

Introduction

The creation of the internal market, ‘an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured’,¹ has long constituted a primary objective and justification for the European integration project. It remains to date a key parameter for the overall success of this legislative endeavour.

One of the most fundamental instruments for the furtherance of European harmonisation is Article 114 of the Treaty on the Functioning of the European Union (TFEU), a legal base enabling the European institutions to adopt measures for the approximation of national provisions that have as their object the establishment and functioning of the internal market. Article 114 TFEU, as the key vehicle for the advancement of ‘positive harmonisation’, that is, the approximation of national norms through European legislative intervention, represents a vital and forceful complementary tool in the attainment of market integration to ‘negative harmonisation’, that is, the indirect approximation of national norms resulting from the deregulatory effects on Member State laws of the case law of the European judiciary.² Much attention has been devoted to the latter type

¹ Article 26(2) TFEU. Article 26(1) TFEU states: ‘The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.’ Reference is made throughout to legal texts and other documents publicly available on the EUR-Lex website: © European Union, <http://eur-lex.europa.eu/>. Only European Union legislation printed in the paper edition of the *Official Journal of the European Union* is deemed authentic. The Treaty of Lisbon, signed at Lisbon, 13 December 2007, has amended the Treaty on European Union and the Treaty establishing the European Community, (OJ 2007 C 306, p. 1). See, for a table of equivalences setting out the new numbering following the Lisbon reforms, the Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (OJ 2010 C 83, p. 361). Pursuant to Article 1 TEU, the Union replaces and succeeds the European Community. An overview of the modifications introduced by the Lisbon Treaty can be found in the European Parliament resolution of 20 February 2008 on the Treaty of Lisbon (OJ 2009 C 184, p. 25). For a detailed discussion of the amendments made, see M. Dougan, ‘The Treaty of Lisbon 2007: Winning minds, not hearts’ 45 *Common Market Law Review* (2008), pp. 617–703.

² Pursuant to Article 19(1) TEU, the Court of Justice of the European Union

of harmonisation, examining, where legislative effort has been scarce or unsatisfactory and judicial developments flourished, the impact of the judgments of the European Courts on the scope of regulatory national autonomy. Many studies have thus focused on the substantive aspects of European Union law, encompassing the free movement of goods, services, persons and capital, 'in the absence of common rules'.³ In this context, the potential for Member States to invoke interests such as consumer, health or environmental protection to uphold national norms representing obstacles to the process of European market integration has been amply analysed. However, significantly less emphasis has been placed on delineating the competence of the European institutions to take legislative action and the concomitant, residual power of Member States to continue applying or introduce new precautionary national legislation in the *presence* of such European approximation norms. This book⁴ purports to make a contribution in this regard, by providing an extensive exploration of the harmonisation paradigm encapsulated by Article 114 TFEU.

Even though issues like the important question of Union competence enclosed within this fundamental provision have been, especially in the light of the *First Tobacco Advertising Case*,⁵ enthusiastically discussed, less emphasis has been placed on uncovering the exact implications of the model of harmonisation currently selected for the purposes of the creation of the internal market. It is the aim of this book to examine the crucial and unusual interplay between the forceful trade integration premise inherent in Article 114(1) TFEU and the contradictory ability of Member States to derogate from harmonisation norms on the basis of related market policies encapsulated by Article 114(4) TFEU et seq., as well as the way the Commission and Courts have responded to it, so as to evaluate the Treaty's proposed solution to the balancing between economic integration and welfare protection within the Union. Deployment of Article 114 TFEU 'generally leads to Community legislation touching the most diverse

is stated to include the Court of Justice (formerly the Court of Justice of the European Communities), the General Court (formerly the Court of First Instance of the European Communities) and specialised courts (formerly designated 'judicial panels').

³ See the Case 8/74 *Dassonville* [1974] ECR 837 and Case 120/78 *Cassis de Dijon* [1979] ECR 649 line of jurisprudence.

⁴ The book has partly evolved through ideas presented at the Institute of Advanced Legal Studies in London (Hart Legal Workshop), the University of Edinburgh, the University of Lecce, and the Inter-University Centre Dubrovnik. I am extremely grateful to the conference organisers and participants for their helpful observations.

⁵ Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419.

areas of national law'.⁶ By scrutinising a notification procedure traditionally meant to comfort national authorities concerned that the level of protection selected as the European standard may not cater for public policy objectives to the same extent or in the same way that the domestic market would, the book examines the potential to accommodate national regulatory differentiation within the European Union's integrationist agenda. Inherent in this provision, which both enables the European legislative institutions to introduce harmonisation norms approximating national laws, and, at the same time, authorises Member States to derogate in prescribed circumstances from the introduced common standards, is the constitutionally imperative compromise between the European Union's legislative competence and residual scope for Member State regulatory autonomy.

The book is structured around the text of a specific Treaty provision, Article 114 TFEU, through the lens of which the European internal market can be examined. The research is divided into five main parts.

Chapter 1 locates the Article 114 TFEU paradigm within the broader context of market integration. In particular, the section provides an overview of the harmonisation process, outlining the complementary rationales for positive and negative integration. Exploring first the scope, success and limitations of negative integration, the section revisits some of the main rulings and underlying principles that have informed the Court of Justice 'in the absence of common rules'. The chapter then proceeds to describe the model of harmonisation envisaged by Article 114 TFEU, offering a historical introduction to this important market-building provision and explaining its functioning against the background of comparable procedures located in other areas of the Treaty. By examining the interaction between positive and negative harmonisation, the section highlights the significance of Article 114 TFEU and ultimately seeks to assess its value as a parallel and as an alternative to negative integration for the completion of the internal market.

Chapter 2 analyses the competence of the Union, depicting the legislative instruments available for the attainment of market integration. The chapter initially sets out the trade promotion premise in Article 114 TFEU, with specific emphasis on paragraph one of Article 114 TFEU. It then explores the extent to which, despite the principle of attribution of powers and the seminal *First Tobacco Advertising Case*,⁷ Article 114(1)

⁶ Opinion of Advocate General Jacobs in Case C-350/92 *Spain v Council* [1995] ECR I-1985, para. 26.

⁷ *Germany v Parliament and Council*, supra note 5.

TFEU has been adapted to cater for non-trade-related interests. The innovative structure of the discussion, looking in detail at the Treaty text by considering in turn the terminological components of the competence formula and tracing its interpretation in the Court's case law, is intended to contribute to the existing literature whilst defining fully the relevant background for the remainder of the study. The salient aspects of the duty contained in Article 114(3) TFEU for the EU legislature to pursue 'a high level of protection' in proposals based on the first paragraph of Article 114 TFEU are examined, with a view to assessing the breadth of the legislative advancement envisaged therein. More familiar issues such as the conundrum regarding the scope of European competence, the divide between centralised and regional authorities, the principles of proportionality and subsidiarity, the impact of policies influencing economic legislation, are developed in an unexplored context and assume a new dimension in this work. Finally, this section discusses recent regulatory trends under Article 114 TFEU, in particular outlining the implications of a potential shift towards exhaustive harmonisation in an area demanding merely qualified majority voting rather than unanimity in the decision-making process.

Chapter 3, focusing on the remaining provisions within Article 114 TFEU and complementing Chapters 1 and 2 through a detailed account of the possibilities for derogation from European harmonisation norms, investigates the scope for national regulatory differentiation within the context of the internal market legislative paradigm. As the discussion of the notification procedure within Article 114 TFEU constitutes an essential part of the study, the section explores in considerable detail the exact meaning and procedural aspects of the relevant Treaty text. Chapter 3 thus seeks to provide a comprehensive overview of Article 114 TFEU, analysing thoroughly one by one the provisions therein. The section ultimately purports to illustrate the concern for effective regulatory protection evidenced in these paragraphs of Article 114 TFEU and to highlight some of the most controversial aspects of the notification procedure, with a view to uncovering the implicit allocation of regulatory competence between the European institutions and Member States within the market-building process.

Chapter 4 deploys a collection of emerging case law and related Commission decisions to test the overall effectiveness of the Article 114 TFEU notification procedure. In particular, the section examines the way Article 114 TFEU has been interpreted by the Commission and the Courts, with a view to assessing the actual capability of the Article 114 TFEU derogation mechanism to accommodate national regulatory differentiation within the Union's integrationist agenda. Tracing a range of national justifications put forward to uphold obstacles to economic

integration, the study navigates through the controversial waters of risk assessment and risk prevention and related responsibility allocation within the context of complex regulatory norms. Identifying a number of recurring themes and exploring the functioning of the Article 114 TFEU provisions in practice, Chapter 4 aims to determine whether the harmonisation model proposed under this provision is ultimately a viable one.

Based on the investigations carried out in the previous sections, in Chapter 5 conclusions are drawn as to the overall success of the conflicted harmonisation paradigm proposed by Article 114 TFEU. Identifying potential improvements and possible alternatives to the procedure within Article 114 TFEU, the book ultimately seeks to evaluate the current harmonisation archetype selected for the attainment of the establishment and functioning of the internal market. As part of the appraisal, the role and contribution of the Member States and Union institutions entrusted with its administration are assessed. By scrutinising the scope of the key provision for the completion of the internal market and by highlighting the collaborative rather than adversarial value of national deviations from common European regulations, the study not only complements the literature available on negative integration, but also challenges prevailing tenets in this field. Rather than subscribing to the traditional view that national derogations from attained European standards are reflective of a weak integration process, the study stresses instead the opportunities for reflexive learning and risk prevention resulting from diverse European and national regulatory standards.