Introduction

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It really has been some time now since 1992, but its potency as a deadline that came (and went) remains strong. The internal market waits still to be ‘achieved’ or ‘completed’, but it seems locked in a prolonged state of ‘nearly there’. The Commission persists in its motivation of the Member States towards this end, praising the compliant and chiding the errant as appropriate, and its own legislative programme is proceeding buoyantly; at the time of writing, its proposal on the liberalisation of services is dominating the market agenda.¹ When or if the internal market might be ‘completed’ is anyone’s guess. But fixating on this goal rather misses the point as, whether ‘completely’ or not, a dense internal market *has* been achieved; it is up, running and functioning.

The purpose and future of the European Union continue to provoke the question ‘why?’, especially within the current scrambling for a Constitutional plan B. In a globally sensitised market debate, even the rationale for what might have been called the ‘safest’ EU purpose, the internal market, demands renewed reflection and justification. The functioning of the internal market, however, is much more about ‘how?’ – how does it work and, central to this, how and by whom is it managed? This collection of papers explores these questions about administration and supervision – in its broadest sense, ‘regulation’ – of the internal market, from a legal perspective. It seeks to combine cross-freedom, thematic analysis² with this emphasis on regulation and management, a strong focus in other disciplines within EU studies (and also interdisciplinary studies)³ but less traditionally explored with a predominantly legal flavour. It strives also to avoid artificially isolating the market and

¹ COM (2004) 2 final/3; amended by COM (2006) 160 final.

² A method of analysis advanced by, in particular, C. Barnard and J. Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Oxford: Hart Publishing, 2002).

³ See, for example, G. Majone (ed.), *Regulating Europe* (Oxford: Routledge, 1996); K. Armstrong and S. Bulmer, *The Governance of the Single European Market* (Manchester: Manchester University Press, 1997); and C. Joerges and R. Dehousse (eds), *Good Governance in Europe’s Integrated Market* (Oxford: Oxford University Press, 2002).

constitutional aspects of government and governance; market regulation choices have political, institutional and constitutional implications, and indeed *vice versa*. Armstrong and Bulmer pinpoint how the concept of regulation veers into ‘governance without government’ and thereby throws up a whole range of questions which, primarily, reside in the zone of constitutional principle.⁴ Moreover, the Treaty and doctrine that gave us the market were famously ‘constitutionalised’ at a very early stage in the evolution of the Community; perhaps the inevitable consequence of that process is that the market must operate within more constitutionally sensitive parameters than might usually be attributed to a trading area or agreement. This means that questions of market regulation, of regulatory techniques, and of the increasingly blurred boundaries between law and regulation are as much about democracy, power-sharing, competence, transparency and legitimacy as they are about efficiency, competition and results. So while 1992 may not have materialised as a deadline *per se*, perhaps it is better to think of the date as, nonetheless, a regulatory moment or watershed; as Armstrong observed, ‘the post-1992 activities of the EU’s political institutions have become less concerned with rule-making through legislation and more preoccupied with the management and application of the structures, strategies, and instruments associated with the [single European market]’.⁵

When evaluating the coherence or otherwise of the regulatory project at the very core of European integration, we do find, on the surface at least, a free market at a very advanced stage of implementation and functioning, and thus managed by a relatively formulaic application of internal market law. This is exemplified by a growing tendency to hand the market ‘back’ to the Member States and, increasingly, to authorities and bodies (both public and private) therein. The achievement of the internal market is no longer, on this view, conceptually based on reining in the Member States; we are quite simply beyond all that. Rather, we are in the midst of a period of regulatory creativity and experimentation, which conjures an almost casual air of (Commission) confidence in the place of the market in European integration, a nonchalance which borders, at times, on a swagger of condescending purposefulness – of course the internal market project is a good one, and good for you (depending of course on who ‘you’ actually are and where you come from).

Peeling back that veneer, however, we see too an internal market framework that strains to cope with a series of challenges, both internal and external to the EU itself. The downside of the shifting and varied approach to regulation is

⁴ Armstrong and Bulmer, *ibid.*, p. 256.

⁵ K.A. Armstrong, ‘Governance and the single European market’, in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford: Oxford University Press, 1999), pp. 745–89 at 745; see similarly, Armstrong and Bulmer, *op. cit.*, p. 3 above, p. 8.

equally real, with tensions between increased and reduced centralisation, between enhanced codification and deliberate deregulation. There is the whole question of re-regulation, which reveals a shift (from national to supranational) regulatory capacity rather than, as neatly put by Armstrong and Bulmer, a ‘neo-liberal paradise’.⁶ There is also quite a varied vocabulary of regulation – for example, ‘to regulate’ seems to cover such different understandings as cajoling and suggesting; guiding, shaping, or steering; manipulating; fixing, mandating and stipulating – with varied levels of prescription and persuasion being implied along this spectrum of obligation. Through all of this, we see elements of a supposedly unified market ideal working in very different ways; debates then emerge as to which model or method of regulation is ‘right’ and thus can or should be imposed on (all) other spheres of application. Relations between general and sector-specific rules, principles and concepts become problematic, and we see also a somewhat uneasy mix of soft law methods being deployed to secure ultimately, in truth, hard (legal) results. All of this means that the fundamental questions about appropriateness, coherency and legitimacy already suggested above – at the junction of government and governance – are never that far behind; and it is here that the legal expression of standards, principles and benchmarks will bite.

In both identifying and questioning these conflicting market and/or regulatory trends, the approach of the contributors is broadly twofold – some chapters reflect thematically on questions of regulation which cut across the spectrum of the market and its freedoms, while others adopt more sector (rather than freedom) specific lenses including, for example, regulation of the media and of the internet, through which contemporary regulatory dynamics can be re-considered. A series of power struggles becomes strongly apparent – between the Community legislature and the Community courts; between the Community courts and their national counterparts; between the Community institutions and the Member States; between all of these and both public and private bodies, and even individuals; and, increasingly, between the Community and external regulators, most notably the World Trade Organization (WTO). And if anything, tensions between these different levels and sites of regulation seem to be intensifying.

Laurence Gormley frames the collection with a historical backdrop to internal market evolution, beginning with the etymology of the term itself and then critically charting various phases of activity, consolidation, impasse and progression. The ebb and flow of committed interest in the internal market remains strongly frustrating today. The piece introduces trends and tensions with which subsequent chapters continue to grapple: the complexity of

⁶ Armstrong and Bulmer, *op. cit.*, n. 3 above, p. 9.

institutional priorities and relations; the patchwork of measures used to manage the market and the varying degrees of adherence they demand. Gormley concludes by setting down an arch challenge, calling on both national and Union actors strongly to rethink the priority – and delivery – of the internal market. He also urges caution against ungarded seduction by what he calls the ‘charms of regulatory pluralism’. From the outset, then, we are steered towards thinking that we are by no means ‘nearly there’.

Stephen Weatherill and Bruno de Witte both address the place of non-market values in the internal market scheme, exploring this question in respect of legislation and harmonisation rather than the more typically addressed premise of derogation via case law. The ‘constitutional character of some aspects of the law governing the internal market’, as outlined briefly above, is a strong theme of Weatherill’s analysis, as he uncovers the source of authority or competence to harmonise, and the implications of this for ‘residual national competence’. He asks hard questions about when a proposed harmonisation measure is, or is actually not, about building the market. The interaction between the scope of the Treaty freedoms and the (related, remaining) scope for harmonisation is discussed in general (in particular, looking at the conflict generated by post-Single European Act (SEA) express, but limited, competences in the domain of non-market values) but also concrete terms, using the value of consumer protection as a case study. Weatherill also tracks an emerging reaction against the ethos of ‘minimum’ harmonisation, formerly a method (until fairly recently) latched onto as a politically savvy way of achieving more ambitious ends than might otherwise have been possible. Throughout his contribution, the fluid (impossible?) reconciliation of market integration and local diversity looms large.

While first presenting the narrow view of competence to regulate the market that can be taken from the judgment in *Tobacco Advertising*⁷ (with an end-result that Gormley describes as ‘scarcely surprising when the Community tries to justify harmonisation on the basis of unconvincing arguments’), Bruno de Witte goes on to uncover the deceptive subtlety of the Court’s claim. It is not that the market cannot be regulated at all, but that no one locus of regulatory power can claim *exclusive* regulatory competence. De

⁷ Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, esp. para. 83. The fiction of ‘non-regulation’ raises also, of course, the less direct, *de facto* regulatory power that thereby transfers to the problem-solving function of the Court, evoking also Sharpf’s ‘regulatory gap’ (see, for example, F. Scharpf, ‘Negative and positive integration in the political economy of European welfare states’ in G. Marks (ed.), *Governance in the European Union* (Sage, 1996), 18–42, and discussion by G. More, ‘The principle of equal treatment: From market unifier to fundamental right?’, in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford: Oxford University Press, 1999), pp. 517–53, esp. at 529 et seq.

Witte's discussion on the incorporation of non-market values addresses, as he puts it, 'the balance between market integration and policy integration'; the objectives underlying Community harmonisation legislation are examined again, but here from more of a substantive than constitutional law premise, thus complementing Weatherill's chapter. De Witte traces the mix of market/non-market objectives both before and after the SEA, revealing the constitutional discomfort discussed by Weatherill but going on to explore the underlying questions from a substantive perspective also – the market side of market harmonisation; he thereby demystifies some constitutional questions, acknowledging the constitutional framework of some internal market law, but presenting equally a less lofty reality of policy choices. In tackling difficult questions on levels of capacity strewn across (and outwith) express Treaty provisions, De Witte looks at what the market can mean, and contain. The situation is, somewhat ironically, easier when the non-market value is not itself the subject of an express competence in the Treaty; here, he uses the principle of derogation from Treaty freedoms not to contradict with but actually to explain and justify the capacity to accommodate non-market values in harmonisation legislation. In this way, market and non-market values can be seen as different facets of the same thing, and not, therefore, inherently in competition with one another. It all becomes much more about balance, not winning. Where express, and typically quite limited, competence *does* exist, however, things are more complex. Here, to authorise harmonisation, we enter the territory of a measure's 'principal aim', with strong potential for competence to harmonise so long as the 'aim' is primarily market-driven. Again, however, De Witte argues that the incorporation of non-market values can stem from a more sophisticated, broad-ranging understanding of that market; the will to harmonise is thus distinguished from a crude competence-hungry momentum. Having worked out some conceptual coherence, De Witte proceeds empirically to assess actual institutional practice; the story that unfolds here is far less susceptible to neatness, and calls for more nuanced consideration of the regulatory preferences and priorities of both institutional, and non-institutional, players.

Erika Szyszczak, Rachael Craufurd Smith, Michel Van Huffel and John Usher highlight and examine a series of regulatory questions using sector-specific lenses i.e. competition policy, the media, the internet and monetary movements, respectively (Chapters 4–7). Szyszczak examines both economic governance and economic constitutionalism in her discussion of the changing regulatory relationship between competition policy and the market freedoms, an unsettled interrelation that she depicts as the 'normative basis of the economic constitution', yet the management of which in real terms remains 'unfinished business from the internal market modernisation project of the 1980s'. She acknowledges the almost stealthy injection of momentum derived

from new forms of governance when traditional methods of law-making failed to advance the integration project. Interestingly, Szyszczak argues that it is not so much that market governance is a ‘new’ methodology, rather that its use and functions are more openly acknowledged and accepted, and being extended more comprehensively now, alongside ‘hard law’. Using tools like the open method of co-ordination to achieve substantive progress is emerging especially where national competence in a given area is closely guarded. Though focusing on competition policy, she depicts the character of the market regulatory zone more generally, unearthing a simultaneous drive for centralisation and de-centralisation, for de-regulation and re-regulation, the latter, she observes, being deployed mostly for areas that she calls ‘Community integration priorities’. Szyszczak traces the increasingly influential role of private economic actors in shaping competition policy, but discusses also the levels of expectations and duties that are thereby generated, thus shifting some of the responsibilities and burdens of public power into the private domain, an uneasy development from many perspectives (and itself the subject of a separate chapter). In the specific context of competition policy, she argues that the evolving role of these private market participants necessitates a far-reaching conceptual rethink. Picking up the bigger-picture theme discussed by both Weatherill and De Witte on non-market values, Szyszczak concludes her chapter with a parallel reflection on incorporation of what we might call ‘non-competition’ values.

Some of the concerns raised by Szyszczak on competition policy seem equally problematic for the media sector, discussed by Rachael Craufurd Smith. By looking at regulation of the media as a sectoral point for regulatory experimentation, Craufurd Smith teases out some of this underlying uneasiness, which relates somewhat also to Weatherill’s discussion of the less comfortable consequences of the minimum harmonisation drive. Craufurd Smith sketches regulation of the media as another example of the move away from ‘command and control regulation’, towards an increasingly prevalent blend of hard and soft law; of harmonisation and autonomy; and of co-regulation and self-regulation. In a deeply engaging narrative, using the Television Without Frontiers Directive⁸ as a channel, she cuts through the ambiguity often surrounding discussion of different regulatory techniques, instead building a detailed and incisive profile of the different mechanisms and, crucially, providing concrete examples of the various techniques in (media) action. Mirroring Szyszczak’s reflections on the transfer of public power to private actors, Craufurd Smith reveals a similar shift in responsibility

⁸ Directive 89/552, OJ 1989 L298/23, amended by Directive 97/36, OJ 1997 L202/60.

for the setting of standards across various sectors of the media and the increasing role played here not just by industry and by voluntary regulatory bodies but also, at the lowest level of ‘regulation’, by the consumer; she provides a fascinating, and timely, discussion of how this exercise of privatisation is bolstered by considerations of fundamental rights and freedom of expression on the one hand, yet simultaneously making enforcement of human rights all the more difficult on the other. Throughout her contribution, Craufurd Smith raises and deals with the elements of both the constitutional and the substantive that characterise the evolution of regulatory policies. But she also raises fundamental questions as to the legitimacy of ‘new’ methods. A very varied approach to regulation and its many techniques may look bold and brave, but it generates also some very basic problems – not least, the disturbance of the institutional balance so painstakingly incorporated into the various stages of traditional law-making functions, including the after-care of judicial review.

In the specific field of e-commerce, Michel Van Huffel explores the reconciliation of an existing regulatory system, and indeed *acquis*, with sectors requiring something altogether more elaborate and sophisticated if a successful and contemporary (e-)marketplace is to be established, managed and maintained. If the regulation of services presents multiple challenges in general, not least in terms of its sheer scope, then the additional difficulties that provision of financial services via the Internet can generate present an even more complex set of challenges. Van Huffel’s analysis is channelled primarily through the E-commerce Directive,⁹ and its interactions with EC law – as well as regulatory policies and techniques – on, for example, the free movement of services, financial regulations and protection of the consumer; he looks also at the transposition of fundamental internal market principles like mutual recognition to this burgeoning domain. Van Huffel provides a detailed – and opportune – discussion on the meaning(s) and implications of the country of origin principle in the context of services regulation. A string of related yet inconsistent legislative provisions across a flurry of related sectors unfolds; and, anticipating subsequent chapters on regulatory tensions that come from *outside* the Community, Van Huffel tries also to decipher hierarchies between EC and private international law in the context of e-commerce and more generally. Despite the perplexing inconsistencies that are uncovered throughout his contribution, Van Huffel concludes not with a pessimistic fatalism but instead, develops a number of clear and practical reforms from his detailed exposition and critique of the field. Overall, he rightly asserts that the Community *acquis* so long in the fashioning cannot just randomly be cast aside.

John Usher tells a somewhat similar story of incoherence in the context of

⁹ Directive 2000/31, OJ 2000 L178/1.

monetary movements, dealing again with sectors acutely testing a market framework which should in theory be able quite happily (conceptually) to deal with them, but which in reality (practically) cannot, causing interactions among the freedoms which seem to tie the rules and principles governing them into relational knots. Usher first traces the crafting of EC law on capital movements through a two-fold process of legislative harmonisation and judicial interpretation, but not always a successfully coherent one; we see a unique regulatory phenomenon here, a sort of 'reverse regulation' where the applicable rules evolved from secondary legislation into directly effective Treaty provisions, rather than the far more typical 'other way round'. Usher then introduces a web of interacting freedoms, discussing the rules applicable when cross-border payments are actually for goods or services, thus themselves the subject of (not always mutually compatible) Treaty provisions and secondary legislation, and all of these coated with a dense gloss of judicial interpretation. Further layers of complexity are added when Usher goes on, first, to compare the rules on payments within the Community and those relating to payments from/to third countries and, secondly, to bring the implications of non-discrimination for the very different Member State systems of taxation (both corporate and personal) into the equation. Thus, he presents sectoral, institutional and geographical factors, asking somehow to be gelled together into a coherent regulatory package; like Van Huffel, Usher similarly chooses to take up this challenge, concluding by suggesting ways of both incorporating and extending the *acquis*.

The debate on the common or civil law roots of the Court of Justice is transferred from its more usual administrative law home to a theory of market regulation by Gareth Davies. He frames his chapter with an introductory discussion on the function and place of courts in the community, and Community. In their operation of the Article 234 EC reference procedure, Davies sites the relationship between the Community and national courts firmly in the language and behaviour of competition, finding in particular that the Court of Justice is too directional, too concrete and, ultimately, disrespectful of the capacity of national courts to partake more materially in the management of the market. While Article 234 lines are drawn at interpretation of the law and application of that law to the facts, Davies contends that, while the concept of interpretation is itself a vague one open to abstract definition, the Court strays frequently into concrete determinations of both law *and* fact, the latter more properly the domain of the national courts. He demonstrates this empirically, assessing key judgments in the areas of free movement, competition, taxation and the common customs tariff. Davies portrays a hopeless circle of reference, whereby the Luxembourg Court delivers concrete judgments on particular facts containing little by way of more abstract, principled guidance, which thus spawn more references from national courts on similar but not identical

concrete questions. Always mindful of the importance of uniformity in Community law, but careful also not to see that principle as an immovable, sacred block to any creativity and development, Davies proposes a system based on appeals rather than references, giving to *all* courts, then, a meaningful role in the application and interpretation of Community law, and thereby enhancing analogous market values like efficiency and participation, noting shrewdly that there is ‘little market for control any more’. His overall judgment on the market for law finds the present balance tilted far too heavily in a bias of centralisation, thus transposing his arguments to regulatory as well as institutional competition and finding, ultimately, ‘an adjudicative system poorly adapted to a large and dynamic market’.

The role of private actors, in both an internal and external capacity, is explored by Robert Lane and Panos Koutrakos. If the market comprises not just the Member States but also consumers (defined in as broad a sense as possible) as well as traders and industries, then its regulation must accomplish a fragile balance between protection and empowerment. Lane’s reference to the free market ideology of Adam Smith’s ‘invisible hand’ evokes also Mayne’s less hallowed but fitting notion that ‘[i]f economics was once little more than natural history, it is now coming more to resemble applied biology’.¹⁰ Lane acknowledges the ‘oxymoron of regulating the free market’ and then seeks to establish the role of the private actor within that paradigm. While the extent of the rights granted to individuals has always characterised the most striking aspects of Community law, he argues that legal development happens more now in respect of the *duties* they ‘owe’, and here, specifically in the market context; we saw this to some extent in the chapter by Rachael Craufurd Smith, but Lane extends the premise, exploring not just the regulation of the market *by* private actors, but also the regulation *of* those individuals in their exercises of market participation. On the first strand, regulation *by*, Lane examines in some detail a question alluded to by many of the other contributors: the capacity (or otherwise) of the individual to influence the direction of market regulation via his/her access to judicial protection. First distinguishing the private realm of competition law (though later cautioning that the two spheres work when competition, but not regulation of the market more generally, is privatised), Lane then goes on to look at the degrees to which the market freedoms have been found to rein in the private market conduct of individuals. Yet again, the picture that emerges is riddled with incoherence, where horizontal effect has been achieved for most aspects of the free movement of workers, flirted with in respect of the free movement of goods,

¹⁰ R. Mayne, *The Community of Europe: Past, Present and Future* (New York: WW Norton, 1963), p. 65.

mismanaged in the field of services, and remains uncharted for the free movement of capital. Lane accepts a distinction in favour of the free movement of persons to some extent, his support for horizontality here underpinned by the status of EU citizenship; but he cautions against a rigid freedom model, advocating instead a functional division – truly recognising the person(al). In all cases, however, Lane points to a critical difficulty inherent in the extension of horizontal effect – the corollary extension of the derogation tool to private actors also; despite the openness of the Court to this, Lane dismisses it as ‘nonsense’ in reality, since private actors have ‘neither the power nor the duty to protect public policy’. Ultimately, the individual in the market is motivated by self-interest; but not much more than that, Lane suggests, can be expected, or imposed.

The role (or burden) of the individual in effecting management of the market through legal means and methods stands in fairly ironic contrast to the subjection of the national courts themselves, as challenged by Davies. Koutrakos picks up this call for decentralisation in quite a different context, arguing against the emasculation of national courts in respect of external (commercial) relations, looking to the implications of WTO membership and the Common Commercial Policy (CCP). In the context of the former, he presents the management role historically taken on by the Court of Justice in its interpretations of international agreements, virtuously protecting the scheme of protection for the rights of individuals found within the Community framework but not other international arrangements. He thus presents the Court undertaking a threefold juggling act, ‘at the intersection of Community law, international law and national law’, and reminds us that beyond internal parameters, the Court does not attribute its masterpiece principle, direct effect, lightly. Koutrakos reminds us also, however, that it is the character of the WTO legal framework, and not misplaced jealousy, that guides the Court’s reluctance; that framework may well be an evolving one, but it is one, for now at least, in respect of which a constitutional dimension ‘has been exaggerated’. Despite its complementary function vis-à-vis the internal market, the position of the individual does not fare more strongly in respect of the CCP, a position sealed by the Court in *Opinion 1/94*.¹¹ But Koutrakos cautions against an overblown status for the individual more generally in this sphere of EU external relations – the link to the internal market only goes so far, relating to matters of policy and content; the more relevant comparator is legal context, and the differences in that vein are both numerous and incontestable. It is not that there is no consideration of the individual, but that the levels of market management are, at the external level, altogether different. As noted at the

¹¹ [1994] ECR I-5267.

outset, the place of the national courts in this web of protection, is especially significant, in terms of delivering ‘downwards’ from there to the individual.

Following through on the external dimension of the market, but moving away from the specific question of the protection of the individual, Nick Bernard tackles precisely the smooth functioning of these levels of market management depicted by Koutrakos. Bernard sees less of an internal–external market divide in his sectoral assessment of air transport regulation. His central thesis is that, in reality, the internal market simply *is* affected by external trade, and yet this has still not been taken properly into account in the vacuum-like evolution of market regulation. Bernard begins by setting out both the (liberalised) intra-EC and the international air transport regulatory frameworks, and the inevitable conflicts between them; he goes on, however, to dissect the nature of these conflicts – are they normative or structural? This dictates whether a more streamlined approach can be put in place, but also *how* this might be done; is it a question of redirecting institutional relations, to iron out differences seen to result from a conflict of competing provisions, or are there more sensitive and intractable issues of capacity and competence that need to be resolved? The Court clearly shied away from the latter debate in the series of judgments collectively drawn together as the *Open Skies* cases,¹² leaving the Commission to work out a series of alternative ways forward, still awaiting mandate from a sluggish Council. Bernard’s parting message is that the interaction of internal and external market governance thrown up through the lens of the aviation sector is not something that can be ignored in the formulation and reformulation of governance structures.

Lorand Bartels looks at this point, in effect, from the opposite premise, closing the collection of papers with a somewhat cautionary tale by reminding us that regulatory questions pierce the market from outwith as well as within the EU. The very real potential for clashes with WTO law displace a sort of regional righteousness too often presumed by EU ‘insiders’. The reality of the contrary was picked up on by Van Huffel, when addressing hierarchies between EU and private international law in the context of e-commerce, but it developed in detail in the course of Bartels’ surgical analysis of competing norms, which he undertakes from a WTO law rather than EC law perspective. The discomfort generated is all the more stark given that Bartels challenges EC adherence to mutual recognition, a principle at the heart of market governance; but the concept – and reality – of preferential treatment that mutual recognition puts

¹² Cases C-467/98 *Commission v Denmark* [2002] ECR I-9519; C-468/98 *Commission v Sweden* [2002] ECR I-9575; C-469/98 *Commission v Finland* [2002] ECR I-9627; C-471/98 *Commission v Belgium* [2002] ECR I-9681; C-472/98 *Commission v Luxembourg* [2002] ECR I-9741; C-475/98 *Commission v Austria* [2002] ECR I-9797; and C-476/98 *Commission v Germany* [2002] ECR I-9855.

in place vis-à-vis goods from inside the internal market (as well as goods of EEA and Turkish origin), while cutting through discrimination among the Member States, clearly discriminates against the non-preferred. Bartels' subtle presentation of the norms and provisions applicable at both EC and international levels allows the provisions of the relevant WTO agreements to speak for themselves, a modest yet astute methodology which serves to underpin the strength of his claims all the more. He also explores in-built WTO mechanisms of justification and derogation, trying to find ways in which the EC might proceed with the fundamentals of its internal market programme, looking at both constitutionally-flavoured and regulatory options. He finds only marginal scope for manoeuvre here and encourages instead a fundamental overhaul of the EC's approach to mutual recognition, what he calls 'a policy of conditional but non-discriminatory recognition of the technical regulations of all WTO Members', thereby affirming the views of the other contributors who see the days of the rigid internal/external market schism as well and truly numbered, but finding external as well as EC impetus for moving to a more comprehensive and complex, and less parochial, construct of the market and its regulation.

Finally, it is interesting also to think about some issues which did not really feature in the chapters collected here. The challenge of EU enlargement, and its obvious and considerable enlargement of the internal market (physical and regulatory) space, features only intermittently. Is this because it is simply too early to assess the impact of enlargement on the market framework? Or does it mean that geographical area is not really important or, at least, not as important as what we might call 'substantive area', i.e. the breadth of issues covered within the market is more testing than the breadth of the territory of application?

It is also worth noting that the principle of subsidiarity, as either a real or potential regulatory restraint, does not often feature in these legal assessments of regulation. Subsidiarity invokes a sliding scale of responsibility, thus seeming tailor-made to position the numerous claims of different market actors, yet its potency or otherwise in the context of market regulation did not materialise here. Weatherill refers to the Court's own slippery dealings with subsidiarity in *Tobacco Advertising*; and as Davies points out, supervision of subsidiarity drew much attention in the preparation of the Constitution, yet it remains an 'indeterminate idea' – is this bark-but-not-bite approach reflective of the limited reach and/or practical value of the principle itself, or of the difficulties encountered at a law-policy crossroads?

Looking at the market freedoms themselves, the free movement of persons is perhaps that which ends up being least addressed. Notwithstanding the prescriptive vision of Article 14 EC, has the free movement of persons graduated or been promoted 'upwards' from market governance? Does citizenship

of the Union now site these questions more comfortably within constitutional rather than market language?

Finally, references to the Constitution of the EU feature very sparsely – wisely, for the present time; but rather disappointingly, from the perspective that the gaps and problems identified in this collection are unlikely to be solved by this momentous exercise in Treaty reform. The constitutional place of the internal market (and competition policy) within the EU is restored;¹³ but what that means, in terms of its management and of regulatory policy, and coherence between government and governance, seems no clearer really. This serves further to underscore the feeling of ‘missed opportunity’ that already haunts the troubled Constitution; but it challenges also the perception that the internal market was and remains that aspect of European integration both the existence and regulation of which we complacently take for granted.