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CHAPTER 23

THE COMPLEX WEAVE OF HARMONIZATION

LOÏC AZOULAI

The European Union can be defined in a number of ways. It may be envisaged as a power or as a market, as a union of states or as a federation, as a special mode of governance or as a community of values. The EU Treaties themselves offer a more neutral and basic definition. The European Union is an institutional arrangement, which allows for the development of a set of policies and the regulation of a broad range of economic, social and legal relationships. The harmonization of national laws is a prominent instrument for achieving this goal of policy development and regulation. It and its synonyms are frequently referred to by the Treaties.[1] At the

[1] The general bases of harmonization of national laws for the functioning of the internal market are to be found in Title VII, Chapter 3 of the TFEU under the title 'Approximation of laws' (Arts 114 to 118). Specific harmonization provisions relying on market integration include Art 46 TFEU (free movement of workers), Art 48 TFEU (certain aspects of social security), Art 50 TFEU (freedom of establishment and company law), Art 53 TFEU (regulation of activities of self-employed persons), Art 59 TFEU (liberalisation of services), and Art 64 TFEU (free movement of capital). Other legal bases not explicitly tied to the internal market include Art 18 TFEU (rules designed to prohibit discrimination on grounds of nationality), Art 21 TFEU (citizenship rights), Art 43 TFEU (common agricultural policy Art 78 TFEU (asylum policy), Art 79 TFEU (immigration policy), Art 81 TFEU (civil matters), Art 83 TFEU (criminal matters), Arts 91 and 100 TFEU (transport policy), Art 106 TFEU (public undertakings), Art 113 TFEU (indirect taxation), Art 153 TFEU (social policy), Art 157 TFEU (equal treatment of men and women), Art 169 TFEU (consumer protection), and Art 192 TFEU (environmental protection).

same time, its basis has evolved over time, both in scope and in substance. This is reflected in the two main references juxtaposed in Article 3 TEU.

The first and still dominant reference is to the establishment of a European internal market mentioned in Article 3(3). Before the advent of the European Communities, Europe was essentially perceived as a collection of closed national markets. European integration has been a conscious effort aimed at creating interconnections between domestic markets. It first materialized in the idea of establishing a common mode of production and a more efficient allocation of resources in certain sectors, then developed as a means to 'merge the national markets into a single market bringing about conditions as close as possible to that of a genuine internal market'.[2] The Treaties contain two possible routes to creating the internal market: one is that of negative integration, relying on provisions contained in the Treaties prohibiting restrictions on trade; the other is positive integration which tries to establish common rules for regulating the market. The latter is what is usually broadly referred to as harmonization.[3]

The other reference in Article 3(2) is to the area of freedom, security and justice (AFSJ). Although its definition draws heavily on the definition of the internal market introduced by the Single European Act (now to be found in Article 26 TFEU), it now comes first in the Treaties. The AFSJ is defined as 'an area without internal frontiers' in which the free movement of persons is ensured in conjunction with policies concerning migration and the prevention of crime. This area is 'offered' as Union citizens' own place. A sense of identification with the Union is thus brought about. With the AFSJ, one is led to think of the Union not simply as a technical construction concerned mainly with interstate economic harmony but as a personal engagement of individual citizens with an area to circulate in and to occupy under the protection of common values. To be sure, the enforcement mechanisms of these values are not quite perfect. Still, there is a clear shift in the rhetoric of the Treaties, from the building of an economic union to the establishment of a new social space structured around a set of shared values. Harmonization of national laws may also be a useful tool in this regard.[4]

A familiar narrative presented by the EU institutions suggests that the AFSJ is a logical extension to the establishment of the internal market. The abolition of internal borders within the Union would call for an intensification of cooperation in civil and criminal matters, the development of common controls at the external borders as well as European cooperation in the field of migration. Moreover,

[2] Case 15/81 *Schul* [1982] ECR 1409, para 33.

[3] See initially Raymond Vander Elst, 'Les notions de coordination, d'harmonisation, de rapprochement et d'unification du droit dans le cadre juridique de la Communauté économique européenne' in *Les instruments du rapprochement des législations dans la Communauté économique européenne* (1976) 1.

[4] As demonstrated by Art 83(2) TFEU which provides a legal base for the approximation of criminal laws under certain conditions.

the AFSJ is often presented as a tentative response to the general crisis affecting the European project where the grand market, long associated with the success of European integration, is now perceived as a source of cultural standardization and social commodification. However a more detailed look at the legal picture reveals a different story. To a large extent internal market law anticipated the realization (and the shortcomings) of the AFSJ. What appears to the lawyer is a process of market integration largely informed by the defining features of the AFSJ. This is reflected in the nature of harmonization.

I. Harmonization in a Changing Legal Context

The evolution of the law of the internal market has brought about three interrelated features which bring it closer to the way we usually define AFSJ law: we shall call them the personalization, the re-valuation and the fragmentation of the law. First of all, individual rights were not the main concern of the EEC Treaty drafters. The focus was on ensuring the rational distribution of production and the circulation of products as well as factors of production. A significant change took place in 1963 when the ECJ made clear that it was individuals who engage in the market, who develop transnational activities and who trigger cross-border exchanges.[5] However, as has been pointed out, 'if the internal market comprises not just the Member States but also consumers (defined in as broad a sense as possible) as well as traders and industries, then its regulation must accomplish a fragile balance between protection and empowerment'.[6] Internal market law is intended to elaborate on individual rights as well as on the social and personal conditions that structure and foster the development of trade.[7] Indeed, that is how Union citizenship was discovered. This rights-based approach has led to uncertainty regarding the sense of this law. On the one hand, it can be seen as a deregulatory device in the hands of free movers, transformed into free-riders seeking personal advantage to the detriment of regulatory systems and welfare structures of Member States. On the other hand, it can be seen

[5] Case 26/62 *Van Gend en Loos* [1963] ECR 7.

[6] Niamh Nic Shuibhne, 'Introduction' in Niamh Nic Shuibhne (ed), *Regulating the Internal Market* (2006) 9.

[7] Case 186/87 *Cowan* [1989] ECR 195; Case C-60/00, *Carpenter*, [2002] ECR I-6279. See generally Eleanor Spaventa, 'From *Gebhard* to *Carpenter*: Towards a (Non-)Economic European Constitution' (2004) 41 *Common Market Law Review* 743.

as a means of re-embedding the market by granting an economic and social status to European citizens.[8]

Secondly, there has been shift from fact to values. The internal market has long been presented as a matter of facts. It has been conceived as a rational and volitional exercise, endorsed by the main players of European integration, to construct a level playing field in the area of trade. The main job of the Court was one of supporting this exercise through a constructive interpretation of the law. As has been pointed out by a perceptive observer, the Court relied on the assumption that the common market is 'a fact, of the existence of which it takes judicial notice and from which observation it draws the necessary consequences'.[9] The granting of rights to individuals as market participants mirrored a general commitment to market integration principles that were broadly agreed amongst Member States, even when the vindication of these rights in individual cases conflicted with their self-interest, narrowly conceived. This commitment can no longer be taken for granted. It is difficult to view the internal market today as a consensual institutional fact concentrating on trade. As was made clear by the Court in the recent *Demirkan* case, internal market law cannot be reduced to a law which 'pursues an essentially economic purpose'.[10] It addresses issues which inextricably affect market and non-market interests such as consumption habits, the regulation of gambling activities, drugs policies, healthcare, data protection, the patentability of biotechnological inventions, social rights and so on. By extending far beyond its origins in commercial activities, the internal market has entered a new era where value conflicts arise, ideological differences emerge and political choices are to be made. Viewed in this way, it is no surprise that it has to cope with a new set of difficulties relating to the recognition of social, moral and ethical diversity.[11]

The third and final change comes from our having to give up the holistic and uniform picture of the internal market that was until recently taken for granted. The European Community and its market were usually seen as forming 'a system, that is it say, a structured, organized and finalized whole'.[12] This assumption was manifested legally through 'the perspective of the unity of market' adopted by European institutions. It was through this perspective that the legal principles governing the establishment of the internal market were given maximum coverage and it led to the notion that these principles have to be applied and interpreted in a

[8] On this debate see recently Martin Höpner and Armin Schäfer, 'Embeddedness and Regional Integration: Waiting for Polanyi in a Hayekian Setting' (2012) 66 *International Organization* 429.

[9] Roger-Michel Chevallier, 'Methods and Reasoning of the European Court in its interpretation of Community Law' (1965) 2 *Common Market Law Review* 21.

[10] Case C-221/11 *Demirkan*, judgment of 24 September 2013.

[11] Floris de Witte, 'Sex, Drugs & EU Law: The Recognition Of Moral And Ethical Diversity In EU Law' (2013) 50 *Common Market Law Review* 1545.

[12] Pierre Pescatore, *The Law of Integration. Emergence of a New Phenomenon in International Relations Based on the Experience of the European Communities* (1974) 41.

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uniform manner across all relevant sectors and in all Member States. This however soon gave rise to a form of legal centralism that was perceived as threatening diversity. Already in 1974 the Commission stated that its objective was 'to make it possible for producers and consumers to benefit fully from trade liberalization', but not to 'eliminate from the market diverse local products which help maintain the originality of the various Member States'.[13] To respond more generally to this concern, an element of differentiation was incorporated into the operation of internal market law. Some states were provisionally exempted from its application while others were granted derogations.[14] Seen in this way, internal market law was historically as much a field of differentiation as current AFSJ law, if to a more limited extent. However, differentiated integration has recently expanded in the internal market context. This raises serious issues concerning not only the institutional dynamic of the EU but also for the very meaning of the project of creating a 'single' market.[15]

These three broad features of personalization, re-valuation, and fragmentation, are reflected in the way harmonization is currently developing in the EU. The first of these concerns the scope of harmonization. Internal market law goes far beyond the completion of the customs union and the removal of obstacles to trade. It is as much concerned with the institutional, the social, and the moral infrastructure of the market. Harmonization measures are designed to deal not only with the nature, composition, and control of specific products, services, sectors, or professions, but also address the conditions under which these products are traded, these services provided, these sectors structured and the professions exercised. They seek to ensure the smooth functioning of the internal market by opening up new opportunities for businesses, but also to protect the non-market interests that are deemed to be essential to the pursuit of European integration, such as the safety of workers, the security of the populations, the protection of environment and public health, or the preservation of welfare structures in Member States. As a result, the harmonization process that is founded on an internal market legal base may give rise to the liberalization of network industries and services as well as the strengthening of workers', consumers' or patients' rights.[16]

Second, it is not only the scope but also the quality of harmonization that has changed. Quality refers to the fact that fundamental rights and values are present

[13] *Seventh General Report on the Activities of the European Communities* (1974) 130. In its more recent *Green Book on the Promotion of Regional Products* of 2011, the Commission states again that 'regional and local markets are an essential meeting place for producers and consumers'.

[14] Gráinne de Búrca, 'Differentiation within the Core: The Case of the Common Market' in Gráinne de Búrca and Joanne Scott (eds), *Constitutional Change in the EU. From Uniformity to Flexibility?* (2000) 133.

[15] Editorial comments, 'What do we want? "Flexibility! Sort of. . . ." When do we want it? "Now! Maybe. . . ."' (2013) 50 *Common Market Law Review* 673.

[16] Daniel Kelemen, 'The EU Rights Revolution: Adversarial Legalism and European Integration' in Tanja A. Börzel and Rachel A. Cichowski (eds), *The State of the European Union. Law, Politics and Society* (2003) 222.

in the harmonization process. References are now frequently found to the safeguarding of fundamental rights of individuals as one of the manifold objectives of harmonization or to fundamental values which apply despite the pursuit by the harmonization measure of an objective of market integration.[17] As part of the harmonization process, the EU institutions may have to give meaning to the 'dignity and integrity' of a regulated profession;[18] or they may be involved in difficult issues concerning the 'dignity and integrity of the person' such as the definition of the concept of human embryo.[19] Harmonization is not simply the regulation of market activities—it does not simply influence the lifestyle of European populations through the regulation of environmental and public health risks, but it directly affects the basic ethical and social conditions of human life as well as incidentally those of animal welfare.[20]

Finally, since the new approach to technical harmonization, endorsed by the Council and the Commission in 1985 with a view to completing the internal market by 1992, flexibility is an integral part of the EU approach to harmonization. In the context of an expansion in the scope of the Union's competence combined with rather limited administrative and enforcement capacities and an enlarged and ever less homogeneous Union where the concerns of Member States regarding the preservation of national and local diversity are ever more pressing, flexibility becomes a kind of magic formula. Through it one can address the conundrum of maintaining the dynamic of integration whilst at the same time accounting for its practical limits and allowing for the possibility of granting some leeway to the Member States. Flexibility takes various forms in EU legislation: the use of minimum harmonization clauses whereby Member States are allowed to maintain or to introduce more stringent standards than those required by the harmonization measure;[21] the limitation of harmonization to essential substantive standards coupled with mutual recognition clauses whereby Member States are required to

[17] See for instance Dir 95/46 on the protection of individuals with regards to the processing of personal data and on the free movement of such data [1995] OJ L 281/31 and Dir 98/44 on the legal protection of biotechnological inventions [1998] OJ L 213/13.

[18] Case C-119/09 *Société fiduciaire nationale d'expertise comptable* [2011] ECR I-2551 interpreting Art 24 of Dir 2006/123 on services in the internal market [2006] OJ L 376/36.

[19] Case C-34/10 *Brüstle* [2011] ECR I-2821.

[20] See eg Reg 1007/2009 on trade in seal products [2009] OJ L 286/36. In the proposal leading to this regulation, the Commission argued that the Treaty 'does not provide for a specific legal basis allowing the Community to legislate in the field of ethics as such. However, where the Treaty empowers the Community to legislate in certain areas and that the specific conditions of those legal bases are met, the mere circumstance that the Community legislature relies on ethical considerations does not prevent it from adopting legislative measures. It should be noted, in that respect, that the Treaty enables the Community to adopt measures aimed at establishing and maintaining an internal market, which is a market without internal frontiers according to Art 14 of the Treaty' (COM (2008) 469 final, p. 3).

[21] Michael Dougan, 'Minimum Harmonization and the Internal Market' (2000) 37 *Common Market Law Review* 853.

rely on legal situations established in other Member States;[22] the combination of limited harmonization with forms of coordination of national legislation whereby Member States retain competence to enact rules regarding the substantive aspects of the matter covered.[23] More recently, however, flexibility has developed unexpectedly. It has freed harmonization from the traditional institutional framework of the EU. Thus, the creation of unified patent protection and the financial transaction tax are the subjects of enhanced cooperation regimes involving only a limited number of Member States.[24] Even more striking is the new instrument of the banking union, the Single Resolution Mechanism, which is adopted partly as an intergovernmental agreement concluded by the eurozone Member States outside the EU institutional framework. It may appear paradoxical to seek to complete the internal market through means that fail to establish a uniform legal field. However, this seems to be the price to be paid for accommodating tensions, resistances and calls for autonomy amongst the Member States whilst helping to establish a framework of cooperation between businesses and public administrations.

II. Unbound Harmonization

The question of the limits to harmonization has long been neglected. From the outset, the Community was said to operate on the basis of the broad objective of establishing a common market that in turn was considered by the Court as one of the 'most fundamental objectives of the Community'. Hence, although it was originally conceived of as 'partial' in nature and restricted to the socioeconomic sphere, market integration was construed as a 'non-specific' legal project capable of embracing a wide range of sectors and interests.[25] The EU legislator and the Court accepted that any disparity between legislation that may affect the current or future functioning of the common market justified harmonization. That the Member States were content with this construction was made clear at the Paris

[22] See eg Case C-241/97 *Skandia* [1999] ECR I-9821 and generally Christine Janssens, *The Principle of Mutual Recognition in EU Law* (2013).

[23] Examples include pieces of legislation as diverse as Reg 883/2004 on the coordination of social security systems [2004] OJ L 166/1 and Dir 2000/31 on electronic commerce [2000] OJ L 178/1.

[24] Reg 1257/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection [2012] L 361/1 and Council Decision 2013/52 authorising enhanced cooperation in the area of financial transaction tax [2013] OJ L 22/1.

[25] Opinion of AG Fennelly in Case C-376/98 *Germany v Parliament and Council* (*Tobacco Advertising*) [2000] ECR I-8419, para 62 and Opinion of AG Tesauro in Case C-300/89 *Commission v Council (Titanium Dioxide)* [1991] ECR I-2867, para 10.

Summit of 1972 where the Member State heads of government agreed to extend the scope of the powers of the Community. From then on the former Article 100 of the EEC Treaty and later Article 100a of the EC Treaty were interpreted so as to include both market and non-market activities within the ambit of the Community.[26] It amounted to a general power to regulate the internal market.

This framework was acceptable so long as two conditions were met: harmonization measures were to be agreed by the Council acting unanimously in the form of directives and the Common Market was perceived and even appropriated by the main EU players as a key element of the success of European integration, able to deliver long-term socioeconomic gains. These conditions ceased to apply following the introduction of Article 114 TFEU by the Single European Act requiring the use of qualified majority instead of unanimity and the growth of discontent surrounding the alleged benefits delivered by the dynamic of market integration. The question of the limits to harmonization then emerged as part of a broader debate pointing to a 'competence problem' in the EU.[27] This debate ended up reaching the Court, which had built its position and legitimacy on the functional and holistic consolidation of the internal market. In the famous *Tobacco Advertising* case of 2000, it finally delivered a message which had a clear constitutional resonance: just as there are limits to deregulation on the basis of the free movement Treaty provisions, made clear in the *Keck and Mithouard* case, so there are limits to the power to regulate contained in the general legal base for harmonization. Article 114 TFEU can no longer be construed as 'as meaning that it vests the [Union] legislature a general power to regulate the internal market'.[28] A mere finding of a disparity between national rules is not sufficient to trigger the harmonization legislative competence. The disparity must be such as to create 'likely' obstacles to trade or 'appreciable' distortions of competition.

Where none of the judicial tests are met, recourse to Article 114 as a legal base is not justified, and another legal base needs to be found in the TFEU. However, account should now be taken of the limits placed on other legal bases by the Treaty. Many of the specific legislative competences explicitly exclude, in part or in full, the harmonization of national laws.[29] Moreover, a new subsidiarity mechanism was

[26] Bruno de Witte, 'A Competence to Protect: The Pursuit of Non-Market Aims Through Internal Market Legislation' in P. Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (2011) 25.

[27] René Barents, 'The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation' (1993) 30 *Common Market Law Review* 85; Loïc Azoulai (ed), *The Question of Competence in the European Union* (2014).

[28] C-376/98 *Germany v Parliament and Council* (*Tobacco Advertising*) [2000] ECR I-8419, para 83.

[29] This is the case in Art 19(2) TFEU (the combat against discrimination), Art 79(4) TFEU (integration of third country nationals), Art 84 TFEU (crime prevention), Art 149 TFEU (employment), Art 153 (2)(a) (specific actions related to social policy) and, according to Art 2(5) TFEU, in all areas where the Union has competence to support, coordinate or supplement the actions of the Member States (health protection, industry, culture, tourism, education, vocational training, youth and sport, civil protection, and administrative cooperation).

introduced by the Lisbon Treaty empowering national parliaments to exercise an *ex ante* control over proposed EU legislation. Thus, even though the broad competence conferred on the Union legislature on the basis of Article 114 TFEU has not been affected by subsequent amendments to the Treaties, restrictive judicial formulas and political safeguards are in place.

Whether this is sufficient to turn the idea of limits into an effective reality remains to be seen. In practice, the implementation of the criteria set out by the Court amounts to little more than a rejection of the total elimination of trade barriers as a goal of harmonization. In the *Tobacco Advertising* case, the Court accepted that a Directive prohibiting the advertising of tobacco products could be adopted. It objected to a measure that amounted to an outright obstacle on trade affecting all kinds of products, but it accepted that any other measure which restricts particular forms of trade by relying on non-trade objectives would be legitimate.[30] As has been noted, the outcome of the new judicial tests is simply 'to serve as a "drafting guide" which readily enables the legislative institutions to comply with the principle of conferral'.[31] As a matter of fact, in exercising its review, the Court is principally engaged in a careful reading of the preambles of the EU legislative acts and the explanatory memorandums to the legislative proposals issued by the Commission in order to identify arguments that support the adoption of the challenged measure. This leads it to accept, for instance, acts of harmonization adopted not to approximate existing national measures but to 'forestall [national] measures which would probably have been taken by the Member States' or acts that provide for the setting up of a European agency which may act under certain circumstances in addition to (not in lieu of) existing national authorities.[32] The internal market harmonization clause of the Treaty continues to contain a number of heterogeneous forms of action.

Strict judicial review of harmonization measures by the Court still seems far off. The judicial control lies essentially in a cautious use of the principle of proportionality. The Court sees its main task as imposing a duty on the legislature to give careful prior consideration and to conduct an assessment of all relevant economic and scientific data justifying the adoption of a measure.[33] In fact, this form of review transposes to the legislative sphere an obligation that was traditionally imposed on the EU administration as a 'duty of diligence' and is now reflected in Article 41(1)

[30] Case C-210/03 *Swedish Match* [2004] ECR I-11893 and Case T-526/10 *Inuit Tapiriit Kanatami and others v Commission*, judgment of 25 April 2013.

[31] Stephen Weatherill, 'The Limits of Legislative Harmonization Ten Years after *Tobacco Advertising*: How the Court's Case Law has become a "Drafting Guide"' (2011) 12 *German Law Journal* 827.

[32] Case C-58/08 *Vodafone and others* [2010] ECR I-4999, para 43; Case C-270/10 *United Kingdom v Parliament and Council (ESMA)*, judgment of 22 January 2014, para 115.

[33] Koen Lenaerts, 'The European Court of Justice and Process-oriented Review' (2013) 32 *Yearbook of European Law* 3.

of the EU Charter.[34] The idea is to ensure that the political discretion granted to the EU institutions is exercised in a rational manner. Discretion still applies however, and renders any real engagement by the Court with the principle of subsidiarity unlikely. As a matter of fact, under the subsidiarity review, the Court has generally failed to clearly differentiate the reason for granting a competence to the Union and the reason for exercising that competence at the EU level.[35] The former seems to imply the latter. Such a control does not set any serious limits to EU legislative action.

Nor do political safeguards. True, there are clauses inserted in the Treaties to protect the powers of Member States in relation to sensitive areas. But the legislature has not been put under strong pressure by the Court to opt for specific legal bases or to make a clear choice between the various legal bases available. The fact that a measure is to a large extent inspired by objectives which relate to an area of competence in which harmonization is excluded or limited to minimum standards, is not considered by either the Union legislature or the Court as an overriding reason to exclude the use of Article 114 TFEU as a legal base.[36] More often than not, a measure which pursues inextricably associated market and non-market objectives will be based on several legal bases, including Article 114 TFEU.[37] As for the political mechanism of subsidiarity, it is widely acknowledged that it has had but a limited impact on the dynamic of the harmonization process thus far.[38]

It follows that few constraints exist on harmonization under EU law. Once this is recognized, it may be argued that there is virtually no limit to harmonization. That however would be a mistake. Certainly, the categorical and economic approach consisting in excluding harmonization in certain areas and subjecting it to a market-making test has failed. Formal textual exclusions of harmonization do not work and the tests established in the *Tobacco Advertising* case are rather loose. This does not however mean that the idea of limits does not hold. It is still there and manifests itself in a variety of forms, sometimes pathological. For many important actors it remains a source of concern.

Once we have admitted that harmonization has both market integration and regulatory goals, perhaps the real test should not be confined to assessing its

[34] Loïc Azoulai and Laure Clément-Wilz, 'La bonne administration' in Jean-Bernard Auby and Jacqueline Dutheil de la Rochère (dir.), *Traité de droit administratif européen* (2014) 671.

[35] Case C-58/08 *Vodafone* (n 32) para 78.

[36] Case C-376/98 *Tobacco Advertising* (n 27) paras 78–79.

[37] A good illustration of these multi-based acts is Reg 178/2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L 31/1.

[38] There has been only one Commission's proposal withdrawn under the pressure of national parliaments so far and it concerned the regulation of the exercise to take collective action within the context of internal market law.

contribution to trade or competition. Beyond this test, a deeper justification for harmonization is required, which must be derived from its added value with respect to national regulatory processes.[39] The EU legislator is a 're-regulator'.[40] The current legal and political discourse lacks a set of clear justifications for engaging in this re-regulation, as well as a set of criteria to measure the appropriateness of the justification in each individual case. The arguments used or implied in the current practice are often not clearly identified and remain under-debated. The first is that national action alone is incapable of dealing with large-scale processes that may adversely affect Member States' structures or interests. A good example is money laundering on a global scale. It may be argued that isolated actions on a national level are likely to be insufficient to deal with this phenomenon or cause helpless fragmentation. A second oft-heard argument refers to local phenomena or activities which have cross-border effects. A classic example is pollution. In such a case, it is evident that purely national initiatives make little if any sense. The third argument is that, irrespective of global processes or cross-border externalities, the Union may be better placed to deal with certain structural failures or biases on the part of states, such as natural monopolies.

Unbound harmonization is not necessarily irresponsible or unresponsive harmonization. In every case, it would be important to show that the Union's action is not detrimental to nationally sensitive interests and values. Internal market harmonization has to be rethought as an area sufficiently wide to take into account the heterogeneity of regulatory ends involved in each particular context, but one within which the degree of harmonization may vary, different values may be expressed, and involving the different levels of responsibilities.

III. Embedded Harmonization

EU harmonization law is a 'world of its own'.[41] While drawing on the experience of harmonization at the international level, it goes far beyond the mere approximation of diverse legal sources. It not only aims to bring national laws together and putting them into a single rational scheme. It aims at achieving the project of

[39] Miguel Poiares Maduro, 'Three Claims of Constitutional Pluralism' in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (2012) 67.

[40] Stephen Weatherill, 'Supply of and Demand for Internal Market Regulation: Strategies, Preferences and Interpretation' in Niamh Nic Shuibhne (ed), *Regulating the Internal Market* (2006) 29, 53.

[41] cf Pescatore (n 12) 77.

market integration.[42] This presupposes that EU harmonization measures should strive to be legally perfect, substantively complete, socially effective and applied in a uniform manner.[43] Now, this is just what EU law, relying on political compromises during the legislative process and on the support of domestic remedies and enforcers at the stage of application, is incapable of being. To keep up with this project, the law of harmonization has been construed as a closed system, standing on its own and keeping the connections to external legal sources to a minimum. This is reflected in two general assumptions. The first is that harmonization law should be more or less immune from the effect of the non-market provisions of the Treaties, including the reference to fundamental rights. The second is that reference to national law should be minimized. To be sure, these assumptions still generally hold and continue to impact on legal practice. However, a look at recent legislation and case law suggests a more complex and nuanced legal picture. There is evidence of an increasing interplay between harmonization law and external legal sources. Harmonization measures are being articulated in light of the fundamental and horizontal provisions of the Treaties as well as fundamental conceptions enshrined in national law. This is for two reasons. First of all, by giving consideration to concerns different from the ones it outlines itself, internal market harmonization gains a wider basis of legitimation. Second and perhaps more clearly, it may be a way of protecting diversity and local autonomy.

1. Harmonization and EU Constitutional Law

Free movement law has experienced a process of transformation through case law in the last ten years.[44] Market freedoms have been put in touch with non-market values. The internal market provisions of the Treaties have been embedded in an interpretive framework which allows for the possibility of reconciling free movement and contradictory requirements of equal constitutional value that arise out of EU and national constitutional law. Until recently, the law of harmonization seemed to be immune from this evolution. There may be two main reasons for this. The first is that when a harmonization measure is adopted it is somehow assumed that the goal of market integration is achieved. The threat to interstate trade is then

[42] Jérôme Porta, *La réalisation du droit communautaire. Essai sur le gouvernement juridique de la diversité* (2007) 303–325.

[43] Opinion of AG Ruiz-Jarabo Colomer in Case C-374/05 *Gintec* [2007] ECR I-9517, § 30: 'there is nothing to support the argument that, in fulfilling their commitment under Arts 95 and 152 EC to safeguard that collective interest, the Community institutions can adjust downwards and accommodate each Member State's particular requirements, which, as the EU legislature points out, hinders the achievement of the project'.

[44] Starting with Case C-112/00 *Schmidberger* [2003] ECR I-5659 and Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609.

regarded as removed. As a consequence, the confrontation with superior rules of the Treaties other than the underlying economic freedoms is deemed unnecessary. The second reason has to do with a desire to defend the integrity of EU legislation. If recourse to EU constitutional grounds were openly permitted, the possibility they could be relied upon before national courts to challenge national legislation implementing harmonization measures, in turn challenging the underlying EU harmonization measure, would be endless.

This may change as the result of two main developments. The first concerns the place of harmonization in the system of EU norms. Treaty provisions are conditions of the validity of EU legislative norms. Harmonization norms are no exception to this. The Court has repeatedly held that free movement provisions apply 'not only to national measures but also to measures adopted by the Community institutions'.[45] At the same time, it is generally acknowledged that judicial review of harmonization measures has been rather soft. By assuming that the EU legislature 'must be allowed a broad discretion which entails political, economic and social choices on its part', the Court considers that 'the legality of the measure can be affected only if it is manifestly inappropriate having regard to the objective which the legislature is seeking to achieve'.[46] In the case of potential conflicts with the economic freedoms, the Court has usually opted for a constructive reading of the measure so as to save it from being declared invalid. A similar technique has been used when fundamental rights or values were invoked.[47] However, the entry into force of the Lisbon Treaty including the Charter and the perspective of accession to the ECHR has made it harder to maintain this approach. Evidence of a stricter approach appears in recent case law.[48] Regardless of the outcome of each individual case, what is striking is the way the Court has become increasingly familiar with addressing the challenge. Far from assuming that the harmonization measures are designed exclusively to meet the needs of economic integration, it focuses the review on their non-market objectives.[49] The reference to fundamental rights is used to widen the framework in which the measure is to be interpreted and to give

[45] Case C-15/83 *Denkavit* [1984] ECR 2171, para 15. Kamiel Mortelmans, 'The Relationship between the Treaty Rules and Community Measures for the Establishment and Functioning of the Internal Market. Towards a Concordance Rule' (2002) 39 *Common Market Law Review* 1303.

[46] Joined Cases C-154 and C-155/04 *Alliance for Natural Health v Secretary of State for Health* [2005] ECR I-6451, para 52. See Kosmas Boskovits, *Le juge communautaire et l'articulation des compétences normatives entre la Communauté européenne et ses Etats membres* (1999) 725–733.

[47] Antoine Bailleux, *Les interactions entre libre circulation et droits fondamentaux dans la jurisprudence communautaire. Essai sur la figure du juge traducteur* (2009) 321–326.

[48] See Cases C-293/12 & C-594/12 *Digital Rights Ireland*, judgment of 8 April 2014.

[49] See eg Case C-51/93 *Meyhui* [1994] ECR I-3879 para 20; Case C-245/01 *RTL Television* [2003] paras 62-70; Case C-210/03 *Swedish Match* (n 29), para 74; Joined Cases C-154 and C-155/04 *Alliance for Natural Health v Secretary of State for Health* (n 45), para 152; Case C-479/04 *Laserdisken* [2006] ECR I-8089, para 65; Case C-544/10 *Deutsches Weintor*, judgment of 6 September 2012, paras 42-60; Case C-283/11 *Sky Östereich*, judgment of 22 January 2013.

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effect within the area of harmonization to the pluralism of interests and values protected by EU law.

The second development concerns the place of harmonization with respect to negative integration. The former is traditionally seen as supporting and completing the latter. Ever since the introduction of the so-called 'new approach', harmonization is the classic response to national measures that are seen as restrictions to trade but are justified on the basis of a recognized non-market public interest. Triggered by the application of the free movement rules, harmonization applies independently of it.[50] This holds true as regards the scope of application of harmonized law: recourse to the internal market legal base 'does not presuppose the existence of an actual link with free movement between Member States in every situation referred to by the [harmonization] measure'.[51] This also applies to substance: internal market legislation has long pursued non-market aims. This has only been reinforced by the introduction of qualified majority voting in the Council.[52] However, the traditional model of harmonization remains firmly committed to the idea of building a cross-border market.

The recent institutional practice bears witness to a two-way and somewhat paradoxical trend. On the one hand, a growing amount of legislation conforms to the conditions for the application of the free movement provisions. Some harmonization measures are designed to be applicable to cross-border situations only. Others incorporate a clause directly referring to primary internal market law.[53] This 'light touch' approach may be the price to be paid for the continuous expansion of the harmonization programme to fields that are heavily regulated at the national level. At the same time, it raises issues as to the real impact of harmonization. On the other hand, however much free movement law may endow the legislation with its market integration rationale, there is still a possibility of recognizing other values flowing from the overriding objectives pursued by the Union. The legislature may be encouraged in this by the numerous horizontal clauses introduced by a series of amendments of the Treaties since the Single European Act, making it legitimate to take into consideration gender inequality, social protection, health and environmental protection, consumer protection, animal welfare or social and territorial cohesion when adopting harmonization measures (Articles 8 to 14 TFEU). A good

[50] Pedro Caro de Sousa, 'Negative and Positive Integration in EU Economic Law: Between Strategic Denial and Cognitive Dissonance' (2012) 13 *German Law Journal* 979.

[51] Joined Cases C-465/00, C-138/01 and C-139/01 *Rechnungshof and others* [2003] ECR I-4989, para 41.

[52] Bruno de Witte, 'Non-Market Values in Internal Market Legislation' in Niamh Nic Shuibhne (ed), *Regulating the Internal Market* (2006) 61.

[53] The Directive on electronic commerce (n 23) and the services Directive (n 18) are two prominent examples of the use of this technique. See also Case C-108/09 *Ker Optica* [2010] ECR I-12213 paras 75–76. On this technique see Marc Fallon, '1992–2012: Etat des lieux et enjeux du droit du marché intérieur' in Valérie Michel (dir.), *1992–2012: 20 ans de marché intérieur* (2014) 17.

example is provided by the Directive on the application of patients' rights. Building upon the application of free movement principles developed by the Court on a case-by-case basis, it recognizes the importance of state health systems as contributing to social cohesion and social justice, and as 'part of the wider framework of services of general interest'.[54] This is a means of re-embedding internal market harmonization in the wider scheme of the Treaties. Arguably, this move responds to the perceived need to grant more leeway to the Member States in sensitive fields covered by harmonization. It may then in turn inform the way free movement law itself is applied.[55]

2. Harmonization and National Law

The initial picture looks pretty much the same regarding the interaction between harmonization and national law. Although Article 114 TFEU does not specify the type of harmonization to be attained, a vague assumption exists that, if not otherwise stated, complete harmonization entailing comprehensive displacement of domestic law is the best way to achieve the internal market.[56] Complete harmonization does not necessarily mean that national variation is not permitted. Indeed, the legislature may provide for specific derogations, options or references to national law. However, the room for manoeuvre allowed Member States under these provisions is strictly delimited.[57] In particular, a Member State is not allowed to rely on grounds different from those governing harmonization.[58] More generally, the Court has consistently held that where EU legislation provides for the protection of various public interests, derogations by Member States based on grounds of public interest referred to in the Treaties (especially Article 36 TFEU) are no longer admissible.[59] In other words, harmonization excludes reliance by Member States on the Treaty based public interest exceptions. National measures must be adopted within the framework outlined by harmonized law. This doctrine presupposes

[54] Dir 2011/24 on the application of patients' rights in cross-border healthcare [2011] OJ L 88/45 (preamble, recital 3).

[55] See with respect to posted workers, Opinion of AG Cruz Villalón in Case C-515/08 *Palhota* [2010] ECR I-9133.

[56] This is clearly reflected in Opinion of AG Ruiz-Jarabo Colomer in Case C-374/05 *Gintec* (n 42) paras 22–40.

[57] Case C-52/00 *Commission v France* [2002] ECR I-3827. But this is without prejudice to the boundaries which affect the scope of harmonized law: 'complete harmonization' is not to be conflated with 'exhaustive harmonization' as made clear in Case C-285/08 *Leroy Somer* [2009] ECR I-4733.

[58] Case C-540/08 *Mediaprint* [2010] ECR I-10909 (concerning a national measure justified on the ground of the protection of media pluralism). See also Case C-512/12 *Octapharma France*, judgment of 13 March 2014, paras 42–46.

[59] See eg Case 28/84 *Commission v Germany* [1985] ECR 3097.

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that the policy concerns as well as fundamental rights concerns of Member States have been exhaustively addressed by the EU legislature.[60] This doctrine fits poorly with the notion that harmonized law is part of a wider legal and constitutional framework.

True, Article 114 TFEU provides for mechanisms to derogate from harmonization. This provision is partly the outcome of a concession made to Member States who expressed reservations on the adoption of qualified majority voting during the negotiations for the Single European Act. In response to these concerns, it was decided to insert paragraphs 4 to 9 allowing for the possibility of derogation. However, this possibility is subject to strict interpretation and has been used very little in practice.[61] On the other hand, it is still possible for the legislature to insert a safeguard clause pursuant to Article 114(10) or to opt for minimum harmonization using a distinct legal base[62] thereby allowing for the possibility of maintaining or introducing more stringent national measures justified by the protection of public interests.[63] This does not however mean total freedom and it should be pointed out that these national measures remain subject to free movement provisions.[64]

In the end, there seems to be a very limited scope for there to be exemptions from harmonization in the internal market framework. This stands in contrast to the evolution of free movement law. In this domain, the Court has reintroduced a preoccupation for the wider constitutional and social context, resulting in more leeway for the Member States. In *Sayn Wittgenstein*, for instance, the Court stated that the objective of observing the principle of equal treatment, as enshrined in Austrian constitutional law, reflects an important value that should be recognized as a general principle guiding the interpretation of free movement law and ultimately restricting its application.[65] It expressly referred to the EU Charter and to Article 4(2) TEU, the national identities clause introduced by the Lisbon Treaty.

However, it seems that, in some instances at least, the Court is now capable of demonstrating the same awareness of national interests in the field of harmonization. In doing so it employs different techniques. Relying on the flexibility offered

[60] Regarding fundamental rights concerns Georgios Anagnostaras, 'Balancing conflicting fundamental rights: the Sky Östereich paradigm' (2014) 39 *European Law Review* 111.

[61] Isodora Maletić, *The Law and Policy of Harmonisation in Europe's Internal Market* (2013).

[62] eg in contrast to Art 114 TFEU, Art 193 TFEU leaves untouched the Member States' power to adopt more stringent protective measures. However, it is clearly stated that 'such measures must be compatible with the Treaties' and notably the free movement provisions. See further Nicolas de Sadeleer, *EU Environmental Law and the Internal Market* (2014).

[63] An example is to be found in the field of consumer law in Art 8 of Dir 2006/114 concerning misleading and comparative advertising [2006] L 376/21.

[64] Case C-309/02 *Radlberger* [2004] ECR I-11763, paras 56–57; Case C-12/00 *Commission v Spain (Chocolate)* [2003] ECR 459, para 97.

[65] Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693, para 89.

by some Directives, it grants national authorities a margin for manoeuvre to apply the provisions of these directives in a way which sets a fair balance between the applicable fundamental rights. The Court offers the Member States the opportunity to interpret these provisions in a manner consistent with EU fundamental rights where the protection of these rights reflects a domestic constitutional concern.[66] This is one way of responding to the legitimate concerns of Member States without destabilizing EU legislation. In relation to the Directive on television without frontiers, it finds that the Directive grants the Member States a broad discretion to determine the events which are of major importance for society, taking account of social and cultural particularities in the Member State concerned, with the result that this designation will lead to 'inevitable' obstacles to trade.[67] To that end, it finds support in Article 11 of the EU Charter guaranteeing the freedom to receive information in a democratic and pluralistic society. In the realm of consumer law, the Court resorts to a new category of principles, the 'general principles of civil law', in order to correct the application of EU directives, reading them in light of core values underlying the national legal orders.[68] In all of these cases, the connection to fundamental rights or general principles is a way of placing the harmonization measure in the context of Member States' own understandings of the factual, legal, social or ethical environment in which they operate. If not the letter, at least the spirit of the duty to respect the national identities of the Member States enshrined in their political, civil and social constitution now seems to operate in harmonization law.

Harmonization law began as a self-sufficient and comprehensive legal regime for a particular economic project. As it extends and affects ever larger areas of national law and deeper sets of socioeconomic relationships, it becomes apparent that it cannot rely solely on its own resources and its own limited goals. It must now be seen within a wider constitutional and pluralist context, dealing with external references and competing rationales while keeping in mind the broad market-building project pursued by the Union.

[66] Case C-101/01 *Lindqvist*, [2003] ECR I-12971, paras 83–87 (data protection). Case C-314/12 *UPC Telekabel*, judgment of 27 March 2014, para 46. See more generally in that connection, Case C-377/98 *Netherlands v Commission* [2001] ECR I-7079.

[67] Case C-201/11 P *UEFA*, judgment of 18 July 3013, paras 10–21. Compare this to the case law of the Court in the context of primary law: C-67/96 *Albany* [1999] ECR I-5751; Joined Cases C-51/97 and C-191/97 *Deliège* [2000] ECR I-2549; Case C-309/99 *Wouters* [2002] ECR I-1577. See further on primary law, Loïc Azoulai, 'The European Court of Justice and the duty to respect sensitive national interests', in Mark Dawson, Bruno de Witte and Elise Muir (eds), *Judicial Activism at the European Court of Justice* (2013) 167.

[68] See eg Case C-412/06 *Hamilton* [2008] ECR I-2383. Stephen Weatherill, 'Interpretation of the Directives: The Role of the Court' in Arthur Hartkamp et al. (eds), *Towards a European Civil Code* (2011) 185.

IV. Managed Harmonization

Harmonization law is not made according to a single and coherent plan run by an institution driven by clear and consistent ideas. It is not a perfect set of texts smoothly received and uniformly applied. On the contrary, it appears as a complex set of actions based on sectoral programmes, as the outcome of institutional initiatives, political compromises, and civil society inputs, as a set of networks involving EU and national public and private actors, as a mix of divergent elements and tendencies expressed in different areas of EU law, all interpenetrating each other and leading to a rather fragmented body of law. The result is a constant concern about coherence and a recent focus on management and monitoring.

As the harmonization programme gathered pace in the aftermath of the Single European Act, attention shifted to setting up governance mechanisms to improve the functioning of the internal market.[69] There has been a focus on the implementation of and compliance with harmonization rules, sometimes expressed in the motto: 'less regulation, better implementation' and captured by the Commission in a communication entitled, *A Europe of Results—Applying Community Law*.[70] Instead of intensifying the production of legislation, it was decided to 'extensify' it. The idea was to limit the adoption of new legislative texts while streamlining the decision-making process and enhancing the monitoring and surveillance of the application of existing legislation. Whether this has been a success is far from certain, but it has resulted in a broad structure of governance involving three distinct layers of actors and responsibilities: Union institutions and bodies, Member States and private actors.

1. The Responsibilities of Union Bodies

The Union's responsibilities are mainly of a political and administrative nature. Harmonization clearly entails a shift from the judiciary entrusted with the task of applying the free movement rules to the legislature and the administration. This shift is, however, reversible. Ambiguous or imprecise texts as well as texts filled with broad clauses or general principles inevitably lead to re-empowering the judicial process, giving the Court the opportunity to decide on how harmonization is to be applied. In fact, the special character and the many flaws of the Union

[69] Kenneth Armstrong and Simon Bulmer, *The Governance of the Single European Market* (1998); Michelle Egan, *Constructing a European Market* (2001); Shawn Donnelly, *The Regimes of European Integration: Constructing Governance in the Single Market* (2010).

[70] COM (2007) 512 final. And see recently Commission's proposal, 'Better Governance for the Single Market' (COM (2012) 259 final).

decision-making process make the Court a powerful actor in fashioning the harmonization programme.[71]

The process of setting harmonization standards involves a multiplicity of actors. Member States participate in this process alongside the European legislature, ie the Commission, the Council and the Parliament, which are assisted by a myriad of committees and expert networks. This process entails a form of competition of state as well as non-state interests and regulatory models.[72] In some cases, it may not be too hard to trace the models relied upon during the drafting process by looking at the broad and consensual recitals of the preamble of a legislative act. More often than not, harmonization measures are based on a complex and imperfect combination of different models. This is also the reason why numerous pieces of legislation undergo adaptations and revisions after some years. This process of revision may result, depending on the context and the political balance, in an exercise of deepening market integration through the elimination of obstacles or distortions of competition that may have remained or emerged, as well as in a strengthening of the level of protection of health or environment.

Under Article 114(3) TFEU, the legislature is required to aim for a high level of protection as far as health, safety, environmental protection and consumer protection are concerned. However, the Court has made clear that the level of protection does not necessarily have to be the highest possible. It is sufficient to show that this aim has been taken into consideration in a serious manner.[73] The same broad discretion characterizes the choice of harmonization technique. This is particularly the case in specific fields where the proposed approximation requires a highly technical analysis or implies sensitive issues. The Court has therefore accepted that Article 114 could be used for establishing a complete regulatory infrastructure under which a Union body would be granted the power to take decisions directed at individuals and to adopt measures that prevail over measures taken by specialized national authorities.[74] Accordingly, a specific administrative system of intervention entailing the replacement of national decision making may count as harmonization.

In *A Europe of Results*, the role of the Commission is crucial in ensuring that internal market rules are applied and enforced. Accordingly, it has been provided with a plethora of supervisory instruments. These mainly consist in obligations to

[71] See eg in relation to the protection of social rights, Claire Kilpatrick, 'Internal Market Architecture and the Accommodation of Labour Rights: As Good as it Gets?' (2011) *EUI Working Papers LAW* No. 2011/04.

[72] Adrienne Héritier, 'The Accommodation of Diversity in European Policy Making and its Outcomes: Regulatory Policy as a Patchwork' (1996) n° 96/2 *European University Institute Working Paper SPS*.

[73] Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405, para 48.

[74] Case C-58/08 *ESMA* (n 31), paras 102-103; Case 66/04 *United Kingdom v Parliament and Council* [2005] ECR I-10553, para 44; Case C-217/04 *United Kingdom v Parliament and Council* (2006) ECR I-3771, para 44.

inform that is imposed on Member States, a power to request that Member States take all necessary measures, and investigation and prosecution powers against recalcitrant Member States through infringement proceedings.[75] The responsibilities clearly lie principally on the Member States.

2. Member States' Obligations

The first responsibility of the Member States is of course to correctly implement Union legislation. This may prove to be a burdensome exercise. Thus, for instance, in 2007 the Commission felt it necessary to publish a handbook on the implementation of the services Directive in order to give Member States technical assistance in the implementation process.[76] This text is a proper 'discourse on the method' amounting to a set of practical exercises. Part of these consists in screening thousands of domestic laws to assess their compatibility with the Directive's provisions or engaging in a 'mutual evaluation' exercise in cooperation with other Member States. This does not ensure that implementation is done perfectly. Incorrect implementation or failure to notify transposing measures of a Directive to the Commission may lead to the Member State being sanctioned under Article 260 TFEU.

National authorities are also under an obligation to inform the Commission of the introduction of new norms or standards which may have a restrictive effect on trade.[77] This obligation is justified by the idea that this information may supply the Commission with a possible basis for developing harmonization. Accordingly, the Court has famously stated that a failure to notify a draft technical standard renders the technical regulation adopted by the Member State concerned inapplicable.[78] This obligation to notify extends to national measures maintained or introduced after the adoption of a harmonization measure. This may be provided by individual directives[79] and a notification procedure is laid down in Article 114(6) for derogating national provisions justified on specific non-market grounds.

Finally, Member States are under an obligation, increasing in both intensity and scope, to cooperate and exchange mutual information.[80] Again, the services Directive provides an excellent example. It is arguable that the main added value of this legislation consists in establishing a system of mutual assistance by

[75] See eg Reg 2679/98 on the functioning of the internal market in relation to the free movement of goods among the Member States [1998] OJ L 337/8.

[76] COM (2012) 261 final.

[77] Dir 98/34 laying down a procedure for the provision of information in the field of technical standards and regulations [1998] OJ L 204/37.

[78] Case C-194/94 *CIA Security International* [1996] ECR I-2201.

[79] An example is given by Dir 2001/95 on general product safety [2002] L 11/4.

[80] Commission's Working Document, 'Administrative Cooperation in the Single Market' (SEC(2009) 881).

obliging Member States and their administrations to establish contact points and a European network of competent authorities, which may even include an exchange of officials. Cooperation and mutual assistance is aimed at facilitating access to service activities, promoting the quality of service provision and ensuring the supervision of providers and services. Furthermore, Member States must encourage the involvement of private actors in the regulatory process.[81]

3. The Role of Private Actors

Harmonization is addressed to Member States as regulators. It is an attempt to provide market participants and citizens with a legal environment in which production, trade, consumption, and all other sorts of activities are made secure and effective. Harmonized law is not supposed to directly involve or target private actors and relations. Market participants and citizens are supposed to enjoy the benefits of the internal market and to trust the effective collaboration of EU and national regulatory authorities.[82] And yet it is quite clear that private actors are deeply involved in harmonization. They are included in this exercise as co-regulators or efficient monitors of the smooth functioning of the market.

Firstly, under the new approach to harmonization, regulatory tasks have been delegated by the Union legislature to private European standardization bodies.[83] These bodies have been entrusted with the responsibility of managing the process for the elaboration of national and European technical standards. Co-regulation, whereby private parties are associated to the formation or implementation of rules, and self-regulation, whereby they are exclusively responsible for the elaboration of regulatory standards, have also been promoted in various sectors.[84] Secondly, private actors are in some cases assigned a major role in monitoring and ensuring that the regulatory objective incorporated in the harmonization measure is met. For instance, under the regulation on food law and food safety, food and feed operators are required, while being monitored by competent national authorities and subject to liability, to produce safe food, inform consumers and withdraw unfit food.[85] Other examples include the outstanding responsibility of data controllers

[81] See Art 37(1) of the services Directive (n 18).

[82] It follows in particular that Member States are bound to respect the freedom granted to private parties by the EU legislature (Case C-639/11, *Commission v Poland*, judgment of 20 March 2014, para 38).

[83] Jacques Pelkmans, 'The New Approach to Technical Harmonization and Standardization' (1987) 25 *Journal of Common Market Studies* 249.

[84] See eg in the sectors of services Vassilis Hatzopoulos, *Regulating Services in the European Union* (2012) 290–306.

[85] Reg 178/2002 on food law (n 37).

under the data protection Directive or the obligation on private actors to pass on information to Member States authorities.[86]

In the *Vodafone* case about roaming, Advocate General Poiares Maduro proposed to go one step further and to accept that harmonization may directly address and regulate the behaviour of private parties restricting free movement.[87] The Court rejected this proposal. This may be justified by the letter of Article 114 TFEU and more generally by the stance that harmonized law does not directly impact on private relationships but leaves it to national law to organize the enforcement of the rights and obligations provided for in EU law. However, it is quite evident that there are cases, such as the roaming case, in which the Member States have no clear interest in regulating and yet nonetheless require the intervention of the EU regulator. More generally, and despite the recurring statements to the contrary by the Commission, it must be acknowledged that EU harmonized law has profound consequences for large sectors of private relationships and, as a consequences, for all branches of national private law.[88] In fact this is a matter of real concern for private lawyers and for those concerned with the integrity of national legal systems.

In a ruling of 1985, the Court suggested that harmonization aims at bringing about a new era in which the population will become 'fully conscious' of the reality and the benefits of the common market.[89] How emphatic—indeed, optimistic—these words appear in today's context, in the aftermath of the financial crisis, in the middle of the Eurozone crisis, in light of the shortcomings of the harmonization *acquis*, with the lingering fragmentation of the internal market, and the widespread perception that the internal market is a place of desocialization and discrimination in favour of the mobile and the wealthy. But these words still make sense as a point of reference, as a welcome counter-point to institutional constructions which view the harmonization process as simply a form of management targeting the 'happy few' engaged in transnational activities.

What is harmonization? It is an enterprise in trade liberalization as well as a form of re-regulation, a set of standard legal formulas inseparable from a case-by-case analysis, an unbound and still poorly justified mode of action, a complex weave of legislative choices and constitutional requirements, a quest for uniformity and coherence anxious to accommodate plurality and diversity, a complex form of governance involving a bundle of various actors and layers of responsibility, and finally a combination of diligent management and genuine commitment. It

[86] See eg Case C-131/12 *Google Spain*, judgment of 13 May 2014 (data protection); Case C-40/04 *Yonemoto* [2005] ECR I-7755 (machinery); Case C-305/05, *Ordre des barreaux francophones et germanophone and others* [2007] ECR I-5305 (fight against money laundering).

[87] Opinion of AG Poiares Maduro in Case C-58/08 *Vodafone and others* (n 32), paras 19–21.

[88] Hugh Collins, *The European Civil Code. The Way Forward* (2008).

[89] Case 54/84 *Michael Paul* [1985] ECR 920, para 15.

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is in light of these contradictions that harmonization emerges, an insuperable yet imperative task—a symbol of Europe's condition.

Bibliography

Antoine Bailleux, *Les interactions entre libre circulation et droits fondamentaux dans la jurisprudence communautaire. Essai sur la figure du juge traducteur* (2009)

Bruno de Witte, 'A Competence to Protect: The Pursuit of Non-Market Aims Through Internal Market Legislation' in P. Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (2011) 25

Michael Dougan, 'Minimum Harmonization and the Internal Market' (2000) 37 *Common Market Law Review* 853

Christine Janssens, *The Principle of Mutual Recognition in EU Law* (2013)

Isodora Maletić, *The Law and Policy of Harmonisation in Europe's Internal Market.* (2013)

Niamh Nic Shuibhne (ed), *Regulating the Internal Market* (2006)

Jacques Pelkmans, 'The New Approach to Technical Harmonization and Standardization' (1987) 25 *Journal of Common Market Studies* 249

Jérôme Porta, *La réalisation du droit communautaire. Essai sur le gouvernement juridique de la diversité* (2007)

Stephen Weatherill, 'Why Harmonise?' in Takis Tridimas and Paolo Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order* (2003) 11

Stephen Weatherill, 'The Limits of Legislative Harmonization Ten Years After *Tobacco Advertising*: How the Court's Case Law has become a "Drafting Guide"' (2011) 12 *German Law Journal* 827