University of Reading

Competence creep in EU free movement case law

Article

Accepted Version

Vėlyvytė, V. ORCID: https://orcid.org/0009-0008-8085-1695 (2023) Competence creep in EU free movement case law. European Law Review, 48 (6). pp. 363-661. ISSN 0307-5400 Available at https://centaur.reading.ac.uk/113835/

It is advisable to refer to the publisher's version if you intend to cite from the work. See Guidance on citing.

Publisher: Sweet & Maxwell

All outputs in CentAUR are protected by Intellectual Property Rights law, including copyright law. Copyright and IPR is retained by the creators or other copyright holders. Terms and conditions for use of this material are defined in the End User Agreement.

www.reading.ac.uk/centaur

CentAUR

Central Archive at the University of Reading

Reading's research outputs online

COMPETENCE CREEP IN EU FREE MOVEMENT CASE LAW

Vilija Vėlyvytė[**]

Abstract

This article advances the EU competence debate by demonstrating that the interpretation by the Court of Justice of the free movement rules enshrined in the Treaties is a major, and often dominant, cause of EU competence creep. To that end, the article examines the Court's free movement case law in four sensitive areas of national policy (healthcare, education, collective labour law and gambling) in light of the constitutional principles that govern the scope and exercise of EU competences—conferral, subsidiarity and proportionality. The comparative analysis of the case law allows to identify patterns of judicial reasoning that lead to competence creep in areas that are constitutionally and/or politically sensitive from an EU law point of view. The Court should avoid these patterns of reasoning in order to maintain its legitimacy as a guardian of the rule of law in the EU and, more broadly, preserve the integrity of the EU legal order.

Introduction

In a recent keynote address dedicated to the 30th jubilee of the Academy of European Law, Koen Lenaerts, the President of the Court of Justice of the European Union (CJEU, or the Court), sought to debunk what he referred to as the myth that the CJEU has enabled the EU to creep into the domain of national competence by failing to control the boundaries of EU legislative decision making.[1] After having discussed a number of CJEU judgments that show sensitivity to the issue of competence, Lenaerts concluded that the Court should not be portrayed as "a biased promoter of EU competences" or a "centralist vision of the EU". This article questions that position. It enters EU competence debate through an inquiry into a significant yet understudied aspect of the so-called EU's competence creep[2]: competence creep in the interpretation by the Court of EU primary law, specifically, the rules of the internal market enshrined in the Treaties. The article unveils patterns of judicial competence creep in important areas of free movement case law, namely healthcare, education and collective labour law. By doing so, it exposes the scale of the problem of the EU's

---

* Dr Vilija Vėlyvytė is Lecturer in Law at the University of Reading. She holds DPhil in Law, MPhil in Law and MJur degrees from the University of Oxford. I wish to thank Stephen Weatherill, Emily Hancox, Elena De Nictolis, Vicky Kosta, Claudia Cinnirella, Joyce De Coninck, Gráinne de Búrca, Petra Weingerl and Marija Jovanović for helpful comments on earlier versions of this article or parts of it. I am also grateful for feedback received at presentations delivered at: Jean Monnet Center, NYU School of Law; *Amicale des Référendaires*, Court of Justice of the European Union; and Society of Legal Scholars' Annual Conference 2023. Thanks to British Academy for funding this research. All errors remain my own.

* This is a pre-copyedited, author-produced version of the article accepted for publication following peer review, which will appear in the December 2023 issue of *European Law Review*. The definitive published version will be available online on Westlaw UK or from Thomson Reuters DocDel service.

[1] K. Lenaerts, "The broadening of EU competences through the case-law of the Court of Justice: myth or reality?" (13 October 2022) ERA Jubillee Conference – 30 Years of the Academy of European Law, "European Sovereignty: The Legal Dimension – A Union in Control of its Own Destiny".

[2] The term 'competence creep' was coined by M. Pollack in "Creeping Competence: The Expanding Agenda of the European Community" (1994) 14 Journal of Public Policy 95, and popularised by S. Weatherill in "Competence Creep and Competence Control" (2004) 23 Yearbook of European Law 1. See also S. Prechal, "Competence Creep and General Principles of Law" (2010) 3 Review of European Administrative Law 5; S. Garben, "Competence Creep Revisited" (2019) 57 Journal of Common Market Studies 205.

competence creep and demonstrates that the exercise by the Court of its interpretative authority is its major, and often dominant, cause.

Much has been written about the EU's competence creep, describing the extension of the EU's competence to regulate the internal market into the areas which predominantly lie within the realm of national competence, such as public health, social security, tax policy, and others. That discussion criticises the EU legislative institutions for failure to respect the limits of EU competence and the Court for failure to police those limits. Specifically, it has been argued that the Court's interpretation of art.114 TFEU—the legal basis for the adoption of internal market measures—has endowed the EU with something close to a general mandate to regulate the internal market.[3]

The EU's competence creep is not only a concern for the Member States. It is also a concern for the EU as a whole. It threatens to compromise the integrity of the EU's legal order by encouraging challenges to the authority of EU law and the CJEU, as the EU's supreme judicial body. Recent years have witnessed a growing tendency among national constitutional courts to refuse to follow the rules of EU law and the judgments of the CJEU which deliver an authoritative interpretation of those rules.[4] On the political level, there has been a rise in Eurosceptic, populist movements which exploit the narrative of the EU's competence creep to justify defiance of the EU and its core values, such as democracy and the rule of law.[5] These developments divide and weaken the EU. Moreover, they suggest that the question of EU competence and its limits remains ever so urgent.

The article investigates whether, and if so to what extent, the Court respects the limits of EU competence in the interpretation of the rules of the internal market enshrined in the Treaties (as opposed to the judicial review of EU internal market legislation in light of those Treaties). The interpretation by the Court of internal market rules has significant implications for the scope of the regulatory autonomy that Member States are entitled to under the Treaties. An expansive interpretation of those rules, one that overstretches the limits of EU competence, undermines that autonomy, thereby putting into question the very nature of the EU as a polity of limited and conferred powers. This practice impairs not only the legitimacy of the Court, as a guardian of the rule of law in the EU, but also of the whole of the EU. It also highlights the importance that the Court respects—and is perceived as respecting and enforcing—the limits of EU competence in all of the EU's activities, including the judicial interpretation of internal market law.

The argument of this paper builds on the analysis of EU free movement case law in four sensitive areas of national policy—healthcare, education, collective labour law and gambling. All four areas are highly regulated at the Member State level and have been for a long time in order to ensure adequate access to public services (in the healthcare and education sectors) and/or protect vulnerable societal groups (consumers and employees in the case of gambling and collective labour law, respectively). This makes it almost inevitable that subjecting these areas to the application of EU internal market rules will create tensions between national governments and the EU. Due to the

[3] See, eg, D. Wyatt, "Community Competence to Regulate the Internal Market" in *Fifty Years of the European Treaties: Looking Back and Thinking Forward* (Oxford: Hart Publishing, 2009), pp.93–136; S. Weatherill, "The Limits of Legislative Harmonisation Ten Years after *Tobacco Advertising*: How the Court's Case Law Has Become a "Drafting Guide"" (2011) 12 German Law Journal 827.

[4] See, e.g. Danish Supreme Court, Case no 15/2014 *Dansk Industri (DI) acting for Ajos A/S v The estate of A*, Judgment of 6 December 2016; Corte Costituzionale, Order 24/2017, 26 January 2017 (*Taricco*); BVerfG, Judgment of 5 May 2020, 2 BvR 859/15 (*Weiss*).

[5] See, e.g. Gabriela Baczynska, "EU top court paves the way to cut billions to Poland and Hungary" (*Reuters*, 16 February 2022) https://www.reuters.com/world/europe/eu-top-court-dismisses-polish-hungarian-rule-law-challenge-2022-02-16/.

sensitivity of the issues involved and, in some cases, a lack of an explicit legislative competence,[6] none of these areas has been harmonised at the EU level, save for the legislation essentially codifying the Court's case law.[7]

In the absence of a meaningful legislative action, the four areas come within the purview of EU law mainly through the Court, which then becomes the key driver of legal integration in these areas. Whilst the case law involving these various areas has been analysed before and criticised for being activist, it is hardly ever discussed in light of concrete constitutional principles that govern the scope and exercise of EU competences.[8] This article does exactly that. It takes a comparative view of the case law and examines it in light of the principles of conferral, subsidiarity and proportionality.[9] The analysis uncovers patterns of judicial reasoning that have led to competence creep in the areas of healthcare, education and collective labour law. It suggests that the Court should avoid those patterns of reasoning whenever it deals with policy areas that are constitutionally sensitive from the point of view of EU law, such as tax, social security, acquisition and loss of national citizenship, and others.

The article is structured as follows. It begins with a discussion of the EU's competence creep and shows how the Court is implicated in it. The remainder of the article examines competence creep in the judicial interpretation of free movement law. To that end, the article analyses the Court's free movement case law in the areas under study in light of the principles of conferral, subsidiarity and proportionality. It starts from the principle of conferral. It demonstrates that the principle of conferral is triggered when the Court decides whether the situation at hand falls within the scope of EU law. Then, the article turns to the principles of subsidiarity and proportionality, which, it shows, come into play at the stage of the judicial inquiry into the justification of national derogations from free movement. The article argues that the three constitutional principles require a competence-sensitive interpretation of free movement law. Specifically, the Court is expected to take into account concerns relating to the protection of national competence and regulatory autonomy in areas that are constitutionally or, in the case of subsidiarity and proportionality, politically sensitive from an EU law point of view. Drawing on examples from case law involving the areas of healthcare, education, collective labour law and gambling, the article demonstrates that the Court has not been consistent in respecting the limits of EU internal market competence in the interpretation of free movement law. It ends with a conclusion.

---

[6] See arts 153(1), 165(1) and 168 TFEU, respectively.

[7] The dynamic between case law and EU legislative outcomes is discussed further in this paper.

[8] There are rare exceptions. See D. Wyatt, "If the Court of Justice Ignores the Principle of Conferral Simply Because It Can, How Do We Fix the Problem?" (14th Jean Monnet Seminar on EU Law, Dubrovnik, 17–23 April 2016) https://www.biicl.org/event/1124. For accounts not involving these areas but discussing, generally, aspects of competence creep in the judicial interpretation of EU law, see: Prechal, "Competence Creep and General Principles", analysing competence creep through interpretation of general principles of EU law; G. de Búrca, "The Principle of Subsidiarity and the Court of Justice as an Institutional Actor" (1998) 36 Journal of Common Market Studies 214 and T. Horsley, "Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?" (2012) 50 Journal of Common Market Studies 267, conceptualising the CJEU as an institutional actor for the purposes of subsidiarity.

[9] Notably, the argument draws on a comprehensive study of free movement case law conducted in V. Vėlyvytė, *Judicial Authority in EU Internal Market Law: Implications for the Balance of Competences and Powers* (Oxford: Hart Publishing, 2022). For a thoughtful and thematically close inquiry, see T. Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and its Limits* (Cambridge: CUP, 2018), examining, broadly, the "internal constitutionality" of EU judicial lawmaking in light of the framework of the Treaties.

The EU's competence creep

The concept of the EU's competence creep is generally used to criticise the extension of EU competences, most notably EU internal market competence, into the areas in which the EU has not been granted explicit competence to act.[10] This problem is associated with an expansive use by the EU legislature of art.114 TFEU—the functionally broad legal basis allowing the adoption of harmonising legislation aimed at the regulation of the internal market.[11] The Court has on many occasions reviewed the validity of EU action taken on the basis of art.114 in light of the principles governing the division of competences between the EU and Member States. These are the principle of conferral, which defines the scope of EU competences, and the principles of subsidiarity and proportionality, which limit the exercise of those competences. It is, however, almost universally agreed that the Court has been far from rigorous in enforcing these principles in the EU's legislative and executive practices.

The principle of conferral

The Court has interpreted the principle of conferral in a way that allows the EU to regulate areas that fall (in whole or in part) outside the scope of its legislative competences. Such regulation is permitted if it is required to achieve an EU objective.

Spelled out in art.5(2) TEU, the principle of conferral requires that the EU act only within the limits of the competences conferred upon it by the Member States and competences not conferred upon the EU remain with the Member States. Articles 2–6 TFEU list the areas of competence conferred upon the EU, dividing them into exclusive, shared and supplementary competences. Whilst in relation to the EU's exclusive competences and those shared between the EU and Member States the EU has the power to adopt measures that pre-empt and supersede Member State legislation, it has no such power in relation to policy areas that fall within the category of the EU's supplementary competences. Examples of such areas include healthcare, education and collective labour law, to be looked at later in this article. The EU's powers in these areas exclude any harmonisation of national laws. They are limited to carrying out actions to "support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas".[12] This suggests that the prohibition embodied in the principle of conferral precluding interference by the EU with the competences reserved to the Member States effectively extends to the areas falling within the category of the EU's supplementary competences.

The sector-specific legal bases governing the areas that fall within the EU's supplementary competences reiterate and make more concrete the limitations expressed in the principle of conferral. For example, art.168 TFEU, which provides the EU with a supplementary competence in the area of public health, excludes EU-level harmonisation of national laws and obliges the EU to "respect the responsibilities of the Member States for the definition of their health policy and the organisation and delivery of health services and medical care".[13] Article 165(1) TFEU charges the EU with a duty to "contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action". It also stipulates that EU action must be taken while fully respecting the responsibilities of the Member

---

[10] See literature referred to in n 2.

[11] art.114 TFEU.

[12] art.6 TFEU.

[13] art.168(7) TFEU.

States and, just like art.168, excludes any harmonisation of national laws or regulations.[14] Similarly, art.153(1) TFEU states that the EU shall support and complement the activities of the Member States in, inter alia, the representation and collective defence of the interests of workers and employers. This provision is subject to para.(5) of the same article, which expressly excludes the right to strike and the right of association from EU-level harmonisation.

The phrasing of the principle of conferral in art.5(2) TEU and its detailing in arts 2–6 TFEU and the sector-specific legal bases suggest that there is a clear line between what the EU can and cannot do. In reality, however, this is far from true. The principle of conferral is much more elastic than its phrasing in the Treaties might suggest.

This is illustrated by the Court's case law on art.114 TFEU, the so-called internal market legal basis, which authorises the EU to adopt "harmonising measures that have the objective of improving the conditions for the establishment and functioning of the internal market". This means that the measure in question must contribute to the elimination of existing or likely obstacles to the exercise of fundamental freedoms or to the removal of appreciable distortions of competition likely to arise from the diverse national rules.[15] Where this threshold is met (and, in practice, it is met quite easily),[16] the Commission can rely on art.114 even if the decisive factor for the legislative intervention is a policy concern not related to the functioning of the internal market per se.[17] Moreover, the latter rule applies to situations where the EU has not been accorded competence to regulate the matter in question in a binding way.[18] For example, in the landmark *Tobacco Advertising* cases, Germany challenged the EU's power to adopt harmonising legislation in the area of public health. The Court ruled in favour of the EU. As pointed out above, art.168 TFEU precludes the possibility of EU-level harmonisation of national laws in the area of public health. But art.114, the chosen legal base, did not preclude this outcome.[19]

The judicial interpretation of the scope of art.114 suggests that the principle of conferral, as construed by the Court, is rather permissive in practice, allowing the EU to regulate, or creep into, the areas that are predominantly reserved by the Treaties to the domain of national competence.

The principles of subsidiarity and proportionality

Once it is established that the EU has competence to act, that competence has to be exercised in line with the principles of subsidiarity and proportionality. However, the Court's interpretation of these principles in the context of art.114 makes them ineffective in controlling the exercise of EU internal market competence. This exacerbates the problem of the EU's competence creep.

---

[14] art.165(4) TFEU.

[15] See, e.g. *Germany v Parliament* (C-376/98) EU:C:2000:544, paras 83–84, 95, 106 (*Tobacco Advertising*); *British American Tobacco and Imperial Tobacco* (C-491/01) EU:C:2002:741, paras 60–61; *Germany v Parliament* (C-380/03) EU:C:2006:772, paras 37–38, 41 (*Tobacco Advertising II*). For a comprehensive discussion, see Wyatt, "Community Competence to Regulate the Internal Market"; Weatherill, "The Limits of Legislative Harmonisation".

[16] See, e.g. Weatherill, "The Limits of Legislative Harmonisation".

[17] See, e.g. *Tobacco Advertising*, paras 83–84. For academic commentary, see B. De Witte, "A Competence to Protect: The Pursuit of Non-Market Aims through Internal Market Legislation" in *The Judiciary, the Legislature and the EU Internal Market* (Cambridge: CUP, 2011), pp.25–46.

[18] See, e.g. *Swedish Match* (C-210/03) EU:C:2004:802, para 31; *Czech Republic v Parliament and Council* (C-482/17) EU:C:2019:1035, para 37.

[19] *Tobacco Advertising*, para 88. For a comprehensive analysis, see Weatherill, "The Limits of Legislative Harmonisation".

The principle of subsidiarity, enshrined in art.5(3) TEU, structures the exercise of competences that are shared between the EU and Member States. The internal market is a prominent example of such a shared competence. Subsidiarity determines under what conditions and to what extent the competence concerned should be exercised by the EU rather than the Member States. It authorises intervention by the EU "only if and insofar as" the objectives of an action cannot be sufficiently achieved by the Member States but can be better achieved at Union level, "by reason of the scale and effects of the proposed action".[20] So subsidiarity favours decision making at the level of the Member States unless efficiency considerations suggest otherwise. It is thus designed to protect national regulatory autonomy.

The problem with subsidiarity, as a constraint on the exercise of the EU's internal market competence, is that in the Court's interpretation it means nothing more than a competence review, that is, a review aimed at compliance with the principle of conferral. Case law on art.114 suggests that as long as harmonisation of a specific sector is justified by reference to the objectives of the internal market, subsidiarity is complied with.[21] The logic follows that Member States cannot adopt common rules needed for the governance of the internal market by acting alone and, inevitably, the EU is better placed than them to do so. This is circular logic, making subsidiarity virtually impossible to breach once the competence to set common rules is shown to exist. As Wyatt rightly observes, the objectives, scale and effects of harmonisation as a legislative technique will always be transnational and thus intrinsically pan-European, thereby making it worthwhile to act at the EU level.[22] Accordingly, the existence of a conferred competence for the adoption of a harmonising measure will also determine compliance with subsidiarity.[23] As a consequence, subsidiarity review cannot provide an effective safeguard against the EU's legislative competence creep. If anything, it seems to contribute to it.

Unlike subsidiarity, the principle of proportionality governs the exercise of all of the EU's competences, including the exclusive ones. Proportionality controls the intensity of EU action. Laid down in art.5(4) TEU, it stipulates that the content and form of Union action must not go beyond what is necessary to achieve the objectives of the Treaty. Proportionality is inextricably linked to subsidiarity: while subsidiarity generally concerns the propriety of EU-level action (the EU shall act "only if"), proportionality defines the degree and scope of that action.[24] The two principles also seem to overlap because the subsidiarity review comprises the elements of degree and scope of EU action (the EU shall act "insofar as"). In essence, both principles are designed to protect national regulatory autonomy but in slightly different ways. If subsidiarity is primarily concerned with the protection of the *scope* of national regulatory autonomy, proportionality ensures that EU regulatory intervention does not intrude excessively into the various *values and interests* protected through the exercise of national regulatory autonomy. Consequently, an inquiry into a measure's proportionality should examine whether the regulatory means employed to pursue a particular

[20] art.5(3) TEU.

[21] See, e.g. *British American Tobacco*, paras 180–83. For academic commentary, see D. Wyatt, "Subsidiarity: Is It Too Vague to Be Effective as a Legal Principle?" in *European Studies at Oxford: Whose Europe? National Models and the Constitution of the European Union* (Oxford: OUP, 2003), p.86, p.92; Weatherill, "The Limits of Legislative Harmonisation".

[22] Wyatt, "Subsidiarity" 88.

[23] S. Weatherill, "The Function and Limits of Legislative Harmonization in Making the Internal Market" in *Oxford Principles of European Law: Volume II* (forthcoming, OUP).

[24] E. Swaine, "Subsidiarity and Self-Interest: Federalism at the European Court of Justice" (2000) 41 Harvard International Law Journal 1.

policy objective at the EU level infringe excessively on the interests protected at the national level.[25]

In practice, however, the value of proportionality as a check on the exercise of EU competences is minimal because of the substantial degree of deference that the Court is prepared to give to EU institutions, particularly the legislature, in political decision-making. Judicial review is premised on the recognition that the "legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations".[26] As a result, the standard of judicial review is low. The Court will not invalidate a measure unless it considers it to be "manifestly inappropriate" in light of the objective pursued.[27] The low standard of review seems to be justified in light of the principle of separation of powers and concerns relating to the institutional competence of the judiciary: the Court is not willing to substitute its judgment for that of the legislature, and rightly so.[28] That said, the Court's approach has been subject to active criticism—including, most recently, from national constitutional courts—for depriving the principle of proportionality of a meaningful normative function.[29]

Overall, the way in which the Court interprets the principles of conferral, subsidiarity and proportionality in the context of the legislative exercise of the EU's internal market competence seems to display a bias in favour of a centralised, EU-wide regulation. The centralist bias in judicial review is what enables the EU's legislative competence creep.

The constitutional implications of EU competence creep

Competence creep has significant constitutional implications. It puts into question the nature of the EU as a polity of limited powers. The EU's legal order rests on a specific power-sharing arrangement between the EU and Member States. The principles of conferral, subsidiarity and proportionality represent the criteria on whose basis that power is shared.[30] These principles maintain the balance between what the EU can do and what is reserved to Member States, or, put differently, balance between EU supranationalism, necessary for the achievement of common goals at the EU level, and respect for the regulatory autonomy of the Member States.[31]

As the EU's supreme judiciary, the Court has a duty to preserve the balance of powers in the EU. It performs this duty when it exercises the judicial review of EU legislative decision making but *equally so* when it interprets directly judicially enforceable provisions of the internal market. Every time the Court adopts an interpretation of the EU's fundamental freedoms, it makes a

[25] For a taxonomy of protected interests, see V. Kosta, "The Principle of Proportionality in EU Law: An Interest-Based Taxonomy" in *EU Executive Discretion and the Limits of Law* (Oxford: OUP, 2019), p.198.

[26] See, e.g. *British American Tobacco*, para.123; *Tobacco Advertising II*, para.145.

[27] See, e.g. *British American Tobacco*, para.123; *Vodafone, O2 et al v Secretary of State* (C-58/08) EU:C:2010:321, para.69. For academic commentary, see, e.g. W. Sauter, "Proportionality in EU Law: A Balancing Act?" (2013) 15 Cambridge Yearbook of European Legal Studies 439.

[28] See also K. Lenaerts, "The European Court of Justice and Process-Oriented Review" (2012) 31 Yearbook of European Law 3.

[29] See 2 BvR 859/15, *Weiss*, analysed in M. Höpner, "Proportionality and Karlsruhe's Ultra Vires Verdict: Ways out of Constitutional Pluralism?" (2021) MPIfG Discussion Paper 21/1 hdl.handle.net/21.11116/0000-0007-EACA-E.

[30] On this point, see D. Elazar, *Exploring Federalism* (Tuscaloosa, AL: University of Alabama Press, 1987), p.12, discussing balance between self-rule and shared rule in the context of federalism.

[31] P. Pescatore, "Foreword" in *Courts and Free Markets: Perspectives from the United States and Europe* (Oxford: Clarendon Press, 1982), Vol.1, pp. ix–x, discussing the search for unity and respect for the autonomy of the participating entities in the context of the EU.

decision about the balance between EU supranationalism and national autonomy in a concrete case. Therefore, when the judicial interpretation of those freedoms overstretches the principles of conferral, subsidiarity and proportionality, it does not simply compromise the credibility of the Court as the guardian of the rule of law in the EU. It implicates the EU's constitutional nature as an entity of conferred and limited powers.

An imbalance in the division of powers between the EU and Member States—or even a perception of imbalance—has consequences for the integrity of the EU's legal order. It fuels Euro-sceptic, often populist political movements that exploit the narrative of the EU's competence creep to justify defiance of the EU and its core values, such as democracy and the rule of law.[32] At the judicial level, it exacerbates tensions in the relationship between the CJEU and the constitutional courts of the Member States. Concerns over the CJEU expanding EU competences reinforces the commitment of national constitutional courts to defending the primacy of national constitutional orders over the EU's legal order, at times through explicit departure from EU law and its interpretation by the CJEU.[33] It is, therefore, crucial that the CJEU, as the guardian of the rule of law in the EU, respects—and is perceived as respecting and enforcing—the limits of EU competence in all of the EU's activities, including the judicial interpretation of internal market law.

The principle of conferral in free movement case law

This article argues that the EU's competence creep can be found in—and often originates from—the interpretation by the Court of the fundamental freedoms of the internal market, or EU free movement rules. It shows that the judicial interpretation of these rules sits in tension with the requirements of the principles of conferral, subsidiarity and proportionality. This section focuses on the principle of conferral. It explains how conferral should be understood when applied to the Court's interpretative practice and the extent to which it is observed in the free movement case law.

Conferral as a guiding principle of interpretation

As discussed earlier, the Court interprets the principle of conferral extremely generously when reviewing the validity of EU legislative action. Essentially, it holds that the EU can regulate any area, including the areas that are predominantly reserved to Member State competence, as long as such regulation is justified by the goals of the internal market.

The Court applies the same logic to the judicial interpretation of the Treaties. Member States must comply with the Treaties, including the directly judicially enforceable provisions of the internal market, even in the areas that in principle fall outside the scope of the EU's regulatory competence. In that respect, the Court holds a position whereby the lack of competence on behalf of the EU to regulate the matter in question does not remove it from the scope of EU law—a legal category that is broader than legislative competence and encompasses the substantive rules of EU primary law. This line of reasoning has by now become the standard opening line in judgments that concern constitutionally sensitive areas of EU law and policy. Labelled as the "retained powers formula" by Azoulai, it reiterates that in the absence of EU-level harmonisation, Member States retain the competence to regulate the area concerned, but when exercising that competence, they nevertheless need to comply with the rules laid down in the Treaties.[34] This means that national

[32] See *Reuters* article in n 5.

[33] See judgments mentioned in n 4 above.

[34] L. Azoulai, ""Retained Powers" Formula in the Case Law of the European Court of Justice: EU Law as Total Law?" (2011) 4 European Journal of Legal Studies 192.

laws and practices, regardless of whether they concern matters that fall within the scope of the legislative competence of the EU or Member States, must comply with EU internal market law, which includes the free movement rules laid down in the Treaties and interpreted by the Court.

For example, in the context of the provision of healthcare, the Court recognises that EU law "does not detract from the power of the Member States to organise their social security systems" and "decide the level of resources to be allocated to their operation"[35]; yet this does not exclude the possibility that Member States may be required under the free movement rules to make adjustments to their social security systems.[36] Similarly, the Court holds that while Member States retain the power to organise and manage their education systems, when exercising that power they must comply with the rules regarding EU citizens' freedom to move and reside within the territory of the EU.[37] In the same vein, the Court recognises that EU law does not preclude the territorial application of national employment laws and collective agreements,[38] but those nevertheless must comply with EU free movement rules.[39]

The main justification behind the Court's approach to the principle of conferral, as expressed through the relationship between the categories of EU competence and scope of EU law, comes from the well familiar doctrine of *effet utile*, or effectiveness, of EU law. In this context, the doctrine of effectiveness requires that no measure or policy area be a priori excluded from the reach of the Treaties—most notably, the rules of the internal market— because doing so would risk compromising the objectives of the internal market and the EU's integration process more generally. In other words, if the principle of conferral were to be construed too rigidly, the EU's capacity to achieve the goals it was created for would be significantly diminished.[40] This applies equally in relation to both the legislative and judicial regulation of the internal market. The doctrine of effectiveness thus mandates an interpretation of the principle of conferral as an elastic principle, allowing an overlap between competences conferred upon the EU and those predominantly reserved to the Member States.

The elasticity inherent in the principle of conferral is indeed desirable from the perspective of an effective resolution of common problems at the EU level. However, the same elasticity may have serious consequences for the scope of the regulatory autonomy of the Member States as it extends the EU's regulatory mandate into the areas that should in principle be exempted from interference by the EU. This challenges the nature of the EU as a polity of limited powers. It also puts into question the raison d'être of the principle of conferral as a constitutional constraint on EU competence.

If the principle of conferral is to have a meaningful normative function, there needs to be a limit to how far EU internal market law can legitimately encroach into the areas of national competence that would otherwise be exempted from any binding interference on behalf of the EU. This article discusses that limit in the context of the judicial interpretation of free movement rules laid down in the Treaties. What requirements does the Court need to satisfy in the interpretation of free movement rules in order for that interpretation to be consistent with the principle of conferral?

---

[35] See, e.g. *Raymond Kohll* (C-158/96) EU:C:1998:171, para.17; *Watts* (C-372/04) EU:C:2006:325, para.121.

[36] See, e.g. *Watts*, para.121.

[37] See, e.g. *Bressol* (C-73/08) EU:C:2010:181, para.38; *Morgan and Bucher* (C-11/06 and C-12/06) EU:C:2007:231, para.24.

[38] *Laval* (C-341/05) EU:C:2007:809, para.57.

[39] *Viking Line* (C-438/05) EU:C:2007:772, paras 87–89; *Laval* (C-341/05) EU:C:2007:809, para.40. See also *Schumacker* (C-279/93) EU:C:1995:31, para.21, employing the same reasoning in relation to direct taxation.

[40] See also S. Weatherill, *Law and Values in the European Union* (Oxford: OUP, 2016), p.21.

The answer is more straightforward than might appear at the outset. It lies in the conditions that trigger the application of free movement law. Free movement law does not have general application—it is triggered when certain conditions are met. For instance, there are two such main conditions, as recognised by the Court, in the context of the freedom of establishment and freedom to provide services.[41] First, the cross-border activities governed by these freedoms must be of an economic, as opposed to social, character. Second, the national measure or practice that is challenged must constitute a "restriction" on those activities. So, there must be a market involved and there must be an effect on the *internal* market.

By nature, these conditions are, and should be viewed as, particular manifestations of the principle of conferral in the judicial interpretation of the Treaties. The principle of conferral does not authorise judicial interference in the name of the internal market with constitutionally sensitive areas *unless* the aforementioned conditions—the economic nature of the activity and the presence of a restriction—are met. If they are, the matter then falls within the scope of free movement.

Therefore, when interpreting the meaning of those conditions in a given case, the Court ought to adopt a systemic approach, contextualising them in the constitutional requirements of the principle of conferral. In other words, the concepts of an economic activity and restriction of free movement should be interpreted and applied in a way that is cognisant of the fact that both concepts have a constitutional basis in the principle of conferral. This presupposes a judicial interpretation of the two concepts that weighs the objectives of the internal market inherent in them against the concerns about the protection of national competence and regulatory autonomy in the area concerned. Those concerns need to be taken into account whenever free movement law collides with policy areas that are constitutionally sensitive from an EU law point of view. Examples of such areas include, amongst others, healthcare, education, collective labour law, tax, acquisition and loss of national citizenship, administration of justice, culture, and sport.

Observance of conferral in the case caw

Drawing on examples from free movement case law involving healthcare and education, this section assesses the compatibility of the Court's interpretation of free movement rules with the principle of conferral. The next section, which examines the case law in light of the principles of subsidiarity and proportionality, also covers the areas of collective labour law and gambling.

It was suggested above that conferral requires that the Court weigh the objectives of the internal market against competence concerns when deciding whether a matter falls within the scope of free movement law. This could suggest, for example, that activities which take place in constitutionally sensitive areas and have some economic features but are otherwise heavily regulated at the national level in the interests of social policy and solidarity would fall outside the scope of free movement. A prominent example of such activities is the provision of public healthcare and education services. Curiously, the Court considers the former to be an economic activity and the latter social. The discussion below explores the reasons why and argues that the interpretative approach employed by the Court sits in tension with the principle of conferral.

Healthcare as an economic activity

As discussed earlier, the Treaties make clear that the regulation of healthcare is the prerogative of the Member States and that the EU is obliged to respect that prerogative. However, this does not mean that the healthcare sector has not been touched by EU law. Access to healthcare across borders has long been regulated in the case law. According to this case law, EU nationals have the

[41] arts 49 and 56 TFEU, respectively.

right to go to another Member State to get the medical treatment that they need if it cannot be obtained in time in their home Member State.[42] The costs of such treatment, whether outpatient or inpatient, must be reimbursed by the patient's home Member State.

To illustrate, the Court held in *Petru* that Romanian authorities had to pay for an open-heart surgery performed on a Romanian citizen in Germany because the treatment available for her in Romania could not have been considered as sufficiently effective, owing to the lack of basic medical supplies and healthcare infrastructure in the country.[43] The hospital expenses incurred by Ms Petru amounted to over 17,000 euros.

This ruling has systemic implications for Romania and any other less economically developed Member State. It obliges the Romanian government to pay for the treatment, which may involve complex and expensive procedures, provided abroad, typically at the rates charged by a more developed Member State.[44] At the same time, the government needs to continue to cover the infrastructural costs of maintaining domestic hospitals. This impedes the government's capacity to control healthcare expenditure and, in the long run, may threaten the financial sustainability of national healthcare system—a problem that has been exacerbated by the Covid-19 pandemic.[45]

The *Petru* judgment also demonstrates why the Court's case law on cross-border access to healthcare is problematic from a competence point of view. The case law cuts to the heart of the prerogative of the Member States to manage national healthcare systems independently. This, then, begs the question: is this line of case law an incidence of judicial competence creep or does it follow from the provisions of the Treaties? Let us investigate.

The Treaty basis for this case law is art.56 TFEU—the freedom to provide (and receive) services. The main criterion that defines a service, pursuant to art.57 TFEU, is remuneration. This brings private provision of healthcare under art.56. But what about public healthcare? Governments have on numerous occasions argued before the Court that healthcare should not be considered a service where it is provided within the framework of social security, that is, free of charge and funded through general taxation or social insurance contributions.[46] This line of argument never convinced the Court, which has taken the view that the provision of healthcare is an economic activity, hence a service, regardless of the way it is organised in the patient's home Member State.[47]

The decisive factor behind the Court's approach is the pecuniary nature of the transaction between the patient and foreign healthcare provider. Healthcare is a service because the patient

---

[42] *Watts*, paras 62, 68, 119.

[43] *Elena Petru* (C-268/13) EU:C:2014:2271, paras 33–36. See also *Ivanov Elchinov* (C-173/09) EU:C:2010:581.

[44] Patients are reimbursed at the rates applicable at their home Member States if they have not filed for authorisation under Council Regulation (EC) 883/2004 on the coordination of social security systems [2004] OJ L166/1.

[45] See, e.g. K. Gillet, "Romania's Underfunded Health System Creaks under the Pressure of the Pandemic" *The New York Times* (New York, 3 March 2021), *https://www.nytimes.com/2021/10/01/world/romanias-underfunded-health-system-creaks-under-the-pressure-of-the-pandemic.html*. For accounts examining financial impacts of cross-border healthcare, see, e.g. G. Davies, "The Process and Side-Effects of Harmonisation of European Welfare States", NYU Jean Monnet Program Working Paper 2/2006, p.125; D. Schiek, "The EU Constitution of Social Governance in an Economic Crisis: in Defence of a Transnational Dimension to Social Europe" (2013) 20 Maastricht Journal of European and Comparative Law 185, 195.

[46] See, e.g. *Smits and Peerbooms* (C-157/99) EU:C:2001:404.

[47] By contrast, see *Casa Regina* (T-223/18) EU:T:2021:315 and *Casa Regina* (C-492/21) EU:C:2023:354, suggesting that the provision of public healthcare is *not* an economic activity for the purposes of EU competition law, even where private and public providers compete for government funds. In the author's view, this is a problematic position given the specific context of competition law.

pays directly for the treatment obtained in another Member State.[48] The fact that the costs of such treatment are subsequently reimbursed by the social security system of the patient's home Member State is immaterial to the judicial assessment of the situation.[49] In the Court's view, it is sufficient that hospitals which function within national social security systems ultimately receive consideration for the treatment they provide from sickness insurance funds or other managing bodies.[50] This money represents remuneration and indicates that hospitals are engaged in an activity of an economic character.

The Court seems to be unduly selective in its reasoning. It focuses exclusively on the circumstances that justify bringing public healthcare within the scope of free movement and dismisses considerations that would suggest otherwise. In particular, it emphasises the economic relationship between the service provider and the recipient within the state which provides treatment yet completely disregards the social policy relationship between the citizen and national social security system in the patient's home Member State.[51] Furthermore, it highlights that hospitals at home are ultimately remunerated for the services they provide but ignores the fact that that remuneration comes predominantly from public funds.

The Court's dismissal of relevant circumstances sits uncomfortably with the principle of conferral. Conferral would require that when assessing whether the provision of public healthcare constitutes an economic activity for the purposes of free movement of services, the Court take into consideration competence sensitivities surrounding the regulation of healthcare through EU law. It is virtually impossible to envision how this requirement could be met without assessing the nature of the relationship between the patient and their home healthcare system, especially given that this relationship underpins patients' access to treatment abroad. Yet what the Court does is trivialise that relationship by placing a nearly exclusive emphasis on the economic nature of the transaction between the patient and foreign healthcare provider. The Court's reasoning is unbalanced and unpersuasive, and it strains the principle of conferral.

The prohibition of discrimination in access to education

Curiously, the Court has never considered public education a service within the meaning of art.57 TFEU. The Court has taken the view that when establishing and maintaining its education system, the state is performing a social function rather than engaging in a gainful activity. This is reflected in the fact that education is predominantly financed from the public purse. The fact that students contribute to the operating expenses of the system in the form of tuition fees could not alter this conclusion.[52] Notably, the explanation offered by the Court for why education is not an economic activity applies equally to the healthcare sector, for reasons discussed above. It therefore seems incoherent that services provided in the framework of public education systems, on the one hand, and public healthcare systems, on the other, do not bear the same characterisation for the purposes of free movement law.

Despite escaping the characterisation by the Court as economic, the education sector has not been insulated from free movement law. Students residing in the EU have been granted a right

[48] Notably, this is not the case where the patient has obtained prior-authorisation under Council Regulation 883/2004.

[49] *Smits and Peerbooms*, paras 55–57.

[50] *Smits and Peerbooms*, para.58.

[51] See, e.g. *Smits and Peerbooms*, paras 53–58; *Watts*, para.90. For academic commentary, see E. Spaventa, "Public Services and European Law: Looking for Boundaries" (2003) 5 Cambridge Yearbook of European Legal Studies 271.

[52] *Humbel* (C-263/86) EU:C:1988:451, paras 17–19; *Wirth* (C-109/92) EU:C:1993:916, para.15.

to study in other Member States on the same conditions of access and tuition fees as nationals of those states. Equal treatment for the most part extends to application for maintenance grants and loans.[53] The rights associated with student mobility have been developed by the Court drawing on the principle prohibiting discrimination on grounds of nationality. The prohibition of discrimination underpins the free movement of persons within the EU, which includes the free movement of students.

However, just like the economic freedoms, the principle of non-discrimination does not have general application. It applies to situations which fall within the scope of the Treaties. In the interpretation of the Court, this means that the situation concerned must be governed by a substantive rule of EU law, primary or secondary, or otherwise connected with such a rule.[54] The latter condition is, and should be seen as, an expression of the principle of conferral in the application of the prohibition of discrimination to concrete situations. Accordingly, when assessing a situation's connection with EU law, the Court should take into account potential competence concerns that might arise in the circumstances of the case at hand. What exactly does this mean in practice, and has the Court observed this requirement in the case law involving cross-border access to education?

The Court was first asked whether access to education fell within the scope of the Treaties in the *Gravier* case, concerning Belgian rules that required foreign students to pay an additional enrolment fee as a condition of access to university. The Court answered in the affirmative and held that the Belgian rules discriminated against foreign students. This ruling set the foundations for the Court's entire case law on cross-border access to education. It is argued below that it also disregarded the requirements of the principle of conferral.

The EEC Treaty, in force at the time when *Gravier* was delivered, did not foresee any powers for the Community in the field of education, with the exception of vocational training. Article 128 EEC contained a vague stipulation that the Council would lay down general principles for implementing a common vocational training policy that would contribute to the economic objectives of the Community. The primary economic objective referred to in art.128 concerned the advancement of the European labour market. A common vocational training policy was meant to contribute to the advancement of the European labour market by addressing questions of worker mobility, such as the transnational transfer of vocational qualifications. On that basis, the Court ruled that vocational training fell within the scope of Community law.

Moreover, the Court took a view that the concept of vocational training encompassed any form of education which prepared for a qualification for a particular profession, trade or employment, even if the training programme included an element of general education.[55] Essentially, this meant that access to education fell within the scope of Community law by virtue of its indirect link to the European labour market. According to the Court, cross-border access to education was likely to promote the free movement of workers by enabling them to obtain the necessary qualifications in the Member States whose education programmes included their desired subjects.[56]

---

[53] *Dany Bidar* (C-209/03) EU:C:2005:169, paras 56–57, recognising the right of Member States to limit access to financial assistance to students who had demonstrated "a certain degree of integration into the society of that State" in order to avoid an "unreasonable burden" on public finances.

[54] See *Brown* (C-197/86) EU:C:1988:323, para.18; *Cowan* (C-186/87) EU:C:1989:47, paras 14–20; *Collins* (C-92/92 and C-326/92) EU:C:1993:847, paras 17–28; *Bidar*, paras 28–48. For academic commentary, see Prechal, "Competence Creep and General Principles" 8–11.

[55] *Gravier* (C-293/83) EU:C:1985:69, paras 30–31.

[56] *Gravier*, paras 23–24.

The Court's reasoning appears strained and unconvincing. It relies on an indirect link between higher education, vocational training and the European labour market. Essentially, what the Court is saying is that since access to higher education, in principle, falls within the scope of vocational training, and the latter contributes to the free movement of workers, higher education also contributes to the free movement of workers and thus falls within the scope of Community law.

The link between access to higher education and the free movement of workers provided by the Court is tenuous. The Court finds the existence of such link whilst offering no consideration or at least recognition of competence concerns pertaining to the application of free movement law to the education sector. In other words, the Court gives no reflection to the requirements of the principle of conferral. Having adopted a rather one-dimensional interpretation of the role and character of higher education in the EU, the Court effectively moves it from the domain of social and public policy, protected by national regulatory autonomy, into the domain of activities that are instrumental to enabling the free movement of workers.[57]

There are clear similarities between the Court's approaches to healthcare and education. In both contexts, the Court places a nearly exclusive emphasis on the economic aspects of the activity concerned. In the patient mobility case law, it accentuates the economic nature of the transaction between the patient and the healthcare provider in another Member State. In relation to student mobility, it focuses on the link between access to education and the European labour market. These interpretative choices are hard to defend in light of the principle of conferral, which, as argued earlier, would require weighing the economic objectives of free movement law against competence concerns relating to the application of that law to constitutionally sensitive areas.

The Court's responsiveness to Treaty reforms

Since *Gravier*, the Treaties have undergone substantial reforms, strengthening the EU's commitment to respecting the limits of its competence. The way in which the Court has incorporated those reforms into subsequent case law reveals a persistent marginalisation of the principle of conferral in the judicial interpretation of the scope of free movement.

The entry into force of the Maastricht Treaty provided the Court with an explicit basis for its case law on cross-border access to education. It did so by introducing the concept of EU citizenship and a legal basis for Community action in education.[58] The Court thus no longer needed to distinguish between general education and one that prepared for a profession or employment, although in practice this distinction never mattered. More importantly, the Court used the concept of EU citizenship to expand further the EU's interference into national education systems. Pursuant to art.8(a)(1) EC, EU citizenship granted nationals of EU Member States the right to move and reside freely within the territory of the Union. The Court read this provision as embedding a "fundamental status of EU citizens", which, interpreted along with the principle of non-discrimination, guaranteed EU citizens equal treatment irrespective of their nationality when they found themselves in the same circumstances as the nationals of the Member State concerned.[59] Such equal treatment extended to situations where students were applying for financial support for

[57] By contrast, see *Brown*, para.18, stipulating that student maintenance grants fell outside the scope of the principle of non-discrimination because they were a matter of educational policy and social policy, both of which fell predominantly within national competence.

[58] arts 8(a)(1) and 126 EC (Maastricht consolidated version), respectively.

[59] See landmark judgment in *Rudy Grzelczyk* (C-184/99) EU:C:2001:458, para.31.

education in another Member State.[60] As a result, educational maintenance grants and loans, previously having been outside the scope of the Treaty, were brought within its scope.[61]

The interpretative choices taken by the Court seem to sit uncomfortably within the wider framework of the Treaties, specifically key amendments introduced in 1992. It is highly significant that the new legal basis for education (art.126 EC) highlighted the complementary nature of the Community's role in education. This role was limited to encouraging cooperation between Member States. An almost identical stipulation was added to art.127 EC in relation to vocational training. Moreover, the Treaties made explicit the principles of conferral and subsidiarity, which were supposed to clarify the division of competences between the EU and Member States. The Maastricht reforms were widely interpreted as signifying an attempt by the Member States to curtail the Community's ambitions in the area of education, as well as in other politically sensitive areas.[62] However, the Court ignored the wider context and focused exclusively on those Treaty amendments, such as the introduction of EU citizenship, which justified broadening the scope of freedom of movement rather than limiting it.

Ultimately, the fact that education, unlike healthcare, was never considered by the Court an economic activity did not have much effect on the development of the case law. Mobile patients and mobile students have been granted comparable amplitude of rights to access foreign healthcare and education systems, respectively.[63] This may be an indication that the Court interprets the Treaties in a result-driven way: where bringing a measure directly within the scope of the economic freedoms seems too far-fetched, the Court will arrive at virtually the same conclusion through the principle of non-discrimination and the concept of EU citizenship, formulated broadly enough in the Treaties to be susceptible to a generous judicial interpretation.

Implications for legislative conferral

An expansive interpretation by the Court of the scope of free movement also impairs the effectiveness of the legislative dimension of the principle of conferral.

As pointed out earlier, the EU's regulatory competences in relation to both healthcare and education have always been minimal, confined to the authority to adopt measures of a non-binding, recommendatory character. Yet these limitations become irrelevant when a matter is considered to fall within the scope of free movement. That matter can then be regulated at the EU's legislative level using the functionally broad legal basis dedicated to the regulation of the internal market. For example, the provision of healthcare, as a service, can be harmonised under art.114, the internal market legal basis, or art.59, legal basis for the liberalisation of a specific service across the EU.

A prominent example is EU Directive on Patients' Rights, which harmonises national rules on patients' access to cross-border healthcare.[64] Notably, as its first attempt to regulate healthcare, the Commission had proposed to include healthcare services in the Services Directive.[65] This attempt was unsuccessful because the health policy stakeholders objected to the largely economic logic embedded in that directive. Yet access to cross-border healthcare was at that time already *de*

---

[60] *Bidar*, para.42.

[61] For the Court's previous stance, see *Lair* (C-39/86) EU:C:1988:322, para.15; *Brown*, para.25.

[62] M. Dougan, "Fees, Grants, Loans and Dole Cheques: Who Covers the Costs of Migrant Education Within the EU?" (2007) 1 Journal of Contemporary European Research 4, 6.

[63] For a comprehensive analysis, see Vėlyvytė, *Judicial Authority in EU Internal Market Law*, Chs 2 & 3.

[64] Council Directive 2011/24/EU on the Application of Patients' Rights in Cross-Border Healthcare [2011] OJ L88/45.

[65] Council Directive 2006/123/EC on services in the internal market [2006] OJ L376/36, Preamble, Recital 23, art.2(2)(f).

facto regulated through the case law. The case law guaranteed patients treatment abroad effectively free of charge if such treatment was medically necessary.[66] So, the rules governing cross-border healthcare had been laid down, if via the judicial route, and thus had to be applied. Transposing those rules into EU-wide legislation would have added to the legal certainty and transparency of the regulatory framework established through case law. This is how the Directive on Patients' Rights came into being. Adopted jointly under arts 114 and 168 TFEU, this directive harmonises national rules on reimbursement of costs of cross-border healthcare and for the most part codifies the rules laid down by the Court.[67]

The example of the adoption of the Directive on Patients' Rights showcases how judicial competence creep leads to legislative competence creep. An expansive interpretation by the Court of the scope of free movement rules in the context of public healthcare effectively authorised the EU legislature to disregard the safeguards of non-interference contained in the principle of conferral and made more specific in arts 6 and 168 TFEU, which explicitly preclude binding legislation in the healthcare sector. As a result, the EU could now legitimately regulate cross-border access to healthcare via both the judicial and legislative routes.[68] This outcome is hard to justify from a conferral point of view, given that the Court has never provided a convincing explanation why public healthcare should be considered a service in the first place.

Case law on student mobility has had similar implications. The Court's interpretation of EU citizenship rights in the context of access to education has created tensions with the principle of conferral on multiple levels. First, it brought within the scope of the Treaties a question which at the time fell squarely within national regulatory autonomy—that of cross-border access of economically inactive individuals to national social security systems. Such access had been until then reserved to mobile workers. Second, in doing so, the case law went against an explicit EU-wide legislative consensus on the matter. Community directives on residence that were in force at the time precluded economically inactive individuals residing in other Member States from accessing welfare benefits in those states. In fact, they conditioned the right of residence itself on the possession of sufficient financial resources.[69] This was reversed by the case law. Third, the Court's case law became one of the main drivers behind the adoption of the Citizens' Rights Directive of 2004, which by and large transposed the rules laid down by the Court into EU legislation.[70] Thus, the judicial interpretation of the scope of free movement in relation to cross-border access to education has effectively neutralised the principle of conferral as a safeguard against legislative encroachment by the EU into several policy areas, such as social security, that lay in part or in whole outside the scope of EU competence.

---

[66] The meaning of this condition is discussed in further in this paper.

[67] See Directive 2011/24, Preamble, Recitals 8, 10, 12, 27, 38, 40, 42, 44, 46 and art.1(1). For a comprehensive analysis of the adoption of this directive from the point of view of the institutional balance of powers between the CJEU and EU legislature, see Vėlyvytė, *Judicial Authority in EU Internal Market Law*, Ch.4.

[68] See also Wyatt, "Principle of Conferral", discussing this issue in relation to the regulation of the right to strike.

[69] See Council Directive 90/364/EEC on the right of residence [1990] OJ L180/26, Preamble, Recital 4, art.3; Council Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L180/28, Preamble, Recital 4, art.3; Council Directive 93/96/EEC on the right of residence for students [1993] OJ L317/59, Preamble, Recitals 10 and 11, art.4.

[70] Council 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 L158/79. For a thorough analysis of the drafting process, see F. Wasserfallen, "The Judiciary as Legislator? How the European Court of Justice Shapes Policy-Making in the European Union" (2010) 17 Journal of European Law and Policy 1128, 1139–43.

Subsidiarity and proportionality in free movement case law

It was argued above that the Court has failed to take due account of the requirements of conferral in the interpretation of the scope of free movement in the constitutionally sensitive areas of healthcare and education. The analysis below demonstrates similar trends in relation to the principles of subsidiarity and proportionality, whose observance by the Court has been inconsistent across different areas of free movement case law.

Subsidiarity as a guiding principle of interpretation

As discussed earlier, the principle of subsidiarity has been ineffective in controlling the legislative exercise of the EU's internal market competence. This is so because the Court's interpretation of subsidiarity is focused on the capacity unique to the EU to adopt harmonising measures for the regulation of the internal market.

The construction of the principle of subsidiarity adopted by the Court is unduly narrow and seems unsuited to achieve the objectives underlying the principle of subsidiarity. At its core, subsidiarity is designed to preserve the distinctive national identities of the Member States—political, social and cultural—insofar as this is compatible with effective problem solving.[71] One of the main ways in which national identities manifest themselves in real life is through the regulatory policies pursued by the Member States. The impact of EU action on such policies is disregarded when the assessment of a measure's compliance with subsidiarity focuses exclusively on its capacity to attain EU-wide advantages. This is ever more true given that EU measures adopted on the basis of art.114 are typically aimed at finding solutions to problems that lie at the heart of national regulatory prerogatives, such as public health protection,[72] consumer protection,[73] the maintenance of public security,[74] and others.[75] Assessing the impact of EU action on those prerogatives should be part of the inquiry into a measure's subsidiarity.

In light of the inadequacies of the judicial construction of subsidiarity, legal scholars have long argued for a conception of subsidiarity that is more suited to protect national regulatory prerogatives. For example, Bermann highlights the need to weigh the gains of economic integration against the Member State's "loss of freedom to govern subjects that lie squarely within its sphere of competence".[76] In the same vein but in more detail, Weatherill suggests that subsidiarity at its core requires an inquiry into "whether even if the EU's objectives are advanced by and best achieved by the proposed measure, it is nevertheless important enough to override objections rooted in the worth of national diversity and autonomy".[77] Similarly, Schütze, who conceptualises subsidiarity as federal proportionality, argues that subsidiarity review should be aimed at assessing whether "European law disproportionately restricts national autonomy".[78]

---

[71] European Council in Edinburgh, "Overall Approach to the Application by the Council of the Subsidiarity Principle and Article 3b of the Treaty on European Union" (1992) Conclusions of the Presidency SN 456/92, Annex 1 to Pt A. See also *Germany v Parliament and Council* (C-233/94) EU:C:1997:231, Opinion of AG Léger, paras 88, 150, 152–53.

[72] See, e.g. *British American Tobacco* (C-491/01), para.62; *Swedish Match* (Case C-210/03), para.31.

[73] See, e.g. *Vodafone*, para.32.

[74] See, e.g. *Czech Republic v Parliament*, para.37.

[75] See also De Witte, "A Competence to Protect".

[76] G. Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States" (1994) 94 Columbia Law Review 331, 400–02.

[77] Weatherill, "The Limits of Legislative Harmonisation" 846.

[78] R. Schütze, "Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?" (2009) 68 Cambridge Law

So, there seems to be an agreement in the academic literature that the principle of subsidiarity should protect national regulatory autonomy in the exercise of EU internal market competences. But what does this mean in the context of the judicial exercise of those competences? In other words, how do the requirements of subsidiarity manifest themselves in the interpretation of free movement law?

It was discussed in the previous section that the principle of conferral gets triggered when the Court considers whether the matter falls within the scope of free movement. If it does, the question of the existence of competence is decided: EU internal market law will apply. The question remains to what extent. To what extent should the Court *exercise* the EU's internal market competence through the interpretation of free movement rules in the situation concerned? The question concerning the extent to which a conferred competence should be exercised is the domain of the principles of subsidiarity and proportionality. In the context of judicial interpretation, this question arises at the stage of the inquiry into the justification of national measures restrictive of free movement. National regulatory measures may be struck down, completely or partially, as unlawful restrictions of free movement or be justified in light of the legitimate regulatory objectives behind them. The degree to which those measures will be justified depends on the standard of judicial review employed by the Court. Accordingly, the standard of judicial review has a direct bearing on the observance by the Court of the principles of subsidiarity and proportionality.

When the Court employs a high standard of review of national restrictions of free movement, the degree to which Member States are allowed to pursue their chosen regulatory policies in the internal market is significantly reduced. If it opts for a deferential review, the space for autonomous decision making at the national level is preserved. The principle of subsidiarity would require that the Court tailor the standard of review to accommodate Member State concerns about the protection of national regulatory autonomy in the circumstances of the case at hand. Put differently, when deciding on the intensity of review, the Court would be expected to consider the impact of unrestricted free movement on the scope of national regulatory autonomy in the area concerned, be it healthcare, education, collective labour law or any other politically, if not also constitutionally, sensitive area.[79] This requirement acquires paramount importance in cases where the Court's interpretation of the scope of free movement appears to overstretch the principle of conferral.

Proportionality as a guiding principle of interpretation

Questions of proportionality are closely related to those concerning subsidiarity. As discussed earlier, both principles protect national regulatory autonomy by ensuring that EU action does not intrude disproportionately into that autonomy (subsidiarity) and the interests protected within its exercise (proportionality).

Unlike subsidiarity, the principle of proportionality has long been employed by the Court in the interpretation of internal market law. The Court uses proportionality to assess the lawfulness of national regulatory measures in light of their effect on the internal market: the restriction of free movement has to be proportionate to the public interest objectives pursued by national authorities.

Journal 525, 533.

[79] For early accounts exploring subsidiarity in judicial interpretation, see T. Schilling, "A New Dimension of Subsidiarity: Subsidiarity as a Rule and a Principle" (1994) 14 Yearbook of European Law 203, 247–55, and Bermann, "Taking Subsidiarity Seriously" 400–03, both arguing that subsidiarity requires to limit the reach of internal market rules to what is necessary. See generally De Búrca, "The Principle of Subsidiarity" and Horsley, "Subsidiarity and the European Court of Justice", conceptualising the Court as an institutional actor for the purposes of subsidiarity.

This entails a two-fold inquiry: first, whether the measure in question is appropriate, or suitable, for achieving the given objective; and second, whether there exist alternative measures that would be equally effective in achieving the given objective but less restrictive of free movement.[80] As will be demonstrated in the case law analysis below, in some cases the Court might choose to focus only on one part of the inquiry, either appropriateness or necessity.

Notably, the Court does not normally assess the proportionality of its particular interpretation of free movement rules in light of the legal interests protected at the national level. One might argue that this sort of application of proportionality has no place in the Court's reasoning, given that the dispute itself arises from a challenge to national laws and practices as alleged restrictions of free movement, and not vice versa. Yet, the answer will be different if we take a view that the judicial interpretation of free movement rules should be guided by the principle of proportionality *as a constitutional constraint* on the exercise of EU internal market competence. Thus applied, the principle of proportionality would require that free movement law not cause excessive interference with the values and interests protected through national regulatory policies. On way in which this could be achieved is through a symmetrical, or double, application of proportionality review.

The Court has in the past used a double proportionality review in cases involving conflicts between the exercise of fundamental rights and fundamental freedoms. The landmark *Schmidberger* judgment concerned a permission granted by the Austrian government to close a national motorway in order to allow a demonstration against the levels of pollution caused by heavy traffic. In that case, the exercise of freedom of expression and freedom of assembly interfered with the free movement of goods in the EU. The Court ruled that economic freedoms and fundamental rights were values of equal importance in EU law and could both be subject to restrictions, and that the task for the national authorities was therefore to strike a fair balance between the two values.[81] The balancing exercise required that in addition to assessing the lawfulness of national measures in light of the free movement of goods, the Court assess the effect of the free movement on the exercise of the fundamental rights in question, noting that interference with fundamental rights could not go as far as to impair their very substance.[82] In light of that analysis, the Court decided that restrictions of free movement arising from the exercise of the freedom of expression and of assembly were justified.

The balancing approach employed in *Schmidberger* illustrates how the requirements of proportionality, as a constitutional principle limiting the exercise of EU competences, can be applied in the judicial interpretation of free movement law. Notably, this approach was also proposed by AG Trstenjak in *Commission v Germany* as a tool for resolving conflicts between the exercise of the fundamental freedoms and collective labour rights.[83]

---

[80] The necessity review is sometimes accompanied by proportionality *sensu strictu*, which involves weighing the restrictive effect of the measure in question against the importance of the public objective pursued by that measure. For academic commentary, see G. de Búrca, "The Principle of Proportionality and its Application in EC Law" (1993) 13 *Yearbook of European Law* 105, 117; T-I Harbo, "The Function of the Proportionality Principle in EU Law" (2010) 16 European Law Journal 158, 165.

[81] *Schmidberger* (C-112/00) EU:C:2003:333, paras 77–81.

[82] *Schmidberger*, paras 80, 89–90.

[83] See also *Commission v Germany* (C-271/08) EU:C:2010:426, Opinion of AG Trstenjak, paras 81, 188, 192–95, critically examined in C. Barnard, "A Proportionate Response to Proportionality in the Field of Collective Action" (2012) 37 E.L. Rev. 117, 124. See also, V. Vėlyvytė, "The Right to Strike in the European Union after Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence" (2015) 15 Human Rights Law Review 73.

It should, however, be pointed out that the balancing approach is not the only technique of interpretation that ensures judicial compliance with the principle of proportionality. At its core, proportionality requires that the Court take into consideration the impact of EU free movement law—or the judicial interpretation thereof—on the various non-market interests protected by national regulatory policies. This can certainly be achieved through an equitable balancing of competing interests. Equally, it can be achieved by giving national authorities space to pursue regulatory policies that are designed to protect these various non-market interests, such as the exercise of fundamental rights, described above. In fact, the Court emphasised in *Schmidberger* that national authorities were to enjoy a "wide margin of discretion" in performing the balancing exercise. This suggests that the principle of proportionality, just like its corollary principle of subsidiarity, mandates, and requires, the use of judicial deference.

Observance of subsidiarity and proportionality in the case law

The Court is not consistent in its observance of the principles of subsidiarity and proportionality in the interpretation of free movement law. This is evident from a comparative analysis of free movement case law involving areas that are politically sensitive. The areas studied in this article are healthcare, education (both discussed earlier from a conferral point of view), collective labour law and gambling. The arguments that governments put forward to justify regulatory action in all of these areas have a common thread: they stem from considerations of social protection and solidarity; tend to emphasise the sensitivity of the sector concerned; and highlight the need to protect vulnerable groups.

While in the areas of healthcare, education and collective labour law the Court employs a high standard of review, aimed at assessing the necessity of national regulatory measures; in the gambling case law it opts for a low standard of review, focused on the suitability of such measures. As there seems to be no compelling basis for these distinctions, they suggest that the Court is unduly selective in enforcing the requirements of subsidiarity and proportionality in the interpretation of free movement law.

High standard of review: healthcare and education

The *Bressol* judgment concerned Belgian measures restricting foreign students' access to some of the oversubscribed medical programmes in the French Community of Belgium. For context, in some of those programmes foreign students (mainly French) would make up more than 80% of the class. Notably, similar issues were and still are experienced by Austria, whose universities have been particularly popular with German students who have failed to meet the entry requirements to study at German universities.[84] In *Bressol*, the Belgian government argued that uncontrolled numbers of foreign students in Belgian universities could in the long term lead to a potential shortage of health specialists in the country. More broadly, this situation raised concerns about the financial sustainability of the Belgian higher education system, which was funded through general taxation and offered essentially free and open access to university studies.

The Court held that in order to be justified, the measures adopted by Belgium had to be appropriate and proportionate. This meant, first of all, that the government had to provide "an objective, detailed analysis, supported by figures, … capable of demonstrating, with solid and consistent data, that there [were] genuine risks to public health".[85] Second, the assessment of the proportionality of the measures employed had to take into account the possibility that the

[84] For figures, see C. Rieder, "Case C-147/03, *Commission of the European Communities v. Republic of Austria*, Judgment of the Court (Second Chamber) 7 July 2005" (2006) 43 C.M.L. Rev. 1711, 1715–19.

[85] *Bressol,* para.71.

government might have been able to achieve its regulatory goals with less restrictive means, such as measures aimed at encouraging foreign students to establish in the French Community of Belgium or attracting medical professionals educated abroad.[86] This set an impossibly high threshold for the government to meet in order to be able to maintain measures restricting foreign students' access to medical education. Effectively, the Court's reasoning suggested that the Belgian higher education policy could only be pursued by employing measures that did not restrict the free movement of students in the EU.

A similar, high-scrutiny approach has been employed in cases concerning cross-border access to healthcare. The landmark *Watts* case concerned a refusal by the UK health authorities to authorise a hip replacement surgery in France (to be paid for by the UK) on the ground that the patient was already on the waiting list for that surgery to be performed within the framework of the NHS. The Court ruled that the use of waiting lists as a ground for refusing treatment abroad was incompatible with the freedom to provide (and receive) services. Authorisation could be refused only if the government could show that the treatment in question was not medically necessary. Moreover, the assessment of a medical necessity had to take into account all the circumstances of each specific case, including the history and probable course of the patient's illness, the degree of pain they were in and the nature of their disability.[87] Where medical necessity was shown to exist, virtually no other, systemic or budgetary considerations could justify the refusal to grant authorisation for treatment abroad.[88]

The interpretative approach employed by the Court in *Watts* resembles that employed in *Bressol*. It favours individual interests, specifically individual free movement, over the systemic objectives underlying a particular regulatory policy. In *Bressol*, the interests of mobile students are prioritised over the objectives of an education system which offers free and open access to education for all citizens. To maintain such access in light of the case law, the government needs to either increase the financing of higher education or accept that its quality will inevitably go down.[89] Similarly, in *Watts*, the needs of mobile patients are given precedence over general clinical priorities reflected in the waiting lists, which are accordingly drawn up to take into account the needs of all domestic patients. By dispensing with the waiting lists, the test of 'medical necessity' diverts resources from other domestic patients, potentially with more urgent medical needs, making their waiting time for treatment longer as a result of mobile patients skipping the queue.[90]

Whilst preference for individual interests over systemic ones might be consistent with the logic of liberalisation in the internal market, it sits uncomfortably with the principles of subsidiarity and proportionality. The broader, systemic objectives underlying the adoption of Member State measures restrictive of free movement typically reflect national public policy preferences in the area concerned. For instance, the waiting lists used in the provision of healthcare are intended to maintain fairness and equality between patients who require medical treatment.[91] Quotas on the

---

[86] *Bressol*, paras 77–78. See also *Commission v Austria* (C-147/03) EU:C:2005:427, para.61, proposing an entry exam or the requirement of a minimum grade as possible alternatives to national measures that discriminate foreign students.

[87] See, e.g. *Smits and Peerbooms*, para.53; *Watts*, paras 59–61.

[88] To that effect, see *Watts*, paras 59–63, 120.

[89] For a comprehensive discussion, see AP van der Mei, 'Free Movement of Students and the Protection of National Educational Interests: Reflections on *Bressol and Chaverot*' (2011) 13 European Journal of Migration and Law 123.

[90] C. Newdick, "Citizenship, Free Movement, and Healthcare: Cementing Individual Rights by Corroding Social Solidarity" (2006) 43 C.M.L. Rev. 1645, 1646.

[91] *Watts*, para.14. For academic discussion, see Newdick, "Citizenship, Free Movement, and Healthcare" 1646.

number of foreign students are employed in order to preserve free and open access to education for all citizens. The described policy choices fall within national regulatory prerogatives in the areas of healthcare and education, respectively. These prerogatives are exactly what the principles of subsidiarity and proportionality are meant to protect through requiring, as argued earlier, that the standard of judicial review be tailored to accommodate Member State concerns about the protection of national regulatory autonomy. Consequently, when the standard of review neglects those concerns by placing the individual free movement above other, systemic policy considerations, it also neglects the requirements embodied in the principles of subsidiarity and proportionality.

Low standard of review: gambling

Now, contrast the Court's approach in *Bressol* and *Watts* with that employed in the gambling case law. Gambling, as a commercial activity and an internal market service, falls within the category of competences that the EU shares with the Member States. This means that the EU can regulate gambling unreservedly and that any action at the EU level pre-empts corresponding action at the level of the Member States. The Treaties contain no other provision that would limit the EU's competence in the gambling sector. So, unlike healthcare and education, gambling is not a constitutionally sensitive area from the EU law point of view. Nevertheless, it is a politically sensitive one[92] and for that reason remains largely untouched by EU legislation.[93]

In the absence of EU-level harmonisation, national gambling regulations come within the purview of EU law mainly through the case law of the CJEU. Judicial challenges in the gambling sector typically arise from situations where governments impose restrictions on foreign gambling operators to enter their markets, often by monopolising the operation of gambling, and/or impose penalties for unauthorised gambling activities. Such restrictions are usually backed by various moral and religious considerations as well as concerns about the social costs of gambling, namely addiction to gambling and money laundering associated with the operation of gambling.[94] However, one also needs to bear in mind that gambling generates major revenues for the public purse, derived from tax and State operation of games of chance.[95] To illustrate, in 2022 the revenues of Europe's gambling market reached €108,5 billion.[96] Therefore, from a purely economic point of view, governments have a significant financial interest in the profitability of the gambling sector. Also, they have a strong incentive to limit foreign operators' access to national gambling markets because doing so keeps the revenues derived from gambling within national borders.

The Court's review of national measures that regulate gambling is highly deferential. It is grounded in respect for national regulatory autonomy in the gambling sector. In that connection, the Court holds that each Member State is entitled to a margin of discretion to determine, in accordance with its own scale of values as well as social and cultural features, what is required in order to protect the players and maintain order in society.[97] Accordingly, "it is for those authorities

[92] See, e.g. European Parliament, "Resolution on online gambling in the internal market" 2012/2322(INI), preamble. See also Philippa Runner, "EU Parliament Opposes Creation of Online Gambling Market" (*EUobserver*, 10 March 2009) https://www.euobserver.com/?aid=27752.

[93] For examples of EU-level initiatives concerning the regulation of gambling, see Commission, "Towards a comprehensive European framework on online gambling" (Communication) COM (2012) 596 final; Commission Recommendation 2014/478/EU on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online [2014] OJ L214/38.

[94] See, e.g. *Schindler* (C-275/92) EU:C:1994:119, para.60; *Diego Zenatti* (C-67/98) EU:C:1999:514, para.35.

[95] Discussed in P. Collins, *Gambling and the Public Interest* (Westport, CT: Praeger Publishers, 2003), p.66.

[96] https://www.egba.eu/uploads/2023/02/230203-European-Online-Gambling-Key-Figures-2022.pdf

[97] *Schindler*, paras 59–61.

to consider whether, in the context of the aim pursued, it is necessary to prohibit activities of [gambling], totally or partially, or only to restrict them and to lay down more or less rigorous procedures for controlling them".[98]

Due to the margin of appreciation accorded to national authorities, the Court's review focuses on checking national rules for suitability, or consistency, rather than necessity. This test requires that national systems which regulate gambling reflect a genuine concern on behalf of public authorities to protect consumers from gambling addiction and fraud.[99] Accordingly, if the authorities decide to monopolise the gambling sector, they must exercise effective control over the monopoly and ensure that the expansion of the gambling sector is commensurate to the scale of unauthorised gambling in the country. If, on the other hand, the authorities opt for a more liberal model, such as a licensing scheme, they must ensure the transparent and non-discriminatory character of the scheme.

Most importantly, national authorities are not required to justify why they have chosen one regulatory model over another, perhaps less restrictive, model because such choice falls within national margin of discretion. The fact that one system of protection differs from a system adopted by other Member States has no bearing on the assessment of the need for, or proportionality of, the more restrictive system.[100] The discussion of less restrictive options does not appear in the Court's reasoning.

The Court's approach to the gambling sector suggests two things: first, that the Court considers the systemic objectives underlying national regulatory frameworks for gambling—namely, consumer protection and crime prevention—to be more important than the individual economic freedoms of businesses operating in the EU's gambling market; second, that the regulatory diversity between national gambling sectors, which is embraced in the name of subsidiarity, takes precedence over the objective of liberalisation pursued in the name of the internal market. This approach seems to be exemplary of how the requirements of subsidiarity and proportionality can be translated into competence-sensitive judicial interpretation of free movement law.

At times, however, the deference that the Court shows to national authorities in the regulation of gambling appears unwarranted. For instance, in *Ladbrokes*, the Court held that it was lawful for the Dutch government to pursue an expansion of the gambling sector while at the same time barring foreign operators' access to the market. The policy of expansion seemed difficult to reconcile with the objective of protecting consumers from addiction to gambling. Yet the Court took the view that the Dutch policy was lawful given that "the scale of unlawful [gambling] activity was significant and the measures adopted were aimed at channelling consumers' propensity to gamble into activities that were lawful".[101]

A factually similar *Pfleger* case concerned Austrian monopoly on the operation of gaming machines. The referring court took the view that the real purpose of government's policy was "a mere increase of State tax revenue", which was apparent from excessive advertising of games of chance and an "aggressive" commercial policy carried out by the holders of the monopoly.[102] The CJEU observed that it was the prerogative of the national court to assess whether the legislation

[98] *Zenatti*, para.33.

[99] *Zenatti*, para.36.

[100] *Zenatti*, para.34.

[101] *Ladbrokes International Ltd* (Case C-258/08) EU:C:2010:308, paras 29–31, 34–35.

[102] *Pfleger and Others* (C-390/12) EU:C:2014:281, paras 16–17, 43, 47, 53, 55.

genuinely met the public interest objectives pursued by the government.[103] At the same time, it emphasised that the inability on the part of national authorities to produce "studies serving as the basis for the adoption of the legislation at issue" was not a sufficient reason to question its proportionality.[104]

The *Ladbrokes* and *Pfleger* judgments suggest that the standard of proof required to demonstrate the proportionality of the regulatory system for gambling is extremely low.

Persons *versus* businesses: lessons from case law on collective labour rights

The Court's ready acceptance of government claims at face value in the gambling case law sits uncomfortably with its approach in other sensitive areas, namely healthcare and education, examined above. One could argue that the discrepancies in the Court's standard of review reflect the relative constitutional importance attached to the different types of movement within the framework of EU law. An argument thus could be made that the right of EU citizens to access healthcare and education services in other Member States is more important than a purely economic right of gambling operators to access foreign markets. This could explain why the Court employs a high standard of review in relation to measures restricting cross-border access to healthcare and education.[105]

The narrative about the varying constitutional importance of different types of free movement in the EU is appealing because it brings a sense of coherence to the case law. It does not, however, remove tensions with subsidiarity and proportionality that arise in that case law. Moreover, this narrative does not seem to be supported by the wider free movement case law.

Case law on collective labour rights provides a powerful illustration in that respect. It would be hard to find an EU law scholar who is not familiar with the infamous *Viking* and *Laval* judgments. Those judgments established that strike action would be considered unlawful in EU law unless trade unions could prove that they have exhausted all other, less restrictive means to negotiate with their (foreign) employer.[106] In other words, to be lawful, strike action must be a necessary last resort. This position has been widely condemned for depriving the right to strike of its very essence. The ability of trade unions to use the threat of strike action strategically is often the sole bargaining tool that workers have to offset the imbalance of power inherent in the employment relationship.[107] The test employed by the Court has taken that tool away, thereby weakening trade unions' capacity to protect workers.

On the broader level, *Viking* and *Laval* have made clear that the freedom of businesses to move across the EU took precedence over the collective protection of workers.[108] This position displays a familiar pattern of judicial interpretation whereby individual free movement is prioritised

---

[103] *Pfleger and Others*, para.49.

[104] *Pfleger and Others*, para.51.

[105] On this point see, e.g. *Commission v Austria*, para.70; *Bressol*, para.79, suggesting that limitations on the free movement of persons can be justified only in exceptional circumstances.

[106] See, e.g. *Viking*, paras 107–110.

[107] See, e.g. T. Novitz and P. Germanotta, "Globalisation and the Right to Strike: The Case for European-Level Protection of Secondary Action" (2002) 18 International Journal of Comparative Labour Law 67, 68–69. See also A.C.L. Davies, "One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ" (2008) 37 Industrial Law Journal 126, 143; K. Ewing and J. Hendy, "The Dramatic Implications of *Demir and Baykara*" (2010) 39 Industrial Law Journal 2, 13.

[108] For academic commentary, see, e.g. S. Deakin, "Regulatory Competition after *Laval*" (2008) 10 Cambridge Yearbook of European Legal Studies 581. See also N. Hös, "The Principle of Proportionality in the *Viking* and *Laval* Cases: An Appropriate Standard of Judicial Review?", EUI Department of Law Working Paper 2009/06, p.16, pp.19–20 https://cadmus.eui.eu/bitstream/handle/1814/11259/LAW_2009_06.pdf.

over the broader objectives of the regulatory system, at the expense of subsidiarity and proportionality. More importantly, it demonstrates that the nature of free movement, that is, whether it is the free movement of persons or businesses, cannot account for differences in the intensity of judicial review across sensitive areas of national policy.

The overall analysis suggests that, ultimately, the Court's deferential approach to the gambling sector may be motivated by political considerations. A more aggressive judicial intervention could upset gambling arrangements in much of the EU and encourage further litigation, thus risking depriving Member States of a significant source of revenue.[109] Regardless, this approach demonstrates that the Court is aware of the implications of its judgments for national regulatory autonomy and the protection of the interests rooted in that autonomy. Judicial awareness of these issues is key to avoiding tensions with the principles of subsidiarity and proportionality in the interpretation of free movement law. The gambling case law shows that the Court has tools to avoid those tensions. It can do so by adjusting the standard of judicial review employed to assess the lawfulness of national derogations from free movement.

Conclusion

This article examined EU competence creep in the judicial interpretation of free movement law. To that end, it assessed the Court's free movement case law involving sensitive areas of national policy in light of the principles that govern the scope and exercise of EU competences—conferral, subsidiarity and proportionality. It demonstrated that the exercise by the Court of its interpretative authority is a major, and often dominant, cause of EU competence creep.

The article argued that while the principle of conferral does not preclude judicial interference into areas that are predominantly reserved to national competence, it sets a limit to such interference. That limit lies in the conditions that determine whether a matter falls within the scope of free movement. The Court's interpretation of those conditions in the areas under study—healthcare and education—does not show adequate consideration of questions of competence. On the contrary, the judicial reading of the scope of free movement has been expansive, giving little to no regard to circumstances which would suggest the exclusion of the matter from the scope of EU law.

The neglect of the requirements of conferral in the judicial interpretation of free movement also impairs the effectiveness of the legislative dimension of this principle, thereby enabling legislative competence creep. Specifically, it opens up the possibility for matters reserved to national competence to be addressed at the EU's legislative level through the functionally broad legal bases dedicated to the regulation of the internal market. This means that the prohibitions contained in sector-specific legal bases excluding EU-level regulation of areas of high political sensitivity can now be legitimately circumvented, thus further diminishing the practical significance of the principle of conferral.

The principles of subsidiarity and proportionality come into play at the stage of the judicial inquiry into the justification of national derogations from free movement. The article explained that these principles require that the standard of judicial review employed by the Court take into account the implications of unrestricted free movement for national regulatory autonomy (subsidiarity) and the interests protected via its exercise (proportionality).

[109] On this point, see S. Van den Bogaert and A. Cuyvers, "“Money for Nothing”: The Case Law of the EU Court of Justice on the Regulation of Gambling" (2011) 48 C.M.L. Rev. 1175, 1209; V. Yanchev, "Between the Hammer and the Hard Place: European Gambling Regulation in the Post-Santa Casa Era" (2012) 23 European Business Law Review 213, 227.

The analysis revealed that the Court has been unduly selective in its observance of the principles of subsidiarity and proportionality. It appears to have neglected the requirements of these principles in the areas of healthcare, education and collective labour law. Owing to a high-scrutiny approach, the free movement in these areas has been advanced at the expense of the broader, systemic objectives pursued by national governments. By contrast, the gambling sector has been approached with judicial deference, grounded in respect for national regulatory prerogatives. The latter approach is thematically similar to that employed by the Court in cases involving conflicts between free movement law and the exercise of fundamental rights.[110]

The overall analysis of the areas under study reveals a tendency by the Court to overstretch the principles of conferral, subsidiarity and proportionality in the interpretation of free movement rules. This tendency, which is also observed in the judicial review of EU internal market legislation, demonstrates the presence of a judicial competence creep in EU free movement case law.

Notably, the findings of this article are confined to the areas studied here. There exist multiple examples in the Court's case law of judgments which demonstrate sensitivity to the collision between internal market law and constitutionally and/or politically sensitive policy areas.[111] This article does not contest that; nor does it suggest that the Court expands the limits of EU competences in everything it does. The article's contribution lies in that it uncovers patterns of judicial reasoning that lead to such expansion of competences and should therefore be avoided in order to preserve the legitimacy of both the Court and the EU as a whole. This applies to the Court's interpretative practice in any constitutionally and/or politically sensitive area, such as tax, social security, acquisition and loss of national citizenship, and others.[112]

In terms of concrete propositions, this article does not necessarily suggest that policy areas that are constitutionally sensitive from an EU law point of view should be a priori excluded from the scope of free movement. It does, however, suggest that the Court should be more rigorous in its reasoning when establishing why the matter in question falls within the scope of free movement. More importantly, in situations where the connection with free movement is weak, the Court should be expected to give greater consideration to systemic concerns underlying national derogations from free movement.

[110] See *Schmidberger*, discussed earlier. See also *Omega Spielhallen* (C-36/02) EU:C:2004:614; *Sayn-Wittgenstein* (C-208/09) EU:C:2010:806.

[111] See, e.g. *Keck and Mithouard* (C-267/91 and C-268/91) EU:C:1993:905; *Albany* (C-67/96) EU:C:1999:430; *Elisabeta Dano* (C-333/13) EU:C:2014:2358; *Criminal proceedings against M.A.S. and M.B.* (C-42/17) EU:C:2017:936 (*Taricco II*); *Commission v Poland* (C-562/19 P) EU:C:2021:201.

[112] See, e.g. Commission's 2022 case against Malta challenging its citizenship by investment programme: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5422#:~:text=Investor%20citizenship%20scheme:%20Commission%20refers%20MALTA%20to%20the%20Court%20of%20Justice&text=Today,%20the%20European%20Commission%20has,as%20the%20'golden%20passports'.