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CORE ANALYSIS

'Integration-through-Law': grand theory, revisionist history

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Abstract

How has the European Union been integrated in the past? Legal academics have traditionally pointed to the Court of Justice and to the broader idea of an 'integration-through-law'. Through its supranational jurisprudence, the Court – not the EU legislature – was thus placed at the centre of the European integration project. The underlying reasons for this dominance of constitutional 'law' over legislative 'politics' have thereby been the subject of three famous explanations: the 'equilibrium theory' (Weiler), the 'asymmetry theory' (Scharpf) and the 'over-constitutionalisation theory' (Grimm). What are the merits of these grand theories of European integration when measured against the historical record? This article hopes to explore this question in the context of the internal market. Its historical revision begins with an analysis of the respective spheres of normative and decisional supranationalism during and after a foundational period (Sections 2 and 3). This is followed by an examination of the meaning and significance of the *Cassis de Dijon* judgment in the late 1970s. Through this revolutionary case, a dialectical relationship between the EU Court ('law') and the EU legislator ('politics') emerges (Section 4) that ultimately leads to the spectacular rise of EU legislation (Section 5) after the SEA. This transformational relationship will provide the critical lens for a historical revaluation of the three grand theories of legal integration (Section 6).

Keywords: Integration-through-law; equilibrium theory; asymmetry theory; over-constitutionalisation theory; *Cassis de Dijon*

1. Introduction

How has the European Union been integrated in the past; and what are the respective roles of 'law' and 'politics' in this process? The traditional answer has here insisted on a constitutional dominance of the judicial over the political sphere, with especially legal academics having overwhelmingly pointed to the Court of Justice and the idea of an 'integration-through-law'.[1]

[1]The literature on the Court of Justice's role in the integration of Europe has been extensive. See for example: MP Maduro, *We the Court* (Hart 1998); A Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004), K Alter, *The European Court's Political Power: Selected Essays* (Oxford University Press 2009); D Sindbjerg Martinsen, *An Ever More Powerful Court?: The Political Constrains of Legal Integration in the European Union* (Oxford University Press 2015); S Saurugger and F Terpan, *The Court of Justice of the European Union and the Politics of Law* (Red Globe Press 2016); SK Schmidt, *The European Court of Justice and the Policy Process* (Oxford University Press 2018); and very recently: M Dawson et al (eds.), *Revisiting Judicial Politics in the European Union* (Elgar 2024). For an overview of the 'integration-through-law' school specifically: A Vauchez, 'Integration-through-Law: Contribution to a Socio-history of EU Political Commonsense' (EUI Working Paper, RSCAS 2008/10); D Augenstein, *'Integration through Law' Revisited: The Making of the European Polity* (Ashgate 2012); L Azoulai, 'Integration through Law' and Us' 14 (2016) International Journal of Constitutional Law 449; and

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Through its supranational jurisprudence, the EU Court – not the EU legislature – is here seen to be at the centre of the earlier integration project.

The reasons behind this apparent triumph of judge-made 'law' over legislative 'politics' have been explored by three famous integration-through-law theories. In 1981, a young Joseph Weiler proposed, for the first time, his 'equilibrium theory'.[2] According to that theory, normative supranationalism ('law') and decisional supranationalism ('politics') were locked in an inverse relationship that guaranteed the stability and legitimacy of the 'Community system'. In essence: the *more* the normative quality of European law had assumed supranational characteristics via direct effect and primacy, the *less* supranational the political decision-making process had become.[3] For when the revolutionary judgments of *Van Gend* and *Costa* transformed 'soft' (international) into 'hard' (supranational) law, the Court removed a (selective) 'exit' option from the Member States and the latter had, therefore, naturally reclaimed their 'voice' in the legislative process.[4] This dialectical counter-movement meant that the 'Community system' had returned to an intergovernmental-decisional arrangement close to the United Nations, while its supranational-normative system approached that of the United States.[5]

Taking Weiler's inverse correlation between *supranational* law and *intergovernmental* politics as a starting point, Fritz Scharpf subsequently developed – a decade later – his 'asymmetry theory'.[6] According to him, European integration was profoundly imbalanced as regards the spheres of negative integration ('law') and positive integration ('politics'). He famously explains:

> The main beneficiary of supranational European law has been negative integration. Its basic rules were already contained in the 'primary law' of the Treaties of Rome. From this foundation, liberalization could be extended, without much political attention, through interventions of the European Commission against infringements of Treaty obligations and through the decisions and preliminary rulings of the European Court of Justice. By contrast, positive integration depends upon the agreement of national governments in the Council of Ministers; it is subject to all of the impediments facing European intergovernmental policy making. This fundamental institutional difference is sufficient to explain the frequently deplored asymmetry between negative and positive integration in EC policy making. The most likely result is a competency gap, in which national policy is severely restrained in its problem-solving capacity, while European policy is constrained by the lack of intergovernmental agreement.[7]

Importantly, Scharpf's theoretical claim here partly differs from Weiler's equilibrium theory. For while both identify an asymmetric development between 'law' and 'politics' within the Union system, Scharpf sees the Court as an agent of *decisional* supranationalism; and it is from within

for a brilliant historical approach, see R Byberg, 'The History of the "Integration through Law" Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe' 18 (2017) German Law Journal 1531.

[2]J Weiler, 'The Community System: The Dual Character of Supranationalism' 1 (1981) Yearbook of European Law 267. The thesis was refined in numerous subsequent publications, including Weiler's famous 'The Transformation of Europe' 100 (1990–91) Yale Law Journal 2403.

[3]Weiler, 'The Community System' (n 2) 292. This inverse or reverse correlation is best expressed in J Weiler, 'The European Community in Change: Exit, Voice and Loyalty' 3 (1990) Irish Studies in International Affairs 15.

[4]Ibid, 22.

[5]M Cappelletti, M Seccombe and J Weiler, 'A General Introduction' in *Integration Through Law: Europe and the American Federal Experience*, Volume 1 – Book 1 (de Gruyter 1986) 3 at 29.

[6]F Scharpf, *Governing in Europe: Effective and Democratic* (Oxford University Press 1999) and more recently: F Scharpf, *Community and Autonomy: Institutions, Policies and Legitimacy in Multilevel Europe* (Campus 2010). Scharpf expressly points to Weiler as his inspiration (Ibid, 91): 'The process of European integration is characterized by a fundamental asymmetry which Joseph Weiler (1981) accurately described as a dualism between supranational European law and intergovernmental European policy-making'.

[7]Ibid, 91.

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that different perspective that three constitutional asymmetries are identified. There is – first – a *decisional* asymmetry between the supranational organ of negative integration (the Court) and the intergovernmental organ of positive integration (the Council). There is, secondly, a *normative* asymmetry between negative and positive integration due to the 'impossibility of political correction' by the Union legislator once the Court has offered an interpretation of EU law.[8] Finally, there is also a *competence* asymmetry according to which the scope of negative integration is wider than the scope of positive integration.

The success of both integration-through-law theories has been remarkable. They dominate Europe's legal imagination up to today.[9] Their overwhelming influence has even given rise to a third variant in the last decade: Dieter Grimm's 'over-constitutionalisation theory'.[10] The latter directly builds on the ideas of both Weiler and Scharpf by claiming that through the rise of normative supranationalism 'the direct participation of Member States was no longer needed in order to establish the single market', because '[d]irect effect and supremacy of European law allowed . . . the ECJ (the organ charged with determining the meaning of the treaties in concrete cases) to take the task of implementing economic integration into [its] own hands'.[11] Yet Grimm here also adds a new theoretical claim that goes beyond those of Weiler and Scharpf:

> Different from national constitutions, the treaties are not confined to those provisions that reflect the functions of a constitution. They are full of provisions that would be ordinary law in the Member States. This is why they are so voluminous. As long as the treaties were treated as international law, this was not a problem. As soon as they were constitutionalised, their volume became problematic: in the EU the crucial difference between the rules for political decisions and the decisions themselves is to a large extent levelled. The EU is over-constitutionalised. This has two important consequences. First, the over-constitutionalisation severely limits the Member States' role as 'Masters of the Treaties' . . . Second, combined with the lack of differentiation between the constitutional law level and the ordinary law level, the constitutionalisation of the treaties immunises the Commission and particularly the ECJ against any attempt by the democratically responsible institutions of the EU to react to the Court's jurisprudence by changing the law.[12]

What are we to make of these three grand theories of European *legal* integration? This article wishes to critically re-evaluate them through a close historical re-construction of the legal

[8]Ibid, 340.

[9]This is not to say that there have not been other important integration theories, or to prejudge that today's European Union can still be explained by these theories. Nevertheless, among EU constitutional law scholars, Weiler's and Scharpf's ideas continue to dominate much of the legal discourse. See, eg, as regards Weiler's thesis: M Maduro and M Wind (eds), *The Transformation of Europe: Twenty-Five Years On* (Cambridge University Press 2017); as well now: J Komárek, 'Why Read The Transformation of Europe Today?' in J Komárek (ed), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023) 119. With regard to Scharpf's theory, see especially: SK Schmidt, *The European Court of Justice* (n 1) as well as M Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021).

[10]Grimm has expressed his thesis most clearly in D Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' 21 (2015) European Law Journal 460. In the wake of this publication, a number of political scientists have chosen to endorse the thesis too, see, eg: F Scharpf, 'De-constitutionalisation and Majority Rule: A Democratic Vision for Europe' 23 (2017) European Law Journal 315 as well as SK Schmidt, 'Governing by Judicial Fiat? Over-Constitutionalisation and Its Constraints on EU Legislation' in M Dawson and M Jachtenfuchs (eds), *Autonomy without Collapse in a Better European Union* (Oxford University Press 2022) 105. Grimm has today come to be associated and credited with the over-constitutionalisation problem; yet Bruno de Witte had already raised this point long before him in the context of EU foreign relations law – a point that my 'European Constitutional Law' (Cambridge University Press 2012) 3 also emphasised.

[11]Grimm, The Democratic Costs of Constitutionalisation (n 10) 467.

[12]Ibid, 470–1.

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integration of the internal market.[13] Why the internal market? Because until at least '1992', if not '2007', the common market was at the centre of European integration. Indeed, after the failure of the European Political Community in 1954, it was through 'the market' that the founding fathers had hoped to re-launch a federal Europe;[14] and the very essence of the 1957 European Economic Community (EEC) had therefore been defined in common-market-terms. Against this backdrop, it is hardly surprising that (almost) all classic EU landmark cases were embedded in an internal market context.[15] Any grand theory of European integration that cannot explain the past evolution of the internal market thus cannot really claim to properly theorise European integration writ large.

This article pursues its historical-revisionist aim in five steps. Section 2 begins with a reconstruction of the original balance between normative and decisional supranationalism, as well as negative and positive integration, in the foundational period between 1958 and 1969. It will be argued that the EEC Treaty contained, from the very beginning, directly effective legal norms; yet that the main method of establishing the common market was via the political organs of the Union. This original division of power between 'law' and 'politics', however, changed after the transitional period had ended. In this second period, discussed in Section 3, the removal of all discriminatory national laws could, from now on, be done directly through the EEC Treaty, whereas positive integration was to refocus on the removal of obstacles to trade arising from legislative disparities between the Member States.

This post-foundational balance between the spheres of 'law' and 'politics', however, radically changed in 1979 with the Court's *Cassis* judgment.[16] With it, the Court came to push negative integration ('law') into what was originally designed as the province of positive integration ('politics'). And yet, as Sections 4 and 5 hope to demonstrate, this did *not* mean that positive integration, and with it the Union's political and legislative process, would be asymmetrically disadvantaged. On the contrary, the ultimate constitutional result of the *Cassis* revolution was more – not less – decisional supranationalism and positive integration. For after the Single European Act (SEA), there will be an enormous rise of EU legislation with legislative 'politics' even enjoying applicative priority over EU primary 'law'.

This self-reinforcing relationship between the EU Court ('law') and the EU legislator ('politics') undermines, however, all those integration theories that insist on a negative asymmetry between 'law' and 'politics' in the Union legal order. It will thus be argued in Section 6 that Weiler's equilibrium theory not only fails to account for the original chronology and place of direct effect in the early Union legal order; his allegedly inverse relationship between 'law' and 'politics' must itself be inversed. The same is, partly, true for Scharpf (and Grimm), whose asymmetry theories will not only be shown to significantly undervalue the decisional and democratic evolution of the EU legislature since 1957, their postulated zero-sum game between 'law' and 'politics' will also be judged severely reductionist. A Conclusion will briefly reflect on these results and, equally briefly, outline a 'republican' legitimation strategy for the Court's historical integration-through-law approach.

[13]Due to their historical nature, the early parts of this article (Sections 1–4) will consistently refer to the older 'Community' legal order and the original 1957 EEC Treaty provisions. A short selection of the most relevant EEC provisions can be found in the Appendix. For my earlier historical work here, see R Schütze, *From International to Federal Market: The Changing Structure of European Law* (Oxford Univrsity Press 2017).

[14]See W Loth, *Der Weg nach Europa: Geschichte der europäischen Integration 1939–1957* (Vandenhoeck & Ruprecht 1990), Chapter 6; and P Gerbet, *1957, La Naissance du Marché Commun* (Editions Complexe 2007) esp. 76–92.

[15]Let me only give a few examples: *Van Gend en Loos* (on the customs union), *Costa v ENEL* (on freedom of establishment), *Internationale Handelsgesellschaft* (on the Common Agricultural Policy), and *Van Duyn* (on the free movement of workers).

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

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2. The foundational period: building the common market, 1958–1969

The 1957 Rome Treaty's sole central task had been the creation of a common market;[17] and to achieve it, the European Economic Community (EEC) pursued a dual strategy: negative and positive integration.[18] Negative integration here refers to the removal of obstacles to trade by the European Court ('law'), whereas positive integration means the adoption of secondary law by the European legislature ('politics'). Through these two strategies, a common market was to be built during a transitional period of 12 years (divided into three distinct stages),[19] with the expiry of that period set to be 'the latest date by which all the rules laid down [in the EEC Treaty] must enter into force and all the measures required for establishing the common market must be implemented'.[20] The creation of the common market was thus to be done gradually and, at first, primarily through the *political* process.

Nevertheless, and so as to prevent legal retrogressions during the transitional period, the Rome Treaty contained a number of 'standstill' provisions that were designed to lock in the 1957 status quo. The EEC Treaty articles on the customs union, for example, made a distinction between 'new' (post-1957) and 'old' (pre-1957) customs duties: the former were prohibited outright by ex-Article 12 EEC, whereas the latter were to 'be progressively abolished' by the political process during the transitional period.[21] A similar distinction was made in the chapter on quantitative restrictions on goods. Here ex-Article 30 EEC set out the general prohibition for 'old' import restrictions, which were to 'be abolished by the end of the transitional period';[22] whereas ex-Article 31 EEC immediately prohibited Member States 'from introducing between themselves any *new* quantitative restrictions or measures having equivalent effect'.[23]

An automatic prohibition for *new* national restrictions could equally be found for the freedoms of persons, services and capital.[24] For the freedom of establishment, ex-Article 53 EEC thus stated: 'Member States shall not introduce any *new* restrictions on the right of establishment in their territories of nationals of other Member States';[25] and, as regards services, ex-Article 62 EEC added: 'Member States shall not introduce any *new* restrictions on the freedom to provide services which have in fact been attained at the date of the entry into force of this Treaty'.[26] (For the free

[17]Ex-Art. 2 EEC. For the text of the provision, see Appendix. The association between the young European Community and the 'Common Market' was so strong that the latter provided, for a long time, a synonym for the Community as such. The best illustrations here continue to be two academic journals that have shaped the discipline, namely: the '*Common Market* Law Review' and the 'Journal of *Common Market* Studies' (emphasis added).

[18]For this key distinction, see J Pinder, 'Positive and Negative Integration: Some Problems of Economic Union in the EEC' 24 (1968) The World Today 88. Pinder had himself borrowed the distinction from J Tinbergen, *International Economic Integration* (Elsevier 1965), with both authors choosing a *functional* definition that defined the distinction by its result (negative integration = deregulation; positive integration = reregulation). The problem with this definitional choice is, however, that in the history of the common market European secondary law often de-regulates as well as re-regulates. An *institutional* definition of negative and positive integration, as adopted in this article, is therefore more precise: negative integration here refers to the enforcement of directly effective primary law (the EU fundamental freedoms) by the Court, whereas positive integration is linked to the adoption of secondary law by the Community/Union legislator.

[19]Ex-Art 8 (1) EEC. The text of the provision can be found in the Appendix. The second stage was supposed to begin in 1962, whereas the third and final stage was to start in 1966. The common market was supposed to be completed on 1 January 1970.

[20]Ex-Art 8(7) EEC.

[21]Ex-Art 13 EEC. See also ex-Arts 14 and 15 EEC.

[22]Ex-Art 32 EEC. The timetable was set out in ex-Art 33 EEC.

[23]Emphasis added. As regards goods, the same distinction could also be found in the EEC Treaty's tax provisions. Here, ex-Art 95 (1) and (2) EEC laid down a general prohibition for all discriminatory national tax measures, yet this was qualified by paragraph 3 with regard to 'old' restrictions (emphasis added): 'Member States shall, not later than at the beginning of the second stage [of the transitional period], repeal or amend any provisions *existing* when this Treaty enters into force which conflict with the preceding rules'.

[24]The sole textual exception here appears to be the free movement of workers, where ex-Art 48 EEC only stated that '[f]reedom of movement of workers shall be secured within the Community by the end of the transitional period at the latest'.

[25]Emphasis added.

[26]Ibid.

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movement of capital, the EEC Treaty had preferred a softer obligation: '[t]he Member States shall endeavour to avoid introducing within the Community any *new* exchange restrictions on the movement of capital'.[27])

By contrast, as regards 'old' national restrictions, all three fundamental freedoms expressly acknowledged the end of the transitional period as the date by which all these restrictions were to be removed.[28] The 1957 EEC Treaty thus consistently followed a dual logic of trade liberalisation: Treaty-based non-regression clauses ('law') were combined with legislative liberalisation competences ('politics') to establish the common market until the end of the transitional period in 1970. Let us therefore look at this new-old distinction in more detail.

A. 'New' trade restrictions: negative integration and the European Court

What was the Rome Treaty's legal regime for 'new' restrictions to free movement? In its 1961 judgment in *Commission v Italy*, the Court had clarified, early on, that the Treaty's standstill provisions would give rise to automatic – that is: direct[29] – obligations under the EEC Treaty.[30] This was confirmed in *Commission v Luxembourg & Belgium (Gingerbread)* in 1962.[31] Dealing with ex-Article 12 EEC specifically, the Court here left no doubt that the introduction of *new* customs duties after 1957 violated the EEC Treaty directly.[32] With regard to such self-executing prohibitions, the Member States could not invoke the absence of (implementing) Community legislation during the transitional period.

But if the Rome Treaty contained such directly effective prohibitions, could their legal effects also penetrate the national legal orders? This very question was famously asked and answered in *Van Gend & Loos*.[33] The Court here again dealt with ex-Article 12 EEC – the standstill clause prohibiting the introduction of new customs duties. The Netherlands appeared to have violated it and Van Gend & Loos – a Dutch trading company – had therefore brought proceedings in a Dutch court to enforce it. Yet could a private party enforce a self-executing norm of an *international* treaty in a *national* court? The European Court of Justice indeed confirmed this possibility in 1963:

> The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting

[27]Ex-Art 71 EEC (emphasis added).

[28]For the text of ex-Art 48 (1) EEC, see above n 24. See also: ex-Art 52 EEC; and, for an almost identical text, see ex-Art 59 EEC. As regards the free movement of capital, the EEC Treaty had also set the deadline to be the end of the transitional period but, importantly, only in relation to those liberalisation measures 'necessary to ensure the proper functioning of the common market' (ex-Art 67 EEC).

[29]The question of 'direct effect' is often reduced to the direct effect of European law *in the national legal orders*. Yet if direct effect is defined as the quality of a legal norm to be enforceable or justiciable, it can also apply to the European legal order and here, specifically, to the enforceability of a norm by the European Court of Justice. Unlike the (vertical) question of direct applicability, direct effect here conceptually relates to the horizontal relation between the Union/national legislature and the Union/national courts.

[30]Case 7/61 *Commission v Italy*, (1961) English Special Edition 317 at 328: 'The "standstill" obligation laid down by [ex-]Art 31[EEC] is absolute. It comprises no exceptions, not even partial or temporary ones. The interpretation pleaded by the defendant would open the way to unilateral actions by Member States going directly against the aim pursued by the Treaty in regard to the free movement of goods'.

[31]Joined Cases 2/62 and 3/62 *Commission v Luxembourg and Belgium* [1962] ECR 425.

[32]Ibid, p 435: 'It must therefore be declared and adjudged that the decisions to increase or extend this duty, taken after 1 January 1958, constituted infringements of the Treaty'.

[33]Case 26/62 *Van Gend en Loos* [1963] ECR 1. Advocate General Roemer had seen this clearly (Ibid, 22): '[T]he crucial issue according to the question raised by the Tariefcommissie is whether this direct effect [of ex-Art 12 EEC] stops at the Governments of the Member States, or whether it would penetrate into the national legal field and lead to its direct application by the administrative authorities and courts of Member States. It is here that the real difficulties of interpretation begin'.

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> States. . . . The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. *Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.*[34]

Van Gend is justly celebrated as a constitutional landmark; yet the concept of direct effect was – contrary to a common view – not a revolutionary invention that started in 1963.[35] It was, on the contrary, firmly embedded in the normative structure of the Community legal order. For not only had the latter expressly envisaged the direct effect of its secondary law for 'regulations',[36] special parts of the EEC Treaty had clearly been designed with direct effect in mind.[37] Yet with *Van Gend*, the Court had, crucially, clarified that even those Treaty provisions that were *addressed to the Member States* could be part of those legal norms giving rise to individual rights that national courts were to enforce. And more fundamentally still, the iconic constitutional vision *behind* the judgment ('new legal order') announced an unconditional departure from the 'old' legal order of international law.[38]

What, however, were the conditions for direct effect, as set out in *Van Gend*? The Court here focused on the text of ex-Article 12 EEC and found:

> The wording of [ex-]Article 12 [EEC] contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of the States, which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects. The implementation of [ex-]Article 12 [EEC] does not require any legislative intervention on the part of the States. The fact that under this Article it is the

[34]Ibid, 12 (emphasis added).

[35]The 'revolutionary' invention of the direct effect doctrine in *Van Gend* is a central premise of all integration-through-law variants, see, eg, Weiler, 'The Transformation of Europe' (n 2) 2428. It has become part of the equivalent political-science theories too, see, eg, K *Alter, Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2003) 1: 'The transformation of the European legal system was orchestrated by the ECJ through bold legal interpretations'.; and 17 ('revolutionary pronouncements'). For a nuanced historical analysis, see M Rasmussen, 'Revolutionizing European law: A history of the *Van Gend en Loos* judgment' 12 (2014) International Journal of Constitutional Law 136.

[36]On the normative quality of regulations as 'direct legislation', see R Schütze, 'The Morphology of Legislative Power in the European Community: Legal Instruments and the Federal Division of Powers' 25 (2006) Yearbook of European Law 91 at 112: 'By making regulations directly applicable, the Treaty recognized a monistic connection between that Community instrument and the national legal orders. Regulations would be automatically binding within the Member States – a characteristic that distinguished them from ordinary international law that would only be binding on States'. For proof that this view was expressly accepted in the ratification debates in France, Germany, Italy as well as the other founding Member States, see J-V Louis, *Les Règlements de la Communauté Économique européenne* (Presses Universitaires de Bruxelles 1969) esp. 146–8.

[37]For European competition law, see W Alexander, 'The Domestic Courts and Article 85 of the Rome Treaty' 1 (1963) Common Market Law Review 431 at 432: 'Domestic courts will have to apply [ex-]Article 85 [EEC]'. See also JJA Ellis, 'Les règles de concurrence du traité de Rome applicable aux enterprise' 15 (1963) *Revue international de droit comparé* 299. For a brilliant recent discussion of these issues, see H Delfs, *Komplementäre Integration: Grundlegung und Konstitutionalisierung des Europarechts im Kontext* (Mohr Siebeck 2015).

[38]This abstract future-oriented vision was, in my view, the real 'revolutionary' contribution of *Van Gend*. For the same view, see the early case comment in the first volume of the Common Market Law Review in 1963.

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> Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation.[39]

The test for direct effect was here clearly presented: wherever the Treaty contained a prohibition that was 'clear', 'unconditional' and 'unqualified' then an article would have direct effect. This seemed to be a very strict test; yet all three conditions were satisfied as regards ex-Article 12 EEC, with the Court even finding the provision to be 'ideally adapted' to having direct effect. One year later, in *Costa v ENEL* the same conclusion was reached for the Treaty's other standstill clause in the context of the freedom of establishment:

> By [ex-]Article 53 [EEC] the Member States undertake not to introduce any new restrictions on the right of establishment in their territories of nationals of other Member States, save as otherwise provided in the Treaty. The obligation thus entered into by the States simply amounts legally to a duty not to act, which is neither subject to any conditions, nor, as regards its execution or effect, to the adoption of any measure either by the States or by the Commission. It is therefore legally complete in itself and is consequently capable of producing direct effects on the relations between Member States and individuals. Such an express prohibition which came into force with the Treaty throughout the Community, and thus became an integral part of the legal system of the Member States, forms part of the law of those States and directly concerns their nationals, in whose favour it has created individual rights which national courts must protect.[40]

But so much more than that! Indeed, the *Costa* Court now also famously spelled out that all directly effective European Community law would enjoy primacy over national law:

> The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories. . . . The precedence of Community law is confirmed by [ex-] Article 189 [EEC], whereby a regulation 'shall be binding' and 'directly applicable in all Member States'. This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law. It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.[41]

The direct effect and primacy of the EEC Treaty's standstill clauses on *new* restrictions was subsequently confirmed for all but one of its fundamental freedoms.[42] And, *nota bene*: because the direct effect of these Treaty provisions ultimately depended on them being 'unconditional', that is: *not* requiring further legislative action by the Community (or the Member States), the normative supranationalism of 'law' did here in no way affect the original sphere of 'politics' in

[39]Van Gend (n 33) 13 (emphasis added).

[40]Case 6/64 *Costa v ENEL* [1964] ECR 585 at 596.

[41]Ibid, 594.

[42]As regards the free movement of goods, see, eg, Case 20/64 SARL *Albatros v Société des pétroles et des combustibles liquids* [1965] ECR 29. Here the Court held with regard to 'new' import restrictions that 'the Treaty brought about the abrogation *ipso jure* of the legislation of the Member States' (Ibid, 35). The exception among the fundamental freedoms was the freedom of capital, where the Court clarified that the standstill clause in ex-Art 71 EEC did not have direct effect on the ground that the wording 'shall endeavour' made it only a political obligation. See Case 203/80 *Casati* [1981] ECR 2595.

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which the Community's political organs were to adopt positive legislation for 'old' trade restrictions – to which we must now turn.

B. 'Old' trade restrictions: liberalisation through positive legislation

Following the original Treaty logic, most *pre*-1957 restrictions had to be removed, during the transitional period, by means of the political process.[43] Community legislation was thereby to be adopted, after an initial stage, by qualified majority voting in the Council;[44] and the Rome Treaty had, with one exception, here consistently chosen the 'directive' as its legislative instrument of market integration.[45] A good illustration of this general design can be found in the context of the freedom of establishment, where ex-Article 54 EEC stated:

1. Before the end of the first stage [of the transition period], the Council shall, acting unanimously on a proposal from the Commission and after consulting the Economic and Social Committee and the [Parliament], draw up a general programme for the abolition of existing restrictions on freedom of establishment within the Community. The Commission shall submit its proposal to the Council during the first two years of the first stage. The programme shall set out the general conditions under which freedom of establishment is to be attained in the case of each type of activity and in particular the stages by which it is to be attained.
2. In order to implement this general programme or, in the absence of such programme, in order to achieve a stage in attaining freedom of establishment as regards a particular activity, the Council shall, on a proposal from the Commission and after consulting the Economic and Social Committee and the [Parliament], issue directives, acting unanimously until the end of the first stage and by a qualified majority thereafter.[46]

Following ex-Article 54 EEC to the letter, the Community adopted, in 1962, its 'General Programme for the Abolition of Restrictions on Freedom of Establishment' in which it set out a concrete timetable for future Community legislation. And by 1964, the Council had actively begun to make use of its competence through – for example – the adoption of a directive that harmonised the conditions under which Member States could justify restrictions to the free movement of persons on grounds of public policy, public security or public health.[47] Parallel legislative

[43]The deadline as regards the removal of 'old' restrictions thereby differed depending on whether *import* or *export* restrictions were involved: old import restrictions were to be abolished by the end of the transitional period (1970), whereas the regime for old export restrictions was stricter with ex-Arts 16 and 34 EEC setting the deadline to the end of the first stage of the transitional period (1962).

[44]Depending on which Treaty freedom is involved, the move to qualified majority voting in the Council was to take place either after the end of the first stage of the transitional period in 1962 (eg, ex-Art 54 (2) EEC (establishment) or ex-Art 63 (2) EEC (services)); or, it was to take place after the end of the second stage of the transitional period in 1966 (eg, ex-Art 43 EEC (agriculture) or ex-Art 69 EEC (capital)).

[45]Eg. see ex-Art 14(2), ex-Art 33(8), ex-Art 54 (2), ex-Art 56(2), ex-Art 57(1), ex-Art 63(2), ex-Art 69 EEC. The exception, outside the CAP, was the free movement of workers, where ex-Art 49 and ex-Art 51 EEC also allowed for the use of 'regulations'.

[46]Ex-Art 54 (1) and (2) EEC. For the free movement of services, see the identical provision in ex-Art 63 EEC. In the context of the free movement of workers, a less complex arrangement had been chosen in ex-Art 49: 'As soon as this Treaty enters into force, the Council shall acting on a proposal from the Commission ... issue directives or make regulations setting out the measures required to bring about, by progressive stages, freedom of movement for workers[.]'

[47]Eg, Directive 64/221 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ English Special Edition: Series I Volume 1963–1964, 117). *Nota bene*, it is this Directive that will be invoked in *Van Duyn*.

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endeavours were undertaken for the other fundamental freedoms during the first and second stage of the transitional period too.[48]

Yet just when the Community was about to pass into the third and final phase of this period on 1 January 1966,[49] destiny struck. The Commission had made a daringly federalist proposal on the financing of the 'Common Agricultural Policy' – a special part of the EEC common market – that had linked the reform of the Community's own resources system to the rise of the European Parliament.[50] Incensed by this supranational move, and objecting to the start of majority voting in general, Gaullist France began to boycott the Community's political organs until a 'compromise' had been found that would counter-balance the (imminent) transition to decisional supranationalism with France's national interests. That compromise became known as the 'Luxembourg Compromise'.[51] After it, decision-making in the Council would take place under the 'shadow of the veto';[52] and this new constitutional convention would transform Community decision-making into intergovernmental 'politics' for almost two decades.[53]

But the legislative programme for the establishment of the common market would slowly continue; and it was to even arrive at a significant achievement in 1968 as regards the free movement or workers. For here, despite the Luxembourg Compromise, the Council had managed to adopt two major legislative instruments before the end of the transitional period.[54] The core provision within the 'Freedom of Movement for Workers' Regulation thereby stated:

1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.
2. He shall enjoy the same social and tax advantages as national workers . . .
3. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorizes discriminatory conditions in respect of workers who are nationals of the other Member States.[55]

This well-known provision successfully 'translated' ex-Article 48 EEC into a legislative form that was designed to have – vertical and horizontal – direct effects in the national legal orders.[56] This legislative translation did, however, not happen for all fundamental freedoms before the end

[48]For the free movement of workers, see, eg, Verordnung Nr. 3 über die Soziale Sicherheit der Wanderarbeitnehmer (1958) OJ 561/58; Verordnung No.15 über die ersten Maßnahmen zur Herstellung der Freizügigkeit der Arbeitnehmer innerhalb der Gemeinschaft, (1961) OJ 1073/61.

[49]While ex-Art. 8 EEC had envisaged a political decision to pass from the first to the second stage (para 3), the passage from the second to the third stage of the transitional period was meant to be automatic ('law').

[50]For an excellent analysis of the dynamics here, see P Bajon, *Europapolitik "am Abgrund": Die Krises des 'leeren Stuhls' 1965–66* (Steiner 2012), Chapter 2; as well as A Teasdale, 'The Life and Death of the Luxembourg Compromise' 31 (1993) Journal of Common Market Studies 567.

[51]'Final Communiqué of the Extraordinary Session of the Council' 3 (1966) Bulletin of the European Communities 5.

[52]Weiler, 'The Transformation of Europe' (n 2) 2450.

[53]On the gradual decline of the Luxembourg Compromise, see above, n 50.

[54]Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ L 257/13), and Regulation 1612/68 on freedom of movement for workers within the Community (OJ L257/2).

[55]Ibid, Art 7 (1)–(4). The interesting corollary, derived from para 4, is the coverage of collective private party actions.

[56]H ter Heide, 'The Free Movement of Workers in the Final Phase' 6 (1969) Common Market Law Review 466: 'With the adoption of the definitive regulation of the free movement of workers in Council Regulation No. 1612/68 a speeding up in the implementation has also been achieved in the application of [ex-]Article 48 of the EEC Treaty that runs practically parallel with the speeded-up establishment of the customs union'.

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of the transitional period; and the question therefore arose what effects these freedoms would have, with regard to 'old' measures, on and after 1 January 1970.

3. After the transitional period: expanding direct effect, 1970–1974

The EEC Treaty's common market regime distinguished, as we saw in Section 2, between 'new' and 'old' trade restrictions. The former were to be automatically prohibited by the Treaty (negative integration), whereas the latter were generally meant to be removed by the political process (positive integration) before 1970.[57] Yet was that legislative implementation a constitutional prerequisite and condition; or would the direct effect (and primacy) principles, developed in the context of 'new' trade restrictions, also extend to 'old' trade restrictions once the transitional period had ended?

The text of the Rome Treaty seemed to give a clear answer to this question: 'the expiry of the transitional period shall constitute the latest date by which all the rules laid down must enter into force and all the measures required for establishing the common market must be implemented'.[58] And it was, consequently, widely assumed that the establishment of the common market would 'not, under any circumstances, depend on the achievement of certain objectives or the fulfilment of the obligations imposed by the Treaty' because the 'absolute automatism of [ex-]Article 8' meant that all (but one) fundamental freedoms were to get direct effect.[59] That this was indeed the case was soon confirmed.

A. Negative integration: general direct effect of the fundamental freedoms

The view that ex-Article 8 EEC would trigger the direct effect of the common market freedoms had gained early judicial support in 1966. For in *Lütticke*, the ECJ had confirmed that the expiry of the (shorter) transitional period for the prohibition on discriminatory national taxation had indeed led to the full direct effect of the relevant Treaty article.[60] This judicial confirmation was subsequently extended to customs export charges under ex-Article 16 EEC;[61] and it equally

[57]Once again, for *exports* a stricter Treaty regime applied according to which all 'old' restrictions were to be outlawed by the end of the first stage of the transitional period in 1962 (above n 43). The same was true for ex-Article 95 EEC, which had also set the implementation date for 'old' measures to 'the beginning of the second stage' of the transition period (above n 23).

[58]Ex-Art 8(7) EEC.

[59]G Rambow, 'The End of the Transitional Period' 6 (1969) Common Market Law Review 434 at 441–4. For a more nuanced view, see G Bebr, 'Directly Applicable Provisions of Community Law: The Development of a Community Concept' 19 (1970) The International and Comparative Law Quarterly 257. According to Bebr, the expiry of the transition period would only give direct effect to those Treaty freedoms that fulfilled the requirements set out in *Van Gend*, that is those that were clear, unconditional and unqualified. To him, this was the case for the customs union as well as the free movement of workers (Ibid, 282–3); yet for the freedoms of establishment and services 'it still may remain an open question' whether they would become directly applicable after the end of the transition period (Ibid., 283). HP Ipsen, *Europäisches Gemeinschaftsrecht* (Mohr Siebeck 1972) 554, by contrast, generally confirmed the 'automaticity' of ex-Art 8 EEC and here referred to a resolution of the European Parliament and the Commission as well as a range of academic authors to support this view. All authors acknowledged the exception of ex-Art 67 EEC, whose wording was taken to 'leave[]the Council a discretionary power in determining the range of discriminations to be abolished' (G. Rambow, The End of the Transitional Period 444).

[60]Case 57/65 *Lütticke* [1966] ECR 205, esp.at 210. For an early discussion of this case, see M Waelbroeck, 'The Application of EEC Law by National Courts' 19 (1967) Stanford Law Review 1248; and G Bebr, 'Directly Applicable provisions of Community Law: The Development of a Community Concept' 19 (1970) The International and Comparative Law Quarterly 257.

[61]For a well-known, albeit indirect, confirmation, see Case 24/68 *Commission v Italy* (Statistical Levy), [1969] ECR 192. This was subsequently confirmed by Case 18/71, *Eunomia di Porro v Ministry of Education of the Italian Republic*, EU:C:1971:99, para 6:

> [Ex-]Articles 9 and 16 taken together involve, at the latest at the end of the first stage [of the transition period], with regard to all charges having an effect equivalent to customs duties on exports, a clear and precise prohibition … It lends itself, by its very nature, to produce direct effects in the legal relations between Member States and those subject to their jurisdiction. Therefore, from the end of the first stage, that is, from 1 January 1962, these provisions have conferred on individuals rights which the national courts must protect[.]

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informed other parts of the young Community legal order.[62] Yet would the expiry of the transitional period really lead to the direct effect of all fundamental freedoms, even as regards 'old' trade restrictions?

That this was indeed so was clarified as early as 1970 in *SACE*.[63] The Court here held:

> [Ex-]Article 13(2) [EEC] imposes on Member States the obligation to abolish progressively 'during' the transitional period charges having an effect equivalent to customs duties on imports. *Although the Commission had to decide the rhythm with which such charges had to be abolished during the transitional period, nevertheless it appears from the very wording of [ex-]Article 13 that these duties had in any event to be eliminated at the latest at the end of the said period. Therefore from the end of this period [ex-] Article 9 must have its full effect on its own.* [Ex-]Articles 9 and 13(2) taken together, involve, at the latest at the end of the transitional period, with regard to all charges having an effect equivalent to customs duties on imports, a clear and precise prohibition on exacting the said charges, which is not subject to any reservation for the States to subject its implementation to a positive act of national law or to an intervention by the institutions of the Community. It lends itself, by its very nature, to producing direct effects in the legal relations between Member States and their subjects.[64]

But what about the rest of the fundamental freedoms? In record time, the Court here also endorsed the general and full direct effect of the Treaty freedoms on goods,[65] workers,[66] establishment,[67] and services.[68] By '1974', the sole exception only remained the freedom of capital, whose 'text' was judged to be too qualified to ever give rise to direct effects.[69]

What was the main argument for the general direct effect of the common market provisions? In essence it was this: the Treaty's historic choice in favour of a gradual implementation *during* the transitional period did not make them 'conditional' provisions *after* the expiry of that period. Thus, even if, for example, the freedoms of establishment and services expressly referred to 'the framework of the [legislative] provisions set out below', that condition had only applied during(!) the transitional period; and once that period had ended, direct effect was to automatically follow.[70] To the Court, this solution textually derived from the constitutional effect of ex-Article 8 EEC, 'according to which the expiry of the transitional period shall constitute the latest date by which all the rules laid down must enter into force and all the measures required for establishing the common market must be implemented'.[71]

After the transitional period, then, the fundamental freedoms had become *unconditional* norms; yet what about their also being *clear* and *unqualified*? To better justify the second element of the classic direct effect test, the Court now expressly linked all fundamental freedoms to a

[62]On the direct effect of ex-Art 119 EEC after the end of the first stage of the transitional period, see the Opinion of Advocate-General Dutheillet de Lamothe in Case 80/70 *Defrenne v Belgium* [1971] ECR 445 at 456. This was later confirmed in Case 43/75 *Defrenne v Sabena* EU:C:1976:56, para 56.

[63]Case 33/70 *SpA SACE v Finance Minister of the Italian Republic* EU:C:1970:118.

[64]Ibid, paras 9–10 (emphasis added). This was confirmed in Case 77/72 *Capolongo* EU:C:1973:65.

[65]For goods, see Case 13/68 *SpA Salgoil v Italian Ministry of Foreign Trade* [1968] ECR 453, where the Court anticipated the direct effect of ex-Art 30 EEC after the transitional period. For an express confirmation, see here Case 74/76 *Iannelli & Volpi SpA v Ditta Paolo Meroni* EU:C:1977:51.

[66]Case 41-74 *van Duyn v Home Office* EU:C:1974:133, esp. paras 5–6.

[67]Case 2/74 *Reyners v Belgian State* EU:C:1974:68, esp. paras 26–28.

[68]Case 33/74 *van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* EU:C:1974:131, esp. paras 23–24.

[69]In Case 203/80 *Casati* (n 42), the Court confirmed that the general prohibition in ex-Art 67 EEC could not have direct effect because the wording 'to the extent necessary to ensure the proper functioning of the common market' meant that the Community's fourth fundamental freedom was subject to a political judgment by the Council (Ibid, paras 8–11). This would only change in '1992' with the Treaty on European Union.

[70]Above, notes 67 and 68.

[71]Case 2/74, Reyners (n 67), para 28.

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discrimination rationale; and here especially to ex-Article 7 EEC.[72] Indeed, according to the Court, it was that provision that ex-Article 52 EEC implemented 'in the special sphere of the right of establishment'.[73] And, as regards the provisions on the freedom of services, the Court similarly held that they could have direct effect 'in so far as they seek to abolish any discrimination against a person providing a service by reason of his nationality'.[74] This constitutional link between ex-Article 7 EEC and the scope of the fundamental freedoms was also judicially confirmed for the free movement of workers;[75] and a discrimination rationale equally arose under the free movement of goods.[76] The Court had linked direct effect to discrimination, because only a classic discrimination test was 'clear' enough to be applied by the national judiciary.[77]

Following the '1974' judgments of *Reyners*, *Van Binsbergen*, *Walrave* (and *Dassonville*), all discriminatory measures falling within these freedoms were, after the end of the transitional period, directly prohibited by the Rome Treaty as part of its negative integration sphere ('law').[78] From now on, positive integration ('politics') could, therefore, concentrate on the harmonisation of those national differences that also posed obstacles to the creation of the common market.[79] These obstacles could not be caught by a discrimination rationale, because the latter logically presupposed that it was 'possible to hold one and the same subject responsible for the prohibited discrimination'.[80] And since ex-Article 7 EEC was 'not concerned with any disparities in treatment or the distortions which may result. . . from divergences existing between the laws of the various Member States',[81] these disparities could not be addressed by negative integration; they had to be addressed, instead, by positive integration – to which we will now turn.

B. Positive integration: the direct effect of Community directives

After the transitional period, the relationship between the sphere of negative integration ('law') and the sphere of positive integration ('politics') appeared to be this: the former was to remove *discriminatory* national measures, whereas positive harmonisation was to remove obstacles to trade arising from disparities between *non*-discriminatory national laws. This constitutional

[72]The text of ex-Art 7 EEC can be found in the Appendix. For early discussions of ex-Art 7 EEC, see I Bode, *Die Diskiminierungsverbote im EWG-Vertrag* (Göttingen 1968); and BB Sundberg-Weitman, *Discrimination on Grounds of Nationality. Free Movement of Workers and Freedom of Establishment under the EEC Treaty (*North-Holland Publishing 1977).

[73]Reyners (n 67) para 16.

[74]Van Binsbergen (n 68) para 27.

[75]Case 36/74 *Walrave and Koch v Association Union cycliste internationale et al* EU:C:1974:140, para 6: 'These provisions [ex-Articles 48–51 or 59 to 66 EEC], which give effect to the general rule of [ex-]Article 7 of the Treaty, prohibit any discrimination based on nationality in the performance of the activity to which they refer'. See also Case 41/74, *Van Duyn* (n 66), para 5: 'It is provided, in [ex-]Article 48(1) and (2), that the freedom of movement for workers shall be secured by the end of the transitional period and that such freedom shall entail 'the abolition of any discrimination based on nationality . . . '.

[76]Schütze, *From International to Federal Market* (n 13) Chapter 3.

[77]One problem however remained. For even if ex-Article 7 EEC and its discrimination rationale provided a handy answer to the 'clearness' of the fundamental freedoms, while ex-Art 8 EEC could be used to justify why they had become 'unconditional' after 1970, some fundamental freedoms, like ex-Art 48 EEC, were not 'unqualified'. For unlike ex-Arts 13 EEC and 95 EEC, the Member States were here expressly granted public policy justifications that 'qualified' the general fundamental freedom. However, following its earlier views in EEC competition law, the Court held that the existence of certain justifications would not prevent the direct effect of the general prohibition as such. This point was expressly made in *Van Duyn*.

[78]Case 2/74, *Reyners* (n 67) para 30 (emphasis added): 'After the expiry of the transitional period the directives provided for by the Chapter on the right of establishment have become superfluous *with regard to implementing the rule on nationality*, since this is henceforth sanctioned by the Treaty itself with direct effect'.

[79]See Commission Communication of the Consequences of the Judgment of the Court of Justice of 21 June 1974 in Case 2/74 (*Reyners v Belgian State*) on the Proposals for Directives Concerning the Right of Establishment and Freedom to Provide Services (SEC(74) 4024 final).

[80]BB Sundberg-Weitman, *Discrimination on Grounds of Nationality* (n 72) 41.

[81]Case 14/68 *Walt Wilhelm* EU:C:1969:4, para 13.

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division of labour can, for example, be seen in Directive 70/50;[82] and it was taken to mean, in particular, that 'a product which has been manufactured in conformity with French standards could not be sold in Germany because the German authorities apply different standards'.[83] Here, it was the political process – not the Court – that was charged to remove 'obstacles to international trade resulting from differences between national legislative and administrative provisions'.[84]

To pursue this positive integration, the Rome Treaty gave a number of legislative competences to the Community.[85] Yet for only one fundamental freedom had it permitted the adoption of 'regulations' – the supranational instrument expressly allowing for direct effects in the national legal orders.[86] By contrast, almost all common market competences envisaged the adoption of 'directives'. Ex-Article 100 EEC, to mention just one example, thus stated: 'The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market'.

When compared to negative integration, positive harmonisation thus seemed to generally suffer from a *decisional and a normative* weakness. For not only did the adoption of secondary Community law require, especially after the Luxembourg Compromise, unanimity in the Council, it also appeared to lack direct effect because directives were, like international law, only binding 'on' Member States and solely 'as to the result to be achieved'.[87] On the other hand, positive integration seemed to be wider in scope than negative integration because its competences could, from the start, enter into areas into which the fundamental freedoms – confined to a discrimination rationale – could not; and the Luxembourg Compromise further reinforced this competence asymmetry in favour of positive (!) integration, when the Member States agreed to dramatically expand the Community's general competences via ex-Article 100 and 235 EEC.[88]

In a parallel movement, the Court nonetheless quickly decided to strengthen the normative qualities of directives too. The Court indeed discovered their (vertical) direct effects as early as 1970,[89] and, more famously again, in 1974. In *Van Duyn*,[90] a Dutch secretary's entry into the United Kingdom had been halted on public policy grounds. In an effort to harmonise such national derogations, the Community had previously adopted a directive that technically outlawed the British restriction;[91] yet the United Kingdom had not implemented it into national law. The general question therefore arose whether directives could – contrary to the express wording of ex-Article 189 [3] EEC – have direct effects. And the *Van Duyn* Court famously found that this was indeed possible:

[82]Directive 70/50 on the abolition of measures which have an effect equivalent to quantitative restrictions on imports [1970] OJ L 13/29. According to the Directive, national measures that were distinctly applicable to imports were directly caught by ex-Art 30 EEC, whereas measures that were equally applicable to imported and domestic goods were considered outside the scope of negative integration – unless they were discriminatory. Negative integration thus only targeted national rules which *themselves* discriminated – directly or indirectly – against imports.

[83]M Waelbroeck, 'Recent Developments and Future Prospects of the Common Market' 1 (1970) Georgia Journal of International and Comparative Law 1 at 4.

[84]PJ Slot, *Technical and Administrative Obstacles to Trade* (Sijthoff 1975) 4 (emphasis added).

[85]Eg, ex-Art 51 EEC: 'The Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers . . . '. See also: ex-Art 57 EEC that allowed for the adoption of 'directives for the mutual recognition of diplomas . . . '.

[86]On this point, see notes 36 and 45 above.

[87]Ex-Art 189 [3] EEC.

[88]For a discussion of the rapid post-1972 expansion of the positive integration sphere, see R Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press 2009) 132–56.

[89]Case 9/70 *Grad v Finanzamt Traunstein* EU:C:1970:78. See also Case 8/70 *Commission v Italy* EU:C:1970:94; and Case 33/70 *SpA SACE v Finance Minister of the Italian Republic* EU:C:1970:118. For a pre-1970 anticipation of this development, see M Waelbroeck, 'The Application of EEC Law by National Courts' 19 (1967) Stanford Law Review 1248 at 1274.

[90]Case 41-74 *Van Duyn* (n 66).

[91]See Directive 64/221 (n 47).

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> [B]y virtue of the provisions of [ex-]Article 189 regulations are directly applicable and, consequently, may by their very nature have direct effects, it does not follow from this that other categories of acts mentioned in that Article can never have similar effects. It would be incompatible with the binding effect attributed to a directive by [ex-]Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if the individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law.[92]

Like regulations, directives could thus have direct effects; and this even despite their being binding only 'as to the result to be achieved'. For the Court had simultaneously clarified that directives were not confined to establishing mere 'aims' or 'directions'; they could, instead, establish 'exhaustive' or 'complete' harmonisation wherever this was necessary.[93] This federalist pre-emptive effect shall, however, not interest us here;[94] rather, it is a more fundamental question: why did the Court supranationalise the directive in the early 1970s?

With many Member States fiercely opposing this normative development from the start and for a long time,[95] the constitutional impulse must have come from *within* the normative sphere itself. Two reasons here come to mind. First and foremost, if *state*-addressed Treaty provisions – like the fundamental freedoms – could have direct effects after their 'implementation period' had ended in 1970, the same logic could of course apply to other state-addressed norms – such as directives – once their implementation period had passed.

But secondly, and more importantly: without the Court giving direct effect to directives, a *normative* asymmetry between primary and secondary law would have arisen. It would have meant that an individual could directly rely on her abstract Treaty-based freedom (negative integration); yet, ironically, she would not have been able to rely on secondary law that *concretised* her rights under that freedom (positive integration).[96] The simultaneous announcement of the direct effect of primary law (Treaty) and secondary law (directives) in *Van Duyn* is therefore no coincidence. It was, on the contrary, a manifestation of a self-reinforcing normative supranationalism in which the need for normative *symmetry* between negative and positive integration was the driving force behind this development!

4. Moving into trouble: the 'deficient' legislator and the *Cassis* revolution

How successful would the Community's positive integration method be? The extensive harmonization programme of the young Community had, as regards the free movement of goods for example, been reflected in its 1969 'General Programme for the elimination of technical

[92]Case 41/74, *Van Duyn* (n 66), para 12. *Nota bene*: the Court's argument again focused on 'regulations' as directly applicable and directly effective Community law.

[93]This result had been supported in the literature since 1965, see J Herok, *Rechtsangleichung durch Richtlinien* (Mohr Siebeck 2021) 196–237.

[94]Case 148/78, *Ratti* [1979] ECR 1629. See also Case 38/77, *Enka BV v Inspecteur der invoerrechten en accijnzen,* [1977] E.C.R. 2203.

[95]One of the unresolved *Leerstellen* within Weiler's equilibrium theory, which will not be discussed here, is the acceptance question (but see *infra* n 174 with references there). For the potential direct effects of directives provoked an especially strong 'pluralistic' reaction from various national legal orders. See here again Herok, *Rechtsangleichung durch Richtlinien* (n 93) 296–301.

[96]For Advocate General Roemer in Case 9/70 (n 89), the direct effect of 'decisions' and 'directives' was thus justified, by analogy, to the direct effect of the 'Treaty' (Ibid, 846).

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barriers to trade arising from disparate national regulations'.[97] Yet by 1973, only a third of the envisaged directives had been successfully adopted;[98] and a supplementary programme needed to quickly approve a new timetable. That new timetable slipped again,[99] but worse: the already low legislative output was given a *regressive* momentum by the neo-protectionist Member States after the 1973 oil crisis. By 1978, the Commission was exasperated: the Community was 'adopting fewer and fewer directives each year'![100] The decisional intergovernmentalism ('politics') within the Community had created a major constitutional crisis: the apparent 'equilibrium' between normative and decisional supranationalism had caused a major 'disequilibrium' in the Community system!

How was this systemic crisis to be resolved? In order to reinvigorate the Community's decision-making process, the European Council called, as early as 1974, on the Member States to renounce the Luxembourg Compromise.[101] Yet the Member States, especially the newer ones, continued to fiercely support it.[102] This only changed in 1986 with the Single European Act (SEA) that reintroduced majority voting a decade later. But, alas, what were the triggers and drivers behind this return to decisional supranationalism? Some have pointed to a convergence of economic interests amongst the Member States (Moravcsik);[103] others have emphasised structural (Keohane),[104] or ideational aspects (Parson).[105] This section, by contrast, wants to explore the power and potential of a *legal* driver behind the SEA: the *Cassis de Dijon* judgment.

A. Expanding negative integration: the *Cassis de Dijon* wager

Cassis de Dijon is the most important case in all internal market law – if not in all European Union law.[106] It concerned a German measure that had fixed the minimum alcohol strength of liqueurs to 25 per cent. Formally, the German law thereby applied equally to foreign and domestic goods and was therefore not discriminatory; yet because of it, the French liqueur Cassis de Dijon could not be sold in Germany, as its alcoholic strength was significantly lower. The resulting trade obstacle within the common market had arisen from a *disparity* between French and German law; and such disparities had traditionally fallen, as we saw in Section 3, within the sphere of positive

[97]Council Resolution of 28 Mai 1969 drawing up a programme for the elimination of technical barriers to trade, O.J. [1969] C 76, 1-5 (English special edition: Series II Volume IX, 25).

[98]KA Armstrong and S Bulmer, *The Governance of the Single European Market* (Manchester University Press 1998) esp. Chapter 6.

[99]A Dashwood, 'Hastening Slowly: The Communities' Path Towards Harmonization' in H Wallace (ed), *Policy Making in the European Communities* (Wiley 1977) 177.

[100]Commission, Twelfth General Report on the Activities of the European Communities (1978), para 104.

[101]Final Communiqué, 'Conference of Heads of Government in Paris on 9 and 10 December 1974', Bulletin of the European Communities, EC 12-1974, 7 at 8: 'In order to improve the functioning of the Council of the Community, [the Member States] consider that it is necessary to renounce the practice which consists of making agreement on all questions conditional on the unanimous consent of the Member States, whatever their respective positions may be regarding the conclusions reached in Luxembourg on 28 January 1966'.

[102]For the softer concession to limit the Luxembourg Compromise to voting abstention, see 'Draft European Act' (Genscher-Colombo Initiative), reproduced in Bulletin of the European Communities, EC 11-1981 87. Similarly, see: *Solemn Declaration on European Union* (Stuttgart 1983) Bulletin of the European Communities, EC 6-1983 24 at 26.

[103]A Moravcsik, 'Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community' 45 (1991) International Organization 19; and more generally: A Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Routledge 1998).

[104]RO Keohane and S Hoffmann, 'Institutional Change in Europe in the 1980s' in RO Keohane and S Hoffmann (eds), *The New European Community: Decisionmaking and Institutional Change* (Routledge 1991) 1.

[105]C Parson, 'Revisiting the Single European Act (and the Common Wisdom on Globalization)' 43 (2010) Comparative Political Studies 706; and more generally: C Parson, *A Certain Idea of Europe* (Cornell University Press 2003).

[106]Case 120/78, *Cassis de Dijon* (n 16). For a classic contextualisation of the case, see K Alter and S Meunier-Aitsahalia, 'Judicial Politics in the European Community: European Integration and the Parthbreaking *Cassis de Dijon* Decision' 26 (1994) Comparative Political Studies 535; and more recently and extensively: A Albors-Llorens et al (eds), *Cassis de Dijon: 40 Years On* (Hart 2021).

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integration ('politics'). The *Cassis* Court however famously rejected this traditional logic in a legendary judgment, which now held:

> Obstacles to movement within the Community resulting from disparities between national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements . . . [T]he requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community . . . There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules.[107]

The judgment profoundly re-structured the constitutional division of labour between positive integration ('politics') and negative integration ('law'), discussed above. From now on, a different constitutional logic applied: *unless* there was a general public interest that the host State could invoke, the latter was *not* entitled to impose its own domestic laws on imported goods. This new legal presumption has become known as the 'principle of mutual recognition'. It meant that Member States must, in principle, mutually recognise each other's national legislation; and this was, from now on, a *constitutional* principle of negative integration.[108]

What was the revolutionary idea behind *Cassis*? Its rationale was as simple as it was radical: so long as the Member States could not agree on positive integration in the Council, the Court could take over and judicially handle all legal conflicts between the home and the host state through negative integration. And yet: it would be a serious mistake to equate the *Cassis* revolution with negative integration ('law') triumphing over positive integration ('politics'). For let us return to the *Cassis* formula, quoted above, but now starting from the previous paragraph:

> In the absence of common rules relating to the production and marketing of alcohol – a proposal for a regulation submitted to the Council by the Commission on 7 December 1976 (Official Journal C 309, p 2) not yet having received the Council's approval — it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory. Obstacles to movement within the Community resulting from disparities between national laws relating to the marketing of the products in question must [however only] be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements . . .[109]

The European Court here expressly lamented the 'absence of common rules', adopted by the Community legislator, and unmistakably pointed the finger to the Council for having failed to reach a political compromise through the decisional process. And this judicial lament is the critical point: the Community legislator *could* have harmonised the matter, but pending political

[107]Case 120/78, *Cassis de Dijon* (n 16), paras 8 and 14.

[108]CD Ehlermann, 'The "1992 Project": Stages, Structures, Results and Prospects' 11 (1990) Michigan Journal of International Law 1097 at 1101: 'The Community owes the principle of mutual recognition primarily to the European Court of Justice and its case law on [ex-]Article 30 of the EEC Treaty'. Ex-Art 57 EEC allowed for the adoption of mutual recognition directives; yet, with *Cassis*, a radical transformation took place when the Court takes this principle from the positive integration sphere ('politics') into the negative integration sphere ('law'). It is this transformation that K. Nicaolaïdis misses when she argues against the importance of *Cassis* (in, eg, 'Mutual Recognition among Nations: The European Community and Trade in Services' (PhD thesis, Harvard University 1993), Chapter 4 as well as in her many subsequent publications).

[109]Case 120/78, *Cassis de Dijon* (n 16), para 8 (emphases added).

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agreement in the Council, integration-through-law now provided a second and alternative solution to integration-through-legislation. The expansion of negative integration ('law') henceforth offered a fallback solution that was, in the future, to nudge reluctant Member States into finding a legislative compromise in the positive integration sphere ('politics').[110] After *Cassis*, one could say, positive integration was to take place in the shadow of negative integration.

This dialectic relationship between negative and positive integration was confirmed, a few years later, in *Polydor*.[111] The Community had concluded a free trade agreement with a (then) third state, whose formal text clearly reproduced ex-Articles 30 and 36 EEC; and yet the Court unambiguously refused to project its *Cassis*-jurisprudence into the external realm. Why? According to the Court, this was because of the absence of positive integration competences under international law:

> The considerations which led to that interpretation of [ex-] Articles 30 and 36 of the Treaty do not apply in the context of the relations between the Community and [a third state] as defined by the Agreement. It is apparent from an examination of the Agreement that although it makes provision for the unconditional abolition of certain restrictions on trade between the Community and [the third state], such as quantitative restrictions and measures having equivalent effect, it does not have the same purpose as the EEC Treaty . . . *In the present case such a distinction is all the more necessary inasmuch as the instruments which the Community has at its disposal in order to achieve the uniform application of Community law and the progressive abolition of legislative disparities within the common market have no equivalent in the context of the relations between the Community and [the third state].*[112]

For the Court, the critical factor in choosing between the 'international' and the 'Cassis' interpretation of 'Article 30 EEC' was therefore whether a trade rule was embedded (or not) in an institutional context that allowed for *positive* integration. And since, in this context, the Community's *legislative* powers could not extend to harmonising third-country goods, there could be no principle of mutual recognition.[113] This systemic nexus between negative and positive integration can be found in other jurisprudential contexts too;[114] and this close connection seems to suggest this: without the possibility of positive integration in the Community system, there would have been no *Cassis*, yet, as we shall see in the next section, without *Cassis*, there may have also been no future to positive integration!

B. The principle of mutual recognition: from *Cassis* to the SEA

The *Cassis* judgment provoked two polarised reactions. The Commission instantly put forward a generalisation of mutual recognition in the negative integration sphere: 'Any product lawfully produced and marketed in one Member State must, in principle, be admitted to the market of any other Member State';[115] and this, in particular, ought to mean that 'harmonisation will henceforth

[110]Another famous illustration of Court-provoked legislation is the EU Merger Regulation. In that context, see the excellent PhD thesis by Patricia Garcia-Duran Huet, *European Integration Theories: The Case of EEC Merger Policy* (LSE 1999), available here: <https://etheses.lse.ac.uk/2615/>.

[111]Case 270/80 *Polydor Limited and RSO Records. v Harlequin Records Shops Limited and Simons Records Limited* EU:C:1982:43.

[112]Ibid, paras 18–20 (emphasis added).

[113]Case 525/14 *Commission v Czech Republic* EU:C:2016:714, para39 (emphasis added).

[114]Eg, in the contexts of the common agricultural policy and the common commercial policy. With regard to the latter especially, see R Schütze, 'Third-Country Goods in the EU Internal Market' in F Amtenbrink et al (eds.), *The Internal Market and the Future of European Integration* (Cambridge University Press 2019) 200.

[115]Communication from the Commission concerning the Consequences of the Judgment given by the Court of Justice on 20 February 1979 in Case 120/78 ('Cassis de Dijon'), (1980) OJ C 256/2.

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have to be directed mainly at national laws . . . which are admissible under the criteria set by the Court'.[116] For most Member States, on the other hand, such a radical generalisation of mutual recognition was utterly unacceptable.[117]

In between both views lay the Court that, in the early 1980s, carefully consolidated and refined its *Cassis* jurisprudence.[118] And, importantly, once its jurisprudence had settled, the principle of mutual recognition had become a legal 'fact' that the Member States would have to accept as a general constitutional principle of European law. It was, as a legal fact, picked up by the Council in 1983 and 1984;[119] and the Dooge Committee subsequently endorsed it in 1984 and 1985.[120] The most significant push however came in the form of the 1985 White Paper on 'Completing the Internal Market',[121] which would form the bedrock of the 1986 Single European Act. Here we read:

> The harmonisation approach has been the cornerstone of Community action in the first 25 years and has produced unprecedented progress in the creation of common rules on a Community-wide basis. However, over the years, a number of shortcomings have been identified and it is clear that a genuine common market cannot be realised by 1992 if the Community relies exclusively on [ex-]Article 100 of the EEC Treaty . . . In principle, therefore, given the Council's recognition (Conclusions on Standardization, 16 July 1984) of the essential equivalence of the objectives of national legislation, mutual recognition could be an effective [new] strategy for bringing about a common market in a trading sense . . . Following the rulings of the Court of Justice, both the European Parliament and the Dooge Committee have stressed the principle that goods lawfully manufactured and marketed in one Member State must be allowed free entry into other Member States.[122]

With the 1985 White Paper, the Commission now pushed the principle of mutual recognition beyond technical standards, and even beyond goods. It indeed went unashamedly to the very centre of a 're-constituted' common market. For '[w]hat is true for goods, is also true for services and for people', because '[i]f a Community citizen or a company meets the requirements for its activity in one Member State, there should be no valid reason why those citizens or companies should not exercise their economic activities also in other parts of the Community'.[123]

But why would the Member States accept such a dramatic expansion of the *Cassis* revolution in areas in which the Court had not yet juridically confirmed the principle of mutual recognition?

[116]Ibid.

[117]K Alter and S Meunier-Aitsahalia, 'Judicial Politics in the European Community' (n 106) 542: 'As relatively high standard countries, France, Germany, and Italy were the most vigorously opposed to the new policy. (. . .) Even the British government had some reservations, although the United Kingdom was generally favourable to the principle of market liberalization[.]' For the German government specifically, see U Loewenheim, *Die Beseitigung Nichttarifärer Handelsschranken im Innergemeinschaftlichen Handel unter besonderer Berücksichtigung der gewerblichen Schutzrechte und des Urheberrechts: Deutscher Landesbericht, FIDE 1982 – Volume II : The Elimination of Non-Tariff Barriers with Particular Reference to Industrial Property Rights Including Copyright* (FIDE 1982) 4.1.at 4.9.)

[118]On this process, see R Schütze, *From International to Federal Market* (n 13) 135–43.

[119]Eg, Directive 83/189 laying down a procedure for the provision of information in the field of technical standards and regulations, (1983) *OJ L109/8*, esp. preamble 6: 'Whereas barriers to trade resulting from technical regulations relating to products may be allowed only where they are necessary in order to meet essential requirements and have an objective in the public interest of which they constitute the main guarantee . . . '

[120]Ad hoc Committee for Institutional Affairs ('Dooge Committee'), Report to the European Council, SEC(85) 460, 5: 'pending the adoption of European standards, the immediate mutual recognition of national standards by establishing the simple principle that all goods lawfully produced and marketed in a Member State must be able to circulate without hindrance throughout the Community'.

[121]European Commission, 'Completing the Internal Market: White Paper from the Commission to the European Council' COM (1985) 310.

[122]Ibid, paras 61–62 and 77.

[123]Ibid, para 58.

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The claim of a sudden convergence of national economic interests here significantly underplays, in my view, the power of political 'ideas' and legal 'facts'. For the 1986 SEA was a political project in the footsteps of the 1957 Rome Treaty.[124] Like the latter, its principal aim was thus the creation of 'a genuine political entity among European States'.[125] Yet the road to this 'new political utopia' was, once more, economic integration, with all the major Member States – apart from Britain[126] – willing to 'play' the 'market' for supranational 'political' reforms, like the reintroduction of qualified majority voting and the rise of the European Parliament.[127]

But let us take one step back: how, concretely, was the SEA to implement the White Paper's commitment to completing the internal market? Its novel ex-Article 8a EEC here re-introduced a 'transitional' period set to end in '1992'.[128] Its most important innovation was, however, to end the Luxembourg Compromise, at least for the internal market.[129] The central provision in that context was, undoubtedly, ex-Article 100a EEC (today Article 114 TFEU). While narrower in scope than ex-Article 100 EEC,[130] it now simultaneously strengthened positive integration with regard to *both* decisional and normative supranationalism. For apart from allowing for qualified majority voting, the Community legislator was also no longer confined to directives. And almost forgotten today, the provision was, thirdly, strengthened by ex-Article 100b EEC (today deleted), which allowed ex-Article 100a to be used, once the new transitional period had passed, to 'decide that the provisions in force in a Member State must be recognized as being equivalent to those applied by another Member State'.

Ex-Article 100b here embodied a *Cassis de Dijon* wager writ large. For even if it did not envisage the automatic mutual recognition of all unharmonized national laws by 1992, as had been originally suggested by the Commission,[131] it nonetheless allowed the Community legislator to do so in one single legislative act – and one to be adopted by a qualified majority of Member States. If sectoral harmonisation within the sphere of positive integration was thus not forthcoming, the Community could – under the conditions set out in ex-Article 100a – complete the internal market by simply generalising the principle of mutual recognition! This threat soon re-galvanised the Community legislator – a legislative renaissance that will be explored in the next section.

[124]For this point, see especially C Parson, *A Certain Idea* (n 105) 27: 'The Single Market 1992 project emerged thanks to community-minded leaders who decided to build Europe around deregulation, not liberalisers who thought deregulation had to take place at the European level'. For an excellent discussion of how 'the market' became a means for various ends, see N Jabko, *Playing the Market: A Political Strategy for Uniting Europe, 1985–2005* (Cornell University Press 2006), esp. 5:

> In the course of the European Union's quiet revolution [1980s and 1990s], market ideas had an impact not so much because of a general conversion to neoliberal ideology but because they were incorporated into a well-crafted political strategy. In the 1980s and 1990s, 'the market' served as a rallying banner for pro-European actors to advance their integrationist goals.

[125]Report of the 'Dooge Committee' (n 120) 3. This is how the first preamble to the SEA reads (emphasis added): 'MOVED by the will to continue the work undertaken on the basis of the Treaties establishing the European Communities and to *transform relations as a whole among their States into a European Union*'.

[126]Furious to discover that the 'single market project' was more that an exercise in deregulation, the British Prime Minister Thatcher would later explain what she had in mind: 'We have not successfully rolled back the frontiers of the state in Britain only to see them reimposed at a European level, with a European superstate exercising a new dominance from Brussels[.]' Reproduced in AG Harryvan and J van der Harst, *Documents on European Union* (Macmillan 1997) 244–5 (emphasis added).

[127]J De Ruyt, *L'Acte Unique Européen* (Études Européennes 1989), esp.71. According to Jabko, *Playing the Market* (n 124) 17 the 'market' even represented 'a promise of future progress toward common social and industrial policies'.

[128]Ex-Art 8a EEC (see Appendix) mimicked ex-Art 8 EEC. However, in order to counteract what had happened to ex-Art 8 EEC, the Member States added a 'Declaration on Article 8a of the EEC Treaty', which expressly excluded 'an automatic legal effect'.

[129]The SEA did not 'formally' end the Luxembourg Compromise; yet it was generally assumed that the latter had ended with the re-introduction of qualified majority voting for the internal market, see above, n 50.

[130]Paragraph 2 excluded the use of the provision for the harmonisation of fiscal measures, the movement of persons and employment measures. Here, the broader ex-Art 100 EEC would continue to apply.

[131]For the original Commission proposal, see CD Ehlermann, 'The Internal Market Following the Single European Act' 24 (1987) Common Market Law Review 361 at 371.

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5. 'Integration-through-legislation': the rise of positive integration

The dramatic rise of European legislation following the SEA has been extraordinary: in the course of two decades, European integration came to re-embrace positive integration; and, methodologically, this also signalled a new 'integration-through-legislation' ('politics') approach.[132] For European legislation was not made by the European Court but by the *political* organs of the Union deliberating and deciding on which positive rules were to govern Europe. The normative advantages of legislative rules over judicial ones are thereby manifold.[133] Democratically, the legislature enjoys a more direct representational link to the citizens; and, functionally, legislative rules tend to offer clearer and more precise solutions when compared to the often rather casuistic law offered by the judiciary. It is for these reasons that courts ought to defer to legislation; yet would this deference also be shown by the European Court? Let us explore this question after quickly showcasing the spectacular rise of European legislation after 1987.

A. The *Cassis* wager redeemed: three (plus one) legislative illustrations

Would the *Cassis* wager, presented in Section 4, ultimately be redeemed? Nothing tells this story better than the fate of the (draft) legislation mentioned in *Cassis* itself.[134] Soon after *Cassis*, the Commission had re-started working on a legislative proposal 'laying down general rules on the definition, description and presentation of spirituous beverages' that was formally published in the Official Journal in 1982.[135] Yet the latter, again, remained with the Council for years;[136] and only following the SEA's re-introduction of qualified majority voting could the Council finally adopt a regulation laying down general rules on the definition, description and presentation of spirit drinks in 1989.[137] Based, inter alia, on Article 100a EEC (now Article 114 TFEU) – the new internal market competence introduced by the Single European Act, the legislation now offered detailed rules on the definition of 'liqueur' for the entire internal market.

This *Cassis* dynamic of negative integration 'provoking' positive integration has, importantly, not been confined to product-related rules only. It can also be seen in the context of so-called selling arrangements. For after a judicial push to maximise negative integration in the *Sunday Trading* cases,[138] the Union legislator quickly pushed back to achieve one of its most important social policy measures: the Working Time Directive. Following a 1990 Commission proposal that had creatively used the post-SEA social policy provisions,[139] the Directive comprehensively set out

[132]For the term integration-through-legislation, see H Delfs, *Komplementäre Integration* (n 37) 12; and also KK Patel and HC Röhl, *Transformation durch Recht* (Mohr Siebeck 2020) 24: '"Integration durch Recht" wandelt sich zur "Integration durch gesetztes Recht"'.

[133]For a civil law exposition of this point, see B Mertens, *Gesetzgebungskunst im Zeitalter der Kodifikationen* (Mohr Siebeck 2006); and for a more philosophical study, see J Waldron, *The Dignity of Legislation* (Cambridge University Press 2008). A specific discussion of the place of legislation in the EU legal order can be found in M van den Brink, 'Justice, Legitimacy and the Authority of Legislation within the European Union' 82 (2019) Modern Law Review 293.

[134]For an earlier use of this illustration, see my '"Re-Constituting" the Internal Market: Towards a Common Law of International Trade?' 39 (2020) Yearbook of European Law 250 at 282. This example has, subsequently, become more prominent through the work of Zglinski.

[135](1982) OJ C 189/7.

[136]There was even an amendment in 1986: (1986) OJ C269/4.

[137]Regulation 1576/89, (1989) OJ L 160/1. The Regulation would later be replaced by Regulation 110/2008, (2008) OJ L 39/16, which was itself replaced by Regulation 2019/787, (2019) OJ L130/1.

[138]Eg, Case C-145/88 *Torfaen Borough Council v B & Q plc* EU:C:1989:593.

[139]The directive was not based on ex-Art 100a (whose para. 2 excluded social policy matters) but on ex-Art 118a EEC that had re-introduced qualified majority voting for health and safety matters and which was broadly interpreted by the Court to also cover social matters generally. The legal basis can today be found in Art 153 TFEU.

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weekly rest and holiday periods for workers.[140] It was immediately challenged by a pro-market United Kingdom – a challenge that was, however, generally rejected by the Court acknowledging a wide margin of discretion that the EU legislature would enjoy in socio-economic matters.[141]

A third illustration may, finally, be cited from outside the free movement of goods. Here, after the Iberian accession in 1986, the Court had – myopically – decided that the EU freedom of services would entail the right of foreign companies to post workers into a host state.[142] The judgment, unsurprisingly, raised grave concerns about social dumping in Member States with high levels of social welfare and employment protection, especially France. And within a year, the Delors Commission, strongly pressed by the European trade unions, produced a legislative proposal for the posting of workers.[143] It took another five long years before a political compromise was reached, yet the resulting 1996 Posted Workers Directive now *required* host Member States to extend their core labour laws to foreign posted-workers,[144] while it also *allowed* them – or so it appeared – to additionally impose stricter host state rules more favourable to workers.[145]

With these three illustrations of European re-regulation in mind, it is also important to note that EU legislation is not just about the harmonisation or the coordination of national laws in a cross-border situation. Like in the past, it will also often liberalise intra-Union trade by removing national barriers. EU legislation here functionally 'replaces' the EU Treaties' fundamental freedoms; and it is the rise of such free movement legislation that explains, to a great extent, the dramatic decline in fundamental-freedom-jurisprudence in recent years,[146] as the Court's judgments today primarily relate to Union legislation.[147]

A good example of such 'negative' integration through Union legislation is the Services Directive,[148] which has been said to be 'the most widely and passionately discussed text of secondary [*sic*] legislation in the history of the EU'.[149] Its central pillar had originally been the principle of mutual recognition ('country of origin') principle,[150] but the idea that the home State was the exclusive regulator of a service encountered severe criticism, especially from the European Parliament.[151] The final version of the Services Directive has therefore come to liberalise the internal market in a less absolute manner.[152] But the general inclusion of mutual recognition

[140]Directive 93/104 concerning certain aspects of the organization of working time, (1993) OJ L307/18. The Directive also permitted Member States to adopt higher national levels of worker protection, see: Art 15.

[141]Case C-84/94 *United Kingdom v Council* EU:C:1996:431, esp. para 58.

[142]Case C-113/89 *Rush Portuguesa Ld^a^ v Office national d'immigration* EU:C:1990:142. I borrow the term 'myopic' from Sacha Garben, who has re-analysed the judgment and its peculiar legal context recently ('Posted Workers Are Persons Too! Posting and the Constitutional Democratic Question of Fair Mobility in the European Union' in N Nic Shuibhne (ed), *Revisiting the Fundamentals of the Free Movement of Persons in EU Law* (Oxford University Press 2023) 39 at 52). *Rush Portuguesa* is the quintessential 'hard' case that made 'bad' law!

[143]Commission, Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services, COM(1991) 230 final – SYN 346. The Commission had anchored the proposal in the 'Community Charter of Basic Social Rights for Workers' (Ibid, para 1). For an excellent analysis of the general adoption process here, see D Sindbjerg Martinsen, *An Ever More Powerful Court?* (n 1), Chapter 6.

[144]Directive 96/71 concerning the posting of workers in the framework of the provision of services (OJ L18/1), Art 3 (1).

[145]Directive 96/71, Art 3(7) and Art 3(10).

[146]J Zglinski, 'The End of Negative Market Integration: 60 Years of Free Movement of Goods Litigation in the EU (1961–2020)' 31 (2024) Journal of European Public Policy 633.

[147]For an empirical analysis of this claim, see JC Fjelstul, 'The Evolution of European Union Law: A New Data Set on the *Acquis Communautaire*' 20 (2019) European Union Politics 670.

[148]Directive 2006/123 on services in the internal market [2006] OJ 376/36.

[149]V Hatzopoulos, 'Assessing the Services Directive 2006/123' 10 (2007–8) CYELS 215 at 236. On the negotiating history of the directive, see also J Flower, 'European Legislation: The Services Directive' 9 (2006–7) CYELS 217.

[150]Art 16(1) of the original draft proposed by the Commission ('Bolkenstein draft').

[151]Hatzopoulus, 'Assessing the Services Directive' (n 149) 238.

[152]The directive describes its aims in preamble 6:

> [B]arriers cannot be removed solely by relying on direct application of Articles [49] and [56] of the [FEU] Treaty, since, on the one hand, addressing them on a case-by-case basis through infringement procedures against the Member State

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clauses in Union legislation following the Single European Act is no coincidence. Instead, it forms part of a shift from total to minimum harmonisation.[153] For under the minimum harmonisation model, the Member States continue to be allowed to maintain their stricter national standards; yet in order to guarantee free movement, the Union now insists on the mutual recognition of all Union-compliant national standards.[154]

B. The place of positive integration: the legislative priority rule and the Court

With internal market legislation ('politics') increasingly setting out the concrete balance between liberalisation and re-regulation, what is its relationship to negative integration and the EU Court ('law')? In other words, how has the Court dealt with the 'presence of Union legislation': would it defer to the concrete balance struck in the Union legislative act; or would it give normative priority to the more abstract EU fundamental freedoms set out in the EU Treaties?

The judicial answer to this question has recently become known as the 'legislative priority rule',[155] according to which the Court gives, as a rule, *applicative* priority to EU legislation. A classic formulation here states that 'where a matter is regulated in a harmonised manner at [Union] level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure *and not of [the fundamental freedoms] of the Treaty*'.[156] The Court will thus 'suspend' the application of the EU Treaty's fundamental freedoms in the presence of – exhaustive – Union legislation.[157]

This legislative-priority-rule has a vital constitutional corollary. For when translating the EU fundamental freedoms into secondary law, the Union legislator enjoys a wide margin of discretion; and the resulting political freedom means that the Union can adopt collective solutions that the Member States *individually* could not. In *Bauhuis*,[158] for example, Union legislation was challenged on the ground that the compulsory health checks it created when animals were exported to other Member States violated the EU Treaties, including Article 34 TFEU (ex-Article 30 EEC). Legally, there was no doubt that national border inspections were measures prohibited by this provision. Yet the Court found that a different normative standard would apply to the Union legislator.

Why? Because EU legislation would, unlike national legislation, establish a Union-wide standard that furthered the 'unity of the market', and it followed that the 'criteria to appreciate the legality of national and [Union] measures with respect to their effects on the Common Market cannot be the same'.[159] This fundamental difference in the normative status and role of EU legislation, when compared to national legislation, indeed stems from the different interests they represent. Unlike the particularistic national interests, represented by the Member States, the EU legislator stands for the general Union interest – an interest that is unlikely to be tainted by a spirit

concerned would, especially following enlargement, be extremely complicated for national and [Union] institutions, and, on the other hand, the lifting of many barriers requires prior coordination of national legal schemes, including the setting up of administrative cooperation.

[153]On this shift, see Schütze, *From Dual to Cooperative Federalism* (n 88), Chapter 4.

[154]Eg, Case C-11/92 *Gallaher Ltd, Imperial Tobacco Ltd and Rothmans International Tobacco (UK) Ltd* EU:C:1993:262.

[155]For an outstanding monograph here, see E Ni Chaoimh, *The Legislative Priority Rule and the EU Internal Market for Goods: A Constitutional Approach* (Oxford University Press 2022). See also the same author's excellent overview article, 'Introducing the legislative priority rule: a constitutional compass for the Court' 42 (2023) Yearbook of European Law 84.

[156]Case 324/99 *DaimlerChrysler AG v Land Baden-Württemberg* EU:C:2001:682, para 32 (emphasis added).

[157]Importantly, the requirement of exhaustive Union legislation does not mean field pre-emption in the sense that the Member States have no longer any role to play. Exhaustiveness relates to the *scope* not to the *intensity* of the Union harmonisation.

[158]Case 46–76 *Bauhuis v The Netherlands State* EU:C:1977:6.

[159]R Barents, 'The Community and the Unity of the Common Market: Some Reflections on the Economic Constitution of the Community' 33 (1990) German Yearbook of International Law 9 at 22. For a similar argument, see now: Opinion of Advocate General Campos Sánchez-Bordona in Case C-626/18 *Poland v Parliament and Council* EU:C:2020:394, paras 34–35.

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of national protectionism.[160] The Union legislator will thus be able to legislate in a substantially freer way than national legislators; and it is even permitted to restrict intra-Union trade to the highest degree if it so wishes![161]

But what if the Court of Justice disagrees with such a high regulatory standard? A recent example of this eventuality comes from the 1996 Posted-Workers-Directive. We saw above that the original legislative regime here appeared to have been designed to protect the national labour laws of the host state. Yet in the course of time, the Directive had received a very controversial neoliberal interpretation by the Court, especially in *Laval* and *Commission v Luxembourg*.[162] These cases now sternly limited the ability of host states, and their trade unions, to impose higher social protection standards on posted workers. Could the EU legislator, unhappy with this judicial re-interpretation, subsequently correct the Court by amending the legislation? Spurred and supported by the Commission,[163] the Union legislator clearly believed so:

> According to Article 3 of the Treaty on European Union, the Union is to promote social justice and protection. According to Article 9 TFEU, in defining and implementing its policies and activities, the Union is to 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. More than 20 years after its adoption, it has become necessary to assess whether Directive 96/71/EC of the European Parliament and of the Council still strikes the right balance between the need to promote the freedom to provide services and ensure a level playing field on the one hand and the need to protect the rights of posted workers on the other. . . . Ensuring greater protection for workers is necessary to safeguard the freedom to provide, in both the short and the long term, services on a fair basis, in particular by preventing abuse of the rights guaranteed by the Treaties.[164]

The pro-labour legislative amendments were immediately challenged by a number of Eastern European States, two of which ultimately brought annulment proceedings before the Court.[165] There, the applicants alleged a violation of the underlying EU fundamental freedom, because the amended directive 'creates restrictions on freedom to provide services that are contrary to Article 56 TFEU'.[166] The Court however unconditionally confirmed the power of the EU legislator to shape and define the specifics of all fundamental freedoms in the following manner:

> [I]n relation to the free movement of goods, persons, services and capital the measures adopted by the EU legislature, whether measures for the harmonisation of legislation of the Member States or measures for the coordination of that legislation, not only have the objective of facilitating the exercise of one of those freedoms, but also seek to ensure, when necessary, the protection of other fundamental interests recognised by the Union which may be affected by that freedom. That is the case, in particular, where, by means of coordination

[160]Ni Chaoimh, *The Legislative Priority Rule* (n 155) 92.

[161]Barents, *The Community and the Unity of the Common Market* (n 159) 26.

[162]Case 341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* EU:C:2007:809; and C-319/06 *Commission v Luxembourg* EU:C:2008:350.

[163]For an overview of the political battles leading to the final revision of the Posted Workers Directive, see A Kyriazo, 'Making and Breaking Coalitions for a More "Social Europe": The Path Towards the Revision of the Posted Workers Directive' 29 (2023) European Journal of Industrial Relations 1; as well as D Seikel, 'Die Revision der Entsenderichtlinie: wie die Hürden marktkorrigierender EU-Politik überwunden werden konnten' 63 (2022) *Politische Vierteljahresschrift* 499.

[164]Directive 2018/957 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (OJ L/173/16), preambles 3, 4 and 10.

[165]Case 626/18 *Poland v Parliament and Council* EU:C:2020:1000.

[166]Ibid, para 72.

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> measures seeking to facilitate the freedom to provide services, the EU legislature takes account of the general interest pursued by the various Member States and adopts a level of protection for that interest which seems acceptable in the European Union . . . *With regard to judicial review of compliance with those conditions, the Court has recognised that, in the exercise of the powers conferred on it, the EU legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations.*[167]

The Court's strong constitutionality presumption for legislative choices of the Union, especially socio-economic ones, here belies the view that considers the Union legislature ('politics') as an agent of the European Court of Justice ('law').[168] For even if the EU legislator will – of course – keep a very keen eye on the Court and often react to it, the legislative priority rule generally suspends the fundamental freedoms wherever the Union legislature has harmonised a subject (in a not totally unreasonable manner).[169] The Court, today, therefore mostly operates as an 'ordinary' court that interprets EU legislation; and the internal market case 'law' that results from this interpretation, having the same status as the 'legislation' it interprets, also no longer constitutes an absolute barrier to future EU 'politics'.

6. History meets theory: 'Integration-through-Law' revisited

Let us now take stock. Having previously analysed three concrete historical balances between normative and decisional supranationalism as well as negative and positive integration in Sections 2–4, and having specifically explored the normative status of EU legislation in Section 5, what theoretical insights can we abstract from all this historical material? In particular: could we, with Weiler's equilibrium theory, find an inverse relationship between normative supranationalism ('law') and decisional supranationalism ('politics')? Or were there, with Scharpf, major asymmetries between negative and positive integration? And what about Grimm's over-constitutionalisation thesis? Let us revisit and reassess all three famous integration-through-law theories in this final section – starting with the third and youngest integration-through-law variant first.

A. The over-constitutionalisation theory: text of teleology?

Is the internal market 'over-constitutionalised'? Almost half of the original Rome Treaty covered the internal market, because its establishment and future functioning was its essential aim. (For an idea of how complex and cumbersome many of the original EEC provisions were, take another look at the Appendix!) Yet the relevant Treaty text on the internal market has significantly reduced since then; and after the *Cassis* revolution, most Treaty-based internal

[167]Ibid, paras 88, 89 and 95.

[168]For this – extravagant – view, see G Davies, 'The European Union Legislature as an Agent of the European Court of Justice' 54 (2016) Journal of Common Market Studies 846. According to Davies, the principal-agent relationship is a product of two factors, namely the lack of any meaningful legislative discretion due to the fact that all legislative acts are 'quite strictly' circumscribed by the jurisprudence of the Court; and secondly, the absence of the Union legislature's capacity to overrule the Court (Ibid, 846 and 849: 'The idea of 'legislative override' is a myth . . . [b]ecause most Court judgments are Treaty interpretation, akin to constitutional interpretation, they cannot be corrected by legislation'.). Both of these statements are, in my view, wrong. It is moreover simply a category mistake to argue, as regards the Union legislator, that 'to be an agent of the Treaties is, in substance, to be an agent of the Court' (Ibid, 847).

[169]EU legislation must, of course, itself conform with the broad normative framework set out in the EU Treaties. But the Court has generally operated a 'constitutionality' presumption that grants wide discretionary powers to the EU legislator. See K Mortelmans, 'The Relationship between the Treaty Rules and Community Measures for the Establishment and Functioning of the Internal Market – Towards a Concordance Rule' 39 (2002) Common Market Law Review 1303; as well as now: Ni Chaoimh, *The Legislative Priority Rule* (n 155).

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market law has been created out of single constitutional provisions – each for one fundamental freedom. As regards the free movement of goods, this constitutional text has been Article 34 TFEU which contains but 16 words – hardly a number that amounts to *textual* over-constitutionalisation. On the contrary, and as has been argued elsewhere, the secret behind the enormous success of the internal market provisions lies in their textual *under*determination, which has allowed the Court to 'transform' the EU internal market from an international to a federal market order.[170]

Yet what about the EU Treaties' *teleological* over-constitutionalisation? The problem with this line of argument, however, is that most modern states will have insisted, in the past, on the creation of a domestic – national – market in which the free movement of goods, persons, services and capital is constitutionally guaranteed. This economic aim is thus not a *sui generis* objective of the Union alone. It has, for example, been part and parcel of the US American constitutional order, where the Supreme Court has pressed the 'Commerce Clause' even beyond what the European Court has done so far. True, the US Constitution pursued, since its inception, many more substantive aims; but the European Union has – over time – also considerably diversified its constitutional aims, particularly since the Lisbon Treaty. When compared to ex-Article 2 EEC, a look into Article 3 TEU thus clearly shows that 'the very purpose and *telos* of the European Union has enlarged'.[171] The Union constitutional order is today, as regards its objectives or 'telos', an increasingly 'open' political order with the EU legislator enjoying a wide margin of discretion to pursue the Union's diverse and variegated aims and competences.

What, however, explains the lengthy text of the 1957 EEC Treaty and its enormous textual increase ever since? It is hard to follow Grimm's claim that the original 'over-constitutionalisation' was the attempt to 'immunise[] the Commission and particularly the [European Court of Justice]'.[172] For was it not the Member States themselves that had – as collective Masters of the Treaties – deliberately chosen to textually fix the exact way in which European integration was to proceed? This change of perspective also better explains why subsequent Treaty amendments would add ever more EU constitutional law. For it is against the background of significant *informal* changes of the EU Treaties – both in the negative and positive integration sphere – that the dynamics and forces behind the exponential growth of EU constitutional law ought to be understood.

The Union's general competences, for example, had been exploited to informally expand the Union's legislative sphere;[173] and the emergence of textually complex complementary competences and the inclusion of ever 'wordier' Protocols – both constitutionally designed to harness the Union – here constitute clear manifestations of the Member States trying to 'immunise' themselves – not the Commission or the Court – against all *organic* change within the Union legal order. Because more text means more precision; and more legal precision means less informal freedom for the Union. The post-1986 over-constitutionalisation of the EU Treaties thus

[170]For a discussion of this transformation, see my '*From International to Federal Market*' (n 13). One of the central ambivalences of Grimm's over-constitutionalism claim is whether it includes Court judgments or not. Schmidt (n 1) believes this to be the case. Yet then we no longer talk of a *textual* over-constitutionalisation of the EU legal order, which is, I think, what Grimm has in mind. But if Court judgments are meant to be included, then Grimm can surely no longer specifically indict the EU legal order alone. For in light of the US Supreme Court's (as well as other Constitutional Court's) enormously rich jurisprudence, these legal orders would surely also be over-constitutionalised? Take for example the numerous judgments of the US Supreme Court on the Commerce Clause (n 13, Chapter 2) – have they over-constitutionalised the relatively short US Constitution; and if not, why not?

[171]R Schütze and T Tridimas, *Oxford Principles of European Union Law – Volume I* (Oxford University Press 2018) xi. For an elaboration of this point, see J Larik, 'From Specialty to a Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union' 63 (2014) International and Comparative Law Quarterly 935; and more recently, M Dawson, 'The Changing Substance of European Law' 20 (2024) European Constitutional Law Review 451.

[172]Grimm, The Democratic Costs of Constitutionalisation (n 10) 471. Note that this argument contradicts, without Grimm realizing it, his support of the 'Weiler thesis'. For if it is assumed that the Member States had wanted to immunise the Commission and the Court through textual overdetermination, what was the point of the Luxembourg Compromise?

[173]For an extensive discussion of this informal transformation, see Schütze, *From Dual to Cooperative Federalism* (n 88).

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appears to be a reaction and result of the historical evolution of the Union. It is the consequence – not the cause – of an integration-through-law approach that Grimm's theory simply cannot explain.

Let us therefore concentrate on the first and second theory in the remainder of this Section.

B. The equilibrium theory: inverting the inverse relationship?

This cannot be the place to subject Weiler's integration-through-law theory to a comprehensive 're-reading'. Section 2 has, however, already hinted at a serious reservation about the revolutionary nature of the doctrine of direct effect;[174] but for the purposes of this section, the core paradox within Weiler's equilibrium theory is this: what does the Court's choice in favour of the direct effect of *Treaty* articles have to do with the decisional processes in the Union? Put more concretely: if ex-Article 12 EEC was never meant to be implemented by Union legislation, how can the Luxembourg Compromise be said to balance the normative supranationalisation of the provision after *Van Gend*?

Weiler's equilibrium theory could, at best, make sense as a theory for *secondary* Union law (positive integration).[175] Yet with regulations constitutionally designed to be directly applicable in the national legal orders from the start, all here depends on directives, which are hardly discussed by Weiler's theory. If a bit more jurisprudential work had here been done,[176] Weiler might have also found that all important judgments on the direct effect of Treaty articles were given *after* his foundational period had ended. This, of course, significantly relaxes the associative connection between '1963' (*Van Gend*) and '1964' (*Costa*), on the one hand, and '1965' (empty chair crisis) and '1966' (Luxembourg Compromise), on the other. And yet: could one not still argue, as regards the internal market, that the decline in decisional supranationalism after the Luxembourg Compromise was compensated by the rise of normative supranationalism in '1974' (*Reyners*, *Van Binsbergen*, *Van Duyn*, *Dassonville*)? This is not Weiler's thesis, but a different one, later developed by Paul Craig; yet even this new equilibrium theory suffers, in my view, from explanatory difficulties of its own.[177]

[174]And, as has been hinted at above in n 95 already, it is also hard to understand why Weiler could simply presuppose the *acceptance* of normative supranationalism by the Member States (and their courts) without having seriously considered the various acts of normative resistance (selective 'exit') starting immediately in the foundational period. For example, what would Weiler make of the original refusal by the Italian Constitutional Court (ICC) of '*Costa* v ENEL' supremacy? For a reconstruction of the Italian context and the *non*-reception of European supremacy in the Italian legal order, see A Arena, 'From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of *Costa v ENEL*' 30 (2019) European Journal of International Law 1017, esp.1035: '[T]he ICC's judgment in *Costa v. ENEL* of 24 February 1964 signalled that, at least for the time being, centralised primacy enforcement was out of the question'. On the belated and gradual acceptance of the supremacy doctrine by the Italian Constitutional Court and Italian scholarship over time, see G. Itzcovich's 'Teorie e ideologie del diritto comunitario' (Giappichelli 2006). Yet this 'European journey' took decades and lasted until the SEA and beyond – which rather suggests a positive correlation between normative and decisional supranationalism, if there is one at all?

[175]The argument would here be: the 'harder' *secondary* European law ('legislation') gets, the more the Member States will want to control the legislative decision-making process. This reduced focus could, then, explain why the Member States were so willing to tolerate the expansion of EU legislative competences in the 1970s; yet it could not explain the expansion of the negative integration sphere after *Cassis*.

[176]Studying internal market cases is still not a given for many EU constitutional 'theorists'! Weiler did however try to fill this gap in the late 1990s, when he published, *inter alia*, 'The Constitution of the Common Market Place' in P Craig and G de Búrca (eds), *The Evolution of European Law* (Oxford University Press 1999) 349. For my criticism of his 'convergence thesis' (according to which the EU internal market increasingly re-converges with the GATT international market), see R Schütze, 'Re-Constituting' the Internal Market: Towards a Common Law of International Trade? (n 134).

[177]In his 'Once upon a Time in the West: Direct Effect and the Federalization of EEC Law' 12 (1992) Oxford Journal of Legal Studies 453, Paul Craig has brilliantly suggested that the Court's decision to give direct effect to the fundamental freedoms in '1974' was a deliberative move to balance the declining decisional supranationalism during this period (Ibid, 464–6). Yet, there are, in my view, good arguments against this view. As discussed in Section 3, ex-Art 8 EEC in combination with ex-Art 7 EEC, seem to imply that direct effect had been intended from the start for all – but one – fundamental freedom. For if the EEC

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But be that as it may, Weiler's equilibrium thesis is badly misconceived for a second reason. For *Cassis de Dijon* – a case that plays no role in his grand theory of European integration– simply cannot be understood in normative supranational terms.[178] The essence of *Cassis* is not the normative quality of Article 34 TFEU; it is rather the revolutionary choice to allow the (intergovernmental) 'politics' in the EU legislature to be replaced by the (supranational) 'law' of mutual recognition. And it is this move that goes directly against Weiler's equilibrium theory because by potentially removing the political need to get the actual consent of the Member States in the Council to establish internal market law, the Court assumes a role within the decisional supranational sphere. Supranational 'law' is here not counterbalanced by intergovernmental 'politics'; the former stands in for the latter!

Furthermore, if one believes – as I do – that the *Cassis* Court's ultimate intention was to push the EU legislature into action within the *positive* integration sphere, Weiler's entire theory needs to be put – as Marx did with Hegel – on its head. Indeed, after 1979, *Cassis* inverted the inverse relationship that Weiler claims to have discovered between the legal and the political spheres. For it is, as we saw in Section 4, the *imbalance* between negative integration ('law') and positive integration ('politics'), created by the *Cassis* jurisprudence, that is – seven years later – rebalanced by *more* decisional supranationalism in the political sphere.[179] More supranational law, more supranational politics! And Weiler's theory here not only misses the link between *Cassis* and the Single European Act; it also misses the positive correlation between the *rise* of majority voting in the Council and the *rise* of the European Parliament.

Let me explain this last point by means of a small, but hopefully revealing, excursion.

The original Union 'legislator' had, of course, been the Council alone; and after the Luxembourg Compromise, this was a Council in which each and every Member State could potentially veto each and every legislative act. After the SEA, the Union had however returned to decisional supranationalism with its core provision now allowing the Council 'acting by a *qualified majority* on a proposal from the Commission *in cooperation with the European Parliament*' to adopt EU legislation.[180] This new legislative procedure had – *nota bene* – not only abandoned unanimity voting in the Council; it now also required the 'cooperation' of another supranational institution: the European Parliament.[181] Is there, then, perhaps a constitutional link between the reintroduction of QMV in the Council and the rise of the supranational European Parliament after the SEA?

The original role of the European Parliament under the 1957 Rome Treaty had been minimalist: it was only to be consulted. It had gained some budgetary powers in the early 1970s, when the Community shifted to a system of own resources. (We saw in Section 2 that this reform had, at first, been blocked by de Gaulle's empty chair policy, yet after his departure in 1969, this change was swiftly implemented; and this, in turn, triggered Parliament's transformation into a directly elected organ.[182])

Treaty makers had made the classic 'international' scope of the free movement provisions, like the free movement of goods, dependent on future positive legislation for its implementation, then the legal obligations under the EEC Treaty would have fallen below the GATT standard, where discriminatory measures were 'directly' prohibited as such, ie, without the need for further international implementing measures.

[178]Weiler's 1981 'Community system' (n 2, 295) briefly mentions *Cassis* as a decision whose meaning is yet to be determined; yet the 1991 'Transformation of Europe' does not refer to *Cassis* once. What would we say of a global history of the twentieth century that did not mention the United States? We would, surely, think that this missing 'fact' undermined any grander theoretical claims about global politics?

[179]For the same, albeit softer, point, see RD Kelemen and A Stone Sweet, 'Assessing the Transformation of Europe: A View from Political Science' in M Maduro and M Wind (eds), *The Transformation of Europe: Twenty-Five Years on* (n 9) 193, 201.

[180]Art 114 (1) TFEU (emphasis added).

[181]R Bieber et al, 'Implications of the Single Act for the European Parliament' 23 (1986) Common of Market Law Review 767; as well as R Bieber, 'Legislative Procedure for the Establishment of the Single Market' 25 (1988) Common Market Law Review 711.

[182]For a discussion of this point, see B Rittberger, *Building Europe's Parliament: Democratic Representation Beyond the Nation-State* (Oxford University Press 2005) Chapter 4.

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With the Single European Act,[183] Parliament was suddenly given legislative powers under those exact competences in which qualified majority voting had been reintroduced. Why? Three potential answers may be suggested here.

A first answer draws on the powerful 'supranational' idealism that many (though not all) Member States still shared.[184] For the Dooge Committee, for example, the rise of the European Parliament was a constitutional value in itself because it was 'a guarantor of democracy in the European system';[185] and when preparing the SEA, it therefore had clear words: 'A parliament elected by universal suffrage cannot, if the principles of democracy are logically applied, continue to be restricted to a consultative role or having cognizance of only a minor part of [Union] expenditure'. Parliament's role had perforce to be enhanced, especially 'by effective participation in legislative power'.[186]

A second – complementary – answer points again to the logic of 'compensatory constitutionalism'.[187] (This logic had, it has been argued, already operated in favour of the European Parliament when the Community moved towards a supranational financing system based on own resources in the 1970s.) The post-SEA move from unanimity to majority voting in the Council here, ultimately, meant a decline in *national* parliamentary control over European integration, which would need to be 're-balanced' by the rise in *European* parliamentary control.[188]

A third answer, finally, explains the inclusion of the European Parliament by means of an intergovernmental logic. For under the SEA-introduced cooperation procedure, as employed in the original ex-Article 100a EEC, any parliamentary disagreement with the Council allowed the latter to return to unanimity voting – something that the Member States might have liked. Subsequent Treaty reforms have, however, weakened this third argument significantly. For already the 1992 Maastricht Treaty replaced most instances in which the cooperation procedure had been used with a new 'co-decision' procedure under which this intergovernmentalist logic would no longer apply.[189]

But be that as it may. The fundamental point this small excursus wished to make is this: whatever one makes of these three alternative explanations of the post-SEA rise of the European Parliament, the crucial point is that there is always a *positive* correlation between the rise of *decisional* supranationalism in the Council and the rise of *more* decisional supranationalism through the legislative involvement of the European Parliament. More decisional supranationalism triggers more decisional supranationalism! And a similar self-reinforcing logic could, as we saw in Section 3, also be found in the normative supranationalism sphere. For once the Court had generalised the direct effect of the EU Treaty freedoms in 1974, directives were immediately found to have direct effects too. Why? Because it would have been legally inconvenient, if not outright impossible, to deny the direct effect of directives when they were meant to concretise and complement directly effective primary law.

[183]See Art 6 SEA.

[184]See above, n 124.

[185]Report of the 'Dooge Committee' (n 120) 30.

[186]Ibid, 30. For earlier versions of this 'federalist' idealism, see 1974 Paris Communique (n 101) 8: 'The European [Parliament] will be associated with the achievement of European unity . . . The competence of the European [Parliament] will be extended, in particular by granting it certain powers in the Communities legislative process'.

[187]A Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' 19 (2006) Leiden Journal of International Law 579.

[188]For a discussion of this argument, see B Rittberger, *Building Europe's Parliament* (n 182) Chapter 5.

[189]For a contemporary analysis of these changes in the legislative procedures, see A Dashwood, 'Community Legislative Procedures in the Era of the Treaty on European Union' 19 (1994) European Law Review 343.

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In conclusion, then: the internal dynamics *within* the normative sphere ('law') and the decisional sphere ('politics') appear to have been the principal driving forces behind their respective constitutional development; and when there is an interaction between both spheres, like the interaction between *Cassis* and the SEA, the relationship between 'law' and 'politics' seems also self-reinforcing. There never was an 'equilibrium' between normative and decisional supranationalism in the zero-sum inverse logic suggested by Weiler – neither in the foundational period of EU integration, nor ever hereafter.[190] The equilibrium theory is a serious historical mistake; and yet it has become a 'myth' that keeps on ensnaring! As a historical myth, however, it was nonetheless important, because it emphased the role and relevancy of 'law' to a generation of political scientists co-studying the process of European integration.[191]

C. The asymmetry theory: decisional, normative, competence?

What about Scharpf's asymmetry theory? From among the three integration-through-law theories revisited in this article, Scharpf offers the best account of the historical picture, although some of his strong assumptions have recently and righty come to be questioned.[192]

There is no doubt that the doctrines of direct effect and primacy have reinforced the normative character of the fundamental freedoms (negative integration); yet it is – in my view – but a slight of hand to claim that the rise of normative supranationalism *expanded* the sphere of *negative* integration. For as Section 2 has shown, the direct effect of the EU fundamental freedoms was originally limited to provisions that were meant to be self-executing from the start; and even after the transitional period had ended, the Court had, at first, only confirmed the direct effect of negative integration in relation to the principle of non-discrimination. Due to this 'international' scope, the direct effect of the EU fundamental freedoms however only formally strengthened a substantive GATT standard that, at least for goods, already bound the Member States under international law.

Van Gend therefore did not imply *Cassis*: the rise of normative supranationalism did not, as such, lead to an expansion of the sphere of negative integration. This expansion only happened with and after the *Cassis* revolution, when negative integration enters into a sphere originally reserved to positive integration; and once there is this overlap, Scharpf is correct to highlight the decisional asymmetries between negative and positive integration because the *supranational* decision-making power of the Court enjoys a clear advantage over any *intergovernmental* decision-making within the EU legislature.

[190]With regard to later stages of EU integration, take, for example, the *Francovich* doctrine that was to significantly strengthen the normative supranationalism of EU law just one year before the '1992' Maastricht Treaty would, once again, boost decisional supranationalism. On the importance of the *Francovich* doctrine, and its perception at the time, see J Steiner, 'From Direct Effects to *Francovich*: Shifting Means of Enforcement of Community Law' 18 (1993) European Law Review 3. For a good contextual and comparative discussion, see also: M Claes, *The National Courts' Mandate in the European Constitution* (Hart 2006), esp.283: 'By the end of the 1980s and the beginning of the 1990s, it became apparent that some new mechanisms must be introduced to improve the observance and enforcement of Community law by the Member States. The failure on the part of the Member States to implement directives timely and correctly had reached a level of intolerance and irritation'.

[191]The influence of Weiler on (especially American) political scientists (Alter, Nicolaïdis, etc.) cannot be exaggerated. Take for example Alter's admission that her scholarship 'begins where Stein and Weiler end' and that she would 'accept entirely their legal analysis' (K Alter, *The European Court's Political Power* (n 1) 3.

[192]For earlier critical engagements with Scharpf's asymmetry theory, see P Dann, 'Parlamentarische Legitimation der Binnenmarkt- und Wettbewerbspolitik' in J Bast and F Rödl (eds), *Wohlfahrtsstaatlichkeit und soziale Demokratie in der Europäischen Unio*n (Nomos 2013) 92; A Crespy, 'Can Scharpf Be Proved Wrong? Modelling the EU into a Competitive Social Market Economy for the Next Generation' 26 (2020) European Law Journal 319; S Schreurs, 'Scharpf Revisited: European Welfare Governance Through the Lens of Actor-Centred Institutionalism' 31 (2024) Journal of European Public Policy 2692; and most recently: M van den Brink (et al), 'Revisiting the Asymmetry Thesis: Negative and Positive Integration in the EU' 32 (2025) Journal of European Public Policy 209. Especially the last contribution covers many similar points to the ones in this section, but there are also major differences (see *infra* n 206).

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This decisional asymmetry has, nonetheless, become much less pronounced since the SEA and the subsequent rise of QMV.[193] Scharpf indeed significantly undervalues the rise of legislation, discussed in Section 5, which today – more or less – ubiquitously and comprehensively sets the balance between deregulation and reregulation in the internal market.[194] The Court can, of course, try to alter that legislative balance in ways unintended or unwanted by the EU legislator, yet the latter can also correct the Court interpreting its legislation if it wants to. This might not always be easy because of the need to build political coalitions in the Parliament and the Council, but to speak of a *normative* asymmetry in favour of the Court is misleading in light of the legislative priority rule discussed above.[195]

Nor is there – *pace* Scharpf – a competence asymmetry disadvantaging positive integration. For while it is true that the rise of complementary competences after the SEA and '1992' has come to severely limit – and over-constitutionalise – the legislative competences of the Union, the Union's constitutional ability to use its general competences (Articles 114, 115, 352 TFEU) continues to allow it to legislate on (almost) all matters.[196] Take, for example, *Laval* and the right to strike. Here, the Court had judicially limited that right at the national level, while the specific Union competence seemed to expressly exclude any legislative involvement of the Union.[197] Yet this did *not* mean that the Union had no competence to legislate in this area. It could and indeed did try to legislative under Article 352 TFEU ('Monti II Regulation').[198] And the key problem here was a decisional asymmetry in the form of an unanimity requirement that prevented the Union from exercising its – existing – legislative competence.

This decisional asymmetry between the Court and the Council is clearest where a single Member State is able to block EU legislation under, say, Articles 115 or 352 TFEU. It can, however, also be of a 'political' nature, where majority voting is allowed. For Scharpf is – again – correct to point out that with every EU membership enlargement the *political* heterogeneity within the EU legislature has increased. (The polarised reactions to *Laval* and the reform of the Posted-Workers Directive bear witness to that.[199]) Yet are these political asymmetries of a structural and permanent nature; and will they thus condemn the Union to a neoliberal Hayekian project?[200]

[193]Contrast this to Scharpf's 2010 statement in 'Community and Autonomy' (n 6) 107: 'Thus Weiler's (1981) diagnosis, cited at the beginning of this chapter, will continue to hold: in contrast to the legal processes defining and enforcing the supranational law of negative integration, the political processes required for positive integration will retain their intergovernmental character and will be easily blocked when national interests diverge'.

[194]For this excellent point, see Dann, 'Parlamentarische Legitimation der Binnenmarkt- und Wettbewerbspolitik' (n 192) 94: 'In Bezug auf den Binnenmarkt erfolgt längst eine weitgehend politisch ausgehandelte und parlamentarisch legitimierte De-Regulierung und Re-Regulierung[.]'

[195]For the same conclusion, see now also: M van den Brink, *Legislative Authority and Interpretation in the European Union* (Oxford University Press 2024), esp. 136.

[196]See again R Schütze, *From Dual to Cooperative Federalism* (n 88).

[197]Art 153(3) TFEU states: 'The provisions of this [competence] shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs'.

[198]Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 final, esp. 10–11. It is particularly noteworthy how the Commission justified its proposal (Ibid, 2).

[199]It was a coalition of Eastern European Member States that blocked the proposed 'Monti II Regulation'; and it was Eastern European States that challenged the legality of the reformed Posted-Workers Directive, discussed in Section 5.

[200]F Scharpf, *The Double Asymmetry of European Integration – Or: Why the EU Cannot Be a Social Market Economy* (MPIfG Working Paper 09 /12), 30: 'The evolution of European integration has confirmed Friedrich Hayek's prediction, published in 1939, that the integration of previously sovereign nation-states in Europe would reduce the capacity of states to regulate the capitalist economy and to burden it with the costs of an expensive welfare state'. For a recent uptake of Scharpf's argument that the EU was designed as a neoliberal authoritarian regime from the start, see M Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021). For a convincing rebuttal of the 'illusion of an inexorably neoliberal Europe' and a brilliant reconstruction of the original three integration visions that coexisted until the mid-1980s ('socially oriented', 'neomercantilist' and 'neoliberal'), see L Warlouzet, *Governing Europe in a Globalizing World: Neoliberalism and its Alternatives following the 1973 Oil Crisis* (Routledge 2018). In a similar vein, see now also: AD Andry, *Social Europe, the Road not Taken: The Left and European Integration in the Long 1970s* (Oxford University Press 2022).

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There can be little doubt that the politico-economic interests of the European 'centre' and those of the European 'periphery' will sometimes be opposed.[201] Member States do differ in their structural position within the European economy as well as in their ideological preferences. But why should we assume that these cleavages will be permanent? Is there hope for a broad societal convergence in the long term? I think there is, but in order to achieve that convergence the Union must find better ways to compensate all (temporary) 'losers' of European integration, whether they be individual citizens or Member States.[202] This however brings us to a new and crucial asymmetry within the Union: its *fiscal* asymmetry.

The European Union is a legislative giant on clay fiscal feet. Its budget is – when measured against its legislative tasks – miniscule;[203] and its fiscal income still predominantly consists – despite what the EU Treaties formally demand – of Member State contributions. But how can this asymmetry between legislative and fiscal integration be rebalanced? One answer here might – *Cassis*-like – point to the Court. Yet there are inherent limits to any '*Cassis* wager' in the fiscal sphere.[204] And while there may be other judicial strategies,[205] a more conservative answer always returns to the Member States as unanimous 'legislators' (under Article 311 TFEU) or unanimous Treaty-makers (Article 48 TEU). The core problem of fiscal integration, and of European re-distributive 'politics' in general, thus comes back to a *decisional* problem.

In conclusion, then, Scharpf's thesis about a decisional asymmetry between negative integration ('law') and positive integration ('politics') continues to hold true,[206] albeit less in its broader formal-legislative than in a more restrictive material-fiscal way. Why would the Member States ever wish to give up their veto powers, especially over fiscal matters, and drop a 'republican intergovernmentalism' that celebrates national sovereignty?[207] This question brings me to a fifth and final asymmetry, which is not an asymmetry within the Union but an asymmetry within the Member States. It has been pointedly expressed by the late David Held:

> Throughout the nineteenth and twentieth centuries, theorists of democracy have tended to assume a 'symmetrical' and 'congruent' relationship between political decision-makers and the recipients of political decisions. In fact, symmetry and congruence have often been taken for granted at two crucial points: first, between citizen-voters and the decision-makers whom they are, in principle, able to hold to account; and secondly, between the 'output' (decisions, politics and so on) of decision-makers and their constituents – ultimately, 'the people' in a delimited territory . . . But the problem, for defenders and critics of modern democratic

[201]For the oft-forgotten Eastern European perspective, see D Kukovec, 'Law and Periphery' 21 (2015) European Law Journal 406; and A Skrbic, 'Pushing the debate on Posted Workers beyond the EU's Status Quo' 2 (2023) European Law Open 162.

[202]For two good criticisms of Scharpf's social pessimism vis-à-vis the Union, see A Crespy, *Can Scharpf Be Proved Wrong?* (n 192); as well as S Schreurs, Scharpf Revisited (n 192).

[203]The European Union budget has traditionally been around 1 per cent of EU GDP, while Member State budgets will generally amount to between 30 and 45 per cent of national GDP.

[204]I have explored this question in R Schütze, 'Fiscal Barriers in the Internal Market' in A. Hinarejos and R Schütze (eds), *EU Fiscal Federalism: Past, Present, Future* (Oxford University Press 2023) 11 at 26–30.

[205]One could here think, in analogy to the Court's *ERTA* jurisprudence, of implied fiscal powers running in parallel to the Union's legislative powers.

[206]This is a key conclusion in which my analysis differs from the one recently offered by M van den Brink (et al), 'Revisiting the Asymmetry Thesis: Negative and Positive Integration in the EU' (n 192). The article undervalues, in my view, significantly the remaining decisional asymmetries between negative and positive integration, especially in the fiscal area. I also strongly disagree with the authors' contention that '[o]ver the past three decades, the CJEU has made efforts to limit the scope of free movement law' (Ibid, 10). This – wrong – view stems from Zglinski's wider thesis (*Europe's Passive Virtues: Deference to National Authorities in EU Free Movement Law* (Oxford University Press 2020)), according to which the Court has, in general, become more deferential in the sphere of negative integration. For my – completely oppositive – view here, see R Schütze, 'Re-Constituting' the Internal Market: Towards a Common Law of International Trade?' (n 134).

[207]R Bellamy, *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (Cambridge University Press 2019).

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> systems, is that regional and global interconnectedness contests the traditional national resolutions of the key questions of democratic theory and practice.[208]

Economic globalisation, despite all its efficiency gains, has indeed significantly weakened the public powers that most nation states can exercise over their national economy.[209] How can this *governmental* asymmetry be addressed? If one believes, as I do, that the collective problems humanity faces require collective solutions, then strengthening decisional supranationalism has much to recommend. From its very beginning, the Union was thus meant to 'govern' the external pressures of globalisation,[210] and it has today, undoubtedly, more governmental capacities than those smaller European states that have been captured by American (or Chinese) corporations and the hegemonic forces of hyper-capitalism.[211] The future of effective government in Europe thus lies in a 'republican federalism' that is capable of exercising public powers at a level most suited to the size of the problem at hand.

7. Conclusion

How has the EU internal market, and with it the original European Union, been integrated in the past; and what were the respective roles of 'law' and 'politics' in this process? This was the broad question this article wished to explore. We saw above that the relationship between the EU Court and the EU legislature has changed over time. In a first period, discussed in Section 2, the Union legal order gave preference to positive integration, as the common market was to be gradually built over a period of 12 years. After the transitional period had ended, however, negative integration ('law') became fully autonomous and, as a consequence, positive integration ('politics') came to be seen as operating in a separate sphere – a division of legal labour that was analysed in Section 3. Accordingly, discriminatory national laws fell within the negative integration sphere, whereas non-discriminatory trade obstacles arising from disparities in national laws fell into the positive integration sphere.

This radically changed with *Cassis de Dijon* – a revolution that was analysed in Section 4. It is with *Cassis* – not *Van Gend* or *Costa* – that the integration-through-law philosophy reaches its climax.[212] Yet with *Cassis*, the idea that normative and decisional supranationalism were in some form of 'equilibrium' lies in shatters.[213] For the constitutional dynamic that this case engenders is the very oppositive of what Weiler's theory had predicted. The supranational judicial sphere ('law') here actively helps the European political sphere ('politics') to regain supranational agency. The Court (C) helps to sublate national legislation (L) into supranational legislation (L'). Yet

[208]D Held, *Democracy and the Global Order* (Polity 1995) 16.

[209]For a powerful analysis of the increasing schism between 'states' and 'markets', see S Strange, *States and Markets* (Bloomsbury 2015); as well as her wonderful *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge University Press 1996).

[210]For this point, see W Mattli, *The Logic of Regional Integration* (Cambridge University Press 1999) 70–1 but see also and especially: S Meunier, *Trading Voices: The European Union in International Commercial Negotiations* (Princeton University Press 2007).

[211]The genesis of the 'double Irish' tax scheme – written by US American companies for US American companies – is a powerful illustration of how 'local' legislatures might be captured by 'global' companies. On the strategic position of small states in the world economy generally, see P Katzenstein, *Small States in World Markets: Industrial Policy in Europe* (Cornell University Press 1985) and, more recently: 'Small States and Small States Revisited' 8 (2003) New Political Economy 9. On the 'American challenge' specifically, see the classic by J-J Servan-Schrieber, *The American Challenge* (Hamilton 1968).

[212]What, then, explains the persistent neglect of the *Cassis* revolution by many an EU constitutional 'theorist'? For two lonely attempts to bring constitutional thinking to the internal market and internal market thinking to constitutional law, see Maduro, *We the Court* (n 1), and Schütze, *From International to Federal Market* (n 13).

[213]The counter-argument that *Cassis*, or even a more radical interpretation, had always been inherent in the original internal market provisions is historically mistaken. The judicial evolution of the internal market simply cannot be portrayed as the mechanical or 'inevitable working out of the correct implications of the constitutional text' (Shapiro).

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through this L-C-L' logic, *Cassis* is – dialectically – also the beginning of the end of the integration-through-court paradigm. For by re-galvanising the Union legislator, the judgment ultimately gives rise to a new 'integration-through-legislation' paradigm that was discussed in Section 5.

What could, in retrospect, legitimise the *Cassis* revolution? In the past, some scholars have tried to justify the Court's judicial activism as 'democratic', when viewed from a European perspective.[214] This approach is, however, empirically and normatively untenable.[215] A second approach has, by contrast, concentrated on 'liberal' outputs; yet this approach also suffers from major problems.[216] A third legitimation approach has, finally, argued that the *Cassis* revolution should be justified on 'republican' grounds.[217] What are the broad outlines of this legitimation strategy? If one accepts, with Section 6, that the nation state has become too small for the global economy and that the 'spheres of justice' (Walzer) must be expanded, then the Court's judicial activism could potentially be seen as assisting in forging a new political community ('politics'). The integration of the EU market is here viewed as a neo-functionalist *means* to a neo-federal *end*.[218]

This strategy has been very successful in the past. Yet European integration under the banner of the 'internal market' has 'run its course'.[219] In the last two decades, the Union has thus been accused of having itself become a neo-liberal tool, because it has not managed to redeem the quintessential promise of all political integration, that is: social integration. The Union urgently needs a 'European Social Act' (preceded and supported by a 'European Fiscal Act'). Why social and fiscal integration? Because the success of modern states in normatively 'integrating' their citizens was mainly achieved – the horrors of nationalistic wars aside – through the 'welfare state' in which the 'winners' and 'losers' of economic nationalism were reconciled by considerations of distributive justice.[220] The Union should follow this path and rediscover – to use Koselleck's evocative phrase - its 'futures past'.[221]

But in order to get there, the Union must rid itself of all unanimity voting – whether at the constitutional or the legislative level. Only once this outdated international law remnant is dropped, can the decisional and governmental asymmetries that are affecting the Union and its Member States be seriously addressed. The future equilibrium of the Union system indeed may depend on it. For any broad social legitimacy among its citizenry will only ever be re-established if the Member-States-in-Union offer convincing solutions to those everyday problems that are today transnational problems: how to organise the modern economy (work), how to protect the environment (life); and how to reign in transnational private companies and hostile public external actors. All these questions can no longer be decided in splendid national isolation, even if some wish it so.

[214]Maduro, *We the Court* (n 1).

[215]R Schütze, 'Judicial Majoritarianism Revisited: "We, the Other Court"?' 43 (2018) European Law Review 269.

[216]For a detailed discussion of this liberal approach and its problems, see R Schütze, 'The Internal Market: A Constitutional Perspective' in R Schütze and T Tridimas (eds), *Oxford Principles of European Union Law – Volume II: The Internal Market* (Oxford University Press forthcoming).

[217]For a detailed discussion of this 'republican' approach, see Ibid.

[218]In other words, the 'market' is seen as 'embedded' in a broader *political* project with the former being 'played' to achieve the latter. For a judicial endorsement of this view, see *Opinion 1/91 (EEA Agreement)*, EU:C:1991:490, esp. paras 17–18 (emphasis added): '[T]he objective of all the [Union] treaties is to contribute together to making concrete progress towards European unity. It follows from the forgoing that the provisions of the [EU Treaties] on free movement and competition, far from being an end in themselves, *are only means for attaining those objectives*'.

[219]N Jabko, *Playing the Market* (n 124) 179 and 185: 'A political strategy of playing the market is unlikely to sustain the European Union's integrationist momentum much further in the face of growing popular dissatisfaction[.]'

[220]On the emergence of the modern welfare state see E Eichenhofer, *Geschichte des Sozialstaats in Europa* (Beck 2007). There is a wide range of EU law scholars sceptical towards this welfare development, see particularly: F de Witte, 'Transnational Solidarity and the Mediation of Conflicts of Justice in Europe' 18 (2012) European Law Journal 694, where he argues that the EU's normative claims 'cannot (should not) be of a directly redistributive or openly political nature', as they should rather be of 'a different, transnational and apolitical type of justice' focused on individual self-determination (Ibid, 698). I radically disagree!

[221]On the historically existing – and important – political vision of a 'social' Europe, see Warlouzet and Andry cited above (n 200).

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We can therefore only hope that the Member States remember, as after the Second World War,[222] that the best way to 'rescue' themselves is within a stronger European Union. Yet this is no plea for European integration for European integration's sake; nor is it pushing market integration for economic efficiency's sake. This is an argument for effective democracy's sake: because if democracy refers to the ability to collectively decide on certain outputs, it loses its core meaning when the very ability to positively determine these outputs is lost. How can this 'sovereign' ability to collectively choose for Europe and one's Member State be regained; and what can the future role of 'law' here be? The claims that Europe's 'messianic' potential is spent (Weiler); or that the Union is but a 'Hayekian' project (Scharpf); or, that it is undemocratic and 'over-constitutionalised' (Grimm) tragically deflect from the constructive role that 'integration-through-law' can still play in pushing for further *political* integration. The history of European integration here offers stark lessons; and we should be very critical of any grand theory of European integration that ignores them.

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Appendix: selected provisions of the 1957 EEC Treaty

Part I. Principles

Article 2

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

Article 7

Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The Council may, on a proposal from the Commission and after consulting the [Parliament], adopt, by a qualified majority, rules designed to prohibit such discrimination.

Article 8

1. The common market shall be progressively established during a transitional period of twelve years. This transitional period shall be divided into three stages of four years each; the length of each stage may be altered in accordance with the provisions set out below.
2. To each stage there shall be assigned a set of actions to be initiated and carried through concurrently . . .
6. Nothing in the preceding paragraphs shall cause the transitional period to last more than fifteen years after the entry into force of this Treaty.
7. Save for the exceptions or derogations provided for in this Treaty, the expiry of the transitional period shall constitute the latest date by which all the rules laid down must enter into force and all the measures required for establishing the common market must be implemented.

[222] A Milward, *The European Rescue of the Nation State* (Routledge 1999), esp. 376: 'The historical evidence shows that the real argument has never been about whether it is desirable that a supranational Europe should supersede the nation-state, but about whether the state can find a political and economic base for survival'.

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Part II. Foundations of the Community, Title I – Free movement of goods

Chapter 1. The customs union

Article 12

Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.

Article 13

1. Customs duties on imports in force between Member States shall be progressively abolished by them during the transitional period in accordance with Articles 14 and 15.
2. Charges having an effect equivalent to customs duties on imports, in force between Member States, shall be progressively abolished by them during the transitional period. The Commission shall determine by means of directives the timetable for such abolition. It shall be guided by the rules contained in Article 14 (2) and (3) and by the directives issued by the Council pursuant to Article 14 (2).

Article 16

Member States shall abolish between themselves customs duties on exports and charges having equivalent effect by the end of the first stage at the latest.

Chapter 2. Elimination of quantitative restrictions

Article 30

Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States.

Article 31

Member States shall refrain from introducing between themselves any new quantitative restrictions or measures having equivalent effect . . .

Article 32

In their trade with one another Member States shall refrain from making more restrictive the quotas and measures having equivalent effect existing at the date of the entry into force of this Treaty. These quotas shall be abolished by the end of the transitional period at the latest. During that period, they shall be progressively abolished in accordance with the following provisions.

Article 34

1. Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.
2. Member States shall, by the end of the first stage at the latest, abolish all quantitative restrictions on exports and any measures having equivalent effect which are in existence when this Treaty enters into force.

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Title III. Free movement of persons, services and capital

Chapter 1. Workers

Article 48

1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, renumeration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy public security or public health . . .

Article 49

As soon as this Treaty enters into force, the Council shall, acting on a proposal from the Commission and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about, by progressive stages, freedom of movement for workers, as defined in Article 48 . . .

Chapter 2. Right of establishment

Article 52

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period. Such progressive abolition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State . . .

Article 53

Member States shall not introduce any new restrictions on the right of establishment in their territories of nationals of other Member States, save as otherwise provided in this Treaty.

Article 54

1. Before the end of the first stage, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Economic and Social Committee and the [Parliament], draw up a general programme for the abolition of existing restrictions on freedom of establishment within the Community. The Commission shall submit its proposal to the Council during the first two years of the first stage. The programme shall set out the general conditions under which freedom of establishment is to be attained in the case of each type of activity and in particular the stages by which it is to be attained.
2. In order to implement this general programme or, in the absence of such programme, in order to achieve a stage in attaining freedom of establishment as regards a particular activity, the Council shall, on a proposal from the Commission and after consulting the Economic and Social Committee and the [Parliament], issue directives, acting unanimously until the end of the first stage and by a qualified majority thereafter . . .

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Article 56

1. The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.
2. Before the end of the transitional period, the Council shall, acting unanimously on a proposal from the Commission and after consulting the [Parliament], issue directives for the coordination of the aforementioned provisions laid down by law, regulation or administrative action. After the end of the second stage, however, the Council shall, acting by a qualified majority on a proposal from the Commission, issue directives for the coordination of such provisions as, in each member State, are a matter for regulation or administrative action.

Chapter 4. Capital

Article 67

1. During the transitional period and to the extent necessary to ensure the proper functioning of the common market, Member States shall progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested.
2. Current payments connected with the movement of capital between Member States shall be freed from all restrictions by the end of the first stage at the latest.

Article 69

The Council shall, on a proposal from the Commission, which for this purpose shall consult the Monetary Committee provided for in Article 105, issue the necessary directives for the progressive implementation of the provision of Article 67, acting unanimously during the first two stages and by a qualified majority thereafter.

Part 3. Policies of the Community

Chapter 3. Approximation of laws

Article 100

The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market. The [Parliament] and the Economic and Social Committee shall be consulted in the case of directives whose implementation would, in one or more Member States, involve the amendment of legislation.

1986 Single European Act amendments

Article 8a

The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this

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Article and of Articles 8b, 8c, 28, 57 (2), 59, 70 (1), 84, 99, 100a and 100b and without prejudice to the other provisions of this Treaty.

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.

Article 100a

1. By way of derogation from Article 100 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 8a. The Council shall, acting by a qualified majority on a proposal from the Commission in co-operation with the European Parliament and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.
2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons . . .

Article 100b

1. During 1992, the Commission shall, together with each Member State, draw up an inventory of national laws, regulations and administrative provisions which fall under Article 100a and which have not been harmonized pursuant to that Article. The Council, acting in accordance with the provisions of Article 100a, may decide that the provisions in force in a Member State must be recognized as being equivalent to those applied by another Member State . . .
3. The Commission shall draw up the inventory referred to in the first subparagraph of paragraph 1 and shall submit appropriate proposals in good time to allow the Council to act before the end of 1992.

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