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DISCUSSION

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Alive and kicking or barely alive? The asymmetry thesis in the twenty-first century EU

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ABSTRACT

This paper focuses on the legal and institutional assumptions of Fritz Scharpf's famous thesis of an asymmetry between positive and negative integration in the EU. Taking issue with a number of arguments forwarded in the lead piece for this debate section, it questions the relevance of the thesis to the governance of the contemporary EU, objecting to (i) the limited falsifiability of the asymmetry thesis as established by the distinction between structure and agency; (ii) the emphasis of the thesis on the weakening influence of negative integration and (iii) the way in which asymmetry ignores the increasing centrality of positive integration to defining the EU's legal order. As the paper concludes, while the asymmetry thesis pioneered inter-disciplinary exploration of how the EU's legal and political order inter-relates, it needs serious re-thinking in the Europe of the 2020s.

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Martin Höpner, Susanne Schmidt and Daniel Seikel's opening contribution to this debate section further develops an important debate on Fritz Scharpf's legacy. Its central conclusion is that, far from being outpaced by contemporary developments, Scharpf's diagnosis of an asymmetry between positive and negative integration 'is alive and kicking'. Höpner *et al*. (2025) respond to a growing strand of literature, including an article published by the present authors, questioning the legal assumptions of the asymmetry thesis.

While Höpner *et al*.'s piece makes important clarifications on the scope of Scharpf's work, we remain of the view that the asymmetry thesis does not reflect important changes in the structure of EU governance, and the

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balance between positive and negative integration, that we observe in the last two decades. Reflecting the structure of their piece, we focus our remarks on the legal and institutional elements of Höpner *et al*.'s claims, examining, as they do, three elements: (i) the re-framing of Scharpf's theory and the distinction between structure and agency; (ii) the weakening of negative integration; and (iii) positive integration's growing force. As we conclude, far from being 'alive and kicking', the asymmetry thesis could better be described as barely alive in the EU of the 2020s.

Structure, agency and falsifying the asymmetry thesis

A key element of Höpner *et al*.'s critique is the distinction between structure and agency. Even if we see patterns of strengthening positive integration, or weakening negative integration, they may result from changing actor preferences on the part of policy-makers or judges. These preferences, however, are precarious: beneath them is a *structural* asymmetry that has remained even as actor preferences have ebbed and flowed in liberalising or market-correcting directions (see also Scharpf, 2010).

A few remarks are warranted in this regard. To begin with, and bracketing the issue that agency has played a greater role in Scharpf's scholarship than the authors acknowledge,[1] our challenge to the continuing relevance of the asymmetry thesis does not solely pertain to changing preferences, such as the notion that the views of judicial or political actors have simply evolved with time. Rather, it also concerns structure, including elements of the EU's legal order overlooked in his original theory.

Höpner *et al*. rightly point to diversity – and the gap between European and national politics – as an important continuing barrier to positive integration. Precisely the same factors, however, also inhibit successful negative integration. The CJEU's efforts to strike down national laws for violating Treaty rules are mediated by national courts, whose cultural diversity, organisational features and knowledge of EU law play a decisive role in their willingness to utilise it in domestic litigation (Ghavanini, 2019; Pavone, 2020). Enlargement has deepened this diversity, requiring new tools for cooperation between the national and EU judiciaries. It is therefore not different judges but rather the very *structure* of EU law – implemented through the 'borrowing' of national judicial and administrative systems – that produces patterns of judicial deference, affecting in turn the relative success of negative and positive integration.

In our view, the distinction between structure and agency points to a more fundamental problem: the potential dilution of Scharpf's thesis in a manner that makes it more difficult to meaningfully test and thereby weakens its scholarly relevance. One strength of Scharpf's original theory was precisely its boldness. It provided a heuristic that could be applied across policy

fields and that also had important normative implications, as evidenced by the debate over Social Europe (Schreurs, 2025). It set broad expectations about the Union's policy and political structure, and has been received in the scholarly literature in this light. By repeatedly caveating the thesis – that it is only probabilistic; that it does not concern agency; or that it only applies to specific policy areas – the lead piece dilutes the usefulness of asymmetry as a general theory of how we can expect integration in the EU's internal market to develop.

The structure-agency distinction also has implications for the testability of the thesis. The distinction allows failed efforts at social policy-making, or liberalising case-law of the CJEU, to be presented as evidence of asymmetry. At the same time, it allows the exact opposite, i.e., social protective legislation, or the refusal of the CJEU to expand the scope of EU substantive law, to be cast not as evidence of structural change but as a temporary change of heart by the actors involved, under which the asymmetry remains. New forms of positive integration, like the extensive growth of policy coordination, or market-correcting policy that harmonises, but only partly, is simply 'not enough' to change the fundamental asymmetry [even though it might mimic the way economic or social policy is organised in other federal settings (Zeitlin & Trubek, 2003)]. The question this raises is: what evidence *would* disprove the asymmetry thesis?

The weakening of negative integration

Höpner *et al*. also extensively discuss the balance between negative and positive integration. Before addressing the points raised, it may be helpful to clarify in more detail the boundaries between these terms. One of the key difficulties of the asymmetry thesis is that it conflates two potential asymmetries that may co-incide but that also may not. The first is the distinction between advancing integration through courts and doing so through legislation or political bargaining. The second is the distinction between EU policy that creates markets by removing trade barriers and EU policy that corrects market behaviour by laying down regulatory requirements. In the asymmetry thesis, they match up in the form of a market-making court and a market-corrective legislature. The two might also, however, be separated – the court e.g., can use its case-law and interpretation of Treaty articles in a market-corrective manner (even establishing a basis for future policy-making), just as EU legislation can be used to liberalise and remove trade barriers. It is important to keep this nuance in mind when discussing, as we will do below, the question of how the balance between negative and positive integration has altered.

Negative integration, so the defenders of the asymmetry thesis claim, remains as strong as ever. This shows in the manifold ways in which the

Court of Justice continues to constrain national political processes. The discussion here revolves around three sets of issues.

The *first* concerns the scope and intensity of judicial review exercised by the CJEU. It is worth highlighting that the Court follows what has been called the 'global model of constitutional rights' (Möller, 2012). This means that it interprets the scope of most EU rights, including the fundamental freedoms, expansively, as a result of which the focus of judicial review shifts towards justification and proportionality analysis. Since 2000, more than 80 per cent of all free movement of goods rulings have looked at the justification of Member State action (Zglinski, forthcoming); it is likely that the jurisprudence in other areas of free movement has evolved along similar lines. Two implications follow. One is that, over time, justification and proportionality have become the main forum for solving questions surrounding not only the substantive content of free movement law but many broader issues of market integration, such as the scope of national autonomy, the role of democratic decision-making, and the balance between economic and non-economic concerns. The other is that the changes concerning the scope of free movement rights, which have fascinated EU lawyers for decades, matter increasingly little.

Against this backdrop, we are reluctant to give *Keck* too much space in this exchange. It is true that *Keck* has not been adopted outside the goods context, but similar doctrinal tools aimed at limiting the scope of the four freedoms, such as the *de minimis* doctrine, have emerged elsewhere. It is equally true that there are relatively few *Keck* cases decided by the CJEU (Zelger, 2024), but that, in a way, was precisely the point: the doctrine was meant to reduce litigation concerning general economic regulation. Finally, *Italian Trailers* may have created some ambiguity around the doctrine's legal status by introducing a broad market access test, but it has not taken us back to the days of *Sunday trading*-style activism (cf. Enchelmaier, 2021, p. 574). This has to do with the rise of EU legislation in the period between those rulings, as well as how the Court has handled the task of justification and proportionality review.

Höpner *et al*. worry that it is the Court which decides what counts as a legitimate justification ground in free movement disputes. This would be a serious threat if the Court imposed meaningful constraints on the types of justifications that Member States can put forward – but it hasn't. The jurisprudential *acquis* suggests that any domestic policy goal will be recognised as a legitimate defence as long as it has a minimum degree of plausibility. More importantly, the intensity of judicial review in free movement cases has dropped (Zglinski, 2020). Deferential judgments are becoming more and more common (López Zurita and Brekke, 2024). This is not to say that interventionist judgments like *Laval*, which has become a principal witness for

proponents of the asymmetry thesis, have completely vanished. Yet, they are increasingly perceived as atypical (Weatherill, 2022).

The *second* source of disagreement concerns the decline of free movement litigation. Zglinski (2024) shows that numbers of goods cases have fallen since the mid-1980s, reading the results as a sign of the diminishing strength of negative integration. Höpner *et al*. challenge the conclusion on two grounds. They say that while goods cases may be decreasing, cases concerning other free movement rights are increasing. What is more, negative integration is not reliant on new CJEU rulings to operate.

We want to start by noting a certain tension in this line of defence. On the one hand, the rise in some free movement cases (persons, services etc.) is seen as an indicator of negative integration working efficiently. At the same time, the absence of other free movement cases (goods) is considered to not present an obstacle for the efficient functioning of negative integration either. This framing makes it hard – going back to our earlier point about theory testing – to determine what evidence would need to be provided to falsify the asymmetry thesis.

Free movement of goods cases before the CJEU have decreased, not just relocated to other areas of EU law (cf. Zöllmer, 2024);[2] and, although further research is needed here, it appears that goods are not alone. Šadl and Hermansen (2024) have studied the evolution of the free movement of persons, which includes workers and establishment. Her data covers litigation on both primary and secondary law. She finds a similar, if delayed, development, with case numbers increasing from the mid-1980s until 2011 before reverting back to rates comparable to those in the mid-1980s. The findings are even more striking once we break down the cases into the legal issue at stake. For the last three available years in the dataset (2020–2022), only 12 out of the 51 CJEU rulings (23.53 per cent) concern Article 45 or 49 TFEU, the Treaty provisions guaranteeing the free movement of workers and right to establishment. And where these provisions come up, they are, for the most part, used as mere interpretive aids for EU legislation. The rest is all about secondary law: the various directives and regulations concerning social security, third-country nationals, Schengen rights and so on. To the extent that the Court is still active in free movement adjudication, it mainly acts as an enforcer of positive integration (Šadl *et al*., 2023).

Although it is possible, even likely, that internal market cases have partly migrated to national courts, there is no specific evidence that this has happened at the same rates that they have been disappearing from EU courtrooms. Further, the little systematic research on domestic application of free movement law we have suggests that national courts are more lenient than the CJEU (Jarvis, 1998). This carries an obvious logic: why would they have a greater interest in the strict application of market freedoms than the CJEU itself?

The above leads us to the *third* and final issue: the relationship between negative integration and litigation. According to Höpner *et al*., a steady stream of liberalisation impulses in the Member States unfolds in practice without the need for new CJEU rulings. Zöllmer (2024) aptly calls this the 'invisible hand' of the case law. Let us be clear: we do not claim that judgments have no relevance beyond the specific dispute they settle, or that Member States do not comply with internal market rules unless judicially challenged. However, we do believe that progress in negative integration can, at least typically, only be made through new litigation or the serious threat thereof (Pavone & Stiansen, 2022). Take the principle of mutual recognition. After *Cassis de Dijon*, it was clear that Belgium could not require margarine to be sold in cube-shaped blocks, Germany require beer to be produced in line with the *Reinheitsgebot*, or Italy require pasta to be made from durum wheat. Yet, each of these issues had to be litigated one by one. Even 40 years later, a company lawfully manufacturing food supplements in one Member State was prohibited from marketing these in another Member State (Weatherill, 2018). This is the flipside of the global model of constitutional rights and the conditional nature of mutual recognition. Litigants can rely on a broad scope of rights, but governments have ample room to justify their regulations, making legal action necessary to determine the boundaries of what is or not allowed in the internal market.

The strengthening of positive integration

Our argument that the asymmetry thesis no longer accurately reflects EU governance is additionally based on the view that positive integration has gained strength. We made four interrelated observations to support that view: (1) positive integration has grown significantly, which shows that the legislature is less inept than Scharpf claims; (2) despite competence-based limitations on positive integration, the legislature could amply pursue non-market goals; (3) contrary to what Scharpf argues, the Court does not have a monopoly on Treaty interpretation; (4) the CJEU tends to respect the legislature's choices (van den Brink, 2024).

In response to our argument, Höpner *et al*.'s contribution raises three objections. Before examining these, we want to note that it leaves several of our observations unaddressed, including that the Court has no monopoly over the interpretation of EU law, that competence constraints did not prevent the harmonisation of non-market standards (Dawson, 2024, pp. 22–25), or that the CJEU, especially when reviewing European legislation, is not at all activist. What is more, it frames the debate too narrowly. To assess the strength of positive integration, the primary question is how good the EU is at enacting positive integration, not whether positive integration can correct negative integration. Höpner *et al*. do not engage with the fact that

there is 'nowhere near enough case law to support the full breadth of legislation that has emerged'. Indeed, even absent CJEU case law (or perhaps especially then), the EU legislature can leave its regulatory mark on the internal market. To take but one recent high-profile example, the AI Act regulates a sector in which there were no previous Court rulings. This is an important instance of positive integration even if it does not correct any case law. It illustrates that the debate over the strength of positive integration cannot be answered primarily by asking whether legislative override of negative integration is possible.

With these preliminary remarks out of the way, let us examine the three objections. The *first* is that secondary law cannot easily modify the Court's interpretation of primary law for two reasons: primary law takes precedence over secondary law, and the Commission can use its power of legislative initiative to bring legislation in line with case law. While primary law indeed ranks above secondary law, the classical mistake would be to think that the Court therefore ranks above the legislature. It does not. Primary law has no agency of its own. It is a body of law to be interpreted, and this is done through both case law and legislation, without one taking priority over the other in principle (van den Brink, 2024). Moreover, in practice, given the Court's widespread use of the 'legislative priority rule' (Ní Chaoimh, 2022), legislation may well have a greater interpretative impact on primary law than case law these days.

We do not contest Höpner *et al*.'s further point: the Commission can use its powers to try to enact into legislation the Court's interpretation of primary law. More generally, we accept that institutional factors can allow negative integration to leave its mark on legislation. Our point, however, is that reality is often so out of sync with what the asymmetry thesis predicts that it therefore needs to be revisited. The legislature often manages to negotiate the constraints of case law (Martinsen, 2015; Ní Chaoimh, 2022). The examples offered in our earlier piece continue to demonstrate this, including the legislature's overruling of *Cassis de Dijon*. While the Court ruled against the fixing of alcohol contents, subsequent legislation prescribed in detail the required content of alcoholic drinks. In response, Höpner *et al*. argue that this issue was of secondary importance; the real issue was that the Court established 'the country-of-origin-principle'. Of course, this is what *Cassis de Dijon* is famous for, but the fact remains that the legislature corrected the Court on the concrete issue at hand, i.e., the regulation of alcoholic drinks. Moreover, although it did not reject the country-of-origin rule altogether, it did set aside this principle as regards the content of alcoholic drinks by, indeed, enacting harmonised product standards.

This brings us directly to the *second* objection: the general likelihood of positive integration is lower than we assume. This does not mean that it is low. Höpner *et al*. recognise, in line with Scharpf (1999, pp. 72–72), that

there are differences in the comparative likelyhood of success of for example product and consumer-related standards when compared to more ambitious process standards. This suggests that it is really only the latter – such as alignment in social policy and working conditions across the EU – that will effectively address the asymmetry thesis. Absent such standards 'regulatory competition resulting from mutual recognition remains an important concern in the EU' (Höpner *et al*., 2025, p. 4).

In our view, the distinction between product and process standards seems unhelpful since plenty of internal market rules do not fall under either rubric. The lead piece presents the collision rules of the Posted Workers Directive as process standards, but these rules do not set standards for the provision of services. Rather, they determine whether the standards of the home or host state can be applied to posted workers. In this respect, a more helpful distinction is one between substantive rules (product rules, environmental standards, working conditions, etc.) and conflict rules (home-state rule, host-state rule, etc.). The argument of Höpner *et al*. then seems to be that the EU struggles to adopt meaningful substantive rules on social policy and working conditions (and in part enacts only conflict rules). One can cite extensive EU regulation to contest this argument (anti-discrimination law and other EU labour law), but they have a point that recent social initiatives established either conflict rules (posted workers) or minimum standards. These initiatives could therefore be seen as falling short of aligning process conditions [read substantive rules] across the EU.

But what does this say about the asymmetry thesis? Relatively little, we think. Höpner *et al*. seem to assume that the only way the EU can remedy negative integration is by fully harmonising working conditions, wage policies, social security standards etc. But why reject everything below full harmonisation? Scharpf didn't do so in his original work: not all the goods legislation he mentions is full harmonisation. Moreover, in many areas – including social policy (Art 153 TFEU) – the EU can at best adopt minimum standards. These standards might be seen as a 'second best', but they also allow Member States to adopt more ambitious versions of market-corrective policies if they so wish and may often be necessary to navigate precisely the significant divergences between European states of central concern in Scharpf's work. So, it cannot surprise that recent social policy initiatives do not align conditions across the EU: this is often either prohibited or unwanted.

More importantly, EU regulatory alignment is needed to prevent the asymmetry only when there is negative integration to be remedied. Take the Social Security Coordination Regulation. Instead of aligning social security standards, the Regulation establishes conflict rules that determine which domestic social security system covers whom. It does not follow that the Regulation fails to remedy negative integration. In fact, its conflict rules

create neither negative nor positive integration: they neither dismantle national social security norms nor erect such norms at the EU level. The same can be said of the amended Posted Workers Directive (PWD). Its rules determine what working conditions can be applied to posted workers. Because the amended PWD allows the host state to make posted workers subject to most of its rules on pay and working conditions, it neither dismantles such standards at the national level nor erects them at the EU level.

Several consequences follow from the above. First, while conflict rules can have a negative effect on regulatory standards (e.g., mutual recognition or home state control), not all conflict rules can be described under the headers of positive and negative integration. Second, to establish an asymmetry between positive and negative integration in an area, it is not enough to point to the absence of (full) EU harmonisation; we also need to know whether the EU exercises deregulatory powers in the area. Third, even when it does, the EU might be able to rectify the asymmetry between negative and positive integration without adopting harmonising legislation. As in the case of the PWD, it might sometimes be better to amend the conflict rules. The conclusion is: yes, the lead piece is correct that positive integration cannot be easily established in all areas, but no, this does not tell us much about the asymmetry thesis.

The *third* and final objection is that 'negative integration directly impacts positive integration as it shifts the fallback position in political negotiations'. Member States favoured by case law can rely on the judicial process and do not need to engage in political negotiations and the Commission can take advantage of favourable case law to push its political agenda. This objection does not strike us as altogether different from the first. We agree that negative integration can have this effect. Yet, it need not and often does not have this effect. To return to the product-process distinction, the EU could harmonise product requirements even if mutual recognition favoured some member states, namely those with low product standards. Likewise, the EU was able to harmonise consumer protection laws and many process rules even if member states could have relied on the principle of mutual recognition instead. Finally, more and more, integration operates in areas – see the earlier AI example – where the shadow of case-law is not a meaningful predictor of political power. We therefore remain of the view that positive integration is an increasingly significant driver of EU governance.

Conclusion

The above observations, in our view, leave proponents of the asymmetry thesis in a difficult position. Scharpf's analysis was a powerful diagnosis of the dilemmas of the internal market of the 1980s and even early 90s. In the intervening period, however, European integration has undergone enormous

changes. The Treaties have been constantly amended, both shifting the EU's policy focus away from the internal market and opening-up decision-making rules. The EU legislature has become significantly more active, establishing some 1,500 legislative acts in the internal mark*et al*one. The CJEU has also changed, re-organising its internal structure and establishing new doctrines that regulate the relation between national and EU courts (while being accompanied by new non-majoritarian bodies like the ECB). It seems incredulous to imagine that these changes have dramatically impacted the *structure* of integration but somehow left the asymmetry entirely intact.

In our view, we pay better respect to the intellectual impact of Scharpf's work by understanding the asymmetry thesis as a robust depiction of a particular phase of integration that must be re-thought for a new era (Azoulai, 2022; Bartl, 2024). It should be re-built along the theoretically ambitious, empirically testable and disciplinary inclusive lines Scharpf established. As the papers in this debate section attest – with political science authors extensively discussing the details of CJEU case-law and legal scholars engaging in policy analysis – Scharpf's enduring legacy has been his capacity to expand the scope of inter-disciplinary collaboration on EU affairs. Our hope is that this debate provides useful input for developing new theories of EU integration for our present era.

Notes

1. This concerns both the political and judicial arena. *Governing Europe* e.g. explains the differences in deregulatory pressures on process, but not product standards, with reference to the 'characteristic constellations of interest among member states' (Scharpf, 1999, p. 86). Later work posits that the liberalising effect of judge-made law is not equally strong in all policy areas, depending on 'the jurisdiction of the ECJ and, in particular, differences in the application of the Cassis formula' and how 'hostile' the case law is to national regulations (2010, p. 226).
2. Zöllmer (2024) attributes the fall of litigation rates to the growth of notification procedures under Directive 2015/1535 and SOLVIT disputes, which she reads as a sign of negative integration gaining, not losing, strength. The periodic reports on the Single Market Transparency Directive (European Commission, 2022) suggest that the majority of national notifications concern secondary law. Similarly, SOLVIT disputes appear to predominantly revolve around EU harmonisation (Kokolia, 2018). So, while significant, these mechanisms are primarily enforcement tools of positive, not negative integration.

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No potential conflict of interest was reported by the author(s).

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