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Author: Tezcan, Narin
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PART III

Legal Constraints Flowing from the Constitutional Foundations of the Union

INTRODUCTION

Having examined the legal constraints flowing from EU-Turkey Association Law and EU enlargement law in the first two parts of this thesis, this final part proceeds to examine the legal constraints on Member States when drafting an Accession Agreement flowing from the constitutional foundations of the Union legal order. The case law of the Court established that there are rules in primary law that are more difficult to derogate from,[769] implying those rules are more important than others. This suggests that those rules, which according to the Court constitute the "very foundations" of the legal order,[770] could act as constraint on the primary law making function of Member States.

In addition to the case law of the Court, it is possible to identify those foundations by examining the original Treaties, subsequent Treaty amendments, as well as academic literature on the issue. To enable a full understanding of Treaty provisions and recent case law, a brief account of the historical evolution of certain aspects of the system is required. In other words, a mere snapshot of recent case law and the current version of the Treaties might not be enough to tell the full story on how the legal order gradually gained a life (and a nucleus or core) of its own, managing to get out of the full grip of its Masters, namely the Member States of the Union.

It should be emphasized from the very start that the purpose of this part is not to identify those "very foundations" in their entirety, but simply to identify parts of those foundations, which would be breached by the proposed PSC on free movement of persons in Turkey's Negotiating Framework. Identifying those relevant parts would enable us to argue that they could act as constraint on Member States when drafting Turkey's Accession Agreement. Hence, while Chapter 6 elaborates on the idea of constitutional foundations of the Union that comprise a hard core that could even limit Member States' power to revise the Treaties, which is extrapolated from the Court's Opinions[771] and judgments,[772] Chapter 7 focuses on the compatibility of

769 *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, para. 304.

770 *Opinion 1/91 EEA*, para. 46; *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, para. 304.

771 *Opinion 1/91 EEA*; *Opinion 1/92 EEA*; *Opinion 1/09 of the Court of Justice*. See Vilaça and Piçarra, *Are there material limits to the revision of the Treaties on the European Union?*: 31-32.

the PSC with a central element of those very foundations of the Union constitutional order, namely the principle of non-discrimination on the basis of nationality, or in broader terms the principle of equality.

In short, Chapter 6 identifies the contours of the constitutional foundations of the Union as recognized by the Court and later acknowledged by the Member States. The substance of those "very foundations", as far as they relate to the PSC on free movement of persons, is arguably comprised of: the fundamental freedoms, Union citizenship and fundamental rights. Lastly, the Chapter discusses the possible application of those areas as constitutional constraints on Member States when drafting an Accession Agreement.

Chapter 7 focuses on the compatibility of the proposed PSC with, arguably the most important principle forming part of those "very foundations", which it would breach, i.e. the principle of equality. To demonstrate how this principle underpins and defines the edifice of the Union legal order, firstly, its traditional role in the development of the internal market is briefly reviewed. Secondly, it is demonstrated that equality is an inalienable part of the concept of Union citizenship. Moreover, it is an integral part of the CFR as well as an important general principle of EU law. As central as the equality of Member State nationals is for the functioning of the EU legal order, another indispensable aspect of the principle that is analysed in Chapter 7 is the equality of Member States, which has been constitutionalized recently in Article 4(2) TEU. It is argued that a constitutional principle as central to the Union legal order as the principle of equality would preclude Member States from including a PSC on free movement of persons that would blatantly breach it.

772 See *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*; Kokott and Sobotta, "The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?."

6 Constitutional Foundations of the Union as a Constraint on Primary Law Making

6.1 INTRODUCTION

To demonstrate the existence of constitutional constraints in the Union legal order, Chapter 6 begins by examining the areas identified as the foundations of the Community in the original Treaties. Subsequently, it provides a detailed analysis the first EEA Opinion, which inspired the literature on the existence of a "core *acquis*",[773] an "untouchable hard core",[774] or a "fundamental patrimony",[775] which constitutes an "irreducible minimum"[776] and thereby constrains Member States as primary law makers. While the first EEA Opinion laid down the basis of the thesis on the existence of implied material limits to changing the Treaties, it has not remained an exception. Few recent pronouncements and opinions of the Court have further confirmed the existence of those "very foundations". Their implications for the inclusion of a PSC on free movement of persons in a future Accession Agreement are spelled out in this section.

Once the judicial acknowledgment of the existence of the "very foundations" of the Union is laid down, the next section tries to shed light on the substance of those "very foundations". Opinions and cases of the Court that are examined in the above-mentioned section so as to establish the existence of the "very foundations" of the legal order, are re-examined with a view to establishing their substance. It is argued that the first component that constitutes part of those very foundations is the four freedoms; free movement of persons in particular. The second component is the concept of Union citizenship, which the Court proclaimed as "destined to be *the fundamental status* of nationals of the Member States".[777] It is argued that the concept has entrenched the significance of the right to free movement of persons to such an extent that now it constitutes a consolidated constitutional right. It has

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773 S. Weatherill, "Safeguarding the Acquis Communautaire," in *The European Union after Amsterdam: A Legal Analysis*, ed. T. Heukels, N. Blokker, and M. Brus (The Hague: Kluwer Law International, 1998), 167.

774 C. C. Gialdino, "Some Reflections on the Acquis Communautaire," *Common Market Law Review* 32, no. 5 (1995): 1119.

775 Vilaça and Piçarra, *Are there material limits to the revision of the Treaties on the European Union?*: 38.

776 Weatherill, "Safeguarding the Acquis Communautaire," 168.

777 Emphasis added. *Case C-184/99 Grzelczyk*, para. 31.

moved up in the hierarchy of norms and become stronger. For our purposes, this translates into more constraining power on Member States.

The third component identified as part of the very foundations of the Union in this study is fundamental rights. Fundamental rights were initially introduced by the Court into the Union legal order as general principles of law. Recent case law confirms that some of those principles belong to the "very foundations" of the Union legal order.[778] Arguably, these principles today go beyond constituting "implicit" constraints or implicit material limits on Member States as primary law makers, as they have not only been entrenched by the case law of the Court over the years, but they have also been accorded a prominent place in the Treaties for more than two decades. Now, they are enshrined in Article 2 TEU, which follows the very first provision announcing the establishment of the European Union (Article 1 TEU), and explicitly proclaims and enumerates the values on which the Union is founded. A brief overview of the process of entrenchment of those principles and their rise in the constitutional hierarchy of norms will shed light not only on the development trajectory of those principles but also on the constitutionalisation or "autonomization" of the EU legal order *vis-à-vis* its founders, i.e. the Member States of the Union. It will demonstrate that they constitute another source of constraint on introducing a PSC on free movement of persons in a future Accession Treaty.

6.2 Existence of constitutional constraints: Judicial acknowledgment of the "very foundations" of the Union

While it is the Court's first EEA Opinion that introduced the concept "very foundations" of the Union, it is worth pointing out that the EEC Treaty also allowed us to identify what it considered to constitute the "Foundations of the Community". Part II of the EEC Treaty carried that title,[779] highlighting the importance of the four freedoms in the construction of the common market. Even though the EEC Treaty laid down quite clearly what the foundations of the integration project were, it was Article 8a (later 14 EC) introduced by the Single European Act[780] that described best the relationship between the com-

778 *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*.

779 Part II titled "Foundations of the Union" contained four Titles. Title I dealt with the establishment of "Free Movement of Goods" with chapters on "The Customs Union" and the "Elimination of Quantitative Restriction between Member States". Title II was on "Agriculture" and Title III on the "Free Movement of Persons, Services and Capital". Chapter I of Title III was on "Workers", Chapter 2 on the "Right of Establishment", Chapter 3 on "Services", and Chapter 4 on "Capital". Lastly, followed "Transport" under Title IV, another common policy essential for the establishment and proper functioning of the common market.

780 OJ L 169/1, 29.06.1987.

mon market[781] and the four freedoms. It provided that "[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty." Obviously, the internal market was not confined to the four freedoms, yet they constituted the essence, the very core of the project.

As important as the freedoms were, in the early years of the EEC, it was not possible to deduce by looking at Treaty provisions alone the existence of an area or principles of Community law of such paramount importance that they could act as implicit material constraint on Treaty change. The idea emerged only after the Court's first EEA Opinion, which found the proposed judicial supervision system envisaged under the EEA Agreement to be incompatible with "the very foundations of the Community". Hence, Member States had no choice but to make the necessary revisions to bring the EEA Agreement in line with EU law.

For a clearer understanding of the Court's Opinion, it is worth briefly outlining the main characteristics of the EEA Agreement beforehand. The purpose of the agreement was to create a European Economic Area covering the territories of the Member States and those of the EFTA countries. Its Article 1 provided that its aim was "to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and respect for the same rules, with a view to creating a homogeneous European Economic Area". The legal regime that were to apply in relations between the EEA States would cover the free movement of goods, persons, services, capital, and competition. The rules applicable in those areas would be those laid down in corresponding provisions of the EEC

781 The common market was to be also called the single market or the internal market from that time on. For our purposes there is no need to distinguish between these concepts. However, it is worth noting that the term "internal market" is seen to be less extensive than the term "common market". See L. W. Gormley, "The internal market: history and evolution," in *Regulating the Internal Market*, ed. N. Nic Shuibhne (Cheltenham, UK; Northampton, MA, USA: Edward Elgar, 2006), 14. Gormley notes that this distinction has not always been understood by the Court. See, for example; *Case C-376/98 Germany v Parliament and Council*, [2000] ECR I-8419; for comments see, L. W. Gormley, "Competition and free movement: Is the internal market the same as a common market?," *European Business Law Review* 13, no. 6 (2002): 517-22; P. J. G. Kapteyn and P. VerLoren van Themaat, *Introduction to the Law of the European Communities*, ed. Laurence W. Gormley, 3 ed. (London: Kluwer Law International, 1998); According to Barnard, since the realization of the single market is dependent on policy action in ever-wider range of fields, including competition and social policy, "it is likely that the terms common, single, and internal market are largely synonymous". C. Barnard, *Substantive Law of the EU: The Four Freedoms*, 3 ed. (Oxford: OUP, 2010). 12; K. Mortelmans, "The Common Market, the Internal Market and the Single Market, What's in a Market?," *Common Market Law Review* 35(1998): 107. D. Hanf, "Legal Concept and Meaning of the Internal Market," in *The EU Internal Market in Comparative Perspective: Economic, Political and Legal Analyses*, ed. J. Pelkmans, D. Hanf, and M. Chang (Brussels: P.I.E Peter Lang, 2008), 78-81.

and ECSC Treaties as well as secondary legislation. Moreover, the Contracting Parties were to extend to the EEA future Community law in those fields.[782]

The aim of homogeneity was to be ensured through the use of provisions identically worded with corresponding provisions in Community law and through the establishment of an EEA Court, to which a Court of First Instance would be attached. The EEA Court would have jurisdiction to settle disputes between the Contracting Parties. Article 6 of the agreement provided that its provisions and corresponding provisions of Community secondary law were to be interpreted in conformity with the case law of the ECJ which were given *prior* to the date of the signature of the agreement. Moreover, under Article 104(1) of the agreement all the Courts, EEA and EC/EU Courts were to pay due account to the principles laid down in decisions delivered by the other courts so as to ensure as uniform as possible an interpretation of the EEA agreement.[783]

6.2.1 Opinions 1/91 and 1/92

In its first EEA Opinion, the Court of Justice identified several aspects of the EEA Agreement that would create problems in terms of its compatibility with the Union legal order. To mention the most important ones, firstly, it would not be possible to achieve homogeneity of the rules of law throughout the EEA because the aims and contexts of the agreements were different, which meant that even identical provisions could be interpreted differently. The fact that Article 6 of the EEA Agreement provided a duty of conform interpretation only with the case law of the Court delivered prior to the signature of the agreement was also problematic. As the case law evolved over time, the possibility of divergent interpretation would emerge.[784] Moreover, the interpretation of the expression "Contracting Parties" by the EEA Court also raised issues,[785]

782 *Opinion 1/91 EEA*, paras. 3-4; See annotation by H. G. Schermers, "Opinion 1/91 of the Court of Justice, 14 December 199; Opinion 1/92 of the Court of Justice, 10 April 1992," *Common Market Law Review* (1992): 991-99; B. Brandtner, "The 'Drama' of the EEA: Comments on Opinions 1/91 and 1/92," *European Journal of International Law* 3(1992): 300-19.

783 *Opinion 1/91 EEA*, paras. 5-9.

784 Ibid., paras. 13-29.

785 The problem with the interpretation of the expression of "Contracting Parties" was that as far as the Community and its Member States were concerned it could mean various things depending on the issue and respective competences of the Community and Member States. It could mean the Community and Member States; the Community; or Member States. In other words, interpreting the term "Contracting Parties" would require the EEA Court to rule on the respective competences of the Community and Member States. This was likely to negatively affect the allocation of responsibilities defined in the Treaties as well as the autonomy of the Community legal order, which was to be ensured by the Court of Justice. See, ibid., paras. 30-35.

as well as the effect of the case law of the EEA Court on the interpretation of Community law.

To examine the latter problem in more detail, the provisions of the EEA Agreement as well as measures adopted by its institutions would become an integral part of the Community legal order once it entered into force. The decisions of the EEA Court would be binding on the Community institutions, including the Court of Justice. According to the Court, an international agreement providing for such a system of courts is in principle compatible with Community law.[786] "However, the agreement at issue takes over *an essential part of the rules* – including the rules of secondary legislation – which govern economic and trading relations within the Community and which constitute, for the most part, *fundamental provisions of the Community legal order*."[787] The problem with Article 6 of the agreement was mentioned above. In addition, the agreement's objective to ensure homogeneity of the law throughout the EEA would not only determine the interpretation of the rules of the EEA Agreement, but would also affect the interpretation of the corresponding rules of Community law. Thus, the Court concluded: "in so far as it *conditions the future interpretation of the Community rules on free movement* and competition [,] the machinery of courts provided for in the agreement *conflicts* with Article 164 of the EEC Treaty [now Article 19(1) TEU] and, more generally *with the very foundations of the Community*".[788]

As to the question whether an amendment of Article 238 [now Article 217 TFEU] would permit the establishment of such a judicial system, the Court unequivocally replied that "Article 238 of the EEC Treaty does not provide any basis for setting up a system of courts which conflicts with Article 164 of the EEC Treaty and, more generally, with *the very foundations of the Community*".[789] Consequently, an amendment of that article could not cure the incompatibility with Community law of the judicial system envisaged by the EEA Agreement.

The judicial system envisaged by the EEA Agreement threatened the autonomy of the legal order. Under Article 19(1) TEU (ex Article 164 of the EEC Treaty) it has always been the Court of Justice that is to "ensure that in the interpretation and application of the Treaties the law is observed". Thus, conditioning the future interpretation of the Treaties by the Court to the interpretation provided by another court in the context of another agreement was incompatible with Article 19(1) TEU and endangered the autonomy of the Union legal order. What increased the gravity of the incompatibility was the fact that the area that would be affected or conditioned by the interpretation of the EEA Court, that is the rules on free movement, constituted an "essential" or "fundamental" part of the legal order, arguably part of its core or part of

786 Ibid., paras. 37-40.
787 Emphasis added. Ibid., para. 41.
788 Emphasis added. Ibid., para. 46.
789 Emphasis added. Ibid., para. 71.

its "very foundations".[790] Incompatibility of such gravity according to the Court could not be cured by a simple amendment of the provision providing a legal basis for the conclusion of association agreements with third countries and international organizations.

The Court's first Opinion resulted in the following changes: firstly, the idea of creating an EEA Court was dropped. An EFTA court was to be set up in its place with the competence to rule on the acts of the Surveillance Authority as well as disputes between EFTA states. In other words, there would be no common judicial organ but two separate courts: the EFTA court for EFTA countries, and the Court of Justice for the EEC. Secondly, a new Article 111 was introduced to ensure that only the Court of Justice would be empowered to interpret the provisions of the EEA Agreement that were identical in substance to provisions existing under Community law. However, since EFTA countries were far from being willing to subject themselves to future rulings of the Court of Justice, a new mechanism was introduced via Article 105, whereby it would be a political organ, the Joint Committee that would introduce the Court's new judgments into the EFTA legal order, keeping in mind the aim to preserve the homogenous interpretation of the EEA Agreement. Similarly, in cases of conflict between the rulings of the two courts, it was again the Joint Committee that would be responsible to solve the conflict (Article 111). Moreover, an "Agreed Minute" specified that the decisions of the Joint Committee would not affect the rulings of the Court of Justice in any way.[791]

The revised version of the EEA Agreement was sent to the Court once again, to check whether the new renegotiated provisions were compatible with the EEC Treaty. The Court's second Opinion was positive, however not unconditional. The Court's interpretation of the new provisions clearly underlined the paramount importance of one single principle, i.e. that of the autonomy of the Community legal order. When asked to evaluate the mechanism introduced under Article 105, the Court unequivocally declared that " [i]f that article were to be interpreted as empowering the Joint Committee to disregard the binding nature of decisions of the Court of Justice within the Community legal order, the vesting of such a power in the Joint Committee would adversely affect the autonomy of the Community legal order, respect for which must be assured by the Court pursuant to Article 164 of the EEC Treaty".[792] According to the Court, the "Agreed Minute" stipulating that decisions of the Joint Committee were not to affect the case law of the Court was an essential safeguard, which was indispensable for preserving the autonomy of the Community legal order.[793]

790 Ibid., paras. 41 and 46.
791 See, *Opinion 1/92 EEA*; Schermers, "Opinion 1/91 of the Court of Justice, 14 December 199; Opinion 1/92 of the Court of Justice, 10 April 1992," 999-1000.
792 *Opinion 1/92 EEA*, para. 22.
793 Ibid., 23-24.

As to the newly introduced Article 111(3), which provided the possibility to request the Court's interpretation of provisions of the EEA Agreement containing identical rules to the EEC Treaty, the Court ruled that "an international agreement concluded by the Community may confer new powers on the Court, *provided that in so doing it does not change the nature of the function of the Court as conceived in the EEC Treaty*".[794] The Court found that the function concerned was not changed in the context of Article 111, since the wording of the provision empowering the Court to "give a ruling" ("*se prononcer*" in French) was clear on the point that the Court's interpretation would be binding on both the Contracting Parties and the Joint Committee. The fact that it was the Joint Committee that had to settle the dispute at the end did not change that fact.[795] In short, if the revised version of the EEA Agreement were to be interpreted in line with the Opinion of the Court, taking due account of pitfalls that could endanger the autonomy of the Community legal order, it could be considered as compatible with the EEC Treaty.

6.2.2 Opinion 1/09

A recent example confirming that some essential characteristics of the system are untouchable or worthy of protection is the Court's Opinion on the establishment of a unified patent litigation system (called European and Community Patents Court) situated outside the institutional and judicial framework of the EU.[796] As in its EEA Opinions, the Court found that such a system "would alter *the essential character of the powers* which the Treaties confer on the institutions of the European Union and on the Member States and which are *indispensable to the preservation of the very nature of European Union law*."[797] The system of courts established by the proposed agreement would have an exclusive jurisdiction to hear actions brought in the field of Community patent and would have to interpret and apply EU law in that field, which would deprive national courts of their power to interpret and apply EU law as well as from referring preliminary rulings to the Court of Justice. Moreover, to increase the gravity of the problem, if the Patents Court were to breach EU law, there

794 Emphasis added. Ibid., para. 32.

795 Ibid., paras. 33-35.

796 For a more detailed discussion of the Opinion, see C. Baudenbacher, "The EFTA Court remains the only Non-EU-Member States Court – Observations on Opinion 1/09," *European Law Reporter*, no. 7-8 (2011): 236-42; M. C. A. Kant, "A Specialized Patent Court for Europe?," *Nederlands Internationaal Privaatrecht*, no. 2 (2012): 193-201; H. M. H. Speyart, "Is er nu eindelijk een Unieoctrooi-pardon: "Europees octrooi met einheidswerking"," *Nederlands Tijdschrift voor Europees Recht*, no. 4 (2013): 135-44; F. Dehousse, "The Unified Court on Patents: The New Oxymoron of European Law," in *Egmont Papers 60* (Brussels: Academia Press, October 2013).

797 Emphasis added. *Opinion 1/09 of the Court of Justice*, para. 89.

would be no remedy against that breach. The Patents Court could not be subject to infringement proceedings or sued for financial liability. All these shortcomings led the Court to establish that draft agreement on a unified patent litigations system would be incompatible with the Treaties.[798]

What was central in this Opinion as well as those on the EEA Agreement is the principle of the autonomy of the legal order. The system of courts envisaged under both international agreements would interfere with the Court's monopoly over interpreting EU law. Yet, the second system would also damage the system of cooperation established between the national courts and the Court of Justice. It would change the fundamental qualities of the system, its essential dynamics, its "very nature" or "very foundations", which are inextricably linked and which rely on the cooperation between the national courts and the Court of Justice. Accordingly, both agreements were found to be incompatible with the Treaties.

6.2.3 *Kadi I*

To begin with providing a brief factual background to the *Kadi* case, which also contained important statements regarding the "very foundations" of Union law, it concerned Mr. Kadi, whose name appeared in Resolutions issued by the Sanctions Committee of the UN Security Council. He was listed as one of the persons associated with Usama bin Laden and Al-Qaeda. The Resolutions provided for the freezing of assets of organizations and people mentioned in their lists. In order to implement the Security Council Resolutions, Member States of the Union adopted few Common Positions, which were further implemented by Council Regulations providing for the freezing of assets of each entity or individual identified in the above-mentioned lists.[799]

As one of the individuals affected by the provisions of these Regulations, Mr. Kadi applied to the General Court for the annulment of those Regulations

798 Ibid., paras. 88-89.

799 Mr. Kadi's name was "added to the list in Annex I to Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation No 337/2000 (OJ 2001 L 67, p. 1), by Commission Regulation (EC) No 2062/2001 of 19 October 2001 amending, for the third time, Regulation No 467/2001 (OJ 2001 L 277, p. 25). He was subsequently listed in Annex I to Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Regulation No 467/2001 (OJ 2002 L 139, p. 9)." See, *Joined Cases C-584/10 P, C-593/10 P and C-595/10 P Kadi II*, judgment of 18 July 2013, n.y.r., para. 17.

as far as they concerned him for infringing his fundamental rights.[800] While Mr. Kadi's application in front of the General Court was not successful,[801] his appeal to the Court of Justice was. The Court set aside the judgment of the General Court, and annulled Regulation No 881/2002 in so far as it concerned Mr. Kadi.

What is important for our purposes here is the fact that the Court reiterated the existence of "the very foundations of the Community legal order" that may not be challenged under any circumstances.[802] While most of the commentaries written on the case focus on the relationship it spells out between the international and Union legal orders, for our purposes its significance is twofold: firstly, the Court acknowledged the existence of the "very foundations" of the Union in a ruling it delivered in a Grand Chamber formation, and secondly, it revealed some clues as to what constitutes part of those "very foundations". The latter aspect of the judgment is dealt with in section 6.3.3.1 below.

To provide a full citation of the Court statement regarding the untouchable core of Union law, it ruled that primary law provisions, here Article 307 EC and 297 EC, could not be interpreted as authorizing "any derogation from the principles of liberty, democracy, and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as *a foundation of the Union*".[803] The Court also categorically stated that Article 307 EC "may in no circumstances permit any challenge to *the principles that form part of the very foundations of the Community legal order*…"[804] As to the content and principles which form part of those "very foundations", they are discussed in the following section examining the "Substance of constitutional constraints".

6.2.4 Implications

The most important pronouncement of the Court in its first EEA Opinion for our purposes is to be found in the last two paragraphs (paragraphs 71-72), in which the Court declared not only that Article 238 of the EEC Treaty [now 217 TFEU] did not provide any legal basis for setting up a system of courts that would violate Article 164 of the EEC Treaty [now Article 19(1) TFEU] and

800 To be more specific, "[o]n 18 December 2001 Mr Kadi brought before the General Court an action seeking the annulment, initially, of Regulations No 467/2001 and No 2062/2001, then of Regulation No 881/2002, in so far as those regulations concerned him. The grounds for annulment were, respectively, infringement of the right to be heard, the right to respect for property and the principle of proportionality, and also of the right to effective judicial review." See, ibid., para. 18.

801 See *T-315/01 Kadi v Council and Commission*, [2005] ECR II-3649.

802 *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, para. 304.

803 Emphasis added. Ibid., para. 303.

804 Emphasis added. Ibid., para. 304.

the very foundations of the Community, but further added that even revising Article 238 would not cure the incompatibility in question. This conclusion was interpreted to imply the priority or hierarchical superiority of Article 164 EEC over Article 238 EEC, and more generally, the priority of provisions constituting "the very foundations of the Community" over those that did not.[805]

The three Opinions of the Court highlighted the paramount importance of the principle of the autonomy of the Community legal order, which could be maintained only and only if Article 164 EEC was fully respected.[806] The Opinions confirm Pescatore's findings in his seminal essay of 1981, which identified some parts of the *acquis* as "*acquis* fondamental",[807] that is a "fundamental patrimony",[808] "a "fundamental" *acquis* of constitutional rank"[809] or "core *acquis*".[810] According to Pescatore, the fundamental *acquis* was an *acquis* of a superior rank ("de rang supérieur"[811]), which contained the most crucial elements of the Community legal order, that is "essential elements, requirements effecting the very foundations of the Community, and rules which guarantee the unity, identity and existence of the whole European project".[812] This *acquis*, he argued, constituted "an untouchable hard core, that is an absolute substantial restriction implicitly imposed on any substantial revision".[813]

After the EEA Opinions, other scholars followed in agreement that there had to be aspects of the legal order, which were so central to its nature that if removed, the legal order would be deprived of its essential characteristics. Hence, those aspects had to be protected at all cost. Weatherill called the latter the "core *acquis*"[814] or "irreducible minimum of Community law";[815] Delcourt called it "a basic *acquis*, constituting what one might call the "genetic inheritance" of the European Union"[816] or "supra-constitutional *acquis*";[817]

805 C. Delcourt, "The Acquis Communautaire: Has the Concept had its Day?," *Common Market Law Review* 38, no. 4 (2001): 843.
806 Article 164 EEC provided as follows: "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed."
807 P. Pescatore, "Aspects judiciaries de l'acquis communautaire," *Revue Trimestrielle de Droit Européen* (1981): 620.
808 Vilaça and Piçarra, *Are there material limits to the revision of the Treaties on the European Union?*: 38.
809 Weatherill, "Safeguarding the Acquis Communautaire," 167.
810 Gialdino, "Some Reflections on the Acquis Communautaire," 1109.
811 Pescatore, "Aspects judiciaries de l'acquis communautaire," 620.
812 "des choses essentielles, des exigences qui touchent aux fondements même de la Communauté, des règles dont la méconnaissance mettrait en cause l'unité, l'identité et jusqu'à l'existence même de l'entreprise européennee", ibid.; cited in Delcourt, "The Acquis Communautaire: Has the Concept had its Day?," 841.
813 Gialdino, "Some Reflections on the Acquis Communautaire," 1109.
814 Weatherill, "Safeguarding the Acquis Communautaire," 167.
815 Ibid., 168.
816 Delcourt, "The Acquis Communautaire: Has the Concept had its Day?," 835.
817 Ibid., 844.

Cruz Vilaça and Piçarra qualified it as a ""hard core" of the Treaty" or the "foundations of the Community", which in relation to the power of revision posses a "supra-constitutional value";[818] for Gialdino "those are the principles and values whose immutability constitutes the safeguard of the legality of the order itself."[819]

The most important implication of the existence of such an unamendable core or fundamental *acquis* for our purposes is its function as a constraint on Member States as primary law makers. If Member States are constrained by that core or by the principles constituting part of that core within the Treaty revision procedure, in which they arguably posses the widest room for manoeuvre, they will be all the more constrained within Article 49 TEU procedure, which as illustrated in the previous part, empowers Member States to make only the necessary "adjustments" linked directly to the accession of a new Member State.

While many scholars[820] agreed that in its EEA Opinions the Court construed the existence of "unamendable principles in the Community legal order"[821] or "legal principles which even Treaty amendment cannot violate",[822] it was more difficult to agree on which principles exactly these were except for the principles, which could be derived from Article 164 EEC, such as the principle of the rule of law, and the principle of the autonomy of the legal order. Similarly, Vilaça and Piçarra acknowledge that the main difficulties in identifying the material content of the implied limits to Treaty revision suggested by the Court relate "to the absence of objective legal criteria capable of defining such limits with certainty".[823] However, as difficult as it might be to identify those limits precisely, by making use of clues contained in the Treaties and above all in the case law of the Court, it is argued that it is possible to approxiamtely draw those limits as far as they could have implications for the inclusion of a PSC on free movement of persons in a future Accession Agreement.

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818 Vilaça and Piçarra, *Are there material limits to the revision of the Treaties on the European Union?*: 31-32.

819 Gialdino, "Some Reflections on the Acquis Communautaire," 1112-13.

820 T. C. Hartley, "The European Court and the EEA," *International and Comparative Law Quarterly* 41, no. 4 (1992): 846-48; R. Bernhardt, "The Sources of Community Law: the 'constitution' of the Community," in *Thirty years of community law* (Brussels-Luxembourg: 1981), 71.

821 Gialdino, "Some Reflections on the Acquis Communautaire," 1109.

822 J. H. H. Weiler, "Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration," *Journal of Common Market Studies* 31, no. 4 (1993): 418, footnote 2.

823 Vilaça and Piçarra, *Are there material limits to the revision of the Treaties on the European Union?*: 49.

6.3 Substance of constitutional constraints

The Treaties have never explicitly indicated the existence of hierarchy among their provisions; had they done so, we would be talking about "explicit" and not "implicit" limits to Treaty change. It is possible to talk about "implicit" limits to Treaty change or implicit hierarchy among the provisions of a Treaty or a constitution, when firstly, it is possible to infer that hierarchy from the wording, function and place in the Treaty of some provisions compared to others. Obviously, provisions that are placed at the very beginning of a Treaty or a constitution under the title "Principles" or "Foundations of the Community" will have priority or more weight compared to provisions that are placed under the title "Transitional Provisions" placed towards the end of a Treaty or a constitution. Logically, provisions that enshrine ends will also have priority over those laying down means to achieve them, as the latter might be changed or discarded in a subsequent revision if deemed inadequate or inappropriate to achieve the desired ends. Hence while some provisions constitute part of the "*acquis* fondamental" in a legal order, it would be possible to qualify other provisions, as Pescatore did, as constituting "un droit plus périphérique de caractère contingent et transitoire".[824]

From the perspective of creating constraints, it makes a lot of a difference, if it is merely legal scholars or a constitutional court (or the supreme court of the land (or legal order)) that reads such a distinction into a constitution. While the former might effect the latter in the long run, until that takes place, as interesting or insightful as it might be, the academic discussion does not bind anyone. However, once a constitutional court gives a particular interpretation of a certain provision or a concept, the latter becomes binding on all actors operating within that legal system.[825] Hence, the power of authoritative interpretation vested in constitutional courts is of paramount importance.

As was briefly discussed in the introduction of this thesis, many constitutional courts have developed doctrines to protect what they consider to be the "core", the "essence" or "spirit" of their legal orders, based on the objectives, structure as well as the underlying rationale of the constitutional orders they had been created to uphold. They identify elements they believe imbue the construct with particular values, purpose and meaning and thereby hold it together. In their pursuit to safeguard the "core", or the "spirit" of their legal orders, each constitutional court has created its own terminology. While the Indian Constitutional Court is after protecting the "basic structure" of the Indian Constitution, the German Constitutional Court protects the "coherence"

824 P. Pescatore, "Commentaire de l'article 164 CEE," in *Commentaire article par article du traité instituant la CEE*, ed. V. Constantinesco, et al. (Paris: Economica, 1992), 960; cited in Delcourt, "The Acquis Communautaire: Has the Concept had its Day?," 843.

825 Fallon calls the latter phenomenon "mediated constitutional constraint". See, Fallon, "Constitutional Constraints," 1036.

and "inner unity" of the Basic Law, while the Court of Justice protects the "very foundations" of the Treaties as well as certain characteristics "which are indispensable to the preservation of the very nature of European Union law".[826]

When it comes to identifying those "very foundations", three clusters of provisions are of interest to us, as they are capable of precluding Member States from including a PSC on free movement of persons, which will violate all those provisions. It should be noted that the concepts of "fundamental *acquis*" and the "very foundations" of the Union are not used interchangeably here, as the scope of the former concept seems to be broader. The former concept also encompasses the latter. Or put differently, the "very foundations" of the Union as defined by the Court could be seen as the hard core or nucleus of the "fundamental *acquis*". It constitutes the top layer in the hierarchy of principles and norms, such as the principle of the autonomy of the Union legal order.

The three clusters of provisions identified as belonging to the "very foundations" of the Union, or at least to the "fundamental *acquis*" are: the fundamental freedoms, particularly those that concern free movement of persons; Union citizenship, which constitutionalised the right to free movement; and last but not least, fundamental rights. The leading authority in identifying those clusters of provisions as constituting the substance of constitutional constraints that are expected to play a role in precluding the inclusion of a PSC on free movement of persons is the case law of the Court interpreting those provisions, since in the Union legal order, it is the Court of Justice that is vested with the power to provide an authoritative interpretation of Treaty and secondary law.[827] In addition to the Court's case law, this section will make use of the interpretation methods used by the Court, such as looking at the wording, context, purpose of a provision, as well as relevant academic literature so as to support and strengthen the evidence provided by the case law and Opinions of the Court.

826 *Opinion 1/09 of the Court of Justice*, para. 89. See Jacobsohn, "An unconstitutional constitution? A comparative perspective."; Kommers, "German Constitutionalism: A Prolegomenon."; Goerlich, "Concept of Special Protection for Certain Elements and Principles of the Constitution Against Amendments and Article 79(3), Basic Law of Germany."; Albert, "Nonconstitutional Amendments."

827 See Articles 19(1) TEU and 267 TFEU.

6.3.1 Fundamental freedoms

Many consider the internal market as "the core of the EU's constitutional order".[828] A brief look at the EEC Treaty confirms this view, as the four freedoms were listed under the title "Foundations of the Community", and almost all of the objectives listed under Article 3 were related to the establishment of the common market and the four freedoms. What follows in this section is a brief overview aiming to illustrate how important the freedoms have been for the construction of the integration project, which for a long time has had the establishment of a common market at its core. Illustrating how significant the freedoms have been, and above all the free movement of persons, will enable us to argue that they belong to the "very foundations" of the Union, or are at least part of the "fundamental *acquis*", thereby precluding Member States from interfering with their functioning as they please.

For the purpose of illustrating their importance for the *acquis*, their place in the Treaties and the provisions regulating their functioning are analysed first. Next, follows a brief mention of secondary law promulgated to increase their effectiveness. Thirdly, comes the case law of the Court that has blown life into the freedoms by interpreting them in ever-broader terms, while keeping under strict control the instances of derogation. Lastly, follows academic commentary that confirms how crucial the freedoms have been in particular for the construction of the internal market and in general for European integration.

6.3.1.1 Fundamental freedoms in the Treaties

To achieve the objective of establishing a common market, the Treaty of Rome contained provisions to ensure the free movement of factors of production. In the current Treaty it is Articles 34-37 TFEU that prohibit quantitative restrictions on the free movement of goods. Articles 45-48 TFEU provide for the free movement of workers, Articles 49-55 TFEU for freedom of establishment, Articles 56-62 TFEU for free movement of services, and Articles 63-66 TFEU for free movement of capital. These Treaty provisions provide the skeleton for the functioning of the four freedoms, which are based on the principle of

828 D. Howarth and T. Sadeh, "The ever incomplete single market: differentiation and the evolving frontier of integration," *Journal of European Public Policy* 17, no. 7 (October 2010): 923. See also, G. De Búrca, "Differentiation Within the "Core"? The Case of the Internal Market," in *Constitutional Change in the EU: From Uniformity to Flexibility?*, ed. G. de Búrca and J. Scott (Oxford and Portland, Oregon: Hart Publishing, 2000), 133-71. N. Bernard, "Flexibility in the European Single Market," in *The Law of the Single European Market: Unpacking the Premises*, ed. C. Barnard and J. Scott (Oxford and Portland, Oregon: Hart Publishing, 2002), 101.

negative integration that is removing obstacles and barriers to trade,[829] whereas the flesh was added by passing directives and regulations, which provide for harmonization and creating a level-playing field.[830]

The importance of the freedoms has only increased in time, especially that of free movement of persons after the introduction of Union citizenship into the Treaties. Since the purpose of this study is to establish whether Member States would be constrained from including a PSC on free movement of persons, obviously, what is of primary concern to us is the development and place of free movement rules for natural persons.[831] The reason why they are examined together under the title "fundamental freedoms" with free movement of goods and capital is the simple fact that in the pre-1993 period the Treaties, case law of the Court, as well as scholarly work would often lump and study those freedoms together. Hence, when reading case law, and literature on the freedoms, it should be kept in mind that what is central to this study is the free movement of persons.

The principle of non-discrimination on the ground of nationality, which is analysed in more detail in Chapter 7 of this study, is what underpins the four freedoms at a minimum.[832] This means that a migrant or a product has to enjoy the same treatment as nationals or local products in a comparable situation. In the early line of case law on the freedoms, Community law would not interfere with national rules that were not directly or indirectly discriminatory. However, since the early 1990s the Court has moved beyond that discrimination model, fighting both discriminatory and non-discriminatory "obstacles" or "restrictions" to free movement.[833]

The fact that the fundamental freedoms have been strengthened by the Court's interpretation as well as by legislation laying down the rules facilitating the exercise of these freedoms should not lead one to think they are absolute. They are not and they have never been. The Treaty itself provides for grounds

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829 This approach can be illustrated by the Court's ruling in *Gaston Schul*, according to which the aim of the four freedoms is to eliminate "all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market". See *Case C 15/81 Gaston Schul*, [1982] ECR 1409, para. 33.

830 Barnard, *Substantive Law of the EU: The Four Freedoms*: 10-11.

831 While free movement of workers is straightforward, freedom of establishment and freedom to provide services are relevant as far as they relate to the free movement of natural persons. The free movement rules for the "self-sufficient", which were introduced via secondary law in the 1990s, are also covered in this sub-section.

832 See the Opinion of AG Mayras in *Case 33/74 Van Binsbergen*, [1974] ECR 1299.

833 For an example see, *Case C-49/89 Corsica Ferries*, [1989] ECR I-4441, para. 8. It reads as follows: "the articles of the EEC Treaty concerning the free movement of goods, persons, services and capital are fundamental Community provisions and any restriction, even minor, of that freedom is prohibited".; Barnard, *Substantive Law of the EU: The Four Freedoms*: 223-24; A. P. Van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing, 2003). 77.

under which derogating from the freedoms is justified.[834] As far as free movement of persons is concerned, Article 45(3) TFEU allows Member States to derogate from the free movement of workers on the grounds of public policy, public security and public health. The same grounds of derogation from the freedom of establishment and free movement of services are provided in Articles 52 and 62 TFEU respectively. Moreover, Article 45(4) TFEU excludes the application of the free movement of workers "to employment in the public sector". Similarly, Article 51(1) TFEU excludes the application of the freedom of establishment and freedom to provide services "to activities, which in that State are connected, even occasionally, with the exercise of official authority". The Court ensures that that all derogations from the freedoms are interpreted restrictively.[835]

6.3.1.2 Development of free movement of persons in secondary law

While the Treaty provisions mentioned above sketched the skeleton of the general derogations provided in the Treaty on free movement of persons, Directive 64/221/EEC[836] fleshed out those provisions. With the guidance of the Directive it would be more difficult for Member States to abuse or extend the scope of the derogation grounds provided in the Treaty. For instance, Article 2(2) of the Directive prohibited Member States from invoking the Treaty derogations to service economic ends. Article 3 specified that any measure taken on the grounds of public policy or public security were to be based exclusively on the personal conduct of the individual concerned. Moreover, previous convictions were not supposed to constitute in themselves grounds for taking such measures. Today Directive 64/221 has been replaced and the case law interpreting its provisions has been codified in Directive 2004/38/EC,[837] which is analysed more closely together with the concept of "Union citizenship".[838]

While derogations from the freedoms were interpreted restrictively, the free movement provisions were empowered by the case law of the Court,[839] so as to enable them catch more obstacles and barriers to free movement. Directives and regulations promulgated to that effect also helped to reach that

834 Articles 36, 45(3) and (4), 51 and 52 TFEU.

835 *Case 66/85 Lawrie-Blum*, [1986] ECR 2121, paras. 26-28; *Case 2/74 Reyners*, [1974] ECR 631, paras. 51-55.

836 Directive 64/221/EEC, note 450 above.

837 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158/77, 30.04.2004.

838 See sub-section 6.3.2.2.

839 See sub-section 6.3.1.2.1.

objective. As far as the development of free movement of persons is concerned, it is noteworthy that in the 1990's the Community adopted three directives conferring a general right of movement and residence on the retired, students, and those who are financially self-sufficient. This right was however subject to the requirement of having sufficient finances and medical insurance.[840]

These three directives signalled the beginning of the erosion of the link between economic activity and free movement. They instigated a shift in perception of migrants from economic agents or factors of production to individuals with rights. This shift was consolidated further and moved to a whole new level with the introduction of Union citizenship for all nationals of Member State by the Treaty of Maastricht. With the interpretation of the Court, Union citizens acquired a more general, freestanding right of free movement within the EU. Even though, as will be examined in more detail below in the part on EU citizenship, that right is still to be exercised in accordance with the limitations and conditions laid down in the Treaties and secondary legislation.

6.3.1.2.1 Case law on the freedoms

The Court interpreted the free movement provisions broadly. It extended the scope of Articles 34, 45 and 49 TFEU to cover indistinctly applicable measures to free movement. To counterbalance the extension of scope of the free movement provisions, it created additional grounds of derogation to the freedoms, the so-called mandatory requirements or imperative requirements in the general interest.[841] To provide a concrete example, in *Säger*, the Court ruled that Article 49 EC required "not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of *any restriction*, even if it applies without distinction to national providers of services and to those of other Member States, when it is *liable to prohibit or otherwise impede* the activities of the provider of services established in another Member State where he lawfully provides similar ser-

840 See Council Directive 90/364/EEC on the right of residence for persons of sufficient means, OJ L 180/29, 13.07.1990; Council Directive 90/365/EEC on the rights of residence for employees and self-employed persons who have ceased their occupational activity, OJ L 180/28, 13.07.1990; and Council Directive 90/366/EEC on the rights of residence for students, OJ L 180/30, 13.07.1990, repealed and replaced by Council Directive 93/96/EEC, OJ L 317/59, 18.12.1993.

841 S. O'Leary, "Free Movement of Persons and Services," in *Evolution of EU Law*, ed. P. Craig and G. De Búrca (Oxford: OUP, 2011), 508.

vices".[842] Such "restrictions" could however, be justified by imperative reasons relating to the public interest.[843]

In *Gebhard*, the Court provided one single test to be applied to national measures that were "liable to hinder or make less attractive the exercise of the fundamental freedoms".[844] Such measures had to fulfil four conditions to be allowed by the Court: "they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it".[845] In addition to the principle of proportionality,[846] derogations were to be read subject to the general principles of law, fundamental human rights[847] in particular. Overall, the conclusion to be drawn from the Court's case law is that the freedoms are to be interpreted broadly,[848] while derogations are to be interpreted restrictively.[849]

As to specific cases in which the Court underlined the centrality of the freedoms for the legal order, it is worth mentioning that in its early case law the Court referred to the freedoms as "fundamental objectives" of the Community.[850] Back in 1989 it stated that "the articles of the EEC Treaty concerning the free movement of goods, persons, services and capital are *fundamental Community provisions* and any restriction, even minor, of that freedom is prohibited".[851] In its later case law the Court qualified the four freedoms as "*fundamental freedoms*" both collectively and individually. To cite the most well-known cases, in *Kraus* and *Gebhard* the Court referred collectively to the four freedoms as fundamental freedoms,[852] whereas in *Heinonen* and *Schmidberger* it referred individually to the free movement of goods as a "fundamental

842 Emphasis added. *Case C-76/90 Säger*, [1991] ECR I-4221, para. 12; Subsequently, this test was also applied to free movement of workers, e.g. *Case C-464/02 Commission v Denmark*, [2005] ECR I-7929, para. 45; freedom of establishment, e.g. *Case C-55/94 Gebhard*, [1995] ECR I-4165, para. 37; and free movement of capital, e.g. *Case C-367/98 Commission v Portugal*, [2002] ECR I-4731, paras. 44-45.

843 *Case C-76/90 Säger*, para. 15.

844 *Case C-55/94 Gebhard*, para. 37.

845 Ibid.

846 *Case C-3/88 Commission v Italy* [1989] ECR I-4035, para. 15; *Case C-108/96 Mac Quen*, [2001] ECR I-837, para. 31; *Case C-100/01 Olazabal*, [2002] ECR I-10981, para. 43.

847 *Case C-260/89 ERT*, [1991] ECR I-2925, para. 43.

848 *Case 152/82 Forcheri*, [1983] ECR 2323, para. 11.

849 *Case 36/75 Rutili*, [1975] ECR 1219, para. 27; *Case 30/77 Bouchereau*, [1977] ECR 1999, para. 33; *Case C-114/97 Commission v Spain*, [1998] ECR I-6717, para. 34; *Case C-348/96 Donatella Calfa*, para. 23; *Case C-503/03 Commission v Spain*, [2006] ECR I-1097, para. 45.

850 *Case 36/74 Walrave and Koch*, [1974] ECR 1405, para. 18.

851 Emphasis added. *Case C-49/89 Corsica Ferries*, para. 8.

852 *Case C-19/92 Kraus*, [1993] ECR I-1663, para. 32; and *Case C-55/94 Gebhard*, para. 37; see also *Case C-390/99 Canal Satélite Digital v Spain*, [2002] ECR I-607, para. 28.

freedom",[853] and in *Bosman* and *Angonese* it referred to free movement of workers as a "fundamental freedom".[854] The Court ruled that free movement of goods constitutes "*one of the foundations* of the Community".[855] It even referred to the free movement of workers as a "*fundamental right*" long before the introduction of the concept of European Citizenship.[856] The cases named here are not exceptions but the rule that has been repeated in most of the cases concerning the four freedoms.

The importance of the free movement rules can also be deduced from the Court's first *EEA Opinion*. While the most sacrosanct principle worthy of protection identified in the Opinion was the autonomy of the legal order, which was to be ensured by safeguarding the exclusive jurisdiction of the Court over the Treaties, the Opinion also highlighted that the proposed system of courts was inconceivable because the EEA Agreement took over "*an essential part of the rules* – including the rules of secondary legislation – which govern economic and trading relations within the Community and which constitute, for the most part, *fundamental provisions of the Community legal order.*"[857] Moreover, the agreement's objective to ensure homogeneity of the law throughout the EEA would inevitably affect the interpretation of the corresponding rules of Community law. Hence, concluded the Court: "in so far as it *conditions the future interpretation of the Community rules on free movement* and competition [,] the machinery of courts provided for in the agreement *conflicts* with Article 164 of the EEC Treaty [now Article 19(1) TEU] and, more generally *with the very foundations of the Community*".[858] In short, the Court could not allow free movement rules, which constitute an essential and fundamental part of Community rules, to be affected by the new legal regime created under the proposed EEA Agreement.

6.3.1.3 Academic opinion

As to the academic literature emphasizing the importance of the four freedoms in the context of European integration, it abounds with references underlining their central role. The fact that "the four fundamental freedoms provided in

853 *Cases C-394/97 Sami Heinonen*, [1999] ECR I-3599, para. 38; and *Case C-112/00 Schmidberger*, [2003] ECR I-5659, paras. 62 and 74.

854 *Case C-415/93 Bosman*, [1995] ECR I-4291, para. 7; and *Case C-281/98 Angonese*, [2000] ECR I-4139, para. 35.

855 Emphasis added. *Case C-194/94 CIA Security v Signalson* [1996] ECR I-2201, para. 40; and *Case C-443/98 Unilever Italia v Central Food*, [2000] ECR I-7535, para. 40.

856 *Case 152/82 Forcheri*, para. 11; *Case 222/86 Heylens*, [1987] ECR 4097, para. 14; and the Opinion of AG Lenz in *Case C-415/93 Bosman*, para. 174; the Court also referred once to free movement of goods as 'a fundamental right'. See *Case C-228/98 Dounias*, [2000] ECR I-577, para. 64.

857 Emphasis added. *Opinion 1/91 EEA*, para. 41.

858 Emphasis added. Ibid., para. 46.

the EC Treaty constitute *the very essence of the Internal Market"*[859] is not disputed, i.e. the two are seen as inextricably linked. Curzon describes their role as follows:

> 'The establishment of a *common market* … is *one of the cornerstones* of the European Union (herein EU) and is *based upon the protection of four fundamental economic freedoms*, i.e. the free movement of goods, persons, capital and the free provision of services. Such free movement provisions have played a pivotal role in the evolution of the EU and appear to have assumed what some consider to be of a *constitutional value* in the EU legal order.'[860]

The four freedoms have been described as the "foundation stones of the internal market",[861] and have been placed at the core of both the Community legal system as well as that of the Union.[862] They are seen as a prerequisite for the establishment of the common market.[863] What underpins those freedoms at a minimum is the principle of non-discrimination on the ground of nationality,[864] which is analysed in detail in the last Chapter of this thesis. Kingreen argues that the freedoms "were gradually transformed from general principles of non-discrimination into rights of freedom".[865] According to Lane they are "constitutional rights; they may be constitutional rights *plus ultra*".[866] Gekrath defines them as "economic constitutional rights" and as "the principle elements of the economic Constitution of the Community".[867]

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859 Emphasis added. V. Skouris, "Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance," *European Business Law Review* 17, no. 2 (2006): 225.

860 Emphasis added. S. J. Curzon, "Internal Market Derogations in Light of the Newly Binding Character of the EU Charter of Fundamental Rights," in *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument*, ed. Giacomo di Federico (Springer, 2011), 145.

861 Gormley, "Competition and free movement: Is the internal market the same as a common market?," 520. Similarly, Schmidt and de Búrca describe them as the "core of the internal market", and as the "kernel of the EC's common market". See respectively, S. K. Schmidt, "The Internal Market Seen from a Political Science Perspective," in *The EU Internal Market in Comparative Perspective: Economic, Political and Legal Analyses* ed. J. Pelkmans, D. Hanf, and M. Chang (Brussels: P.I.E Peter Lang, 2008), 101; De Búrca, "Differentiation Within the "Core"? The Case of the Internal Market," 136.

862 See respectively, P. Oliver, "Competition and Free Movement: Their Place in the Treaty," in *European Union Law for the Twebty-First Century*, ed. Takis Tridimas and Paolisa Nebbia (Oxford and Portland Oregon: Hart Publishing, 2004), 175; G. Garrett, "The politics of legal integration in the European Union," *International Organization* 49(1995): 178.

863 T. Kingreen, "Fundamental Freedoms," in *Principles of European Constitutional Law*, ed. A. Von Bogdandy and J. Bast (Hart Publishing and Verlag CH Beck, 2010), 531.

864 See the Opinion of AG Mayras in *Case 33/74 Van Binsbergen*.

865 Kingreen, "Fundamental Freedoms," 523.

866 R. Lane, "The internal market and the individual," in *Regulating the Internal Market*, ed. N. Nic Shuibhne (Edward Elgar, 2006), 258.

867 J. Gerkrath, *L'émergence d'un droit constitutionnel pour l'Europe* (Etudes Européennes, 1997). 315, cited in; Oliver, "Competition and Free Movement: Their Place in the Treaty," 166.

No matter what exactly they are called, all discussions and studies point to their pivotal role in the Union legal order. As Oliver puts it "the Court has not wavered in its determination to keep the four freedoms … at the core of the Community legal system".[868] Not only are the four freedoms at the core, the free movement of persons, which is the freedom central to our research, has been elevated somewhat higher than the other freedoms by virtue of the introduction of the concept of Union citizenship.

Scholars argue that with the introduction of Union citizenship and the Court's subsequent case law interpreting it, movement related to an economic activity was "relegated to constituting merely the 'specific expression' of a more general and overarching right of free movement enshrined in Article 21 TFEU".[869] Since Union citizenship seems to have subsumed the economic aspects of free movement of persons, and since the four freedoms have already been studied thoroughly in the literature, this section will not deal in more detail with the specifics of these freedoms, but will focus on the general free movement right developed under the concept of Union citizenship. The following section aims to demonstrate that following the introduction of Union citizenship, the free movement right has arguably developed to an extent that it would amount to a constitutional constraint on Member States, precluding their arbitrary interference with the principles underlying it.

6.3.2 Union citizenship: The fundamental status

Another addition that is by now part of the fundamental *acquis* of the Union, and has contributed to the approximation of the Union legal order to that of States, is that of Union citizenship introduced by the Treaty on European Union in 1993. Even though at the time of its introduction many were sceptical about the more tangible and intangible[870] benefits the new status could deliver,[871]

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868 Oliver, "Competition and Free Movement: Their Place in the Treaty," 175.

869 J. Tomkin, "Citizenship in Motion: The Development of the Freedom of Movement for Citizens in the Case-law of the Court of Justice of the European Union," in *The First Decade of EU Migration and Asylum Law*, ed. E. Guild and P. Minderhoud (Leiden; Boston: Martinus Nijhoff Publishers, 2012), 44-45; Tomkin refers to *Case C-212/06 Government of the French Community and Walloon Government*, [2008] ECR I-1683, para. 59. For a similar argument, see F. Wollenschläger, "A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration," *European Law Journal* 17, no. 1 (2011): 30.

870 Obviously, the most intangible benefit expected to flow from the introduction of the concept was in the form of increased legitimacy for the integration project, by making the Union's benefits more visible to people, and by creating a genuine connection between the Union and "the peoples of Europe", thereby hoping to change the public perception of the EU as elite-driven and distant from people. However, subsequent developments, such the introduction of the Lisbon Treaty, have arguably resulted in citizens' further alienation from Europe. See, S. Van den Bogaert, "The Treaty of Lisbon: The European Union's Own

today many agree that the gap between what the status promised and what it seemed to provide initially, has been partially filled in by the judgments of the Court of Justice.[872]

With the introduction of Union citizenship the umbilical cord between the free movement of persons and the need to perform an economic activity was cut,[873] and nourished by the judgments of the Court, the new born concept ('citizenship') developed quickly to become an independent source of rights for all the nationals of Member States within the Union legal order. After the entry into force of the Lisbon Treaty, the Union has also acquired its Bill of Rights,[874] namely the Charter of Fundamental Rights that clearly sets all the bundles of rights to be enjoyed by citizens as well as some TCN residents in the territory of the Member States of the Union.

This section provides a brief legal analysis of the status of Union citizenship. The focus of this section is on the substance of the status of EU citizenship as it stands, addressing the following questions: what are the core or inalienable rights that all Union citizens enjoy and what are the implications of those rights for the PSC on free movement of persons? The aim of this section is to establish whether it is possible to reconcile a PSC on free movement of persons with the status of Union citizenship.

The analysis begins with a brief overview of the rights envisaged for Union citizens in the Treaties and secondary law. While the provisions in the Treaties are the starting point and source of inspiration for the Court, the real propelling force behind the growth and development of the concept has been the case law of the Court of Justice. Hence, the following sections examine the seminal cases that shaped the concept, and briefly discuss case law that seems to have

Judgment of Solomon?," *Maastricht Journal of European and Comparative Law* 15, no. 1 (2008): 19.

871 Scholars would often point out to the gap between the symbolism and grandeur of the concept and what it actually delivered. See, F. G. Jacobs, "Citizenship of the European Union – A Legal Analysis," *European Law Journal* 13, no. 5 (2007): 592. R. Bellamy and A. Warleigh, "Introduction: The Puzzle of European Citizenship," in *Citizenship and Governance in the European Union*, ed. R. Bellamy and A. Warleigh (London and New York: Continuum, 2001), 3.

872 See, S. O'Leary, "Putting Flesh on the Bones of European Citizenship," *European Law Review* 24(1999): 68-79; Jacobs, "Citizenship of the European Union – A Legal Analysis," 592. X. Groussot, "'Principled Citizenship' and the Process of European Constitutionalization – From a Pie in the Sky to a Sky with Diamonds," in *General Principles of EC Law in a Process of Development*, ed. U. Bernitz, et al. (Wolters Kluwer, 2008), 315; W. T. Eijsbouts, "Onze Primaire Hoedanigheid," (Europa Instituut, Universiteit Leiden, 2011), 7-10.

873 That link between free movement and performing an economic activity was already weekend by the introduction of the three directives conferring a general right of movement and residence on the retired, students, and those who are financially self-sufficient. See, Directives cited in note 840 above.

874 See, E. Guild, "The evolution of the concept of union citizenship after the Lisbon Treaty," in *Integration for Third-Country Nationals in the European Union: The Equality Challenge*, ed. S. Morano-Foadi and M. Malena (Edward Elgar, 2012), 3-15.

taken Union citizenship beyond what was initially envisaged in the Treaties. The purpose behind this overview of case law is to reveal the core components of Union citizenship, so as to establish the basic rights to be enjoyed by all Union citizens. What is crucial for our purposes is to find out whether a PSC on free movement of persons is going to affect those core components.

6.3.2.1 Union citizenship as defined in the Treaties

There are two main provisions in the Treaty that are interesting and that will help us establish the crux of EU citizenship. These are Articles 20 and 21 TFEU (*ex* Articles 17 and 18 EC). The first one, Article 20(1) TFEU solemnly proclaims that:

> 'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.'[875]

Article 20(2) TFEU lists the rights Union citizens are to enjoy: the right to move and reside within the territory of the Member States; rights of political participation, that is to vote and stand as candidate in elections to the EP, and in the municipal elections in their Member State of residence;[876] the right to petition the EP, and apply to the Ombudsman;[877] the right to enjoy diplomatic and consular protection in the territory of a third country in which their Member States is not represented.[878] These rights are further elaborated in the following articles (Articles 22-24 TFEU). Except for the right to diplomatic and consular protection in the territory of a third state, there is not anything new introduced by the concept of Union citizenship. It should also be noted that not all of the rights just mentioned are exclusive to the Union citizens. Some rights, such as voting in the municipal elections, petitioning the EP or applying to the Ombudsman are also enjoyed by TCNs who are legally resident on the territory of the Union.

The second important provision for our analysis, Article 21(1) TFEU, provides that "[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect". The fact that the main right granted to Union citizens was subject to

875 It should be noted that the Lisbon Treaty has changed the wording of this provision. Pre-Lisbon citizenship was "complementary" and not "additional" to national citizenship. For a commentary on the possible implications of this change, see J. Shaw, "Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism," in *The Evolution of EU Law*, ed. P. Craig and G. De Búrca (Oxford: OUP, 2011), 598-600.

876 See also Article 22 TFEU.

877 See also Article 24 TFEU.

878 See also Article 23 TFEU.

the limitations and conditions that already existed in secondary law, in practice meant that actually nothing new was granted. That was one of the main criticisms and a source of disappointment with the concept at the time of its introduction. However, as will be demonstrated below, the Court managed to give meaning to the concept by linking it inextricably with the general non-discrimination provision (Article 18 TFEU), which precedes the citizenship provisions under the same title.

6.3.2.2 Citizenship Directive

The Citizenship Directive erodes entirely the remaining link between free movement and economic activity for Union citizens and their families, who wish to move and reside on the territory of another Member State for up to three months, by introducing an unconditional right to free movement under its Article 6.[879] For residence exceeding three months the conditions of possessing sufficient resources and medical insurance remain in place.[880] However, the Court reinterpreted those conditions in light of Union citizenship and ruled that those conditions are to apply subject to the principle of proportionality.[881]

The Directive entered into force thirteen years after the introduction of Union citizenship. Hence, to a large extent it is a codification of the Court's citizenship case law until that point. It repealed and replaced nine directives and amended Regulation 1612/68.[882] Another important novelty of the Directive was the right of permanent residence and corresponding strengthened rights granted to those Union citizens who had resided for a continuous period of five years in a host Member state.[883] By now, the details of the Directive are well established and well known. Since many of the decisions of the Court codified in the Directive are briefly analysed below, there is no need to discuss the Directive in more detail here. It is worth noting that this codification implies the confirmation, or approval of the Court's case law by the institutions of the Union as well as by its Member States.

879 Article 6(1) of the Directive reads as follows: "Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months *without any conditions or formalities other than the requirement to hold a valid identity card or passport*." Emphasis added.

880 See Article 7 of the Citizenship Directive.

881 *Case C-413/99 Baumbast*, [2002] ECR I-07091, paras. 90-91.

882 It repealed the following Directives: 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

883 See Chapter IV, Articles 16 to 21 of the Citizenship Directive.

6.3.2.3 Union citizenship in the case law of the Court

The most important components of Union citizenship that the case law of the Court brings forward are undoubtedly: free movement and equal treatment. Coincidentally, those are the most important aspects of citizenship that would be breached by the introduction of the proposed PSC. By suspending the free movement rights of Turkish nationals, such a clause would be discriminating on the basis of nationality, since no other Accession Agreement ever contained such a clause. Thus, if we were able to demonstrate that free movement and non-discrimination are at the very core of citizenship, i.e. they are the constitutive or defining characteristics of the status of Union citizenship, it would be possible to establish the incompatibility of the proposed PSC with the status of Union citizenship. Moreover, the analysis of the citizenship case law aims to argue and demonstrate that the status by now belongs to the "very foundations" of the Union,[884] and as such amounts to an important constitutional constraint on Member States whenever they act within the scope of EU law.

To demonstrate how the concept of Union citizenship could amount to a constraint on Member States as primary law makers, a brief reminder of the case law on the economic free movement provisions would be helpful. For individuals to successfully rely on the free movement provisions before the introduction of Union citizenship, they had to fall both under the personal and material scope of the Treaty and/or secondary legislation.[885] In order to fall under the personal scope of one of the freedoms in the Treaty, individuals had to be nationals of a Member State and fulfil two conditions. Firstly, they had to demonstrate that they performed a genuine and effective economic activity: that they provided (or received) a service for remuneration in an employed or self employed capacity. Secondly, they had to demonstrate that their situation contained a cross-border element. To be able to fall under the material scope of the freedoms, individuals had to rely on the rights granted by those provisions, such as the right to non-discrimination on the ground of nationality, the right to accept offers of employment, the rights to move within the territory of the host Member State etc.[886]

6.3.2.3.1 Union citizenship taking shape: First 'ground breaking' cases

The novelty brought by the first citizenship case, that of Maria Martinez Sala, was that even though she did not perform any economic activity, she was brought into the personal scope of the Treaty by virtue of the citizenship

884 The Court has never expressed itself in those terms, however, it will be demonstrated that the overall development of the citizenship case law implicitly conveys that message.

885 The personal scope (*ratione personae*) of a Treaty provision or a piece of legislation defines those to which it applies, whereas its material scope (*ratione materiae*) defines the rights that it grants.

886 E. Spaventa, "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects," *Common Market Law Review* 45(2008): 14-15.

provisions. The Court ruled that "[a]s a national of a Member State lawfully residing in the territory of another Member State, the appellant in the main proceedings comes within the scope *ratione personae* of the provisions of the Treaty on European citizenship".[887] It went on to rule that a citizen of the Union, such as Ms Sala, "lawfully resident in the territory of the host Member State, can rely on [Article 18 TFEU] in all situations which fall within the scope *ratione materiae* of [Union] law".

The second seminal judgment on the rights of Union citizens was that of *Grzelczyk*,[888] in which the Court declared its future projections of the status of citizenship as follows: "*Union citizenship* is destined to be *the fundamental status* of nationals of the Member States, enabling those who find themselves in the same situation to *enjoy the same treatment in law* irrespective of their nationality, subject to such exceptions as are expressly provided for".[889] Whereas citizenship in *Martinez Sala* was used to bring her within the personal scope of the Treaty, in this case "the right to move and reside freely, as conferred by [Article 21 TFEU]" was used to bring the case under the material scope of the Treaty.[890] In short, once a national of a Member State moves to another Member State, he or she falls within the personal and material scope of the Treaty, which enables him or her to rely on the principle of non-discrimination laid down in Article 18 TFEU.

In *Baumbast*, the Court confirmed that Article 21 TFEU was directly effective and created an independent right to free movement and residence for all Union citizens.[891] The Court acknowledged that the right was subject to limitations and conditions contained in the Treaty and secondary law (to be financially self-sufficient and to have a comprehensive health insurance), however, according to the Court those limitations and conditions had to be interpreted with regard to general principles of law, in particular with regard to the principle of proportionality.[892]

The only condition that Mr Baumbast did not fulfil was to have comprehensive sickness insurance. His insurance did not cover emergency treatment in the UK. According to the Court, it would be disproportionate to deny Mr Baumbast the right of residence conferred on him by Article 20(1) TFEU just on that ground. The implications of this ruling were huge. What this meant in practice was that national authorities were under an obligation to take into account the personal circumstances of every Union citizen relying on Article 20(1) TFEU. According to Spaventa, this "personalized" assessment of proportionality "brings about a qualitative change in the expansion of judicial

887 *Case C-85/96 Martinez Sala*, [1998] ECRI-2691, para. 61.
888 *Case C-184/99 Grzelczyk*.
889 Emphasis added. Ibid., para. 31.
890 Ibid., para. 33.
891 *Case C-413/99 Baumbast*, para. 84.
892 Ibid., paras. 85-90.

review of national rules".[893] She argues that such "indirect review" of Union law limits the discretion of the legislature since all their actions or requirements will need to be assessed on the basis of their proportionality.[894] Hailbronner's criticism goes further, since he argues that the citizenship provisions and the principle of proportionality are used to rewrite the rules laid down in secondary Union law.[895]

Baumbast was definitely "[a] further step in the advancement of citizens' rights"[896] instigated by the Court's willingness to interpret relevant secondary law in light of the Treaty's citizenship provisions. Other cases followed where this time the Court "softened" the "sufficient resources" requirements laid down in the citizenship directive. According to the Court, recourse to social benefits should not result automatically in losing residence rights.[897] Moreover, those Union citizens who could demonstrate a sufficient degree of integration in the host Member State would have access to social benefits that are available to the nationals of that state.[898]

6.3.2.3.2 Further developments: Beyond discrimination, beyond material scope, beyond internal situations?

Firstly, it is argued that the citizenship provisions in the Treaty go beyond prohibiting discrimination on the grounds of nationality to prohibit non-discriminatory restrictions as well under certain circumstances, in a way following the Court's approach on the four freedoms.[899] It follows that any measure that is liable to deter,[900] dissuade,[901] or discourage[902] a Union citizen from exercising his free movement right, or places him at a disad-

893 Spaventa, "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects," 40.

894 Ibid., 41.

895 K. Hailbronner, "Union Citizenship and Access to Social Benefits," *Common Market Law Review* 42(2005): 1251.

896 Tomkin, "Citizenship in Motion: The Development of the Freedom of Movement for Citizens in the Case-law of the Court of Justice of the European Union," 43.

897 First established in *Case C-184/99 Grzelczyk*, para. 43; afterwards, repeated in *Case C-456/02 Trojani*, [2004] ECR I-7573, para. 45. This statement of the Court was codified in Article 14(3) of Directive 2004/38/EC.

898 *Case C-209/03 Bidar*, [2005] ECR I-2119, para. 59; *Case C-158/07 Förster*, [2008] ECR I-8507, para. 49.

899 Jacobs, "Citizenship of the European Union – A Legal Analysis," 596-97; Groussot, "'Principled Citizenship' and the Process of European Constitutionalization – From a Pie in the Sky to a Sky with Diamonds," 335; Tomkin, "Citizenship in Motion: The Development of the Freedom of Movement for Citizens in the Case-law of the Court of Justice of the European Union," 35; Wollenschläger, "A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration," 25.

900 *Case C-224/98 D'Hoop*, [2002] ECR I-6191, para. 31.

901 *Case C-192/05 Tas-Hagen and Tas*, [2006] ECR I-10451, para. 32.

902 *Joined Cases C-11/06 and C-12/06 Morgan and Bucher*, [2007] ECR I-9161, paras. 30-31.

vantage for exercising those rights,[903] is prohibited unless justified based on objective considerations independent of the nationality of the persons concerned which are proportionate to the legitimate aim of the measure concerned.[904]

Secondly, in *Tas-Hagen and Tas* the Court clearly used the language of "restrictions" and ruled on access to a benefit, which at first sight fell outside the material scope of the Treaty. The case concerned Dutch legislation on the award of benefits to civilian war victims, which required the person concerned to be resident in the Netherlands at the time when the application for the benefit was submitted. Mr. Tas and Mrs. Hagen-Tas were Dutch nationals who resided in Spain at the time of their application. Their applications were rejected upon which they appealed. As to the analysis of the Court of Justice, applicants clearly fell within the personal scope of the Treaty as Union citizens. The benefit they were trying to obtain clearly fell within the competence of Member States. However, according to the Court, that competence had to be exercised in line with Union law, "in particular with the Treaty provisions giving every citizen of the Union the right to move and reside freely within the territory of the Member States".[905] Then, the Court repeated that Article 20 TFEU was not intended to extend the material scope of the Treaty to internal situations.[906] However, the situation of the applicants in this case was clearly covered by the right to free movement and residence granted to every Union citizen by Article 21(1) TFEU. Since the exercise of their right had an impact on their right to receive a benefit under national law, their situation could not be considered as purely internal.

According to the Court, "the opportunities offered by the Treaty in relation to freedom of movement cannot be fully effective if a national of a Member State *can be deterred* from availing himself of them by *obstacles* raised to his residence in the host Member State by legislation of his State of origin penalising the fact that he has used them".[907] The Court went on to establish that national legislation that placed at a disadvantage nationals that had "exercised their freedom to move and reside in another Member State is *a restriction* on the freedoms conferred by Article [21(1) TFEU]".[908] The Court admitted that such a restriction could be justified by objective considerations of public interest, however it also had to satisfy the principle of proportionality. The Court found that a residence criterion was not an appropriate or satisfactory indicator for achieving the aim of the legislation, which was to ensure

903 *Case C-224/98 D'Hoop*, para. 34; *Case C-224/02 Pusa*, [2004] ECR I-6421, para. 20.
904 *Case C-224/98 D'Hoop*, para. 36; *Case C-224/02 Pusa*, para. 20; *Case C-406/04 De Cuyper*, [2006] ECR I-6947, para. 40; *Case C-192/05 Tas-Hagen and Tas*, para. 33.
905 *Case C-192/05 Tas-Hagen and Tas*, para. 22.
906 Ibid., 23.
907 Emphasis added. Ibid., para. 30. The Court referred to *Case C-224/02 Pusa*, para. 19.
908 Emphasis added. *Case C-192/05 Tas-Hagen and Tas*, para. 31.

the connection of applicants to the Member State granting the benefit. In short, Article 21(1) TFEU precluded the contested Dutch law.

Spaventa suggests that this line of case law can be seen from two perspectives. Firstly, it can be argued that what was at stake in these cases was discrimination against movers. Both those who had moved or those who had returned after having exercised their right to free movement were at a disadvantage compared to those who had not moved. Secondly, as proposed by other scholars mentioned above, the right to move contained in Article 21(1) TFEU could be seen as of broader application encompassing also non-discriminatory obstacles to free movement.[909]

Similarly, in *Schempp*,[910] the Court examined whether the national legislation in question in the case "obstructed" applicant's right to move and reside in another Member State independently of any discrimination.[911] According to AG Kokott, "[s]uch a harmonised approach, which aligns the interpretation of the right to freedom of movement or residence to the other fundamental freedoms, corresponds to the "fundamental status" of Union citizenship established by the Court and the new EU citizenship Directive."[912]

Thirdly, as far as the effect of Union citizenship on "purely internal situations" (one of the most criticized concepts of EU law[913]) is concerned, the rule remains in place. In other words, the freedoms or the citizenship provisions do not cover entirely internal situations that have no Union link (cross-border element). However, the case law on citizenship has made some inroad in that field as well, inciting comments as to the "arbitrariness to attaching so much importance to crossing a national border".[914] As is often questioned, what is indeed an 'internal situation' within an internal market which aims to eliminate national frontiers and barriers to free movement?[915]

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909 Spaventa, "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects," 25.

910 *Case C-403/03 Schempp*, [2005] ECR I-6421, paras. 42-47.

911 J. Kokott, "EU citizenship – citoyens sans frontières?," (Durham Euroepan Law Institute – European Law Lecture, 2005), 9.

912 Ibid.

913 N. Nic Shuibhne, "Free Movement of Persons and the Wholly Internal Rule: Time to Move on?," *Common Market Law Review* 39(2002); A. Tryfonidou, "Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe," *Legal Issues of Economic Integration* 35, no. 1 (2008); C. Dautricourt and S. Thomas, "Reverse discrimination and free movement of persons under Community law: all for Ulysses, nothing for Penelope?," *European Law Review* 34, no. 3 (2009).

914 Opinion of AG Sharpston in *Case C-212/06 Government of the French Community and Walloon Government*, para. 141.

915 Shaw, "Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism," 596; Groussot, "'Principled Citizenship' and the Process of European Constitutionalization – From a Pie in the Sky to a Sky with Diamonds," 338.

For the purposes of this thesis, it is sufficient to emphasize the importance of *Zambrano*,[916] as it is the most important case that illustrates the erosion of the outer boundaries of the concept of internal situations. The Zambrano children were born in Belgium, to parents of Columbian nationality who sought asylum, but did not succeed. Their applications to regularize their stay and obtain unemployment benefits did not succeed either. Mr. Zambrano challenged those refusals arguing that as a parent of minor children of Belgian nationality, he was entitled to reside and work in Belgium on the basis of the Union citizenship provisions. The problem was that the Zambrano children had never moved outside their state of nationality (Belgium), which normally meant that there was nothing to bring them within the scope of EU law. However, the Court disagreed, establishing that "Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of *the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union*."[917] According to the Court, refusing to grant Zambranos a right to residence and a work permit would have such an effect, since it would lead to a situation where the Zambrano children, who are citizens of the Union, would have to leave the territory of the Union together with their parents.

As important as *Zambrano* is, perhaps it would be more correct to classify it as an exception to the rule of internal situations, as the cases following it (*Dereci* and *McCarthy*[918]) demonstrated the "purely internal situations" still matter. Hence, *Zambrano* can be interpreted to exemplify an internal situation, which is considered to have a link with EU law due to its drastic consequences. Such a situation has the effect of depriving Union citizens of the genuine enjoyment of the substance of their citizenship rights,[919] as in the case of Zambrano children, who would have to leave the territory of the Union. When the genuine enjoyment of the substance of citizenship rights is threatened, "the veil of internal situations may legitimately be pierced".[920]

916 *Case C-34/09 Zambrano*, [2011] ECR I-1177. For a detailed analysis, see V. Borger, "Ruiz Zambrano: Hoe Europees Burgerschap zijn Schaduw in de Tijd Vooruit Werpt," in *Vrij Verkeer van personen in 60 arresten: De zegeningen van het Europees burgerschap*, ed. G. Essers, A. P. van der Mei, and F. van Overmeiren (Den Haag: Kluwer, 2012).

917 *Case C-34/09 Zambrano*, para. 42.

918 *Case C-256/11 Dereci*, judgment of 15 November 2011, n.y.r; *Case C-434/09 McCarthy*, [2011] ECR I-3375. For an in-depth discussion, see A. Tryfonidou, "Redefining the Outer Boundaries of EU Law: The Zambrano, McCarthy and Dereci trilogy," *European Public Law* 18, no. 3 (2012): 493-526; J. T. Nowak, "Case C-34/09, Gerardo Ruiz Zambrano v. Office National de L'Emploi (ONEM) & Case C-434/09, Shirley McCarthy v. Secretary of State for the Home Department," *Columbia Journal of European Law* 17(2010-2011): 673; A. P. Van der Mei, S. Van den Bogaert, and G. R. De Groot, "De arresten Ruiz Zambrano en McCarthy," *Nederlands Tijdschrift voor Europees Recht* 6(August 2011): 188-99.

919 *Case C-34/09 Zambrano*, para. 42.

920 N. Nic Shuibhne, "(Some of) The Kids Are All Right," *Common Market Law Review* 49(2012): 365.

Zambrano is a step in the right direction, since it enables the Court to deal with an extremely problematic example of reverse discrimination,[921] by using and sharpening further one of the most precious weapons in its arsenal of provisions of EU law, that of Union citizenship. In the light of *Zambrano* it could be concluded that anything that would deprive Union citizens of "the genuine enjoyment of the substance of their citizenship rights" would constitute a constraint on Member States. The following section tries to establish the contents of that substance.

6.3.2.3.3 Core of Union citizenship

What these cases reveal as to the substance or the core of Union citizenship is that first and foremost Union citizenship is about movement and residence on the territory of the Member States. That conclusion is confirmed by Advocate Generals and scholars alike. AG Sharpston calls the right to movement and residence the "core" right of Union citizenship,[922] while AG Colomer calls it the "central right of citizenship".[923] Nic Shuibhne calls them the "the undoubted "core" rights of citizenship".[924]

Yet, that is not the only right attached to citizenship. As the case law clearly demonstrated, the right to free movement and residence come with the bonus of the right to equal treatment. Once a Union citizen exercises his right to free movement and residence, by virtue of his citizenship status he is automatically entitled to equal treatment in the host Member State. According to Wollenschläger, the right to move and reside in the host Member State, the far-reaching claim to national treatment,[925] as well as the prohibitions on restriction to freedom of movement constitute the "core guarantees" of Union citizenship.[926]

Scholars argue that with the introduction of Union citizenship and the Court's subsequent case law interpreting it, movement related to an economic activity was "relegated to constituting merely the 'specific expression' of a more general and overarching right of free movement enshrined in Article

921 P. van Elsuwege, "Shifting the Boundaries? European Union Citizenship and the Scope of Application of EU Law," *Legal Issues of Economic Integration* 38, no. 3 (2011): 276.

922 See the AG's Opinion in *Case C-34/09 Zambrano*, para. 80.

923 See the AG's Opinion in *Joined Cases C-11/06 and C-12/06 Morgan and Bucher*, para. 67.

924 Nic Shuibhne, "(Some of) The Kids Are All Right," 365; Kochenov also calls the rght to free movement "a core element of European citizenship", see D. Kochenov, "European Integration and the Gift of the Second Class Citizenship," *Murdoch University Electronic Journal of Law* 13, no. 1 (2006): 212.

925 The equality aspect of citizenship is analysed further in the following chapter.

926 Wollenschläger, "A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration," 30.

21 TFEU".[927] According to Tomkin, this is a paradigm shift. Member State nationals are no longer granted rights as economic means serving economic ends, but by virtue of their status as Union citizens.[928]

As to the implication of these developments for the inclusion of a PSC on free movement persons, it is evident that such a clause would go against the grain of the status of Union citizenship. It will undermine the work of the Court in this field, as it will create second-class citizens on a permanent basis. Citizens whose right to free movement and residence within the territory of Member States can possibly be suspended at the whim of individual Member State governments. In addition to violating the substance of the Union citizenship concept, such a clause will also be discriminatory. It will discriminate directly on the basis of nationality, providing the possibility to single out and suspend the free movement rights of nationals belonging to one Member State only. It will be quite a challenge to legitimize such a clause when the Court's case law already moved beyond non-discrimination on the basis of nationality to tackle all kinds of restriction affecting free movement. If Member States are to respect the existing Treaties and their provisions as interpreted by the Court, the Union citizenship provisions at their current stage of development will preclude Member States from including such a controversial clause into the Turkish Accession Agreement.

6.3.3 Fundamental rights

The third cluster of cases demonstrating that some provisions of EU law belong to the "very foundations" of the Union or implying they are hierarchically superior to other provisions of the Treaties, are those dealing with fundamental rights.[929] This section begins by examining the most recent and important cases of the Court revealing the place of fundamental rights in the current hierarchy of norms. This demonstration begins with the case, in which the Court was most explicit and compelling in its statements regarding the importance and status of fundamental rights, i.e. the first *Kadi* judgment.[930] It is

927 Tomkin, "Citizenship in Motion: The Development of the Freedom of Movement for Citizens in the Case-law of the Court of Justice of the European Union," 44-45; Tomkin refers to *Case C-212/06 Government of the French Community and Walloon Government*, para. 59; For a similar argument, see Wollenschläger, "A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration," 30.

928 Tomkin, "Citizenship in Motion: The Development of the Freedom of Movement for Citizens in the Case-law of the Court of Justice of the European Union," 45.

929 See *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, para. 303; *Case C-229/05 P PKK and KNK v Council*, [2007] ECR I-439; and *Case C-432/04 Cresson*, [2006] ECR I-6387.

930 *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*.

followed by two other cases, *Cresson* and *PKK*,[931] in which the Court's examination of the compatibility of primary law provisions with relevant provisions of the ECHR, implicitly confirmed that provisions protecting fundamental rights are hierarchically superior to other provisions of the Treaties, i.e. to provisions which are not considered to be part of the "very foundations" of the Union.

After providing a snapshot of the most important cases revealing the status of fundamental rights in today's legal order, a more historical approach is taken in order to illustrate and explain the emergence and the rise of fundamental rights to their current position. Next, the inclusion of fundamental rights in the Treaties and their rise from being mentioned in the preamble to the SEA to constituting Article 2 TEU after Lisbon is put under the spotlight. Lastly, it is argued that the case law of the Court, starting from the first cases, in which it declared protection of fundamental rights constituted general principles of Community law, to drafting of the Charter, which eventually became part of primary law after Lisbon, contributed to the constitionlisation, i.e. autonomisation of the EU legal order over the decades. Today Member States respect fundamental rights and freedoms not only because they have deeply internalized them, but also because their violations are backed up by sanctions provided by the Court of Justice.

6.3.3.1 Snapshot of recent case law

To begin with the *Kadi* case,[932] the gist of the Court's ruling is in the statement that "the obligations imposed by an international agreement cannot have the effect of prejudicing *the constitutional principles of the EC Treaty, which include the principle that all European Union acts must respect fundamental rights*, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by that treaty".[933] The Court held that the General Court had to review the lawfulness of the contested Regulations in light of fundamental rights, even if they had been adopted in order to implement Security Council resolutions. Since it failed to do so, its reasoning was vitiated by an error of law.[934] Moreover, the fact that the Council had failed to communicate to Mr. Kadi the evidence relied on against him to justify the inclusion of his name in the contested Regulations, deprived him of the right to defend himself, as well as from the right to effective judicial review.[935] On the same grounds, the Court found that his right to property was also infringed.[936]

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931 *Case C-432/04 Cresson*; *Case C-229/05 P PKK and KNK v Council*.
932 For the factual background of the case, see section 6.2.3 above.
933 *Joined Cases C-584/10 P, C-593/10 P and C-595/10 P Kadi II*, para. 22.
934 *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, paras. 326-27.
935 Ibid., paras. 345-49.
936 Ibid., paras. 369-71.

As to the Court's statements regarding the position of fundamental rights in the EU legal order, which is the most important aspect of the judgment for the purposes of this thesis, they were clear and unequivocal. Referring to two primary law provisions, Articles 307 and 297 EC, the Court ruled that they could not be interpreted as authorizing "any derogation from the principles of liberty, democracy, and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as *a foundation of the Union*".[937] The Court also categorically stated that Article 307 EC "may in no circumstances permit any challenge to *the principles that form part of the very foundations of the Community legal order*, one of which is the protection of fundamental rights".[938]

The Court's statements in *Kadi* place fundamental rights at the top of the hierarchy of norms in the Union legal order. Just like the principle of the autonomy of the legal order, which was protected by the Court in its first *EEA Opinion*, fundamental rights have been declared sacrosanct by the Court, by virtue of their "form[ing] part of the very foundations of the Community legal order".[939] Fundamental rights in general, and the principles enshrined in Article 6(1) TEU (now renamed as values under Article 2 TEU) in particular, are hierarchically superior principles that constitute part of the core, of the "very foundations" of the legal order. As such they constrain Member States whenever they act within the scope of EU law, including when they perform their functions as primary law makers in the context of drafting an Accession Agreement.

In *Cresson*, the second example, the Commission brought action against former Commissioner Mrs. Cresson on the basis of the third subparagraph of Article 213(2) EC [now Article 245(2) TFEU] for breaching her obligations as a Commissioner. She was accused of "conduct amounting to favouritism or, at least, and gross negligence".[940] In her defence, she raised procedural issues concerning the way her case was handled and argued that her rights of defence had not been not respected. More specifically, she complained of a lack of legal remedy, in case the Court decided to impose a penalty on her, since there would be no possibility to appeal that decision. To check whether that would indeed breach her right to effective judicial protection, the Court tested Article 213(2) EC against Article 2(1) of Protocol No. 7 of the ECHR.[941]

937 Emphasis added. Ibid., para. 303.
938 Emphasis added. Ibid., para. 304.
939 Ibid.
940 *Case C-432/04 Cresson*, para. 1. For details, see R. Mastroianni and A. Arena, "Case C-432/04, Commission of the European Communities v. Édith Cresson, Judgment of the Court (Full Court) of 11 July 2006, [2006] ECR I-6387.," *Common Market Law Review* 45(2008): 1207-32.
941 Article 2(1) of Protocol No 7 to the ECHR provides that "everyone convicted of a criminal offence by a court or tribunal has the right to have his conviction or sentence reviewed by a higher court or tribunal. Even if it be accepted that that provision applies to proceedings based on Article 213(2) EC, it is sufficient to point out that Article 2(2) of that Protocol states that that right may be subject to exceptions in cases, inter alia, where the

The Court found that Article 213(2) EC complied with the rules established under the Convention. The fact that the Court found it necessary to check whether a provision of the Treaties was fundamental rights-compliant clearly implies the hierarchical superiority of fundamental rights. Moreover, these cases illustrate that the Court needs fundamental rights not only to legitimize various provisions of secondary law, but also of primary law.

The third and last example, which confirms and illustrates the 'precedence' of fundamental rights over provisions of primary law, is the *PKK* case.[942] The facts of the *PKK* case are similar to *Kadi*. The PKK's funds and financial assets were frozen since it was added as a terrorist organization to the list envisaged in Article 2(3) of Regulation No 2580/2001, which was adopted to implement UN Security Council Resolution (Res. 1373 (2001)).[943] The PKK brought an action for annulment and damages to the General Court, but its action was declared inadmissible, upon which it appealed to the Court of Justice. The relevant part of the Court's judgment for our purposes is the part where KNK, an umbrella organization to which the PKK was related, argued that the admissibility requirement under Article 230(4) EC [now Article 263(4) TFEU], the requirement to be "directly and individually concerned", was so restrictive that it conflicted with the ECHR, and more specifically with Article 13 of the Convention which provides for the right to an effective remedy. Instead of dismissing that argument, the Court went on to check whether that was indeed the case.

After repeating the importance of fundamental rights in the EU legal order, the Court examined the issue of admissibility under Article 34 of the Convention. The Court established that to be considered a victim, the case law of the Strasbourg court and Article 13 ECHR require an applicant to have been affected by a violation that had already taken place. Moreover, the case law of the Strasbourg court had already established that "persons who claim to be linked to an entity included in the list annexed to Common Position 2001/931, but who are not included in the list themselves, do not have the status of victims of a violation of the ECHR within the meaning of Article 34 thereof and that, consequently, their applications are inadmissible".[944] The KNK was linked to the PKK, but it was not included in the disputed list, which meant that it

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person concerned was tried in the first instance by the highest court or tribunal." Hence, the fact that Mrs. Cresson would not be able to appeal the Court's decision did not violate her right to effective judicial protection. See, ibid., paras. 112-113.

942 *Case C-229/05 P PKK and KNK v Council*.

943 The PPK sought the annulment of Council Decision 2002/460/EC of 17 June 2002 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/334/EC, OJ L 160/26, 18.6.2002.

944 *Case C-229/05 P PKK and KNK v Council*, para. 80. The Court refers to the following Strasbourg case: *ECtHR, Segi and Gestoras Pro-Amnistia and Others v 15 States of the Euroepan Union*, Appl. Nos. 6422/02 and 9916/02.

would not be able to establish the status of a victim under Article 34 ECHR. Thus, it would not be able to bring an action before the Court of Human Rights, which illustrated that Article 230(4) EC (now Article 263(4) TFEU) was in line with the ECHR.[945]

As briefly described below, even though fundamental rights initially had no place either in the Treaties or the case law of the Court, once they were introduced into the legal order as general principles of EU law, their rise was steady and consistent over the decades. The few cases analysed above, as well as the central place of fundamental rights in the Treaties,[946] clearly illustrate how deeply entrenched they are today into the Union legal order. By now they have reached the pinnacle of norms and values in the Union legal order and constitute part of the core or of the "very foundations" of the legal order. The vast array of case law on fundamental rights as well as the never diminishing judicial and academic interest on this topic in the last half a century, have contributed to the deep internalization of protection of fundamental rights firstly in the national and then also in the Union legal orders.[947] However, the most decisive factor in the internalization of fundamental rights in various legal orders was undoubtedly, the mechanisms of external sanctions built-in within various legal orders in the aftermath of the Second World War.

At national level, it was the national constitutional courts that guaranteed the protection of fundamental rights. To provide the most prominent example, in the case of Germany it was the Bundesverfassungsgericht that ensured compliance regarding the protection of fundamental rights enumerated in the Grundgesetz. At international, or more precisely regional level, it was the European Court of Human Rights that ensured that its Contracting Parties abide by the rights enumerated in the Convention, for the protection of which it was established. Given the rise and centrality of the protection of fundamental rights of the individual at all levels and almost all jurisdictions in the last century, it was unthinkable, at least in Europe, that there would be a legal order, or a level of governance (however one names it), that would not take account of those rights.

While the Union legal order started taking account of fundamental rights as early as the 1970s, they soon became so central to it that compliance with them became a pre-condition for the validity and lawfulness of any Union act. In other words, acts disrespecting a fundamental right could be sanctioned by annulment (nullity) by the Courts of the Union. The Court's pronouncement in *Kadi II* is quite clear, it provided that "the Courts of the European Union

945 *Case C-229/05 P PKK and KNK v Council*, paras. 80-83.

946 See the introduction, as well as section 6.3.3.3 following below.

947 It should be noted that all Member States of the Union are also parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

must ensure the review, in principle the full review, of the lawfulness of *all* European acts in the light of fundamental rights".[948]

What can be inferred from the Court's pronouncement in *Kadi II* is that fundamental rights are capable of constraining Member States in their roles as primary as well as secondary law makers. While their constraining role regarding the latter is clear and uncontested, it is their constraining role when Member States act as primary law makers that is more controversial. However, the analysis of the *Pringle* case following below,[949] illustrates clearly the constraining force of general principles on Member States when they act as primary law makers too. The constraining force flows from the threat of a sanction (here in the form of a declaration of incompatibility) since there is the possibility to refer a Council Decision approving the conclusion of an Accession Agreement or the adoption of a Treaty revision to the Court before its ratification for a check of its legality and/or compliance with the requirements of the procedure under which the contested Decision was adopted.[950]

While the four freedoms were indigenous to the legal order, fundamental rights were not. They were incorporated later into the Union legal order; however, they climbed up the stairs in the hierarchy of norms in Union law. Today, just like the four freedoms, they form part of the "very foundations" of the Union. What follows is a brief overview of the emergence and development of fundamental rights in the EU legal order, and a discussion of their constraining, legitimizing as well as constitutionalizing functions in EU law. This overview sheds light on their central place in the EU legal and demonstrates that those principles are capable of constraining Member States even when they act as primary law makers.

6.3.3.2 Inception and rise of fundamental rights

The silence of the founding Treaties on fundamental rights and their subsequent incorporation into the case law of the Court as general principles of law in response to the challenge of the German and Italian constitutional courts is well known. Thus, the discussion on this process is brief, as comprehensive studies on the topic already exist,[951] and since what is relevant here is their

948 Emphasis added. *Joined Cases C-584/10 P, C-593/10 P and C-595/10 P Kadi II*, para. 23.

949 *Case C-370/12 Pringle*.

950 R. Plender, "The European Court's Pre-emptive Jurisdiction: Opinions under Article 300(6) EC," in *Judicial Review in European Union Law*, ed. D. O'Keeffe (Kluwer Law International, 2000), 203-20.

951 See Tridimas, *The General Principles of EU Law*; X. Groussot, *General Principles of Community Law* (Groningen: Europa Law Publishing, 2006); J. A. Usher, *General Principles of EC Law*, European Law Series (London and New York: Longman, 1998); A. Arnull, *The General Principles of EEC Law and the Individual* (St. Martin's Press, 1990). For an alternative account see, G. De Búrca, "The Road Not Taken: The European Union as a Global Human Rights Actor," *The American Journal of International Law* 105(2011): 649-93.

current status and possible function as constraint on Member States when drafting an Accession Agreement.

As to the Court's approach in its endeavour to extrapolate general principles of EU law, it had to "weigh up and evaluate the particular problem and search for the best and most appropriate solution".[952] The common constitutional traditions of the Member States as well as international human rights agreements would be the main sources of inspiration. What is "best and most appropriate" would depend on the objectives of the Community. Thus, the standard of protection would change from one case to another,[953] igniting criticism and academic debate on the issue.[954]

Starting with *Stauder*,[955] and later rulings on more and more cases involving issues of fundamental rights,[956] the Court established a comprehensive "unwritten" catalogue of rights, which was eventually adopted as the Charter of Fundamental Rights. From the first case until the adoption of the Charter (and even afterwards), the Court was criticised for various reasons. At the beginning, it was criticised for the fact that the its initial motivation was not the protection of fundamental rights *per se*, but the protection of the supremacy of Community law as well as the autonomy of the legal order.[957] After *Internationale Handelsgesellschaft* and *Nold*,[958] it was criticised for protecting fundamental rights only to the extent this was necessitated by the goal

952 Opinion of AG Slynn in *Case 155/79 AM&S*, [1982] ECR 1575, 1649.

953 According to Groussot, the Court's approach is neither minimalist nor maximalist, but "evaluative". For details see, Groussot, *General Principles of Community Law*: 48-50. See also, M. Lindfelt, *Fundamental Rights in the European Union – Towards Higher Law of the Land?* (Åbo: Åbo Akademi University Press, 2007). 67-70.

954 For an example, see L. Besselink, "Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union," *Common Market Law Review* 35(1998).

955 Stauder was the first case in which the Court recognized that fundamental human rights were enshrined in the general principles of Community law and were protected by the Court. See, *Case 29/69 Stauder*, [1969] ECR 419, para. 7.

956 For a comprehensive survey of the rights protected and recognized as general principles of EU law see, K. Lenaerts et al., *European Union Law* (London: Sweet & Maxwell; Thomson Reuters, 2011). 845-48.

957 Lindfelt, *Fundamental Rights in the European Union – Towards Higher Law of the Land?*: 65.

958 In *Internationale Handelsgesellschaft*, the Court identified "the constitutional traditions common to the Member States" as the source of inspiration for such rights, and ruled that those rights had to be "ensured within the framework of the structure and objectives of the Community". See, *Case 11/70 Internationale Handelsgesellschaft*, [1970] ECR 1125, para. 4. In *Nold*, it identified international treaties for the protection of human rights as an additional source of inspiration. However, according to the Court, fundamental rights were not "unfettered prerogatives". They had to be viewed in the light of the social function of that right and the activities it protected, i.e. they were "subject always to limitations laid down in accordance with the public interest". Hence, those rights could be subject to certain limits justified by the overall objectives of the Community, as long as the substance of those rights was left intact. See, *Case 4/73 Nold*, [1974] ECR 491, para. 14.

of economic integration.[959] Others argued that the Court's use of fundamental rights was 'instrumental', the underlying motive being the extension of its jurisdiction to matters reserved to Member States.[960] The main critique regarding the state of affairs before the adoption of the Charter was that the case law developed by the Court lacked legal certainty and predictability.[961] Despite all the criticisms and discussions the prominence of fundamental rights in the EU legal order increased slowly but surely.[962]

6.3.3.3 Constitutionalisation of fundamental rights by inclusion in primary law

Late judge Mancini claimed that the *acquis* of fundamental rights developed by the Court was "one of the greatest contributions that the court has made to democratic legitimacy in the Community".[963] Similarly, Member States declared that "[p]rotection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy".[964] In other words, the judges' contribution was acknowledged and matched by the Member States: first, by recognizing and enshrining the protection of fundamental rights in the Treaties, and secondly, by crystallizing the case law of the Court in the Charter of Fundamental Rights.[965] What follows is a brief overview of the inclusion and rise of fundamental rights in the Treaties, i.e. from appearing in the preamble to becoming Article 6 TEU and rising up to constitute Article 2 TEU with the Lisbon Treaty revision.

Fundamental rights were first mentioned in the preamble to the Single European Act.[966] It was only with the Treaty on European Union adopted

959 Lindfelt, *Fundamental Rights in the European Union – Towards Higher Law of the Land?*: 2-3.

960 J. Coppel and A. O'Neill, "The European Court of Justice: taking rights seriously?," *Legal Studies* 12, no. 2 (1992): 227. For another critical account of the fundamental rights jurisprudence of the Court, see P. R. Beaumont, "Human Rights: Some Recent Developments and Their Impact on Convergence and Divergence of Law in Europe," in *Convergence and divergence in European Public Law*, ed. Paul R. Beaumont, Carole Lyons, and Neil Walker (Oxford: Hart Publishing, 2002).

961 Lindfelt, *Fundamental Rights in the European Union – Towards Higher Law of the Land?*: 3.

962 P. (ed.) Alston, *The EU and Human Rights* (OUP, 1999); R. Lawson, "Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg," in *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers*, ed. R. Lawson and M. De Blois (Martinus Nijhoff Publishers, 1994).

963 G. F. Mancini, *Democracy and Constitutionalism in the EU* (Oxford and Portalnd, Oregon: Hart Publishing, 2000). 45.

964 See Presidency Conlcusions to the Cologne European Council, 3-4 June 1999, Annex IV.

965 The Charter was first proclaimed as a non-binding instrument in December 2000, OJ C 364/1, 18.12.2000. By virtue of the reference to the Charter that was included in Article 6(1) TEU with the Lisbon Treaty revision, it has a primary law status, OJ C 306/1, 17.12.2007.

966 The Single European Act made the following reference in its preamble: "the findamental rights recognized in the constitutions and laws of the Member States, in the Convention for Protection of Human Rights and Fundamental Freedoms and the Social Charter, notably freedom, equality and social justice".

in Maastricht that they found their place in the main text of the Treaties as Article F(2). The latter article stipulated that "[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from constitutional traditions common to the Member States, as general principles of Community law".[967] As important as this development was, Von Bogdandy argues that the latter article, which is now Article 6(3) TFEU, was formulated entirely from a limiting perspective. It commits "the Union to general principles of law which have no constitutive function but only a restrictive one".[968]

Von Bogdandy's argument does not diminish the importance of Article 6(3) TFEU. It rather serves to highlight a subsequent development that took the protection of fundamental rights to a new level. That development was the inclusion of Article 6(1) TEU by the Amsterdam Treaty revision. Article 6(1) TEU provided that "[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States". According to Von Bogdandy, this provision laid down the normative core content on which the EU is established, and as such, the argument goes, the constitutional content of Article 6(1) TEU by far surpasses the constitutional dimension of Article 6(2) TEU (ex Article F(2)). He concludes that "[n]ow not only restrictive, but also a constitutive European constitutionalism has found its recognition in positive law".[969] As discussed above, the Court's statements on protection of fundamental rights, democracy and the rule of law in the *Kadi* ruling, support this view.[970]

With the Lisbon Treaty revision, the Member States renamed the "principles" on which the Union is founded as "values", and extended further the list. The significance and effect of the renaming remain to be seen. Article 2 TEU now reads as follows:

> 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

967 Article F(2), became Article 6(2) TEU with the Amsterdam Treaty revision, and it is now Article 6(3) TEU after the Lisbon Treaty revision.

968 A. von Bogdandy, "Founding Principles," in *Principles of European Constitutional Law*, ed. A. von Bogdandy and J. Bast (Oxford, München: Hart Publishing, Verlag C.H. Beck, 2011), 22.

969 Ibid.

970 *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, paras. 303-04.

Undoubtedly, one of the most significant developments was the Charter's assuming primary law status with the entry into force of the Lisbon Treaty on 1 December 2009.[971] Its text was not reproduced in the Treaties, but Article 6(1) TEU stipulates that the Charter "shall have the same legal value as the Treaties". This was not an easy decision for the Member States, which were wary of conferring greater powers to the Union via the Charter. The US experience illustrated how a Bill of Rights of very limited scope could have centralizing effects engendered by the creative interpretation of a Supreme Court.[972] Thus, Member States wanted to prevent that from happening by making absolutely clear that the Charter would have a limited personal and material scope.[973] Hence, the Charter was addressed to "the institutions, bodies, offices and agencies of the Union with due regard to the principle of subsidiarity and to the Member States *only when they are implementing Union law*".[974]

Another important development illustrating the importance given to fundamental rights was the inclusion of Articles 7 TEU and 309 EC (now Article 354 TFEU) with the Amsterdam Treaty. The aim was to provide a legal basis for the Union to react against a Member State that would seriously and persistently breach the principles (now values) recognized in Article 6(1) TEU (now Article 2 TEU). The drawback of this provision was that it provided a *post hoc* tool, i.e. it could not be used preventively. The Nice Treaty amendment corrected this drawback by also adding a mechanism enabling preventive action in the event of "a clear risk of a serious breach" (Article 7(1) TEU). When the European Council determines the existence of such a risk under Article 7(2) TEU, the Council under Article 7(3) TEU "may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council".

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971 OJ C 306/1, 17.12.2007.

972 It is interesting to note the US experience in this respect. Similarly, the framers of the US constitution were afraid that a Bill of Rights would widen federal legislative powers. It was introduced only later in 1791, to appease those opposing the Constitution on the ground that it did not contain a Bill of Rights. So when adopted, it had a limited scope ratione personae. It would only apply to the federal government and would not in any way affect the legislative powers of the states. However, over the years, the Supreme Court extended the application of almost all the rights contained in the Bill of Rights to the states as well, thereby limiting their legislative competence. This extension was based on the theory of incorporation, according to which the Fourteenth Amendment, which was addressed to the states, "incorporates" the Bill of Rights. For more details see, A. Knook, "The Court, the Charter, and the Vertical Division of Powers in the European Union," *Common Market Law Review* 42(2005): 374-79. T. M. Fine, *An Introduction to the Anglo-American Legal System* (Navarra: Thomson-Aranzadi, 2007). 28-36.

973 Knook, "The Court, the Charter, and the Vertical Division of Powers in the European Union," 373-74.

974 Emphasis added. Article 51(1) CFR. See also, *Case C-617/10 Åkerberg Fransson*, judgment of 26 February 2013, n.y.r.

Article 7 TEU is mainly a political tool. Yet, its mere existence is quite significant as it very clearly illustrates the underlying values of the Union, the breach of which might trigger sanctions. It is not only the possibility of sanctions that demonstrates the importance and constraining force of fundamental rights, but also the fact that in terms of scope Article 7 TEU is all encompassing, i.e. all Member State action falls within its scope. The fact that it is a provision that makes no distinction as to whether Member States act within or outside the scope of EU law, illustrates how central fundamental rights are to the EU legal order.

6.3.3.4 Role of fundamental rights in the constitutionalisation of the legal order

While the previous section covered how fundamental rights slowly but surely obtained primary law status, and how they rose to become Article 2 TEU, it should be emphasized that fundamental rights played a constitutionalizing role also as unwritten general principles of EU law. This sub-section firstly, looks briefly into how fundamental rights, as general principles, were used by the Court to increase the autonomy of the Union legal order. Secondly, it examines the significance of adopting a binding Charter of Fundamental Rights that has primary law status.

6.3.3.4.1 As general principles of Union law

"General principles" is a broad category that is a moving target as it evolves by every case delivered by the Court. Some of the functions and legal effects of the term are more controversial than others.[975] To begin by mentioning briefly the most important functions of those principles in the Union legal order: they serve to fill gaps, as aid to interpretation and as grounds for review.[976] The fact that every scholar creates different sub-categories of general principles of EU law is an indication of the relative character of the

975 Editorial Comments, "Horizontal Direct Effect – A Law of Diminishing Coherence," *Common Market Law Review* 43, no. 1 (2006); A. Masson and C. Micheau, "The Werner Mangold Case: An Example of Legal Militancy," *European Public Law* 13, no. 4 (2007); P. Cabral and R. Neves, "General Principles of EU Law and Horizontal Direct Effect," *European Public Law* 17, no. 3 (2011).

976 Tridimas, *The General Principles of EU Law*: 29-35; See, S. Peers, "The 'Opt-out' that Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights," *Human Rights Law Review* 12, no. 2 (2012); V. Belling, "Supranational Fundamental Rights or Primacy of Sovereignty? Legal Effects of the So-Called Opt-Out from the EU Charter of Fundamental Rights," *European Law Journal* 18, no. 2 (2012); D. Anderson and C. C. Murphy, "The Charter of Fundamental Rights," in *EU Law After Lisbon*, ed. A. Biondi, P. Eeckhout, and S. Ripley (Oxford: OUP, 2012), 166-69. A. Dashwood et al., *Wyatt and Dashwood's European Union Law* (Oxford and Portland, Oregon: Hart Publishing, 2011). 321.

term.[977] As rightly noted by Tridimas, those classifications usually raise more questions than they answer.[978] While it is useful to keep in mind the breadth of the term as well as the existence of different sub-categories of general principles, our focus here is on the sub-category of fundamental rights as defined in Article 6(3) TFEU.[979]

As far as they encapsulate fundamental rights, general principles also have a legitimising function, as they reflect the norms and values on which the legal order is built.[980] Their legitimising function goes hand in hand with their function as constraint. Tridimas elaborates on how in the aftermath of the Second World War distrust of executive power led to the search of constitutional principles to constrain administrative discretion in Germany. The development of general principles of EU law can be seen as a parallel development. More specifically, it was "an effort to assert the legitimacy and supremacy of Community law over conflicting national traditions",[981] by subjecting the

977 Every author uses a different classification of general principles of EU law. Some general principles find themselves under more than one category, while others are not categorized as "general principles" at all by some scholars. To begin with Tridimas, he identifies two main types of general principles: "(a) Principles which derive from the rule of law. In this category belong, for example, the protection of fundamental rights, equality, proportionality, legal certainty, the protection of legitimate expectations, and the rights of defence. … (b) Systemic principles which underlie the constitutional structure of the Community and define the Community legal edifice. These refer to the relationship between the Community and Member States, and include primacy, attribution of competences, subsidiarity, and the duty of cooperation provided for in Article 10 EC." Tridimas, *The General Principles of EU Law*: 4. Schermers and Waelbroeck identify three types of general principles of law: (a) Compelling (or constitutional) legal principles; (b) Regulatory principles common to the laws of the Member States; (c) General principles native to the Community legal order. For the definition and distinction of each group see, H. G. Schermers and D. F. Waelbroeck, *Judicial Protection in the European Union*, 6th ed. (The Hague: Kluwer Law Internation, 2001). 28-30. Groussot divides general principles of law into three groups: administrative principles (e.g. proportionality, non-discrimination and legitimate expectations), the procedural principles (e.g. rights of defense), and fundamental rights (e.g. right to property). He also traces back the origins of those principles to the national jurisdictions from which they were derived. See, Groussot, *General Principles of Community Law*: 4 and 17-43.

978 Tridimas, *The General Principles of EU Law*: 3.

979 Article 6(3) TEU reads as follows: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

980 Lindfelt, *Fundamental Rights in the European Union – Towards Higher Law of the Land?*: 12.

981 Tridimas, *The General Principles of EU Law*: 24. Similarly, Von Bogdandy claims that "the phenomenon of one-sided public power" is at the centre of every constitutional order. This one-sidedness clashes with "the central tenet of modern Europe", that is with individual freedom, turning this clash into the central problem of modern constitutional law. Both national as well as EU constitutional law are preoccupied with "the constitution, organization and limitation of this problematic one-sidedness". He argues that most, if not all constitutional principles are concerned with this problem. See, Bogdandy, "Founding Principles," 24.

exercise of public power to substantive and procedural limitations,[982] without getting into conflict with national constitutional courts.

As mentioned before, the founding Treaties are framework treaties i.e. *traités cadres*. They did not and still do not contain "a complete set of rules and principles which is necessary to redeem the promise of reining in the exercise of political power by the 'rule of law'".[983] It was the Court of Justice that developed those principles based on its mandate to "ensure that in the interpretation and application of this Treaty *the law* is observed".[984] According to AG Mázak, by formulating general principles of EU law, the Court has "added flesh to the bones of Community law, which otherwise … would have remained a mere skeleton of rules, not quite constituting a proper legal 'order'".[985] For others, general principles constitute the 'spirit' of the Treaties, or of any constitution, by imbuing it with meaning going beyond the black letter of its provisions.[986] The Supreme Court of Canada has expressed this view eloquently in the following paragraph:

> 'The constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution…Those principles must inform our overall appreciation of the constitutional rights and obligations.'[987]

Similarly, Tridimas is of the opinion that general principles are an expression of the constitutional standards underlying the EU legal order; hence recourse to them constitutes an integral part of the methodology employed by the Court of Justice. Since general principles embody constitutional values, they are capable of influencing the interpretation of written rules even in the absence of gaps.[988] As illustrated above, the most significant of those principles have been codified by the Member States in the Treaties. In the pre-Lisbon Treaty on the European Union they were called the *principles* on which the Union

982 M. Herdegen, "General Principles of EU Law – the Methodological Challenge," in *General Principles of EC Law in a Process of Development*, ed. U. Bernitz, J. Nergelius, and C. Cardner (Great Britain: Kluwer Law International, 2008), 3.

983 Ibid., 344.

984 Emphasis added. Now Article 19(1) TEU.

985 Opinion of AG Mázak in *Case C-411/05 Félix Palacios de la Villa*, [2007] ECR I-08531, para. 85.

986 Von Bogdandy argues that Article F in the Maastricht Treaty, as well as Article 6(2) TEU in the Amsterdam version were formulated from a limiting perspective. Therefore, they had only a 'restrictive' function, as opposed to the 'constitutive' function of Article 6(1) TEU (now Article 2 TEU). Bogdandy, "Founding Principles," 15.

987 Reference re Secession of Quebec, [1998] 2 SCR 217 (Can) to question 1, cited in ibid.

988 Tridimas, *The General Principles of EU Law*: 19.

is founded, while under current Article 2 TEU they are the *values* on which the Union is founded. No matter what their official designation is, scholars, and the Court of Justice,[989] agree on the fact that they constitute "the top tier of the hierarchy of norms of EU law".[990] They express the normative core content on which the EU is built, and are seen as the recognition in positive law of "a constitutive European constitutionalism".[991]

To sum up, general principles have contributed to the constitutionalisation of the legal order in many senses of the term. First of all, as just mentioned above, some of those principles have become constitutional by virtue of being codified in the Treaties, i.e. "the constitutional charter" of the Union. Secondly, they have contributed to the constitutionalisation of the legal order by incorporating the protection of fundamental rights,[992] by establishing the rule of law, and overall by laying down substantial and procedural constraints on the exercise of law making power in the EU. Thirdly, they have contributed to the process whereby the Treaties have asserted their normative independence *vis-à-vis* the Member States, and have evolved into "the founding charter of a supranational system of government."[993] As to how the latter happened, Von Bogdandy explains the role of principles in formulating an autonomous legal discourse, which strengthens the autonomy of courts *vis-à-vis* politics and allows for an internal development of the law that circumvents Article 48 EU.[994]

6.3.3.4.2 As part of the Charter of Fundamental Rights

Lastly, the codification of fundamental rights in the Charter has led many to view it as "the centrepiece of the current EU constitutionalization process".[995] With its clear constitutional overtones, the Charter, as the EU's 'Bill of Rights',[996] contributes further to this shift away from the international legal order where the Member States are the 'Masters of the Treaties', towards "a

989 *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, para. 304.

990 Tridimas, *The General Principles of EU Law*: 16. C. Eckes, "Protecting Supremacy from External Influences: A Precondition for a European Constitutional Legal Order," *European Law Journal* 18, no. 2 (2012): 241.

991 Bogdandy, "Founding Principles," 22.

992 Von Bogdandy argues that individual rights were essential for the constitutionalisation of the Union, however he acknowledges that those rights were rarely qualified as fundamental rights. He claims that "integration has followed the functionalist, not the constitutionalist path". ibid., 45.

993 This definition of 'constitutionalisation' has been provided by Tridimas, *The General Principles of EU Law*: 5.

994 Bogdandy, "Founding Principles," 18.

995 P. Eeckhout, "The EU Charter of Fundamental Rights and the Federal Question," *Common Market Law Review* 39(2002): 945.

996 G. De Búrca and J. B. Aschenbrenner, "The Development of European Constitutionalism and the Role of the EU Charter of Fundamental Rights," *Columbia Journal of European Law* 9(2002-2003): 372.

genuinely autonomous legal order" with "a self-sustaining constitution".[997] It reinforces the democratic legitimacy of the legal order,[998] by providing for a constitutionalized system of protection of fundamental rights as well as by constraining the scope of action of Union institutions and Member States.

6.4 Application of constitutional constraints

The entrenchment and inviolability of certain fundamental rights is the hallmark of modern constitutionalism as far as it means "nothing more than a system of legally entrenched rights that can override, where necessary, the ordinary political process".[999] The latter understanding of constitutionalism is criticised regarding its legitimacy, or "the 'undemocratic nature' of judge-made higher law".[1000] It is accused of positing democracy versus rights.[1001] However, as far as one talks about the Treaty amendment process, which is "characterized by a singular lack of transparency and real 'democratic' choice, then it is suggested that the guarantee of judicial control by a Court concerned to protect the rights of individuals and their fundamental freedoms may be essential to fulfil the characterization of the EC Treaty as 'a constitutional

997 Ibid., 364.

998 Ibid., 368; O. Zetterquist, "The Charter of Fundamental Rights and the European Res Publica," in *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument*, ed. G. Di Federico (Springer, 2011), 8.

999 Bellamy, "The Political Form of the Constitution: the Separation of Powers, Rights and Representative Democracy," 436. Similarly, Dworkin points out that constitutionalism is increasingly understood as "a system that established legal rights that the dominant legislature does not have the power to override or compromise". See, Dworkin, "Constitutionalism and democracy," 2.

1000 Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces," 65.

1001 According to Dworkin the conflict between democracy and rights "is illusory, because it is based on an inaccurate understanding of what democracy is". He clarifies that democracy does not merely mean majority rule, i.e. "mere majoritarianism does not constitute democracy unless further conditions are met". Even though there is no agreement as to exactly what those conditions are "some kind of constitutional structure that a majority cannot change is certainly a prerequisite to democracy". For example, argues Dworkin, there must be rules to ensure that a majority cannot disenfranchise a minority, or abolish future elections. See, Dworkin, "Constitutionalism and democracy," 2; building on Dworkin's arguments, Schauer adds that "[j]ust as we might expect anyone – including judges, lawyers, members of Congress, the President, and ordinary citizens – to be systematically deficient at the task of acting against self-interest, so, too, might we expect majorities to have the same systematic deficiencies. … [Hence], the same arguments for being reluctant to let police officers, presidents, attorneys general, and lawyers police themselves would also apply to the policing of majorities and the policing of the people, for this is a large part of what rights against majorities do". See, F. Schauer, "Judicial Supremacy and the Modest Constitution," *California Law Review* 92(2004): 1064; on the conflict between democracy and rights see also, Katz, "On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment," 252-53.

charter based on the rule of law'."[1002] As mentioned in the introduction, it was mainly the historical experience of the Second World War, which demonstrated that democracy is a necessary but not sufficient guarantee for the protection of individual rights and freedoms. That was for instance, the rationale behind entrenching those rights in an "eternity clause" in the German Constitution.[1003]

In the same vein, Vilaça and Piçarra argue that the idea that Member States are free to revise the Treaties as they want, "disregards the obvious fact that the Treat[ies] not only create[s] rights and obligations on the part of the Member States but also create[s] fundamental rights on the part of their nationals, such as those relating to free movement of persons".[1004] Hence, goes the argument, the Treaties "[are] not and could not be at the entire disposal of the Member States anymore than the fundamental rights embodied in their respective constitutions as States based on the rule of law could ever be".[1005]

As illustrated by the incorporation of general principles of law based on the common constitutional traditions of Member States, as well as ECHR to which all Member States are parties, the Union legal order is not insulated from that of its Member States. The interaction between the two has been studied widely, and is considered "entirely normal and healthy".[1006] In this respect, it is perhaps inevitable that the Court takes up the limits to revision drawn by national constitutions and constitutional courts as an example in this respect.[1007] After decades of interaction, harmonization and approximation between legal orders, it is argued that "a substantial part of the consti-

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1002 Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces," 65.

1003 See, Goerlich, "Concept of Special Protection for Certain Elements and Principles of the Constitution Against Amendments and Article 79(3), Basic Law of Germany," 397-412; Herzog, "The Hierarchy of Constitutional Norms and Its Functions in the Protection of Basic Rights," 90-93. More recently, the Czech Constitutional Court performed review around a non-amendable Article 9(2) of the Czech Constitution, which was included to protect the constitution against changes to essential requirements of a democratic state governed by the rule of law. For more details, see I. Šlosarèík, "Czech Republic 2009-2012: On Unconstitutional Amendment of the Constitution, Limits of EU Law and Direct Presidential Elections," *European Public Law* 3(2013): 435.

1004 Vilaça and Piçarra, *Are there material limits to the revision of the Treaties on the European Union?*: 50.

1005 Ibid., 50-51.

1006 Ibid., 56.

1007 The Court's approach in *Kadi*, also reminded many scholars of the approach taken up by the national constitutional courts, especially that of the Bundesverfassungsgericht in early 1970s, when it declared that "so long as" there were no mechanisms for the protection of fundamental rights at Union level, it would not hesitate to review the judgments of the Court of Justice. (The case triggering the so-called " Solange" approach or cases was Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 11 25.) For the similarity between the approaches of national constitutional courts of 1970s and that of the Court of Justice in *Kadi*, see A. von Bogdandy et al., "Reverse Solange – Protecting the Essence of Fundamental Rights Against EU Member States," *Common Market Law Review* 49(2012): 489-520.

tutional core of the [Union] ultimately coincides with the fundamental principles shared, to a greater or lesser degree, by the various national constitutional orders, and that therefore, to that extent, the material limits to be preserved in the [Union] legal order derive, quite simply, from the transposition to the [Union] level of those which, identical or similar in nature, are laid down by the national constitutions".[1008]

6.4.1 Are the "very foundations" impossible to amend?

As illustrated by history, no regime, no legal order is cast in stone. Rarely are States able to prevent revolutions, which is a clear illustration of the fact that their constitutions are not capable of preventing their own violation, they "can only deny any semblance of legality to such violation".[1009] The Union legal order is not much different from those of States in this respect as well.

Weatherill agrees that the Union legal order has "inalienable elements in its "very foundations"",[1010] as suggested by the Court in its Opinion 1/91. He adds that "[t]here is and should be *an irreducible minimum* to [Union] law – as seen from within".[1011] However, as a matter of public international law, he argues that it is difficult to envisage how Member States could be prevented from amending the Treaties as they wish, provided they all agree on the desired changes. He warns that if those changes are of a fundamental nature, this might mean the existing legal order has been brought to an end. Member States are capable of doing that "acting 'from outside'".[1012] A similar warning comes from Ehlermann, who argues that constraining the freedom of amending the Treaties by setting unwritten material limits might induce Member States to rely on conventional public international law so as to bypass those limits by arriving at a consensus outside Union law,[1013] as illustrated by the fiscal compact.

In other words, what is argued here is not that the substantive limits to amendment set by the Court will protect the legal order and its essential characteristics forever, but simply that the essential characteristics of the legal order or its "very foundations" are a *sine qua non* (essential pre-requisite) for the continuation of the legal order *as it is*. The fact that the nature of the legal

1008 Vilaça and Piçarra, *Are there material limits to the revision of the Treaties on the European Union?*: 56-57.
1009 Ibid., 52.
1010 Weatherill, "Safeguarding the Acquis Communautaire," 168.
1011 Emphasis added. Ibid.
1012 Ibid.
1013 C.-D. Ehlermann, "Mitgliedschaft in der Europäischen Gemeinschaft – Rechtsprobleme der Erweiterung, der Mitgliedschaft und der der Verkleinerung," *Europarecht* 19(1984): 123; cited in Vilaça and Piçarra, *Are there material limits to the revision of the Treaties on the European Union?*: footnote 51.

order can be changed or be brought to an end by the Member States is not disputed. It is worth noting that changing the essential characteristic of the legal order will mean the end of the Union legal order, as we know it, and the birth of a new, different legal order. In short, the latter will no longer be the legal order of *Van Gend en Loos*.[1014] It will be of a legal order of a different character that rests on new foundations. Hence, the argument put forward here is that there are constraints on Member States as primary law makers assuming that they want to maintain the essence of the *existing* legal order.

6.4.2 Are the "very foundations" able to constrain Member States as primary law makers?

To repeat the gist of the argument, Member States are constrained by the essential characteristics of the Union legal order, its constitutional foundations, or as put by the Court, by its "very foundations", as long as they want to maintain it and continue to act within its framework. As described in the introduction, there are two types of constraints: internal (normative) and external constraints. They can function independently as well as jointly by reinforcing each other. The section above demonstrated how the protection of fundamental rights spilled over from the national constitutional traditions into the case law of the Court of Justice, by the initial push of few national constitutional courts. After that, slowly but surely their protection was deeply ingrained in the Union legal order, firstly, as general principles of EU law, and then enshrined in the Treaties initially as principles (*ex* Article 6 TEU) and now as values (Article 2 TEU) on which the legal order is established. Their inclusion into the Treaties, as well as the case law of the Court is another illustration of firstly, how deeply entrenched or internalized those principles are; and secondly, of how both types of constraints reinforced each other over time.

After having examined the process of internalization of fundamental rights in the Union legal order, it is also worth looking more closely at the source of external constraints, that is the threat of sanctions flowing from the Court of Justice when Member States do not comply with some of the principles constituting part of the "very foundations", especially in their role as primary law makers. In this respect, the recent *Pringle* case points towards the possibility of judicial review, as well as the obligation on Member States to act in line with general principles whenever they act in the scope of Union law, irrespective of whether they act as primary or secondary law makers.

The *Pringle* judgment illustrates that primary law making procedures are amenable to judicial review. The case arose after the adoption of European Council Decision 2011/199/EU, which concerned the amendment of Article

1014 *Case 26/62 Van Gend en Loos.*

136 TFEU by insertion of a new paragraph 3.[1015] The amendment was to be carried out on the basis of Article 48(6) TEU, the newly introduced "simplified revision procedure". Mr. Pringle claimed that the amendment of Article 136 TFEU by Decision 2011/199 was unlawful. Hence, the first question referred to the Court concerned the validity of Decision 2011/199 in so far as it amended Article 136 TFEU on the basis of Article 48(6) TFEU.

In addition to the Council and the Commission, ten Member States intervened in the case arguing that the Court's jurisdiction to examine the first question was limited, if not excluded. They argued that the Court had no power to assess the validity of Treaty provisions under Article 267 TFEU. The Court's response was that it was the validity of Decision 2011/199, an act of a EU institution that was at stake and not that of Article 136 TFEU. Since the European Council was one of the Union's institutions under Article 13(1) TEU, the Court ruled that it had jurisdiction to examine the validity of the contested decision under Article 267(1)(b) TFEU.[1016]

As to its analysis of the matter, the Court began by admitting that the examination of the validity of primary law does not fall within its jurisdiction under Article 267(1)(a) TFEU. However, it added that after the introduction of the simplified revision procedure, it was up to the Court to ensure that Member States comply with the conditions laid down by the simplified procedure. For that purpose, the Court had to check, first, whether the procedural rules laid down in Article 48(6) TEU were met;[1017] second, whether the amendments concern only Part Three of the TFEU as required by the first subparagraph of Article 48(6) TEU; and lastly, whether there is no increase in the competences of the Union as required by the third subparagraph of Article 48(6) TEU.

According to the Court, compliance with the conditions provided for in Article 48(6) TEU had to be monitored in order to establish whether the simplified revision procedure was applicable. As the institution responsible to ensure that in the interpretation and application of the Treaties the law is observed under Article 19(1) TEU, it fell to the Court to examine the validity of the contested decision. In other words, the Court had jurisdiction to examine

1015 OJ L 91/1, 6.4.2011. The following paragraph was to be added to Article 136 TFEU: "3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality".

1016 *Case C-370/12 Pringle*, paras. 30-31.

1017 The Court did not list the procedural requirements of Article 48(6) TEU, probably because they were all met in this case. One of those requirements is provided in the second sentence of subparagraph 2 of Article 48(6) TEU and reads as follows: "The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area".

the validity of Decision 2011/199 in the light of the conditions of Article 48(6) TEU.[1018]

At the end of a comprehensive review, the Court found that there was nothing capable of affecting the validity of the contested decision. However, it should be noted that in addition to checking whether the procedural conditions of Article 48(6) TEU were met, the Court also had to go into the substance of the matter. It was not enough to establish formally that Article 136 TEU is a provision in the Part Three of TFEU. The Court also had to check whether the proposed amendment affected provisions in Part One of the Treaty, that is whether the amendment would encroach on the competences of the Union in the areas of monetary policy and coordination of Member States' economic policies.[1019] After establishing that the proposed revision concerned only provisions of Part Three of TFEU, the Court went on to check the content, that is the substance of the proposed amendment, which was laid down in Article 1 of the contested decision, to ensure that the amendment would not entail the conferral of new competences on the Union.[1020]

It should be noted that the Court's approval was not the end of the simplified revision procedure. In order to attain primary law status, Decision 2011/199 had to be approved by the Member States in accordance with their constitutional requirements as stipulated by the last sentence of subparagraph two of Article 48(6) TEU. That is actually how every procedure entailing amendment, or changes to the Treaties ends, be it the ordinary revision procedure (Article 48(4) TEU) or the enlargement procedure (Article 49(2) TEU). The fact that those procedures have intergovernmental components, however, does not exclude them from the Court's jurisdiction, as suggested by *Pringle*.

The second question referred to the Court is also of relevance for the arguments put forward in this thesis, more specifically, for establishing that general principles of EU law are also capable of constraining Member States when acting as primary law makers under Article 49 TEU. The second question concerned the interpretation of various Treaty provisions,[1021] as well as of the general principle of effective judicial protection.[1022] The referring court wanted to establish "whether those articles and principles preclude a Member State whose currency is the euro from concluding and ratifying an agreement

1018 *Case C-370/12 Pringle*, para. 35.
1019 Ibid., paras. 45-70.
1020 Ibid., paras. 71-76.
1021 Articles 4(3), and 13 TEU; and Articles 2(3), 3(1)(c) & (2), 119 to 123, and 125 to 127 TFEU.
1022 The second question also concerned the interpretation of Article 2 and 3 TEU, as well as the prinicple of legal certainty. However, the Court found the second question inadmissible as far as it concerned those two provisions and the prinipcle of legal certainty, on the ground that the order of reference failed to explain the relevance of those provisions and that prinicple to the outcome of the dispute.

such as the ESM Treaty".[1023] In other words, could those articles and general principles act as constraint on Member States in ratifying the ESM Treaty?

After analysing every provision individually, the Court ruled that none of those provisions precluded a Member State whose currency is the euro from concluding the ESM Treaty. As to the application and interpretation of the general principle of effective judicial protection, the applicant argued that the establishment of the ESM outside the Treaty framework would remove it from the scope of the Charter, which would breach the guarantee to effective judicial protection laid down in Article 47 CFR.

The Court responded by pointing out that Article 51(1) CFR is addressed to the Member States only when they are implementing EU law. According to Article 51(2) CFR, the Charter does not extend the field of application of Union law, establish new powers and tasks or modify those defined in the Treaties. Thus, the Court interprets EU law within the limits of powers conferred on it. The Court went on to explain that, "the Member States are not implementing Union law, within the meaning of Article 51(1) of the Charter, when they establish a stability mechanism such as the ESM where … *the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism*."[1024] Thus, the Court concluded that the general principle of effective judicial protection did not preclude either the conclusion or the ratification of the ESM Treaty.

The explanation provided by the Court is pretty clear. The general principle of effective judicial protection and Article 47 CFR, which the Court seems to use interchangeably, will not apply to a Treaty (the ESM), which will be born entirely outside the structures of the Treaties. The Treaties do not confer any competence on the Union to establish the ESM; whereas, they contain a procedure to admit new Member States under the conditions stipulated by Article 49 TEU as well as to amend the Treaties under the conditions stipulated by Article 48 TEU. Thus, general principles do apply and constrain Member States when they are acting within procedures embedded in the Treaties.

The Court of Justice has jurisdiction to review whether the conditions laid down in those provisions are met, and whether the proposed amendments comply with general principles of EU law. It should be noted that the most straightforward way for the Court to review the validity of a European Council decision would be before its entry into force, that is before the act it adopts is ratified by all Member States. Even though the same decision could be challenged after ratification, the latter process would be trickier in terms of its consequences.[1025]

1023 *Case C-370/12 Pringle*, para. 77.

1024 Emphasis added. Ibid., para. 180.

1025 Hillion notes that the Court could interpret and check the application of the provisions of a future Turkish Accession Treaty via the preliminary ruling procedure (Article 267 TFEU). He argues that the more radical option would be the use of the plea of illegality

Pringle seems to be in line with AG Lenz' Opinion in *LAISA* where he argued that "the possibility cannot be excluded that the Member States themselves might enact primary law contrary to the Treaty which would then necessarily be subject to review by the Court, not only by means of an interpretation of the kind constantly undertaken by the Court in proceedings under Article 177 of the EEC Treaty (4) [now Article 267 TFEU] but also in a direct action, be it eventually essentially on the basis of Article 164 of the EEC Treaty [now Article 263 TFEU]".[1026] It should be noted that previously, the European Council was not one of the institutions listed in the Treaties consequently its acts were not within the jurisdiction of the Court of Justice. Whereas after Lisbon, the validity of its acts can be challenged, both via Article 267 TFEU as in *Pringle*, as well as via Article 263 TFEU.[1027]

As Von Bogdandy underlines, it is the Member States that compose the European Council and Council and as such they are "in the centre of the public authority constitutionalised by the Treaties, *while being strictly subjected to primary law*".[1028] In other words, Member States act as Member States of the Union whenever they act within the scope of EU law, i.e. whenever they act within the procedures, structures of the Union or whenever their actions affect areas or competences in which their actions have been pre-empted by the Treaties or secondary EU law. Thus, whenever they act within the scope of EU law,[1029] they are bound by the Treaties, the Charter, as well as by general principles of law, which together constitute primary law.

In conclusion, if a Member State or an institution of the Union applies to obtain the Court's Opinion on the compatibility of the PSC with Union law included in Turkey's Accession Agreement after the Council's approval of the agreement,[1030] or challenge its validity under Article 263 or 267 TFEU, just

(Article 277 TFEU) whereby a Turkish national asks the Court to hold inapplicable a safeguard measure claiming that the basis on which it is adopted (that is the PSC in the Accession Treaty) is itself invalid for not being compatible with fundamental principles of Union law. For a more detailed discussion, see Hillion, "Negotiating Turkey's Membership to the European Union: Can the Member States Do As They Please?," 281-82.

1026 See, Opinion of AG Lenz delivered on 1 December 1987 in Joined Cases 31 and 35/86 LAISA and CPC España v Council of the European Communities [1988] ECR 2285, part B -I- (a) of the Opinion.

1027 Article 263(1) TFEU provides as follows: "The Court of Justice of the European Union shall review the legality of legislative acts … of the European Council intended to produce legal effects vis-à-vis third parties."

1028 Emphasis added. Bogdandy, "Founding Principles," 35.

1029 In the explanations to the Charter, OJ C 303/32, 14.12.2007, the cases referred to explain the statement "Member States when they act in the scope of Union law" are the following: *Case 5/88 Wachauf*, [1989] ECR 2609; *Case C-260/89 ERT*; *Case C-309/96 Annibaldi*, [1997] ECR I-7493. While the first case seems to exemplify the most straightforward situation, that is Member States acting as agents of the Union in implementing EU law, the Court has interpreted it recently in boarder terms, that is not only when Member States are directly implementing an EU Directive for instance, but also when a national law, which was not put in place to implement a Union obligation, is connected to or has an effect

like it did in *Pringle*, the Court would be able to review the legality of the Council Decision approving the Agreement. The Court could review the contested Council Decision on procedural grounds as it already stated that Article 49 TEU is "*a precise procedure encompassed within well-defined limits for the admission of new Member States*",[1031] which can be interpreted to mean that it is up to the Court to rule on whether the procedural requirements of Article 49 TEU have been met. Moreover, like in *Pringle*, the Court could carry a limited substantive review to check whether there's anything in the Accession Agreement that goes beyond being a mere "adjustment" that aims to integrate the new Member State into the structures of the Union.

The Court should not be expected to uphold an Accession Agreement that contains elements which are incompatible with the "the very foundations" of the EU legal order as defined in Article 2 TEU. The fact that this could be the case is demonstrated more clearly in the following Chapter, by providing a specific example of how the PSC would violate one of the founding principles of the Union legal order, that is the principle of non-discrimination on the basis of nationality.

6.5 Conclusion

This Chapter discussed the existence of the "very foundations" of the Union as an untouchable core, which acts as a constraint on Member States even when they act as primary law makers. The Court's *EEA Opinions*, *Opinion 1/09* and its pronouncements in *Kadi I* confirm the existence of fundamental principles that constitute "the very foundations of the [Union]" that have to be respected at all times. It was noted that a concept similar to that used by the Court, but not identical, the concept of "fundamental *acquis*" was coined first by Pescatore to indicate the existence of an *acquis* of superior rank, before the Court's *EEA*

to an issue regulated by EU law. See, *Case C-617/10 Åkerberg Fransson*, paras. 19-26. The ERT case exemplifies situations in which Member States derogate from Union law and the Court reminds them that they need to comply with fundamental rights even in cases of derogation. The obligation to comply with fundamental rights even in "derogation cases" was recently confirmed in *Case C-390/12 Pfleger*, judgment of 30 April 2014, n.y.r., paras 35-36. As to the Annibaldi case, it refers to a situation that is covered entirely by national law and has no link to EU law. The latter situations has been recently confirmed in *Case C-483/12 Pelckmans Turnhout NV*, judgment of 8 May 2014, n.y.r., paras 18-23. For a more detailed discussion of these three situations, see K. Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights," *European Constitutional Law Review* 8, no. 3 (2012): 376-87.

1030 The legal basis for obtaining the Court's Opinion is Article 218(11) TFEU [ex Article 300(6) EC]. For more information on the procedure, see Plender, "The European Court's Pre-emptive Jurisdiction: Opinions under Article 300(6) EC," 203-20.

1031 Emphasis added. *Joined Cases 31 and 35/86 LAISA and CPC España v Council of the European Communities*, para. 7.

Opinion. The implication of the existence of such a core of Union law for the inclusion of a PSC on free movement of persons is clear, as principles belonging to that core would arguably be able to constrain Member States from including such a clause if it were to violate any of those principles.

While the existence of "the very foundations" is not disputed very much, what is controversial is identifying the content of the notion defined by the Court. To be able to determine the content of the notion, firstly the original Treaties, case law and Opinions of the Court were examined for clues. In addition to the principles of the rule of law (now embedded in Article 19(1) TEU, ex Article 164 EEC), the autonomy of the legal order (*EEA Opinions* and *Opinion 1/09*) and protection of fundamental rights (*Kadi I*), it was argued that the fundamental freedoms and the core of Union citizenship also constitute part of those "very foundations".

The analysis on the substance of constitutional constraints begins with the four freedoms. They are identified as part of the "very foundations" due to several factors. Firstly, their central place in the original EEC Treaty, under the title "Foundations of the Community", as well as their vital role in the establishment of the internal market, which has been traditionally seen as the essence of the integration project. Secondly, The Court's case law and academic writing also confirm how crucial they have been and still are to the project of European integration. The analysis in this part focused on the development of the free movement of persons, since that is one of the areas in which the introduction of a PSC is considered. As they developed over time, the Court acknowledged that it considered the freedoms as part of the foundations of the [Union], and even as "fundamental rights". Similarly academics defined them as "economic constitutional rights".

The development that removed the adjective "economic" and turned free movement into almost (as it is still subject to some limitations) a fully-fledged constitutional right was the introduction of Union citizenship. While the concept is arguably the latest addition to the "very foundations" of the Union legal order, in our demonstration of the substance of constitutional constraints, it follows immediately the freedoms, mainly because it provides a clear illustration of the relationship between what is "destined to be the fundamental status of nationals of Member States" and the right to free movement of persons. While Union citizenship as provided in the Treaties initially was seen as a disappointment or an empty promise, the overview of the Court's case law illustrated how the Court managed to make something out of it, i.e. as put by O'Leary, how it fleshed out the bare bones of the citizenship concept.

As demonstrated above, the Court's case law on Union citizenship cut the existing connection between the right to free movement and its economic objective, i.e. the pursuit of an economic activity. Now the right to free movement, and the corollary right of equal treatment, which is analysed in more detail in the following Chapter, are directly linked to the status of Union citizenship. Free movement and equal treatment constitute the very core of

the citizenship status. Since a PSC on free movement of persons is bound to breach both aspects of the latter status, as (it will suspend the free movement rights of Union citizens of only Turkish nationality) it would be breaching the essence or the entire core of the citizenship concept. Hence, it is argued that Member States would be precluded from including such a clause that is liable to violate Union citizenship, "the" status of nationals of Member States, which is arguably part of the "very foundations" of the Union.

The third and final substantive constitutional constraint identified in this Chapter, which the Court already identified explicitly as one of "the principles that form part of the very foundations of the Union"[1032] is the protection of fundamental rights. Unlike the fundamental freedoms, fundamental rights were initially not even mentioned in the Treaties. Hence, the inception and rise of fundamental rights in the hierarchy of norms within the Union was briefly reviewed by examining the Court's case law in this area. The Court was the engine propelling the upward movement of those rights. Reaching the pinnacle in the hierarchy of norms in the Union legal order would however, not have been possible if it had not been for the approval of the Member States. That approval was manifested by the inclusion of protection of fundamental rights in the Treaties, and by giving them a more prominent place in each subsequent Treaty revision. The latter development, combined with the case law of the Court, created a virtuous circle that led to stronger protection and genuine internalization of fundamental rights at both Member State and Union levels.

Next, it was argued that fundamental rights played an important role in the constitutionalisation of the Union legal order in at least two senses of the word. Firstly, the development of fundamental rights and their inclusion in a binding Charter brought the Union legal order closer to those of nation states. Secondly, they contributed to the autonomisation of the Union legal order *vis-à-vis* the Member States, by helping the Court develop an autonomous legal discourse. Hence, the Court of Justice was identified as the main authority in the Union legal order competent to ensure respect for the substantive constitutional constraints and the "very foundations" of the legal order. It was noted however, that as constitutionalized as a legal order could be, that would not mean it could not be brought to an end. Just like revolutions terminate national legal orders, theoretically Member States are also, in principle, able to bring the Union legal order to an end. Hence, the argument forming the basis of this thesis was fine-tuned to claim that the "very foundations" of the Union constitute an untouchable core assuming that Member States want to maintain the fundamental structure of the existing legal order in place. Changing the fundamentals of the legal order would mean the end of the existing one and the creation of a new legal order.

1032 *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, para. 304.

While the entrenchment and internalization of fundamental rights illustrated their constraining power as normative or internal constraints, the recent *Pringle* judgment illustrated clearly how they could also be used as external constraints matched with the threat of sanction in the hands of the Court of Justice. In other words, *Pringle* was an example of the application of constitutional constraints. It showed that any Council Decision adopting a Treaty of Accession, before its ratification and transformation into primary law, could be challenged to check if it respects, firstly, the conditions stipulated by the procedure on the basis of which it was adopted, and secondly, principles that constitute part of the "very foundations" of the Union.

As for our test case, in the framework of Article 49 TEU, the Council Decision approving an Accession Agreement could be reviewed firstly, on procedural grounds, and secondly, on substantive grounds, so as to check whether what Article 49 TEU provides for has been respected. Regarding the former, the Court already established that Article 237 EEC (now Article 49 TEU) is "*a precise procedure* encompassed within *well-defined limits* for the admission of new Member States".[1033] The Court could check if those limits had been respected. Regarding the latter, the Court could check whether the "very foundations" of the Union were respected, and if there were anything in the Accession Treaty that went beyond being a mere adjustment carried out to facilitate the accession of the new Member State. Obviously, a PSC on free movement of persons that breaches few elements that constitute part of the "very foundations" of the Union will not be able to pass the test set by the Court. Hence, the next step (Chapter 7) is to establish that the proposed PSC would breach one of the fundamental principles of the Union legal order, which belongs to those "very foundations", namely the principle of non-discrimination on the basis of nationality or the principle of equality.

1033 Emphasis added. *Case 93/78 Mattheus v Doego*, para. 7.