Revisiting the Asymmetry Thesis: Negative and Positive Integration in the EU

Abstract

The 'asymmetry thesis', articulated by Fritz Scharpf, holds that EU governance is characterized by an asymmetry between positive and negative integration. The EU has well-developed capacities for negative integration but only limited capacities for positive integration. The present paper challenges the orthodoxy that this thesis has become in EU law and political science scholarship. It argues that the asymmetry thesis no longer accurately depicts European integration, revisiting its key legal and institutional assumptions. Taking the internal market as the most likely case to test the thesis, we show that negative integration has become weaker, positive integration has gained in strength, and both developments have had an impact on the substance of EU law and policymaking, which is promoting non-economic concerns and market-correcting policies to a greater extent than it used to. These shifts, so we contend, could be even more pronounced in other areas of European integration.

Key words

Negative integration, positive integration, EU internal market, free movement law, Fritz Scharpf

1. Introduction

Few, if any, theories have had such a profound influence on our understanding of European integration as the 'asymmetry thesis'. According to it, the governance structure of the European Union (EU) is marked by two interconnected imbalances, one structural and the other substantive. Structurally, the EU has well-developed means for negative integration but only

limited capacities for positive integration. It is defined by an extraordinarily strong judicial process, which removes any obstacles to trade, free movement, and other aspects of integration with great – perhaps too great – effectiveness, and a comparatively weak political process, which is inefficient and impotent. Substantively, this imbalance affects the EU's democratic and social legitimacy. Through its activist jurisprudence, the judiciary, with the Court of Justice of the European Union (CJEU) at its helm, restricts democratic decision-making at the national and European level. Domestic laws protecting non-economic concerns in general, and social policy objectives in particular, are quashed due to legal challenges brought based on EU free movement and competition rules. The simultaneous inability of the European legislature to (re-)regulate the areas covered by these laws and establish meaningful *ersatz* protections, a result of both legal constraints and institutional factors, creates a de-regulatory spiral, giving the internal market a neo-liberal bias.

The conceptual and theoretical apparatus of the asymmetry thesis has complex roots. The distinction between positive and negative integration goes back to the work of Jan Tinbergen (1954) in the 1950s and has, subsequently, been employed by other economists and political scientists working on economic integration (Pinder, 1968; Pelkmans, 1979; Hix, 1994; Young and Peterson, 2006). In similar terms, if for different purposes, constitutional scholars such as Joseph Weiler (1981) began to differentiate between normative and decisional supranationalism in the 1980s, drawing attention to the success of juridical and the failure of political dimensions of the EU. Yet, it is Fritz Scharpf who deserves credit for articulating and developing the thesis in its full form. In *Governing in Europe* (1999), he posited that an asymmetry existed along the aforementioned lines, explained its impact on European integration, and examined its underlying causes. His later writings elaborated on individual aspects of the thesis, including the challenges it poses for social policy-making (Scharpf, 2002; 2010), the Economic and Monetary Union (Scharpf, 2015), and the question of legitimacy in a multilevel polity (Scharpf, 2009). Scharpf's more recent *oeuvre* on the over-constitutionalisation of the EU follows the same fundamental

premises, advocating a limitation of the scope of the Treaties and powers of the CJEU in order to re-empower the European and national political processes (Scharpf, 2017).[1]

It is hard to overstate the influence which the asymmetry thesis has had on the many sub-disciplines of EU studies, but particularly on law and political science. Scholars picked up on different elements of Scharpf's theory and conducted research further exploring it, adding new facets to the original argument. Its most meaningful impact, however, may be more subtle. The thesis turned into a basic reference point – one might even say, a foundational credo – for enquiries into EU law and policy. A broad consensus emerged during the 2000s and 2010s that European integration, indeed, functions along the lines drawn and suffered from the problems identified by Scharpf. Political scientists accepted the legal assumptions he made as correct, lawyers took the political dynamics he theorised as facts. In this way, the asymmetry thesis became theoretical orthodoxy.

The present article seeks to challenge this orthodoxy. Our objective is to re-visit the thesis as stated by Scharpf and show that it no longer accurately depicts the way in which European integration proceeds. Using a variety of evidence, stemming partly from our own research and partly from that of other scholars, we will argue that the doctrinal, political, and institutional parameters underpinning the asymmetry thesis have changed since it was first formulated. In doing so, we are contributing to an emerging literature which seeks to critically re-assess Scharpf's work. Crespy (2020) and Schreurs (2023) have argued that the asymmetry which Scharpf theorised fails to capture recent developments in social policy, highlighting not only the relative stability of domestic welfare mechanisms but also the emergence of EU tools pursuing social and redistributive goals. Rather than tracking policies in specific areas of EU law, we examine the dynamics between negative and positive integration more broadly, re-assessing in particular a set of crucial constitutional and institutional assumptions that underlie the thesis.[2] Our analysis will,

[1] Scharpf thus conceptualises over-constitutionalisation in terms of the empowerment of legal process – such as through private litigation – over political processes, 'in other words, the judicial constitutionalisation, extension and enforcement of economic liberties has the effect of incapacitating democratic political action' (Scharpf 2017 at p. 320).

[2] We are bracketing a discussion of the ideological roots of the asymmetry between negative and positive integration, notably its relationship to ordo- and neo-liberal ideas. Likewise, we will not examine its deeper socio-

echoing that of Scharpf, primarily focus on the internal market and encompass both EU adjudication and legislation, with examples drawn from across the wide spectrum of market governance to illustrate the claims made. National implementation of EU law will not be addressed, although some repercussions of the changes we identify for domestic judicial and political processes will be acknowledged.

The main argument put forward is that negative integration has become weaker, positive integration has gained in strength, and both phenomena have impacted on the substance of EU law and policy-making, which is promoting market-correcting policies to a greater extent than it used to. Two clarifications about the article's ambition and scope are in order. Firstly, our contention is not that the asymmetry thesis did not, at one point, capture the realities of European integration. We simply argue that it no longer constitutes an adequate representation of what is currently happening in the EU. Secondly, our findings do not necessarily signify that the EU has become a 'social market economy' (Scharpf 2010). The costs of European integration for social policy have motivated key parts of Scharpf's critique, which stresses that the EU has negatively affected the balance between the state and the market, or 'the social' and 'the economic'. Challenging this proposition goes beyond the scope and, indeed, the goal of our analysis. Instead, we try to show that a gradual shift has taken place over time in EU law and policy making, with non-economic concerns gaining in relative strength vis-à-vis classical market-driven interests.

The article proceeds as follows. Section 2 will explain the asymmetry thesis in greater detail and shed light on the influence it has exerted on legal and political science scholarship. We will, then, investigate the changes within European integration that have taken place over time. Since the internal market forms the undisputed historical centre-piece of the European project and is the domain on which Scharpf has primarily drawn to illustrate his claims, section 3 will focus on the internal market as the crucial test case for his theory. The analysis is divided into features of

economic roots, such as the diversity of Member State welfare systems. All of this is connected to broader questions about the precise nature of the stated asymmetry, which can and has been characterised as structural, but also institutional and constitutional by Scharpf and other scholars. We thank the reviewers for bringing this point to our attention.

negative and positive integration. Section 4 will conclude by examining the situation outside the internal market and show that European integration here deviates even further from the tenets of the asymmetry thesis.

2. The asymmetry thesis and its influence

The asymmetry thesis has strongly influenced our understanding of EU law and governance and shapes its study to this day. This section discusses the thesis as conceptualised by Scharpf, before exploring its impact on the study of European integration.

a. Asymmetry and its consequences

The asymmetry thesis rests on three simple claims: firstly, the EU is well-equipped, both institutionally and legally, to pursue negative integration, i.e. to dismantle national regulatory policies; secondly, the EU lacks the ability to counterbalance negative with positive integration, i.e. to reconstruct regulatory standards at the EU level; thirdly, the ensuing asymmetry adversely affects the EU's democratic and social legitimacy. The first two of these claims are structural and supported by specific assumptions about the institutional and legal context in which European integration takes place. The third is consequential and rests on specific assumptions about the socio-political context in which the institutional asymmetry operates. Our analysis focuses mainly on the first two claims, that is, the alleged asymmetry between negative and positive integration.

For Scharpf, the reason why the EU is so good at realising negative integration is essentially threefold. The first is that EU law, since *Van Gend en Loos* (Case 26/62) and *Costa/ENEL* (Case 6/64), enjoys direct effect and supremacy in the national legal orders. The principle of direct effect allows individual parties to invoke EU law directly against national authorities. It was, Scharpf says, the proverbial 'foot in the door', which was then 'thrown wide open by the doctrine of "supremacy"' (1999, p. 53). This doctrine settles any conflict between EU and national law in favour of the former: it requires the disapplication of inconsistent national legal norms. The

combined effect of these principles was to allow the EU to actively promote its economic agenda and elevate it above the wishes of democratically legitimated national institutions (Scharpf, 1999, p. 54). Secondly, direct effect and supremacy primarily benefitted two actors whose powers were mostly deregulatory: the CJEU and the Commission. They created 'an effective monopoly of the European Court of Justice in the substantive interpretation of European law' (Scharpf 1999, p. 55), which it has used to expansively interpret the economic freedoms and competition law (see also Scharpf, 2010). The Court did so in tandem with the Commission. The constitutional force of EU law not only strengthened the latter's ability to initiate legal action against national regulations that hindered free trade and fair competition; it was also used by the Commission to influence the position of national governments in the Council of Ministers (Scharpf, 1999, p. 70). Thirdly, both actors were able to exploit a legal imbalance between economic objectives and market-correcting objectives. The Treaties place the former on a higher constitutional footing by putting the justificatory burden on national authorities that restrict these objectives. This gave the Commission and CJEU a foothold to expand the reach of negative integration (Scharpf, 1999, p. 57). It is important to mention that, according to Scharpf, these developments did not occur in isolation, but were intimately linked with and simultaneously amplified global forces of economic liberalization. Although we cannot get into this in this article, he argued that the 'constraints on national policy choices that have resulted from economic "globalization" are intensified and tightened through the legal force of "negative integration" in the European Community' (Scharpf, 1999, p. 28-29), so that the ability of states 'to defend existing patterns of national policy is reduced to a much greater degree than is generally implied by the pressures of global economic competition' (Scharpf, 1999, p. 42).

In contrast, Scharpf argues, the EU cannot with the same ease and to the same extent pursue positive integration. He provides two reasons for this, one legal and one institutional. The EU's regulatory powers are subject to the principle of conferral, which means that it cannot enact harmonising legislation in areas where it has not been conferred competence. Worse, precisely where EU regulation seems most needed, namely where negative integration has weakened the regulatory capacity of individual states (such as taxation), the EU has no or limited legislative powers (Scharpf, 2010). In addition, its capacity to enact positive integration is also subject to

considerable institutional constraints, the most important being the veto points in the legislative process (Scharpf, 1988; 2006). Because the EU needs an agreement between several institutions and a heightened majority in the Council before legislation can be adopted, Scharpf has always considered the legislative process relatively ineffective and unable to re-regulate what negative integration had deregulated at the national level.

The putative asymmetry between positive and negative integration would not have received so much attention was it not for its alleged consequences: namely, its responsibility for the EU's democratic and social deficit. Regarding the first, negative integration deprived democratically elected national parliaments of control over domestic policy-making and the implementation of EU norms. This could not be compensated by positive, democratically legitimized, legislative measures at EU level. The socioeconomic consequences of the asymmetry are more complex: it is not neutral between states or economic models but depends on their position vis-à-vis the market. According to Scharpf, 'small, open economies have more to gain from liberalization than countries with larger internal markets, and highly efficient industries will benefit at the expense of less efficient, and hitherto protected, competitors' (1999, p. 105). This is so for two reasons. On the negative integration side, the preferences of the CJEU and Commission align with states favouring open markets. On the positive integration side, their actions establish a default political position for legislation that social market states face an uphill task to amend. Negative integration thus creates political biases that feed through into positive integration.

b. Scharpf and the Study of European Integration

To state that the work of Scharpf more generally, and his asymmetry thesis in particular, has had a lasting impact on the study of European integration would be an under-statement. The asymmetry thesis has had considerable impact both on empirical work seeking to understand the dynamics of integration and on how scholars normatively view the EU. At the root of this influence is the ability of Scharpf's work to frame debates in two of the central disciplines of EU studies –

law and political science – at once. Like other important German social scientists before him,[3] Scharpf was initially trained as a lawyer (see Hepp & Schmidt, 2017, pp. 21 et seq). It is perhaps then of little surprise that Scharpf places rules and legal institutions at the centre of his analysis. By doing so – while simultaneously anchoring his research in the methods of political economy and comparative politics – the asymmetry thesis has acted as a rare point of connection between legal and political science scholarship.

For political science, Scharpf's asymmetry thesis has been an important driver of empirical work on the relationship between the EU institutions, and their impact on national policy-making. If the asymmetry thesis is correct, it would imply a significant reduction in the agency of political, at the expense of legal, institutions. Political science research has therefore sought to examine this postulate empirically across fields of policy-making. From the national perspective, scholars such as Martin Höpner (2012) and Michael Blauberger (2012) have examined the national consequences of negative integration, illustrating for example the constraining impacts of judicial rulings on the political economy of certain Member States. More recent political science work has provided a trans-national complement to this work, examining the degree to which the CJEU has 'constitutionalised' EU politics, thus removing certain policies from political negotiation (Blauberger & Schmidt, 2017; Moser & Rittberger, 2022). In two influential books from the 2010s, Dorte Martinsen (2015) and Susanne Schmidt (2018) have given these lines of research empirical depth by exploring how the CJEU's advancement of 'negative integration' has impacted the policy-making process. Whereas, for Schmidt, 'constitutionalised case-law largely does not permit over-rule' (2018, p.40), Martinsen argues that, once law 'enters EU politics', it is often re-framed or even over-turned as a consequence of legislative politics. While part of their diverging conclusions can be explained with reference to the different objects of analysis (e.g. the policy fields chosen and the choice of Schmidt to focus on national as well as EU-level impacts), the broad scholarly interest in this work illustrates the ability of the asymmetry thesis to set a scholarly agenda even in circumstances where its empirical assumptions are heavily disputed.

[3] Marx and Luhmann are two prominent examples.

Legal researchers commonly lack the empirical tools to test the assumptions of the asymmetry thesis (although there has been a growth of empirical legal research in the EU). The thesis, however, offers them something equally useful: a set of descriptive claims that can be used to build normative arguments about the EU's legal trajectory. For many lawyers, the asymmetry thesis thus demonstrates the neo-liberal bias built into the project of integration – a bias that is reflected by legal institutions. To take one example, Michael Wilkinson (2021) has drawn on the thesis to argue in a recent book that EU integration from its inception was designed to contain democratic politics, projecting onto the EU level a model of national constitutionalism designed to limit state intervention in the economy. Similarly, EU private and social lawyers, such as Christian Joerges (2009), Diamond Ashiagbor (2013), and Sacha Garben (2017), have relied upon the asymmetry thesis to point to the 'imbalances' between integration's social and economic aspects. More doctrinal legal scholars, too, have taken the asymmetry thesis as a starting point. The most notable of these is Dieter Grimm, whose book *The Constitution of European Democracy* once again utilised Scharpf's work to argue that many of the EU's legitimacy deficits can be traced to the Treaties and the decision to 'constitutionalise' substantive prescriptions that in other constitutional orders would be left to the political process (Grimm, 2017). Grimm's work adds an institutional emphasis to the asymmetry thesis, connecting it to debates about the proper role of the CJEU, a concern found in other work such as that exploring the relationship between the EU legislature and judiciary (Davies, 2014; van den Brink, forthcoming).

While Scharpf's use as a connector between law and political science adds to the scientific importance of the asymmetry thesis, it also poses potential problems. For political science, the risk which reliance on the asymmetry thesis presents is that its postulates about case-law and legal doctrine, e.g. that EU law is liberalizing or that EU competence norms are strictly limited, are taken for granted. For lawyers, the same risk exists in a different direction, i.e. that normative theories about the EU are based on theoretical assumptions (e.g. regarding the way vetoes operate in EU politics or regarding the pressures of negative integration on the social state) that may or may not be empirically well founded. In simple terms, both the continued reliance of EU scholarship on the asymmetry thesis and its resonance across multiple disciplines makes it all the

more important *that the thesis is right* or that is at least a plausible description of the EU of the 2020s. It is to this question that we will now turn.

3. The most likely case: The internal market

The asymmetry thesis, as stated by Scharpf, has a broad analytical scope. It is not limited to certain areas or periods, but purports to capture the way in which European integration operates writ large. Against this backdrop, different strategies could, in principle, be adopted to test it. We propose a qualitative approach based on one central case study: the internal market. Two reasons warrant this choice. To begin with, the internal market has historically been at the heart of the European project and 'remains the EU's core business' (Pelkmans 2016). As such, it carries unique political, legal as well as symbolic significance for European integration. Perhaps more importantly, the theoretical arguments developed by Scharpf and other scholars following his footsteps are primarily based on observations relating to EU free movement and market integration. Against this backdrop, the internal market can, for the purposes of case selection, be seen as a most likely case (Gerring & Cojocaru, 2016). If the legal and political dynamics in this area are inconsistent with the theoretical expectations of the thesis – and we shall argue they are – the result would cast serious doubt on its validity (Levy, 2008, p. 12).

Our analysis focuses on internal market law and policy in its different flavours. This includes constitutional provisions, CJEU case law, and EU legislation in this area. Similarly to Scharpf's original investigation, we pay particular attention to the free movement of goods, but also incorporate evidence from other areas of free movement, notably the free movement of persons, services, and EU citizens, which have grown in importance over time. (Competition rules, which had a secondary part in *Governing Europe* and seem to have largely vanished from Scharpf's writings since, will be omitted.) In the final section, we will offer additional, if more limited, evidence from areas of European integration outside the internal market, including fiscal, environmental, and digital policy, to reflect on the wider generalizability of our findings as well as

of Scharpf's work. We find that the divergences between his theory and current practice are even greater here.

A. Negative integration in the internal market

The first limb of the asymmetry thesis holds, in essence, that the application of EU internal market rules exceedingly curtails domestic regulatory autonomy. Although the Commission plays a significant supporting role by initiating infringement proceedings against Member States for violations of EU law, it is, above all, the Court of Justice which is at the root of the problem. By interpreting the economic rights in the Treaties in an expansive manner, it strikes down a great number of national laws, obstructs domestic regulatory attempts in a variety of sectors, and, by doing so, restricts democratic decision-making. According to Scharpf, three main issues can be identified, all of which can be illustrated and largely find their starting point in the case law on free movement.

Firstly, the CJEU has interpreted the scope of the four freedoms too broadly. Departing from classical readings of trade rights, which revolve around anti-protectionism and anti-discrimination, the CJEU decided to widen the scope of application of Article 34 TFEU as well as, subsequently, that of the remaining free movement provisions – persons, services, and capital – so that it encompasses any obstacle to cross-border movement (for a proposal to undo this doctrinal turn see Scharpf, 2017; p. 284). The *Dassonville* (Case 8/74) and *Cassis de Dijon* (Case 120/78) rulings were the defining moments in this story, with the latter establishing the principle of mutual recognition which gave 'the freedom to sell and to consume... constitutional protection against the political judgment of democratically legitimized legislatures' (Scharpf, 1999, p. 56). Secondly, the CJEU gives national governments too narrow possibilities to justify trade barriers. Despite accepting justification grounds beyond the written Treaty derogations as part of the 'mandatory requirements' jurisprudence, it exerts final control over what counts as a legitimate policy objective and has adopted a restrictive approach in this respect (Scharpf, 2010, p. 230-231). Thirdly, and relatedly, the CJEU displays too little deference when reviewing domestic regulatory choices. Unlike the US Supreme CJEU, which 'has consistently refused to second-guess the

"political branches" of government on the plausibility of the means-end assumptions underlying otherwise permissible measure' (Scharpf, 1999, p. 55-56), the CJEU's scrutiny of Member State acts is exceedingly strict, as can especially be seen in the way in which it applies the proportionality test.

All three points warrant closer examination. Regarding the scope of free movement law, it is certainly true that the CJEU has and continues to define the four freedoms more broadly than it did at the outset of its jurisprudential activity as well as, arguably, than is common in international trade law (Weiler, 2001; cf. Schütze, 2020). Each of the free movement rights, if at different points in time, underwent the same basic evolution from protection against discrimination to guarantee against any obstacle hindering market access. Yet, the implicit assertion that the case law stopped at *Dassonville* and *Cassis de Dijon* is inaccurate – it misses important developments that have occurred since.

Over the past three decades, the CJEU has made efforts to limit the scope of free movement law. The most famous of these, of course, is *Keck* (C-267/91). In a rare moment of explicit self-reflection, the CJEU decided to reverse its previous jurisprudence and narrow down the, at least on paper, virtually unlimited scope of the *Dassonville* formula. Non-discriminatory 'selling arrangements', i.e. national rules on how, when, where, and by whom a product is sold, would, from hereon, no longer be subjected to European judicial review. *Keck* is mentioned only in passing in *Governing in Europe* (Scharpf, 1999, p. 166) and relegated to a mere footnote (Scharpf, 2010, p. 219) or omitted altogether (Scharpf, 2017) in later writings of Scharpf, which present *Dassonville* and *Cassis* as the leading cases that continue to define the substance of free movement law. This is an outdated portrayal of the field. Valid questions may be raised about the way in which the *Keck* exemption is employed in practice (Spaventa, 2009, p. 914; Horsley, 2012, p. 734). But the fact that national laws concerning selling arrangements, many of which precisely have a market-correcting function, in principle fall outside the scope of free movement law has relevance for the asymmetry thesis.

Similar, if less far-reaching, adjustments have been made in relation to the remaining free movement rights. The free movement of persons, services, and capital all had their '*Dassonville* moment' in the 1990s and early-2000s, which resulted in a much-expanded scope of application. While the CJEU never chose to implement *Keck* in these areas, it did introduce different *de minimis* tests to limit the substantive scope of the respective freedoms (Jansson and Kalimo, 2014, p. 523; Hojnik, 2013, p. 30). As a result, Member State acts with an 'insignificant' or 'too uncertain and indirect' impact on cross-border trade no longer constitute *prima facie* violations of EU law. National rules on tax enforcement, maritime transport, labour law, and consumer protection have, *inter alia*, profited from this. While limited in quantity, cases like these suggest that a partial re-thinking of the scope of free movement law has taken place at the CJEU.

The second claim, concerning the restricted possibilities for Member States to justify regulatory measures, stands on even shakier empirical grounds. According to the longstanding jurisprudence of the CJEU, national governments can, when defending trade barriers, rely on policy objectives which are not listed in the TFEU's explicit derogation clauses. There is an in-built element of judicial control here as Member States must argue that a certain policy aim is legitimate, a question over which the CJEU holds ultimate interpretive authority. However, the CJEU has been extremely generous in accepting justification grounds put forward by government representatives, acknowledging most plausible policy reasons as legitimate. In the free movement of goods case law alone, 17 justification grounds have been recognised as valid mandatory requirements (Zglinski forthcoming). This includes classical regulatory objectives such as consumer protection, workers' rights, and road safety, as well as more idiosyncratic concerns such as the promotion of tourism, cinematographic works, and the national language. The same holds true for the free movement of persons, services, and capital, as well as in the adjacent field of EU citizenship, where a myriad of justifications have been allowed by the Court, ranging from environmental protection, to cultural policy, to the construction of social housing (Bernard 2022 Ch. 12).

There are two limitations to this jurisprudence. One concerns economic aims. Member States cannot rely on purely economic considerations to justify trade barriers. This, for instance,

precludes measures aimed at encouraging domestic production (Case 288/83 *Commission v Ireland*) and protecting the local economy (Case C-265/95 *Commission v France*) – rather clear examples of one country trying to reap the benefits of the internal market without wanting to extend these benefits to others. The other concerns discrimination. Mandatory requirements cannot be invoked in the case of distinctly applicable measures, i.e. where Member States openly distinguish based on the origin of an economic activity. Ultimately, however, these are minor constraints on an otherwise far-reaching doctrine. What is more, the CJEU has relaxed both criteria over time. In litigation concerning the free movement of services and EU citizens, it has, for instance, acknowledged the objective of protecting the domestic social security (C-158/96 *Kohll*) and higher education systems (C-73/08 *Bressol*) as legitimate despite its inherent economic dimension and, in a goods case upheld legislation on waste disposal despite its openly discriminatory nature (Case C-2/90 *Commission v Belgium*). And even where, exceptionally, a policy objective is dismissed as illegitimate, Member States rarely struggle to find alternatives given the vast array of available justification grounds.

Yet, it is the third issue raised by the asymmetry thesis that may have the most important effect in practice: the intensity of judicial scrutiny. Scharpf is not alone in bemoaning that the CJEU shows insufficient deference to domestic political and regulatory choices, a consequence of the exceedingly strict standards of review it applies (see Mancini, 1991; Barnard, 2009). The problem is considered to be particularly acute in relation to justification and proportionality analysis. The memory of the CJEU's early activist rulings on free movement still looms large and has been reanimated by more recent judgments like *Viking* and *Laval* (Davies, 2008; Kilpatrick, 2011). But systematic evidence suggests that the CJEU has changed its approach over time and has come to embrace 'passive virtues' to a greater extent (Zglinski, 2020). Member States are being granted a margin of appreciation more frequently in free movement disputes, with the CJEU choosing to refrain from questioning the regulatory assessments made by domestic political processes. The degree of deference varies and depends on factors such as the policy field at stake, the level of harmonisation, and the type of regulatory measure. Nonetheless, in sum, the result is a widening of national autonomy.

There has, in parallel, been an increase in deference to national courts (Tridimas, 2011; Zglinski, 2018). European judges are delegating a growing number of decisions to their national counterparts, especially assessments relating to the justification or proportionality of a domestic measure. The consequences of this development for national autonomy are more subtle. When the CJEU defers a question concerning the justification or proportionality to a national judge, it is, in theory, not lowering the intensity of scrutiny of the given Member State act but merely affecting where that scrutiny will take place. In practice, however, the results can be similar. *Scotch Whisky Association* (C-333/14) provides an illustrative example. The Court of Justice, while leaving the final decision to the referring judge, made clear that the minimum alcohol laws at stake were a disproportionate restriction on the free movement of goods, given the availability of alternatives like higher taxation. The UK Supreme Court ended up deciding contrary to the CJEU's guidance and upheld the legislation, making use of the leeway it had been given. The deference granted to the national judiciary translated into greater deference for the national political process.

Partly as a result of the foregoing developments, partly as a result of the strengthening of positive integration which will be discussed below, there has been a decrease of free movement litigation. Fewer and fewer cases on free movement rights are being brought before the CJEU. A new study on the free movement of goods shows that the annual number of proceedings on Article 34 TFEU has dramatically dropped since the mid-1980s and currently stands at below-*Dassonville* levels (Zglinski, 2023a). The same phenomenon can be observed in the free movement of persons (Šadl forthcoming). For the penetrating force of negative integration, this is no minor issue. Negative integration crucially depends on litigation (see Kelemen, 2011). Due to the open-ended nature of the free movement provisions, which prohibit trade barriers but give Member States the possibility to justify these, economic actors typically need to challenge restrictions on their freedoms in CJEU in order to have them removed. The principle of mutual recognition demonstrates the difficulties in this context. Despite, in theory, giving producers a seemingly clear-cut right to sell any lawfully manufactured good across the entire internal market, enforcing this right has proven difficult in practice. National authorities regularly prohibit the marketing of foreign goods by reference to legitimate policy objectives, forcing traders to challenge these trade

barriers judicially (European Commission, 2015). This has led scholars like Weatherill to conclude that the principle of mutual recognition 'doesn't work because it doesn't exist' (2018, p. 224).

3b. Positive integration in the internal market

The second limb of the asymmetry thesis asserts that the EU is structurally inept at generating positive integration. The fact that legislation cannot be adopted by simple majority hinders a political response to negative integration, especially on issues where the preferences of Member States differ significantly. Moreover, when it can marshal the required majorities, the legislature is not writing on a blank sheet; the areas of EU law it can regulate are often already the subject of extensive judicial law-making. The problem, according to the asymmetry thesis, is that CJEU interpretations are difficult to correct. Interpretations of primary EU law can only be amended by Treaty revision, while interpretations of secondary law require a Commission initiative supported by the Council and Parliament. And thus, Scharpf argues (2010, p. 225),

> given the ever-increasing diversity of national interests and preferences, such corrections were and are in theory improbable and in practice nearly impossible. In other words, [CJEU] interpretations of European law are much more immune to attempts at political correction than is true of judicial legislation at the national level.

As a result, legislative measures are more likely to entrench the constraints of negative integration by 'systematiz[ing] and regulariz[ing]' case law than remedy the EU's deregulatory pressures on national law (Scharpf, 2010, p. 225-227, 240).

This section revisits these claims through four interrelated observations. Firstly, negative integration has been accompanied by ever-increasing positive integration, even in areas where national preferences diverge widely. This suggests that the legislature is less inept than the asymmetry thesis suggests. Secondly, harmonizing legislation has amply pursued non-market goals. In other words, the competence-based limitations on positive integration may seem strong in principle but are often pretty much toothless in practice. Thirdly, the legislature has been able to push back against and even overturn the rules and principles set by case law. This casts doubt

on the claim that the judiciary has an effective monopoly over the interpretation of EU law. Fourthly, the CJEU tends to respect the measures the legislature adopts, so there is much more room for positive legislative integration than the asymmetry thesis posits. While we will not offer a fully-fledged theoretical explanation of why the legislature has been more successful at bringing about positive integration and why the judiciary has not more extensively exploited the powers it formally enjoys, our empirical observations can be partly explained by the legislature's political discretion, the dampening effect legislation can have on litigation, and the CJEU's willingness to defer to legislation.

European integration was not always characterised by deregulation and economic liberalisation. During the first decades, the project advanced slowly, and the progress that was made did little to upend the national regulation of the economy. Only from the early 1980s did economic liberalisation accelerate and intensify (Scharpf, 2010, p. 212). As already noted, the principle of mutual recognition was created judicially just before the start of the decade and later transposed to all free movement rights. The Commission seized on the principle in its 1985 White Paper on the Completion of the Internal Market. It promoted 'a new approach to harmonisation' (Meunier and Alter, 1994, p. 535), according to which mutual recognition should be preferred to the harmonisation of national rules where possible. Hence, this case not only maximised 'the CJEU's quasi-discretionary control over the substance of member states policies' (Scharpf, 2010, p. 219), but also 'changed the bargaining constellation and incentives that member states faced in the processes of European legislation' (Scharpf, 2010, p. 224). Under the threat of litigation, states with high social and labour standards became more willing to open their economies to market pressures by agreeing to legislation that codified economically liberal case law.

The evidence reveals a more complex reality. To begin with, from the 1970s until the present, the legislative acquis regulating the internal market has steadily increased, quadrupling in the period from the Treaty of Maastricht until now (Zglinski, 2023a, p. 1, 5). So, whatever impediments the legislature faces, these could not stop it from enacting an ever more comprehensive regime regulating the movement of persons, products, and services. This is not because the legislature has needed five decades merely to systematise case law. Not only is there nowhere near enough

case law to support the full breadth of legislation that has emerged, but looking at the internal market in goods, which is subject to extensive legislative harmonisation and where CJEU-driven law-making has declined, it appears that legislation is not simply driven by litigation; it can also replace it (Zglinski, 2023a, p. 76). One reason to think that legislation can have a dampening effect on litigation is that it obviates the need to review national measures against EU primary law. It is settled case law that 'where a matter is regulated in a harmonised manner at EU level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not of those of the … Treaty' (see Ní Chaoimh, 2022). Coupled with the relative precision and detail of legislation (van den Brink forthcoming), national authorities can more easily settle disputes without having to ask the CJEU for interpretative clarity.

Of course, the fact that the content of internal market law is increasingly determined by positive integration does not show that there is no imbalance between market-liberalization and market-correcting policies. While negative integration is usually associated with economic deregulation, legislation can be used both to remove existing trade barriers by harmonising disparate national laws and to curb or correct economic liberalisation (Scharpf, 1999, p. 45-46). So, highlighting the growth of positive integration will not be enough to mitigate the charge that a neo-liberal bias is written into EU law. If it were true that the legislature lacks the legal and institutional capacity to enact market-correcting measures, and in any case must comply with the market-liberalization case law of the CJEU, positive integration will do little more than deregulate the European economy by other, legislative, means.

However, it would be implausible to claim that this is all there is to positive integration. To begin with, the non-economic dimension of European integration is dramatically underestimated in the literature. Over the years, the EU has acquired many market-correcting competences, including in the areas of consumer protection (Art. 169 TFEU), environmental protection (Art. 192 TFEU), and social policy (Art. 153 TFEU). To prevent it from lowering regulatory standards, the Treaties provide that it may only partially harmonise these areas and not prevent member states from maintaining or introducing more protective measures (Boeger, 2012). Moreover, competence constraints on the adoption of non-market policies have partly been overcome by the liberal

usage of Article 114 TFEU, the legal basis for measures promoting the establishment and function of the internal market. Because the legislature enjoys 'broad discretion' in using its powers under this provision,[4] it can be used as a legal basis for market-correcting legislation. On the undemanding condition that the legislative measure would remove (future) obstacles to trade, Article 114 TFEU can be relied on even if non-market goals (e.g., consumer or public health protection) are a 'decisive factor' in the regulatory choices made.[5] This explains why the norm has come to underpin such a wide range of legislative acts that pursue objectives mostly unrelated to the establishment of the internal market, ranging from environmental protection to data security and from public health to the regulation of artificial intelligence (Dawson, 2023; de Witte 2012).

Further, the legislature has been able to rebut and overrule important case law. This directly contradicts the central assumption of the asymmetry thesis that the CJEU holds a monopoly on the interpretation of EU law. While there is legislation codifying case law (van den Brink, 2021; van den Brink forthcoming, Chapter II.5), there is much evidence pointing in the other direction. In fact, case law often cited in support of the claim that the EU suffers from an asymmetry between positive and negative integration tells us the opposite story. The clearest example is *Cassis de Dijon* itself. Regulation 1576/89 on the definition, description, and presentation of spirit drinks, adopted many years after the ruling and the Commission's new approach to harmonisation, regulated the exact same matter as was before the CJEU in *Cassis de Dijon*—the minimum alcoholic strength of beverages. And yet, while the CJEU had ruled against the fixing of alcohol contents (instead proposing that labelling requirements sufficed to protect consumers), the Regulation harmonised European alcohol standards, prescribing in detail the alcoholic content that spirit drinks should have (Weatherill, 2021). Indeed, 'the CJEU's most famous free movement ruling was simply "legislated away"' (Zglinski 2023b).

[4] Case C-257/06 *Roby Profumi*, ECLI:EU:C:2008:35, para 14; Case C-324/99 *DaimlerChrysler*, ECLI:EU:C:2001:682, para 32.

[5] Case C-58/08 *Vodafone*, ECLI:EU:C:2010:321, para 36; Joined Cases C 154/04 and C-155/04 *Alliance for Natural Health*, ECLI:EU:C:2005:449, paras 30-32.

More generally, the implementation of the principle of mutual recognition in internal market law is subject to significant variation, much of which is due to legislative pushback against the principle. For example, the Commission's proposal for a Services Directive provided that Member States could subject service providers 'only to the national provisions of their Member State of origin'. This caused such an outcry that the proposal was watered down to the point that 'the letter, if not unambiguously the spirit, of mutual recognition [was] sacrificed' (Nicolaïdis and Schmidt, 2007, p. 728). Likewise, the country-of-origin principle has been rejected as the guiding principle in the area of consumer law. Whereas the proposal for the Unfair Commercial Practices Directive stated that 'traders shall only comply with the national provisions… of the Member State in which they are established',[6] the enacted legislative act makes no mention of this principle.[7] Finally, when legislation does adopt the principle, it is usually supplemented by provisions leaving certain safeguard mechanisms to the host state (Janssens, 2013, p. 91-94). These provisions do not necessarily conflict with existing case law, which only ever applied 'a principle of conditional or non-absolute mutual recognition' (Weatherill, 2018, p. 5). Yet, the examples do illustrate that 'the EU legislature can genuinely influence the contours of the internal market's various regulatory regimes' (Ní Chaoimh, 2022, p. 73).

The presence of case law does not prohibit a legislative response even where Member State preferences significantly diverge. A good example is the revised Posted Workers Directive, which was adopted in response to the much-maligned judgments in *Laval*, *Rüffert*, and *Commission v Luxembourg*. The rulings immediately provoked a fierce backlash and sparked a *political* debate on the interpretation of the Treaties. Numerous actors, including trade unions, national governments, and the European Parliament, called for political action to undo the case law (Martinsen, 2017). The proposed legislative reforms were opposed by several Eastern European countries, the biggest senders of posted workers. Their opposition slowed down negotiations and, at one point, the revision process stalled entirely. Yet, contrary to the worry that a diversity of national preferences makes corrections of case law impossible, enough of these states could be

[6] Article 16(1) of the Proposal for a Directive of the European Parliament and of the Council on services in the internal market (COM/2004/0002 final).
[7] Article 4 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (OJ L 149/22).

brought on board to amend the law following lengthy bilateral and multilateral negotiations (Kyriazi, 2023; more critically, see Vėlyvytė, 2022). This is but one example; there are many others which show that divergent national or institutional interests need not stand in the way of legislative reform in the internal market, even if they may influence its content. The above-mentioned Services Directive, for instance, was adopted after intense negotiations between the Commission, Parliament, and Council of Ministers (Jensen and Nedergaard, 2012, p. 844). Negotiations over the newly enacted Digital Services Act were even more protracted, this time because of fierce disagreement between Parliament and Council. While such disagreements sometimes lead to a breakdown in negotiations, the examples show that often a compromise can be forged between diverse interests and preferences and that these need not be a barrier to positive integration.

Indeed, even in the area of social policy, which plays a key role in Scharpf's critique, we find increasing evidence of EU institutions and Member States being able to cooperate successfully despite significant divergences (Crespy 2020; Schreuers 2023). Since the mid-2010s, the EU legislature has managed to adopt a number of directives which raise protective standards, covering issues that range from work-life balance, to adequate minimum wages, to transparent and predictable working conditions. These are complemented by soft law initiatives, such as the European Pillar of Social Rights, and financial tools, such as the Just Transition Fund, Youth Guarantee, and Support to mitigate Unemployment Risks in an Emergency (SURE), which have a redistributive dimension. All this appears to confirm Martinsen's finding that 'EU politics, despite its multitude of actors and their diverse perceptions, interests and interpretations, is not too fragmented to respond' (2015, p. 229).

Finally, the legislature's choices are normally respected. Controversial rulings, such as *Sturgeon* (C-402/07) and *Mangold* (C-144/04), which ignored these choices are very much the exception to the rule. This tells us that, instead of holding a monopoly on the interpretation of primary law, the CJEU shares interpretative authority with the legislature. The *Dano* (C-333/13) ruling provides a good illustration of this. The CJEU deferred to the provisions of the Citizenship Directive saying that they give 'more specific expression' (para 61) to Treaty provisions regulating the movement

of EU citizens (van den Brink, 2023). More generally, free movement cases are normally decided under a 'legislative priority rule' according to which 'secondary legislation enjoys a general presumption of constitutionality' and displaces primary law (Ní Chaoimh, 2022, p. 71). This, in turn, tells us that the increase in positive integration has directly affected the content and application of EU law. Overruling unwanted case law does not require Treaty reform; legislative reform will usually suffice. This does not contradict the claim underlying the asymmetry thesis that case law can affect the bargaining constellation among legislative actors and as such influence the direction of legislation. It shows, however, that these actors are also able to influence the direction of the case law and sometimes even overrule it.

4. Beyond the internal market: Concluding remarks

This paper was based on a most likely case design: it explored the relevance of the asymmetry thesis in a policy area where there was strong prima facie evidence to support its assumptions, namely the internal market. This of course leaves open the question of how our argument would apply to other policy areas. Underlying this shift in perspective are the shifts in the substantive focus of the EU as a whole. While the internal market has long been considered the core of the EU and its law, the last decades of post-Maastricht integration have seen a radical expansion in the range of policy fields in which it is active. It has also seen significant shift in the tools of EU governance – from a reliance on rules to an increasing importance of resources and money to achieve EU goals. It is therefore important to also assess the thesis outside of the internal market home in which most of its arguments were developed, a goal this concluding section will only tentatively begin.

Suffice to say that, outside of the internal market context, there may be even stronger reasons to question the continued validity of the asymmetry thesis. In simple terms, many of the patterns we have identified above – both of a changed approach to negative integration and the increasing relevance and scope of positive integration – apply even more strongly in areas such as environmental, fiscal, and digital policy.

This begins with negative integration. One reason for the influence of judicial institutions over the internal market lay in the direct effect of Treaty provisions in this area. This allowed the CJEU to use primary law not only to decide cases but to determine the substantive content of internal market policies. If we shift our focus to other policy areas, the Treaty commonly regulates them differently. Treaty provisions in the Chapters on economic and environmental policy, for example, rarely lay-out clear and unconditional rights, capable of carrying direct effect, but rather establish either i) principles governing an area of policy[8] or ii) legal bases that allow the EU legislature to establish more detailed rules precisely through positive integration.[9] This inevitably shifts the balance of power from the CJEU to the legislature. By establishing *legislative* competence to act, the Treaty makes political institutions responsible for determining substantive policy, with the role of the judiciary therefore largely left to interpreting secondary law – or checking for compliance with fundamental rights – and not applying the Treaties themselves (Muir, 2014).

As a result, while areas like economic, environmental, and digital policy contain plenty of landmark cases, they have not commonly experienced the degree and depth of judicialisation we observed in the 'founding' period of the internal market. This relates not only to direct effect but also to the ability to access the CJEU. As is well known, the CJEU carries restrictive standing rules. Access requires private parties to demonstrate their 'direct and individual' concern[10]; at the same time, the CJEU will rule inadmissible references brought by national courts where the question referred does not need to be answered to resolve a given dispute.[11] These rules inevitably render it difficult to raise cases in areas like fiscal and environmental policy (Bignami, 2020). In the environmental example, as observed in the recent *People's Climate Action* case before the CJEU (C 565/19 P), environmental NGOs and other claimants almost uniformly fail the individual concern test (as a breach of environmental standards inevitably affects a wide range of claimants). In the fiscal example, most rules of EMU, such as the excessive deficit or macro-

[8] For EMU, see Art. 119(3) TFEU; for environment, see Art. 191(1) TFEU.
[9] For EMU, see Art. 121(6), Art. 122, Art. 126(14), Art. 136 TFEU; for environment, see Art. 192(1) TFEU; for data protection, see Art. 16(2) TFEU.
[10] Case 25-62 *Plaumann & Co. v Commission* ECLI:EU:C:1963:177.
[11] Case C-244/80 *Pasquale Foglia v Mariella Novello (No 2)*, ECLI:EU:C:1981:302.

economic imbalances procedures, are directed at states, not individuals, making it more difficult for individuals to raise national, and subsequent EU, litigation.

Even in those examples where cases in these areas *have* reached the CJEU, such as the famous *Gauweiler* (C-62/14) and *Weiss* (C-493/17) decisions, we hardly see a highly interventionist Court (Dawson & Bobić, 2019). Given the political salience and technical complexity of areas like EMU, the CJEU has had limited choice but to display a highly deferential attitude to the policy choices of the EU institutions, laying accused by national inter-locutors such as the German constitutional court not of over-reaching but rather failing to robustly apply proportionality standards.[12] The CJEU simply has less opportunity to shape these decisive areas of policy through negative integration or, where it is given the opportunity, may have sound policy reasons to be deferential to political institutions. This links to our earlier observations regarding Article 114 TFEU – the CJEU is highly reluctant to stand in the way of political initiatives where they have wide Member State support.

What about positive integration? As already discussed, an important element of the asymmetry thesis and subsequent work has been that negative integration establishes a default standard. This standard then structures positive integration making it difficult for the political process to alter negative integration measures (given, for example, restrictive decision-making rules). In the sections above, we have questioned this dynamic; we see legislation and case-law emerging simultaneously and mutually influencing each other. This applies to an equal or greater degree in other fields of EU action. To take digital rights as an example, this is a field decisively impacted by key cases: in judgments such as *Schrems* (C-311/18)*, Digital Rights Ireland* (C-293/12) and *Google Spain* (C-131/12) the CJEU has decisively 'upgraded' the level of data protection enjoyed by EU citizens. These cases have also informed subsequent legislative developments such as the adoption of the GDPR.

[12] BVerfG, Judgment of 5 May 2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 at para. 116.

At the same time – while in each of these cases the CJEU adopted strict standards of review, affording little discretion – the imprint of legislation is equally clear. The 2006 data retention directive was found invalid because it failed to give effect to the 1995 Data Protection Directive and its guarantee, strengthened by applicable Charter rights, to give an appropriate level of individual data protection in data transfer decisions. *Google Spain* also directly interprets the 1995 Directive by reading a right to be forgotten into the obligations incumbent upon data processors in Art. 12 and 14 of the DPD. In this field we see both the ability of the legislature to establish ambitious positive integration measures (something we also see in the environmental and EMU examples) *and* the way those measures influence the CJEU and its own interpretation of primary law. While space limitations inhibit us from drawing out the implications of our analysis across different fields of EU policy, there is at least prima facie evidence that – outside of the internal market – the assumptions of the asymmetry thesis are even more questionable.

Given the increasing importance of non-market policy objectives to the policy orientation of the EU, this gives further weight to the need to update and re-evaluate this thesis for the 21st Century Union. It also increases the importance of studying the dynamics that have allowed for the asymmetry to be eroded. This work – which is largely beyond the scope of this paper – has already begun. In a recent paper, for example, Sven Scheuers points to the importance of the cognitive and normative orientation of policy-makers as an important factor in overcoming barriers to social policy-making implied by the cold dynamics of distributive bargaining (Scheuers 2023). Other empirical work, for example on new dynamics in the interaction between the national and European judiciary (Wallerman-Ghavanini 2022), or the aforementioned shift to resources as a tool of EU governance seem of equal importance in understanding causal factors driving the balance between positive and negative integration.

This leaves, however, a final question: what does the potential demise of the asymmetry thesis mean for the EU's social and democratic legitimacy? This relates to the final aspect of Scharpf's thesis – the asymmetry is important because it structurally limits the ability of the Union to achieve a full range of social objectives, thus harming its democratic legitimacy. While this paper has not, and did not seek to, prove that there has been a fundamental change in the EU's

underlying political economy, it does suggest that the dynamics that produce social deficits in EU integration may be different than previously thought. While Scharpf's thesis points our attention to the CJEU, other non-majoritarian institutions, particularly the ECB, may be of equal importance in shaping the EU's balance between market and other objectives. At the same time, the demise of the asymmetry thesis places greater emphasis on the choices and agency of the EU's political institutions (such as the explicit decisions of the Commission and legislative institutions to prioritise certain Treaty objectives over others). For Scharpf, the EU's social deficit was produced not by ideological beliefs but by institutional conditions (Scharpf 2006, p. 854). Our analysis potentially alters this logic: if institutional conditions have shifted, political agency is of more significance in understanding imbalances in the EU's social development. Even the 'demise' of the asymmetry thesis thus establishes importance lessons for the EU's democratic and social legitimacy.

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