Competence Review: the internal market

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Introduction

Since its inception, the creation of the common market, now internal market,[1] has been the core of the EU's activity. According to the Court:[2]

> The Treaty, by establishing a common market and progressively approximating the economic policies of the Member States seeks to unite national markets in a single market having the characteristics of a domestic market.

In other words, it should be as easy to trade between London and Lisbon as it is between Birmingham and Barnsley. The Treaty – primarily the Treaty on the Functioning of the European Union (TFEU), originally the European Economic Community (EEC) Treaty – provides the framework for delivering this vision. First, it contains Treaty provisions which prohibit states from having or creating unjustified barriers to the free movement of goods persons, services and capital (so-called 'negative integration'). Second, the Treaty gives the power to the EU to legislate to remove obstacles to free movement created by divergent national laws (so-called positive integration).

In this part of the FCO's Competence Review the distinction between negative and positive integration is used to structure the discussion of the EU's powers in the area of the internal market. This is a vast and complex area of law. The discussion below aims to highlight the most important features of the EU rules. Those interested in more detail are referred to the further reading at the end of this text.

'Negative' integration

The relevant Treaty provisions

The competences of the EU in the field of free movement focus on the 'four freedoms': free movement of goods, persons, services and capital (see fig.1). We shall begin by outlining the relevant Treaty provisions and then consider their interpretation by the Court of Justice.

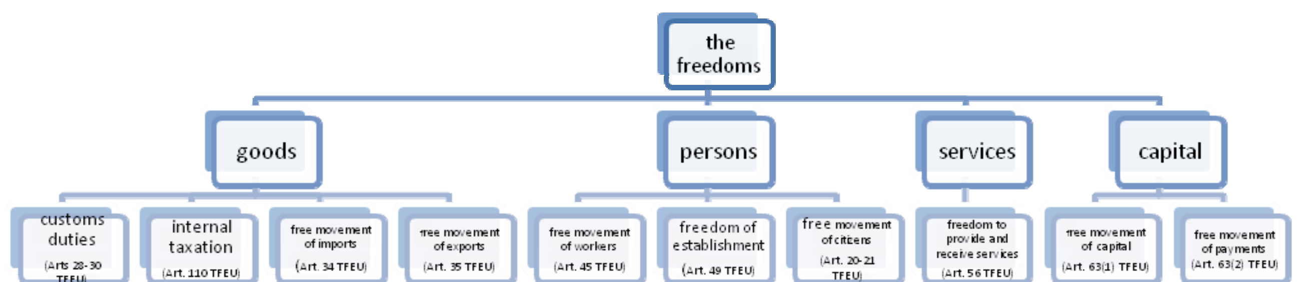

Fig 1 A summary of the four freedoms

[1] Art. 26(2) TFEU 'The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.'
[2] Case 207/83 *Commission v UK* [1985] ECR 1202.

The **free movement of goods** provisions were originally regarded as the cornerstone of the EU Treaties. There are two main limbs:

- the establishment of a customs union (Article 28 TFEU) which involves:
    - the prohibition between Member States of customs duties on imports and exports (ie charges levied at the frontier of a state) and of all charges having equivalent effect (eg charges for storage and inspections of imported goods (Article 30 TFEU));
    - the adoption of a common customs tariff which may apply to goods coming into the EU from 'third' countries (ie non-Member States);
    - the elimination of discriminatory and protectionist taxation (Article 110 TFEU). Unlike the other Treaty provisions discussed here, Article 110 TFEU is permissive: it allows states to tax domestic and imported goods provided the taxation is not discriminatory against foreign goods nor protective of the domestic market;
- the removal of quantitative restrictions on trade (eg quotas or a total ban on imports) and all measures having equivalent effect (eg rules on packaging, presentation and content of goods). These Treaty provisions cover both imports (Article 34 TFEU) and exports (Article 35 TFEU).

The Treaty provisions on **free movement of persons,** insofar as they concern those who are economically active, were found in the original Treaty of Rome. They cover:

- the free movement of workers (Article 45 TFEU) ie those who are engaged in 'genuine and effective' economic activity which is not purely ancillary or marginal[3] who 'for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'.[4]
- The freedom of establishment (Article 49 TFEU). This applies to:
    - the right to take up and pursue activities on a self-employed basis, often as a professional person. This covers 'primary' establishment (ie a professional person relocating to another Member State to set up business there) and secondary establishment (ie a professional person having one place of business in State A and one in State B)
    - the right to set up and manage undertakings, in particular companies and firms in another Member State in accordance with Article 54 TFEU (primary establishment) and setting up subsidiaries, branches and agencies in another Member State (secondary establishment).
- The free movement of services (Article 56 TFEU). This covers three situations
    - The freedom to travel to provide services (eg as a consultant)
    - The freedom to travel to receive services (eg as a tourist, student or as a patient). This has significantly opened up the scope of this freedom
    - Where no person moves but the service itself moves (eg transmission of broadcasts across frontiers).

The Maastricht Treaty of 1992 extended the right of free movement to **EU citizens** (Article 21 TFEU) ie to those holding the nationality of a Member State. At first it was not clear whether this provision merely codified the rights in Articles 45, 49 and 56 TFEU or whether it extended the right to free movement to those who are not economically active. The case law of the Court of Justice suggests

[3] Case 139/85 *Kempf v Staatssecretaris van Justitie* [1986] ECR 1741.
[4] Case 66/85 *Lawrie-Blum v Land Baden-Wurttemberg* [1986] ECR 2121.

the latter, although the precise scope is not clear. It certainly covers persons of independent means (often referred to as playboys but in fact covering all those who have sufficient resources and sufficient medical insurance) and students, who must also have sufficient resources and sufficient medical insurance.

At this stage, three observations should be made about the free movement rights discussed so far. First, the Treaty provisions apply only to goods having an EU origin[5] and persons holding the nationality of one of the Member States, the determination of nationality being a matter for national law.[6] The corollary of this is that those not having the nationality of a Member State do not enjoy free movement rights.

Second, the rights of free movement of workers, establishment and services are dependent on the person being engaged in an economic activity. This phrase is not defined but, as the free movement of workers cases discussed above indicate, it would appear that while the threshold set is fairly low it will rule out volunteering. In the field of free movement of goods, the requirement of economic activity is not articulated but it is assumed that it applies to the exchange of goods for consideration of some form.

Third, the Treaty provisions are engaged only when there is movement between states, although sometimes it takes little movement for EU law to apply.[7] The corollary of the requirement of an inter-state element is that the free movement provisions cannot be applied to situations which are 'wholly internal to a Member State'.[8] This means that EU migrants may therefore enjoy more favourable treatment in the host state (since they enjoy the benefit of both EU law and national law) than non-migrant nationals who have not exercised their rights to free movement (they enjoy the benefits of national law only). This situation is referred to as 'reverse discrimination'.

The final freedom is the **free movement of capital.** Article 63(1) TFEU provides 'all restrictions on the movement of capital between Member States and Member States and third countries shall be prohibited'. Article 63(2) TFEU prohibits 'all restrictions on payments'. The difference between the two provisions lies in the fact that the provision on capital involves financial operations essentially concerned with the investment of funds in question, while the payments provision concerns the remuneration for a service or good provided in the framework of the provisions on, for example, goods and services. There are three striking features that distinguish Article 63 TFEU from the other fundamental freedoms. First, Article 63 expressly applies not only to the abolition of all restrictions on capital and payments between Member States but also those between Member States and third countries. Second, there is no express requirement that the capital have an EU origin (although this may be implicit). And third, there is no express requirement of economic activity; in the case of capital this is assumed.

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[5] Goods in 'free circulation' ie goods which have paid the CCT if one is due will also enjoy free movement rights.

[6] Cf Case C–135/08 *Rottman* v. *Freistaat Bayern* [2010] ECR I–1449 where the Court said that a determination of nationality may be subject to general principles of EU law (eg proportionality) if the Member State's decision deprives the individual of 'the status conferred by Article [20 TFEU] and the rights attaching thereto falls'.

[7] Case C–60/00 *Carpenter* [2002] ECR I–6279.

[8] Case 175/78 *R* v. *Saunders* [1979] ECR 1129, para. 11.

The rights

Assuming that one of the relevant Treaty provisions applies, what rights does it give the individual? First it allows the goods, person, service and capital to leave Member State A and enter Member State B and, where appropriate, reside in that Member State. Second, it allows the individual to enjoy equal treatment in the host state. The scope of the application of the equal treatment principle is particularly important in respect of persons. It applies to:

- Initial access to the market including the terms and conditions on which a job is offered and terminated
- Exercise of the freedom once on that market. This includes:
    - Recognition of qualifications
    - Access to facilities[9] to perform the work
    - Access to housing[10]
    - Tax advantages[11]
    - Social advantages eg funding for studies,[12] death benefits[13]
    - Vocational training[14]

These rights can be invoked against the state (both the home state and the host state),[15] a principle referred to as **vertical direct effect**. The means that where, for example, a Polish migrant worker considers that a UK government department has discriminated against him, he can bring proceedings in a court in England and Wales seeking a declaration of rights and, possibly, damages.[16] However, the term 'state' is broadly construed to include not only central and local government but also regulatory bodies like the Bar Council and the Cycling Union. So the Polish migrant worker can also enforce his rights against these bodies.

Much more controversial is whether these Treaty provisions apply horizontally ie whether they can be invoked against non-state actors. The Court's case law is not entirely clear or consistent on this crucial point. The best view is that Articles 30 and 110 TFEU have vertical direct effect only (unsurprising since raising tax revenue is a state prerogative), likewise Articles 34 and 35 TFEU (except in the area of intellectual property). By contrast, Article 45 TFEU on free movement of workers does have both vertical and horizontal direct effect in respect of discriminatory treatment.[17] Therefore it can be invoked by a Slovak migrant worker against a private sector employer.

The position is much less clear in respect of Articles 49 and 56 TFEU on freedom of establishment and free movement of services. There are dicta in, for example, *Viking*[18] that these provisions do

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[9] Case 197/84 *Steinhauser* v. *City of Biarritz* [1985] ECR 1819.
[10] Case 63/86 *Commission* v. *Italy (social housing)* [1988] ECR 29.
[11] Art. 7(2) of Reg. 492/11.
[12] Case C-542/09 *Commission* v. *Netherlands (higher education)* [2012] ECR I-000, para. 48.
[13] Case C–237/94 *O'Flynn* [1996] ECR I–2617 (social security payments to help cover the cost of burying a family member).
[14] Case 293/83 *Gravier* v. *Ville de Liège* [1985] ECR 593.
[15] See eg Case 33/74 *van Binsbergen* v. *Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299 and Case C–384/93 *Alpine Investments* [1995] ECR I–1141 respectively.
[16] Joined Cases C–46 and 48/93 *Brasserie du Pêcheur SA* v. *Federal Republic of Germany* and *R.* v. *Secretary of State for Transport, ex p. Factortame and others (Factortame III)* [1996] ECR I–1029.
[17] Case C–281/98 *Angonese* [2000] ECR I–4139.
[18] See eg Case C–438/05 *International Transport Workers' Federation* v. *Viking Line* [2007] ECR I–10779.

have vertical and horizontal direct effect. However, the defendant in that case was a trade union with powers analogous to those of a state body so the case may actually involve some extended form of vertical direct effect. In respect of Article 21 TFEU on citizenship and Article 63 TFEU on capital, the cases so far have concerned vertical direct effect only.

Yet, bringing a case to challenge a pre-existing national law is inherently inefficient, ad hoc and wasteful of both time and resources. For this reason, Directive 98/34 and Directive 2006/123 both introduce 'screening' provisions of draft technical regulations (largely rules covering product requirements) in the case of Directive 98/34 and some rules on freedom of establishment and services in the case of Directive 2006/123. The screening rules – and the sanctions for non-notification – are far more prescriptive under Directive 98/34 than those under Directive 2006/123. Where a state fails to comply with the notification requirement under Directive 98/34 and proceeds to adopt the measure, the national rule is generally unenforceable against private parties.[19]

The meaning of equal treatment

As we have seen, the Treaty provisions outlined above are all premised on the principle of 'non-discrimination' or 'equal treatment'. According to the Court, the principle of equal treatment provides that where goods or persons are similarly situated there must be no direct or indirect discrimination; rules which do not discriminate are therefore lawful (see fig 2).

Direct (or overt) discrimination means different and usually less-favourable treatment on the grounds of nationality/origin. So, for example, a requirement that imported, but not domestic, goods be inspected is directly discriminatory and breaches Article 34 TFEU.[20] The prohibition also extends to 'Buy National' campaigns. So in *Commission* v. *Ireland ('Buy Irish')*[21] the Court condemned an Irish government-backed campaign designed to achieve 'the substitution of domestic products for imported products [which] was liable to affect the volume of trade between Member States'.[22]

[19] Case C–194/94 *CIA Security International SA* v. *Signalson SA and Securitel SPRL* [1996] ECR I–2201.
[20] Case 251/78 *Firma Denkavit Futtermittel GmbH* v. *Minister für Ernährung* [1979] ECR 3369.
[21] Case 249/81 *Commission* v. *Ireland* [1982] ECR 4005.
[22] Para. 25.

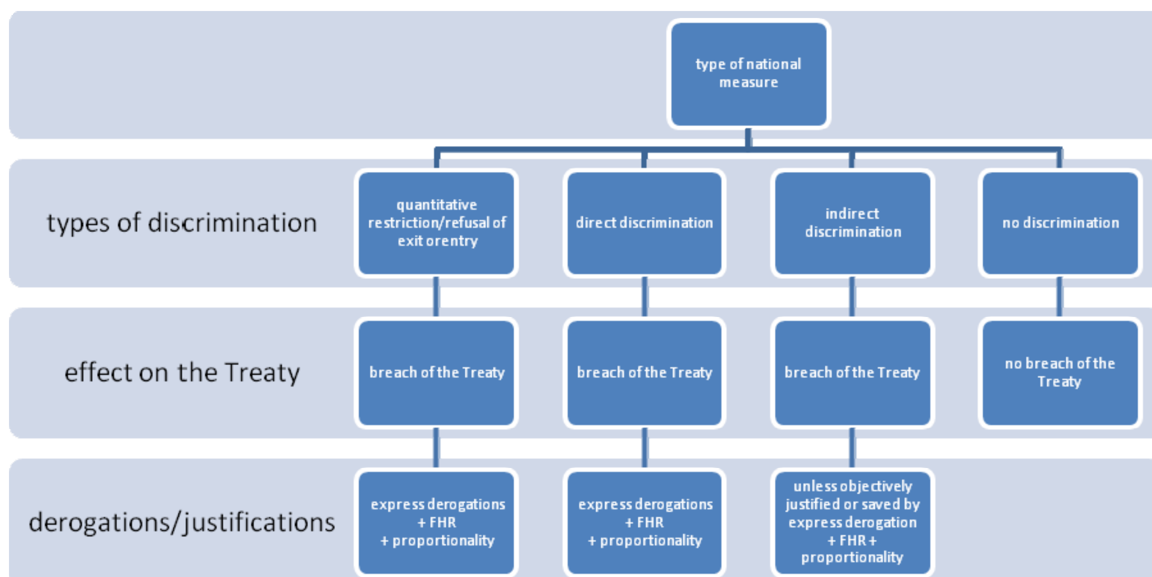

Fig 2 The non-discrimination approach

The Treaty also prohibits **indirect (or covert) discrimination**. This involves the elimination of requirements which, while apparently nationality-neutral on their face, have a greater impact on nationals of other Member States. So for example, in *O'Flynn,*[23] a British rule made payment by the state to cover funeral costs conditional on the burial taking place in the UK. The Court found the rule constituted unjustified indirect discrimination: it was more likely to disadvantage migrants who would prefer to be buried in their state of origin (but the Court did say that the UK could limit the allowance to a lump sum or reasonable amount fixed by reference to the normal cost of a burial in the UK). National rules imposing requirements concerning residence[24] and language[25] can also be indirectly discriminatory: while nationals almost always satisfy the condition, migrants do not.

Requirements as to holding particular qualifications[26] or licences[27] are also considered to be indirectly discriminatory, but in these cases the discrimination arises because the requirements create a double burden on migrants who have to satisfy two sets of rules: both in the home and the host state.

In the leading case of *Cassis de Dijon*[28]the Court developed an innovative way of addressing the burden caused by dual regulation: it developed the principle of **mutual recognition**. The case concerned the refusal by the German authorities to allow Cassis de Dijon, a blackcurrant fruit liqueur made in France, to be sold in Germany owing to its insufficient alcoholic strength. German law required fruit liqueurs to have a minimum alcohol content of 25 per cent, whereas the French cassis

[23] Case C–237/94 [1996] ECR I–2617.
[24] Case C–350/96 *Clean Car* [1998] ECR I–2521; Case C–388/01 *Commission* v. *Italy (museums)* [2003] ECR I–721, para. 14.
[25] Case 379/87 *Groener* v. *Minister for Education* [1989] ECR 3967.
[26] Case C–340/89 *Vlassopoulou* v. *Ministerium für Justiz* [1991] ECR I–2357.
[27] Case 292/86 *Gullung* v. *Conseil de l'ordre des avocats* [1988] ECR 111.
[28] Case 120/78 *Rewe Zentrale* v. *Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* [1979] ECR 649

had an alcohol content of only 15–20 per cent. The Court said that '[i]n the absence of common rules [i.e., harmonization] it is for Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory'. As a corollary to the state's freedom to regulate, the Court said 'There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State.'[29] This idea, known as the presumption of *equivalence* or *mutual recognition*, is of great importance. It means that goods lawfully produced and marketed in one Member State (France) can, in principle, be sold in another Member State (Germany) without further restriction. Putting it another way, Germany must recognize French standards as equivalent to its own.

However, this presumption can be rebutted by the host state (Germany) demonstrating that its laws can be justified under one of the so-called '*mandatory requirements*' (also referred to as public interest requirements or objective justifications). These mandatory requirements are a non-exhaustive list of good reasons which the state can raise to justify the existence of its rules. Mandatory requirements supplement the express derogations found in the Treaty (see below).

On the facts Germany's attempts to raise any of the mandatory requirements was supremely unsuccessful. It argued, first, that the minimum-alcohol-content rule prevented a proliferation of low-alcohol drinks on the national market since such drinks more readily induced tolerance towards alcohol than stronger drinks. Not surprisingly, the Court dismissed this argument. Secondly, Germany ran an argument based on consumer protection/fair trading. It said that drinks with a lower alcohol content secured a competitive advantage over drinks with a higher alcohol content, since alcohol was the most expensive constituent of the product. The Court rejected this too, saying that 'it is a simple matter to ensure that suitable information is conveyed to the purchaser by requiring the display of an indication of origin and of the alcohol content on the packaging of products'.[30] Therefore, the national rules constituted an obstacle to trade and breached Article 34 TFEU; labelling would have been a proportionate response.

Thus the effect of the decision in *Cassis de Dijon* is to promote free trade. Yes, states can now invoke a range of justifications over and above those in the Treaty but the burden of proof is set at a high level: not only must the states come up with a good reason (a mandatory requirement) but they must also show that the national measure is proportionate. In most of the mainstream cases concerning national rules prescribing so-called product requirements (ie rules concerning the shape, size, weight, composition, presentation etc of the product) the Court finds the national rules to be either unjustified or disproportionate. Thus the decision in *Cassis de Dijon* is widely viewed as being deregulatory and promoting free trade.

Where a state does successfully invoke a mandatory requirement, this creates an obstacle to trade in goods from other Member States. This obstacle will need to be removed via harmonisation (see below).

[29] Para. 14.

[30] Case 120/78 *Cassis de Dijon* [1979] ECR 649, para. 13.

The market access/restrictions/obstacles approach

Free movement of goods

For many commentators, the Court's approach in *Cassis de Dijon*, when read in conjunction with the earlier decision in *Dassonville*,[31] actually marked a shift away from a discrimination reading of Article 34 TFEU towards a reading based on **market access**. In *Dassonville* the Court said that:

> All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-[Union] trade are to be considered as measures having an effect equivalent to quantitative restrictions.

Unlike the discrimination approach, the market access approach does not look to see how the domestic good is treated (and then make a comparison with the treatment of the imported good). Instead, it looks at the national measure solely from the perspective of the out-of-state trader: does this rule hinder, directly or indirectly, actually or potentially, intra-[Union] trade? If so, the measure is presumptively contrary to Article 34 TFEU unless the state can show that the rule can be justified and is proportionate. The advantage to the EU of the Court adopting this approach was that it effectively presaged a bonfire of national regulation, much of which had been on the national statute books for decades, sometime centuries, and whose original purpose had long since disappeared. The disadvantage was that a supranational legal order was being used to challenge the existence of national rules adopted by democratically elected national governments.

In fact, during the late 70s, early 80s the Court generally struck a fair balance, striking down national rules which did really hinder inter-state trade, but allowing national rules whose original purpose was still relevant to be saved. Most of the rules found to contravene Article 34 TFEU were discriminatory in some way, either directly or indirectly.

The problem came when traders started using the *Dassonville* formula to challenge any national rule which stopped them doing what they wanted, when they wanted, and where they wanted. The common feature of these rules was that they were usually non-discriminatory and often concerned not the importer or producer of the good but those selling the goods, ie the retailers. A good example of this was the challenges made by DIY stores to the then UK rules effectively banning Sunday trading. After a series of unsatisfactory rulings by the Court of Justice,[32] the Court thought it had sorted the problem in its (in)famous decision in *Keck*. [33] In that case, the Court confirmed that the *Cassis de Dijon* decision would continue to apply to national rules on product requirements (ie rules on shape, size, weight composition etc considered above) but said that in the case of the new, but undefined, category of 'certain selling arrangements' Article 34 TFEU would not apply, provided the national rules regulating certain selling arrangements were non-discriminatory. Thus the effect of the judgment was to ring-fence certain types of national rules from the scrutiny of EU law. For this reason many states were pleased with the outcome of the judgment.

However, there was considerable concern expressed by both the Advocate Generals and the academic community about the legal reasoning employed, the lack of clarity of the judgment, and the fears that it was both too broad (exempting some national rules, eg restrictions on advertising,

[31] Case 8/74 *Procureur du Roi* v. *Dassonville* [1974] ECR 837, para. 5.
[32] Case C–145/88 *Torfaen Borough Council* v. *B & Q plc* [1989] ECR 3851.
[33] Joined Cases C–267 and 268/91 *Keck and Mithouard* [1993] ECR I–6097.

which should be caught by the Treaty) and too narrow (the formula pegged on 'selling arrangements' limited the potential application of the ruling to other deserving areas (eg some planning rules)). Unsurprisingly, the *Keck* settlement soon began to unravel, particularly in the light of *Commission v Italy (trailers)* (considered below).[34] That said, *Keck* has not been expressly overturned and it is still of symbolic value, indicating that there are outer limits of the reach of Article 34 TFEU into the national systems.

The other freedoms

While, in the early 1990s, the Court was beginning to clip its own wings in the field of free movement of goods with decisions such as *Keck*, it was at the same time increasingly adopting a more expansive approach to identifying unlawful restrictions to free movement in the fields of persons, services and capital. The reasons for this were much the same as those that inspired the decision in *Dassonville* in 1974: the non-discrimination approach was not robust enough to get at the plethora of national rules which were obstructing free movement. As Advocate General Jacobs noted in *Leclerc-Siplec*,[35] 'If an obstacle to trade exists it cannot cease to exist simply because an identical obstacle affects domestic trade.' So in *Säger*[36] the Court said that Article 56 TFEU required:

> not only the elimination of all discrimination against a person providing services on the ground of his nationality *but also* the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.

The Court continued that any such restriction could be justified by imperative reasons relating to the public interest (ie 'good' reasons equivalent to the 'mandatory requirements' in the field of free movement of goods). Thus, the Court ruled that Article 56 TFEU caught not only discriminatory restrictions to free movement but also non-discriminatory restrictions which were liable to prohibit or otherwise impede the activities of a provider of services. Increasingly, the Court has simplified the language used in *Säger* and talks simply of the national rule constituting a 'restriction' or 'obstacle' to free movement which breaches Article 56 TFEU unless justified. This approach has since been extended to free movement of workers,[37] freedom of establishment, [38] free movement of citizens,[39] and free movement of capital.[40] (see fig. 3) Moreover, the Court began to extend its restrictions analysis to areas of national regulation which were deemed to interfere with free movement but over which the EU has little, if any, competence to regulate positively: social security, healthcare and taxation being three major examples. This can be seen in *Geraets-Smits,*[41] one of the leading cases establishing the basic rules on the right to receive health care treatment in another Member State which is paid for by the recipient's home state. The Court noted that '[EU] law does not detract from the power of the Member States to organise their social security systems and that in the absence of harmonisation at EU level 'it is therefore for the legislation of each Member State

[34] Case C–110/05 [2009] ECR I–519.
[35] Case C–412/93 *Leclerc-Siplec* v. *TF1 Publicité* [1995] ECR I–179.
[36] Case C–76/90 [1991] ECR I–4221, para. 12, emphasis added.
[37] Case C–464/02 *Commission* v. *Denmark (company vehicles)* [2005] ECR I–7929, para. 45.
[38] Case C–55/94 *Gebhard* [1995] ECR I–4165.
[39] Case C–192/05 *Tas-Hagen* v. *Raadskamer WUBO van de Pensioen- en Uitkeringsrad* [2006] ECR I–10451.
[40] Case C–367/98 *Commission* v. *Portugal* [2002] ECR I–4731.
[41] Case C-157/99 *Geraets-Smits* v. *Peerbooms* [2001] ECR I-5473.

to determine, first, the conditions concerning the right or duty to be insured with a social security scheme and, second, the conditions for entitlement to benefits'. It then added: 'Nevertheless, the Member States must comply with [Union] law when exercising that power.'

Under Dutch law, the costs of treatment provided in a hospital in another Member State would be picked up by the Dutch sickness insurance scheme only on certain conditions. These included that the person receiving the treatment obtained prior authorisation -, granted only if the treatment was covered by the Dutch sickness insurance scheme, which required that the treatment be 'normal within the professional circles concerned' - and that adequate timely treatment could not be provided by a contracted care provider in the Netherlands. The Court found that these rules 'deter, or even prevent, insured persons from applying to providers of medical services established in another Member State and constitute, both for insured persons and service providers, a barrier to freedom to provide services' which, in principle, contravened Article 56 TFEU.

Once the Court established that EU law applied, it is perhaps not surprising that the Court considered the rules in *Geraets-Smits* to be restrictions on free movement. But what about other national rules: rules on planning, on employment law, on consumer protection, on speed limits on motorways? Do they constitute restrictions? This raises the fundamental question: what constitutes a restriction?[42] Is it merely a national rule which makes it 'more costly for new firms to enter an industry'? Or does it potentially cover any regulation, since any regulation imposes and implies compliance costs? Or does the Court simply adopt an intuitive approach and find only those rules which it intuits to constitute an obstacle to free movement to be a restriction? Evidence of all these possibilities can be found in the case law.

Further, there have been worries about the potential reach of the 'restrictions' approach deep into the national systems, challenging a variety of non-discriminatory national rules which were never adopted with a view to interfering with trade (eg national rules on the minimum wage or other labour law provisions). Yes, states could justify their national rules (and there are signs that the Court is recognising an ever wider range of justifications), but how will a state show that, for example, a national rule setting the rate at £6.19, is proportionate? These fears about the potential reach of EU law were exacerbated by the decision in *Viking*[43] where the Court ruled that threatened strike action by a trade union (lawful under national law) constituted a restriction on a Finnish ferry company's right to establish itself in Estonia, contrary to Article 49 TFEU. While the strike action could be justified on the ground of worker protection, it probably was not proportionate. While those in favour of creating a single market free from restrictions created by national law applauded the decision, those concerned about the integrity of non-discriminatory national laws were worried.

[42] See E. Spaventa, 'From *Gebhard* to *Carpenter*: Towards a (non-)economic European Constitution' (2004) 41 *CMLRev*. 743, 757–8.
[43] Case C–438/05 [2007] ECR I–10779.

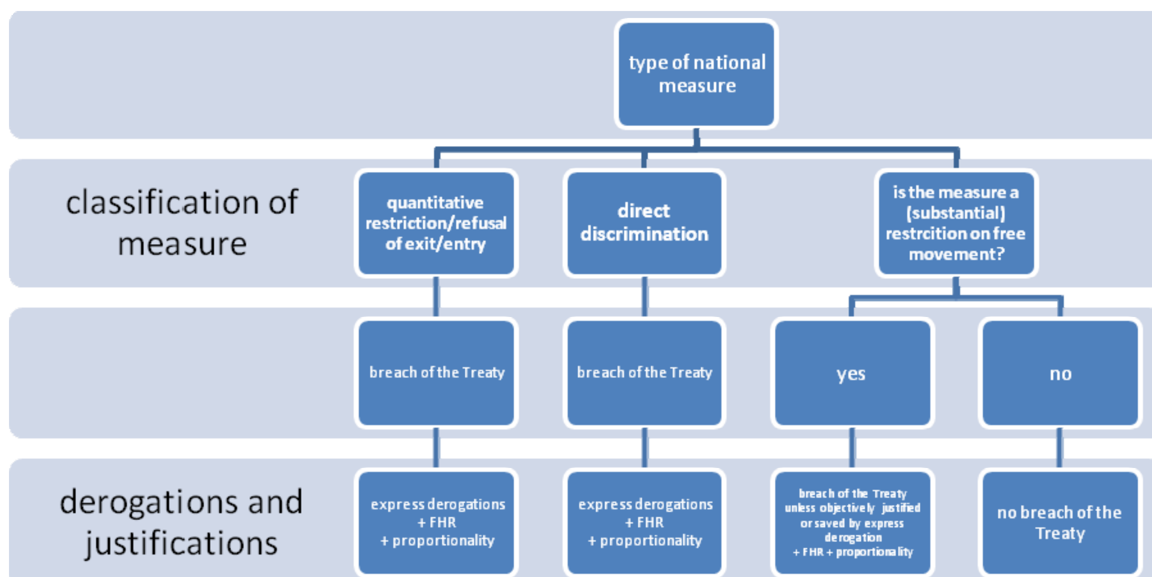

Fig 3 The market access/restrictions approach

Nevertheless, the Court has maintained its enthusiasm for the restrictions approach which has been more recently confirmed by the Grand Chamber in *Commission* v. *Italy (motor insurance)*[44] in respect of Articles 49 and 56 TFEU and extended to free movement of goods in *Commission* v. *Italy (trailers).*[45] That said, there are some signs that the Court has taken on board some of the concerns outlined above.

Restricting restrictions

It seems that the Court has deployed four techniques to limit somewhat the scope of the restrictions approach. First, there are some signs that the Court is considering introducing a threshold requirement to the restrictions test: only those national rules which have a 'significant' effect on free movement will be caught by the prohibition in the Treaty. Therefore in *Commission v Italy (Trailers)* the Court said that 'a prohibition on the use of a product in the territory of a Member State has a *considerable* influence on the behaviour of consumers, which, in its turn, affects the access of that product to the market of that Member State'.[46] Likewise in *Commission* v. *Italy (motor insurance)*[47] the Court found that an Italian obligation imposed on all insurance companies operating in the field of third party liability motor insurance to contract with all vehicle owners 'constitutes a *substantial* interference in the freedom to contract which economic operators, in principle, enjoy'[48] and so breached Articles 49 and 56 TFEU.

While the two *Commission* v. *Italy* cases suggest the introduction of some sort of economic threshold requirement, other cases use a more tortious test based on remoteness to exclude certain

[44] Case C–518/06 *Commission* v. *Italy (motor insurance)* [2009] ECR I–3491.
[45] Case C–110/05 [2009] ECR I–519.
[46] Para. 56, emphasis added.
[47] Case C–518/06 *Commission* v. *Italy (motor insurance)* [2009] ECR I–3491.
[48] Para. 66 (emphasis added).

national rules form the purview of EU law. For example, in *Graf*[49] a German national who resigned from his job in Austria to take up another post in Germany, claimed that he thereby lost his chance to be dismissed and thus to receive compensation, and so the Austrian rules on termination breached Article 45 TFEU. The Court disagreed: the Austrian law was genuinely non-discriminatory and did not preclude or deter a worker from ending his contract of employment in order to take a job with another employer. The Court explained that the entitlement to compensation when the employer dismissed an employee was not dependent on the worker's choosing whether to stay with his current employer but on a future and hypothetical event, namely being dismissed. The Court concluded that '[s]uch an event is too uncertain and indirect a possibility for legislation to be capable of being regarded as liable to hinder free movement for workers'.

Thus, the dismissal was too remote to be considered liable to affect free movement. Putting it another way, non-discriminatory measures which do not substantially hinder access to the (labour) market[50] or whose effect on free movement is too remote, fall outside the Treaty provisions on free movement of persons in much the same way as non-discriminatory certain selling arrangements cases which do not substantially hinder access to the market fall outside Article 34 TFEU.

Second, the Court seems to require some actual evidence that the national rule does in fact hinder market access. This is particularly so in enforcement proceedings brought by the Commission against defaulting states under Article 258 TFEU. So, for example, in *Commission v Italy (maximum fee for lawyers),*[51] a case concerning an Italian law laying down rules requiring lawyers to comply with maximum tariffs for the calculation of their fees in the absence of an agreement between lawyer and client, the Commission argued that the rules had the effect of discouraging lawyers established in other Member States from establishing themselves in Italy. The Court disagreed, stating. that the Italian rules did not constitute a restriction solely because other Member States applied less strict, or more commercially favourable, rules to providers of similar services established in their territory, nor did they constitute a restriction just because service providers had to accustom themselves to a new set of rules. The Court then said:

> 51 By contrast, such a restriction exists, in particular, if those lawyers are deprived of the opportunity of gaining access to the market of the host Member State under conditions of normal and effective competition.....
>
> 52 The Commission has not, however, demonstrated that the contested provisions have such an object or effect.

Thus, the Court appears to be extending some of its case law on competition law (the 'object or effect' test) to determine whether there has been a breach of the free movement rules.

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[49] Case C–190/98 *Graf* v. *Filzmozer Maschinenbau GmbH* [2000] ECR I–493.

[50] Case C–518/06 *Commission* v. *Italy (motor insurance)* [2009] ECR I–3491, para. 66; Case C-565/08 *Commission v Italy (maximum fees for lawyers)* [2011] ECR I-000, para. 51.

[51] CaseC-565/08 [2011] ECR I-000.

Third, in certain sectors, notably taxation, the Court appears to be reverting to a discrimination approach in preference to a restrictions analysis. Under the principles of international tax law, states are entitled to identify:[52]

- the tax unit (those over whom they wish to assert legislative fiscal jurisdiction, usually those resident in the state and the profits which arise in that state)
- the tax base (i.e., the nature and quantum of the receipts it wishes to tax and the identification of the entitlement to and nature of tax reliefs)
- the tax rate
- how they wish to administer, assess, collect and recover tax.

In other words, states enjoy fiscal autonomy.[53] Inevitably, there are differences between Member States in respect of, for example, tax rates, albeit that those rates are applied equally to everyone in the territory. As with the Sunday trading saga, lawyers started to argue that where, for example, corporation tax in the UK was higher than that in Ireland, this discouraged Irish companies from setting up subsidiaries in the UK and so the UK rules contravened Article 49 TFEU. And States found such claims difficult to defend because the natural justification for taxation - obtaining revenue to pay for public goods - might constitute an economic argument which is not a legitimate justification (see below). [54] It therefore became difficult for tax authorities to develop any tax rules which would be immune from challenge under EU law. This created serious difficulties for national exchequers. So, in a series of cases in the mid-2000s, the Court reverted to the non-discrimination model:[55] only if the tax rule was directly or indirectly discriminatory will it breach Articles 45, 49, 56 or 63 TFEU; non-discriminatory rules are lawful (see fig. 2). In this way the case law on persons, services and capital was brought into line with the Court's approach under Article 110 TFEU on discriminatory taxation in the field of free movement of goods (considered above).

Fourth, where the Court finds that there is a restriction, it has embraced an ever wider range of justifications (see below).Finally, in areas such as road safety where a clear rule is necessary the Court has not applied a strict proportionality test. Instead it has said that although it is possible to envisage that other measures could guarantee a certain level of road safety 'the fact remains that Member States cannot be denied the possibility of attaining an objective such as road safety by the introduction of general and simple rules which will be easily understood and applied by drivers and easily managed and supervised by the competent authorities'.[56]

Derogations, limitations and justifications

Express derogations and justifications

The Treaty has always contained exceptions (known as derogations) from the rights of free movement. Article 36 TFEU contains the exceptions to Articles 34 and 35 TFEU (but not to Articles 30 and 110 TFEU which have no Treaty-made exceptions). The Article 36 TFEU derogations are: (1)

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[52] Case C-157/10 *Banco Bilbao Vizcaya Argentaria SA* v. *Administración General del Estado* [2011] ECR I-000, para. 29.

[53] Case C–298/05 *Columbus Container Services BVBA & Co* v. *Finanzamt Bielefeld-Innestadt* [2007] ECR I–10451, para. 53.

[54] Case C–319/02 *Manninen* [2004] ECR I–7477, para. 49.

[55] Case C–134/03 *Viacom* [2005] ECR I–1167; Case C–387/01 *Weigel* v. *Finanzlandes direction für Vorarlberg* [2004] ECR I–4981; Joined Cases C–544/03 and C–545/03 *Mobistar SA* v. *Commune de Fleron* [2005] ECR I–7723; Case C–453/04 *Innoventif* [2006] ECR I–4929.

[56] Case C–110/05 *Commission v Italy (trailers)* [2009] ECR I–519, para. 67.

public morality, (2) public policy or public security; (3) the protection of health and life of humans, animals or plants; (4) the protection of national treasures possessing artistic, historic or archaeological value; and (5) the protection of industrial and commercial property. This is an exhaustive list of derogations which must be read in conjunction with the proviso in the second sentence of Article 36 TFEU. This says that '[s]uch prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'.

The list of derogations to the free movement of workers, freedom of establishment and freedom to provide services provisions is shorter: public policy, public security and public health.[57] The threshold set for a state to invoke a public policy derogation is high: there must be a genuine and sufficiently serious threat to a fundamental interest of society. It is usually not possible for states to reach this threshold. [58] The Court does however, tend to be more sympathetic to a state invoking the public health defence, particularly where the provision of healthcare services are at stake.[59] In addition, there is a special derogation which applies to the free movement of persons provisions: where employment in the public service is at issue (also referred to as exercise of official authority), it is legitimate to reserve those jobs to nationals only.

There is a wider range of derogations in respect of free movement of capital. Article 65(1) TFEU contains two express derogations, one specific and one general. The specific one relates to tax: Article 65(1)(a) TFEU says that the provisions of Article 63 TFEU are without prejudice to the right of the Member States to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested. Article 65(1)(b) TFEU contains the general derogation. It provides that the provision of Article 63 TFEU is without prejudice to the right of Member States 'to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.' Thus, the express derogations contained in Article 65(1)(b) are a mixture of the standard public-policy/public-security derogations found elsewhere in the Treaty together with special provisions concerning taxation which reflect the public interest requirements on the effectiveness of fiscal supervision.

Thus, the EU Treaties have always allowed national measures to take precedence over the free movement where they serve important interests recognized by the Union as valuable. However, the express derogations have not been revised since the Treaty's inception and so have not kept pace with the needs of a modern society. This has led the Court to develop a range of mandatory requirements (*Cassis de Dijon*), increasingly known as 'public interest requirements' or 'objective justifications'. This is a non-exhaustive list of good reasons which a state can invoke to justify restrictions to free movement but only where those restrictions are indirectly discriminatory or hinder market access. Despite a certain amount of vacillation, the Court has generally held the line and said that they do not apply to directly discriminatory measures (see figs 2 and 3). The Court has

[57] Art. 45(3) TFEU, Arts. 52 and 62 TFEU.
[58] Case C–466/98 *Commission* v. *UK* [2002] ECR I–9427.
[59] Case C–60/90 [1991] ECR I–1547, para. 43.

recognised about 50 justifications (and rising) which include protecting the environment,[60] preventing gambling and avoiding the lottery from becoming the source of private profit; avoiding the risk of crime or fraud; avoiding the risk of incitement to spend, with damaging individual and social consequences,[61] and combating illegal employment[62] and bogus self-employment[63]

Eventually, restrictive national rules justified under one of the express derogations or the public interest requirements may be replaced by harmonized Union rules intended to protect the same interests at Union, rather than national, level (see below). In the absence of harmonization, Member States remain free to invoke the derogations subject to certain conditions.

Limitations on the limitations and justifications

The Court has imposed five conditions or limitations on the Member States' freedom to invoke the derogations and justifications. Firstly, since the express derogations are derogations from the basic rule of free movement of goods they have to be interpreted strictly.[64] Secondly, neither the derogations nor the justifications can be used to serve economic objectives.[65] Therefore, in *Commission* v. *Italy*,[66] Italy could not justify its ban on the import of pig meat because of economic difficulties with its own pig industry.

Thirdly, Member States must ensure that decisions they take limiting free movement are compatible with fundamental human rights (FHR). So in *Carpenter*[67] the UK was not allowed to deport a Filipino national, who, having overstayed her entry permit to the UK, married a British national. She argued that her deportation would restrict her husband's ability to carry on business as a service provider in other Member States since she looked after his children while he was away. The Court said that the decision to deport Mrs Carpenter did not 'strike a fair balance' between the competing interests of the right of *Mr* Carpenter to respect for his family life on the one hand and the maintenance of public order and public safety, on the other. Even though Mrs Carpenter had infringed UK immigration laws by overstaying her visa she did not constitute a danger to public order and safety. Therefore, the decision to deport her was not proportionate.

The proportionality principle is the fourth limit on the use of the derogations and limitations. In *Cassis de Dijon* the state measure failed the proportionality test because a total ban on the import of French cassis was disproportionate; more proportionate would have been a label identifying the lower levels of alcohol.

Fifthly, the Court has also said that any person affected by a restrictive measure based on such a derogation had to have access to legal redress. 68 This case law reflects a more general shift in the Court's thinking towards a so-called 'good governance' approach. This can be seen in *Geraets-Smits*

[60] Case C–17/00 *De Coster* v. [2001] ECR I–9445
[61] Case C–243/01 *Gambelli* [2003] ECR I–13031.
[62] Case C–255/04 *Commission* v. *France* [2006] ECR I–5251.
[63] Case C-577/10 *Commission* v. *Belgium* [2012] ECR I-000, para. 45.
[64] Case 113/80 *Commission* v. *Ireland* [1981] ECR 1625, para. 7.
[65] Case 95/81 *Commission* v. *Italy* [1982] ECR 2187, para. 27.
[66] Case 7/61 *Commission* v. *Italy* [1961] ECR 317, 329.
[67] Case C–60/00 *Carpenter* [2002] ECR I–6279, paras. 40–1.
[68] Case C–54/99 *Association Eglise de Scientologie de Paris* v. *The Prime Minister* [2000] ECR I–1335, paras. 17–18.

where the Court ruled that the requirement to obtain authorisation prior to receiving medical treatment in another Member State could be justified provided it was:

> based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily. Such a prior administrative authorisation scheme must likewise be based on a procedural system which is easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time and refusals to grant authorisation must also be capable of being challenged in judicial or quasi-judicial proceedings.

Conclusions

In this section we have examined the EU's powers of negative integration. While the potential reach of the four freedoms into the national systems is quite deep, there are signs that the Court is navigating its way towards a more careful balance between the interests of the EU and those of the Member States. A summary of the limits of the EU's powers can be found in Box 1.

Box 1 Summary of the limits of the EU's powers of 'negative' intervention

- goods, persons, services, capital must have EU origin/nationality to benefit from EU rules
- workers, the self-employed and service providers/recipients must be engaged in economic activity to trigger the right to free movement
- goods, persons, services, capital must move between Member States for the principles of EU law to apply
- the principle of mutual recognition allows states to regulate in a particular area and have those rules recognised in another Member State without further restriction
- the express derogations and the 'mandatory' or 'public interest' requirements allow states to continue to apply their own rules, provided those rules respect fundamental rights and are proportionate
- some Treaty provisions can be invoked against the state only; they do not apply to private parties
- non-discriminatory national rules concerning certain selling arrangements fall outside the scope of the Treaty, as do non-discriminatory rules whose effect on free movement is too uncertain and indirect or too insubstantial

Positive integration

Legislative acts

While the basic model of the Treaty was that the common market would be delivered via negative integration, it was always recognised that the EU would need to adopt harmonisation legislation to help complete the internal market. This harmonisation legislation takes the form of 'secondary' law ie *Regulations* which are automatically part of domestic law and so do not need implementation, and *Directives* which do need transposition into domestic law (usually via statutory instruments in the UK). These measures, know in the jargon as '**Legislative acts**',[69] are adopted via the *ordinary Legislative procedure* (with the Council of Ministers and the European Parliament (EP) having powers

[69] Art. 289(3) TFEU.

of co-decision, jointly adopting the measure with the Council voting by qualified majority[70]) or, exceptionally, by the *special legislative procedure*[71] (usually with the Council acting by unanimous voting and the EP merely being consulted) (see fig.4). The legal basis of the parent measure (see below) specifies which procedure is to be adopted.

These secondary measures can take a variety of forms and serve a range of functions. They can set minimum standards on which the Member States can improve (see eg the Working Time Directive 2003/88, which sets a maximum 48 hour working week; Member States are free to reduce that maximum (eg say to a 40 hour working week) but not to increase it (eg say to a 52 hour working week)). Alternatively the legislation might exhaustively harmonise a particular area (eg the Unfair Commercial Practices Directive 2005/29 which exhaustively lays down the grounds on which Member States can prevent commercial practices; Member States cannot add additional grounds for preventing such practices).

In other areas, the legislation has codified the approach adopted by the Court in its case law, hoping to provide greater transparency. Directive 2011/24 on Patients' Rights to cross-border healthcare is one such example, the Services Directive 2006/123 is another. The Citizens' Rights Directive 2004/38 provides a further example, albeit in some areas (eg the rights for EU citizens to migrate to another Member State for less than three months and for more than five years, and the power for states to deport individuals after five years) go further than the pre-existing case law. The Recognitions of Diplomas Directive 2005/36 codifies the Court's approach to mutual recognition in respect of diplomas, certificates and titles; unfortunately it does so over 121 pages.

The principle of mutual recognition has also inspired the so-called 'new approach' directives. A paradigm example is the Toy Safety Directive 2009/48. This directive allows any toy to be placed on the market, but only if it meets essential safety requirements which can be satisfied in one of two ways. The first is to manufacture the toy according to harmonized standards produced by CEN and CENELEC in accordance with Directive 98/34. Conformity with harmonized standards provides a presumption of conformity with the essential safety requirements of the directive. The manufacturer is then entitled to affix the CE mark confirming that the toys comply with the essential safety requirements laid down by the directive.

The second method of ensuring compliance with essential safety standards is to manufacture the toy in accordance with a model which has been 'EC-type examined' by an approved, conformity assessment body in the state of manufacture. The notified body will test a sample of the toy to see whether it satisfies the essential safety requirements laid down by the directive. The testing body then issues an 'EC-type examination certificate'. Once the toy complies with the directive and bears the CE mark, it enjoys free movement. The host Member State must assume compliance with the essential safety requirements and cannot impede the toy from being placed on its market

Other directives essentially provide a code for a particular area of activity, in practice replacing the text of the (hierarchically superior) Treaty. Directive 2004/18 on public procurement is one such example; the Posted Workers Directive 96/71 which fleshes out the content of Article 56 TFEU in

[70] Art. 289(1) TFEU. The details of the procedure can be found in Art. 294 TFEU.
[71] Art. 289(2) TFEU.

respect of so-called 'posted workers' ie those workers sent by the employer to work in a host state before returning to the home state.

The Posted Workers Directive is of particular interest since it reveals different perspectives on the role and function of EU law in the context of an enlarged European Union. This Directive lays down, in Article 3(1), a limited number of employment rights (including to minimum pay, health and safety protection and equal treatment) which the host state can insist on applying to posted workers, provided the detailed rules in Article 3(8) are complied with. By implication, all other employment rights are left to be provided by the home state. However, Article 3(7) suggests that the Directive lays down only minimum standards; Member States are free to improve upon those standards.

In *Laval*[72] a Latvian company won a contract to build a school in Sweden using Latvian workers. The Swedish trade unions insisted that Laval respect all of the Swedish employment rules, not just those listed in Article 3(1) and, when Laval refused to do so, called their members out on strike and blacked the Laval building site. The Swedish trade unions argued that since the Directive was about worker protection, the Latvian workers should be treated equally with the Swedish workers and so be paid higher rates of pay and enjoy other benefits. The Court disagreed. It pointed to the fact that the Directive was based in the services provisions of the Treaty which are premised not on the idea of equal treatment but home state (Latvian) control. Article 3(1) therefore constituted an exception to the basic rule. Because the trade unions sought to enforce collectively agreed employment rights which were more favourable than those listed in Article 3(1) of the Directive, the strike action contravened Article 56 TFEU. For good measure, the Court said that Article 3(7) of the Directive applied only to a decision by *home* states (and companies like Laval) which decide to impose their (higher) standards on posted workers, not to host states like Sweden.

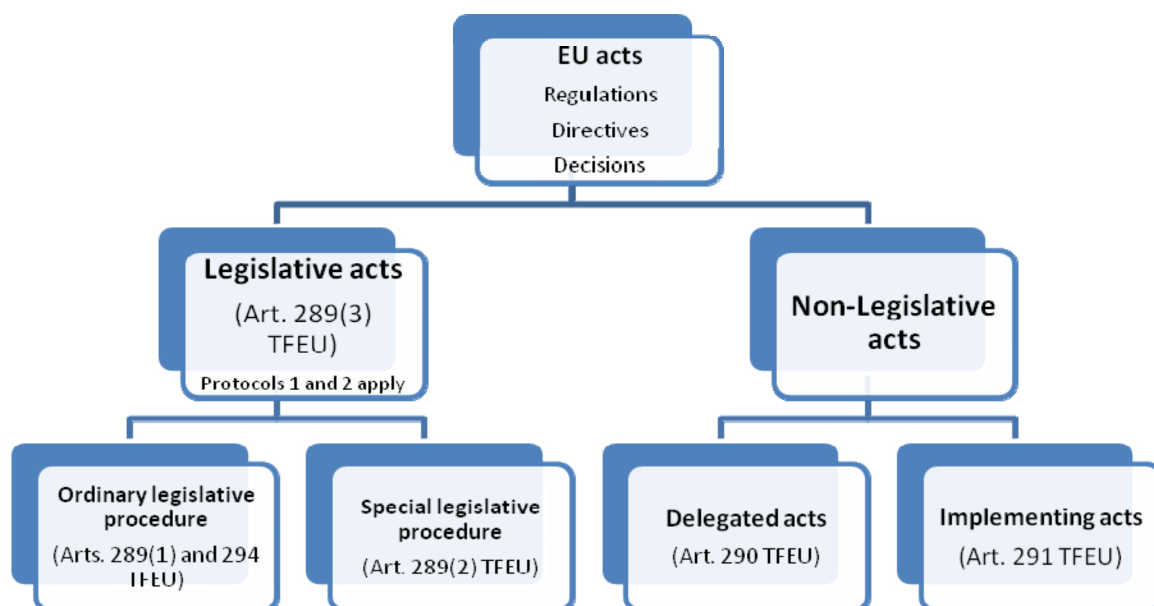

Fig 4 Legislative and Non-Legislative acts

[72] Case C-341/05 *Laval un Partneri ltd* v. *Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

Non-Legislative acts

The Legislative acts can be supplemented by '**Non-Legislative acts**'. For our purposes, these Non-Legislative acts take two forms (see fig 4):

- Article 290 TFEU *delegated acts.* These can be Regulations, Directives or Decisions adopted by the Commission which supplement or amend certain non-essential elements of the Legislative acts. The parent Legislative act lays down the objectives, content, scope and duration of the delegation. It also specifies the conditions to which the delegation is subject (ie the EP or the Council may decide to revoke the delegation (a more exceptional measure of control), the delegated act may enter into force only if no objection has been expressed by the EP or Council within the period expressed by the Legislative act).

- Article 291 TFEU *implementing acts*. These can be Regulations, Directives or Decisions which are adopted by the Commission to ensure uniform conditions for implementing Legislative acts. The parent 'Legislative act' will confer implementing powers on the Commission. The procedure by which the Commission acts (the advisory procedure for less politically controversial matters or the examination procedure for more controversial matters, eg programmes with substantial implications, taxation, health and safety) is also specified in the parent measure. The detail of those procedures is spelled out in Regulation 182/2011[73]. In summary, where the advisory procedure is used the Commission must take the 'utmost account' of the opinion of the relevant 'comitology' committee, composed of representatives of the Member States and chaired by the Commission, but is not obliged to follow it. By contrast, under the examination procedure if the relevant comitology procedure votes against the implementing measure, the Commission cannot adopt it but the Commission can submit the draft to the appeal committee for further deliberation.

An example might help illustrate some of these rules in practice. EP and Council Regulation 995/2010 lays down the obligations of operators who place timber and timber products on the market.[74] This Regulation is intended to help address illegal logging. It prohibits the placing of illegally harvested timber on the EU market and sets up a system of due diligence for operators when placing timber on the market to minimise the risk of placing illegally harvested timber on the market. The bare bones of the due diligence system are contained in Article 6(1) of the Regulation. Article 6(2) of the Regulation provides that detailed rules necessary to ensure the uniform implementation of paragraph 1 shall be adopted in accordance with the examination procedure.[75] These rules were adopted by Commission Implementing Regulation 607/2012.[76]

Regulation 995/2010 also made provision for the establishment of monitoring organisations which must maintain and evaluate the due diligence system and take action against an operator not using the due diligence system. It identifies the criteria for recognising and withdrawing recognition from the monitoring organisations. Article 8(7) provides that 'In order to supplement and amend the procedural rules with regard to the recognition and withdrawal of recognition of monitoring

[73] OJ [2011] L55/13.
[74] OJ [2010] L295/23.
[75] This was formerly the Regulatory procedure (Art. 5 of Council Dec. 1999/468 (OJ [1999] L184/23): Art. 13(1)(c) of Reg. 182/2011.
[76] OJ [2012] L177/16.

organisations and, if experience so requires, to amend them, the Commission may adopt delegated acts in accordance with Article 290 TFEU...'. The Commission duly adopted Delegated Regulation 363/2012 on the procedural rules for the recognition and withdrawal of recognition of monitoring organisations as provided for in Regulation 995/2010.[77]

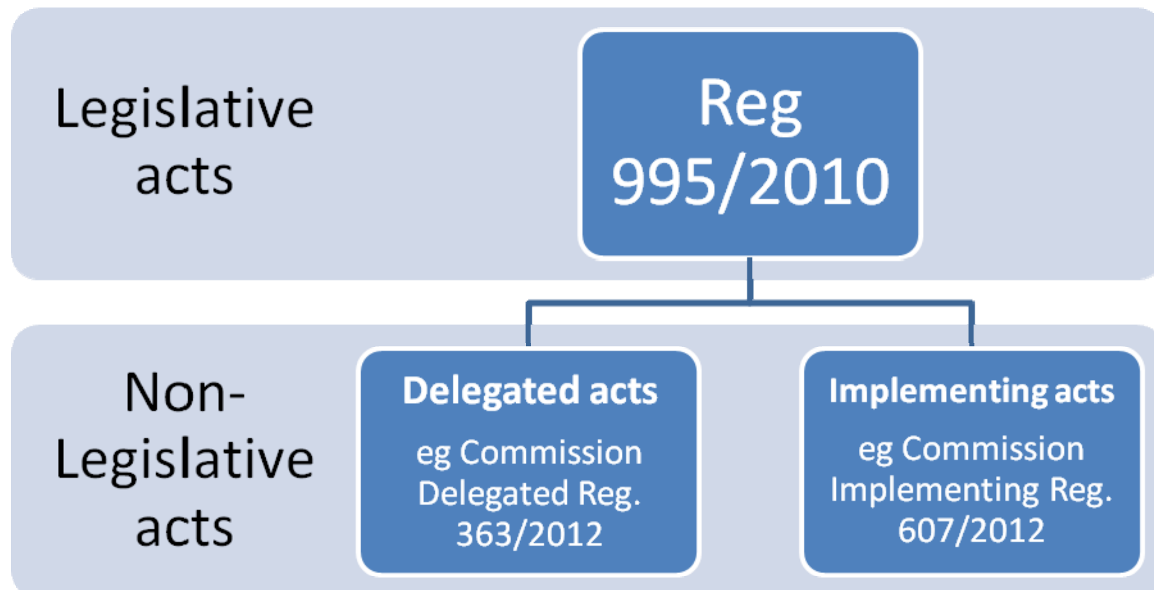

Fig 5 The interplay between Legislative and Non-Legislative acts

This brief survey shows that in respect of non-Legislative acts, the Commission's activities are controlled by the EP and Council in respect of delegated acts and by the Member States acting through the comitology committees in respect of implementing acts. We turn now to see the control the Member States have over the adoption of Legislative acts

Adopting Legislative acts

The principle of conferral

Unlike sovereign states, the EU has no inherent powers. It can only act where the Member States have conferred powers on it (the principle of conferral). This is made clear in Articles 5(1) and (2) TEU:

> 1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
>
> 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

Article 4(1)TEU reiterates:

> In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

[77] OJ [2012] L115/12.

Thus, by Treaty, EU law makes clear that in areas in which competence has not been conferred on the EU the Member States remain free to act, albeit that Member State action is constrained by the principles of negative integration outlined above. So, for example, while the EU has no competence to harmonise the laws and regulations of the Member States in the field of public health (Article 168(5) TFEU), any national legislation remains subject to the four freedoms, in particular the freedom to provide services.

In order to discover whether the EU has the power to act, reference needs to be made to the so-called 'legal bases' scattered across the Treaty. Not only do these legal bases give the EU the power to act but they also lay down the relevant legislative procedures

The Legal Basis of Legislative Acts in the field of internal market

In the field of the internal market, the principal legal bases are set out in Table 1 below. They can be subdivided into *general* legal bases and *specific* legal bases.

Legal basis (TFEU)	Subject area for potential legislation	Legislative Procedure	Other comments
General			
Art. 114	Measures for the approximation of national provisions having as their object the establishment and functioning of the internal market	Ordinary	Discussed in detail below
Art. 115	Directives for the approximation of national provisions as directly affect the establishment or functioning of the internal market.	Special (Council acting unanimously, EP consulted)	Largely replaced by Art. 114 but can be used in areas listed in Art. 114(2). Residual legal basis.
Art. 352	Measures necessary to attain one of the objectives set out in the Treaties.	Special (Council acting unanimously, EP gives consent)	Subsidiarity procedure referred to; limits on harmonisation (see below)
Specific			
Art. 33	Measures to strengthen customs cooperation between Member States (MS) and between MS and the Commission	Ordinary	
Art. 46	Directives or Regulations setting out the measures required to bring about freedom of movement for workers	Ordinary	Reg. 492/2011 on free movement of workers adopted under this provision Dir. 2005/36 on the recognition of qualifications adopted

			in part under this basis
Art. 48	Measures in the field of social security as are necessary to provide freedom of movement of workers and arrangements for employed and self employed migrant workers and their dependants	Ordinary	Reg 883/2004 on the coordination of social security systems adopted under this provision and Art. 352. Special provisions for states which consider a draft legislative act would affect important aspects of its social security system.
Art. 50(1)	Directives in order to attain freedom of establishment.	Ordinary	
Art. 51	Measures prescribing that certain activities are not covered by the rules on freedom of establishment	Ordinary	
Art. 52	Directives for the coordination of the rules on the express derogations	Ordinary	
Art. 53	Directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications, and for the coordination of national provisions concerning the taking up and pursuit of activities as self-employed persons	Ordinary	The Services Directive 2006/123 was adopted under this provision together with Art. 62. Dir. 2005/36 on the recognition of qualifications adopted in part under this basis. Dir. 2009/72 on the common rules for the internal market in electricity adopted under this provision together with Arts. 62 and 114.
Art. 56	Provisions on the Chapter on services can be extended to nationals of a third country who provide services and are established in the EU	Ordinary	
Art. 59	Directives to achieve the liberalisation of a specific service	Ordinary	
Art. 62	Extends Arts. 51 to 54		

	to matters covered by the Chapter on Services		
Art. 64(2)	Measures on the movement of capital to or from third countries involving direct investment, establishment, the provision of financial services or the admission of securities to the capital markets	Ordinary	Provision made for measures (adopted by special legislative procedure) which constitute a step backwards in EU law as regards the liberalisation of the movement of capital to or from third countries
Art. 66	Safeguard measures with regard to capital movements to or from third countries causing or threatening to cause serious difficulties for the operation of EMU	'Special' (Council after consulting ECB)	
Art. 113	Provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and functioning of the internal market and to avoid distortion of competition	Special (Council acting unanimously after consulting EP and ECOSOC)	Council Directive 2011/64/EU on the structure and rates of excise duty applied to manufactured tobacco

Table 1 Summary of the main legal bases in the field of the internal market

In addition to the legal bases identified above, there are certain policies seen as flanking to, or supportive of, the internal market (see Table 2). These all have their own legal bases:

Legal basis (TFEU)	Subject area for potential legislation	Legislative procedure	Comments
Art. 18	Rules designed to prohibit discrimination on the grounds of nationality	Ordinary	
Art. 19(1)	Appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.	Special (Council acting unanimously after obtaining consent of the EP)	Directives 2000/43 prohibiting discrimination on the grounds of race and ethnic origin and Directive 2000/78

			prohibiting discrimination on the other grounds listed except sex
Art. 21	Action by the Union necessary to attain the right for EU citizens to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect	Ordinary is the general rule; Special procedure (Council acting unanimously after consulting the EP) for measures concerning social security and social protection.	The Citizens Rights Directive 2004/38 was adopted on this basis (together with Arts 18, 46, 50 and 59)
Art. 22	Provisions for citizens on the right to vote and stand as a candidate in local and European elections in another MS	Special (Council acting unanimously after consulting the EP)	Council Directive 93/109 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals and Council Directive 94/80 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals adopted under this basis
Art. 23	Directives establishing the coordination and cooperation measures necessary to facilitate diplomatic or consular protection of EU citizens in a third state	Special (Council to adopt after consulting EP)	
Art. 24	Regulation on the rules on the citizens' initiative	Ordinary	Regulation 211/2011 was adopted on this basis

Art. 153	Directives in the field of employment law and working conditions	Ordinary generally; special in respect of certain areas	Minimum standards only; no competence for the EU under this Article in respect of pay, right of association, right to strike or to impose lock-outs The Working Time Directive 2003/88 adopted on this legal basis.
Art. 157(3)	Measures to ensure the application of the principle of equal opportunities and equal treatment of men and women	Ordinary	The equal treatment Directive 2006/54 was adopted under this legal basis
Art. 169(2)	Measures to promote the interests of consumers -through measures adopted under Art. 114 -measures which support, supplement and monitor the policy pursued by MS	 Ordinary Ordinary	The Unfair Commercial Practices Dir 2005/29 adopted under Art. 114
Art. 192	Measures to preserve, protect and improve the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems and in particular combating climate change	Ordinary generally; but special in certain areas	Directive 2003/87 on the emissions trading scheme was adopted under this basis as was the Illegal Logging Regulation 995/2010 (considered in Fig. 5)
Art. 194	Measures ensure the functioning of the energy market, security of energy supply, energy	Ordinary	

	efficiency, interconnection of energy networks		

Table 2 The legal bases of flanking measures

Article 114 TFEU

Of all the legal bases listed in Tables 1 and 2, Article 114 TFEU is the most important for the creation of the internal market and it is this legal basis that we shall concentrate on. Article 114(1) TFEU provides:

> Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

Article 114(3) TFEU adds that in its proposals envisaged in Article 114(1) TFEU concerning health, safety, environmental protection and consumer protection, the Commission will 'take as a base a high level of protection, taking account in particular of any new development based on scientific facts'.

Thus Article 114 TFEU can be used to adopt measures at EU level whose object is the 'establishment and functioning of the internal market'. In other words, where disparate national rules exist on, say, the amount of noise lawnmowers can make, and these rules make it difficult for lawnmower manufacturers who will have to adapt their product to each national market before it can be sold there, the EU has the competence to legislate under Article 114 to adopt a single standard. The EP and Council have done just that: Directive 2000/14 on the approximation of the laws of the Member States relating to the noise emission in the environment by equipment for use outdoors was adopted under Article 114 TFEU.[78]

There are four limits to the use of Article 114 TFEU:

- resort to Article 114 TFEU can be made where no other specific legal basis applies (eg Article 113 TFEU, Article 192 TFEU);
- the measures adopted under Article 114 TFEU must be for approximation of laws (also known as harmonization) ie create a single standard; if the effect of the national rule is to leave national laws remain unchanged then Article 114 TFEU cannot be used. [79]
- Article 114(2) TFEU expressly provides that Article 114(1) TFEU cannot be used to adopt fiscal measures, nor measures relating to the free movement of persons, nor measures relating to the rights and interests of employed persons—areas considered to be too sensitive to be the subject of QMV. Article 115 TFEU could be used instead
- The limits laid down in Tobacco Advertising I (see below)

Despite the limits laid down in Article 114 TFEU there was a sense that this legal basis (and the two other general bases, Articles 115 and 352 TFEU), were being used as a general legislative

[78] OJ [2000] L162/1.

[79] See, e.g., Case C–436/03 *EP and Commission* v. *Council (ECS)* [2006] ECR I–3733.

competence, and so the principle of conferral was being honoured in the breach rather than the observance. Perhaps this mattered less when the legal basis required unanimity in Council, so a Member State which objected could veto the measure, but it became more serious in respect of Article 114 TFEU, which allowed for qualified majority voting.

This issue came to a head in *Tobacco Advertising I*,[80] which concerned the successful challenge by Germany to the Union's competence to adopt the Tobacco Advertising Directive 98/43. This Directive, which banned tobacco advertising and sports sponsorship by tobacco companies, was adopted under Article 114 TFEU. Germany argued that this measure really concerned public health and, as we have seen, Article 168(5) TFEU expressly excluded EU competence to harmonise. The Court appeared to agree: it said other Articles of the Treaty could not be used 'as a legal basis in order to circumvent the express exclusion of harmonization laid down in [Article 168(5) TFEU]'.[81]

Having implied that the directive might have been a disguised health measure, the Court made no further reference to the public-health provision.[82] Instead, it focused on the question of the circumstances in which Article 114 TFEU could be used to adopt EU legislation. It said:[83]

> the measures referred to in Article [114 TFEU] are intended to improve the conditions for the establishment and functioning of the internal market. To construe that Article as meaning that it vests in the [Union] legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in Article [5(1) TEU] that the powers of the [Union] are limited to those specifically conferred on it.

This was an important recognition by the Court of the principle of conferral. The Court continued that:

> Moreover, a measure adopted on the basis of Article [114 TFEU] must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article [114 TFEU] as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory.

Thus, the Court said that where the Union measure was genuinely intended to improve the conditions for the establishment and functioning of the internal market, and actually had that effect, then Article 114(1) could be used in two situations:

- where the legislation contributes to the elimination of likely *obstacles* to the exercise of fundamental freedoms
- where the legislation contributes to the removal of appreciable *distortions of competition* which are likely to arise from the diverse national rules.

[80] Case C–376/98 *Germany* v. *European Parliament and Council* [2000] ECR I–8419 and Case C–74/99 *R.* v. *Secretary of State for Health and others, ex p. Imperial Tobacco* [2000] ECR I–8599.
[81] Para. 79.
[82] Case C–380/03 *Tobacco Advertising II* [2006] ECR I–11573.
[83] Para. 83.

On the facts the Court said that Directive 98/43's ban on advertising of tobacco products in 'non-static advertising media' (periodicals, magazines, and newspapers) could be adopted on the basis of Article 114(1) TFEU, since this would help to ensure the free movement of press products, but Article 114(1) TFEU could not be used to ban advertising in 'static advertising media' (eg posters, parasols, ashtrays, and other articles used in hotels, restaurants, and cafés) because the effect on free movement of goods was too uncertain and indirect.

In respect of distortions of competition, the Court said that the EU had no power to regulate in respect of advertising agencies and producers of advertising media established in Member States (the argument being that those agencies established in states which imposed fewer restrictions on tobacco advertising were at an advantage in terms of economies of scale and increase in profits), because the effects of such advantages on competition were 'remote and indirect' and did not 'constitute distortions which could be described as appreciable'.[84] However, Article 114(1) TFEU could be used to harmonize national rules concerning sports sponsorship by tobacco companies. It noted that prohibiting sponsorship in some Member States and authorizing it in others caused certain sports events to be moved, affecting the conditions of competition for undertakings associated with such events. Since this gave rise to an appreciable distortion on competition, it did justify an EU measure adopted under Article 114 TFEU but not an outright ban on advertising of the kind proposed by the directive.

The decision in *Tobacco Advertising I* was the high water mark of the Court's recognition of the outer limits of Article 114 TFEU on positive integration. It is seen as a pair with *Keck* which laid down limits on negative integration. However, as with *Keck*, the value of the decision is now more symbolic than substantive: the Court has not struck down any other uses of Article 114 TFEU, quite the contrary. In fact it appears to have given the green light to an ever wider range of measures. For example, the Court has since made clear that the phrase 'measures for the approximation' in Article 114 TFEU conferred on the legislature a broad discretion as regard the method most appropriate for achieving the desired result, in particular in areas characterized by complexity.[85] Measures adopted can consist of requiring all Member States to authorize the marketing of products, subjecting any such authorization to certain conditions, or even prohibiting the marketing of products, even though a ban might appear to fly in the face of a single market in goods. And in *Österreichischer Rundfunk*[86] the Court said that the Data Protection Directive could be adopted under Article 114 TFEU even though it applied to a wholly internal situation. The Court said that 'recourse to Article [114 TFEU] as a legal basis does not presuppose the existence of an actual link with free movement between Member States in every situation referred to by the measure founded on that basis'. It was sufficient that the measure adopted under Article 114 TFEU was actually intended to improve the conditions for the establishment and functioning of the internal market.[87]

Article 352 TFEU

The residual legal basis in Article 352 TFEU provides that if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the

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[84] Para. 109.

[85] Case C–380/03 *Tobacco Advertising II* [2006] ECR I–11573, para. 42.

[86] Case C–465/00 [2003] ECR I–4989, para. 41.

[87] Case C–380/03 *Germany* v. *Council and European Parliament (Tobacco Advertising II)* [2006] ECR I–11573, para. 80.

objectives set out in the Treaties and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, must adopt the appropriate measures. Those measures may be legislative in character in which case they are deemed to have been adopted by the special legislative procedure. Perhaps in a nod to the problems generated by *Tobacco Advertising I* and the Court's cavalier approach to the non-harmonization provision in Article 168(5) TFEU, Article 352(2) provides 'Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.'[88]

The most recent – and highly controversial – use of Article 352 was the proposal for the adoption of the so-called Monti II Regulation[89] intended to address the problems arising from the Court's decision in Viking (considered above) which trade unionists saw as limiting their right to strike. This proposal was intended to strike a better balance between principles of free movement and the right to strike while introducing an alert mechanism which required Member States to notify the Commission of 'serious acts or circumstances affecting the effective exercise of the freedom of establishment or the freedom to provide services which could cause grave disruption to the proper functioning of the internal market and/or which may cause serious damage to its industrial relations system or create serious social unrest in its territory or in the territory of other Member States'. A number of Member States objected to the use of Article 352 TFEU as the legal basis and argued that the Commission was deliberately using Article 352 TFEU to circumvent the limits in Article 153(5) TFEU (see Table 1). The Yellow card procedure under the Subsidiarity Protocol (see below) was successfully invoked and the Commission withdrew the proposal.

Subsidiarity and proportionality

So far we have examined whether the Union has t in principle he competence to act (ie the existence of the EU's power – see fig 5). The next question is whether the EU should actually *exercise* those powers (the subsidiarity question) and if so, to what extent (the proportionality question). Article 5(3) TEU says:

> Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
>
> The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

As Article 5(3) TFEU makes clear, the subsdiarity principle applies only in areas where the Union's competence is not exclusive (ie areas of 'shared' competence), which includes the internal market.[90]

[88] See also the limit in Art. 352(4) TFEU: 'This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, 2nd para., of the Treaty on European Union.'
[89] COM(2012) 130
[90] Art. 4(2)(a) TFEU.

However, if the EU has already legislated in the particular area of the internal market (to use the jargon it has already 'occupied the field'), eg in the area of maximum noise levels of outdoor machinery, and it wants to legislate further to improve standards, the subsidiarity principle should not, according to the theory, apply. [91]

If an application of the subsidiarity principle reveals that the Union should act, or it is an area of pre-emption, any measure adopted must also be proportionate (no more extensive than necessary to achieve the objective). Article 5(4) TEU says:

> Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.
>
> The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

The Court has long been reluctant to engage in a detailed examination of the compatibility of a Union act with the principles of subsidiarity and proportionality because, as it explained in *Ex p. BAT*,[92] 'the [Union] legislature must be allowed a broad discretion in an area such as that involved in the present case, which entails political, economic, and social choices on its part, and in which it is called upon to undertake complex assessments'. Consequently, the legality of a measure adopted can be affected 'only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue'.93

Subsidiarity has proved a particularly sensitive issue. In the past, the Court has been reluctant to review the merits of complaints alleging breach of subsidiarity, viewing subsidiarity more as a political, than as a legal, principle. In particular, it has refused to examine whether the criteria laid down in Article 5(3) TEU (i.e., whether the action can be sufficiently achieved by the Member States or, whether by reason of the scale or effects of the proposed action, it could be better achieved by the Union) have been met. Instead, the Court has been content to focus on the procedural aspects of the subsidiarity principle, checking to see whether the Union institutions have actually considered the implications for the principle of subsidiarity of the proposed measure;[94] it has not been prepared to look behind those reasons to see whether they were justified. For example, in *Working Time*[95] the Court simply observed that if harmonization was at issue this 'necessarily' presupposed Union-wide action, without examining the prior question of whether there was a need for harmonization in this area.

However, in *Ex p. BAT*[96] the Court showed itself a little more willing to consider the merits of the subsidiarity principle in deciding whether the Community should have adopted the Tobacco Control Directive 2001/37. It began by considering 'whether the objective of the proposed action could be

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[91] Cf Case C–491/01 *Ex p. BAT* [2002] ECR I–11453 subsidiarity will also apply to situations where the Union has already exercised its shared competence, with at least some pre-emptive effects, and replaces that legislation with revised rules (the Tobacco Control Dir.).

[92] Case C–491/01 [2002] ECR I–11453, para. 123.

[93] Para. 123.

[94] Case C–233/94 *Germany* v. *Parliament and Council (deposit guarantee schemes)* [1997] ECR I–2405.

[95] Case C–84/94 *UK* v. *Council* [1996] ECR I–5755.

[96] Case C–491/01 [2002] ECR I–11453. See also Joined Cases C–154/04 and C–155/04 *Alliance for Natural Health* [2005] ECR I–6451, paras. 105–6.

better achieved at [Union] level'. It said that since the directive's objective was to eliminate the barriers raised by the differences which still existed between the laws of the Member State on the manufacture, presentation, and sale of tobacco products, 'such an objective cannot be sufficiently achieved by the Member States individually and calls for action at [Union] level, as demonstrated by the multifarious development of national laws in this case'. It therefore considered that the objective of the directive could be better achieved at Union level. In effect this is a clearer articulation of the point made in *Working Time* that harmonization requires EU action. Rather curiously, the Court then appeared to merge the tests of subsidiarity and proportionality. It said that:

> the intensity of the action undertaken by the [Union] in this instance was also in keeping with the requirements of the principle of subsidiarity in that ... it did not go beyond what was necessary to achieve the objective pursued.

The Court also found the Tobacco Control Directive's provisions proportionate. For example, when considering the obligation to give information on the tar, nicotine, and carbon monoxide levels and to print health warnings on the packets, it noted that these were appropriate measures for attaining a high level of health protection when the barriers raised by national laws on labelling were removed. The Court continued that although the directive required more of the surface area of the packaging to be used for warnings, it also allowed for sufficient space to be left for the manufacturers to affix other material, in particular trade marks. For this reason, the Court concluded, 'the [Union] legislature has not overstepped the bounds of the discretion which it enjoys in this area'.

Amendments introduced by the Lisbon Treaty are intended to improve the monitoring and enforcement of the subsidiarity principle through ex ante control by national parliaments, the bodies that stand to lose most by Union action, rather than by ex post review by the Court.[97] Article 5(3) TEU says that the Union's institutions must apply the principle of subsidiarity in accordance with Protocol No. 2 on the principles of subsidiarity and proportionality. National parliaments are to ensure compliance with the principle of subsidiarity in accordance with Protocol No. 1 on the role of national parliaments in the European Union. Protocol No. 2 introduces the so-called 'yellow card' procedure under which any national parliament or chamber thereof can object to a proposed EU measure, on the grounds that it does not comply with the principle of subsidiarity, by issuing a reasoned opinion. Where one-third of the national parliaments object (the so-called yellow card procedure), the proposal must be formally reviewed by the EU institutions, as was the case with the Monti II proposal (see above).Heightened scrutiny applies to a proposal under the ordinary legislative procedure which is objected to by a simple majority of votes allocated to national parliaments.

[97] Although Art. 8 of Protocol No. 2 on the principles of subsidiarity and proportionality confirms that 'The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act', brought in accordance with the rules laid down in Art. 263 TFEU by 'Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof'.

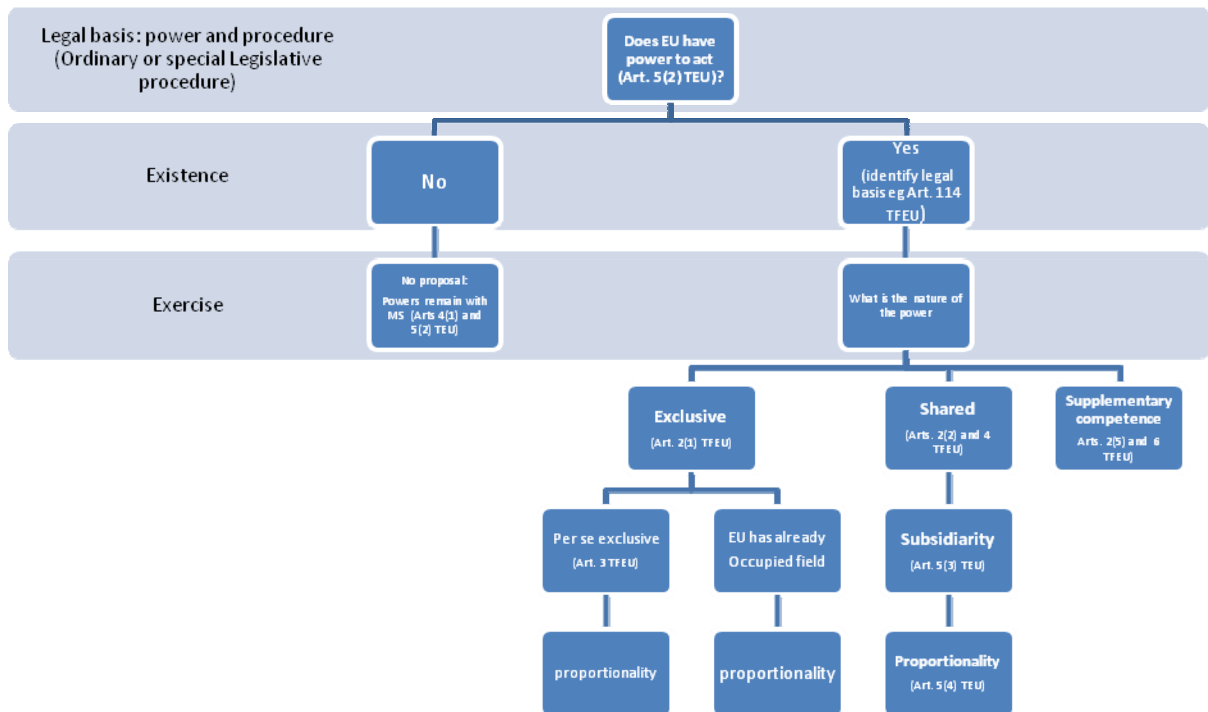

Fig 5 Factors to be taken into account in the Legislative process

Derogations from measures adopted under Article 114(1) TFEU

Articles 114(4)–(5) TFEU make express provision for Member States to derogate from a measure adopted under Article 114(1) TFEU. This was the price for the introduction of QMV into Article 114(1) TFEU. Article 114(4) TFEU concerns pre-existing national measures. It says:

> If, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

Article 114(5) TFEU concerns new measures. It allows a Member State 'to introduce national provisions based on new scientific evidence . . . on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure'. This scientific evidence—which must be both new and raising a problem specific to the applicant Member State—can relate only to the protection of the environment or the working environment. Thus, unlike Article 114(4) TFEU, the grounds listed in Article 36 TFEU (public policy, security, health etc – considered above) cannot be invoked to justify a national derogation under Article 114(5) TFEU. This is because, as the Court explained in *Commission v. Denmark*[98] in respect of Article 114(4) TFEU, the EU institutions already

[98] Case C–3/00 *Commission* v. *Denmark* [2003] ECR I–2643, para. 57.

know of the national provisions but choose not to take them into account, while the adoption of new national legislation under Article 114(5) TFEU is more likely to jeopardize harmonization. For this reason the grounds under which Article 114(5) TFEU can be invoked are more limited. The procedure for applying for a derogation is spelt out in Articles 114(6)-(9) TFEU.

Articles 114(4)–(5) TFEU has not been much invoked by Member States, except in the area of GMOs. For example, the provincial government of Upper Austria wanted to ban GMOs, on the basis of a scientific report, in order (1) to safeguard organic and traditional farming which is characteristic of the region, and (2) to protect natural biodiversity, particularly in sensitive ecological areas, as well as genetic resources, from 'contamination' by GMOs. Since this ban would contravene the Directive 2001/18 on the deliberate release of GMOs into the environment,[99] the Austrian government notified the Commission of its draft legislation, in accordance with Article 114(5) TFEU. The Commission referred the matter to the European Food Safety Authority, which found that (1) there was no new scientific evidence, in terms of risk to human health and the environment, to justify the prohibition; (2) there were no new data that would change the environmental risk assessment conducted on GMOs that currently held marketing consent in the EU; and (3) there was no scientific evidence to indicate that Upper Austria had unusual or unique ecosystems that required separate risk assessments from those carried out for Austria as a whole. The Commission therefore rejected the Austrian application.[100]

The Land of Upper Austria unsuccessfully sought judicial review of the Commission's decision.[101] The General Court emphasized that, in order to avoid prejudicing the binding nature and uniform application of Union law, the procedures laid down in Article 114(4)–(5) TFEU were both intended to ensure that no Member State applied national rules derogating from the harmonized legislation without obtaining prior approval from the Commission. The Court noted that Austria had failed to satisfy the burden of proof that there existed specific problems faced by Upper Austria and, since one of the cumulative conditions laid down in Article 114(5) had not been satisfied, Austria could not derogate from Directive 2001/18.[102] The Court of Justice upheld the General Court's decision.[103]

This case law suggests that, as derogations from a Directive adopted through the EU's legislative process, the Court will control the criteria laid down by the Treaty with care.

Enhanced cooperation

So far we have looked at powers within the Treaty for Member States to opt-out of certain EU measures. Legislative acts themselves also contain provisions for Member States to opt-out of certain Articles (perhaps most famously the opt-out, negotiated by the UK, from the 48 hour week in the Working Time Directive 2003/88) or at least to delay compliance (see eg the Unfair Commercial Practices Directive 2005/29 which allows Member States six years after the implementation date to not apply the Directive; that period can be extended). However, since Amsterdam, the Treaties have made provision for so-called 'enhanced cooperation'. This allows a minimum of nine EU Member

[99] [2001] OJ L106/1.
[100] Commission Dec. 2003/653 ([2003] OJ L230/34). See also Commission Dec. 2008/62/EC ([2008] OJ L16/17) where the Commission rejected a similar request from Poland on the grounds of the absence of any new scientific evidence relating to the protection of the environment or the working environment.
[101] Joined Cases T–366/03 and T–235/04 *Land Oberösterreich* v. *Commission* [2005] ECR II–4005.
[102] Para. 69.
[103] Case C–430/05 P *Land Oberösterreich* v. *Commission* [2007] ECR I–7141.

states to establish advanced integration or cooperation in an area within EU structures but without the other Member States being involved. They thus cooperate within the framework of the Treaties, not outside it as is the case with the European Fiscal Compact (formally, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union). Enhanced cooperation is currently being used in the field of divorce law,[104] and is approved for the fields of patents[105] and a financial transaction tax.[106]

Appetites are being whetted to use this new form of integration. While it is not a limit on the EU's power it certainly allows reluctant states to move forward at a slower pace and conversely more enthusiastic Member States to move faster. However, it is subject to the limitation that such cooperation 'shall not undermine the internal market or economic , social or territorial cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them'. A summary of the main limits to the EU's power of positive integration can be found in Box 2.

Box 2 Summary of the limits of the EU's powers of 'positive' integration

- The EU can act only where the powers are expressly conferred on it
- Non-Leglisative acts can only be adopted under control by the EP and the Council (delegated acts) or the comitology committees (implementing acts)
- each legal basis contains its own inherent limitations which must be respected
- *Tobacco Advertising I* sent out a strong message that there are outer limits on the use of the EU's legislative powers that the Court will control
- the principles of subsidiarity and proportionality are intended to limit the exercise of EU powers
- states can derogate from harmonisation measures under Article 114(4) and (5) TFEU
- states are free to integrate faster and more deeply through enhanced cooperation

Conclusions

This report has attempted to show the range of the EU's powers, both negative and positive, as well as the Court's interpretation of those powers. It is crucial to understand the Court's case law because a simple reading of the Treaty would present only a partial picture. The UK has always been a keen supporter of free trade: the Court's generally robust interpretation of the Treaty provisions on free movement therefore coincides with the UK's agenda.

Legislation from 'Brussels' has always been more controversial in the UK political debate. At first sight, a Directive regulating the amount of noise lawnmowers make is a prime example of the sort of rule that the EU should not be adopting: a quick reading of the subsidiarity principle would suggest

[104] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation OJ {2010] L343/10.
[105] http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/119732.pdf.
[106] http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/134949.pdf.

that this is the very sort of measure which should be left to the Member States to legislate on. In fact, placing this measure in the broader context of the single market offers a different perspective: British lawnmower manufacturers stand to gain from a single standard set centrally (in Brussels) which allows them to achieve the economies of scale of selling in a wider market. Much EU legislation, and the flexibility introduced within that legislation, therefore tend to support the UK's objectives of facilitating free trade.

As this review has shown, in practice negative integration cannot proceed without positive integration; the two are intimately linked. Yet, as has also been shown, negative integration is potentially more intrusive into national sovereignty than positive integration. However, the legal and political safeguards for positive integration are more stringent than those for negative integration and engage the dual legitimising force of the European Parliament, directly accountable to the electorate, and the Council of Ministers, indirectly accountable through national parliaments. An appreciation of these facts offers a more nuanced perspective of the single market.

Further Reading

C. Barnard, *The Substantive Law of the European Union: the Four Freedoms* (Oxford, OUP, 2013)

D. Chalmers et al, *European Union Law: Cases and Materials* (Cambridge, CUP, 2010)

P. Craig and G. De Búrca, *EU Law: Text, Cases and Materials* (Oxford, OUP, 2011)

P. Oliver et al, *Oliver on Free Movement of Goods* (Oxford, Hart Publishing, 2010)

S. Weatherill, *Cases and Materials on EU Law* (Oxford, OUP, 2012)