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LIBERALISATION AND THE PURSUIT OF THE INTERNAL MARKET

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Abstract: Economic liberalisation operates both as functional process and disputed ideological touchstone within the pursuit of the EU's internal market. This article evaluates liberalisation efforts to date, addressing both positive and normative perspectives. It considers the meaning of liberalisation; discusses the legal instruments that exist within EU law; suggests explanations for its prominence; and explores the extent to which ideologically-oriented understandings of such reforms are reflected in the resultant character of the internal market. In doing so, the article aims to identify and analyse the deeper implications of the recurrent use of liberalisation as a tool of economic integration within the EU.

"*…there is no alternative to the liberalisation process*."[1]

I. Introduction

Liberalisation plays a central role, as functional process and ideological touchstone, in constructing the European Union's internal market. Although economic integration has been pursued through various means, few are as prominent or contentious as the iterative waves of market-opening and restructuring deployed to create and reinforce the single market structure. Yet ambiguity exists about the extent to which liberalisation functions as cause or effect within the integration project. Although posited as an "*unavoidable consequence*" of establishing the internal market,[2] the prevalence of liberalisation efforts might equally reflect deliberate policy choices regarding the nature of the integrated market ultimately envisaged. The recurrent use of liberalisation as a means of market-building, moreover, has inevitable consequences for the contours of the emergent internal market.

This article explores the substance of EU-level liberalisation efforts, considering both positive and normative perspectives. A broad definition of liberalisation is employed, encompassing all efforts to reorient domestic markets towards the competitive paradigm,

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[1] Commission, *DG Competition Report on Energy Sector Inquiry* SEC(2006) 1724, p.4.
[2] K. Van Miert, "Liberalisation of the Economy of the European Union: The Game is not (yet) Over" in D. Geradin (ed.) *The Liberalisation of State Monopolies in the European Union and Beyond* (The Hague: Kluwer, 2000), p.1.

including market-opening, structural reorganisation and privatisation. The article examines how liberalisation is effected through EU law, explores potential explanations for its recurrent use, and asks how this might affect what we understand of the nature and purpose of the internal market. Our focus is primarily domestic: beyond removing barriers to *inter*state trade, to what extent does the internal market project attack barriers to "*the exercise of commercial activity as such*,"[3] and what implications follow?

The question of causality—that is, whether EU law forces, or at least presumes, liberalisation—has particular significance, insofar as the concept brings marked ideological baggage, closely associated with so-called 'neoliberalism'.[4] Van Miert's provocative characterisation of the EU as a dogmatic "*liberalisation machine*"[5] captures a persistent scepticism about the methods and motives behind the internal market: namely, a concern that the EU liberalises primarily because it *can*—or, indeed, due to some deeper ideological imperative that it *must*—without directing sufficient attention to the question of *why* it does so, or the longer-term consequences.[6] While such concerns are not new,[7] the tensions that arise from the equivocal status of liberalisation as potentially both cause of and effect within the internal market link to broader questions about the EU's current and future directions, particularly its renewed commitment to an economic union that simultaneously pursues the perhaps-divergent goals of prosperity, connectedness and social progress.[8] Concurrently, the blue-sky thinking invited by the Commission's *White Paper on the Future of Europe*[9] raises questions of whether liberalisation as a market-building mechanism will and should retain priority going forward.

It is well-recognised that liberalisation policies might be defended by reference to either positive arguments regarding, for instance, government failure or pursuit of efficiency, or normative arguments involving, for example, economic freedom or political liberty.[10] This

[3] Opinion in C-110/05 *Commission v Italy (Trailers)* (C-110/05) EU:C:2006:646 at [69].
[4] For academic treatment, see C. Hermann, "Neoliberalism in the European Union" (2007) 79 *Studies in Political Economy* 61; for political critique, see M. Urbán, "Europe's False Choice" (2017) *Jacobin Magazine Online*, 02.04.2017, and J. Guinan & T. Hanna, "Forbidden fruit: The neglected political economy of Lexit" (2017) 24 *IPPR Progressive Review* 14. A nuanced account is C. Kaupa, *The Pluralist Character of the European Economic Constitution* (Oxford: Bloomsbury, 2016).
[5] K. Van Miert, "L'Europe, vecteur de la liberalisation," Speech, Paris, 21 October 1996.
[6] Generally, M. Bartl, "Internal Market Rationality: In the Way of Re-imagining the Future" (2018) 24 *European Law Journal* 99.
[7] See, e.g., the debate between P. Pescatore, "Public and Private Aspects of European Community Competition Law" (1986) 10 *Fordham Int'l L.J.* 373 and G. Marenco, "Competition Between National Economies and Competition Between Businesses—A Response to Judge Pescatore" (1986) 10 *Fordham Int'l L.J.* 420.
[8] Declaration of the leaders of 27 Member States and of the European Council, the European Parliament and the European Commission, 25 March 2017.
[9] Commission, *White Paper on the Future of Europe* COM(2017) 2025.
[10] D. Levi-Faur, "The Politics of Liberalisation" (2003) 42 *European Journal of Political Research* 705, 711.

article combines both in order to explore how liberalisation, and the legal mechanisms deployed to achieve the iterative processes of market-opening and restructuring that it entails, might affect what we understand of the internal market. The central contribution draws upon existing literature exploring normative understandings of liberalisation to identify five well-established perspectives on its potential outcomes and impacts, against which EU-level efforts are measured and critiqued. Although posited as rationales for liberalisation—that is, public policy-oriented explanations for its contemporary prominence—, these perspectives might equally be seen, more defiantly, as defences to its pursuit. Section V considers the extent to which the notional benefits of liberalisation correspond to the characteristics of the existing internal market. We ask, not only whether such advantages have been realised, but also whether these gains counterbalance more negative impacts of the liberalisation process.

A further issue to be explored is the extent to which EU law and its institutions acknowledge and engage with the wider implications of the persistent recourse to liberalisation. Conceiving of liberalisation as a normative phenomenon, going beyond the technical task of correcting market failure, emphasises the extent to which it reflects a particular underlying conception of the good. Taken individually, discrete instances of liberalisation may be more or less successful at furthering the interests of consumers and economic operators, alongside the more intangible goal of integration. Yet the wholesale embrace of liberalisation as a cornerstone of the internal market inevitably decouples blanket reform from specific market failures. Thus, pursuit of a single liberalised marketplace itself becomes the ultimate objective, rather than more granular policy goals such as improving efficiency, increasing consumer access or choice, or challenging vested interests. Moreover, as the range of potential beneficiaries above demonstrates, deferring to ever-greater competition primarily benefits those who stand to gain from the market process. This being the case, we argue, for reasons of legitimacy the inherently normative choices reflected in the essential role granted to liberalisation within the framework of EU integration should be recognised and defended—an issue explored further below.

The article is structured as follows. It begins by constructing a workable definition of liberalisation (section II), and identifying and discussing legal instruments of liberalisation within EU law (section III). We then explore its link to the political project of economic integration, considering alternative conceptions of liberalisation's contribution to development of the internal market (section IV). The central focus of the article comprises a wide-ranging exploration of the normative implications of the recurrent deployment of liberalisation in pursuit of integration (section V). A brief conclusion combines these strands,

assessing how such developments fit with the overarching concept of a social market economy (section VI). Our intention is to move beyond one-dimensional notions of liberalisation as either descriptive process or ideological enterprise, in order to understand the deeper consequences that result for the emergent internal market. In doing so, moreover, we aim to expose and interrogate both the reasons for and significance of what might be termed 'neoliberalism by misadventure,' which, it will be argued, may provide the best understanding of the role of liberalisation in the internal market context.

II. Conceptualising Liberalisation

Liberalisation is a term frequently invoked yet rarely defined in legal scholarship.[11] Despite considerable presence within existing EU law—from the Treaties,[12] to secondary legislation,[13] and the jurisprudence of the Union Courts[14]—it is not a term of art. It is therefore necessary to explore, first, what 'liberalisation' means, or might mean, in this context. To do so, we consider its existing understanding(s) within EU law, alongside theoretical literature which surveys its recognised ambit more generally. The concept of liberalisation exists on two planes: both as a technical concept, describing policies and processes of market reorganisation, and, with a markedly normative dimension, reflecting views on the optimal operation of markets, and society beyond.[15] While its normative understandings are explored later, our initial focus is liberalisation in this first sense, considering how such policies and processes effect restructuring of markets.[16]

With inevitable linguistic variation,[17] 'liberalisation' is referenced throughout the Treaty on the Functioning of the European Union (TFEU), principally in the context of free movement (workers,[18] services[19] and capital[20]), with mention of 'uniformity in measures of

[11] Arriving at equivalent conclusions about 'regulation,' see C. Koop & M. Lodge, "What is regulation? An interdisciplinary concept analysis" (2017) 11 *Regulation & Governance* 95.
[12] See e.g. arts.58-60 Treaty on European Union (TEU).
[13] See e.g. art.1(2), Directive 2006/123/EC on services in the internal market [2006] OJ L376/36.
[14] See e.g. *Federutility and Others v Autorità per l'energia elettrica e il gas* (C-265/08) EU:C:2010:205 at [32].
[15] S. Picciotto, "Liberalisation and Democratisation" (2014) 77 *Law & Contemporary Problems* 157, 160-61.
[16] Similarly, J. Pelkmans & G. Luchetta, *Enjoying a Single Market for Network Industries?* Notre Europea—Jacques Delors Institute, Studies & Reports 95 (February 2013), p.17.
[17] A non-exhaustive survey of other language versions of the TFEU indicates that the Spanish ("liberalización") and Italian ("liberalizzazione") versions adopt the same approach as the English version; the German ("Liberalisierung") and Dutch ("liberalisering") versions adopt the same approach except for art.46(b) TFEU, for which each employs a different construction ("die Herstellung der Freizügigkeit der Arbeitnehmer hinder" and "het vrijmaken van het verkeer van de werknemers"); while the French version distinguishes between "libération" (arts.46, 58 and 59) and "libéralisation" (arts.60, 64 and 207).
[18] Art.46(b) TFEU.
[19] Arts.58, 59 and 60 TFEU.
[20] Art.64(3) TFEU.

liberalisation' under the common commercial policy.[21] The Commission takes the view that the term refers, in substance if not expressly, to art.3 TFEU, by which the EU has exclusive competence in 'the establishing of the competition rules necessary for the functioning of the internal market.'[22] Yet there is ambiguity to its presence in primary EU law and beyond: is the term a proxy for free movement, meaning simply removal of barriers to trade between Member States, or does it imply reorientation towards the competitive paradigm in a more profound sense, thus mandating removal of barriers to domestic commerce, without (necessary) reference to inter-State trade?

This question has been explored, most directly albeit without clear consensus, by the Advocates General. The key issue, as AG Tesauro observed, is whether development of the internal market is "*intended to liberalise intra-[Union] trade or…to encourage the unhindered pursuit of commerce in individual Member States*".[23] Typically, the issue has arisen in cases that explore the outer limits of the fundamental freedoms, and in particular, the contentious question of whether EU law should attack barriers to 'market access' as such.[24] These cases thus disclose, in AG Bot's words, "*a latent conflict between…the various forms of economic protectionism in the Member States and…the concern…not to encroach upon certain areas of the Member States' domestic policy*."[25]

Two divergent visions emerge from the contributions of the various Advocates General. AG Tesauro was ultimately unpersuaded that free movement aims to achieve "*the greatest possible expansion of trade*,"[26] being particularly sceptical of the strategic utilisation of EU law by traders against inconvenient domestic rules.[27] AG Kokott echoed such mistrust about the instrumental deployment of the fundamental freedoms by individuals to challenge national rules whose effect was "*merely to limit their general freedom of action*".[28] Memorably, AG Tizzano invoked the dystopian prospect of a "*market without rules*," to

[21] Art.207 TFEU.
[22] See website of DG Competition at http://ec.europa.eu/competition/general/liberalisation_en.html (accessed 04.07.2018).
[23] Opinion in *Ruth Hünermund and others v Landesapothekerkammer Baden-Württemberg* (C-292/92) EU:C:1993:863 at [1].
[24] See, generally, C. Barnard, *The Substantive Law of the EU*, 5th ed., (Oxford: Oxford University Press, 2016), 19-21, and D. Ashiagbor, "Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration" (2013) 19 *European Law Journal* 303, 312. Contrast the alternative perspective of G.T. Davies, "Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law" (2010) 11 *German Law Journal* 671.
[25] Opinion in *Trailers* at [75]
[26] Opinion in *Hunermund* at [28].
[27] Opinion in *Hunermund* at [27].
[28] Opinion in *Åklagaren v Percy Mickelsson and Joakim Roos* (C-142/05) EU:C:2006:782 at [48].

demonstrate the dangers of attacking domestic regulation whose primary defect is to reduce the economic *attractiveness* of commercial activity, typically by narrowing profits.[29]

Yet others have embraced readily the deregulatory potential of the internal market. A provocative Opinion by AG Wahl opens with the uncompromising assertion that, *"[t]he European Union is based on a free market economy, which implies that undertakings must have freedom to conduct their business as they see fit*."[30] (A claim at odds with the "social market economy" language of art.3(3) TEU.) A more nuanced yet still resolutely liberalising vision was offered by AG Jacobs,[31] who argued for a default principle of "*unfettered access to the whole of the [Union] market*" benefitting traders engaging in "*legitimate economic activity*"—unfettered in the sense of unencumbered by domestic regulation, unless justified by Member States.[32] The rationale for abandoning a discrimination-based approach is instructive: AG Jacobs focused on economic losses for individual traders and the EU economy stemming from intra-State restrictions, with little sympathy for "*local*" concerns that mediate against competition.[33] The implication was that EU law presumes the existence of open, competitive and effectively unregulated national marketplaces, as components of the wider internal market.

These contrasting viewpoints establish the parameters of any deeper claim that EU law is a force for liberalisation: that is, it prompts or compels reorganisation of *domestic* economies, over and above removing barriers to inter-State trade. This raises a further issue; namely, what it is, more precisely, that liberalisation requires within national economies. Brief descriptions within the literature suggest a "*transition to competitive market conditions*,"[34] the task of subjecting sectors or businesses to market forces,[35] or simply, "*opening to competition*".[36] These high-level accounts prompt two related questions.

The first is the range of market conditions that liberalisation moves from, and towards. Implicit is the fact that, initially, economic activity is constrained by obstacles to

[29] Opinion in *CaixaBank France v Ministère de l'Économie, des Finances et de l'Industrie* (C-442/02) EU:C:2004:187 at [63].
[30] Opinion in *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis* (C-201/15) EU:C:2016:429 at [1].
[31] Opinion in *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA* (C-412/93) EU:C:1994:393.
[32] Opinion in *Leclerc-Siplec* at [41].
[33] Opinion in *Leclerc-Siplec* at [39]-[40].
[34] M. Armstrong & D. Sappington, "Regulation, Competition, and Liberalization" (2006) XLIV *Journal of Economic Literature* 325, 325.
[35] D. Newbery, "Privatisation and Liberalisation of Network Industries" (1996) 41 *European Economic Review* 357, 358.
[36] D. Geradin, "Introduction" in D. Geradin (ed.) *The Liberalisation of State Monopolies in the European Union and Beyond* (The Hague: Kluwer, 2000), p.xi.

competition: whether structural barriers like scale economies, natural monopoly,[37] or network effects;[38] regulatory barriers that reduce efficiency by limiting participation, raising costs or creating rents;[39] or characterisation of public services as non-market functions.[40] Liberalisation thus entails the removal or reduction of such obstacles, moving market conditions closer to the competitive paradigm.

The second involves the processes by which liberalisation is realised. Here, two contrasting understandings, narrow and broad, can be identified.[41] The narrower interpretation encompasses efforts that aim, specifically, at "*liberalising prices and access to markets which had previously been restricted by legal and regulatory barriers*".[42] Typically, this includes only policies aimed directly at market-opening,[43] like mandatory sharing obligations; removal of monopoly or special rights; and reform or removal of licencing conditions.[44] The broader, and more common, interpretation includes all efforts at market reform, referring to a shift "*from using public policy instruments, such as regulation or public ownership of enterprises, to a greater reliance on market mechanisms and incentives to pursue consumer welfare, industrial, regional and/or employment objectives.*"[45] It additionally embraces mechanisms such as structural reorganisation,[46] privatisation,[47] and antitrust enforcement.[48] Thus, while liberalisation is often a synonym for deregulation,[49] the concept may be understood both less expansively—addressing only a subset of regulation pertaining to access barriers—and more expansively—including efforts going beyond market

[37] Organisation for Economic Cooperation and Development (OECD), *Restructuring Public Utilities for Competition* (Paris: OECD, 2001), 8.
[38] OECD (2001), 8.
[39] Copenhagen Economics, *Regulation and Productivity in the Private Services Sectors*, Background report for Danish Productivity Commission, May 2013.
[40] T. Prosser, *The Limits of Competition Law* (Oxford: Oxford University Press, 2005), pp.1-2.
[41] Adopting a narrow conception, see J. Clifton, F. Comín & D. Díaz-Fuentes, "Privatizing public enterprises in the European Union 1960–2002: ideological, pragmatic, inevitable?" (2006) 13 *Journal of European Public Policy* 736 (2006) and M. Florio, *Network Industries and Social Welfare* (Oxford: Oxford University Press, 2013). Reflecting the broader conception, see Levi-Faur (2003); Prosser (2005), 99; and M. Pollitt, "The Role of Policy in Energy Transitions: Lessons from the Energy Liberalisation Era" (2012) 50 *Energy Policy* 128.
[42] R. Gönenç, M. Maher & G. Nicoletti, "The Implementation and the Effects of Regulatory Reform: Past Experience and Current Issues" (2001) *OECD Economic Studies* No.32, 2001/I, pp.11-98, 12.
[43] Pelkmans & Luchetta (2013), p.40.
[44] Pelkmans & Luchetta (2013), p.17.
[45] Gönenç *et al.* (2001), 12.
[46] OECD (2001).
[47] G. Hodge, *Privatisation. An International Review of Performance*, Westview Press (2000), p.14.
[48] Pelkmans & Luchetta (2013), p.18; D. Damjanovic, "The EU Market Rules as Social Market Rules: Why the EU can be a Social Market Actor" (2013) 50 *C.M.L. Rev.* 1685 (2013), 1705; and W. Sauter, *Public Services in EU Law*, (Cambridge: Cambridge University Press, 2014), especially chapter 4.
[49] See, e.g., the interchangeable use in A. McGee & S. Weatherill, "The Evolution of the Single Market—Harmonisation or Liberalisation?" (1990) 53 *Modern Law Review* 578; and generally, F. McGowan, "State Monopoly Liberalisation and the Consumer," in D. Geradin (ed.) *The Liberalisation of State Monopolies in the European Union and Beyond* (The Hague: Kluwer, 2000), 212.

supervision, to affect, for instance, ownership structures.[50] It is the broader understanding which is adopted in this work.

III. Mechanisms of Liberalisation within EU Law

How then is liberalisation, in this expansive sense of opening and restructuring of national economies, effected through EU law? Consistent with the Commission's stated understanding of liberalisation as reflective of the principles in art.3(b) TFEU,[51] the free movement and competition rules comprise the central prongs of EU law's mission to liberalise domestic markets. Yet, strictly speaking, neither prescribes liberalisation as such. Accordingly, it is important to understand how the instrumental and sometimes strategic deployment of these provisions has facilitated their application to achieve a very particular vision of what the internal market entails. We consider three key strands of EU law which underpin its liberalisation agenda: the substantive free movement rules; harmonised liberalisation legislation; and the supplementary use of competition law.

(i) The Fundamental Freedoms as 'Engine' of Liberalisation

The fundamental freedoms—guaranteeing circulation of goods, services, establishment, workers and capital—lie at the heart of the internal market project. These obligations drive and condition liberalisation, as opposed to merely the creation of a common market, in three dimensions. First, they provide background motivation for domestic reforms, establishing baseline obligations and generating supranational pressure for deregulation, structural reorganisation and privatisation at Member State-level.[52] Second, the individual prohibitions provide a targeted weapon against discrete national policies that obstruct liberalisation. Finally, the essence of the fundamental freedoms is seen within the intellectual DNA of sector-specific liberalisation directives and vertical harmonisation regimes, which extrapolate specific obligations of market-opening and reform from the overarching goal of a highly-competitive economy.[53]

[50] See also Koop & Lodge (2017) on understandings of regulation.
[51] See fn.22 above.
[52] F. Scharpf, *Governing in Europe* (Oxford: Oxford University Press, 1999), pp.57-58, thus described the emergent "*constitutional force*" of the four freedoms. Clifton *et al.* (2006) similarly characterised such effects as the 'European paradigm'.
[53] Similarly, G.T. Davies, "Freedom of Movement, Horizontal Effect, and Freedom of Contract" (2012) 20 *European Review of Private Law* 805, 807.

It is in the targeted application of the fundamental freedoms that the CJEU functions as "*engine of integration*"[54]—and, more contentiously, engine of liberalisation. Three elements of the Court's approach reveal, most obviously, a liberalising zeal. First is its articulation of an extensive concept of "*economic activity*," encompassing, *inter alia*, non-profit and publicly-funded provision.[55] The Court moreover adopts a rigorously objective perspective, which discounts that certain activities are considered immoral and/or illegal in certain Member States. Accordingly, prostitution,[56] gambling,[57] pornography,[58] and abortion[59] come within free movement, despite often-urgent objections of national governments. Such cases thus coincide with AG Jacobs' vision, whereby the existence of a marketplace for the benefit of traders and consumers is presumed by EU law, regardless of whether it accords with domestic mores or exists in fact.

A second key development was articulation of the now-ubiquitous 'mutual recognition' doctrine. Mutual recognition entails a presumption that, where goods are lawfully produced and marketed within one Member State, other national markets should be equally receptive, unless the host identifies legitimate and proportionate public interest concerns.[60] The presumption of equivalence is essentially asymmetric: where different regulatory burdens exist, the trader must comply with higher standards only of domestic origin. The burden of justifying any derogation rests with host States, which are subject to rigorous proportionality scrutiny. The deregulatory quality of the doctrine is thus well-recognised, reflecting a preference for private market autonomy over domestic regulation.[61] Moreover, reliance upon mutual recognition has further deregulatory impact by reducing the mandatory content of harmonised internal market rules.[62]

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[54] M. Pollack, *The Engines of European Integration: Delegation, Agency and Agenda Setting in the European Union* (Oxford: Oxford University Press, 2003).
[55] See, e.g., *The Queen, on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health* (C-372/04) EU:C:2006:325.
[56] See, e.g., *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* (C-268/99) EU:C:2001:616 at [48]-[49] and [56]-[61].
[57] See, e.g., *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* (C-275/92) EU:C:1994:119 at [19] and [32]-[35].
[58] See, e.g., *Regina v Maurice Donald Henn and John Frederick Ernest Darby* (C-34/79) EU:C:1979:295 at [11]-[13].
[59] See, e.g., *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* (C-159/90) EU:C:1991:378 at [16]-[21].
[60] *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein* (C-120/78) EU:C:1979:42 at [8] and [14]. See also Commission, *Completing the Internal Market. White Paper from the Commission to the European Council* COM(85) 310 final at [61]-[79].
[61] S. Weatherill, "Pre-emption, Harmonisation and the Distribution of Competence" in C. Barnard & J. Scott (eds.), *The Law of the Single European Market. Unpacking the Premises* (Oxford: Hart Publishing, 2002), p.47. See also McGee & Weatherill (1990), 581.
[62] McGee & Weatherill (1990), 583.

Third came adoption of the 'market access' approach,[63] which moves beyond a concern with restrictions that manifest disparate impact for foreign traders or consumers.[64] Instead, market access concerns hindrances to commerce as such, which may have equally negative impact for domestic traders, but are considered inimical within open and competitive markets.[65] Its deregulatory potential is well-illustrated by recent case-law on goods. In *Trailers* and *Mickelsson and Roos*, the Court repeatedly condemned national regulation of product *use*, on the basis that such rules influence consumer behaviour to the detriment of purveyors.[66] Such cases thus imply an apparent entitlement of traders to competitive domestic markets—indeed, to existence of domestic *demand*—, and not merely an absence of discriminatory barriers to accessing existing markets.[67] In *Scotch Whisky* and *Deutsche Parkinson*, furthermore, the Court vehemently attacked domestic price controls, suggesting that any incursion into the freedom of economic operators to set commercially-acceptable retail prices violates art.34 TFEU.[68] Yet, where the criterion to identify obstacles to free movement is simply whether exercise of economic activity is rendered less attractive, practically all regulation becomes presumptively suspect: AG Tizzano's disturbing "*market without rules*".[69] Outside the realm of goods, the liberalising thrust of market access is apparent in various—quite notorious—cases suggesting the superiority of free movement over labour rights, including *Viking*,[70] *Laval*[71] and *AGET Iraklis*.[72] Although Member States retain the possibility of justifying restrictions, scrutiny of derogations is exacting, as illustrated by the Court's interventionist approach to proportionality in the price regulation cases. Moreover, by requiring Member States to defend intervention, the default perspective

[63] See, e.g., *Manfred Säger v Dennemeyer & Co. Ltd.* (C-76/90) EU:C:1991:331; *Alpine Investments BV v Minister van Financiën* (C-384/93) EU:C:1995:126; *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* (C-415/93) EU:C:1995:463; *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* (C-55/94) EU:C:1995:411; and *Trailers*.

[64] See fn.24 above.

[65] See, e.g., the extended discussion of AG Bot in *Trailers* at [53]-[107].

[66] *Trailers* at [57]; also *Roos* at [26]-[27].

[67] See also D. Schiek, "Towards More Resilience for a Social EU—The Constitutionally Conditioned Internal Market" (2017) 13 *European Constitutional Law Review* 611, 621.

[68] *Scotch Whisky Association and Others v The Lord Advocate and The Advocate General for Scotland* (C-333/14) EU:C:2015:845 and *Deutsche Parkinson Vereinigung eV contre Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* (C-148/15) EU:C:2016:776. See also A. MacCulloch, "State intervention in pricing: an intersection of EU free movement and competition law" (2017) 42 *E.L. Rev.* 190.

[69] See fn.29 above.

[70] *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* (C-438/05) EU:C:2007:772.

[71] *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* (C-341/05) EU:C:2007:809.

[72] *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis* (C-201/15) EU:C:2016:972.

is of a free market in its most profound sense. "*When pressed,"* Snell observed, *"the notion [of market access] may collapse into economic freedom*."[73]

(ii) Liberalisation through Harmonisation

Building on these conceptual foundations, liberalisation has been amplified by adoption of harmonised internal market policies, which require Member States proactively to engage in market-opening.[74] It is Parliament and Council that function as formal decision-makers, although the seemingly-limitless enthusiasm of the Commission is reflected in skilful exercise of its right of legislative initiative.[75] Although unexhaustive, harmonised liberalisation comprises an essential component of the EU-level framework, representing the clearest, most systematic and often most far-reaching efforts at market-opening and reform across the Union. Moreover, although the existence of an expansive corpus of EU-level regulation belies any conception of the internal market as an exclusively deregulatory project, harmonised frameworks for subsequent re-regulation tend towards a minimalist vision.

Such top-down policies divide, broadly, into three categories. The first comprises directives that elaborate upon the core of the fundamental freedoms, including the Citizens' Rights Directive,[76] E-Commerce Directive,[77] Services Directive[78] and Technical Regulations Directive.[79] Such legislation has a liberalising quality, generally, by reinforcing the underlying freedom(s), and specifically, by creating EU-level hurdles to domestic enactment of obstacles to free movement. The Technical Regulations Directive presents an example: Member States must inform the Commission of proposed regulations creating potential barriers to trade in goods, with a three-month standstill period which enables scrutiny and objection by the Commission.

A second category comprises vertical harmonisation of specific legal areas,[80] including consumer protection, health and safety, and IP laws. Here, the EU is both regulator and liberator: often raising standards through minimum protections, but also limiting

[73] J. Snell, "The Notion of Market Access: A Concept or a Slogan?" (2010) 47 *C.M.L. Rev.* 437, 467.
[74] See also Weatherill (2017), 148-50.
[75] G. Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford: Oxford University Press, 2005), p.147.
[76] Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.
[77] Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1.
[78] Directive 2006/123/EC on services in the internal market [2006] OJ L376/36.
[79] Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services [2015] OJ L241/1.
[80] A thorough account is H. Micklitz, "The Visible Hand of European Regulatory Private Law" (2009) 28 *Yearbook of European Law* 3.

domestic regulation through maximum harmonisation methods.[81] This is particularly common in consumer protection, where EU rules circumscribe both individual commercial freedom *and* the residual power of Member States to further restrict such freedom.[82] The Unfair Commercial Practices Directive provides an example.[83] Under the UCPD, Member States must prohibit a range of business-to-consumer commercial practices deemed automatically unfair.[84] Yet, as a measure of full harmonisation, "*Member States may not adopt stricter rules, …even in order to achieve a higher level of consumer protection*."[85] Accordingly, although premised on achievement of a "*high level of consumer protection*,"[86] the optimal standard is not ever-higher, but reflects a balance between consumer protection and economic freedom.

A third category encompasses directives that seek, explicitly, to open specific markets to competition, particularly utility and transport sectors including telecommunications,[87] electricity,[88] gas,[89] post,[90] rail,[91] aviation[92] and airports.[93] Three recurring themes are noteworthy. First, apart from highly centralised[94] or technical issues,[95] legislation takes the form of directives under art.114 TFEU, which provide flexibility in implementation and even

[81] See, e.g., S. Weatherill, "Maximum versus Minimum Harmonisation: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market" in N. Nic Shuibhne & L. Gormley, *From Single Market to Economic Union: Essays in Memory of John A. Usher* (Oxford: Oxford University Press, 2012).
[82] N. Reich, "From Minimal to Full to 'Half' Harmonisation" in J. Devenney & M. Kenny (eds.), *European Consumer Protection: Theory and Practice* (Cambridge: Cambridge University Press, 2012).
[83] Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22 ("UCPD").
[84] Art.5(5), UCPD.
[85] *VTB-VAB NV v Total Belgium NV* (C-261/07) EU:C:2009:244 at [52].
[86] Recital (5), UCPD.
[87] Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities [2002] OJ L108/7; Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services [2002] OJ C108/33; Directive 2002/20/EC on the authorisation of electronic communications networks and services [2002] OJ L108/21; Commission Directive 2002/77/EC on competition in the markets for electronic communications networks and services [2002] OJ L249/21; and Directive 2009/140/EC amending Directives 2002/21/EC, 2002/19/EC, and 2002/20/EC [2009] OJ L337/37.
[88] Directive 2009/72/EC concerning common rules for the internal market in electricity [2009] OJ L211/55.
[89] Directive 2009/73/EC concerning common rules for the internal market in natural gas [2009] OJ L211/94.
[90] Directive 2008/6/EC amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services [2008] OJ L52/3.
[91] Directive 2012/34/EU establishing a single European railway area [2012] OJ L343/32.
[92] Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community [2008] OJ L293/3.
[93] Directive 2009/12/EC on airport charges [2009] OJ L70/11.
[94] Such as establishing the Body of European Regulators for Electronic Communications under Regulation 1211/2009 [2009] OJ L337/1.
[95] Such as local-loop unbundling under Regulation (EC) No 2887/2000 on unbundled access to the local loop [2000] OJ L336/4.

modes of liberalisation.[96] Although competition is the ultimate objective, this is not contingent upon uniformity. Second, because efforts involve sectors with persistent State ownership, liberalisation necessitates, as a baseline, removal of exclusive or special rights to ensure that markets are open to future entry. This process is typically iterative and incremental;[97] while, where restrictions on competition are unavoidable, for instance to accommodate universal service obligations, the inevitable privileging of providers must comply with the competition framework.[98] Third, although responsibility for day-to-day regulation typically remains with Member States after market-opening, domestic discretion is constrained. Most regimes require an independent national regulator, with recurrent use of good governance principles to steer decision-making.[99] In purpose and function, therefore, EU-level coordination both limits the ability of Member States to restrict economic freedom in liberalised sectors and channels future regulation through harmonised frameworks—neutralising and standardising functions discussed below.

(iii) Liberalisation through the Prism of Competition Policy

Yet domestic regulation is not the only potential obstacle to market competition: the Treaty framework recognises, though a suite of competition rules, that *private* restraints might similarly inhibit liberalisation. Here, again, we encounter recurrent application of EU law to pursue and enforce the competitive paradigm within Member States, and not merely eliminate barriers to *inter*state trade—driven, in this instance, primarily by the enforcement activities of the Commission. Such cases not-infrequently involve an oblique attack on national regulatory choices, moreover, blurring the boundary between public and private in the internal market.

Most obviously, there is strategic deployment of antitrust against individual undertakings—particularly incumbent or former monopolists under art.102 TFEU[100]—to achieve internal market objectives. Absent EU-level liberalisation, antitrust fills the gap,

[96] A contentious example is the diverging options for ownership reform under the Third Energy Package: see R. Boscheck, "The EU's Third Internal Energy Market Legislative Package: Victory of Politics over Economic Rationality?" (2009) 32 *World Competition* 593.
[97] In telecommunications and energy, the potential for effective competition has been progressively strengthened: compare the transition from Commission Directive 90/388/EEC to Directives 2002/19/EC and 2002/21/EC in the telecommunications sector, from Directives 96/92/EC to 2009/72/EC in the electricity sector, and from Directives 98/30/EC to 2009/73/EC in the gas sector. Post has seen an expansion rather than deepening of competition: compare progress from Directive 97/67/EC to Directive 2008/6/EC.
[98] In the postal sector, e.g., Member States are subject to competitive tendering obligations even for publicly-subsidised universal delivery historically undertaken by public providers: art.1(8), Directive 2008/6/EC.
[99] Illustrated by the Airport Charges Directive, which establishes an EU-wide framework for charges at major airports, but does not dictate actual levels: see recital (2) and art.1, Directive 2009/12/EC.
[100] Sauter (2014), 131.

empowering the Commission to address structural problems from behavioural perspectives. Beyond *ad hoc* solutions, recurrent enforcement can identify markets that require harmonised efforts, or generate political support for coordinated responses.[101] Where markets are ostensibly liberalised, antitrust provides additional means of implementation. Competition law has been applied where the Commission disagrees with national regulatory decisions,[102] or where the powers of national regulators are inadequate to address disruptive behaviour.[103] Enforcement can secure concessions beyond the scope of liberalisation frameworks,[104] while domestic regulation rarely provides a defence to *ex post* scrutiny.[105] Competition law thus becomes a "*regulator's regulator*,"[106] second-guessing domestic regimes while obliquely increasing the Commission's powers.

Beyond antitrust, liberalisation benefits from a complex interplay of competition policy instruments that constrain the ability of Member States to favour (ostensibly) private parties and thus distort the internal market. State aid rules curtail the provision of economic advantages to undertakings, a significant limitation in liberalised markets where the State retains ownership interests or where cross-subsidies are required.[107] The procurement rules limit the processes by which public authorities may purchase services, works and supplies.[108] Such restrictions are particularly relevant for public undertakings in liberalised markets and contracting-out of public services. Art.106(1) TFEU prohibits distortive measures that favour undertakings with monopoly or special rights.[109] The strength of this requirement in liberalised markets was reaffirmed in *DEI*, where special rights held by the former Greek electricity monopolist created inequality of opportunity in a supposedly open marketplace.[110] Likewise, the principle of sincere co-operation, in art.4(3) TEU, constrains domestic

[101] T. Soames, 'Ground-handling Liberalisation" (1997) 3 *Journal of Air Transport Management* 83, 85-86.
[102] See, e.g., *Deutsche Telekom AG v European Commission* (C-280/08 P) EU:C:2010:603.
[103] See, e.g., *Orange Polska S.A., formerly Telekomunikacja Polska S.A. v European Commission* (T-486/11) EU:T:2015:1002.
[104] A notable aspect, for instance, of commitment decisions in the energy sector following the Commission's defeat on unbundling: see, e.g., Commission Decisions in Cases COMP/39.315—*ENI* (OJ C352/8, 23.12.2010) and COMP/39.402—*RWE Gas Foreclosure* (OJ C133/10, 10.12.2009), and Boscheck (2009)
[105] *Deutsche Telekom* at [80]-[82].
[106] G. Monti, *EC Competition Law* (Cambridge: Cambridge University Press, 2007), 496.
[107] T. Von Danwitz, "The Concept of State Aid in Liberalised Sectors," *EUI Workings Papers* LAW 2008/28.
[108] See Directive 2014/23/EU on the award of concession contracts [2014] OJ L94/1; Directive 2014/24/EU on public procurement [2014] OJ L94/65; and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors [2014] OJ L94/243.
[109] See, e.g., *France v Commission (Telecommunications Terminals)* (C-202/88) EU:C:1991:120.
[110] *European Commission v Dimosia Epicheirisi Ilektrismou AE (DEI)* (C-553/12) EU:C:2014:2083.

policymaking that conflicts with market-opening and deregulation,[111] insofar as this might prompt antitrust violations by private undertakings.[112]

Outside the realm of 'hard' law, finally, the Commission engages in competition advocacy efforts to encourage and protect liberalisation. This can involve pointed critiques of national rules, backed by an implicit threats of counteraction. The energy sector, where the Commission has been consistently critical of regulated retail tariffs, provides an example.[113] Words are matched by deeds, moreover, such as the Commission's action against Poland for open-ended business tariffs.[114] Alternatively, the Commission may seek to avert domestic regulation before its adoption, its approach, for instance, within the sharing economy.[115]

Several recurrent features and concomitant implications emerge. First, although market-opening and deregulation are not the only mechanisms available to achieve economic integration, liberalisation plays a prominent if not preeminent role. We see default hostility to much domestic regulation, while harmonised regulatory frameworks tend towards a liberal model. Second, pursuit of liberalisation expands the substantive reach of the EU rules deployed to achieve this goal: from the shift to an all-encompassing market access standard, to incremental extension of the liberalisation directives, to strategic application of antitrust to achieve market-making. A third, linked implication highlights the distortions that may follow: from the critique of market access as a synonym for economic freedom, to the after-effects of the instrumental application of antitrust. Finally, liberalisation challenges the balance between the economic and social by prompting domestic deregulation, privatisation and marketisation, a concern considered further in section V.

IV. The Interrelationship of Liberalisation and Economic Integration

Beyond any simple conception of EU-level liberalisation as a technical phenomenon, however, a deeper question arises: how can liberalisation drive the integration that is among

[111] *Pascal Van Eycke v ASPA NV* (C-267/86) EU:C:1988:427.
[112] *Criminal proceedings against Wolf W. Meng* (C-2/91) EU:C:1993:885.
[113] Its *Report on Energy Sector Inquiry*, fn.1 above, at [1047], highlighted the "*highly-distortive effects*," while the Commissioner for Energy declared that "*price regulation must end where it still exists*": see Speech by Commissioner Arias Cañete at 30th meeting of the European Electricity Regulatory Forum, Florence, 3 March 2016.
[114] *Commission v Poland* (C-36/14) EU:C:2015:570.
[115] Commission, *A European Agenda for the Collaborative Economy* COM(2016) 356 final.

the Union's ultimate goals?[116] Economic integration refers to governmental policies aimed at enlarging the economic space beyond national boundaries;[117] marking a shift from the domestic to the 'European' in market forces and governance. Having established that the legal framework underpinning the internal market entails multiple dimensions of domestic liberalisation, it is appropriate to consider how these reforms link to the overarching *political* goal of integration.

This question is relevant because it enables us to better understand the unresolved question of causality, which itself reflects the normative significance of liberalisation within the internal market project. Is liberalisation so prominent within the EU's 'economic constitution' because it is the optimal means to achieve the core objective of integration—or, conversely, is our understanding of the demands of integration and the character of the internal market shaped by the fact that policymaking is so frequently implemented through mechanisms of liberalisation? In practice, a definitive answer that isolates a single motivating factor is likely to prove elusive, as explained further below. Yet by exploring the question, "*why liberalisation*," it is possible to distinguish between those potential rationales which explain such reforms in largely functional terms—as either the best or most achievable path to integration—and a more ideologically-oriented vision of the merits of the competitive paradigm. While the extent to which the 'end may justify the means' is considered more directly in Section V, what concerns us here is to understand how the iterative and cumulative processes of liberalisation described above may be conceived of as contributing to the higher-level goal of economic integration.

The first potential explanation for the prominence of liberalisation is *instrumental*: it provides the most effective—perhaps only practicable—means to construct a cohesive single market from disparate national economies and regulatory regimes.[118] It is uncontroversial that liberalisation polices make a significant contribution towards construction of the internal market,[119] and can be viewed as preeminent examples of 'integration through law'.[120]

[116] Art.3(3) TEU reaffirms the centrality of the internal market goal—comprising, *inter alia*, 'a highly competitive social market economy'—as a core Union objective.
[117] Scharpf (1999), p.45.
[118] J. Pelkmans, "An Enterprising Community: The Common Market as Locomotive for Integration" (1988) 8 *SAIS Review* 137, 140. For a persuasive defence of existing approaches to integration from this perspective, see Weatherill (2002).
[119] See, e.g. van Miert (2000), 1; Pelkmans & Luchetta (2013), p.24; Florio (2013), p.8; J. Glachant & S. Ruester, "The EU Internal Electricity Market: Done Forever?" (2014) 31 *Utilities Policy* 221, 221; and M. Dotterud Leiren, "Scope of Negative Integration: A Comparative Analysis of Post, Public Transport and Port Services" 53 (2015) *Journal of Common Market Studies* 609, 609-12.
[120] F. Scharpf, "Perpetual Momentum: Directed and Unconstrained?" (2012) 19 *Journal of European Public Policy* 127.

Beyond their utility in generating and reinforcing competitive forces between (and within) national markets, processes of liberalisation realise the complex objective of integration in two interlinked ways: neutralisation and standardisation.[121] First, disparate national policies and market structures are 'neutralised': that is, isolated and broken down.[122] Examples include elimination of special or exclusive rights, thus enabling new entry; vertical separation of integrated markets to avoid structural conflicts of interest; and removal of unduly demanding or restrictive regulation that inhibits entry. Subsequently, liberalisation has standardising effect: by directing regulation at national level, reconstructed policies are streamlined and coordinated. Although superficially re-regulatory, such efforts have deregulatory impact insofar as a plurality of national regulation collapses into a single regime,[123] while reconstructed frameworks tend towards a *laissez-faire* model.[124]

Taken together, from this perspective, liberalisation becomes the instrument of choice for the task of market-making,[125] upon which establishment of the internal market is predicated. Liberalisation may thus function as a synonym for harmonisation;[126] as a particular form of Europeanisation;[127] as the 'destructive' and 'constructive' forces of EU policymaking;[128] or may even mark a break from "*the Ricardian logic of diversity and comparative advantages*" towards institutional convergence.[129] Accordingly, liberalisation is not simply a question of increasing competition within discrete sectors, but implies expansion of the overall market, with a shift from domestic to supranational in participation and governance.

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[121] Implicit in *Gaston Schul Douane Expediteur BV v Inspecteur der Invoerrechten en Accijnzen, Roosendaal* (C-15/81) EU:C:1982:135 at [33], where the Court held that the internal market "*involves the elimination of all obstacles to intra-[Union] trade in order to merge the national markets bringing about conditions as close as possible to those of a genuine internal market*". See also A. Stone Sweet & W. Sandholtz, "European Integration and Supranational Governance" (1997) 4 *Journal of European Public Policy* 297, 307-8.

[122] In his Opinion in *Leclerc-Siplec* at [40], AG Jacobs highlighted precisely this concern: a focus on discrimination does little to alleviate arbitrary restrictions which prevent attainment of a single market.

[123] Weatherill (2002), 52-53.

[124] H. Haber, "Liberalising Markets, Liberalising Welfare? Economic Reform and Social Regulation in the EU's electricity Regime" (2018) 25 *Journal of European Public Policy* 307.

[125] Scharpf (1999), 45.

[126] H. Schweitzer, "Services of General Economic Interest: European Law's Impact on the Role of Markets and of Member States" in M. Cremona (ed.) *Market Integration and Public Services in the European Union* (Oxford: Oxford University Press, 2011), p.49.

[127] Implying iterative processes of adaptation, transformation and convergence towards an EU exemplar: K. Featherstone, "In the Name of 'Europe'" in K. Featherstone & C. Radaelli (eds.), *The Politics of Europeanization* (Oxford: Oxford University Press, 2003).

[128] Haber (2017), 4.

[129] M. Höpner & A. Schäfer, "A New Phase of European Integration: Organised Capitalisms in Post-Ricardian Europe" (2010) 33 *West European Politics* 344, 351.

A second explanation is *pragmatic*, emphasising the association between mechanisms of liberalisation and negative integration.[130] From this viewpoint, liberalisation is the most attainable means to secure integration; representing the 'path of least resistance' within the constraints of the Union's institutional framework. The market-making processes that comprise liberalisation have both a negative character—removing obstacles to trade and undistorted competition—and a positive one—through reconstruction of a system of economic regulation for the larger unit.[131] Yet it is the former with which liberalisation is closely associated, not least because of significant 'behind-the-scenes' contributions through the supplementary tools of liberalisation, which involve, predominantly, negative integration.[132] The preference for negative integration within the EU's constitutional structure has accordingly been advanced to explain the bias towards liberalisation within regulatory practice.[133] Negative integration requires only a consensus or mandate to abandon existing barriers, avoiding disputed questions of what, if anything, should take their place.[134] Its "*surreptitious power*" thus provides an easier route to outcomes unobtainable in the democratic arena.[135] Liberalisation is the key driver of integration for essentially political reasons from this perspective: it is most easily achieved in a supranational context where the fundamental building blocks remain nation States first and foremost.

A third explanation is *ideological*, reflecting some notion that liberalised markets present the best means to structure the internal market.[136] From this viewpoint, market-opening and reorientation towards the competitive paradigm constitutes the ultimate desired outcome. This implies that economic integration is not value-neutral: that is, the internal market should not merely constitute a single integrated whole but moreover ought to reflect a certain vision of economic organisation. Thus, liberalisation is pursued as an end itself. This is illustrated by Thatcher's 'Bruges Speech,' which advocated a very specific idea of what the EU should achieve. In her view:

> [T]he Treaty of Rome itself was intended as a Charter for Economic Liberty…And that means action to free markets, action to widen choice, action to reduce government intervention. Our aim should not be more and more detailed regulation from the centre: it should be to deregulate and to remove the constraints on trade.[137]

[130] See also Weatherill (2002), 45.
[131] Drawing on Scharpf (1999), p.45.
[132] Scharpf (1999), 50.
[133] Dottterud Leiren (2015), 611.
[134] Scharpf (1999), pp.50-51; S. Garben, "The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union" (2017) 13 *European Constitutional Law Review* 23, 53.
[135] Garben (2017), 36.
[136] What Scharpf (1999), p.45, labelled the 'neoliberal' or 'anti-interventionist' perspective.
[137] Margaret Thatcher, Speech to the College of Europe ("The Bruges Speech"), 20 September 1988.

The ostensibly depoliticised nature of the integration process—essentially an exercise in technocracy—is both acknowledged and disputed.[138] EU policymaking is cloaked in economics, law and scientism, [139] which obscure the inherent—and potent—policy choices it nonetheless reflects.[140] At its root, the determination to liberalise reflects community choices about organisation of society, and the respective roles of the public and private spheres.[141] The internal market is, moreover, a political construct, the nature of which is open to contestation.[142] Accordingly, "*the fallacy of ideological neutrality*" has long been criticised.[143] Despite a veneer of economic and social agnosticism,[144] such heavy reliance upon liberalisation inevitably reflects "*a highly-politicised choice of ethos, ideology, and political culture: the culture of 'the market'*" within the Union.[145]

Yet the 'ideology' of liberalisation is complicated by the plurality of constituencies within the EU's institutional and policymaking structures. For certain political actors, a direct parallel can be drawn to an equivalent emphasis upon freeing markets domestically.[146] Conventional partisan politics are not decisive, however: the sense of purpose generated by the single market project should not be underestimated,[147] while the rhetoric of "ever closer union," though unnuanced, retains appeal.[148] Even for apparently depoliticised actors, an enduring commitment to liberalisation remains evident. The Court is considered to play a decisive role in determining what are essentially political issues, raising concomitant concerns about whether too much policy-making is left to the judiciary.[149] The intrinsically deregulatory nature of its approach is beyond doubt, though not beyond critique.[150] The Commission, similarly, has faced criticism for prioritising policies that entrench its powers,

[138] Generally, e.g., Garben (2017), 59-60.
[139] Garben (2017), 59.
[140] R. McCrea, "Forward or Back: The Future of European Integration and the Impossibility of the Status Quo" (2017) 23 *European Law Journal* 66, 75.
[141] Hodge (2000), p.245.
[142] Weatherill (2017), 125.
[143] J. Weiler, "The Transformation of Europe" (1991) 100 *Yale Law Journal* 2403, 2477
[144] M. Dougan, "'And Some Fell on Stony Ground'–A Review of Giandomenico Majone's *Dilemmas of European Integration*" (2006) 31 *E. L. Rev.* 865, 873-74.
[145] Weiler (1991), 2477. See also W. Sandholtz & J. Zysman, "1992: Recasting the European Bargain" (1989) 42 *World Politics* 95, 112, describing EU-level liberalisation as part of a deregulatory "*fad*," and J. Fitoussi & F. Saraceno, "European Economic Governance: The Berlin-Washington Consensus" (2013) 37 *Cambridge Journal of Economics* 479, 480, as part of "*neoliberal doctrine*".
[146] Notably, at Bruges, Thatcher warned that *"[w]e have not successfully rolled back the frontiers of the State in Britain, only to see them re-imposed at a European level*": see fn.137 above.
[147] Pelkmans (1988), 146.
[148] Weiler (1991), 2458.
[149] Garben (2017), 41.
[150] See, e.g., Ashiagbor (2013), 319-23; Weatherill (2017), 134; Schiek (2017), 638.

and thus contribute to expanding the EU.[151] Market liberalisation accordingly provides a focal point for regulatory activity, both as objective to strive for and benchmark against which to defend the Union's jurisdiction.[152] It is unsurprising that the supposed neoliberal excesses of the internal market are a key theme of contemporary Euroscepticism, one which persists despite conventional de-politicisation.[153] Accurate or otherwise, the perception that the internal market is premised upon a radically liberalising mentality is prevalent across both scholarship and popular culture.

These differing viewpoints—providing alternative, though not mutually exclusive explanations for the prevalence of liberalisation—have distinct implications. The instrumental perspective posits liberalisation as intrinsic to the success of the internal market: to be realised effectively, economic integration at least benefits from, and perhaps requires, liberalisation. The pragmatic perspective sets the bar lower: liberalisation—effectively a policy of *laissez-faire*—is merely what can be achieved within the internal market at present. From both perspectives, the wider normative consequences of liberalisation are, essentially, spill-overs from the integration process. Although more negative consequences should arguably be anticipated *ex ante*, they are not sought proactively. The ideological perspective, by contrast, inverts any functional understanding of the relationship between liberalisation and economic integration: the former is pursued as optimal organisational mechanism for the latter. Realising the normative consequences of liberalisation accordingly represents precisely the objective of the integration process. Insofar as such effects as positively desired by policymakers, moreover, it is reasonable to expect that they should similarly be positively defended.

Reconciling or deciding between these explanations would be no easy task, and this article does not attempt to do so. Indeed, it is arguable that all three perspectives are reflected, to some degree, in current EU practice. The functional rationales, in particular, offer credible descriptions of existing liberalisation efforts, yet both arguably beg the question by leaving unexplored higher-level perceptions of the implicit value of liberalised markets. The ideological rationale, though compelling, is difficult to ground in robust data, and thus inherently speculative. Our understanding of the motivations for liberalisation is not helped by a notable absence of engagement at EU-level. Although there may be "*no*

[151] See, e.g., Majone (2005), p.147, and Bartl (2018), 7.
[152] G. Majone, "The Rise of the Regulatory State in Europe" (1994) 17 *West European Politics* 77.
[153] Garben (2017), 52.

alternative"[154] to liberalisation, rarely do the EU institutions grapple with the distinction between liberalising trade and liberalising commercial activity more generally, an omission revisited below.

Two important considerations nonetheless arise from the above discussion: the extent to which the wider normative consequences of any technical liberalisation process can and should be anticipated by policymakers, and the extent to which the overarching political goal of economic integration can be realised successfully by recourse to mechanisms *other* than liberalisation. Thus, leaving open the perhaps unanswerable question of what motivates liberalisation efforts as such, we turn to the central concern of this article: the implications for the internal market which follow from a market-building process premised principally on liberalisation.

V. Normative Perspectives on Liberalisation: the Shaping the of Internal Market

As the preceding discussion foreshadowed, liberalisation is not, solely, a technical phenomenon. Indeed, debates regarding its merits almost invariably adopt a normative character; importing inherent underlying conceptions of the good that may, or may not, be furthered by competition.[155] Normative perspectives on liberalisation are important because they help us to understand, in more socially-meaningful terms, what an ostensibly successful outcome would entail—thus better enabling us to determine whether, indeed, pursuit of liberalisation is defensible. In this penultimate section, we assess EU-level efforts by reference to various well-recognised perspectives on the underlying motivations for liberalisation, asking both whether reforms to date have realised the perceived benefits of liberalised markets, and whether such advantages, in substance, comprise legitimate policy goals.

The normative conception of liberalisation is susceptible to diverse understandings. Thus, while it may be taken to reflect a particular conception of the good, the supposed benefits are neither immutable nor indisputable.[156] Drawing upon the existing literature, we explore five perspectives on the potential outcomes and impacts of the liberalisation process, namely: pursuit of prosperity through efficiency; liberalisation as deregulation; liberalisation

[154] See fn.1 above.
[155] In his work on utilities regulation, for instance, C. Decker rejected the term for its "*ideological overtones*," substituting the phrase "*restructuring policies*": *Modern Economic Regulation* (Cambridge: Cambridge University Press, 2015), p.2, fn.2.
[156] See, e.g., differing approaches taken by Florio (2013); Picciotto (2014); D. Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005); and Prosser (2005).

as impetus for privatisation and marketisation; economic participation as a standalone virtue; and consumer sovereignty. Having sketched the parameters of each, we consider the extent to which the underlying normative perspective is reflected in the legal framework underpinning the internal market, either overtly or implicitly, and the practical and policy implications that follow. Again, our focus is primarily domestic: to what extent and how does the internal market project generate relevant spill-overs that affect the make-up and quality of national economic and social spheres.

(i) Efficiency, growth and prosperity

The straightforward 'textbook' explanation for liberalisation is to enhance efficiency and improve welfare effects in the internal market.[157] This is premised upon the perceived superiority of well-functioning markets as a means of economic organisation: the view that unencumbered competition provides better incentives towards efficiency and growth than governmental ordering.[158] At its most trenchant, this may shade into 'market fundamentalism,' "*the belief that markets by themselves lead to economic efficiency, that economic policies should focus on efficiency, and that distributional concerns could and should be taken care of elsewhere in the political process*."[159] Although overcoming market failure constitutes a positive rationale for liberalisation in discrete instances, its wholesale embrace across the internal market assumes a more normative character. The 'carrot' behind the iterative processes of market-opening and reorganisation mandated by EU law is thus the promise, ultimately, of longer-term prosperity throughout the Union.

At least at a high level, establishing the internal market is considered a means to drive growth and increase overall welfare, both within individual Member States and across the EU. Art.3(3) TEU lists as an objective, or potentially logical consequence, of the internal market, "the sustainable development of Europe based on balanced economic growth". Calls for intervention or restraint are increasingly couched in terms of explicitly monetary—and often fantastical-sounding—advantages.[160] The express commitment to prosperity within the Rome Declaration of March 2017 reaffirms the connection between completion of the (fully-

[157] See e.g. R. Clement, "Liberalisation of the Internal Market: Efficiency Advantages and Requirements" (1988) 23 *Intereconomics* 228.
[158] See, generally, Newbery (1996).
[159] J. Stiglitz, "Is there a Post-Washington Consensus?" in N. Serra & J. Stiglitz (eds.), *The Washington Consensus Reconsidered* (Oxford: Oxford University Press, 2008), p.46.
[160] See, e.g. the Commission's Digital Single Market Strategy, which it suggests will add €415 billion to the European economy annually (COM(2015) 192 final, p.3), and its recommendations for a largely-unregulated sharing economy, which it suggests may add €160-572 billion (COM(2016) 356 final, p.2).

liberalised) single market and optimisation of efficiency and welfare effects.[161] Notably, pursuit of prosperity is decoupled from that of "*a social Europe*";[162] although both are core goals, their separate existences suggest that enhancing overall welfare—a measure of total productive, allocative and dynamic efficiency—is a standalone concern, even if subsequent (re)distribution is of equal importance.

Within the Court's jurisprudence, the deregulatory implications of the market access criterion are broadly consistent with this objective, insofar as perceived 'burdens on businesses'—a central preoccupation of neoliberalism—inhibit market participation by reducing expected profitability,[163] and also diminish competitiveness.[164] A "*market economy operator*" test is the baseline for permissible interventions under the State Aid rules;[165] while the Commission decrees, unprompted by the jurisprudence, that Member States must introduce efficiency incentives for providers of state-funded public services.[166] Höpner & Schäfer accordingly construe contemporary liberalisation as a means to achieve convergence of varieties of capitalism, an approach which, they argue, pushes European economies towards the liberal Anglo-Saxon model.[167]

Yet the mechanical treatment of efficiency as principal determinant of prosperity in its broader sense—excluding, for example, socially-valuable ethical considerations—has been criticised,[168] and the EU institutions do not draw rigid correlations in practice.[169] Inefficiency is tolerated most obviously—albeit restrictively—through derogations contained in the Treaties[170] and developed jurisprudentially.[171] Despite movement towards a 'more economic approach,' antitrust law prohibits not only behaviour that diminishes consumer welfare, but also which harms "*the structure of the market and, in so doing, competition as such*."[172] While competitive markets often go hand-in-hand with efficiency, the Court

[161] See fn.8 above.
[162] See fn.8 above.
[163] Snell (2010), 467-468.
[164] E. Spaventa, "Leaving *Keck* behind? The free movement of goods after the rulings in *Commission v Italy* and *Mickelsson and Roos*" (2009) 34 *E.L. Rev.* 914, 925.
[165] Commission Notice on the notion of State aid as referred to in Art.107(1) of the Treaty on the Functioning of the European Union [2016] OJ C262/1 at [73]-[114].
[166] Commission, *European Union framework for State aid in the form of public service compensation* [2012] OJ C8/15 at [39]-[43].
[167] Höpner & Schäfer (2010).
[168] Fitoussi & Saraceno (2013), 494.
[169] Davies (2012), 826.
[170] See, e.g., arts.36, 52 and 65 TFEU.
[171] See, e.g., *Cassis de Dijon* at [8].
[172] *GlaxoSmithKline Services Unlimited v Commission of the European Communities* (C-501/06) EU:C:2009:610 at [63].

explicitly rejects any requirement of the latter to protect the former,[173] thus endorsing (even inefficient) market participation as valuable in the context of European integration, as considered below. In the realm of the fundamental freedoms, again the Court refuses to approach the benefits of market access solely in efficiency-based terms, for instance in *ANETT* rejecting arguments that obstacles to integration could exist only where consumers were denied cheaper products.[174]

Perhaps the strongest indication that economic integration is not (merely) a means of enhancing efficiency, however, is seen in the tenor and approach of sector-specific efforts. Here, the considerable irony for those who critique EU-level liberalisation as a neoliberal phenomenon is that such efforts may be a source of considerable *in*efficiency within the internal market. There is evidence, for instance, that blanket mandatory unbundling across markets with divergent characteristics—the preferred approach for electricity, gas and rail—is likely to negatively affect competition and consumers welfare in a non-trivial number of circumstances.[175] Similarly, efforts to liberalise postal services make limited economic sense where physical delivery is declining, non-economic considerations are prevalent, and experience indicates that viable competition is difficult if not impossible to introduce.[176]

With clear indications that there is no 'one-size-fits-all' model for effective market-opening,[177] the focus of the liberalisation agenda is thus squarely upon building a distinct 'European market,' rather than one that adheres to any textbook model of efficiency.[178]

[173] *GlaxoSmithKline* at [62]-[64].
[174] *Asociación Nacional de Expendedores de Tabaco y Timbre (ANETT) v Administración del Estado* (C-456/10) EU:C:2012:241 at [54].
[175] See e.g. S. Bogner, S. Gasser & M. Rammerstorfer, "Mergers and Acquisitions in European and North American Energy Markets: Empirical Analysis of Legal and Ownership Unbundling" (2015) 11 *Journal of Competition Law & Economics* 935 (2015); C. Growitsch & M. Stronzik, "Ownership Unbundling of Natural Gas Transmission Networks: Empirical Evidence," 46 *Journal of Regulatory Economics* 207 (2014); F. Mizutani & M. Uranishi, "Does Vertical Separation Reduce Cost? An empirical Analysis of the Rail Industry in European and East Asian OECD Countries" (2013) 43 *Journal of Regulatory Economics* 31; and K. Gugler, M. Libensteiner & S. Schmitt, "Vertical Disintegration in the European Electricity Sector: Empirical Evidence on Lost Synergies" (2014) *Department of Economics Working Paper Series* 190, WU Vienna University of Economics and Business, October 2014.
[176] See e.g. C. Jaag, "Postal-Sector Policy: From Monopoly to Regulated Competition and Beyond" (2014) 31 *Utilities Policy* 266. See also the stark findings in Wik-Consult, *Main Developments in the Postal Service (2010-2013). Study for the European Commission*, August 2013.
[177] See E. Bohne, "Conflicts between National Regulatory Cultures and EU Energy Regulations" (2011) 19 *Utilities Policy* 255; F. Belloc, A. Nicita & M.A. Rossi, "Whither Policy Design for Broadband Penetration? Evidence from 30 OECD Countries" (2012) 36 *Telecommunications Policy* 382; M. Finger, "Governance of Competition and Performance in European Railways: An Analysis of Five Cases" (2014) 31 *Utilities Policy* 278; and, more generally, Hodge (2000).
[178] Glachant & Ruester (2014), 222.

Davies accordingly described the internal market as "*an exercise in neither classical liberalism nor orthodox economics but in social engineering*."[179]

(ii) A "market without rules"?

A second question is whether EU liberalisation is an inherently deregulatory exercise, an end itself rather than the means to achieve effective integration.[180] The conventional critique of regulation is premised upon, *inter alia*, an inefficient and presumptively captured regulator, whose interventions tend to deter rather than foster competitive behaviour.[181] Liberalisation, from this perspective, frees the market to achieve more efficient outcomes, minus ineffective second-guessing by the state. [182] Yet the unsettling prospect of a 'market without rules,' where all human values are subject—and subservient—to the market, suggests the undesirability of unmoderated deregulation.

For those familiar with critiques of Brussels bureaucracy as a never-ending source of 'red tape'[183]—or, indeed, Brexit-driven concerns that *departing* the internal market may facilitate 'Mad-Max-style' deregulation[184]—the notion that EU integration aligns with an ideological commitment to rolling back the frontiers of the State may appear absurd. Liberalisation, in this context, is emphatically not equivalent to deregulation in the public choice sense.[185] Liberalised markets are often characterised most acutely by the breadth and depth of regulation subsequently enacted—typically originating at EU level, taking effect in domestic law—to govern the operation of ostensibly free markets.[186] The internal market functions as an "*empowering concept*" for art.114 TFEU,[187] prompting swathes of standardised regulation across a range of economic activities.[188] Moreover, development of fundamental rights protections at EU-level, which constrain the substantive scope of the

[179] Davies (2012), 806.
[180] A. Aman, "Deregulation in the United States" in D. Geradin (ed.) *The Liberalisation of State Monopolies in the European Union and Beyond* (The Hague: Kluwer, 2000), p.268.
[181] Gönenç *et al.* (2001), 60-73.
[182] OECD (2001), 10.
[183] See e.g. *The Economist*, "Drowning in Red Tape?", 3 March 2016.
[184] See, e.g. *The Guardian*, "David Davis: Brexit will not plunge Britain into 'Mad Max dystopia'," 19 February 2018.
[185] See, e.g., G. Stigler, "The theory of economic regulation" (19710 2 Bell Journal of Economics 3; a convincing critique is S. Croley, *Regulation and Public Interests* (Princetone: Princeton University Press, 2007).
[186] Sauter (2014), 228.
[187] Weatherill (2017), 146.
[188] See discussions in Micklitz (2009) and Weatherill (2017).

internal market rules, provides some—albeit limited[189]—counterbalance against the perceived neoliberal orthodoxy.[190]

Development of the internal market is, nonetheless, premised upon breaking down the regulatory boundaries of the *nation* State, integrating multiple entities into a single supranational whole. There is, therefore, an increasing hostility to domestic regulation, encapsulated by the market access 'slogan,'[191] which at its most ambitious marks a switch from free *movement* towards free *markets*. Whether this in fact reflects 'neoliberalism by stealth'[192] remains disputed. Weatherill, for instance, rejected the convenience of the neoliberal critique, arguing that it misrepresents the focus of EU-level liberalisation, which principally:

> confronts the dead wood of centuries of regulatory tradition…[T]he Court is engaged in weeding out unrepresentative and outdated manifestations of national-level decision-making that are hostile to and inappropriate in an integrating European market….[193]

The moderation implicit in Weatherill's defence is not always borne out in the jurisprudence, however: although a valid critique of the idiosyncratic marketing restrictions in *Cassis de Dijon*, for example, it is difficult to recognise here the more nuanced and credible price restrictions in *Scotch Whisky*. Accordingly, although domestic regulation, whether to further economic or non-economic objectives, is not irreconcilable inherently with the demands of the internal market, two structural asymmetries pull towards a deregulatory *laissez-faire* vision.

The first is an asymmetry in the Court's approach to review of the fundamental freedoms. As discussed, much recent jurisprudence is premised on an assumption that domestic regulation intrinsically impedes market access, whether by altering demand patterns or diminishing incentives of would-be entrants, thereby shifting the focus of analysis to potential justification by Member States.[194] Arguing that the equilibrium between (EU-mandated) economic freedoms and (nationally-protected) social rights that underpins the concept of 'embedded liberalism' has become unstable, Schiek emphasised this inherent imbalance: national law and policy require positive and proportionate justification, while the

[189] See the discussion of *Viking* and *Laval* below.
[190] Schiek (2017), 626.
[191] Snell (2010).
[192] See, e.g., Dougan (2006), 876-77.
[193] Weatherill (2002), 49.
[194] Recent examples include *Scotch Whisky*, *Deutsche Parkinson* and *Association nationale des opérateurs détaillants en énergie (ANODE) v Premier ministre and Others* (C-121/15) EU:C:2016:637.

"*deregulatory thrust*" of the fundamental freedoms is accepted *a priori*.[195] 'The market,' moreover, has less to lose than 'the social': a judgment accepting domestic restrictions permits other Member States to liberalise, whereas condemnation of domestic regulation prohibits *all* Member States from adopting or maintaining such rules.[196]

Such unevenness, alongside the manifestly strategic nature of many domestic challenges taken by traders under the free movement rules, has occasionally caused unease for the Court.[197] This was addressed most clearly in *Keck*,[198] where the Court distinguished between rules that merely limit commercial freedom for economic operators, and those that make life more difficult for foreign traders, carving the former from the scope of art.34 TFEU. However, although the Court reaffirmed *Keck*, equivocally, in *Trailers*,[199] the subsequent failure to consider the case in the factually-similar *Scotch Whisky* calls into question its continuing relevance.[200] Other attempts to rein in perceived misuse of the fundamental freedoms, without resiling from the breadth of their liberalisalising implications, include rejection of cases where exercise of the relevant freedom was hypothetical,[201] the link to the relevant freedom was too tenuous,[202] or by reference to some (largely unspecified) *de minimis* threshold.[203] *Keck* stands out, however, as an instance where the Court explicitly disclaimed an overtly deregulatory role.[204] The retreat from this more modest vision cannot but bolster arguments that the fundamental freedoms, as currently approached by the Court, function as a deregulatory force at national level.

Second, to the extent that EU law subsequently fills the regulatory void to protect legitimate public policy concerns, further difficulty arises due to an asymmetry within the EU's regulatory capabilities between the economic and social domains.[205] Social policy is a shared competence, although sensitive areas like public health and education lie primarily

[195] Schiek (2017), 616.
[196] Garben (2017), 42.
[197] Snell (2010), 447.
[198] *Criminal proceedings against Bernard Keck and Daniel Mithouard* (C-267/91) EU:C:1993:905.
[199] *Trailers* at [36].
[200] Unlike AG Bot, who considered the proposed regulation from both market access and *Keck* perspectives: Opinion in *Scotch Whisky* (C-333/14) EU:C:2015:527.
[201] See, e.g., *Friedrich Kremzow v Republik Österreich* (C-299/95) EU:C:1997:254 at [16].
[202] See, e.g., *Grogan* at [24].
[203] See e.g. *Mobistar SA v Commune de Fléron* (C-544/03) EU:C:2005:518 at [28]-[35]; and *SC Volksbank România SA v Autoritatea Naţională pentru Protecţia Consumatorilor — Comisariatul Judeţean pentru Protecţia Consumatorilor Călăraşi (CJPC)* (C-602/10) EU:C:2012:443 at [80]-[81]; also M. Jansson & H. Kalimo, "*De minimis* meets "Market Access": Transformations in the Substance—and Syntax—of EU Free Movement Law?" (2014) 51 *C.M.L. Rev.* 523.
[204] See also S. Weatherill, "The Several Internal Markets" (2017) 36 *Yearbook of European Law* 125, 136-38, discussing the extent to which *Keck* is applicable outside of goods.
[205] See arts.3-6 TFEU for division of competences between EU and Member States, and Damjanovic (2013), 1688.

with Member States.[206] Yet the fact that the burden of financing social redistribution falls to Member States, which have divergent welfare models and resource availability, means that, in practice, EU-level intervention typically is limited to support for domestic efforts.[207] Moreover, as indicated by cases like *Viking* and *Laval*, discussed further below, in areas of public policy salience where EU law finds purchase, recognised standards of social protection tend towards the minimal. Similar scepticism is seen in the emphasis placed, in re-regulation of markets following sector-specific liberalisation efforts, on the need to constrain national regulators.[208] This creates a not-unjustified perception that EU law strongly favours (domestic) deregulation. The well-intentioned window-dressing of the new non-binding European Pillar of Social Rights is, furthermore, unlikely to address this asymmetry in the short-term.[209]

Yet, an important bulwark against the menacing prospect of a market devoid of necessary rules continues to exist in the residual sovereignty of Member States, who may choose to regulate domestically despite outward incompatibility with internal market requirements. *Scotch Whisky* illustrates this point. In the face of significant scepticism from the CJEU, the domestic rules were nonetheless upheld by the UK's Supreme Court, which took a considerably more generous approach than Luxembourg to the proportionality criterion.[210] Thus, within the schema of the internal market, there remains scope for domestic intervention where required; what is more contentious, however, is who decides, and on what basis, when intervention is merited. Moreover, even where national regulation is clearly incompatible with EU law, the default backstop of enforcement proceedings against offending Member States is a slow process, viewed as an option of last resort, and unsuitable as a comprehensive mechanism to guarantee domestic compliance with EU-level deregulation.[211] Rather than a market without rules, therefore, EU policymakers may be required to decide between condoning national variation or imposing more complete top-down harmonisation.

(iii) The (nation) State in the (internal) market: privatisation and marketisation

[206] Arts.4 & 6 TFEU.
[207] Ashiagbor (2013), 308. See also, generally, C. Barnard, "EU Employment Law and the Social European Model" (2014) 67 *Current Legal Problems* 199.
[208] Sauter (2014), 32.
[209] See, generally, S. Garben, "The European Pillar of Social Rights: Effectively Addressing Displacement?" (2018)14 *European Constitutional Law Review* 210.
[210] *Scotch Whisky Association v The Lord Advocate* [2017] UKSC 76.
[211] P. Craig & G. de Burca, *EU Law: Text, Cases and Materials*, 6th ed., (Oxford: Oxford University Press, 2015), chapter12.

Whether economic integration implies concurrent rejection of public ownership and service provision—and thus the State *qua* economic actor—is less straightforward. Privatisation as an end itself is closely associated with a broader libertarian agenda.[212] Clifton *et al.* described how "*a new rhetoric and credo in the market replaced the post-war faith in the state*," with an assumption that "*a change of ownership from public to private status would release enterprises from the shackles of bureaucracy and lead them via the cold winds of market forces to economic efficiency*."[213] Beyond ideologically-charged revulsion with state enterprise,[214] privatisation may be championed to enhance managerial incentives within public companies and/or increase competitive pressures.[215] In the context of public services, 'marketisation' similarly is presented as a means to achieve efficiency, affordability and choice.[216] Yet both are deeply-disputed mechanisms of reform, in theory[217] and in terms of impact in practice.[218]

Within the EU, the core question is the extent to which internal market norms are permitted to encroach upon the conventional domain of national welfare states. By definition, the existence of welfare state systems implies a more hands-on role for national governments in economic and social ordering, particularly in areas of acute public policy concern. This typically involves, *inter alia*, public ownership, public provision and/or public funding of key services. To the extent such services also constitute 'economic activity' under EU law, however, a potential conflict arises with the liberalising forces of the internal market project, which, as discussed, assumes that such endeavours are correspondingly susceptible to open and undistorted market competition.

Formally, EU law does not challenge the competence of Member States regarding nationalised industries or privatisation. Art.345 TFEU declares that, *"[t]he Treaties shall in no way prejudice the rules in Member States governing the system of property ownership*," while arts.37 and 106(2) TFEU assume the lawful existence of "*State monopolies of a commercial character*" and "*revenue-producing monopolies*," respectively. Unlike certain

[212] A. Dorfman & A. Harel, "Against Privatisation as Such" (2016) 36 *Oxford Journal of Legal Studies* 400, 403.
[213] J. Clifton, F. Comín & D. Díaz-Fuentes, *Privatisation in the European Union* (Dordrecht: Springer, 2003), p.1.
[214] Reflected, most neatly, in (later, Chancellor) Nigel Lawson's exhortation that: "*The Conservative Party has never believed that the business of government is the government of business*": quoted by Newbery (1996), 359.
[215] Gönenç *et al.* (2001), 56-58.
[216] J. Davies & E. Szyszczak, "Universal Service Obligations: Fulfilling New Generations of Services of General Economic Interest," in E. Szyszczak, J. Davies, M. Andenæs, & T. Bekkedal (eds.) *Developments in Services of General Interest* (The Hague: TCM Asser Press, 2011), 158.
[217] See e.g. strong objections of Dorfman & Harel (2016).
[218] See, e.g., concerns regarding distributional impacts in Hodge (2000), 226.

national jurisdictions, the primary driving force behind liberalisation is not any desire to effectuate privatisation.[219] Moreover, in theory, development of the internal market is neither incompatible with the existence of national welfare states, nor determinative of their organisation. Although art.151 TFEU nominally foresees an eventual harmonisation of social systems, the Court maintains that EU law "*does not detract from the power of the Member States to organise their social security systems*".[220]

Yet in practice, the logic of the internal market pulls towards privatisation and marketisation.[221] Various explanations have been advanced: that corporatisation alerts Member States to the value of assets; that budgetary restrictions motivate indebted countries to sell; or that governments are inclined, when public monopolies are opened to competition, to shift risks to private finance.[222] Much of what characterises privatisation beyond asset sales—including commercialisation of public entities, removal of subsidies, and contracting-out[223]—has become part and parcel of the wider internal market agenda. This chimes with the notion of rolling back the boundaries of the nation State: in an ostensible single market where supervision is delegated to national regulators, it becomes important to limit ties between regulators and regulatees to curtail incentives for distortive behaviour. EU-level developments might thus be construed as "*catalysts or filters*" that, obliquely, condition privatisation.[224]

Three interlinked aspects of the overlap between the internal market and national welfare systems merit specific attention. First, there is the question of public ownership, and in particular its relationship with free movement of capital. Despite the nominal forbearance of art.345 TFEU, the extraordinary *Essent* case suggests a more proactive role for EU law in prompting privatisation. Here, Dutch rules prohibiting privatisation of energy infrastructure were held to violate art.63(1) TFEU, regardless of the apparent leeway granted by art.345. Rejecting the urgings of its Advocate General—who argued that "*the fact that no private investor may buy shares or interests in a company reserved for public shareholders…is* precisely *an element of the system of property ownership that the Treaty does not seek to change*"[225]—, the Grand Chamber construed art.345 as merely a principle of "*neutrality*".[226]

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[219] McGowan (2000), p.224.
[220] *Watts* at [92]; *Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa* (C-173/09) EU:C:2010:581 at [40].
[221] Pelkmans & Luchetta (2013), pp.13-14, and Florio (2013), pp.10-12.
[222] Florio (2013), pp.11-12.
[223] R. Bauman, "Forward" (2000) 63 *Law and Contemporary Problems* 1, 2.
[224] Clifton *et al.* (2006), 740.
[225] Opinion of AG Jääskinen in *Staat der Nederlanden v Essent NV* (C‑105/12) EU:C:2013:242 at [45] (emphasis added).

While EU law did not preclude, *a priori*, either nationalisation or privatisation,[227] this neutral stance was insufficient to counter the positive obligation to remove impediments to free movement.[228] The case might thus be seen as the logical inverse of *Trailers*: suggesting apparent entitlement of investors to a ready supply of potential assets, much as the latter presumed entitlement of traders to demand for their products.

As a statement of the internal market's attitude towards public ownership, the potential breadth of *Essent* is quite incredible. The case should be distinguished from the 'golden share' jurisprudence,[229] which involved control of *already*-privatised undertakings. Although directed against an explicit prohibition on privatisation, the Court's reasoning in *Essent*—that restrictions on alienation of capital arise from the mere fact that private parties cannot invest in public undertakings[230]—is equally applicable to decisions to maintain State ownership.[231] Public ownership itself thus becomes contrary to EU law, unless justified by Member States. From this perspective, privatisation is the *default* status within the internal market. The *Essent* decision, and its wider implications, are amongst the strongest evidence that the EU might indeed be a 'liberalisation machine' in certain instances.

Second, the treatment of public monopolies—historically a vehicle by which national governments controlled provision of key public services and/or potentially harmful economic activities—evinces increasingly little discretion for Member States. Sector-specific liberalisation has functioned to dismantle many of the most lucrative monopolies; although later efforts enjoy the imprimatur of Member State-approval through the ordinary legislative procedure. The use of art.106(1) TFEU to extend application of competition law to national measures favouring domestic monopolists is well-established,[232] and was reaffirmed forcefully in *DEI*. In theory, under art.37 TFEU public monopolies are not absolutely incompatible with free movement, but must merely be "adjusted" to eliminate discrimination.[233] Yet, the market access standard again appears to be devouring whatever

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[226] *Staat der Nederlanden v Essent NV* (C‑105/12) EU:C:2013:677 at [29].
[227] *Essent* at [30].
[228] *Essent* at [39]-[43].
[229] See, e.g. *Commission v UK* (C-98/01) EU:C:2003:273, and *Commission v Germany* (C-112/05) EU:C:2007:623.
[230] *Essent* at [43].
[231] Coming to different conclusions, pre-*Essent*, on the ambit of art.345 TFEU, see B. Akkermans & E. Ramaekers, "Article 345 TFEU (ex Article 295 EC), Its Meaning and Interpretations" (2010) 16 *E.L. Rev.* 292.
[232] See, e.g., *France v Commission* (C-202/88) EU:C:1991:120; *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* (C-260/89) EU:C:1991:254; and *Klaus Höfner and Fritz Elser v Macrotron GmbH* (C-41/90) EU:C:1991:161.
[233] L. Hancher & W. Sauter, "Public Services and EU Law" in C. Barnard & S. Peers (eds.) *European Union Law* (Oxford: Oxford University Press, 2014), p.545.

nominal domestic discretion remains. In *Läärä*, an exclusive gambling concession constituted *prima facie* breach of art.56 TFEU, despite an absence of discrimination.[234] In *Rosengren*[235] and *ANETT*, the Court similarly found violations of art.34 TFEU arising from, respectively, Sweden's alcohol monopoly and Spain's tobacco monopoly. In both, the Court excluded consideration of art.37 TFEU, taking an incredibly narrow view of what rules pertain to "*the existence or operation*" of state monopolies.[236] Moreover, *contra* its deference in *Läärä*, in *Rosengren* and *ANETT* the Court concluded that the national provisions should not be exempted, because proportionate public interest concerns were not identified.[237] What united all three was the contentious nature of the economic activity: in each, the product was socially harmful, so that the monopoly rights enabled the Member State to exert greater public control. Yet such concerns, the validity of which is implicit in arts.37 and 106(2) TFEU, found little resonance with the Court.

Third, EU-level requirements are particularly contentious to the extent they dictate, directly or obliquely, the conditions of service provision within national welfare regimes, particularly the allocation of resources. We leave aside the Court's generous reading of arts.20 and 45 TFEU, which extends coverage of national social systems to a range of non-national residents,[238] thus prioritising the *inter*-State dimension of social solidarity.[239] Our concern instead is the extent to which EU-level liberalisation disrupts the financial balance within domestic systems, limiting the relevance of *intra*-State conceptions of solidarity.[240] The procurement rules constitute perhaps the most pervasive influence, constraining purchasing activity by state agencies.[241] Public services are not immune from antitrust scrutiny,[242] furthermore, although case-law recognises exceptions for sovereign[243] or

[234] *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State)* (C-124/97) EU:C:1999:435 at [28]-[29].
[235] *Klas Rosengren and Others v Riksåklagaren* (C-170/04) EU:C:2007:313.
[236] *Rosengren* at [15]-[27]; *ANETT* at [24]-[27].
[237] *Rosengren* at [57]; *ANETT* at [50]-[56].
[238] See, e.g., *John O'Flynn v Adjudication Officer* (C-237/94) EU:C:1996:206; *María Martínez Sala v Freistaat Bayern* (C-85/96) EU:C:1998:217; *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* (C-184/99) EU:C:2001:458, and *Florea Gusa v Minister for Social Protection and Others* (C-442/16) EU:C:2017:1004.
[239] Ashiagbor (2013), 322.
[240] Ashiagbor (2013), 322.
[241] See, e.g., Commission Staff Working Document, *Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest* SWD(2013) 53 final.
[242] Due to the expansive concept of "undertaking" within EU law: see, e.g., *Höfner* and *Cisal di Battistello Venanzio & C. Sas v Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)* (C-218/00) EU:C:2002:36.
[243] See, e.g., *Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)* (C-343/95) EU:C:1997:160.

solidaristic[244] activities. Consistent with its expansive approach to the concept of economic activity,[245] however, the Court has few qualms about drawing equivalence between public and private provision in applying the fundamental freedoms.[246]

A troubling area is healthcare, where finite public resources most obviously meet urgent human need. Here, there is top-down liberalisation with the Cross-Border Healthcare Directive,[247] which facilitates cross-border provision and patient mobility.[248] Expansive interpretations of this legislation, however, have significant impact on domestic arrangements for public healthcare.[249] In *Watts*, for example, the Court confirmed the right of a British patient to public reimbursement for unauthorised treatment obtained abroad to circumvent domestic waiting lists, even though she was ineligible to claim costs of care at home but merely direct provision under the (Beveridgean) NHS. In *Elchinov*, it endorsed reimbursement for types of treatment unavailable within home Member States, again privileging, at public expense, the free-moving patient. *Petru* involved a patient dissatisfied with the quality of care in her home State. Although recognising an obligation to 'shop around' for higher-quality treatment domestically, the Court ultimately endorsed a qualified right to reimbursement. Thus, a public good—healthcare—is reinterpreted as an individual entitlement, albeit still funded with public money.[250] Although such cases have been applauded as prompting a 'race to the top' in public healthcare,[251] this ignores the collective dimension of provision. If Mr Elchinov and Ms Petru receive reimbursement for expensive German care as a right under EU law, this impacts upon the finite pot of money to treat the majority of patients remaining within the domestic system—and thus, almost necessarily, the extent and quality of care they receive.[252] These cases thus provide a vivid illustration of

[244] Involving "*the inherently uncommercial act of involuntary subsidisation of one social group by another*": Opinion of Advocate General Fennelly in *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia* (C-70/95) EU:C:1997:55 at [29].
[245] See fn.55-59 above.
[246] See, e.g. *Minister voor Wonen, Wijken en Integratie v Woningstichting Sint Servatius* (C-567/07) EU:C:2009:593, on public housing.
[247] Directive 2011/24/EU on the application of patients' rights in cross-border healthcare [2011] OJ L88/45.
[248] Directive 2011/24/EU, recital (10).
[249] Early cases include *Raymond Kohll v Union des caisses de maladie* (C-158/96) EU:C:1998:171 and *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen* (C-157/99) EU:C:2001:404.
[250] C. Newdick, "Citizenship, Free Movement and Healthcare: Cementing Individual Rights by Corroding Social Solidarity" (2006) 43 *C.M.L. Rev.* 1645.
[251] B. van Leeuwen, "The Doctor, the Patient, and EU Law: The Impact of Free Movement Law on Quality Standard in the Healthcare Sector" (2016) 41 *E.L. Rev.* 638, 652.
[252] For a more sympathetic assessment, see F. de Witte, "The Constitutional Quality of the Free Movement Provisions: Looking for Context in the Case Law on Article 56 TFEU" (2017) 42 *E.L. Rev.* 313, 326-331.

how liberalisation may lead to a "*hallowing out*,"[253] or destabilising,[254] of domestic welfare states.

Such concerns are accommodated most obviously within art.106(2) TFEU, which allows ring-fencing of 'services of general economic interest' (SGEIs)—broadly equivalent to domestic notions of public services[255]—from disruptive market forces.[256] (Where the question is funding of public services, the *Altmark* criteria and exceptions to the State aid rules are also relevant.[257]) As a derogation, in principle art.106(2) TFEU should be interpreted strictly, so that economic activity remains, where possible, subject to internal market rules.[258] A 'one-size-fits-all' approach has been rejected, however.[259] The task of defining SGEIs is primarily a *Member State* competence, where they have significant margins of discretion,[260] while flexible approaches are taken to proportionality.[261] Yet art.106(2) nonetheless functions primarily as an exception to the norm of liberalisation. Rather than imposing top-down obligations regarding public services,[262] it enables Member States to opt-out of elements of market-opening to achieve public interest goals.[263] It thus endeavours to address concerns about inequalities unreachable through competition alone;[264] but does so by rendering such considerations *extraordinary* and thus outside the internal market. This approach is therefore consistent with earlier observations about the default presumption of the existence of markets which underlies EU law. Moreover, although art.106(2) makes broad reference to "the rules contained in the Treaties," its application tends to be restricted to use as a defence for undertakings alleged to have breached competition

[253] Sauter (2014), 77.
[254] Damjanovic (2013), 1689.
[255] J.L. Buendia Sierra, *Exclusive Rights and State Monopolies under EC Law* (Oxford: Oxford University Press, 1999) at [8.31]; and Prosser (2005), p.33.
[256] Davies & Szyszczak (2011), 156; Damjanovic (2013), 1705.
[257] *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* (C-280/00) EU:C:2003:415.
[258] *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior* (C-127/73) EU:C:1974:25 at [19].
[259] Schweitzer (2011), 42.
[260] *BUPA Hospitals Ltd and Goldsborough Developments Ltd v Commissioners of Customs & Excise* (C-419/02) EU:C:2006:122 at [166]-[167].
[261] See discussion in J. Faull & A. Nikpay (eds.), *The EU law of Competition*, 3rd ed. (Oxford: Oxford University Press, 2014) at [6.176], and the approach in cases like *Criminal proceedings against Paul Corbeau* (C-320/91) EU:C:1993:198, *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij* (C-393/92) EU:C:1994:171 and *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* (C-475/99) EU:C:2001:577.
[262] Contrast the 'universal service obligation' concept, found in liberalisation directives: see Opinion of State Aid Group of EAGCP, "Services of General Economic Interest," published 20 June 2006, p.2.
[263] *Corbeau* at [14].
[264] Generally, Prosser (2005).

law, with little purchase *vis-à-vis* obligations of the State in free movement cases like *Essent*, *Rosengren* or *Watts*.[265]

Accordingly, although EU law does not, in principle, challenge the existence of domestic welfare states, it places pressure upon direct Member State involvement in the internal market from numerous directions: from challenging public ownership and monopoly rights, to conceptualising public service provision as contestable marketplaces, to disputing the allocation of public resources from consumerist perspectives. The Court's disingenuous resort to neutrality in *Essent* thus sits uncomfortably with Weiler's scathing attack upon the fallacy of ideological neutrality in this context.[266] A façade of impartiality, resolutely indifferent to any distinction between public and private operators, constitutes in practice a favouring of the latter where the parameters of the plane within which both must compete are designed almost exclusively with private operators in mind. Although EU law does not—because it cannot—force Member States from the internal market entirely, the existing legal framework evinces obvious reluctance to allow them any substantive role.

(iv) Economic participation as a standalone right

Our fourth perspective considers the extent to which liberalisation champions individual economic participation as a virtue. Schweitzer encapsulated this as: "*the principle that economic opportunities shall be open to all*."[267] Closely though not incontrovertibly associated with ordoliberal thinking on the imperative of individual freedom within the economic constitution, [268] this approach focuses on the experience of (private) market actors and the benefits they derive from the competition process. Ordoliberalism is claimed to support a right for individuals to compete, free from political interference yet backstopped by strong State protection for open markets,[269] thus segueing into competition as *essence*.[270] There is complementarity with consumer sovereignty, discussed below, insofar as each

[265] Discussing the extent to which art.106(2) TFEU *should* be interpreted as a general clause within EU law, see T. Bekkedal, "Article 106 TFEU is Dead. Long Live Article 106 TFEU!" in E. Szyszczak, J. Davies, M. Andenæs, & T. Bekkedal (eds.) *Developments in Services of General Interest* (The Hague: TCM Asser Press, 2011).
[266] See fn.143 above.
[267] Schweitzer (2011), 58.
[268] For excellent debate of the Ordoliberal contribution to European integration, see J. Hien & C. Joerges (eds.), *Ordoliberalism, Law and the Rule of Economics* (Oxford: Bloomsbury Publishing, 2017). See also D. Gerber, *Law and Competition in Twentieth Century Europe* (Oxford: Oxford University Press, 1998), pp.232-65, and P. Nedergaard, "The Influence of Ordoliberalism in European Integration Processes—A Framework for Ideational Influence with Competition Policy and the Economic and Monetary Policy as Examples" *MPRA Paper* No.52331.
[269] Sauter (2014), 112.
[270] M. Foucault, *The Birth of Biopolitics* (Basingstoke: Palgrave MacMillan, 1979) [2008 edition], p.120.

prioritises the interaction between consumption and production that underlies any market; yet the participatory perspective turns the orthodox understanding of markets—that production is about means and consumption about ends[271]—on its head. Rather than fostering entry to achieve subsequent goals, like efficiency, this perspective derives value from the very *possibility* of participation after liberalisation.

As Schweitzer described, the internal market is premised on an integral link between individual economic rights and European 'general interest'.[272] Under the fundamental freedoms, the language of market access emphasises the extent to which a core goal is to facilitate entry and participation by traders in markets across the EU.[273] The crux of the integration concern is the extent to which regulation inhibits participation, whether by rendering it legally impossible or practically undesirable. Moreover, there is a strong default assumption that, where a market *can* exist—that a product or service could potentially be provided for remuneration by private economic operators—, as a matter of EU law it *should* exist, so that derogations from the presumed norm of open competition must be justified. The starting point within the internal market is, essentially, that everything is for sale; or, put differently, a market should exist for (almost) any product or service that suppliers may conceivably wish to sell.[274] We saw this in *Trailers*, where domestic regulation skewed demand patters, denying manufacturers a domestic product market to which they were presumptively entitled; in *Essent*, where public ownership denied access to a lucrative assets market; in *Watts*, *Elchinov* and *Petru*, where Member States were obliged to reimburse foreign medical providers outside domestic health systems; and in multiple cases rejecting claims of moral repugnancy to deny status as economic activity. *Josemans* took the latter point to astonishing conclusion: although internal market law does not (quite) extend to the illegal drugs trade, it protects the right of purveyors of narcotics to market ancillary products like coffee.[275] As discussed, moreover, participation need not be efficient in the sense of welfare-enhancing to merit protection: *"[m]arket access is a policy of market opportunity, not a guarantee of market success*."[276] Accordingly, "*economic liberties for entrepreneurs*"[277] have independent value.

[271] Discussed by J. Persky, "Consumer Sovereignty" (1993) 7 *Journal of Economic Perspectives* 183, 187.
[272] Schweitzer (2011), 51. See also Weatherill (2002), 45, and Schiek (2017), 621-22.
[273] S. Enchelmaier, "Always at your Service: the ECJ's case law on article 56 TFEU (2016-11)" (2011) 36 *E.L. Rev.* 615, 629.
[274] Davies (2012) thus draws close links between free movement and individual contractual autonomy.
[275] *Marc Michel Josemans v Burgemeester van Maastricht* (C-137/09) EU:C:2010:774.
[276] Davies (2012), 814.
[277] Schiek (2017), 621.

Few cases illustrate this with such potency as the much-criticised duo of *Viking* and *Laval*. Both concerned trade union strikes to enforce labour standards against service providers seeking to make use of cheaper workforce from other Member States. In each, the Court construed collective action as contrary to free movement, focusing squarely on the employer perspective. In *Viking*, this meant a concern that a ferry-operator would decline to re-flag its vessel, that is, exercise its freedom of establishment.[278] In *Laval*, the higher wages demanded rendered service provision "*less attractive*" for the employer, similarly an oblique obstacle to market participation.[279] The pivotal concern in each was the knock-on negative effects for traders, which the Court posited as contrary to the economic freedom protected within the internal market. Little attention was directed towards arguably more compelling collective action/social dumping concerns,[280] and in *Laval*, the Court even declared, precipitously, that strike action was unjustifiable.[281] Both cases therefore demonstrate the force, but also potential illogicality, of the participatory understanding of the internal market.

Implicit in *Viking* and *Laval*, but also cases as diverse as *Essent* and *Scotch Whisky*, is the fact that a focus on individual participation, even if couched in the most inclusive terms, conflicts with a more collective vision of integration. From the latter perspective, individual economic rights are inherently 'selfish,' and at odds with wider public interest.[282] Hints of such concerns arguably lie at the heart of *Keck*: a fear that individual traders were being empowered to ride roughshod over national rules, enacted to further public policy goals, to advance private self-interest. Indeed, private litigants are described as motors of the internal market,[283] exercising a strategic function which may partly explain the centrality of the role afforded to them. Within an ostensible social market economy, a disproportionate emphasis on private autonomy once again risks destabilising the notional balance between the individual and the collective.[284] Although the extent to which internal market law can be said *always* to prioritise individual participation is debatable,[285] its strong underlying protection

[278] *Viking* at [72]-[74].
[279] *Laval* at [99].
[280] Academic commentary on these judgments is predominantly critical; a sample includes C. Barnard, "*Viking* and *Laval*: An Introduction" (2007) 10 *Cambridge Yearbook of European Legal Studies* 463; A.C.L. Davies, "One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ" (2008) 37 *Industrial Law Journal* 126; and Ashiagbor (2013).
[281] *Laval* at [106]-[111].
[282] Schweitzer (2011), 50.
[283] Weatherill (2017), 134.
[284] Contrast the more optimistic approach of D. Leczykiewicz, "Conceptualising Conflict between the Economic and the Social in EU Law after Viking and Laval" in M. Freedland and J. Prassl (eds.), *EU Law in the Member States:* Viking, Laval *and Beyond* (Oxford: Hart Publishing, 2015).
[285] Contrast e.g. *Dirk Rüffert v Land Niedersachsen* (C-346/06) EU:C:2008:198, *Commission v Luxembourg* (C-319/06) EU:C:2008:350 and *AGET Iraklis*, very much in the vein of *Viking* and *Laval*, with more nuanced

for private economic freedom is consistent with a minimalist liberal vision, in which solidarity not-infrequently yields to individual self-determination.

(v) Consumer sovereignty

Our final perspective conceives of liberalisation as enhancing consumer choice, and thereby bolstering consumer sovereignty.[286] It is not merely economic actors meaning producers and suppliers which benefit from market participation; consumers, too, gain from engagement. Market-opening drives innovation and strengthens competitive dynamics, placing consumers in a stronger position to assert power over quality and price.[287] This perspective is thus premised upon some rebalancing of the benefits of the market process to advantage consumers at the expense of traditionally-dominant producers.[288] To secure this, greater levels of state involvement may be tolerated even within liberalised markets.[289]

The legal framework underpinning the internal market recognises a central role for consumers: *"[i]t is important that not only commerce as such but also private persons who happen to be conducting an economic transaction across national frontiers should be able to enjoy the benefits*".[290] The consumer is empowered and protected to participate,[291] on the basis that consumer welfare is better served by liberalisation and competition than by exclusionary local regulatory practices.[292] The flipside is that consumers take a non-negligible degree of personal responsibility. The average consumer is assumed to be "*reasonably well-informed and reasonably observant and circumspect*,"[293] an arguably unrealistic standard.[294] *Caixa-Bank* illustrates the trade-off: here, the Court rejected

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approaches in *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna* (C-396/13) EU:C:2015:86 and *RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz* (C-115/14) EU:C:2015:760. A notable recent decision is *Asociación Profesional Elite Taxi v Uber Systems Spain, SL* (C-434/15) EU:C:2017:981, in which the CJEU read the E-Commerce and Services Directives narrowly, to permit domestic regulation of ride-sharing activities as transport services.

[286] See, generally, Persky (1993).

[287] See, generally, McGowan (2000); and Davies & Szyszczak (2011), 160.

[288] McGowan (2000), 213.

[289] Persky (1993), 185.

[290] *Gaston Schul* at [33].

[291] See, generally, contributions in D. Leczykiewicz & S. Weatherill, *The Images of the Consumer in EU Law* (Oxford: Hart Publishing, 2016).

[292] Weatherill (2002), 48.

[293] *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung* (C-210/96) EU:C:1998:369 at [31]. Cf. V. Mak, "Standards of Protection: In Search of the 'Average Consumer of EU Law in the Proposal for a Consumer Rights Directive" (2011) 19 *European Review of Private Law* 25, arguing that characteristics of the perceived average consumer differ markedly across different areas of EU law.

[294] See, e.g., A. Sibony & G. Helleringer, "EU Consumer Protection and Behavioural Sciences: Revolution or Reform?" in A. Alemanno & A. Sibony (eds.) *Nudge and the Law: A European Perspective* (Oxford: Hart Publishing, 2015).

consumer protection justifications for the prohibition of remuneration of certain types of bank account, deemed necessary to maintain free banking services, on the basis that consumers would derive greater benefit from greater choice.[295] It is instructive to contrast *Watts*, in which Mrs Watts *qua* consumer prevailed against the NHS, with *FENIN*,[296] where claims by unpaid suppliers of the Spanish health service fell outside the protection of competition law. The Court in *FENIN* specifically rejected arguments that the obviously commercial nature of sales from the perspective of suppliers was relevant to the scope of art.102 TFEU;[297] yet when faced with conceptually-similar concerns in *Watts*, the Court had few qualms about prioritising Mrs Watts' consumerist preferences.[298]

Beyond the fundamental freedoms, much of the positive integration framework advancing consumer protection is concerned overtly with re-regulation of national markets,[299] although even here preserving "the competitiveness of enterprises" remains a central concern.[300] Improving outcomes from a consumer perspective is nonetheless a key theme of harmonised liberalisation legislation. The Services Directive, for instance, includes numerous clauses aimed at enhancing provision for recipients,[301] while the revised Energy Directives emphasise protection of vulnerable consumers.[302] A commitment to consumer sovereignty is also central to antitrust law: "*enforcing competition law ensures that there is a voice for the consumers*."[303] Consumer choice is thus expressly recognised as a pivotal benefit of open and competitive markets.[304] Where economic activity restricts competition to consumer disadvantage but enhances overall efficiency, moreover, the latter counterbalances the former only where consumers receive a fair share of resulting benefits.[305] Accordingly, the internal market is not merely concerned with maximising total wealth; at least outwardly, consumer surplus is relevant, meaning that it matters *how* advantages of liberalisation are

[295] *CaixaBank France v Ministère de l'Économie, des Finances et de l'Industrie* (C-442/02) EU:C:2004:586 at [20]-[22].
[296] *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission of the European Communities* (C-205/03) EU:C:2006:453.
[297] *FENIN* at [25]-[27].
[298] *Watts* at [86]-[92].
[299] See e.g. Directive 2011/83/EU on consumer rights [2011] OJ L304/64.
[300] *Ibid*, recital (4).
[301] See, particularly, arts.19-23, Directive 2006/123/EC.
[302] Haber (2017).
[303] Commission, *Report on Competition Policy 2016* COM(2017) 285, 2.
[304] See, e.g., *France Télécom SA v Commission of the European Communities* (C-202/07) EU:C:2009:214 at [112], and Commission, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C265/6 at [10].
[305] Art.101(3) TFEU. A similar approach is read into art.102 TFEU: *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* [2009] OJ C45/7 at [30].

distributed. Commentators query, however, whether liberalisation efforts succeed in delivering a 'consumer dividend'.[306]

Yet a consumer sovereignty perspective, as interpreted in the EU, again contrasts with redistributive or solidarity-based conceptions of markets as, principally, "*servants of the state's values*".[307] In *Scotch Whisky*, the peremptory dismissal of minimum pricing neglected the well-evidenced fact that, in alcohol markets, lower prices counterintuitively *diminish* welfare by generating greater levels of alcohol-related harms.[308] In *Deutsche Parkinson*, the Court invoked dubious and speculative reasoning regarding the capacity of online pharmacies to service vulnerable customers.[309] *Watts*, *Elchinov* and *Petru* pitted the preferences of individual patients against the collective organisation and resource limitations of their national health systems. There is little sense in these cases that individual consumers are members of a broader community, in which non-economic or collective concerns should sometimes take priority.[310] Even in antitrust, where the Commission has a renewed—and contentious[311]—commitment to 'fairness' as motivating value, this ultimately boils down to ensuring that "*markets stay competitive enough to give consumers the power to demand a fair deal*."[312]

Accordingly, such approaches are vulnerable to critiques of liberalisation as involving the imposition of a market society model upon public life, whereby citizenship is reduced to mere consumption of economic benefits and rights.[313] Such a perspective contrasts with one premised on social solidarity, whereby the state has inherent responsibility to ensure equal treatment regardless of resources.[314] Prosser thus argued against a consumerist vision of citizenship because "*we do not come to the market as equals*," meaning the theory is essentially non-egalitarian.[315] Greater emphasis on consumer sovereignty may enhance the absolute level of choice; but, absent some redistributive mechanism outside the purview of the market, it does little to attenuate existing inequality in the abilities of consumers to

[306] Florio (2013).
[307] Prosser (2005), p.37.
[308] Scottish Government, *Final Business and Regulatory Impact Assessment for Minimum Price Per Unit of Alcohol as Contained in Alcohol (Minimum Pricing) (Scotland) Bill (2012)*, p.6.
[309] *Deutsche Parkinson* at [37]-[43]; see also AG Szpunar's quite-extraordinary Opinion, EU:C:2016:394 at [52].
[310] Generally, Ashiagbor (2013).
[311] A. Lamadrid de Pablo, "Competition Law as Fairness," (2017) 8 *Journal of European Competition Law and Practice* 147.
[312] Speech of Commissioner Vestager, "Fairness and competition," GCLC Annual Conference, Brussels, 25 January 2018.
[313] McGowan (2000), p.210.
[314] Prosser (2005), p.35.
[315] Prosser (2005), p.29.

participate and gain advantages. Even what is perhaps the most inclusive normative conception of liberalisation therefore continues to tolerate existing inequality, while arguably reinforcing a markedly narrow, defiantly liberal understanding of the citizen's role within the internal market.

(vi) Positive implications of normative assessment

Accordingly, the liberalisation process and resulting market structures are largely an exercise in compromise: between the domestic and supranational in terms of regulatory governance; between the archetype of 'open and undistorted competition' and reality of market failures; and between those who stand to benefit from greater competition and those who lose out. Sauter posits a balance between preferences of 'liberal' Member States, reflected in the fundamental freedoms and competition rules, and 'statist' Member States, reflected in derogations from market rules and protections for SGEIs.[316] Yet the adequacy of this settlement remains contested. From an economic perspective, any space for national interests within the liberalisation agenda risks fragmenting the single market.[317] From socially-oriented perspectives, the decoupling of market reform from public policy concerns is inherently unrealistic.[318] It is unfair to suggest that the internal market is unequivocally or unavoidably a neoliberal construct. Yet by relying so heavily on liberalisation to clear the way, the integration process necessarily promotes and perhaps privileges free market-oriented perspectives. Whether such an outcome merits critique in substance is an inherently subjective question: to what extent are open and unencumbered markets 'good' for society, either themselves or compared with alternatives that might otherwise exist?

For reasons of legitimacy, however, there needs to be more direct and detailed engagement at EU-level with both the rationale for liberalisation as agent of integration and its consequences in practice, desirable or otherwise. Even if one accepts that the internal market does not mandate liberalisation *as such*—but rather, perhaps, merely presupposes its existence—the existing legal framework that underpins it leans strongly and unabashedly towards a default position of open and unencumbered competition. Yet, as others have observed, such an approach is compelled by neither the EU's constitutional structure nor the black-letter of its primary laws.[319] In reality, liberalisation is not the inexorable solution to market failure, nor does it reflect the only or indeed necessarily the optimal understanding of

[316] Sauter (2014), p.115.
[317] Glachant & Ruester (2014); see also Damjanovic (2013), 1714.
[318] Florio (2013), p.352.
[319] See, e.g., Kaupa (2016).

what is demanded by the legal framework that underpins the internal market. Adoption of the market access standard by the Court, for instance; of mandatory unbundling policies for public utilities by the Council and Parliament; or of the necessity of efficiency incentives to justify State aid to public service providers by the Commission: none of these interpretations of the internal market rules was inevitable, but instead each represents a deliberate policy decision to advance the competitive paradigm.

This reflects, unavoidably, distinct normative claims about optimal social and economic organisation within the internal market, over and above positive arguments regarding the need for intervention to correct market failure in discrete instances. The available empirical evidence is hugely mixed as to when and why liberalisation generates benefits: in short, 'it depends,' varying with market circumstances and means utilised.[320] Thus, the contention that EU-level liberalisation is aimed at poor quality national regulation enacted to further vested interests may well be true in certain instances.[321] To the extent that, within the internal market, "*[t]here is no alternative to the liberalisation process*,"[322] however, such a position is more ideological than technocratic. While it is not our intention to direct an indiscriminate attack at the liberalisation efforts that have helped to develop and shape the internal market as it exists today, this process cannot be legitimate—and thus arguably should not continue—unless and until these normative claims are at least acknowledged and defended.

VI. Conclusions

This article has surveyed the principal means by which liberalisation is effected in the EU, alongside the implications that arise for the evolving internal market. Liberalisation processes comprise both negative and positive integration, involving direct legislation and supplementary law enforcement, embedded and enriched by jurisprudential innovation. The resultant marketplace prioritises equality of access, open competition, efficiency-enhancing behaviour (mostly) and a reduced role for nation States. Yet the regulatory framework says little about the social dimension of integration, thus exposing the EU to forceful critiques as an essentially neoliberal project. Purely functional accounts of liberalisation—that it is

[320] Many reforms are pursued with laudable aims (Hodge (2000), p.230), and even critics acknowledge that liberalisation has delivered certain benefits (Prosser (2005), p.237; Bartl (2018), 10). Yet concerns persist that liberalisation facilitates cronyism; increases inequality; leads, primarily, to the advantaging of rent-seeking financial investors (Florio (2013)); or negatively impacts dynamic efficiency (Pollitt (2012), 128).
[321] See fn.193 above.
[322] See fn.1 above.

achieved because it *can* be achieved—are increasingly inadequate. On the one hand, EU-level efforts push ever-deeper into the realm of the domestic and the social. On the other, the EU finds itself at a political cross-road, where its superiority and relevance are no longer a given.[323] Liberalisation has proven a readily achievable means of integrating markets, yet this conclusion means little unless we understand its significance to the broader project of economic and even political integration.

Thus, returning to our alternative accounts of the relationship between liberalisation and integration, it seems undisputable that, generally speaking, liberalisation provides an effective technique for breaking down barriers between national markets, by neutralising and standardising domestic regulation. Yet its use generates a notably pared-back vision of what the internal markets entails and permits, making it a decidedly lopsided beast. The pragmatic reliance upon negative integration mechanisms has, moreover, arguably anointed liberalisation with an autonomous or self-perpetuating quality: the fact that this is what can be achieved somehow transformed into an imperative that it is what must be achieved. Whether the latter indicates an implicit ideological commitment to a fully-liberalised internal market—liberalisation as an end itself—remains open to dispute. The preponderance of evidence supports the contention that liberalisation has been the primary tool of internal market-building, and, certainly, aspects of its development would suggest a strong preference for contestable, competitive and indeed privatised markets as the archetype. Yet, ultimately, existing evidence is insufficient to substantiate the more definitive proposition that market liberalisation is an affirmative goal within the integration process, though its approach is largely consistent with such an objective.

Arguably, the absence of clarity on this issue reflects an absence of political ownership over the project of economic integration more broadly. Given our starting observation that liberalisation reflects a particular underlying conception of the good, the EU appears to still lack a political authority which can legitimately and effectively adopt it as a core policy. Yet there is a significant risk that, though its recurrent use, liberalisation may be perceived as a synonym for integration—with the attendant implication that, because integration is an on-going and iterative process, there is "*no alternative*" but to pursue liberalisation in furtherance. This is not so much neoliberalism by stealth, perhaps, as by misadventure; yet even if inadvertent, it reveals an ideological commitment to free markets. By nonetheless prioritising the economic without granting due weight to socially-valuable

[323] *White Paper on the Future of Europe*, fn.9 above, 6.

non-economic goals within the 'visible' corpus of liberalisation efforts, the EU legal framework might thus be accused of furthering a partisan and normatively-loaded vision of society, one which goes beyond the parameters of its legitimate mandate.[324] While economic integration is primarily about enlarging the economic space beyond national boundaries, this high-level goal cannot grant EU institutions *carte blanche* to dictate the qualitative nature of the ensuing marketplace and its wider social implications.

Absent clear political endorsement and defence of liberalisation, therefore, aspects of the current framework are vulnerable to critique. These include the implicit assumption that all human activity should be susceptible to the market; that within the marketplace the rights of traders are paramount; that domestic interventions are inherently suspect; and that there is little difference between public and private in the realm of economic activity. The fiction of neutrality is all the more disingenuous, and even destructive, because of structural asymmetries between advancement of economic and social interests that exist within the internal market structure. The weakness of the European Social Pillar, merely an aspirational 'compass' for renewed social protection that must face-off against the bulldozer of market access, places this concern in sharp focus.[325] The very concept of market failure, exposing the limits of the competitive paradigm, illustrates how liberalisation alone is an inadequate vehicle for integration. Yet social considerations remain largely outside the purview of the internal market: viewed with scepticism, they are treated as derogations which are the responsibility of Member States to defend and protect. Such an approach, both as a matter of principle and practice, distorts our understanding of what a social market economy entails, fuelling the more normatively-charged, problematical perspectives on liberalised markets discussed in the preceding section. Accordingly, 'neoliberalism by misadventure' may escape the most vitriolic critiques of neoliberalism as an ideological enterprise, yet it nonetheless supports a highly debatable and somewhat disturbing conception of the perceived aims and optimal outcomes of the economic integration process.

The resulting perception that the EU is irredeemably, unrepentantly focused on the pursuit of free markets has the unnecessary effect of alienating many constituencies that should celebrate its successes, a feature of popular critiques today. In considering alternatives to liberalisation as a motor of economic integration, it is necessary acknowledge what might be deemed its comparative advantages in this task. Yet such recognition is

[324] See, e.g., J. Snell, "Varieties of Capitalism and the Limits of European Economic Integration" (2011) 13 *Cambridge Yearbook of European Legal Studies* 415, arguing that EU integration should be "agnostic" between different models of domestic economic organisation. Also Hopner & Schafer (2010), 363.
[325] Commission, *Establishing a European Pillar of Social Rights* COM(2017) 250 final, p.2.

neither a steadfast policy prescription for liberalisation, nor should it legitimate an integration process that results, in effect, in surreptitious economic—or even social—ordering. As the EU embarks on an overdue period of soul-searching with respect to its future evolution, it is an opportune time to consider the implications of an integration process that has, to date, adhered closely to a neoliberal model—and to ask whether, going forward, this remains the optimal vision for an integrated, innovative and inclusive internal market.