Purely Internal Situations and the Limits of EU Law: A Consolidated Case Law or a Notion to be Abandoned?

Sara Iglesias Sánchez*

Purely internal situations – Fundamental freedoms – Attribution of powers – *Ullens de Schooten* – Reverse discrimination – Non-discriminatory obstacles – EU citizenship – Preliminary rulings – Jurisdiction of the Court of Justice – Conditions of admissibility of preliminary references

Introduction

The lively and longstanding doctrinal discussion on purely internal situations is symptomatic of the overall constitutional challenges intrinsic to the design of the EU legal system. It underscores the dynamism and complexity of the division of powers between the EU and the member states. It unveils the hidden limits and divergent underlying approaches to the different fundamental freedoms. It epitomises, through the side effect of reverse discrimination, the limitations of EU citizenship and renders visible the shortcomings of national constitutional approaches to the equality principle. Finally, it reflects the delicate balance between the openness of European judicial cooperation through the preliminary rulings procedure and the limits of the jurisdiction of the Court of Justice.

The purely internal rule entails that situations where all the elements are confined within a single member state fall outside the scope of EU (free movement) law. The application of this rule has met with criticism due to the apparent randomness of the concrete results produced,[1] being acknowledged at the same time as the necessary corollary of the principle of attribution

* Référendaire ECJ. PhD U. Complutense; LLM Yale Law School. All the opinions expressed are purely those of the author.

[1] *See*, e.g., Opinions of AG Sharpston, ECJ 28 June 2007, Case C-212/06, *Gouvernement de la Communauté française and Gouvernement wallon*, point 141 ff and ECJ 30 September 2010, Case C-34/09, *Ruiz Zambrano*, point 135 ff.

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of powers.[2] This debate paradigmatically illustrates the dilemmas intrinsic to European legal integration: the tension of EU law and the aspirations of further integration with the principle of conferred powers; the role of judicial interpretation and its limits; and the pressure put on member states' action – even in their own realm of competence – by an EU legal system with sometimes blurred frontiers.

In the framework of this discussion, the Grand Chamber of the Court of Justice has recently undertaken an important clarification endeavour. The judgment in *Ullens de Schooten*[3] has addressed one of the most controversial issues linked to the treatment of purely internal situations: the possibility for the Court of Justice to provide answers to preliminary questions where the facts of the case are confined within a single member state. In this judgment, the Court has provided a roadmap for situations in which it may derogate from the general approach, according to which the Court does not give an answer when the rule of EU law is not per se applicable to the case, because the situation at issue does not have a connection with EU law. This clarification and rationalisation of different strands of case law that had been developed along parallel lines but in an un-systematised manner throughout the years, is drawn together in a strong message to national courts that brings to the fore the delimitation of tasks between them and the Court of Justice, and their responsibility in enabling the Court to give a response in 'exceptional' cases. This exercise of clarification has not, however, put an end to the debate on purely internal situations. Rather, it prompts thoughtful and thorough consideration of the conceptual limitations of the purely internal rule and the repercussions that it has on the role and jurisdiction of the Court of Justice.

This article does not intend to provide an exhaustive analysis of all the substantive problems posed by the purely internal rule, the overall limits of the scope of EU law, or the concomitant effect of reverse discrimination. It rather focuses on the intersection between the competences of the Union and the jurisdiction of the Court of Justice in connection to the notion of 'purely internal situations' in the light of the recent judgment of the European Court of Justice in *Ullens de Schooten*. The examination of that judgment invites us to revisit the broader conceptual and jurisdictional problems linked with the concept of the 'purely internal situation' and casts some doubt on the usefulness of the concept as such.

[2] *See generally* on this discussion M. Mataija, 'Internal situations in Community Law: an Uncertain Safeguard of Competences within the Internal Market', 5 *CYELP* (2009) p. 31. *See also*, R.-E. Papadopoulou, 'Situations purement internes et droit communautaire: instrument jurisprudentiel à double fonction ou arme à double tranchant?', 38 *Cahiers de droit européen* (2002) p. 95 at p. 114.

[3] ECJ 15 November 2016, Case C-268/15, *Ullens de Schooten*.

The article is structured as follows. The first section will place the discussion in context, briefly recalling the basic elements of the original concept of purely internal situations and the tensions to which it has been subject due to the evolution of free movement law and the problematic question of reverse discrimination. The second section will examine the jurisdictional treatment of purely internal situations by the Court of Justice in preliminary rulings. That section outlines the different lines of case law (the so-called 'exceptions') where, despite having identified a purely internal situation, the Court proceeds to give an answer on the merits. It also examines the contribution of the judgment in *Ullens the Schooten* to the systematisation and clarification of that 'exceptional' jurisdictional approach to purely internal situations. The problems unsolved and questions remaining after that landmark decision will be analysed in the third section. That section will first address the conceptual challenges posed by the notion of 'purely internal situations' both within and beyond the realm of the fundamental freedoms. From a jurisdictional point of view, that section further examines some of the challenges in terms of systematisation and coherence in the treatment and effects of preliminary rulings in the different lines of case law where purely internal situations are addressed by the Court.

It will be posited that, while the concept of 'purely internal situations' may retain some relative descriptive value, it is not suitable as a legal concept to which normative consequences can be systematically attached. Due to the evolution of EU law in general (covering many areas where no cross-border link is necessary) and of free movement law in particular (where actual movement is not always a requirement and potential obstacles play an increasing role), a factual setup characterised as purely internal does not necessarily attach either the irrelevance of EU law, or the lack of jurisdiction of the Court.

What is a 'purely internal situation'

The concept

Free movement law is the core of European integration. It is based on cross-border dynamism: persons, services, companies, and goods enter the realm of the EU fundamental freedoms when they are set in motion. It may therefore not come as a surprise that the first phase of normative development of the EU legal system was focused on ensuring the implementation and buttressing of the smooth functioning of the fundamental freedoms.

In this context, the concept of 'purely internal situations' originated in contraposition to cross-border situations covered by the Treaty fundamental freedoms. A purely internal situation is defined by the absence of a cross-border link, namely, when all the elements of a given case are confined within the territory

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of a single member state.[4] The *Saunders* case is often cited as one of the inaugural judgments of the purely internal rule. In the framework of a preliminary question, the Court of Justice examined whether the provisions of EU law concerning free movement of workers were applicable to the facts in the main case, which concerned the application of penal measures depriving or restricting free movement within the territory of a member state. The Court found that to be a 'wholly domestic situation'. Since the facts showed 'no factor connecting them to any of the situations envisaged by [EU] law' the conclusion was that they 'fall outside the scope of the rules contained in the Treaty (...)'.[5]

The notion of 'purely internal situations' seems therefore a clear-cut and straightforward concept, logically following the rationale underlying the fundamental freedoms. From a substantive point of view, it mirrors the limits of EU law in the internal market: it is a manifestation of the principle of attributed powers.[6] As a consequence, it would follow that, from an institutional and procedural point of view, purely internal situations also lead to limitations for the Court to examine, on the merits, a situation that factually falls outside the scope of EU law.

The tensions: evolutions of free movement and reverse discrimination

The clarity of the purely internal rule as outlined above soon encountered challenges: (i) from the point of view of its functioning as an element in the system of delimitation of powers and jurisdiction, the evolution of free movement law has shown the limits to the coherent application of the purely internal rule; (ii) from the point of view of the relationship between EU and national law, it is today apparent that the purely internal rule produces some undesired side effects, in particular, reverse discrimination. Furthermore, the Court has confirmed that its jurisdiction is not limited to situations that factually fall within EU law, leading to its jurisprudential engagement with purely internal situations in different contexts. This latter discussion will be addressed separately in the third section of this article.

Evolution of free movement law

With the evolution of EU law on free movement, the determination of what is a purely internal situation has become one of the most complex and unclear areas of interpretation of EU law. The substantive evolution of free movement law has led to an expansion of situations covered by the fundamental freedoms, with a concomitant reduction of the scope of what is deemed to be

[4] ECJ 28 March 1979, Case 175/78, *Saunders*, para. 11.
[5] *Ibid.*, para. 12.
[6] *See generally* Mataija, *supra* n. 2, p. 31.

'purely internal'.[7] Two elements have led to this situation: the dynamic interpretation of the cross-border link from the point of view of the *facts* involved; and the wide approach to restrictions to movement, covering non-discriminatory obstacles, from the point of view of the *rules* involved.

The required cross-border connection was interpreted in the case law in a progressively broad manner.[8] Indeed, the cross-border link necessary to trigger the application of EU rules on free movement does not necessarily need to entail *actual* physical movement, as was made apparent in the *Zhu and Chen* case.[9] Moreover, case law has provided for a more comprehensive understanding of the fundamental freedoms, acknowledging that they are applicable against the member state of one's own nationality if a previous exercise of free movement has occurred. The cross-border link is given in cases involving so-called 'returning' citizens; it does not require that the situation concern a member state other than the state of nationality.[10] Additionally, the dynamism of free movement has fuelled the case law of the Court, leading to the result that *potential* deterrents to movement may be enough to establish a cross-border connection.[11] Free movement law has moreover developed so as to cover non-discriminatory obstacles. That means that national rules that apply without distinction to national and foreign actors can eventually come under EU fire. As a result, if the non-distinctive or non-discriminatory character of a measure is ultimately not the sole decisive factor, the discussion becomes more nuanced as to the potential impact of a national rule in a cross-border context.

This evolution of free movement law has led, logically, to a decrease in factual constellations that can be materially considered 'purely internal situations'. By progressively buttressing the substantive scope of the fundamental freedoms (ergo, of the scope of EU law),[12] the purely internal realm has shrunk. Moreover, the fact that non-discriminatory obstacles may be covered by free movement law has led to a situation in which, even though the detrimental effect on free movement is the leading force, the normative consequences of EU law are also felt

[7] *See* in particular N. Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal rule: time to Move On?', 39 *CML Rev* (2002) p. 731.

[8] *See* for this discussion N. Nic Shuibhne, *The Coherence of EU Free Movement Law. Constitutional Responsibility and the Court of Justice* (Oxford University Press 2013) p. 124 ff.

[9] E.g. ECJ 19 October 2004, Case C-200/02, *Zhu and Chen*; ECJ 11 July 2002, Case C-60/00, *Carpenter*.

[10] E.g. ECJ 7 February 1979, Case 115/78, *Knoors*; ECJ 7 July 1992, Case C-370/90, *Singh*; ECJ 31 March 1993, Case C-19/92 *Kraus*; or ECJ 11 December 2007, C-291/05, *Eind*.

[11] E.g. ECJ 10 May 1995, Case C-384/93, *Alpine Investments*; ECJ 15 December 1995, Case C-415/93, *Bosman* or ECJ 10 February 2009, Case C-110/05, *Commission* v *Italy (trailers)*.

[12] *See* on this discussion, P. Caro de Sousa, 'Catch Me if You Can? The Market Freedoms' Ever-expanding Outer Limits', 4 *European Journal of Legal Studies* (2011) p. 162 at p. 164 ff.

in situations where national rules are applicable without distinction to static actors and free movers. The apparent simplicity of the purely internal rule has therefore given way to a complex set of questions needed to determine who can invoke EU free movement rules, under what circumstances, with regard to which rules and with which impact or consequences.

Reverse discrimination

In *Saunders*, the Court of Justice had already acknowledged an important reality: free movement rights conferred by the Treaty 'may lead the Member States to amend their legislation, where necessary, even with respect to their own nationals'.[13] However, the recognition of the far-reaching normative impact of EU law, which may transform the position of actors in situations which are purely domestic, did not aim to restrict the powers of Member States in those purely internal situations.[14] This pronouncement is meaningful in the light of the previous *Rutili* case,[15] where the Court declared that the freedom of movement enjoyed by nationals of other member states extended to measures restricting residence in a part of a member state's territory. That was not, however, applicable in *Saunders*, which was a purely internal situation falling outside the scope of EU law. *Saunders* and *Rutili* are amongst the first examples illustrating the phenomenon of reverse discrimination, whereby EU law free movement rules have as a consequence that nationals of other member states are placed in a more favourable position than 'static' nationals (i.e. those not having exercised the fundamental freedoms).

Seen from this perspective, the purely internal rule entails a difference of treatment in two parallel situations. Whereas a cross-border situation receives the protection of EU law, a corresponding internal situation – even though it involves similar (but non-cross-border) facts – would not.

The phenomenon of reverse discrimination has become apparent in different fields of EU law, and paradigmatically, with regard to family reunification.[16] It has moreover often channelled tensions in politically sensitive situations concerning federal arrangements, where the compatibility with EU law of differences in treatment across the different territorial subdivisions of a member state is contested.[17]

[13] *Saunders*, *supra* n. 4, para. 10.

[14] *Ibid.*

[15] ECJ 28 October 1975, Case 36/75, *Rutili*.

[16] *See*, for a general study, A. Tryfonidou, *Reverse Discrimination in EC Law* (Wolters Kluwer 2009).

[17] E.g. ECJ 1 April 2008, Case C-212/06, *Gouvernement de la Communauté française and Gouvernement wallon*. *See* P. Van Elsuwege and S. Adam, 'The Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination. Constitutional Court, Judgment 11/2009 of 21 January 2009', 5 *EuConst* (2009) p. 327.

Against this framework and despite intense academic debate on possibilities for overcoming reverse discrimination,[18] the Court has consistently confirmed that reverse discrimination is not precluded *as a matter of EU law*.[19] The Court has consequently placed the responsibility to remedy this side-effect and undesired outcome on the member states: reverse discrimination is a purely internal matter. Since the EU equal treatment principle cannot be invoked in this context, only national equal treatment principles can provide a remedy.[20]

The phenomenon of reverse discrimination is therefore acknowledged to be inevitable: it is the flip side of the coin of purely internal situations and an intrinsic by-product of the principle of attributed competences in the field of the fundamental freedoms. However, from a broader constitutional perspective, the elusive contours of the cross-border aspect make reverse discrimination an element of discomfort.

This is all the more so since the introduction of the status of EU citizenship. Indeed, in our days, the dichotomy between cross-border and purely internal has lost much of its original legitimacy as the central and decisive element for the determination of the applicability of EU free movement and EU citizenship law. This is in the first place because the normative dynamics of EU law have long since surpassed the scope of free movement: reverse discrimination is often a result of the way in which EU competences are used (or not used), and not an inevitable consequence of the limits placed on those competences. Second, the concept of EU citizenship itself, a fundamental status embodying the aspiration of shared status and rights, puts pressure on the unequal treatment of equivalent situations that often ensues from the complex entanglement of national and EU rules and principles.[21]

[18] *See*, e.g. the Opinion of AG Poiares Maduro, ECJ 6 May 2004, Case C-72/03, *Carbonati Apuani* or the Opinion of AG Sharpston in *Ruiz Zambrano*, *supra* n. 1. The doctrinal discussion is extremely broad. *See* e.g. E. Cannizzaro, 'Producing "Reverse Discrimination" Through the Exercise of EC Competences', 17 *Yearbook of European Law* (1997) p. 29; D. Hanf, '"Reverse Discrimination" in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice', 18 *Maastricht Journal of European and Comparative Law* (2011) p. 29; S.D. Kon, 'Aspects of Reverse Discrimination in Community Law', 6 *EL Rev* (1981) p. 75; D.M.W. Pickup, 'Reverse Discrimination and Freedom of Movement for Workers', 23 *CML Rev* (1986) p. 135; M. Poiares Maduro, 'The Scope of European remedies: the Case of Pure Internal Situations and Reverse Discrimination', in C. Kilpatrick, T. Novitz and P. Skidmore (eds.), *The Future of Remedies in Europe* (Hart 2000) p. 117.

[19] *See* e.g. ECJ 7 February 1984, Case 237/82, *Jongeneel Kaas*; ECJ 18 February 1987, Case C-98/86, *Mathot*; ECJ 5 June 1997, Joined Cases C-64/96 and C-65/96, *Uecker and Jacquet*; or ECJ 25 July 2008, Case C-127/08, *Metock*.

[20] ECJ 21 February 2013, Case C-111/12, *Ordine degli Ingegneri di Verona e Provincia*, para. 22.

[21] *See*, e.g. D. Kochenov, 'Equality Across the Legal Orders; or Voiding EU Citizenship of Content', in E Guild, C. Gortázar Rotaeche and D. Kostakopoulou (eds.), *The Reconceptualisation of European Union Citizenship* (Nijhoff Brill 2014) p. 301.

The jurisprudential treatment of purely internal situations

Once it has been acknowledged that a situation does not have any cross-border link and that it should be qualified as a wholly internal situation, how does this affect the jurisdiction of the Court of Justice? Can the Court, under such circumstances, address the merits of a given case or give an answer to a preliminary question? That is, of course, a question for which there is no definitive answer. Rather, a correct response very much depends on the procedure by which an issue arrives before the Court (and – if a preliminary ruling – on the national procedure under which the main case originated).

Just to refer briefly to the most common proceedings, annulment and infringement actions do not pose much of a problem. One could very well imagine, in the context of the fundamental freedoms, an action for annulment based on the lack of competence to adopt an EU act because it concerns purely internal situations.[22] A member state could also argue, as a defence in an infringement procedure, that a situation at issue is not covered by EU law because it is purely internal.[23] In both cases, the determination of the jurisdiction of the Court would not present any great challenge, and the nature and effects of the allegedly purely internal character of a situation/rule would be examined on the merits. True difficulties arise, however, in ascertaining the jurisdiction of the Court in the preliminary ruling procedure. It is in that context that the jurisdictional approach to purely internal situations has developed quite broadly, to the extent that the issue of the scope of application of EU law becomes intertwined with the discussion on the jurisdictional limitations attached to questions relating to situations falling outside that scope.

Preliminary rulings and purely internal situations: a general rule?

When confronted with a question in a case where the facts are confined within a single member state, the Court has sometimes adopted different approaches, as highlighted by Advocate General Jääskinen in his Opinion in *Sbariglia*.[24] The Court has either given an answer on the merits (in the sense that the rules of EU law do not apply to purely internal situations[25] or that the legislation at issue was

[22] *See*, regarding measures adopted on the basis of the fundamental freedoms and on ex Art 100A of the EEC Treaty, ECJ 5 October 2000, Case C-376/98, *Germany* v *Parliament and Council*, para. 99. The argument of reverse discrimination has also been adduced (without success) by member states in annulment actions, ECJ 7 November 2000, C-168/98, *Luxembourg* v *Parliament and Council.*

[23] *See* e.g. ECJ 23 October 2008, Case C-286/06, *Commission* v *Spain*, para. 52. *See also*, on a related note, ECJ 1 December 2011, Case C-250/08, *Commission* v *Belgium* and ECJ 11 October 2016, C-601/14, *Commission* v *Italy*.

[24] Opinion of 10 March 2010, Case C-393/08, *Sbarigia*, points 31-35.

[25] E.g. ECJ 8 December 1987, Case 20/87, *Gauchard*, para. 12; ECJ 23 April 1991, Case C-41/90, *Höfner and Elser* para. 37; ECJ 28 January 1992, Case C-332/90, *Steen*, para. 9; ECJ 19 March 1992,

not precluded by EU law)[26]; has examined the issue from the point of view of jurisdiction[27] or admissibility[28]; or a mix of both.[29]

In practical terms, the most common approach in recent times has been that the Court declines jurisdiction where it is obvious 'that the provision of European Union law referred to the Court for interpretation [is] incapable of applying.'[30] Since free movement provisions do not apply to situations 'confined in all respects within a single member State',[31] it is therefore somehow logical that the possibilities for the Court to give an answer on the merits encounter limits in purely internal situations. However, the Court has often provided a response on the merits even in those situations where EU law was not per se applicable to the specific facts of the case, thereby making explicit the fact that a *factually* purely internal situation does not inextricably lead to a lack of jurisdiction of the Court. Indeed, the Court has traditionally examined and provided answers to a number of legal questions in situations where the cross-border element or the link with EU law was not given, but where the interpretation of an EU law rule was deemed to be useful because of the potential effects on cross-border situations, because national law had extended EU law rules to internal situations to avoid reverse discrimination, or because national law contained an explicit *renvoi* to an EU law regime or provision. These lines of case law can be labelled as 'exceptions' to the rule of lack of jurisdiction in purely internal situations and will be further examined below.

The exceptions

A first type of cases concerns questions posed with regard to internal situations where it may be possible that the national legal systems attach the same treatment

Case C-60/91, *Batista Morais*, para. 8; ECJ 16 February 1996, Joined Cases C-29/94 to C-35/94, *Aubertin*, para. 11.

[26] E.g. ECJ 5 April 2004, Case C-3/02, *Mosconi et Ordine degli Ingegneri di Verona e Provincia* (operative part) and ECJ 19 June 2008, Case C-104/08, *Kurt*, para. 24 (orders).

[27] *See* e.g. ECJ 30 January 2014, Case C-122/13, *C*, para. 18 (order); ECJ 15 October 2014, Case C-246/14, *De Bellis e.a.*, paras. 19 and 20 (order); ECJ 12 May 2016, Joined Cases C-692/15 to C-694/15, *Security Service*, paras. 29-31 (order).

[28] E.g. ECJ 3 July 2014, Case C-92/14, *Tudoran e.a.*, para. 42 (order); ECJ 1 June 2010, Joined Cases C-570/07 and C-571/07, *Blanco Pérez and Chao Gómez*, paras. 33-42; ECJ 19 July 2012, Case C-470/11, *Garkalns*, paras. 16-22.

[29] E.g. ECJ 22 December 2010, Case C-245/09, *Omalet*, paras. 18 and 19; ECJ 20 March 2014, Case C-139/12, *Caixa d'Estalvis i Pensions de Barcelona*, paras. 47 and 48; ECJ 13 February 2014, Joined Cases C-162/12 and C-163/12, *Airport Shuttle Express*, paras. 50 and 51.

[30] E.g. ECJ 30 June 2016, Case C-464/15, *Admiral Casinos & Entertainment*, para. 20 and the case law cited therein.

[31] *Ibid.*, para. 21 and case law cited therein.

to static and cross-border situations (the *Guimont* line).[32] Even though the facts of a given case may be wholly domestic, the Court considers it *useful* to provide an answer to the national court, bearing in mind a possible scenario in which national law requires that static nationals be granted the same rights that a national of another member state would derive from EU law in the same situation. Indeed, '[w]here national law prohibits reverse discrimination, a national court will, after all, need an interpretation of the claims that nationals of other Member States are entitled to assert under Community law if it is to be able to determine whether the case before it involves reverse discrimination'.[33]

A second line of cases (the *Venturini* line),[34] which often appears in close connection with the situation previously described,[35] concerns questions whose answers, even though posed in an internal context, bear *potential* consequences for cross-border situations. The Court therefore confirms jurisdiction where it is 'not inconceivable' that nationals or companies from other member states could be interested in making use of those freedoms in the territory of the member state concerned, and that the national legislation at issue, even if applicable without distinction to nationals and free movers, was capable of producing effects not confined to a member state.[36]

Third, the so-called *Dzodzi* line of cases concerns the 'indirect' application of EU law through the mediation of national legislation.[37] It relates to situations where, even though the facts lie outside the direct scope of EU law, national legislation refers to EU law. This jurisprudential line is not confined to fundamental freedoms, but is transversally applicable where an EU law regime or provision becomes the object of a *renvoi* by national law. In the words of Advocate General Jacobs in *Leur-Bloem*, an EU 'rule is borrowed by a Member

[32] E.g. ECJ 5 December 2000, Case C-448/98, *Guimont*, para. 23; ECJ 5 March 2002, Joined Cases C-515/99, C-519 to C-524/99 and C-526/99 to C-540/99, *Reisch*, para. 26; ECJ 11 September 2003, Case C-6/01, *Anomar*, para. 41; ECJ 30 March 2006, Case C-451/03, *Servizi Ausiliari Dottori Commercialisti*, para. 29; ECJ 5 December 2006, Joined Cases C-94/04 and C-202/04, *Cipolla*, para. 30; *Blanco Pérez and Chao Gómez*, *supra* n. 28, para. 39.

[33] Opinion of AG Geelhoed in Joined Cases C-515/99 and C-527/99 to C-540/99, *Reisch*, point 87.

[34] The origin of this jurisprudential line is usually situated in ECJ 15 December 1982, Case 286/81, *Oosthoek's Uitgeversmaatschappij*, para. 9.

[35] In fact, many judgments allude to both hypotheses. E.g. *Blanco Pérez and Chao Gómez*, *supra* n. 28, paras. 39 and 40; ECJ 5 December 2013, Joined Cases C-159/12 to C-161/12, *Venturini*, paras. 25-28; ECJ 13 February 2014, Case C-367/12, *Sokoll-Seebacher*, paras. 10-12; ECJ 12 December 2013, Case C-327/12, *Soa Nazionale Costruttori*, paras. 47 and 49.

[36] E.g. case law cited in *supra* n. 35 as well as ECJ 18 July 2013, Case C-265/12, *Citroën Belux*, para. 32 ff and case law cited therein.

[37] ECJ 18 October 1990, Cases C-297/88 and C-197/89, *Dzodzi*, paras. 36-41. This line of case law has its origin in ECJ 26 September 1985, Case 166/84, *Thomasdünger*.

State and transposed to a non-Community context'.[38] Even though this category is broader, it may also overlap with the '*Guimont* line', since it is based on the logic of cross-reference between the national and the EU legal orders.[39]

The most controversial of the above-mentioned exceptions, probably because of the potential width of its application, is the *Dzodzi* line. Indeed, the fields in which that 'exception' has been applied are very varied, including national references, for rather technical purposes, to elements of customs union law,[40] private law agreements,[41] rules and criteria of EU competition law,[42] or more generally to rules or regimes emanating from EU acts of secondary law and the extension of their application to situations that are, in principle, outside their material[43] or temporal[44] scope of application. In those cases, the justification for the Court giving a preliminary ruling is based on the 'interest of the European Union that, in order to forestall future differences of interpretation, provisions or concepts taken from European Union law should be interpreted uniformly, irrespective of the circumstances in which they are to apply.'[45]

The judgment in Ullens de Schotten: a consolidation of the case law or a new approach?

The case law described above has not met with universal acclaim. The weak points of and dangers inherent to the various 'exceptions' whereby the Court of Justice proceeds to give an answer to questions concerning purely internal facts have in past repeatedly been raised by Advocates General.[46] The Court has, however, maintained its jurisprudential approach, even if it has progressively

[38] Case C-28/95, *Leur-Bloem*, point 47 (Opinion).

[39] E.g. ECJ 15 May 2003, Case C-300/01, *Salzmann*, paras. 33 and 34; ECJ 15 January 2002, Case C-43/00, *Andersen og Jensen*, paras. 17 and 18.

[40] *See Thomasdünger*, *supra* n. 37; ECJ 8 November 1990, C-231/89, *Gmurzynska-Bscher*, para. 37; ECJ 24 January 1991, Case C-384/89, *Tomatis*; ECJ 11 January 2001, Case C-1/99, *Kofisa Italia*, para. 32; ECJ 17 July 1997, Case C-130/95, *Giloy*; ECJ 29 April 2004, Case C-222/01, *British American Tobacco*, para. 40; ECJ 3 December 1998, Case C-247/97, *Schoonbroodt*, para. 14; or ECJ 17 March 2005, Case C-170/03, *Feron*, para. 11.

[41] ECJ 12 November 1992, Case C-73/89, *Fournier*; ECJ 25 June 1992, Case C-88/91, *Federconsorzi*.

[42] ECJ 14 December 2006, Case C-217/05, *Confederación Española de Empresarios de Estaciones de Servicio*, para. 19; ECJ 11 December 2007, Case C-280/06, *ETI*, para. 21.

[43] ECJ 16 March 2006, Case C-3/04, *Poseidon Chartering*, paras. 15-17; ECJ 20 May 2010, Case C-352/08, *Modehuis A. Zwijnenburg*, para. 32 ff; ECJ 22 December 2008, Case C-48/07, *Les Vergers du Vieux Tauves*, para. 19 ff; ECJ 18 October 2012, Case C-603/10, *Pelati*, para. 17 ff; ECJ 19 October 2017, Case C-295/16, *Europamur Alimentación*, paras. 29-32.

[44] E.g. ECJ 2 March 2010, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla*, paras. 47-49.

[45] ECJ 14 March 2013, Case C-32/11, *Allianz Hungária Biztosító*, para. 20 and case law cited.

[46] *See* discussion below, nn. 96 and 101.

given signs that reveal a stricter approach to the requirements that need to be met in order to trigger those exceptional instances of jurisdiction for preliminary rulings.

Indeed, originally, application of the above-mentioned exceptions had been rather lenient. The Court used to give a generic indication of the existence of such a possibility for giving equal treatment, or of a cross-border impact (or potential interest by actors beyond the state border). However, the jurisdictional approach has become progressively stricter, explicitly identifying the elements that offer a clearer indication that the same treatment was indeed required,[47] and rejecting the application of the 'exception' when there are elements indicating that such is not the case.[48] Moreover, the Court started to explicitly reject taking the initiative in elucidating the potential obligations under national law when it was not apparent from the order for reference that the national court was actually under such an obligation to grant equal treatment.[49] The limits of the *Dzodzi* approach were also outlined by the Court when it required a 'direct and unconditional *renvoi'* to EU law provisions.[50] Despite the variable application of those limits in the past, the evolution of the case law consolidated a progressively stricter trend to carefully ascertain the content of the order for reference in order to establish whether there were sufficiently precise indications enabling the identification of such a reference to EU law,[51] the Court not being satisfied with any explanation by the national court.

The judgment of the Grand Chamber in *Ullens de Schooten* follows that trend and could even be described as its culmination. The case concerned a long and complex dispute with its origins in the criminal proceedings against, and conviction of, Mr Ullens de Schooten for concealing the illegal operation of a clinical laboratory, in contravention of national law. Mr Ullens de Schooten

[47] E.g. ECJ 21 June 2012, Case C-84/11, *Susisalo*, paras. 20-21; *Ordine degli Ingegneri di Verona e Provincia*, *supra* n. 20, para. 34.

[48] *Omalet*, *supra* n. 29, para. 16.

[49] E.g. *C*, *supra* n. 27, para. 17 (order); *Tudoran e.a.*, *supra* n. 28, paras. 41-42.

[50] ECJ 28 March 1995, Case C-346/93, *Kleinwort Benson*, para. 16. On the strict application of the criteria laid down by that case law, *see* the Opinion of AG Cruz Villalón of 25 October 2012, Case C-32/11, *Allianz Hungária Biztosító*, point 20 ff.

[51] E.g. ECJ 7 July 2011, Case C-310/10, *Agafiţei*, para. 28 ff; ECJ 21 December 2011, Case C-482/19, *Cicala*, para. 23 ff; ECJ 7 November 2013, C-313/12, *Romeo*, para. 26; ECJ 18 October 2012, Case C-583/10, *Nolan*, paras. 47 and 48; ECJ 9 September 2014, Case C-488/13, *Parva Investitsionna Banka e.a.*, para. 30 ff (order); *C*, *supra* n. 27, para. 15 (order); ECJ 19 October 2017, Case C-303/16, *Solar Electric Martinique*, paras. 25 and 26; ECJ 12 May 2016, Case C-281/15, *Sahyouni*, paras. 28-31 (order). However, the possibility for the referring court to pose a new question and give further clarification remains open. *See*, e.g. with regard to that later case, a follow up case, in which AG Saugmandsgaard Øe delivered his opinion considering that the connecting factor is given (opinion delivered 14 September 2017 Case C-372/16, *Sahyouni*).

argued that the rule of national law[52] which he was accused of having violated was not compatible with EU law. However, that argument was dismissed in several instances of national procedure without a preliminary question ever being asked.

The Court of Justice had declared several years earlier that the national rule at issue was not precluded by the freedom of establishment since it was not contrary to the principle of non-discrimination.[53] However, that was before the case law of the Court considered non-discriminatory obstacles to be contrary to the fundamental freedoms.[54] Years later, in 2002, and in line with that evolution, the Commission issued a reasoned opinion against Belgium considering the provision at issue to be contrary to Article 43 EC (on the freedom of establishment). Since the national provision was subsequently amended, the Commission took no further action. The Belgian Constitutional Court held moreover that the provision at issue was in compliance with the Belgian Constitution. In addition to all this, the European Court of Human Rights found that there had been no violation of Article 6(1) of the Convention in the case of Mr Ullens de Schooten.[55] Having exhausted those other jurisdictional options, Mr Ullens de Schooten initiated a procedure for damages against the Belgian State, in the course of which the Court of Appeal sent a preliminary reference to the Court of Justice.

In its judgment in *Ullens de Schooten*, the Court of Justice only addresses the second question posed by the referring court, concerning the implications of the concept of 'purely internal situations' in proceedings for damages caused by an alleged infringement of EU law.[56] This question is rather peculiar. The referring court does not ask about the interpretation of EU free movement rules in the context of freedom of establishment in a purely internal situation,[57] but raises a question indirectly related to that freedom: the possibility to rely on the EU principle of non-contractual State liability for damages caused to individuals for

[52] The national rule at issue provided that clinical biology laboratories must be operated by persons authorised to provide clinical biology services in order to be approved by the Minister for Public Health and to receive payments from National Institute for Sickness and Invalidity Insurance.

[53] ECJ 12 February 1987, Case C-221/85, *Commission* v *Belgium*.

[54] As pointed out by E. Dubout, 'Voyage en eaux troubles: vers une épuration des situations 'purement' internes. CJEU, gde ch., 15 novembre 2016, Ullens de Schooten, aff. C-268/15', 4 *Revue des affaires européennes* (2016) p. 679 at p. 680.

[55] ECtHR 20 September 2011, *Ullens de Schooten and Rezabek* v *Belgium* (CE: ECHR:2011:0920JUD000398907).

[56] The other questions referred related to the issue of time limitations on national law and the principles of effectiveness and equivalence; the principles of primacy and sincere cooperation and the principle of res judicata of judicial decisions contrary to EU law.

[57] This question was, however, addressed by the Opinion of AG Bot of 16 June 2016, point 61 ff. He concluded that the provisions at issue were compatible with Art. 43 EC.

alleged breaches of EU (free movement) law ('the EU principle of state liability') in an internal situation.

This question addresses the applicability of an EU principle and hence leads inevitably to an affirmation of jurisdiction:[58] it is a question on the scope of EU law, which falls squarely within the interpretative jurisdiction of the Court of Justice. Therewith, the Court does not only confirm the broad nature of its jurisdiction in preliminary ruling procedures in internal situations; it underscores that the purely internal nature of a given situation does not per se solve the jurisdictional question, which can only rely on the relevance of the question asked with regard to the rule at issue: it is not so much the *factual* nature of a 'purely internal situation' that determines jurisdiction, but the *legal* implications of the preliminary question.

In its answer, the Court recalls its established case law, according to which, in order to trigger the EU principle of State liability, three conditions need to be met, the first of which being that the infringed rule of EU law should be intended to confer rights on the individual harmed. The decisive question is therefore 'whether an individual in a situation such as that of Mr Ullens de Schooten derives rights from the relevant provisions of the FEU Treaty'.[59]

In order to answer that question, the Court must examine the EU provisions at issue: the Treaty provisions on freedom of establishment. Those provisions do not, however, apply in internal situations.[60] The judgment confirms that the situation at issue in the main proceedings is one where all the elements are confined within a single member state.[61]

The Court could have stopped here: in such an internal situation, an individual does not derive rights *from EU law*. However, in a subsequent step of its reasoning, the Court acknowledges its own practice regarding jurisdiction in preliminary rulings concerning purely internal situations, taking this opportunity to proceed to a long-awaited clarification and systematisation of its previous case law on the exceptional situations where jurisdiction in preliminary ruling proceedings is guaranteed even in the face of a purely internal situation. The Court lists the three traditional lines of case law outlined above,[62] and makes explicit the existence of a fourth (the *Libert* situation),[63] concerning preliminary rulings in proceedings for

[58] *Ullens de Schooten*, *supra* n. 3, paras. 39-42.

[59] *Ullens de Schooten*, *supra* n. 3, paras. 41 and 46, referring to ECJ 19 November 1991, Joined Cases C-6/90 and C-9/90, *Francovich*, para. 35 and ECJ 5 March 1996, Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, paras. 31 and 51.

[60] *Ullens de Schooten*, *supra* n. 3, para. 47.

[61] *Ullens de Schooten*, *supra* n. 3, paras. 48-49.

[62] *Ullens de Schooten*, *supra* n. 3, paras. 50-53. *See* above.

[63] ECJ 8 May 2013, Cases C-197/11 and C-203/11, *Libert*, para. 35.

the annulment of provisions which apply not only to its own nationals, but also to those of other member states.[64]

The most important element of the judgment is probably that, after enumerating and describing those 'exceptions', the Court proceeds to clarify what the role of national courts is: the Court cannot consider that its answer is necessary to enable the national jurisdiction to pass judgment if that court does not indicate 'something other than that the national legislation in question applies without distinction to nationals of the Member State concerned and those of other Member States'.[65] The order for reference *itself* must contain 'the specific factors that allow a link to be established between the subject or circumstances of a dispute, confined in all respects within a single Member State, and Article 49, 56 or 63 TFEU.'[66]

This point of the reasoning encapsulates two rather important developments already foreshadowed in previous case law. First, it is not enough to abstractly indicate that a rule might exist which is applicable without distinction: more specific legal or factual information needs to be provided. Second, the order for reference is the decisive element; it must establish those elements, without the need for a request for clarification or for recourse to the frequently contradictory observations of the parties. Moreover, with this statement, the Court underscores the importance of Article 94 of the Rules of Procedure, which states the conditions for the admissibility of preliminary rulings, and assigns the national court the responsibility of identifying and explaining the connecting factor that justifies the need for a preliminary ruling in purely internal disputes.[67]

Against that background, the Court concludes that the order for reference in *Ullens de Schooten* does not fulfil those requirements. It neither shows that national law requires that Belgian nationals be granted the same treatment as free movers nor that EU provisions have been made applicable by national law.[68] In consequence, the Court answers – in the negative – the question of whether Mr Ullens de Schooten derives rights from EU law so as to fulfil the requirements of the EU principle of state liability. Since the circumstances of the dispute in the main proceedings do not display any connecting factor to EU law, those provisions 'are not capable of conferring rights on Mr Ullens de Schooten, and EU law cannot therefore give rise to non-contractual liability of the Member State concerned'.[69]

[64] *Ullens de Schooten*, *supra* n. 3, para. 51.
[65] *Ullens de Schooten*, *supra* n. 3, para. 54.
[66] *Ibid.*
[67] *Ullens de Schooten*, *supra* n. 3, para. 55.
[68] *Ullens de Schooten*, *supra* n. 3, para. 56.
[69] *Ullens de Schooten*, *supra* n. 3, paras. 57-58.

The systematisation effort and clarification provided by this judgment is to be welcomed. It lists all the exceptions as a typology of instances where it is not the factual situation per se that determines jurisdiction, but the relationship between national proceedings, the nature of the question, and its connection with a rule of EU law. It moreover emphasises the role of national courts and clarifies the requirements to be fulfilled in a way that brings a degree of unity to the previously polarised scenario of differing but often overlapping exceptions. It gives greater visibility to and underlines the importance of Article 94 of the Rules of Procedure as the guiding provision ensuring the success of the system of cooperation established by the preliminary ruling procedure.

However, the concrete answer to the case at issue raises new follow-up questions. Notably, regarding the particular case at hand, one may wonder, supposing the order for reference had contained the abovementioned elements allowing one or more of the 'exceptions' to apply, whether that would have amounted to a 'right' conferred under EU law sufficient to trigger the EU principle of state liability. Furthermore, the systematisation of the four 'exceptions' makes explicit the need to tackle further connected issues. Are all of the 'exceptions' systematised in *Ullens de Schooten* equivalent and subject to the same requirements concerning the elements to be provided by the national court? Do all those 'exceptions' equally concern situations which are 'truly' purely internal? Would the preliminary rulings of the Court issued with regard to all those different situations produce the same effects? Those questions unveil some of the difficulties and challenges remaining with regard to the normative and jurisdictional consequences attached to the notion of purely internal situations, which will be discussed in the following section.

Purely internal situations in perspective: shortcomings of an outdated notion

Conceptual problems

It is by now undisputed that the conceptual clarity that the notion of 'purely internal situations' was deemed to convey in the early stages of EU integration has faded away to a great extent due to the constitutional evolution of EU law. That concept has proven insufficient to provide, on its own, for a solid framework of reference enabling the accurate assessment of either the substantive scope of application of EU law or the jurisdiction of the Court. In the traditional realm of the fundamental freedoms, the evolution of law and case law already renders the notion of purely internal situations an oversimplification. Indeed, it is very difficult to adopt a coherent normative approach to what really should be considered within or beyond the reach of free movement law on the sole basis of

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the concept of 'purely internal situations'. Moreover, the powers of the EU have clearly and broadly surpassed the logic of free movement: there is an increasingly important body of primary and secondary law rules whose applicability does not in any way depend on cross-border elements. In those fields, the 'purely internal rule' is in theory not applicable but may in practice have a rather confusing influence.

Purely internal situations and free movement law

The application of the requirement of a 'cross-border link' as a trigger for the application of free movement law has become increasingly varied and complex. In this context, all the elements present in the formula 'purely-internal-situation' present important conceptual challenges.

It can be pointed out from the outset that the notion 'internal' has become more of a rough approximation than an accurate descriptive term. As outlined above, the scope of the fundamental freedoms has been detached from physical movement or tangible cross-border elements. The decisive elements triggering the application of the fundamental freedoms have progressively reached the realm of 'potential' effect. Aside from clear-cut cases where a more traditional exercise of free movement is clearly present, the notion 'internal' has lost much of its conceptual force to serve as a precise depiction of the negative scope of application of EU law. The rigid and static 'territorial' or 'geographical' connotations of the purely *internal* rule do not correctly grasp the elements of 'potentiality' and exercise of the fundamental freedoms not linked to movement, and have turned this term of art into a conceptual metaphor which conveys more confusion than clarification.

The complexity of the task of identifying situations covered by EU law, free movement rules in particular, also contrasts with the rotundness implied by the adverb 'purely'. Indeed, since the exercise of defining the scope of application of the fundamental freedoms is often linked to the potential of a given measure, the question becomes one of defining the intensity of the connection or remoteness, which is necessarily a matter of nuanced interpretation. The establishment of absolute black and white criteria is extremely difficult; 'affectation' is necessarily framed in a scale where a number of intermediate points are likely to exist, each giving rise different outcomes. Taking that nuanced approach, some factual situations may be caught within the scope of EU law whereas some other discretely diverging situations may not. An argument can often be made identifying a potential (although remote) connection. In such a nuanced scenario, it is by no means accurate to speak of 'pure' internal character as an intrinsic or clear-cut feature defining a given situation. This makes it particularly difficult to draw a dividing line between situations where there exists a potential connector with EU free movement rules resulting in a situation covered by EU law, and the *Venturini*

line of cases.[70] Therefore, the absolute terms 'purely' and 'wholly' compromise the perception of the consistency in the application of the rule. Indeed, as put by Nic Shuibhne, 'how can we ensure that the exclusionary application of a purely internal rule in some cases is not arbitrary, given that the free movement framework also accepts a potential impact on movement as a legitimate factor for the purposes of connecting a situation to EU law?'[71]

The 'purely' internal character also contrasts with the relative and differentiated approach towards the rule in the context of the different fundamental freedoms.[72] Indeed, the different freedoms do not always follow the same principles so that, from a conceptual point of view, the cross-border nature of a situation is difficult to assess in a coherent manner. Some aspects of the freedoms may be peculiar to each of them, as made evident by the case law of the Court, notably in the field of free movement of goods.[73] In this complex scenario, the concept of purely internal situations is again insufficient to explain the different approaches towards free movement of goods when compared with the other fundamental freedoms. These diversified approaches, when measured against the threshold of the purely internal rule, produce an impression of inconsistency. They are better explained by the diverse nature of the functioning and practical implications of the particular provisions and freedoms at issue than by the mere fact of having or not having a clear or 'pure' cross-border nature.

Finally, if the elements 'purely' and 'internal' are confusing, the most problematic element is that of *situation*. By referring to a *situation*, the formula emphasises the relevance of the *factual* elements at issue in a given case as decisive in defining the scope of application of EU law. Through this 'situational'

[70] *See* in this connection, D. Sarmiento, 'The purely internal situation in free movement rules – Some clarity at last from the ECJ', 16 November 2016 (available at <despiteourdifferencesblog.wordpress.com>).

[71] Nic Shuibhne, *supra* n. 8, p. 116.

[72] *See*, extensively on this issue e.g. Papadopoulou, *supra* n. 2, p. 196 ff; M. Whatelet et al., 'Situations purement internes, discriminations à rebours et fiscalité', 6 *Revue Générale du Contentieux Fiscal* (2011) p. 465; B. Cheynel, 'Les "situations purement internes" à la lumière de l'arrêt Libert e.a.', 2 *Revue des affaires européennes* (2013) p. 405 at p. 409; F. Martucci, 'Situations purement interne et libertés de circulation', in E. Dubout, A. Maitrot de la Motte (eds.), *L'unité des libertés de circulation - In varietate concordia*? (Bruylant 2013) p. 43.

[73] *See*, with regard to tariff obstacles: ECJ 16 July 1992, Case C-163/90, *Legros*; ECJ 30 April 1998, Joined Cases C-37/96 and C-38/96, *Sodiprem*; or ECJ 8 November 2005, Case C-293/02, *Jersey Produce Marketing Organisation*. For non-tariff obstacles, *see* ECJ 14 July 1988, Case C-298/87, *Smanor*; ECJ 7 May 1997, Joined Cases C-321/94 to C-324/94, *Pistre*; *Guimont*, *supra* n. 32. *See* on this issue P. Oliver 'Some further reflections on the scope of articles 28-30 (ex 330-36) EC', 36 *CML Rev* (1999) p. 783; P. Oliver and S. Enchelmaier, 'Free Movement of Goods: Recent Developments in the Case-law', 44*CML Rev* (2007) p. 649; A. Tryfonidou, 'The Outer Limits of Article 28 EC: Purely Internal Situations and the Development of the Court's Approach through the Years', in C. Barnard and O. Odudu, *The Outer Limits of European Union Law* (Hart 2009) p. 197.

characterisation, the formula seems to adopt a 'geographical approach' to the connecting factor to the scope of EU law.[74] However, the Court often looks at the impact of national provisions and answers a question by looking at the (potential) impact of *a rule*. The shift from factual (geographical) elements to legal ones underlines the nature of *rules* as a trigger for the applicability of free movement law.[75] In consequence, the notion of 'purely internal situation' is once more unsuitable for tackling the more complex issue of the connection of a given factual setup with a national rule, and does not provide clarification as to the key questions of who is entitled to invoke a given rule, and in which procedure.

All in all, even within the realm of the fundamental freedoms, the definition of 'purely internal situations' as those whose elements are confined within the territory of a member state has, to a great extent, been emptied of content and significance. This has been made apparent by different but related episodes in the case law of the Court where the factual and geographical content which underlies the purely internal situation concept has been undermined, demonstrating that what is relevant is not whether there is a cross-border connection to a given situation, but whether the EU rule at issue is relevant for the solution of a given case, taking into account the specific scope of the rule in question. Indeed, in the field of free movement of goods, the Court has expressly declared that Article 34 TFEU 'cannot be considered inapplicable simply because all the facts of the specific case before the national court are confined to a single member state.'[76] Similarly, in the field of citizenship law, and despite a very cautious approach,[77] the case law has confirmed the conceptual dismantling of the notion of 'purely internal situations' by declaring, on the basis of Article 20 TFEU, that 'the situation of a Union citizen who ... has not made use of the right of freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation, that is to say, a situation which has no factor linking it with any of the situations governed by EU law.'[78]

[74] *See*, for a critical view of this geographical approach, Poiares Maduro, *supra* n. 18, p. 125 and the literature discussed therein.

[75] *See* e.g. Opinion of AG Geelhoed in *Reisch*, *supra* n. 33, point 88, stating that 'it is the nature and substance of the national measure that determine whether the Court answers questions referred to it for a preliminary ruling, not the facts in the main proceedings'.

[76] *Pistre*, *supra* n. 73, para. 44.

[77] Declaring that 'citizenship of the Union is not intended to extend the material scope of the Treaty to internal situations which have no link with Community law' *see* e.g. *Gouvernement de la Communauté française and Gouvernement wallon*, *supra* n. 17, para. 39 and case law cited therein.

[78] *See* ECJ 13 September 2016, Case C-304/14, *CS*, para. 23; ECJ 5 May 2011, Case C-434/09, *McCarthy*, para. 46; ECJ 15 November 2011, Case C-256/11, *Dereci*, para. 61; ECJ 6 December 2012, Case C-356/11, *O*, and C-357/11, para. 43; *Zhu and Chen*, *supra* n. 9, para. 19. *See also Ruiz Zambrano*, *supra* n. 1, para. 42 and ECJ 2 March 2010, Case C-135/08, *Rottmann*, para. 42. Similarly, the fact that a citizen acquires nationality in the host member state cannot be treated either as a purely domestic situation, ECJ 14 November 2017, Case C-165/16, *Lounes*, para. 49.

This last statement has provoked an important doctrinal debate, with many authors heralding triumph over the purely internal rule by citizenship of the Union.[79] However, the *Ruiz Zambrano* saga does not entail a departure from that notion, nor does it carve out any other jurisdictional exception to the limits of preliminary rulings related to purely internal situations. It merely clarifies the scope of the status of EU citizenship and the rights attached thereto which, despite being deeply entrenched in the free movement acquis, are neither always nor per se dependent on cross-border connections. That line of case law paradigmatically foreshadows the limitations and confusing potential of the 'purely internal situation' concept: the Court acknowledges that factual situations with no cross-border elements are not purely internal (even in a free movement related context) redefining purely internal situations as those with 'no factor linking it with any of the situations governed by EU law'. In consequence, that notion appears to be nothing more than a rather simplified approximation of the more complex debate on the scope of EU law in the realm of free movement law.

Beyond free movement

The reference to the 'purely internal rule' may still be made to certain avail with regard to those areas or instruments of EU law where a cross-border element is required (e.g. in judicial cooperation and criminal cooperation related to mutual recognition).[80] However, the evolution of the scope of EU law and the depth of legal integration has progressively overcome the predominance of free-movement-based law. The number of areas of EU law where a cross-border connection is not required has become increasingly broader (e.g. environmental policy, social policy, consumer protection, asylum and migration law or procedural criminal law).[81]

It might seem obvious that the purely internal rule applied to free movement has to be 'distinguished from preliminary rulings concerning the interpretation of measures of secondary Union law, which need not have an actual link with free movement'.[82] Nonetheless, the paramount place occupied by free movement in EU law has given great amplification to the notion of purely internal situations. The Court refers to the concept of 'purely internal situations' in a broader context, even if only as an analogical reference to the lack of applicability of an EU law rule

[79] *See*, e.g. on that debate, M. Hailbronner and S. Iglesias Sánchez, 'The European Court of Justice and Citizenship of the European Union: New Developments Towards a Truly Fundamental Status', 5 *Vienna Journal on International Constitutional Law* (2011) p. 498.

[80] E.g. ECJ 14 November 2013, Case C-478/12, *Maletic*; *Parva Investitsionna Banka*, *supra* n. 51; ECJ 7 June 2012, Case C-27/11, *Vinkov*.

[81] *See*, in this connection, Poiares Maduro, *supra* n. 18, p. 121.

[82] K. Lenaerts et al., *EU Procedural Law* (Oxford University Press 2014) p. 239, note 126. For this discussion *see also* Mataija, *supra* n. 2, p. 31.

(and often, with regard to the *Dzodzi* line of case law).[83] By symbiosis or analogical use, the term 'purely internal situations' risks migrating to other areas where no cross-border link is required (or where its necessity is up for debate), as demonstrated by its rather usual appearance in the submissions of parties and Member States in cases unrelated to free movement.

In this context, the concept of 'purely internal situations' reveals certain intrinsic shortcomings; it fails to articulate proper legal reasoning regarding the scope of application of harmonisation rules. In particular, it more often obscures than clarifies the legal analysis when it comes to assessing the scope of EU law rules connected with the philosophy of free movement but conceived using the rationale of harmonisation. That is the case, for example, of public procurement law or data protection law where cross-border dynamics are already embedded in the self-defined scope of application as determined by secondary law.[84]

From those examples, it already becomes apparent that the divide between positive (harmonisation) and negative (free movement) integration is not as clear-cut as it may seem for the purposes of the operability of the purely internal rule. This is the case, in particular, when secondary law develops Treaty articles on the fundamental freedoms which, *on their own*, would be subject to the purely internal rule. The most paradigmatic example of the difficulty of application of the 'purely internal rule' in a free movement related context is the Services Directive.[85] The discussion on the possibility of relying on it even in internal situations is linked in particular to the fact that its Chapter III, related to establishment, does not contain an explicit requirement demanding a cross-border connection, with many voices interpreting it as being applicable to purely internal situations.[86]

[83] Referring generally to situations which did not materially or temporally fall within the scope of EU law, but where the rule at issue did not entail or require a cross border connection, e.g. ECJ 8 November 2012, Case C-271/11, *Techniko Epimelitirio Elladas*; 12 July 2012, ECJ Case C-602/10, *SC Volksbank România*; ECJ 9 November 2010, Joined Cases C-57/09 and C-101/09, *B and D*; *Salahadin Abdulla*, *supra* n. 44; or ECJ 17 December 1998, Case C-2/97, *IP*.

[84] *See*, e.g. ECJ 13 July 2000, Case C-456/98, *Centrosteel*, para. 13; ECJ 20 May 2003, Joined Cases C-465/00, C-138/01 and C-139/01, *Österreichischer Rundfunk*, paras. 41-42; ECJ 6 November 2003, Case C-101/01, *Lindqvist*, paras. 40-41; ECJ 17 November 2015, Case C-115/14, *RegioPost*, paras. 49-51. *See*, generally, Mataija, *supra* n. 2, p. 36 ff.

[85] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

[86] *See especially* the Opinions of AG Szpunar in Cases C-360/15 and C-31/16, *X and Visser*, and in Joined Cases C-340/14 and C-341/14, *Trijber and Harmsen*. It is also to be noted that even though all the facts were confined within a member state, the Court did not address the issue of the applicability of the directive to purely internal situations, and gave a response to the question posed in ECJ 16 November 2016, Case C-316/15, *Hemming*. For this discussion *see* G. Davies, 'The Services Directive: Extending the Country of Origin Principle and Reforming Public Administration', 32 *European Law Review* (2007) p. 241; C. Barnard, 'Unravelling the Services Directive', 45 *CML Rev* (2008) p. 352; V. Hatzopoulos, 'The Court's Approach to

As a result, the purely internal rule does not seem to have much value in the harmonisation context and adds an unnecessary element of uncertainty in connection with the normative development of the fundamental freedoms through secondary law.

In a nutshell: from a conceptual point of view, if the notion of 'purely internal situations' has become tantamount to finding that a situation is not regulated by EU law, one could wonder whether it would not be better to reverse the trend and use the more basic but precise formulation 'outside the scope of EU law'. Such a formula brings us back in line with the terminology generally used with regard to the limits of EU law. In this regard, the task of determining whether a situation falls within the scope of EU law constitutes an intricate endeavour which can only be undertaken through careful consideration of the nature, content, purpose and context of a provision or instrument, as explicitly shown by the very complex jurisprudential development of the determination of the scope of application of EU fundamental rights by reference to the scope of application of EU law.[87]

Jurisdictional problems

It may come as no surprise that the conceptual difficulties discussed above have seeped into the jurisdictional sphere. First, the notion of 'purely internal situations' leads to uncertainty with regard to the limits of the relevance of questions to and the jurisdiction of the Court of Justice. Second, important difficulties arise when it comes to assessing the effects of preliminary rulings in cases with a factual background labelled as a 'purely internal situation'.

Jurisdiction, admissibility and the role of national courts

Once it has been determined that the facts of the case are wholly situated within the territory of a member state (with the effect that a specific provision of EU law is not per se applicable to the facts), this does not mean that the Court lacks jurisdiction. The 'exceptions' referred to in the second section of this article, whereby the Court gives an answer on the substance in such situations, demonstrate that the jurisdiction of the Court does not equate to the scope of application of EU law. Indeed, whereas the question of the scope of application of EU law concentrates on whether a situation/national

Services (2006-2012): From Case Law to Caseload?', 50 *CML Rev* (2013) p. 462; E. Faustinelli, 'Purely Internal Situations and the Freedom of Establishment Within the Context of the Services Directive', 44 *Legal Issues of Economic Integration* (2017) p. 87.

[87] For one of the latest systematisation attempts, see, Opinion of AG Bobek of 7 September 2017 in Case C-298/16, *Ispas*, point 20 ff.

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rule is covered by EU law, the question of the jurisdiction of the Court looks, principally, at whether the requirements of Article 267 TFUE have been fulfilled.[88]

Article 267 TFEU describes a broad scope of jurisdiction encompassing the interpretation of the Treaties and the validity and interpretation of secondary law. By focusing on merely that point, the interpretative powers of the Court risk going far beyond the limits of the broader system of allocation of competences in the EU and could lead to rather unsatisfactory outcomes in terms of clarity and the efficient use of judicial resources. Therefore, the very broad interpretative powers of the Court are narrowed by reference to the national jurisdictional reality embedded in Article 267 TFEU: the question must have been raised before a court or tribunal of a member state, and that jurisdiction must consider its answer to be crucial for deciding whether it can pass judgment.[89] Furthermore, the rules of admissibility contained in Article 94 of the Rules of Procedure play a paramount role in further framing the approach to purely internal situations, since they require that the request by the national court describes the facts and legal context so as to enable the Court to give a ruling. The admissibility requirements therefore ensure a real link to a case, and not merely a hypothetical connection.

On this basis, the case law of the Court has consistently underscored that neither the wording of Article 267 TFEU nor the aim of the preliminary ruling procedure indicates that the Treaty makers intended to exclude from the jurisdiction of the Court requests concerning EU law provisions where national law refers to that EU law provision 'in order to determine the rules applicable to a situation which is purely internal.'[90] Indeed, the case law has emphasised that it is the relevance of the question for the national proceedings which constitutes the decisive element. The Court has explained, specifically in the *Dzodzi* line of cases, that the underlying logic of this broader jurisdictional approach is rooted in the spirit of cooperation with national jurisdictions and in the presumption of relevance of the preliminary questions.

In this context, and leaving aside its broader constitutional implications, the issue of jurisdiction in the framework of purely internal situations can be boiled down to a question of relevance: if the facts are not governed by EU law, the relevance of the question can be very plausibly be doubted.[91] Only in the

[88] *See* on this debate, Opinions of AG Wahl in *Venturini*, *supra* n. 35, point 18 ff and in Case C-497/12, *Gullotta and Farmacia di Gullotta Davide & C*, points 16-25. *See also* Opinion of AG Szpunar in *X and Visser*, *supra* n. 86, para. 115.

[89] *See*, particularly, the Opinion of AG Wahl in *Gullotta and Farmacia di Gullotta Davide & C*, *supra* n. 88, point 17 ff.

[90] ECJ 17 July 1997, Case C-28/95, *Leur-Bloem*, para. 25; or more recently, *Salahadin Abdulla*, *supra* n. 44, para. 48.

[91] E.g. Opinion of AG Wahl in *Gullotta and Farmacia di Gullotta Davide & C*, *supra* n. 88, point 31.

exceptional circumstances identified by Court of Justice can such preliminary references still be regarded as relevant.

The above shows that cases concerning situations that are factually 'purely internal' cannot be approached by abstracting from the specific question and type of procedure at issue in the main proceedings. Those elements are essential for enabling the Court to justify giving an answer in situations which would prima facie concern facts falling outside the scope of EU law. First, as regards the object of the referral, the substantive content of the specific question posed is decisive for determining jurisdiction: often, the question is of a 'meta' nature, involving the scope of EU law itself or the applicability of an EU rule. The interpretative powers of the Court include policing the borders of EU powers so as to determine applicability; what is or is not internal is consubstantial to its task. The appreciation of whether a situation lies within the scope of EU law appertains to the merits and is therefore admissible (as was the case e.g. in *Ullens de Schooten*).[92]

Second, assessment of the 'relevance' of the answer given by the Court for the case at hand very much depends on the nature of the main proceedings. When national proceedings are about abstract control (for example, in national annulment procedures), the factual framework, or the fact that the person at the origin of the case is a national with no cross-border links, becomes less decisive. Indeed, the result of the case will have effects *erga omnes*,[93] i.e. for both internal and cross-border situations (and most importantly, abstract arguments concerning the validity of the rule – either internal or cross-border in nature – may be taken into account by the national judge).[94] The relevance of the nature of national proceedings has been reinforced by the judgment in *Ullens de Schooten*, both through the identification of a specific exception related to annulment procedures where the effects are felt equally in internal and cross-border situations (the *Libert* exception) and through the clear dismissal of the argument based on the 'paradoxical' comparison with infringement proceedings.[95]

[92] *Ullens de Schooten*, *supra* n. 3, paras. 39-44. *See also* ECJ 27 October 2009, Case C-115/08, *ČEZ*, para. 67; *SC Volksbank România*, *supra* n. 83, para. 51.

[93] Putting forward this question, F. Picod, 'Libre circulation et situation interne', 1 *Revue des Affaires Européennes* (2003-2004) p. 47 at p. 50. This is to be distinguished from cases where infringements are declared on the basis of a national rule which may be contrary to EU law only insofar as it affects situations covered by the fundamental freedoms (but that would arguably remain unproblematic with regard to situations not covered by EU law). *See*, in this connection, O. Due and C. Gulmann, 'Restrictions à la libre circulation intracommunautaire et situations purement internes', in N. Colnerick et al. (eds.), *Une comunauté de droit. Festschrift für Gil Carlos Rodríguez Iglesias* (Berliner Wissenschafts-Verlag 2003) p. 377 at p. 380.

[94] That is the case for the 'Libert'-type cases identified in *Ullens de Schooten*, *supra* n. 3, para. 51, (*Libert*, *supra* n. 63). *See also* ECJ 21 September 2017, Case C 125/16, *Malta Dental Technologists Association and Reynaud*, para. 30.

[95] *See* Opinion of AG Bot, Case C-268/15, *Ullens de Schooten*, points 50-52.

Against this background, one relevant reflection inspired by the judgment in *Ullens de Schooten* is precisely the need to reinforce the visibility and importance of elements such as the object of the question and the relevance of national proceedings. Again, those rather important elements are independent from the qualification of facts as a 'purely internal situation', which becomes more of a red herring.

This debate also bears relevance when considered in light of the reinforced responsibility of national courts for providing an accurate factual and legal framework. Indeed, after several cases already pointing in that direction, it can be concluded that the judgment in *Ullens de Schooten* constitutes the consolidation of a trend, strongly advocated for by certain Advocates General,[96] leading to a more exigent approach towards situations that factually appear unconnected with the operation of EU law. It would indeed appear that this case has to a degree brought about a reversal of the presumption of relevance of the preliminary questions in those exceptional cases.

Despite those clarifications and advances, the judgment in *Ullens de Schooten* also makes it more apparent that certain important questions still remain unanswered. There is a need to further elaborate on the level of scrutiny that the Court must deploy with regard to the content of the order for reference where a national court struggles to describe a potential cross-border link or the consequences of a *renvoi*. It is indeed necessary to examine whether the requirements for accepting jurisdiction are equally demanding with regard to the different types of 'exceptional' situation. In this regard, some level of differentiation may be justified. Indeed, it should be kept in mind that, whereas in the *Venturini/Libert* lines of cases the assessment of a potential cross-border impact is a task for which the Court may be relatively well equipped, *Guimont/Dzodzi* cases pose important challenges of interpretation of national law when it comes to identifying the elements that ensure relevance and necessity of an answer in complex national legal scenarios.[97] This is all the more so in the event that the presumption of relevance of preliminary questions is deprived of its strength.

In this regard, the judgment in *Ullens de Schooten* gives the impression of unified and consistent consideration when it enumerates and systematically describes the four exceptional situations where the Court offers an interpretation of EU law even though it is, of its own force, not applicable to the facts and

[96] Opinions of AG Wahl in *Venturini*, *supra* n. 35, and in *Gullotta and Farmacia di Gullotta Davide & C*, *supra* n. 88, as well as the Opinion of AG Kokott in Cases C-162/12, C-419/12 and C-420/12, *Crono Service*.

[97] It has been argued by some authors that the *Guimont/Dzodzi* lines follow a similar rationale and that similar constraints and limitations should be present in both, *see*, e.g., proposing that the *Guimont* approach be abandoned and subsumed by the *Dzodzi* approach, C. Ritter, 'Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234', *EL Rev* (2006) p. 690.

circumstances. However, the concrete implications of that analysis cannot be ascertained for that specific judgment. Indeed, in that case, the decisive element is not so much the lack of elements that justify triggering the 'exceptions' but the fact that the EU free movement rules invoked are not intended to protect those who are not making actual use of those freedoms; therefore, they cannot confer an individual right on Mr Ullens de Schooten that would give rise to state liability.[98] This fact probably explains why the Court did not examine whether the requirements of the *Venturini* exception had been met, even though that exception would seem to be the most relevant in the factual context concerned.[99]

Effects of preliminary rulings in purely internal situations

Bearing in mind that it is the 'relevance' of the preliminary question that to a great extent justifies the jurisdiction to provide a material answer, the normative effects of that answer then become a central issue.

The judgments of the Court of Justice in preliminary ruling procedures are 'binding on the national court, as regards the interpretation or the validity of the acts of the European Union institutions in question, for the purposes of the decision to be given in the main proceedings.'[100] With this statement in mind, the risk of providing an answer in cases where the facts lie outside the scope of EU law have been noted by several Advocates General, mostly criticising the *Dzodzi* line of cases in that it could lead to merely consultative decisions, to the detriment of the obligatory effects of preliminary rulings.[101] Indeed, it cannot be ignored that, in those cases, the 'normative' power of the decisions of the Court is borrowed. It does not emanate from the sources of EU law but from the national legal system. The same considerations could be made with regard to the *Guimont* line of cases (reverse discrimination), e.g. an equality provision interpreted in such a way as to

[98] *Ullens de Schooten*, *supra* n. 3, para. 57.

[99] *Ullens de Schooten*, *supra* n. 3, para. 56. *See*, in this regard, Dubout, *supra* n. 54, p. 679.

[100] ECJ 5 October 2010, C-173/09, *Elchinov*, para. 29 and case law cited therein.

[101] Opinion of AG Darmon in *Gmurzynska-Bscher*, *supra* n. 40, point 7; Opinion of AG Darmon in *Dzodzi*, *supra* n. 37; Opinion of AG Tesauro in Case C-346/93, *Kleinwort Benson*; Opinion of AG Jacobs in Case C-28/95, *Leur-Bloem*, para. 63; Opinion of AG Ruiz-Jarabo Colomer in Case C-1/99 and C-226/99, *Kofisa Italia*, paras. 38-39; Opinion of AG Saggio in Case C-448/98, *Guimont*, point 7; Opinion of AG Jacobs in C-306/99, *BIAO*. *See* extensively on this discussion, A. Barav, *Etudes sur le renvoi préjudiciel dans le droit de l'Union européenne* (Bruylant 2011) p. 227 ff. *See also* S.L. Kaleda, 'Extension of the preliminary rulings procedure outside the scope of Community law: "The Dzodzi line of cases', 4 *European Integration on line Papers* (2000). Other problems in this regard have also been put forward, e.g. whether there is an obligation to have recourse for it under the case law on Art 267 TFEU, the impact in validity questions or the potential for judicial infringements. *See generally* Opinion of AG Ruiz-Jarabo Colomer in Cases C-1/99 and C-226/99, *Kofisa Italia*, para. 40 and Opinion of AG Jacobs in Case C-28/95, *Leur-Bloem*, para. 64.

avoid unequal treatment may still be subject to different justification, comparability or proportionality approaches under national law.

However, the issue of the effect of decisions rendered in those cases is rarely addressed by the Court.[102] The Court limits itself to recalling the need for the national rule operating the *renvoi* to EU law to be bound by the response, precisely to undercut the danger of rendering its own jurisdiction purely advisory.[103] The need to identify an obligatory character in national law does not, however, mean that the source of such a binding nature can be found in EU law: the insistence on that element can rather be explained from the point of view of the relevance of the question and the necessity of the answer – which could very easily be put into doubt if national courts were explicitly allowed to depart from the judgment given by virtue of national law.

The issue of the effect of preliminary judgments also presents specific challenges in the '*Venturini*' line of cases. It is not easy to draw a line between cases where free movement is *actually* applied, and where an answer is given in a 'purely internal situation' with justification found in the *potential* effect of a national rule.[104] In other words, there is a thin line that separates 'exceptional' cases where the Court gives an answer regarding a 'true' purely internal situation lying outside the scope of EU law from those where that situation has stopped being 'internal' so as to fully fall within the scope of EU law. In consequence, it may prove difficult to determine the basis and the effects of the Court's answer; whether the answer of the Court concerning a national rule in a case where all the facts concern a member state is circumscribed in its obligatory effects to the potential cross-border effects, or whether it is generally applicable.[105]

In this framework, the uncertainty about the normative power of EU law and the effects of preliminary rulings in cases concerning 'purely internal situations' is not resolved by the judgment in *Ullens de Schooten*. The national court wished to know whether the EU principle of state non-contractual liability for damages caused by breaches of EU law could apply if the damage caused by an alleged

[102] *See Fournier*, *supra* n. 41, para. 23.

[103] E.g. order of 26 April 2002, C-454/00, *VIS Farmaceutici Istituto scientifico delle Venezie*, paras. 22-24; order of 3 September 2015, C-456/14, *Orrego Arias*, para. 24; 7 January 2003, C-306/99, *BIAO*, paras. 92 and 93.

[104] As one author has put it, there is a difference between cases like *Lancry* or *Ruiz Zambrano*, where EU law is applicable, and the cases concerning the 'exceptions' mentioned in *Ullens de Schooten*, where EU law can be invoked without being applicable: Dubout, *supra* n. 54, p. 683. Also, those cases could be qualified as purely internal 'in appearance': *see* L. Potvin-Solis, 'Qualification des situations purement internes', in E. Neframi (ed.), *Renvoi préjudiciel et marge d'appréciation du juge national* (Larcier 2015) p. 41 at p. 55.

[105] The Court has only rarely expressly limited the value of its response or given a differentiated answer. *See Smanor*, *supra* n. 73, or *Gouvernement de la Communauté française and Gouvernement wallon*, *supra* n. 17.

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violation of EU free movement was circumscribed by a purely internal context. The Court's response on the merits – the abovementioned EU principle is not applicable in such a situation – can be considered correct. However, the line of reasoning followed by the Court still raises still some doubt with regard to the issue of the effect of preliminary rulings in cases where the facts fall outside the scope of EU law.

Indeed, in order to determine whether a particular rule of EU law – the EU principle of non-contractual State liability – was applicable, the main issue to be resolved was whether the EU law rule whose violation was adduced as the basis for such liability (free movement rules) was *intended to* confer *rights* on *those* individuals.[106] The answer to that question may have stopped at the point where the Court confirmed that the particular provisions of the Treaty on the fundamental freedoms did not apply in a situation such as the one involving that issue. Indeed, if those provisions do not apply, they may not per se confer rights on individuals and cannot, as such, form the basis of EU law-based state liability. However, the subsequent thorough examination of the 'exceptions' concerning jurisdiction in purely internal situations, even if highly enlightening from a general systematic point of view, shifts the focus of the reasoning in the particular case from the material consequences of having a situation governed by EU law to the issue of the jurisdiction of the Court to provide an answer.

The Court states, after examining those exceptions, that a 'connecting factor' is not given in the present case,[107] and from that element it derives its conclusion on the merits.[108] This leaves a somewhat problematic impression. It could indeed be deduced, by this reasoning, that by application of the jurisdictional exceptions to a lack of jurisdiction with regard to purely internal situations, the Court is entitled to give an answer that could also serve as a substantive foundation for a subjective right.

Indeed, one may wonder whether, if a 'connection' that triggered one of the four jurisdictional exceptions had been properly established by the national court, the response would have been different. In the event that national law extended EU law treatment to static citizens; in the event of a '*renvoi*'; if it appeared certain that the rule could have a cross-border impact: would that mean that those EU law provisions could *confer rights* upon Mr Ullens de Schooten, thereby making the EU principle of state liability – together with its conditions as interpreted by the

[106] *Ullens de Schooten*, *supra* n. 3, para. 46.

[107] It is indeed striking that the Court seems only to consider the 'reverse discrimination' (*Guimont*) and the 'renvoi' (*Dzodzi*) exceptions (*Ullens de Schooten*, *supra* n. 3, para. 56). First, because, as the Advocate General signalled, the *Guimont* approach was explicitly precluded by national case law. Second, because the relevant point seemed to be the potential effect on cross-border actors. *See*, in this regard, Dubout, *supra* n. 54, p. 688.

[108] *Ullens de Schooten*, *supra* n. 3, para. 57.

Court – applicable in a purely internal situation? Would national law not still be the source of rights (even in the presence of such a jurisdictional 'connecting factor') and therefore, would not the national law principles related to state liability be applicable? Does the presence of a 'connecting factor' for the purposes of establishing jurisdiction turn a purely internal situation into one covered by EU law, extending therefore to all the principles attached to its application (including, e.g. fundamental rights)?

Granted, the response to these questions is negative, as can be concluded from an attentive reading of paragraph 57 of the judgment, which establishes the decisive element: the EU free movement rules invoked cannot confer an individual right on Mr Ullens de Schooten in the given situation, and this precludes the possibility of finding state liability. However, that core element of the reasoning gets somehow diluted in light of the paramount role that the consideration of the four exceptions (which could not, seemingly, have any decisive impact on the solution of the case) occupies in the judgment.

Concluding remarks

The notion of purely internal situations was born as a useful concept which conveyed a powerful description of the limits of EU free movement law. It served as a catalyst to the scope of application of EU law and through a simple notion helped to easily grasp the relevance of EU law for a given factual setup. The concept may still be of certain avail with regard to those areas or instruments of EU law where there is a requirement for a cross-border element, as it may provide for an approach to the applicability of an EU rule where the scope of that rule is clearly governed, in a given situation, by a cross-border connection, and that link (either actual or potential) is clearly missing in a given case. However, the evolution of EU law in general and of free movement law in particular has rendered the concept somewhat obsolete, turning it into a rather rough and inaccurate approximation of the scope of EU law in the majority of cases, which do not present such clear-cut features.

Even in the realm of the fundamental freedoms, the notion of purely internal situations does not ensure clarification as to the question of determining the scope of application of EU law. The complexity and dynamism of free movement law leads to a progressively nuanced approach to the 'connection' with EU law, which makes it inaccurate to speak of 'purely' 'internal' 'situations'. It is not clear whether the issue is triggered by the nature of a 'rule' or of a factual 'situation', whether its 'internal' character is more construed than real, or whether 'purity' can exist at all. Indeed, the 'purely' internal character of a situation evokes an idea of clarity and absoluteness which does not properly correspond to the reality of the assessment of the cross-border link across the different fundamental freedoms. The discourse

becomes more complex when it tries to fit current developments into those concepts, and leads progressively to a further dichotomy between 'true' purely internal situations and 'apparent' purely internal situations, the divide between both being extremely blurry. Moreover, not only has the purely internal realm been reduced: when identified, it is not consistently applied with regard to the different fundamental freedoms. Finally, outside the field of the fundamental freedoms, that concept becomes an approximation which sometimes produces more confusion than clarity. All in all, the concept does not suffice to systematically serve as a basis for normative or jurisdictional consequences. As a result, the value of the concept of 'purely internal situations' has been reduced to being suitable, at most, for general use as a tentative metaphor or figure of speech.

In this framework, the approach of the Court of Justice to purely internal situations through the preliminary rulings procedure adds another layer of complexity. Indeed, due to the broad scope of preliminary ruling jurisdiction, and inspired by the purposes of judicial cooperation and uniform interpretation of EU law, the Court examines the merits in cases where the facts lie in principle outside the scope of EU law. In this context, the notion of 'purely internal situations' serves to articulate a set of exceptional instances where the Court provides substantive answers in such situations.

The recent judgment in *Ullens de Schooten* has systematised four lines of case law (adding a fourth – the *Libert* type – to the traditional *Guimont, Dzodzi, Venturini* trilogy) and has underlined the particularly relevant responsibilities of national jurisdiction in laying out the legal and factual framework allowing the Court to consider a request for a preliminary ruling. However, it still remains to be seen to what extent the identification of those four types of case can be kept consistent in terms of the requirements to be met and the scrutiny to be exercised by the Court. Indeed, the various exceptions cannot be justified by the same concerns; they each relate to different scenarios in which the connection with the normative power of EU law is very different. Moreover, the issue of the effect of preliminary rulings in those diverse situations becomes particularly problematic, and it remains far from clear whether it would be viable to adopt a uniform approach. As a result, it seems apparent that while the notion of 'purely internal situations' provides for a merely approximative point of departure, neither does it attach fixed jurisdictional implications. Rather, the decisive element is the relevance of the question in the specific factual and legal context which can be better approached by comprehensive consideration of the specific question at issue, the nature of the EU rule, the implications (and potential effects) of the national legal framework and, particularly, the nature of the national proceedings in which the question is posed.

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