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RESEARCH ARTICLE

A Crisis of Neo-liberalism and the Future of the European Union: Socio-economic and Political Challenges to Its Legal-Constitutional Framework (and a Defence of Scharpf's Asymmetry Theory)

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Abstract

This article illuminates the powerful role of law in shaping the EU's political economy. I argue that the neo-liberal architecture and, ultimately, the lack of a socio-economic equilibrium ingrained in the EU legal framework and in the (case) law of the ECJ are crucial with regard to their effects on the political and (socio-)economic spheres. Solutions to this and the restoration of socio-economic balance are limited. As Treaty change seems unrealistic, I argue that the Court should develop a new (self-)understanding that replaces the 'integration through law' paradigm with something that could be understood as 'integration *sustained* by law'.

Keywords: EU internal market; EU economic integration; liberalisation; asymmetry theory; neo-liberalism; free movement rules; law and political economy

Introduction

As the EU strives to be 'a highly competitive *social* market economy',[1] I argue that the legal framework and the case law of the European Court of Justice ('ECJ' or 'Court') as they present themselves today cannot be unified under anything approaching the idea of a balanced system of socio-economic rights. The reason for this lies with the EU's neo-liberal architecture and its imbalance between 'the market' and 'the social', between market-making (or -creating) and market-complementing (or -correcting) competencies enshrined in the legal framework as well as in the ECJ case law. There is, in other words, a 'constitutional asymmetry between market-making and market-correcting competences',[2] and therefore a lack of a genuine socio-economic equilibrium within the law and political system of the EU. In that sense, the EU has ever since its foundation and up to the present day been suffering from a 'social deficit'.[3]

[1] Art 3(3) TEU, emphasis added.

[2] M Savevska, 'Centralization of Rule-Making versus Embeddedness in the Eurozone' (2020) 28 (4) *Journal of Contemporary European Studies* 449, p 452 referring to FW Scharpf, 'After the Crash: A Perspective on Multilevel European Democracy' (2015) 21 (3) *European Law Journal* 384.

[3] For many: AD Andry, *Social Europe: The Road Not Taken* (Oxford University Press, 2022); FW Scharpf, 'The Asymmetry of European Integration—or Why the EU Cannot Be a Social Market Economy' (2010) 8 (2) *Socio-economic Review* 211.

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In legal literature, this imbalance between 'the market' and 'the social'[4] is widely recognised and found in the Treaties and the case law of the Court.[5] Less attention has been given to what this imbalance implies for the liberalisation process from a legal and (socio-)economic perspective. This includes the limits of liberalisation, what it can realistically deliver, the necessary preconditions for it to benefit the many (rather than the few), and the pivotal role played by the legal framework and the ECJ's jurisprudence in shaping the structure of the EU's social market economy within which the internal market operates. Borrowed from Joerges, the 'integration-through-law' paradigm 'constructed a transnational legal framework which was to operate without taking the *socio-economic diversity* of the jurisdictions which it sought to integrate into account' (emphasis added).[6] Part of its success is owed 'to the camouflaging of its ideological basis'—'economic rationality',[7] or, as I shall argue, (neo-liberal) market ideology. The socio-economic imbalance enshrined in the EU Treaties and echoed in the case law of the Court is thus crucial in shaping the political economy of the EU. Both contribute to the EU's overall neo-liberal architecture,[8] and it is this neo-liberal bias within the very structure of the EU that has, among other things, contributed to the increasing gap between the poor and the rich,[9] and the economic malaise we are undergoing.[10] This is echoed, for example, in the slow but continuous decline of the middle class,[11] and, in the context of the Eurozone, arguably has

[4]S Garben, 'The Constitutional (Im)balance between "the Market" and "the Social" in the European Union' (2017) 13 (1) *European Constitutional Law Review* 23.

[5]For examples from the vast body of literature, see Niall O'Connor, *Business Freedoms and Fundamental Rights in European Union Law* (Oxford University Press, 2025), p 263; Q Detienne and E Schmidt, 'Social Pensions and Market Values: A Conflict?' (2019) 15 (2) *Utrecht Law Review* 81; S Garben, 'Balancing Social and Economic Fundamental Rights in the EU Legal Order' (2020) 11 (4) *European Labour Law Journal* 364, p 386 and 389; J Mulder, *Social Legitimacy in the Internal Market: A Dialogue of Mutual Responsiveness* (Hart Publishing, 2018); S Weatherill, *The Internal Market as a Legal Concept* (Oxford University Press, 2017), p 126 et seq as well as chs 7 and 8; Frank Vandenbroucke et al (eds), *A European Social Union after the Crisis* (Cambridge University Press, 2017); D Schiek, 'Towards More Resilience for a Social EU—the Constitutionally Conditioned Internal Market' (2017) 13 (4) *European Constitutional Law Review* 611; D Ashiagbor, 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration' (2013) 19 (3) *European Law Journal* 303; P Copeland, 'EU Enlargement, the Clash of Capitalisms and the European Social Model' (2012) 10 (4) *Comparative European Politics* 476; Scharpf,'The Asymmetry of European Integration'; C Barnard, 'Restricting Restrictions: Lessons for the EU from the US?' (2009) 68 (3) *Cambridge Law Journal* 575; C Joerges and F Rödl, 'The "Social Market Economy" as Europe's Social Model?' (2004) EUI Working Paper LAW No. 2004/8; E Spaventa, 'From Gebhard to Carpenter: Towards a (Non-)Economic European Constitution' (2004) 41 (3) *Common Market Law Review* 743; MP Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart Publishing, 1998).

[6]For many of his contributions: C Joerges, 'Varieties of Economic Constitutionalism and the Alternative of Conflict-Law Constitutionalism: Observations on the Conceptual History of the Law of the Integration Project' (2025) 4 (1) *European Law Open* 7, p 12.

[7]Ibid, p 13.

[8]W Streeck, *Taking Back Control: Stats and State Systems after Globalism* (Verso, 2024), p 28; M Dani, 'Openness, Purposiveness, and the Realignment of the EU and the Democratic and Social Constitutional State' (2023) 24 *German Law Journal* 1099, p 1100; JE Stiglitz, *The Euro: How a Common Currency Threatens the Future of Europe* (WW Norton & Company, 2016), p 51 and 330: 'Neoliberalism and the perspectives of corporate elites provided the intellectual lodestar for guiding not just the creation of the euro but much of the evolution of the EU'.

[9]P Collier, *Left Behind: A New Economics for Neglected Places* (Allen Lane, 2024) arguing that orthodox economics and 'the market is right' and 'knows best' (p 5, 9) ideology leads to an increase of the gap between poor and rich, echoed in the phenomena of 'looming global poverty' and 'the emergence of a new class in high-income countries' (p 13); T Piketty, *The Laws of Capitalism* (Harvard University Press, 2014); The World Inequality Database, available at: https://wid.world/ (accessed 9 October 2025).

[10]Kukovec illustrates socio-economic issues such as, eg, the so-called 'hollowing out of the economy' and the 'brain drain' effect, as well as the benefits (for high gross domestic product (GDP) per capita countries) of low production costs and cheap labour (in low GDP per capita countries) in the context of the EU by distinguishing between 'centre' and 'peripheral countries': D Kukovec, 'Economic Law, Inequality, and Hidden Hierarchies on the EU Internal Market' (2016) 38 (1) *Michigan Journal of International Law* 1.

[11]JD Derndorfer and S Kranzinger, 'The Decline of the Middle Class: New Evidence for Europe' (2021) 55 (4) *Journal of Economic Issues* 914; for the US: JX Fan and H Zan, 'The Decline of the American Middle Class: Evidence from the Consumer Expenditure Surveys 1988–2015' (2020) 41 *Journal of Family and Economic Issues* 187.

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created some of the challenges its Member States, but also the EU more generally, are facing today.[12] All this not only indicates a (socio-economic) malaise but also helps explain the decreasing public faith in Western democracies and capitalism.[13] The role of the law in this context is therefore pivotal, as 'the law is a function of the economy, and the economy (especially its structure) is a function of the law'.[14]

Solving this issue may seem simple, but it is in fact anything but, as it is about restoring a genuine socio-economic equilibrium within the law that runs and governs the economic system, ie the EU internal market and, therefore, ultimately the EU social market economy. Borrowed from one strand of political economy literature, the EU market(s) needs to be 'embedded',[15] as the EU today is arguably a perfect realisation of 'neoliberal economic globalism, indeed hyperglobalism: a common market embedding states rather than states embedding markets'.[16] The embeddedness of markets, a notion developed and articulated by Karl Polanyi,[17] is based on the idea that markets are embedded in society as a whole and situated in the broader social fabric. Therefore, they cannot be separated from politics and institutions or social relations that shape and sustain them.[18] In other words, there is no such thing as a neutral or autonomous market sphere.[19] Rather, it is inextricably linked with the political and, therefore, remains a human artefact.

In the EU context, and starting from the premise that the EU market(s) are 'disembedded' rather than 'embedded', such embedding (basically striking a socio-economic balance) could be achieved either through Treaty change or, alternatively, through a change in the Court's adjudicative methodology. As the current political landscape does not make Treaty change a likely and realistic (political) option, owing to the lack of 'political will',[20] this article will focus on what the Court could do to establish the socio-economic balance desperately needed. I shall argue that in order to sustain what EU (economic) integration has achieved so far, the ECJ should not do more of the same, as this would only widen the socio-economic divide. Rather, if the Court stepped in and acted otherwise, it could arguably sustain the success of the EU integration project. It might also help abate the storm of anti-EU resentment echoed in the populist movements that have gained strength over the years across the EU. This, in turn, would foster an environment that ultimately makes political integration (ie the transfer of further competencies) indeed feasible, provided that such integration is politically, democratically, and therefore legitimately aspired to.

In political economy and economics literature, the rise of populism has been explained by the political economy of a state. It is, therefore, a reaction by the people to the socio-economic realities they face.[21] The role of law is crucial in this regard. Law creates a social, economic, and political reality of its own.[22] It is central in shaping the political economy and, therefore, the socio-economic

[12] Stiglitz, *The Euro*.

[13] DS Grewal, 'Three Theses on the Current Crisis of International Liberalism' (2018) 25 (2) *Indiana Journal of Global Legal Studies* 595, p 600.

[14] WJ Samuels, 'Legal-Economic Nexus' (1989) 57 (5) *George Washington Law Review* 1556, p 1567.

[15] JG Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in Postwar Economic Order' (1982) 36 (2) *International Organization* 379, p 393.

[16] Streeck, *Taking Back Control*, p 28.

[17] K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, 2nd ed (Beacon Press, 2001 (first published in 1944)), p xxiii et seq.

[18] F Block, 'Introduction' in Polanyi, *The Great Transformation*, p xxiii et seq.

[19] Ibid.

[20] C Barnard and S de Vries, 'The "Social Market Economy" in a (Heterogenous) Social Europe: Does It Make a Difference?' (2019) 15 (2) *Utrecht Law Review* 47, p 48.

[21] P Manow, *Die Politische Ökonomie des Populismus* (edition suhrkamp, 2018) 10, p 15 et seq; D Rodrik, 'Populism and the Economics of Globalization' (2018) 1 (1–2) *Journal of International Business Policy* 12.

[22] E Cáceres Nieto, 'The Foundations of Legal Constructivism' in JL Fabra-Zamora et al (eds), *Conceptual Jurisprudence Methodological Issues, Classical Questions and New Approaches* (Springer, 2021), p 295; G Teubner, 'How the Law Thinks: Toward a Constructivist Epistemology of Law' (1989) 23 (5) *Law and Society Review* 727, p 730.

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circumstances people experience.[23] Hence, the role of the Court continues to be essential to the success of the EU. For this reason, I call for a change, from the 'integration-through-law' paradigm[24] to a new self-understanding of the Court that could be described as 'integration *sustained* by law'. The former identifies the ECJ's case law as a major driving force of EU (economic) integration while neglecting the ideological foundations of the market logic inherent in it; by contrast, the latter uses law not to deepen liberalisation but as a stabilising force that preserves integration while preventing a deepening of the systemic socio-economic imbalance.

Against this backdrop, Section I outlines the purported ongoing crisis of neo-liberalism before examining the current political economy of the EU as a multi-state political entity. It illustrates how the legal architecture of the EU, with its neo-liberal bias, might have contributed to today's political developments, and shows the need to solve the socio-economic imbalance enshrined in the EU system. Section II details why the discrepancy between market-creating (or -making) and market-correcting (or -complementing) measures continues to be an issue, namely that of the socio-economic imbalance of the EU legal and political system. In fact, despite recent voices contesting the validity of Scharpf's influential asymmetry theory,[25] I take the opposite stance. In that sense, this article can—with respect to the relevant parts—be understood as a defence of the asymmetry theory. But there is more: a neo-liberal bias underpins the doctrinal approach of the ECJ in interpreting the law. Section III highlights the need for the Court to develop a new self-understanding—one that replaces the paradigm of 'European integration through law' with a new one, such as 'European integration *sustained* by law'. Section IV concludes.

I. Neo-liberalism, the political economy of the EU, and the law

The 21st century has been marked by a series of crises,[26] accompanied by profound changes in geopolitics and a rise of populism in large parts of the Global North. The swings to the populist right across Europe,[27] as well as the re-election of Donald Trump as the 47th president of the United States, support this claim. In the EU, the rise of parties with a more nationalist agenda[28] and the rise of Euroscepticism[29] are accompanied by an economy that is not performing well,[30] together with inflation and a housing crisis culminating in sky-high housing and living costs.[31] In concrete numbers: 'In less than 10 years, between 2015 and 2023, house prices in the EU rose on average by 48%'.[32] Moreover, the economic powerhouse of the EU, Germany, risks remaining in recession for the third

[23] Employing a *constructivist* approach to the law drawing from political philosophy. On constructivism as an epistemological process in philosophy more generally, see J Rawls, *A Theory of Justice* (Oxford University Press, 1976). I am grateful to Carlos Arturo Villagrán Sandoval, who suggested this perspective to me.

[24] R Schütze, '"Integration-through-Law": Grand Theory, Revisionist History' (2025) 4 (2) *European Law Open* 162.

[25] FW Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999).

[26] The financial crisis, the Euro crisis, the EU refugee crisis, the Covid-19 crisis, Russian's full-scale invasion into Ukraine, the economic and energy crisis that followed, the appalling terror attack of the Hamas, and so on.

[27] Manow, *Die Politische Ökonomie des Populismus*, p 11.

[28] Eg Germany, Austria, Belgium, France, The Netherlands, Hungary, Italy, Portugal, Sweden, Czech Republic, and Spain.

[29] G De Búrca, 'Is the EU Supranational Governance a Challenge to Liberal Constitutionalism?' (2018) 85 (2) *University of Chicago Law Review* 337, p 338; I Sánchez-Cuenca, 'From a Deficit of Democracy to a Technocratic Order: The Postcrisis Debate on Europe' (2017) 20 *Annual Review of Political Science* 351, p 359 contending that 'it does not seem far-fetched to argue that the European Union is suffering its worst legitimacy crisis'.

[30] M Draghi, *The Future of European Competitiveness* (September 2024); E Letta, *Much More Than a Market* (April 2024).

[31] European Parliament, 'Rising Housing Costs in the EU: The Facts (Infographics)' (updated 3 February 2025), available at: www.europarl.europa.eu/topics/en/article/20241014STO24542/rising-housing-costs-in-the-eu-the-facts-infographics (accessed 9 October 2025).

[32] Ibid.

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year in a row.[33] When Olaf Scholz, the former chancellor of Germany, talked about a *Zeitenwende* in the German *Bundestag* in 2022, he may not have been aware of how right he was.

All of this arguably epitomises a deepening crisis—or even the impending demise—of neo-liberalism, a process unfolding since the 2008 financial crisis.[34] Considering the EU's neo-liberal architecture, deeply embedded in both the Treaties and the case law of the ECJ, these developments are critical to understanding the EU's current trajectory. Our present legal and economic landscape is shaped by decisions made in the past. Therefore, the phenomena described here can be seen as a consequence—or at least a by-product—of neo-liberal ideology, which has dominated economic thought since the 1990s. This article aims to illustrate and raise awareness of the neo-liberal bias (most likely unconscious) entrenched in the ECJ's adjudicative methodology. It advocates for a more nuanced approach capable of addressing today's complex socio-economic challenges. Political economy and socio-economic reality are not naturally given but shaped by rules, laws, and their interpretation governing their respective spheres. Whatever outcome is generated, or status quo is prevalent in one specific sphere, for example the (socio-)economic sphere, might well have an impact or effect in another sphere, for example the political sphere. The law is powerful in shaping the socio-economic reality and therefore, ultimately, the political economy of the EU.

Borrowed from Žižek, who makes this point in relation to Donald Trump, 'populism is, at least in part, a reaction to the failure of the liberal-democratic welfare state, so while we can and should support some measures advocated by the liberal centre …, we should always bear in mind that in the long term, the liberal centre is at the root of our crises'.[35] As briefly mentioned earlier, one explanation for the increase in populism points to the socio-economic reality of people. The rise of populism of any kind, so the argument goes, is a symptom of the political economy of a society.[36] Following this argument, different forms of populism (right- or left-wing) thus stem from circumstances[37] that can be traced back to the political economies of states and the socio-economic circumstances they create. This occurs through the rules and laws that govern the respective relevant spheres at a normative level. In other words, the rise of populism is a symptom of protest against the effects of globalisation[38] and, therefore, the socio-economic result of inter-state trade and liberalisation.

This theory identifies neo-liberalism as part of the problem. As King noted, 'although potentially trade can make everyone better off that does not guarantee that it will make everyone better off'.[39] Trade liberalisation always has distributional implications, particularly for lower incomes.[40] It can be the 'bit-part player' in contributing to inequality,[41] as it creates welfare under a very *narrow set*

[33] D Berger and AS Feil, 'Deutschland im Griff der Rezession' (15 January 2025) ZDF Heute, available at: www.zdf.de/nachrichten/wirtschaft/bip-rueckgang-rezession-deutschland-100.html (accessed 9 October 2025). Statista (statistical data for Germany) available at: https://de.statista.com/themen/26/bip/ (accessed 9 October 2025).

[34] Streeck, *Taking Back Control*; R Abdelal and JG Ruggie, 'The Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism' in D Moss and J Cisternino (eds), *New Perspectives on Regulation* (Tobin Project, 2009) p 153 speaking of the 'crisis of legitimacy for globalization [that] has been unfolding since the end of 1990s' while emphasising the fact that the 'crash 2008 did not cause the crisis, but has surely made it worse'.

[35] S Žižek, *Against Progress* (Bloomsbury, 2025), p 53.

[36] Manow, *Die Politische Ökonomie des Populismus*, p 11.

[37] Ibid, p 15.

[38] Rodrik, 'Populism and the Economics of Globalization'.

[39] Interview of J Anderson with Lord M King, 'Failed Predictions, Printing Money and Cryptocurrency' (2024), available at: www.youtube.com/watch?v=gnGOFvzMO6I (accessed 13 December 2025), at 1:05:28.

[40] D Rodrik, *The Globalization Paradox: Why Global Markets, States and Democracy Can't Coexist* (Oxford University Press, 2011), p 59.

[41] P Krugmann, 'Trade and Wages, Reconsidered' (2008) *Brookings Papers on Economic Activity* 103; 'Krugman's Conundrum—The Elusive Link between Trade and Wage Inequality' (17 April 2008) *The Economist*, available at: www.economist.com/finance-and-economics/2008/04/17/krugmans-conundrum (accessed 9 October 2025); Piketty, *The Laws of Capitalism*.

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of assumptions only.[42] As emphasised in political economy literature, '[w]hether free trade causes economic gains or not is one of the oldest unsettled questions of political economy'.[43] Additionally, beyond pure trade liberalisation concerns, the ramifications of labour and capital liberalisation suggest that, 'without some system of shared debt, free mobility of labor and capital ensure that economic efficiency will *not* be obtained'.[44] In other words, '[a]n economic framework that combines mobility of labor with country (place-based) debt … creates divergence, just as we saw that free mobility of capital does',[45] a potential corollary of which is 'large distributive consequences within each country, with some segments of the population—in some cases, even a majority—worse off'.[46] In simple terms, a system of shared debt and redistribution must be aligned with the market system in order for the liberalisation process to produce optimal outcomes and, therefore, work for the many.

From this perspective, the widespread narrative, particularly present in public debate, that liberalisation of trade is only good[47], fails to capture the complexity of the actual effects of the liberalisation process.[48] More provocatively, 'in light of the apparent settled nature of economists' judgement on the issue of trade liberalization, the profession has stopped thinking critically about the question and, as a consequence, makes poor-quality arguments justifying their consensus'.[49] The 'dark side' of the internal market—essentially the liberalisation process in action—has more recently also been acknowledged in internal market law literature.[50]

One implication of the finding that distributional implications are inherent in trade liberalisation is that redistributive policy measures counterbalancing the potential negative effects are crucial for making a capitalist economic system work.[51] While free trade increases overall efficiency, some win while others lose; therefore, redistribution is pivotal in achieving the goal of making everyone better off (and not just a few), regardless of such 'redistribution-of-wealth-undertaking' being politically sensitive. However, although the EU Treaties foster the establishment of an internal market with common market rules and hard competencies, redistribution—or competencies with respect to market-correcting or -complementing measures—do not exist at the EU level (except through the social funds, which are structurally unsuitable for creating a genuine socio-economic balance within the economic system of the EU; see Section I.A). This is so particularly in the Eurozone as fiscal and economic policy remains a competency of the Member States regardless of the common currency.[52] There is a 'constitutional asymmetry between market-making and market-correcting competences',[53]

[42] L Mireles-Flores, 'The Evidence for Free Trade and Its Background Assumptions: How Well-Established Causal Generalisations Can Be Useless for Policy' (2022) 34 (3) *Review of Political Economy* 534; Rodrik, *The Globalization Paradox*, p 62; also see the work of 'free trade' economist Jagdish N Bhagwati who showed that 'when market imperfections exist, laissez-faire … will not be the optimal policy', see JN Bhagwati, 'The Generalized Theory of Distortions and Welfare' (May 1969) *MIT Working Paper Department of Economics*, No 39, p 1, available at: https://dspace.mit.edu/bitstream/handle/1721.1/63654/generalizedtheor00bhag.pdf (accessed 9 October 2025).

[43] Mireles-Flores, 'The Evidence for Free Trade' with further references.

[44] Stiglitz, *The Euro*, p 26.

[45] Ibid, p 134.

[46] Ibid, p 343.

[47] Ibid, p 340.

[48] Rodrik, *The Globalization Paradox*, p 56, 61 et seq.

[49] R Driskill, 'Deconstructing the Argument for Free trade: A Case Study of the Role of Economists in Policy Debates' (2012) 28 (1) *Economics and Philosophy* 1, p 2.

[50] C Barnard and F Costello, 'The Darker Side of the Internal Market Ideal: EU Migrant Workers Living in a Coastal Town' (2023) *Cambridge Legal Studies Research Paper Series*, No 32/2023; C Barnard, F Costello, and S Fraser Butlin, *Low-Paid EU Migrant Workers: The House, the Street, the Town* (Bristol University Press, 2024); I Goldner Lang and M Lang, 'The Dark Side of Free Movement: When Individual and Social Interests Clash' in S Mantu et al (eds), *EU Citizenship and Free Movement: Taking Supranational Citizenship Seriously* (Brill, 2020), p 382.

[51] Stiglitz, *The Euro*, p 340.

[52] Extensively, on the 'structural flaws' of the eurozone or the euro: Stiglitz, *The Euro*.

[53] Savevska, 'Centralization of Rule-Making'.

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and, therefore, a lack of genuine socio-economic equilibrium within the law and the political system of the EU. This imbalance is found in the Treaties but also in the case law of the Court.[54]

In this regard, the EU legal architecture, with its socio-economic divide, arguably makes it a construction of 'disembedded markets',[55] by contrast with what John Ruggie called a 'compromise of embedded liberalism'[56] (building on Karl Polanyi's work). The latter recognises that markets 'need to be embedded in a much more complete, and stricter set of institutions',[57] to accompany economic integration in the social sphere, since markets are far less self-regulating and self-stabilising than anticipated by a 'Smithian' understanding.[58] Put otherwise, 'social embeddedness of markets implies that they do not regulate themselves but require continuous managerial activities'.[59] Therefore, 'embedded liberalism' is a system of economic multilateralism 'predicated upon domestic interventionism'.[60] This assumes that, as a consequence, 'practices of domestic interventionism would tame the socially disruptive effects of markets without, however, eliminating the welfare efficiency gains derived from cross-border trade'.[61]

Against this backdrop, a neo-liberal bias can be seen in the construction of the EU,[62] particularly after 1992, when the free movement of capital became a 'fully-fledged economic freedom' included in the Treaties, and as the ECJ developed a gradual neo-liberal interpretation of the economic freedoms in its case law.[63] The status quo of the EU internal market comprising various (national) markets is, as noted in the introduction, 'a common market embedding states rather than states embedding markets'.[64] This is so because, in the supranational context, the alternative option of 'embedded liberalism' is not possible at the EU level as long as the division of competencies between the EU and its Member States remains unchanged. Scharpf's famous asymmetry thesis thus holds from a structural (and competence) perspective.[65] As long as political integration does not occur and (necessary) measures accompanying market liberalisation (among others, social and redistributive measures and policies) are not introduced at the EU level,[66] markets risk having disruptive effects and have the potential to eliminate welfare and efficiency gains derived from the market liberalisation process. In other terms, 'the "social dimension" of the kind of Europe that emerged in the 1980s has been insufficient to cope with the consequences of liberal economic integration, to the point that the socio-economic governance of the EU today "can be regarded as an attack on the welfare state"'.[67] Therefore, 'integration through law (as opposed to political integration) continues apace and limits national governments' ability to correct markets'.[68] This is because, at the EU level, risks are not shared in the same way as at the nation-state level, where risks are shared through a variety of safeguards and insurance schemes that accompany market liberalisation.[69] Consequently, the EU cannot, from a structural perspective of its economic system, mitigate the disruptive effects of liberalisation in the same way that individual states could, at least for the time being.

[54] See the contributions in note 5.
[55] Abdelal and Ruggie, 'The Principles of Embedded Liberalism', p 153.
[56] Ruggie, 'International Regimes, Transactions, and Change', p 393.
[57] D Rodrik, 'Globalization Dilemmas and the Way out' (2012) 47 (2) *Indian Journal of Industrial Relations* 393, p 395.
[58] Ibid, p 394.
[59] Joerges, 'Varieties of Economic Constitutionalism', p 18.
[60] Ruggie, 'International Regimes, Transactions, and Change', p 393.
[61] Abdelal and Ruggie, 'The Principles of Embedded Liberalism', p 153.
[62] Sánchez-Cuenca, 'From a Deficit of Democracy to a Technocratic Order', p 356.
[63] AJ Menéndez, 'The Existential Crisis of the European Union' (2013) 14 (5) *German Law Journal* 454, p 471 et seq and 481.
[64] Streeck, *Taking Back Control*, p 28.
[65] Scharpf, *Governing in Europe*.
[66] FW Scharpf, 'Economic Integration, Democracy and the Welfare State' (1997) 4 (1) *Journal of European Public Policy* 18.
[67] AD Andry, *Social Europe*, p 276.
[68] M Höpner and A Schäfer, 'Embeddedness and Regional Integration: Waiting for Polanyi in a Hayekian Setting' (2012) 66 (3) *International Organization* 429, p 431.
[69] Abdelal and Ruggie, 'The Principles of Embedded Liberalism', p 153.

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II. The socio-economic status quo and the law

Under Scharpf's influential asymmetry theory,[70] the 'EU has well-developed capacities for negative integration but only limited capacities for positive integration'.[71] Positive integration suffers from a structural disadvantage (owing to high consensus requirements and limited competencies in the Treaties) as opposed to negative integration. As a consequence, the balance shifts 'between state and market to the disadvantage of the states' ability to intervene in market process'.[72] Scharpf's thesis has recently been challenged by, among others,[73] Van den Brink, Dawson, and Zglinski, as it arguably 'no longer accurately depicts European integration'.[74] In this paper, however, I take a different stance. I argue that the 'constitutional asymmetry between market-making and market-correcting competences'[75] remains unchanged as the market-complementing or -correcting policies adopted at the EU level lack the necessary structural redistributive nature. Additionally, negative integration (still) plays a powerful role in shaping the socio-economic reality within the EU.[76] This is owing to the long-standing doctrinal methodology employed by the Court. Therefore, the ECJ holds significant power to shape the EU political economy and establish a socio-economic balance of market-creating and market-complementing policies, particularly as long as Treaty change remains unrealistic. Those two reasons in support of the continued validity of Scharpf's asymmetry thesis are detailed below.

A. The division of competences and why coordination cannot substitute political integration

Firstly, Van den Brink et al. argue that since 2010 the EU legislature has adopted measures that are of redistributive nature,[77] namely a set of directives[78] complemented by soft law (eg the European Pillar of Social Rights) and financial tools (eg Just Transition Fund, Youth Guarantee, Support to mitigate Unemployment Risks in an Emergency—SURE). Therefore, EU politics is 'not too fragmented to respond'.[79]

Although it is true that social convergence and coordination have been strengthened over the years, I do not believe that the EU measures and policy coordination endeavours are capable of genuinely embedding the EU market(s), since the measures adopted do not lead to a situation that sufficiently mimics (real) political integration. They are, therefore, unsuitable to rebalance the (socio-)economic system of the EU, and to achieve 'integration *sustained* by law'.

To begin with, it is common knowledge that the European Union has 'hard competencies' in the market sphere,[80] but rather soft and limited power only when it comes to competencies in the social sphere. Notwithstanding the fact that the EU Treaties do mention social principles, they do not establish any obligation for the Member States to harmonise their social laws at the EU level. According to Article 153 TFEU located under the section dedicated to 'Social Policy', for example, 'the Union shall

[70] Scharpf, *Governing in Europe*.

[71] M Van den Brink, M Dawson, and J Zglinski, 'Revisiting the Asymmetry Thesis: Negative and Positive Integration in the EU' (2025) 32 (1) *Journal of European Public Policy* 209.

[72] M Höpner, SK Schmidt, and D Seikel, 'Asymmetry Resolved? Revisiting Negative and Positive European Integration' (2025) 32 (11) *Journal of European Public Policy* 2595, p 2596.

[73] Ibid, with an overview of the debate and references to the most recent contributions in the literature on p 2.

[74] Van den Brink et al, 'Revisiting the Asymmetry Thesis', p 209.

[75] Savevska, 'Centralization of Rule-Making', p 452.

[76] V Velyvyte, 'Competence Creep in EU Free Movement Law' (2023) 48 (6) *European Law Review* 636; V Velyvyte, *Judicial Authority in EU Internal Market Law—Implications for the Balance of Competences and Powers* (Hart Publishing, 2022).

[77] Van den Brink et al, 'Revisiting the Asymmetry Thesis', p 225.

[78] Eg the Minimum Wages Directive (EU) 2022/2041, the Work-Life-Balance Directive (EU) 2019/1158, and the Directive on Transparent and Predictable Working Conditions (EU) 2019/1152.

[79] Ibid.

[80] Eg the Treaty competition and internal market provisions and Article 114 TFEU for harmonisation purposes.

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support and complement the activities of the Member States'. Moreover, Article 5(3) TFEU explicitly stresses that the 'Union may take initiatives to ensure coordination of Member States' social policies'.[81]

This status quo of the EU's social dimension stems from a persistent lack of political will and consensus with respect to the establishment of a real 'social Europe', a controversy that has accompanied the integration process since its inception.[82] Yet the risks of pursuing economic integration without simultaneously advancing integration towards social progress were explicitly articulated in very early political debates on post-war integration.[83] Although coordination and convergence in EU economic *and* social policy have undoubtedly strengthened over the years through different coordination mechanisms and instruments as well as social policy packages,[84] these efforts are arguably insufficient to counterbalance the negative effects of liberalisation within the context of the EU's deep integration project.[85] They are systemically ill-suited to achieving this goal, despite containing some redistributive elements.[86] From an economic perspective,[87] therefore, the EU suffers from its neo-liberal ideology and this is echoed in the discrepancy between the market and the social dimensions.

First, these EU measures lack the necessary conditions for redistributive policy measures to work effectively.[88] Measures of redistributive nature must operate within a (more or less) coherent and reciprocal *system*—one capable of counterbalancing the negative effects of the liberalisation process. Such a system would require *a systemically uniform and congruent* market system that is aligned with the framework governing the social sphere, not only in regard to the socio-cultural identity[89] but also within the (geographic) area it encompasses. However, such system and uniformity are lacking at the EU level. Instead, the EU is characterised by a heterogeneity of welfare states[90] and welfare levels,[91] alongside diverse existing varieties of capitalism[92] and diversity also with respect to, among others, social security systems, tax systems, and health and educational systems. Furthermore, the markets of the Member States, and, therefore, the EU internal market as such, are not homogeneous either.[93] A brief look at the various gross domestic products (GDPs) of the EU Member States,[94] as well as their different economic structures,[95] clearly illustrates this point.

To genuinely embed the EU internal market, it would be necessary to establish a coherent system of transnational shared debts and redistributive mechanisms aligned with the market sphere. In other words, what is needed, at its most extensive, is a welfare state equivalent at the central EU

[81] For a detailed analysis of the legal competences of the EU in the social field, see Barnard and de Vries, 'The "Social Market Economy"', p 53 et seq.

[82] Andry, *Social Europe*, masterfully tracing the history of *social* Europe.

[83] Ibid, p 27.

[84] Eg the Next Generation EU post-pandemic recovery instrument 2020, the Pillar of Social Rights in 2017, the Social Investment Package and Youth Guarantee in 2013, the Employment and Youth Employment Package in 2012, the Europe 2020 Strategy in 2010, the European Semester in 2010, the Open Method of Cooperation in 2000, and the Social Dialogue.

[85] Rodrik, *The Globalization Paradox*, p 214.

[86] MA Panascì, 'Unravelling Next Generation EU as a Transformative Moment: From Market Integration to Redistribution' (2024) 61 (1) *Common Market Law Review* 13.

[87] Stiglitz, *The Euro*, eg p 322 and 330.

[88] For the Eurozone: Savevska, 'Centralization of Rule-Making', p 454, 456.

[89] Scharpf, 'The Asymmetry of European Integration', p 232.

[90] G Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press, 1990).

[91] Höpner and Schäfer, 'Embeddedness and Regional Integration', p 436.

[92] PA Hall and D Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001); M Höpner and A Schäfer, 'Integration among Unequals: How the Heterogeneity of European Varieties of Capitalism Shapes the Social and Democratic Potential of the EU', *MPIfG Discussion Paper*, No 12/5 (Max Planck Institute for the Study of Societies, 2012).

[93] S Weatherill, 'Several Internal Markets' (2017) 36 *Yearbook of European Law* 125.

[94] An overview of the GDP in European countries is available at: www.statista.com/statistics/685925/gdp-of-european-countries/ (accessed 9 October 2025).

[95] Stiglitz, *The Euro*, p 93.

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level, comparable to that at the national level.[96] This means real political integration and a transfer of competencies not only in fiscal and economic policy but also in establishing a real '*Social* European Union'.[97] By contrast, all existing measures and methods to coordinate social and economic policy cannot substitute for political integration and the transfer of competencies to the EU level. To effectively counterbalance the negative effects of the liberalisation process, genuine market-correcting or -complementing measures must be *redistributive in nature and embedded within a coherent system that is socio-economically balanced*. This is necessary because the heterogenous welfare states at the national level,[98] once their national markets were liberalised, are either in systemic competition with each other (ie 'regulatory competition') or open to foreign nationals without, however, 'reciprocity of rights and obligations'[99] (ie 'most favoured (or favourable) option'). With respect to 'regulatory competition' between EU Member States, differences in tax systems serve as an example. Another illustration is that of (lower) labour standards and labour costs. Both trigger what is known as a 'race to the bottom'.[100] By comparison, the 'most favoured (or favourable) option' has its roots in the attractiveness of jobs, education, social security, and health-care systems that are better paid, more easily accessible, or that provide more generous support and services than the system of one's home country. A prominent, albeit politically sensitive example is 'that Austrian taxpayers should pay for the education of German medical students who fail to qualify under numerus-clausus requirements at home',[101] as is the (qualified labour) 'brain drain' from East to West[102]—which leads to the so-called hollowing out of the economy in some Central and Eastern European countries.

In a nutshell, the various (national) systems within the EU underlying the liberalisation process are neither coherent nor reciprocal. For this reason, convergence and coordination in the social policy context do not suffice to complement the liberalisation process. Rather, they provide fertile ground for competition between the Member States, which culminates in 'regulatory competition' and the 'most favoured (or favourable) option'.

Moreover, even if one agreed to integrate politically, what was true for economic integration similarly applies to social integration: economic integration and the elimination of tariffs and trade barriers more generally were implemented gradually, with transition periods and complex provisions for 'old' and 'new' restrictions to free movement in the EEC Treaty.[103] Therefore, if political integration were pursued to strike the socio-economic balance desperately needed, Treaty change and discussions about a (detailed) 'step plan'—including transition periods—would be pivotal to initiate a process towards a genuine 'Social European Union'. This 'step plan' would establish how to not only converge but also unify the divergent systems of national welfare states as well as their divergent levels of welfare services.[104] Such an undertaking would presuppose political will,[105] something that has largely been lacking since the 1950s among EU Member States, despite the fact, as Barnard and de Vries note, 'that there are also political voices calling for a reinforced social Europe'.[106] Nevertheless,

[96] C Offe, 'The European Model of "Social" Capitalism: Can It Survive European Integration?' (2003) 11 (4) *Journal of Political Philosophy* 437, p 447 et seq.

[97] While Article 3(3) TEU refers to the concept of a 'social market economy', I prefer characterising the EU as a 'Social Market Union' to reflect its unique nature as a supranational, multilevel governance system and polity.

[98] Esping-Andersen, *The Three Worlds of Welfare*.

[99] Scharpf, 'The Asymmetry of European Integration', p 222.

[100] S Feenstra, 'How Can the Viking/Laval Conundrum Be Resolved? Balancing the Economic and the Social: One Bed for Two Dreams?' in F Vandenbroucke et al (eds), *A European Social Union after the Crisis* (Cambridge University Press, 2017), p 309, 314; Stiglitz, *The Euro*, p 260; Offe, 'The European Model of "Social" Capitalism', p 458.

[101] Scharpf, 'The Asymmetry of European Integration', p 222; Velyvyte, *Judicial Authority in EU Internal Market Law*.

[102] D Kukovec, 'The Origins of the Crisis of Common Values of the European Union' in T Capeta et al (eds), *The Changing European Union: A Critical View on the Role of Law and the Courts* (Hart Publishing, 2024), p 161, 166 et seq, 170 et seq.

[103] Schütze, '"Integration-through-Law"', p 166.

[104] Höpner and Schäfer, 'Embeddedness and Regional Integration', p 436.

[105] Barnard and de Vries, 'The "Social Market Economy"', p 48, 55 et seq.

[106] Ibid, p 56 referring to the French President Emanuele Macron.

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what holds true in the context of the Economic and Monetary Union similarly applies to the European Union and the internal market as a whole, namely, that 'the existing limited social provisions adopted by the EU and the new policy initiative[s] … are nothing more than "high hopes and limited realization"'.[107]

Finally, as noted by AG Emiliou in his Opinion on Denmark's action for annulment of the Minimum Wages Directive, 'the authors of the Treaties have aimed, on the one hand, to promote cohesion and convergence and, on the other hand, to build a Union which has regard of the diversity of national systems and the key role of social partners, two objectives which are not always easy to reconcile'.[108] I would go further and contend that if we advocate deeper (economic) integration, real social and, therefore, political integration are indispensable. In fact, 'acknowledging diversity' of national systems while striving for deeper economic integration is, from an economics perspective, irreconcilable since a consequence of deeper (economic) integration would be the constant growth of the socio-economic imbalance if social integration were to continue to lag behind. In other words, if we want to deepen integration, we need to catch up with social integration. All efforts to converge and coordinate the different welfare systems—while acknowledging their diversity—can only be preparatory steps for deeper social integration, provided the actual (political) will for deeper integration exists. By comparison, current endeavours, however, are not genuinely market-correcting in nature and, therefore, cannot embed the EU market(s).

It is beyond the scope of this article to assess whether real social integration of such scale and therefore political integration is indeed feasible.[109] It would, by nature, be an incremental process, probably lasting over decades. Against this backdrop, Feenstra articulates the crux of the issue, claiming that 'despite their interdependence, the relation between the economic and social dimension [*sic*] of the European integration process constitutes more a legacy of unresolved tensions than a happy marriage'.[110]

B. *The Court's methodology: policymaking role and neo-liberal bias in free movement interpretation*

Secondly, Van den Brink et al. argue that the Court has set genuine limits to free movement law, with *Keck*[111] being the most prominent example.[112] They also contend that the asymmetry theory and particularly later writings on it heavily rely on outdated case law,[113] and therefore provide an 'outdated portrayal of the field'.[114] According to the authors, arrangements with market-correcting capacity in principle fall outside the scope of the Treaty provisions on free movement.[115]

[107] Savevska, 'Centralization of Rule-Making', p 457. See also Stiglitz, *The Euro*, p 330 et seq.

[108] Opinion of Advocate General Emiliou in *Denmark v Parliament and Council (Salaires minimaux adéquats)*, C-19/23, ECLI:EU:C:2025:11, para 2.

[109] Eg W Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism*, 2nd ed (Verso, 2017) and Streeck, *Taking Back Control*, who doubts feasibility and desirability of deep political integration; Höpner and Schäfer, 'Embeddedness and Regional Integration', p 9, argue that the necessary 'convergence is not likely to occur any time soon'. In favour of political integration and centralism while pleading for *real democracy* at the EU institutional level and *less technocracy*: J Habermas, 'Demokratie oder Kapitalismus? Vom Elend der nationalstaatlichen Fragmentierung in einer kapitalistisch integrierten Weltgesellschaft' (2013) 58 (5) *Blätter für deutsche und internationale Politik* 59, p 65 et seq; J Habermas, *The Lure of Technocracy* (Polity Press, 2015).

[110] Feenstra, 'How Can the Viking/Laval Conundrum Be Resolved?', p 314.

[111] *Keck and Mithouard*, C-267/91, ECLI:EU:C:1993:905.

[112] Van den Brink et al, 'Revisiting the Asymmetry Thesis', p 218.

[113] Ie the landmark cases in *Dassonville*, C-8/74, ECLI:EU:C:1974:82 and *Cassis de Dijon*, C-120/78, ECLI:EU:C:1979:42.

[114] Van den Brink et al, 'Revisiting the Asymmetry Thesis', p 218.

[115] Ibid.

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1. The Court's doctrine

I disagree with the above claim. As argued elsewhere,[116] the doctrinal trend after *Keck* and particularly since the decision in *Italian Trailers*[117] is as broad as the test initially developed in *Dassonville* in 1974 to identify measures having an effect equivalent to quantitative restrictions ('MEEQR') and thus a breach of free movement of goods. This has not changed, not even, as argued by the authors,[118] with the ECJ landmark decision in *Keck* and the exemption of certain selling arrangements from the scope of Article 34 TFEU. Most developments and dynamics,[119] as noted by Zglinski, have 'moved towards the question as to whether the measure *can be justified* and *is proportionate*—and, among the two, especially the latter' (emphasis added).[120] Relatedly, the market jurisprudence continues to be characterised by an 'asymmetry between rule and exception'.[121] From a doctrinal perspective, this has been labelled a 'restriction approach',[122] 'breach/justification methodology',[123] or a 'restriction-justification approach',[124] which confers far-reaching 'supervisory power over national law'.[125]

Furthermore, while *Keck* would have provided the Court with an opportunity to exempt indistinctly applicable rules with no protectionist effect from the scope of Article 34 TFEU, the Court did not seize it. Instead, it maintained a broad interpretation of what constitutes a restriction of the free movement (of goods) rules through the market access test. In *Italian Trailers* the Court introduced a test that is 'old wine in new bottles', as it resembles, in its expansiveness, the breadth of the test developed in *Dassonville*. Moreover, even in cases where the *Keck* exemption could have been applied (such as those concerning indistinctly applicable pricing measures), the Court's rulings have been inconsistent, at times[126] deviating from its established doctrine in *Keck*. As a result, the expansive capture of almost any measure[127] remains as pressing today as it was before *Keck*. Market preference and a broad notion of what constitutes a restriction on the free movement rules are, therefore, deeply enshrined in the adjudicative methodology of the Court, so that, as a general rule, a national measure is most often declared (in)compatible with EU law only at the justification-proportionality level. The focus of controversy and assessment, that is, the 'centre of attention', as Zglinski calls it,[128] is undoubtedly at the latter level of the assessment. This holds true for all four of the free movement rules,[129] as there is a convergent approach in the interpretation of all freedoms.[130]

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[116] The arguments in this and subsequent sections (ie II.B.1 and II.B.2) have been developed in B Zelger, 'A Recap 30 Years after Keck: Unbridgeable Differences or Recurring Tales in EU Market Jurisprudence?' (2024) 27(3) *ZEuS* 305, p 307 et seq.

[117] *Commission v Italy*, C-110/05, ECLI:EU:C:2009:66 (*Italian Trailers*).

[118] Van den Brink et al, 'Revisiting the Asymmetry Thesis', p 218.

[119] J Zglinski, 'The Internal Market as Dynamic Process: Five Scenarios for the Future' in J Adams-Prassl et al (eds), *The Internal Market Ideal: Essays in Honour of Stephen Wetherill* (Oxford University Press, 2024), p 77.

[120] J Zglinski, 'The Rise of Deference: The Margin of Appreciation and Decentralized Judicial Review in EU Free Movement Law' (2018) 55 (5) *Common Market Law Review* 1341, p 1343.

[121] Scharpf, 'The Asymmetry of European Integration', p 219.

[122] Barnard, 'Restricting Restrictions'.

[123] S Reynolds, 'Explaining the Constitutional Drivers behind a Perceived Judicial Preference for Free Movement over Fundamental Rights' (2016) 53 (3) *Common Market Law Review* 643.

[124] Zelger, 'A Recap 30 Years after Keck', p 308.

[125] Barnard, 'Restricting Restrictions', p 593 referring to S Enchelmaier and P Oliver, 'Free Movement of Goods: Recent Developments in the Case Law' (2007) 44 (3) *Common Market Law Review* 649, p 674.

[126] While *Keck* was applied in *Ker-Optika*, C-108/09, ECLI:EU:C:2010:725 and *Etablissements Fr. Colruyt*, C-221/15, ECLI:EU:C:2016:704, it wasn't in *The Scotch Whisky Association*, C-331/14, ECLI:EU:C:2015:845 and *Deutsche Parkinson Vereinigung*, C-148/15, ECLI:EU:C:2016:776.

[127] For many: Opinion of Advocate General Kokott in *Mickelsson and Roos*, C-142/05, ECLI:EU:C:2006:782, point 42; C Barnard, *The Substantive Law of the EU: The Four Freedoms*, 7th ed (Oxford University Press, 2022) p 28; T Kingreen, 'Art 34 AEUV' in C Callies and M Ruffert (eds), *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta*, 6th ed (Beck, 2022), para 67; D Grimm, 'The Democratic Cost of Constitutionalism: The European Case' (2015) 21 (4) *European Law Journal* 460, p 468; Scharpf, 'The Asymmetry of European Integration', p 217.

[128] Zglinski, 'The Rise of Deference', p 1343.

[129] D Grimm, *Europa ja—aber welches?* (Beck 2016), p 109.

[130] SK Schmidt, *The European Court of Justice and the Policy Process* (Oxford University Press, 2018), p 63 et seq.

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It is exactly this phenomenon that is crucial for and characterises Scharpf's asymmetry theory from a legal (doctrinal) perspective. In his own words, a corollary of the doctrine, be it *Dassonville* or *Italian Trailers*, is that '[e]ven in policy areas where no powers have been delegated to the EU, it is for the Court, rather than for national constitutions and national democratic processes, to determine the legitimate purposes of national policy. And it is for the Court, rather than for national governments and legislatures, to judge the effectiveness and necessity of measures employed in the pursuit of allowable policy purposes'.[131] While the Court's doctrine has not been uncontroversial from a legal doctrinal perspective,[132] it arguably also lacks deference to the system of shared competencies in a multilevel polity such as the European Union[133] (which makes it vulnerable from the perspectives of political and legal theory[134]).

Furthermore, while there might be fewer cases of free movement litigation,[135] the Court's broad reading of what constitutes a restriction of the free movement rules still holds true. A decrease in litigation does not alter the doctrine of the Court from a substantive perspective, as the Member States' leeway to adopt market-correcting policies remains constrained by the Court's methodology—assuming, as is (or should be) generally the case, that Member States comply with EU law. As a consequence, a genuine balance between market-creating and market-correcting policies cannot be struck in the context of the EU, as the Member States are limited by the ECJ jurisprudence in adopting market-complementing policy measures to counteract the negative effects of the liberalisation process, while the EU's capacity to act accordingly is limited by its lack of competencies. As Scharpf observed, '[in certain] areas, such as capital taxation or industrial relations, … the Court's protection of economic liberties prevents action at the national level, but … neither liberalizing nor regulatory legislation could be adopted at the European level'.[136] The same is true for the EU housing crisis: While the EU lacks competence to (re)act and combat the crisis, Member States are prevented from adopting measures that keep housing affordable for the local population, as any restriction would likely qualify as (at least indirectly) discriminatory, restricting the free movement of capital within the Union.[137] The current status quo in this regard could be eliminated only if the EU were equipped with the competencies and tools to act accordingly or, alternatively, if the Member States were granted some leeway to adopt the necessary measures.

Moreover, the case law approach—where priority is, quite possibly inadvertently, given to the market while other legitimate interests are considered only at the justification-proportionality stage—extends even to cases where the four freedoms clash with fundamental rights.[138] The conferral of primary law status to the EU Charter of Fundamental Rights[139] has not changed much in this regard

[131] Scharpf, 'The Asymmetry of European Integration', p 219.

[132] For many: Velyvyte, *Judicial Authority in EU Internal Market Law*; Velyvyte, 'Competence Creep'; S Enchelmaier, 'Free Movement of Goods: Evolution and Intelligent Design in the Foundations of the European Union' in P Craig and G De Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 2021), p 546; J Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 (2) *Common Market Law Review* 437, p 447 et seq; Barnard, 'Restricting Restrictions'. The test is described as 'intuitive' (Spaventa, 'From Gebhard to Carpenter', p 758) and 'based on an "inherently nebulous" idea' (Barnard, 'Restricting Restrictions', p 593).

[133] Velyvyte, *Judicial Authority in EU Internal Market Law*; Velyvyte, 'Competence Creep'.

[134] Scharpf, *Governing in Europe*, p 56 et seq.

[135] Van den Brink et al, 'Revisiting the Asymmetry Thesis', p 220.

[136] Scharpf, 'The Asymmetry of European Integration', p 225.

[137] B Zelger and JM Abt, 'Wohnungsnot in Europa—*what now*? Eine Analyse der unionsrechtlichen (Un)Möglichkeiten als Beitrag zur Lösung der Krise' (2024) 59 (2) *EuR (Europarecht)* 136; Offe illustrates the lack of effective means on the side of the Member States to react to labour market issues in the context of the EMU: Offe, 'The European Model of "Social" Capitalism', p 459 et seq.

[138] S Garben, 'Competence Creep Revisited' (2019) 57 (2) *Journal of Common Market Studies* 205, p 216; Reynolds, 'Explaining the Constitutional Drivers'.

[139] Art 6(1) TEU.

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either.[140] As Reynolds puts it, fundamental (social) rights are only 'a "defence" to a prima facie restriction of free movement under the current adjudicative framework'.[141] As a result, even fundamental rights 'are placed at a clear structural disadvantage as a consequence of the Court's adjudicative methodology'.[142] The 'Laval Quartet'[143] of ECJ decisions serves as the most prominent example in this regard.[144]

Finally, the Court 'continuously seeks to broaden rights as a way of fostering integration' and thereby arguably 'neglects the necessary reciprocity between benefits and duties'[145] within a coherent welfare system. In the context of national social security, health, and education services, this approach becomes particularly problematic given that those economic freedoms are, one way or another, linked to the free movement of persons (ie services, workers, or, even more broadly, EU citizenship). This goes back to the 'most favoured (or favourable) option' phenomenon discussed earlier (Section II.A), which has its roots in the non-discrimination and liberalising approach of the Court across all four fundamental freedoms. Schmidt highlights the core issue, noting that

> [t]he extensive interpretation of the free movement and of union citizenship would lead to universal access to different kinds of national benefits … The transfer of the non-restriction approach from goods to other areas, thus, poses a dilemma.[146]

2. The Court's neo-liberal interpretation

Another phenomenon arguably adds to the Court's doctrine and goes beyond the *structural* analysis captured by the asymmetry theory:[147] a neo-liberal bias underpinning the interpretation of the free movement rules. The case law and, particularly, the methodology employed by the Court are, in my view, characterised by a preference for the market, which further fosters the socio-economic imbalance enshrined in the Treaties. Therefore, the existing structural asymmetry (favouring negative integration and thus market-making or -creating means) is accompanied and enhanced by an interpretation of the law that further echoes neo-liberal ideology. Such interpretation places free movement and 'the market' in an advantageous position by means of the Court's adjudicative methodology.[148]

Inherent in the Court's extensive approach to what constitutes a restriction or an obstacle to free movement is 'an economic rights construction'.[149] Market liberalisation (according to its initial understanding[150]) aims to secure genuine market access, not, however, to warrant personal

[140] T Horvat, 'Constitutional Rights of Corporations in the United States and the European Union: A Comparative Political Economy Perspective' (2025) *German Law Journal* 1 (https://doi.org/10.1017/glj.2025.18) arguing that over the past 50 years 'the CJEU has similarly [to the US Supreme Court] interpreted the "freedom to conduct a business" to weaken labor protections and different market regulations' (p 1); Reynolds, 'Explaining the Constitutional Drivers'; Schiek, 'Towards More Resilience for a Social EU'.

[141] Reynolds, 'Explaining the Constitutional Drivers', p 647.

[142] Ibid, p 644; similarly, Menéndez, 'The Existential Crisis of the European Union', p 482.

[143] J Louis, 'Constructing the Viking and Laval Cases as a Major Defeat for Social Europe: A Contextual and Processual Analysis' (2023) 2 (4) *European Law Open* 724, p 741.

[144] *Viking*, C-438/05, ECLI:EU:C:2007:772; *Laval un Partneri*, C-341/05, ECLI:EU:C:2007:809; *Rüffert*, C-346/06, ECLI:EU:C:2008:189; and *Commission v Luxembourg*, C-319/06, ECLI:EU:C:2008:350.

[145] Schmidt, *The European Court of Justice and the Policy Process*, p 167.

[146] Ibid, p 90.

[147] Höpner et al, 'Asymmetry Resolved?', p 3.

[148] Reynolds, 'Explaining the Constitutional Drivers', p 644.

[149] JB Cruz, *Between Competition and Free Movement—The Economic Constitutional Law of the European Community* (Hart Publishing, 2002), p 118; similarly, Menéndez, 'The Existential Crisis of the European Union', p 454, 477 et seq; Scharpf, 'The Asymmetry of European Integration', p 221.

[150] Tracing the evolvement from the 'initial understanding' to the 'new understanding' of the four economic freedoms: Menéndez, 'The Existential Crisis of the European Union', p 471 et seq.

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economic freedom (ie a neo-liberal feature).[151] While the dividing line between the two interpretations is arguably thin, it should not be blurred[152] but should instead clearly distinguish between 'warranted interpretations of such provisions (as prohibiting unjustified restrictions of trade: ie an anti-protectionist construction) and unwarranted interpretations thereof (*as prohibiting all hindrance of individual commercial freedom, ie an economic rights construction*)' (emphasis added).[153]

The economic rights construction in the case law is particularly evident in the ECJ's reasoning in *Italian Trailers*.[154] As is well known, the case concerned a ban in the Italian Highway Code on using trailers together with a *motoveicolo* (motorcycle); and while the prohibition on use applied indistinctly to Italian and foreign trailers alike, the Court established a breach of the free movement rules, as access to the Italian market was restricted. The ECJ argued that the prohibition affected market access, as it exercised a 'considerable influence on the behaviour of consumers'. This led to a diminished interest among consumers in buying such a trailer, thereby reducing or even eliminating demand in the respective relevant market concerned.[155] For this reason, the effect of the relevant provision in Italian law was considered 'to hinder access to the Italian market for trailers' subject to objective justification in order to comply with EU law.[156]

The Court's consideration of consumer behaviour in assessing whether market access is restricted reflects a neo-liberal interpretation of the free movement rules—namely the construction of these rules as (individual) economic rights. In other words, the extent to which national laws influence consumer market behaviour or their (purchasing) preferences should be irrelevant when assessing the impact of a measure on genuine market *access* from an economics perspective. Any difference in regulatory frameworks might affect the marketing of a specific product. However, indistinctly applicable rules that apply to foreign and domestic products alike are usually not protectionist, in either purpose or effect, and, therefore, not of market-access-restrictive nature. This is even more so as product requirements are subject to the principle of mutual recognition in the EU anyway. Market regulation (affecting sales while echoing policy choices) and market access are two different things. Furthermore, as long as no fully harmonised regulatory system exists within the whole of the EU, this heterogeneity is ultimately part of the reality that accompanies the liberalisation process, but which it does not seek to abolish (at least not entirely) because the EU (market) integration process comprises different Member States with heterogeneous welfare states and, in parts, regulatory frameworks in different policy areas. That is unless, of course, one pursues the idea of an 'EU federal state', such an undertaking is, for various reasons, controversial even in academic circles.[157]

Menéndez illustrated the shift to a 'neoliberal reading' of the four economic freedoms in the history of EU market integration and jurisprudence.[158] He takes this finding to the normative level, arguing that the 'disembedding of economic freedoms contributed to accelerating the neoliberal turn in the whole of the European Union'.[159] In doing so, the socio-economic imbalance and the disembedding of markets were arguably enhanced. Simultaneously, the ECJ jurisprudence perfectly echoes and captures the trend in economic history, where embedded liberalism was replaced by a more neo-liberal agenda between the late 1970s and the mid-1980s and the decades that followed.[160] Nevertheless,

[151] Ibid.

[152] Cruz, *Between Competition and Free Movement*, p 118; arguing similarly, Grimm, 'The Democratic Cost of Constitutionalism', p 467.

[153] Cruz, *Between Competition and Free Movement*, p 118.

[154] I argued similarly in B Zelger, 'Policy Maker und gerichtlicher Interventionismus—Die Rolle des EuGH im Mehrebenensystem' (2025) *EuR (Europarecht) Beiheft 1: Europa 2024-2029* 201.

[155] *Commission v Italy*, ECLI:EU:C:2009:66, paras 56–57.

[156] Ibid, para 58.

[157] See the contributions in note 109.

[158] Menéndez, 'The Existential Crisis of the European Union', p 471 et seq.

[159] Ibid, p 482.

[160] Ibid, p 478.

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the EU internal market 'is a political construct'.[161] It is, therefore, not necessarily to be understood in a neo-liberal sense. Moreover, the internal market as a legal concept[162] is flexible,[163] as echoed in the different interpretations of the four economic freedoms that have existed in different periods of time (ie an embedded understanding of the free movement rules as opposed to a neo-liberal reading).

So, what could or should the Court do, particularly since striking the socio-economic balance by means of Treaty change seems unrealistic?

III. The Court: its role in sustaining the integration project

Rather than perpetuating the paradigm of 'integration through law', which has historically driven deeper economic liberalisation, the Court should adopt a new self-understanding, one which I describe as 'integration *sustained* by law'. 'Integration *sustained* by law' means using law not as a force for further liberalisation but as a stabilising mechanism that preserves integration while preventing a deepening of the systemic socio-economic imbalance.

In practice, the most obvious step would be, as suggested elsewhere,[164] to abandon the neo-liberal interpretation of the free movement rules and to distinguish between measures and rules that prohibit genuine market access and those that concern market regulation only.[165] By way of example, from an economics perspective, a ban on an entire distribution channel (eg online sales) is directly related to market access, as are rules linked to price setting (eg minimum, maximum, or price caps). Banning a distribution channel may disadvantage foreign products by reducing existing opportunities to access a specific market, thereby potentially putting them at a disadvantage compared to competing domestic products. The assessment of a detrimental (ie protectionist) effect on market access for foreign products depends on how many other distribution channels are still available—say nine instead of 10 or, alternatively, one instead of two. A reduction from 10 to nine is arguably less of an obstacle to market access than a reduction from two to one.

However, a ban on advertising, on driving a motorcycle during weekends, or a ban on using a certain product (eg a trailer) is not related to market access in the sense described earlier. Moreover, such rules apply indistinctly and affect non-foreign and foreign goods alike. For example, both foreign and domestic goods reach their final destination—say Trento, Italy—with the same delay as a result of the weekend transport ban, which requires all lorries to pause over the weekend, for instance at the German border in Kufstein, Austria. There is, therefore, no detrimental effect on foreign goods at all. As argued in Section II.B.2, while some regulation might have an indirect effect on market access more generally (as does all national regulation, tax systems, etc), it is usually not protectionist (in either purpose or effect) and, therefore, not of genuine market-access-restrictive nature. Rather, such rules govern different policy areas, that is, health (restricting advertising for tobacco products), the environment (the ban on using the motorway during weekends), and road safety (the ban on using trailers with a motorcycle), and those areas may very well be governed differently by the different Member States. Limiting the applicability of the free movement provisions to genuine market access (abandoning the neo-liberal individual economic right approach) would, therefore, at the very least,

[161] Weatherill, 'Several Internal Markets', p 125.

[162] Weatherill, *The Internal Market as a Legal Concept*.

[163] G Davies, 'Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-Constitutionalisation' (2018) 24 (6) *European Law Journal* 358, p 368.

[164] Some of the arguments in this section have been articulated in Zelger, 'A Recap 30 Years after Keck'; and Zelger, 'Policy Maker und gerichtlicher Interventionismus'.

[165] Differentiating between market access and regulation already in 2000: JHH Weiler, 'Epilogue: Towards a Common Law of International Trade' in JHH Weiler (ed), *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade* (Oxford University Press, 2001) p 201, 228.

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exempt indistinctly applicable rules (that do not qualify as product requirements and thus automatically fall within the scope of a MEEQR owing to the principle of mutual recognition) from the scope of the free movement provisions.

Interestingly, in all ECJ decisions since *Italian Trailers*, rules were justified and exempted (or at least declared justifiable[166]) at the justification-proportionality level of the assessment when they (i) applied indistinctly to both foreign and domestic goods, (ii) were measured against EU primary law, and (iii) qualified as market regulation rather than relating to genuine market access.[167] To exempt them from the scope of the free movement provisions would, therefore, be possible for the ECJ. Such an approach would arguably refine its overly broad methodology, make it more nuanced in determining what hampers genuine market access, and build upon long-standing doctrines and principles developed by the Court. Moreover, doing so would also return some leeway to the Member States and curtail the policymaking role of the Court, which stems from its methodological approach and the fact that it most often declares a measure compatible with EU law at the restriction-justification level.

With respect to measures that fall within the 'most favoured (or favourable) option' phenomenon described in Section II.A, it is more challenging to develop a doctrinal approach that builds upon the long-standing doctrines and principles developed by the Court. This is because measures in this context would easily be regarded as discriminatory. For example (as seen in Section II.B.2), to restore affordability of housing for the local population in urban areas and areas that attract capital respectively, Member States are prevented from adopting possible measures that could ease the tense situation in housing markets (by curtailing demand) and restore affordability for the local population. Any restriction would likely qualify as (at least indirectly) discriminatory, restricting the free movement of capital within the Union[168] (while the EU simultaneously lacks competence to act accordingly). One option would be an exemption at the justification-proportionality level of the assessment. This would take account of the status quo of specific markets in a member state. This resembles the quotas as regards access to Austrian or Belgian universities for German or French students that were considered justified by the Court owing to public health considerations.[169] Quotas could also be a means to combat the housing issues prevalent in many capitals and regions across the EU. However, such an approach would not change the Court's involvement as a 'policymaker', let alone its doctrine and methodological approach.

Therefore, another nascent and cautious suggestion would be to draw from Karl Polanyi and distinguish between different markets (ie land, labour, and capital), taking into account the political economy of a state as well as its prevalent socio-economic circumstances. For example, EU competition law has long developed different categories and doctrines in the context of different market realities (that have, in the course of EU competition law history, undergone change and development[170]). Therefore, it includes insights from the economics discipline in its assessment of potential anti-competitive or abusive measures. Furthermore, as the long-standing debates about the goals of competition law and policy clearly show, there are debates about taking account of non-economic

[166] *Commission v Austria*, C-28/09, ECLI:EU:C:2011:854 as well as *Commission v Austria*, C-320/03, ECLI:EU:C:2005:684.

[167] See the chart in Zelger, 'A Recap 30 Years after Keck', s III.3: *Commission v Italy*, ECLI:EU:C:2009:66 (note 117 above); *Mickelsson and Roos*, C-142/05, ECLI:EU:C:2009:336; *Ker-Optika*, C-108/09, ECLI:EU:C:2010:725; *ANETT*, C-456/10, ECLI:EU:C:2012:241.

[168] Zelger and Abt, 'Wohnungsnot in Europa—*what now*?'.

[169] *Commission v Austria*, C-147/03, ECLI:EU:C:2005:427; *Bressol and Others*, C-73/08, ECLI:EU:C:2010:181.

[170] Take for examples the approaches in the law to resale price maintenance or tying.

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concerns,[171] the need to consider the idiosyncrasies of labour markets,[172] or to take account of sustainability concerns[173] in competition law assessment. However, such controversy and broader discussion of the socio-economic implications of the case law are largely absent in the context of the EU liberalisation process, even though free movement complements the Treaty competition provisions in establishing the internal market. Rather, market jurisprudence is characterised by a certain inflexibility with respect to doctrinal developments of the Court. This is neither to contest that the internal market is a dynamic process[174] nor to claim that there has been no shaping of the internal market through legislative, harmonising measures[175] or developments in internal market law. There have, of course, been such developments. However, the basic methodological approach of the ECJ has remained unchanged. Borrowed from Zglinski, '[g]one are the days when the key issue in disputes before the ECJ was whether a national measure fell *within the scope* of free movement law' (emphasis added);[176] most of the dynamism in recent decades has occurred at the justification-proportionality level.

My intuition regarding this discrepancy is that the 'neo-liberal consensus' among economists (briefly summarised in Section I), which has prevailed in the economics debate over decades,[177] could help explain why market jurisprudence in the context of the four economic freedoms has been less influenced by economic controversy and critical reflections.[178] Although there are indeed suggestions in the literature on narrowing the scope of the free movement rules in areas where the 'most favoured (or favourable) option' phenomenon occurs,[179] another potential starting point for the development of future doctrinal categories could be to draw from Polanyi, acknowledge the idiosyncrasies of certain markets, and develop legal doctrines based on the premise that land, labour, and capital markets might not necessarily be suitable for subjugation to (neo-liberal) market logic. While legal certainty concerns immediately come to mind when reading such a proposal, the adequacy of decisional outcomes is equally important. In that sense, legal certainty and adequacy of judicial decisions 'should be seen as "communicating vessels" working as "reciprocal correctives" that contribute to an overall consistent but also flexible framework capable of adapting to (societal) changes gradually happening over time'.[180] Arguably, EU competition law has already undergone such a process once, as it abandoned its overly legalistic approach to interpreting the Treaty competition provisions at the beginning of the 1990s and in the decades that followed.[181] Moreover, while the 'more economic approach'[182] is

[171] For many: K Stylianou and M Iacovides, 'The Goals of EU Competition Law: A Comprehensive Empirical Investigation' (2022) 42 (4) *Legal Studies* 620; I Lianos, 'Minding Competition in Complex Adaptive Social Systems: The Sociological Approach to Competition Law' (2024) *UCL Research Paper Series*, No 19/2024.

[172] For many: J Broulík, 'Harm to Workers in EU Competition Law: A Sufficient Condition for Intervention' (2025) 26 (3) *German Law Journal* 493; G Monti, 'Collective Labour Agreements and EU Competition Law: Five Reconfigurations' (2021) 17 (3) *European Competition Journal* 714.

[173] For many: B Zelger, 'Environmental and Sustainability Aspects in EU Competition Law—Towards a "More Economic & Ecological Approach" under Article 101 TFEU?' in J Bäumler et al (eds), *European Yearbook of International Economic Law 2022* (Springer, 2023), p 411 with a comprehensive overview to the relevant body of literature.

[174] Zglinski, 'The Internal Market as Dynamic Process', p 77.

[175] Van den Brink et al, 'Revisiting the Asymmetry Thesis', p 221 et seq; LD Spieker, 'Was Grimm Wrong? Putting the Over-Constitutionalization of EU Law to the Test' (2025) 26 (3) *German Law Journal* 416, p 434 et seq.

[176] Zglinski, 'The Rise of Deference', p 1342.

[177] Rodrik, *The Globalization Paradox*, p 56, 61 et seq.

[178] I detail this argument in B Zelger, 'Divergent Developments in EU Competition and Internal Market Jurisprudence in Shaping the EU (Constitutional) Economic Order?', *forthcoming*.

[179] Velyvyte, *Judicial Authority in EU Internal Market Law*, ch 5.

[180] B Zelger, *Restrictions of EU Competition Law in the Digital Age* (Springer, 2023), p 32.

[181] Ibid, p 82. First in the context of Art 101 TFEU and only later—arguably in 2005—for Art 102 TFEU.

[182] Arguably being the manifestation of the 'neo-liberal consensus' in the field of competition law and policy, as it basically implemented and transferred the ideas of the Chicago School of economic thought as regards US antitrust law in the EU context.

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currently subject to heavy controversy and debate,[183] competition law and policy have proven to be amenable and responsive[184] to broader societal and economic developments.[185]

Finally, and on a more general note, law needs to be interpreted in its given context, which might require a change and refinement in the approach over time. In that sense, the interpretation of law is, or should be, context-specific and should pay deference to the circumstances of a given period.[186] As long as institutional reform, Treaty change, and, therefore, the establishment of a real political union remain wishful thinking, it is for the Court to allow striking a balance between market-making and market-correcting policies. As long as the latter are not fully embraced and adopted at the EU level, they need to be adopted in the context of the divergent political economies of the Member States. Doing so would require a new, nuanced approach of the Court. It should be based on the understanding that, from an economics perspective, a 'one-size-fits-all' philosophy[187] and doctrinal approach (in the law) to all markets or areas does not do justice to market realities and ultimately leaves people and/or regions behind.[188] Moreover, deciding most of the cases at the justification-proportionality level raises the question of whether the Court—or national courts, if the ultimate decision is left to them—is the appropriate forum to adjudicate sensitive questions of (socio-)economic policy.[189] As emphasised, my tentative suggestions build on Polanyi's insights and the premise that certain markets might require a differentiated approach. Besides, while market jurisprudence has been instrumental in fostering EU (economic) integration in its early days, the EU today is different from the European Communities of the 1970s when the Court laid the groundwork for its long-standing doctrines. Accordingly, it seems legitimate to question the adequacy of the methodology developed by the Court more than 50 years ago in light of today's EU needs.[190]

Ultimately, the role of the Court seems as important today as it was at the very beginning of EU integration. However, while pushing for liberalisation was crucial in the early stages of the integration process, it is now necessary to abandon the neo-liberal reading of the four freedoms that has gradually taken hold, and instead develop an interpretation that does justice to the political economies of the Member States—one that permits, where necessary, regional solutions and allows Member States to introduce accompanying market-correcting and market-complementing measures, tailored to their respective socio-economic realities, to offset the negative effects of liberalisation. The EU integration process can only endure if the paradigm of 'integration through law', geared towards (neo-liberal) economic integration, is replaced by a new self-understanding of the Court—one that requires it to be more nuanced and deferential in its approach to Europe's diverse political economies, thereby ensuring that 'integration is *sustained* by law'. As argued in Section II, this is necessary at least as long as political integration is not implemented at the EU level. Failing to do this risks worsening the crisis of neo-liberalism in action and further fuelling its purported symptom, namely the rise of populism. The status quo within the EU multilevel governance system is thus characterised by a stalemate that can best be described as follows: although the EU lacks sufficient competence to restore a genuine

[183]On the demise of the 'more economic approach' more generally: P Ibáñez Colomo, *The New EU Competition Law* (Hart Publishing, 2024), ch 2.

[184]S Makris, 'EU Competition Law as Responsive Law' (2021) 23 *Cambridge Yearbook of European Legal Studies* 228.

[185]The shift in paradigm in the context of competition enforcement was detailed by Ibáñez Colomo, *The New EU Competition Law*, p 272 and is arguably also echoed in the adoption of a bunch of digital laws shaping the digital economy: the Digital Markets Act, the Digital Services Act, the Data Act, the Data Governance Act, the AI-Act, etc.

[186]T Kingreen, 'Grundfreiheiten' in A von Bogdandy and J Bast (eds), *Wirtschaftsverfassung im Binnenmarkt*, 2nd ed (Springer, 2009), p 710, 717.

[187]C Joerges, 'Integration through Law and the Crisis of Law in Europe's Emergency' in D Chalmers et al (eds), *The End of the Eurocrats' Dream—Adjusting to European Diversity* (Cambridge University Press, 2016), p 317.

[188]Collier, *Left Behind*, criticises orthodox economics and their uniform (p 13), the 'place-blind' (p 9) universal policies applied across the board that don't do justice to real-life circumstances of people but increase the gap between poor and rich (p 13).

[189]Scharpf, *Governing in Europe*, p 55 and 63 et seq.

[190]Kingreen, 'Grundfreiheiten', p 710 et seq, 717.

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socio-economic balance, the Member States must not act, as they run the risk of interfering with the case law of the Court.

IV. Conclusion

The genuine need for socio-economic equilibrium in the context of any political and economic system has been expressed in distinct disciplines. A political economy characterised by (a) market(s) embedded in the broader context of society is, therefore, crucial for a political entity to function and its economy to prosper. The transfer of (social) competencies would be one option to strike this balance in the EU. However, political integration not only presupposes political will but does not appear likely any time soon, in light of the political circumstances and developments of our time. Given that structural and competence reforms are not realistic, it is up to the ECJ to step in and act accordingly. Nevertheless, the Court alone cannot further push (economic) integration but must leave room for policy measures that currently not only seem impossible at the EU level but are, at the same time, inhibited at the Member States level too, as they risk interfering with the economic freedoms as currently interpreted by the ECJ. However, if the Court were to act differently, it could arguably contribute to abating the storm of anti-EU resentment echoed in the growing strength of populist movements and thereby help create an environment that could ultimately make political integration feasible, if that is politically aspired to. To secure the European Union's future success, the era of 'integration through law' should thus be replaced by a new paradigm that is understood as 'integration *sustained* by law'. To dissolve the stalemate, we should resist a single step forward if it risks sending us five steps back. Sometimes holding our breath and recalibrating is precisely what allows us to take five steps forward.

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