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Who cares about nationality? The path-dependent case law of the ECJ from goods to citizens

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ABSTRACT

The role that the ECJ plays in European integration has been much discussed by political scientists. Less is known about how case law develops. In this contribution, I give a historical-institutionalist account and argue that path dependence explains the course that case law takes. Litigants provide positive feedback in this process, aiming to strengthen their rights by transferring legal arguments from one area to the next, leading to a convergent interpretation of the fundamental freedoms. The paper traces this development, analyzing how legal arguments were transferred from goods markets to the free movement of workers and citizenship as a result of positive feedback to a distinct legal interpretation. I discard alternative explanations that explain case law by drawing on the preferences of member states or judges.

KEY WORDS Case law; citizenship; ECJ; four freedoms; litigants; path dependence.

1. INTRODUCTION

In the literature, it is well-recognized that the European Court of Justice (ECJ) managed to become an important actor for European integration (Stone Sweet 2010). By establishing the direct effect and supremacy of European law in the early 1960s, the ECJ constitutionalized the Treaty, granting European rights to individuals. The preliminary ruling procedure at the same time offered an institutional venue for individuals to enforce these new rights. Member states had to observe this process relatively helplessly. They may join court proceedings with observations (Granger 2004), but given the heterogeneity of preferences among them and the need to find unanimous positions to alter the Treaty and its legal interpretation, the Court is well shielded from member-state intervention. At the same time, the frustrations of an activist court are counterbalanced by the general interest and dependence on having a functioning independent umpire of controlling the implementation of agreements (Alter 2001).

While the strength of the ECJ is well-established, the literature is not as advanced in explaining the course that the development of case law takes. Existing research provides several indications for explanations. The extreme positions **(← p.8)** here would be that judges either simply realize their own policy positions (Gely and Spiller 2008), or that they follow the preferences of the most powerful member states (Garrett 1995). Both interpretations face the problem that the precise content of the law does not matter: It is merely an empty shell that is either filled with the preferences of judges or those of their masters (Dyevre 2010). Against these alternative explanations, I argue that we can detect a path dependence of case law. More specifically, I argue that the interpretation of the freedom of movement of goods, as the area where the economy transnationalized first, served as a path for the interpretation of the other fundamental freedoms, supported by the positive feedback of private litigants. Had the case law originally been developed for another freedom, for instance services, another path of legal interpretation would have been likely. Positive feedback in this argument is caused by

the litigious behaviour of private actors and the European Commission that take up existing arguments from the case law and transfer it to other fundamental freedoms. The Court, at the same time, is free to make reversals of its case law, and in fact this is something we repeatedly see in different areas. However, its overarching interest in the consistency of case law, often backed by litigants' support for the existing path, imply that the ECJ generally follows precedent. Compared to the alternative explanations of attributing case law to member states' or judges' preferences, this interpretation has the advantage of 'taking the law seriously' (Joerges 1996).

In this paper, I will start by discussing this argument of a path dependence of case law, based on the legal interpretation for the free movement of goods, against alternative explanations. The argument of a path dependence is then 'tested' against developments in freedom of movement of workers and Union citizenship. Both cases can be seen as least likely because legally there would be good reasons for following a different legal interpretation.

2. THE DEVELOPMENT OF ECJ CASE LAW AS A PATH-DEPENDENT PROCESS

In the following, I will first present the concept of path dependence and apply it to case law. With its interpretation of the free movement of goods, I argue, the ECJ established a path that was then transferred to the other fundamental freedoms in a process of positive feedback. I close by discussing alternative explanations drawing on member states' and judges' preferences.

The concept of path dependence

Path-dependent processes were originally studied in the context of technical innovations, with the QWERTY-keyboard being a very prominent example (David 1985). Later the idea was transferred to welfare states' institutional development (Pierson 2000). Characteristic of such

processes is that the beginning of a path is contingent. The sequence of events and positive feedback, such as economies of scale or technical complementarities, result in a 'lock-in', **(← p. 9)** making it highly unlikely to change a path once taken, even if it is inefficient (Mahoney 2000).

More recently, the concept has also been applied to case law, particularly focussing on the role of precedent (e.g., Fon *et al*. 2005). Reasoning by analogy allows courts to further legal certainty. They avoid appearing to be acting arbitrarily (i.e., politically) (Gerhardt 2005: 909). Only if similar cases are ruled in a similar manner can justice ever be established. Thus, precedent limits the range of permissible legal arguments, encouraging litigants to pursue certain legal claims rather than others.

By itself precedent is insufficient to argue for path dependence. On the one hand, stable equilibria in an area of law can result that lack the dynamism of a path-dependent process, fuelled by positive feedback.[1] On the other hand, frequent deviations from established case law show that precedent does not prohibit courts from pursuing alternative lines of reasoning. 'It is difficult to defend the assertion that precedents impose binding rules on judges, compelling them to decide individual cases in certain ways' (McCown 2003: 979). While the coherence of case law and legal certainty support precedent, there are also arguments favouring deviations, for instance that cases are not alike. I therefore follow Stone Sweet in his argument that it is precedent *together* with its motivating or de-motivating impact on litigants that establishes a path-dependent process.

> Legal institutions are path dependent to the extent that how litigation and judicial rule-making proceeds, in any given area of the law at any given point in time, is fundamentally conditioned by how earlier legal disputes in that area of the law have been sequenced and resolved (Stone Sweet 2002: 113).

I will now turn to the question of the degree to which the ECJ's case law regarding the fundamental freedoms developed in a path-dependent way.

Path dependence in case law

As in other free trade areas, the provisions for the free movement of goods, services, workers, and establishment[2] were formulated and originally interpreted as prohibitions of discrimination. Member states could not discriminate against those seeking economic activity in their markets, as long as they adhered to their domestic market regulations. In the famous cases of *Dassonville* (8/74) and *Cassis de Dijon* (120/78) in the 1970s, the ECJ changed this interpretation of the free movement of goods by arguing that national regulatory obligations could be treated as quantitative restrictions to trade. Member states have to take into account that market participants have already adhered to regulations in their home countries; these have to be mutually recognized. Additional regulatory burdens may only be required when being proportionate and justified by overriding public interests, as they pose 'a double burden' for market participants already regulated in their home country. The ECJ rarely grants (← **p. 10**) member states this possibility (Oliver and Roth 2004). With the new argumentation based on a prohibition of restriction, implicitly member states traded enhanced market access for a loss of their regulatory autonomy (McCall Smith 2000). In a Community of nine member states with similar levels of economic development, they could assume equivalent market regulations.

Given the early internationalization of the goods trade, the new interpretation was originally established in this area. Stone Sweet and Brunell (2008: 9) provide data on the distribution of preliminary references across legal domains for the period 1958 to 2005. Litigation on goods has been important from the beginning, with 20.4% of cases between 1958 and 1975, retaining its relative importance with 17.2% in the period 2001-05. Similarly, for freedom of workers – albeit on a much lower level – we do not see significant changes with 3.2% and 4.3% respectively. Cases for establishment, in contrast, steadily grew from 2.4% from 1958-75 up to 20.9% in 2001-05. A similar development could probably be shown for services but they are not included in this data set.

The interpretation of the fundamental freedoms other than goods, that only slowly grew in importance over the years, such as establishment, stayed with the prohibition of discrimination for a longer time. However, the alternative interpretation as prohibition of restriction, which the ECJ pioneered in goods, offers private actors significant leeway. They can target all member state markets on the basis of their home regulation, and, moreover pick the member state with the lowest regulatory requirements for their establishment (Sun and Pelkmans 1995). Legally, interpreting the fundamental freedoms as a prohibition of restriction is a very different 'path' to the obligation of non-discrimination. The much greater leeway to pursue economic activities that such an interpretation offers is a significant incentive for litigants for extending this interpretation from the area of trade in goods to cover the other fundamental freedoms as well. Via their domestic courts and the preliminary ruling procedure, private actors have indirect access to the ECJ, allowing them to bring litigation that generates positive feedback, encouraging the case law to move down a path that extends their preferred interpretation to other fundamental freedoms.

An example is *Säger* (C-76/90), one of the first judgments transferring the reasoning of *Cassis* to services. Here, a patent-renewal alert service, established in the UK, had offered its services in Germany. This industry was more heavily regulated in Germany and a special licence was required which the company did not hold. The citation shows how the ECJ argued fully in parallel to the free movement of goods:

> Article 59 of the Treaty requires not only the elimination of all discrimination against a person providing services on the grounds of his nationality, but also the abolition of any restriction, even if it applies without distinction to national providers of services **(← p. 11**) and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services (Summary, No. 1).

By granting additional rights, the ECJ motivates other actors to similarly use EU litigation to their favour. To this important source of positive feedback I will turn now.

Sources of positive feedback

Which factors support the path dependence of case law and where does it find its limits? As mentioned, precedent furthers legal certainty, and it guards judges against appearing to rule politically. Particularly in a legally hierarchical setting such as in the EU, the ECJ depends on the cooperation of the courts in the member states in order to be effective. Lower courts will only be able to apply European law independently if the case law is consistent. This is also one incentive of the US Supreme Court to honour *stare decisis* (Bartels 2009: 475). However, courts, in particular courts of last instance, are not bound by precedent at all times. The cases reaching the ECJ or other constitutional or supreme courts are those where precedent does not give a clear hint towards the expected outcome. Otherwise the cases would not need to be treated at this level (Gerhardt 2005). Also, landmark judgments initiating new interpretations are not that rare. A well-known example is the *Keck* (C-267/91 and C-268/91) ruling, where the ECJ exempted selling arrangements from the reach of the free movement of goods. This was a response to an increase of cases on purely internal matters like shop opening hours (Rawlings 1993). It shows that judges are relatively free to break existing paths, or to start new legal traditions.

The path-dependence argument, in short, builds on the importance of precedent for courts but cannot be restricted to it. Feedback by private litigants is necessary. Not all possible paths are equally likely to get this support: litigants only follow up on case law that is beneficial to them. For instance, tax litigation before the ECJ typically reduces national revenue as litigants only pursue cases reducing their tax bills (Genschel and Jachtenfuchs 2011). A judgment like *Keck* that diminishes the scope of the freedoms, is therefore unlikely to spark liti-

gant behaviour. No dynamic case law development takes place, when positive feedback is lacking. Not all legal entitlements generate positive feedback: The fundamental freedoms grant individual rights to actors, furthering liberal notions of the public good, but hampering republican traditions that emphasize solidaristic against individual rights (Scharpf 2009; Menéndez 2009: 27).

The support of litigants provides legitimacy to the Court (and also to the Commission for that matter) by showing that there is a positive response to the individual rights it has itself created. Similarly there is a wide-spread belief in the legal profession that member states have fallen short of delivering to citizens the 'promise' of European integration, and that the development of citizenship rights by the Court can bolster support for European integration (Aziz 2009: 282). (← **p. 12**)

From the point of view of the ECJ, interpreting the different freedoms along similar lines strengthens the coherence of case law, given that often more than one freedom is relevant to a case. The following graph shows for infringement cases and preliminary references reaching the ECJ between 1990 and 2008 whether only a single or at least two freedoms were invoked for goods, services and the free movement of workers. While most goods cases concern exclusively this freedom, this is different for other freedoms, most notably for services, where, typically, several freedoms are cited as relevant. Consequently, once the logic of a prohibition of restrictions is transferred from goods to the other freedoms, there is much more pressure of pursuing a parallel approach to all freedoms in order to maintain the coherence of case law.

[Figure 1]

(← **p. 13**) Path-dependent processes are difficult to interrupt, even if they lead to inefficient outcomes. The increased liberalization going along with an expansive interpretation of the fundamental freedoms is seen by some to increase efficiency; an economic argument that cannot be decided here. In this context, inefficiency refers to the political implications of the process. These concern, first of all, the judicialization of the policy process that takes decisions from the legislature to the courts. Secondly, redistributive implications arise from court decisions. Being less of a problem in the original area of goods, for services a reverse discrimination of nationals can result when service providers are subject to less stringent regulations (Schmidt 2009). Similarly, the freedom of establishment may allow the circumvention of tax and company law restrictions.

What are the scope conditions of such a path-dependent process to take off? Positive feedback through litigant behaviour requires that lower courts support the legal development by directing preliminary procedures to the ECJ. Also the lock-in of this path-dependent process can only result if a weak EU legislative cannot redress problematic developments due to demanding decision rules (Scharpf 2009).

Alternative explanations

Making a path-dependence argument has the advantage of according an independent influence to legal doctrine. Neither can be said of the two major contending schools of thought analyzing judicial politics from a political science perspective, the attitudinal and the structural approach. Both approaches largely ignore legal doctrine – either judges follow their own policy preferences or those of the member states. However, if the content of legal texts does not contribute to Courts' decision-making, it becomes difficult to understand why rational actors would try to influence their final shape in the first place – or why it should make a difference whether courts can be overruled legislatively (Dyevre 2010: 311).

Nevertheless, these two explanations need consideration. The argument that the ECJ would merely follow the preferences of the larger member states was introduced into the 1990s debate on the ECJ by Garrett (1995). Later, Garrett and collaborators refined it, acknowledging that the ECJ would rule against the preferences of powerful member states whenever legal norms calling for such a ruling were well-established (Garrett *et al.* 1998). This argument needs no further discussion here as the following analysis of the case law on workers and citizenship rights give ample examples where the court rules against the member states.

The question of judges' preferences is more difficult to refute. Since deliberations are confidential, and there are no dissenting opinions at the ECJ, we lack the empirical basis to analyze preferences. Based on a thought experiment, Kelemen (2012) finds that Member states have little incentive to send judges with extreme – non-integrationist – preferences to the court. Decision-making by majority in the chambers would isolate them. Additional reasons speak against judges with extreme preferences. Judges can increase their impact with length of service, and a judge with medium preferences stands a better chance of reappointment should the government change. Such a judge would also be one that supports the path dependence of case law. Practices, like the German one, to hardly ever re-new the term of the judge, seem to imply, however, that the domestic pay-off to patronage, of sending a party member to the court, may be higher than the expected gain from having an influential ECJ judge.

There are good reasons to assume that policy preferences of judges matter less rather than more at the EU than at the national level, given the rules of allocating cases to *rapporteurs* and to chambers. We can assume that the *rapporteur* to a case is most influential for its solution. Judges are never allocated cases concerning their home country. Moreover, there is no specialization among chambers as to case assignment. An arbitrary case allocation, however, makes it unlikely that judges can develop a specific line of argumentation across a series of

cases. (← **p. 14**) Moreover, incentives to pursue specific policy preferences should be lower with no connection to the affected polity. Altogether it is likely that policy preferences play less of a role at the EU compared to the national level. The pay-off to building the EU's legal doctrine may be larger.

With no possibility to assess judges' preferences empirically (but see Malecki 2012), I therefore assume that the ECJ largely fosters its corporate self-interest of stabilizing and extending its own position. In as far as judges pursue, beyond that, individual preferences, these are more likely to be professional legal preferences than policy preferences.

To summarize: Neither member states' nor judges' preferences can explain the development of case law as well as a historical-institutionalist explanation. Through a path-dependent process, fuelled by the positive feedback of litigant behaviour, I argue that the logic of a prohibition of restrictions was transferred from the free movement of goods to the other freedoms. While for the free movement of goods, the *Cassis*-logic does not imply significant redistributive consequences, this is different for the other freedoms (Schmidt 2009). It is highly unlikely, that a similarly far-reaching interpretation could have been established, had it not been for the 'coincidence' of goods markets internationalizing first. Given the distributional issues being raised by this path, it can be regarded as inefficient in a political sense. To what extent, however, can we speak of a path leading to convergence also when regarding the freedom of workers and the rights of European citizenship?

3. THE FREE MOVEMENT OF WORKERS AND CITIZENSHIP RIGHTS AS A 'LEAST LIKELY' CASE

There are several reasons to expect that the free movement of individuals is a 'least likely' case (Eckstein 1975; Gerring 2007) for a path-dependence explanation. Legally, there is a different set up of the free movement of workers and citizenship rights. Socially, individual

actors are concerned, which have much less resources in playing a 'Eurolaw game' (Rawlings 1993), while the other freedoms mainly apply to corporate actors. One would therefore expect a different path of legal explanation.

In its wording, the freedom of movement of persons is explicitly linked to non-discrimination with no equivalence to the prohibition of quantitative restrictions, present for goods (Barnard 2001: 38). Different to goods and services, there cannot be a 'double burden' of adhering to the regulations of the home and the host state for natural or legal persons, but an integration into the host state takes place and its rules apply (Barnard 2010: 240). Moreover, the freedom of movement for workers has been shaped much more through secondary law than the other freedoms (Barnard 2010: 240, 224f). The Court therefore had many indications how member states envisaged the interpretation of this freedom.

Different lines of argumentation of the Court with regard to the freedoms resulted. (← **p. 15**)

> In the 1970s and 1980s the prevailing view was that the scope of the four freedoms should be drawn along different lines: Article 28 EC on the free movement of goods was to be considered as a far-reaching prohibition of any measures potentially hindering or restricting the import of goods, whether indistinctly applicable or not. (…) In contrast, the provisions on the free movement of persons – workers, establishment and services – were generally regarded as an expression of the general principle of non-discrimination on grounds of nationality, as set forth in Article 12 EC (Oliver and Roth 2004: 411).

Also citizenship rights show specificities. As a last minute addition to the Treaty of Maastricht, without significant political discussions (Aziz 2009: 291), EU citizenship supplements national citizenship, and the free movement of workers on the European level. All citizens of all member states automatically qualify. EU citizens may move and reside freely throughout

the EU, and may stand and vote in elections for municipalities and the European Parliament (Wind 2009: 254). Also relevant is Art. 12 (now Art. 16D) prohibiting discrimination on the ground of nationality.

Next to legal differences, it is questionable whether individuals can act as well as corporate actors as positive feedback for pushing an extensive interpretation along. However, non-governmental organizations (NGOs) play an important role in furthering individual European rights. Well-known is the significance of the British Equal Opportunity Office (EOO) in strategically initiating cases that were handed as preliminary procedures to the ECJ (Alter and Vargas 2000). NGOs can play a similar role by linking with law firms. One example is *Watts* (C-372/04), an important case for the freedom of health services, where Ms Watts went abroad to avoid the waiting time for a new hip which the NHS imposed. She was supported by the law firm Leigh Day and Co that has strong links to a variety of NGOs[3], and offers its services for free to clients in strategic cases.

Also to be noted in this context is ECAS, the European Citizen Action Service. When citizens access the EU homepage for information on their rights ('Europe Direct'), their questions are answered by the Citizen Signpost Service that is run by ECAS for DG Market. A team of 60 legal experts provides free advice on about 10.000 questions each year.[4] This allows ECAS to pick important cases. Despite a weak legal basis, there could thus be sufficient support for individuals to foster an expansive interpretation.

The development of the case law on workers' free movement

Originally, rights for residence and movement in the EU were strictly tied to being a worker. In the 1980s a series of cases (53/81; 139/85; 196/87) broadened the application, making it sufficient to be economically active at all, not necessarily earning enough for one's living

(Davies 2003: 195). The Court largely followed a discriminatory test (Barnard 2001: 38f). (← **p. 16**)

Bosman (C-415/93) brought about a major shift. Here a non-discriminatory rule was declared 'an obstacle to the freedom of movement' (para 103). Thus, with *Bosman* the Court moved to an interpretation of a prohibition of restrictions. As known from goods, this is coupled with the question of public interests ('mandatory requirements'), and proportionality. The restrictions path has by now become the dominant interpretation of the freedom of movement.

> Whatever nomenclature used in that jurisprudence, be it manifested in impeding access/hindrance to trade or the terminology of 'liable to hamper or to render less attractive', it is crucial to appreciate that the common objective in all such jurisprudence is the removal of the restriction to exercise the free movement right (Connor 2010: 177).

With the change towards a prohibition of restrictions, potentially the Court can classify any national rule as a restriction to a freedom (Barnard 2010: 258), there not being a threshold to the extent of hindrance. However, the Court accepts that member states can require a 'link' to their territory when social benefits are concerned. In *Hartmann* (C-212/05) a family had moved to Austria, thereby loosing the German child benefit, due to the residence principle. The Court argued that residence was not the only possible link with the husband being a German civil servant. Interestingly, the Advocate General came to the opposite conclusion (para 88), because the family's movement had been unconnected to employment.

Many conflicts have centred on the question of whether social benefits accrued in one Member state are exportable to another. Following regulation 1408/71 social security schemes are exportable, but social assistance remains territorially bound. As benefits cannot always be clearly assigned to one or the other, several court cases ensued (e.g., 139/82; 381/85). Often, the Court rules against the opinions of several member states or against existing secondary

law, showing how little the preferences of member states determine its case law (Wasserfallen 2010; Martinsen and Falkner 2011).

The *Ibrahim* (C-310/08) judgment of 23 February 2010 further extended access to social assistance. A Somali woman in the UK was granted the right to social assistance given that her children – Danish nationals – were going to school here. Interestingly the legal costs of this landmark ruling were paid by Shelter, a UK charity supporting homeless people, who mandated a large barristers' chambers to argue this case at the ECJ.[5]

The other tendency that has to be noted will also play a role when we turn to citizenship rights. Starting with *d'Hoop* (C-224/98), the Court has argued that measures count as restrictions that make the take up of free movement rights less attractive. D'Hoop was a Belgian whose secondary school education in another member state implied that she could not qualify for the Belgian tideover allowance available to school-leavers. *Hartmann*, discussed above, is also part of this line of cases, as loosing child-raising benefits may deter people from taking residence abroad. (← **p. 17**)

Recently, the Court has pushed this interpretation further, arguing not only against restrictions but even requiring member states' support for mobility. *Hendrix* (C-287/05) concerned the Dutch incapacity benefit for young people. Mr Hendrix had moved to Belgium while continuing to work in the Netherlands. The Court challenged the legality of the territoriality principle for social assistance, arguing against the existing social security regulation (1408/71, now 883/04). Consequently, member states have to justify restrictions on the export of benefits, with the proportionality review being a task for the local court. '.. the development in Hendrix can be seen as a way of facilitating free movement by encouraging the homestate to bear some of the costs of the emigration of its citizens, and not just the host state' (Barnard 2010: 283). Again, the Court expanded the reach of rights against a large body of secondary

law. If any disincentives to moving abroad count as restrictions to the free movement of workers, clearly, many far-reaching changes become necessary at the member state level.

The case law on citizenship

Although EU citizenship rights were introduced merely as a supplement, their interpretation has resulted in comprehensive citizen rights, thereby even subsuming the other fundamental freedoms (Davies 2003: 189; but see Wollenschläger 2011: 30). In its case law, the ECJ has incrementally extended rights from workers to economically inactive EU citizens (Menéndez 2009: 16). Furthermore, the language of restrictions is being transferred to citizenship law. *Martinez Sala* (C-85/96) is the first notable case, where citizenship rights implied that an economically inactive Union citizen lawfully residing in Germany had to have access to child benefit as Germans do (Tryfonidou 2010: 39).

In *Grzelcyk* (C-184/99) the Court established a right of residence also for economically inactive Union citizens, here a student, requiring assistance. Only if they are an 'unreasonable burden' can this right be withdrawn; otherwise they have to be treated on a par with nationals regarding social assistance (Tryfonidou 2010: 39). The Court thereby contradicted directive 93/96 that requires students from other member states to have sufficient resources as to avoid needing assistance, and its own case law in *Brown* (197/ 86) (Wind 2009: 258).

The *Grzelcyk* ruling was passed during the negotiations of the citizenship directive (2004/38). In it, the member states largely followed the ECJ's case law, allowing permanent residence and access to all social assistance measures after five years of residence. Within the first five years, citizens are required to be able to support themselves financially. But if social assistance in the host state is being sought, expulsion cannot be an automatic reaction. There needs to be 'an unreasonable burden on the host state' for this to be justifiable, reflecting the Court's argument in the *Grzelczyk* case (Wind 2009: 243).

In *Baumbast* (C-413/99), the Court ruled for the first time that EU citizens enjoy a right of residence and movement by direct application of Art. 18 I, not (← **p. 18**) requiring secondary law (Wind 2009: 256, 259). In *Collins* (C-138/02) the Court argued that the general principle of non-discrimination (Arts. 6, 8) implied rights 'to benefits of financial nature' (para 50). Moreover, rights of residence given by the member states were seen as merely declaratory, and not as legally constitutive; the right being already 'conferred directly by the Treaty' (para 40). In *Trojani* (C-456/02), the Court further spelled out how rights to financial benefits grounded in non-discrimination, thus contradicting directive 90/364 (Wind 2009: 243; 260).

De Cuyper (C-406/04) concerned the question whether the granting of social benefits could be territorially restricted. The Court argued that a disadvantage occurring simply due to the fact that a national exercised the freedom of movement clearly fell under Art. 18 (para 39). As before with the freedom of workers (*d'Hoop*), it emphasized that no disadvantage may be suffered from using the free-movement right. In this case, the residence clause was, however, seen to be in the public interest (para 48).

> The language of *De Cuyper* is similar to that of *Cassis de Dijon*. It is the restrictiveness of the measure which is considered to be egregious, but it will be considered lawful if it is in the public interest and proportionate (Chalmers and Monti 2008: 127).

Altogether, the case law aligns the rights of workers and non-workers (Wind 2009: 243). Moreover, the case law on citizenship makes inroads into national welfare systems when pursuing non-discrimination. A state can no longer privilege its own nationals. While for goods, non-discrimination is much more autonomy-regarding than home-country rule, this is not true for persons. Here, non-discrimination is far-reaching, prohibiting a differentiation between nationals and EU citizens. By coupling citizenship and non-discrimination, the ECJ pursues a perspective of equal rights, making it increasingly unimportant which nationality someone has.

To what extent can we speak of path dependence, however, when the case law follows home-country rule for goods, services, capital and establishment, and – effectively – host-country rule for persons? In all areas, and this is the commonality, we find a development towards a prohibition on restrictions of movement. Such a restriction may consist of not granting equal access to social benefits, or of making the movement of nationals to other member states less attractive.

Having established these broad citizenship rights, the Court's case law subsequently expanded the eligibility to these rights. A few developments shall be summarized before closing: In *Zhu and Chen* (C-200/02), decided in 2004, the Court allowed (Chinese) parents to partake in the citizenship rights of their (Irish-born) child. *Zambrano* (C34/09) extended the reasoning of *Chen* by granting third-country national parents the right of residence and work, as their expulsion would take EU citizenship away from their children born in Belgium. It was a purely internal situation with no cross-border movement. Also *Metock* (C-127/08) shows how quickly developments take place in the case law on Union citizenship. While in *Akrich* (C-109/01, decided in 2003) (← **p. 19**) the ECJ had still argued that the right to accompany a Union citizen depended on the prior legal residence of the third-country national, since *Metock* this is no longer necessary. Moreover, member states' power to expel EU citizens for reasons of public security has been curtailed. The ECJ ruled in C-482/01 (para 67) and C-50/06 (para 43) that the public policy restriction regarding illegal activities needs to be interpreted narrowly. *Rottmann* (Case C-135/08) of March 2010 finally shows that member states lose part of their discretion in determining naturalization, having to take into account the concomitant loss of EU citizenship when withdrawing their citizenship.[6]

Some years ago, Kadelbach expected that member states' reaction to the significant broadening of the reach of entitlements to social assistance through the case law would consist of restricting residence rights (Kadelbach 2003: 563). Subsequently, the ECJ has made such a

reaction much more difficult. But when member states can no longer restrict eligibility to benefits, they can only cut down on social benefits in general to prevent welfare tourism (Scharpf 2009).

In conclusion, the ECJ has repeatedly deviated from established case law, and from secondary law established by legislative actors. Case law gave litigants incentives to claim European citizenship rights against 'restrictive' member states' provisions, extending the path-dependent interpretation of the fundamental freedoms to this area. As a result, citizenship rights have had an astonishing career from being a rather meaningless Treaty addition to becoming a central tenet of EU law.

4. CONCLUSION

The ECJ has been, and continues to be, a major force furthering European integration, and its case law on the fundamental freedoms has been very important in this respect. I have argued that based on the coincidence of the early transnationalizing goods markets, an approach of prohibiting restrictions to these fundamental freedoms has been established as a 'path', to which the interpretations of the other freedoms have converged. Focussing on the freedom of workers and citizenship rights as a crucial case, I have shown how this path was adopted, despite good reasons for the Court to treat these freedoms differently. Once legal issues related to trade do not only touch on the free movement of goods, typically different freedoms are concerned in one case, broadening the path established in the area of free movement of goods to other related freedoms.

I have argued that legal arguments made in one area – goods – can give incentives to private actors to reason analogously for other freedoms. The action of litigants provides positive feedback to the path. The Court may follow the arguments and thereby sets incentives for yet more actors to pursue this route. By not following certain arguments, in contrast, the Court

dissuades actors from certain lines of reasoning. The judges, thus, are not bound by precedent and its path. There are, however, positive incentives for (← **p. 20**) the court to honour precedent, as there are to a convergent approach to the interpretation of all fundamental freedoms. The ECJ is highly dependent on the cooperation of the national courts, which apply EU law autonomously, whenever precedent is sufficiently clear and unambiguous, so that a preliminary ruling is not necessary. Too many changes in its case law and a differentiated approach to the different freedoms would complicate and hamper the diffusion of EU law as the 'law of the land'.

The advantage of a path-dependent argument is that it takes the law seriously and provides for an independent role of legal doctrine (Smith 2008). While legal doctrine can be handled with several degrees of freedom by the judges, it provides an important orienting function for litigants. The concept of path dependence allows taking this ideational influence into account. As it stands, the article could only make it plausible that the transfer of a prohibition of restriction to the case law of free movement and citizenship took place via positive feedback of litigants. To be more precise, it would be necessary to show via process-tracing using for instance interview data with litigants, how they and their attorneys, possibly aided by NGOs, strategically took up legal arguments as a means to expand rights in other areas. But such a micro-perspective would need the space of a book and not just an article.

How would one refute that a path-dependent process was taking place? Case law often is ambiguous and where one scholar still sees a non-discrimination approach (Davies 2003), another sees a prohibition of restriction (Barnard 2010), while yet another argues for an evolving market access test (Tryfonidou 2010). Notwithstanding these differences in classification, there is widespread agreement among legal scholars on a convergence in the interpretation of the fundamental freedoms through the ECJ (Davies 2003; Oliver and Roth 2004; Tryfonidou 2010; Barnard 2010). Would there still be distinct reasoning on the different fundamental

freedoms, we would not see the identical argumentative figures in different areas, and there would be no path dependence.

Applied to citizenship rights, the language of prohibiting restrictions coupled with the principle of non-discrimination on the basis of nationality has led to a significant broadening of rights of EU citizens, and resulting difficulties of member states to restrict social benefits, and increasingly even of shaping their national citizenship law. As is often the case, the Court invites to balancing between European individual rights and national political concerns. However, as each case deals with individuals, it is hardly imaginable that these could pose 'an unreasonable burden' on a member state, be it for its welfare or public security. The actual 'burden' is a cumulative issue. For the Commission and the Court the expansion of individual European rights is a welcome development to bring Europe 'home' to the citizens, to show that integration makes a difference, and thereby to get much needed support.

> Notwithstanding this, the political elite of Europe has mismanaged the EU's constitutional process by failing to place the citizen at the center. (…) The same (← **p. 21**) cannot be said regarding the judicial elite, who have championed the cause of citizenship to a considerable extent (Aziz 2009: 282).

Whether this pays out as planned once citizens realize that there is a concomitant loss of national means to democratically shape the welfare state remains to be seen. Given these dangers to the legitimacy of a court-shaped rights regime, I have argued that the path results in political 'inefficiency'. There are overwhelming arguments that the citizenship rights regime of the EU needs to be politically shaped – and not by the Court (Bellamy 2007).

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NOTES

[1] I thank Fritz Scharpf for pointing out the usefulness of this distinction to me.

[2] The freedom of capital is a special case but also fits the argument (see Blauberger *et al.* 2012).

[3] See http://www.leighday.co.uk/about-us/social-justice (accessed 7 September 2011).

[4] ECAS Mind the Gap, report December 2009, p. 16f.

[5] http://www.gardencourtchambers.co.uk/news/news_detail.cfm?iNewsID=548 (accessed 7 September 2011).

[6] See the discussion by several scholars of the case under: http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law (accessed 7 September 2011).

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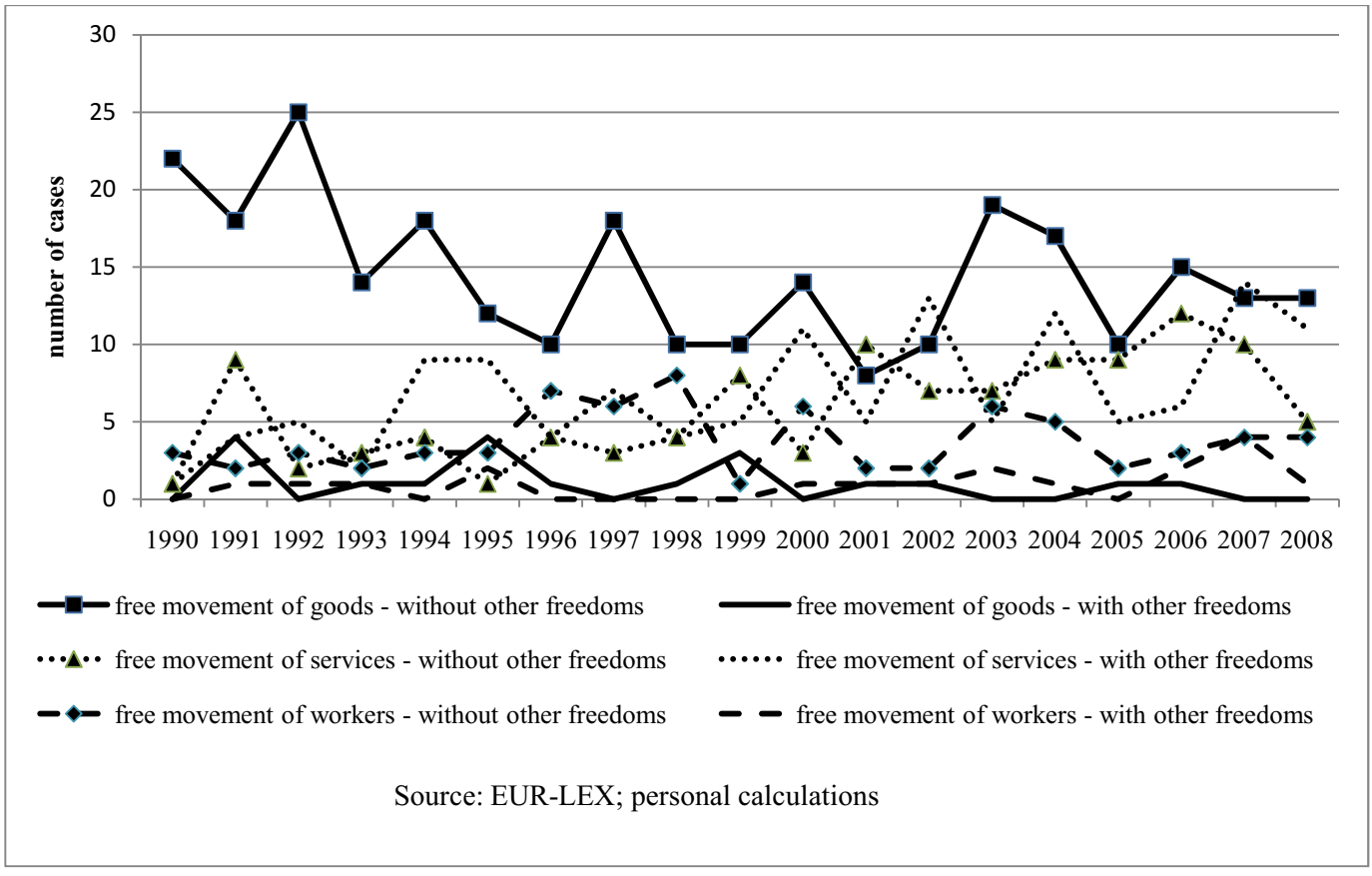
Figure 1 Two or more freedoms in one case



Source: EUR-LEX; personal calculations