

## Democracy and Legitimacy in the Shadow of Purposive Competence

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Abstract

This article argues that the way EU competences are defined plays an important role in the social legitimacy problems of the EU. The fact that its powers are purposive compels the EU to privilege narrow functional goals and act in a highly focussed way. This has the consequence that politics cannot be meaningful within the EU, since essential choices of direction are pre-empted. It also has the consequence that EU law is over-instrumental and lacks expressive qualities, alienating the public. Now that EU law is so broad, the same defects are being imposed increasingly on Member States. Without another form of conferred power the legitimacy of the EU, and of law and government in Europe, will be increasingly undermined. The constitutional DNA which has been a functional success for Europe may also be its political nemesis.

### I. Introduction

The thesis of this article is that the choice to define EU powers in terms of purposes to be achieved, in particular with respect to the internal market, has important and often neglected consequences for its social legitimacy, meaning the acceptance of its laws and institutions by the public. Firstly, purposive powers prevent meaningful democratic processes from taking place because they render certain goals non-negotiable, and thereby pre-empt essential choices of policy direction. Secondly, purposive powers reduce the EU's emotional appeal: the relative ambiguity about their limits, because a goal can be

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pursued in many ways, is reduced via a technocratic and instrumental orientation, but this orientation may be alienating, particularly where the competences impact on socially and culturally sensitive fields.<sup>1</sup>

The foundation of this argument is a distinction between what are called purposive competences, and what may be called sector-specific competences. The former, characteristic of the EU, are defined in terms of the power to take measures to achieve a particular goal. The latter, by contrast, are defined in terms of a particular field to be regulated. An example of a purposive power is the authority to take measures necessary for public order or security. An example of a sector-specific one might be the authority to fix levels of income tax or lay down safety rules for the operation of trains. The two forms of power may of course be combined, so that a purpose may be pursued within limited fields, and this is the most common form of regulatory power. However, a defining characteristic of pure purposive power is that while it is constrained to follow specific goals it is not constrained in its subject matter or the breadth of its impact.

This fact makes it dangerous. It is even more so because the commitment to a purpose pre-determines a core feature of the final decision: it will take us in a certain direction. That fact sounds the death-knell for meaningful democracy or politics within the sphere of the power. Debate is changed from 'where should we go' to 'how do we get to X'. The legislator is reduced to an implementer of goals, co-opted by the framing purpose. As EU powers spread to encompass ever more areas of life, and of national regulation, the systematic exclusion of free political choice from all of these fields becomes a challenge to EU legitimacy, and may be expected to lead to frustration.<sup>2</sup>

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<sup>1</sup> U. Haltern, 'Pathos and patina: the failure and promise of constitutionalism in the European imagination' (2003) 9(1) *European Law Journal* 14; M. Everson, 'European citizenship and the disillusion of the Common Man' in R. Nickel (ed) *Conflict of laws and laws of conflict in Europe and beyond* (2009) *Arena Report* 1/09.

<sup>2</sup> For different perspectives on legitimacy, see e.g. R. Bellamy and D. Castiglione 'Legitimizing the Euro-Polity and Its Regime: The Normative Turn in EU Studies' (2003) 2 *European Journal of Political Theory*, 1; E. Jones, 'Output legitimacy and the global financial crisis: Perceptions matter' (2009) 47(5) *Journal of Common Market Studies*, 1085; F. Scharpf, *Governing in Europe: Effective and democratic?* (OUP, 1999); G. de Búrca, 'The quest for legitimacy in the European Union' (1996) 59(3) *Modern Law Review* 349.

This political deficit will become an affective deficit if the EU cannot overcome such frustration and attract the sympathy of the public for the purposes it imposes.<sup>3</sup> Yet precisely such an appeal is made harder by the prominent role of expertise in EU law, a matter which is no accident but a corollary of purposiveness. The command to focus on how specific goals can be effectively achieved seems to invite the use of expertise, whereas a more sectoral framing of competence, in which the EU was confined to certain fields of regulation, but without pre-determining the goals to be pursued with that regulation, would invite the use of politics.

Even at the best of times, technocratic regulators may not engage the hearts of the public, but where such a regulator is embedded within politics this may not matter to legitimacy. However, the EU problem is that it reverses that situation, increasingly embedding politics within technocracy, as a result of the sheer body and scope of its law. To make matters worse, it is often what may be called a ‘sham technocracy’: the internal market impacts on aspects of the quality of life which cannot be quantified, priced or sold, and the costs and benefits involved are beyond the capacity of expertise, and certainly of economics.<sup>4</sup> Attempts to portray internal market regulation as an appropriately expert-led activity are thus a deception whose primary consequences are to marginalise the role of certain non-economic interests in debate. We therefore see the quality of European life being profoundly changed as the result of a process whose dominant discourse lacks the language or understanding to address what is really going on, but can only address the simplest, most banal, and ultimately least important aspects of the change.

The context of this argument is a concern with the breath of EU economic powers, their impact on non-economic concerns, and the consequences for their legitimacy, a concern which is ubiquitous in the literature, and found in many forms. Weiler was one of the first to argue in English that substantive EU law is a constitutional matter, because of its impact on the regulatory competence of Member States,

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<sup>3</sup> The terminology is borrowed from P.T. Clough and J. Halley, (eds) *The Affective Turn: Theorizing the Social* (Duke University Press, 2007). See also M. Koskenniemi, ‘The Fate of Public International Law: Between Technique and Politics’ (2007) 70(1) *The Modern Law Review* 1; P.L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (OUP, 2010).

<sup>4</sup> I am grateful to an anonymous reviewer for suggesting this perspective and the colourful term ‘sham technocracy’.

and this norm-rich perspective, inviting consideration of matters beyond trade itself, has been wholeheartedly embraced by scholars.<sup>5</sup> The internal market is now most typically conceived as a battlefield of values and interests, a conception which has offered fertile ground for thinking about mechanisms for balancing, accommodating, and respecting the matters at stake.<sup>6</sup> Even Majone, who has been the most prominent advocate of a technocratic and apolitical EU regulator, has always emphasised that such regulators must be under final political control, and where he doubts, in his recent work, that such control can be effective, so that economics invades the non-economic without democratic justification, his conclusion is that the tasks of the EU should then be reduced.<sup>7</sup> The need for the political within the economic, or for the economic to be within the political is thus barely contested. Yet despite a certain consensus that there is over de-politicisation, and a great diversity of discussion around this, there is relatively little consideration of the role of the Treaty text as a cause, rather than merely a means – Weiler being a notable exception.<sup>8</sup> The contribution of this article is to fill that gap, and to look at the particular way that the Treaty defines EU economic competences, and to argue that these definitions are an important part of the cause of the problems and imbalances which so many perceive.

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<sup>5</sup> J.H.H. Weiler 'The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods' in P. Craig and G. De Burca *The Evolution of EU Law* (OUP, 1999) 349.

<sup>6</sup> The discussion has been nowhere more prominent than in this journal. See for an overview the papers in the recent special edition: M Everson and C Joerges 'Reconfiguring the Politics–Law Relationship in the Integration Project through Conflicts–Law Constitutionalism' (2012) 18(5) *European Law Journal* 644; D Chalmers, 'The European Redistributive State and a European Law of Struggle' (2012) 18(5) *European Law Journal* 667; M Dani, 'Rehabilitating Social Conflicts in European Public Law' (2012) 18(5) *European Law Journal* 621; F De Witte, 'Transnational Solidarity and the Mediation of Conflicts of Justice in Europe' (2012) 18(5) *European Law Journal* 694; G. Davies 'Subsidiarity: the wrong idea, in the wrong place, at the wrong time' (2006) 43 *Common Market Law Review* 63-84.

<sup>7</sup> G. Majone 'Political and Normative Limits to Piecemeal Integration: Rethinking the European Project after the Monetary Union Crisis' Keynote speech at the RECON conference, Oslo, November 2011; G. Majone *Rethinking the Union of Europe Post-Crisis: Has Integration Gone too Far?* (CUP, 2014); G. Majone 'Rethinking European Union after the Debt Crisis' *UCL European Institute Working Paper* no. 3/2012.

<sup>8</sup> Weiler, *op cit* n 5 *supra*.

The practical significance of this neglected aspect of the competence *problematique* is twofold. On the one hand, it is the most direct path to change: the legislator and, most importantly, the Court may not be trapped by the text, but they are influenced by it. If we want to steer them, we should shape the words of law they read. Calls for power to be used differently may find no echo in practice if they do not resonate with the way that power is made. On the other hand, it helps explain how attributed powers can work, and offers a warning about the dangers of letting the end determine the means which, if not entirely original, may nevertheless be worth translating to the context of modern organisations beyond the state.<sup>9</sup>

The article has four parts. Part II, following this introduction, explains what is meant by social legitimacy, and how the process of law-making may be relevant to this. The next part then looks at that process – competence to legislate, and the law-making of the Court – and describes in some detail how purposiveness within the internal market leads to a systematic imbalance between economic and non-economic interests, so that public preferences for certain values, institutions and ways of life are structurally subordinated to internal market goals. The subsequent section then explores what this means for democracy and politics within the EU and within Member States, and describes the limitations imposed upon them. There follows a discussion of the way in which expertise is used, and its consequences for the ability of the citizen to recognise their values and interests in the law. The last section then considers options for change, making the suggestion that if purpose is not to be abandoned – although it certainly could be – then an alternative is to contain it, and the core technique here should be to bring more precision to the law, both in the Court and in regulation. It is open-ended concepts which allow EU law to colonise so widely, and both the legislator and the Court could limit this process by addressing more seriously what an internal market is and requires, and challenging the assumption which has driven European economic law since its inception: that market-making is a permanent, progressive, never-ending project.<sup>10</sup> It could, if we choose to define it so, have an end.

## II. Social legitimacy

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<sup>9</sup> N. Machiavelli *The Prince* (1513).

<sup>10</sup> Weiler, *op cit* n 5 *supra*, 371-372.

This paper is concerned with whether the public accept the EU as legitimate, usually referred to as its social legitimacy, sometimes as its popular legitimacy.<sup>11</sup> It is taken as self-evident that such acceptance may be influenced by many factors, including perceptions of democracy, of material self-interest, and of national identity, and more complex psychological, social or emotional considerations too: the essence of acceptance is that it is a subjective process.<sup>12</sup>

The focus is on two such factors which it is suggested will play a role in influencing public attitudes to the EU: the perception of a genuine democratic process, and the ability to recognise their values and ideals in its law. Although the mapping of public attitudes is ultimately an empirical question it is suggested that the relevance of these factors to social legitimacy is sufficiently plausible to justify thinking *in abstracto* about how they may be affected by aspects of EU law.

A genuine democratic process is here understood to mean a process in which all the interests and views held by the public are represented, in which the outcome is not pre-determined by factors external to the democratic process, and in which the expectation is that the final decision corresponds to public preference, measured in some acceptable way – for example majority of citizens, or majority of regions or majority of states. The argument will be made below that in the most impactful area of its law-making the EU is unable to represent all interests, and the outcome is not sufficiently free of external constraint, and public preferences are in some cases *a priori* excluded from success, so that a reasonable observing citizen would not feel that they were witnessing a genuine democratic process in this sense. A recent theme of much legal and political science scholarship on the EU is the need to bring more politics into EU law and policy, exposing rather than repressing conflicts of interest.<sup>13</sup> The argument here is that

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<sup>11</sup> A. Føllesdal 'Legitimacy Theories of the European Union' (2004) *ARENA Working Papers* WP 04/15.

<sup>12</sup> L. Hooghe and G. Marks 'Does Identity or Economic Rationality Drive Public Opinion on European Integration?' (2004) 37(3) *Political Science and Politics* 415; L. Hooghe and G. Marks 'Calculation, Community and Cues: Public Opinion on European Integration' (2005) 6(4) *European Union Politics*, 419; D. Miller, *On Nationality* (OUP, 1995); C.f. J. Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe' (1992) 12(1) *Praxis International* 1.

<sup>13</sup> V.A. Schmidt 'The European Union in search of political identity and legitimacy: Is more Politics the Answer?' (2010) *EIF Working Papers* No. 05/2010; Bellamy, *op cit* n 2 *supra*; Føllesdal *op cit* n 11 *supra*; A. Føllesdal, A. and S. Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44(3) *Journal of*

purposive competences prevent this from happening. But if politics and choice are prevented, then whatever model of democracy may be adopted for the EU, however sophisticated, it cannot succeed.

The second factor to be considered is whether citizens are able to recognise their wider values and ideals in EU law-making and law.<sup>14</sup> Does the debate and discussion around this law put that law in a wider context than its immediate concrete goals, relating it to history, collective identity, social norms, and wider values and social ambitions than the immediate goal? Can the citizen see EU laws as contributing to a vision of society in which they can believe because it offers them a place as a whole human being, not merely a consumer or economic actor?<sup>15</sup> It will be argued below that, in the field of its most impactful law-making, the EU is unable to offer such a vision. The narrowness of its competence steers it towards presenting law as a narrow tool, not a building block of a good society, while its technocratic orientation steers it towards a language from which more complex human considerations are absent.<sup>16</sup> In the words of one scholar, EU law could be said to lack ‘expressivity’; it fails to

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*Common Market Studies* 533. D. Chalmers, ‘The European Redistributive State and a European Law of Struggle’ (2012) 18(5) *European Law Journal* 667; M. Dani, ‘Rehabilitating Social Conflicts in European Public Law’ (2012) 18(5) *European Law Journal* 621; F. De Witte, ‘Transnational Solidarity and the Mediation of Conflicts of Justice in Europe’ (2012) 18(5) *European Law Journal* 694.; M. Everson and C. Joerges ‘Reconfiguring the Politics–Law Relationship in the Integration Project through Conflicts–Law Constitutionalism’ (2012) 18(5) *European Law Journal*, 644; C. Joerges ‘Conflicts-Law Constitutionalism: Ambitions and Problems’ (2012) *ZenTra Working Paper in Transnational Studies* 10/2012; M. Dawson and F. de Witte, ‘Constitutional balance in the EU after the Euro-crisis’ (2013) *Modern Law Review* forthcoming; G. Davies ‘Subsidiarity: the wrong idea, in the wrong place, at the wrong time’ (2006) 43 *Common Market Law Review* 63-84.

<sup>14</sup> See C. Taylor, ‘The Politics of Recognition’ In C. Taylor C (ed) *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press, 1994).

<sup>15</sup> See Everson, ‘The disillusion’ *op cit* n 1 *supra*.

<sup>16</sup> U. Haltern, ‘On Finality’ in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (Hart Publishing, 2007), at 690–691. ‘there seemed to be a cold modernist void, a spiritual absence at the heart of the European integration project.’ See also on technocracy and complex interests, J.S. Dryzek, *Discursive Democracy: Politics, Policy, and Political Science* (CUP, 1990).

communicate norms and values beyond the immediate, concrete, and largely economic.<sup>17</sup> In the related language used more recently by Weiler, the EU could be said to be unable to link its law to a ‘messianic’ vision of a better society which may appeal to the people as humans, rather than merely as consumers.<sup>18</sup> This is not to say that such messianic rhetoric does not exist, but that because of the nature of EU competences it is not linked to actual EU law and law-making in a plausible way, making it seem either dishonest or empty.

### III. Competence to create an internal market

#### A. Legislative competence

The Treaty on European Union and the Treaty on the Functioning of the European Union contain a number of provisions concerning the competences of the EU. Some of these provide a broad framing of the purposes and powers of the EU, indicating its dedication to widely accepted values and goals such as peace, well-being and human dignity.<sup>19</sup> Others provide a classification of competences into various types, such as exclusive and shared.<sup>20</sup> However, more important in practice are the Treaty articles which serve as a legal base, that is to say those articles which specifically authorize the taking of measures, in particular the adopting of legislation. Any legal act adopted by the EU must have such a legal base, that is to say that the act must fall within the range of authorization provided by one of those Treaty articles, or it will fall outside the competences of the EU, and may be annulled by the Court of Justice.<sup>21</sup>

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<sup>17</sup> C.R. Sunstein, ‘On the Expressive function of law’ (1995) 144 *University of Pennsylvania Law Review* 2021; W. Van der Burg, ‘The Expressive and Communicative Functions of Law, especially with Regard to Moral Issues’ (2001) 20 *Law and Philosophy* 31; See also B. Tamanaha, *Law as Means to an End; Threat to the Rule of Law* (CUP, 2006).

<sup>18</sup> J. H. H. Weiler ‘In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration’ (2012) 34 *Journal of European Integration* 825.

<sup>19</sup> E.g. Articles 2-4 TEU.

<sup>20</sup> Articles 2-6 TFEU.

<sup>21</sup> See Article 5 TEU.



Many legislative legal bases contain some purposive language and elements. Examples include Article 21 TFEU, authorizing the adoption of measures necessary to facilitate the free movement of citizens, Article 43(2) TFEU on the Common Agricultural Policy, Article 48 TFEU on the Free Movement of Workers, and Article 192 TFEU on measures to protect the environment. Other competences are defined in a more sector-specific way, and clearly only authorize legislation within a particular field: Article 43(3), with its list of matters including the ‘allocation of fishing opportunities’, or Article 77(3) allowing the Council to adopt measures concerning ‘passports, identity documents....’ or Article 113, allowing harmonisation of turnover taxes, excise duties, and indirect taxation. Most policy areas thus involve a mix of types of competence, with purposive powers, defined by the goal to be achieved, complemented by more precise sector-specific powers allocating a certain defined legislative field to the EU, sometimes exclusively and sometimes in conjunction with the Member States.

Perhaps the most dramatic example of a purposive competence is Article 352 TFEU, which authorizes the adoption of legislation if it is “necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties”. This phrase is open enough to border on the indeterminate, and the forerunner of Article 352, Article 308 TEC, was one of the most controversial Treaty articles.<sup>22</sup> However, this paper will place Article 114 central, the major legal base for harmonization within the internal market. The reason for this focus is as follows: of all EU policies, the creation of the internal market is the one that has caused the most disruption to national institutions and policies – even if the recent Euro crisis measures are now close competition. The internal market is the source of an unequalled range and quantity of legislation and case law, which significantly constrains Member States in their policy freedom and has been the source of consistent criticism as a result of its alleged over-subordination of national and social concerns to EU and economic ones.<sup>23</sup> Internal market law, touching not only on all aspects of the economy but on welfare states, culture, and legal systems, to name a few examples, has a sufficient impact to potentially affect the legitimacy of the EU as a whole.

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<sup>22</sup> A. von Bogdandy and J. Bast, ‘The European Union’s Vertical Order of Competences: The Current Law and Proposals for its Reform’ (2002) 39 *Common Market Law Review* 227.

<sup>23</sup> A. Somek, ‘Solidarity Decomposed: Being and Time in European Citizenship’ (2007) 32 *European Law Review* 787; Everson and Joerges *op cit n 6 supra*; De Witte, *op cit n 6 supra*; Scharpf, *op cit n 2 supra*.

Article 114 provides that the Council and Parliament may adopt harmonization measures “which have as their object the establishment and functioning of the internal market”. Clearly, if it was sufficient to merely state that a measure had this object Article 114 would be an open-ended power.<sup>24</sup> Hence the Court has found that, since the EU is a creature of conferred powers and its competences must not be open-ended, measures adopted under this article must objectively serve the interests of the internal market.<sup>25</sup> It must be possible to actually verify that they are contributing to its establishment and functioning.

This raises the profound question of what a market entails and requires. The answer of the Court to this question, in its first *Tobacco Advertising* judgment, is that any measure adopted under Article 114 must either contribute to the removal of obstacles to free movement or to the removal of appreciable distortions of competition.<sup>26</sup> Subsequent cases have addressed peripheral issues such as the nature of harmonization, and the direct regulation of private economic actors, but the basic principles of *Tobacco Advertising* remain.<sup>27</sup>

These principles do not come out of thin air. Article 26 TFEU provides that the internal market is to be an area without internal frontiers in which freedom of movement is ensured, and that the EU shall take measures, in accordance with the relevant Treaty provisions, to achieve this. The Court’s view that Article 114 may be used to remove obstacles to movement is a corollary of this. The importance of this view, however, which can hardly be overstated, is that the jurisprudence of free movement becomes part of the constitutional framework of competence: where the Court defines an obstacle or restriction in the context of free movement law and the Treaty prohibitions, it is also helping to define the kinds of

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<sup>24</sup> See Case C-338/01 *Commission v Council* [2004] ECR I-4829; para 54; Case C-376/98 *German v Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419 para 84.

<sup>25</sup> *ibid*

<sup>26</sup> Case C-376/98 n 24 *supra*; Measures involving persons, tax or workers must be adopted under the similarly phrased Article 115, which requires unanimity.

<sup>27</sup> C-217/04; Case C-58/08 *Vodafone* [2010] ECR I-4999. See generally I. Govaere, ‘The Future Direction Of The E.U. Internal Market: On Vested Values And Fashionable Modernism’ (2009) 16 *Columbia Journal of European Law* 67.

things that may be harmonised.<sup>28</sup> It is arguable that competence to harmonise goes even further than competence to set aside laws on the basis of the Treaty prohibitions.<sup>29</sup> It is clear, however, from *Tobacco Advertising*, that it goes at least as far. The well-known open-ended, imprecise, and far-reaching definitions at the heart of free movement are therefore co-determinative of the limits of Article 114,<sup>30</sup> importing all the problems of their vague breadth from the context of negative integration to that of positive.

The view that Article 114 may also be used to remove distortions of competition comes from a provision which used to be in the TEC providing that the internal market would contain a system ensuring that competition was not distorted. The judicial view that the establishment and functioning of the internal market entailed measures aimed at this end was therefore fairly orthodox. Since Lisbon this Treaty provision has been moved to a protocol, which still provides that distortions of competition should be removed, but creates some ambiguity regarding whether Article 114 or Article 352 TFEU is now the most appropriate legal base for measures aiming at this.<sup>31</sup> In recent judgments the Court has suggested that it regards Article 114 as having the same meaning as its forerunner, Article 95 EC, which is not surprising given their identical wording.<sup>32</sup> On balance, it is most plausible that the decision in *Tobacco* that Article 114 can be used to remove distortions of competition remains good law.<sup>33</sup> If not, a matter

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<sup>28</sup> Weiler *op cit* n 5 *supra*, 371-372.

<sup>29</sup> G. Davies 'Can selling arrangements be harmonised?' (2005) 30 *European Law Review* 370.

<sup>30</sup> H. Schepel 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law' (2012) 18 *European Law Journal* 177; E. Spaventa, 'From Gebhard to Carpenter: Towards a (non)-Economic European Constitution' (2004) 41 *Common Market Law Review* 743; J. Snell 'The notion of market access: a concept or a slogan?' (2010) 47 *Common Market Law Review* 437; G. Davies 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law' (2010) 11 *German Law Journal* 671.

<sup>31</sup> Protocol 27 to the TFEU, on the internal market and competition; D. Chalmers, G. Davies and G. Monti *EU Law* (CUP, 2010, 2<sup>nd</sup> edn), 695.

<sup>32</sup> C-128/11 *UsedSoft* [2012] ECR I-000 para 41.

<sup>33</sup> Chalmers, Davies and Monti, *op cit* n 31 *supra*, 695.

which will only be entirely clear when the point arises in a case, then the arguments below about purposiveness could be partially transferred *mutatis mutandis* to Article 352 EC. However, it will be assumed below that the protocol does not overrule this aspect of *Tobacco Advertising*.

A further finding implicit in the judgment was that Article 114 could not be used to harmonise for purposes other than the internal market ones, and this has been made explicit in later cases: a measure which only nominally or marginally pursues these goals, and is primarily aimed at some other goal, however worthy, such as public health, exceeds competence and will be annulled.<sup>34</sup> That applies to sub-sections of measures, insofar as they are severable: it is not permitted to add on articles which do not serve internal market goals unless they are necessary for the internal market ones.<sup>35</sup> Where such market-ineffective provisions do exist, and cannot be severed without undermining the coherence of the measure as a whole, the entire measure may be annulled.<sup>36</sup>

However, that is not to say that interests other than internal market ones cannot be taken into account. Indeed, Articles 7-12 TFEU, and the latter parts of Article 114, provide that they must be. EU policies, and in particular the internal market, should aim at a high level of protection of health, consumers and so on, and this should be integrated into internal market law and policy. Article 114(3) even refers to the situation where the Commission 'in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection....'.

Constraining Article 114 to the pursuit of specific economic goals may seem inconsistent with integrating a high level of protection of non-economic interests. However, the goals of the internal market are primarily achieved by the simple fact of replacing disparate national laws with a single European one. It is, at least in the view of the Court, regulatory difference which tends to create obstacles to movement and distortions of competition, and the fact of harmonisation which solves these

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<sup>34</sup> Case C-338/01, *n 24 supra*, para 55 and para 69 and para 95.

<sup>35</sup> See Case C-376/98, *n 24 supra*, para 100.

<sup>36</sup> The situation in Case C-376/98, *n 24 supra*.

problems.<sup>37</sup> But if the internal market goals are primarily served by harmonisation as such, this leaves open the question of what the content of the harmonisation measures should be, and this is where the integration of non-economic interests is relevant. As the Court put it in *Tobacco Advertising*, “provided that the conditions for recourse to [Article 114 TFEU, 53 TFEU and 62 TFEU] as a legal basis are fulfilled, the Community 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”.<sup>38</sup>

This becomes clearer if one remembers that the scope of Article 114 is not limited to any particular field of law. Rules may impact on economic activity and economic actors even if those rules are not conventionally economic themselves. Hence aspects of the regulation of culture, healthcare, criminal law, recycling and planning rules, the legal system, labour rights, employment safety, public health and animal welfare have been identified in case law as creating obstacles to movement or distortions of competition and are thus potential objects of harmonisation, in some cases already achieved.<sup>39</sup> Given this enormous potential breadth of Article 114 the need to integrate non-economic concerns is evident.

The apparent philosophy of Article 114 – and of Article 115, which may be used for free movement of persons and tax matters – is thus of reconciliation of the economic and non-economic, with the latter even seeming to enjoy a sort of hierarchical superiority, in that they constrain the way that economic goals are to be pursued. However, this is not to say that economic and non-economic goals are necessarily in balance, and there are important differences in their status and position within the

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<sup>37</sup> *Cassis*, c-376/98, n 24 *supra*; Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11753; R. Van der Laan and A. Nentjes, ‘Competitive Distortions in EU Environmental Legislation: Inefficiency versus Inequity’ (2001) 11 *European Journal of Law and Economics* 131 .

<sup>38</sup> Case C-376/98, n 24 *supra*, Para 88

<sup>39</sup> Case C-388/01 *Commission v Italy* [2003] ECR I-721; C-158/96 *Kohll v Union des Caisses de Maladie* [1998] ECR I-1931; Case C-341/05 *Laval* [2007] ECR I-11767; Case C-438/05 *Viking Line* [2007] ECR I-10779; C-274/96 *Bickel and Franz* [1998] ECR I-7637; 302/86 *Commission v Denmark* [1988] ECR4607; C-470/03 *AGM* [2007] ECR I-2749; C-41/02 *Commission v Netherlands* [2004] ECR I-11375; C-1/96 *Compassion in World Farming* [1998] ECR I-1251; Directive 2011/24 on the application of patients’ rights in cross-border healthcare. See also F. Fabbrini and K. Granat, “‘Yellow card, but no foul’: The role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike’ (2013) 50 *Common Market Law Review* 115.

internal market. The pursuit of free movement and undistorted competition is a condition for harmonization at all, and must be the primary goal of such harmonization. It is non-negotiable, and ever-present. Every measure must, in some way, take these goals a little further, even if that measure is in fact regulating a socially important matter such as healthcare, the legal system, or aspects of culture. By contrast, non-economic interests are present purely as peripheral to internal market interests. They are not autonomous legislative goals within the internal market, but matters which may be regulated insofar as necessary to prevent the internal market doing them harm.

Three observations may be made about this situation. First, it is not necessarily the case that the internal market improves the level of protection of non-economic interests. It may, in some cases, but the style and level of protection to be chosen is a political matter. It is not *a priori* determined by the Treaty except for the Article 114(3) requirement that it should be 'high' but this does not really tell us whether it will be higher or lower than existing Member State rules, and it is often likely to be somewhere in between the most protective Member State law and the least protective. Thus whereas each measure must always take economic goals a bit further, whether levels of non-economic protection are improved, remain roughly the same but in a different form, or are lowered in the name of economic advantage and free consumer choice, is a contingent political question to be decided in each legislative process.

Another observation is that while measures must primarily serve the purposes of free movement and undistorted competition, this need not be their primary *impact*. To take the examples of harmonization of foodstuffs, and the directive on cross-border healthcare, such measures undoubtedly facilitate cross-border trade in goods and medical services to a non-trivial extent.<sup>40</sup> However, it is not necessarily the case that they lead to radical, game-changing increases in such trade, and this is not a condition for their legality. By contrast, they may well have profound impacts on eating culture, and on traditions, and on the domestic organization of healthcare, as institutions adapt to take account of the possibility of free movement.<sup>41</sup> Legally, the fact of this asymmetrical impact does not matter.

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<sup>40</sup> Directive 2011/24 on the application of patients' rights in cross-border healthcare.

<sup>41</sup> See S. Greer and S. Rauscher 'Destablization rights and restablization politics. Policy and political reactions to European Union healthcare services law' (2011) *18 Journal of European Public Policy* 220.

A final observation is that in order to apply Article 114 to non-economic fields of law it is not necessary to claim that these fields are themselves best regulated at EU level.<sup>42</sup> If one assumes for the purpose of argument that issues such as food safety, healthcare, and legal procedure are best regulated at national level, that is to say that considerations of efficiency and autonomy and local culture make the national regulator more likely to serve welfare and democratic preferences than the EU regulator would be, then this fact does not at all stand in the way of internal market measures which *de facto* reorganize these fields.<sup>43</sup> The reason is that the purpose of such measures, when adopted within the internal market, is the facilitation of free movement or undistorted competition. Since this is something that requires EU action, there is no subsidiarity-based objection.<sup>44</sup> Thus, ironically, a directive reorganizing healthcare in the cause of better healthcare for Europeans might be very vulnerable to subsidiarity objections, quite aside from the fact that there would in fact be no legal base. However, a directive having the same effect, indirectly, as a consequence of provisions serving the goal of free movement, is legally sound. The internal market allows national non-economic policy to be turned entirely upside down, as long as this is done for economic reasons.

It may be noted that much criticism of internal market competence emphasises its breadth and lack of containment. It has been argued that the formal limits imposed by the Court in *Tobacco Advertising* are without substance, even an invitation to substantive legislative expansion, and in any case easily satisfied by 'intelligent drafting'.<sup>45</sup> This may seem at odds with the suggestion above that the law is

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<sup>42</sup> The subsidiarity argument: See Article 5(3) TEU; Protocol no 2 on the application of the principles of proportionality and subsidiary.

<sup>43</sup> Case C-154/04 *Alliance for Natural Health*, [2005] ECR I-06451; Case C-491/01 *British American Tobacco* [2002] ECR I-11453; Case C-377/98 *Netherlands v Parliament and Council (Biotechnology directive)* [2001] ECR I-7079. See also Case C-84/94 *UK v Council (working time directive)* [1996] ECR I-5755.

<sup>44</sup> F. Fabbrini and K. Granat 'Yellow card but no foul' (2013) 50 *Common Market Law Review* 115 ; G. Davies 'Subsidiarity: The wrong idea in the wrong place at the wrong time' (2006) 43 *Common Market Law Review* 63. See also G. Conway 'Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ' (2010) 11 *German Law Journal* 966.

<sup>45</sup> S. Weatherill 'The limits of legislative harmonisation ten years after *Tobacco Advertising*: How the Court's case law has become a drafting guide' (2011) 12 *German Law Journal* 828, 843; A. Somek *Individualism* (OUP, 2008); M. Pollack, 'Creeping Competence: The Expanding Agenda of the European Community' (1994) 14 *Journal of Public*

confined to the pursuit of internal market goals. However, there is no disagreement here: the legitimacy challenges that this paper addresses arise precisely because wide powers are exercised in the name of narrow goals. It is the disparity between the breadth of the law's impact and the narrowness of the vision, purpose, and rhetoric which sustains that impact which is at the heart of the democratic and expressive problems outlined below.

### *B. Judicial competence*

Case law is not always described in the language of competence. However, thanks to the direct effect of the Treaty articles on free movement of goods, persons, services and capital, and the doctrine of supremacy of EU law, there can be said to be a delegated (to national judges) judicial competence to set aside national rules or practices which impede free movement. Instead of being integrated into this power, and reconciled with free movement, other interests serve here as derogations: they set limits to the judicial competence.<sup>46</sup> National measures which are necessary to protect non-economic interests are, as a result, resistant to free movement law.

There are two aspects of this judicial competence which are relevant to the argument of this paper. One is that it employs a framing of the questions involved which is as distinctively purposive and asymmetrical as that found within the legislative competence.<sup>47</sup> Free movement is a goal beyond question, whereas obstacles – as the Court refers to national policy measures serving non-economic goals - must be justified in each case. Moreover, the obstacles only survive free movement law if it can be shown that they cannot be adapted to serve their goals in less movement-obstructive ways, whereas the party claiming free movement rights has no obligation to show that they cannot reasonably adapt to the measure *in casu*. The burden of adaption is entirely on one side, adaption to free movement is implicitly posited as costless, and the requirement to demonstrate necessity and to think about whether

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*Policy 95*; S. Weatherill, 'Competence Creep and Competence Control' (2004) 23 *Yearbook of European Law* 1; A. Dashwood, 'The Limits of European Community Powers', (1996) 21 *European Law Review* 113.

<sup>46</sup>120/78 *Cassis de Dijon* [1979] ECR 649: Articles 36, 45, 52, 62, 65 TFEU.

<sup>47</sup> F. Scharpf 'The asymmetry of European integration, or why the EU cannot be a 'social market economy' (2010) 8 *Socio-Economic Review* 211.



the 'same' ends could be achieved in other ways implicitly pushes concrete interests to the fore and marginalises less functional factors, such as history and continuity.

The other relevant aspect of judicial competence is its particular relationship to legislative competence. It is the duopoly of Court and legislator which ensure that the internal market is an ever-onward march, since each picks up where the other fails.<sup>48</sup> If a national measure is found to be justified and proportionate in court, then this identifies it as an obstacle to free movement which cannot be removed by direct effect, and therefore establishes a prima facie competence to harmonise – since this is clearly necessary to remove the obstacle. Where the courts fail to overturn a national measure, the Member State has therefore won but a partial victory: the game is simply moved to the legislative arena.

A reverse dynamic also exists: where the legislator decides not to adopt internal market legislation, at least concerning free movement, they do not succeed in putting Member State institutions or autonomy safely outside the reach of EU law. Instead, they simply pass the ball back to the Court, and national courts, where the legality of the obstacles that these institutions entail may be challenged. This will be returned to below.

### *C. The internal market and other competences*

There are a number of other competences in the Treaty which are indirectly connected to the internal market, in that they allow measures which prevent a competitive race to the bottom. The environmental competence is an example, but the emphasis here will be on the competences to adopt measures in the field of social policy and to adopt measures combating discrimination.<sup>49</sup> These are autonomous legal bases, and in the presentation and adoption of measures it is their ability to achieve social and equality goals which is central to legality, not economic concerns. However, implicitly, and sometimes explicitly, the internal market frames and guides the choices to be made.<sup>50</sup>

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<sup>48</sup> See Scharpf, *ibid.*

<sup>49</sup> Article 19, 153 and 157 TFEU. E.g. Directive 93/104 on working time; Directive 2000/78 on equal treatment; directive 89/391 on health and safety at work.

<sup>50</sup> See e.g. preambles to Directive 93/104/EC concerning certain aspects of the organization of working time; Directive 2009/104/EC concerning the minimum safety and health requirements for the use of work equipment by

There is relatively little non-economic reason to locate social policy and non-discrimination policy at EU level. To some degree mutual state commitments to these goals may facilitate their achievement in all states, so that there is a policy advantage to sharing competence in this way. However, a significant part of the logic of an EU competence in these fields is indirectly economic. As the internal market becomes more open, competition increases, potentially pressuring states to cut social costs to protect their business, and creating a so-called race to the bottom.<sup>51</sup> The setting of minimum social standards – and the emphasis in these fields is precisely on minimum standards rather than total harmonisation – is an attempt to bring balance to the internal market and limit this regulatory competition. This is acknowledged with reasonable clarity in the preambles to some of the measures.<sup>52</sup>

#### IV. Democracy

##### A. *Democracy in the internal market*

A consequence of purposive competence is that Europeans are denied a meaningful democratic forum for the debating and adoption of laws. Both European and national parliaments are limited in their capacities by the constitutional pre-emption of policy directions other than the continuing progress towards ever-freer movement and ever less distorted competition. The mechanism and extent of this problem is discussed in this section.

The essence of a political debate is the possibility of choice between outcomes.<sup>53</sup> Most laws are a compromise between various interests, goals and policy considerations, and the fact that it is not a

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workers at work; Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP; Directive 94/45/EC on the establishment of a European Works Council.

<sup>51</sup> See generally C. Barnard and S. Deakin, 'Market Access and Regulatory Competition' in C. Barnard and S. Deakin (eds.), *The Law of the European Single Market* (Hart, 2005); N. Reich, 'Competition Between Legal Orders: A New Paradigm of EC Law?' (1992) 29 *Common Market Law Review* 459; S. Deakin, 'Legal Diversity and Regulatory Competition: Which Model for Europe?' (2006) 12 *European Law Journal* 440; H. Sondergaard Birkmose, 'Regulatory Competition and the European Harmonisation Process' (2006) *European Business Law Review* 1075.

<sup>52</sup> See n 50 *supra*.

<sup>53</sup> J.S. Dryzek, *Discursive Democracy: Politics, Policy, and Political Science* (CUP, 1990).

*priori* determined what that compromise will be is important to making the process genuinely democratic. However, where laws are adopted on the basis of purposive EU competences, such as the internal market, such freedom of choice does not exist. Laws must achieve certain purposes, and may not harm those purposes. Political choice is limited to how to achieve those purposes. The question whether those particular policy goals are the right ones for society at a given moment is removed from politics by the Treaty.<sup>54</sup> Politics within the internal market legislative process is reduced to how, and how fast, the internal market should be advanced, but not whether it should be. Even non-action by the legislator does not represent a retreat from internal market goals. Thanks to direct effect it simply moves the game back to the courts, which from the perspective of a Member State administration may be more threatening and less democratically acceptable than harmonization measures.<sup>55</sup>

Thus as long as the Treaty has its current form the goals of the internal market are constraints from which no Member State policy field can escape, yet which no political organ has the capacity to challenge. That includes national parliaments. They may in practice be able to adopt laws which conflict with the internal market, but such laws will be deprived of effect by the courts. The question of where free movement and undistorted competition belong in the policy matrix is removed from national politics too.

This may seem like no more than the logical consequence of a Treaty commitment – that political freedom is correspondingly limited. However, the granting of a sector-specific competence to an international body has quite different consequences from the granting of a legally enforceable purpose: one limits the laws that states, and the organization, can make, in a precise and pre-defined way. The other limits what the state, or organization, may seek to be.

Limitations of such an open and normative kind are found in other legal places: all constitutional principles are open to the criticism that they are undemocratic insofar as they constrain politics, and not every constitutional principle is precise and sector-specific. However, where the principles in question

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<sup>54</sup> See F. De Witte 'Sex, drugs & EU law: The recognition of moral, ethical and cultural diversity in EU law' *Common Market Law Review* forthcoming.

<sup>55</sup> Scharpf *op cit* n 47 *supra*; G. Davies, 'Is mutual recognition an alternative to harmonization?' in L. Bartels and F. Ortino (eds) *Regional Trade Agreements and the WTO Legal System* (OUP, 2006) 265.

enjoy a high degree of consensus acceptance, and impose a low degree of functional policy constraint – human rights being the obvious example – then the issue is different and far less contentious than when, as in the case of the internal market, precisely the opposite is true. Free movement and undistorted competition are certainly defensible policy goals, but it is hard to present them as enjoying the same normative status as more traditional constitutional law, and they certainly do not enjoy the same degree of consensus support. On the other hand, they do impose extremely wide policy constraints.<sup>56</sup> Because they address activities in which every person or business may be engaged, and require these to be unhindered, they interact with such a wide range of government policies – and even private policies<sup>57</sup> – that their direct effect has been described, not implausibly, in terms of a general proportionality review of national law.<sup>58</sup>

These competence constraints put the European Parliament, or parliamentarian, in a rhetorical dilemma. Internal market measures are ‘about’ many things, and in a parliament with a full range of unfettered policy competences internal market legislation would undoubtedly be debated in terms of the desirability of trade, openness, community, closure, self-interest, international relations, social values, economic advantage, solidarity, culture, stability, individual freedom, individualism, and so on. The implication would be that the choice of balance and direction was to be determined. Such a debate can offer the citizen recognition of their concerns and values, and potentially contribute to social legitimacy. However, such a debate in the European Parliament would be a deceit, for it would suggest a policy freedom which does not exist.

Thus if European Parliamentarians speak of a holistic vision of society, and speak of measures which aim to build that society, they imply powers that they do not have, and are vulnerable either to the criticism

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<sup>56</sup> De Witte, *op cit* n 6 *supra*; L. Azoulai, ‘The ‘Retained Powers’ Formula in the Case Law of the European Court of Justice: EU Law as Total Law?’ (2011) 4(2) *European Journal of Legal Studies* 192.

<sup>57</sup> Case C-415/93 *Union Royal Belge des Sociétés de Football Association (URBSFA) v Bosman* [1995] ECR I-4921; Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779; *Vodafone* n 27 *supra*.

<sup>58</sup> E. Spaventa, ‘From Gebhard to Carpenter: towards a (non-) Economic Constitution’ (2004) 41 *Common Market Law Review* 743.

that they are full of hot air, incompetent, unaware of the limitations of their post, like the municipal councilor who wants to promote world peace, or that they are dangerous, seeking to extend their competences, aiming to legislate in a way that the EU is not authorized to do and to undermine its constitutional order.

Yet if these Parliamentarians speak of measures only in terms of their contribution to free movement and undistorted competition, and whether other interests have been sufficiently protected in the pursuit of these goals, then this produces a narrow and impoverished debate in which the citizen with wider concerns cannot recognize themselves. The voice against ever-more economic openness is absent from such a debate, except for the parliamentarian who wishes to see no legislation adopted at all (although this representative will have to think about the consequences of abandoning states to the mercy of the courts applying the Treaty). However that voice does speak for a part of the population: commitment to internal market goals is not an issue above controversy. Where a parliament debates how to achieve internal market goals without discussing *whether* these goals should be pursued their leap over this initial normative step might therefore be expected to provoke public anger or alienation. What use do the public have for a parliament which legislates without questioning the purpose of that legislation?

Perhaps more seriously, at least from the perspective of public disaffection with politics in general, the reproduction of the same kind of rhetorical limitations at national level may be expected. If national parliaments have no real choice about complying with the internal market, what is the point in parliamentarians interrogating the desirability of its goals, unless it is membership of the EU or fundamental reform which is the subject of the debate? Where more mundane laws are in issue, and greater closure of the national market might arguably serve some national goal, there is rarely much point to proposing this: even in the unlikely event that such a measure can be defended against the courts that would simply open the way to its replacement by harmonization. In practice, policy and law have to be made within the constraints of internal market principles, even if that means that policy and law are limited to certain forms.<sup>59</sup> If national parliaments ignore this, and act as if they were free, they risk seeming either dishonest or incompetent. If, by contrast, they accept that every law must pass the test of free movement law, and that all other policies must be adapted as much as possible to its

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<sup>59</sup> De Witte, *op cit* n 6 *supra*.

demands, then they produce a debate and legislative process in which voices are unrepresented, where contentious questions are answered in silence, and from which public alienation and disaffection with both national politics and the EU would be a rational response.

A compensation for the hollowing-out of national politics caused by EU law might seem to lie in the 'yellow card' subsidiarity process.<sup>60</sup> This involves national parliaments in the EU legislative process, and allows them to take a stand on all measures adopted within a shared competence, which includes the internal market. However, the role allocated to national parliaments is limited to a critique of the compliance of EU law with subsidiarity. This role does not allow them to question whether the purpose of the law is desirable, but merely whether that purpose – free movement and undistorted competition in the case of internal market measures - could have been achieved in a more decentralized way, by states acting alone.<sup>61</sup> Whether the internal market benefits justify the price in national autonomy, and whether the balance of economic and non-economic is a good one, are not questions which fit within the process.<sup>62</sup> The yellow card process is just another example of a parliament being asked to debate and decide within constraints which exclude some of the very questions that most need to be asked.

#### *B. Democracy in other policy areas*

Some of the most controversial EU measures are social policy ones, such as the working time directive and many health and safety measures.<sup>63</sup> These are criticised, by some, for their invasion of Member State autonomy and are seen as examples of EU interference in an area where there are few advantages to transnational law – no economies of scale, few practical problems caused by disparities, few functional benefits of a common rule – and many reasons to maintain national control: there are different traditions in the way in which social policy goals are reached, and the choice of rules and

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<sup>60</sup> P. Kiiver 'The treaty of Lisbon, the national parliaments, and the principle of subsidiarity' (2008) 15 *Maastricht Journal of European and Comparative Law* 77; G. Davies 'The post-Laeken division of competences' (2003) 28 *European Law Review* 686.

<sup>61</sup> *Ibid*; Protocol no 2 on the application of the principles of proportionality and subsidiary.

<sup>62</sup> See works cited in n 44 *supra*.

<sup>63</sup> Directive 2003/88/EC OJ L 299, 18.11.2003, 9. See also n 49 *supra*.

institutions carries significant historical, cultural and symbolic baggage.<sup>64</sup> However, not adopting EU measures would not leave national autonomy safe, since it would then be exposed to the not inconsiderable economic pressure of increasing competition from firms in different states. An advantage of EU law in these fields is that it protects states, and social policy, from regulatory competition.<sup>65</sup> The internal market thus creates a situation in which autonomy, social protection, and open markets are in tension.<sup>66</sup> A choice for any two of them puts the third at risk.

A meaningful debate about EU social policy would ask which of the three should give ground. By contrast, because the internal market is a given, the choice for the social policy legislator is merely between autonomy and social protection – the trilemma is reduced to a dilemma. EU social policy will often be a choice between lesser evils, with no capacity, any more than within the internal market, to address the fundamental choices which are really at stake.

## V. Technocracy

There is no novelty in the suggestion that the EU is a relatively technocratic law-maker, and that where the internal market is concerned economic analysis of potential impact plays a significant part in the construction of proposed laws. There has also been wide discussion of the democratic issues associated with this technocratic bent. On the one hand it has been argued that expert law-making presents normative choices as if they are scientific ones, essentially depoliticising what is properly political under the cover of 'objectivity'.<sup>67</sup> On the other hand, it has been argued that most of what the EU does really is

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<sup>64</sup> See the discussion in A. Hug and O. Tudor 'Single Market, equal rights? UK perspectives on EU employment and social law' (Foreign Policy Centre, 2012).

<sup>65</sup> See for discussion and critique of this argument C. Barnard 'Social dumping and the race to the bottom. Some lessons for the European Union from Delaware?' (2000) 25 *European Law Review*, 57.

<sup>66</sup> D.Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* ( W.W.Norton &Company, 2011).

<sup>67</sup> M. Kritikos, 'Traditional Risk Analysis and Releases of GMOs into the European Union: Space for Non-Scientific Factors' (2009) 44 *European Law Review* 405; C. Joerges, 'The Law's Problems with the Governance of the Single European Market' in C. Joerges and R. Dehousse (eds) *Good Governance in Europe's Integrated Market* (OUP, 2002) 1; A. Somek *Individualism* (OUP, 2008).

the proper domain of experts, and the question of which laws most satisfy public needs and preferences (for example for safety, health or wealth) is a technical matter that can only be rationally decided by experts, albeit under ultimate political supervision.<sup>68</sup>

What has been less considered is the specific role of competence in this relationship between technocracy and legitimacy. Yet even if experts are important for good law, and even if it is believed that expert law may in some ways lead to 'better' results, the role of expertise is not limited to this: it is also important to the safeguarding of the principle of conferral, in fields, such as the internal market, where competence is defined purposively.

One of the difficulties of such purposive conferral is that it can easily become oxymoronic. The idea of pursuing a certain goal, particularly one as broad as 'removing barriers to movement', is so ambiguous and open-ended that it could easily serve as a licence for almost any law-making, rendering the idea that the EU only has specific conferred powers an empty one.<sup>69</sup> Given that it is uncontroversial to claim that the integration of states and peoples is affected by matters such as language, culture, and identity, as well as infrastructure, wealth differences and education, quite plausible arguments can be made that if there are to be genuinely no obstacles to inter-state movement, and a genuinely level playing-field for competition, then almost any aspect of life can and should be harmonised.<sup>70</sup> If the goal is to make the internal market look like the market of a single state, then it is quite arguable that the EU must come to look like a single state too. Indeed, if markets are to be embedded in society then an attempt to make a market without making a nation would be not only unsuccessful, but perhaps harmful.<sup>71</sup>

Since such an open-ended harmonisation power is not desired by the Member States and would not be welcomed by the public there is a need to determine the limits of what is necessary for the internal

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<sup>68</sup> G. Majone 'The regulatory state and its legitimacy problems' (1999) 22(1) *West European Politics*, 1. C.f. more recently G. Majone 'Rethinking European integration after the debt crisis' (2012) *UCL Working Paper* 3/2012.

<sup>69</sup> Conway, *op cit* n 44 *supra*.

<sup>70</sup> Davies, *op cit* n 44 *supra*.

<sup>71</sup> S. Giubboni, *Social Rights and Market Freedom in the European Constitution* (Cambridge University Press, 2006); More widely: B. Bugarcic 'Europe Against the Left? On Legal Limits to Progressive Politics' *LEQS Paper* 61/2013.



market in some reasonably objective and concrete way, which can allow the Commission to understand the limits of the proposals that it can and should put forward, and can allow the Court to provide meaningful judicial review. A systematic deconstruction and analysis of concepts such as ‘obstacle’, ‘distortion of competition’ and ‘movement’ might be one way of achieving this, but it is not the path that has been followed until now by the Court. Rather, the legal limits to internal market competence are given substance by economic expertise. Hence it is necessary to show that a measure ‘objectively’ contributes to the internal market, in some cases to an ‘appreciable’ extent, and these criteria are above all satisfied by showing not merely an ‘abstract’ case that the measure might serve internal market purposes but by evidence-based argument showing that it actually will.<sup>72</sup> Impact assessments and economic analysis are a standard part of the procedure for formulating and defending proposals, and they are implicitly present in the Court’s judgments on internal market competence, which turn to a large extent on disagreements about market analysis and actual economic consequences.<sup>73</sup> While there may be doubts about the reliability of such an approach from an economic perspective, from a constitutional one it is both important and reasonably functional: it takes the limits of competence to a significant extent outside of political preference, and brings them within the realm of what can be defined, understood, and reviewed.

However, the nature of such economic analysis is that it provides a language that is well suited to concerns that can be quantified, measured easily in money, and made concrete, but which is less suited to the expression of concerns that are more subtle, qualitative, and indirect. It can capture the direct financial and trade consequences of a measure, and its impact on defined markets, and it can even to a certain extent address behavioural issues such as how consumers may respond to certain stimuli or disincentives. However, the importance of a rule or institution for a sense of community, the value of its history, the degree to which it reinforces identity and public norms, the sense of loss and emasculation which may be experienced if it is snatched away for reasons of trade – all these are too subtle and hard to quantify to be part of the kind of objective arguments upon which measures are initially founded and against which the Court tests them.

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<sup>72</sup> Case C-376/98 n 24 *supra*; Case C-338/01, n 24 *supra*.

<sup>73</sup> *ibid*

Yet any decision to harmonise is a decision to take away a degree of autonomy, and to replace something national by something European, and considerations of the kind above are highly relevant. The value of rules to do with products, public service institutions, professions, and so on is not just in the trade-off between direct costs and immediate profits, but is also in the way that such rules contribute to a certain texture of society.<sup>74</sup> The mere fact of autonomy has a value in itself, the capacity of a community to determine its own way of life – even if not at all times in accordance with immediate efficiency.<sup>75</sup> Alongside this, the fact that a rule or institution has a history gives it a value to that society, contributing to identity and a feeling of solidity.<sup>76</sup> Then norms such as equality, quality, fairness, and a feeling of collective engagement may also be in play, precisely where rules set limits to economic freedom, thereby ensuring that the experience of the citizen in the market is more uniform, more shared, less lonely – even if, arguably, less financially advantageous.<sup>77</sup>

All the parties in the political and legal process enjoy in principle rhetorical freedom. The European Parliament and Council and the Court of Justice may voice all these concerns, and use them to justify opposition to the measure. However, where the proposer – the Commission – presents a measure in the language of narrowly economic rationality and imperative then the risk must be that this frames debate to the partial exclusion of other ways of thinking. The risk of meeting economic language with non-economic opposition is that one may seem to be ‘missing the point’, not addressing the issue, and so be marginalised. The temptation must be to engage fully with the arguments put forward in favour of the measure, but thus to be, at least to some extent, co-opted by its frame.<sup>78</sup>

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<sup>74</sup> De Witte, ‘Sex, Drugs’ *op cit* n 54 *supra*; Haltern, ‘Pathos’ *op cit* n 1 *supra*.

<sup>75</sup> *ibid*

<sup>76</sup> J. Simons ‘Democratic Aesthetics’ (2009) 50(1) *Culture, Theory and Critique* 1; Schmidt ‘The EU in search’, *op cit* n 13 *supra*.

<sup>77</sup> G. Davies ‘The process and side-effects of harmonisation of European welfare states’ *NYU Jean Monnet Working Paper* 02/2006.

<sup>78</sup> A. Tversky and D. Kahneman ‘The framing of decisions and the psychology of choice’ (1981) 211 *Science* 453.

Whether and to what extent this actually occurs in European Parliament debate is an empirical question to which this paper has no answer. However, the risks here described do seem to be reflected in the jurisprudence of the Court of Justice – whose judgments, it may be noted, are as widely reported as are the debates of the Parliament, and so perhaps just as important to public perception. These judgments, when to do with the internal market, are mostly about the application of the free movement articles rather than judicial review of legislation. However, the market concepts underlying both judicial and legislative competence are essentially the same, and one might expect similar approaches to them. Hence it is not surprising that a view of the internal market in which economic, concrete, quantifiable and direct considerations are more developed, and taken more seriously, than complex, indirect, qualitative and social ones, does emerge. There is an almost complete absence of any discussion of the latter type of factor, or any acknowledgment that they might serve as legitimate justifications for restrictions on free movement. To some extent this may be because states are not good at articulating these issues, and fail to raise them. However, in the few cases where states have tried to raise more complex and fundamental social issues as arguments against the disruption of socially sensitive institutions, the Court has in all cases brushed these arguments aside or ignored them.<sup>79</sup>

The striking contrast is with the Court's own case law on Union citizenship. This stands out for the redolent and symbolic phrases it contains, which are often used to justify relatively far-reaching and textually non-evident legal leaps.<sup>80</sup> In this field, the Court shows itself to be profoundly aware that individual laws have a wider legal, social and political context, and that part of justification is the relating of particular legal arguments to wider visions – to 'destiny' perhaps, to use one of its words.<sup>81</sup> In the law on citizenship it has created a body of judgments which stands out for its expressive qualities.

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<sup>79</sup> See limited and largely dismissive remarks in Case C-148/02 *Garcia Avello* [2003] ECR I-11613; Case C-147/03 *Commission v Austria* [2005] ECR I-5969; Case 186/87 *Cowan* [1989] ECR 195.

<sup>80</sup> E.g. C-85/96 *Martínez Sala v Freistaat Bayern* [1998] ECR I-2691; C-184/99 *Grzelczyk* [2001] ECR I-6193; Case C-224/98 *D'Hoop* [2002] ECR I-6191; Case C-200/02 *Chen* [2004] ECR I-9925; Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177.

<sup>81</sup> *Grzelczyk*; *D'Hoop*, *ibid.*

Yet the profound irony of this is that while this case law certainly speaks to, and embodies, wider values and ideals, these are the values and ideals of a minority, not the product of popular political preference.<sup>82</sup> The social legitimacy which citizenship case law lends to the EU in some groups may be more than matched by alienation which it will inspire in others. Moreover, the asymmetry between the capacity of the Court to present the underlying values and vision of this part of EU law so powerfully, and its inability to articulate or recognise the underlying values and visions of national measures when these are challenged, is striking. Symbolic arguments, expressive law, and messianic considerations are clearly not rejected by the Court as a matter of principle. It appears simply to be the case that the EU has established, perhaps unconsciously, a monopoly of their use.

## **VI. Conclusion**

Purpose is a brutal tool. If I ask you to do something, then depending perhaps on what I ask, I exercise only a limited and shallow power over you. If I ask you to accept and be loyal to a certain goal in all your actions which may affect that goal, then I touch upon your very self, and ask you to give up an autonomous identity. I ask you to give up your freedom to choose what matters. No Treaty should ask a state to commit to a purpose unless that purpose is rigorously ring-fenced, highly consensual, or unless that Treaty contains workable mechanisms for deep political legitimation, and for self-questioning, so that autonomy is moved rather than eliminated. The judicial and legislative competences of the internal market fulfil none of these conditions.

It does not have to be this way. It is quite possible to envisage a Treaty in which the EU enjoys a range of sector-specific competences, concerning relevant matters such as product and service standards, and administrative co-operation, which allow most of the work of the internal market to be done in a more precise, defined, and socially acceptable way. It is not inevitable that purpose, as embodied in the free movement articles of the Treaty, be given direct effect as such. More precise and sector-specific ways of formulating the prohibitions could, as with legislative competence, do much of the work without the collateral democratic harm.

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<sup>82</sup> A. Somek 'From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination' (2012) 18(5) *European Law Journal* 711.

The price of course is in effectiveness, although this formulation is a cheat, since effectiveness can only be measured against a purpose, and assumes purposiveness. To say that a more precisely defined internal market would be less effective is to refuse to accept that the internal market can be limited – it is to remain loyal to the open-ended goals which such a precise definition would reject. However, it might be true that limiting definitions of what the market entails would also reduce trade, and wealth, and individual freedom in some ways, and that to define powers without any reference to goals or purpose would invite subversion of those powers by the Member States, whose commitment then would be too narrow and specific to create much change. However, there is a scale between the most limited and specific competences and the most broad and purposive ones, and at the moment we sit at one end of that scale. There is room for adjustment

Perhaps the most urgent need, if we are not to entirely rewrite the Treaties, is for more precision about what an internal market needs – both what kind of harmonisation can be said to ‘serve the object’ of the internal market and what kinds of national measures should be seen as obstacles.<sup>83</sup> That these questions have fascinated academics to a quite exceptional extent is fuelled by the refusal of either the Court, or the Commission as policy-maker, to give any coherent, consistent or precise answers. A suggestion may be made that the legislator should step in. An interpretative regulation on the meaning of the internal market, of free movement, and of undistorted competition, would be an intriguing – albeit controversial - use of Article 114 that could, by addressing the interests at stake, and by bringing precision and therefore limits, address some of the problems this paper has discussed.<sup>84</sup> Would such a measure serve the goals of the internal market, within the sense of Article 114? On the basis of existing jurisprudence that is far from evident, but on the basis of policy and logic it is arguable, and the Court has shown that it is not incapable of adapting its case law where needs demand.<sup>85</sup>

More reflectively, how did the EU get to this point? Part of the answer must be that it was designed to. The functional advantages of taking certain issues out of the political arena were always known, and the

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<sup>83</sup> A. Carlton Davies ‘Taking from the state and giving to the union: dissolving member state sovereignty through the noble goal of establishing a common market’ (2012) 21 *Journal of Transnational Law and Policy* 2011-12 207.

<sup>84</sup> See *Ibid* for a similar suggestion.

<sup>85</sup> Cases C-267 and 268/91 *Keck and Mithouard* [1993] ECR I-6097.

intention to save states from themselves, however undemocratic that may now seem, was far more reasonable in the early years of European integration.<sup>86</sup> Moreover, the idea that technocratic economic integration might be unstable, might lead to a situation in which political integration became necessary to support it, was present from the beginning.<sup>87</sup> The model of the EU which we now inhabit, largely similar to its earliest versions, was thus designed to be temporary, to create the conditions for its own demise and replacement by something more politically profound. The recent constitutional moment – for despite the failure of the Constitutional Treaty the Lisbon Treaty was represented as to some extent a *finalité* – can thus be understood not as indicating that the structure of Europe is now stable and complete, but rather that the initial phase has come to end. The corollary is that the time is ripe for a new phase to begin.

The tragedy, however, from at least some perspectives, is that it seems unlikely that this new phase will be deeper and more complete political union. The public support is not there. But if runaway economic integration is not to be legitimated by political depth, then the only socially legitimate alternative is to restrain that economic process, to bring it back within the bounds of what the European political arena can sustain. In order to allow Europeans to collectively make choices about the social, economic, cultural and moral texture of their lives, the location of the power to emasculate needs to be re-united with the location of the competence to create. In other words, there needs to be a fundamental rethinking of what exactly it is that we need the European Union to do.

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<sup>86</sup> Haltern 'Pathos', *op cit n 1 supra*; J.W. Müller, *Contesting Democracy: Political Ideas in Twentieth Century Europe* (Yale University Press, 2011).

<sup>87</sup> See E. Haas, *The Uniting of Europe*, 3rd edn (Stanford University Press, 2004), 527; see also U. Beck, W. Bonss and C. Lau 'The Theory of Reflexive Modernization : Problematic, Hypotheses and Research Programme' (2003) 20 *Theory Culture Society* 2003 1.