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The Competence to Create an Internal Market: Conceptual Poverty and Unbalanced Interests

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INTRODUCTION

THE MEASURES TAKEN by the EU to create an internal market continue to be among the most impactful, politically inflammatory, and contentious of all its actions. The internal market is defined in Article 26 TFEU as an area of free movement for persons, capital, goods and services and all of these factors of production have revealed themselves to touch on matters of extreme national sensitivity: from early debates over the undermining of product standards and the consequences for national food cultures,[1] through fiercely fought battles over the impact of free movement of services on the welfare state,[2] to the Brexit phase, with a City of London desperately fighting to preserve its access to the capital and services market and where, most prominently, the free movement of workers has emerged as sufficiently contested to fragment and potentially explode the Union itself. Defining and using market competences in a way that attracts public and political support has become a matter of existential importance for the Union.

The role of the law in this is, at least, four-fold. First, it should be functional: it should have a clear and practical nature which allows it to be used for its

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[1] See H-C von Heydebrand und der Lasa, 'Free movement of foodstuffs, consumer protection and food standards in the European Community: has the Court got it wrong?' (1991) *European Law Review* 391.

[2] See eg G de Búrca (ed), *EU Law and the Welfare State* (Oxford, Oxford University Press, 2005); M Dougan and E Spaventa, *Social Welfare and EU Law* (Oxford, Hart Publishing, 2005); E Spaventa, 'Public Services and European Law: Looking for Boundaries' (2002) *Cambridge Yearbook of European Legal Studies* 271; G Davies, 'The Process and Side-effects of Harmonisation of European Welfare States' (2006) Jean Monnet Working Paper No 2/06; C Newdick, 'Citizenship, Free Movement and Healthcare: Cementing Individual Rights by Corroding Social Solidarity' (2006) 43 *Common Market Law Review* 1645; C Newdick, 'Disrupting the Community—Saving Public Health Ethics from the EU Internal Market' in J van de Gronden, E Szyszczak, U Neergaard and M Krajewski (eds), *Health Care and EU Law* (The Hague, Asser Press, 2011) 211.

purposes, and to achieve those purposes. Second, it should provide concepts and a framework which encourage substantively good results, by ensuring that relevant interests are adequately represented in the legal and legislative processes. Third, it should provide limits: the EU is a creature of conferred powers, and the legitimacy of those powers is partly dependent upon them being defined in a way that does not unduly undermine residual national competences and amount to an open-ended conferral. Fourth, the law should provide the basis for a legitimating discourse. It should contain principles and concepts which make evident that what is permitted or prohibited is so for good reasons. It should, in short, contain persuasive reasons for the scope of EU power.

These four functions are of course intertwined. They do not represent independent legal tasks for the Court or the legislator. Rather, they provide different perspectives from which to examine the law and consider whether it is doing its job well.

The suggestion in this chapter is that only the first task is done adequately. There is a generous mandate provided to the legislature to adopt rules, and relatively limited constraints on its functional freedom.[3] However, what the law does less well is provide balance, limits, or legitimating language. As the Court has interpreted them, internal market competences are overly focused on EU goals, and not enough on affected national interests;[4] they lack meaningful limits; and the law framing them displays a conceptual poverty which makes the internal market seem perhaps even more unbalanced than it is.

The chapter has three sections subsequent to this introduction. The next section considers what EU internal market competences are, and what matters are at stake in them. The following section considers how these have been interpreted, and the problems of this interpretation. The final section then concludes.

THE LEGAL BASIS OF INTERNAL MARKET COMPETENCES

Internal market competences have two aspects. On the one hand there are the legal bases allowing adoption of legislation, notably Article 114 TFEU, but also including several specific legal bases associated with particular aspects of freedom of movement, and allowing the adoption of harmonising or co-ordinating directives or regulations.[5] Many of these, and particularly Article 114, are relatively open and ambiguous in their wording: Article 114 allows legislation for measures whose object is the establishment and functioning of the internal market. That is a quite

[3] See S Weatherill, 'The Limits of Legislative Harmonisation Ten Years after Tobacco Advertising: How the Court's Case Law Has Become a Drafting Guide' (2011) 12 *German Law Journal* 828; A Dashwood, 'The Limits of European Community Powers' (1996) 21 *European Law Review* 113.

[4] G Davies, 'Democracy and legitimacy in the shadow of purposive competence' (2015) 21 *European Law Journal* 2.

[5] eg Arts 46, 48, 50, 52, 53, 59, 74, 75, 115 TFEU.

deliberate, and perhaps appropriate, deferral of difficult interpretative and applicatory decisions by the Member States in signing the Treaty. As often noted, they concluded an incomplete bargain, and left it to the EU institutions to complete it. The guarantee that the internal market would further develop in accordance with Member State wishes was not provided by substantive constraints on its scope, but instead by a legislative procedure and institutional structures which they clearly felt gave them, as states, sufficient continuing control.

What they may not have foreseen was that the Court of Justice would take such a central role.[6] Its interpretations of the legislative competences have become much more important than the Treaty text itself. In particular, it has determined that, broadly speaking, internal market legislative powers may only be used for measures which remove either obstacles to movement, or appreciable distortions of competition.[7]

This 'definition' of the internal market as an area without obstacles to inter-state movement or distortions of inter-state competition raises many issues, but what it also does is link the positive and negative competences of the EU.[8] For in order to understand what it means to remove an obstacle to movement we must have some definition of what such obstacles are, or perhaps of what it means to move freely. These definitions are found in the case law on free movement, those judgments in which the Treaty prohibitions on restrictions on movement of persons, services, capital or goods are given direct effect. This is a vast, and vastly discussed, body of law, which in defining free movement becomes part of the law on competence.[9]

It is also a body of law which in itself deserves to be seen as comprising an EU competence, the second aspect of the EU's internal market powers. For when courts apply the Treaty prohibitions to national measures they restrain national policies, and so limit the remaining competences of the Member States. The competence division between the EU and its Member States, the subject of this book, is not just determined by which directives and regulations the EU can adopt, but also by the extent to which its primary texts constrain national freedom of action. Both what EU law allows itself, and what it prevents in Member States, are part of the division of powers.

THE CONCEPTUAL BASIS OF THE INTERNAL MARKET

Both the legislative (positive) and negative competences of the EU rest on a small number of judicially developed concepts. Central is the idea of an obstacle to

[6] See G Davies, 'The European Union Legislature as an Agent of the European Court of Justice' (2016) 54 *Journal of Common Market Studies* 846.

[7] Case C-376/98 *Germany v Parliament and Council (Tobacco advertising)* EU:C:2000:544.

[8] G Davies, 'Can Selling Arrangements Be Harmonised?' (2005) 30 *European Law Review* 370.

[9] ibid. See for the law on free movement C Barnard, *Substantive Law of the EU*, 5th edn (Oxford, Oxford University Press, 2016); C Kaupa and F Weiss, *EU Internal Market Law* (Cambridge, Cambridge University Press, 2014).

movement, and a justified restriction on such movement. In addition, the Court uses the idea of undistorted competition. Finally it uses the ideas of subsidiarity and proportionality to provide limits to EU powers.

Alongside this are more procedural aspects of the law, such as the requirement for legislative impact assessment, the quality of evidence required both in such impact assessment and in assessing derogations,[10] the requirements of procedural correctness and the taking into account of the opinions of national parliaments.[11] These are all important legitimating factors which may well do much to save the internal market, but they are not considered in further depth in this chapter for the following reason: they are not to do with how the market itself is defined, but how choices about it are made. Assessing impact is important, but the prior question is which impacts matter. The question here is what kind of market the law imagines, rather than how the procedural aspects of creating it are supervised.

Nevertheless, the relationship between the procedural side of market-building and its substantive definition is more complex than the paragraph above suggests. For while one criticism made in this chapter is that certain interests are underplayed or ignored in market definition, these interests may well be represented in the political, and even in the administrative aspects of preparing legislation. The internal market may be a more rounded and justifiable creation than the law suggests. However, if that is the case, while it may offer encouraging avenues for justification, it does not defuse the critique that the law itself performs poorly, in that it does not in fact guarantee, nor explain, nor supervise, such a rounded representation of interests. It does not, in itself, tell a persuasive and justified story about the internal market.

THE MOST PERFECT MARKET: FULL HARMONISATION OR MANAGED DIVERSITY?

The legislative internal market competences may be used, the Court has found, for the removal of obstacles to movement or appreciable distortions of competition.[12] In pursuing these goals other interests should be taken into account, but those other interests do not provide independent justification for use of the legal base.[13] The case law since these ideas emerged has added many nuances and details to the law, concerning specific situations and problems, but the fundamental principles

[10] K Lenaerts, 'The European Court of Justice and Process-Oriented Review' (2012) 31 *Yearbook of European Law* 3; Case C-58/08 *Vodafone* [2010] ECR I-04999.

[11] M Zalewska and OJ Gstrein, 'National Parliaments and their Role in European Integration: The EU's Democratic Deficit in Times of Economic Hardship and Political Insecurity' (2013) Bruges Political Research Papers 28/2013; F Fabbrini and K Granat, '"Yellow Card, But No Foul": The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike' (2013) 50 *Common Market Law Review* 115.

[12] Case C-376/98, above n 7.

[13] ibid. See Davies, 'Democracy and legitimacy', above n 4.

remain. The primary purposes of any internal market legislation are one or both of the two above.

This interpretation of the Treaty is both too broad, and too narrow.

It is too broad because it allows in principle for the removal of almost all legislative differences between Member States.[14] Obstacles to movement have been persistently presented by the Court in primarily subjective terms: a measure is not analysed in the light of its global effects on economic activity or market structure but in terms of its consequences for the actors in the lawsuit in question.[15] As a result, almost all differences between legislation can, in some context, be regarded as creating obstacles to movement and be potentially harmonisable.[16] Similarly, the idea of a distortion of competition is understood to arise when regulatory burdens differ between states, but this is the default state of affairs where rules differ, rather than an exception.[17] Other than the essentially indeterminate limit of 'appreciability' the internal market is once again understood to entail the complete removal of regulatory difference.

The problem with this judicial understanding is that it suggests the internal market will be 'complete' when there are no differences in law left, since only in this situation would there be no obstacles or distortions in the sense that the law understands these ideas. Almost total homogeneity is implicitly, maybe even explicitly, the ideal to be pursued.

However, this is not an ideal: it is not a worthy goal for the European Union or its Member States and it does not correspond to a desire that is present to any significant extent among the public, or even among elites or politicians. A destination is sketched that almost no-one would in fact want to reach, for legal differences between Member States are widely regarded as desirable to at least a significant extent; they reflect the individual characters, preferences and circumstances of the state, as well as being expressions of autonomy per se. The capacity to make local choices is a democratic good in itself, quite independently of the additional good entailed in being able to match those choices to local needs and preferences. If a completed single market really entails legal homogeneity, then the EU should not strive for a completed single market, but rather for a more nuanced goal, for an optimal balance between market integration and other interests. The absoluteness of the Court's understanding is so at odds with good policy that it cannot reflect what was intended, and for that reason nor is it a plausible interpretation of the Treaty text.

[14] Weatherill, 'The Limits', above n 3; Dashwood, 'The Limits', above n 3. See also G Davies, 'Subsidiarity, the wrong idea, in the wrong place, at the wrong time' (2006) 43 *Common Market Law Review* 63.

[15] E Spaventa, 'From Gebhard to Carpenter: Towards a (non) economic European constitution' (2004) 41 *Common Market Law Review* 743; D Regan, 'An Outsider's View of "Dassonville" and "Cassis de Dijon": On Interpretation and Policy' in M Poiares Maduro and L Azoulai (eds), *The Past and Future of EU Law* (Oxford, Hart Publishing, 2010); *cf* G Davies, 'Understanding Market Access' (2010) 11 *German Law Journal* 671.

[16] Davies, 'Subsidiarity', above n 14.

[17] ibid.

Moreover, the idea that the most perfect or complete market is the most legally homogenous one is open to critique even on market or economic grounds. First, harmonising law does not create competitive equality if the background conditions are different. Where economic actors are subject to many rules and burdens, harmonising just a few of these does not necessarily make for a more level playing field. It may do, possibly, but the effects of measures and of harmonisation can only be assessed in their complete context. Given how widely the background conditions for business in European states vary—not just the laws, but the costs, the quality of infrastructure, the availability of personnel, business cultures, distance from relevant markets, tax levels, and so on—a piecemeal approach to harmonisation is hard to explain or justify. It looks far more like an authorisation to respond to ad hoc political lobbying than a pathway to a better market. Even if harmonisation were carried to the extreme of uniform European law, this would not create some ideal or perfect market. It would simply entrench advantages created by natural circumstances, social and behavioural differences, or other non-legal factors.

In practice, of course, total harmonisation is completely unrealisable anyway,[18] making the harmonisation programme even harder to explain, for selective harmonisation of law surely has little to do with creating competitive equality except in the most particular circumstances. What is required is a means of identifying those particular circumstances, the ones where harmonisation does level the playing field rather than just moving its bumps. The idea of a 'distortion' is intended to capture this, referring pejoratively as it does not just to differences, but to those whose elimination would enhance equality. However, nothing in the law provides the basis for an enforceable distinction between difference and distortion. There are of course economic theories on this, but they are both contested and narrow.[19] Economic models of undistorted competition use a more limited vision of what factors are relevant to making competition beneficial than this chapter argues should be the case. They may contribute to thinking about what should be harmonised, but they do not answer the question alone.

Second, diversity of law is one of the fuels of European economic activity. Local law, reflecting local circumstances, is more likely to be locally optimal, and also allows for experiment and change on a local level. Both the fact of local control over the shape of regulation, and the fact of being able to compare and contrast it with what the neighbours do, is likely to make a contribution to economic and social vibrancy.

When law is harmonised, the burden of adaptation to difference is transferred from individuals to jurisdictions. Instead of a business having to take account of

[18] S Weatherill, 'Harmonisation: how much, how little?' (2005) 16 *European Business Law Review* 533; G Teubner, 'Legal Irritants: Good Faith in British law or How Unifying Law ends up in New Divergences' (1998) 61 *Modern Law Review* 11.

[19] R Van Der Laan and A Nentjes, 'Competitive Distortions in EU Environmental Legislation: Inefficiency versus Inequity' (2001) 11 *European Journal of Law and Economics* 131.

different rules in another state, it is the state itself which must adapt to those differences, by bringing its own laws into line with an agreed common model. There is no particular reason to think that it is always more desirable or efficient to put the burden entirely on the state and never on the economic actors. Indeed, they are ultimately one and the same: almost all citizens are consumers, and all consumers are economic actors.[20] The real question is how we should adapt to the fact of difference with our neighbours: as individuals, or collectively. The presumption that collective adaptation is inherently better has no obvious basis. Either form of adaptation represents a cost that must be absorbed in the goal of cross-border business, but which form entails the best cost-benefit outcome is likely to be complex and case-specific.

More concretely, this means that harmonising as many laws as possible is unlikely to be a recipe for maximum economic activity or vibrancy. We might end up with a market which was more perfect in a certain legal formal sense, but was in fact less active, and in which even cross-border trade was reduced because of this. One may make a comparison with a team of workers: each may have their own style of work, and getting the best out of them will require giving them a certain freedom of action and choice. Yet getting the most out of the team as a whole requires facilitating their co-operation, which may require adopting certain common patterns and methods. Yet even getting such patterns and methods to be adopted may be difficult—it may happen more effectively if the level of compulsion is low, and individuals are induced to learn from and listen to each other, rather than if rules are simply laid down. Hence the optimal team is not one in which there is a maximum degree of commonality, nor a maximum degree of agreed rules, but rather one with an optimal balance between diversity, commonality, compulsion, and liberty. How that balance is arrived at is the art of management, but it will be at least to some extent context-specific: that means there will be no universal formula.

So in the internal market: a market which increases wealth, and in which trade and even cross-border trade is maximised and becomes easier and more usual, is not simply one in which there is the most intense framework of common regulation, but rather one in which the optimal culture- and context-specific balance of commonality, difference, compulsion and liberty is achieved. The ideal expressed in the law should not be that uniformity is good and necessary, but that the EU is committed to finding the best balance between uniformity and difference, not just in the name of diversity as such and non-economic interests, but even in the name of the market itself: the best, most complete, market is not the most legally homogenous, but the one in which social, cultural, economic and other conditions encourage economic actors to look easily and comfortably across borders. Just as self-confidence may facilitate relationships, autonomy at home may, by giving the self-confidence to face the world, facilitate trade.

[20] See G Davies, 'The consumer, the citizen and the human being' in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law* (Oxford, Hart Publishing, 2016) 325.

What the law should seek to express is then the search for the right balance, not a unidirectional march towards ever more uniformity.[21] The best, and therefore the proper, understanding of the competence to create an internal market is that the EU is authorised to adopt rules which seek to enhance our economic openness to each other. This will entail taking account of the importance of local autonomy for creating economic success and actors with the capacity and desire to act internationally, as well as the importance of a legal framework which minimises the practical difficulties that they should have, and a search for the right balance between these when they conflict. The law should seek to voice and express the ways in which autonomy and difference can enhance the market and the capacities of its actors, as well as the ways in which uniformity can do so, so that the legislature can locate and debate their choices within a convincing legal framework.

WHAT PLACE FOR NATIONAL INTERESTS IN INTERNAL MARKET COMPETENCES?

Existing law does not go far along this path. It has little language to explain the distinction between desirable and undesirable differences. *Keck* was a hesitant step in that direction, with its half-presumption that rules concerning circumstances of sale, rather than product features, are likely to have a socio-economic importance that outweighs any impact on trade.[22] However, the Court has never really developed its first thoughts, and its use of the idea of selling arrangements has been intermittent and half-hearted, and in recent years it seems to want to marginalise their role in the law, without ever formally overruling *Keck*.[23] There was here the opening for serious thoughts about the kinds of rules that are presumptively desirable to remove in the name of trade, and about the kind of national interests that are at stake, but those thoughts never came. Hence there simply is no voice given in the law to the importance of national autonomy and diversity to social and economic success and to the success of a pan-European market.

A somewhat similar pattern is visible in the law concerning derogations from free movement. These are important to the division of competences in two ways.

[21] See M Dani, 'Rehabilitating Social Conflicts in European Public Law' (2012) 18(5) *European Law Journal* 621; F De Witte, 'Transnational Solidarity and the Mediation of Conflicts of Justice in Europe' (2012) 18(5) *European Law Journal* 694; M Everson and C Joerges, 'Reconfiguring the Politics-Law Relationship in the Integration Project through Conflicts-Law Constitutionalism' (2012) 18(5) *European Law Journal* 644; G Davies, 'Free movement, quality of life, and the myth that the Court balances interests' in P Koutrakos, N Nic Shuibhne and P Syrpis, *Exceptions from Free Movement Law* (Oxford, Hart Publishing, 2016) 214.

[22] Joined Cases C-267 and 268/91 *Keck and Mithouard* EU:C:1993:905.

[23] P Pecho, 'Good-Bye Keck?: A Comment on the Remarkable Judgment in Commission v Italy, C-110/05' (2009) 36 *Legal Issues of Economic Integration* 257; T Horsley, 'Annotation' (2009) 46 *Common Market Law Review* 2001–2019; E Spaventa, 'Leaving Keck behind? The free movement of goods after the rulings in Commission v Italy and Mickelsson and Roos' (2009) 24(6) *European Law Review* 914; P Wenneras, 'Selling arrangements, keeping Keck' (2010) 35(3) *European Law Review* 387.

For one, they demarcate the extent to which national policies can be defended against the Treaty prohibitions, showing the limits to national competence. However, they are also important to legislative powers, as the way that these derogations are described in the law is relevant to the role that they should be accorded in compiling legislation.[24] Are the interests at stake matters to be taken more or less seriously, to be harmonised as fully as possible, or to be left to national discretion?

The starting point for the Court when adjudicating on either 'mandatory requirements' or Treaty derogations is that they should be interpreted restrictively, because they represent limitations on the fundamental freedoms of Europeans.[25] A restriction on free movement involves a Member State pleading special interests in order to deprive a European of the freedoms that are part of their legal 'heritage' and so this must be strictly supervised and regarded as exceptional.[26]

This has a certain rhetorical grandeur, but is substantively nonsense. When national laws conflict with free movement there is substantive legitimacy on both sides. One can equally phrase the situation as free movement law restricting the choices made by democratic processes within the national constitutional order. Respect for national constitutional orders,[27] for substantive subsidiarity, and for democracy entails that free movement must in such a situation be interpreted restrictively.

Certainly, there seems little to be gained from a rhetorical battle to see whether it is national democratic choices or free movement which can be phrased in ways seeming to give them the most legitimacy. However, the Court's choice to put one side of the conflict on a high moral ground while the other is then treated as implicitly less important does not seem to rest on any objective view of what might give rules or policies legitimacy or moral weight. Rather than interpreting restrictions restrictively, they should simply be interpreted fairly: the interests represented should be respected, albeit not misused. A derogation is something that is regarded as more important than the policy derogated from, not less: that is what makes it a derogation.

In treating the derogations as matters to be reluctantly tolerated,[28] the Court assumes a particular role, as an agent of the EU, rather than an adjudicator for the body of Europe as a whole.[29] As in other federal systems, there are states' rights and states' interests, and there are federal competences and interests, and the logical function of the Court of Justice as an adjudicator between these, serving neither, and with no interest in one more than the other.[30] The Treaties have traditionally

[24] Davies, 'Can Selling Arrangements?', above n 8.

[25] Case 41/74 *Yvonne van Duyn v Home Office* EU:C:1974:133.

[26] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1.

[27] Art 4 TEU.

[28] See Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* ('Cassis de Dijon' case) EU:C:1979:42 para 8; national measures protecting certain interests 'must be accepted'.

[29] See Davies, 'Subsidiarity', above n 14.

[30] ibid.

regarded it differently, however: until Lisbon it was entrusted, with the other institutions of the EU, with the purposes of the EU, almost an invitation to treat EU law as a mission to be pursued and national laws and policies as matters to be pushed as far as possible to the side.[31] That particular entrustment clause has now been softened somewhat: the new Article 13 TEU provides that Union institutions should serve its interests but also those of the Member States. On the other hand, it still provides that the institutions, including the Court, should seek to advance the objectives of the Union, without any parallel provision for the Member States. Could one imagine the American Supreme Court being commanded to advance the objectives of the Federal government? In any case, it is hardly controversial to say that the Court's judgments display a commitment to EU policies and goals that is not matched by a similar commitment to protecting and assisting national policies and goals.

Partly this may be explained by jurisdictional matters; the Court has no competence to interpret national law, only European.[32] However, a system such as the EU requires a court whose adjudicatory starting point is that both EU and national law must be interpreted with due respect for each other, neither more restrictively than the other, and the legitimate policies and competences of each must be protected from encroachment and hindrance by the other.[33] Of course, no-one would really deny this statement if forced to take a stand on it, but it is not the rhetorical or even substantive perspective which the Court has chosen to adopt. The result is relative under-prioritising of legitimate national concerns.

Yet despite all these ways in which national competence is squeezed while EU competences are interpreted broadly, there is another way in which internal market legislative competences can be seen as too narrow: in the goals that may be pursued.[34]

ESTABLISHING A DISEMBEDDED MARKET

For what does it mean to establish a functioning internal market? What is required? One can argue that it requires trust between communities, effective communication, perhaps a certain shared understanding and expectations. Cultural and educational similarities can make trade easier, as can a shared language. One can also certainly argue, and indeed it is fiercely argued by many in these days of permanent economic crisis, that a market without redistribution cannot truly work—that it will lead to stresses and inequalities that will ultimately destroy it or the fabric of the societies in which it is embedded. It may be that an internal market requires a

[31] Former Art 7 TEC.

[32] Case 6/64 *Flaminio Costa v ENEL* EU:C:1964:66.

[33] See T Horsley, 'Reflections on the Role of the Court of Justice as the Motor of European Integration: Legal Limits to Judicial Lawmaking' (2013) 50(4) *Common Market Law Review* 931.

[34] Davies, 'Purposive Competence', above n 4.

high degree of political and economic integration. To 'establish', it may be noted, implies creating a thing in a way that is solid and rooted. An established market is not a disembodied one, but one that is solidly connected with and rooted in its society.

Who should take such decisions about what market establishment requires? It seems evident that it must be the legislature, or the Member States, but not the Court of Justice, for the matters at stake are as intensely contested and political as can be. Surely in choosing to make Article 114 so open the Member States were deferring the interpretation of 'establishment and functioning' to the legislature, with the function of the Court being to guard outer limits, rather than to impose a particular view.

Yet in limiting the possible uses of this Article to only two, the Court does seem to be imposing a substantive interpretation of what a market is and requires. Suppose the legislature does take one of the mainstream views that establishing a functioning market entails, for example, shared values or redistribution. It would seem that the Court will not allow them to pursue this path with law.

It could be said that this is merely a functional, practical understanding of Article 114, limiting it to actually facilitating trade, rather than making it available for all the other things that a trading society may need. Surely such other policies, however important, should have their own legal bases? The principle of conferral would seem to support this kind of limited, technocratic approach to the Treaty.[35]

This presentation seems to give the Court's limited approach a sensible, neutral colour, as if all the other values at stake in a market are not being denied, but merely pushed to their proper legal place. However, there is nothing neutral about the proposition that establishing a market requires merely movement and competition. This is a particular political standpoint, and a very contentious one. It is close to what is commonly referred to in critique as 'neo-liberalism' and however vague and misused that term may be, it is hard to fully rebut claims that the EU is a neo-liberal project as long as its core competence is not permitted to be used in any other than a neo-liberal way: as long as establishing a market and making it function cannot include ensuring that it is embedded in wider society.[36]

For a market is not separate from its context. It is not a place where abstract contracts exist without contracting parties, but rather a place where parties, often individuals, contract. A functioning market, one can certainly suggest, means that not just the contracts but the contracting parties are functional: then the human, social, context in which a market exists is inseparable from the functioning of that market. Hence, many might say that a market which undermines social institutions or the quality of life is dysfunctional.[37] EU law would seem to disagree,

[35] Arts 4 and 5 TEU.

[36] See and *cf* J Caporaso and S Tarrow, 'Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets' (2009) 63 *International Organization* 593.

[37] ibid. G Davies, 'Internal market adjudication and the quality of life in Europe' (2015) 21(2) *The Columbia Journal of European Law* 289.

in that measures whose primary aim is making people or institutions market-resilient would not appear to fall within Article 114.

It is, admittedly, possible that such measures could be adopted. The functional constraints imposed by the Court are fairly weak: many measures could be argued to promote movement or fair competition in some sense, and it is possible to slip quite a range of pork-barrel clauses into a fundamentally trade-orientated measure and call it preventing side effects. Health, harmony and the protection and promotion of good things can enter the law by being taken account of and respected within the trade-promoting project.

Yet there is an element of dishonesty to this approach. If the need is for redistribution or protection of weaker actors or greater trust and understanding, then it should be possible to overtly put these matters as the goal of legislative measures. Their contribution to the market may not be that they make movement easier or create more of it, but that they make it *better*: they make the market a less dysfunctional one. If such measures are adopted but under a false label, as if they are all about promoting trade, making more of it and removing obstacles in a concrete, narrow, sense, this distorts the politics and legitimacy of the EU legislative process. It is as if public health measures could only be adopted by a parliament if they could be shown to be cost-saving. Perhaps one can argue that the promotion of public health generally does save costs, if one looks at a big enough picture, but why should it be illegitimate to wish to protect public health even at the expense of some wealth? Requiring a certain frame and purpose sends a clear message about values and legitimacy, which can have a profound impact on society and on the legislating institution.[38] On the one hand it can corrupt society, by promoting a view in which certain values are treated as not worth pursuing on their own, as marginal to the economic.[39] On the other hand it can undermine the institution,[40] because so long as the public retains a robust sense of morality and decency they will slowly turn against a legislature which appears to be fixated on a political vision that they do not share. Both processes are arguably at work in the European Union. While the corruption of society may be more subtle and diffuse, the alienation of the EU from the public is evident, and if populist rhetoric does indeed reflect popular views then at least a part of this alienation comes from the promotion of the market as a body independent of its human and social consequences.

Thus while Article 114 is only weakly constrained functionally, the conceptual constraints are of great political importance. They may affect European consciousness and will certainly affect European views of the EU, and of its internal market. The Union should be able to do the things necessary to create a well-functioning

[38] CR Sunstein, 'On the Expressive Function of Law' (1995) 144 *University of Pennsylvania Law Review* 2021; W Van der Burg, 'The Expressive and Communicative Functions of Law, especially with Regard to Moral Issues' (2001) 20 *Law and Philosophy* 31.

[39] B Tamanaha, *Law as Means to an End; Threat to the Rule of Law* (Cambridge, Cambridge University Press, 2006).

[40] ibid.

market, which includes creating a market-ready society—fair, tolerant, lacking opportunities for exploitation, redistributive, mutually understanding, sceptical of economics, not too materialistic, protective of its weaker members and areas, and with a job-market which allows welfare-enhancing participation in that market for all: or at least this is one mainstream European political view—and it should be able to say openly that it is doing this, and not have to always pretend that it is merely seeking to facilitate and expand trade, for that is just one tiny part of what establishing a market may be thought to entail.

SUBSIDIARITY AND PROPORTIONALITY

As well as helping to shape the meaning of the internal market, one of the judicial functions is to police its principled limits.[41] The concepts of subsidiarity and proportionality are core here: they, in slightly different ways, indicate lines that the internal market competence should not be allowed to cross.[42]

Unfortunately, neither of them has the substance to do the work required. Proportionality is widely understood by the Court merely as a principle of effectiveness, requiring the Union (or Member State) to go no further than necessary.[43] This is, in itself, a banal proposition, difficult to object to, but not addressing the important and challenging situations where a measure which is necessary for one actor or level to achieve its preferences conflicts with a measure which is necessary for another actor or level to achieve theirs. That situation could be brought within proportionality, via the balancing process which is classically regarded as its third element,[44] but there is little evidence of a judicial taste for this in the law.[45] There are few cases where it occurs, and the general rule appears to be that the Court will not ask whether an EU measure is actually *worth it*; whether it is worth having given the disruptive consequences that it may have for national policy. Perhaps the Court regards this as too political, a decision best left to the legislature. Yet surely then it should be adopted explicitly into the procedural supervision of proportionality, so that the Court will regularly want to see, upon judicial review of EU measures, that such a cost-benefit analysis has been made. That is not the same as a mere impact assessment, which focuses on how a measure may promote trade and the trade and economic benefits which may arise from it, but the more difficult and less quantitative question of how much adjustment it may demand of states, how easy this will be, how negatively it will be experienced, and whether the expected benefits justify this. It may be that the

[41] Horsley, above n 33, 931–64.

[42] Art 5 TEU.

[43] W Sauter, 'Proportionality in EU law: A Balancing Act?' (2013) 15 *Cambridge Yearbook of European Legal Studies* 439; J Jans, 'Proportionality Revisited' (2000) 27 *Legal Issues of Economic Integration* 239.

[44] J Snell, 'True Proportionality' (2000) 11 *European Business Law Review* 50.

[45] Jans, 'Proportionality Revisited', above n 43; Sauter, 'Proportionality in EU law', above n 43.

enhanced role of national parliaments in the legislative process in recent years will help bring these questions to the political fore,[46] but there is still a role for the Court in ensuring that they have been adequately addressed.

Subsidiarity is of marginal importance because of its exclusive focus on EU needs.[47] It insists that the EU should not act where *its* goals—the EU goals—can be achieved by the Member States. This makes it a principle of delegation, rather than one of protecting national autonomy. It simply does not address the question of conflicts of interest or policy, nor of the value of local autonomy, diversity and decentralisation.

It should be noted that this is not the only imaginable form of subsidiarity. The version above follows from the way subsidiarity has been given textual shape in the Treaties and is the version which both Court and Commission use. However, subsidiarity is a principle with a life and history outside the EU, and there are those who argue that the traditional and best understanding of it is far more radical—that higher-level units of government should be truly subsidiary.[48] They should be residual, in the sense that they act only to complement or enhance lower-level action, never to undermine or contradict it.[49] It would be a challenge to give such a view of subsidiarity legal form in a way that did not entirely undermine the functioning of the EU and essentially make all compliance with its law discretionary.[50] However, the historical and philosophical roots of what may be called radical subsidiarity do display how the limited version placed in EU law is a particular and non-inevitable choice. The virtues of local decision-making are recognised, but in a way which keeps them quite clearly subordinate to the policy requirements of the higher level. This choice is understandable given that the EU is intended to have the capacity to restrain states, and that is widely understood as one of its strengths, but one should be aware of its political nature. The public discourse around subsidiarity in the EU tends to use it as a shorthand for the general safeguarding of decentral choices, when this is not in fact its function, thereby adding a further potentially disillusioning layer of deception to speech about the EU.

CONCLUSION

The Court has always taken a purposive view of the internal market, and required Member States to adapt to the requirements of inter-state trade. It concedes certain derogations and it concedes the protection of certain interests in this process,

[46] See K Auel and T Christiansen, 'After Lisbon: National Parliaments in the European Union' (2015) 38 *West European Politics* 261.

[47] Davies, 'Subsidiarity', above n 14.

[48] M Cahill, 'Theorizing Subsidiarity: Towards an Ontology-Sensitive Approach' (2017) 15 *International Journal of Constitutional Law.*

[49] ibid.

[50] G Davies, 'Theorizing Subsidiarity: Towards an Ontology-Sensitive Approach: a reply to Maria Cahill' (2017) 15 *International Journal of Constitutional Law*.

but they are minimised, or appended to the needs of trade. A certain vision of the market, as a trading framework unembedded in national institutions or policies, prevails.

This might have been challenged by the legislature, but they have shown little inclination, largely following the Court's cues and codifying them into law.[51] The combination of a broad functional competence mandate, combined with a narrow conceptual one, may have been attractive, allowing powerful and disruptive law to be adopted while only requiring a relatively limited range of political discussion or debate. Or it may simply be that the political sophistication and rootedness required to think and argue about what a market is does not yet exist on the European level, at least to a sufficient extent. It may well be that the enhanced role of national parliaments, with their more ideologically coherent and socially connected political parties, in EU legislation post-Lisbon will bring a change to this.

Such a change is needed to make the internal market legitimate and to ensure that it contributes as much as possible to the well-being of Europeans. However, that is not to say that the Court's role has always been opposed to such well-being. Rather, it has adopted an approach to the law which is easy to understand and sympathise with in the context of the early years of European integration, when building a robust EU could easily have been seen as both vital and challenging: as a project essential to a peaceful and contented Europe, and yet continually threatened by entrenched national structures, protectionism, nationalism, and backward-looking ideologies. Respect for national democratic processes may well have been seen as a less urgent priority than other more pan-European issues. The 'effectiveness' of EU law has traditionally indeed been one of the Court's most used and powerful ideological tools.[52]

Times change. The EU is in a different phase now, in which many states feel their competences threatened, and fear for their ability to shape the environment of their state in ways reflecting the values and preferences of their citizens.[53] Whether or not their fears are always correct, in the current phase of integration it would seem appropriate to take these fears very seriously, and to amend the law to reflect the fact that for most Europeans the direct facilitation of inter-state trade is not their most important political priority, whereas the possibility to shape their state via national political processes is deeply prized, or at least profoundly aspired to. Establishing an internal market, in the current phase of integration, may mean above all helping Member States become ready for that market, which

[51] G Davies, 'The EU Legislature', above n 6.

[52] See E Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Oxford, Hart Publishing, 2012).

[53] See Treaty of Lisbon, 2 BvE 2/08 para 249, *Bundesverfassungsgericht* (*BVerfG*) [Federal Constitutional Court], 30 June 2009, available at www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html. ('European unification on the basis of a treaty union of sovereign states may, however, not be achieved in such a way that not sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions'). See also paras 257–59.

may sometimes entail leaving them to work out their choices, and at other times assisting them with strengthening their institutions and social structures.

It is likely that the crude trade measures which have been the heart of internal market competences in the past should come to play a much smaller role. Let obstacles and distortions remain—they are often not so important. Traders can adapt to many burdens and circumstances, and that adaptability should be used and prized to relieve Member States and their populations of some of the economic pressures which they appear to find threatening to a considerable degree. For if states and their populations feel strong and self-confident, then a successful and active market will grow, and differences in law will be part of the texture and richness of that market, not something opposed to it at all.