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More Autonomy for Member States in So-called 'Purely Internal Situations'?

Recently, some member states of the EU have become more outspoken about their autonomy in an ever more completed internal market. The central focus of study in this contribution is the actual role and function of the 'purely internal (or domestic) situation' in the case law of the CJEU. Is this concept able to aid member states in their quest for more autonomy and flexibility? And if not, can it be adapted in such a way that it helps the autonomy of the member states and the national judiciary in situations where the interests of the EU and of the internal market are not really at stake?

I The Concept of 'Internal' or 'Domestic' Situation

The internal market used to be the core construct and policy of the EU, and probably it still is.[1] The Court of Justice of the EU (CJEU or the Court) has played an important role in its creation and development. The four economic or 'fundamental' freedoms, of goods, persons, services and capital, have been interpreted very widely and exceptions have been narrowly interpreted. An economic freedom presupposes the crossing of a border between two member states. If a crossing does not take place, there is a so-called 'purely internal situation', in which all the relevant factual elements are located within one and the same member state. In this contribution, the 'purely internal situation' case law of the CJEU of the last ten years (2009–2019) will be analysed. I prefer to speak of a 'domestic' situation, as the word 'internal' is confusing since we are also speaking of an 'internal' EU market. In the old case of *Saunders,* the Court already used the terminology 'wholly domestic situation'[2]. In recent case law, the Court sometimes uses 'purely domestic situation'[3]. In the literature, the terms 'purely' and

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1 Jacques Pelkmans, 'Why the Single Market Remains the EU's Core Business' (2016) 39 (5) West European Politics 1095–1113.

2 Case C-175/78 *Saunders* [1979] ECR 1129.

3 Joined cases C-532/15 and C-538/15 *Eurosaneamientos*, ECLI:EU:C:2016:932.

'situation' are criticised as being too vague.[4] This is part of the problem to be addressed in this contribution.

Recently, member states are more outspoken about their autonomy in an ever more completed internal market. In the Treaty of Lisbon, the scope of the EU Charter of Fundamental Rights has been explicitly tied to the scope of the Treaty (art. 51, para 2 Charter). In the area of European citizenship, we find recent case law that may qualify as a retreat or 'partial eclipse' of EU citizenship.[5] The central focus of study in this contribution is the actual role and function of the 'purely domestic situation' in the case law of the CJEU. Is this concept able to aid member states in their quest for more autonomy and flexibility? In cases such as *Omega*[6] and *Sayn-Wittgenstein,*[7] the CJEU already pays respect to some national issues related to public order and national identity when at the same time the overall damage to the internal market is not too severe.[8] This undoubtedly involves balancing, an act that lawyers and judges are good at. In both *Omega* and *Sayn-Wittgenstein,* the balancing took place at the justification stage; there were no purely domestic situations in these two cases. Does this kind of balancing also occur in the 'domestic situation' case law?

I will look at the most interesting cases of the last ten years concerning the 'purely domestic situation' and try to find if there is a balancing act here as well and of what this balancing act consists. Is autonomy an element in the balancing or is the internal market further 'radicalised' and completed through the case law of the CJEU? In the academic literature, there is scepticism concerning the domestic situation's ability to safeguard the autonomy of member states. Mataija is very outspoken: the internal situation rule is 'largely inadequate for the purpose of protecting Member States competences'[9]. He prefers a substantive criterion to distinguish internal situations from EU situations without reference to the simple act of moving from one country to the other.[10] Nic Shuibne admits that the threshold to decide whether there is a cross-border connection has been significantly diluted.[11] Iglesias Sánchez even asks herself whether the notion of a purely internal situation should be abolished.[12] This point of view is illogical, as the Court hardly goes directly against its established case law.[13] The concept of a 'purely

4 Sara Iglesias Sánchez, 'Purely Internal Situations and the Limits of EU Law: A Consolidated Case Law or a Notion to be Abandoned?' (2018) 14 (1) European Constitutional Law Review 7–36, at page 23 and 24.

5 Julio Baquero Cruz, *What's Left of the Law of Integration? Decay and Resistance in European Union Law* (Oxford University Press 2018) at page 87, it is the title of his ch 5.

6 Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609.

7 Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693.

8 Koen Lenaerts, 'The Court's outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' in Maurice Adams et al. (eds), *Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2015, Oxford and Portland, Oregon) 59–60.

9 Mislav Mataija, 'Internal Situations in Community Law: An Uncertain Safeguard of Competences within the Internal Market' (2009) (5) CYELP 5 at page 31.

10 Mataija (n 9) on page 33.

11 Niamh Nic Shuibne, *The Coherence of EU Free Movement Law. Constitutional Responsibility and the Court of Justice,* (Studies in European Law, Oxford University Press 2013) 124.

12 See (n 4).

13 A famous exception is joined cases C-267/91 and C-268/91, *Keck and Mithouard* [1993] ECR I-6097.

domestic situation' will therefore remain relevant, but the question is how relevant? Or is it too easy for a national court asking preliminary questions to circumvent this concept? There is, indeed, a concern in the literature that the CJEU is too easily admitting preliminary questions in purely domestic situations.[14]

II The Case Law of the CJEU on the Scope of the Internal Market – a Layered Approach

The four fundamental or economic freedoms, the free movement of goods, persons, services and capital, have been interpreted widely by the Court in order to oversee the creation and operation of the European internal market. Exceptions were interpreted strictly with help of the rule of reason; reasonable national measures were still acceptable if there is a legitimate aim for the national measure and if the measure fulfils the requirements of proportionality.[15] An internal market is defined in art. 26, para (2) TFEU as an area without internal frontiers. It is not exactly crystal clear what an area without internal frontiers is. If there are purely domestic situations then an internal market should not cover internal situations within one and the same member state. The most radical interpretation is with respect to customs duties, as the Court in the at the time much criticized case of *Lancry* held that even customs duties levied at a border *within* one member state are prohibited.[16] This radical approach has not been followed in those freedoms where the movement of persons is inherent in the effective use of the freedom. This became clear in case law concerning the federation of Belgium, for example case *Commission versus Belgium*[17]. Crossing the border between Flanders and Wallonia is not always sufficient in order to pass the threshold of applicability of art. 45, 49 and 56 TFEU. Weatherill implicitly submits that the CJEU uses a threshold for the applicability of the economic freedoms, e.g. in the event there is a *considerable* influence on consumer behaviour in another member state or if there is a *serious* inconvenience because of the existence of a national measure then EU law would be applicable.[18] These qualifications suggest balancing by the European Court; this balancing is, however, not made explicit.

There is case law, however, in which the Court could not invoke one of the four freedoms, as these freedoms pre-suppose a cross-border movement within the member states. Either the cross-border movement is too weak and indirect, or the situation before the judges is

14 See for example Jasper Krommendijk, 'Wide Open and Unguarded Stand our Gates: The CJEU and References for a Preliminary Ruling in Purely Internal Situations' (2017) 18 (6) German Law Journal 1359–1394.

15 Annette Schrauwen (ed), *Rule of Reason. Rethinking another Classic of European Legal Doctrine* (Europa Law Publishing 2005).

16 Case C-363, 407-411/93 *Lancry* [1994] ECR I-3957.

17 Case C-250/08 *Commission versus Belgium* [2011] I-12341.

18 Considerable influence on consumer behaviour is taken from the Court's case C-142/05 *Åklagaren v Mickelson and Roos* [2009] ECR I-4273 and serious inconvenience to an affected person from the case law on EU citizenship. Stephen Weatherill, 'The Court's Case Law on the Internal Market: 'A Circumloquacious Statement of the Result, rather than a Reason for Arriving at it' in Maurice Adams et al. (n 8) at page 91.

confined in all its factual aspects to one and the same member state. After several decades, we find essentially three clusters or layers of the Court's case law in which the 'relevance' of an issue is to be determined before a substantive answer may be given in a case. These layers need to be separated:

– There is the case law on the 'relevance' of a preliminary question from a national judge of one of the member states. If the preliminary question does not relate to a real conflict or only concerns a 'hypothetical' conflict or problem, the Court will generally not give an answer. If the national judge needs an answer to the preliminary question to solve a real conflict before the national court, the CJEU will give an answer. There is some discretion for the national judge to formulate the preliminary question(s); sometimes the CJEU will reformulate the questions so as to be able to interpret EU law and not national law, for which the Luxembourg-based court is not competent. In the words of the CJEU, 'questions concerning EU law enjoy a presumption of relevance' and may only be refused 'where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose'[19]. The test used by the CJEU is largely jurisdictional, and also partly on the merits. The implicit question, of whether there is a link with EU law, is a substantive test; even the notion 'quite obvious' has to be dealt with in a substantive manner.

– Subsequently, there is the case law concerning the 'purely internal/domestic situation', in which all the 'legally relevant' factors and/or the facts are confined to one single member state and none of the four economic freedoms is deemed to be applicable. It is possible that the national court asking the preliminary question did not bring concrete information on the cross-border character of an issue before it. EU law is not 'relevant' for a solution in this case. The 'situation' is outside the scope of EU law and the CJEU is not competent in this respect. In four exceptional situations, the Court is now willing to give an answer even when all the factual elements are located within one and the same member state; first if a national judge needs an answer in a 'purely internal situation' in order to ban cases of 'reverse discrimination' prohibited by national law and where a national is 'discriminated' because a national of another EU member state has rights under one of the economic freedoms of the internal market. This is a matter of the national law concerned, and not an issue of EU law.[20] Nevertheless, the Court gives an answer to the national court. The second is where national law directly applies provisions of EU law for internal situations, and in this respect the Court gives an answer because two different lines of interpretation are not in the Union's interest. These two exceptions will not be dealt with in this contribution: I will focus on the other two, where the nature of the cross-border effects are the determining factor. The third is the so-called *Blanco Pérez* case law.[21] indistinctly applicable national measures may dissuade nationals of other member states from making use of their rights to free movement. Finally, there is the *Libert*

[19] See joined cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez* [2010] I-4629 at para 36.

[20] See Alina Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer Law International 2009) who is vehemently against cases of reverse discrimination.

[21] Joined cases C-570 and 571/07, *Blanco Pérez and Chao Gómez* [2010] I-4629.

case law:[22] this concerns proceedings to annul provisions of national law that are indistinctly applicable and therefore also might be relevant for nationals of the other member states. Here there seems to be a mixture of a jurisdictional and a substantive test. These two latter exceptions are very interesting for this contribution, as the link with the exercise of economic freedoms takes centre stage. There has to be evidence to substantiate this connection.

– Finally, there is the case law in which the link with one of the economic fundamental freedoms is substantively tested. The *Dassonville* test or criterion, in order to decide whether there is a measure of equivalent effect as a quantitative import restriction,[23] is famous and extremely wide so as to cover many different kinds of national measures that may subsequently be justified by a rule of reason. Nevertheless, there are cases with a too indirect or too tenuous link with free movement of goods. In that situation, there is no violation of Article 34 TFEU. This test is substantive, on the merits; hypothetical situations are not covered by this wide test but virtual or potential cross-border situations are on the other hand covered. How is it possible to distinguish between hypothetical at the one hand and potential on the other? For the other three economic freedoms, a slightly different rule but still with comparable scope applies.

– There is a fourth layer as well, but in this layer we are definitely within the scope of EU law. This layer deals with the justification stage and the rule of reason. This layer, of a different nature, is not treated in this contribution, but there is definitely much balancing by the CJEU in it.

In this contribution I will first and foremost deal with the second layer, the case law concerning the purely domestic situation, and will study how it differs from the two other layers. It was thought by some of the earlier commentators that 'purely internal situations' would gradually disappear as the internal market freedoms would become more popular. Internal situations, in the words of one author, were so-called growing pains or initial problems, and we would have to deal with these issues for a certain while.[24] However, if we have a look at the number of cases dealing with 'purely internal/domestic situations' in the period from 1 September 2009 until 1 January 2020, it is clear that this cluster of case law has not disappeared. One may even argue that this cluster of cases will become larger after the *Ullens de Schooten* case.[25] In the next chapter, I will discuss this important case and the major cases concerning domestic situations in the period under research.

22 Joined cases C-197/11 and 203/11 *Libert a.o.*, ECLI:EU:C:2013:288.

23 Case 8/74 *Dassonville* [1974] 837.

24 Kamiel J. M. Mortelmans, 'Omgekeerde discriminatie in het gemeenschapsrecht' (1979) SEW: Sociaal-Economische Wetgeving at page 654.

25 Case C-268/15 *Ullens de Schooten,* ECLI:EU:C:2016:874.

III The Case *Ullens de Schooten*: Change of Approach by the CJEU?

1 Case Law Prior to *Ullens de Schooten*

Before introducing the case mentioned in the heading of this chapter from 2016, two seemingly conflicting approaches will have to be dealt with first. In 2010, the CJEU issued two comparable cases within one month. On 1st June, in *Blanco Pérez and Chao Gómez,* the CJEU argued that the answer to the preliminary question of the Spanish *Tribunal Superior de Justicia de Asturias* was useful in order to enable that national court to decide on the lawfulness of the national legislation at issue related to license policies for establishing pharmacies in specific areas, based on population density and maximum distance between pharmacies.[26] The Grand Chamber of the Court decided that it is 'not obvious' that the problem at stake is hypothetical and that 'it is far from inconceivable' that nationals from other member states might get in trouble with this restrictive legislation. The CJEU added that the legislation is capable of falling within the scope of EU law only if there are 'situations connected with trade' between member states. Apparently this connection was present and a detailed analysis of the national legislation followed. A case with an opposite outcome *(Sbarigia)* was issued one month later, on the 1st of July 2010.[27] An owner of a pharmacy in the centre of Rome asked for an exemption from closing times and periods, especially during summer. This was several times refused by the authorities. The national court asking the preliminary questions, the regional administrative tribunal for the province of Lazio, deemed the legislative provisions to be too excessive and unjustified. The first layer of case law distinguished in chapter 2 is easily passed. The preliminary question enjoys a presumption of relevance. However, at the next layer, the CJEU confronts this case with *Blanco Pérez and Chao Gómez.* The general system of rules behind the Italian legislation is not in dispute, as in *Sbarigia* only the decision to refuse exemption from closing times was disputed. Neither the free movement of services, nor the freedom of establishment was at stake. The CJEU did not mention the purely domestic situation, but added that a national of another member state, if he or she would be in the same situation as Sbarigia, would either ask for an exemption to the rules or be already established in Italy on a permanent basis. It is 'quite obvious' that the answer to be given to this preliminary ruling was not 'relevant' and therefore the reference for a preliminary ruling was inadmissible. Both cases have a different outcome and in both cases there was a purely domestic situation. The difference between the two is 'the general system of rules', which is not the same as only closing times and periods that are apparently not so relevant for one of the four freedoms.[28] *Airport Shuttle Express,* an example of a purely domestic situation, an Italian operator also protested against the temporary suspension of an authorisation by an Italian

[26] See (n 21).

[27] Case C-393/08 *Sbarigia* [2010] ECR I-6337.

[28] This reminds us of the concept of 'selling arrangements' in the case law since *Keck & Mithouard,* joined cases C-267/91 and 268/91, [1993] ECR, I-6097.

municipality because of failure to observe certain conditions.[29] The preliminary question was inadmissible; free movement of establishment was not at stake and more evidence of a cross-border link is needed.[30] A failure to observe conditions linked to an authorization of an Italian in Italy does not have implications for cross-border economic activities.

Omalet is about two contracting partners who are both established in Belgium, therefore art. 49 TFEU is cannot be applied.[31] In this decision, the Court referred to an earlier case, *Woningstichting Sint Servatius*, but there the Court argued that there was a restriction because a scheme of prior authorisation before somebody from another EU member state could invest in a public housing scheme leads to a clear restriction of art. 56 TFEU, the free movement of capital.[32] A general system of prior authorisation is particularly sensitive and not the same as relations between two contracting parties. A system of prior authorisation was at stake in *Venturini,*[33] where the ruling in *Blanco Pérez and Chao Gómez* was repeated, because here was a 'potential' effect for cross-border situations. The focus is on the general capability of the national legislation in question to produce effects outside the member state itself. However, if there would be a potential effect on cross-border situation then it is not a purely domestic situation and this would have to be explicitly tested in the third layer of case law distinguished in the previous chapter. This is the substantive test of whether there is a restriction of one of the four freedoms. The second and third layers of the scope of the internal market are blurred. I submit that a hypothetical and future effect must be separated from a potential and more nearby effect on cross-border situations. Neither in *Blanco Pérez and Chao Goméz*, nor in *Venturini,* were there nationals of other member states involved. The CJEU only uses the general term 'not inconceivable'. How can 'not inconceivable' be substantiated?[34] One element is clear, though; it is always possible that prior authorisation schemes will restrict economic activities, including cross-border ones. The Court is particularly explicit in its approach to bring this kind of scheme within the scope of the internal market, even if there is not yet a subject from another member state interested in investing or becoming an economic operator in the member state with the prior authorisation scheme. This is not the same as complaints concerning opening times and periods, or specific authorisations. Moreover, measures such as in *Blanco Pérez* and *Venturini* were against an established line of earlier case law of the Court. Why then not treating this kind of measures as situations confined in all aspects in one and the same member state? The second and third layers set out in chapter Two are not separated well enough.

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29 Joined cases C-162/12 and 163/12, *Airport Shuttle Express,* ECLI:EU:C:2014:74.

30 Joined cases C-419/12 and 420/12, *Crono Service v Roma Capitale,* ECLI:EU:C:2014:81 is a comparable case. The general system of rules seems not to be in dispute.

31 Case C-245/09 *Omalet* [2010] I-13771.

32 Case C-567/07 *Woningstichting Sint Servatius* [2009] I-9021.

33 Joined cases C-159/12 and 161/12, ECLI:EU:C:2013:791. Sara Iglesias Sánchez, 'Purely Internal Situations and the Limits of EU Law: A Consolidated Case Law or a Notion to be Abandoned?' (2018) 14 (1) European Constitutional Law Review, calls this the *'Venturini line'* of case law, at page 16.

34 See also Krommendijk (n 14) at page 1377. The threshold is not clear. At page 1369 in reference 67 he submits that the criterion 'not inconceivable' is derived from earlier case concerning public procurement.

The number of cases before 2016 in which the Court used the famous 'not inconceivable' terminology in cases where the facts related to one and the same member state is quite large. It is not inconceivable that, for example, companies established in other member states have been or are interested in selling motor fuel in Italy and are concerned by an Italian rule where mandatory minimum distances were imposed on new roadside service stations selling fuel or LPG.[35] This would deter newcomers from other member states, as the already established companies would not move. This would lead to discrimination against newcomers. A deterrent effect on the potential exercise of one of the economic freedoms comes within the scope of EU law. In *Libert a.o.* a Flemish regulation limiting purchases or leases of immovable property located in some municipalities brought the CJEU to the same remark: 'it is by no means inconceivable that individuals or undertakings established in member states other than the Kingdom of Belgium have been or are interested' in buying or leasing property.[36] The Flemish measure tried to hinder French and Walloon persons or undertakings from buying or leasing property in Flanders. Concerning a Latvian case, *Garkalns,* related to betting and gaming the CJEU again reiterated: 'it is far from inconceivable that operators established in member states others than the Republic of Latvia have been or are interested in opening amusement arcades in Latvia'[37]. In *Citroën Benelux NV,* the CJEU submitted that

> in the present case, however, it is conceivable that businesses established in member states other than the Kingdom of Belgium are interested in making, in that member state, combined offers involving at least one financial component, such as the offer at issue in the main proceedings.[38]

In all these cases, the facts were confined to the territory of one member state. The CJEU could have concluded that these were purely domestic situations. The Court deems it, however, not inconceivable that the general capability of the national measure at stake is relevant from the viewpoint of one of the four economic freedoms. This blurs the second and third layers of our scheme mentioned in Chapter Two. In *Berlington,* at last, a cross-border element was specifically mentioned: Since, from 2004, EU citizens holidaying in Hungary were still within the Single Market, a national piece of legislation prohibiting the operation of slot machines outside casinos fell within the scope of the free movement of services.[39] The case of *Ragn-Sells* is a rare example where the Court is more strict.[40] The case is a purely Latvian one and, because it was not shown that actors from other member states were interested in treatment of waste, one of the economic freedoms was not applicable. A Latvian company protested against a municipality awarding an exclusive right to treat types of waste collected on its territory. One specific and individual case of awarding is apparently not the same as a 'general' deterrent effect on cross-border economic activity.

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35 Case C-384/08 *Attanasio Group* [2010] ECR I-2055.
36 Joined cases C-197/11 and C-203/11 *Libert a.o.,* ECLI:EU:C:2013:288.
37 Case C-470/11 *Garkalns*; ECLI:EU:C:2012:505.
38 Case C-265/12 *Citroën Benelux NV,* ECLI:EU:C:2013:498.
39 Case C-98/14 *Berlington*, ECLI:EU:C:2015:386.
40 Case C-292/12 *Ragn-Sells AS v Sillamäe Linnavalitsus*, ECLI:EU:C:2013:820.

2 *Ullens de Schooten* (2016)

The judgment in the *Ullens de Schooten,* case delivered on 15 November 2016 is often seen as a turning point with a stricter approach to the purely domestic situation.[41] Advocate-General Bot argued against the 'strict application' of the purely domestic situations case-law in point 48 of his conclusion and the Grand Chamber of the CJEU decided that, nevertheless, there was a domestic situation confined in all its aspects within the Kingdom of Belgium.[42] In this conflict, many legal battles had been fought before Belgian courts and even one before the European Court of Human Rights, on art. 6 of the European Convention of Human Rights[43] concerning the laboratory of *Ullens de Schooten,* declared insolvent in the year 2000. Prior to the date of insolvency, *Ullens de Schooten* was fined and imprisoned for tax evasion and for the illegal operation of a laboratory, contrary to a Belgian legal provision. He complained that the Belgian provisions were not compatible with EU law, since the fact that he was not able to operate his laboratory was contrary to the freedom of establishment, the freedom to provide services and the free movement of capital. The Belgian Constitutional Court argued earlier that all aspects of this case were confined within the Kingdom of Belgium. The Belgian Supreme Court asked the preliminary questions.

The criteria stressed by the Court, apparently because the Advocate-General had another view in this matter, are that 'specific factors' have to be made explicit in the request for a preliminary question that show a link 'between the subject or circumstances' of a conflict and one of the economic freedoms. In other words, the 'connecting factor' with the freedoms has to be apparent, in order to protect individuals planning, deciding, or effectively making use of one or more of the economic freedoms. In *Ullens de Schooten,* there is no such factor present, or the national court did not set it out in its order for reference in sufficient detail. Advocate-General Bot argued differently, that there might still be 'potential' infringements of EU law existing, especially for economic operators established in member states other than Belgium. Access to the Belgian market in medical analysis laboratories was at stake and therefore the Advocate-General was of the opinion that the Belgian legislation is capable of producing cross-border effects. Even the European Commission argued earlier that the Belgian provision was against the freedom of establishment. The CJEU did not follow this view for the reasons stated earlier. However, a deeper reason may have been the importance of the violations of Belgian law, including tax evasion, in this case. The opinion of the CJEU needed to be aligned perfectly with an earlier ECJ case, in *Commission v Belgium*[44]. There the Court decided that the non-reimbursement under the Belgian social security laws of clinical biology services from laboratories that are operated by a legal person under private law and where the members, partners or directors are not all natural persons is not against the

41 See for example Krommendijk (n 14) pages 1359–1394, who argues that *Ullens de Schooten* is a step in the right direction. The CJEU should not leave its gates too open.

42 Case C-268/15 *Ullens de Schooten;* ECLI:EU:C:2016:874.

43 ECLI:CE:ECHR:2011:0920JUD000398907.

44 Case 221/85 [1987] ECR 719.

freedom of establishment. Nationals from other member states were still allowed to operate such a laboratory and therefore the important principle of non-discrimination was upheld. In that older case, the Court focused on issue whether the Belgian legislation under scrutiny had been adopted for discriminatory purposes or whether it produced discriminatory effects. This was not the case for both. Therefore, in *Ullens de Schooten,* the Belgian provision was applied without distinction and did not ban nationals of other member states from operating a laboratory in the Kingdom of Belgium. The criminal aspects of the case could strengthen this domestic nature, in the sense that the CJEU is in that case less likely to intervene in domestic situations. In this respect it reminds us of the *Saunders* case, where a criminal aspect was involved as well.[45]

The Advocate-General was right, though, that the Court in earlier cases did focus on 'potential effects' and the general capability of a national measure to hinder freedom of movement, apart from its non-discriminatory nature. However, again, this capability was not an issue in the dispute subject to a preliminary ruling. Wahl and Prete argue that the Court has become stricter in questions of jurisdiction and admissibility; the number of preliminary questions by national courts of the member states threatened to become too high.[46] That is why the onus was, from then on, more on the national court, asking the preliminary questions, to substantiate with sufficient evidence that there is a relevant cross-border link, notwithstanding the circumstance that the facts are all confined within one and the same member state. It is good that the national court is now forced to bring sufficient evidence for a 'potential' effect on cross-border economic relations; it is problematic that in a purely domestic situation there might still be potential cross-border effects of the measure, as it would limit autonomy. Again, as stated before, the second layer of the purely domestic situation and the third layer of whether there is a restriction of one of the freedoms are too much blurred.

3 Case Law After *Ullens de Schooten*

Ullens de Schooten has indeed been some kind of a turning point. In *Queisser Pharma versus Federal Republic of Germany* from January 2017, *Ullens de Schooten* was already quoted in a decision concerning the free movement of goods.[47] Articles 34 to 36 TFEU are not applicable to a German regulation prohibiting a certain food supplement with the possibility of a temporary derogation in a 'purely domestic situation'. As it the free movement of goods here, the Court adds that the regulation may not have 'as object or effect disadvantaging exports, vis-à-vis internal commerce'[48]. The substance of the turning point is the duty of national courts to bring more evidence to show the cross-border link. A case strongly related to the *Ullens de Schooten* affair is *Mastromartino versus Consob,* in which an Italian so-called

45 Case 175/78 [1979] ECR 1129.

46 Nils Wahl, Luca Prete, 'The Gatekeepers of Article 267 TFEU: on Jurisdiction and Admissibility of References for Preliminary Rulings' (2018) 55 (2) Common Market Law Review 511–548 at page 535.

47 C-282/15, ECLI:EU:C:2017:26.

48 Case 282/15 *Queisser Pharma,* para 39.

'tied agent' to an investment company was temporarily banned for one year from doing his job by Consob, the Italian authority supervising the stock exchange, because a disciplinary procedure had been introduced against him.[49] The position of 'tied agents' operating outside the premises of a financial corporation was, as such, not regulated by Directive 2004/39 concerning markets for financial instruments. There were some provisions in that directive about tied agents, but only related to the responsibility for their work. The national judge asking the preliminary question, was of the opinion that a cross-border element was present, in that a temporary ban would have consequences for the activities of the agent and that those activities could be of cross-border nature. As in *Ullens de Schooten,* the CJEU is very reserved in this case. As there is no link with the substance of the directive, the cross-border element is not given. In the request from the national court for a preliminary ruling, there were insufficient concrete elements to substantiate the relevance of one of the fundamental economic freedoms of the internal market, not even for the potential exercise of the freedom of establishment and the freedom to provide services.[50] The CJEU added the important words that even a link with a 'potential exercise' of one of the economic freedoms was not present. This is helpful, because it implies that the test in the third layer of case law distinguished in chapter two is not satisfied. If there had been a sufficiently substantiated potential impact on cross-border economic relations, the Court would have passed layer three. Nevertheless, the CJEU had some doubts: in para 36 it admits that it cannot be completely excluded that a national measure, as the Italian regulation (applicable without distinction to nationals and nationals of other member states) could still have consequences that might 'produce effects' outside the confines of Italy.[51] This doubt is not helpful: it matters that there is a focus on the potential effect on cross-border situations. This potential effect needs to be substantiated. A hypothetical or theoretical cross-border situation is not sufficient. The distinction between 'potential' and 'hypothetical' effect must be better explained addressed by the CJEU. Here is where the threshold is between layers two and three.

Let us have a look at two other interesting cases after which we shall try to establish a conclusive argument on what is a purely domestic situation. The first case is *NKBM,* where Directive 2003/98/EC was at stake.[52] After the CJEU argued that this directive was not applicable to the case, there was an argument over whether the freedom to conduct a business in art. 16 of the Charter of Fundamental Rights of the European Union and articles 49, 56 and 63 TFEU were applicable. Is the Slovenian dispute of a cross-border nature? Advocate-General Bobek focused, in his conclusion, on the remarks of the national court asking the preliminary questions; according to the national court, there were no cross-border elements at the material time of the conflict, only subsequently, and answering the question of conformity with the economic freedoms was therefore deemed to be hypothetical. The CJEU

49 Case C-53/18, ECLI:EU:C:2019:380.

50 See paragraph 37 of the case.

51 In the Dutch translation of this paragraph the word 'merkbaar' ('noticeable') appears. This term might suggest a *de minimis* approach.

52 Case C-215/17 *NKBM,* ECLI:EU:C:2018:901.

was also of the opinion that the cross-border elements, e.g. the acquisition after the material time of the dispute of a subsidiary in Austria, were not 'relevant' to the case. As Wahl and Prete submit, preliminary questions are 'hypothetical' when an EU rule is not applicable *ratione temporis* to the facts of the case.[53] A potential deterrent effect of the Slovenian regulation for service-providers in other member states was not substantiated with concrete evidence. It is specific evidence and not hypothetical considerations that are needed in order to establish a linking or connecting factor to one of the four economic freedoms. Complaints of operators from other member states, for example, are necessary in this case. This blurs the line between potential and actual; is an 'actual' exercise the required threshold for applicability of one of the four freedoms or is a 'potential' exercise sufficient?

The second case is *Fremoluc,* a purely Belgian case.[54] The European Court returned to its older case law, where specific factors on the basis of the facts were essential. The Court needs 'objective and consistent evidence' that there is an impact on competitors from other member states. In this case, it led to inadmissibility of the preliminary question, because there was no such evidence. In *Fremoluc, a* so-called priority rule for government agencies responsible for housing policy to purchase lands in Flanders was at stake. A major distinction with the earlier mentioned case of *Libert a.o.* is that, in that case, a general effect of the measure, absolutely limiting purchases, brought it within the scope of the economic freedoms, while the company Fremoluc only demanded the annulment of a contract between the owners of some land and the government agency responsible for housing policy. This might explain the distinction in the outcome.

From the discussion of the cases it becomes clear that the purely domestic situation did not wither away in the case law. Since *Ullens de Schooten,* it seems to be stronger than ever. Specific evidence is needed to transform the domestic situation into an EU-related one. One could submit, though, that the purely domestic situation was increasingly merged with the admissibility of the preliminary question, layer one, where the 'relevance' of the question for EU law is at stake. In *Fremoluc,* the CJEU referred explicitly to its recommendations to national courts in relation to the initiation of preliminary ruling proceedings.[55] In other recent cases, the purely domestic situation is directly linked with the relevance of the preliminary question asked by the national court. In some of these cases, the CJEU deems the preliminary questions to be 'manifestly inadmissible' and refers to *Ullens de Schooten*. One such case is *Emmea and Commercial Hub*[56]. In this dispute, a regional regulation concerning necessary permits for activities was disputed, but there was lack of factual information of why one of the economic freedoms could be relevant. In *Bán,* it was a Hungarian private law regulation making possible the annulment of contracts concerning the use of arable land in Hungary.[57] The national judge was of the opinion that such a rule could deter operators from other member states, in

53 Wahl, Prete (n 46) at page 533.
54 Case C-343/17 *Fremoluc,* ECLI:EU:C:2018:754.
55 OJ 2016 C 439, 1.
56 Case C-595/16 *Emmea and Commercial Hub,* ECLI:EU:C:2017:320.
57 Case C-24/18 *Bán,* ECLI:EU:C:2018:376.

that their contracts could be annulled without compensation as a consequence of this Hungarian law. Although deterrence or dissuasion of operators from other member states is an important criterion for applying the four economic freedoms, the CJEU referred again to *Ullens de Schooten* and argued that the TFEU freedoms only protect persons who *effectively* made or make use of one of the freedoms. This case also substantiates 'potential' effects: effective exercise is needed for the CJEU to deal with a Hungarian private law rule such as the one mentioned above. This reasoning is against a long line of case law where potential effects on interstate trade within the EU were sufficient to pass the threshold. It is submitted that 'effective exercise' by a national of another member state of the EU is a higher threshold than only 'potential' effects on a certain economic freedom.

IV More Autonomy in Purely Domestic Situations?

What distinguishes the cases *Ullens de Schooten, NKBM* and *Fremoluc* from other cases, where the CJEU concluded that it is conceivable or at least not inconceivable that there is a potential impact on one of the four economic freedoms? In the three cases mentioned, even a potential impact on one of the economic freedoms could not be established. Some points are, in my opinion, important in this respect.

First, the information the national court gives in its request for a preliminary question is important. When the national court already admits that a situation does not have a cross-border component or such a component is only hypothetical, the CJEU might be more easily convinced that there is a purely domestic situation. Second, the general and abstract capability of the national regulation to produce potential effects on interstate trade is an element to be taken into account, notwithstanding the confinement of the case to only one member-state of the EU. This general ability of the national law to restrict one of the four freedoms is also the central question at the third layer, and there is again, the confusion between the two layers. The general ability has to be substantiated by sufficient concrete evidence concerning the relation of the disputants and the facts of the dispute with one of the economic freedoms of the internal market. I submit that this evidence must be specific and linked to the immediate exercise of one of the economic freedoms. Again, a hypothetical or future exercise is not a potential one. The term 'potential' must be sufficiently substantiated, and if that is not possible, we should change this term to 'immediate'. There is an important threshold between the exercise of the right to free movement and the mere relevance of a future and hypothetical event. For free movement of goods, this is explicitly stated by the Court in *New Valmar BVBA,* where the drawing-up of an invoice has a direct impact on free movement of goods.[58] In this case, from the Flemish-speaking part of Belgium, invoices were null and void if they were not drafted in the Dutch language. This was not proportionate and therefore contrary to the free movement of goods.

58 Case C-15/15 *New Valmar BVBA,* ECLI:EU:C:2016, at para 46.

Third, in *Ullens de Schooten* and *NKBM,* criminal procedures were at issue, where nationals of the member state in question were penalised. How is a criminal conviction of a national to be linked with the exercise of one of the economic freedoms? To invoke provisions of EU internal market law in such a context is not the issue.[59] That is the criminal procedure itself. This might be an application of a so-called 'object-or-effect' approach: both the object (conviction of a national in a national criminal procedure) and the effect (no cross-border elements involved) add up, and the outcome of this combination of effect and object is that there is a purely domestic situation. It is submitted, however, that the main test in layer three is also an 'object-or-effect' approach. Hence, the object does matter and there is a kind of (hidden) balancing by the CJEU involved, both at layer two (the purely domestic situation) as in layer three (the substantive test of one of the four freedoms).

Fourth, the peculiar nature of the preliminary rulings procedure is an element of importance as well. In this kind of procedure, an answer to the national courts' questions must be necessary for the national dispute to be solved. On the other hand, there is the infringement procedure the European Commission starts against a member state for violating or neglecting EU law. In this last procedure, the CJEU will focus on the more general ability of a national measure to impact on one of the four economic freedoms. This distinction can be explained by the purposes of these two procedures. The purpose of the preliminary procedure is to help in solving a legal dispute before a national court.[60] Cooperation between the CJEU and the national courts is essential in this specific procedure. If the actors in this dispute do not *effectively* make use of EU law, there is, clearly, no need to give an answer to the question of the national court.

Concluding, this recent case law upholds the formal relevance of the purely domestic situation, at least in the preliminary procedure.[61] It is submitted that the CJEU may have taken this direction for efficiency reasons, in order to limit the amount of questions from national judges.[62] It is therefore questionable whether the older *Venturini* line or also the *Blanco Pérez*-line of case law, on the 'not inconceivability' of relevance for one of the economic freedoms in situations where all the facts of the case are limited within one and the same member state, is still valid in preliminary rulings procedures. A very recent judgment from 19 December 2019 gives the answer. As long as there is sufficient concrete evidence, given by the national court that asks the preliminary questions, it is still 'not inconceivable' that an indistinctly applicable measure produces cross-border effects, even in a situation where all of

59 Sacha Prechal mentions the option of introducing a so-called *Schutznorm* in this respect; does the economic freedom really protect the interests of the person who invokes one of the economic freedoms? Sacha Prechal, 'Interne situaties en prejudiciële vragen' (2015) (11) SEW: Sociaal-Economische Wetgeving 494–496. See also Jasper Krommendijk (n 14) n 35 above at page 1376.

60 In the words of an old publication from a Dutch academic, it takes two to tango. Martijn van Empel, 'It takes two to tango. Over de samenwerking tussen Hof van Justitie en nationale rechter in het kader van art. 177 EEG-Verdrag' in *Een goede procesorde: opstellen aangeboden aan mr. W.L. Haardt* (Kluwer 1983) 271.

61 See also Shuibne (n 11) at page 129.

62 See concerning this argument especially the article by Wahl and Prete referred to in n. 46 above at page 511.

the facts are confined within one and the same member state. In *Comune di Bernareggio* concerning the sale of a pharmacy under a tendering procedure, the referring judge successfully produced evidence that the value of the tendering was 580,000 euro, that the acquisition is open to any EU citizen with the required professional qualifications and that there is a mutual recognition of such qualifications under an EU directive.[63] Under these circumstances, an unconditional right of pre-emption granted by regulation to only those pharmacists in the service of the municipal pharmacy is against the freedom of establishment. This recent case shows that the turning point in *Ullens de Schooten* is not as huge as originally thought. It is only by the national court asking the preliminary question to bring sufficient evidence that cross-border economic relations may potentially be affected.

An important distinction is the one between hypothetical and potential. A potential effect on a cross-border type of situation may trigger the applicability of one of the four economic freedoms. Only a hypothetical situation is definitely not sufficient. In the old *Moser* case, a German citizen who was not allowed to enter postgraduate training to become a teacher tried to invoke the free movement of workers.[64] If he could not enter vocational training, he could not become a teacher and later work in another member state. This relationship with one of the economic freedoms is hypothetical, according to the Court. Moser was a member of the German Communist party and in the 1980s these members were banned from several jobs because of the applicable *Berufsverbote,* including the job of teacher. This case may be an example of the object-or-effect test mentioned earlier. The effects on the free movement of workers are hypothetical because Moser could only go to another EU country after finishing vocational training. The object of the case is the sensitive issue of the *Berufsverbote,* an object the European Court, in relation to its effects on cross-border movement, apparently considered to be too tenuous. The causal relation between not being able to access vocational training and the movement to another member state is simply too indirect.

V Conclusion: Towards a Solution

It is the overlap between a formal or jurisdictional and a substantive approach to purely domestic situations that is confusing. The jurisdictional approach in the preliminary rulings procedure, with a stronger focus on the purely domestic situation, might not be sufficient in the end to restrain national judges from asking preliminary questions in cases where all elements are confined within the territory of one and the same member state. Moreover, the European Commission could still start an infringement procedure against this member state. This makes the purely domestic situation not suitable for increasing the autonomy of and flexibility within the member states of the EU. Autonomy is easier to be expected after an application of the proportionality principle in the justification stage of the test whether

63 Case C-465/18 *AV, BU versus Comune di Bernareggio,* ECLI:C:EU:2019:1125.
64 Case C-180/83 *Moser v Land Baden Württemberg,* [1984] ECR 2539.

a national measure is justified, notwithstanding its meagre impact on one of the four economic freedoms. The *Sayn-Wittgenstein* and *Omega* cases mentioned in the beginning of this contribution are proof of this. The purely domestic situation case law is less prone to increase the autonomy of the member states.

Nevertheless, I submit that the balancing between impact on the internal market and the preservation of public order and national identity at the level of the individual member states also does take place in the decision on whether there is a purely domestic situation or not. Here there is also an object-or-effect test, clearly more hidden and implicit, and it is not only actual movement that matters. I agree with Mataija that it may be better, for the sake of predictability and legal certainty, to have a substantive test to decide whether one of the four economic freedoms is at stake and whether there is a purely domestic situation or a sufficient connection with an EU-relevant situation.[65] He even derives inspiration from other branches of EU law, such as competition and public procurement law, to find the substantive threshold. This threshold is, according to him, 'where the effectiveness of the internal market is substantially affected'[66]. This specific threshold may indeed protect in a better manner the competences and the autonomy of the member states. His approach, however, is against the *acquis communautaire* built over several decades, as the term 'substantially' also introduces a kind of *de minimis* approach, in that minor impediments on the freedoms are still to be accepted.[67] The term 'substantially affected' is, on the other hand, an improvement in comparison with the 'not inconceivable' line of case law.

We are indeed in need of explicit thresholds between domestic and EU-related situations. In my view, it is better to integrate the three layers of case law mentioned in Chapter Two, because, in all three layers, decisions by the CJEU are partly or wholly made on the merits, whether hidden or not. An object-or-effect-test to decide whether a national rule does not comply with one of the four economic freedoms is the best option. It is not only cross-border movement or economic activity *per se*[68] that is sufficient; this activity should also be assessed in light of the object of the national rule in question. Purely an effect-based approach would open the door to a *de minimis* approach that would be inconsistent with EU internal market law.

In conclusion, we should work with two instead of three layers. The first layer is on the relevance of the preliminary question, on the production of evidence by the national court that asks the question and on the presence of a purely domestic situation if there is insufficient evidence for a cross-border link. The second layer is a more substantive test of whether there is a sufficient connection with one of the economic freedoms. If there is a hypothetical or a too indirect link with one of the four freedoms, the result would also be a purely domestic

65 Mataija (n 9) at page 63.

66 Ibid, at page 63.

67 The concept of *de minimis* is known from EU competition law.

68 Okeoghene Odudu, 'Economic Activity as a Limit to Community law' in Catherine Barnard, Okeoghene Odudu (eds), *The Outer Limits of European Economic Law* (Hart Publishing 2009, Oxford and Portland) at page 225.

situation. As such, we could have a purely domestic situation both at layers one and two. We could easily use the example of the Roman god of Janus, with which Wahl and Prete started their article, here as well.[69] Here this example of the god with the two faces, one directed to the past and the other to the future, is used in another manner. One face, layer one, is directed to the national court asking the preliminary questions. The other one, layer two, is about the scope and the outer limit of the EU internal market law and EU law in general.

69 See the contribution of Wahl, Prete mentioned in n 46 at page 511.