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Amedeo Arena

Tear Down the Wall! Should the Charter of Fundamental Rights be Extended to Purely Internal Situations? Reflections on the European Parliament's Proposals to Amend the EU Treaties

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Tear Down the Wall! Should the Charter of Fundamental Rights be Extended to Purely Internal Situations? Reflections on the European Parliament's Proposals to Amend the EU Treaties

Amedeo Arena*

Abstract:

This article examines the implications of abolishing the so-called purely internal rule, an 'invisible wall' introduced by the European Court of Justice (ECJ) in 1979, which excludes the applicability of the EU's internal market freedoms and, accordingly, of the Charter of Fundamental Rights to situations having no cross-border elements. The purely internal rule has long been criticized for causing reverse discrimination, undermining EU citizenship, and contradicting the internal market's definition as a "space without internal frontiers." Drawing on historical developments, the article traces the origins, evolution, and "codification" of the purely internal rule in the ECJ ruling in *Ullens de Schooten*, highlighting its substantive and procedural exceptions as well as its challenges, including inconsistent jurisprudence and legal uncertainty.

The article subsequently analyzes recent treaty reform proposals by the European Parliament that might prompt the extension of the Charter to purely internal situations. It evaluates the potential consequences of abolishing the purely internal rule, such as increased harmonization of fundamental rights protection, the eradication of reverse discrimination, and deeper economic integration among national markets. However, it also explores the risks, including a significant rise in the ECJ's workload, prolonged judicial proceedings, reduced national regulatory autonomy, and heightened tensions between national courts and the ECJ.

* Full Professor of European Union Law, University of Naples Federico II Faculty of Law; Professor of European Union Legal History at the European College of Parma.

1. *The Purely Internal Rule: the 'Invisible Wall' that Still Divides Europe.*

Between 1945 and 1991, the Iron Curtain sharply delineated the Warsaw Pact countries from the rest of Europe. Although this physical barrier has long since vanished, an "invisible wall" still divides Europe: the so-called "purely internal rule".[1] Rooted in judicial precedent, this rule stipulates that situations confined wholly within a single Member State, termed "purely internal situations," do not fall within the ambit of the free movement provisions set forth in the Treaty on the Functioning of the European Union (TFEU).

As a result, over 190 million EU citizens who have never left their home country cannot,[2] absent any other connecting factors with the "scope of Community law,"[3] rely on the fundamental freedoms of the internal market in legal disputes with Member States. Likewise, these citizens are denied recourse to the protections established under the Charter of Fundamental Rights of the European Union (the Charter), as its applicability is restricted to instances in which Member States are "implementing Union law".[4]

In the context of treaty reform debates, the European Parliament's Committee on Civil Liberties, Justice, and Home Affairs, in its Opinion of 10 February 2023, has advocated for an expanded application of the Charter, proposing that it "should protect individuals whenever Member States act within the scope of a Union competence, whether exclusive or shared, *even if such competence has not yet been exercised by the Union*".[5] Additionally, in its resolution of 22 November 2023 concerning proposed amendments to the Treaties, the European Parliament has called for a revision of the definition of the

[1] *See* AMEDEO ARENA, *The Wall Around EU Fundamental Freedoms: the Purely Internal Rule at the Forty-Year Mark*, 38 Y.B. EUR L., 153 (2019); R. Grimbergen, How Boundaries Have Shifted: On Jurisdiction and Admissibility in the Preliminary Ruling Procedure, (2015) Review of European Administrative Law 67; J. Krommendijk, Wide Open and Unguarded Stand our Gates: The CJEU and References for a Preliminary Ruling in Purely Internal Situations, (2017) German Law Journal 1367; C. Iannone, Le ordinanze di irricevibilità dei rinvii pregiudiziali dei giudici italiani, (2018) Il Diritto dell'Unione Europea 255.
[2] *See* Special Eurobarometer 414 (2014), 130-31, https://digital-strategy.ec.europa.eu/it/node/8584.
[3] *See* C-260/89, Elliniki Radiophonia Tiléorassi AE v. Dimotiki Etairia Pliroforissis, 1991 ECLI:EU:C:1991:254, ¶ 42.
[4] Charter of Fundamental Rights of the European Union art. 51 (1).
[5] Opinion of the Committee on civil liberties, justice and home affairs (2.10.2023), Proposals of the European Parliament for the amendment of the Treaties (2022/2051(INL)), ¶ 9 (italics in original), https://www.europarl.europa.eu/doceo/document/A-9-2023-0337_EN.html#_section13.

internal market under Article 26(2) TFEU, specifying that the free movement of persons, goods, services, and capital must be guaranteed "in all Member States".[6]

These proposals have the potential to prompt the European Court of Justice (ECJ) to reconsider, and perhaps abolish, the purely internal rule. But is it truly time to "tear down the wall" as in the final act of Pink Floyd's celebrated concept album?[7] This article explores the historical origins, evolution, and "codification" of the purely internal rule, before evaluating the potential consequences of its abolition for the functioning of the internal market and the EU legal order as a whole.

2. Origins and Developments of the Purely Internal Rule

While the purely internal rule aligns with both the language[8] and objectives[9] of the free movement provisions in the EEC Treaty as drafted in 1957, it is notably absent from the ECJ's case law during the 1950s and 1960s. For instance, in the landmark *Costa v. ENEL* judgment (1964),[10] which concerned the compatibility of Italian legislation nationalizing the electricity sector with the right of establishment and other EEC Treaty provisions, neither the parties nor the ECJ remarked that the facts of the case were entirely confined within Italian territory.[11]

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[6] European Parliament resolution (11/22/2023) on proposals of the European Parliament for the amendment of the Treaties (2022/2051(INL)) C/2024/4216/OJ, amend. 93 (italics added).
[7] Pink Floyd, *The Wall* (Columbia Records 1979), Side 4, *The Trial*. Lyrics by Roger Waters.
[8] Treaty on the Functioning of the European Union art. 20 (2) b) and art. 22 (1) (concerning the situation of the EU citizen "residing in a Member State of which he is not a national"); arts. 30, 34 and 35 (prohibiting customs duties on imports and exports and quantitative restrictions "between Member States"); art. 49 (prohibiting restrictions on the freedom of establishment "of nationals of a Member State in the territory of another Member State"); art. 56 (prohibiting restrictions on freedom to provide services "in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended"); art. 63 (prohibiting "restrictions on the movement of capital between Member States and between Member States and third countries"); TFEU art. 110 (prohibiting any discriminatory internal taxation or internal taxation of such a nature as to afford indirect protection "on the products of other Member States").
[9] Opinion of Advocate General Wahl, Joined Cases C-159/12, C-160/12 e C-161/12, Alessandra Venturini v. ASL Varese and others., Maria Rosa Gramegna v. ASL Lodi and others., Anna Muzzio c. ASL Pavia and others., 2013 ECLI:EU:C:2013:529, ¶ 27 ("The need for a cross-border element in order for the Treaty provisions on fundamental freedoms to be applicable is consistent with the very purpose of those provisions", i.e. "to liberalise intra-[Union] trade [and not to] encourage the unhindered pursuit of commerce in individual Member States.")
[10] *See* Case 6/64, Flaminio Costa v. E.N.E.L, 1964 ECLI:EU:C:1964:66.
[11] *See* A. ARENA, *From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of Costa v. ENEL*, 30 EUR. JOUR. INT. LAW 1017-37 (2019).

The "jurisprudential genesis" of the purely internal rule occurred in 1979 with the *Saunders* judgment.[12] The ECJ was asked to determine whether an order from the Bristol Crown Court, issued during a criminal trial against a British national, Mrs. Saunders, was compatible with the free movement of workers provisions under the EEC Treaty. This order required Mrs. Saunders to relocate to Northern Ireland, barring her from re-entering England or Wales for a period of three years.

In *Saunders*, the ECJ held that the EEC Treaty's free movement provisions did not apply to "purely internal situations" such as Mrs. Saunders's case.[13] Accordingly, the ECJ found that the free movement of workers did not restrict Member States' authority to impose territorial limitations on the movement of individuals subject to their jurisdiction, pursuant to domestic criminal law.[14]

The purely internal rule entails both substantive and procedural consequences. Its substantive implications are exemplified by the *Morson* judgment.[15] In this case, Mrs. Morson and Mrs. Jhanjan, both Surinamese nationals, sought authorization to reside in the Netherlands with their children, who held Dutch citizenship and were employed in that Member State.[16] Article 10 of Regulation No. 1612/68 explicitly granted family members of Community workers the right to reside with them within the Community's territory.[17] However, as the Dutch citizens in question had not exercised their right to free movement within the internal market, the ECJ held that the free movement provisions did not apply, permitting Dutch authorities to deny residence rights to Mrs. Morson and Mrs. Jhanjan.[18]

By restricting certain rights granted by EU law to citizens who have exercised their free movement rights, the purely internal rule gives rise to the problematic issue of "reverse discrimination," where purely internal situations may receive less favorable treatment than cross-border situations.

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[12] *See* Case 175/78, The Queen v. Vera Ann Saunders, 1979 ECLI:EU:C:1979:88.
[13] *Id.*, ¶ 11.
[14] *Id.*, ¶ 10.
[15] *See* Joined Cases 35/82 and 36/82, Elestina Esselina Christina Morson v. Paesi Bassi, 1982 ECLI:EU:C:1982:368.
[16] *Id.*, ¶ 2.
[17] *See* Council Regulation 1612/68, on freedom of movement for workers within the Community, 1968 O.J. (L 257/2) 475, 476 (EEC).
[18] *See* Joined Cases 35/82 and 36/82, Elestina Esselina Christina Morson c. Paesi Bassi, *supra* note 14, ¶ 18.

This is illustrated by the *Drei Glocken* case, in which the ECJ found Italian legislation banning the sale of pasta made from non-durum wheat to be incompatible with the free movement of goods.[19] The ECJ specified, however, that the relevant Italian provisions should be set aside only for imported pasta (cross-border situations) and could remain applicable to pasta produced domestically (purely internal situations),[20] thereby disadvantaging Italian producers relative to producers from other Member States, as Italian producers were bound to use only durum wheat, while others could utilize less costly wheat varieties.[21]

The *Kremzow* case serves as a compelling example of how the purely internal rule affects the protection of fundamental rights.[22] Mr. Kremzow, an Austrian citizen, claimed that his conviction in Austria for murder and subsequent sentencing to life imprisonment violated his right to free movement and fundamental rights. The ECJ ruled that it had no jurisdiction to assess the measure's compatibility with fundamental rights, as the case involved a purely internal situation outside the "field of application of Community law".[23]

The purely internal rule also has a procedural corollary: since fundamental freedoms do not apply to purely internal situations, interpreting these freedoms cannot be regarded as necessary to rule on disputes involving such situations. Thus, the ECJ often declared preliminary references arising from purely internal disputes inadmissible[24] or that it lacked jurisdiction to rule on those references.[25]

The "traditional" purely internal rule, as laid down by the ECJ in 1979, rested on the presumption that when the main proceedings lacked cross-border factual elements, the

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[19] *See* Case 407/85, Drei Glocken GmbH and Gertraud Kritzinger v. USL Centro-Sud e Provincia autonoma di Bolzano, 1988 ECLI:EU:C:1988:401, ¶ 28.

[20] *Id.*, ¶ 25 ("It should first be stressed that it is the extension of the law on pasta products to imported products which is at issue, and that Community law does not require the legislature to repeal the law as far as pasta producers established on Italian territory are concerned.").

[21] See ALINA TRYFONIDOU, *The Outer Limits of Article 28 EC, in* THE OUTER LIMITS OF EUROPEAN UNION LAW 204 (CATHERINE BARNARD & OKEOGHENE ODUDU eds., 2009).

[22] Case C-299/95, Friedrich Kremzow v. Republik Österreich, 1997 E.C.R. I-2629.

[23] *Id.*, ¶¶ 13-19.

[24] *See e.g.* Case C-27/11, Anton Vinkov c. Nachalnik Administrativno-nakazatelna deynost, 2012 ECLI:EU:C:2012:326, ¶ 54-60; C-112/16, Persidera SpA c. AGCOM, 2017 ECLI:EU:C:2017:597, ¶ 31-35; Joined Cases C-427/16 and C-428/16, CHEZ Elektro Bulgaria AD v. Yordan Kotsev e FrontEx Internationa EAD v. Emil Yanakiev, 2017 ECLI:EU:C:2017:890, ¶ 38.

[25] *See* Joined Cases 532/15 and 538/15, Eurosaneamientos SL e a. c. ArcelorMittal Zaragoza, SA e Francesc de Bolós Pi c. Urbaser SA, 2016 ECLI:EU:C:2016:932, ¶ 50; *See also* A. TRYFONIDOU, REVERSE DISCRIMINATION IN EC LAW 31 (2009).

national measure applicable to such situations had no cross-border legal effects.[26] Soon, however, it became evident that this presumption could lead to "false negatives," where, despite all factual elements being confined to a single Member State, the national measure had cross-border effects.[27] Furthermore, as noted above, the ECJ's "traditional" approach to the purely internal rule could give rise to reverse discrimination.[28]

To address these issues, an "expansive" approach emerged, extending the application of the free movement rules and the ECJ's preliminary ruling jurisdiction to purely internal situations. As part of that approach, the ECJ introduced four "substantive" exceptions to the purely internal rule, overturning the presumption that national measures applicable to purely internal situations lacked cross-border impact, thus bringing them within the scope of free movement rules.[29]

First, in a series of cases beginning with *Jersey Produce*, the ECJ extended the scope of the free movement of goods to trade occurring within a single Member State, insofar as the goods in question *might then be re-exported to other Member States*, leading to the (potential) application of the contested domestic measure to goods that are effectively in transit between Member States.[30]

Second, in *Zambrano* and subsequent rulings, the ECJ held that Article 20 TFEU, which enshrines Union citizenship, must be interpreted as precluding national measures—such as deportation orders affecting income-generating family members—that would deprive Union citizens dependent on those family members of the *genuine*

[26] Joined Cases C-159/12 to C-161/12, Venturini v. ASL Varese, Gramegna v. ASL Lodi & Muzzio v. ASL Pavia, Opinion of Advocate General Wahl, EU:C:2013:791, ¶ 81.
[27] D. O'Keeffe & A. Bavasso, Four Freedoms, One Market and National Competence: In Search of a Dividing Line, in Liber Amicorum in Honour of Lord Slynn of Hadley: Judicial Review in European Union Law 554–55 (D. O'Keeffe & A. Bavasso eds., Kluwer Law Int'l 2000) ("[One] could easily imagine [an] internal matter with a major effect on the common market"); A. Tryfonidou, Reverse Discrimination in EC Law 58 (Kluwer Law Int'l 2009) ("just because the case happens to be brought before a court by a national producer of goods and thus there is no inter-state movement on the facts before the Court, this does not mean that the application of the measure ... does not have, also, an effect on inter-state trade").
[28] S*ee* AMEDEO ARENA, LE "SITUAZIONI PURAMENTE INTERNE" NEL DIRITTO DELL'UNIONE EUROPEA (2019).
[29] *See* Case C-367/12, Susanne Sokoll-Seebacher, EU:C:2014:68, ¶ 11 ("While it is admittedly clear ... that all the factual aspects of the main proceedings are confined to one Member State ... the legislation at issue in the main proceedings is nevertheless capable of producing effects which are not confined to that Member State.").
[30] Case C-293/02, Jersey Produce Mktg. Org. Ltd. v. States of Jersey & Jersey Potato Export Mktg. Bd., 2005 E.C.R. I-9543, EU:C:2005:664, ¶ 65.

enjoyment of the substance of the rights as EU citizens, by forcing them to leave the territory of the Union.[31]

Third, in *Coname* and similar cases involving the award of public contracts, the ECJ provided preliminary rulings on the interpretation of free movement provisions in purely internal cases, where the economic activity underlying the contract *could have been of interest to an undertaking located in another Member State*," and the use of non-transparent procedures for awarding such contracts could result in "a difference in treatment" to the detriment of the undertakings located in the other Member States.[32]

Fourth, in *Libert* and its progeny, the ECJ issued preliminary rulings on whether fundamental freedoms must be interpreted as precluding domestic measures that apply indistinctly to nationals of several Member States, even when challenged in purely internal situations, insofar as the decision of the referring court that will be adopted pursuant to *the preliminary ruling would have effects also on the nationals of other Member States*.[33]

The ECJ also recognized two "procedural" exceptions to the purely internal rule, allowing the EU judges to interpret free movement provisions even when they were not applicable to the purely internal situation at issue in the main proceedings.

First, in *Dzodzi* and other judgments, the ECJ declared admissible preliminary ruling requests in cases where *the national law of a Member State refers to the content of an EU law provision* in order to determine rules applicable to a situation which is purely internal to that State, reasoning that it was manifestly in the interest of the EU legal order that every Community provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied".[34]

Second, since the *Guimont* judgment, the ECJ has deemed admissible requests for preliminary rulings in cases lacking cross-border elements, provided the interpretation of EU law requested by the referring court might be useful to it if its national law were to require, in proceedings such as those in this case, that *a national producer must be*

[31] Case C-34/09, Ruiz Zambrano v. Office national de l'emploi (ONEm), EU:C:2011:124, ¶¶ 42–44.
[32] Case C-231/03, Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti, EU:C:2005:487, ¶ 17-19.
[33] Joined Cases C-197/11 & C-203/11, Libert v. Gouvernement flamand & All Projects & Developments NV v. Vlaamse Regering, EU:C:2013:288, ¶ 36.
[34] Joined Cases C-297/88 & C-197/89, Dzodzi v. Belgian State, EU:C:1990:360, ¶ 37.

allowed to enjoy the same rights as those which a producer of another Member State would derive from Community law in the same situation.[35]

However, even the "expansive" approach was not without issues. The substantive exceptions were often applied based on presumptions, leading to "false positives," i.e. attributing a cross-border impact to national measures lacking such effects. Similarly, the procedural exceptions were often applied based on conjectures, resulting in preliminary rulings that were in fact irrelevant to the resolution of the dispute pending before the referring court, contrary to the principle of inadmissibility of hypothetical questions. Moreover, those exceptions increased the ECJ's workload, significantly extending the length of judicial proceedings.

The ECJ sought to address these issues by developing a "reflective" approach to the purely internal rule: it introduced adjustments to five of the six exceptions to that rule, ensuring their application *in concreto*, i.e., having regard to the specific circumstances of the case rather than on the basis of presumptions or conjectures.

For instance, in *Tecnoedi* the ECJ ruled that "a conclusion that there is certain cross-border interest cannot be inferred hypothetically from certain factors which, considered in the abstract, could constitute evidence to that effect, but must be the positive outcome of a specific assessment of the circumstances of the contract at issue".[36] Likewise, in *Kleinwort Benson* the ECJ introduced a corrective to the *Dzodzi* doctrine, ruling that references stemming from purely internal situations would be admissible only if the renvoi to EU law set out in national law be "direct and unconditional".[37]

3. The 'Codification' of the Purely Internal Rule and its Latest Applications

While the introduction of the "reflective" approach made the purely internal rule a more reliable indicator of the applicability of free movement rules and of the limits of the ECJ's preliminary jurisdiction, it did not replace the other two approaches–rather, it complemented them. This led to a coexistence of rulings applying the purely internal rule

[35] Case C-448/98, Criminal Proceedings Against Jean-Pierre Guimont, EU:C:2000:663, ¶ 23.
[36] Case C-318/15, Tecnoedi Costruzioni Srl v. Comune di Fossano, EU:C:2016:747, ¶ 22.
[37] Case C-346/93, Kleinwort Benson Ltd. v. City of Glasgow District Council, EU:C:1995:85, ¶ 16.

in its "traditional" version, rulings applying one or more of the exceptions of the "expansive" approach, and rulings applying the same exceptions with the adjustments of the "reflective approach".

Such inconsistent jurisprudence seriously undermined legal certainty. However, with the 2016 *Ullens de Schooten* judgment,[38] the ECJ began "codifying" its jurisprudence on the purely internal rule, making its application more consistent and predictable in subsequent rulings.

In *Ullens de Schooten*, first, the ECJ reaffirmed the purely internal rule in its traditional form, stating that EU free movement rules "are not applicable to a situation where all the elements are confined within one Member State".[39]

The judgment proceeded to enumerate four exceptions introduced by the ECJ as part of its expansive approach. Notably, the ECJ indicated that, even within a purely internal context, it would be prepared to issue a preliminary ruling if: (i) it cannot be ruled out that nationals from other Member States might have an interest in engaging in the relevant economic activity in the Member State concerned; (ii) the main proceedings could result in the annulment of a domestic measure also applicable to nationals or companies from other Member States; (iii) the referring court's national law mandates that it grant a national the same rights that a national from another Member State would hold under EU law in the same circumstances; or (iv) the EU law provisions in question have been extended to purely internal situations by the referring court's national law.[40]

Lastly, the judgment clarified that, pursuant to Article 94 of the ECJ's Rules of Procedure, it is incumbent upon the referring court to determine whether any of the aforementioned exceptions to the purely internal rule apply, by providing "concrete elements" to establish a link between the purely internal situation in the main proceedings and the free movement rules at issue in the preliminary reference, in line with the reflective approach.[41]

The ECJ's ruling in *Ullens de Schooten* established the leading precedent for cases involving purely internal situations. An analysis of subsequent rulings on such cases

[38] *See* C-268/15, Fernand Ullens de Schooten v. État belge, 2016 ECLI:EU:C:2016:874.
[39] *Id*., ¶ 47.
[40] *Id*., ¶ 50-53.
[41] *Id*., ¶ 54-55.

within two years demonstrates its substantial impact: over half explicitly reference the judgment, while those that do not still appear to closely follow its reasoning.[42]

For a recent example that underscores its continued relevance, in *FA.RO.* the ECJ had been asked to rule whether the TFEU provisions on establishment and services should be interpreted as precluding Italian legislation on the location of tobacco product outlets.[43] In its October 2024 ruling, the ECJ, recalling *Ullens de Schooten*, found that "all the factors characterising the dispute in the main proceedings [we]re confined within [...] the Italian Republic" and that the "order for reference contain[ed] nothing to suggest that, despite its purely domestic character, the subject matter of that dispute ha[d] a connecting factor with Articles 49 and 56 TFEU that would make the interpretation thereof necessary for it to give judgment in that dispute."[44] Accordingly, the ECJ ruled the questions referred for a preliminary ruling inadmissible.[45]

4. What would ensue from the abolition of the Purely Internal Rule?

Despite the various adjustments the ECJ has made to the purely internal rule over the years, this rule has been the subject of significant criticism in academic circles since its inception. Some scholars argued that the rule contradicts the very definition of "internal market",[46] as it attaches legal relevance to crossing national borders that should no longer exist.[47] Other authors pointed out the inconsistency between the purely internal rule and the concept of "European citizenship," asserting that EU citizens should enjoy the rights

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[42] *See* AMEDEO ARENA, *The Wall Around EU Fundamental Freedoms: the Purely Internal Rule at the Forty-Year Mark*, 38 Y.B. EUR L., 153 (2019), 212-213.
[43] Case C-16/23, FA.RO. di YK & C. Sas v. Agenzia delle Dogane e dei Monopoli, Judgment of the Court (First Chamber), 17 October 2024, ECLI:EU:C:2024:886.
[44] Id., ¶ 41.
[45] Id., ¶ 42.
[46] HANS ULRICH JESSURUN D'OLIVEIRA, *Is Reverse discrimination still permissible under the Single European Act?, in* FORTY YEARS ON: THE EVOLUTION OF POSTWAR PRIVATE INTERNATIONAL LAW IN EUROPE: SYMPOSIUM IN CELEBRATION OF THE 40TH ANNIVERSARY OF THE CENTRE OF FOREIGN LAW AND PRIVATE INTERNATIONAL LAW, UNIVERSITY OF AMSTERDAM, ON 27 OCTOBER 1989 84 (VV.AA. ed., 1990) ("Aiming at an internal market, or completing it, while at the same time continuing to attach importance to the crossing of national frontiers is self-contradictory"). *See also* Op. Advoc. Gen. Mischo, Joined Cases 80/85 and 159/85, Nederlandse Bakkerij Stichting and others v. Edah BV,1986 ECLI:EU:C:1986:333, 3375 ("Reverse discrimination is clearly impossible [...] within a true common market, which must of necessity be based on the principle of equal treatment.")
[47] *See* TFEU art. 26 (2).

associated with that fundamental status even if they do not exercise their right to free movement.[48]

Moreover, some commentators highlighted the contradiction between the purely internal rule and the principle of equality, as that rule is the root cause of reverse discrimination.[49] Others argued that the purely internal rule is an unreliable and arbitrary indicator of the applicability of the TFEU free movement provisions and of the ECJ's jurisdiction.[50] It is therefore unsurprising that, over the years, several legal scholars have called for abolishing the purely internal rule altogether.

As a matter of fact, the ECJ has already ceased to apply the purely internal rule in the area of goods, finding the relevant free movement provisions applicable even to domestic measures that affect only trade in goods within a single Member State, based on the mere possibility that such goods could be re-exported to other Member States.[51]

It seems reasonable to speculate that this could also happen for the other free movement provisions, especially in light of the new definition of the internal market set

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[48] *See* SIOFRA O'LEARY, THE EVOLVING CONCEPT OF COMMUNITY CITIZENSHIP. FROM THE FREE MOVEMENT OF PERSONS TO UNION CITIZENSHIP 273-78 (1996); *See also* A. TRYFONIDOU, *Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe*, 35 LEGAL ISSUES OF ECON. INTEGRATION 1, 43-67 (2008); *See also* ELEANOR SPAVENTA, *Seeing the Wood despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects*, 45 COMMON MKT. L. REV. 1, 13-45 (2008); ARMIN VON BOGDANDY et al., *Reversing Solange: Protecting the Essence of Fundamental Rights against EU Member States*, 49 COMMON MKT. L. REV. 2, 489-519 (2012). *See also* Op. Advoc. Gen. Sharpston, Case 34/09, Ruiz Zambrano,2011 E.C.R. I-1179, ¶ 167 ("A person who had not yet exercised [fundamental rights] would not need to set about doing so in order to create the circumstances in which he could benefit from fundamental rights protection").

[49] *See* NIC SHUIBHNE, *Free movement of persons and the wholly internal rule: time to move on?*, 39 COMMON MKT L. REV. 4, 770 (2002) ("It is not that reverse discrimination is a new phenomenon; it is a long-standing consequence of the long-standing wholly internal rule"); *See also* ENZO CANNIZZARO, *Esercizio di competenze comunitarie e discriminazioni 'a rovescio'*, 96 DIR. UN. EUR. 1, 335 (1996) ("Reverse discrimination arises [...] because of the exercise of community competencies that are functionally limited as to their scope") [author's translation].

[50] *See* DAVID O'KEEFFE, ANTONIO BAVASSO, *Four freedoms, one market and national competence: in search of a dividing line', in* LIBER AMICORUM IN HONOUR OF LORD SLYNN OF HADLEY: JUDICIAL REVIEW IN EUROPEAN UNION LAW 554-55 (D. O'Keeffe, A. Bavasso eds., 2000) ("The existence of a cross-border element is still a useful tool to determine if Community rules should come into play [...] However, one should not overstate the benefits of this approach. One could easily imagine a transnational case with little impact on the common market and [an] internal matter with a major effect on the common market"); *But see* SARA IGLESIAS SÁNCHEZ, *Purely Internal Situations and the Limits of EU Law: A Consolidated Case Law or a Notion to be Abandoned?*, 14 EUR. CONSTITUTIONAL L. REV. 1, 35 (2018) ("The notion of purely internal situations was born as a useful concept which conveyed a powerful description of the limits of EU free movement law. [...] However, the evolution of EU law in general and of free movement law in particular has rendered the concept somewhat obsolete, turning it into a rather rough and inaccurate approximation of the scope of EU law in the majority of cases.")

[51] *See* C-293/02, Jersey Produce Marketing Organisation Ltd v. States of Jersey e Jersey Potato Export Marketing Board, 2005 ECLI:EU:C:2005:664, 9580.

out in the European Parliament proposals to amend the TFEU, whereby the free movement of people, goods, services, and capital would be ensured "in all Member States".[52]

If this occurs, the TFEU internal market provisions could be invoked to challenge any national measure capable of hindering or making less attractive the exercise of economic activities, even within a single Member State. This would mean, as Advocate General Tesauro put it in *Hünermund,* applying fundamental freedoms not merely to liberalize trade *between* the Member States, but to promote free commercial activity *within* individual Member States.[53]

Taking this reasoning to its extreme, it could open up the scenario foreseen by Advocate General Tizzano in *CaixaBank:* an internal market where national rules are, in principle, prohibited unless they are necessary and proportionate to pursue general interest goals.[54] This would effectively make the ECJ the ultimate arbiter of Member States' policy decisions regarding the goals worthy of protection and their appropriate level of protection. [55]

The most significant implication of abolishing the purely internal rule would be a sweeping application of fundamental rights as general principles of EU law and as codified in the Charter. Given their broad scope, the fundamental freedoms of the market, no longer constrained by the purely internal rule, would attract a significant number of situations within the "scope of EU law",[56] subjecting national measures applicable to these situations to the Charter and its underlying principles.[57] This seems to be the

[52] European Parliament resolution (11/22/2023) *supra* note 6.
[53] *See* Op. Advoc. Gen. Tesauro, C-292/92, Ruth Hünermund and others v. Landesapothekerkammer Baden-Württemberg, 1993 ECLI:EU:C:1993:932, ¶ 1,28.
[54] *See* Op. Advoc. Gen. Tizzano, C-442/02, CaixaBank France v. Ministère de l'Économie, des Finances et de l'Industrie, 2004 ECLI:EU:C:2004:586, ¶ 63.
[55] *See* CYRIL RITTER, *Purely internal situations, reverse discrimination, Guimont, Dzodzi and Article 234,* 31 EUR. L. REV. 5, 710 (2006) ("do we want a true "single" market where the myriad national rules will all be tested for compliance with the narrow list of public order objectives tolerated under EC law? Do we want a litigation-mad, almost completely deregulated pan-European society where public policy choices are made by ECJ judges?"); *See also* ROBERT SCHÜTZE, FROM INTERNATIONAL TO FEDERAL MARKET: THE CHANGING STRUCTURE OF EUROPEAN LAW (2017) 283 ("The EU Treaties' free-movement provisions would assume an 'individualistic' interpretation that approximates the (American) 'economic due process' jurisprudence under the Fourteenth Amendment. The Court here leaves its role as relative arbitrator between competing 'sovereignty' claims of the Member States and becomes the absolute judge of the politico-economic choices within Europe.")
[56] *See* C-260/89, Elliniki Radiophonia Tiléorassi AE v. Dimotiki Etairia Pliroforissis, *supra* note 3, ¶ 42.
[57] See Charter, art. 51 (1).

corollary of the proposed amendment to Article 51 of the Charter, aiming to extend its scope in all areas of Union competence, whether exclusive or shared, "even if such a competence has not yet been exercised by the Union".[58]

However, applying the Charter to purely internal situations would significantly increase the number of preliminary references, even though the ECJ lacks procedural tools—such as the *writ of certiorari* of the US Supreme Court—that allow it to pick the cases it will hear. The increased workload for EU judges would lead to prolonged judicial proceedings, undermining the principle of effective judicial protection.[59]

On the other hand, introducing provisions enabling the ECJ to select preliminary ruling cases could conflict with the right to an effective judicial protection, given that the ECJ has consistently held, since *Van Gend en Loos,* that the preliminary ruling procedure should (also) be regarded as a tool for protecting individual rights.[60]

A solution could be to increase the ECJ's institutional capacity, for instance, by transferring preliminary ruling jurisdiction in certain matters to the General Court. Indeed, the Court of Justice's Statute was recently amended to transfer to the General Court jurisdiction over preliminary references in specific areas that accounted for about around 20% of the preliminary references submitted to the ECJ.[61]

However, the abolition of the purely internal rule would likely lead to a substantial increase in the number of preliminary references, necessitating the transfer of a significant quantity of cases to the General Court. This might exceed its current institutional capacity, resulting in spill-over effects on the length of direct actions. Moreover, the amendment to the ECJ's Statute identifies the areas where preliminary jurisdiction is to be transferred to the General Court in a way that excludes cases raising "independent questions relating to the interpretation' of EU primary law or public

[58] *See* Opinion of the Committee on civil liberties, justice and home affairs (2.10.2023), *supra* note 5.
[59] *See* Op. Advoc. Gen. Wahl, Joined Cases C-159/12, 160/12 e 161/12, Alessandra Venturini v. ASL Varese and others., Maria Rosa Gramegna v. ASL Lodi and others., Anna Muzzio v. ASL Pavia and others, *supra* note 8, ¶ 22; *See also* Op. Advoc. Gen. Wahl Case 497/12, Davide Gullotta e Farmacia di Gullotta Davide & C. Sas v. Ministero della Salute e Azienda Sanitaria Provinciale di Catania, 2015 ECLI:EU:C:2015:436, ¶ 2.
[60] *See* Case 26/62, van Gend & Loos, 1963 ECLI:EU:C:1963:1, 24.
[61] Regulation (EU, Euratom) 2024/2019 of the European Parliament and of the Council of 11 April 2024 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, [2024] OJ L, 12.8.2024.

international law"[62] or requiring "decisions of principle"–[63] —that is to say, exactly the type of cases likely to arise from extending the scope of the Charter to purely internal situations.

Secondly, extending the Charter's scope would inevitably harmonize the protection of fundamental rights within the EU, even in areas where Member States have so far provided different levels of protection based on their national constitutions.[64] However, not everyone agrees that the ECJ has the necessary "moral authority" to assume the role of supreme guide in the delicate and contentious field of fundamental rights protection.[65] The increase in preliminary ruling requests regarding the Charter's interpretation could therefore give new impetus to the process of the Union's accession to the European Convention on Human Rights. However, coordinating the latter with the ECJ's prerogatives is not without difficulties, as highlighted in Opinion 2/13.[66]

Thirdly, extending the ECJ's preliminary ruling jurisdiction on fundamental rights protection to purely internal situations could significantly increase the potential for tensions with Member States' supreme and constitutional courts. This might be problematic, given the limited coercive tools available to ensure compliance with EU law. Unlike the United States, the EU does not have federal agents and courts in each Member State answering only to the EU to ensure the enforcement of EU law.[67]

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[62] See Article 50b of the Statute of the Court of Justice of the European Union (consolidated version as of 1.9.2024).
[63] See Article 256(3), second subparagraph, TFEU.
[64] *See* KOEN LENAERTS, *Fundamental rights to be included in a Community Catalogue*, 16 EUR. L. REV. 1, 389 (1991) (who already in the early 1990s considered the establishment of a Community catalogue of fundamental rights as a potential "federalizing device").
[65] *See* KOEN LENAERTS, *Respect for fundamental rights as a constitutional principle of the European Union*, 6 COLUM. J. EUR. L. 1, 21 (2000) (arguing that such a development could only take place if the Member States agreed to confer upon the ECJ the role performed by the U.S. Supreme Court—namely, safeguarding any citizen, based on a 'federal' standard of fundamental rights protection, against any public authority within any jurisdiction). *But see* ANDRÁS JAKAB, *Application of the EU CFR by National Courts in Purely Domestic Cases*, *in* THE ENFORCEMENT OF EU LAW AND VALUES: ENSURING MEMBER STATES' COMPLIANCE 252, 258 (A. Jakab e D. Kochenov eds., 2017) [hereinafter *Application of the EU CFR by National Courts in Purely Domestic Cases*] (arguing that the ECJ could only assume such authority by aligning its jurisprudence as closely as possible with that of the Strasbourg Court).
[66] Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, EU:C:2014:2454.
[67] *See* MARK TUSHNET, *Enforcement of National Law against Subnational Units in the US*, *in The Enforcement of EU Law and Values: Ensuring Member States' Compliance* 316, 317 (A. Jakab, D. Kochenov eds., 2017).

Admittedly, the European Parliament's Resolution on the amendment of the EU Treaties aims to strengthen these enforcement mechanisms,[68] transferring the task of determining a "serious and persistent breach" of EU values from the European Council to the ECJ and expanding the range of measures that can be applied following such a determination.[69] Similarly, that Resolution proposes significant amendments to the infringement procedure, imposing strict deadlines on the Commission to initiate and pursue this procedure and extending the European Parliament's power to bring actions against Member States for EU law violations.[70]

Nonetheless, the success of these proposals for reforming enforcement mechanisms remains uncertain. Failure to implement them entails a risk of non-compliance with the ECJ judgments on fundamental rights protection in purely internal situations, potentially prompting Member State organs to disregard the ECJ jurisprudence also in areas where non-compliance is currently minimal. This domino effect could undermine the foundational principles of EU law—such as primacy and direct effect—threatening the very foundation of the European integration process.[71]

5. Extending the Scope of the EU Legal Order? Make it or Break it.

The purely internal rule, an "invisible wall" around the internal market fundamental freedoms erected by the ECJ in 1979, stipulates that those freedoms do not apply to purely internal situations—namely, scenarios where all relevant facts are confined to a single Member State. Although the ECJ has developed various exceptions and correctives to this rule over the years, its application has generated a range of challenges.

[68] *See* European Parliament resolution (11/22/2023) *supra* note 6.
[69] *Id.*, amends. 10, 11.
[70] *Id.*, amends. 197-202.
[71] *But see* A. JAKAB, *Application of the EU CFR by National Courts in Purely Domestic Cases*, *supra* note 47, 261-62 (who considers the prospect of a revolt by national judges against the ECJ to be "extremely unrealistic," arguing that violations of EU law would offer European judges opportunities to refine and develop their jurisprudence. While past conflicts between the ECJ and national courts have undeniably advanced the process of European integration, it is evident that an excessive multiplication of such conflicts could surpass a critical threshold, leading to an irreversible weakening of the Court's authority and, consequently, the effectiveness of Union law, thereby jeopardizing the integration process driven by the supranational organization).

First, the purely internal rule is the root cause of what is known as "reverse discrimination," whereby citizens of a Member State are subject to a less favorable legal treatment compared to citizens of other Member States or citizens of the same State who exercise their free movement rights. Second, the purely internal rule appears inconsistent with the concept of EU citizenship, as it makes the enjoyment of some rights associated with that status conditional on the presence of a cross-border element. Third, the purely internal rule seems to contradict the very definition of the internal market as a "space without internal frontiers," as it attaches legal relevance to crossing those frontiers.

The EU Treaties amendment proposals advanced by the European Parliament appear to lay the foundation for the ECJ to abolish the purely internal rule. Tearing down that invisible wall could yield notable advantages. At the outset, such an abolition would broaden the application of TFEU fundamental freedoms, and the rights enshrined in the Charter, fostering enhanced integration and uniformity within the internal market. Establishing a common set of rights, applicable independently of whether economic freedoms within the internal market have been exercised, could also deepen citizens' sense of affiliation with the EU. Furthermore, abolishing the purely internal rule would address the issue of reverse discrimination, eliminating the current disparities in treatment between cross-border situations and purely internal ones.

However, abolishing the purely internal rule also carries substantial risks. In the absence of far-reaching institutional reforms, broadening the scope of internal market freedoms and the Charter could lead to a marked rise in the number of preliminary references, thus lengthening judicial proceedings and potentially weakening the effectiveness of EU judicial protection. Moreover, an indiscriminate extension of EU free movement provisions to purely internal situations might undermine Member States' regulatory autonomy and increase the likelihood of conflicts between national courts and the ECJ.

To conclude, abolishing the purely internal rule could signal a move towards a more integrated and cohesive EU, provided it is accompanied by substantial institutional reforms. Only through these changes could the abolition of the purely internal rule avoid undermining the EU legal order and, instead, foster greater uniformity in the application of the Charter and the fundamental freedoms of the internal market across all EU citizens.