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EDITORIAL COMMENTS

Is the "indivisibility" of the four freedoms a principle of EU law?

Even in the inaugural post-referendum statement issued by the stunned configuration of "EU27" in June 2016, it was asserted that "[a]ccess to the Single Market requires acceptance of all four freedoms".[1] This determination was made in the context that, "[i]n the future, we hope to have the UK as a close partner". However, it was also appreciated that an agreement would be concluded with the UK "as a third country" and would therefore "have to be based on a balance of rights and obligations".

So began the uncharted voyage of an EU Member State regressing to third State status yet, at the same time, instituting a new and particular kind of third State status.[2] Nevertheless, when the European Council issued its guidelines for Brexit negotiations in April 2017, it reaffirmed its commitment to the principles already communicated in June 2016. For present purposes, and under the heading of "core principles" ("*principes fondamentaux"*), it was underlined that "[p]reserving the integrity of the Single Market excludes participation based on a sector-by-sector approach".[3] The European Council therefore "welcome[d] the recognition by the British Government that *the four freedoms of the Single Market are indivisible* and that there can be no 'cherry picking'".[4]

The logic behind that statement had two principal dimensions. First, it was asserted that "[a] non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same

1. Statement following Informal meeting at 27, Brussels, 29 June 2016, para 4.
2. See e.g. Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, 2019/C 66 I/02, para 5: "[t]he period of the United Kingdom's membership of the Union has resulted in a high level of integration between the Union's and the United Kingdom's economies, and an interwoven past and future of the Union's and the United Kingdom's people and priorities. The future relationship will inevitably need to take account of this unique context. While it cannot amount to the rights or obligations of membership, the Parties are agreed that the future relationship should be approached with high ambition with regard to its scope and depth, and recognize that this might evolve over time. Above all, it should be a relationship that will work in the interests of citizens of the Union and the United Kingdom, now and in the future".
3. European Council (Art. 50) guidelines for Brexit negotiations, 29 April 2017, para 1.
4. Ibid (emphasis added).

benefits as a member".[5] Taken on their own terms, perhaps those words contributed to stoking a belief that the indivisibility of the four freedoms is an entirely political choice, the consistent adherence of the Union to which in the months that have followed suggesting an obstructiveness pitched on a spectrum of explanation from insecurity through tactical gameplaying, to brash retribution on the part of the Union institutions. Choice of words is always important and perhaps "non-divisibility'[6] or "inseparability" would have had less theological resonance. Consciously or subconsciously, it is also interesting that the concept of indivisibility is spoken of in the context of the *Single Market* even though that phrase appears nowhere now in the EU Treaties. The Treaty-matched language of the "internal market" is used throughout the Draft Withdrawal Agreement with just one notable exception: where express reference is made to the necessity of protecting "the *integrity* of the *single* market".[7] We might also speculate about whether a commitment to indivisibility both so immediate and so sustained would have materialized had a Member State with a smaller economy than that of the UK been the first user of the Article 50 TEU withdrawal process.

But a second dimension of the European Council's logic must also be considered. In the same part of the guidelines for Brexit negotiations, it was also underlined that "[t]he Union will preserve its autonomy as regards its decision-making as well as the role of the Court of Justice".[8] Here, we sense the entanglement of legal and political factors in the Union context. Does this then mean that, contrary to the "obstructiveness" critique, the "indivisibility" of the four freedoms has a legal as well as a political character? Is it, in other words, a principle of EU law? And how would we know?

The basic architecture of what he refers to as the "process of discovery" of principles of EU law can be drawn from Tridimas, who characterizes general principles, more particularly, as "fundamental propositions of law which

5. Ibid.

6. Though for a different purpose, note the concepts of economic non-divisibility, technical non-divisibility and legal non-divisibility of standards developed by Bradford, "The Brussels Effect", 107 *Northwestern University Law Review* (2015), 1, 17–19; discussed by Scott, "The global reach of EU law" in Cremona and Scott (Eds.), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (OUP, 2019), pp. 21, 32–35.

7. Draft Withdrawal Agreement, 5 Dec. 2018 (O.J. 2019, C 66 I/01, 1), Protocol on Ireland/Northern Ireland, Annex 2, Art. 6(1): "[b]y way of derogation from Articles 170 to 179 of the Withdrawal Agreement, Article 6(1) of the Protocol and Article 2 of this Annex, in case of non-compliance by the United Kingdom with the obligations set out in Articles 1, 3 and 4 of this Annex with respect to goods and products from third countries, the Union may, where it considers this necessary to protect the integrity of the single market, impose tariffs or other restrictions on the movement of the relevant goods into or out of the customs territory of the Union. These goods shall not be considered as being within the scope of this Annex, as set out in Article 1(1)".

8. European Council (Art. 50) guidelines for Brexit negotiations, 29 April 2017, para 1.

underlie a legal system and from which concrete rules or outcomes may be derived".[9] A general principle of law may "transcend specific areas of law and underlie the legal system as a whole" and it must "[enjoy] a minimum degree of recognition by a relevant constituency e.g. the courts, *or the political actors*, or the citizenry, *or the constituent members of a supra-national legal order*".[10] General principles of law may be derived "from specific rules *or from the legal system as a whole*".[11] But they "must express a *core value* of an area of law or the legal system as a whole".[12]

In the specific context of EU law, Tridimas observes a distinction between two kinds of general principle. First, there are "principles which derive from the rule of law".[13] Such principles can be relevant irrespective of the kind of legal order in question. Concepts such as proportionality or legal certainty or fundamental rights are relevant to national legal orders and to the transnational legal order of the ECHR as well as to the supranational legal order of the EU. They possess, in that sense, a non-specific quality. For the protection of fundamental rights, Article 6(3) TEU captures the conventional sources of general principles of EU law: first, international instruments to which the Member States are signatories (here, the ECHR) and, second, the "constitutional traditions common to the Member States". For example, establishing that non-discrimination on grounds of age constitutes a general principle of EU law, the Court stated in *Mangold* that while the purpose of Directive 2000/78 is "to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation, the source of the actual principle underlying the prohibition of those forms of discrimination [is] found . . . in various international instruments and in the constitutional traditions common to the Member States. The principle of non-discrimination on grounds of age *must thus be regarded as a general principle* of [Union] law".[14]

9. Tridimas, *The General Principles of EU Law*, 2nd ed. (OUP, 2006) p. 1. See also the typology of general principles developed in Simon, *Le système juridique communautaire*, 1st ed. (Presses Universitaires De France, 1998).

10. Tridimas, op. cit *supra* note 9, p.1 (emphasis added).

11. Ibid. (emphasis added).

12. Ibid. (emphasis added).

13. Ibid. p. 4.

14. Case C-144/04 *Mangold*, EU:C:2005:709, paras. 74–75 (emphasis added). Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L 303/16. The "discovery" of age discrimination as a general principle in *Mangold* was controversial, especially because of its implications for *de facto* reach of Directive 2000/78 into private employment relationships. See e.g. Editorial Comments, "Horizontal direct effect – A law of diminishing coherence?" 43 CML Rev. (2006), 1; O'Cinneide, "The Uncertain foundations of contemporary anti-discrimination law", 11 *International Journal of Discrimination and the Law* (2011), 7.

If the indivisibility of the four freedoms is a principle of EU law, it would, however, belong in the second category of general principles that Tridimas examines i.e. "systemic principles which underlie the constitutional structure of the [Union] and define the [Union] legal edifice".[15] In a similar sense, Cremona investigates the "structural principles" of EU law, "structural in the sense of *defining and being inherent to the deep structure of the EU*".[16] She identifies a "specific function" for such principles with respect to the structuring of relations between the Union and third States: "[t]his is both internal and external in effect. Internal in the sense of structuring internal processes (*how decisions are made*). External in the sense that *the legal particularities of the EU as an international actor*, e.g. joint participation of EU and Member States in mixed agreements, or the status of international law within the EU legal system, find their source in these principles".[17] The principle of sincere cooperation provides a good example of this second understanding of general principles of EU law. It is now reflected in Article 4(3) TEU, which requires that "the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties". Importantly, in contrast to the non-specific character of "rule of law" general principles, systemic or structural principles of EU law are "bespoke" constructs. It does not matter that they do not find reflection in other international instruments or in the constitutional traditions common to the Member States; they are "of" the Union as much as they are "for" it.

Indivisibility of the four freedoms satisfies the criteria we have outlined thus far. It underlies the legal system of the EU. It enjoys a degree of recognition by the constituent members of the EU legal order. It has both internal and external effect, demonstrably constraining the scope of Union options in its pre-external relations with the UK in the latter respect. The key to understanding *why* it has such effects lies in the fact that the UK Government "indicated that it will not seek *to remain in* the Single Market, but would like to pursue an ambitious free trade agreement with the European Union".[18] The European Council responded in kind, agreeing that "[a]ny free trade agreement should be balanced, ambitious and wide-ranging. It cannot

15. Tridimas, op. cit. *supra* note 9, p. 4.

16. Cremona, "Structural principles and their role in EU external relations law", in Cremona (Ed.), *Structural Principles in EU External Relations Law* (Hart, 2018), pp. 3, 15 (emphasis added).

17. Ibid., p. 16 (emphasis added).

18. European Council (Art. 50) guidelines for Brexit negotiations, 29 April 2017, para 19 (emphasis added).

however, *amount to participation in the Single Market or parts thereof*, as this would undermine its integrity and proper functioning".[19]

In other words, participating or remaining "in" the Single Market is categorically and qualitatively different from enjoying access "to" it.[20] It marks the difference between *movement* and *free* movement across State borders; between "the *principle* of free movement" that distinguishes the Single Market and the "targeted removal of barriers to trade" that characterizes free trade agreements.[21] Now, there may well be political reasons or advantages for entrenching these distinctions. But there are legal reasons for it too. These lie in the conception of the Single Market in the Treaties (the *foundational* dimension of the claim); in the practical implications that have grown from it (the *functional* dimension of the claim); and in the nature of the law wrapped around but also pulsing through it (the *systemic* dimension of the claim).

First, on the conception of the Single Market in the Treaties, Article 3(3) TEU states that "[t]he Union shall establish an internal market". Article 26(2) establishes that "[t]he internal market shall comprise an area without internal frontiers *in which the free movement of goods, persons, services and capital is ensured* in accordance with the provisions of the Treaties". This provision is a necessary if insufficient starting point for the claim to indivisibility. It is important to remember that "indivisible" does not mean "identical". Aspects of the Treaty provisions that elaborate the four freedoms differ: compare, for example, the legitimate derogations from free movement addressed in Articles 36 (goods), 45(3) (workers), 61 (services) and 65 (capital); or the fact that Article 63(1) alone encompasses restrictions on free movement (of capital) between Member States but also between Member States and third

19. Ibid. para 20 (emphasis added); further reflected in the Recommendation for a Council Decision authorizing the Commission to open negotiations on an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, COM(2017)218 final: "In accordance with the European Council guidelines, the following core principles will apply equally to the negotiations on an orderly withdrawal, to any preliminary and preparatory discussions on the framework for a future relationship, and to any form of transitional arrangements . . . Participation in the Single Market requires the acceptance of all four freedoms".

20. A distinction further illustrated by the fact that "any transitional arrangements require the United Kingdom's *continued participation in* the Customs Union and the Single Market (*with all four freedoms*) during the transition" (Annex to the Council Decision supplementing the Council Decision of 22 May 2017 authorizing the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union, 29 Jan. 2018, XT 21004/18, para 16, emphasis added).

21. Internal EU27 preparatory discussions on the framework for the future relationship: "Regulatory issues", TF50 (2018) 32 – Commission to EU 27, 21 Feb. 2018.

countries. Rather, the Brexit process illuminates precisely the *structural* quality of indivisibility highlighted earlier.

Second, the practical realities of the Single Market agitate for indivisibility in order that it can *function* effectively as well as efficiently. The four freedoms are interconnected in essentially unquantifiable instances of intra-EU trade on a daily basis. Breaking every step of every transaction into its component freedom parts is neither desirable nor always even possible.[22] It is all the more inconceivable in the Union's frontier spaces, which transcend national boundaries in lived experience as much as in geography. Barnard has suggested that "[t]he single market is totemic in the minds of its proponents. It must remain untouched and defended at all costs. Such a purist view is wholly comprehensible when seen from the institutions in Brussels and Strasbourg. The real world is different".[23] But the "real world" provides one of the strongest rationales for legal protection of the principle of indivisibility. In this respect, Edward challenges the perception "in Britain at least . . . that freedom of movement of goods ('trade') is severable from the other freedoms" as "economic and practical nonsense":

> "Goods do not float across frontiers on magic carpets. They are transported, usually on lorries driven by 'persons', whose employers are providing 'services' in the form of transport. The sale and purchase of the goods will often have been arranged by salesmen or agents crossing frontiers ('persons' or 'services') or operating from a local branch office or subsidiary ('establishment'). Nowadays, where the goods consist of complex machinery or components, they will be accompanied to their destination by technicians or fitters ('persons' providing 'services'). The goods must be paid for, and this is straightforward because restrictions on payments between Member States are prohibited ('capital and payments')."[24]

He therefore stresses that "[i]t is not 'intransigence' to insist that the package is indivisible and not open to 'cherry-picking'".[25]

When we join the foundational claim to the functional claim, the package of freedoms created not in general but by and for the Union specifically is what comes to the fore. In that light, the mandate to create an internal market in

22. See e.g. Hojnik, "The servitization of industry: EU law implications and challenges", 53 CML Rev. (2016), 1575.

23. Barnard, "Brexit and the EU internal market" in Fabbrini (Ed.), *The Law and Politics of Brexit* (OUP, 2017) pp. 201, 217.

24. Edward, "The lessons of Brexit", in Lenaerts, Bonichot, Kanninen, Naômé and Pohjankoski (Eds.), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas* (Hart Publishing, 2019, forthcoming) pp. 339, 344.

25. Ibid.

Article 3(3) TEU must, like any other objective assigned to the Union, be read against Article 3(1): that "[t]he Union's aim is to promote peace, its values and the well-being of its peoples". In that light, the Single Market is not just about maximizing economic or functional efficiency. It is also about how the benefits achieved through its existence are distributed and shared, and about what is created through participating in the cooperative processes that deliver them. It simply does not matter, then, that *a* single market can be conceived on a basis other than the indivisibility of these four freedoms. It does not matter that the free movement of persons might be less central to the creation of other markets, or indeed that it was less central in the conception of the EU market compared to the other freedoms; that a framework to facilitate the free movement of workers was something of a compromise, balancing out for some of the original Member States the more obvious advantages in trade in goods enjoyed by others. It does not matter that the services sector is utterly unrecognizable in the modern world compared to anything that could have been envisioned in the 1950s. Nor does it matter that temporary divisibility of the single market was effected both by the transition periods for implementation in the original EEC Treaty and in accession arrangements put in place since then.[26] These situations, which concern only the internal functioning of the Single Market, were impermanent by very definition.[27] More substantively, they constitute derogations from the expectations set by the Treaty; they do not entirely dissolve these expectations.

Third, the *system* of law that constitutes, regulates, supervises and enforces the Single Market is, in turn, "indivisible" from it. In *Wightman*, the Court restated the profile of the EU legal order that has its origins in *Van Gend en Loos* and found more contemporary reflection in Opinion 2/13, *ECHR*.[28] That legal order is premised on the "autonomy of EU law with respect both to the law of the Member States and to international law", which in turn:

26. Barnard suggests that the original transition periods indicate that "[a]t no stage was there a suggestion that the four freedoms were intimately linked and interconnected and so could not be liberalized in different stages", Barnard op. cit. supra note 23, pp. 201, 203. On the example of post-accession transitional regimes that place temporary restrictions on the free movement of persons for workers, but not with respect to establishment or services, see Dougan, "The institutional consequences of a bespoke agreement with the UK based on a 'close cooperation' model", commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee (May 2018), 39.

27. The idea of "permanent safeguard clauses" was included as part of the negotiating framework for the accession of Turkey to the Union; for criticism in terms of their compatibility with EU law, see Hillion, "Negotiating Turkey's Membership to the European Union: Can the Member States do as they please?" 3 EuConst (2007), 269.

28. Case 26/62, *Van Gend en Loos*, EU:C:1963:1; Opinion 2/13, *ECHR Accession*, EU:C:2014:2454.

> " . . . is justified by the essential characteristics of the European Union and its law, relating in particular to the constitutional structure of the European Union and the very nature of that law. EU law is characterized by the fact that it stems from an independent source of law, namely the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to *a structured network of principles, rules and mutually interdependent legal relations binding the European Union and its Member States reciprocally as well as binding its Member States to each other*."[29]

The centrality of the Single Market within that system – essentially, why membership of the Single Market is so bound up with membership of the Union itself – can already be seen in Opinion 1/91 on the compatibility of the draft EEA Agreement with the EEC Treaty. There, the Court determined that "as far as the [Union] is concerned, the rules on free trade and competition, which the agreement seeks to extend to the whole territory of the Contracting Parties, *have developed and form part of the Community legal order*, the objectives of which go beyond that of the agreement".[30] Moreover, "the objective of all the [Union] treaties is to contribute together to making concrete progress towards European unity", which means that "the provisions of the [TFEU] on free movement and competition, far from being an end in themselves, are only means for attaining those objectives".[31] In that light, the purpose of the Court of Justice is "to secure observance of a particular legal order *and to foster its development with a view to achieving*" the broader objectives of the Union – of which, once again, "free trade and competition are merely means of achieving those objectives".[32]

As the case law on the EEA Agreement demonstrates, the closer to Single Market membership that any accord between the Union and a third State edges, the more difficult it is to sidestep the burdens as well as the benefits of such membership. In such circumstances, it is more likely that the agreement could threaten the autonomy of the Union and of EU law. In Opinion 2/13, *ECHR*, the Court restated this understanding of things all the more forcefully, considering that "[t]he pursuit of the EU's objectives, as set out in Article 3

29. Case C-621/18, *Wightman*, EU:C:2018:999, para 45 (emphasis added); referring to Case C-284/16, *Achmea*, EU:C:2018:158, para 33.

30. Opinion 1/91, *EEA (I)*, EU:C:1991:490, para 16 (emphasis added).

31. Ibid., paras 17–18.

32. Ibid., para 50 (emphasis added).

TEU, is entrusted to a series of fundamental provisions, *such as those providing for the free movement of goods, services, capital and persons*, citizenship of the Union, the area of freedom, security and justice, and competition policy. Those provisions, *which are part of the framework of a system that is specific to the EU*, are structured in such a way as to contribute — each within its specific field and with its own particular characteristics — to the implementation of the process of integration that is the *raison d'être* of the EU itself".[33] In contrast, where an arrangement with a third State is based on "merely" a free trade agreement, such arrangements do not imply the need to interpret EU law or call into question the EU's regulatory (internal market) autonomy.[34] There are certainly legitimate questions to ask about the (extent of the) self-referential character of the EU legal order that results from its autonomy impetus, and about how principles that enhance the functioning of the Union then become somehow part of its inherent legal essence. But it is how the system of the Union has developed.

The critical link reproduced by the European Council in its guidelines for Brexit negotiations – between the indivisibility of the four freedoms, on the one hand, and the system of EU law as defined by its autonomy and its purpose, on the other – has shaped the entire edifice of Union thinking on the implementation of Article 50 TEU process. It has framed, for example, the Commission's preparatory discussions on the framework for the future relationship. In that respect, and first reflecting the functional dimension of indivisibility, slides published on the options for future trade in services refer to the "[i]ndivisible four freedoms: goods, services & establishment, capital, persons (*all relevant to provision of services*)".[35] In the same presentation, addressing the systemic dimension, the single market for services is described as "an integrated regulatory area", which is itself the consequence of "pooled sovereignty" – highlighting the responsibility side of the sovereignty coin deployed in *Wightman*. The Single Market area is further defined by the (possibility of) harmonized rules that stems from positive integration alongside the restriction-based safety net provided by negative integration, all cushioned by the principle of mutual recognition. Legislation can take effect on the basis of qualified majority voting. Furthermore, while the Single Market is primarily implemented and enforced through national laws and procedures, compliance with EU law is ultimately overseen and/or enforced by the Commission, by EU regulatory agencies, by national authorities, and by

33. Opinion 2/13, *ECHR Accession*, para 172 (emphasis added).
34. E.g. Opinion 1/17, *CETA*, EU:C:2019:341.
35. Internal EU27 preparatory discussions on the framework for the future relationship: "Services", TF50 (2018) 28 – Commission to EU 27, 6 Feb. 2018 (emphasis added).

what the Commission refers to as "cooperation networks". The primacy and direct effect-primed system of judicial enforcement is also critical.[36]

It is not just, then, the UK's decision to end its reciprocal commitment to the free movement of persons that would undermine the integrity of the Single Market from the perspective of the Union. It is just as much its desire to retract regulatory autonomy more generally and to elude the jurisdiction of the Court of Justice. It is also not just about the UK. The reflection process necessarily triggered by Brexit has also, for example, reinforced the sense that, from the Union side, its existing arrangements with Switzerland need to be reconsidered in terms of a governance "upgrade" before "further market access" should be contemplated.[37]

No language captures the legal dimension of indivisibility as well as the Commission has itself, in its statement that "Union policies and actions, including the Internal market with its four freedoms, form *a unique ecosystem underpinned by instruments and structures that cannot be separated from each other*".[38] The Commission's "ecosystem" construct aligns with the autonomy-driven template for understanding the EU legal order that has evolved through the case law of the Court of Justice. Crucially, it communicates not just entanglement but also inter-dependency. In that light, the ostensibly political view that "[a] third country cannot have the same rights and benefits as a member of the Union, as it does not live up to the same obligations" displays also its legal content.[39] It is true that the Union has "a strong political imperative to ensure that any agreement it might reach with a third country does not pose an external threat to the smooth functioning, underlying cohesion or indeed very legitimacy of the Union's own ecosystem".[40] But the interconnectedness of these dimensions is exemplified by the statement that the idea of cherry-picking engenders a "risk for integrity and distortions to proper functioning of internal market, aggravated by [the] absence of [the] full EU 'ecosystem' (including regulatory, supervisory, enforcement tools, with [the Court of Justice] on top)".[41]

36. On the role of the Court of Justice in this respect, see e.g. Opinion 1/91, *EEA (I)* para 35; on the role, and responsibilities, of Member State courts and tribunals, see e.g. Opinion 2/13, *ECHR Accession*, paras. 173–176.

37. Internal EU27 preparatory discussions on the framework for the future relationship: "Regulatory issues", cited *supra* note 21.

38. Ibid. (emphasis added). See similarly e.g. Internal EU27 preparatory discussions on the framework for the future relationship: "Mobility", TF50 (2018) 31 – Commission to EU 27, 21 Feb. 2018.

39. Internal EU27 preparatory discussions on the framework for the future relationship: "Regulatory issues", cited *supra* note 21.

40. Dougan, op. cit. *supra* note 26, 39.

41. Internal EU27 preparatory discussions on the framework for the future relationship: "Regulatory issues", cited *supra* note 21.

The Commission also points to the responsibility of the Union not to undermine relations with EEA States i.e. with non-EU Member States who *do* participate in the Single Market, paying an agreed price that involves the ceding of their own autonomy to some extent, for their own reasons.[42] And it should not be forgotten either that the Union has responsibilities – including legal responsibilities – to the remaining 27 Member State participants in the Single Market, if one recalls that "EU law is . . . based on the fundamental premiss that *each Member State shares with all the other Member States*, and recognizes that they share with it, *a set of common values on which the EU is founded,* as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognized, and therefore that the law of the EU that implements them will be respected".[43] The principle of mutual trust "is not applicable in relations between the Union and a non-Member State".[44] In contrast, the commonality on which membership of the Union rests – and on which EU law rests in turn – is itself legally meaningful. In the complex web of relations that spans the Union, the principle of sincere cooperation travels in multiple directions.

Ultimately, the act of completing the inherently iterative "process of discovery" of indivisibility as a principle of EU law will fall to the Court of Justice. That is how it fulfils its Article 19(1) TEU mandate to ensure that "the law is observed". But that process is one of confirmation rather than creation. Therefore, the fact that the Court has not yet been asked to confirm indivisibility of the four freedoms as a principle of EU law does not call its characterization as such into question. The EU "ecosystem" is patently a dynamic system. Observing events since 2016, but also taking account of the roots of the responses to them that were sown long beforehand, the more difficult task would now be to explain why indivisibility is *not* a principle of EU law. The fact that it *also* has political and economic dimensions does not detract from that assessment.

However, we should remember too that a principle of EU law is for life, and not just for Brexit. If the indivisibility of the four freedoms is "discovered" as a principle of EU law, where and how will the line between participation *in* the Single Market and access *to* it ultimately be drawn beyond the specific challenges and circumstances of charting a future relationship with the UK? In particular, will indivisibility (have to) manifest more explicitly and more

42. Their special position has also been acknowledged by the European Parliament, which has resolved that "a third country must not have the same rights and benefits as a Member State of the European Union, or a member of the European Free Trade Association (EFTA) or EEA" (European Parliament, resolution of 14 March 2018 on the framework of the future EU-UK relationship, 2018/2573(RSP), para 4).

43. Case C-284/16, *Achmea*, para 34.

44. Opinion 1/17, *CETA*, para 129.

consistently as a legal limit on political initiative – and to what constraining effects – for external agreements between the Union and third States; with respect to trade but also for critical Single Market-proximate sectors such as energy? It is clear that legal tools engaged and enhanced for managing Brexit have a longer history in EU law than Brexit itself. But we should not forget that they have a future there too.