Chapter 19
Why There Is No 'Principle of Mutual Recognition' in EU Law (and Why that Matters to Consumer Lawyers)

Stephen Weatherill

Abstract Lately both the Court and the Commission have taken to referring to the principle of mutual recognition in the law of the EU's internal market. But there is no principle of mutual recognition in the law of the EU's internal market. There is only a principle of non-absolute or conditional mutual recognition. Put another way, EU law does not require Member States to admit on to their market products or services that comply with the regulatory requirements of the State of origin. Instead EU law requires Member States to show good reasons in the public interest when they wish to refuse admission to such products or services. Internal market law includes space for justified trade barriers. The Court and the Commission are probably not trying to re-write the law of the EU's internal market. The Court and the Commission are probably just being a bit sloppy and a bit lazy. But such imprecision carries risk. An over-emphasis in internal market law on the impetus towards the liberation of cross-border trade at the expense of the regulatory sensitivities of individual Member States carries the risk that deregulation-by-law will be driven too deep—more deeply than the Treaty envisages. And that same overemphasis on market deregulation also carries the risk of loading too much weight on to the judicial means to construct an internal market—the law of free movement—at the expense of the supplementary role performed by the EU's legislative process, most prominently in the name of harmonisation. So recognition that there is no principle of mutual recognition in the law of the EU's internal market is important in grasping the legitimate place of both Statelevel and EU-level regulation in the building of that market.

19.1 Introduction

Lately both the Court and the Commission have taken to referring to the principle of mutual recognition in the law of the EU's internal market. But there is no principle of mutual recognition in the law of the EU's internal market. There is only a

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principle of non-absolute or conditional mutual recognition. Put another way, EU law does not require Member States to admit on to their market products or services that comply with the regulatory requirements of the State of origin. Instead EU law requires Member States to show good reasons in the public interest when they wish to refuse admission to such products or services. Internal market law includes space for justified trade barriers. The Court and the Commission are probably not trying to re-write the law of the EU's internal market. The Court and the Commission are probably just being a bit sloppy and a bit lazy. But such imprecision carries risk. An over-emphasis in internal market law on the impetus towards the liberation of cross-border trade at the expense of the regulatory sensitivities of individual Member States carries the risk that deregulation-by-law will be driven too deep—more deeply than the Treaty envisages. And that same over-emphasis on market deregulation also carries the risk of loading too much weight on to the judicial means to construct an internal market—the law of free movement—at the expense of the supplementary role performed by the EU's legislative process, most prominently in the name of harmonisation. So recognition that there is no principle of mutual recognition in the law of the EU's internal market is important in grasping the legitimate place of both State-level and EU-level regulation in the building of that market.

19.2 The Court

In recent practice the Court has regrettably taken to dropping the important nuance that EU law is no instrument for automatic market deregulation. It has instead mistakenly referred to an unconditional principle of 'mutual recognition' and 'of ensuring free access of EU products to national markets'.

In its 2009 Grand Chamber ruling in *Commission* v *Italy*, a case concerning the use of trailers in Italy, the Court referred to (what is now) Article 34 TFEU as the source of

> … the obligation to respect the principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of Community products to national markets (see, to that effect, Case 174/82 *Sandoz* [1983] ECR 2445, paragraph 26; Case 120/78 *Rewe—Zentral* ('*Cassis de Dijon*') [1979] ECR 649, paragraphs 6, 14 and 15; and *Keck and Mithouard*, paragraphs 16 and 17).[1]

But the cited paragraphs of *Sandoz* and *Cassis* are directed at the absence of justification for the trade barriers at stake in those cases, whereas the cited paragraphs of *Keck and Mithouard* concern the absence of any trade barrier in the first place. None of these rulings is supportive of the crude claim made by the Grand Chamber in *Commission* v *Italy* that there is an unqualified intra-EU principle of mutual recognition of products lawfully manufactured and marketed in other Member States.

So the Court is wrong—wrong to refer to a principle of mutual recognition and wrong to locate that principle in its pre-existing case law. Worse, it seems intent

[1] Case C-110/05 *Commission v Italy* [2009] ECR I-519 para 34.

on staying wrong. Citing *Commission v Italy*, it has on four occasions asserted that Article 34 TFEU reflects *the obligation to comply with the principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of EU products to national markets*.[2] The four tarnished judgments are *Ker-Optika*,[3] a ruling of the Third Chamber, *Ascafor* (Fifth),[4] *ANETT* (Third),[5] and *Elenca Srl* (Fifth).[6]

The type of trade barrier at stake in these cases is not the same, which makes the Court's zeal for consistency all the more peculiar. So, for example, in *Commission* v *Italy* the Court proceeded to discuss the line of case law developed through *Dassonville* and *Keck and Mithouard*, and to consider that in the light of the problem raised by the case itself, a restriction on use (of trailers towed by motorbikes in Italy). In *Ker-Optika* the Court avoided direct engagement with the question whether the impugned rule, which required sale of contact lenses to be channelled through particular types of medical premises, was one that in fact, if not in law, had a detrimental effect on products from out-of-State when compared with domestic products or whether instead it was better treated as a restriction on a method of selling which might have a considerable influence on the behaviour of consumers. *Elenca Srl* by contrast was a straightforward '*Cassis*-type' case of a 'dual regulatory burden': Italian rules required imports to meet technical standards without taking account of the regulatory environment to which they had been subject in their home State.

In each of these five cases the Court subsequently moved to consider questions of justification. I do not think the *outcome* of any of these cases is wrong. The Court correctly adopted a two-stage test—finding a trade barrier and then assessing whether it was justified. But it should assert at the first stage that there is a second stage. Otherwise there is a risk that the false notion that EU internal market law is based on a principle of mutual recognition may spread. This may lead to misunderstanding and misapplication of the law, but, even as a minimum, it is damaging to the EU's reputation if an excessively deregulatory tone is struck in describing and planning the internal market.

19.3 The Commission

The Commission's recalcitrance has a longer pedigree. In the aftermath of the *Cassis de Dijon* ruling in 1979, the Commission published a Communication concerning the consequences of the judgment.[7] Its main concern was to draw attention to the

[2] The change from 'respect' the principles to 'comply with' the principles seems to be merely a translation glitch: respecter and einhalten are used consistently in the French and German texts.

[3] Case C-108/09 *Ker-Optika* [2010] ECR I-12213 para 48.

[4] Judgment of 1 March 2012, Case C-484/10 *Ascafor*, not yet reported, paras 53, 70.

[5] Judgment of 26 April 2012, Case C-456/10 *ANETT*, not yet reported, para 33.

[6] Judgment of 18 October 2012, Case C-385/10 *Elenca Srl*, not yet reported, para 23.

[7] [1980] OJ C 256/2.

key institutional implication of the judgment. This holds that, in consequence of the Court's generous interpretation of the scope of (what is now) Article 34 TFEU in application to national technical standards, the Commission's own legislative programme of harmonisation may be focused on trade barriers which survive inspection pursuant to Article 34. Those that do not will be unlawful as a result of the application of the Court's criteria, and need not be addressed by legislative action. But the Communication is well-balanced. It does not at all conceal the key point that even if the scope of the trade barrier subject to review pursuant to Article 34 TFEU is broad, so too is it open to the regulator to justify the maintenance of that barrier—and, moreover, under a justificatory formulation that is broader than is envisaged by Article 36:

> Any product lawfully produced and marketed in one Member State must, in principle, be admitted to the market of any other Member State. Technical and commercial rules, even those equally applicable to national and imported products, may create barriers to trade only where those rules are necessary to satisfy mandatory requirements and to serve a purpose which is in the general interest and for which they are an essential guarantee.

The Communication of 1980 prominently places the *limits* of mutual recognition alongside its opportunities. Quite right!

The vision is rather different in the White Paper of the Commission on the completion of the internal market which was published in June 1985.[8] In paragraphs 77–79 in particular an emphasis on mutual recognition is absorbed by, and significantly affects, the Commission in planning its strategy for building the internal market. There is no denial that mutual recognition is conditional or non-absolute. But such qualification is voiced far more softly. It appears that the balance has altered—in favour of a greater emphasis on market deregulation achieved by the application of the free movement rules and less emphasis on the permitted space for justified national market regulation.

In June 1999 the Commission issued a communication entitled 'Mutual Recognition in the context of the follow-up to the Action Plan for the single market'.[9] The first sentence of the document's *Summary* declares that 'The principle of mutual recognition plays a central role in the Single Market by ensuring free movement of goods and services without making it necessary to harmonise national legislation'. Entirely absent from the four-paragraph *Summary* is any hint that this principle is conditional. In the document proper, that necessary caveat is not completely neglected but it is granted far less prominence than it should be—far less than in 1980—and the 'principle of mutual recognition' is consistently cited without qualification as a foundation stone of internal market law.

In similar vein in April 2006 a public consultation on the Future of the Internal Market was announced by DG MARKT. Consultation of 'stakeholders' was conducted, the results of which were released in September 2006: this was the Commission Staff Working Document, *Public Consultation on a Future Single Market*

[8] Available via http://ec.europa.eu/white-papers/index_en.htm.

[9] COM(99) 299.

Policy: Summary of Responses.[10] There are two references to 'mutual recognition', but neither admits that it is a non-absolute or conditional principle.

This misrepresentation has achieved legislative status.

Regulation (EC) No 764/2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State applies with effect from 13 May 2009.[11] It represents an important legislative impetus towards improving the practical management of the internal market. It envisages a process of curative dialogue and administrative co-operation where Member State authorities propose to close their market to imported goods.

The 'principle of mutual recognition' is cited in seven of the recitals in the Regulation's Preamble—Recitals (3), (4), (6), (21), (22), (30) and (34). But only three balance that citation with reference to scope for justification of national rules. These are Recitals (3) and (21), which serve up this important qualification only at the end of the Recital, and the only genuinely well-balanced recital is Recital (22), which serves up the full package of conditional or non-absolute mutual recognition.

As with the Court, so with the Commission—the allegation is not that the conditional or non-absolute nature of mutual recognition is denied but rather that it is being actively downplayed or at least that it is being presented in a manner that may risk a reader choosing to downplay it.

This is profoundly wrong. And this matters in the depiction and future shaping of the EU's internal market.

19.4 There Is no Principle of Mutual Recognition in the Law of the EU's Internal Market—The Basic Rules

It is worth returning to basics to recall how central is this balance between market deregulation and market regulation in EU internal market law.

Articles 34–36 TFEU are directed at scrutiny of national measures that restrict cross-border trade in goods. But they do not prohibit all such national measures. Article 36 allows derogation, so some trade barriers will survive (and fall to be addressed by the EU's legislative process). There is no *absolute* right to trade in goods across borders in the EU. The right is conditional or non-absolute, in the sense that it is always subject to the possibility that an obstructive national rule acting as a trade barrier will be shown to be justified by the regulating entity. The *Cassis de Dijon* principle famously applies new and more elaborate language to the particular case of national technical standards which restrict inter-State trade, subjecting them to (in short) a broader public interest inquiry than that envisaged by Article 36, but that landmark ruling does not alter the *structure* of the legal analysis at all.[12] The Court's explanation that obstacles to movement within the EU resulting

[10] SEC(2006) 1215.

[11] [2008] OJ L218/21.

[12] Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements is exactly in tune with the prohibition-plus-justification model asserted by Articles 34–36 TFEU. So that line of case law fully complies with the structure mapped out by Articles 34–36 TFEU: it puts trade barriers to the test, but it does not require that they automatically be set aside. True, a lot of power is granted to the Court. The wider the scope allowed to the possibility to justify barriers to trade, the more room for manoeuvre is handed back to national regulatory autonomy—and the more weight is placed on the process of legislative harmonisation at EU level as the way to advance integration. And vice versa. So there are vertical and horizontal implications to the interpretative choices made by the Court about the shape of the law of free movement. But the key point for present purposes is that simply because a product or service is lawfully made or marketed in one Member States does not entitle it unconditionally to access to the markets of other Member States. There is no unconditional right to free trade created by the Treaty. That is what the Court and the Commission are getting wrong or, at least, it is what they are downplaying. But it fundamental to the vertical and horizontal allocation of competence to build an internal market.

Making clear that mutual recognition is not automatic is vital to allowing space—space envisaged by the Treaty—for the expression of Member State regulatory autonomy via the window of justification in support of barriers to inter-State trade. And making clear that mutual recognition is not automatic is vital to allowing the EU legislative opportunities to re-shape the regulatory environment of the internal market by addressing questions of harmonisation which arise only once regulatory fragmentation persists precisely because Member States have been able to defend diverse regulatory practices as worthy of higher status than the impetus towards trade integration.

19.5 The Court—The Vertical Dimension of Why There Is no Principle of Mutual Recognition

It would admittedly be easy to survey the Court's case law and forget the importance of the conditional or non-absolute nature of mutual recognition. This is because so few regulators succeed in showing a satisfactory justification for their trade-restrictive choices. In part this is because the burden of proof rests on the regulator.[13] But in large part it is because the justifications advanced are so often absurd.

19.5.1 Justifying the Absurd

Cassis de Dijon itself is vividly illustrative. The German government sought to defend its rigid rules which suppressed choice among different types of liqueur

[13] e.g. Case 227/82 *Van Bennekom* [1983] ECR 3883; Case C-14/02 *ATRAL SA* [2003] ECR I-4431.

by claiming that the consumer needed protection from unexpectedly *weak* alcoholic drinks. In *Walter Rau v de Smedt* the Court was faced with the argument that consumers could lawfully be prevented from choosing between differently packaged margarines and that they instead should be permitted to buy only cube-shaped packs—a situation, which as the Court commented and as economic theorists would expect, led to Belgian consumers paying more for their margarine than consumers in neighbouring states.[14] *Corporación Dermoestética* concerned Italian rules prohibiting televised advertisements for certain medical and surgical treatments carried out in private health care establishments.[15] The Italian justification was rooted in protection of public health, to which the Court has long been in principle receptive—except that here, and utterly inconsistently, the ban applied to national television but not at all to local television networks.

National governments have come to the Court time and time again to defend absurdly anachronistic and often incoherent rules—probably because they are propelled to do so by the very vested interests that benefit from such protectionism. EU law cracks open such regulatory malpractice and liberalises the market for products and services, thereby expanding the consumer's choice.

It is easy enough to develop a sense that EU law is intolerant of national regulatory autonomy and thus to cast the EU as a vicious deregulatory engine. And I think that some (national) consumer lawyers have tended to depict the EU in these hostile terms. The Court was famously aggressive in *Mars*.[16] A marketing practice concerning product packaging that would not mislead a 'reasonably circumspect' consumer cannot be forbidden. The danger is that this 'confident consumer' or 'well-informed consumer' is treated as the paradigm: the lever to wrench aside national measures that attend to less robust consumers. But I think the real story here is less the ferocity of EU free movement law and more the absurdity of national regulatory eccentricity. These are cases where the conditional or non-absolute nature of the principle of mutual recognition lurks in the background, but the absurdity of the national (over-regulatory) choices ensures that the most powerful theme in the Court's judgments is market liberalisation and—on the facts of the cases—unrestricted mutual recognition. These are fact-specific cases: the confident consumer in EU free movement law is a reaction to the gross over-emphasis on national law on the stupid consumer of liqueur and margarine and chocolate as the norm. But there is room for justification. The requirement is that Member States take seriously the need to show why confident consumers should not be a lever in this way.

19.5.2 Taking Justification Seriously

It is exactly here that the crucial importance of the conditional or non-absolute nature of the principle of mutual recognition is visible and where appreciation of just

[14] Case 261/81 *Walter Rau v de Smedt* [1982] ECR 3961.

[15] Case C-500/06 *Corporación Dermoestética* [2008] ECR I-5785.

[16] Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln eV v Mars GmbH* [1995] ECR I-1923.

how much it matters to the allocation of competence and the shape of the internal market is sharpened. As the Court put it in *Ahokainen and Leppik*: '(…) Member States enjoy a margin of discretion in determining, having regard to the particular social circumstances and to the importance attached by those States to objectives which are legitimate (…), such as the prevention of alcohol abuse and the campaign against the various forms of criminality linked to its consumption, the measures which are likely to achieve concrete results'.[17] A comparable permissive approach emerges in the field of free movement of services, where the Court, asked to consider the compatibility of France's *Loi Evin* with (what is now) Article 56 TFEU, concluded that the restrictions on trade consequent on the prohibition of advertisements for alcoholic drinks at sports events broadcast on television were a justified expression of concern to contain alcohol abuse.[18]

Pursuit of an integrated market under EU law does not involve the automatic disabling of national regulatory competence: consumer choice is not the inevitable result of the impact of EU 'negative law'. Regulation by the public authorities at national level remains permitted even where it obstructs cross-border trade, provided both ends and means are capable of justification against the standards recognised by EU law. *Eyssen*[19] stands as an enduringly helpful example of the Court's tolerance of justifying arguments based on regulatory difference—where they are thoughtful and sincere. Dutch rules banning the use of nisin, a preservative, in processed cheese were presented as measures of health protection, yet other states were prepared to allow the use of nisin, adopting a different view of inconclusive scientific evidence about the safety of the substance. The Court held that a state may take precautions to protect its consumers against health risks in accordance with Article 36 where there is genuine scientific doubt about the safety of the product. EU law does not depress national standards of protection to the lowest common denominator prevailing among the Member States. More recently the Court has adopted the language of the 'precautionary principle' in conceding to Member States the space to maintain rules that restrict trade in goods, especially foodstuffs, on the basis that there is doubt about the effects of particular ingredients on the health of consumers. States enjoy a 'discretion relating to the protection of public health [which] is particularly wide where it is shown that uncertainties continue to exist in the current state of scientific research'.[20]

And it is not just protection of consumer health that may provide a basis for justifying national measures. Protection of economic interests may equally form the basis of justified restraint on inter-State trading freedom—provided that the case made has coherence and weight. In *Buet v Ministère Public*[21] the Court held that a French law which prohibited 'doorstep selling' of educational material was

[17] Case C-434/04 *Ahokainen and Leppik* [2006] ECR I-9171 para 32.

[18] Case C-262/02 *Commission v France* [2004] ECR I-6569; Case C-429/02 *Bacardi v TF1* [2004] ECR I-6613.

[19] Case 53/80 *Eyssen* [1981] ECR 4091.

[20] e.g. Case C-192/01 *Commission v Denmark* [2003] ECR I-9693 para 43.

[21] Case 328/87 *Buet v Ministère Public* [1989] ECR 1235.

not incompatible with Article 34 in view of its contribution to the protection of consumer from pressure selling tactics. The ruling attaches significance to the point that the national law was designed to protect consumers behind with their education and wishing to improve it. So the Court, in assessing the compatibility of the measure with internal market law, took into account the national regulator's concern to protect a particular group of vulnerable consumers. In similar vein, in *A-Punkt Schmuckhandels v Claudia Schmidt*[22] the Court, in considering Austrian rules restraining sales achieved through the organisation of 'jewellery parties' in private homes, was prepared to accept the relevance in justifying such restrictions of the potentially higher risk to consumers of being cheated by lack of information, impossibility of comparing prices and exposure to psychological pressure to buying in such a private setting. This was context-specific consumer protection adopted at national level—and it was treated as such by the Court in sensitive assessment of its justification under the law of the internal market. Similarly the complexity of the market for financial services has prompted a relatively permissive approach by the Court to national measures designed to protect the consumer from unexpected consequences against which he or she is not able to guard effectively because of intransparency and informational asymmetry in that sector.[23]

The case law on regulation of gambling is equally illustratively helpful in showing the Court's receptivity to local concern to impose restrictions in the name of consumer protection and the prevention of fraud.[24] In its rulings the Court has openly admitted the depth of moral, religious and cultural differences between the Member States in such matters, although one might choose to reflect on the extent to which such divergent perceptions can truly be reflected in vigorous enforcement of restrictions on an activity technologically incapable of effective containment within national borders.

There is, of course, a connection here to wider questions of how to manage diversity in the building of the internal market. Landmark rulings such as *Schmidberger*[25] and *Omega Spielhallen*[26] are nothing to do with consumer protection, They pit economic interests in free movement against social and political values promoted at national level, in particular the freedom of expression and the preservation of human dignity respectively. But both rulings are *structurally* comparable to the cases on national consumer protection which impedes trade. They admit space in free movement law within which to judge whether national practices should be treated as justified even where they fragment the EU's internal market along national lines. They fully comply with the core thematic point that there is no absolute right to trade across borders in the EU.

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[22] Case C-441/04 *A-Punkt Schmuckhandels v Claudia Schmidt* [2006] ECR I-2093.

[23] E.g. judgment of 7 March 2013, Case C-577/11 *DKV Belgium SA*, not yet reported; judgment of 18 July 2013, Case C-265/12 *Citroën Belux NV*, not yet reported.

[24] E.g. Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633; Joined Cases C-316/07 et al *Markus Stoss* [2010] ECR I-8069; judgment of 24 January 2013, Joined Cases C-186/11 and C-209/11 *Stanleybet*, not yet reported.

[25] Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659.

[26] Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609.

19.5.3 What the Court's Formula Should Look Like

The Court's case law is largely correctly open to the justification of barriers to inter-State trade and it is infused with respect for genuine and properly structured expressions of local regulatory concern. Its misplaced formula, considered above and first unfurled in *Commission* v *Italy*, is almost certainly simply unfortunate, not an attempted coup. But precision and wider understanding would be much improved were the Court to adjust its definition of Article 34 as source of *the obligation to comply with the principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of EU products to national markets* by adding at the end of this formula *subject to the possibility that the regulating authority may demonstrate an objective in the general interest which shall prevail over that in securing the free movement of goods.*

19.6 The EU Legislative Process—The Horizontal Dimension of Why There Is no Principle of Mutual Recognition

When the Court rules that a State measure that restricts trade in goods is incompatible with Article 34 TFEU, that measure shall no longer be applied to impede cross-border trade. The relevant market is de-regulated—the national law is, in effect, sacrificed to the higher demands of market integration. But the conditional or non-absolute principle of mutual recognition ensures that some national measures will survive inspection. Internal market orthodoxy holds that the promotion of an internal market passes from the free movement rules, applied by judges, to the process of legislative harmonisation, the preserve of the EU's political institutions. And where the EU legislature decides to replace diverse State measures that hinder integration by an initiative of harmonisation, the aim is to put in place common EU rules. Here too the relevant market is de-regulated, in the sense that (on the simplest model) 28 different regimes are reduced to one common regime. But the market is also *re-regulated*—that one common EU rule becomes the basis for the regulation of the sector in question. And a choice must be made about the type of regulatory regime that is to be introduced at European level. The Treaty provides some framing guidance—in particular in Articles 7, 11, 12, 114(3), 167(4), 168(1) and 169(1) TFEU—and provisions of the Charter of Fundamental Rights such as Articles 35 (public health) and 38 (consumer protection) are directly relevant too. As a matter of constitutional law harmonisation is a process that must attend to the quality of the (re-)regulated environment, not simply the creation of an integrated trading space across the territory of the EU. But in detailed elaboration this is fundamentally a political question engaging choices between regulatory styles and techniques.

The insistence that the principle of mutual recognition is conditional or non-absolute is vital precisely because it gives space for this political involvement is de-

ciding the nature and intensity of the EU (re-)regulatory landscape that will balance the impetus towards deregulation. An automatic principle of mutual recognition would radically tip that balance towards unregulated economic freedom and vicious inter-jurisdictional competition. This is not the Treaty mandate.

19.6.1 Regulating the Internal Market—Harmonisation in Particular

Areas in which the EU is competent to legislate in this 'positive' sense are fixed by its Treaty, ranging from the rather carefully and specifically drawn (such as Article 168 TFEU on public health which precludes harmonisation of national laws and the supporting competence concerning consumer protection envisaged by Article 169(2)(b) TFEU) to the much broader provisions of which the two main examples are Articles 114 and 352 TFEU.

Article 114 is the main preoccupation of the current inquiry. It provides for the harmonisation of national laws in so far as this improves the functioning of the EU's internal market. And, aside from the material limits written into Article 114(2), it is functionally driven rather than sector-specific. *Any* national measures may be harmonised, whatever their content may be, provided their existing diversity affects the shaping of the internal market.

So national measures tackling unsafe products may cause barriers to trade, but they are likely to be justified. So a harmonised regime has been introduced. This is Directive 2001/95/EC on general product safety which bans unsafe goods under a regime that operates across the whole territory of the EU, under an assumption that leaving the matter to be dealt with at national level would maintain fragmentation, since national controls over unsafe goods would certainly be justified yet diverse.[27] And adopting a harmonised ban of unsafe goods creates a unified EU market for safe goods—this is integration plus re-regulation. Similarly Directive 2005/29/EC bans unfair business-to-consumer commercial practices in order to establish a common regime within which fair practices *are* allowed.[28] Its Preamble explains that this is a choice about how to protect consumers taken against a background assumption of the need for a harmonised regime that is apt to underpin the construction of the EU's internal market. It declares that: 'The laws of the Member States relating to unfair commercial practices show marked differences which can generate appreciable distortions of competition and obstacles to the smooth functioning of the internal market'; and 'these disparities cause uncertainty as to which national rules apply to unfair commercial practices harming consumers' economic interests and create many barriers affecting business and consumers'.[29]

[27] [2002] OJ L11/4.

[28] [2005] OJ L149/22.

[29] Recitals (3) and (4).

The Court itself has approved the constitutional validity of this legislative role in the wake of the limits—the conditional or non-absolute character—of mutual recognition and free movement law in achieving a genuine internal market. Article 5(1) TEU, the 'principle of conferral', dictates that Article 114 may be used only for the purposes set out in the Treaty. It is no grant of general regulatory competence. And the practical edge to this principle is vividly illustrated by the annulment of a measure of harmonisation for failure to respect the limits set by what is now Article 114 TFEU: this is famously *Tobacco Advertising*.[30] In that case the Court held that a measure of harmonisation must actually contribute to eliminating obstacles to the free movement of goods or to the freedom to provide services, or to removing appreciable distortions of competition. And the measure in question failed to cross that threshold.

But it is fundamentally important to appreciate that the Court in *Tobacco Advertising* did *not* deny that public health policy and concern for consumer protection may legitimately inform the shaping of the harmonisation programme. Quite the reverse. The Court insisted that such concerns form a constituent part of the EU's other policies, including market-making pursued in the name of harmonisation.[31] This follows from the directions in favour of policy integration now found in Articles 12, 114(3), 168(1) and 169(1) TFEU as well as Articles 35 and 38 of the Charter. This confirms the point that in principle the EU is able, by harmonisation, to adopt a re-regulatory standard that restricts or even forbids particular forms of trading practice throughout the territory of the EU, provided that this forms part of a broader market-making regime.[32] In this vein a harmonised ban on unsafe products creates an internal market for safe products. The Court has not been lured down a path which envisages the internal market being built only on the basis of market freedoms unfettered by regulatory prohibition.

So subsequently the Court has been conspicuously more tolerant of legislative stretching of the scope of Article 114 TFEU than it was in *Tobacco Advertising*—with the consequence that it has opened up ever more widely the scope for legislative attention to be paid at EU level to the demands of market re-regulation. So in *Germany v Parliament and Council*—sometimes called '*Tobacco Advertising II*'[33]—the Court was persuaded that banning advertising in periodicals, magazines and newspapers made a contribution to opening up the wider internal market—for periodicals, magazines and newspapers, which would be subject to precisely the same harmonised rules throughout the EU governing (banning!) tobacco advertising. In its most recent judgment in this vein, *Vodafone, O2 et al v Secretary of State*,[34] the Court found in favour of the validity of the so-called 'Roaming Regulation', Regulation (EC) No 717/2007. The Regulation caps the wholesale and retail charges terrestrial mobile operators may charge for the provision of roaming services on public mobile networks for voice calls between Member States. The Court

[30] Case C-376/98 *Germany v Parliament & Council* [2000] ECR I-8419.

[31] Ibid, paras 78, 88.

[32] Ibid, paras 98, 117.

[33] Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573.

[34] Case C-58/08 *Vodafone, O2 et al v Secretary of State* [2010] ECR I-4999.

declared that the Regulation had been adopted in response to the likelihood that national price control measures of divergent type would be adopted aiming to address the problem of the high level of retail charges for EU-wide roaming services. So this was treated as classic preventive harmonisation aimed at improving the conditions for the functioning of the internal market. The Court simply did not address the rather strong argument that national measures capping the cost of roaming were *unlikely* to be adopted because they would have the perverse effect of harming the competitive position of companies based on the regulator's territory while protecting only out-of-state consumers.[35] Regrettably this twist was completely ignored in a judgment which took at face value the claims of the EU legislature. Perhaps since the first *Tobacco Advertising* case the Court's teeth have become less sharp. Or perhaps—more pertinent—the EU legislature has been able to absorb the Court's vocabulary and readily present its initiatives as consistent with the rather wide scope of Article 114. In this sense crossing the threshold in order to bring the matter within the valid scope of Article 114 TFEU requires careful legislative drafting in order to demonstrate the necessary connection to the internal market, but in practice judicial intervention is likely to be uncommon.[36]

Crucially, however, there is plenty of scope for selecting among the types of—harmonised—market regulation that are judged politically desirable. This is space that would be shut out under an automatic principle of mutual recognition which would leave no scope for the re-regulatory bargain shaped through the legislative process. So in *Tobacco Advertising II* the Court observed that provided that the conditions for recourse to Article 114 TFEU are fulfilled, the Union legislature 'cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made', and it cited what are now Articles 168(1) and 114(3) TFEU.[37] And logically 'those measures may consist in requiring all the Member States to authorise the marketing of the product or products concerned, subjecting such an obligation of authorisation to certain conditions, or even provisionally or definitively prohibiting the marketing of a product or products'.[38]

The concession that the Treaty-conferred competence to harmonise laws is not lost where regulatory protection is 'a decisive factor' in the legislative choices made is dependent on showing an adequate contribution to the making of the internal market. But that is not a high threshold. The Court's tolerance has been consistent and the consequence is that there is plenty of room for legislative intervention in the EU's internal market.

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[35] See M Brennke, 'Annotation' (2010) 47 *Common Market Law Review* 1793, 1804–1806.

[36] See S Weatherill, 'The limits of legislative harmonisation ten years after Tobacco Advertising: how the Court's case law has become a "drafting guide"' (2011) 12 *German Law Journal* 827; D Wyatt, 'Community Competence to Regulate the Internal Market' in M Dougan and S Currie (eds), *Fifty Years of the European Treaties: Looking Back and Thinking Forward* (Oxford, Hart, 2009) 93.

[37] Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573, para 39.

[38] Ibid, para 43.

These are cases in which the attack on regulatory intervention was driven by the—unsuccessful—claim that the competence granted by the Treaty did not extend so far as to permit protective aims to serve as a decisive factor in the adoption of market-making legislative harmonisation. They are vital in showing how the *absence* of a principle of mutual recognition in EU internal market law leads to a shift of responsibility from the Court to the EU legislative process—which then has space to select among different political choices about the appropriate intensity of (re-)regulation of and in the internal market.

19.6.2 Subsidiarity, Freedom to Conduct a Business and Other Attempts to Restrain EU Market Regulation

Appeals to subsidiarity, as a restraint on the exercise of legislative ambition even where competence exists, have prompted little interest at the Court. In *Ex parte BAT* the Court readily found compliance with the subsidiarity principle by observing that given that the challenged Directive's objective was to eliminate the barriers caused by inter-State regulatory divergence while also ensuring a high level of health protection, it followed that since such an objective could not be sufficiently achieved by the Member States individually but rather was better achieved at EU level, the dictates of subsidiarity were satisfied.[39] This approach has become the Court's norm[40] and it entails that whenever the EU sets common rules then by definition it has complied with the principle of subsidiarity. In similar vein reliance on the proportionality principle as a basis for preserving commercial freedom from legislative intervention has cut little ice at the Court. In that same ruling in *ex parte BAT*, for example, the Court insisted that the 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'.[41] In consequence a measure must be manifestly inappropriate having regard to its objective before the legislative choice will be regarded as disproportionate and therefore invalid. Proportionality may have bite where administrative decisions affecting the individual are at stake but the broader the measure's scope, the less likely that proportionality will trip up the legislature. A contextual understanding of the application of proportionality is required.[42] Only legislative choices that verge on the absurd are likely to be condemned as manifestly inappropriate. A gap looms between the *principle* that these are rules of constitutional significance which place reviewable limits on EU action and the *practice* of judicial restraint.

[39] Case C-491/01 *R v Secretary of State ex parte BAT and Imperial Tobacco* [2002] ECR I-11543 paras 181–183.

[40] e.g. Case C-58/08 *Vodafone, O2 et al v Secretary of State* [2010] ECR I-4999 paras 72–80.

[41] Case C-491/01 *R v Secretary of State ex parte BAT and Imperial Tobacco* para 123. See similarly Case C-58/08 *Vodafone* para 52.

[42] T Tridimas, *The General Principles of EU Law* (Oxford, OUP, 2006) Chap. 3–5.

The connecting thread in the reticent case law dealing with judicial review in the name of proportionality and (especially) subsidiarity is the concern of the Court not to trespass on the exercise of legislative discretion. The Court's sensitivity to the proper limits of its role when asked to intrude on legislative agreement is plain.

Increasingly—inspired especially by the conferral of binding status on the Charter by the Lisbon Treaty with effect from 2009—the Court finds itself pressed to find that regulatory burdens are unlawful interferences with property rights and commercial freedoms. But here too a degree of restraint is evident.

Deutsches Weintor eG v *Land Rheinland-Pfalz* provides a helpful example of the structure and style of the analysis one may anticipate (and hope for) from the Court in such cases.[43] Regulation 1924/2006 harmonises rules governing nutrition and health claims made about food.[44] Differences between national provisions relating to nutrition and health claims may impede the free movement of foods and consequently harmonisation is required to promote the functioning of the internal market, which also implies a need to address questions of techniques designed to achieve a high level of consumer protection at EU level. Nutrition and health claims made on foods must comply with the provisions of the Regulation. Among prohibited practices are 'false, ambiguous or misleading' claims; and also those that 'encourage or condone excess consumption of a food' and 'state, suggest or imply that a balanced and varied diet cannot provide appropriate quantities of nutrients in general'. Pursuant to the Regulation use of the phrase 'easily digestible' in connection with wines was forbidden. The Court was asked whether this restriction was compatible with the Charter. On the one hand, Article 15(1) of the Charter grants the right to engage in work and to pursue a freely chosen or accepted occupation and Article 16 guarantees the freedom to conduct a business. On the other, Article 35 of the Charter requires that a high level of human health protection be ensured in the definition and implementation of EU policies and activities. (The Court did not cite Article 38 on consumer protection—it easily could have done so). The Court was therefore required 'to reconcile the requirements of the protection of those various fundamental rights protected by the Union legal order' and to strike 'a fair balance between them'.[45] These are not absolute rights.[46] The Court emphasised that alcoholic beverages 'represent a special category of foods that is subject to particularly strict regulation'[47] and cited existing case law in which *national* restrictions on advertising of such products have been held to be compatible with EU law despite their trade-restrictive effect.[48] The problem with the claim made, which highlighted *only* the easy digestion of the wine, was its likely encouragement of consumption with increased risks for consumers' health inherent in excessive consumption of

[43] Judgment of 6 September 2012, Case C-544/10 *Deutsches Weintor eG v Land Rheinland-Pfalz*, not yet reported.

[44] [2006] OJ L 404/9.

[45] Para 47, citing Case C-275/06 *Promusicae* [2008] ECR I-271.

[46] Para 54.

[47] Para 48.

[48] Especially Case C-262/02 *Commission v France*; Case C-429/02 *Bacardi v TF1*.

alcohol, and that consequently 'the prohibition of such claims is warranted in the light of the requirement to ensure a high level of health protection for consumers'.[49] This legislative regime was based on a reconciliation of the several fundamental rights at stake, striking a fair balance between them. It was compatible with EU law. The Court found that the EU legislature had respected fundamental rights when it intervened in commercial freedom by adopting the Regulation.

This is a case suggesting the increasing prominence of arguments based on fundamental rights in general and the Charter in particular which are designed to challenge the validity of the EU's regulatory intervention in the market. Freedom to conduct a business and more generally appeal to the virtue of private autonomy are becoming part of the fabric of the reasoning in cases which call into question the choices made through the legislative process. One may readily anticipate their deployment to attack EU measures on, say, consumer protection, labour market regulation and even anti-discrimination and equality. This promises an intriguing exercise in shaping priorities. And it is a task that attracts an acutely normative sensitivity: how interventionist should EU law be? How interventionist should the Court be in checking the legislative choices? Attitudes vary profoundly.[50]

The Court has a long-standing formula which grants a broad discretion to the EU legislature in circumstances where it is called on to undertake complex assessments in matters that engage political, economic and social choices. Only where a high threshold is crossed will the Court find action to be unlawful—only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue.[51] *Deutsches Weintor* is in this vein. So is *Sky Österreich*, in which Directive 2010/13's bite into the contractual freedom of the exclusive holder of broadcasting rights was held valid because of the public interest in permitting other broadcasters the right to use short extracts from events of high interest to the public in their own coverage.[52] Here too, as in *Deutsches Weintor*, the freedom to conduct a business recognised by Article 16 of the Charter was not treated as absolute, but instead fell to be assessed in the light of its social function. These rulings do not suggest that the Court is ready to act aggressively in curtailing legislative options for the regulation of the internal market.

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[49] Case C-544/10 *Deutsches Weintor eG v Land Rheinland-Pfalz* para 52.

[50] e.g. C Herresthal, 'Constitutionalisation of the Freedom of Contract in European Union Law' in K Ziegler and P Huber (eds), *Current Problems in the Protection of Human Rights—Perspectives from Germany and the UK* (Oxford, Hart Publishing, 2013) 89; D Leczykiewicz, 'Horizontal Effect of Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law?' in U Bernitz and X Groussot (eds), *General Principles of EU Law and Private Law* (The Hague, Kluwer International, 2014); J Basedow, 'Freedom of Contract in the European Union' (2008) 16 *European Review of Private Law* 901, and several contributions, in particular but not only those by M Hesselink, B Lurger and R Schulze, in R Brownsword, H-W Micklitz, L Niglia, and S Weatherill (eds), *The Foundations of European Private Law* (Oxford, Hart Publishing, 2011).

[51] e.g. Case C-380/03 *Germany v Parliament and Council* para 145; Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755 para 58; Case C-491/01 *R v Secretary of State ex parte BAT and Imperial Tobacco* para 123.

[52] Judgment of 22 January 2013, Case C-283/11 *Sky Österreich*, not yet reported. Cf in the same vein judgment of 17 October 2013, Case C-101/12 *Herbert Schaible*, not yet reported.

If there were a principle of mutual recognition in EU law, there would be little, if any, scope for the adoption of this type of legislation, let alone its judicial review. Given that there is only a conditional or non-absolute principle of mutual recognition in EU law, such legislation is required to advance the building of the internal market beyond the stage attainable by application of the free movement rules alone, and the questions that reach the Court focus on the validity of the regulatory choices made through the political process. There is a risk of Charter-based claims running amok in the Court's diet, as well-funded commercial parties seek to use judicial review to assert shelter from socially motivated regulation, and—to broadcast the author's own normative preferences—the Court's unwillingness to be led in this direction deserves welcome.[53] Hans Micklitz has it right when, in a brilliant plea to appreciate that consumer law as a project of market-making should not neglect the need for protection from some consequences of that market-making, he argues 'in favour of a more active European Court of Justice, one which sharpens the social dimension of the EU, not only through consumer law, but also through anti-discrimination and employment law'.[54]

19.7 Conclusion

My conclusion is short and it is addressed to the Court and to the Commission. It is—'Just be a bit more careful, please'. Article 34 is the source of *the obligation to comply with the principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of EU products to national markets, subject to the possibility that the regulating authority may demonstrate an objective in the general interest which shall prevail over that in securing the free movement of goods.* That final sub-clause, which is my addition to the formula wrongly used by the Court in some recent decisions, crucially confirms that there is no principle of mutual recognition in the law of the EU's internal market. Any hint that there is damagingly obscures the rather subtle balance that has been struck between, on the one hand, the deregulatory impulse of free movement law and the regulatory autonomy of the Member States (the vertical issue) and, on the other, the role of the Court in ruling against the application of unjustified trade barriers and the role of the EU legislature in deciding how to replace justified trade barriers at national level with common EU rules apt to re-regulate and thereby to integrate the wider internal market (the horizontal issue).

[53] The only blot on the Court's record is judgment of 18 July 2013, Case C-426/11 *Alemo-Herron*, not yet reported, which adopts an inappropriately aggressive interpretation of Article 16 of the Charter in the context of protection of workers on the transfer of undertakings, and quite wrongly pretends to be in line with the rulings in *Sky Osterreich* and *Deutsches Weintor. Alemo-Herron* deserves no more than I here grant it—scornful comment in a footnote.

[54] H-W Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: a Bittersweet Polemic' (2012) 35 *Journal of Consumer Policy* 283.

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