

Chapter 5

Variation and the Internal Market



5.1 Introduction

The internal market, which encompasses the free movement of goods, persons, services and capital, is at the heart of European cooperation. The Treaty on the Functioning of the European Union (TFEU) prohibits Member States, and in some cases private organisations, from introducing measures that impede free movement. In addition, there are provisions in the Treaty that prohibit companies from obstructing competition in the internal market. Legislation, including directives and regulations, completes its legal architecture¹ and is meant to eliminate differences between national rules that might disrupt the internal market process and to set common standards for the 28 Member States.

Ever since the Treaty of Lisbon came into force, the EU has had a ‘social market economy’ as its aim. The crucial question is what that means and to what extent variation is compatible with that aim and with attempts to meet the needs of different groups of citizens. More specifically, how divisible (or indivisible) is the internal market? Is it politically and legally conceivable and beneficial to society to separate the four freedoms from one another and thus for each Member State to no longer guarantee all freedoms? But also, how conceivable and beneficial is variation *within* each of the four freedoms? For example, concerning the precise definition of the free movement of persons: to what extent can national exceptions be permitted?

The question of the divisibility or indivisibility of the internal market is crucial because it is important for the overall direction of European integration, and because it must be settled at Treaty level with the agreement of all the Member States. Variation within the individual freedoms has more to do with everyday political practice, where the emphasis is much more on how European legislation should be fleshed out in specific terms, depending on the policy objective. The questions this involves include what sort of European standard or level of protection is required, how much discretionary scope can be left to the Member States, and what kind of legal or policy instruments are appropriate.

Three phenomena come to light repeatedly when analysing such questions. We will come across them time and again in this chapter.

1. First of all, the process of European market integration is constantly disrupted by various factors. Those factors include national legislation and rules that are meant to protect national public interests but that may simultaneously create obstacles to free movement within the EU. In other words, there is tension between Europe's interest in market integration and national public interests. For example, safeguarding market integration may have negative consequences for the national social domain.
2. Second, while harmonisation of national rules is important for eliminating market distortions while protecting national interests at European level, it does not always require homogeneity and convergence across the full breadth of internal market rules. On the contrary, allowing for national differences can also strengthen support for the EU, for example because it is more in keeping with the temporary—and constantly evolving—nature of many EU arrangements or with special circumstances in a particular Member State. The internal market is not based on a simple 'one-size-fits-all' approach but instead leaves scope for divergence. In fact, the way in which the single market deals with distortions and allows for variation in national public interests can also provide interesting insights into other policy domains.
3. Third, market integration and the enactment of European legislation in the internal market can also be distorted from the outside, for example by non-EU countries. The internal and external worlds of European market integration are inextricably linked. The completion of the internal market therefore also depends on the arrangements and rules agreed with the outside world.

5.2 A Social Market Economy: Work in Progress

It is clear that not everyone benefits to the same extent from the free market and sees their standard of living improve as a result, even if the *economic added value* of the European internal market is widely acknowledged.² By estimates, almost a quarter of the EU's population is currently at risk of poverty or social exclusion. Employment levels and living standards vary widely not only between Member States but also between regions within Member States. There are also major differences between Member States in terms of working patterns, education, health and social security.³ Many people are therefore worried about how the EU is tackling the social problems associated with an open (labour) market. According to the 2017 *Eurobarometer*, more than eight out of ten Europeans see unemployment, social inequality and migration as the three most important challenges facing the Union and expect a free market economy to go hand in hand with high levels of social protection. Seven out of ten feel that social and unemployment policies are poorly managed and support decision-making at both national and EU level.⁴

Since the entry into force of the Treaty of Lisbon in 2009, Article 3(3) TEU provides that the EU shall work for the sustainable development of Europe, based, among other things, on a ‘highly competitive social market economy, aiming at full employment and social progress’. Other objectives mentioned in Article 3(3) support these aims, namely combating social exclusion and discrimination and promoting social justice and protection and solidarity between generations. These passages flesh out the more general aim of Article 3(1), namely that the Union’s objective is ‘to promote peace, its values and the well-being of its peoples’. But well-being goes beyond safeguarding the social dimension in the above sense; it also implies protecting other public interests, for example the environment, sustainable development and consumers. Ancillary policy of this kind is therefore also important in shaping the internal market.⁵ The Union is founded⁶ on the values of ‘respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’.

However, opinions differ considerably as to the form that the social market economy and related aims and values should take.

Article 26 TFEU defines the internal market as ‘an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties’. This definition says nothing about how the internal market should be shaped, the intensity of EU regulation, the relationship between national and European public interests, or the idea of a social market economy. It is also unclear exactly what the relationship is between the four freedoms and whether there may be a hierarchy between them.⁷ Article 151 TFEU, on the objectives of Europe’s social policy, also refers to the internal market. Objectives such as the promotion of employment, improved living and working conditions, proper social protection, lasting high employment and the combating of exclusion are linked explicitly to the internal market.

The task of developing the social dimension of the internal market and safeguarding other public interests going forward is literally a work in progress. The two defining factors in this context are the existing principles of market organisation (e.g. the fundamental rights set out in the Charter of Fundamental Rights of the European Union), but also the possibilities and impossibilities arising from ‘political will’.

Two factors: Principles of market organisation and political will

The first factor is that the Member States are not entirely free to define the Union’s socio-economic objectives and core values. Specifically, we can identify a number of market organisation principles in EU law that constitute important legal and political benchmarks for their further elaboration. In the first place, there are the fundamental rights of citizens and other residents of the Union as now enshrined in the Charter of Fundamental Rights of the European Union. The Charter includes provisions on human dignity and freedoms, solidarity, citizenship and justice.

These not only guide the Union legislator and—in the policy domains covered by Union law—the Member States, but also the Court of Justice in its judicial reviews of the relationship between the internal market and national public interests. We will discuss this in the sections below.

What is important here, however, is to take a closer look at solidarity as a key principle for the Member States and its possible significance for citizens. It is not yet clear what this principle encompasses or precisely what it requires of them,⁸ but what *is* clear is that it is acquiring growing political and legal relevance. In terms of the Treaties, it is not only identified as one of the core values of the Union but is also referred to in Article 3 of the TEU, i.e. in terms of ensuring solidarity between generations and between Member States and promoting economic, social and territorial cohesion. In practical terms, the EU pursues the latter aim by redistributing funds through the Structural and Investment Funds, including the European Regional Development Fund and the European Social Fund.⁹ However, the importance of solidarity between Member States is also reflected in the Union's external policies,¹⁰ the common foreign and security policy,¹¹ migration and asylum policy,¹² and in the internal market, even if the Treaties do not refer to it specifically in this context.¹³ There, solidarity is referenced indirectly in the Court's judgments on the free movement of services and persons, but also in the political assessment that takes place in the legislative process. Solidarity can also be regarded as an important factor in loyal cooperation, not only between the Member States and the Union's institutions, but also between the Member States themselves.¹⁴

The TFEU also contains a number of 'mainstreaming principles' (Articles 8–13) that oblige Union institutions to afford public interests other than purely economic ones a high level of protection when adopting any European legislation, rules or policy. Article 9 TFEU specifically provides that:

In defining and implementing its policies and actions, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

The other provisions concern combatting discrimination and promoting equality on various grounds, integrating requirements to promote sustainable development, and taking consumer protection requirements into account.¹⁵ Regarding the single market, the main legal basis for internal market legislation (Article 114 TFEU), which we will discuss further below, states that 'any proposals must take as a base a high level of protection concerning health, safety, environmental protection and consumer protection'.

These socio-economic aims, core values and market organisation principles together constitute the framework for the second factor: determining precisely what level of social protection and progress is being pursued in the context of European decision-making, how much guidance that requires of the EU, and how much discretion is left to the Member States is above all a question of political assessment. The initial expectation, i.e. that establishing the common market would

improve standards of living, implied that there was no need to transfer significant national competences in the social policy domain to Europe. When reality proved otherwise, however, the political will to make social protection an essential element of the internal market expressed itself through other channels in legislation, including directives derived from the legal basis for the internal market set out in Article 95 of the EC Treaty (now Article 114 TFEU). Examples are the Directive on the safeguarding of employees' rights in the event of transfers of undertakings,¹⁶ the Directive on the protection of employees in the event of the insolvency of their employer,¹⁷ and various directives on equal treatment of men and women.¹⁸ Although the EU's legislative power to implement social policy was and still is limited, for example in relation to employment policy and social security, the Union legislator has interpreted its competences in internal market matters broadly so as to guarantee the social rights of workers as well. In that sense, we can say that the EU has a certain social *acquis*.¹⁹

The political guidelines for the social *acquis* are set by the European heads of state or government, together with the President of the Commission and under the leadership of the President of the European Council, while the legislative and regulatory details are negotiated by the Council of Ministers together with the European Parliament upon proposals from the Commission. As our discussion of various cases below will make clear, amendments or adjustments to European legislation may also be deemed necessary as insights into the downsides of market forces change. In other words, the EU's legal framework leaves plenty of scope to weigh up the interests of the economic market and other public interests politically, and so the matter of how to flesh out the social market economy is, above all else, a question of political choice.

The European Commission's recent proposal to establish a European Pillar of Social Rights reaffirms the importance of both factors in achieving a more 'social' internal market.²⁰ On the one hand, the twenty principles and rights covered by this pillar deploy the principles of market organisation in a legal and policy-related sense. On the other hand, the joint adoption by the Commission, the Council and the European Parliament of the European Pillar of Social Rights at the Social Summit for Fair Jobs and Growth in Gothenburg on 17 November 2017 expresses the political will to implement the principles and rights under the pillar. The pillar is about delivering on equal opportunities and access to the labour market, fair working conditions, and social protection and inclusion.

The courts play a reactive role in the internal market in that they review national laws and rules in the light of the EU Treaties' free movement provisions whenever the public or companies are disadvantaged by them. The Union legislator has a proactive role in that it creates rules and policies to protect various public interests. Coordinating policy measures are also needed, however, and are now provided for in the European Pillar of Social Rights, for example concerning employment policy in relation to the European Semester for economic policy coordination and the convergence process within the EMU.²¹

Assessing public interests in the internal market

The EU Treaties have various provisions prohibiting rules and conduct that impede free movement. The Court of Justice, which plays a major role in interpreting more general Treaty provisions, stipulated early on in the history of the European Communities that these provisions must be applied and enforced by Member States through their own courts. The Court described European law as an autonomous source of law, binding Member States and citizens alike to the rules governing the common market. As a result of this ‘normative-functional’ integration method, which emphasised market liberalisation and the removal of barriers to movement, the law governing the internal market, in which the four freedoms play a crucial role, has proliferated and extended into virtually every domain of economic and social life.²² These market rules thus provide normative frameworks for national measures and actions, even when they pursue public objectives and guarantee social rights.²³

Although they are applied broadly, the four freedoms are not absolute in nature. The Member States may restrict freedom of movement to a certain extent to safeguard non-economic interests, for example the fundamental rights of citizens, including social rights, which may be guaranteed under certain conditions and within the boundaries of the four freedoms. Case law has recognised that Member States may restrict freedom of movement to safeguard non-economic interests, provided that the relevant national measure is proportionate. It therefore makes allowance for certain public interests, typically national values or ethical or politically sensitive issues such as the protection of vulnerable groups of consumers, a regional language, or the regulation of gambling.

The scope that is created in this way makes a balanced assessment possible that can be used to protect social rights and interests. There are, however, certain situations in which the Court’s judgments subordinate social rights to the rules of free movement. In the *Viking* and *Laval* cases,²⁴ the Court restricted the trade unions’ right to strike, something for which it was criticised.²⁵ Its approach here conflicts with the underlying principle of the Charter of Fundamental Rights of the European Union, which requires a balanced assessment between economic freedoms and the fundamental rights of citizens. After all, the Charter implies that the freedoms of the internal market are no more important than fundamental rights or public interests.²⁶ The economic freedoms and the guarantee of social rights are by no means mutually exclusive, however, but complementary, something that became apparent in the 1968 Regulation on freedom of movement for workers within the Community, which stipulated that workers employed in the territory of another Member State must enjoy the same social and tax advantages as national workers.²⁷ In its judgments, the Court has interpreted the term ‘social advantages’ broadly to include non-financial advantages, such as the right to require the use of a certain language in court proceedings²⁸ and the right of residence for the unmarried companion of a worker who is a national of another Member State, which the Court asserts must be regarded as social advantages within the meaning of Article 7(2) of the Regulation.²⁹

The Court of Justice has also issued key rulings on the importance of the free movement of persons versus that of maintaining national social security systems, i.e. between transnational and national social solidarity. It has, in fact, promoted transnational solidarity between citizens by increasingly granting them access to national social security rights, based on the notion that Member States must treat their own nationals and the nationals of other EU Member States as equals. It has used the principle of proportionality to interpret social solidarity in a way that affords citizens the right to social assistance, but within the limits of the available resources.^{30, 31} The Court requires Member States to show solidarity towards the nationals of other Member States, depending on the length of time an individual has resided in the host Member State—an indicator of his/her level of integration—and on the condition that the individual does not become an unreasonable financial burden on the host Member State.³² A similar dilemma between transnational and national solidarity can be seen in case law concerning the free movement of services in relation to access to medical care in other Member States, where the Court has guaranteed individual citizens access to such care under certain conditions.³³ On the one hand, we can say that the Court's approach to citizens' rights has added a dimension of social solidarity to the economic internal market paradigm that extends beyond the customary beneficiaries of the free movement provisions.³⁴ On the other hand, its championing of individual rights has been criticised for weakening the social solidarity that underpins the national social security systems. Newdick refers meaningfully in this connection to 'citizenship, free movement and health care: cementing individual rights by corroding social solidarity'.³⁵ It is, in any case, clear that the free movement of persons and services has impacted the guarantee of public interests through social security systems grounded in national social solidarity.

Negative integration is thus based directly on the norms of the Treaties and involves assessing national public interests within the framework of EU law, with the Member States being obliged to take the interests of free movement into account in that assessment and not to interfere disproportionately with the four freedoms. By interpreting internal market law, the Court of Justice plays a guiding role, and that role is decisive for the discretion that remains to protect national public interests. The fact that the Member States are largely in charge of creating social policy and that the Union legislator has little or no input gives the Court of Justice the final say in assessing how national social interests weigh up against the EU rules on free movement. After all, whenever the exercise of national competences affects freedom of movement within the internal market, a private individual can invoke the free movement provisions of the Treaty and challenge the social law provisions in court. It is then up to the Member State to show that its policy is meant to safeguard social interests.

The situation is different when the Union legislator takes the initiative. It is empowered to assess public interests within the context of the internal market (positive integration). The fact that it possesses such legislative competence already implies that the internal market is about more than simply removing barriers to trade. That is why legal specialists and other researchers have now come to regard

the internal market as a ‘battlefield of values and interests’.³⁶ As noted above, the Treaties require the Union legislator to take other interests into account, for example a high level of protection for health, safety, the environment and consumers (Article 114(3) TFEU). The question then is how the various interests are weighed up and accommodated in the practical sense. Our analysis of two key pieces of legislation that concern interests other than the elimination of internal market barriers, i.e. the Posting of Workers Directive and the General Data Protection Regulation (GDPR), has given rise to a number of findings. The following questions are central to the analysis:

1. How does the EU weigh up public interests against the removal of barriers to free movement?
2. How is this assessment made manifest in legislation?
3. How much discretion do individual Member States have to vary policy content?

Sometimes the importance of removing barriers to the four freedoms of the internal market is diametrically opposed to other public interests. In the original proposal for the Posting of Workers Directive, the Commission stated that it was a question of ‘finding a balance between two principles which find themselves in contradiction’.³⁷ On the one hand, there is the free competition between companies. That requires a ‘level playing field’ eliminating unfair competitive advantages under national rules. On the other hand, Member States wish to protect workers—for example by setting minimum pay levels—in a way that takes the relevant country’s circumstances into account. In the directive as ultimately enacted, the free movement of services is mentioned explicitly as one of the objectives of the Community (in recital 1).

We also see another tension in the assessment of public interests in the Posting of Workers Directive. Not only is the protection of free competition and the free movement of services at odds with the protection of workers, but there is also the related issue of the level at which that public interest should be protected: the first two interests require the Union legislator to take action, whereas the protection of workers—as interpreted by the Commission—requires action on the part of the Member States.

The interests involved in data protection are not diametrically opposed. At stake here are the protection of privacy on the one hand and the free movement of personal data on the other, the latter being viewed as an aspect of the internal market (indeed, some argue that the free movement of knowledge and data should be considered the fifth freedom of the internal market).³⁸ Whether enshrined in the GDPR or the old Data Protection Directive, these interests remain the same (although the wording is slightly different). The reason for the new Regulation lay mainly in the rapidly changing social and technological context, referred to as the ‘datafication’ of the economy,³⁹ which has made the exchange of data within the EU crucial for prosperity growth.

The legal system also assumes that protecting privacy does not necessarily undermine the free movement of data. On the contrary, the Commission’s argument

was that a uniform system of privacy rules would boost confidence in personal data protection and thus ease the free movement of data. While this belief is not based on any empirical evidence, the new Regulation is designed in such a way that if organisations comply with a range of privacy safeguards, the free flow of data will be guaranteed by the absence of diverging national regimes.

Similar trade-offs between free movement and other public interests can also be found in other legislation. The Audiovisual Media Services Directive⁴⁰ strikes a balance between free movement and cultural interests, for example. The Directive's preamble states that the growing importance of audiovisual media services for societies, democracies, education and culture justifies the application of specific rules that restrict the operation of the internal market. It follows from the Directive's articles that other interests are also at stake, such as the protection of minors, the right of those with visual or auditory disabilities to access media, and the diversity of television programming.⁴¹ The revised Payment Services Directive (PSD2) weighs the free movement of payment services against the protection of individuals (data protection).⁴² The Directive opens up the market for payment services but at the same time improves consumer protection—although there are doubts about how effective that protection really is.⁴³ Finally, in its public procurement law, the EU now (since a review round) gives contracting authorities more leeway to include environmental and social aspects in contract award criteria.⁴⁴

The political assessment of public interests is fleshed out in European legislation. The content of EU legislation answers the question of how the Union legislator weighed up public interests, what weight it assigned to each of those interests, and what balance it ultimately struck between them. Our analysis of the two legislative case studies shows, however, that other factors also play a role in this assessment. Two of these are of critical importance for the above questions: the chosen legal basis, and the role of the Court of Justice.

The legal basis and the role of the Court

The Union legislator does not have a general mandate but must rely on the legal basis laid down in each sector in the Treaties. With regard to the internal market, the Treaties provide a broad legal basis for action, in particular in Article 114 TFEU. The question is: to what extent does the chosen legal basis influence the assessment of public interests at stake?

Our analysis of the two legislative cases reveals that the Court considers free movement very important whenever the Union legislator refers to one of the legal bases of the internal market as justification for a directive or regulation (see also the Court of Justice's *Laval* judgment below). This is understandable: as a legal basis, free movement is intended precisely to create an internal market. The fact that the Treaties define these legal bases in terms of broad, general objectives has led to major problems and allowed economic interests to prevail over non-economic ones. Nevertheless, the importance attached to free movement is not indisputable. The Court of Justice has ruled that a measure grounded in such a legal basis may certainly serve other public interests, as long there are guarantees that it will also

have a positive effect on free movement. In fact, pursuant to the principles of market organisation identified above, other interests and principles must also be taken into account. The Court has even accepted that the primary objective of internal market legislation may concern a public interest other than the improvement of conditions for the free movement of goods, persons, services and capital. In a judgment concerning the Tobacco Advertising Directive, which was clearly meant to protect public health, the Court ruled that this was acceptable as long as the measure also contributed to improving the conditions for the functioning of the internal market.⁴⁵ If legislation grounded in the legal bases of the internal market does indeed contribute in such a way, then it is valid. Such legislation may also be applied in domestic situations. For example, individuals may invoke the rights stemming from the Data Protection Directive (now the GDPR) even if they reside in the same Member State as the person against whom they are invoking those rights.

Legislative practice reveals, however, that the legal basis does influence the assessment of public interests. The GDPR makes that clear. The legal basis of the old Data Protection Directive was the internal market (Article 114 TFEU), whereas the new Regulation has a special, new legal basis (Article 16 TFEU)⁴⁶ leading to a different assessment of the interests of free movement versus those of privacy. The Regulation imposes new obligations on data processors (e.g. on data portability, how to respond if citizens wish to exercise their ‘right to be forgotten’, how to act in the event of data breaches, etc.), extends the conditions under which organisations appoint data protection officers, increases organisations’ responsibility for demonstrating compliance with the law, and inflicts severe penalties in the event of non-compliance. These and other elements show that the balance has shifted in favour of privacy protection.

The current Posting of Workers Directive also shows that the chosen legal basis can advance the interest of free movement—because it is given greater weight than social interests—especially when combined with the role of the Court of Justice (see below). However, a new Posting of Workers Directive has now been agreed that will tip the scales towards the protection of workers, in response to criticism that the current Directive focuses too much on free movement. The Sociaal-Economische Raad (Social and Economic Council of the Netherlands) (SER) argued that the current Directive failed to strike the right balance in this respect.⁴⁷ It saw opportunities to broaden the basis of support for the internal market with a ‘trust offensive’ consisting of measures intended to eliminate the unequal treatment of labour migrants. The revision envisaged by the SER was meant to create a level playing field for companies and workers, in particular by addressing ambiguities in the period of posting and the concept of remuneration. Its proposals have now been incorporated into the agreement concerning the revised Posting of Workers Directive. The revised text emphasises the temporary nature of posting by imposing a 12-month cap on posting (with the possibility of a six-month extension). Regarding the concept of remuneration, the principle of equal pay for equal work will prevail; before, it was the minimum wage. The Directive will also be extended to all sectors of the economy, with special conditions applying in the transport sector, thus creating a level playing field there too. These changes are meant to

restore the balance between the freedom of companies to provide services and the protection of posted workers.

Both legislative case studies show that, in the context of the internal market, public interests are assigned different weights over time and that the relevant legal bases also provide leeway for this. While free movement is clearly subordinate to other public interests in these case studies, that is not always so, as the Services Directive demonstrates.⁴⁸ Even there, however, the interests of the internal market were undoubtedly set off against social interests at the time, with the Commission's original proposal undergoing a major revision as a result. For example, the country of origin principle was eliminated during the negotiations for that reason, and certain sectors and services excluded from that principle.⁴⁹ It is therefore difficult to draw general conclusions about the direction of this trend. Legislative and other decision-making processes and their outcomes are often impenetrable. Not even the objectives targeted by EU legislation are always made explicit, for example.⁵⁰ The data protection case also shows that other actors can significantly influence these processes in ways that are not equally clear to all. In this instance, the Article 29 Data Protection Working Party (WP29)—a group composed of representatives of the national supervisory authorities and two EU representatives—played a role. The Working Party's official task was advisory in nature, but in fact it exercised considerable influence on the interpretation of data protection law.⁵¹ The Working Party has now been superseded by the European Data Protection Board. In addition, data and privacy considerations within the context of European law are also influenced by other parties, notably the United States.

From a legal point of view, then, there is leeway in the internal market for the pursuit of other public interests. There are no restrictions on the type of public interest that can be protected under internal market legislation. At the same time, it should be noted that this leeway is not yet being exploited to its full potential. In many cases, it is unclear how much weight has been assigned to the various interests, an ambiguity that could very well undermine the political and democratic underpinnings of the assessment.⁵²

The Posting of Workers Directive is a particularly good example of the way in which the Court of Justice protects the interests of free movement. First of all, the Member States must interpret the Directive in the light of the free movement of services. This means, for example, that legitimate limitations provided for in the Directive must be interpreted restrictively. As regards the application of EU law, on the other hand, the Court is inclined towards a broader interpretation, for example of the key concepts of the Directive. The Court has also ruled that only the country of origin (and therefore not the host country) may offer more extensive social protection than the minimum provided for in the Directive.⁵³

The role of the Court of Justice is exceptional for another reason. The Court does not always adhere to the intentions of the Union legislator (in so far as they can be ascertained). A gap may therefore arise between the Court and the Union legislator in the *interpretation* of EU law and its underlying aims. After all, the Union legislator's intentions are only one factor among many considered by the Court. At least as important is the position of the directive in the larger body of EU law, in

particular the Treaties, ‘the objectives pursued by the legislation of which they form part’. The Court, moreover, sometimes describes those objectives in its own unique way. The *EasyCar* and *Brüstle* cases, for example, offer striking examples⁵⁴ in that the Court’s interpretations of provisions and key concepts do not necessarily correspond to what the Commission, the Council and the European Parliament had in mind. But the Court’s role may go even further. It may even invalidate legislation that it regards as contrary to fundamental rights, for example. The *Schrems* case is notable in the area of personal data protection. The Court ruled that the Commission was wrong to assume that the United States provides sufficient safeguards for the protection of personal data in the event of data transfer from Europe. The ruling had enormous consequences: data transfer to the US was prohibited and the EU’s political institutions were forced to negotiate entirely new agreements with the US.⁵⁵

The Court regularly comes under fire for its judgments, such as in the aforementioned *Laval* case in which it ruled that an employer who employed posted workers could not be forced to agree on a minimum wage with the trade unions, the customary procedure in Sweden. Although most legal specialists understood the ruling, others were fiercely critical. Many commentators felt that the Court had allowed the free movement of services to take precedence over the social protection of workers.⁵⁶ The proposal for a new Posting of Workers Directive shows, however, that the Union legislator need not take note of the way in which the Court weighs up the interests at stake. After all, the Court’s role is limited to interpretation; it cannot disregard explicit provisions in Union legislation concerning the scope of concepts, or the inclusion of specific rights to protect employees.

More recently, the Court has been much more vigorous about protecting fundamental rights, particularly in the context of the internal market.⁵⁷ Fundamental rights became more firmly embedded in the constitutional structure of the Union when the Charter of Fundamental Rights became binding on the Union legislator on 1 December 2009. As a result, the Court has taken to assigning more weight to fundamental rights when they are at odds with the four freedoms.⁵⁸ In doing so, it applies the rule-of-reason analysis, also used in assessing conflicts between free movement provisions and public interests. In addition, it interprets internal market legislation in a manner conducive to fundamental rights. For example, it interpreted the old Data Protection Directive in a ‘privacy-friendly’ manner.⁵⁹ It is less inclined to do this when other public interests are at stake, however; in such cases, the Court’s protection depends more heavily on the way in which the Union legislator has made those interests explicit in the relevant legislation.⁶⁰ The Union legislator bears more responsibility in such instances.

5.3 Variation Within the Internal Market

The foregoing implies that Member States have the discretion to protect public interests in the context of both ‘negative’ and ‘positive’ integration. National variation is therefore possible, but the question is how much variation the system can take, because national differences that result in the restriction of free movement will be disruptive to the market. In other words, how homogenous must the internal market be and how much heterogeneity is allowed to create a European social market economy while protecting national public interests at the same time? How can we reconcile the conflict between economic freedoms, public interests and fundamental rights? In the following, we first consider the possibility of variation after EU legislation has been enacted, and then explore variation within the wider context of the internal market and the EU’s external trade policy.

By applying a combination of deregulation and re-regulation, the law has always played a crucial role in the completion of the internal market.⁶¹ The single market must be guaranteed by removing national barriers and by establishing common rules that are interpreted and applied uniformly. After all, ‘unilateral action by the Member States leads to fragmentation of the market and affects the Community legal order’.⁶² We must, however, rethink the idea that Member States’ hands are tied by the rules once EU legislation has been adopted. In reality, this is by no means always the case. Although the Member States now have less room for manoeuvre in certain areas, such as consumer and data protection, most EU legislation does give them some discretion to make their own choices. The best-known example is minimum harmonisation; in fact in some domains, the Union legislator is prohibited from going beyond the minimum. That is not the case in the internal market, but even there, the Union legislator frequently limits itself to establishing a certain minimum set of rules. This is one way to resolve the tension between free movement and other public interests.⁶³ It means that public interests are assessed partly by the EU and partly by the Member States themselves. It should be noted, however, that the Member States must explicitly take the interests of free movement into account in their assessment.

Policy discretion can also be the outcome of open standards and concepts in EU legislation, which identifies general objectives but not the means to achieve them, and of legislation that allows Member States to decide on the precise scope of certain standards.⁶⁴ The legislative case studies that we have analysed also feature different forms of policy discretion. The proposal for the new Posting of Workers Directive, for example, creates greater leeway for collective agreements and thus offers the Member States more tools for regulating their own labour markets. Replacing the concept of ‘minimum wage’ by the broader concept of ‘remuneration’ also gives Member States more latitude to protect employees.

In the data protection domain, on the other hand, policy discretion is being restricted. Article 5 of the old Directive allows Member States to determine the conditions under which the processing of personal data is lawful, within the limits of the Directive. The new GDPR is much more restrictive because it raises the bar

with respect to protecting privacy. It also contains detailed rules that establish the legal relationships between parties directly (i.e. without the intervention of the Dutch legislator). Nevertheless, it still offers the Member States some discretionary powers, not only to supplement the rules but even to derogate from them in specific situations or to restrict the rights of data subjects (for a comprehensive analysis of the various forms of policy discretion provided by the Regulation, see the Dutch Data Protection Authority's Opinion on the Personal Data Implementation Act (*Uitvoeringswet Algemene Verordening persoonsgegevens*).⁶⁵ Examples include the possibility of providing for more specific rules to protect personal data in the employment context (Article 88), and of permitting further conditions to be introduced for specific types of personal data, including data concerning health (Article 9). As is often the case in EU legislation, the Member States have discretion with regard to regulating oversight, enforcement and legal protection (although the Regulation also contains rules regarding key aspects in this respect, such as the power of supervisory authorities to impose fines). The GDPR is thus a good example of the way in which the Union legislator combines mandatory rules with the discretion to interpret certain elements of the law.

Differences in the way countries deal with the policy discretion provided for in EU legislation can lead to national variation. In the case of the GDPR, for example, the Dutch legislator has opted for the principle of 'policy neutrality', i.e. maintaining existing national law as far as possible, unless the Regulation disallows this (see the Dutch Data Protection Authority's Opinion referred to above). As a result, the previous regulatory framework (in this context, the 2001 Dutch Personal Data Protection Act) continues to set the tone in discretionary policymaking as provided by the Regulation. Member States regularly choose a relatively 'bare-bones' implementation of EU legislation, thereby avoiding the delays in implementation that could arise if they were to extensively rethink the policy discretion available to them. In doing so, however, they may be overlooking an opportunity to allow for changes in circumstances (in the case of the GDPR, technological advances) or to express their policy preferences in the way that they deal with their national policy discretion. With reference to the GDPR, the Dutch Data Protection Authority cites the possibility of regulating the processing of the personal data of deceased persons. In cases where the Union legislator allows the Member States discretion, it accepts that the applicable law may vary from one Member State to another. This may impede the creation of a 'level playing field' between Member States, but it is a risk that the Union legislator is prepared to accept in the light of Member States' interests. It is therefore important that Member States do not simply choose, automatically, to interpret their policy discretion in a way that alters as little as possible in their own legislation.

As the number of objectives and competences has grown and fundamental rights have been included, variation is becoming more of a possibility—or is the internal market already so heterogeneous that bilateral arrangements between Member States are also conceivable? We consider this below in connection with the four freedoms and how they relate to other policy domains, i.e. competition law, social policy, and external trade policy.

The four freedoms: coherence and divergence

One important goal of the four freedoms and European competition law is to ‘unite the national markets into a single market reproducing as closely as possible the conditions of a domestic market’.⁶⁶ The unity of the market is critical here; it must be safeguarded by common rules that are applied uniformly.

If we consider the relationship between the four freedoms, we see that the case law of the Court of Justice is largely consistent.⁶⁷ The freedoms granted under the Treaties apply only in cross-border situations and in reference to an economic activity, a concept that the Court interprets broadly.⁶⁸ The Court also embraces the ‘market access test’ in the enforcement of all fundamental freedoms. According to this test, both discriminatory and non-discriminatory measures are basically prohibited if they result in restrictions on free movement. And, as noted above, Member States may justify the imposition of restrictive measures by invoking a wide range of exceptions, either in the Treaty or in case law. The rule of reason doctrine introduced by the Court with regard to all fundamental freedoms has been applied consistently. This doctrine asserts that restrictions on the freedom of movement may, by way of exception, be justified if they are designed to satisfy urgent requirements in a public interest that have not already been provided for explicitly in the Treaty. In its case law, however, the Court of Justice recognises that, although a Member State may safeguard such public interests, the validity of a national measure depends on whether European harmonisation legislation already exists that takes such interests into account and whether the measure meets the requirement of proportionality. The implication is that a Member State must be able to demonstrate that a national measure is both appropriate and necessary to safeguard the interest that it invokes, and therefore does not go beyond what is necessary.

Nevertheless, there are differences between the four freedoms and the prohibitions with regard to their scope of application. For example, unlike the other freedoms, the free movement of goods basically does not apply to legislation concerning such market conditions as shop closing times or advertising. It is also not possible to simply invoke the free movement of goods when challenging the trade-impeding measures of trade unions, banks, online companies and other organisations, whereas the other freedoms have been recognised as valid grounds. The Court’s case law is erratic when it comes to accepting horizontal direct effect in the free movement of goods. The free movement of capital also extends to liberalisation of free trade with third countries. In terms of the free movement of persons and, more specifically, provisions concerning EU citizenship, the Court has come up with its own method of assessing whether the rights of EU citizens are not being undermined, even in internal situations under specific circumstances.⁶⁹ Moreover, the fundamental legal dimension that underpins the free movement of persons is obvious, and that affects the scope of these provisions.⁷⁰

We also see that, when applying the principle of proportionality, the Court of Justice examines some cases more scrupulously than others, depending on the interest that has been invoked and the procedure followed.⁷¹ There is very extensive

case law in which the Court has applied only a limited test of proportionality to allow for characteristic national values or ethical or politically sensitive issues, such as the protection of vulnerable groups of consumers, a regional language, or the regulation of gambling.⁷² In other judgements, however, the Court has applied the proportionality principle more scrupulously, thereby limiting the discretion of Member States or private parties to safeguard consumer or social interests.⁷³

Regarding the activities of the Union legislator, we see that variation is possible within the context of the internal market either because the legal basis itself permits Member States to adopt more far-reaching measures, for example concerning the environment (Article 193 TFEU), or because the Union legislator has a range of harmonisation methods at its disposal, such as minimum harmonisation or total harmonisation. Variation is also possible under Article 20 TEU and Articles 326–334 TFEU, for example, which allow for closer cooperation between some Member States. Such cooperation must not undermine the internal market, however, emphasising the importance of market unity. The question is how seriously this prerequisite is applied.⁷⁴

Although the foregoing instruments thus permit variation and national policy discretion, and although the case law is erratic, consistency between the freedoms remains crucial. The political wish not to separate the four freedoms is also consistent with the Treaty's aim of establishing a social market economy that not only liberalises trade but also creates an area founded on the principles of equality, freedom and solidarity.⁷⁵ This area is changing constantly owing to social trends and technological advances that blur the dividing lines between production factors and make it even more difficult to separate the four freedoms.⁷⁶ Some even favour the introduction of a fifth freedom, the free movement of data. However, data—also known as 'digital gold'—has certain characteristics that make it unlike goods or services. As we explained above, the legal framework for *personal data* has largely been set by the GDPR. The Regulation does not cover 'non-personal data', i.e. data in general, nor is there a clear-cut legal framework in this regard. A Commission proposal for a new European regulation appears to remedy this⁷⁷; it aims to ensure the free movement of data—i.e. data mobility—for non-personal data. Article 3 of the proposal defines such data as data other than personal data as referred to in the GDPR. This would include facts and statistics collected for purposes of reference or analysis. Non-personal data cannot be used to identify individuals. Since the Commission proposal does not provide a definition of non-personal data, the Court of Justice may be asked to provide clarification.

Introducing the free movement of non-personal data is regarded as an important step in the completion of the *digital* single market and is particularly important for businesses. In a press release, the Commission says that it will achieve this by removing 'unjustified or disproportionate national rules that hamper or restrict companies in choosing a location for storage or processing of their data'.⁷⁸ Examples include professional secrecy rules that imply local data storage and supervisory authorities advising financial service providers to store their data locally. The prohibition on such data localisation requirements curtails national differences with regard to non-personal data, with variation between Member States

only being permitted if public security is at stake—a concept that the Court normally interprets narrowly in its case law.

The four freedoms and competition rules: coherence and divergence

The four freedoms, EU competition rules, and harmonisation of laws are among the building blocks of the internal market. There is considerable coherence between competition law and all other areas of substantive European law. That coherence is expressed in various ways, for example in the territorial scope of the freedoms, in the ‘effect on trade’ as a necessary condition for the application of competition rules, in the concept of economic activity, and in such principles as non-discrimination and market access. The broad applicability of the four freedoms and competition law means that virtually no socio-economic policy domain escapes the effects of internal market law.⁷⁹

Of further note are the efforts made within the context of competition law to allow for public and social interests that are safeguarded by companies. For example, collective agreements between the social partners do not, in principle, fall within the scope of the prohibition on restrictive agreements (Article 101 TFEU) if they concern wages and working conditions.⁸⁰ The Court of Justice has also ruled in a number of cases that specific interests defended by companies, for example in sports, may constitute a justified exception to the prohibition on restrictive agreements.⁸¹ In the *Wouters* case, the Court even ruled that public interests defended by the Bar of the Netherlands [*Nederlandse Orde van Advocaten*] constitute a justified exception to the competition rules.⁸² These rulings are not so broad in their interpretation that they carve a path to a blanket exception for public interests in competition law, however. In addition, the Treaty includes an exception for ‘undertakings entrusted with the operation of services of general economic interest’ (Article 106(2) TFEU).

There are, nevertheless, significant divergences from the free movement provisions. For example, the Court of Justice’s case law suggests that the requirements of environmental protection may outweigh the economic importance of a free movement provision.⁸³ This is much less the case in competition law. In the *CECED* case, the European Commission granted an exemption to washing machine manufacturers that had made a restrictive agreement for environmental protection purposes.⁸⁴ Its decision, however, depended on the environmental benefits arising from the agreement resulting in a quantifiable economic benefits, which, moreover, had to accrue to consumers. That is because consumer welfare is at the heart of EU competition law, alongside the interests of the internal market. The aim of consumer welfare is often interpreted narrowly, leaving the European Commission and the Netherlands Authority for Consumers & Markets (ACM) little leeway to pursue general interest aims in their practices. This limited view of competition law has come under increasing fire⁸⁵ and is not compatible with mainstreaming principles. Although the European Commission has put environmental and social policy objectives at the heart of its long-term strategy, *Europe 2020*,⁸⁶ it apparently does not yet see a broader interpretation of the concept of consumer welfare as an effective means of achieving this.

The question, then, is to what extent European competition law can encompass both national public interests and a social market economy. There have been proposals to introduce the ‘capability approach’ in competition law, with more emphasis on the role that companies play in achieving environmental objectives or reinforcing social cohesion in cities.⁸⁷ Fundamental rights and social welfare would then play a more significant role in how competition rules are applied. That is the strategy put forward in the Dutch government’s coalition agreement, but because Dutch competition law is based on European competition law, the legal latitude is very limited.⁸⁸

The four freedoms and social policy: coherence and divergence

The Treaties, and in particular Article 151 TFEU, assume that the functioning of the internal market will contribute to convergence between national social welfare systems and thus help improve living and working conditions, provide adequate social protection, achieve lasting high levels of employment, and combat exclusion. In reality, however, such ‘spontaneous’ convergence or harmonisation has proven much more problematic; in addition, the EU lacks legislative competence to impose harmonisation. This is, in part, the reason behind the ‘open method of coordination’ (OMC), which emerged in the 1990s as a ‘third option’ midway between independent national policy and harmonisation within the Union, initially in the field of employment policy. The open method, now laid down in Article 153(2)(a) TFEU, implies that policy objectives are set jointly at EU level, but that it is left to the Member States to achieve them. It is also used for other aspects of social policy, such as combating social exclusion. The point is not to harmonise national legislation but to only use ‘soft law’ mechanisms to coordinate national policies and steer them towards convergence. The first aim of coordination is to identify common policy objectives and then to achieve real policy convergence by sharing expertise and success stories and by using peer reviews and applying peer pressure to detect, criticise and change bad practices. One of the basic assumptions of the OMC, then, is that convergence between the Member States’ social policies can be achieved through many different national measures, as long as such measures contribute to attaining the policy objective set at EU level.

The four freedoms and the common commercial policy: coherence and divergence

Based on the assumption that the EU’s internal and external areas are connected—as we emphasised in the introduction to this book—we must also consider how the internal market relates to the EU’s common commercial policy vis-à-vis third countries and other international organisations. The common commercial policy is one of the Union’s areas of exclusive competence (Article 3(1) TFEU), and the most critical element of its economic relations with the world outside and its external actions in general.⁸⁹ The EU’s exclusive competence in this policy area implies that the European Commission plays a key role, for example in trade negotiations with third countries and in international organisations such as the World Trade Organisation (WTO). External trade policy is therefore often regarded

as an external dimension,⁹⁰ the external face,⁹¹ or a complement to the internal market and as a logical consequence of the interaction between internal and external trends and events in world trade.⁹² The Court of Justice ruled as long ago as 1975 that: '[s]uch a policy is conceived ... in the context of the operation of the common market, for the defence of the common interests of the Community, within which the particular interests of the Member States must endeavour to adapt to each other. Quite clearly, however, this conception is incompatible with the freedom to which the Member States could lay claim by invoking a concurrent power, so as to ensure that their own interests were separately satisfied in external relations, at the risk of compromising the effective defence of the common interests of the Community.'⁹³

The foregoing also explains the EU's exclusive competence in external trade relations. Unilateral action by Member States in this area would undermine the economic foundations of the internal market.⁹⁴ It should be noted here, however, that European trade policy is based on a different institutional structure, uses different instruments and, to a certain extent, pursues different objectives than those of the internal market. Moreover, the Union's external trade policy has always been closely linked to the multilateral system of the General Agreement on Tariffs and Trade (later WTO), concluded some ten years before the Treaty of Rome was signed. The EEC framework was therefore inspired, in part, by the gatt model.⁹⁵ That is why the Union's external trade policy should not be seen as a simple expansion of the internal market to outside the EU, but rather as a necessary or even indispensable consequence of the internal market in the external sphere.⁹⁶ Larik⁹⁷ argues that European trade policy is 'a necessary corollary for the maintenance of its internal market'.

We can get a better idea of the evolving relationship between the internal market and the common commercial policy by considering how the scope, objectives and instruments of trade policy have developed over time, from a common customs tariff to the dispersal of fundamental rights. The original reason behind the external trade policy—which was related directly to the development of the internal market—was the need to establish uniform rules for the customs union, in particular the introduction of a common customs tariff for Member States' relations with third countries (now Article 28 TFEU).

The Treaty of Nice and, in particular, the Treaty of Lisbon have given the external trade policy an extra push, mainly by increasing the EU's powers and by placing the entire policy within the framework of non-economic principles and objectives. In particular, the Treaties have broadened considerably the principles on which the external trade policy is based, as well as the associated instruments. Those instruments now include trade agreements on services, the trade-related aspects of intellectual property, and foreign direct investment.⁹⁸ This means that the EU is now also competent to conclude international trade agreements on certain aspects of capital and establishment. In this respect, the EU's competences in the area of trade policy increasingly reflect the scope of the internal market. The precise scope of those competences is currently the subject of fierce discussion, but that subject is beyond the remit of this book.

The most notable addition to the EU's competences in the area of external trade policy can be found in the final sentence of Article 207(1) TFEU: 'The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.' Article 205 TFEU clarifies the mandatory nature of the general objectives and principles with which the common commercial policy must comply.⁹⁹ Since the Treaty of Lisbon, then, the Union has pursued its external actions and, in particular, its commercial policy explicitly within the framework of Article 21 TEU, basing them on the principles of democracy, the rule of law, human rights and fundamental freedoms 'which have inspired its own creation, development and enlargement'.¹⁰⁰ In addition, in its common commercial policy, the Union pursues the various political and non-economic objectives enumerated in the second paragraph of Article 21 TEU, for example to safeguard its values, fundamental interests, security, independence and integrity and the principles of international law, to preserve peace and strengthen international security, to foster the sustainable development of developing countries in order to eradicate poverty, to encourage the integration of all countries into the world economy, and to improve the quality of the environment and to ensure sustainable development.

Article 21 TEU thus reflects the content of Articles 2 and 3 of the Treaty to a certain extent, but adds its own unique elements. Formally speaking, however, there is no hierarchical relationship between all the principles and objectives of trade policy; they are all equally valuable and significant.¹⁰¹ That means that there is also no hierarchical relationship between the economic and non-economic objectives of the common commercial policy. Finally, the Treaty of Lisbon stresses the need to guarantee coherence between the Union's external and internal actions.¹⁰² This raises the question of how to address potential conflicts between trade liberalisation and the non-economic objectives set out in Article 21 TEU. We should emphasise here that the Union has already used external actions, and trade policy in particular, to promote broader and non-economic objectives.¹⁰³

With multilateral trade negotiations within the context of the WTO at a long-standing impasse, the Union has sought alternative ways of fostering economic cooperation with the world beyond. Increasingly, it has focused on concluding bilateral and regional trade agreements with third countries. Free trade agreements are certainly nothing new for the European Union.¹⁰⁴ Within the context of its European Neighbourhood Policy, for example, it has concluded partnership, cooperation and, more recently, association agreements. The strategy published by the Commission in 2010¹⁰⁵ does not represent a break with the past, but does imply a number of shifts in emphasis. The Commission proposes to focus more on concluding bilateral free trade agreements, in particular with the EU's neighbouring countries, with the aim of gradually integrating these countries into the internal market. A new generation of Deep and Comprehensive Free Trade Agreements has been introduced in this context, the Association Agreement with Ukraine being one example. This new generation of free trade agreements goes far beyond tariff reductions and trade in goods and services and shows that this form of bilateral economic cooperation has become the main instrument of the Union's external

trade policy.¹⁰⁶ The Treaty of Lisbon and the Union's expanded competences have therefore given bilateral economic cooperation an additional boost.

The EU now has the widest range of free trade agreements in the world, with considerable variation between them. Practically every agreement provides for a different model of market integration. Often, they are part of a broader political agreement, such as an association agreement. The EU also concludes economic partnership or cooperation agreements that are more geared to its trade partner's development. For example, if we compare the EEA Agreement, CETA, the EU-Ukraine Association Agreement and the EU-South Korea Free Trade Agreement, we see that liberalisation can take different forms across the four freedoms. The EU's values and principles, as well as its objectives and its social market economy, are reflected in all these bilateral agreements, but to varying degrees and with differing emphases. They are also underpinned by different processes that vary in intensity and impact, with the third countries adapting their own legislation to the EU *acquis* or confining themselves to dialogue and cooperation. Ultimately, it seems, there is no hierarchical relationship between the different principles and objectives.

5.4 Conclusion: Principles Leave Room for Manoeuvre

The European internal market is as politically and economically significant today as it ever was. In terms of social welfare, however, the current structure falls short because it does not offer a sufficiently solid safety net to the losers in an open, free market. This chapter has considered whether EU law offers a framework for promoting not only economic but also other public interests within the context of the internal market, and how variation might contribute to this. In the light of the aforementioned core elements of market integration, as well as the 'logic of appropriateness' and the 'logic of consequences', we can draw the following conclusions from our analysis.

First of all, we must question an approach that claims that national public interests and fundamental rights can distort economic market integration. The internal market is not an end in itself but supports a social market economy. Public interests and fundamental rights should in fact serve as important indicators for the completion of the internal market. That is something that the Union legislator but also the Court of Justice must take into account when determining whether a specific national measure is compatible with the internal market provisions. The internal market's legal framework is so flexible that both the legislator and the Court can weigh economic market interests against other public interests, the former from a political and the latter from a legal perspective. It is even so that the 'logic of appropriateness' has, over time, become increasingly important as a basis for the structure of the internal market. That is because the current organisation of the internal market reflects the explicit pursuit of a social market economy and the view that fundamental rights and the principles of solidarity, proportionality and

‘mainstreaming’ (which mirror public interests) are important principles of market organisation under the Treaty. Moreover, the Treaties assume that the functioning of the internal market will contribute positively to the public’s well-being and standard of living.

Given the close connection between the internal market and competition law, limiting the assessment of interests under competition law to economic interests versus consumer welfare is not consistent with the rationality of the internal market. It would be more logical for competition law to place greater emphasis on other public interests too, and to weigh them against the interests of the market. Competition law still appears to be firmly rooted in the logic of consequences than in the overarching pursuit of a social market economy and the safeguarding of other public interests. These require a coherent approach in which the policy domains closely associated with the four freedoms evolve in accordance with the same guiding principles. On the other hand, one could argue that competition law is geared towards companies and that such companies do not necessarily promote public interests in the way that government institutions are obliged to do.

This brings us to the risks of greater variation. As the above shows, variation between the guiding principles of the internal market and closely associated policy domains raises problems when it comes to establishing a social market economy. Variation in the way the Member States interpret the four freedoms would also pose a major risk not only to the economic completion of the internal market but also to the safeguards afforded to the associated social and public interests. The general principles of Union loyalty and effectiveness of Union law limit such variation, in any event.

At the same time, however, we also see that the broad spectrum of principles underpinning the internal market does, in fact, offer more scope for national variation, especially where no EU legislation applies. These principles allow for variation by permitting Member States to apply certain rules and practices that protect certain public interests in preference to the interests of the internal market. It should be noted, however, that it is precisely when the Member States have more discretion in policy-making that their responsibility for considering the interests of free movement and the internal market increases. The assessment framework for the four freedoms developed by the Court for such national rules has remained uniform and therefore offers legal certainty. The absence of a ‘level playing field’ for commercial parties and individuals in the Member States is a given in internal market law, however. Coherence and divergence thus go hand in hand and a sustained commitment to the internal market cannot be guaranteed without allowing the Member States a certain degree of policy discretion. The problem now is that the Court sometimes leaves little leeway for national variation with respect to social rights and social policy, something that the Union legislator cannot always compensate, given its limited competence in this domain.

Parallel coherence and divergence is an established feature of internal market law in other respects as well. On the one hand, there is a large measure of convergence in the interpretation and scope of the four freedoms, which contributes to the uniform application of internal market law and to legal certainty; on the other

hand, the Treaty has already recognised some variations in their scope of application, for example, by providing for the free movement of capital not only within the EU but also vis-à-vis third countries. In addition, variation is inherent to the mechanism of harmonisation by means of directives for the purpose of completing the internal market. These give the Member States room to exercise discretion in various ways, for example by establishing minimum harmonisation measures, allowing possible exceptions, and introducing concepts that are open to interpretation. Finally, there is variation in the way Court interprets the scope of application of the four freedoms, but also, for example, in the degree to which it recognises their horizontal effect.

The rationality of the internal market also has implications for the institutional dimension, i.e. the role of the various actors at both European and national level in contributing to a social market economy and safeguarding public interests. Thinking in terms of shared principles and responsibility rather than a division of competences might help to mitigate the technocratic nature of European cooperation.¹⁰⁷ It is also the responsibility of the Member States themselves to ensure that the European social market economy becomes reality; this depends on how they formulate general policies within the context of the European Council and how they fulfil their role on the Council as Union co-legislators with respect to the internal market, competition law and trade policy. The same applies to the way they exercise their powers in the context of European social policy. The Union is competent primarily to coordinate policy, and so much depends on the Member States themselves taking steps to achieve the policy objectives they have jointly set at EU level. An open process of political and democratic decision-making and a broad public debate about how public interests are assessed would also help to mitigate the technocratic complexion of the EU. At the moment, it is not always clear exactly how that assessment has taken place within the Council, the European Parliament and the Commission, and what influence powerful lobbies have had, for example on the protection of privacy. When it comes to sensitive issues such as the protection of privacy and the posting of workers, or whether to ban agricultural pesticides that may pose a threat to the environment and public health, a public debate can help to assess the interests at stake, an assessment that will ultimately find its way into European rules.

Notes

1. Union law on the internal market is largely based on Article 114 TFEU, which provides for decisions to be taken in accordance with the ordinary legislative procedure, as laid down in Article 294 TFEU. In this context, the Union legislator is the Commission as the initiator and the Council and the European Parliament as the bodies that jointly adopt a legislative act.
2. Single Market, Four Freedoms, Sixteen Facts—Economic Effects in the EU, National Board of Trade, 2015, see: <https://www.kommers.se/Documents/dokumentarkiv/publikationer/2015/Publ-single-market-4-freedoms-16-facts.pdf>.

3. European Commission (2017b).
4. European Commission (2017b: 20).
5. de Vries (2006).
6. Pursuant to Article 2 of the TEU.
7. The Spaak report referenced above appears to contradict this.
8. Domurath (2013).
9. 5 Article 174 TFEU.
10. Article 21 TEU.
11. Articles 24 and 31 TEU.
12. Articles 67 and 80 TFEU.
13. However, solidarity is also mentioned in connection with economic policy (Article 122 TFEU), energy policy (Article 194 TFEU) and in the ‘solidarity clause’ in the event of a terrorist attack or natural or man-made disaster (Article 222 TFEU).
14. Article 4(3) TEU and, more explicitly, for example in Article 24(2) TEU.
15. Articles 35, 37 and 38 of the Charter of Fundamental Rights of the Union impose a similar obligation as regards public health, environmental protection and consumer protection.
16. Directive 77/187/EEC, OJ 1977, L 061/26.
17. Directive 80/987/EEC, OJ 1980, L 283/23.
18. Directive 75/117/EEC on the approximation of the laws of Member States relating to the application of the principle of equal pay for men and women, OJ 1975, L 45/19, adopted on the basis of Article 100 of the EEC Treaty; Directive 86/378 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ 1986, L 225/40, adopted on the basis of Articles 100 and 235 of the EEC Treaty.
19. For a concise overview, see the Commission Staff Working Document, ‘The EU social acquis’, SWD (2016) 50 draft, of 8 March 2016.
20. Communication from the Commission Establishing a European Pillar of Social Rights, COM (2017) 250 final, 26 April 2017.
21. As long ago as 1990, the Social and Economic Council of the Netherlands explicitly stressed the importance of the social dimension of the European internal market, which was to be completed in 1992, in the light of its far-reaching liberalisation as provided for in the Single European Act of 1986; *Advies Sociale dimensie Europa 1992*, SER Advisory Report 90/11.
22. Weatherill (2013: 14), de Vries (2016: 9).
23. Mortelmans (1985: 10).
24. ECJ 11 December 2007, C-438/05 (Viking Line) ECLI:EU:C:2007:772; ECJ 18 December 2007, C-341/05 (Laval) ECLI:EU:C:2007:809.
25. Weatherill (2015).
26. See Conclusion *ag Trstenjak* in C-271/08, (European Commission v Germany), ECLI:EU:C:2007:809, recitals 186–188.
27. Regulation 1612/68, now replaced by Regulation 492/2011 on freedom of movement for workers within the Union, OJ 2011, L141/1. See also

- Regulation 883/2004 on the coordination of social security systems, OJ 2011, L166/1.
28. ECJ 11 July 1985, C-137/84 (Mutsch) ECLI:EU:C:1985:335.
 29. ECJ 17 April 1986, C-59/85 (Reed) ECLI:EU:C:1986:157.
 30. Domurath (2013).
 31. ECJ 17 June 1997, C-70/95 (Sodemare), ECLI:EU:C:1997:301, par. 29.
 32. E.g. ECJ 12 May 1998, C-85/96 (Martinez Sala) ECLI:EU:C:1998:217; ECJ 15 March 2005, C-209/03 (Bidar), ECLI:EU:C:2005:169, par. 60.
 33. E.g. ECJ 23 April 1998, C-120/95 (Decker) ECLI:EU:C:1998:167; ECJ 28 April 1998, C-158/96 (Kohll) ECLI:EU:C:1998:171.
 34. Domurath (2013).
 35. Newdick (2006: 1645).
 36. Davies (2015: 4).
 37. Commission (1991: 9).
 38. The argument was initially put forward by Janez Potočnik, former European Commissioner for Science and Research (2007).
 39. Moerel (2014).
 40. Directive 2010/13/EU on Audiovisual Media Services, OJ 2010, L95/1.
 41. de Witte (2012: 40).
 42. The Commission has now adopted a proposal amending this directive. According to the Explanatory Memorandum, the Commission's new proposal reflects market, consumption and technology changes; it extends the scope of application of the Directive, improves the protection of minors and lays down rules on advertising (European Commission 2016, Proposal for amendment of Directive 2010/13/EU, com 2016 287 FINAL).
 43. Directive 2015/2366 on payment services and the internal market (PSD II), OJ 2015L 337/35.
 44. See Article 41 of Directive 2014/23/EU, OJ 2014, L 94/1 and Article 67 and recital 92 of Directive 2014/24/EU, OJ 2014, L 94/65 (Procurement Directives).
 45. ECJ 5 October 2000, C-376/98 (Tobacco Advertising), ECLI:EU:C:2000:544.
 46. In addition to the privacy aspect, Article 16 TFEU also grants authority to regulate the free movement of personal data.
 47. SER Report—*Arbeidsmigratie* (2014).
 48. de Witte (2012).
 49. 'Editorial Comments', *Common Market Law Review* (2006), Barnard (2008).
 50. de Witte (2012).
 51. For examples, see Prins and Moerel (2017).
 52. Davies (2012).
 53. See Brink et al. (2019b).
 54. ECJ 10 March 2005, C-336/03 (EasyCar) ECLI:EU:C:2005:150; ECJ 18 October, C-34/10 (Brüstle) ECLI:EU:C:2011:669.
 55. ECJ 6 October 2015, C-362/14, ECLI:EU:C:2015:650.

56. Joerges and Rodl (2009), Lindstrom (2010), Garben (2017).
57. de Vries (2016).
58. A critical judgment in this respect is ECJ 12 June 2003, C-112/00 (Schmidberger) ECLI:EU:C:2003:333.
59. See, for example, ECJ 27 February 2012, C-131/12 (Google v Spain) ECLI:EU:C:2014:317. For a comprehensive overview of privacy-friendly rulings of the Court of Justice, see: Van den Brink et al. (2019a). *Differentiatie en uniformiteit in EU-wetgeving: detachering en gegevensbescherming*, section 3.3, WRR Working Paper.
60. See, for example, ECJ 6 September 2012, C-544/210 (Deutsches Weintor) ECLI:EU:C:2012:526; and ECJ 22 January 2013, C-283/11 (Sky Osterreich) ECLI:EU:C:2013:28.
61. Mortelmans (1998: 105).
62. Prechal (2006: 14).
63. Dougan (2000).
64. van den Brink (2015).
65. Available at: https://autoriteitpersoonsgegevens.nl/sites/default/files/atoms/files/advies_uitvoeringswet_avg.pdf.
66. ECJ 21 May 1985, C-47/84 (Gaston Schul) ECLI:EU:C:1982:135.
67. de Vries (2006), Nic Shuibhne (2013).
68. This is not the case for internal market legislation, which may apply to purely national situations.
69. ECJ 8 March 2011, C-34/09 (Ruiz Zambrano) ECLI:EU:C:2011:124.
70. Prechal and de Vries (2009).
71. de Vries (2006, 2016).
72. See, for example, ECJ 20 May 1976, C-104/75 (De Peijper) ECLI:EU:C:1976:67; ECJ 24 March 1994, C-275/92 (Schindler) ECLI:EU:C:1994:119; ECJ 28 November 1989, C-379/87 (Groener) ECLI:EU:C:1989:599; ECJ 16 December 2010, C-137/09 (Josemans) ECLI:EU:C:2010:774; ECJ 14 October 2004, C-36/02 (Omega Spielhallen) ECLI:EU:C:2004:614.
73. See, for example, ECJ 2 February 1994, C-315/92 (Clinique); ECLI:EU:C:1994:34; ECJ 14 July 1988, C-407/85 (Drei Glocken) ECLI:EU:C:1988:401; ECJ 11 December 2007, C-438/05 (Viking Line) ECLI:EU:C:2007:772.
74. Weatherill (2017: 31).
75. VerLoren van Themaat (1982).
76. See also White Paper on the Future of Europe, Reflections and Scenarios for the EU 27 by 2025, COM (2017) 2025, 1 March 2017.
77. Proposal for a Regulation of the European Parliament and the Council on a framework for the free flow of non-personal data in the European Union, COM (2017) 495 final.
78. European Commission (2017e).
79. de Vries (2006).

80. ECJ 21 September 1999, C-115/97 to C-117/97 (Brentjens) ECLI:EU:C:1999:434; ECJ 12 September 2000, C-180/98 to C-184/98 (Pavlov) ECLI:EU:C:2000:428.
81. ECJ 18 July 2006, C-519/04 P (Meca-Medina) ECLI:EU:C:2006:492.
82. ECJ 19 February 2002, C-309/99 (Wouters) ECLI:EU:C:2002:98.
83. van de Gronden and Mortelmans (2001).
84. EC 24 January 1999, comp.F.1/37.894 (CECED).
85. de Vries (2016).
86. See Communication from the Commission. *Europe 2020: A strategy for smart, sustainable and inclusive growth*, COM (2010) 2020 final.
87. Claassen and Gerbrandy (2016).
88. Gerbrandy (2017).
89. Dimopoulos (2010).
90. van Vooren and Wessel (2014).
91. Cremona (2017: 498).
92. van Vooren and Wessel (2014).
93. Opinion No 1/75 of the Court of Justice of 11 November [1975] ECR 01355, Part B (2).
94. van Vooren and Wessel (2014).
95. Larik (2011).
96. Cremona (2017).
97. Larik (2011: 16).
98. Article 207(1) TFEU.
99. Krajewski (2012).
100. See Article 21 TEU.
101. Krajewski (2012).
102. Article 21(3) TEU.
103. See, for example, the Generalised Scheme of Preferences (GSP). The GSP+, introduced in 2006, is a European trade policy instrument aimed at supporting sustainable development in developing countries. It is a preferential tariff system that incentivises developing countries to comply with basic international agreements on human rights, labour rights, the environment and good governance.
104. A complete list of all agreements concluded and under negotiation can be found at http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_in-place. At present, 33 treaties are in full force and effect.
105. European Commission (2010).
106. Bungenberg (2010).
107. Habermas (2011).

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