The constitutional quality of the free movement provisions: looking for context in the case law on Article 56 TFEU

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Abstract

One of the pervasive narratives in EU law is that the free movement provisions have significant (and problematic) constitutional implications. In consequence, many scholars have offered interpretations of free movement that offer a more appropriate constitutional vision of the EU. This article suggests – in surveying the case law in diverse areas such as healthcare, labour law, and gambling – that we can only fully understand the constitutional quality of the free movement provisions if we contextualise their effect within specific and discrete policy domains. A genuinely constitutional understanding of free movement ought to judge the quality of the jurisprudence of the Court primarily in light of its capacity to attain or (conversely) subvert the normative objectives of a certain policy domain.

Introduction

The question regarding the constitutional implications of the free movement provisions has been a perennial favourite among academics. This discussion has focused, in general terms, on two different but interrelated questions. The first one discusses the vertical division of competences between the Member States and the EU: who has the authority to decide certain questions that see to the regulation of the market but may impact on non-economic values? This question is crucial, as it understands the interaction between free movement and national policy choices to be, in essence, about the constitutional arrangement of power sharing between the EU and its Member States. It is, ultimately, about the scope of political self-determination: should Member States (and their citizens) be free to choose their own preferred policy options in regulating railways, vitamins, gambling, euthanasia, or fireworks? Or, conversely, does the commitment to the creation of an internal market without borders mean that such choices are constrained in reference to economic objectives?

The second question that informs discussions on the constitutional implications of free movement is a more explicitly normative one: which rules, values, or principles *should* structure the European market, and which rules, values or principles should be rejected from it? This discussion typically suggests that the free movement provisions have reached constitutional status – that is, their effect cannot be displaced politically – and that the values articulated through the free movement provisions are therefore of a constitutional nature. According to this line of reasoning, there are three sources through which norms find expression and acceptance in the internal market. First, national norms can be accepted as conforming to the values of the internal market and so come to normatively inform the internal market. Second, national norms might have to adapt or be altered normatively in order to conform to the values of the internal market. Thirdly, national norms can be explicitly displaced with reference to an EU-wide or external norm that conforms more closely to the idea of an internal market. The management of these norms typically takes place, in the Court's case law, through the principle of proportionality.

* Assistant Professor, LSE. Many thanks to Sacha Garben, Michèle Finck, and the anonymous reviewer for their invaluable comments on a previous draft. The usual disclaimer applies.

These two questions are understood to be 'constitutional', in other words, because they see to the relationship between the EU and its Member States, and see to the core values that inform that relationship. These two questions have primarily been analysed in the areas of the free movement of goods, within the context of EU citizenship, and in the *Viking*/*Laval* saga. In all these analyses, much of the discussion has focused on the constitutional implications of certain elements of the legal structure of the Court's case law, such as the scope of application of the free movement provisions and the interpretation of the principle of proportionality. The constitutional quality of free movement, in other words, has to a large extent been derived by the method through which the Court structures the interaction between domestic policy norms and the free movement provisions when adjudicating. Different constitutional understandings of the nature and scope of EU law can even be read into this interaction between free movement and national policy norms. In consequence, and as will be discussed in the following section, much of the literature suggests that if we want to change the way in which the Court deals with these constitutional questions, we must alter the *legal structure* through which these cases are settled.

This article suggests – in surveying the case law in diverse areas of the freedom to provide services – that we can only fully understand the constitutional quality of the free movement provisions if we contextualise their effect within *specific* and *discrete* policy areas (section 1). After all, each policy area will have a different division of competences between the Member States and the EU underlying it; and each policy area will pursue different normative objectives. Only by looking at the way in which the Court's case law affects the division of authority between the EU and its Member State within a specific policy area, as well as the values that are articulated through that case law, can we understand the constitutional implications of the Court's case law. A genuinely *constitutional* understanding of free movement, then, ought to judge the quality of the jurisprudence of the Court in light of its capacity to attain or (conversely) subvert the normative objectives of the policy area concerned. As will be demonstrated, using as an example the Court's case law on Article 56 TFEU within the context of the regulation of labour law, healthcare, and gambling, such a prism suggests that the Court's case law *should* be incoherent *across* policy domains and *should* be tailored to specific policy areas, and that the Court *is* more successful at discharging this constitutional task in certain policy areas than in others.

While the substantive regulation in all three areas fall within the competences of the Member State, the Court's case law deals with these policy areas in very different ways. The Court's case law on labour law, for example, challenges and even subverts the normative ambitions of domestic legislation, sacrificing standards that protect the worker at the altar of free movement (section 2). In its case law on healthcare, on the other hand, the Court is more nuanced, to the point where it defends domestic policy ambitions through the interpretation of the free movement provisions (section 3). Finally, in the area of gambling, the Court – in a very counterintuitive move – uses free movement to enforce the non-economic concerns that underlie Member States regulatory choices (section 4). The constitutional quality of the case law of the Court, in other words, in areas that fall within the legislative competences of the Member States, crucially depends on the extent to which the free movement provisions can reflect the normative ambitions that underlie domestic policy choices.

The free movement provisions and the EU's constitutional order

One of the peculiarities of the EU is that its market freedoms or economic principles have constitutional status, and cannot be displaced without altering the Treaty. The usual narrative through which this process is described suggests that a combination of revolutionary legal

doctrines and political bottlenecks have led to the constitutionalisation of the free movement provisions. The most authoritative accounts in this area come from Weiler and Scharpf. Weiler's work highlights the interaction between legal supranationalism and political intergovernmentalism.[1] The former, centred on the legal doctrines of supremacy and direct effect, creates a system of governance that is at once autonomous and restrictive of national political actors. As such, this process structures the EU's (legal) authority around individual rights – to the detriment of other institutional actors and values that typically are understood to protect more communitarian or political visions of authority.[2] Scharpf adds that this process has substantive political repercussions. It facilitates negative integration, in the sense of striking down domestic regulations in reference to their restrictive effect on transnational movement, while joint-decision traps hamstring the re-regulation of these areas on the European level. What follows is a vision of the European market that is both depoliticised and highly protective of individual economic freedoms (to the detriment of communitarian and non-economic values). This means that EU law struggles to limit its jurisdiction to the areas in which it has legislative competence. Instead, its economic principles pervade all areas of domestic regulation. This also means that EU law has the potential to indirectly recalibrate substantive choices on the national level in policy areas that fall outside its direct legislative reach. The typical narrative suggests, moreover, that this recalibration is skewed in favour of economic freedom, and that, as such, the very structure of European (market) integration militates against a more social or inclusive vision of the internal market.

This development can be defended in economic terms (as making the EU more 'competitive'), in institutional terms (as preventing domestic political actors from taking protectionist measures) or in political terms (as serving ordo-liberal objectives of freedom from public or private power). Most commonly, however, this 'constitutionalisation' of the market freedoms has been criticised. While such criticism is located (as we shall see) in many different areas of the development of the internal market, it generally revolves around two arguments.[3] One argument suggests that what is problematic is the way in which free movement law skews the *vertical distribution of competences* between the EU and the Member States.[4] The problem, in simple terms, is that the Court misreads the jurisdictional limitations of the EU project and thereby starts engaging in policy domains that ought to be dealt with by the Member States. What underlies this criticism, ultimately, is a commitment towards authority and (political) self-determination. It suggests that the division of legislative competences in the Treaty serves to insulate certain normative or substantive choices from the reach of EU law exactly *because* the EU cannot legitimately make such decisions. Choices that have a redistributive effect, or have an ethical or cultural character, on this view, can only legitimately be made if they can be traced back to the electorate's wishes. The sophisticated democratic process that exists on the national level, in other words, serves as a 'safety valve' to ensure that salient policy choices (do we spend €40 billion on healthcare or on education? Do we allow or ban abortion and the use of soft drugs?) can be traced back to the normative preferences of the electorate. But the democratic process also ensures the legitimacy of substantive policy preferences in other ways. First, it legitimises the policy norm itself, by internalising conflict and dissent, while allowing for its future renegotiation. Second, it legitimises the coercive authority necessary to enforce a certain redistributive or moral standard. Third, it legitimises the political process

[1] J. Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.
[2] J. Weiler, 'Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy' (2014) 12 *ICON* 94.
[3] Other – more descriptive – criticism includes the coherence of reasoning, use of judicial instruments and tests. On this, see N. Nic Shiubhne, *The Coherence of EU Free Movement Law* (OUP 2013).
[4] *Ibid*, 10.

itself, as the site through which contested policy orientations are negotiated.[5] In other words, the Treaty's commitment to leaving the *substantive* legislative decisions on how to regulate, say, gambling, abortion, or healthcare in the hands of the national political sphere serves to ensure that those decisions are legitimate. The Court's involvement in these policy areas through the free movement provisions, then, becomes, in this first argument, problematic because it eats away at this legitimacy and authority. In short, the Court's reading of the free movement provisions not only fail to respect the vertical distribution of competences as laid down in the Treaty, but, in doing so, undermine the capacity of Member States to freely choose how to regulate the policy areas under their control.

The second, related but distict, narrative that criticises the understanding of the free movement provisions in the Court's case law focuses on the *substantive* implications of the process of constitutionalisation, and suggests that the main problem is that the vision of the market that emerges is *inappropriate for normative reasons*.[6] Again in simple terms, the constitutionalisation process makes the EU's market too neo-liberal and not sufficiently sensitive to broad social or political concerns that may exist on the European or the national level.[7] The problem here is not so much *that* the EU's institutions engage in normatively structuring the internal market (as in the first criticism), but that they make substantively *wrong* decisions. This criticism, ultimately, suggests that the Court is structurally biased towards certain values that might reflect personal or institutional preferences, particular visions of state-market relationships, or (as most commonly argued) a particular vision of the extent to which states are allowed to manage economic interactions. This latter line of argument suggests that the legal structure through which the Court manages the construction of the internal market – which requires non-economic objective to be proportionate in reference to the exercise of economic freedom – is inimical to the development of any type of internal market that is 'social' in a meaningful sense.[8] This bias is only magnified when the effect of free movement law is understood from the perspective of the capacity of domestic actors to maintain their policy commitments towards normative understandings of the market that have been articulated within a domestic context, such as, for example, a social market economy, or a public healthcare service that is free at point of access. Scholars such as Scharpf or Newdick have argued that – when perceived from the domestic perspective – free movement undermines both the normative orientation and the institutional infrastructure through which such national social preferences are articulated.[9]

Different suggestions have been made to counter these two nefarious effects of the process of constitutionalisation of the free movement provisions – be it on the vertical distribution of competences or the normative structure of the internal market. These suggestions are premised on very different understandings of where the exact problem lies. Many authors suggest that the main problem is the depoliticised nature of the construction of the internal market, and in particular the institutional configuration within which the Court has

[5] See more in depth, F. De Witte, 'Sex, Drugs, and EU Law: The Recognition of Moral and Ethical Diversity in EU Law' (2013) 50 *CMLR* 1548-50.

[6] See for example, R. Bellamy, 'The Liberty of the Moderns: Market Freedom and Democracy within the EU' (2012) 1 *Global Constitutionalism* 141.

[7] See for example F. Scharpf, 'The Asymmetry of European Integration, or: Why the EU Cannot be a 'Social Market Economy' (2010) 8 *Socioeconomic Review* 218; F. De Witte, 'The Architecture of the Social Market Economy', in: P. Koutrakos and J. Snell, *Research Handbook on the EU's Internal Market Law* (Edgar Elgar 2016).

[8] Schapf, *Ibid*.

[9] See, for example, F. Scharpf, 'The Asymmetry of European Integration, or: Why the EU Cannot be a 'Social Market Economy' (2010) 8 *Socioeconomic Review* 218, with reference to the bias in favour of liberal economies and against social market economies; or C. Newdick, 'Citizenship, Free Movement and Healthcare: Cementing Individual Rights by Corroding Social Solidarity' (2006) 43 *CMLR* 1645, with reference to a bias against the system operated by the British NHS, which is free at the point of access.

accumulated judicial power to shape the internal market.[10] Davies offers the most lucid account, linking the purposive nature of the legislative and judicial construction of the internal market (in so far that the *goal* of economic integration through free movement is never questioned or contestable) with the waning social legitimacy of the EU.[11] On this view, the problem is not only the absence of a mechanism that protects the division of competences between the EU and the Member States, but also the absence of political institutions that can counterbalance judicial biases,[12] making the EU no longer responsive to normative political claims articulated by the electorate.[13] The solution, here, lies in securing more political control over the way in which the free movement provisions operate. Grimm suggests the 'deconstitutionalisation' of the provisions, so that they can be counterbalanced normatively by non-economic interests articulated on the European or national level, which would also entail a shift in institutional power towards political actors in the EU.[14] Scharpf suggests a mechanism through which the Member States, acting in concert, can react to the rulings on the Court that are thought to be problematic.[15] Chalmers more broadly suggests that a commitment to democratic authority requires EU law to be more responsive to national resistance to the Union's substantive values and choices.[16] All these suggestions attempt to address the two problems of the constitutionalisation process simultaneously: securing more *political* control by domestic actors over the way in which free movement operates in the EU will ensure that the development of the internal market more closely meets the broad normative objectives articulated on the national level. The logic here is that political structures are better at securing (substantively) a vision that is normatively appealing to the electorate and offer a better forum (institutionally) for contesting or revisiting choices, and for responding to new voices.

Other authors have suggested that the source of the problem of constitutionalisation and depoliticisation of the free movement provisions lays not so much in the institutional structure of the Union but primarily in the Court's understanding of the *scope* of those provisions.[17] Much of the discussion in this area has focused on the case law of the Court in the context of the free movement of goods (Article 34 TFEU). The argument here is that the *scope* of the free movement provisions to a large extent determines the balance in the vertical division of competences between the EU and the Member States: the wider the scope of Article 34 TFEU, the less political autonomy Member States retain (and conversely, the narrower the scope of Article 34 TFEU, the wider the autonomy of national actors). As authors such as Maduro and Snell have highlighted, different interpretations of the scope of the free movement provisions entail different constitutional visions of the appropriate vertical organisation of competences in the regulation of the market.[18] If the free movement provisions were to catch only discriminatory national rules, or rules that have a differentiated impact on domestic and

[10] F. Scharpf, *Governing in the EU: Effective and Democratic* (OUP 1999); S. Garben, 'Confronting the Competence Conundrum: Democratising the European Union through an Expansion of its Legislative Power' (2015) 35 *OJLS* 1; G. Davies, "Democracy and Legitimacy in the Shadow of Purposive Competence" (2015) 21 *ELJ* 2; M. Bartl, "The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit" (2015) 21 *ELJ* 23; D. Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) 21 *ELJ* 460.

[11] Davies, above, note 10.

[12] See also De Witte, above, note 8 and S. Garben, 'Balancing 'the market' and 'the social' in the EU' (2016) *EUConst* (forthcoming).

[13] Bartl, above, note 10.

[14] Grimm, above, note 10.

[15] F. Scharpf, 'After the Crash: A Perspective on Multilevel European Democracy' (2015) 21 *ELJ* 384.

[16] D. Chalmers, 'European Restatements of Sovereignty' *LSE Law Working Paper* 10/2013.

[17] D. Ashiagbor, 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration' (2013) 19 *ELJ* 310-11.

[18] M. P. Maduro, *We, the Court* (Hart 1996); J. Snell, 'The Internal Market and the Philosophies of Market Integration' in C. Barnard and S. Peers, *European Union Law* (OUP 2014).

foreign products or producers; Member States and political actors would retain a significant margin of autonomy in regulating the market in accordance with their social, cultural or moral preferences. If, instead, indistinctly applicable rules (that do not distinguish between domestic and foreign products or producers, but limit the overall amount of products sold) are also caught; Member State retain very little autonomy in deciding how to embed economic transactions with a view to protect non-economic concerns.[19]

The question to what extent the principle of mutual recognition should guide the Court's reading of the scope of the free movement provisions is a perfect example of this type of argument. Critics of such a wide interpretation of the scope of application of the free movement provisions use its constitutional implications to counsel against it. AG Tizzano has perhaps put it most clearly in *Caixa Bank*. He first highlights the importance of the vertical distribution of competences for the way in which we should think about the scope of free movement: 'where harmonisation has not taken place, Member States remain as a matter of principle competent to regulate the pursuit of economic activities, by means of non-discriminatory measures'.[20] A wide reading of the free movement provisions, however, 'would permit economic operators (..) to abuse Article [56 TFEU] in order to oppose any national measure that (..) could narrow profit margins and hence reduce the attractiveness of pursuing a particular activity'.[21] Such a wide reading is not only problematic from the perspective of the vertical division of competences, Tizzano argues, but also has a significant normative implication for the type of market that emerges in the EU: 'that would be tantamount to bending the Treaty to a purpose for which it was not intended: that is to say, not to create an internal market in which conditions are similar to those of a single market and where operators can move freely, but in order to establish a market without rules'.[22] The scope of the free movement provisions, then, directly matters for how we can answer our two constitutional questions.

This is also, of course, visible in the Court's case law on Article 34 TFEU. While the *Keck* case sought to make a formalistic distinction between the type of rules (product requirements) that would fall within the scope of Article 34 TFEU and the types of rules (selling arrangements) that would fall outside that scope in order to clarify the vertical division of power between the EU and the Member States in market regulation,[23] more recent cases suggest that this constitutional awareness of the Court has decreased. In the cases relating to national limitations on use of a certain product,[24] or the more recent *ANETT* and *Scotch Whisky* cases, the Court seems primarily preoccupied in extending the scope of Article 34 TFEU so as to be able to supervise Member State measures that regulate the market, even if their impact on *cross-border* trade is arguable negligible or non-discriminatory.[25] In Scotch Whisky, for example, the Court explicitly second-guesses Scottish policy in fighting alcoholism by rejecting the Scottish Parliament's imposition of a minimum prices per unit of alcohol.

Another element in the Court's case law that has been criticised for having significant constitutional implications is the question of the possible horizontal application of the free

[19] See also C. Barnard, 'Restricting Restrictions: Lessons for the EU from the US?' (2009) 68 *Cambridge Law Journal* 575.
[20] AG Tizzano in Case C-442/02, Caixa Bank [2004] ECR I-8961, para 61.
[21] *Ibid*, para 62.
[22] *Ibid*, para 63.
[23] Case C-267/91, *Keck and Mithouard* [1993] ECR I-6097.
[24] See e.g. Case C-110/05*, Commission v Italy* [2009] ECLI:EU:C:2009:66; Case C-142/05, *Mickelsson & Roos* [2009] ECR: EU:C:2009:336.
[25] Case C-333/14, *Scotch Whisky* ECLI:EU:C:2015:845; Case C-456/10, *ANETT* ECLI:EU:C:2012:241.

movement provisions.[26] As Schepel has clarified, the acceptance of horizontal effect has direct and distinct implications for how we can answer the two constitutional questions set out above. He suggests that the horizontal application of the free movement provisions introduces a degree of institutional and normative complexity that is very difficult for the Court to manage appropriately.[27] In consequence, both the normative orientation of the internal market, and the respective role of the different institutions (both domestic and EU) involved in managing that market becomes deeply contingent on the actions of *private* actors – which in itself subverts the very notion that the appropriate answers to the constitutional questions are to be found in the Treaty. The most prominent cases where the horizontal application of the free movement provisions has been understood to have constitutional implications are of course *Viking* and *Laval*.[28] The imposition of the obligation on trade unions to respect the free movement rights of companies confounds the Court's capacity to answer the constitutional questions. First, the scope of EU law is no longer determined by the Treaty but by private action. In consequence, the weighing of (contradictory) normative values is taken out of the national political arena, and re-allocated to private actors (albeit supervised by the Court). Second, the normative texture of the internal market is no longer developed through a commitment to the values that the Union and Member States share, but are instead developed through the exercise of movement by private actors. In a sense, and as explored more in depth below, the depoliticisation of national labour law policies makes the attainment of its normative objectives impossible.[29]

Finally, some authors have argued that the problems created by the constitutionalisation of market freedoms in the EU could be solved by a different use of the principle of proportionality, which the Court uses to adjudicate in a case-by-case basis on the relative weight of market freedom and non-economic values.[30] These legal instruments, after all, define to what extent Member State autonomy is respected and which values are allowed to inform the structure of the European market. The test of proportionality used by the Court, many authors have highlighted, tends to create a bias in favour of free movement (and to the detriment of non-economic values) by insisting that the national measure achieves the public policy objective in a method that is the *least restrictive* of free movement possible. These tests are very prescriptive, and often have the effect of replacing domestic regulatory standards with standards that are set by the Court itself.[31] This process has been criticised on account of both constitutional questions set above: it re-allocates regulatory power away from domestic political actors towards transnational judicial actors; and it introduces a bias in the regulation of the internal market which means that it does not necessarily reflect the normative understanding of the market by the political actors on the EU and the Member States.[32] On this account, the keys to improve the constitutional quality of the free movement provisions lies not in the institutional structure of the EU, in the legal structure of free movement, or in their scope of application, but in the way in which free movement arguments are weighted against to non-economic values.[33]

[26] Ashiagbor, above, note 17, 311-12.
[27] H. Schepel, 'Constitutionalising the Market, Marketing the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law' (2012) 18 *ELJ* 177.
[28] Case C-438/05, *Viking* [2007] ECR I-10779; Case C-341/05, *Laval* [2005] ECR I-11767.
[29] See below, section 2.
[30] Barnard, above, note 19.
[31] Nic Shiubhne, above, note 3; De Witte, above, note 5. See also Case C-333/14, *Scotch Whisky* ECLI:EU:C:2015:845
[32] *Ibid*.
[33] See for suggestions to this effect, D. Damjanovic, 'The EU Market Rules as Social Market Rules: Why the EU Can Be a Social Market Economy' (2013) 50 CMLR 1704ff; De Witte, above, note 5.

This article suggests that the above approaches to tackling the question of the constitutional quality of the free movement provisions offer an incomplete account – not because their explanatory accounts are unconvincing or inaccurate, but because of an absence of *context*. In order to understand the constitutional quality of the free movement provisions, context is crucial. Two examples might explain why looking at the legal structure of the Court's case law does not suffice. Take the wide scope of the free movement provisions, catching any measure alone that makes mobility 'less attractive'. Is such a reading of the free movement provisions constitutionally problematic or not? Surely the answer must depend on whether the domestic rule that is challenged relates to (say) telecommunications or drugs policy: in the former policy area the EU shares its competences with the Member States, while the latter formally remains a domestic policy area. Consequently, stringent oversight by the Court and curtailing domestic political autonomy in the former is much less problematic than in the latter example. Or take the restrictive interpretation of proportionality, which introduces a bias in favour of free movement by insisting on the 'least restrictive' alternative available. Is such an interpretation constitutionally problematic? Again, the answer depends on the context. Strict proportionality might undermine social rights (say, in labour law), but also promote them (in healthcare). The normative and constitutional consequences of the case law on free movement, are, in other words, not necessarily linked to its legal structure. These examples show that simply looking at the legal structure of the case law on free movement cannot, on its own, tell us anything conclusive about the *constitutional quality* of the free movement provisions. These provisions can be interpreted to EU to protect, or, conversely, to subvert domestic policy choices. In the absence of context, looking at the legal structure of the Court's case law can tell us something about the formalistic coherence of EU law, but not its substantive quality.[34] These genuinely *constitutional* questions (the question of vertical allocation of competences, and the normative vision of the 'market') must also take account of the *context* of a specific policy area.

If we want to assess the constitutional quality of the free movement provisions, we should instead narrow our analysis to the way in which the case law of the Court impacts on specific policy areas. Different policy areas, after all, will have different vertical division of competences between the Member States and the EU, and different normative objectives will underlie those different policy areas. One would expect the Court to act differently when it is asked to adjudicate on labelling of foodstuffs than when it adjudicates on the compatibility of abortion with free movement. In order to discharge its judicial task in a fashion that is constitutionally appropriate, the Court needs to be very sensitive to the nuances of the policy areas in which it is asked to adjudicate, and the way in which free movement has the potential to skew domestic policy preferences in areas that fall outside the legislative competences of the EU.

This article suggests that the constitutional quality of EU free movement law depends on the case law's capacity i) to respect and reflect the vertical division of competences *in a particular policy area*, meaning that it ought to identify which legislator (EU or Member States) have the authority to decide on policy orientation; and ii) to respect the normative ambitions that underlie such policy areas. What these normative ambitions exactly are must be deduced from its legislative context – which might be EU legislation (in areas falling within the Union's competences) or domestic legislation (in areas falling outside the Union's competences). This task of identifying normative policy orientations, objectives or goals, is a task that both domestic and EU court routinely perform – typically looking beyond the formalistic articulation of those objectives in legislation, and taking into account drafting history, preambles, and the relationship of separate pieces of legislation to its wider policy context

[34] Which itself masks a range of normative and institutional tensions, see Nic Shiubhne, above note 3.

and ambitions.[35] Such a new constitutional approach in analysing the case law in free movement also suggests, of course, that inconsistency *across* the case law of the Court on free movement may not necessarily be a bad thing. What matters less is the procedural relationship between free movement and policy (does the Court use similar standards or methodology in adjudication?);[36] and what matters more is the *substantive* relationship between free movement and policy areas, that is, to what extent free movement case law serves to either uphold or subvert the substantive values articulated by the (EU or domestic) legislator. Such a contextual approach to understanding the Court's case law also entails that the EU – in areas that fall outside of its competences – must respect domestic policy choices not by virtue of their specific normative orientation but simply by virtue of the fact *that* such choices have been made by the domestic political structures. The argument below, importantly, does not suggest a normative reorientation of the case law of the Court in order to achieve an alternative outcome that is more normatively appealing in substance, but one that is more appealing because it respects the authority of the legislative institutions in making those decisions.

The following sections analyses the implications of this more contextual approach with reference to Article 56 TFEU on the freedom to provide services. Article 56 TFEU applies to policy areas as diverse as labour law, gambling, healthcare or telecommunication; and it deals with different forms of cross-border mobility (of the provider, recipient, or service itself). This means that cases coming before the Court under the heading of Article 56 TFEU require meticulous contextualisation in order to make sense of the radically different normative objectives of these policy areas. The next sections will look at three policy areas that articulate salient moral or distributive policy preferences: labour law, healthcare, and gambling. These areas are at once radically diverse (in particular in their normative ambitions and structural properties) but also very similar (in so far as the substantive regulation of these areas falls without doubt in the competences of the Member States). The way in which the internal market and free movement provisions interact with these areas, in other words, ought to serve to *insulate* national normative ambitions and choices, *not* to undermine or skew them. The latter outcome would be constitutionally deeply problematic. Looking at the Court's case law in these three areas through the lens of the constitutional framework discussed in this section, we realise that the constitutional quality of the Court's case law radically differs from one policy area to the next.

Labour law

The constitutional quality of the Court's case law where labour law intersects with Article 56 TFEU is very dubious. The division of competences in this area is clear: Member States are solely responsible for the *substantive* articulation of labour norms (with the exception of health and safety measures and non-discrimination measures), while EU law – and specifically the Posted Workers Directive 96/71 – serves as a conflict of law rule, allocating which Member State is allowed to impose its labour norms on which actors. Article 153 TFEU, in fact, explicitly

[35] See, in the context of the EU, for example J. Komarek, 'Legal Reasoning in EU Law', in D. Chalmers and A. Arnull, *The Oxford Handbook of European Union Law* (OUP 2016); G. Itzcovich, 'The Interpretation of Community Law by the European Court of Justice' (2011) 10 *GLJ* 537. Cases in which the Court has recently and explicitly engaged in these practices are Case C-370/12, *Pringle* ECLI:EU:C:2012:756; or Case C-583/11P, *Inuit* ECLI:EU:C:2013:625.

[36] This is not to say that the methodology does not matter. As Nic Shiubhne and Maci highlight, changes to the Court's use of evidence, for example, has vast implications for the constitutional questions discussed here, as well as the quality of the internal reasoning of the Court. See N. Nic Shiubhne and M. Maci, 'Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law (2013) 50 *CMLR* 965

highlights that "the Union shall support and complement the activities of the Member States" in social policy, explicitly excluding any harmonisation other than the setting of minimum standards (from which Member States are free to deviate upwards),[37] and, in Article 153 (5) TFEU, explicitly ringfencing the regulation of pay, the right to association, and the right to strike, from EU legislative action. In other words, the Treaty is clear about the division of competences in labour law: Member States are solely responsible for the expression of when, why, and how workers *ought* to be protected from the asymmetric power advantage of their employers. This is not particularly surprising. The purpose of labour law, after all, requires both the politicisation of the substance of labour norms and the incapacity for workers and companies to contract out of such protective measures (that is, the compulsory territorial adherence to labour law norms). The EU, on the other hand (at least when one reads the Treaty provisions) is normatively neutral in the substantive regulation of the employment relationship: it does not express any particular substantive vision of what justice is and requires in the employment relationship.

The Court's engagement with the area of labour law in its case law on free movement, however, does not respect this constitutional balance. A brief overview of the case law of the Court, starting with *Rush Portuguesa*[38] and finding its end (for the moment) with *Elektroboduwa* and *Regiopost*,[39] highlights the Court's reluctance to accept that Member States are allowed to impose their own labour norms on (temporarily) resident workers. This case law, as will be discussed below, indicates that the Court is more interested in subverting domestic policy choices than protecting them.

The normative objectives underlying all labour law regimes on the national level – throughout the EU – are generally considered to be the balancing of power between 'labour' and 'capital' or, more practically, between workers and their employers. This normative objective became crucially important in the aftermath of the period of industrialisation in the late 1800s, which led to a big power asymmetry between labour and capital, to the exploitation of large groups of workers, and to social unrest that had to be institutionalised politically.[40] Labour laws were created in order to regulate the interaction between the actors in the productive process in a way that is dictated not just by their economic position, but also in reference to commitments to justice and equality. Labour law, as such, attempts to correct both a structural and substantive problem. In structural terms, it attempts to correct the vast (economic) power asymmetry between labour and capital by altering the form and forum of their interaction.[41] It suggests that the limits to, or conditions for, competitive contracting should *not* be decided on the basis of the relative economic power of the market participants, but is to be decided in the *political* forum where their voices are more equal. The political process, in other words, serves to correct and stabilise capitalist processes,[42] and as such creates what Streeck calls democratic capitalism: a structural commitment to discipline capitalist forces in accordance to ideas of justice.[43] In substantive terms, labour law seeks to prevent the exploitation and commodification of the worker. Labour law, in a sense, offers workers better conditions of

[37] The logic of minimum (also known as reflexive) harmonisation is to explicitly allow for upward deviation by the Member States, and prevent the possible effect of regulatory competition. See S. Deakin, 'Legal Diversity and Regulatory Competition: Which Model for the EU?' (2006) 12 *ELJ* 448.
[38] Case C-113/89, *Rush Portuguesa* [1990] ECR I-1417.
[39] Case C-396/13, *Elektroboduwa* ECLI:EU:C:2015:86; and Case C-115/14, *Regiopost* ECLI:EU:C:2015:760.
[40] R. Hyman, *Industrial Relations: A Marxist Introduction* (MacMillan 1975), 22-23. See also S. Webb and B. Webb, *Industrial Democracy* (MacMillan 2003), 654-60.
[41] W. Streeck, 'Citizenship Under Regime Competition: The Case of the "European Works Councils"', (1997) 1 *EIoP* No. 5, 3.See for an econometric discussion: P. Cahuc, F. Postel-Vinay and J-M. Robin, 'Wage Bargaining with on-the-job Search: Theory and Evidence', (2006) 74 *Econometria* 323-364.
[42] K. Polanyi, *The Great Transformation* (Beacon 2002).
[43] W. Streeck, 'The Crisis of Democratic Capitalism' (2011) 71 *New Left Review* 26.

work in return for their acceptance of the fact that the meritocratic logic of the market dictates the quality of their life. As such, it sets, for example, rules that regulate the health and well-being of workers, minimum rates of payment or holiday, or schemes to protect them in case of redundancies.

Both the structural and substantive normative objective that underlies labour law regimes are implemented by the principle of territoriality, that is, by making adherence compulsory: "protected by means of public authority, [labour norms] are supposed to be non-negotiable between the labor market participants to which they apply, insulating them against the impact of differences in bargaining power. For example, just as workers cannot sell their right to bargain collectively, or agree to work for less than the minimum wage, employers are not allowed to buy themselves out of their obligation to consult."[44] This suggests that the normative objectives of labour law are based on a precarious institutional framework: without a political process that can even out power asymmetries, and without the principle of territoriality that makes certain substantive labour standards compulsory, the normative objectives or labour law *cannot* be achieved.[45]

In light of this intimate connection between the production of labour law norms and the institutional framework that implements it, it is unsurprising that competences in labour law have remained on the national level. It is equally unsurprising that labour lawyers have been preoccupied with how the development of the internal market would impact on the capacity of the Member States to autonomously regulate the employment relationship and the limits to (and conditions of) competitive contracting within their territory. The twin processes of negative integration and regulatory competition suggest that the internal market *could* be a possible threat to national labour law: by disembedding the interaction between 'capital' and 'labour' from the domestic political setting, or challenging the principle of territoriality, the dynamics of the internal market could introduce a bias in favour of the former.[46] In other words, for the Court to engage with labour law in a constitutionally appropriate fashion, and to respect and reinforce the normative objectives underlying labour law (rather than subvert them), the Court ought to be sensitive both to the autonomy of the national political process as the *site* for the elaboration of labour norms, and to the substance and nature of those norms, which require compulsory and territorial adherence.

A brief perusal of the Court's case law on the interaction between labour law and free movement indicates a worrying level of incoherence. In a first range of cases – including *Seco*, *Rush Portuguesa* and *Van der Elst*[47] – the Court seemed to be sensitive to the need to protect political autonomy in norm-setting, and allowed Member States to extend labour norms to *all* workers on its territory, even if temporarily present in the context of the posting of workers: "[Union] law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry relating to minimum wages, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established".[48] This understanding of the interaction between labour law and free movement is constitutionally appropriate: the Court respects the substantive division of

[44] W. Streeck, 'Citizenship Under Regime Competition: The Case of the "European Works Councils"', (1997) 1 *EIoP* No. 5, 3.
[45] See for a more elaborate account, F. De Witte, 'EU Law, Politics and the Social Question' (2013) 14 *GLJ* 591.
[46] Ashiagbor, note 17, 309.
[47] Joined Cases 62/81 and 63/81, *Seco* [1982] ECR 223; Case C-113/89, *Rush Portuguesa* [1990] ECR I-1417; Case C-43/93, *Van der Elst* [1994] ECR I-8303.
[48] Case C-43/93, *Van der Elst* [1994] ECR I-8303, para 23 – the court later nuanced this statement to the effect that only those norms that protect the worker and are not enforced in home state could be demanded. See F. De Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (OUP 2015) 104ff.

competences between the EU and its Member States and *strengthens* the capacity of Member States to meet the normative objectives of labour law – that is, to prevent the exploitation and commodification of the workforce. These rulings were codified in the Posting of Workers' Directive 96/71, which took most labour law norms 'out of competition' by allowing Member States to make adherence on their territory compulsory,[49] and explicitly allowed for the imposition of conditions of employment on temporarily present workers "which are more favourable to workers" than in the workers' home state.[50] In other words, this first line of cases on the interaction between labour law and the internal market suggests that free movement law respects the normative objectives of national labour law regimes.

EU lawyers will all know how the story continues. In a series of rulings in *Viking*, *Laval*, *Rüffert* and *Commission v Luxembourg*, the Court understood the interaction between labour law and free movement to require the exact opposite outcome: Directive 96/71 "cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection".[51] In these rulings, the Court allows temporarily present workers to work under a regime that combines the rules of their home state with the bare minimum rules that apply in the host state. In other words, they do not work under the conditions that a comparable host state worker works under, but instead under the lowest conditions available in the host state. Rather than seeing national minimum labour conditions as a floor under which the conditions of employment become normatively problematic, the Court sees such conditions as a ceiling: companies posting workers abroad cannot be made to comply with higher standards. These same problems are also present in the (lack of) capacity of trade unions to strike in support of their employment rights in case of transnational movement of competitors of employer.[52]

These rulings are constitutionally deeply problematic; primarily in so far as EU law *challenges* the normative objectives of labour law rather than insulating them. This is premised on three fundamental misconceptions about the structure and purpose of labour law that are implicit in the Court's case law. The first – and most evident – is that the Court, in arguing that the interests of both home state service providers *and* their workers are affected by the imposition of labour conditions by the host state,[53] seems to think that *any* work is beneficial for posted workers, rather than work undertaken under conditions of fairness and justice. This is to fundamentally misunderstand the power asymmetry that is at the basis of the employment relationship. Second, the application of the free movement provisions to trade unions (that is, their horizontal application) presumes that trade unions act in the public interest (as their actions can only be justified as such), while capital acts out of private interests in using the free movement provisions. The result is that the Court demands that the weaker party to the employment relationship must take the interests of the stronger party into account when acting. It goes without saying that this turns the normative premise of labour law on its head: it presumes that capital needs to be protected from the power advantage that labour has! Third, the Court, in engaging substantively with the normative question how 'capital' and 'labour' ought to relate with each other – whether within the context of posting of workers or the right to collective action – is taking these questions

[49] P. Davies, 'Posted Workers: Single Market or Protection of National Labour Law Systems?' (1997) 34 *CLMR* 571.
[50] Article 3 (7) and recital 17 to Directive 96/71 on the posting of workers. In later case law, the Court took this to mean conditions more favourable *in the workers' home state*, as if the purpose of the PWD is to protect Luxembourg workers that work in Bulgaria, rather than the other way around. See Case C-341/05, *Laval* [2005] ECR I-11767, para 80-81.
[51] Case C-341/05, *Laval* [2005] ECR I-11767, para 80; Case C-C-346/06 *Ruffert* [2008] ECR I-1989, para 33.
[52] K. Apps, 'Damages Claims against Trade Unions after Viking and Laval' (2009) 34 *ELRev* 141.
[53] Case C-341/05, *Laval* [2005] ECR I-11767, para 58.

outside the scope of politics. The same applies when it demands that labour take account of the interests of capital in exercising the right to collective action.

The Court, here, clearly underestimates the extent to which the political embedding of these questions is vital to level out the power advantage of capital and attain the normative objectives of labour law. The political nature of the interaction between labour and capital served *exactly* the purpose of evening out the power asymmetries between them. All in all, this second line of cases on the interaction between labour law and free movement indicates significant constitutional problems: it undermines the attainment of the normative objectives of labour law not only in a structural manner – by depoliticising its development – but also in a substantive manner – by limiting the territorial and compulsory adherence which protects labour from the power advantage of capital. Rather than respecting and insulating the normative objectives of labour law, then, the Court subverts them, and exposes the worker to the full force of capital.

In more recent cases such as *Elektroboduwa* and *Regiopost*[54] the Court seems to somewhat come to its constitutional senses, and to respond to the avalanche of criticism that followed the cases listed above.[55] *Elektroboduwa* concerned a conflict between Polish workers and their employer over the conditions for work while posted in Finland. More specifically, it dealt with the applicable law that governs payment disputes (on which Directive 96/71 is silent) and whether the notion of 'minimum wage' that Finland was allowed to impose on the Polish employer includes accommodation, transport and food (as it did under the Finnish sectoral trade agreement) or ought to be limited to rates of pay alone.[56] The Court first held that payment disputes could be assigned to trade unions (as Finnish law allowed but Polish law did not). This is an encouraging sign, in so far as it suggests that host states can impose *procedural* standards that protect the worker in the host state.[57] The Court then – in a surprising move – substantively defined 'minimum rates of pay' in a manner that allowed differentiation based on qualifications, experience, training and type of work, that included a daily allowance, reimbursement for travelling time, and that prevented the employer from deducing costs of accommodation and food while posted.[58] In short, the Court allowed the Finnish sectoral labour agreement to (very) broadly define 'minimum rates of pay' and impose these obligations on temporary employment relationships within its territory. Even if the full extent to which it goes back on previous case law is unclear,[59] *Elektroboduwa* seems to carve out more regulatory autonomy for host state. Even though the Court does not formally acknowledge the regulatory autonomy of Finland to impose its own, political, understanding of the appropriate limits to (and conditions of) employment to all workers present on its territory; it does signal a more sensitive approach to the capacity of free movement to undercut the normative objectives of labour law. As such, it seems that the Court is slowly turning to an interpretation of the interaction between labour law and free movement that is more constitutionally coherent. It is to be hoped that in future cases the Court is more sensitive to the structure, nature, and normative objectives of labour law.

In doing so, the Court might be helped by the Union legislator. It is not particularly surprising that it has been political actors that understand the negative consequences of the Court's case

[54] Case C-396/13, *Elektroboduwa* ECLI:EU:C:2015:86; and Case C-115/14, *Regiopost* ECLI:EU:C:2015:760.
[55] See, for example, Garben, above note 12.
[56] Case C-396/13, *Elektroboduwa* ECLI:EU:C:2015:86, para 14-18.
[57] Case C-396/13, *Elektroboduwa* ECLI:EU:C:2015:86, para 19-26.
[58] Case C-396/13, *Elektroboduwa* ECLI:EU:C:2015:86, para 38-69.
[59] Garben, above note 12.

law.[60] Politics, after all, *is* sensitive to power asymmetries and emerging claims of injustice. The Commission's 2016 work programme includes both 'a targeted review of the Posting of Workers' Directive' and the construction of a 'pillar of social rights',[61] both of which are expected to address the way in which the dynamics of the internal market affects the capacity of labour law to embed the employment relationship in ways that prevent the exploitation and commodification of the worker.[62] The legislative proposal on revision of the Posting of Workers' Directive, for example, is premised on the principle of 'same work same pay' and suggests altering the wording of the Directive to that the host state is allowed to impose *all* legislation concerning remuneration on posted workers.[63] This, again, would go some way towards structuring the interaction between free movement and labour law in a manner that facilitates the attainment of the latter's objectives, rather than obstruct it. At the same time, this proposal has been 'yellow carded' by national parliaments, not on the basis of subsidiarity, but on the basis of the desire by central and eastern European Member States to preserve a substantive *status quo* that is in their favour.[64]

In the area of labour law, the constitutional quality of the case law of the Court is very dubious. Its case law has challenged both the structural manner in which labour law functions (by depoliticising it) as well as its substantive and normative commitment to prevent capital from exploiting the power advantage that it has over workers. Rather than insulating domestic normative preferences as to the interaction between labour and capital, then, the case law of the Court *subverts* such preferences. This is constitutionally problematic given that the division of competences clearly allocates such decisions to domestic legislatures.

Healthcare

The Court's case law on the interaction between the free movement provisions and national healthcare policies is quite nuanced, and pays close attention to the particularities and logic of national healthcare choices. The Union's competence in healthcare is not dissimilar from the one in labour law. While Article 168 TFEU allows the EU to support and complement national legislation, it also explicitly highlights that "Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them". In other words, Member States remain responsible for the choice how to run and organise their domestic health system; while EU law is normatively neutral: it does not suggest a particular understanding of justice or solidarity in the provision of healthcare within or across borders. The Court's case law, in healthcare, has a completely different effect when compared to the case law discussed in the previous section. In its case law on cross-border healthcare, the Court respects and even reinforces the normative and substantive political choices made on the national level. While

[60] See the resistance against the codification of the status quo in Viking and Laval through the 'yellow-carding' of the Monti II proposals: F. Fabbrini and K. Granat, 'Yellow Card but No Foul: The Role of National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation of the Right to Strike' (2013) 50 *CMLR* 115.

[61] Commission Work Programme 2016, 'No time for business as usual' COM (2015) 610 final.

[62] Garben, above note 12; speech by the Commissioner Marianne Thyssen presenting the EU's social package, 'First Outline of the European Pillar of Social Rights and reform of the Posting of Workers Directive' 18 March 2016, Speech/16/682, available at: http://europa.eu/rapid/press-release_SPEECH-16-682_en.htm

[63] Proposal for a Directive amending Directive 96/71 on the posting of workers, COM (2016) 128 final, 7.

[64] http://www.euractiv.com/section/social-europe-jobs/news/national-parliaments-invoke-yellow-card-in-response-to-revised-posted-workers-directive/

in the area of labour law, then, the Court's case law *obstructs* the attainment of the normative objectives of that policy area, in the area of healthcare the Court *defends* those objectives.

Healthcare policy – in every Member State – is based on a fundamental distinction between two very different normative objectives. On the one hand, healthcare policies are meant to protect citizens and prevent their premature death. This type of healthcare is often called 'primary healthcare' and is understood as a basic social provision that is extended to all residents, visitors or even illegal entrants (which in itself indicates the fundamental nature of its provision). Treatments such as antenatal care, severe mental illness, treatment of infectious diseases and emergency healthcare are typically understood to fall within this category.[65] Domestic healthcare policy choices – be it relating to the mode of financing, modes of access, or the use of limited financial, infrastructural or personal resources – in every Member State reflect the absolute right for citizens to access healthcare that is crucial and elemental to their very survival. This first normative objective underlying healthcare policies can, in other words, be understood as the commitment to alleviate medical *need*.

The second normative basis for the provision of healthcare that we can distinguish is a more aspirational element. On this view, healthcare is not about preventing death but about improving one's conditions of life.[66] This more aspirational understanding of healthcare may include treatment such as eye-laser surgery, programs for healthy eating or stops smoking, cosmetic dentistry, removing tonsils or physiotherapy, and, fundamentally, sees to a citizen's *choice* to improve their health. The aspirational nature of these type of treatments is obvious, for example, in so far that they constitute relative (and not absolute) rights, may require longer waiting times, are not always delivered under the national health service, or may require an additional financial commitment by the patient. On this second view, the extent to which healthcare is available for all patients, and the extent to which it is collectively financed, depends *not* on medical *need*, but on the political choices that underlie domestic healthcare policies.

The boundary between these two normative objectives that underlie national healthcare policies are, obviously, not clear-cut. This is partially due to medical considerations, but (for the sake of our argument) mainly due to the way in which national healthcare policy is implemented. Due to the high costs of the provision of (all types of) healthcare, most Member States operate a system based on compulsory (semi-public) collective insurance – whereby citizens insure themselves and fellow citizens against a number of health risks. The main difference between Member States in this regard is how the system is financed: out of general taxation, work-related insurance schemes or public schemes. All systems, however, delineate the type of treatment options that are available, substantively excluding treatments such as cosmetic treatment or dentistry, and excluding treatment received abroad. The logic of this latter limit – that patients can only be reimbursed for the healthcare that they receive in the territory of the state – is that running a healthcare service requires a significant amount of planning, and financial and infrastructural resource allocation, which presumes some capacity for the healthcare providers to 'lock in' its recipients. If Belgium knows that it has to treat, on average, 500 patients with tuberculosis each year, it will provide the resources to do so. If,

[65] J. Ruger, *Health and Social Justice* (OUP 2009) 2-3; Article 7 (3) of the 1978 Alma Ata Declaration on Primary Healthcare, which defines primary healthcare as including 'at least: education concerning prevailing health problems and the methods of preventing and controlling them; (…) maternal and child health care, immunisation against the major infectious diseases, preventing and control of locally endemic diseases, appropriate treatment of common diseases and injuries; and provision of essential drugs'. See also B. Toebes, 'The Right to Health as a Human Right in International Law' in A. Eide, C. Krause and A. Rosas (eds.) *Economic, Cultural and Social Rights* (Kluwer 2001).

[66] EP Working Paper, 'Healthcare Systems in the EU: A Comparative Study' (SACO 101 EN).

however, 500 *extra* patients come in from the Netherlands, or, conversely, all 500 Belgian patients decide to be treated in France; the Belgian healthcare service either has insufficient beds, or wastes significant resources.[67] The capacity to 'lock in' patients, then, allows a Member State to implement its normative healthcare objectives.

National healthcare policy, to sum up, fulfils two very distinct normative objectives (one going to the medical *need* to protect the fragility of the human body, and the other to a patient's *choice* to work for its improvement) and is institutionalised across the EU in a contractual and territorial fashion – which appears on first sight to sit uneasily with free movement. The structure of healthcare, in other words, is not dissimilar as the one discussed in reference to labour law, above: the territorial and compulsory nature of the implementation of healthcare is directly relevant for its capacity to achieve the normative objectives. Free movement of patients (with the capacity to 'export' their reimbursement schemes), on this account, could *diminish* the capacity of Member States to ensure access to adequate healthcare for its immobile citizens by creating financial and infrastructural pressures.

It is argued that the case law of the Court (and the subsequent codification by the Union legislator) prevents this from happening by paying close attention to the normative objectives underlying healthcare policy on the national level. The Court in fact carries over the central distinction between, on the one hand, healthcare as need, and, on the other hand, healthcare as choice. The Court distinguishes between an absolute obligation of reimbursement for treatment received abroad (where healthcare is based on need), and a relative obligation of reimbursement for treatment based on the patient's choice rather than medical need. In doing so, the Court insulates these national policy ambitions, and gives them a cross-national scope of application.

In cases such as *Watts* and *Elchinov*, and more explicitly *Petru,*[68] the Court deals with patients that argued that cross-border treatment should be reimbursed by their own state because the treatment available in their own state was inadequate *to their medical need*. *Watts*, for example, dealt with a patient in need of a hip replacement, that left her in considerable pain and unable to work. Instead of waiting for six months (under the British NHS) she chose to be treated in France (where no waiting list existed). *Elchinov* dealt with a Bulgarian patient who was treated in Germany for an eye injury (with the only available treatment at home being the removal of the eye!); while *Petru* dealt with a Romanian national who underwent open heart surgery in Germany on account of her lack of trust in the hospital in Timişoara, which lacked certain basic medical and infrastructural resources. In all three cases, the logic underlying the patients' claims was that their *own* Member State had reneged on the normative promise to prevent medical need. While formally all these cases dealt with the question whether the treatments fell within the 'basket of healthcare' offered to patients in their home state, the Court implicitly (and explicitly in *Petru*) deals with the normative conditions under which healthcare ought to be provided by the Member States. In other words, the Court here assesses what the normative promise to prevent medical need, that underlies national healthcare policies, means in practice.

In *Petru*, the Court stresses that "authorisation [to seek healthcare abroad] cannot be refused if the same or equally effective treatment cannot be given in good time in the Member State of residence of the person concerned",[69] which depends on "the patient's medical condition"

[67] See for more, F. De Witte, *Justice in the EU* (OUP 2015), sections 3.4 and 4.3.1.
[68] Case C-372/01, *Watts* [2006] ECR I-4325, Case C-173/09, *Elchinov* [2010] ECR I-8889, Case C-268/13, *Petru* ECLI:EU:C:2014:2271.
[69] Case C-268/13, *Petru* ECLI:EU:C:2014:2271 para 31.

and the "lack of medication and of medical supplies and infrastructure" in that Member State.[70] This individual assessment – which can also be traced in *Elchinov* and *Watts*[71] - whereby the Court pays close attention to the pathological situation in which the patient finds him or herself, and the exact time frame within which treatment can be obtained in the patient's home state, suggests that the Court is willing to reinforce the normative obligation of primary healthcare even against the citizens' own state. In other words – the Court *insulates* the underlying domestic normative aims of a certain policy area rather than subverting it. It is granting all European citizens a right to adequate primary healthcare that can be enforced against their own state in case the latter fails to provide such healthcare. Or, to turn it around, it is creating an incentive for Member States to ensure that their provision of primary healthcare meets the basic standards that the normative objectives of healthcare imply. This obligation, as the Court highlighted in *Petru* in response to the observations of the UK and Romania, must be understood to see to the capacity of the *overall* healthcare system to offer the medical treatments that meet the patients' primary health concerns (as distinct from the capacity of an particular hospital to do so).[72] In these situations, it is clear that free movement law *may* lead to financial and infrastructural pressures on the Member States (as they are potentially forced to pay out for (more expensive) treatments obtained abroad). Yet, arguably this is only so as long as the domestic delivery of healthcare falls below basic standards of primary healthcare. As AG Colomer put it in *Stamatelaki*, "being a fundamental asset, health cannot be considered solely in terms of social expenditure and latent economic difficulties (…). This right is perceived as a personal entitlement, unconnected to a person's relationship with social security".[73] When a Member State, in other words, does not look after the basic health needs of its citizens (which is an absolute normative obligation that underlies national healthcare policies), the free movement provisions serve to defend this normative obligation by making it accessible beyond the territory of the state.

When, on the other hand, transboundary patient mobility is premised on the patient's *choice* (rather than medical need), the Court is much more willing to respect domestic constraints that relate to the financing or planning of healthcare structures. Again, what the Court is doing here is insulating the normative logic that underlies the relative, aspirational, right to healthcare, which needs to be weighed up against the healthcare claims by other citizens. A commitment to this normative objective, therefore, suggests that Member States dispose of a significant leeway in the regulation of patients who simply *prefer* to be treated abroad. In a range of cases starting with *Kohll* and *Decker*, and recently codified in the Patients' Rights Directive 2011/24, the Court will accept limitations on the rights of patients to travel freely in order to obtain (and be reimbursed for) healthcare *when adequate healthcare was equally available 'at home'*.

These limitations can be based on concerns for the financial[74] or infrastructural[75] balance underlying the delivery of the overall healthcare service. As such, repayment for treatment obtained abroad can be limited to the amount that the procedure would have cost 'at home', so that the financial resources required to run a healthcare service are not diverted abroad to the detriment of immobile patients in the home state. In *Müller-Fauré* the Court suggests that

[70] Case C-268/13, *Petru* ECLI:EU:C:2014:2271 para 32-33.
[71] Case C-372/01, *Watts* [2006] ECR I-4325 para 56-7; Case C-173/09, *Elchinov* [2010] ECR I-8889 para 73.
[72] Case C-268/13, *Petru* ECLI:EU:C:2014:2271 para 35-36.
[73] Opinion of AG Colomer in Case C-444/05, *Stamelataki* [2007] ECR I-3185 para 40, with reference to the Opinion of the European Economic and Social Committee on Healthcare, OJ (2003) C 234/36.
[74] Article 7 (4) of Directive 2011/24. See also Case C-120/95 *Decker* [1998] ECR I-1831, para 38-40; Case C-158/96, *Kohll* [1998] ECR I-1931, para 40.
[75] Article 4 (3) of Directive 2011/24. See also Case C-56/01, *Inizan* [2003] ECR I-1403, para 57, Case C-385/99, *Müller-Fauré* [2003] ECR I-4509, para 83-5.

the patient "can claim reimbursement of the cost of the treatment given to them only within the limits of the cover provided by the sickness insurance scheme in the Member State of affiliation".[76] Article 7 (4) of the Patients' Rights Directive 2011/24 now codifies this financial limit. In other words, when healthcare abroad is obtained because of the patient's preference (rather than medical *need*), reimbursement is conditional. The Court has also accepted a limit to reimbursement based on the infrastructural planning required to run a healthcare service. As such, it allows exceptions to the reimbursement rules where treatment is obtained abroad out of *choice* rather than need, and "requires use of highly specialised and cost-intensive medical infrastructure or medical equipment".[77] The logic here is that Member States are allowed to recoup the investment made in state-of-the-art medical infrastructure by 'locking in' the patients that require its use.

These two limits to free movement can best be understood in their constitutional context. In cases where patients' healthcare needs *can* be met at home, but they *choose* to be treated abroad, movement should not undermine healthcare access by *immobile* patients in the home state. After all, beyond the prevention of medical need, domestic healthcare policy is premised on a *relative* right to healthcare, where a patient's right is balanced against demands of other patients. In a sense, the Court is insulating this normative basis of national healthcare policy by extending it across border without subverting its nature.

Some critics have been less generous in their understanding of the Court's engagement with the national health services. Their criticism comes in two flavours. On the one hand, critics have argued that the Court's judgments have led to the commodification of healthcare and undermines the basic solidaristic premise that each citizen has equal access to healthcare on the sole basis of their healthcare needs. On this view, the possibility of free movement favours the 'savvy' citizen who knows that reimbursement of treatment abroad is possible, and that has the linguistic, legal, financial, and practical expertise to seek out healthcare treatment abroad and deal with the administrative burden of reclaiming expenses.[78] On the other hand, critics have argued that certain practical and structural ways in which free movement skews access to healthcare *for the citizens that remain at home* have been overlooked by the Court. This is a more significant criticism from the constitutional perspective, as it suggests that the functioning of the free movement provisions alters the possibility to access healthcare for immobile citizens and – as a consequence – undermines the Member States' commitment to secure adequate healthcare for its citizens. Ashiagbor, for example, highlights how EU law fails to respect domestic healthcare priorities, fails to control healthcare costs and the principle of equality between insured persons (in so far as it allows queue-jumping).[79] Newdick suggests, more generally, that free movement law prioritises individual rights over collective interests, and skews the political choices underlying the management structure of healthcare[80] to the detriment of the "less vocal, and often already underempowered, categories of citizens".[81] He highlights specifically the danger for the poorer Member States who – forced to pay out healthcare costs incurred abroad – would struggle to direct investment inward and

[76] Case C-385/99, *Müller-Fauré* [2003] ECR I-4509, para 98.
[77] Article 8 (2) of Directive 2011/24. See also De Witte, above note 67, 198-9 for an overview of the case law.
[78] See Newdick, note 9; C. Newdick, 'The European Court of Justice, Transnational Healthcare, and Social Citizenship – Accidental Death of a Concept?' (2009) 26 *Wiscounsin International Law Journal* 844.
[79] Ashiagbor, above, note 14, 322-3
[80] C. Newdick, 'The European Court of Justice, Transnational Healthcare, and Social Citizenship – Accidental Death of a Concept?' (2009) 26 *Wiscounsin International Law Journal* 849-50.
[81] Newdick, note 9. See also S. Greer and T. Sokol, 'Rules for Rights: European Law, Health Care and Social Citizenship' (2014) 20 *ELJ* 79; C. Murphy, 'An Effective Right to Cross-Border Healthcare? On Patients, Primary and Procedural Autonomy: Comment on Elchinov' (2011) 36 *ELRev* 555.

haemorrhage financial resources, leaving immobile citizens with a qualitatively poorer service.[82]

It seems that these arguments are based on a misreading of the case law and its codification in the Patients' Rights Directive. As discussed above, this type of negative impact on immobile citizens is possible only where Member States do not offer adequate primary healthcare for its citizens. In such a situation, forcing Member States to fully reimburse treatment abroad actually *strengthens* the normative objectives of the provision of healthcare. However, in situations where there is no medical need, the reimbursement *pro rata* of treatment abroad cannot possibly undermine the finances of the national healthcare service. Such an argument is only logically tenable if patients are expected to miraculously recover or die before being treated 'at home'. In any other event, after all, the home Member States' expenses are equal whether the patient is treated at home or abroad. Either way, patient mobility in the EU is minimal,[83] as healthcare systems on the whole offer good treatment options for patients,[84] and due to "linguistic barriers, geographical distance, the costs of staying abroad and the lack of information about the kind of care provided".[85] It is possible, however, for free movement to diminish the capacity of Member States to provide adequate healthcare in more subtle ways. One example could be that the operation of free movement diverts substantial resources from strategic and immobile investment (say, cancer research) to mobile diseases (such as hip replacement, for which patients can move abroad). Domestic waiting lists serve to stabilise such allocations of resources, which free movement may thwart. If and when this takes place (which seems unlikely and has so far not been empirically demonstrated) there is an argument to suggest that the right to cross-border healthcare and its reimbursement can be limited to stabilise the normative commitments that underlie such healthcare planning.

Even if not completely perfect, the intention of the Court in its engagement with healthcare is quite clear. In developing the two-tiered system of cross-border healthcare entitlements, it is seeking to *protect* the normative premise that underlies national healthcare systems – which makes a fundamental distinction between healthcare as need and healthcare as choice.[86] Where a patient seeks treatment abroad out of medical need, that is, their own Member State cannot make good on the normative promise that underlies all Member State healthcare policies to protect the fundamental healthcare needs of its citizens, free movement law defends this normative promise. When, on the other hand, a patient seeks treatment abroad while adequate healthcare was available 'at home', free movement law insulates the functioning of national health systems. In constitutional terms – which see to the respect for both the vertical division of competences between the EU and its Member States, as well as the respect for the substantive choices of the domestic legislator – this case law is well-balanced.

Gambling

The division of competences in the regulation of gambling is less clear than in the other two policy areas reviewed. The Treaty does not mention gambling, and gambling policy typically

[82] Newdick, above, note78, 859

[83] Only 4% of patients receive healthcare abroad, with a financial impact of 1% on NHS budgets. See Commission Impact Assessment for the Directive on Cross-Border Healthcare, SEC (2000) 2163, 9.

[84] Statistical data suggest very little unmet medical needs. See Commission Impact Assessment for the Directive on Cross-Border Healthcare, SEC (2000) 2163, 68.

[85] P. Koutrakos, 'Healthcare as a Service under EC Law' in M. Dougan and E. Spaventa (eds.) *Social Welfare and EU Law* (Hart 2005) 122 and Case C-385/99 *Müller-Fauré* [2003] ECR I-4509 para 95.

[86] See for a similar assessment from a different perspective H. Vollaard, H. Van den Bovenkamp and D. Martinsen 'The Making of a European Healthcare Union: A Federalist Perspective' (2016) 23 *JEPP* 157.

covers overlapping policy areas, ranging from internal market to public health, from consumer protection to the fight against organised crime. In consequence, the division of competences between the EU and its Member States is unclear. In practice, however, it is clear that both the EU and its Member States understand gambling regulation to fall within the scope of legislative competences of the Member States. The Commission itself (mirroring the assessment of the Court) suggests "Member States are in principle free to set the objectives of their policy on games of chance and to define in detail the level of protection sought".[87] Instead, Union action is aimed at coordination and the fight against organised crime.[88] Presumably this has to do with the salience of the regulation of gambling – both in economic and in moral-cultural terms.

Member State policy towards gambling, however, is as contradictory and confusing as the Court's assessment of it. On first sight, both appear very straightforward. When reading the case law of the Court, a clear picture emerges: Member States have both social and regulatory concerns about gambling – which primarily focus on the need to prevent addiction and fraud – and the ensuing restrictions of free movement are happily accepted by the Court without more than a light-touch proportionality review.[89] In essence, it appears that the Court is very sensitive to the normative ambitions that underlie domestic policies regarding gambling – a perfect example of how free movement ought to work in areas that fall within the competences of the Member States. Below the surface, however, we can trace a much more nuanced picture, whereby Member States base their regulatory approach to gambling primarily on the economic imperative of maximising tax returns, and use social and regulatory excuses to receive exemptions from the free movement provisions so as to achieve tax income maximisation. The Court, on the other hand, without explicitly acknowledging this economic reality, increasingly demands that the Member States take these putative social and regulatory risks seriously, and structure their regulatory model accordingly. This makes for a counterintuitive picture, whereby EU free movement law – rather than undermining the non-economic objectives of national regulation – becomes an instrument for their *enforcement*.

This history of gambling suggests that public authorities have always been in two minds about its regulation. On the one hand, gambling is thought to contribute to the perpetuation of 'social evils' such as addiction, fraud, the squandering of money, mental health issues, and, more recently, organised crime and match-fixing. Historically, condemnation by religious authorities has, moreover, offered a moralistic glow to its prohibition or stringent limitation.[90] On the other hand, gambling has always been understood as a social activity, a playful act, and as an important source for revenue or even charity (think of church lotteries).[91] With the technological advances of the last decades, moreover, these contradictions have become even more glaring. The online gambling market alone was expected to reach a size of €13 billion by 2015, with an annual growth rate of 15% (the overall gambling market is worth €85 billion).[92] The new possibilities offered by this online industry – the unlimited availability and

[87] See 'Towards a comprehensive European framework for online gambling', Commission Communication COM (2012) 596 final, para 2.
[88] *Ibid*.
[89] See, for example, S. Planzer, *Empirical View on European Gambling Law and Addiction* (Springer2014) 110ff; V. Hatzopoulos, 'The Court's approach to services (2006-2012): From Case Law to Case Load?' (2013) 50 *CMLR* 459; D. Doukas, 'In a Bet there is a Fool and a State Monopoly: Are the Odds Stacked against Cross-Border Gambling? (2011) 36 *ELRev* 243; S. Van den Bogaert and A. Cuyvers, 'Money for Nothing: The Case Law of the Court of Justice on the Regulation of Gambling' (2011) 48 *CMLR* 1175; J. Mulder, 'A New Chapter in the European Court of Justice Gambling Saga: A Stacked Deck? (2011) 38 *LIEI* 243.
[90] Planzer, above note 89, 4-5.
[91] Planzer, above note 89, 2.
[92] 'Towards a comprehensive European framework for online gambling', Commission Communication COM (2012) 596 final, 3.

ease of entry, increased possibility of fraud, the absence of social or medical controls of punters, the possibility of new forms of regulation, and most crucially the absence of the need of a physical shopfront – mean that these contradictions are increasingly played out through EU law.[93]

An overview of Member State legislation shows a wide range of regulatory responses in the area of gambling – ranging from full liberalisation, to licensing systems, to state monopolies. Some Member States differentiate between types of bets (for example, between lotteries and sports betting); others between online and offline betting; and others between the types of activities that can be gambled on.[94] The Court's rejection of mutual recognition in this area means that Member States retain wide autonomy in setting their regulatory model. The EU legislator, at the same time, mainly focuses on consumer protection.[95] It is clear that Member States do not regard gambling as such to be morally problematic (all Member States allow it to a lesser or greater extent). Rather, they understand the social or regulatory implications to be problematic. Whenever the regulatory approach of a Member State to gambling (both online and offline) is challenged on the basis of the free movement provisions, the Court has in principle accepted that anything short of a fully liberalised market constitutes a restriction to free movement. At the same time, it has also accepted a very wide range of justifications. Planzer summarises and lists 'the maintenance of public order', 'the prevention of fraud and other criminal activities', 'the limitation of the exploitation of the human passion for gambling', 'the prevention of the damaging individual and social consequences of incitement to expenses', 'consumer protection', 'maintenance of social order', 'protection of moral and cultural aspects', 'prevention of gambling from being a source of private profit', 'limitation of the propensity of consumers to gamble', 'combating financial crime and money laundering', 'prevention of the incitement to squander money on gambling', 'general need to preserve public order', 'the need to avoid private profit to be drawn from the exploitation of a social evil or the weakness of players and their misfortune', and 'fighting addition to gambling'.[96] The only justification that was explicitly rejected is the argument based on purely economic concerns – be it from the perspective of the gambling companies or the public purse. In *Commission v Italy*, for example, the Court explicitly held that "the need to ensure continuity, financial stability, and a proper return on past investments for licence holders" could not constitute a justification.[97] In *Gambelli*, likewise, the Court summarily dismissed Member State concerns about "the diminution or reduction of tax revenue, [which] does not constitute a matter of overriding general interest."[98] As we will see, this rejection of economic considerations has great implications for the constitutional quality of the Court's case law in this area.

In its assessment of proportionality, finally, the Court appears very hands-off. As Van den Bogaert and Cuyvers put it, "each individual requirement of the test is relaxed to introduce some form of additional margin. For instance, overriding objectives are accepted more easily, the burden of proof is almost reversed, and the necessity test is virtually abolished".[99] The Court's insistence on the coherence and consistency of policy design appear to be – on this take – an instrument to ensure that domestic regulation does not entail hidden protectionist intent, and offers wide normative leeway to Member States in deciding which social and

[93] See for a particularly negative view of the impact of internet on the social problems associated with gambling. Case C-46/08, *Carmen Media* [2010] ECR I-8149, para 103.
[94] See for overview of national regulatory responses: https://gamblingcompliance.com/products/reports-trackers
[95] Commission Gambling Action Plan. See http://europa.eu/rapid/press-release_IP-12-1135_en.htm
[96] Planzer, above note 89, 63-64.
[97] Case C-260/04, *Commission v Italy* [2007] ECR I-7083, para 35.
[98] Case C-243/01, *Gambelli* [2003] ECR I-13031, para 61; Case C-316/07, *Markus Stoß* [2010] ECR I-8069, para 105.
[99] Van den Bogaert and Cuyvers, above note 89, 1191.

regulatory interests to protect and how to do so.[100] On the surface, then, it seems that the Court is very mindful of the Member State's privilege to decide on the normative regulation of gambling.

Below the surface, however, we can trace another dynamic. As AG Stix-Hackl had already suggested in *Lindman*, Member States are deeply ambivalent about the regulation of gambling: "one the one hand, because of the social risks gambling involves, States have traditionally felt obliged to regulate or restrict it; however, gambling is of great significance for the public purse, both in fiscal and in general economic terms".[101] Indeed, work by Des Laffey, Vincent Della Sala and Kathryn Laffey suggests that the prime driver of Member State regulatory stances towards gambling is the maximisation of tax revenue.[102] They trace the regulatory changes, political discourse, and policy response in the UK and Italy over the past decades (as well as indicating anecdotal evidence from other Member States) and find that, despite different models of political economy; Member States all over the EU attempt to regulate gambling in a way that 'locks in' tax revenue.[103] They term this 'economic patriotism', whereby national policy makers attempt to favour (economic) insiders in market regulation. A typical example in the gambling sector would be a regulation that locks in resources obtained by gambling (in the place of incorporation) while outsourcing the social consequences of gambling (which occur at the place of consumption). The example of how the UK's regulatory stance has changed in the last decades is perhaps most instructive in this interplay between the gains and costs of socio-economic regulation. The 2005 Gambling Act liberalised the gambling trade in the UK, with the purpose of increasing employment, tax gains, and creating national champions ready to take on the global gambling market. In a review in 2012, this strategy appeared partially successful. The gambling market employed 95,000 people and generated over £7 billion in revenue.[104] At the same time, gambling addiction had gone up, and, more crucially from the UK's perspective, 90% of the revenue was made by companies not established in the UK, meaning that the UK was left with the social costs of gambling, without the economic gains in taxation.[105] In response, the Gambling Act 2014 set a new regulatory strategy that requires all gambling providers to obtain a UK license, and pay 15% tax.[106] This model is replicated across the continent – even if often the gambling products that can be offered are more restrictive than in the UK market. The objective of Member States is clear: they want a slice of the ever increasing gambling pie, while controlling for the most egregious of social ills related to this activity. Other Member States, such as Italy, operate a slight variation on this model, whereby licenses are given to companies that pay a 'reasonable amount' of tax in Italy, whereas access to non-licensed companies is blocked.[107] The regulatory models in Germany, France, Spain, and the Netherlands are similar.[108] Member

[100] De Witte, above note 5.
[101] Case C-42/02, *Lindman* [2003] ECR I-13519, para 84. See also Van den Bogaert and Cuyvers, above note 89, 1211, who highlight the importance of revenue on Member State regulatory choices in gambling.
[102] D. Laffey, V. Della Salla, K. Laffey, 'Patriot Games: The Regulation of Online Gambling in the European Union' (2015) 17 *Journal of European Public Policy* DOI:10.1080/13501763.2015.1105281.
[103] Laffey, Della Salla & Laffey, above note 102, 13.
[104] Laffey, Della Salla & Laffey, above note 102, 8.
[105] HM Treasury, '2012 Budget Statement by the Chancellor of the Exchequer', available at: https://www.gov.uk/government/speeches/autumn-statement-2012-chancellors-statement; Laffey, Della Salla & Laffey, above note 93, 9.
[106] See UK Gambling Licensing and Advertising Act 2014; HM Treasury, 'Gambling Tax: New Rules and Sanctions to Prevent Avoidance by Gambling Companies' (available at: https://www.gov.uk/government/news/gambling-tax-new-rules-and-sanctions-to-prevent-avoidance-by-gambling-companies).
[107] Laffey, Della Salla & Laffey, above note 102, 11.
[108] Laffey, Della Salla & Laffey, above note 102, 13.

State regulation of gambling markets is primarily geared towards "protecting and promoting domestic producers, and the associated tax returns, rather than consumers".[109]

This peculiarity, whereby Member States disguise gambling policies that are conceived on the basis of their economic and fiscal effect with reference to the need to protect consumers and prevent fraud is a direct effect of the Court's case law. As discussed above, the Court has never accepted purely economic reasons as legitimating restrictions to free movement in gambling. This forces Member States to justify any restriction on gambling (including a system of licensing, monopolies or any other limit) on grounds *other than purely economic ones*. The need to bring forward non-economic objectives – such as the combatting of addiction, the protection of public morality, or the fight against fraud and organised crime – in order to justify restrictive gambling policies that attempt to 'lock in' tax revenue, means that the free movement provisions generate a very counterintuitive effect. After all, the legality of Member State schemes now depends on their *actual* capacity to achieve these non-economic objectives while trying to maximise tax returns. The bias that is generally considered to be implicit in the free movement provisions is, in essence, turned upside down, and the Court is demanding that Member States take seriously the non-economic objectives that supposedly underlie them.

In *Winner Wetten*, for example, the Court held that a regulatory system that granted a monopoly to a public body could not be justified "by reference to the alleged objective of preventing the encouragement of excessive spending on gambling (…) since participation in bets in sporting competitions is encouraged by the national bodies authorities to organise such bets".[110] In *Pfleger*, the Court was very explicit in both its demand that national court closely scrutinise empirical data that demonstrates how Member States intend to protect consumers,[111] and in its rejection of any domestic policy of which "the real purpose is not the fight against crime and the protection of gamblers, but a mere increase of State revenue".[112] Likewise, in *Gambelli*, the Court highlighted that consumer protection considerations were not acceptable if the Member State simultaneously encouraged consumers to participate in betting "to the financial benefit of the public purse".[113] This logic – of forcing Member States to take serious the social or regulatory objectives stated – can also be traced in more detail in *Zeturf* and *Stoss*. In *Zeturf,* the Court explicitly argued that charities – set up to prevent private gains being made from gambling, may have pressure to "increase opportunities for gambling and to attract new bettors".[114] The proportionality assessment, then, depends on whether the domestic regulatory model actually serves social purposes instead of exclusively serving to maximise tax returns. In *Stoss*, which dealt with a national policy seeking to channel gambling activities towards licensed operators (a policy which could, in principle, justify a degree of advertising by these licensed operators) the Court held that: "advertising cannot, however, aim to encourage consumers' natural propensity to gamble by stimulating their active participation in it, such as by trivializing gambling or giving it a positive image due to the fact that revenues derived from it are used for activities in the public interest, or by increasing the attractiveness of gambling by means of enticing advertising messages depicting major winnings in glowing colours".[115] The gist of the case law of the Court is clear. Even if sometimes criticised for being overly moralistic in its view of gambling (seeing gamblers as weak and

[109] Laffey, Della Salla & Laffey, above note 102, 14.
[110] Case C-409/06, *Winner Wetten* [2010] ECR I-8015, para 20; Case C-464/14, *Admiral Casinos* ECLI:EU:C:2016:500, para 33.
[111] Case C-390/12, *Pfleger* ECLI:EU:C:2014:281, para 50-1.
[112] Case C-390/12, *Pfleger* ECLI:EU:C:2014:281, para 54.
[113] Case C-243/01, *Gambelli* [2003] ECR I-13031, para 69.
[114] Case C-212/08, *Zeturf* [2011] ECR I-5633, para 60.
[115] Case C-316/07, *Markus Stoß* [2010] ECR I-8069, para 103.

unable to control their behaviour),[116] its use of the requirement of coherence and consistency of the national gambling policy simply serves to hold Member States to account for their *own* decision how to frame their gambling policy.[117] Any gambling policy preference – ranging from the complete prohibition or complete liberalisation of the gambling market, and all levels of regulation in between, would – on this view – be *in principle* completely compatible with the Court's case law.

What becomes apparent in the Court's case law on gambling, then, is that the Court's refusal to accept purely economic arguments for the restriction of free movement leads to the obligation on Member States to take the non-economic effects of gambling into account. As Des Laffey, Vincent Della Sala and Kathryn Laffey put it, "the tension between the competing discourses of market liberalization and public health concerns is more apparent than real, as it is the former that seems to drive the policy choices (…) ECJ decisions consistently put pressure on Member States to demonstrate their concerns for the social consequences of gambling were genuine. States had to choose between limiting gambling services for all providers and truly protecting consumers; or opening up markets but ensuring that conditions were favourable to protect consumers".[118] This counterintuitive effect of the application of the free movement provisions can be explained by the Court's reluctance to allow Member State to impose barriers to free movement for purely economic or fiscal reasons.

The constitutional effect of the case law of the Court in this area is surprising. Unlike in the area of labour law (where free movement subverts domestic normative aspirations) and the area of healthcare (where free movement defends domestic normative aspirations) in gambling, the Court *enforces* the domestic normative aspirations *against* the Member States. It is, in a sense, forcing Member States to take seriously the policy concerns that they claim underlie their domestic regulation of the gambling sector. This approach is not without problems of its own, as it generates a number of logical inconsistencies,[119] and does not always use (the abundantly available) empirical work on the incidence of gambling disorders and serious fraud in order to test the accuracy of its own assumptions,[120] but – from a constitutional perspective – offers an interesting and convincing approach in respecting both the division of competences between Member States and EU, *and* the specific regulatory and normative choices made on the national level.

Conclusion

One of the pervasive narratives in EU legal studies, that grows stronger and stronger as the political and social implications of EU law are studied more closely,[121] is that the free movement provisions have significant constitutional implications. On this account, the legal structure of the free movement provisions has the capacity to cut through domestic (and EU-level) political opposition, and has the potential to challenge the normative objectives of domestic policy domains in which the EU does not have any legislative competences itself.

[116] Planzer, above note 89, 74.
[117] See also the Opinion of AG Mazak in *Engelmann*, where he argues that granting licenses in a tendering process to the company that offers the highest tax return is disproportionate as it betrays the primarily fiscal objective (and not social objective) underlying gambling regulation: Case C-64/08 *Engelmann* [2010] ECR I-8219, para 79-80.
[118] Laffey, Della Salla & Laffey, above note 102, 14.
[119] Van den Bogaert and Cuyvers, above note 89, 1203.
[120] Empirical and epidemiological work suggests that the prevalence of gambling disorder remains between 0.25 and 1% and remains stable when expanding markets (in relative numbers). The prevalence decreases in time as social adaptation mechanisms kick in (See Planzer, above note 89, chapter 9). Internet increases exposure but not increase incidence (in relative terms), see Planzer, above note 89, 193. See more generally on the question of the use of empirical data in proportionality analysis, Nic Shiubhne and Maci, note 36.
[121] Editorial, 'The Critical Turn in EU legal studies' (2015) 52 *CMLR* 881.

This is problematic, in turn, not only because it does not respect the vertical balance of competences between the EU and the Member States, but also because the decisions as to the normative values that *ought* to structure the internal market (as well as the values that ought to be rejected) are decided by EU judicial actors, rather than domestic political actors. In consequence, many authors have argued that the solution to counter this process lies in changing the structural properties that allow the free movement provisions to have this pervasive effect of dislocating domestic democratic preferences. In other words, these authors suggests that a constitutionally more appropriate understanding of free movement can be secured by altering the framework through which the Court adjudicates cases on free movement.

This article adds to that discussion by highlighting that *context* matters. Understanding the constitutional quality of the case law of the Court in free movement requires us to look at the constitutional *position* of that policy area as well as at the *effect* of adjudication on policy choices. In short, this entails that if a policy area falls outside the scope of legislative competences of the EU, the Court ought to protect the policy objectives articulated in national legislation. Just looking at the legal structure of the Court, therefore, only tells us part of the constitutional story. The structure of the legal reasoning of the Court in, say, *Elchinov* or *Laval* is very similar (it insists on strict proportionality) yet the outcome of these cases in terms of its constitutional implications is radically different. As discussed above, while the Court in the former case protects domestic policy preferences, in the latter it subverts them. A genuinely constitutional reading of the case law of the Court in free movement, therefore, needs to focus more closely on whether or not the Court respects the division of legislative competences between the EU and its Member States and whether it respects the policy preferences of the legislator.

What this more contextual approach entails will, obviously, depend on the policy area at issue. This contribution has looked at three policy areas addressed by the case law on Article 56 TFEU in order to offer examples of what a contextual reading makes of the case law of the Court. This analysis suggests that the Court is more successful in some policy areas than others in discharging its constitutional task in an appropriate manner. The three policy areas reviewed (labour law, healthcare, and gambling) offer a range of different outcomes. The substantive regulation of all three policy areas falls within the competences of the Member States. Yet, the Court has not always respected this constitutional division of competences. In labour law, the Court's understanding of free movement subverts, or at least challenges, the Member States' capacity to meet its normative objectives. In the area of healthcare, on the other hand, the Court's understanding of free movement protects the central distinction between healthcare as need and as choice that lies at the normative core of all Member State healthcare systems. In the area of gambling, finally, the Court's case law has the counterintuitive effect of forcing Member States to live by its own normative objectives. In this area, the free movement provisions become an instrument to police that Member States take their normative objectives underlying the regulation of gambling seriously.

The findings in this article come with two main implications. The institutional implication is that the Court must become considerably more explicit and more sensitive in contextualising the norms of free movement in reference to the effects that they produce. This means that – in areas falling outside the legislative competences of the EU – the Court must be more deferential to national policy ambitions. Discovering those ambitions is a task that courts, both on the national and European level, routinely undertake; and in which they pay attention to the wording of pieces of legislation as much as to the wider policy context. It also means that the Court must be creative and flexible in its understanding of free movement. What matters

is not that a certain level of coherence is achieved *across* the case law of the Court in free movement, but *within* specific and discrete policy areas. This may mean – depending on the policy context – changing the scope of application of the free movement provisions, the nature of the principle of proportionality, or reversing the burden of proof. It may seem odd to allow the Court this margin of manoeuvre in structuring its case law on free movement, partially as the functioning of the Union's judicial system depends on a level of predictability and certainty for national administrations and courts. At the same time, such margin is the only way in which the Court can remain sensitive to the very distinct and diverse policy context that the free movement provisions touch upon – ranging from gambling to blood donation; from education to the regulation of fireworks or vitamin supplements. What matters, primarily, is the protection of the (Member State or EU) legislator's policy preferences, not the way in which this is achieved. The possible ensuing threat to legal certainty should also not be overstated: the Court's case law *is* already radically different in, say, healthcare compared to gambling. As long as the case law remains coherent within a specific policy domain, predictability of application for national administrative and judicial institutions is ensured.

The second, more constitutional implication of the approach advocated in this article is to alter the balance between law and politics in the process of integration. It would allow political institutions (on the EU and national level) to articulate the values that ought to inform the EU and its internal market – whereas the role of the Court would be to ensure absence of discrimination in the implementation of those values. How the Court can respect such political choices while at the same time preventing protectionism will require, as discussed above, a degree of creativity from the Court. But, as we discovered in the areas of gambling and healthcare, the Court is more than able to achieve this. Such a more deferential approach by the Court in managing the free movement provisions would serve the constitutional objectives defended in this article: on the one hand it would respect and reflect the division of competences between the EU and its Member States, which, in turn, reflect a commitment to political self-determination. On the other hand, it would ensure that the values that inform the socio-economic European space are articulated through a (political) process that can legitimise them; and that reflect the needs, aspirations, and values of the European citizenry.