference to an objective legal interpretation. What it is doing in reality, however, is giving full force to the argument from containment to the detriment of the argument of self-determination, a preference which in itself

52. Harmon and Laurie, op. cit. *supra* note 48, 96.
53. See also Varju and Sandor, op. cit. *supra* note 49, 1028.
54. Harmon and Laurie, op. cit. *supra* note 48, 92, and Vrtovec and Scott, "The European Court of Justice ruling in Brustle v Greenpeace: The impacts on patenting of human induced pluripotent stem cells in Europe", 9 *Cell: Stem Cell* (2011), 502.
55. *Brüstle*, cited *supra* note 48, para 30 and the Opinion of A.G. *Brüstle* therein, para 45.
56. Opinion of A.G. Bot in *Brüstle,* ibid., paras. 39–40.
57. Harmon and Laurie, op. cit. *supra* note 48, 100.

has a deep normative impact, let alone when applied to the question of defining the "human embryo". It not only quells any national spaces for contestation, but, more worryingly, replaces it with a monolithic new creature: an autonomous, European-wide, concept of *ordre public*, which has (unsurprisingly) deeply majoritarian tendencies, and cannot accommodate the nuances implicit in the European public space.

This second critique goes more fundamentally to the current capacity of the EU to allow for self-determination. The creation of a unitary, European-wide *ordre public*, after all, presumes both that the EU is institutionally capable of mediating between different views as to moral or ethical goods, and that its citizens consciously engage in this process, in order to imbue the outcome with its appropriate level of legitimacy.[58] Within the Courts, Advocate General Bot is the greatest proponent of this development. In his Opinions in *Brüstle* and in *Josemans*, which dealt with the legality of the Dutch drugs policy conditioning purchase of soft-drugs on a criterion of residence, Advocate General Bot suggests a deeply majoritarian test of moral, ethical, and cultural norms. He seeks "solutions acceptable to the greatest number",[59] and which are "consistent with the concept of *ordre public*, and with an ethical conception which could be shared by all Member States of the Union".[60] In Bot's view, this presupposes in *Brüstle* a wide reading of the notion of embryo, lest "industrial-size farms of human embryos" are created.[61] In *Josemans,* his rhetoric is equally dramatic and majoritarian. In Bot's argument, "drug tourism causes serious problems for European Union public order"[62] which he compares to "human trafficking, prostitution of minors or child pornography".[63] The consequences that Bot attributes to this "finding", is not only that the free movement provisions are not engaged (more below), but that the Netherlands has a positive obligation to change its drugs policy in order to "contribute to the maintenance of European public order".[64] This is not only a particularly conservative view and probably an incorrect reading of global developments in the regulation of soft-drugs,[65] but does away with any facade of self-determination. Advocate General Bot rejects the presupposition that different individuals and different political communities might have a

58. Chalmers, op. cit. *supra* note 14.
59. Opinion of A.G. Bot in *Brüstle*, op. cit. *supra* note 48, para 107.
60. Ibid., para 114.
61. Ibid., paras. 110–114.
62. Opinion of A.G. Bot in Case C-137/09, *Josemans*, [2010] ECR I-13019, para 117.
63. Ibid., para 105.
64. Ibid., para 122.
65. At the time of writing, the use and possession of cannabis is legal or decriminalized in 22 States of the US, most countries in South-America, Mexico, Switzerland, Austria, Portugal, Czech, Belgium, Italy, Spain, Denmark, and the Netherlands.

different view on the use of soft-drugs, or the appropriateness of the use of human ovum for medical research. The argument here is not that soft-drugs should be legalized, but that it is not for Advocate General Bot (or the Court,[66] the EU, or me, in fact) to decide that "the activity of selling cannabis does not have any legitimacy"[67] because it "can lead to social breakdown which, in adults, may make it more difficult to hold down a regular and stable job and, in young people, result in school absenteeism which causes marginalization and depression in some cases".[68] A more nuanced reading of the interaction between national and supranational concepts of morality, such as defended by Azoulai and Coutts in the context of EU criminal law, does not pit them against each other, but rather understands the latter as potentially reinforcing the former, thus safeguarding the capacity of political communities to dissent from the majoritarian standard.[69]

The creation of a monolithic European morality not only goes beyond what the argument from containment demands, but explicitly rejects the most basic commitment to self-determination, either from the perspective of the individual citizen, political communities, or even the European population as such. Even looking beyond the very conservative nature of Bot's "European public order",[70] it is evident that the Union's institutional set-up is incapable of offering the preconditions for individual or collective self-expression on questions of moral or ethical salience. In fact, the structural weaknesses in its set-up have been understood as a *deliberate* safeguard *against* majoritarian republican violence.[71] A European public order, centred on majoritarian first principles, whether given shape through the EU's legislative process, through an overly strict application of the Charter of Fundamental Rights, or through the Court's case law, lacks legitimacy (which is derived from the institutional capacity for self-expression, mediation and re-iteration), robs citizens of the capacity to make moral sense of the communities in which they live, and, in consequence, cannot be expressive of "a certain place, time and people", but is rather partisan, hegemonic and authoritarian.[72] Similar criticism has been

66. As it has, e.g., in relation to gay marriage. In *D. and Sweden*, the Court held that "according to the definition *generally accepted* by the Member States, the term marriage means a union between two members of the opposite sex" (emphasis added).

67. Opinion of A.G. Bot in *Josemans*, op. cit. *supra* note 62, para 93.

68. Ibid., para 15.

69. Azoulai and Coutts, "Restricting Union citizens' residence rights on grounds of public security", Case note on C-348/09, *P.I*, 50 CML Rev. (2013), 564–566.

70. As Phillips observed: "The finding also warned that backpackers heading to the Netherlands for a weekend of spliffs and Heineken endangered the European Union's security": <euobserver.com/justice/30493>.

71. Parker, op. cit. *supra* note 33, chs. 3 and 4.

72. Wilkinson, "The spectre of authoritarian liberalism: Reflections on the constitutional crisis of the European Union", 14 GLJ (2013), 527.

levied on the Court in cases such as *Mangold*, *Viking* and *Laval*, in all of which the Court transferred important redistributive decisions from the national level to the Union level – where it cannot possibly reflect or even engage with the needs, desires and normative preferences of the citizens.[73] It is, simply put, politics in absence of "a political". It has the potential to both skew the *norm* that is accepted as "good" in a Member State, as well as delegitimize the national political arena as the appropriate *forum* for political contestation on first principles.

### 4.2. *The insulation of a national morality or ethics*

The second possible solution is the opposite of the first, and lies in insulating *national* moral, ethical or cultural norms from the dynamics of integration. This solution gives priority to the argument from self-determination, and ensures that polities and their citizens remain free to decide and impose whichever understanding of "the good" they prefer. In the political process, both the Commission and the Council appear willing to engage with exclusions or opt-outs demanded by Member States if they frame their request in the language of moral or ethical sensitivity. As such, Dutch drugs policy has been protected in the Schengen Protocol;[74] Poland, the UK and the Czech Republic have received an opt-out of some Charter rights;[75] and Austrian policies on university access and Swedish policies on alcohol monopoly have been exonerated from Commission infringement procedures.[76] This is not surprising given the political sensitivity of such topics, and the desire to prevent the Union from being seen as a monolithic entity that tramples on moral or ethical differences. In a series of gambling cases, Advocate General Bot suggested that the Court follow this route. According to this reasoning, the regulation of gambling should fall outside the scope of application of the free movement provisions altogether, given that "Community law does not aim to subject games of chance and gambling to the laws of the market".[77] The Court, in its application of the market freedoms, has not always been as respectful of these political compromises,[78] and has hardly ever followed the route suggested by Advocate General Bot, and arguably for good reasons: this

73. See Dale and El-Enany, "The limits of social Europe: EU law and the neoliberal agenda", 14 GLJ (2013), 613; and Kochenov, op. cit. *supra* note 38, 191.

74. Joint declaration 3 attached to the Final act of the Schengen Agreement, O.J. 2000, L 239.

75. Protocol 30 attached to the Treaty on the Functioning of the European Union.

76. Garben, "The Belgian/Austrian education saga", 1 *Harvard European Law Working Paper* (2008), 9, and Kurzer, op. cit. *supra* note 5, 17.

77. A.G. Bot in Case C-42/07, *Liga Portuguesa*, [2009] ECR I-7633, para 245.

78. See e.g. Garben, op. cit. *supra* note 76.

approach excludes from consideration the interest of transnational actors, allows for direct discrimination based on the nationality or residence of actors, and is based on a strange legal fiction that attaches legal obligations to residence rather than territorial presence. Instead, the Court usually argues that the free movement provisions themselves are blind to moral or ethical judgments: whether an activity is allowed or prohibited, tightly regulated or liberalized might play a role in the application of the principle of proportionality, but not on its assessment of the *material scope* of the free movement provisions.

The Court thus only very occasionally employs legal reasoning that aims to fully exonerate national policy from the obligations of the argument from containment – such as in *Grogan*, which dealt with Irish abortion policy, and in *Josemans*, which dealt with Dutch drugs policy. In *Grogan*, it did so by arguing that the free movement provisions were not engaged, not because the case dealt with a morally contentious policy area *per se*, but because the facts of the case did not constitute a transboundary economic activity.[79] This renunciation of the argument from containment has arguably made domestic Irish institutions more comfortable in excluding the demands of EU law from their abortion policies – as the refusal by the Irish Supreme Court to refer the *X* case, or the protocols attached to the Lisbon Treaty attest.[80] *Josemans* is more interesting in our present context. The case dealt with a municipal policy in Maastricht that conditioned the purchase of soft-drugs in the local coffeeshops on a criterion of (national) residence. The question referred to the Court was whether this breached the free movement provisions and the commitment to non-discrimination based on nationality that they imply. Advocate General Bot argued that the sale of soft-drugs ran counter to the objectives of the internal market (and of the EU more generally),[81] and could therefore not engage the provisions on the free movement of goods or services.[82] The Court largely agreed. It stated that the coffee-shop proprietor, Mr Josemans, could not rely on the free movement provisions when marketing narcotic drugs.[83] The Court, in making this decision, seems to have forgotten much of its previous case law. First of all, it is settled case law that "the illegal nature of an activity in one Member State may not prevent its classification as

79. See for other reasons for limiting the scope of the free movement provisions: Case C-159/90, *Grogan*, [1991] ECR I-4685; Joined Cases C-267 & 268/91, *Keck and Mithouard*, [1993] ECR I-6097, or Case C-67/96, *Albany*, [1999] ECR I-5751.

80. Protocol 35 attached to the TFEU.

81. Opinion of A.G. Bot in *Josemans*, op. cit. *supra* note 62, para 103, where he argues that "the activity of selling cannabis does not in any way contribute to the well-being of the citizens of the Union".

82. Opinion of A.G. Bot in *Josemans*, op. cit. *supra* note 62, paras. 92, 105.

83. *Josemans*, op. cit. *supra* note 62, para 42.

a service within the meaning of [the free movement provisions]".[84] Secondly, it overlooked the rights of Union citizens as legal subjects of EU law, despite its own often-repeated mantra that Union citizenship is "the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality",[85] and irrespective of the policy area concerned.[86] Union citizenship has, for example, been used to test the discriminatory nature of taxation policy, education policy, social benefits and naming legislation. It is difficult to understand how the Court could have come to its conclusion that it is the specific nature of the economic activity rather than the rights of individual legal subjects that engage the free movement provisions and the prohibition of discrimination based on nationality. Be that as it may, the Court in *Josemans* accepted the discriminatory nature of the rules on purchase of soft-drugs and insulated the policy choice of the Netherlands from the dynamics of the argument from containment.

In giving priority to the argument from self-determination (protecting *both* the idea of self-determination in the home State and host State, in the sense that French residents cannot smoke in France *or* the Netherlands; while Dutch residents can decide to exclude foreigners), the Court bases its argument on a very strange legal fiction. It harks back to the anachronistic logic that attaches legal authority to the *status* of the citizen (nationality, originally; and residence, more recently) rather than his territorial *presence*. The fact that something is illegal in one State has no logical bearing on a legal relationship that takes place outside its borders. Just as criminal or administrative law attaches to *actions* within a jurisdiction, rather than the nationality or residence of the individual actor, so too do the limits of morally or ethically permissive behaviour. Legal obligations and the coercive capacity of the State follow from mere *presence* within a jurisdiction, not a durable or structural relationship with the polity. The Court's logic in *Josemans*, however, presumes that only residents are allowed to act in certain ways, and, conversely, that foreign residents are bound by limits to permissible behaviour from their home State *even when they are abroad*. The absurdity of this "logic" becomes clear quickly if we transpose it to different policy areas. It would presume, for example, that only German residents may drive 160 km/h on the *autobahn*, only Spanish residents can be a *matador*, or only Slovak residents are allowed to smoke in a bar in Bratislava. Equally, it entails that German

84. See Koutrakos, "Healthcare as an economic service in EU law", in Dougan and Spaventa (Eds.), *Social Welfare and EU Law* (Hart, 2005), p. 113. See also Case C-268/99, *Jany*, [2001] ECR I-8615, para 51 et seq.

85. Case C-184/99, *Grzelczyk*, [2001] ECR I-6193, para 31.

86. E.g Civilian war benefits (*Tas-Hagen*), taxation (*Schempp*) or naming legislation (*Sayn*, *Grunkin and Paul*).

residents may not play lasergames in Sofia, that Irish residents may not have an abortion in Stockholm, that a Swedish tourist may not buy alcohol in an off-licence in Firenze, and that his British friend must leave the pub there at 11pm.

This solution, meant to insulate the moral or ethical choice made by a Member State, is not only anachronistic and illogical, but negates the main promise that the EU offers to its citizens – that of equality and freedom, of the normative trampoline and the limitation of sovereign violence by the nation State, which is a promise that respects the *substance* of national moral and ethical policies, but opens them up for "outsiders".[87] Presumably, the Court found the solution for *Josemans* in its case law on access to social welfare, in a sense equating "sin tourism" with "welfare tourism". In the latter case, indeed, access to welfare benefits in the host State for migrants is *not* dependent on their mere presence on the territory of the State, but on more durable and structural factors, such as residence, nationality, or, more abstractly, "a degree of integration" and "a certain link" to the society of the State. While it is suggested that such criteria are acceptable and indeed necessary in social welfare, the sustainability of which is reliant on a degree of diffuse reciprocity that can be demonstrated by way of a stable link,[88] such an argument simply does not make any sense for acts that are sanctioned in some States on the basis of moral or ethical preferences.

### 4.3. *Between self-determination and containment: Substantive and procedural tests of proportionality*

The third solution, of course, lies in the middle. But how is one simultaneously to allow for national self-determination while preventing parochial biases in the norms generated, and while allowing citizens to move between different Member States with their diverse moral and ethical norms? The legal method employed in an attempt to accommodate both sides of the argument is that of proportionality, which serves to ensure the *reasonableness* of limits on individual rights by way of national policy. As Kumm puts it, proportionality "reflects a basic commitment underlying liberal democracy . . . that any coercive act has to be conceivable as a *collective judgment of reason* about what justice and good policy requires [sic]".[89] Within the European context, the main question that proportionality struggles with, and which imbues it

87. See *supra* section 3.

88. See De Witte, op. cit. *supra* note 40, 694.

89. Kumm, "The idea of Socratic contestation and the right to justification: The point of rights-based proportionality review", 4 *Law & Ethics of Human Rights* (2010), 157 (emphasis in original).

with an important *constitutional* quality, is how to understand the terms "collective", "justice" and "good policy" in a polity that is composed of twenty-nine such understandings (meaning the twenty-eight Member States as well as a European "good" or "collectivity"). As such, the principle of proportionality not only serves to decide on the *division of legal authority* between the Member States and the Union,[90] but also on which *type* of (national or transnational) "justice" or "good" is appropriate for the Union. Proportionality is used to arbitrate between the argument from containment (or, in traditional language, the restriction of free movement) and the argument from self-determination (which serves as a *prima facie* justification of that restriction).

As any student or teacher of EU law knows, the principle of proportionality is surprisingly amorphous and notoriously difficult to understand, its application is not consistent, and the intensity of review that it entails seems to differ in light of the outcome that it can allow for. When reasoned through from the perspective of the regulation of morally or ethically contentious goods, two different approaches can be distinguished in the Court's case law. The first is a *substantive* proportionality test, which seeks to rationalize the *content* of national legislation, and leaves little normative leeway for Member States. The second is a *procedural* proportionality test, which rationalizes the *process* of national legislation and is more respectful of the normative policy aims of Member States. It will be argued that, within the scope of morally and ethically contentious goods, the latter test is much better suited to simultaneously protecting the argument from self-determination and the argument from containment. More generally, it will be argued that the roles of, and interaction between, the individual and his political community in EU law need to be reconceptualized, and that the purpose of the principle of proportionality needs to be re-assessed accordingly.

#### 4.3.1. *Substantive proportionality test*

The substantive proportionality test is the one we usually encounter when the Court tries to make sense of the interaction between national measures and the free movement provisions. It consists of three prongs: the national measure must be (i) *suitable* to achieve the objective stated (which is used to justify the infringement of the free movement provisions); it must be (ii) *necessary* to achieve that objective, in so far as the measure chosen must be the *least restrictive* given the objective; and (iii) the, national measure may as such not

90. Kumm, "Constitutionalising subsidiarity in integrated markets: The case of tobacco regulation in the European Union", 12 ELJ (2006), 513.

impose too excessive a burden on the individual.[91] The test is highly prescriptive of the *substance* of acceptable national measures, and its objective is to re-orient national choices towards European-wide majoritarian standards, and as such to rationalize the regulation of the European space of free movement. It does not test the *internal* reasonableness of the measure, but rather its relationship with and effect on *external* policy choices and actors.[92]

In dealing with Nordic alcohol policy, the Court has employed this type of proportionality. In Sweden, a public retail has a monopoly on the sale of alcohol in order to safeguard against excessive alcohol consumption. Its regulation is cast heavily in moral terms.[93] One of the measures consists of the banning of direct import of alcohol, instead obliging import to be requested through the monopolist shops. The *Rosengren* case dealt with private persons importing wine from Spain directly, and not through the retail monopolist. The question thus arose whether such a limit to inter-state trade was justifiable in light of the moral choices made by Sweden. Part of the justification for this monopoly was that it allowed for an effective way of ensuring that citizens under 20 years of age could not order or purchase alcohol, as they are forced to provide proof of age upon ordering and collecting spirits. On this point, the Court imposed a substantive proportionality test, and argued that "it is for the national authorities to demonstrate . . . that that objective could not be achieved by less extensive prohibitions or restrictions, or by prohibitions or restrictions having less effect on intra-Community trade".[94] The Court finally invalidated the monopoly, pointing to the Commission's suggestion of a less restrictive measure: the

> "age check could be carried out by way of a declaration in which the purchaser of the imported beverages certifies, on a form accompanying the goods when they are imported, that he is more than 20 years of age. The information before the Court does not, on its own, permit the view to be taken that such a method, which attracts appropriate criminal penalties in the event of non-compliance, would necessarily be less effective than that implemented by [the national monopolist]".[95]

91. Harbo, "The function of the proportionality principle in EU law", 16 ELJ (2010), 165. See also Opinion of A.G. Maduro in Case C-434/04, *Ahokainen*, [2006] ECR I-9171, paras. 24–26.

92. See also the contribution of Damjanovic in this *Review*, at section 3.2., where she calls this the "strict" proportionality test.

93. Kurzer, op. cit. *supra* note 5, 49–51.

94. Case C-170/04, *Rosengren*, [2007] ECR I-4071, para 50.

95. Ibid., para 56.

Given that such a reconfiguration of Swedish administrative and criminal law would possibly be less restrictive of the right to inter-state trade, the Swedish ban on direct imports of alcohol was in violation of the Treaty.

*Rosengren* highlights why this three-prong test can best be labelled as a substantive version of proportionality. The legality of a national moral or ethical measure, after all, hinges on the absence of policy alternatives that are less restrictive of the rights of *mobile* actors. It allows such actors to demand that Member State policies are re-assessed in light of less restrictive choices made by other Member States. Internal limits on permissive behaviour, as a consequence, must be minimal, both in reference to a (moral or ethical) objective and in reference to its effect on the mobile actor. This absence of alternatives, moreover, is something that the Member State in question must demonstrate, forcing it to the extremes of logical reasoning, whereby it is asked to prove a negative. In its case law, indeed, the Court appears willing to invalidate a national measure for imposing more than "the least restrictive" limitations on permissive behaviour when the Commission has raised an alternative solution, or even when the Court itself can think of one![96] As such, the substantive variant of the proportionality test is highly prescriptive of the *content* of national choices.

While this substantive type of proportionality may serve its function in the regulation of the internal market and the convergence of *regulatory* policies across the Union,[97] arguably, in light of the particular nature of the Union legal order, it ought not to be used where the free movement provisions clash with national measures that express a moral or ethical choice (or redistributive or cultural, for that matter). It is true that the three-prong proportionality test employed by the Court does not significantly differ from that employed at the national level, where it serves to rationalize the limits that policy impose on individual rights.[98] What makes it inappropriate as a tool for the rationalization of legal authority in the EU context is the particular tiered nature of the Union's legal order, which is very different from that of traditional liberal democracies, and whose structural incompleteness and normative biases risk being propagated in the test of proportionality. In simple terms: the EU's constitutional structure differs profoundly from that of its Member States, and while the three-prong test at the national level serves to

96. See also Opinion of A.G. Sharpston in Case C-542/09, *Commission* v. *Netherlands*, judgment of 14 June 2012, nyr, paras. 121–122; cf. Case C-202/11, *Las*, judgment of 16 Apr. 2013, nyr, para 32; and Case C-370/05, *Festersen*, [2007] ECR I-1135. See more generally Nic Shuibhne and Maci, "Proving public interest: The growing impact of evidence in free movement case law", 50 CML Rev. (2013), 991.

97. See Maduro, op. cit. *supra* note 43, p. 158 et seq.

98. Kumm, op. cit. *supra* note 89, 142.

rationalize public authority, in the EU it has the effect of introducing a significant pull towards policy convergence.

A substantive principle of proportionality causes two profound problems when assessed from the perspective of the capacity of Member States to make their own moral or ethical evaluations of the boundaries of permissive behaviour. The first speaks to the constitutional dimension of proportionality. As discussed above, proportionality functions as a tool for the management of the division of competences between the EU and its Member States. While Member States formally remain in charge of developing their moral and ethical standards, a substantive principle of proportionality risks making a mockery of national autonomy or self-determination by framing such standards in relation to those preferred by external actors or other Member States – either by finding national choices to be unsuitable or unnecessary in light of external majoritarian standards, or by insisting on a standard of application that is least restrictive of the interest of mobile actors. Ethically or morally informed limits to permissive behaviour, insofar as they reflect first principles, sit uneasily with this type of re-orientation, which shifts the locus of the negotiation of first principles from the national democratic arena to the transnational judiciary. This type of proportionality, in other words, affects the *form* of collective self-expression,[99] and its logic is not pluralist, leaving first principles open for continuous renegotiation, but partisan. It does not rationalize the exercise of public authority, but rather imposes substantive limits on what Member States are allowed to decide. Such an understanding of proportionality seems inappropriate: if proportionality is about finding whether national policy is reasonable, in the sense that it is not democratically flawed,[100] a substantive test is much too prescriptive, and it does not as such find support in the argument from containment.[101] If, on the other hand, the objective is to move towards a European-wide conception of morality or ethics, it is surely not the prerogative of the Court to develop such a conception.[102]

The second problem with the application of a substantive proportionality test in these areas is the profound normative bias that is implicit in the Union's legal set-up, and which a substantive proportionality principle propagates by structurally prioritizing free movement rights over national policy choices. A proportionality test cannot be objective (in the sense that it is value-neutral and respects the different moral and ethical choices made by the Member States)

99. See section 2, *supra*.
100. Kumm, op. cit. *supra* note 89, 163.
101. Somek, op. cit. *supra* note 28, 315.
102. See *supra*, section 2.

unless it takes such biases into account.[103] The biases that the substantive proportionality principle propagates are two. First, it contains a communitarian blindspot, in the sense that it cannot conceptually accommodate communal or collective interests – which are exactly the interests that are the subject of this contribution.[104] Collective decisions to sanction certain behaviour are not assessed from the perspective of the impact on the autonomy of *the* individual as part of an internally structured collectivity, but from the perspective of the *transnationally mobile* individual, that is, an actor wholly external to the polity and its communal objectives.[105] Needless to say, this is not the traditional role for proportionality. Proportionality, in its original sense, was meant to *prevent* policy that is "structurally biased in favour of a particular class of actors",[106] not to *create* such biases. Second, a substantive test of proportionality enhances the Union's depoliticizing and neo-liberal conception of the relationship between the citizen and the market, by subjecting national legal authority to *substantive* benchmarks of efficiency and mobility – which seems particularly inappropriate in the rationalization of moral or ethical standards.[107]

All in all, it is argued that the substantive variant of the proportionality test is inappropriate as an instrument for the rationalization of moral and ethical choices that Member States make. It significantly shifts the locus of self-determination away from national political processes, and re-orientates the content of moral and ethical norms towards majoritarian standards.

#### 4.3.2. *Procedural proportionality test*

On the other hand, we can discern a more *procedural* version of the principle of proportionality. The purpose of this test is not to assess the *appropriateness* of a national norm, and re-orient it towards European-wide standards, but to assess the *reasonability* of the articulation of national moral or ethical choices. It stands closer to the traditional role of proportionality in focusing its role on

103. Harbo, op. cit. *supra* note 91, 172.

104. Azoulai, "The European Court of Justice and the duty to respect sensitive national interests", in Dawson, De Witte and Muir (Eds.), *Judicial Activism at the European Court of Justice* (Edgar Elgar, 2013).

105. As Fligstein shows, mobile actors tend to be the educated elite and middle-classes, as well as firms. Fligstein, *Euro-Clash: The EU, European Identity and the Future of Europe* (OUP, 2010).

106. Kumm, op. cit. *supra* note 90, 513.

107. Somek, "Idealization, de-politicization and economic due process: System transition in the European Union", in Iancu (Ed.), *The Law/Politics Distinction in Contemporary Public Law Adjudication* (Elegen International, 2009), p. 131.

the rationalization of public authority,[108] is much more deferential to the Member States in accepting *prima facie* the substance of the moral or ethical choice made, and instead tries to tease out policy inconsistencies that betray underlying protectionist or discriminatory intentions. To that extent, the procedural test of proportionality, instead of focusing on the measure's necessity and suitability,[109] imposes general requirements of policy coherence, consistency and transparency; is better able conceptually to incorporate communitarian interests; is pluralistic and not majoritarian; and uses *internal* comparators instead of external choices and interests as a point of reference for the reasonability of a national policy choice.

EU law lacks a judicial doctrine of deference to national policy choices that is able to rationalize such choices within the context of the argument of containment.[110] In certain policy areas, the Court, even if it formally sticks with its traditional three-prong proportionality test, has, however, *de facto* moved to a more procedural application, allowing more leeway for moral or ethical choices of Member States.[111] In other policy areas, the Court has already explicitly accepted this general shift, but its application is not very coherent.[112] The main area in which this has happened is the area of gambling. As Van den Bogaert and Cuyvers have found, the "Court grants a general discretionary margin to regulate gambling. This margin does not depend on any specific ground of justification, but on the dubious and disputed nature of gambling *itself*". In consequence, they argue, "each individual requirement of the test is relaxed to introduce some form of additional margin. For instance, overriding objectives are accepted more easily, the burden of proof is almost reversed, and the necessity test is virtually abolished".[113] Advocate General Bot has, more generally, argued that this approach is warranted not just for policies that reflect first principles, but for all policy domains falling outside

108. As Kumm puts it, "the greatest danger to justice is not that after due deliberations a flawed choice is made. The greatest danger lies in not seriously engaging with the question what justice and good policy might require". Kumm, op. cit. *supra* note 89, 156.

109. Van den Bogaert and Cuyvers, "Money for nothing: The case law of the EU Court of Justice on the regulation of gambling", 48 CML Rev. (2011), 1175.

110. See also Bomhoff, "Perfectionism in European law", 14 CYELS (2012), 91 et seq.

111. The Court has taken this more procedural approach in *Omega*. Even though it repeated the *strictu sensu* element of its principle of proportionality ("least restrictive"), it did not apply it, leaving Germany with a *carte blanche* to apply its own moral principles, which prevented the commercial exploitation of "laser games" for reasons of human dignity. Case C-36/02, *Omega*, [2004] ECR I-9609, para 39. For an example of the opposite (where the formal language of consistency and coherence led nonetheless to a substantive assessment), see Case E-2/06, *EFTA Surveillance Authority* v. *Norway*, [2007] EFTACR 164.

112. See for critique Van den Bogaert and Cuyvers, op. cit. *supra* note 109, 1191.

113. Van den Bogaert and Cuyvers, ibid., 1191. Joined Cases C-338, 359 & 360/04, *Placanica*, [2007] ECR I-1891, para 47, and Joined Cases C-447 & 448/08, *Sjoberg*, [2010] ECR I-6921, para 43.

the scope of the Union's legislative competences,[114] a point that the Court has rejected as far as redistributive policies are concerned,[115] and evaded where explicitly moral or religious concerns were raised.[116] In *Sayn-Wittgenstein,* however, Austria's invocation of a norm as reflecting its national identity and constitutional history *was* accepted as a ground for relaxation of the standard of proportionality, without the Court explaining why the specific nature of such norms warranted a different test.[117]

Despite often formally sticking to the three-prong (substantive) proportionality test, it seems that the Court has *de facto* long accepted a more procedural version of proportionality in dealing with morally or ethically contentious goods. In many areas, for example, it highlights the *prima facie* complete autonomy of Member States in deciding on the boundaries of permissive behaviour, and on the level and nature of sanctioning. In *Läärä*, which dealt with gambling, for example, it held that:

> "it is for [national] authorities to assess whether it is necessary, in the context of the aim pursued, totally or partially to prohibit activities of that kind or merely to restrict them and, to that end, to establish control mechanisms, which may be more or less strict. In those circumstances, the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the national authorities of the Member State concerned and the level of protection which they are intended to provide".[118]

114. Opinion of A.G. Bot in Case C-171/07, *Apotherkerkammer des Saarlandes*, [2009] ECR I-4171, para 32.

115. See, equally, within the context of national redistributive policies Opinion of A.G. Villalon in Case C-515/08, *Santos Palhota*, [2010] ECR I-9133, paras. 52–53. See also Opinion of A.G. Trstnejak in Case C-282/10, *Dominguez*, judgment of 24 Jan. 2012, nyr, para 159.

116. Case C-165/08, *Commission* v. *Poland*, [2009] ECR I-6843, paras. 51 and 57.

117. In *Sayn-Wittgenstein*, e.g., the Court used the constitutional identity clause to define the margin of appreciation that should be awarded to Member States under the proportionality test. See Case C-208/09, *Sayn-Wittgenstein*, [2010] ECR I-13693, paras. 83 and 92. See for a general discussion of the case law and the use of the constitutional identity clause: Van Bodgandy and Schill, "Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty", 48 CML Rev. (2011), 1417. See, equally, within the context of national redistributive policies Opinion of A.G. Villalon in *Santos Palhota,* cited *supra* note 115, paras. 52–53. See also the Opinion of A.G. Trstnejak in *Dominguez,* cited *supra* note 115, para 159.

118. Case C-124/97, *Läärä*, [1999] ECR I-6067, paras. 35–36; *Liga Portuguesa*, cited *supra* note 77, para 59; and *Omega,* cited *supra* note 111, para 38.

Similar deferential language has been used by the Court in cases dealing with prostitution[119] and pornography,[120] where it emphasized that it would in principle accept the moral and ethical choices made by a Member State.

As such, the objective of the procedural principle of proportionality is not to challenge or re-orient the content of a national policy that is informed by moral or ethical principles,[121] but rather to rationalize its implementation, and ensure the absence of discrimination or protectionism.[122] Such a reading of proportionality makes sense, as it is only in such cases, after all, that the argument from containment is engaged. In the absence of discrimination or protectionism, the argument from transnational effects, the argument from constrained democracy and the argument from aspirational justice cannot justify a re-orientation of national policy preferences.[123] It is argued that a *procedural* proportionality test that respects the substance of national moral and ethical choices, and that instead focuses on teasing out discriminatory or protectionist biases, must only assess the *normative coherence of national policies, the consistent application of sanctions, and legislative transparency*.[124]

The criteria of coherence and consistency have already started to emerge in a string of gambling cases.[125] These criteria should be carefully contextualized. As Mathisen and Cuyvers and Van den Bogaert show, they are slippery: their broad interpretation (using *all* national policy as a comparator to test the coherence and consistency of a measure) might entail an unrealistic and inappropriate demand of perfection,[126] while their narrow interpretation (focusing on a single law or measure) makes them of little use in teasing out national discriminatory measures.[127] For such criteria to be useful in teasing

119. Joined Cases 115 & 116/81, *Adoui & Cornuaille*, [1982], ECR 1665, para 8; Case C-268/99, *Jany*, [2001] ECR I-8615, para 60.

120. Case 121/85, *Conegate*, [1986] ECR 1007, para 14; Case 34/79, *Henn & Darby*, [1979] ECR 3795, para 15.

121. *Jany*, cited *supra* note 119, para 56: "it is not for the Court to substitute its own assessment for that of the legislatures of the Member States where an allegedly immoral activity is practiced legally".

122. *Henn & Darby*, cited *supra* note 120, para 21.

123. See *supra*, section 3.

124. See also the contribution of Damjanovic in this issue (section 3.2.), who traces a similar understanding of proportionality in the competition law cases, where it is employed to test whether national policies are "organized reasonably".

125. Case C-243/01, *Gambelli*, [2003] ECR I-13031, para 67. See, generally, Mathisen, "Consistency and coherence as conditions for justification of Member State measures restricting free movement", 47 CML Rev. (2010), 1021. The Court also applied this criterion in Joined Cases C-316, 358-360, 409 & 410/07, *Stoβ*, judgment of 8 Sept. 2010, nyr, para 98; and Case C-46/08, *Carmen Media*, judgment of 8 Sept. 2010, nyr, paras. 66, 88.

126. Mathisen, op. cit. *supra* note 125, 1040–1041.

127. Van den Bogaert and Cuyvers, op. cit. *supra* note 109, 1191.

out discriminatory biases while at the same time protecting the substance of the moral or ethical choice made by the Member State, it is suggested that they need to be understood as aiming to ensure *general regulatory equivalence*. As Wisher indicates, this "requires a test of similarity based upon the policy objective being pursued. Thus imported goods [or foreign service providers and citizens] which in practice satisfy the policy objectives of the regulator should be treated as similar to each other but not otherwise".[128] The purpose is to test whether, assessed *generally*,[129] the law regulating the boundaries of moral and ethical behaviour treat domestic and foreign situations alike. Simply put, this means that if Germany prohibits domestic service providers from offering laser-games, it may also prohibit foreign service providers from doing so on German territory. Conversely, it means that if the Netherlands allows Dutch residents to buy soft-drugs in coffeeshops, it should also allow foreign EU-residents to do so. A difference in application between domestic and foreign actors, in other words, makes a national moral or ethical policy incoherent, inconsistent and thus disproportionate.[130] Given that a demand of perfection is inappropriate, it is suggested that the burden of proof for demonstrating that a national policy is generally incoherent and inconsistent, and therefore disproportionate, lies on the applicant, that is, on the producer, service provider or citizen challenging a national measure.[131] This reversal of the burden of proof traditionally associated with the free movement provisions in EU law is warranted by the need to insulate the *content* of national moral and ethical decisions from the normative bias that is implicit in the free movement provisions.[132]

The logic of procedural proportionality (if not the language) can in fact be traced in the Court's case law in the 1980s. In a string of cases that dealt with the legality of restrictions on prostitution, pornography and sex-dolls, the Court arguably based its rulings on a finding of general regulatory equivalence. In *Henn & Darby*, for example, which dealt with a UK ban on the import of pornography, the Court held that, since *domestic* measures:

> "*taken as a whole*, have as their purpose the prohibition, or at least the restraining, of the manufacture and marketing of publications or articles of an indecent or obscene character, in these circumstances it is permissible to conclude, on *a comprehensive view* that there is no lawful trade in such

128. Wilsher, "Does Keck discrimination make any sense? An assessment of the non-discrimination principle within the European Single Market", 33 EL Rev. (2008), 7.

129. See also *Läärä*, cited *supra* note 118, para 37.

130. Wisher argues that a similar conception of regulatory equivalence can be seen in the Walloon Waste case (C-2/90, *Commission* v. *Belgium*, [1992] ECR I-4431), and in the qualification cases. Wilsher, op. cit. *supra* note 128, 7–8.

131. See Nic Shuibhne and Maci, op. cit. *supra* note 96, 965.

132. See De Witte, op. cit. *supra* note 40.

> goods in the United Kingdom [and the measure can therefore] not be regarded as amounting to a measure designed to give indirect protection to some national product or aimed at creating arbitrary discrimination".[133]

In other words, if national measures *generally* treat foreign and domestic situations in a similar way, and impose equivalent limits to permissive behaviour, they should stand. *Conegate* offers an example of a situation where such general regulatory equivalence could not be established. The case dealt with a UK ban on the import of sex-dolls. At the same time, domestically produced sex-dolls only faced very limited restrictions on manufacture and marketing, such as a prohibition of transmission by post and a restriction on public display.[134] The Court held that, after having assessed the applicable legislation as a whole,[135] "such [domestic] restrictions cannot be regarded as equivalent in substance to a prohibition on manufacture and marketing" that is imposed on imported sex-dolls.[136] The absence of general regulatory equivalence, then, can be understood to betray the discriminatory or protectionist nature of the domestic policy. In *Adoui and Cornuaille*, which dealt with the question whether a Member State could refuse residence permits for foreign prostitutes, the Court made a similar assessment of general regulatory equivalence, and held that this was unacceptable "in a case where the Member State does not adopt, with respect to the same conduct on the part of its own nationals repressive measures or other genuine and effective measures intended to combat such conduct".[137] The Court repeated this assessment of general regulatory equivalence more recently in *Jany*.[138] This first part of the procedural version of proportionality, in other words, focuses on the internal coherence of national policy.

The second part of the procedural proportionality test focuses on legislative and administrative transparency. Its objective is to make an assessment of coherence and consistency easier, to allow foreign producers, service providers and citizens to understand limits to permissive behaviour, and to force Member States to explicitly internalize the demands of free movement within their moral and ethical policies. Again, this idea of transparency as part of proportionality first appeared in the gambling cases. Since *Placanica*, and, more explicitly, *Liga Portuguesa*, the assessment of the legality of national gambling policy (in the absence, of course, of discrimination based on nationality) is to a large extent based on procedural fairness, and in particular

133. *Henn & Darby*, cited *supra* note 120, para 21 (emphasis added).
134. *Conegate*, cited *supra* note 120, para 17.
135. Ibid.
136. Ibid., para 18.
137. *Adoui & Cornuaille*, cited *supra* note 119, para 8.
138. *Jany*, cited *supra* note 119, paras. 60 et seq.

on transparency in access, administrative procedure and judicial review.[139] In *Commission* v. *Poland*, a case that dealt with the question whether Poland could rely on ethical or religious grounds to ban GMOs within its territory, the Court seemed to suggest a criterion of *legislative intent*, in the sense that a domestic moral or ethical choice must (mainly) be based on moral or ethical considerations, to the exclusion of other commercial or environmental concerns.[140] This general emphasis of transparency can also implicitly be traced in the Court's case law in healthcare and employment,[141] suggesting a wider recognition of the need to curtail the effects of the argument from containment to account for other types of argument – moral, redistributive or social – that exist (or ought to exist) in the European legal order.

This turn to a more procedural variant of proportionality, it is argued, is conceptually able to engage both with the argument from self-determination, in respecting the capacity of political communities to express their moral, ethical or cultural preferences; and with the argument from containment, by protecting against parochial biases and allowing individual actors to move between different Member States.[142] It is in essence premised on a pluralist perspective that every Member State is free to decide on its own moral or ethical agenda, but is unable to restrict the capacity of its citizens to move to

139. Van den Bogaert and Cuyvers, op. cit. *supra* note 109, 1187, with reference to *Betfair*. Case C-203/08, *Betfair*, [2010] ECR I-4695, para 50, Case C-64/08, *Engelmann*, [2010] ECR I-08219, para 55.

140. Case C-165/08, *Commission* v. *Poland*, [2009] ECR I-6843, para 55.

141. Case C-341/08, *Petersen*, [2010] ECR I-47 and Case C-157/99, *Geraerts-Smit and Peerbooms*, [2001] ECR I-5473, paras. 86–90.

142. One of the most contentious moral questions currently discussed throughout Europe is the right of same-sex couples to registered partnership, marriage or adoption. What role should EU law play, e.g., when a married gay couple from Belgium moves to Poland, where such marriage is not recognized? This contribution suggests that the best way to mitigate in such scenarios lies in the concept of fundamental boundaries, whereby each Member State is free to define which *actions* are (not) allowed within its territory, without being directly exposed to alternative views of different Member States. This entails, in other words, Poland should be allowed to decide whether or not an unmarried Belgian gay couple can marry *in Poland*. It is suggested that the concept of fundamental boundaries, however, sees only to permissible *actions*, and not to a person's permissible *status*. In other words, Poland must recognize the marital status of a gay couple that was married in Belgium, regardless of their nationality, and must attribute the same rights to that status as it does for traditional marriage. This distinction is already implicit in the Court's case law on non-discrimination and free movement, where a person's status (whether his name, nationality, race, age, sex, marital status or sexual orientation) is held to be intimately related to his capacity for autonomy and self-determination, which cannot be stripped or altered upon movement to another Member State. See Rijpma and Koffeman, "Free movement rights for same-sex couples under EU law: What role to play for the European Court of Justice", in Gallo, Paladini and Pustorino (Eds.), *Same Sex Couples Before National, Supranational and International Jurisdictions* (Springer, 2013); Kochenov, op. cit. *supra* note 38, 186–190; Opinion of A.G. Maduro in Case C-303/06, *Coleman*, [2008] ECR I-5603; or Case C-369/90, *Micheletti*, [1992] ECR I-4239.

other Member States.[143] This procedural variant of proportionality has two main advantages over the three other solutions discussed above. First, it is in line with the constitutional division of competences between the Member States and the EU. In fact, it can even be understood to correct the structural bias in EU governance that causes functional and substantive spill-overs. As Kumm highlights, much of the spill-over is generated and justified by the fact that the integrity of the domestic political process is undermined, insofar as the free movement provisions create a bias in the national political process in favour of mobile interests, and skew the deliberative process from one that focuses on justice to one that focuses on responsiveness to external interests.[144] As discussed above, the substantive variant of the proportionality test strengthens this bias, whereas the procedural variant, by insulating national choices from external pressures and using solely internal comparators, corrects that bias. In other words, it could operate as a mechanism to more forcefully ring-fence national competences from the spill-over effect that emerges from the free movement provisions. Second, a procedural understanding of proportionality manages to internalize both individual and collective understandings of self-determination, creating a pluralist European space[145] in which individuals are more free and autonomous than Member States alone could allow for. On the one hand, it strengthens collective self-determination on the national level by reinforcing its role and function as the forum through which individuals make moral sense of their environment, and through which moral principles are constantly re-negotiated and legitimized. On the other hand, it provides an "exit" for disenchanted individuals, who can move to Member States whose moral or ethical conception closer meets his or her preferences. Both developments can be understood as elegant mechanisms through which the Union implements its commitments to equality and freedom.[146]

143. See for a similar view, Nic Shuibhne, "Margins of appreciation: National values, fundamental rights and EC free movement law", (2009) EL Rev., 230; and Weiler, "Fundamental rights and fundamental boundaries", in id., *The Constitution of Europe* (CUP, 1999).

144. Kumm, op. cit. *supra* note 90, 511–515.

145. See Deakin and Barnard, "Market access and regulatory competition", in Barnard and Scott (Eds.), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing, 2002).

146. See De Witte, op. cit. *supra* note 40, 694.

## 5. Conclusion

This contribution has analysed the tensions that emerge when national policy decisions that reflect moral or ethical first principles are exposed to the dynamics of European integration. It has broken down the building blocks of the argument from self-determination, which calls for respect of national decisions for the simple procedural reason that they are a reflection of a "certain time, place and people"; and juxtaposed this with the argument from containment, which informs why EU law ought to impose substantive limits on national measures. This contribution has argued that EU law, and the Court specifically, must more explicitly engage with these different arguments that are articulated and shaped in its case law. Only a framework of procedural proportionality, which focuses on the coherence and consistency of national moral or ethical policies, and ensures a general regulatory equivalence between domestic and foreign situations, can at the same time engage with the core of the argument from self-determination and the argument from containment, and can as such ensure that the Union enhances, rather than decreases, the capacity of individual citizens to be in control of the moral and ethical environment in which they live.