

# The Rise of Deference: The Margin of Appreciation and Decentralised Judicial Review in EU Free Movement Law

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## I. Introduction

Over the past decades, we have become accustomed to the European Court of Justice (ECJ) deciding many of the most challenging questions the “peoples of Europe” grapple with: who is entitled to social benefits? How much can our health care systems deliver? When does human life begin? How should marijuana be regulated? All these issues made it necessary to strike difficult compromises – between regulation and deregulation, free trade and public policy, European and national interests –, a responsibility the Court of Justice keenly assumed. Its active attitude towards judicial review, especially in relation to national policies, became a fixpoint in and a hallmark of EU law. It turned the Court into a driving force of the integration project and, as such, the object of broad scholarly and, with some delay, political interest.

Recently, a very different wind is blowing in Luxembourg. Bold decisions, reversing national legislative choices or administrative practices, have not disappeared. Yet, they have been complemented with another class of rulings, those marked by caution. Increasingly, one finds the Court refraining from making certain legal and regulatory assessments, deferring them to Member State institutions instead. Such deference has become prominent when the Court granted a government agency a “margin of appreciation” to balance free movement with free speech,<sup>1</sup> when it let a local body define the meaning of human dignity,<sup>2</sup> and when it allowed a Member State to choose whether to prohibit the carrying of nobility titles.<sup>3</sup> In a similar way, it

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<sup>1</sup> Case C-112/00, *Schmidberger*, ECLI:EU:C:2003:333.

<sup>2</sup> Case C-36/02, *Omega Spielballen*, ECLI:EU:C:2004:614.

<sup>3</sup> Case C-208/09, *Sayn-Wittgenstein*, ECLI:EU:C:2010:806.

surfaced when the ECJ held that it was for national courts to decide whether local press laws,<sup>4</sup> gambling regulations,<sup>5</sup> and video classification systems<sup>6</sup> were compatible with EU law.

This paper investigates how and when the Court of Justice defers to national authorities.<sup>7</sup> It focuses on the Court's jurisprudence on free movement rights and, more specifically, on the way in which the European judges conduct justification and proportionality review of Member State acts. Two sets of considerations motivate this choice. Free movement law is the heartland of the integration project and the place where, through doctrines such as the margin of appreciation, the question of deference has been debated most frequently and controversially. Like few other domains, it allows us to study how the ECJ's behaviour towards Member State institutions has evolved over time. Litigation on the four freedoms has been part and parcel of the Court's review activity since the early 1970s, and remains so until today.

The special focus on justification and proportionality analysis is warranted due to the pivotal role this review technique has acquired in free movement adjudication. Gone are the days when the key issue in disputes before the Court of Justice was whether a national measure fell into the scope of free movement law.<sup>8</sup> The centre of attention has, in line with constitutional developments across the globe,<sup>9</sup> moved towards the question as to whether the measure can be justified and is proportionate – and, among the two, especially the latter.<sup>10</sup> With this shift, the place of a number of important constitutional debates has moved, too. What level of regulation is appropriate, how far courts can intervene in democratic decisions, and which matters should be decided by the EU as opposed to the Member States are matters nowadays primarily fought over in the context of proportionality review.

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<sup>4</sup> Case C-368/95, *Familiapress*, ECLI:EU:C:1997:325.

<sup>5</sup> Case C-243/01, *Gambelli*, ECLI:EU:C:2003:597; Cases C-338/04, 359/04 & 360/04, *Placanica*, ECLI:EU:C:2007:133; Case C-409/06, *Winner Wetten*, ECLI:EU:C:2010:503; Case C-212/08, *Zeturf*, ECLI:EU:C:2011:437.

<sup>6</sup> Case C-244/06, *Dynamic Medien*, ECLI:EU:C:2008:85.

<sup>7</sup> It is part of a broader research project on the ECJ's use of deference *vis-à-vis* the Member States. The findings will be published in Zgliniski, *Europe's Passive Virtues – Deference in EU Free Movement Law* (OUP, forthcoming).

<sup>8</sup> See Weatherill, "The Several Internal Markets", 36 YEL (2017), 1, at 18.

<sup>9</sup> Möller, *The Global Model of Constitutional Rights* (OUP, 2012); Klatt and Meister, *The Constitutional Structure of Proportionality* (OUP, 2012); Cohen-Eliya and Porat, "Proportionality and the Culture of Justification", 59 AJCL (2011), 463; Stone Sweet and Matthews, "Proportionality and the Global Model of Balancing", 47 CJTL (2008), 72; Beatty, *The Ultimate Rule of Law* (OUP, 2004).

<sup>10</sup> Davies, "Abstractness and Concreteness in the Preliminary Reference Procedure" in Nic Shuibhne (Ed.), *Regulating the Internal Market* (Edward Elgar, 2006), p. 218.

The paper proceeds as follows. I will begin by explaining how the Court of Justice defers to national authorities (II.). It will emerge that the Court has created two discrete deference doctrines which, despite their structural similarity, have different consequences for judicial review. I will, then, look into the prevalence and patterns of use of these doctrines: how frequently does the ECJ defer to national authorities in its judgments (III.)? In which scenarios does it choose to do so (IV. and V.)? An empirical study of free movement case-law will help to shed light on these matters. The search covers every complete fifth year of the Court's jurisprudence on national restrictions of the four freedoms, from 1974 until 2013. All preliminary references and infringement actions were analysed, a total of 247 decisions. Based on the results, it is argued that an important change has occurred in EU law (VI.). Over time, the Court of Justice has limited its control over Member State measures and increasingly delegates decision-making tasks to national actors. Thus, it has started to practise a European form of "passive virtues".<sup>11</sup>

## II. Two Deference Routes

The Court of Justice has developed two basic ways in which it defers to Member State institutions. The first is directed towards national legislatures and executives; it is carried out through the margin of appreciation doctrine (1.). The second leads to national courts and is accomplished by means of what will be called a "decentralising" of review responsibilities (2.). One can, against this background, speak of two types of deference in EU law: political and judicial. Before inquiring into their prevalence and patterns of use, it is important that we grasp their nature.<sup>12</sup>

### 1. To National Legislatures and Executives: The Margin of Appreciation

To understand how the Court defers to national authorities, it is easiest to start with the opposite scenario: how it acts when showing no deference. In free movement law, almost 40 years on, the

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<sup>11</sup> Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill, 1962).

<sup>12</sup> Despite the abundance of literature on the margin of appreciation, conceptual work on the doctrine is scarce. Two exceptions from the ECHR context are Legg, *The Margin of Appreciation in International Human Rights Law* (OUP, 2012) and Letsas, *A Theory of Interpretation of the European Convention of Human Rights* (OUP, 2007), pp. 80 et seq. On deference to national courts in EU law see Takis Tridimas, "Constitutional Review of Member State Action: The Virtues and Vices of An Incomplete Jurisdiction", 9 *ICON* (2011), 737.

paradigm case for this remains *Cassis de Dijon*.<sup>13</sup> The facts are well-rehearsed. German law prohibited the production and importation of liqueurs with too low alcohol content, the rationale being consumer protection. According to the government, customers needed to be shielded against the risk of purchasing “inferior”, weaker alcoholic beverages. The ECJ found the law to obstruct the free movement of goods and, therefore, examined whether it could be justified. The crucial question in this regard became: was a measure as drastic as a prohibition really required to protect consumers, or would putting labels on beverages be equally effective? Contrary to the German legislature, which had said yes – customers would be misled all too easily –, the Court famously said no. Labelling, so the European judges opined, would be a perfectly adequate, less intrusive alternative. This conclusion has been endlessly disputed on empirical grounds. Yet, for our purposes, it is not the result of the decision that matters but how it was reached. Faced with a regulatory problem (what is necessary for consumer protection), the Court of Justice made its own assessment and substituted its judgment for that of the legislature.

Although it has always been controversial given its restrictive effects on national autonomy, the *Cassis* approach is one we have grown deeply accustomed to. It has been used by the Court over and over again across different policy fields and free movement rights, yielding free movement classics such as *Centros*, *Säger*, *Gebhard*, and *Bosman*.<sup>14</sup> The essence of the *Cassis* model is as simple as it is consequential: the Court engages in an in-depth assessment of all (relevant) questions related to the justification and proportionality of a Member State act. It appraises and decides which policy aims are legitimate, which means are suitable to achieve them, as well as which measures are necessary and appropriate to do so. As a result of this, it ends up determining matters of regulatory substance: what is required to protect creditors of companies, which training patent agents need, who can use certain professional titles, and how transfer fees should or should not affect the world of football.

The margin of appreciation doctrine constitutes a departure from this. It creates a form of review that differs from the *Cassis* approach. When applying the margin of appreciation, the Court leaves the decision on points concerning justification and proportionality in the hands of the national legislature or executive. Instead of, as under the *Cassis* model, settling which restrictions are required for consumer protection, whether certain measures are effective, or how to strike a balance between free movement and competing social policy goals, the European judges defer

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<sup>13</sup> Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (“*Cassis de Dijon*”), ECLI:EU:C:1979:42.

<sup>14</sup> Case C-76/90, *Säger*, ECLI:EU:C:1991:331; Case C-55/94, *Gebhard*, ECLI:EU:C:1995:411; Case C-415/93, *Bosman*, ECLI:EU:C:1995:463; Case C-212/97, *Centros*, ECLI:EU:C:1999:126.

these assessments to the Member States. This does not mean that the margin of appreciation “switches off” proportionality analysis. Yet, it affects the intensity with which the latter is conducted. There are two types of margins of appreciation which the ECJ applies – one more, the other less far-reaching.

The first is the *full margin of appreciation*. Here, the Court of Justice grants the national political process complete deference on a particular matter. One finds this approach in cases like *Van Duyn*, *Henn and Darby*, *Schindler*, and *Omega*.<sup>15</sup> Member States are given the freedom to define what constitutes a threat to public policy, which acts offend public morality, what is necessary to protect consumers, or what human dignity means. The Court does not second-guess the national judgment. For national authorities,<sup>16</sup> this scenario comes with the widest leeway. Not only can they take the policy decision they want, they can also choose how to reach this decision. The margin of appreciation protects both the regulatory outcome and process. For the Court of Justice, it entails the biggest loss of control. Judicial scrutiny of the national measure remains minimal, as does the Court’s opportunity to shape the relevant subject-matter.

Table 1 Deference Route I: The Margin of Appreciation

Type of MoA	Case	Review Exercised
None	<i>Cassis de Dijon</i>	ECJ makes justification/proportionality assessment itself
Partial	<i>Commission v Denmark (Food Additives)</i>	ECJ defers justification/proportionality assessment to Member State legislature or executive but stipulates <i>how</i> it is to be made
Full	<i>Schindler</i>	ECJ completely defers justification/proportionality assessment to Member State legislature or executive

The second variant, the *partial margin of appreciation*, is of more limited nature. The Court of Justice grants Member States the freedom to make a certain regulatory assessment but stipulates how this assessment ought to be made. The series of infringement proceedings on national restrictions of food additives in the mid-2000s, starting with *Commission v Denmark*,<sup>17</sup> use this approach. In

<sup>15</sup> Case 41/74, *Van Duyn*, ECLI:EU:C:1974:133; Case 34/79, *Henn and Darby*, ECLI:EU:C:1979:295; Case C-275/92, *Schindler*, ECLI:EU:C:1994:119; *Omega Spielballen*, cited *supra* note 2.

<sup>16</sup> When referring to ‘national authorities’ in this as well as in the following sections on the margin of appreciation, I only mean the legislative and executive branches, not the national judiciary. This has to do with the conceptual distinction explained in section II. 2.

<sup>17</sup> Case C-192/01, *Commission v. Denmark (Food Additives)*, ECLI:EU:C:2003:492.

its judgments, the Court holds that it is for the national authorities to decide which vitamins, minerals, or nutrients pose health dangers and at which level of consumption. At the same time, however, it demands that their decision be based on a detailed risk assessment, which is done on a case-by-case basis, considers international scientific studies, and does not exclusively rely on local consumption habits.<sup>18</sup> The ECJ's approach resembles the full margin of appreciation in one respect: ultimately, it is the Member State, not the Court, that determines which substances are dangerous. Yet, there is a crucial difference. Although national authorities are left to decide, the Court lays down *how* their decision ought to be made. It specifies the procedure to be followed, the questions to be taken into account, and the evidence to be considered. The outcome of the regulatory assessment thus, again, lies in the hands of the Member State; the Court will not intervene. The decision-making process, however, is influenced by the European judges to different extents (depending on the density of their instructions).

Although the notion of “standards of review” is, in principle, foreign to EU law – unlike in U.S. constitutional practice, there are no different tests for state action depending on the right or type of measure at stake<sup>19</sup> – the Court's use of the margin of appreciation doctrine *de facto* creates three intensities of scrutiny. Formally, the ECJ may apply the very same justification and proportionality test in all of its free movement decisions. In reality, however, it engages in judicial scrutiny of greatly varying intensity. The *Cassis* or no-margin approach is the strictest. It entails a comprehensive review of the given Member State act and, as such, makes it the hardest to pass constitutional muster. The partial margin of appreciation is more lenient. It limits the Court's to an examination of the regulatory process. The full margin of appreciation, finally, is the laxest. It results in only superficial control of the relevant national measure, leaving substantive leeway for the Member State legislature.

## **2. To National Courts: Decentralised Judicial Review**

The second deference route leads to the national judiciary. When examining the justification and proportionality of a Member State act, the ECJ can hand down review responsibilities to the referring court. In this way, judicial review becomes, partly or fully, “decentralised”. Readers acquainted with the jurisprudence of the European Court of Human Rights (ECtHR) may be surprised that this scenario is treated separately here: is deference to national courts a distinct

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<sup>18</sup> *Ibid.*, para 43.

<sup>19</sup> See U.S. Supreme Court, *United States v. Carolene Products* 304 US 144 (1938) (rational basis review); *Craig v. Boren* 429 US 190 (1976) (heightened scrutiny); *Roe v. Wade* 410 US 113 (1973) (strict scrutiny).

phenomenon at all, differing from deference to national legislatures and executives? Does it not form part of the same concept of the margin of appreciation? The Strasbourg Court's idea of the margin of appreciation doctrine is very wide. It includes both the national legislature, which creates the law, and the judiciary and executive, which apply it.<sup>20</sup> This reflects the classical understanding of the state in public international law, under which every authority equipped with public power counts as a state institution, regardless of the branch of government it belongs to. The Court of Justice's understanding is narrower. When speaking of the national "margin of appreciation", "area of discretion", or "latitude of freedom", the ECJ exclusively refers to Member State legislatures or executives; it never uses this terminology *vis-à-vis* national courts.<sup>21</sup> Regardless of semantics, it is imperative to distinguish between the two options in EU law due to the radically different consequences they come with.<sup>22</sup> The margin of appreciation lowers the intensity with which a Member State act is examined. As a result, it limits judicial scrutiny. A decentralisation of review tasks, in contrast, does not affect how strictly or comprehensively a state act is inspected. It only relocates where this scrutiny will take place – from the European to the national level.

As much as the effects of both options differ, the ways in which the Court defers to Member State courts and legislatures remarkably resemble each other. In the same manner that the discretionary powers granted through the margin of appreciation can be wider or narrower, the Court decentralises review tasks to national courts to varying extents (Table 2). To begin with, just as there can be no margin of appreciation, there can be *no decentralisation* of review. The Court of Justice can choose to make all justification and proportionality-related assessments itself and not involve the referring judge at all. This, once more, is the *Cassis de Dijon* scenario. The question as to what is necessary and effective to protect consumers is conclusively determined by the

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<sup>20</sup> See already ECtHR, *Handyside v. UK*, App no. 5493/72, judgment of 7 December 1976, para 48.

<sup>21</sup> The ECJ usually makes explicit not only if it hands review tasks over to the referring judge (e.g. by signalling that "it is for the national court to decide", "assess" or "ascertain"), but also which ones it does. For the referring judge, this has the pleasant consequence that they will, on the basis of the preliminary ruling, know relatively precisely whether they have to exercise a review task and, if so, which exact task that is.

<sup>22</sup> To avoid a misunderstanding: the account of deference put forward here is not a semantic one. Deference is defined as a particular review approach the ECJ can take, not as the use of the term "margin of appreciation". In other words, it concerns what the Court *does* as opposed to what it *says*. Although one would, ideally, expect the two to align, we find two types of discrepancies in the case-law. Sometimes, the ECJ announces it grants the Member State a margin of appreciation without actually lowering its intensity of review (call this "saying without doing"); see Case C-131/93, *Commission v Germany (Crayfish)*, ECLI:EU:C:1994:290 or Case C-212/11, *Jyske Bank Gibraltar*, ECLI:EU:C:2013:270. Other times, it lowers the level of scrutiny without expressly signalling this ("doing without saying"); see Case C-6/98, *ARD*, ECLI:EU:C:1999:532, paras 25-26. Needless to say that, from a perspective of consistency, both phenomena are problematic as they make it difficult to tell what form of scrutiny the Court will ultimately exercise.

Court. This leaves the referring judge without any true decision-making power; they just have to implement or, as one author put it, “execute”<sup>23</sup> the solution crafted by the ECJ.

Table 2 Deference Route II: Decentralised Judicial Review

Type of Decentralisation	Case	Review Exercised
None	<i>Cassis de Dijon</i>	ECJ makes justification/proportionality assessment itself (= centralised judicial review)
w/ Tendency	<i>Dynamic Medien</i>	ECJ defers justification/proportionality assessment to national court but gives <i>prima facie</i> appraisal of Member State act
w/ Guidelines	<i>Familiapress</i>	ECJ defers justification/proportionality assessment to national court but stipulates <i>how</i> it is to be made
Adoption	<i>Placanica</i>	ECJ takes justification/proportionality assessment over from national court
Full	<i>Libert</i>	ECJ completely defers justification/proportionality assessment to national court

At the other end of the spectrum we find *full decentralisation*. The Court of Justice can let the national judge decide completely freely on the justification and proportionality of a Member State act. It will, then, as for example in *Libert*, simply state that “it is... for the referring court to assess” whether the national law under scrutiny satisfies the principle of proportionality, without giving any further guidance.<sup>24</sup> Similar is the *adoption* technique. The ECJ has the possibility to – at least where these were submitted – take over the justification and proportionality assessments of the national judiciary. *Placanica* on the Italian gambling monopoly illustrates this option.<sup>25</sup> Whilst examining whether Italy pursues the aim of curbing gambling addiction in a consistent and systematic manner, the Court simply appropriates the findings of the *Corte suprema di cassazione* which deemed the Italian legislation incoherent, without reviewing the matter anew itself.<sup>26</sup> As in the full decentralisation scenario, it is the referring court who decides on the proportionality of the Member State act. The difference is one of time. Instead of making the national judge decide after the ruling on the preliminary reference, the Court incorporates an earlier assessment into its judgment.

<sup>23</sup> Paul Craig, *EU Administrative Law*, 2nd edn (OUP, 2012), p. 637.

<sup>24</sup> Joined Cases C-197/11 & 203/11, *Libert*, ECLI:EU:C:2013:288, paras. 67-68.

<sup>25</sup> *Placanica*, cited *supra* note 5.

<sup>26</sup> *Ibid.*, para 54.



The possibilities presented thus far mark two extremes: the Court determines everything or nothing. However, like with the margin of appreciation, there are also options in between. The Court can defer review tasks to the referring judge but constrain or influence the latter's behaviour. One way in which this can occur are *guidelines*. The ECJ hands the decision on the proportionality of the given measure over to the national court but instructs it how to make this decision, by laying down which considerations to take into account, which questions to address, or which regulatory acts to invalidate. *Familiapress* is a well-known example of this approach. In its judgment, the Court states that the Austrian prohibition of prize competitions in magazines must be proportionate in order to comply with free movement law.<sup>27</sup> Whether this is the case it leaves for the national court to determine. However, it specifies that the two decisive questions in this respect are: (i) “whether newspapers which offer the chance of winning a prize... are in competition with... small press publishers” on the Austrian press market and (ii) “whether such a prospect of winning constitutes an incentive to purchase capable of bringing about a shift in demand”.<sup>28</sup> The parallels to the partial margin of appreciation are unmistakable. The review outcome, i.e. whether the national regulation is proportionate, is handed down to the national tribunal. The process, i.e. how to determine this question, is, in contrast, set out by the Court.

Conceptually distinct, although often overlapping in practice,<sup>29</sup> is the *tendency* approach. The ECJ lets the referring judge decide on justification or proportionality but gives a *prima facie* assessment of the matter. *Dynamic Medien*, on the German age classification system for videos, draws on this technique.<sup>30</sup> The Court holds that the proportionality of the German law depends on the existence of appropriate procedural safeguards. It leaves the task of examining whether this is the case with the national court, but remarks that “it *appears* from the observations [that the German law] fulfils the conditions” laid down.<sup>31</sup> Again, the final judgment on the proportionality of the Member State act is left with the national judge. Yet, the Court of Justice influences the decision by sharing its gut feeling on the matter.

The Court of Justice can, thus, interact with national courts in five different ways when it comes to judicial review of Member State acts (Table 2). It can choose not to involve the national judge at all, by deciding on the justification and proportionality of the relevant act by itself (centralised

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<sup>27</sup> Case C-368/95, *Familiapress*, ECLI:EU:C:1997:325.

<sup>28</sup> *Ibid.*, paras. 28-29.

<sup>29</sup> See the analysis in Section V. 1.

<sup>30</sup> *Dynamic Medien*, cited *supra* note 6.

<sup>31</sup> *Ibid.*, para 51.

judicial review). Alternatively, it can exercise various degrees of deference by decentralising minimal review responsibilities (tendency), substantial decision-making tasks (guidelines), or giving the referring court complete freedom of judgment (full decentralisation and adoption). Note that these forms of judicial deference are independent of the deference granted through the margin of appreciation. The Court of Justice can defer to national courts without deferring to the national law maker, and *vice versa*. However, where necessary, the two can be combined. The Court may, to come back to the example of food additives, choose to leave the final decision as to which substances damage human health with the national legislature, but require it to be based on a detailed risk assessment reflecting international research, whilst placing the responsibility of supervising whether these conditions are fulfilled with the referring judge.<sup>32</sup>

### III. The Rise of Deference in the ECJ's Jurisprudence

Deference prompts, as the foregoing shows, an important institutional shift: the Court of Justice limits its involvement and entrusts the decision on a given matter to the national legislature or judiciary.<sup>33</sup> Against this background, it is crucial that we know to what extent and under which circumstances the ECJ resorts to this option. How widely the Court defers indicates how much decision-making power national institutions are given in free movement law. Where it defers points us to the place of this freedom. Both issues carry great constitutional and political weight. For a long time, the Court has been criticised for infringing national autonomy, regulatory and judicial. The oft-cited “motor of integration” from a European perspective, its decisions have frequently been perceived as undue limitations of national competences and unwanted obstacles to local interests. In recent years, the pressure seems to have increased. Scholars have argued that it is growingly difficult for Member States to protect their policies against the exigencies of EU law.<sup>34</sup> National politicians have called for the liberation of their legal orders from the yoke of

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<sup>32</sup> Case C-95/01, *Greenham and Abel*, ECLI:EU:C:2004:71. See also Cases C-482/01 & 493/01, *Orfanopoulos*, ECLI:EU:C:2004:262; Case C-575/11, *Nasiopoulos*, ECLI:EU:C:2013:430.

<sup>33</sup> For the effects of law on institutions and of institutions on law see Komesar, *Imperfect Alternatives* (University of Chicago Press, 1994), on whose insights the paper draws.

<sup>34</sup> Barnard, “Derogations, Justifications and The Four Freedoms: Is State Interest Really Protected?” in Barnard and Odudu (Eds), *The Outer Limits of European Union Law* (Hart, 2009), p. 273.

ECJ jurisdiction.<sup>35</sup> Member State courts have revolted against some pronouncements of the Luxembourg Court.<sup>36</sup>

Yet, how intrusive is the Court actually *vis-à-vis* national authorities? And how often does it, in contrast, defer to their legal or regulatory choices? The following sections investigate this matter with the aid of an empirical study of the Court's case-law. The search covers every complete fifth year of free movement jurisprudence from 1974, the year in which the Court first deferred to a Member State institution,<sup>37</sup> until 2013, the last full year available at the time of the research (taken instead of 2014). The sample includes, for the years studied, every judgment turning on the four freedoms and alleged Member State violations thereof. Preliminary references and infringement actions, the two types of proceedings that can feature deference to national authorities, were considered.<sup>38</sup> This yielded a total of 247 decisions, which amounts to approximately one fifth of all free movement cases ever decided.

Let me begin with the margin of appreciation. In the sample, the Court of Justice applies the doctrine in 47 cases (21.76%). Within this group, the full margin of appreciation is the more common option. It is used 29 times, in areas such as road safety,<sup>39</sup> gambling,<sup>40</sup> and pharmacy regulation.<sup>41</sup> A partial margin of appreciation is granted less frequently, on 18 occasions. Most of the latter cases date from the 1990s onwards. Also, their reach is narrower. Although the partial

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<sup>35</sup> In the process leading up to Brexit, the leave campaign referred to the Court as the “rogue European Court of Justice”, while Boris Johnson wrote that “the UK will extricate itself from the EU’s extraordinary and opaque system of legislation: the vast and growing corpus of law enacted (sic!) by a European Court of Justice from which there can be no appeal”. In a similar vein, Theresa May more recently declared that: “Leaving the European Union will mean that our laws will be made in Westminster, Edinburgh, Cardiff and Belfast. And those laws will be interpreted by judges not in Luxembourg, but in courts across this country.”

<sup>36</sup> Czech Constitutional Court, Case Pl. ÚS 5/12 *Landtova*, judgment of 31 January 2012; Danish Supreme Court, Case no. 15/2014 *Dansk Industri (DI) Acting for Ajos A/S vs. The Estate Left by A*, judgment of 6 December 2016; Italian Constitutional Court, *Taricco*, Order 24/2017 of 26 January 2017.

<sup>37</sup> *Van Duyn*, cited *supra* note 15.

<sup>38</sup> In preliminary reference proceedings, the ECJ can defer to national legislative and executive bodies (margin of appreciation) and/or to national courts (decentralised judicial review). In infringement proceedings, it only has the former option as the national judiciary is not involved in the dispute. Consequently, the findings for the margin of appreciation relate to both types of procedures, whereas those for decentralised judicial review are limited to preliminary references only.

<sup>39</sup> Case C-55/93, *Van Schaik*, ECLI:EU:C:1994:363; Case C-110/05, *Commission v. Italy (Italian Trailers)*, ECLI:EU:C:2009:66.

<sup>40</sup> *Schindler*, cited *supra* note 15; Case C-124/97, *Lääri*, ECLI:EU:C:1999:435; Case C-67/98, *Zenatti*, ECLI:EU:C:1999:514.

<sup>41</sup> Cases C-171 & 172/07, *Apothekerkammer des Saarlandes*, ECLI:EU:C:2009:316; Case C-531/06, *Commission v. Italy (Pharmacies)*, ECLI:EU:C:2009:315.

margin of appreciation appears sporadically in decisions on public policy<sup>42</sup> and consumer law,<sup>43</sup> its use is essentially limited to public health.<sup>44</sup>

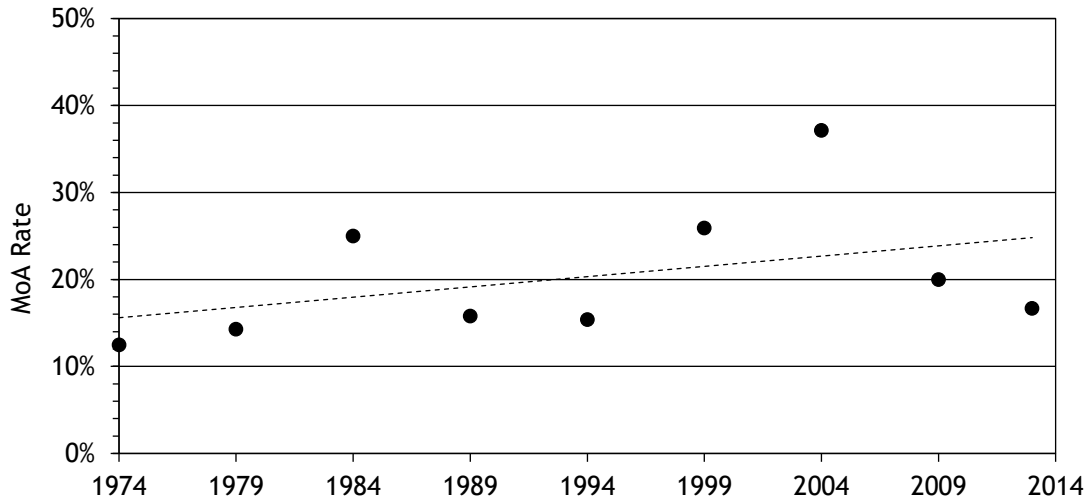


Figure 1 Margin of Appreciation: Time Trend (Infringement Proceedings and Preliminary References)

*Note.* Share of MoA cases in all cases in which the scope of application of at least one free movement right was affirmed.<sup>45</sup> Trend line serves interpretative purposes only and does not make predictive claims about in-between years.

These numbers suggest that the margin of appreciation is a selective, but important element of the Court of Justice’s jurisprudence, appearing in around one out of five judgments. What is more, its significance has grown over time. This, for one thing, is visible in absolute terms. Making only a single appearance in 1974, the doctrine was applied 13 times in 2004. More importantly, it also shows in relative terms (Figure 1). Whereas the 1970s show application rates of less than 15%, subsequent decades testify to a more frequent use, with rates of over 20% in the years 1984, 1999, 2004, and 2009. 2004 marks the highest point with 37.14%, an almost threefold increase compared with 1974.<sup>46</sup>

<sup>42</sup> Case C-348/96, *Calfa*, ECLI:EU:C:1999:6, paras. 22 et seq.

<sup>43</sup> Case C-239/02, *Douwe Egberts*, ECLI:EU:C:2004:445, para 43.

<sup>44</sup> Case 94/83, *Heijn*, ECLI:EU:C:1984:285, paras. 16 and 18; Case C-17/93, *Van der Veldt*, ECLI:EU:C:1994:299, para 17; Case C-112/02, *Kohlpharma*, ECLI:EU:C:2004:208, paras. 14 et seq.

<sup>45</sup> The numbers are limited to judgments in which the scope of application of at least one free movement rights has been affirmed for a simple reason: where the ECJ denies that a dispute falls into the scope of free movement law, it can neither grant Member State authorities a margin of appreciation nor can it decentralise justification and proportionality review (because there is none). It bears mentioning that this scenario is the exception. In the sample, the scope of application is rejected completely only in 12.15% of cases.

<sup>46</sup> 2004 could be viewed an outlier; the same goes for 1994 in the findings on decentralised judicial review. However, in both cases the observed trends do not change even after the respective years are removed.

The results contradict claims according to which the Court of Justice’s scrutiny of Member State laws has become increasingly strict and its enmeshment in national affairs continuously deeper over the years. Although more searching review approaches have not disappeared from free movement adjudication altogether – in fact, they continue to mark an important part of the Court’s activity –, deference is on the rise. When examining the legality of Member State acts, the ECJ opts for lenient forms of control in a growing number of cases. For Member States, protecting their interests has become easier rather than harder.<sup>47</sup>

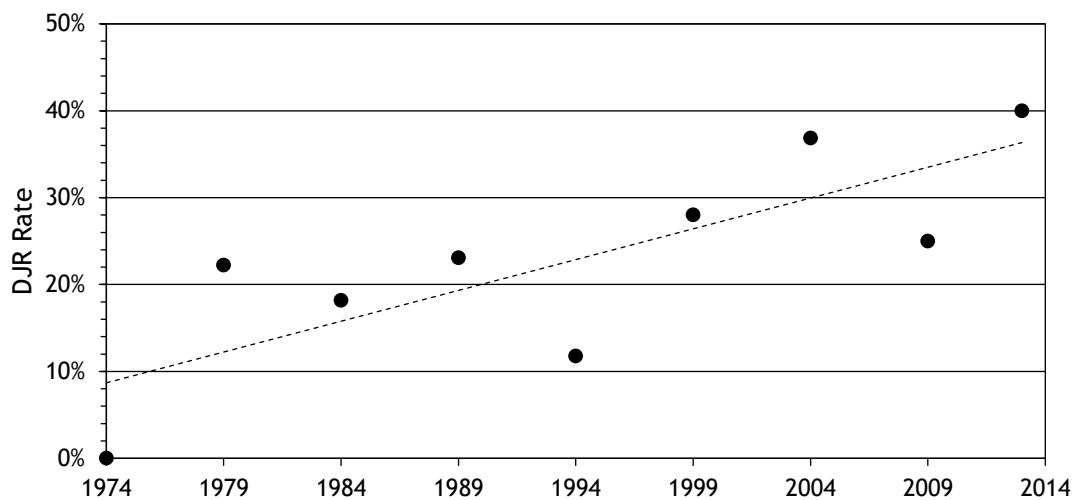


Figure 2 Decentralised Judicial Review: Time Trend (Preliminary References)

*Note:* Share of DJR cases (full decentralisation, tendency, guidelines, or adoption) in all cases in which the scope of application of at least one free movement right was affirmed. Trend line serves interpretative purposes only and does not make predictive claims about in-between years.

The same trend, but even more pronounced, can be observed regarding decentralised judicial review. With the sample limited to preliminary references here – national courts play no role in infringement proceedings –, one finds 42 cases in which the ECJ defers responsibilities from justification and proportionality scrutiny to national courts (by means of any of the four types: full decentralisation, adoption, guidelines, or tendency). This yields an average of 26.88%. Compared with the margin of appreciation, the ratio of complete as opposed to partial deference is mirror-inversed. The ECJ fully decentralises judicial review to the referring judge only 6 times, while passing down review tasks together with guidelines and/or a tendency on 34 occasions. I will come to the implications of this for the separation of functions between the Court and the national judiciary in Section V.

<sup>47</sup> Contrary to Barnard, *op. cit supra* note 34.

Looking at the development over time, we see a fairly constant and steep increase. In 1974, national judges were not asked once to assess or help with assessing the justification or proportionality of Member State acts. In 2013, they were deferred to in two out of five decisions. This means that the Court of Justice disposes of a case, i.e. conclusively decides whether a national measure complies with free movement law, ever less frequently. Whereas in the 1970s, the Court settled almost every question connected with the four freedoms itself, keeping maximum control over what is permitted in the internal market and what is not, it currently does so in only 60% of cases. As for the rest, it is national judges who decide which regulatory behaviour is justified and proportionate.

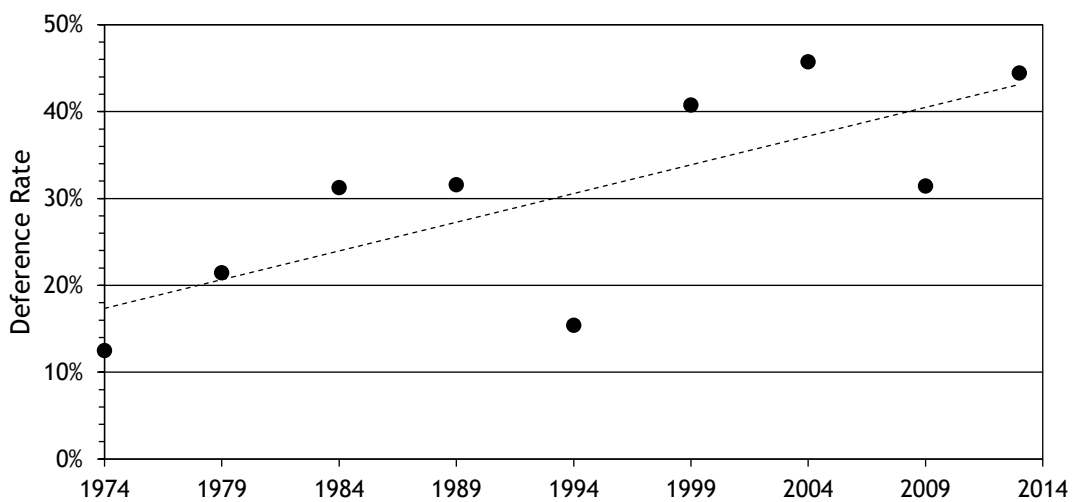


Figure 3 Deference: Time Trend (Infringement Proceedings and Preliminary References)

*Note:* Share of cases in which the ECJ deferred to national institutions – through the MoA and/or DJR – in all cases in which the scope of application of at least one free movement right was affirmed. Trend line serves interpretative purposes only and does not make predictive claims about in-between years.

The true impact of deference, however, only becomes apparent when we combine both figures, i.e. look at the development of decisions in which the Court defers to national legislatures and/or to national courts. We see an astonishing increase over the past four decades (Figure 3). In the mid-1970s, only 12.50% of cases involved some form of deference to national authorities. With the exception of one dip in 1994, this figure continuously rose to 45.71% in 2004. In 2013, it amounted to 44.44%. This, again, does not mean that the ECJ has come to behave deferentially in all of its free movement jurisprudence. However, there has been a clear change in its review behaviour over time. While only one out of eight cases used to be marked by deference 40 years

ago, nowadays almost every other one is. Deferential review, once a marginal phenomenon in the ECJ's free movement case-law, has practically turned into the new standard form of scrutiny.

#### IV. Patterns of Use I: Margin of Appreciation

As important as it is how frequently the Court of Justice defers to Member States authorities is the question as to when it does. The Court has – given its style of reasoning, perhaps unsurprisingly – never laid down a grand theory of the margin of appreciation. There is no judgment that would constitutionally justify the adoption of the doctrine, explain the rationale behind it, or synthesise its rules of use. Nonetheless, the Court has, over the years, rendered a number of decisions that touch on different aspects of the doctrine, making dicta about its legal scope and limits. The result is a long and complex catalogue of factors specifying when Member States are supposed to have a margin of appreciation and when not. These include: the policy field of the dispute; the level of EU harmonisation; the free movement right at play; the existence of regulatory consensus across Europe; the application of fundamental rights; and discrimination.<sup>48</sup>

Empirically, these factors are, of course, mere statements of intent. To what extent they reflect the actual usage of the margin of appreciation is unclear. This section therefore investigates the role of the doctrine in the case-law. Two matters are enquired into. First, it is examined how frequently the ECJ employs the margin of appreciation in cases marked by a particular factor. This is important as many of the statements the Court makes about the doctrine are categorical. Member States are, for instance, *never* meant to receive a margin of appreciation if they discriminate against foreigners. They are, in contrast, *always* supposed to enjoy a margin when a policy area has not been harmonised. Second, it is assessed whether the differences observed are statistically significant. Do the patterns found in the study – say, a lower deference rate for discriminatory than for non-discriminatory national laws – give us reason to believe that the Court is treating certain types of case differently from others in its jurisprudence? Or are the

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<sup>48</sup> The relevant case-law is cited in sections IV.1 to 6. Two factors occasionally referred to by the ECJ will be omitted as they are insufficiently clear or unmeasurable on the basis of its judgments. The former goes for economic activities of a “peculiar nature” and policy interests of “high importance”, which are both meant to prompt a national margin of appreciation; see *Schindler*, cited *supra* note 15, para 59; *Commission v. Italy (Pharmacies)*, cited *supra* note 41, para 55; Case C-320/93, *Ortscheit*, ECLI:EU:C:1994:379. The latter goes for scientific uncertainties which are, likewise, supposed to result in a margin of appreciation, but can typically not be verified based on the Court's judgments; see Case C-150/00, *Commission v. Austria (Food Additives)*, ECLI:EU:C:2004:237, para 86; Case C-41/02, *Commission v. Netherlands (Food Additives)*, ECLI:EU:C:2004:762, paras. 43 and 51.

differences limited to the particular sample? This is determined by means of the Chi-Square test, a basic statistical tool for identifying variation.<sup>49</sup>

## 1. Policy Fields

According to the Court, Member States enjoy a margin of appreciation in two main scenarios. The first one is connected with the policy field of the dispute. Certain regulatory areas are said to automatically bring a margin of appreciation for the Member States.<sup>50</sup> The ECJ's list comprises more than two dozen domains, ranging from public health,<sup>51</sup> to road safety,<sup>52</sup> to specific questions relating to social security,<sup>53</sup> intellectual property,<sup>54</sup> and tax law.<sup>55</sup> This long catalogue suggests two things. First, the margin of appreciation seems to be a doctrine of wide usage, to be found in a large number of areas. Second, one would expect it to be evenly spread throughout these fields, all said to come with a national margin of appreciation.

Against this background, a look at the Court's case-law is surprising (Table 3). The areas in which the usage of the margin of appreciation is noteworthy at all are few. Only five domains show more than a single application of the doctrine: public and animal health (23), games of chance (6), public policy/morality<sup>56</sup> and national security (5), consumer protection, and road safety (each 3). Even within this group, we find a strong concentration on one field: public and animal health.

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<sup>49</sup> For statistical significance, the generally accepted threshold of  $p=.05$  is used. The relevant  $p$  values are indicated in the footnotes to each sub-section. Note that the test does not establish causality.

<sup>50</sup> A claim echoed by the literature, albeit with variations as to which fields matter, see: Craig, *EU Administrative Law*, op. cit. *supra* note 23, p. 631 (who mentions public health); Azoulay, "The European Court of Justice and the Duty to Respect Sensitive National Interests" in Dawson, De Witte and Muir (Eds), *Judicial Activism at the European Court of Justice* (Edward Elgar, 2013), pp. 185 et seq. (public health, gambling, and higher education); De Vries, "Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice", 9 *Utrecht Law Rev.* (2013), 169, at 173-174 (public health, gambling, and consumer protection); De Búrca, "The Principle of Proportionality and Its Application in EC Law", 14 *YEL* (1994), 105, at 133 and 137 (national security, broader public health policies, and health care); Gerards, "Pluralism, Deference and the Margin of Appreciation Doctrine", 17 *ELJ* (2011), 80, at 93-94 (public health, transport, road safety, animal welfare, and public policy).

<sup>51</sup> *Greenham and Abel*, cited *supra* note 32, para 39; *Apothekerkammer des Saarlandes*, cited *supra* note 41, para 19; Case C-169/07, *Hartlauer*, ECLI:EU:C:2009:141, para 30.

<sup>52</sup> Case 50/83, *Commission v. Italy (Roadworthiness Test)*, ECLI:EU:C:1984:128, para 12; *Commission v. Italy (Italian Trailers)*, cited *supra* note 39, para 61.

<sup>53</sup> Case C-8/02, *Leichtle*, ECLI:EU:C:2004:161, para 48.

<sup>54</sup> Case C-9/93, *IHT Internationale Heiztechnik*, ECLI:EU:C:1994:261, para 18.

<sup>55</sup> Case C-307/97, *Saint-Gobain*, ECLI:EU:C:1999:438, paras. 55 and 57.

<sup>56</sup> This category includes cases in which the Member States rely on grounds of public policy or public morality to justify their regulatory measures. See, for instance, *Van Duyn*, cited *supra* note 15; *Henn and Darby*, cited *supra* note 15; *Omega*, cited *supra* note 2.



23 out of 47 margin of appreciation cases fall into this area. This makes almost every other margin of appreciation case a health-related decision.

*Table 3* Margin of Appreciation Across Policy Fields

Policy Field	All Cases	MoA Cases (full/partial)	MoA Rate
Public and Animal Health	40	23 (11/12)	57.50%
Games of Chance	6	6 (6/0)	100.00%
Public Policy/Morality and National Security	10	5 (3/2)	50.00%
Road Safety	5	3 (3/0)	60.00%
Consumer Protection	14	3 (3/0)	21.43%
Liberal Professions/Professional Qualifications	16	1 (0/1)	6.25%
Social Security	22	1 (0/1)	4.55%
Intellectual Property	9	1 (1/0)	11.11%
Tax Law	35	0	0%
Other	59	4 (2/2)	6.78%
Total	216	47 (29/18)	21.76%

*Note:* Figures concern judgments in which the scope of application of at least one free movement right was affirmed.

In addition to this concentration in absolute terms, there are considerable relative differences as to how frequently the doctrine is applied. In four areas, the chances that the Court of Justice will grant a margin of appreciation are very high: public health, games of chance, public policy/morality, and road safety. Here, a margin of appreciation is used in one out of two cases (public policy/morality) or even more (57.50% for public health; 60% for road safety; 100% for games of chance). In others, the doctrine is virtually absent. Only consumer protection shows a noticeable application rate, close to the doctrine's average usage in the whole of free movement (21.43%). The remaining areas, although included in the ECJ's list, are affected either little or not at all (tax law; social security; intellectual property; liberal professions). The variation between

high-margin and low/no-margin fields is so pronounced that it passes the threshold of statistical significance.<sup>57</sup> In other words: the Court reviews different policy fields with different intensity.

The findings suggest that national regulatory autonomy is most constrained in the domains showing little or no usage of the margin of appreciation. It is broadest in the four fields with high deference levels. Note, however, that, even in the latter group, there are differences as to the level of scrutiny. In cases on road safety (3 out of 3) and gambling (6 out of 6), the Court tends to grant national authorities a full margin of appreciation. Member States enjoy the furthest-reaching regulatory freedom in these areas. In contrast, in cases on public health and public morality/policy, it opts for a partial margin of appreciation in around half of the cases (12 out of 23 in public health, 2 out of 5 in public morality/policy). The discretion national legislature have is, as a result, more limited.

## 2. EU Harmonisation

Harmonisation is the second main pillar in the law of the margin of appreciation. According to the Court, the absence of EU harmonisation in a policy field warrants granting Member States deference. This includes cases where no harmonising measures exist at all.<sup>58</sup> Likewise, as some judgments clarify, the lack of “adequate”<sup>59</sup> or “full”<sup>60</sup> harmonisation should have the same effect. Scholarship concurs with this proposition, even if it presents the impact of harmonisation in a more nuanced way. The argument is usually couched in terms of “levels” or “degrees” of harmonisation. A high level of harmonisation is said to render the ECJ’s scrutiny more comprehensive, a low level more deferential.<sup>61</sup>

If we divide up the case-law into individual harmonisation scenarios (Table 4), we find sizeable differences in how often the margin of appreciation is applied. Some have margin of appreciation

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<sup>57</sup>  $p < .001$ .

<sup>58</sup> Case 341/87, *EMI Electrola*, ECLI:EU:C:1989:30, para 11; Case C-293/93, *Houtwipper*, ECLI:EU:C:1994:330, para 22; Case C-317/92, *Commission v. Germany (Expiry Dates)*, ECLI:EU:C:1994:212, para 14; Case C-496/01, *Commission v. France (Bio-Medical Laboratories)*, ECLI:EU:C:2004:137, para 55; Case C-88/07, *Commission v. Spain (Herbal Products)*, ECLI:EU:C:2009:123, para 86.

<sup>59</sup> Case 247/81, *Commission v. Germany (Pharmaceutical Products)*, ECLI:EU:C:1984:79, para 7.

<sup>60</sup> Case 125/88, *Nijman*, ECLI:EU:C:1989:401, para 14; *Commission v. Italy (Italian Trailers)*, cited *supra* note 39, para 61.

<sup>61</sup> De Búrca, *op. cit. supra* note 50, at p. 127; Jans, “Proportionality Revisited”, 27 *Legal Issues of Economic Integration* (2000), 239, at 253 et seq; Lenaerts, “The Court’s Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice” in Adams et al. (Eds), *Judging Europe’s Judges* (Hart, 2013), pp. 29 et seq. and 37 et seq.

rates of over 20%. This concerns cases without any harmonising measure, cases in which EU secondary law is inapplicable or its application to the given area is excluded, as well as those in which the harmonising measure governs just parts of the dispute. Other scenarios show no usage of the margin of appreciation at all (cases in which EU measures are used to interpret the free movement right and disputes in completely harmonised areas<sup>62</sup>) or to a very limited extent (harmonising measure is applied alongside a free movement right).

Table 4 Margin of Appreciation and EU Harmonisation (Broken Down by Types of Harmonisation)

Level of Harmonisation	Type of Harmonisation	All Cases	MoA Cases	MoA Rate
No Harmonisation	Absence of Harmonising Measure	71	20	28.17%
	Harmonising Measure Exists but is Inapplicable	33	8	24.24%
	Harmonising Measure Exists but Application is Expressly Excluded	11	3	27.27%
Medium Harmonisation	Minimum Harmonisation	5	1	20.00%
	Partial Harmonisation	79	16	20.25%
Dense Harmonisation	Harmonising Measure is Interpreted in Light of Free Movement Right	8	0	0%
	Harmonising Measure is Applied in Parallel to Free Movement Right	26	2	7.69%
	Complete Harmonisation	3	0	0%

When we regroup these scenarios into three broader levels of harmonisation, we find differences of similar magnitude. Cases not governed by secondary law at all show the highest margin of appreciation rate of 26.96% (*no harmonisation*). They are followed by those marked by what one could call *medium harmonisation* (20.23%): secondary law governs the dispute to some extent, by determining certain, but not all aspects of it (partial harmonisation) or setting the baseline for national regulatory behaviour (minimum harmonisation). In disputes displaying *dense harmonisation* (the harmonising measure applies in parallel to free movement rights, a free

<sup>62</sup> Although, in theory, disputes in policy fields that were fully harmonised are meant to be entirely governed by EU secondary law, the ECJ in some cases examines whether Member State acts comply with free movement rights despite the existence of complete harmonisation; see Case C-249/92, *Commission v Italy (Plant Protection)*, ECLI:EU:C:1994:335, paras. 27-28 and Case C-165/08, *Commission v Poland (Genetically Modified Organisms)*, ECLI:EU:C:2009:473.

movement right is merely used to interpret the EU act, or the field has been completely harmonised), only 5.41% of judgments make use of the margin of appreciation.

Two conclusions are warranted. First, the way in which the Court of Justice depicts the effects of harmonisation on the margin of appreciation is overstated. The doctrine is applied in 28.17% of disputes without any harmonising measure and in 24.24% resp. 27.27% of cases in which one exists but is inapplicable or its application is excluded. To be sure, this means that the margin of appreciation appears more often in these scenarios than on average. That Member States enjoy a margin of appreciation whenever there is no EU harmonisation is, however, far from the truth. The Court does not defer to national authorities in three out of four cases without harmonisation. The ratio deteriorates if one limits the focus to cases without complete harmonisation. Almost four out of five decisions do not apply the margin of appreciation here (183 out of 233 cases, or 78.54%).

Yet, it would be wrong to conclude from this that harmonisation does not matter for the margin of appreciation – it does. The differences between the three levels of harmonisation are big enough to rebut the presumption that the distribution found in the sample is the result of chance.<sup>63</sup> The survey, to put it differently, justifies the conclusion that the Court defers to national authorities depending on the level of harmonisation at play.

### 3. Free Movement Rights

Factors other than the policy field of the dispute and the level of harmonisation are mentioned less often in the Court's margin of appreciation case-law, but are no less important. This includes the type of free movement right under scrutiny. The Court of Justice states that some free movement rights, and the policy aims relied on to restrict them, bring about a margin of appreciation for the Member States. It has explicitly accepted this for three freedoms: the free movement of goods,<sup>64</sup> capital,<sup>65</sup> and the right to establishment.<sup>66</sup>

Looking at the case-law, one finds considerable variation in the use of the margin of appreciation across the four freedoms (Table 5). The free movement of workers and capital are at the bottom

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<sup>63</sup>  $p=.02$ .

<sup>64</sup> Case C-394/97, *Heinonen*, ECLI:EU:C:1999:308, para 36.

<sup>65</sup> Case C-326/07, *Commission v. Italy (Golden Shares)*, ECLI:EU:C:2009:193, paras. 41-42.

<sup>66</sup> Case C-299/02, *Commission v. Netherlands (Ship Flagging)*, ECLI:EU:C:2004:620, para 18.

of the scale, with single-digit rates of 9.30% and 8.70%. The right to establishment displays a slightly higher usage (14.81%), while the free movement of services comes close to the average for the whole sample (24.56%). The free movement of goods ranks at the top. Almost one third of cases turning on Article 34 TFEU apply the doctrine. This makes it around four times more likely for the margin of appreciation to be used in a case on the free movement of goods than in a case on the free movement of capital or workers. One may find this result surprising. Traditionally, the Court's case-law on Articles 34 and 36 TFEU is thought of as the area of its boldest activism. Yet, it is here that the European judges are most willing to defer to national authorities.

*Table 5* Margin of Appreciation in Individual Free Movement Rights

Free Movement Right	All Cases	MoA Cases	MoA Rate
Goods	79	26	32.91%
Workers	43	4	9.30%
Establishment	54	8	14.81%
Services	57	14	24.56%
Capital	23	2	8.70%

*Note.* Figures concern judgments in which the scope of application of the free movement right was affirmed. Cases turning on more than one free movement right were counted multiple times, i.e. once for each of the free movement rights involved.

The findings go against the ECJ's predictions: not all cases on the free movement of goods, capital, and right to establishment feature a national margin of appreciation. In fact, these freedoms are not even the ones which are most affected by the doctrine. The free movement of capital and the right to establishment show very low application rates, way beneath the overall baseline of 21.76%. Nonetheless, the figures are revealing. They suggest that there are important differences between free movement rights when it comes to standards of review. These differences are, in fact, so great that the question as to whether the Court will apply the margin of appreciation significantly varies depending on the freedom a case turns on.<sup>67</sup>

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<sup>67</sup>  $p < .001$ .

#### 4. Consensus

What will immediately strike those acquainted with the jurisprudence of the ECtHR is how little the ECJ refers to consensus in relation to the margin of appreciation. For the Strasbourg Court, consensus is one of the prime factors influencing the application of the doctrine. If a subject-matter is marked by the lack of a common European approach, the ECtHR is willing to accord the Contracting States a wide(r) margin of appreciation.<sup>68</sup> In the jurisprudence of the Court of Justice, a direct link between the two is only expressed in the case-law on games of chance. And even there, it is nebulous. On the one hand, the Court holds the “general tendency” in Europe to restrict games of chance to justify a national margin of appreciation.<sup>69</sup> On the other, it holds “moral, cultural and religious differences” between Member States to have the same effect.<sup>70</sup>

In the sample, one finds 10 cases on regulatory matters on which there is consensus among the Member States (Table 6). Among these, four make use of the margin of appreciation (40%).<sup>71</sup> Looking at all instances of consensus would, however, be too crude. Consensus can affect Member States in two very different ways: the majoritarian trend can be in line with the national position (*pro-Member-State consensus*) or run against the solution adopted internally (*anti-Member-State consensus*). Four cases are of the former kind – the Member State’s laws correspond to the general tendency across Europe. In this group, the margin of appreciation appears in every judgment. Within the six cases involving anti-Member-State consensus, one finds the doctrine not once. When we turn to the lack of consensus, the number of observations grows slightly. 28 cases show regulatory discrepancies among Member States. In 14 of these cases, the Court of Justice grants the national authorities a margin of appreciation. That is, again, a rate far above the average (50%).

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<sup>68</sup> ECtHR, *Goodwin v. United Kingdom*, App no. 28957/95, judgment of 11 July 2002, paras. 84-85; *Dickson v. United Kingdom*, App no. 44362/04, judgment of 5 December 2007, para 78; *Lautsi v. Italy*, App nos. 30814/06 e.a., judgment of 18 March 2011, para 70.

<sup>69</sup> *Schindler*, cited *supra* note 15, paras. 60 et seq.

<sup>70</sup> *Ibid.*; Case C-42/07, *Liga Portuguesa*, ECLI:EU:C:2009:519, para 57. A similar, if less direct connection can be found in cases in which the Court states that the mere existence of “different systems of protection” among the Member States does not automatically render a national measure disproportionate; see *Omega Spielhallen*, cited *supra* note 2, para 38; Cases C-186/11 & 209/11, *Stanleybet International*, ECLI:EU:C:2013:33, para 28; *Nasiopoulos*, cited *supra* note 32, para 27.

<sup>71</sup> This suggests that the common claim that consensus among the Member States rules out a national margin of appreciation is incorrect; see Petkova, “The Notion of Consensus as a Route to Democratic Adjudication?”, 14 CYELS (2011-2012), 663, at 684 et seq.; Gerards, op. cit. *supra* note 50, at 94; De Búrca, op. cit. *supra* note 50, at 127.

Table 6 Margin of Appreciation and Consensus

		All Cases	MoA Cases	MoA Rate
Consensus	pro Member State	4	4	100%
	anti Member State	6	0	0%
	overall	10	4	40%
No Consensus		28	14	50%

*Note:* Based on the information available in the judgments, it was only possible to establish for 38 cases if there was a Europe-wide regulatory trend on the subject-matter under review.

A statistical analysis of these figures suggests that there is no meaningful difference in the way in which the Court treats disputes marked by consensus and those marked by diversity.<sup>72</sup> Yet, one may feel puzzled by the findings. The data show that the Court is more likely to apply margin of appreciation where there is a majoritarian trend among Member States (at least as long as the national law corresponds to this trend), whilst equally being more willing to apply the doctrine where divergences exist. As much as both observations make sense on their own, they are paradoxical if read together. Consensus is a binary phenomenon: either there is one or there is not. This means that it is impossible that both its existence and its lack increase the probability of the margin of appreciation being applied. One can only speculate about the reasons for the outcome. It is safe to assume that in the vast majority of free movement cases there will be regulatory differences in the EU. Despite that, the Court only addresses this issue in selected judgments, in which it considers the lack of agreement relevant (and has knowledge of them in the first place). This could mean that the data do not reflect the real number of cases in areas marked by regulatory diversity and that the respective margin of appreciation rate is actually lower.

## 5. Fundamental Rights

In *Schmidberger*, the Court of Justice famously declared that Member States enjoy a “wide margin of discretion” to balance fundamental rights with free movement concerns,<sup>73</sup> a principle reiterated elsewhere.<sup>74</sup> How the Court handles fundamental rights questions is, of course, an issue

<sup>72</sup> p=.92.

<sup>73</sup> *Schmidberger*, cited *supra* note 1, para 82.

<sup>74</sup> Case C-71/02, *Karner*, ECLI:EU:C:2004:181, para 51. Some read *Omega Spielballen* in this way, too; see Vries, *op. cit. supra* note 50.

of broader constitutional significance. In the literature, there is an optimistic and a less optimistic view on this. Some scholars believe fundamental rights are a central concern of EU law. They claim that the Court watches carefully over possible violations and subjects Member State acts to strict scrutiny.<sup>75</sup> Others are more critical of the Court's record. They argue that the European judges do too little rather than too much.<sup>76</sup>

Analysing the sample, a first curious finding is how rarely fundamental rights actually appear in the Court's case-law. Only 9 out of 247 judgments mention fundamental rights in any form – the ECHR, the EU Charter of Fundamental Rights, or general principles –, a meagre 3.64%. Although the focus of the study is on free movement, this number is still remarkably low. Implementation of secondary law aside, restrictions on the four freedoms are considered to be a key area in which EU fundamental rights apply to Member State action.<sup>77</sup> In spite of this, they are, numerically speaking, an almost negligible phenomenon in free movement jurisprudence.

In two out of these nine cases, the Court denies an examination of the fundamental rights problem straightaway.<sup>78</sup> In seven judgments, fundamental rights form part of the merits. Within this group, the Court applies the margin of appreciation in three cases and, additionally, decentralises review tasks to the referring judge in two of them. Consequently, we find only four cases in which the Court does not directly refuse to examine the alleged fundamental rights violation or defers the issue to national authorities. Yet, even here, the fundamental rights scrutiny is mostly monosyllabic. In *Commission v Germany (Housing Conditions)*, the Court just states that Regulation 1612/68 must be “interpreted in light of” the respect for family life;<sup>79</sup> the right is not mentioned again in the remainder of the judgment. In *TV10* (freedom of expression) and *Las* (linguistic diversity), fundamental rights are only cited to affirm the legitimacy of the national policy aim. Beyond that, they are irrelevant for the decision. Hence, only one case – that is, one out of 247 – displays what one would think of as a normal fundamental rights inquiry: one which

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<sup>75</sup> Harbo, “The Function of the Proportionality Principle in EU Law”, 16 ELJ (2010), 158, at 173 et seq.; Gerards, op. cit. *supra* note 50, at 100; De Búrca, op. cit. *supra* note 50, at 146.

<sup>76</sup> Kumm, “Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm” in Maduro and Azoulay (Eds), *The Past and Future of EU Law* (Hart, 2010), p. 117; Coppel and O'Neill, “The European Court of Justice: Taking Rights Seriously?”, 29 CML Rev. (1992), 669.

<sup>77</sup> Case C-260/89, *Elliniki Radiophonia Tileorassi (ERT)*, ECLI:EU:C:1991:254, para 42.

<sup>78</sup> Case C-523/12, *Dirextra Alta Formazione*, ECLI:EU:C:2013:831, para 19 (insufficient information to decide); Case C-233/12, *Gardella*, ECLI:EU:C:2013:449, para 39 (fundamental rights scrutiny obsolete due to Art. 45 TFEU).

<sup>79</sup> Case 249/86, *Commission v. Germany (Housing Conditions)*, ECLI:EU:C:1989:204, para 10.



spans more than one sentence, has an actual bearing on the legality of the Member State act, and is fully exercised by the Court of Justice.<sup>80</sup>

Hence, there is little to suggest that fundamental rights are a concern which is particularly dear to the Court of Justice, at least in free movement law. Not only are they addressed extremely rarely, the Court does not show great zeal in protecting them “personally”. When fundamental rights issues come up, the European judges are likely to either not engage in an in-depth analysis or to defer to the relevant Member State. Although the numbers are too small to apply the statistical tools employed in relation to other factors, three out of seven cases with fundamental rights in the merits apply the margin of appreciation (42.86%), almost double the frequency with which the doctrine is used on average. The *Schmidberger* prognosis, as some will lament, seems to hold true. Fundamental rights do not render judicial review stricter. In fact, they seem to make it more lenient.

## 6. Discrimination

The ECJ is very concise on when national authorities are *not* meant to have a margin of appreciation. The most important factor is discrimination.<sup>81</sup> According to the European judges, Member States enjoy no discretion if they adopt measures discriminating against non-nationals.<sup>82</sup> Scholars affirm this link but speak, in this context, more generally of measures that constitute “serious restrictions” on free movement<sup>83</sup> or those which have a “severe impact” on EU interests.<sup>84</sup>

According to a distinction common in free movement case-law and scholarship, national measures can display three degrees of discrimination: direct (also called “in law”), indirect (“in fact”), or none. If one looks at the usage of the margin of appreciation across these categories, one sees, first of all, that the doctrine appears in relation to all types (Table 7). Importantly, this includes discriminatory measures. The Court applies the doctrine in scenarios in which non-

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<sup>80</sup> Case C-418/11, *Texdata Software*, ECLI:EU:C:2013:588.

<sup>81</sup> According to the ECJ, another factor which is meant to preclude a national margin of appreciation is Member States violating the principle of proportionality; see *Heinonen*, cited *supra* note 64, para 36; *Kohlpharma*, cited *supra* note 44, para 14; Case C-262/02, *Commission v. France (Loi Evin)*, ECLI:EU:C:2004:431, para 24. However, as explained earlier, the idea of the Member State’s margin of appreciation being only determined after proportionality analysis is applied does not align with the actual use of the doctrine by the European judges. The margin of appreciation leads to a lowering of the intensity with which proportionality scrutiny is exercised.

<sup>82</sup> *Schindler*, cited *supra* note 15, para 61; *Lääriä*, cited *supra* note 40, para 14; *Zenatti*, cited *supra* note 40, para 15.

<sup>83</sup> Gerards, *op. cit. supra* note 50, at 92.

<sup>84</sup> De Búrca, *op. cit. supra* note 50, at 126.

nationals are treated worse than nationals, sometimes even where they are directly discriminated against. Given the Court’s insistence on discrimination as the doctrine’s non-negotiable boundary, this is no minor surprise. The oft-repeated mantra that Member States forsake their margin of appreciation if they discriminate does not reflect adjudicative practice. A good fifth of all margin of appreciation cases concerns directly or indirectly discriminatory national laws. This, perhaps ironically, includes the very first margin of appreciation case, *Van Duyn*.<sup>85</sup>

Table 7 Margin of Appreciation and Discrimination

Degree of Discrimination	All Cases	MoA Cases	MoA Rate
No Discrimination	97	38	39.18%
Indirect Discrimination	82	6	7.31%
Direct Discrimination	34	3	8.82%

*Note.* Figures concern judgments in which the scope of application of at least one free movement right was affirmed. Cases involving different types of discrimination were counted multiple times.

Despite that, it would be wrong to conclude that discrimination does not influence the Court’s scrutiny of Member State acts. There are important differences between the categories as to the frequency with which the margin of appreciation is applied. Cases without discrimination show the highest margin of appreciation rate, of over 39%, whereas cases with discrimination have rates in the single digits (indirect: 7.31%; direct: 8.82%). The correlation between degree of discrimination and deference may not be perfect; direct discrimination shows a slightly higher figure than indirect discrimination. There is, however, an enormous gap between acts which discriminate, directly or indirectly, and those that do not. The likelihood for national authorities to be granted a margin of appreciation is five times higher for the former than for the latter. Whether the Court will defer to a Member State or not varies, with high statistical significance, depending on whether the latter acts in a discriminatory fashion.<sup>86</sup>

<sup>85</sup> *Van Duyn*, cited *supra* note 15.

<sup>86</sup>  $p < .001$ . It is interesting to compare these figures with those on how the Court of Justice treats restrictions on economic freedom. In recent years, some scholars have argued that free movement law has evolved beyond its traditional focus on anti-discrimination and now aims to protect non-nationals from all regulatory obstacles; see Spaventa, “From Gebhard to Carpenter – Toward a (Non-)Economic European Constitution”, 41 CML Rev. (2004), 743. One would expect this shift to be reflected in the Court’s margin of appreciation jurisprudence. In reality, however, the case-law shows the highest deference rate, of 35.48%, for national measures most seriously restricting economic freedom (prohibitions, expulsions, import bans) and lower ones for medium (authorisation requirements, licence systems, residence requirements) and light restrictions (laws only regulating exercise of economic activity), of 16.15% and 12.50% respectively. This lends empirical support to the normative argument put forward in Maduro, *We the Court* (Hart, 1998), pp. 150 et seq.

## V. Patterns of Use II: Decentralised Judicial Review

Delineating judicial competences is a problem in all jurisdictions with a multi-level structure: which tasks should the high court(s) fulfil, which ones should be dealt with by lower courts?<sup>87</sup> Despite its differences with traditional state legal orders, this question poses itself in essentially the same way in the EU: what is the separation of functions between the European and the national judiciary? Which matters should be decided by the ECJ, which ones by national courts?

For its part, the Court of Justice has always thought the answer to be “clear”.<sup>88</sup> For a long time, it has divided responsibilities between EU and Member State courts based on two distinctions only: law/fact and interpretation/application. Whereas interpreting the law is the task of the Court of Justice, applying it to the facts of the case is for the national judge.<sup>89</sup> Recently, this picture has become a little more complex. Sporadically, the Court has started to refer to two further factors which are meant to influence the division of labour between EU and Member State judiciary. The ECJ seems to be willing to hand review tasks over to national courts if it does not have sufficient information to decide a given problem<sup>90</sup> or when the referring judge is in a better position to assess the factual and legal circumstances of the dispute.<sup>91</sup> At the same time, it has stated that it would go beyond interpreting the law where additional guidance was “necessary”.<sup>92</sup>

Scholars have long suspected that this official portrait does not align with adjudicative reality.<sup>93</sup> They have pointed out occasions on which the Court overstepped the boundary of interpretation

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<sup>87</sup> See Allen and Pardo, “The Myth of the Law-Fact Distinction”, 97 *Northwestern Univ. Law Rev.* (2003), 1769; Monaghan, “Constitutional Fact Review”, 85 *Columbia Law Rev.* (1985), 229; Thornburg, “Law, Facts, and Power”, 114 *Penn State Law Rev.* (2009), 1; Starck, “Verfassungsgerichtsbarkeit und Fachgerichte”, 51 *JZ* (1996), 1033.

<sup>88</sup> Case 6/64, *Costa v E.N.E.L.*, ECLI:EU:C:1964:66: “Article 177 is based upon a *clear separation of functions* between national courts and the Court of Justice”. See also Case C-341/05, *Laval*, ECLI:EU:C:2007:809, para 45; *Liga Portuguesa*, cited *supra* note 70, para 37; Cases C-316/07 et al., *Markus Stoß*, ECLI:EU:C:2010:504, para 46.

<sup>89</sup> Case 26/62, *Van Gend & Loos*, ECLI:EU:C:1963:1. Art. 19(1) TEU speaks about the ECJ’s responsibility to ensure that “*the law is observed*” and Art. 267 TFEU states that “[t]he Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning... *the interpretation of the Treaties*”.

<sup>90</sup> Case C-441/04, *A-Punkt Schmuckhandels*, ECLI:EU:C:2006:141, para 25.

<sup>91</sup> Case C-405/98, *Gourmet International*, ECLI:EU:C:2001:135, para 33. In a similar vein, see already Case C-9/93, *IHT Internationale Heiztechnik*, ECLI:EU:C:1994:261, para 20.

<sup>92</sup> Case C-142/05, *Mickelsson and Roos*, ECLI:EU:C:2009:336, paras. 40-41; Case C-539/11, *Ottica New Line*, ECLI:EU:C:2013:591, para 49.

<sup>93</sup> Mancini, *Democracy and Constitutionalism in the European Union: Collected Essays* (Hart, 2000), p. 42; Rasmussen, *On Law and Policy in the European Court of Justice* (Nijhoff, 1986), p. 447; Micklitz, *The Politics of Judicial Co-Operation in the EU* (CUP 2004) Craig, *op. cit. supra* note 23, p. 637; Cohen, “The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments – A Study in Comparative Judicial Federalism”, 44 *AJCL*

and engaged in factual assessments, thereby usurping the review powers meant to reside with the national judiciary. To what extent such transgressions occur is the object of varying estimates. More conservative authors claim that the Court does “not always” respect the legally intended separation of functions,<sup>94</sup> others hold this to be the case “often”,<sup>95</sup> yet others suggest that “more than two thirds” of its decisions may be affected.<sup>96</sup> Despite the popularity of such claims in the literature, the supporting evidence is mostly anecdotal.<sup>97</sup> As a result, it remains unclear to what extent the European judges abide with their assigned role. This is a matter we shall turn to now.

## 1. Interpretation/Application

The purpose of the interpretation/application-distinction is to limit the competences of courts. This limitation works in two directions. On the one hand, the applying court is not supposed to meddle with the interpretation of the law. On the other, the interpreting court is not supposed to encroach upon its application. (The former has rarely, if ever, been perceived to constitute a danger in EU law; the latter has been a longstanding source of concern.<sup>98</sup>) For the Court of Justice, this second limb includes an important commitment: when it comes to judicial review, it must leave national courts *some* role to play.

How wide the national courts’ role should be crucially depends on how broadly one defines the task of interpreting. On a narrow reading, interpretation can be understood as being strictly limited to statements about the meaning of law, i.e. the rules, principles, and precedents applying to the case. Any assessment of the factual aspects of a dispute would, then, be prohibited. For proportionality analysis, this would mean that the ECJ would have to restrict itself to declaring that “the Member State act must be proportionate” and hand the decision over to the referring judge. On a broader account, interpretation can go further and include some factual aspects. The ECJ could tailor its interpretation of the relevant EU rules to the particular setting by saying: “Free movement law requires the Member State act to be proportionate. Whether this is the case is for you to decide, national court, but please take into account that event A has occurred, factual question B is relevant, concern C must be taken into consideration, etc.” Such behaviour

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(1996), 421, at 430; Davies, “Activism Relocated – The Self-Restraint of the European Court of Justice in Its National Context”, 18 EJPP (2011), 76, at 79.

<sup>94</sup> Craig, *op. cit. supra* note 23, p. 637.

<sup>95</sup> Davies, *op. cit. supra* note 10, p. 216.

<sup>96</sup> Rasmussen, “Remedying the Crumbling EC Judicial System”, 37 CML Rev. (2000), 1071.

<sup>97</sup> One notable exception is Barnard, *op. cit. supra* note 34, pp. 295-298. The sample studied, however, is too small to yield robust findings.

<sup>98</sup> See Mancini, “The Making of a Constitution for Europe”, 26 CML Rev. (1989), 595, at 604 et seq.

amounts to interpretation in the wider sense, but only so long as the ECJ does not fully apply the law. There is agreement in the literature that this point is reached when the Court conclusively decides whether a Member State act is justified or proportionate, without involving the referring judge in the review process at all.<sup>99</sup>

To what extent does the Court just interpret, to what extent does it apply EU law? Section III. showed that national courts are deferred to in 26.88% of cases. It was explained that this figure has significantly grown over the years, leading to a considerable increase in decision-making powers for the national judiciary. Taking into account the limited role national courts played in the early days of EU law, this number is remarkably high. Nonetheless, it should not detract from the fact that decentralised judicial review still remains the exception, not the rule. That the Court defers to national courts in 43 out of 160 preliminary references means that it does not do so in almost three out of four decisions. In 117 cases (73.13%), it either conclusively decides whether the Member State act under review is justified and proportionate or dispenses with an examination altogether.<sup>100</sup> Even in 2013, the year with the highest deference rate, of 40%, decentralised judicial review was less frequent than centralised judicial review.

Where the Court chooses to defer to national judges, the guidelines approach is its clear favourite (Table 8). It is used on 30 occasions. The number rises to 34 if we add the cases in which guidelines are combined with other forms of decentralised judicial review. The guidelines laid down by the Court strongly vary as to their level of detail. Some are relatively short and general like in *Orfanopoulos*, where the Court asks the referring judge just to check whether the public administration struck a fair balance between public policy and the right to family life.<sup>101</sup> Others are dense and specific, such as in *Ottica New Line*, where the European judges spell out a detailed list of points the referring court must tackle to decide whether the local authorisation requirements for opticians' shops are proportionate.<sup>102</sup> Other approaches are much less prominent. In 4 judgments, the Court provides a *prima facie* assessment for the national court

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<sup>99</sup> Craig, op. cit. *supra* note 23, p. 637; Davies, op. cit. *supra* note 10, p. 216; Barnard, op. cit. *supra* note 34, pp. 295-296; Cohen, op. cit. *supra* note 93, at 430-431.

<sup>100</sup> For national courts, the latter option – the Court of Justice dispenses with justification and proportionality review, and finds a violation of EU free movement or a lack thereof – has the same effect: the Court conclusively determines the legality of the Member State act, leaving the national judge without any review responsibility.

<sup>101</sup> *Orfanopoulos*, cited *supra* note 32, para 95.

<sup>102</sup> *Ottica New Line*, cited *supra* note 92, paras. 50-56.

(*tendency*); in all of them it appears together with guidelines.<sup>103</sup> The *adoption* approach is almost as rare. It is applied on 5 occasions.<sup>104</sup> Finally, in 6 cases the Court of Justice hands justification and proportionality review over to the national judge *tout court*, without influencing or restricting the latter's judgment in any way (*full decentralisation*).<sup>105</sup>

Table 8 Types of Decentralised Judicial Review in the ECJ's Case-Law

Type of DJR	Cases	Remarks
w/ Guidelines	30	in 4 cases combined with other techniques (see below)
w/ Tendency	4	in 3 cases combined with guidelines; in 1 case with guidelines and adoption
Adoption	5	in 1 case combined with guidelines; in 1 case with guidelines and tendency
Full	6	
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None	117	

*Note:* Figures concern judgments in which the scope of application of at least one free movement right was affirmed. Cases involving different types of decentralised judicial review were counted multiple times.

The results cast doubt on the practical relevance of the interpretation/application-distinction. Although, as was explained, interpretation can, if understood broadly, encompass a wide range of review behaviour, one scenario can be clearly excluded: the ECJ conclusively deciding whether a Member State act is justified and proportionate. Judicial review of this sort amounts to application and should therefore, in theory, not exist. In this light, the above findings are astonishing. They indicate that, in three-quarters of its judgments, the Court not only interprets but also fully applies the free movement rules by settling the question of justification and proportionality itself. Application, a task supposed to be strictly reserved for the national judiciary, is to a large extent performed by the Court of Justice. The deviation becomes even larger if we opt for a narrow understanding of interpretation. That the ECJ grant the referring court full discretion, without restricting or guiding the latter's judgment in any way, only happens in 3.75% of cases. This, of course, is greatly at odds with a reading of interpretation whereby the

<sup>103</sup> Case C-350/07, *Kattner Stahlbau*, ECLI:EU:C:2009:127; Case C-212/11, *Jyske Bank Gibraltar*, cited *supra* note 22, para 83; *Stanleybet International*, cited *supra* note 70, para 35.

<sup>104</sup> Case C-255/97, *Pfeiffer*, ECLI:EU:C:1999:240, para 23; *Arblade*, ECLI:EU:C:1999:575, paras. 49 and 66; *Omega Spielhallen*, cited *supra* note 2, paras. 16 and 39; Case C-159/12, *Venturini*, ECLI:EU:C:2013:791, para 40.

<sup>105</sup> Case C-60/03, *Wolff and Müller*, ECLI:EU:C:2004:610, para 44; Case C-132/08, *Lidl Magyarországon*, ECLI:EU:C:2009:281, para 45; Case C-127/11, *Van den Booren*, ECLI:EU:C:2013:140, paras. 45-46; *Libert*, cited *supra* note 24, paras. 67-68; Case C-589/10, *Wencel*, ECLI:EU:C:2013:303, paras. 70-71; Cases C-105 to 107/12, *Essent*, ECLI:EU:C:2013:677, para 67.

Court must refrain from making any factual assessment and limit itself to stating that the national measure must be proportionate. Instances of such pure interpretation are the absolute exception.

## 2. Law/Fact

The second principle meant to guide the separation of judicial competences is that “questions of law” – meaning questions of EU law – are for the ECJ, while “questions of fact” are for the national judiciary. Drawing the line between law and fact can be challenging *in casu*. Courts typically apply the law to concrete facts and examine facts in the light of particular laws. However, at a basic level, the difference between the two can be made sense of as a difference as to which type of information is required to decide. Questions of law are based on legal information. They involve evidence such as constitutions, laws, customs, and precedents.<sup>106</sup> Questions of fact require information from outside the legal universe: findings about “who, when, what, and where”.<sup>107</sup> In the free movement context, this comprises the task of identifying the policy aims pursued by the Member State legislature,<sup>108</sup> assessing the effects of national regulation,<sup>109</sup> and, most importantly, exercising proportionality analysis.<sup>110</sup>

Does the term fact-finding adequately describe the role of national courts? Let me begin with an unsurprising observation. When the Court of Justice defers to national courts, the assessments deferred are partly of a factual nature, indeed. Some concern findings relating to the law and practice in the referring court’s Member State, such as questions as to the exact content of the national rules under scrutiny<sup>111</sup> or the behaviour of national authorities charged with implementing them.<sup>112</sup> Others regard findings as to the law and practice in other Member States. Here, the referring court is, for instance, asked to examine whether the safeguards adopted abroad to protect a certain policy interest are equivalent to the ones adopted internally<sup>113</sup> or whether the professional qualifications acquired in other Member States are comparable to those acquired in the national education system.<sup>114</sup> Yet others involve what one could, in line with

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<sup>106</sup> Allen and Pardo, op. cit. *supra* 87, at p. 1793.

<sup>107</sup> Casey, Camara and Wright, “Standards of Appellate Review in the Federal Circuit: Substance and Semantics”, 11 Federal Circuit Bar Journal (2002); Allen and Pardo, op. cit. *supra* 87, at 1778.

<sup>108</sup> *Stanleybet International*, cited *supra* note 70, para 26.

<sup>109</sup> *Torfaen Borough Council*, ECLI:EU:C:1989:593, para 16.

<sup>110</sup> *Ibid.*; Case C-169/91, *Stoke-on-Trent*, ECLI:EU:C:1992:519, para 12.

<sup>111</sup> Case C-33/97, *Colim*, ECLI:EU:C:1999:274, para 42; *Wolff and Müller*, cited *supra* note 105, para 38.

<sup>112</sup> *Greenham and Abel*, cited *supra* note 32, para 49; *Mickelsson and Roos*, cited *supra* note 92, para 40.

<sup>113</sup> Cases 110 and 111/78, *Van Wesemael*, ECLI:EU:C:1979:8, para 39; Case 25/88, *Wurmser*, ECLI:EU:C:1989:187, paras. 18-19; *Houtwipper*, cited *supra* note 58, paras. 15-16 and 23.

<sup>114</sup> *Nasiopoulos*, cited *supra* note 32, paras. 33 and 35.

Hjalte Rasmussen,<sup>115</sup> call “socio-economic findings”: judgments on which regulatory solutions are effective in the national setting,<sup>116</sup> how local consumers behave,<sup>117</sup> and which financial or other risks arise from a particular regulatory choice.<sup>118</sup>

The activity of national judges does not stop at fact-finding, though. When the Court of Justice defers to Member State courts, it often lets them decide on non-factual matters as well. In some cases, this happens relatively openly, for instance when the Court hands down the balancing test to the referring court.<sup>119</sup> Other times, it occurs in a somewhat disguised manner, with the Court delegating review tasks which it presents as factual but which are normative in substance. *Collins*, where the ECJ left the national court to decide whether a “genuine link” existed between a person and a Member State that justified the granting of social allowances, illustrates this.<sup>120</sup> Finally, the Court sometimes decentralises mixed factual-normative judgments. The novel requirement whereby Member States must pursue a policy aim in a “consistent and systematic manner”, often used in cases on games of chance, is one example.<sup>121</sup>

A separate note is warranted on proportionality, the undoubtedly most important question of fact in free movement law. In *Torfaen Borough Council*, the ECJ established that it falls to national courts to examine whether Member State acts are proportionate.<sup>122</sup> Against this background, the Court is in principle meant to refrain from exercising proportionality analysis on its own. In the sample studied, 79 free movement cases apply proportionality analysis. In this group, one finds a decentralisation of review tasks in 38 decisions (48.10%). This includes any of the four approaches: full decentralisation, guidelines, tendency, or adoption. The resulting deference rate is above the average for the whole of free movement case-law. It is, in fact, so pronounced that

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<sup>115</sup> Rasmussen, op. cit. *supra* note 93, p. 428.

<sup>116</sup> Case C-577/11, *DKV Belgium*, ECLI:EU:C:2013:146, para 47; *Jyske Bank Gibraltar*, cited *supra* note 22, paras. 70 and 85; Case 72/83, *Campus Oil*, ECLI:EU:C:1984:256, paras. 47-48.

<sup>117</sup> Case 97/83, *CMC Melkunie*, ECLI:EU:C:1984:212, para 19; Case C-383/97, *Van der Laan*, ECLI:EU:C:1999:64, para 33; Case C-478/07, *Budějovický Budvar*, ECLI:EU:C:2009:521.

<sup>118</sup> *Kattner Stahlbau*, cited *supra* note 103, para 90.

<sup>119</sup> *Orfanopoulos*, cited *supra* note 32, paras. 95-98; Case C-309/02, *Radlberger Getränkegesellschaft*, ECLI:EU:C:2004:799, paras. 81-82; Case C-379/87, *Groener*, ECLI:EU:C:1989:599, para 21.

<sup>120</sup> Case C-138/02, *Collins*, ECLI:EU:C:2004:172. Another famous example is *Torfaen Borough Council*, cited *supra* note 109.

<sup>121</sup> A decision here requires both an analysis of the practice of national authorities (factual element) – information on the degree to which gambling is advertised, the possible expansion of gambling opportunities, the effectiveness of the control exercised, etc. – as well as an evaluative judgment as to whether that practice is coherent all things considered (normative element); see *Gambelli*, cited *supra* note 5, para 67.

<sup>122</sup> *Torfaen Borough Council*, cited *supra* note 109, para 16.



it makes the question as to whether a case applies proportionality a significant factor for whether the Court will defer to the referring judge.<sup>123</sup>

The meaning of these figures for the *Torfaen*-principle, however, only becomes clear once we turn them upside down. In 41 out of 79 cases the Court of Justice decides all by itself. In other words, in 51.90% of decisions using proportionality analysis the national judge plays no role at all, a scenario we had discarded in theory. More than half of the time, the Court acts in violation of *Torfaen*. It should be highlighted that this figure only captures decisions in which national courts do not have any review responsibility at all. The number rises if one includes those cases in which the Court defers the decision on some elements of proportionality, but decides itself on others (69, or 87.34%). Such partial review activity may be compatible with a wide reading of interpretation as it does not amount to full application. Yet, it is at odds with the law/fact-distinction, under which proportionality completely belongs with the referring judge.

The foregoing lays bare that the dichotomy between law and fact fails to capture the interaction between EU and Member State courts in two ways. On the one hand, it is too conservative. That “questions of fact” are for the referring judge, as the oft-repeated mantra goes, is a serious understatement. Although factual assessments are one part of their responsibilities, the Court of Justice entrusts national courts with a wide array of normative decisions as well. On the other, it is far too optimistic. The ECJ does not reach out to the national judiciary for every question of fact. In fact, in the majority of cases, it makes all relevant factual judgments itself, thereby assuming the role theoretically reserved for the referring judge.

### **3. Insufficient Information and the “Better Placed”-Principle**

It was mentioned that, in its more recent jurisprudence, the Court has started to hint at the importance of factors other than law/fact and interpretation/application for the separation of functions with the national judiciary. It stated that it would defer to Member State courts where it had insufficient information on the dispute. Likewise, it announced that it would decentralise justification and proportionality review if the referring judge was in a better position to understand the factual and legal circumstances of the case. (The “all the necessary guidance”-doctrine will be omitted here due to its imprecise content.) These factors suggest that information

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<sup>123</sup> p<.001.

has become a relevant point when it comes to allocating judicial responsibilities in EU law.<sup>124</sup> Does the case-law survey confirm this?

I must begin with a disclaimer. It is impossible to measure the role of information in the case-law as systematically as that of other factors. Judgments of the Court of Justice usually do not allow us to tell whether the European judges did or did not have sufficient knowledge of the facts at stake. The reason for this is twofold. First, we have no access to the national court's orders of reference or the submissions of the parties and intervening Member States, which constitute the ECJ's main sources of information.<sup>125</sup> This problem is aggravated, second, by the fact that the Court itself addresses the issue of information extremely rarely. In the entire sample, it explicitly admits to lacking the necessary knowledge to exercise proportionality analysis just in one case; in *Läärä*, it complains about the "absence of detailed information concerning the practical effect which the legislation has".<sup>126</sup> For the rest, one is left with circumstantial evidence.

Nonetheless, it is evident that the Court of Justice struggles with some of the questions brought before it due to a lack of knowledge and, as a result, defers them to national courts. This often concerns the content of national law. One can distinctly sense informational problems in *Wencel*, where the European judges provide long explanations as to the implications of Regulation 1408/71 on Member State law but finishes by saying: "if such a rule exists in the Polish legal system".<sup>127</sup> In *Konle*, the ECJ seems confused about the temporal effects of judgments of the Austrian constitutional court, which it lets the referring judge determine.<sup>128</sup> Sometimes, the Court's knowledge gaps concern other factual circumstances in a Member State. In *Ottica New Line*, it seems to feel under-informed about administrative practice in Sicily and therefore hands the decision on whether the local pharmacy regulation is consistent over to the referring court.<sup>129</sup> In *Rouffeteau*, it is unsure as to whether the submission of the French government on the use of unauthorised phones is true, leaving the national court to establish the statement's accuracy.<sup>130</sup>

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<sup>124</sup> See also Lenaerts, op. cit. *supra* note 61, at p. 13; Davies, op. cit. *supra* note 10, at p. 217.

<sup>125</sup> This will change to some extent as a result of the opening of the Court of Justice's archives to the public. All case files from 1952 to 1982 were transferred to the Historical Archives of the European Union in Florence and will gradually be made available for consultation.

<sup>126</sup> *Läärä*, cited *supra* note 40, para 26.

<sup>127</sup> *Wencel*, cited *supra* note 105, para 63.

<sup>128</sup> Case C-302/97, *Konle*, ECLI:EU:C:1999:271, paras. 26-30.

<sup>129</sup> *Ottica New Line*, cited *supra* note 92, paras. 50 and 56.

<sup>130</sup> Case C-314/93, *Rouffeteau*, ECLI:EU:C:1994:284, paras. 9-10.

Although the above findings are unsystematic, they suggest that information may indeed affect the ECJ's willingness to defer. Where the European judges lack the understanding of the national regulatory context, they seem to pass the decision onto the referring court. That the Court of Justice is not more outspoken about this link is problematic in itself. Justification and proportionality review require a wide range of information without which the Court will find it difficult to decide or, even worse, decide in a way misrepresenting the reality in the Member State. Emphasising more strongly that national courts will receive an incomplete decision on proportionality, or none at all, as long as they do not furnish the Court of Justice with sufficient information on the national setting – that is, not only an interpretation of the relevant national law, but an explanation of its socio-economic effects, possible local sensitivities in the area, the political dimension of the dispute, etc. – would create a strong incentive for Member State judges to submit better references.<sup>131</sup> By the same token, it could improve the quality of the Luxembourg Court's judgments.

#### 4. Other Factors

Given that the factors set out by the Court itself capture its interaction with the national judiciary poorly, one may wonder if others are more accurate. To find out, a series of further variables were tested. Some mirror the analysis of the margin of appreciation: the applicable free movement right;<sup>132</sup> the policy field of the dispute;<sup>133</sup> the level of EU harmonisation,<sup>134</sup> and discrimination.<sup>135</sup> Others were examined additionally: the rank of the referring court in the national judiciary hierarchy;<sup>136</sup> the length of EU membership of its country of origin;<sup>137</sup> and the

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<sup>131</sup> The Court of Justice has recently made an effort in this direction by issuing its “Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings”, O.J. 2012, C 338/01, in which it clarifies what information it expects national judges to provide when submitting a reference. These recommendations, however, do not include socio-economic facts of the above-described sort. As a remedy for the problems of the Court, they therefore seem of limited use.

<sup>132</sup> The respective deference rates are: 31.37% for goods; 20% for workers; 25% for establishment; 31.71% for services; 27.78% for capital ( $p=.76$ ).

<sup>133</sup>  $p=.11$ .

<sup>134</sup> 26.51% for no harmonisation; 27.87% for medium harmonisation; 13.79% for complete harmonisation ( $p=.31$ ).

<sup>135</sup> 22.22% for direct discrimination, 18.75% for indirect discrimination, 36.23% for no discrimination ( $p=.07$ ).

<sup>136</sup> In the sample, we find 50 references from supreme and constitutional courts, in which the Court of Justice decentralises judicial review on 11 occasions (22%). From the 110 references from lower courts, 31 cases involve a decentralisation of review responsibilities (28.18%);  $p=.35$ .

<sup>137</sup> For the founding Member States, the rates are: 29.16% (Belgium); 23.81% (Germany and Italy); 9.52% (France); 0% (Luxembourg); 17.34% (Netherlands). For those who have joined during the EU between 1973 and 1986, they are: 20% (Denmark); 40% (Greece); 66.66% (Ireland); 0% (Portugal); 25% (Spain and UK). For the newest Member States, whose accession dates to 1995 or 2004, they are: 25 % (Austria); 0% (Czech Republic and Estonia); 14.29% (Finland); 33.33% (Poland and Sweden); 100% (Hungary);  $p=.64$ .

composition of the ECJ.<sup>138</sup> None of these prove to have a significant effect on the decentralisation of review tasks by the Court.

One may not find these results overly concerning. At the end of the day, the study tested factors that were never said to matter, at least not by the Court, and concluded that none of them did. The practice of decentralising judicial review shows to be much less targeted than that of the margin of appreciation. The involvement of national courts cuts through both different free movement rights and policy fields. It is not affected by the composition of the Court of Justice, the referring court's rank in the national justice system, or the length of EU membership of the state the latter is located in. Yet, together with the previous findings, a problematic picture emerges. The distinctions between law/fact and interpretation/application largely fail to capture the Court's interaction with the national judiciary; the only exception is the higher likelihood of deference in cases applying proportionality analysis. Information seems to play a role, but one which cannot be confirmed systematically. Against this background, the Court of Justice's practice looks somewhat random: it is hard to tell in which types of cases the Court will defer and in which ones it will decide on its own. From a perspective of judicial competences, this, of course, is troubling. Who decides on what in EU law remains, to an important extent, a mystery.

## **VI. Conclusion: Towards Passive Virtues**

This paper sought to demonstrate that the Court of Justice has gradually scaled down its control over Member State acts. Instead of, as it used to, determining most aspects of and regulatory questions connected with free movement law itself, the Court ever more frequently defers to national institutions. It does so through the margin of appreciation doctrine and a decentralising of review responsibilities.

Despite the parallel increase of both deference techniques in the case-law, the way in which they are employed differs. The usage of the margin of appreciation is *narrow but deep*. When deferring to national legislatures or executives, the Court often grants them complete decision-making leeway. It does so, however, only in limited scenarios. The doctrine's application is essentially restricted to four policy fields, the most important of which is public health, and occurs most commonly in cases on the free movement of goods. Member States are more likely to receive a

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<sup>138</sup> 18.18% for Small Chambers (4 out of 22 cases); 32.88% for Chambers (24 out of 73); and 23.08% for cases decided by a Small Plenum, Grand Chamber, or Full Court (15 out of 65); p=.26.

margin of appreciation in disputes which involve non-discriminatory regulation and are marked by a low level of EU harmonisation. They get no preferential treatment in situations of regulatory consensus across Europe.

The use of decentralised judicial review can, in contrast, be described as *wide but shallow*. The ECJ defers not only more frequently to national courts than to national legislatures, it does so in a broader range of scenarios. At the same time, national judges are typically just granted restricted decision-making leeway. The Court of Justice influences the outcome of the case through guidelines or *prima facie* assessments, thereby keeping some influence over the scrutiny of the given Member State act and the interpretation of EU law.

The above findings are a not mere probability calculus which enables us to precise how likely it is for the ECJ to defer in a specific scenario. They have broader constitutional implications for the European integration project, on which I would like to offer some reflections by way of concluding. The Court of Justice's turn towards deferential review challenges two narratives that form the foundation of every EU law tale: judicial activism and centralisation. Thereby, they signal a profound transformation of both the Luxembourg Court and European law.

### **1. A Matured Legal Order: The ECJ's Departure from Judicial Activism**

It has become conventional wisdom that the Court of Justice constantly “seized the opportunities presented to it to enlarge its jurisdictional authority and power”.<sup>139</sup> This is the narrative of judicial activism, and we have become accustomed to it since the very beginning of the European project. Few, if any, observations in EU law scholarship have produced such an overwhelming consensus among academic and non-academic commentators, beyond the traditional frontiers of euro-sceptics and euro-enthusiasts.<sup>140</sup>

The now decades-long activism debate, arising anew with astonishing regularity,<sup>141</sup> has failed to provide robust answers as to what counts as activist and what does not. Is it creating *vs* interpreting law? Is it politics *vs* law? Is it reliance on *effet utile vs* traditional methods of

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<sup>139</sup> Alter, *Establishing the Supremacy of European Law* (OUP, 2001), p. 37.

<sup>140</sup> Basedow, “The Judge’s Role in European Integration” in Micklitz and De Witte (Eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2012), p. 65.

<sup>141</sup> For a recent volume dedicated to this issue see Dawson, De Witte and Muir (Eds), *Judicial Activism at the European Court of Justice* (Edward Elgar, 2013). See also Sindbjerg Martinsen, *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union* (OUP, 2015).

interpretation? Or is it decisions supported by society *vs* those which are not?<sup>142</sup> What is clear, though, is that the label amounts to a charge, a charge of doing too much. When accused of being activist, the Court of Justice is criticised for overstepping the boundary of what is considered to be legitimate for a court, however this boundary may be drawn.

With all the activism talk, a parallel phenomenon has entered EU law largely unnoticed: restraint.<sup>143</sup> Although restraint can be just as challenging to pin down as activism, it is, at a basic level, present when a court does little or less than it could. Doing little, or “not doing”,<sup>144</sup> has never been thought of as a defining feature of the Court’s jurisprudence. Yet, over the past two decades, more and more symptoms of such self-limitation come to light, in free movement law and beyond. The narrowing down of the scope of Article 34 TFEU in *Keck* is perhaps the best-known example.<sup>145</sup> But it is not the only one. The Court has introduced *de minimis* rules into the free movement of persons.<sup>146</sup> It has started to render minimalist rulings whose effects are closely tailored to the dispute at hand.<sup>147</sup> Finally, it shows a greater willingness to declare preliminary references inadmissible.<sup>148</sup>

The margin of appreciation and decentralised judicial review are not just further expressions of this new-found restraint, they have become its most effective weapons. (This has to do with the limited success of the Court’s other activity-limiting techniques.<sup>149</sup>) The doctrines permit the ECJ to hand legal and regulatory decisions down to national institutions and, thereby, to reduce its involvement in certain areas. The Court’s choice for deference represents a choice for exercising less than full scrutiny. And just as wrong it would be to claim that this deferential posture has

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<sup>142</sup> The most insightful piece of academic work on this topic remains Rasmussen, *op. cit. supra* note 93. See also Lenaerts, *op. cit. supra* note 61, at pp. 16-17.

<sup>143</sup> An important exception is Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (Macmillan, 1998), p. 148.

<sup>144</sup> In reference to Justice Brandeis, who is reported to have said about his work on the U.S. Supreme Court: “The most important thing we do is not doing.”

<sup>145</sup> Case C-267/91, *Keck and Mitbouard*, ECLI:EU:C:1993:905.

<sup>146</sup> Case C-379/92, *Peralta*, ECLI:EU:C:1994:296, para 24; Case C-20/03, *Burmanjer*, ECLI:EU:C:2005:307, para 31; Cases C-51/96 & 191/97, *Delière*, ECLI:EU:C:2000:199, para 64.

<sup>147</sup> Sarmiento, “Half a Case at a Time: Dealing with Judicial Minimalism at the European Court of Justice” in Claes et al. (Eds), *Constitutional Conversations in Europe* (Intersentia, 2013), p. 21.

<sup>148</sup> Cases C-320 to 322/90, *Telemarsicabruzzo*, ECLI:EU:C:1993:26, para 6; Case C-140/97, *Rechberger*, ECLI:EU:C:1999:306, para 38; Case C-424/97, *Haim*, ECLI:EU:C:2000:357, paras. 55-56; Case C-168/06, *Ceramika Paradyż*, ECLI:EU:C:2007:139, paras. 22-23.

<sup>149</sup> The sample shows only 3 successful applications of *Keck*. This low number is in line with findings of previous studies such as Horsley, “Unearthing Buried Treasures - Art. 34 TFEU and the Exclusionary Rules”, 37 ELR (2012), 734, at 744 and Spaventa, “Leaving Keck Behind? The Free Movement of Goods after the Rulings in Commission v. Italy and Mickelsson and Roos”, 34 ELR (2009), 914, at 920. Just a handful of cases, in addition, make use of *de minimis* rules.

become the sole *modus operandi* of the European judges – a good many free movement cases continue to resort to stricter review approaches –, it would be erroneous to think that nothing has changed in Luxembourg. Deferential review, once an exceptional occurrence, has come to form the basis for almost half of all judgments in free movement law. From a perspective of activism, this is unexpected. Not only does the Court of Justice not “enlarge its power”, it seems to shrink it of its own volition.

The question arises as to why the Court has come to act in this restrained manner. Three factors may play a role. First, the *European legal order has matured*. The body of EU case-law has grown substantially over the past sixty years, leading to a clarification of Member State obligations on many issues. Against this background, the Court may be inclined to engage in deferential forms of review, especially in areas with a well-developed jurisprudential heritage. Where the central questions are settled and the big legal battles fought, it may, in the eyes of the European judges, seem safe to give Member States greater autonomy. The Court’s low-level scrutiny in free movement of goods cases, and the more intense one regarding other freedoms of movement, could be motivated by this. From early on, the scope of Article 34 TFEU was given a broad reading, leading to a high case load which enabled the Court to lay down the fundamental dos and don’ts.<sup>150</sup> Other free movement rights had, in comparison, a much more delayed development. The widening of the scope of the free movement of persons and services to non-discriminatory measures, and the increase in litigation that resulted from it, only occurred in the 1990s.<sup>151</sup> For the free movement of capital, the transitional period, marking the moment when the right could be directly invoked by private litigants, had not even ended before 1994.

Second, there has been a considerable *increase in EU harmonisation*. This has two consequences. On an institutional level, harmonisation means that the EU legislature takes the driver’s seat. The Court of Justice is less needed for protecting and promoting European interests.<sup>152</sup> On a doctrinal level, the existence of secondary law renders the use of structuring tools like the margin of appreciation and proportionality less vital. Where detailed written rules are available, the Court can rely on more traditional review methods to solve a dispute, such as interpreting the wording of and policy aims behind the regulation or analysing its scope and context. This is likely to constitute a reason for the variation in deference levels not only among the different harmonisation scenarios but also among the different free movement rights. Important parts of

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<sup>150</sup> Case 8/74, *Dassonville*, ECLI:EU:C:1974:82; *Cassis de Dijon*, cited *supra* note 13.

<sup>151</sup> *Säger*, *Bosman*, *Gebhard*, all cited *supra* note 14.

<sup>152</sup> Maduro, op. cit *supra* 86, Ch. 4.

the free movement of workers, which shows a low margin of appreciation usage, have been covered by EU harmonisation already in the late 1960s, notably through Regulations 1612/68 and 1408/71, whereas large-scale legislation on goods and services came to light only later.

Finally, there is the matter of *workload*. It has been long pointed out that the ECJ's case load is too high. Courts are, as Neil Komesar has so powerfully argued, institutions with limited resources, especially with regard to time and people.<sup>153</sup> Consequently, they cannot “produce” beyond a certain threshold. At the Luxembourg Court, this became particularly visible during the 1990s, when the average time between the submission of a preliminary reference and the ruling of the Court of Justice reached two years (a problem which has, in the meantime, been successfully remedied). The ever-growing reliance on deference by the ECJ is likely to be connected with its oversized docket. Judicial review requires courts to make many challenging assessments, both empirical and normative: which policy measures work? Which ones are dispensable? How to solve conflicts between economic freedom and social justice, free speech, or public morality? These are matters which can be difficult to resolve in individual cases. When arising as frequently as they do nowadays – a development partly due to the overall increase in judicial review, partly to the spread of comprehensive review tools like proportionality analysis<sup>154</sup> –, they can become impossible to all deal with.<sup>155</sup> The Court of Justice may, quite simply, have gotten to the limits of what it can do. It cannot engage in comprehensive scrutiny of every Member State act anymore and is forced to choose which issues to focus on.

## 2. From Centre to Periphery: The Decentralisation of EU Law

Intimately connected with activism is the issue of centralisation. The integration process has led to a shift of decision-making powers from the national to the EU level. This increasing Europeanisation is, for one thing, a simple matter of fact. More and more aspects of life are determined by EU institutions. It is, at the same time, perceived to be a serious problem. The Union in general (“competence creep”<sup>156</sup>) and the Court in particular (“Stop the European Court

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<sup>153</sup> Komesar, *Law's Limits* (CUP, 2001). See also Coan, “Judicial Capacity and the Substance of Constitutional Law”, 122 *Yale L.J.* (2014), 422.

<sup>154</sup> Möller, op. cit. *supra* note 9; Kumm, op. cit. *supra* note 76; Klatt and Meister, op. cit. *supra* note 9.

<sup>155</sup> The fact that national courts have come to submit questions on increasingly complex factual and ethical problems is also likely to contribute to this, a development which is connected with the below-described evolution of the EU from a primarily economic enterprise to a fuller political and constitutional project. I thank Lena Boucon for alerting me to this.

<sup>156</sup> See Weatherill, “Competence Creep and Competence Control”, 23 *YEL* (2004), 1.



of Justice”<sup>157</sup>) have been criticised for excessively taking decision-making powers away from the Member States. In free movement law, this argument has a long pedigree. Objections to the Court’s interference in national affairs were already raised in the 1970s.<sup>158</sup> More recently, the problem has become acute again with the application of the four freedoms to politically sensitive areas like social security, higher education, and public health, which triggered painful conflicts with national law.<sup>159</sup>

The margin of appreciation and decentralised judicial review demonstrate that continuous centralisation is neither an inevitable consequence of the European project nor the only direction it moves towards. Both doctrines enable the Court of Justice to pass certain decisions down to Member State institutions, a possibility it willingly makes use of. The result is a decentralising pull. What policy measure is appropriate, which ways of regulating are effective, and how to reconcile economic freedom with competing policy concerns are questions that are frequently not settled in Luxembourg anymore, but in Antwerp, Palermo, or Wrocław. Consequently, what violates the free movement rules and what does not ceases to receive one answer, valid for the whole of the internal market. It is determined at the national level for the specific national setting. The periphery decides instead of the centre. As a result, it is possible that the very same issue will be approached in different ways across the continent, potentially even within a single Member State. This is no minor deal for a legal order centrally premised on the uniform application of its rules.<sup>160</sup>

Again, one may wonder about the reasons for this development. One factor is likely to lie in what Joseph Weiler once called the “*habit of obedience*”: the Member States have learned to live with and by EU law. This goes for both the political and adjudicative branches.<sup>161</sup> Naturally, the levels of compliance vary across the continent and frictions, some of them serious, arise. The

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<sup>157</sup> Roman Herzog, *Frankfurter Allgemeine Zeitung*, 8 September 2008. For criticisms of the Court during the Brexit debate see *supra* note 35.

<sup>158</sup> See, for instance, the submission of the German government in *Cassis de Dijon*.

<sup>159</sup> Hilpold, “Hochschulzugang und Unionsbürgerschaft: Das Urteil des EuGH vom 7. 7. 2005 in der Rechtssache C-147/03, Kommission gegen Österreich”, 16 *EuZW* (2005), 647; De Witte, “Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law”, 50 *CML Rev.* (2014), 1545; Davies, “The Price of Letting Courts Value Solidarity: The Judicial Role in Liberalizing Welfare” in Ross and Borgmann-Prebil (Eds), *Promoting Solidarity in the European Union* (OUP, 2010), p. 106.

<sup>160</sup> See Cases 314/85, *Foto-Frost*, ECLI:EU:C:1987:452, para 15 and C-284/16, *Achmea*, ECLI:EU:C:2018:158, paras 35 et seq.

<sup>161</sup> On the theories behind and empirics of EU law compliance, see Conant, “Compliance and What EU Member States Make of It” in Cremona (Ed.), *Compliance and the Enforcement of EU Law* (OUP, 2012) and Hofmann, “Resistance Against the Court of Justice of the European Union”, *iCourts Working Paper Series* No. 121. Both emphasise that, despite the significant amount of research done on this topic, there remain quite a few question marks.

unwillingness of some Member States to implement the refugee relocation policy,<sup>162</sup> the open disregard of the Court of Justice’s judgments by several national high courts<sup>163</sup> and the upcoming withdrawal of the UK from the Union have been recent forceful reminders of this. Nonetheless, they should not detract from the fact that, overall, the EU law machine continues to run stably. National authorities can be trusted in complying with and enforcing European rules, especially in well-established areas like free movement law. The Court knows that and puts it to use.

The shift towards the national level is, likewise, a reflection of the *constitutional changes* – which, in turn, reflect changes in the institutional and political context – which the EU has undergone during the past decade-and-a-half. Since Maastricht, Treaty revisions have, on the one hand, increasingly broadened the legislative competences of the Union and enriched its mission, from a predominantly economic enterprise to an endeavour committed to promoting values and goals such as democracy, justice, pluralism, and solidarity. On the other, they have introduced centrifugal forces into EU constitutional law. The principles of conferral, subsidiarity, and proportionality (Article 5 TEU) accentuate that law making is, in principle, the prerogative of the national and not the European level. Provisions such as Articles 79(5), 153(4), 168(7), and 194(2) TFEU have drawn red lines for the EU, reserving certain strategic regulatory decisions for national rule-makers. Connected with this, there is an ever-growing emphasis on local values and cultural differences. Article 4(2) TEU protects the national identities of Member States. Thought to be a lofty declaration of intent when adopted, the clause has gotten increasingly more bite in recent years.<sup>164</sup> Article 167(1) TFEU contains a similar, if legally softer obligation in the context of the EU’s cultural policy competence, charging the Union with contributing to “the flowering of the cultures of the Member States” and demanding that it respect “national and regional diversity”. The Court of Justice seems to respond to these changes. It is increasingly mindful of national decision-making powers, acting in line with the overall constitutional evolution of the EU.

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<sup>162</sup> Cases C-643/15 & 647/15, *Slovak Republic and Hungary v Council (Relocation of Third-Country Nationals)*, ECLI:EU:C:2017:631.

<sup>163</sup> See the decisions cited *supra* note 36.

<sup>164</sup> *Sayn-Wittgenstein*, cited *supra* note 3; Case C-202/11, *Las*, ECLI:EU:C:2013:239; Case C-391/09, *Runevič-Vardyn*, ECLI:EU:C:2011:291.